THE SUPREME COURT

Supreme Court Record No: S:AP:IE:2023:000049

High Court Record No. 2021 No. 810 JR

[2024] IESC 4

O'Donnell C.J.
Woulfe J.
Hogan J.
Collins J.
Donnelly J.

BETWEEN

BALLYBODEN TIDY TOWNS GROUP

Appellant

And

AN BORD PLEANÁLA,

IRELAND AND THE ATTORNEY GENERAL

Respondents

And

ARDSTONE HOMES LIMITED

Respondent/Notice Party

JUDGMENT of Ms. Justice Donnelly delivered this 22nd day of February 2024

Introduction

1. When can a party who has been the beneficiary of an administrative decision which has been challenged by judicial review by a third party, continue to defend the decision when the decision-maker has *conceded* (as distinct from adopting a neutral stance) that the decision

ought to be quashed on the basis of a ground or grounds relied upon by that third party? If so, what, if any, threshold must be met by the party seeking to defend the decision? These are the issues that arise in this appeal.

2. Ballyboden Tidy Towns Group ("the appellant") describes itself as an unincorporated association dedicated to the protection of the built and natural environment of Ballyboden and the greater Rathfarnham area. The appellant issued judicial review proceedings seeking, *inter alia*, *certiorari* of the decision of An Bord Pleanála ("the Board") to grant planning permission to the notice party, a developer, for the construction of 241 apartments and associated works on lands north of Stocking Avenue, Woodstown, Dublin 16. The proposed development provides for apartment blocks of between four and six stories in height. This development was a Strategic Housing Development ("SHD") within the meaning of the Planning and Development (Housing) and Residential Tenancies Act 2016 ("the 2016 Act").

3. The appellant maintains, *inter alia*, that the height proposed amounts to a material contravention of both Policy H9 Objective 4 of the South Dublin County Development Plan 2016-2022 ("the development plan") and Objective LUD8 of the relevant Ballycullen Oldcourt Local Area Plan (the "LAP"). The development plan (Policy H9 Objective 4) directs tall buildings that exceed five storeys in height to strategic and landmark locations in Town Centres, Mixed Use Zones and Strategic Development Zones and subject to an approved LAP or Planning Scheme. The site is not in such a location. The relevant objective of the LAP (LUD8) made further stipulations as to permitted storeys of prospective developments.

4. The Board indicated it would not oppose the appellant's claim for *certiorari* "... on the basis that in the particular circumstances of this case the Board failed to assess whether there was adequate public transport capacity for the proposed development as pleaded at Core Ground 10 of the Statement of Grounds". Core Ground 10 states: "The impugned decision is invalid in that it contravenes the requirements of SPPR [specific planning policy requirement] 3 of the

Urban Development and Building Height Guidelines [the 2018 Guidelines] as the Board failed to assess whether there was adequate public transport capacity prior to granting planning permission in material contravention of the CDP…".

5. Despite the concession by the Board, the notice party issued a notice of motion seeking liberty to defend the proceedings. The High Court gave liberty to defend on the basis that the appropriate threshold, namely, establishing substantial grounds for leave to defend the Board's decision, had been reached by the notice party. This Court granted leave to appeal directly from the High Court on the basis of the issue set out at paragraph 1 above (see [2023] IESDET 90). This Court also indicated that a further matter could arise, namely, whether the only issue that requires to be considered by the court is the ground or grounds on which the decision-maker has conceded that its decision ought to be quashed.

6. In accordance with s. 8(1)(a)(iv) of the 2016 Act, where the proposed SHD materially contravenes a development plan or a local area plan, the application must include a statement indicating why permission should, nonetheless, be granted, having regard to a consideration specified in s. 37(2)(b) of the Planning and Development Act, 2000 ("the 2000 Act"). The appellant submits that the Board was correct in finding that there was a material contravention of the development plan by the proposed development of the aforementioned apartment blocks. The notice party does not accept that there is a *material* contravention and contests the view that such a material contravention was accepted either in its Statement of Material Contravention or in the Inspector's Report. The notice party also submits that it is a matter for the Court to determine whether or not such a material contravention exists.

Order 84

7. Order 84, rules 18 to 27 provide for applications for judicial review. An application for judicial review must be made by motion *ex parte* grounded upon a notice in the form set out in O. 84, r. 20(2) of the Rules of the Superior Courts. The heading of the required form makes no reference to a notice party; it refers only to the applicant and the respondent. There is no direct reference in O. 84 as originally drafted to "notice party". Order 84, in both its original and current form, requires those directly affected by the impugned decision to be served with the motion for the application for judicial review or the plenary summons (if directed) (see O. 84., r. 22(2)). The terms of O. 84 support the principle that those notice parties may oppose if they so wish and, as discussed further below, the case law puts that interpretation beyond doubt.

8. In 2015, the Rules were amended to say that a judge whose order or jurisdiction is being challenged shall not be named in the title of the proceedings *as a respondent or as a notice party*. The import of this new rule was clarified by the Court of Appeal in *M v M* [2019] IECA 124, [2019] 2 IR 402. It is clear from the judgment of Irvine J. in *M*. that at least in these particular types of cases the burden of defending the validity of the decision under challenge will normally fall on a party other than the actual decision-maker. It would thus be curious if in other types of O. 84 cases, the fact that the decision-maker was served and participated in the proceedings could give that entity the status of *dominus litis* such that it could effectively deprive that other interested party of the right to defend the proceedings by its election not to contest the proceedings.

Order 84, r.22

22. (1) An application for judicial review shall be made by originating notice of motion save in a case to which rule 24(2) applies or where the Court directs that the application shall be made by plenary summons.

(2) The notice of motion or summons must be served on all persons directly affected.

(2A) Where the application for judicial review relates to any proceedings in or before a court and the object of the application is either to compel that court or an officer of that court to do any act in relation to the proceedings or to quash them or any order made therein—

(a) the judge of the court concerned shall not be named in the title of the proceedings by way of judicial review, either as a respondent or as a notice party, or served, unless the relief sought in those proceedings is grounded on an allegation of mala fides or other form of personal misconduct by that judge in the conduct of the proceedings the subject of the application for judicial review such as would deprive that judge of immunity from suit,

(b) the other party or parties to the proceedings in the court concerned shall be named as the respondent or respondents, and

(c) a copy of the notice of motion or summons must also be sent to the Clerk or Registrar of the court concerned.

(3) A notice of motion or summons, as the case may be, must be served within seven days after perfection of the order granting leave, or within such other period as the Court may direct. In default of service within the said time any stay of proceedings granted in accordance with rule 20(8) shall lapse. In the case of a motion on notice it shall be returnable for the first available motion day after the expiry of seven weeks from the grant of leave, unless the Court otherwise directs.

