Neutral Citation Number: [2008] IEHC 71

THE HIGH COURT
JUDICIAL REVIEW

2006 No. 198 J.R.

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT, 2000 (AS AMENDED)

BETWEEN

WESTON

APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENT

SOUTH DUBLIN COUNTY COUNCIL
AND
COMBINED ACTION ON WESTON AERODROME

NOTICE PARTY

Judgment of Mr. Justice John MacMenamin dated the 14th day of March, 2008.

1. The applicant is a registered company with unlimited liability. It has its registered office at Weston Aerodrome, Leixlip, County Dublin. It is the owner and operator of a licensed aerodrome there.

Background

2. In these proceedings the applicant ('Weston') seeks to challenge an imposition by An Bord Pleanála ('the Board') of a condition imposed on a decision to grant planning permission. Weston alleges that the condition which has been imposed is unlawful and seeks orders removing such condition from the grant of planning permission.

3. On or about 5th May, 2005 Weston made a planning application to South Dublin County Council ('the County Council') for a retention in respect of the following development: revision, alteration and retention to approved office/clubhouse, hangar and car park at Weston Aerodrome, Lucan, County Dublin.

4. The development in respect of which retention planning permission was sought consisted in what is described as a "non-airside" development. Its purpose was to allow air traffic controllers in the control tower sited on top of the "clubhouse" to have a full view of the runway and taxiways. The project consisted in (a) a relocation of the control tower from a central position on the roof of the office/clubhouse to the front elevation of that building, with reduced size of the display and visual part of the control tower, and a slight increase in height; (b) a consequential relocation and retention of navigational aid equipment from the control tower to two storage areas internally under the control tower, to be achieved by lowering the ceiling height of the first floor by 1.945 metres; (c) the relocation and retention of a lift shaft internally, thereby avoiding direct entry to the control tower; the height of the lift shaft to be increased by 1.45 metres; (d) the incorporation of necessary security arrangements by change of user of the ground floor by the provision of office accommodation and reception at ground floor, a slight increase in the bar area, and a reduction in office space at first floor; (e) the proposed use of unroofed areas behind the perimeter parapet walling for air handling units and ventilation equipment; (f) the retention of folding doors at the rear of a hangar.

5. In Weston's grounding affidavit, Mr James Mansfield, one of the directors of the company, states that the retention, revision and alteration was necessitated so as to ensure a clear view from the control tower; to ensure that the lift did not terminate at the control tower itself (a security consideration); and (with reference to the hangar) the retention of folding doors at the rear and its division into three units so as to reduce the fire risk to aircraft placed there. Consequently, a car park at the rear of the hangar was to be relocated and an apron provided.

6. In response to the application on 29th June, 2005 the County Council as planning authority, issued a notification of a decision to grant permission and retention for the development subject to a number of specified conditions, the reasons for which were set out in a schedule. Weston took no exception to three conditions or to the reasons which are set out therefor. They are material only by way of context, and possible contrast with that impugned.

7. Each such condition was justified by an attendant and specified reason; respectively, to ensure that the development was in accordance with the permission, in the interests of public health and the assurance of adequate draining. The meaning and effect of all those stated reasons were, in their context, entirely clear.

However, Weston claims that condition No. 4 falls into a different category.

8. The condition itself, closely reflected in the ultimate decision of the Board on appeal provides:

> "4. Development described in Class 32 of Part 1 of Schedule 2 of Planning and Development Regulations, 2001 as amended, shall not be carried out on the lands at Weston Aerodrome within the administration of South Dublin County Council without a prior grant of planning permission from the planning authority or from An Bord Pleanála on appeal."