(4) Any respondent who intends to oppose the application for judicial review by way of motion on notice shall within three weeks of service of the notice on the respondent concerned or such other period as the Court may direct file in the Central Office a statement setting out the grounds for such opposition and, if any facts are relied on therein, an affidavit, in Form No 14 in Appendix T, verifying such facts, and serve a copy of that statement and affidavit (if any) on all parties. The statement shall include the name and registered place of business of the respondent's solicitor (if any).

(5) It shall not be sufficient for a respondent in his statement of opposition to deny generally the grounds alleged by the statement grounding the application, but the respondent should state precisely each ground of opposition, giving particulars where appropriate, identify in respect of each such ground the facts or matters relied upon as supporting that ground, and deal specifically with each fact or matter relied upon in the statement grounding the application of which he does not admit the truth (except damages, where claimed).

(6) An affidavit giving the names and addresses of, and the places and dates of service on, all persons who have been served with the notice of motion or summons must be filed before the motion or summons is heard and, if any person who ought to be served under this rule has not been served, the affidavit must state that fact and the reason for it; and the affidavit shall be before the Court on the hearing of the motion or summons.

(7) Save in a case to which rule 24(2) applies or where the Court directs that the application shall be made by plenary summons, each party shall, within three weeks of service of the statement referred to in sub-rule (4) or such other period as the Court may direct, exchange with all other parties and file in the Central Office written submissions on points or issues of law which that party proposes to make to the Court on the hearing of the application for judicial review.

(8) The Court may on the return date of the notice of motion, or any adjournment thereof, give directions as to whether it shall require at the hearing of the application for judicial review oral submissions in respect of any of the written submissions of the parties on points or issues of law.

(9) If on the hearing of the motion or summons the Court is of opinion that any person who ought, whether under this rule or otherwise, to have been served has not been served, the Court may adjourn the hearing on such terms (if any) as it may direct in order that the notice or summons may be served on that person.

The High Court Judgment under Appeal

9. The High Court (Humphreys J.) delivered a reserved judgment on 10th March 2023. He identified *Protect East Meath Limited v An Bord Pleanála* [2021] 2 IR 796 ("*Protect East Meath*") as the only authority directly on the point of when a notice party may defend proceedings when the statutory decision-maker positively concedes that the challenged decision is unlawful. In that case, the High Court (McDonald J.) refused liberty to defend.

10. Humphreys J. rejected the argument that the Board's decision to concede the proceedings was covered by s. 50 of the 2000 Act (thus requiring it to be challenged within the time limit provided therein), stating that "[t]he board's decision to concede is not a decision under the 2000 Act, it is a litigation decision made in the course of proceedings".

11. The High Court also rejected the notice party's primary position that it did not need to meet any threshold before being granted liberty to defend; this issue having already been decided in *Protect East Meath*. Humphreys J. said that a reinforcing factor was the cost on the system and the absorption of resources that are in demand from other litigants. He stated that the resources issue was not a reason to shut out an applicant altogether, but it is a reason to require a notice party to show that it has a point as demonstrated to an appropriate standard.

12. In addressing the appropriate standard, Humphreys J. observed that McDonald J. in *Protect East Meath* did not set down any rigid red lines. Instead, according to Humphreys J., the judgment in *Protect East Meath* used a variety of formulae such as: "sufficient basis", "a sound basis" and "a strong case" to determine the appropriate standard. Humphreys J. held that these formulae were reasonably close to the threshold that a planning applicant must meet to have its points heard in an application for judicial review, namely, substantial grounds. He held that the court had to be called upon to apply a certain procedural level playing field and there was a logic to having substantial grounds as a similar threshold (in a planning judicial review). Referring to paragraphs from the affidavit filed on behalf of the notice party, the High Court held at paragraph 21 that the threshold of demonstrating substantial grounds was satisfied in the present case.

13. As an alternative, under the heading "Rights and rule of law considerations", Humphreys J. stated that liberty should be granted by reference to the notice party's rights under the Constitution, the European Convention on Human Rights and the EU Charter on Fundamental Rights and Freedoms (noting that those rights as such were not argued in *Protect East Meath*), as to do otherwise would "deprive the notice party of any meaningful remedy". He held that, subject to the court being satisfied that there are sufficient grounds for the proposed defence, an appropriate interested party, such as an applicant for planning permission, ought to be entitled to be heard even where the decision-maker proposes to concede relief. That entitlement arises from a number of sources:

a) As a matter of fair procedures in administrative law;

b) As an aspect of the right of access to the court as an unenumerated constitutional right in order to vindicate the applicant's property rights or other rights;

c) In a case in which it arises, under the EU Charter in terms of the notice party's rights to property and an effective remedy; and

d) In terms of the right to an effective remedy and to peaceful enjoyment of possessions under Article 13 and Article 1 of Protocol 1 to the ECHR as implement by the European Convention on Human Rights Act, 2003.

14. The High Court said that issues such as the presumption of validity and the duty of candour were matters which could be dealt with at the hearing of the judicial review.

The Issues

15. The net questions identified by the parties are:

A) Is a notice party entitled to continue to defend a decision where the decision-maker has decided not to defend it?

B) If yes, what threshold must be satisfied?

C) Whether the threshold was met?

Issue A: Is a notice party entitled to continue to defend a decision where the decisionmaker has decided not to defend it?

16. None of the parties to this appeal now take the position that there can never be an entitlement to defend proceedings where the decision-maker concedes that the order must be quashed by way of judicial review. The appellant, despite indications to the contrary in their written submission (where it is said that once the Board concedes, the Court is *functus officio* except for the purpose of making final orders), accepts that there can be such occasions. It says, however, that this is not an unqualified entitlement and liberty to defend is required referencing *Protect East Meath*. The Board also accepts, as recognised in *Protect East Meath*, that as a matter of law a notice party may be entitled to continue to defend proceedings but that a high threshold must be reached before that can be permitted.

17. The State takes a different view in this appeal. While the State accepts that it is for a court to ensure that the processes of the court are not misused, it submits that O.84 does not envisage an application being made for "liberty to defend". The State's submission is that a notice party

or a co-respondent has an entitlement to oppose relief being sought, but always in the light of O. 84 and the procedural steps that a court will adopt to ensure the efficient and timely disposal of business before it. The State's position on this issue has changed from the stance it adopted in the *Protect East Meath* case.

18. The notice party's position is that there is no statutory provision or rule of court which precludes the notice party from being entitled to defend its grant of permission. According to the notice party, the issue must be determined by reference to the inherent jurisdiction of the courts, which in turn must be calibrated with a presumption in favour of allowing a notice party to continue to defend judicial review proceedings having regard to the Constitution, the European Convention on Human Rights, and the Charter of Fundamental Rights. Insofar as there is any threshold to be met (as the High Court held), the notice party states that it satisfies any potentially relevant threshold or test.