The only reason for this condition is stated to be "in the interest of orderly development". Weston states that the effect of such condition, if upheld, would be to negate a more general type of exemption for the development of 'aerodromes', (a term more redolent of the nineteen thirties than today) thereby rendering it susceptible to ordinary planning processes and stifling the further development of Weston. A further condition imposed by South Dublin County Council sought to restrain increases in aircraft movements, training exercises or any material change in the type or capacity of existing aircraft using the aerodrome. It stipulated that any material increase or change should be the subject of a separate planning permission. The reason for this condition was fully described and included the requirement that there should be full assessment of consequences that might arise from increase or change in the existing use of the aerodrome. Thus the reason for this condition was clearly justified and explained by the County Council.

9. The decision of the County Council was the subject of a third party appeal to the Board. This appeal was taken by an unincorporated association, 'Combined Action on Weston Aerodrome'. Ultimately, on 20th December, 2005, the Board granted planning permission, subject however to a condition slightly amended from that imposed by the County Council.

> "Development described in Class 32 of Part I of Schedule 2 to the Planning and Development Regulations, 2001,as amended, shall not be carried out on the site area without a prior grant of planning permission."

The stated reason was, simply repeated "in the interest of orderly development". Two other conditions imposed are immaterial. This condition and the stated reason therefor is now challenged.

10. By way of background, the prior relationship between the applicant and the respondent has been a chequered one, surrounded by much controversy and no little friction. Ultimately, after its acquisition by Mr. Mansfield's company, Weston has had the benefit of a number of more recent planning permissions in the last decade or so, added to a long established right to use the lands for the purpose of a licensed aerodrome since 1939. Substantial development contested on many quarters has taken place since the Mansfield interests purchase.

11. Weston contends that the effect of the condition now in suit would be to inhibit immediate response to what could be regarded as safety and security issues, including security fencing or alterations to taxiways or aprons which might be requested by the Irish Aviation Authority; and that it is unreasonable to remove or negate the effect of an exemption under the 2001 Regulations as a more immediate response may be required having regard to the nature of an aerodrome. The rationale for the general exemption provided for by the Minister as an exception to the Planning Act, 2000 is to allow for rapid and less inhibited development works at airports developed as part of the State infrastructure.

12. In order to place this contention in context it is necessary first to consider the general ambit of the Planning Act of 2000 with regard to exemptions, and second to consider the specific exemption to which this application relates. The attack on the decision is mounted on three fronts; vires, the duty to give reasons, and proportionality.

(i) Are the conditions and the Regulations under which it is made *ultra vires*?

Statutory provisions
13. The principal categories of development exempted from the requirement to obtain planning permission are set out in s. 4 of the Planning and Development Act, 2000. The relevant provision, s. 4(2), states that:

> "(2) (a) The Minister may by regulations provide for any class of development to be exempted development for the purposes of this Act where he or she is of the opinion that—
>
> > (i) by reason of the size, nature or limited effect on its surroundings, of development belonging to that class, the carrying out of such development would not offend against principles of proper planning and sustainable development, or
> >
> > (ii) the development is authorised, or is required to be authorised, by or under any enactment (whether the authorisation takes the form of the grant of a licence, consent, approval or any other type of authorisation) where the enactment concerned requires there to be consultation (howsoever described) with members of the public in relation to the proposed development prior to the granting of the authorisation (howsoever described).
>
> (b) Regulations under paragraph (a) may be subject to conditions and be of general application or apply to such area or place as may be specified in the regulations.
>
> (c) Regulations under this subsection may, *in particular* and without prejudice to the generality of paragraph (a), provide, in the case of structures or other land used for a purpose of any specified class, for the use thereof for any other purpose being exempted development for the purposes of this Act." (emphasis added)

The section and others are quoted as context in an integral element of interpretation.

14. Section 4(3) provides that references in the Act to "exempted development" are to include development so classified by the Minister pursuant to s. 4(2).

15. It can be seen from these provisions that the Oireachtas envisaged that the Minister might draw up regulations to designate certain classes of development as exempted development and that such classes, by virtue of the terms of the Act itself would not require planning permission. But the Oireachtas clearly also envisaged that by the insertion of s. 4(2)(b), the Minister would have jurisdiction to impose a condition as regards the extent of the exemption. Does this preclude the planning authorities from doing so?

16. The classes of exempted development are found primarily in the Planning and Development Regulations, 2001. Part I of Schedule 2 of the Regulations sets out 55 classes of exempted development. The class of development is described in 'column 1'; the corresponding limitations and conditions on such exemption are set out in 'column 2'. By virtue of article 6(1) of the Regulations –

> "Subject to article 9 development of a class specified in column 1 of Part I of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part I opposite the mention of that class in the said column."

The exempted class
17. The applicant contends that the condition at issue in the within proceedings seeks to deny the applicant the benefit of the entire class of development set out in class 32 of Part I of Schedule 2. The exemption is defined in class 32 as:

The carrying out by any person to whom an aerodrome licence within the meaning of the Irish Aviation Authority (Aerodromes and Visual Ground Aids) Order, 1988 (No. 487 of 1998) has been granted, of development consisting of –

<u>Description of Development Conditions & Limitations</u>

> (a) The construction or erection of (i) Where the building an extension of an airport has not been extended previously operational building within an the floor area of any such extension airport. shall not exceed 500 square metres or 15% of the existing floor area, whichever is the lesser.
>
> > (ii) Where the building has been extended previously, the floor area of any such extension, taken together with the floor area of any previous extension or extensions, shall not exceed 15% of the original floor area or 500 square

metres, whichever is the lesser.

(iii) The planning authority for the area shall be notified in writing not less than four weeks before such development takes place.

(b) The construction, extension, alteration or removal of aprons, taxiways or airside roads used for the movement of aircraft and the distribution of vehicles and equipment on the airside, within an airport,

(c) The construction, erection or alteration of visual navigation aids on the ground including taxiing guidance, signage, inset an elevated airfield lighting or apparatus necessary for the safe navigation of aircraft, within an airport.

(d) The construction, erection or alteration of security fencing and gates, security cameras and other measures connected with the security of airport infrastructure, within an airport, or

(e) The erection or alteration of directional, locational or warning signs on the ground within an airport.

18. Weston, as the holder of the requisite licence, contends that, from the express terms of class 32, and from the remainder of Schedule 2, it is clear that the Minister has not designated broad categories of exempted development in need of further refinement, but has instead designated specific types of development in respect of which he considers planning permission should not be required at all, and has built in conditions and limitations in relation to these. It is contended that the types of development in class 32 are quite specific in nature, are subject to conditions and limitations where the Minister considers it appropriate, and informed by a concern that development essential to security and safety at airports be carried out expeditiously without delays inherent in the planning process.

19. In the absence of an express power to do so, has the Board jurisdiction to "second guess" the Minister's decision as to what is required, much less to deny the benefit of an exemption to the holder of an aerodrome licence? The Board says it has. It relies on a further article of the Planning and Development Regulations, 2001, as the basis for its jurisdiction to deny an applicant for permission the benefit of exempted development. The Board says the provisions as to exempted development are subject to article 9 of the Schedule.

20. Insofar as material, therefore, Article 9(1)(a)(i) provides:

"9(1) Development to which article 6 relates shall not be exempted development for the purposes of the Act –

(a) if the carrying out of the development would –

(i) contradict a condition attached to a permission under the Act or be inconsistent with any use specified in a condition under the Act."

21. The Board relies on the phrase "contradict a condition" as providing it with the jurisdiction to "condition out" this otherwise exempted development.

22. Weston say the Board is impermissibly seeking to re-interpret primary legislation in the light of a provision contained in secondary legislation; that s. 4(2) of the Act of 2000 *alone* provides for the classes of exempted development and that the Board seeks to read into this primary legislation a qualification that development falling into a designated class of exempted development would nonetheless require planning permission where the Board so stipulates in a condition attached to a planning condition in relation to the same land.