19. Prior to the decision in *Protect East Meath,* there was no direct authority on the issue of an entitlement of a notice party to defend in circumstances where the decision-maker concedes the judicial review. The existing case law on notice parties deal with the joinder of "interested parties" to judicial review proceedings and questions of entitlement to costs/security for costs. The principles identified in those cases are nonetheless instructive. It is necessary therefore to consider those cases in more detail.

Protect East Meath

20. The applicant in *Protect East Meath* was granted leave to apply for judicial review of the Board's decision to grant planning permission for an SHD in an area designated as a special protection area under Council Directive 2009/147/EC ("the Habitats Directive"). The Board did not carry out a full appropriate assessment of the implications of the development having concluded that no risk existed that the development would have a significant effect on the special protection area. Before the hearing, the Board indicated it was prepared to consent to

an order of *certiorari*, following another High Court decision, that it had erred in law in screening out the risk of significant effects. One of the notice parties sought to continue to defend the proceedings.

21. In a lengthy judgment detailing the evidence and submissions before the High Court, McDonald J. refused to allow the notice party to defend the proceedings. In addressing whether the notice party had an entitlement to defend, McDonald J. acknowledged that generally a party in the position of that notice party has a legitimate interest in upholding a decision of a planning authority in its favour where that decision is challenged in judicial review. He said the right was firmly established in *O'Keeffe v An Bord Pleanála* [1993] IR 39 ("*O'Keeffe*"), *TDI Metro Ltd v Delap* [2000] 4 IR 337, *Spin Communications Limited v Independent Radio and Television Commission* [2000] IESC 56 ("*Spin Communications*"), *O'Connor v Nenagh Urban District Council & Dunnes Stores Ltd* [2002] IESC 42 ("*O'Connor v Nenagh Urban District Council*") and *BUPA Ireland Ltd v Health Insurance Authority* [2006] 1 IR 201 ("*BUPA Ireland*"). He also said that there can be no doubt that where in judicial review proceedings, a decision-maker chooses not to defend proceedings, the relevant notice party with a direct interest in upholding the decision under challenge will ordinarily be entitled to act as the principal *legitimus contradictor*.

22. McDonald J. also noted, apart from the lack of authority on the subject, that he could not recall from his experience as judge and barrister any situation where a notice party has defended the proceedings in these circumstances. He gave an example of where a notice party had accepted that the concession of the decision-maker brought proceedings to an end notwithstanding the very significant losses to that notice party.

23. McDonald J. then addressed the specific ground at issue in those proceedings. The European Court of Justice in *Waddenvereniging v Staatssecretaris can Landbouw* Case C-127/02 [2004] ECR I-07405 ("*Waddenvereniging*") had concluded that Article 6(3) required an appropriate

assessment to be carried out unless it was possible to conclude at the screening stage that there is no risk that the proposed development will have a significant effect on a protected site. From other Irish authorities, it could be said that the threshold requiring a full assessment was a very low one. McDonald J. said that the concession by the Board was highly significant in the context of the test set out in *Waddenvereniging* case. The Board was a body with vast experience of the appropriate assessment process. McDonald J. said that "[i]f such an expert body is expressing itself in that way in the context of Article 6(3), it would be difficult for a court, in the absence of strong countervailing factors, to reach a conclusion that no doubt exists as to the absence of significant effects".

24. In the course of his judgment McDonald J. did not suggest that a concession by the Board will always be determinative as each case had to be considered in its own context. He did not suggest that a notice party could never defend when the Board made a concession in relation to the adequacy of screening. He said in cases which turn on the adequacy of screening however, a court will be slow to look behind a concession made by a competent planning authority unless the notice party has "sufficient objective evidence" demonstrating very clearly that, notwithstanding the concession, that there is a sound basis to suggest that the *Waddenvereniging* test can be met.

25. Where a concession has been made as a matter of convenience or without reasons the court would, very likely, be prepared to allow the notice party to defend the proceedings. McDonald J. said the case before him was plainly not in that category. He said there was an obvious public interest in public authorities conceding where a case was legally infirm. In some ways, he said, this public interest was a facet of the duty of candour referring to *Murtagh v Kilraine & Ors* [2017] IEHC 384 and *Cork Harbour Alliance for a Safe Environment v An Bord Pleanála* [2019] IEHC 85. McDonald J. also noted that by taking the decision at an early stage to concede the challenge, the public authorities were not only saving valuable costs but were

also ensuring that valuable court time is not spent on litigating an issue which should properly be conceded in the first place.

26. In relation to what the notice party had to establish to be allowed defend, McDonald J. held that it would be sufficient to point to some objective material that could be relied upon at trial to make a strong case to the effect that no doubt exists as to the absence of significant effects on the SPA or the bird species for which the SPA has been designated. In that case, the notice party was primarily relying on the Board's material, but McDonald J. said that where the decision-maker was not prepared to stand over its own material that raised, on a *prima facie* basis, a doubt as to the adequacy of the exercise. On assessing the papers thoroughly, McDonald J. could not see any objective material that removed any doubt that the appropriate assessment was necessary.

27. It ought to be noted that the notice party in the present appeal has sought to distinguish *Protect East Meath* on the basis that it dealt with the Habitats Directive and that environmental assessments were an area of special and particular expertise of the Board. While it is true that McDonald J. specifically referred to that specific expertise in concluding that the notice party therein ought not be to be permitted defend, I am of the view that he was espousing a wider principle in relation to the circumstances where an expert body conceded an application for judicial review of a decision it had made.

Earlier case law concerning "interested parties" in judicial review proceedings

28. In *O'Keeffe,* the leading case on challenging administrative decisions for unreasonableness, the Supreme Court took the opportunity to comment about the joinder of an interested party to judicial review proceedings. In those proceedings, the High Court had quashed the grant of planning permission to Radio Tara Limited to erect a longwave transmitting station in rural Co. Meath. Radio Tara Limited was not party to the High Court proceedings but at the appeal stage was joined on terms that it would not be allowed to introduce fresh evidence or issues.

At the conclusion of his judgment, Finlay C.J. stated: "If application is made for liberty to issue proceedings for judicial review and the claim includes one for *certiorari* to quash the decision of a court or of an administrative decision-making authority the applicant must seek to add as a party any person whose rights would be affected by the avoidance of the decision impugned. If liberty is granted the Court should except for special reasons ordinarily add such person as a party".

29. In this appeal, the notice party places significant reliance upon the Supreme Court decision of *Spin Communications*. It is an *ex tempore*, but approved, judgment of Keane C.J. (McGuinness J. and Geoghegan J. concurring) delivered on 14t April 2000. This was an appeal by the notice party to the judicial review proceedings against a refusal to make an order for security for costs in its favour. The High Court, although noting the greater interest of the third party in the resolution of the proceedings, refused to order security for costs on the basis that the case was really one between the IRTC on the one hand and the applicant on the other.

30. In the Supreme Court, Keane C.J., referring back to *O'Keeffe*, said that a person who is vitally interested in the outcome of proceedings must be joined. Keane C.J. said: "In those circumstances, it seems to me that once the notice party is there, once he is in the proceedings protecting his interests, he may find himself in precisely the same position as the respondent. He may find himself in the position that he has been there, of necessity, to protect his interest, to advance arguments that may not have been advanced by the IRTC and to have had the benefit of his own counsel and solicitor to protect his interest. It would be quite unjust that he should have to pay his costs because the applicant company has no assets, where he has been brought there as a necessary party".

31. The notice party points to the foregoing dicta as an important iteration of the reasoning underlying the necessity to join a notice party and of the protections afforded by such joinder. It should also be noted that Keane C.J. in *Spin Communications* observed that the case at issue

was not one where a multiplicity of notice parties was brought in all of whose presence was not necessary and where the court could exercise its discretion by declining to order costs except in favour of one representative notice party.

32. A further decision of note is the case of *O'Connor v Nenagh Urban District Council*. The applicant was refused judicial review and the High Court ordered that the notice party recover costs against the applicant. On appeal, the applicant argued that the application for judicial review was a matter of public interest, relating to a public document and was a matter of public importance. The Supreme Court (Denham J. as she was then) held there was no error by the High Court in awarding costs to the notice party. Denham J. identified a number of features that would not permit an interference with the exercise of the High Court's discretion. She noted that whereas there was an element of public law, the remedies sought were potentially detrimental to the notice party, the notice party was a necessary party, acting in good faith, which participated fully at trial and was successful. There were no compelling reasons not to grant costs.

33. In *BUPA Ireland Ltd*, the applicant had brought, *inter alia*, a challenge to the constitutionality of that part of the Health Insurance Act, 1994 which established a risk equalisation payment scheme in health insurance. The original proceedings included a challenge to a recommendation by the first respondent to the Minister to commence a relevant scheme under the Act. The VHI had been joined as a notice party to the original proceedings on the basis that they were the party entitled to receive the greater part of any funds becoming available from payments directed by the first respondent under the scheme. When the recommendation by the Health Insurance Authority to the Minister was withdrawn and the proceedings were only to continue in the form of a constitutional challenge, BUPA sought to have the VHI removed as a notice party. It is of some importance that the Supreme Court referred to the then rules of O. 84 (corresponding to r. 22(2), r. 22(9) and r. 27(1)) and that the Supreme Court

quoted the passages from *O'Keeffe* and *Spin Communications* referred to above. The Supreme Court (Kearns J.) reiterated that where a party had a "vital interest in the outcome of a matter" or would be "very clearly affected by the result" of the proceedings, it was appropriate for that party to be joined as a notice party. The Supreme Court recognised that ordinarily a private citizen would not be joined in a constitutional challenge but said that the situation was different where a party was likely to be uniquely adversely affected by a successful outcome to such a challenge.

Discussion

34. As appears from the foregoing, it is a well-established requirement that a person who has a vital interest in the outcome of judicial review proceedings must be joined as a party (by the applicant, and, if not, by the court). Once joined, such an interested party has a right to protect their interests and to advance arguments that may not be made by the decision-maker. Interested parties who participate in the proceedings are consequentially liable to seek security for costs, to be awarded costs and to have costs awarded against them. Undoubtedly a person who has obtained a planning permission is a person who has a "vital interest in the outcome" of proceedings challenging that permission. Such a person, is, in the words of O. 84, r. 22(2), a person who is "directly affected". It is also apparent that there is no statutory prohibition on a person directly affected from continuing to defend an administrative decision where the decision-maker concedes.

35. While the phrase "notice party" is not used in O. 84 to describe those who are directly affected, it is those directly affected who must be served (r. 22) or, as deemed by the Court, "proper persons to be heard shall be heard" (r. 27(1)) in the hearing of the application for judicial review or the application for leave as may be the case. Usually, the correct respondent to judicial review proceedings is the decision-maker. A notable exception concerns judicial review relating to proceedings before a court. In that situation the judge is not to be *named* in

the title to the proceedings unless an allegation of *mala fides* is made. The correct respondent is the party or parties to the proceedings (r. 22(2A)(b)). Thus, in criminal cases, the DPP (or other prosecutor) is therefore named as respondent. The DPP is the *legitimus contradictor* thereby standing in the shoes of the decision-maker. In a family or civil law case, it is the other party to those proceedings who is the respondent and *legitimus contradictor*.

36. It is accepted by all parties that, despite no express provision in the rules, a party who is served with proceedings becomes a notice party and thereafter is entitled to file a Statement of Opposition grounded on affidavit. In the usual course and, at the option of the notice party, there is full participation by the notice party in the contested hearing regardless of whether the decision-maker (like the Board) takes an active part or does not take an active part.

37. The State urges the Court to return to first principles and assess what is at issue in judicial review proceedings generally as challenges to planning decisions form a subset of those proceedings. I view such an approach as a necessity given the nature of judicial review proceedings. Planning cases can be complex and considerable expertise has been developed in dealing with such cases, but they are not a separate category of law; fundamentally they involve claims for judicial review remedies challenging decisions made in the field of public law and must be understood in that light. In broad terms, what is being sought in a judicial review is a public law remedy and the principles which apply in that field apply with the same force when the subject matter of the claim is planning or environmental law. As Clarke J. (as he was then) said in *Rawson v Minister for Defence* [2012] IESC 26: "It is trite law to say that judicial review is concerned with the lawfulness of decision making in the public field." According to Clarke J., if the courts did not have jurisdiction to consider whether administrative decisions were lawful, it is doubtful that such a situation would be consistent with the rule of law.

38. The State refers the Court to some recent authorities restating that while the merits of legislation is for the legislature and the merits of administration are for central and local

government and statutory bodies, the assessment of the legality of such legislation and administration is for the judiciary. The following apt quotation from Browne, *The Law of Local Government*, 2nd Ed 2020, para 6-10, is sufficient to cite: “The duty of the court in judicial review proceedings is not to usurp the jurisdiction of the decision-making body or tribunal nor to impose its views on an administrative decision, but rather to adjudicate on the procedural fairness and lawfulness of a decision.”