23. Henchy J. in *Frescati Estates v. Walker* [1975] 1 I.R. 177 held that Regulations cannot be employed as a tool in interpreting the primary legislation under which they are made:

"Much of the necessary procedures laid down by Regulations made pursuant to the Act, but these I ignore in determining the scope of the Act. As Lord Diplock said in the context of another Act –

'It is legitimate to use the Act as an aid to the construction of the Regulations. To do the converse is to put the cart before the horse.' – *Lawson v. Fox* [1974 AC 803, 809'."

24. Is the effect of the primary legislation that it is for the Minister to determine the conditions on which the exempted development is to be available? Does it require express language in the primary legislation before the respondent could be vested with a power to second guess the Minister in this regard?

25. Useful pointers to the resolution of these questions are to be found elsewhere in the Act. First, s 34(4) of the Act of 2000 enumerates seventeen types of conditions which planning authorities and An Bord Pleanála may lawfully impose. However, that sub-section includes no such condition as that imposed on Weston. Insofar as material the section provides:

"34-(1) Where –

(a) an application is made to a planning authority in accordance with permission regulations for permission for the development of land, and

(b) all requirements of the regulations are complied with*, the authority may decide to grant the permission subject to or without conditions, or to refuse it.*" (emphasis added)

This then is a general power to impose conditions, subject to certain specified and identified circumstances as by sub-section (4) it is provided:

"Conditions under subsection (1) may, *without prejudice to the generality of that subsection*, include any of the following –

…" (emphasis added)

There follows a description of a number of specific conditions including:

> "(b) conditions for requiring the carrying out of works (including the provision of facilities) which the planning authority considers are required for the purposes of the development authorised by the permission;"

Counsel for Weston, Mr. Garrett Simons S.C., forcefully submits that article 9, as secondary legislation, must trace its provenance to an identified antecedent power in the parent Act, that is the Act of 2000. It cannot be free standing.

26. To establish this statutory provenance one must look to the scheme and objectives of the Planning and Development Act, 2000 as a whole and to certain specific provisions.

27. The statutory intent stated in the preamble to the Act is to provide, in the interests of the common good, for proper planning and sustainable development including the provision of housing; it is profoundly informed by the idea and concept of sustainable development which is central to its objectives. It is informed too by the guiding principles for sustainable spatial development of the European continent. The Act mandates development plans to state objectives for integrating the planning and sustainable development of an area with the "social, community and cultural requirements of the area and its population". The objective to halt the deterioration of social capital is reflected in requirements to these objectives for providing community services (see generally *Environmental and Land Use Law*, Yvonne Scannell, Thomson Round Hall, 2006, Chapter 2 – 04). In general, this is to be achieved by the operation of the planning authorities. While the Minister is empowered to issue guidelines and objectives, s. 30 of the Act imposes a limitation on such Ministerial power in that the latter section provides that the Minister shall not exercise any power or control in relation to any particular case with which a planning authority or the Board is, or may be, concerned. Thus the primacy of a planning authority in dealing with each individual case (as opposed to a class) is statutorily enshrined.

28. Part III of the Act deals with the question of control of development. Section 32 provides:

> "(1) Subject to the other provisions of this Act, permission shall be required under this Part – and
>
> (a) in respect of any development of land, not being exempted development, and
>
> (b) in the case of development which is unauthorised, for the retention of that unauthorised development.
>
> (2) A person shall not carry out any development in respect of which permission is required by subsection (1), except under and in accordance with a permission granted under this Part."

Thus the exception provided for in s. 32(1)(a) relates to a general obligation to obtain permission but subject to one exception, that is in the case of exempted development as provided for under s. 4 of the Act. But this is restricted to authorised developments as, in the case of an *unauthorised* development, the exemption does not apply; it is necessary that an applicant re-apply for retention. Thus, the Act provides for a heightened level of scrutiny by the planning authority in the case of an unauthorised development which (as here) is the subject matter of a *retention* application. The rationale is obvious. It is to ensure that unauthorised development cannot be achieved by the 'back door'. Under sub-section (2), no development at all is permitted in respect of a development where permission is required except under and in accordance with permission granted under Part III of the Act. The primary supervisory role of the authorities in individual cases is clear, it is enhanced in retention applications.

29. The general power granted to a planning authority pursuant to s. 34 is either to grant or refuse a permission or to impose conditions. Under sub-section (2) of the section there are identified a number of different *considerations* to which the authority must have regard when making a decision in relation to an application under the section. The considerations which the County Council planning inspector has to take into account in dealing with a retention permission are set out in s. 34(2) of the Act and includes:

> "(vi) Any other relevant provision or requirement of this Act and any Regulation made thereunder."

30. By virtue of s. 34(4) of the Act, seventeen specified circumstances are outlined where conditions may be imposed without prejudice to the generality of s. 34(1). But this must not detract from the general power to impose conditions cited at paragraph 21 of above.

31. It is true that in *Ashbourne Holdings v. An Bord Pleanála* [2003] 2 I.R. 114, decided under the earlier Act of 1963, the Supreme Court held that a planning authority may not rely on its broad discretion under the equivalent section to s. 34(1) to justify imposing *a more severe restriction* on the applicant than one expressly permissible under the equivalent to s. 34(4); i.e. the specified conditions.

32. In *The State (FHP Limited) v An Bord Pleanála* [1987] I.R. 698 at 711, McCarthy J. pointed out that general wording in the precursor provision of s. 34(1) and (4) of the Act of 2000 could not be relied upon to validate stricter conditions because such a power would require "statutory expression in the clearest terms". But these authorities relate to specified circumstances, not the general power to impose conditions not statutorily identified. In *The State (Abenglen Properties Limited) v. An Bord Pleanála* [1984] I.R. 381, Walsh J. observed obiter that the conditions imposed under the equivalent to s. 34(1) should be of the same nature as those referred to in the equivalent to s. 34(4). However, in *Ashbourne* (where *Abenglen* is not referred to in the judgment) speaking on behalf of the court, Hardiman J. specifically held (as part of the *ratio decidendi*), that a condition under s. 34(1) could be imposed even if it were not within the scope of the specific conditions identified under s. 34(4). He observed in relation to the precursor of s. 34, that is s. 26 of the Act of 1963:

> "The structure of s. 26, then, is that a general power to impose conditions is subject to a general restriction. This, insofar as relevant here, is to consider only the proper planning and development of the area and in doing so to have regard to the matters set out in sub-section (2) of the section."

But he continued:

> "This in turn provides that the conditions which may be imposed on a permission under sub-section (1) 'may without prejudice to the generality of that sub-section', include the conditions then set out. This list includes conditions relating to a large number of specific circumstances. …"

He added:

> "There is no doubt that the general words of sub-section *(1) would permit the imposition of an otherwise proper condition even if it were outside the scope of any of the sub-paragraphs of sub-section (2). That* is the effect of the 'without prejudice' provision." (emphasis added)

He concluded:

> "But when a proposed condition is *within* the scope of any part of sub-section (2) then by reason of the last phrase in sub-section (1), the planning authority or Board must have regard to the relevant part …"

It is inconceivable that *Abenglen* was not cited in the course of argument in *Ashbourne*. Thus, I consider *Ashbourne* as the more authoritative on the point. Provided that the condition lies outwith the scope of any specified condition, it may, subject to the objectives of the Act and rational justification, be imposed.

33. None of the identified seventeen specific conditions which might be imposed arise here. Consequently, and absent such specification, I conclude that the power to impose a 'non-specified' condition lawfully exercised by the Board through the Regulations outlined earlier, is one authorised by the general power vested in the Board pursuant to s. 34(1) and (4) of the Act of 2000. The key phrase, or image, contained in s. 26 of the Act of 1963, mirrored in *Ashbourne* and again reflected in s. 34 is the general power: "without prejudice to the generality" of sub-s. (1). Unless the power exercised comes within the scope of any one of the seventeen specified circumstances (when it will require to be strictly construed), the power otherwise, and the jurisdiction vested, is a 'general' one, provided it is lawfully and rationally imposed in the interests of proper planning and sustainable development. Thus, such a condition to be justified in law must rationally accord with the stated objectives of proper planning and sustainable development. I consider that the condition is in accordance with these objectives.