39. It is important to recall that when the High Court makes an order for judicial review, it is exercising its inherent power to supervise the legality, rationality and procedural fairness of the activities of the District and Circuit Courts, tribunals and other public authorities (Hogan, Morgan and Daly, *Administrative Law in Ireland*, 5th Ed 2019, Ch 18). Thus, an applicant for judicial review is asking the High Court to exercise its supervisory function. That inherent power of the High Court can only be exercised when it has been established that the decision was unlawful (remedy of *certiorari*) or that unlawfulness is apprehended (remedy of prohibition) or that an order is required to compel compliance with a legal obligation (remedy of *mandamus*). Usually where all the relevant parties (including the notice party) are consenting to the quashing of an order, there will be very little to trouble the High Court in the exercise of its supervisory function. Nevertheless, the High Court in granting the relief sought does not do so as a matter of course. Instead, the High Court must be satisfied that it is a lawful exercise of its supervisory function based on the evidence and submissions made to it.

40. During the appeal, counsel for the State referred to the previous practice of the High Court, of which I am aware, to list “consent” judicial reviews for *hearing* (not for mention), in the judicial review hearing list on Monday. This was a procedural reminder that no matter the attitude of the parties to the relief being sought, the onus remains on the applicant to persuade the High Court that its power of review was correctly being called in aid. This is in contrast with a private law remedy where, apart from matters involving minors and fatal injuries, the

Court does not scrutinise an order agreed between the parties in settlement of proceedings (with the possible exception that certain orders ought not or will not be made if they would contravene public policy). Judicial review may involve a challenge to a provision of broad application and the court's decision may have an effect on others and indeed be matters in respect of which the public are affected or interested.

41. The appellant argues that there is no (other) authority for the position that a notice party ought to be allowed to defend the proceedings where a decision-maker concedes. This is however perhaps to approach the question the wrong way around. Where it is accepted that a party has a sufficient interest in being joined to proceedings in order to defend the validity of a decision made in their favour or from which they benefit, the question might be better put by asking what authority there is for the proposition that they can lose their entitlement and the benefit of the decision or measure, by reason of the action of another party and without being heard to defend the decision. It may be the position that issue has not been determined, but the absence of authority on a particular issue cannot be determinative of a point of principle. It is indeed noteworthy that the State (and the Board) have referred to a number of cases from England and Wales that proceeded on the basis that an interested party was entitled to continue to defend the decision or at least to be heard as to what ought to be the result of the concession i.e. refusal of relief on the basis of delay or other conduct on behalf of the applicant; *R (Friends of the Earth) v Environment Agency* [2003] EWHC 3193 (Admin), *R (Thornton Hall Hotel Ltd) v Wirral Metropolitan Borough Council* [2019] EWCA Civ 737 [2019] PTSR 1794 and *R (Knowsley MBC) v Knowsley Magistrates Court* [2001] Env LR 28. These decisions are of some importance, since it has not been suggested that the principles underpinning judicial review apply differently in that jurisdiction.

42. The case of *R (Friends of the Earth) v Environment Agency* [2003] EWHC 3193 (Admin) is particularly illuminating. The Agency granted a modification to a waste management licence

required for the dismantling of ships containing various toxic waste substances. When the application came before the Queen's Bench Division (the Administrative Court) for permission to apply for judicial review, the Agency conceded that it has erred in law in permitting the modifications because the dismantling processes had not been "screened" for the purposes of the Habitats Directive. The interested party – the licence holder – did not agree with the making of an order quashing the decision. The Administrative Court granted permission to apply for judicial review and ordered that there should be a preliminary hearing as to whether the Agency's decision to concede had been correct. From the judgment dealing with that point, it appears that the preliminary hearing was a full hearing on the facts and law regarding the necessity for the "screening" to be carried out. It appears that the Agency had not carried out a screening for the purpose of a "wet dock" dismantling. The interested party's position was that a screening was not required as this was not "a plan or project" which required one. That argument was rejected by the Administrative Court. Thus, it seems, in England and Wales an interested party is entitled to defend even where a decision-maker concedes a judicial review and the matter will then be dealt with in an appropriately expeditious manner; in that case by way of a preliminary hearing of the issue on which the concession was made.

43. The State also correctly makes the point that a notice party may frequently argue that not only is the decision lawful but that even if unlawful, the relief ought to be refused because of delay or acquiescence. Such issues of delay or acquiescence may not affect the decision-maker but could affect the notice party. Similarly, a notice party may be aware of a lack of candour on the part of the applicant for leave of which the decision-maker was unaware. In my view, these are all matters which accord with the principled entitlement of a notice party to defend its own interest in the judicial review proceedings.

44. An exception to the above, properly brought to the Court's attention by counsel for the State, an English authority which appears to go in the opposite direction. In *R v Independent Appeals*

Tribunal of the LEA of Hillingdon LBC [2001] ELR 200 ("*Hillingdon LBC*"), an order was agreed between the applicant school and the decision-making independent appeals panel quashing the decision to allow the pupil's appeal against his expulsion. The pupil, as the interested party, did not agree with the order and sought to be heard by the court on the validity of the decision despite the concession. This was rejected apparently in reliance on r.1.1 of the Civil Procedure Rules which states that the "Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly". Newman J. made specific mention of the costs of any continued judicial review proceedings and the courts resources (two days hearing) and was satisfied that the pupil's rights were protected in the remitted process. A further ground for refusing the pupil the right to contest the proceedings was that had there been no application for judicial review, the decision-maker could simply have revoked its decision in light of new material being put before it and the pupil would have been entitled to make submissions on the new material.

45. *The Hillingdon LBC* case relies heavily on the express provision of the Civil Procedure Rules which permits or perhaps requires the court to take an overview of the justice of the case when making decisions under the Rules. It is also quite fact specific. Even if provision were made for such an "overriding objective" in our own Rules of the Superior Courts, any such provision would have to have regard to the vital interests of a notice party in accordance with the accepted jurisprudence of this Court in decisions such as *Spin Communications* and *BUPA Ireland.* I do not accept that the decision in *Hillingdon LBC* is persuasive authority in this jurisdiction as to the rights of a party "directly affected" by a decision to defend its interest. As will be discussed further below, the High Court possesses certain powers to assist in the expeditious and cost-effective determination of proceedings.

46. The appellant makes the argument that the notice party ought to have challenged the decision of the Board to concede the judicial review. Under s. 50(2) of the 2000 Act, a person shall not

question the validity of any decision made or any act done by, *inter alia*, the Board in the performance of a function under the Act other than by way of an application for judicial review under O. 84 within a period of eight weeks from the date of the decision. In my view the High Court correctly rejected this argument. Section 50(2) is directed towards the performance of functions under the Act, that is to say towards decisions related to planning and development matters. It is not directed towards litigation decisions made by the Board. The language of the sub-section is clear in that regard. If there was an ambiguity, and I do not consider that there is, then I would agree with the High Court that to accept the appellant's interpretation of s. 50(2) would lead to the absurdity of an *ad infinitum* spiral of challenges to decisions made within the course of judicial review proceedings. That would be the very opposite of the intention of s. 50(2) which introduced control mechanisms to judicial reviews of planning decisions.

47. With particular reference to *Protect East Meath*, the appellant and the Board made further arguments as to why a threshold must be reached before liberty to defend can be granted. They rely upon matters such as the public interest in ensuring early concessions, the reduction of costs and the efficient use of Court resources. While these matters are all legitimate concerns, at the level of principle it is difficult to see why they would trump the protection of the "vital interests" of the notice party. After all, the notice party has acquired, through following an administrative procedure, an item of value, in this case, a planning permission. If a party has a right to protect that interest in a type of "joint defence" with the decision-maker against the attack on that interest by an applicant for judicial review, or in sole defence if the decisionmaker does not participate, it is difficult to see why, at the level of principle, its right to protect that interest is either lost or significantly diminished merely because the decision-maker makes a decision to concede the judicial review. This principled view is entirely consistent with the authority of *Spin Communications* in which Keane C.J. specifically referred

to the entitlement of the notice party to advance arguments that may not have been advanced by the decision-maker.

48. The appellant argues that the decision has lost its presumption of validity once the Board concedes. I do not accept that this reflects the correct position as to the effect of the presumption of validity in judicial review proceedings taken against the grant of a planning permission. Once the decision to grant permission is made by the Board, the validity of that decision is a function of the law permitting such a decision to be made. The validity of the decision, and the corresponding presumption, is not within the gift of the decision-maker. When the decision is challenged in judicial review proceedings, the presumption operates to identify who bears the burden of proof. The Board's "concession" cannot operate to take away the right of the party who has the benefit of that planning permission to defend that decision when it is challenged by way of judicial review. Depending on the nature of the concession by the Board, an applicant for judicial review may have its path to obtaining the relief claimed eased by such concession but it does not obviate the necessity for the applicant to persuade a court that such relief ought to be granted.

49. The appellant, relying on the State's submission in *Protect East Meath* (which is not the position now taken by the State), also argues that the Court is *functus officio* save for making final orders once the Board has decided to concede. That submission is inherently flawed as it fails to take account of the nature of the role of the High Court, as described in the foregoing paragraphs, when exercising its judicial review functions.

50. The Board and the appellant highlight the expert nature of the Board and the unusual (though not unique) approach the Board takes to defending its decisions before the High Court (where appropriate). Other decision-making bodies such as the Valuation Tribunal do not take that approach. In my view, the active participation by the Board in judicial review proceedings does not alter the underlying principles on which the public law remedy of judicial review is

based. As stated above, challenges to planning decisions are one sub-set of judicial review proceedings. An example of another sub-set of judicial review proceedings is that of challenges to immigration decisions. It is true that each of these examples have separate statutory requirements when seeking judicial review, for example, the eight-week time limit in s. 50(6) of the 2000 Act for challenging planning decision and the two-week limit in s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act, 2000. Those separate statutory requirements do not affect the nature of the remedy claimed, namely, a public law remedy. The argument of the Board and the appellant also does not take account of the interests of the notice party who has specifically been joined to the proceedings for the very reason that it has vital interests to protect.

51. While an expert body may have specific expertise in an area, in matters of law the High Court, subject to appeal, is the ultimate decision-maker on the interpretation and application of law. It is well established that the courts could not and would not hear evidence as to the law of the State (see Declan McGrath and Emily Egan McGrath, *McGrath on Evidence* (3rd ed, Round Hall 2020 para 6-152). The courts will accept submissions, however, on any issues of interpretation raised before them. Although the High Court may rightly expect that the submissions on the law of an expert decision-maker in its area of expertise will be considered, measured and up to date, those submissions are not a substitute for the High Court's role in the identification and implementation of the correct legal principles at issue. In our adversarial system, the court must hear from all opposing parties and make its own decision as to the applicable law. In some cases, the true legal position may be readily discernible. Thus, the High Court may not always require much time in reaching a decision even on a contested case. That is a case-by-case adjudication by the High Court which does not amount to an automatic acceptance of an expert decision-maker's view as to the law.

52. It follows that in a situation where the Board is conceding on the basis of its view of the law, but the notice party wishes to continue its opposition, the Board's view on the law amounts to no more than an opinion. If the Board is no longer continuing as an active party in the proceedings, its view on the law may not be admissible before the High Court; an opinion on the law of this State is not admissible before the courts.

53. Where the Board concedes on a matter of fact and not of law, considerable weight will be accorded to that concession, provided, of course, that the "fact" is properly placed in evidence before the court. A notice party may have an uphill, or perhaps an almost impossible battle, in attempting to dispute such a fact; particularly if the fact relates to an internal matter within the Board's decision-making procedure of which a notice party would be unaware. The High Court would of course be careful to ensure proceedings are not unduly drawn out where the concession appears wholly correct but the position remains that the notice party has an entitlement to contest even where the decision-maker concedes. That entitlement is based upon the fundamental principle that it is for the court to make the proper assessment of the validity of the impugned decision.

54. It is perhaps this type of situation, amongst others, which the appellant and the Board have in mind when they make the argument that it would be difficult to see how the duty of candour, citing *Murtagh v Kilrane & Ors* [2017] IEHC 384, which lies upon public bodies could ever be fastened to a notice party when the Board concedes. That argument really amounts to no more than a caution of the dangers that may lie in permitting a notice party to continue such proceedings. What that argument fails to take account of, is that the duty of candour will already have been activated in such a situation by virtue of the information disclosed by the decision-maker in communicating its concession. Clarke C.J. stated in *RAS Medical Limited v Royal College of Surgeons in Ireland* [2019] IR 63: "As was noted by Lord Donaldson M.R. in *R v Lancashire County Council Ex p. Huddleston* [1986] 2 All E.R. 941, such parties (i.e.

public authorities) should conduct public law litigation "with all cards face upwards on the table". In this case, the Board has given its view of what has happened and its view of the law, thereby complying with its duty of candour in these circumstances.

Issue B: Can a threshold still apply?

55. It can be seen from the foregoing that the inevitable conclusion from the analysis of the principles behind the role of the High Court in judicial review and the rationale for serving an interested party with the proceedings, is that a notice party so joined must be entitled to defend the administrative decision which it has obtained. Nothing in statute law or in the Rules prohibits such an entitlement.

56. Order 84 does not distinguish between situations where a decision-maker concedes, one where the decision-maker remains neutral or one where the decision-maker does not participate at all. The Rules do not provide for a threshold for leave to defend. I agree with the notice party's submissions that where access to the court has been restricted by statute, it has been strictly construed (see, for example, *Murphy v Green* [1990] 2 IR 566 and *In Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999*, [2000] 2 IR 360) and that where, as here, there is no statutory restriction, the court ought not do so by imposing a requirement to seek leave to defend. The entitlement to defend is an integral part of the access to the court of a party who seeks to retain a benefit that (an apparently lawful) administrative decision has granted to them. If the court is to protect its own processes from abuse it cannot do so by requiring a party to seek leave to defend.

57. The Board's interest in supporting the appellant's appeal was that it viewed the threshold for leave to defend as being set too low by the High Court. The issue of a threshold for leave to defend does not arise where a notice party, served as an interested party, wishes to defend the decision of which it is the beneficiary. Many of the issues raised by the Board and the appellant are matters which go to the issue of court resources, the interests of justice and the public

interest in the prompt concession by a public body of judicial review proceedings where appropriate. It is appropriate to consider whether those interests may be protected through O. 84 or by the inherent jurisdiction of the High Court.

Protecting the interests of the parties and the courts resources

Order 84 – Case Management

58. Order 84 contains, as the State submitted, specific provisions which may ensure that a particular process is not side-tracked or derailed by unmeritorious issues being raised by a notice party. From the Rules, I am satisfied that the High Court is both empowered and has a duty to ensure that proceedings before it are conducted in a manner which accords with the efficient administration of justice and is in the interests of justice. Where an administrative body makes an express concession of the judicial review (or at least one aspect thereof), the High Court must be mindful of all the relevant interests involved, be it the applicant or the Board in ensuring that proceedings are brought to a swift conclusion (but appropriate) conclusion or the notice party who is the beneficiary of the impugned decision.

59. As previously stated, the Rules, with the exception of a specific amendment, do not make explicit reference to a "notice party" or address how "interested parties" ought to engage procedurally. It is general practice, however, to apply the rules regarding the filing of a statement of opposition to those notice parties who wish to oppose. Thus, if the proceedings are conceded by the decision-making body before the statement of opposition has been filed, O. 84, r. 22(4) provides for a three-week period or *such other period as the Court may direct* for filing that statement. Therefore, the High Court has control of the time frame for the pleading by the notice party. A reduced time frame may be appropriate depending on the relative simplicity of the point or points at issue in the judicial review. If required, as a matter

of fair procedures, an extension of time may be granted but control would remain with the Court.

60. Pursuant to the provisions of O. 84, r. 22(5), a notice party will have to plead specifically each ground of opposition and the facts supporting each ground. This will enable the High Court to assess the extent of the opposition to the relief conceded and give appropriate directions for the hearing of the case. It may also have relevance to any application to strike out the statement of opposition on the grounds that it discloses no reasonable ground of opposition and/or is frivolous or vexatious and/or is bound to fail, this jurisdiction is discussed below.

61. Rule 22(7) also permits of a further case-management strategy, through which, in a case to which the Rule applies, the High Court may direct submissions to be exchanged within three weeks, *or other period as the Court may direct*, of the filing of the statement of opposition. This will also enable the Court to assess the complexity of the issues and enable it to fix a suitable, and if appropriate, an early date for hearing of the application for judicial review or such part therefore as may be appropriate.

62. The State has also relied upon O. 84, r. 24 (1), (2) and (3) to demonstrate how the High Court has the option of making an application for leave to be heard on notice (and of course such an option is available in planning law as stated at s. 50A(c) of the 2000 Act) whereby the Court may direct an *ex parte* application to be heard on an *inter partes* basis. If it does so hear it, the Court may of its own motion treat an application for leave as if it were the hearing of the application for judicial review and may, *inter alia*, give directions on written and oral submissions. Under O. 84, r. 24(3) on hearing such an application for leave on notice the Court is also empowered to give directions and make orders for the conduct of the proceedings as appear convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings, which may include directions as to exchange of memoranda for the purpose of agreeing issues of fact or law to be

determined in the proceedings on the application. These would seem particularly appropriate where the concession and indication of opposition to that concession has come prior to the application for leave having been finalised. Again, however, this is a matter for the High Court to determine as it sees fit.

An application to strike out or dismiss the statement of opposition

63. There have been High Court cases in which a respondent (or notice party) was permitted to bring an application to dismiss or strike out the judicial review proceedings on the grounds of the inherent jurisdiction to protect the processes of the court from abuse. A discussion of some of these authorities is to be found in the decision of Costello J. in *Alen-Buckley v An Bord Pleanála* [2017] IEHC 311. Costello J. cites approvingly from the decision of Irvine J. in *Connolly v An Board Pleanála* [2008] IEHC 224 who said: "Whilst applications which are brought seeking to invoke the court's inherent jurisdiction are normally brought by a defendant in the context of plenary proceedings issued by a plaintiff, there is no reason to believe that this fact in any way precludes a court considering a motion such as the present one brought by the notice party to dismiss judicial review proceedings which he states are an abuse of the court's jurisdiction…".

64. In *North Westmeath Turbine Action Group v An Bord Pleanála* [2022] IECA 126, ("*North Westmeath Turbine Action Group*") the Court of Appeal (Collins J.) dealt with an appeal from a decision to strike out the judicial review proceedings against the State on the basis that the proceedings disclosed no reasonable cause of action and/or were frivolous and vexatious and/or were doomed to fail. At footnote 5 of the judgment, Collins J. took the opportunity to comment on the form of the application made and he noted that no such point was taken during those proceedings. Nevertheless, he found it difficult to see:

> "how the jurisdiction to strike out a pleading given by Order 19, Rule 28 RSC could arise here given that the definition of "*pleading*" in Order 125, Rule 1 RSC does not

include a statement of grounds or originating notice of motion. Indeed, that very point was made by the State by way of arguing that Order 28 RSC (amendment of pleadings) was of no relevance to the amendment application here. Similarly, Order 19, Rule 27 – which empowers the High Court to strike out or order the amendment of "*any matter in any indorsement or pleading*" would appear to have no application to the proceedings here. As for the *Barry v Buckley* jurisdiction, in *Alen Buckley v An Bord Pleanála* [2017] IEHC 311 the High Court (Costello J) held that such jurisdiction was exercisable in respect of judicial review proceedings, rejecting the applicant's argument that the appropriate procedure was to bring an application to set aside the leave, relying on the jurisdiction recognised in *Adam v Minister for Justice, Equality and Law Reform* [2001] 3 IR 53. No challenge was made to that holding in *Alen-Buckley*. In any event, there would appear to be no material difference between the *Barry v Buckley* threshold test and the threshold test articulated in *Adam*".

65. I agree that there would appear to be no material difference between the *Barry v Buckley* [1981] IR 306 threshold test and the *Adam* threshold test. The important point is that there is a jurisdiction in the High Court to strike out judicial review proceedings either by setting aside the leave granted or by striking out the proceedings as part of the inherent jurisdiction. As the inherent jurisdiction of the High Court extends therefore, in appropriate circumstances, to striking out judicial review proceedings despite leave having been granted, I consider that the inherent jurisdiction to prevent an abuse of the process of the Court, also extends to the possibility of striking out a statement of opposition (and grounding affidavit if necessary) on the basis that no reasonable ground of opposition is disclosed and/or the opposition is frivolous and vexatious and/or is bound to fail. This presents another possible means of ensuring that no entirely spurious opposition is permitted to unduly extend the length and expense of judicial review proceedings. I would also observe however that the threshold under the *Barry v*

Buckley/Alen-Buckley jurisprudence is a very high threshold, and it must be anticipated that such applications would be very rare, especially in light of the court's case-management powers.

66. In determining the appeal in *North Westmeath Turbine Action Group*, Collins J. held that the High Court ought to have heard and determined the applicants' motion to amend their statement of grounds prior to hearing the motion to strike out. In circumstances where the case had been substantially heard, the motion to strike out was moot. Of relevance to the present appeal, Collins J. also made important observations on the status of the State in those proceedings, in which the primary relief was *certiorari* of a planning permission granted by the Board and declarations to the effect that the Board failed to carry out assessments in accordance with the Environmental Impact Assessment Directive and the Habitats Directive. The State had been joined as a respondent, incorrectly in the view of Collins J., where no relief had been claimed against it. However, two of the grounds claimed that Ireland had failed to transpose the Environmental Impact Assessment Directive and the Habitats Directive and in those circumstances the State had an interest in the transposition issues raised in the statement of grounds and "arguably (at least)" were *directly affected* within the meaning of Order 84. That required service on the State and as Collins J. opined "[i]n practice, such persons are generally named as notice parties". In those circumstances the State were free to decide whether or not they wished to be heard on the transposition issues and could have asked the High Court to direct that such issues would only be addressed last and if strictly necessary. I would also observe in a similar vein to Collins J., that from a pragmatic point of view, bringing such a motion to strike out the statement of opposition of a respondent/notice party may not always be the better option. There may be other good reason for bringing the proceedings on to hearing, not least because, unlike the situation with a motion to strike out (see *North Westmeath Turbine Action Group v An Bord Pleanála* [2020] IECA 355), an appeal to the

Court of Appeal may, in planning cases at least, only lie on the grant of a certificate for leave to appeal following the final determination of the application for judicial review in the High Court.

Case-Management – Modular Hearings

67. The Board had specific concerns about how its interests might be protected in a situation where it was prepared to concede the judicial review relief on one ground but disputed all other grounds on which the applicant relied if a notice party was entitled to defend. In order to defend its position (which might affect other cases) on those other grounds, the Board might have to incur expense in defending proceedings which, in its view, ought to be conceded. That unfortunately may be an unavoidable risk if the notice party's right of access to the court is to be protected. There are some possible protections for a respondent, such as the Board, who might find itself in that position. As already pointed out, the Rules provide for measures which assist a court in its management of the proceedings. Moreover, in the exercise of its inherent powers to control its own processes, the High Court may case manage proceedings to direct, where appropriate, a preliminary hearing of the ground on which the concession is made.

68. It is important to acknowledge however that such a direction for a preliminary hearing may not be, in many if not most cases, the best way forward to an early resolution of the proceedings. An early hearing date, perhaps following a truncated period for delivery of a statement of opposition by the notice party, may be much more appropriate. It may be that the best use of court resources, even in complex planning cases, is to proceed to full hearing where the court will retain the option to give an early judgment on the preliminary issue if appropriate.

69. There are a variety of case-management strategies open to the High Court and it is not for this Court to be prescriptive as to how the High Court ought to proceed. The nature and complexity of judicial reviews may vary widely. What is appropriate for a straightforward application for judicial review on the basis of a single issue which is conceded by the public body, may be

entirely different from a judicial review application where there a multiple and complex issues of fact and law at stake and where only one point has been conceded. In the latter situation, the High Court may find that a modular approach may be the best option and thus deal with the conceded point as a preliminary matter. Even then, however, in complex planning cases for example, it may be that listing the entire case for hearing is appropriate given the time estimates for a modular versus a full hearing. A stage may then be reached where the High Court has heard all matters but may prioritise a judgment on the conceded point if that is appropriate. These and perhaps other avenues are open to the High Court when faced with a situation, as here, where a notice party wishes to defend, despite the active concession of the judicial review on a particular ground by the decision-making body. In making its determination of how to proceed, the High Court must balance all the interests at stake and provide for a procedure which is fair to all parties and has regard to the due administration of justice in the courts.

70. It must also be observed that the powers of the High Court in relation to costs will be a significant factor in a notice party' calculation as to whether to seek to defend an administrative decision in their favour especially where a decision-maker expressly accepts that the decision was unlawful. In many challenges to planning permissions, s. 50B of the 2000 Act provides a certain protection in relation to costs. Those protections are not absolute however and under s. 50B(3):

> "The Court may award costs against a party in proceedings to which this section applies if the Court considers it appropriate to do so—
>
> (*a*) because the Court considers that a claim or counterclaim by the party is frivolous or vexatious,
>
> (*b*) because of the manner in which the party has conducted the proceedings, or
>
> (*c*) where the party is in contempt of the Court."

Issue C: The threshold in this case

71. Once the High Court determined that the notice party was a "person affected" by the Board's decision for the purpose of O. 84, r. 22(2), then it had an entitlement to defend the proceedings as of right and accordingly no threshold is required to be met. Insofar as McDonald J. ruled otherwise in *Protect East Meath*, I think, with respect, that he was mistaken. The manner in which this case now proceeds is a matter for the High Court.

Conclusion

72. In judicial review proceedings, the High Court is exercising its inherent powers to supervise the legality, rationality and procedural fairness of lower courts and public decision-making bodies. The grant of a judicial review remedy is the exercise of the High Court of those powers, and one cannot thus correctly speak of a "consent order". The High Court must be persuaded that it ought to exercise its power in a given situation.

73. Established case law points to the entitlement of a person directly affected by judicial review proceedings to be served with those proceedings. Such persons will obviously include a party who has the benefit of the impugned administrative decision. The case law also establishes that the notice party has a right to defend its vital interests in the proceedings and to be entitled to or subject to orders for security for costs or costs as the case may be.

74. In light of these well-established principles, a notice party has an entitlement to defend the judicial review proceedings even where a decision-maker concedes them.

75. The High Court has various powers under O. 84 and under its inherent powers, to case-manage proceedings for the purpose of ensuring that they are conducted as fairly, as expeditiously and in the most cost-effective manner as possible. The approach of the High Court will depend on a case-by-case analysis of the issues before it and it may be that, in a given case, the most

appropriate way to proceed is to list the application for judicial review for full hearing. In other circumstances a preliminary hearing of the point conceded may be more appropriate.

76. For the reasons set out I would dismiss the appeal.