34. The position here is not that the planning authority is "second guessing" the Minister who granted an exemption a case of certain categories of development; rather the authority is properly exercising a power vested in it by statute in relation to the retention of an unauthorised development as provided for under s. 32(2) cited above.

35. As a guide in the process of interpretation sub-s. 12 of s. 34 is also of some assistance. It provides:

> "12. An application for development of land in accordance with the permission regulations may be made for the retention of unauthorised development and this section shall apply to such an application, subject to any necessary modifications."

36. "Permission Regulations" are defined in s. 2 of the Act as regulations made pursuant to s. 33. There is no question that the application was made in accordance with the permission regulations. The "necessary modifications" are that the words "permission for retention of unauthorised development" should be read wherever the words "permission for development" occur in s. 34 of the Act. When one takes the provisions of all of ss. 32 and 34 together, the intent of the Oireachtas is clear: that is in the case of a retention permission, conditions may be imposed even in the circumstances of an exempted development. The Act contains no provision which would indicate to any contrary interest or effect. (See s. 5 of the Interpretation Act, 2005.)

Thus, taking these reasons together, the challenge on *vires* must fail.

Failure to provide reasons

37. It is necessary next to consider the second aspect of the applicant's case, a challenge based on a failure to provide reasons for the condition. The reason ultimately furnished by the Board, it will be recollected, was "in the interest of orderly development".

38. Section 34(10)(a) of the Act of 2000 expressly requires the planning authority or An Bord Pleanála to give reasons for the imposition of any condition in relation to the grant of planning permission:-

> "(a) A decision given under this section or section 37 and the notification of the decision shall state the main reasons and considerations on which the decision is based, and where conditions are imposed in relation to the grant of any permission the decision shall state the main reasons for the imposition of any such conditions, provided that where a condition imposed is a condition described in subsection (4), a reference to the paragraph of subsection (4) in which the condition is described shall be sufficient to meet the requirements of this subsection."

39. It has been submitted that, pursuant to s. 34(2)(vi) the County Council inspector noted the application was for retention and considered this relevant. Pursuant to this provision, one of the considerations which must be taken into account is:-

> "(vi) any other relevant provision or requirement of this Act or any regulation made thereunder."

Ultimately, in the assessment of the retention permission the Board concluded that generally, the permission would not injure the amenities of the area or of property in the vicinity. This basis was different from that of the inspector who had stated that in the context of the greenbelt zoning of the area and established use retention of the development would be acceptable in usual terms and within the character of the area. Thus, with regard to the "reasons and considerations" for the retention permission itself, the Board and the inspector arrived at different reasons.

40. For *conditions*, however, the position is different. It is necessary only to provide "reasons". It is not necessary for the Board to set out in detail the matters it concluded.

41. The condition imposed in the instant case was not one of those seventeen described in s. 34(4). In such circumstance, that is in reliance on the *general* power, and in order to establish *vires* within the objectives of the Act, I consider that the respondent was under an enhanced obligation to state the "main reasons" for the decision. This obligation is derived from the necessity to ensure that the condition imposed is within the four walls of the Act as a whole. For a permission or retention there must be both "a statement of the main reasons but also the *considerations* upon which the decision in question is based" per Kelly J. in *Mulholland v. An Bord Pleanála (No. 2)* [2006] 1 I.R. 453 I.L.R.M. 287. Here, in the case of a *condition*, the requirement is by contrast to state simply the main reasons but not considerations. This does not detract from the requirement that the rationale for the condition must be explicit.

42. In *O'Donoghue v. An Bord Pleanála* [1991] I.L.R.M. 750, 759: Murphy J. stated:

> "It has never been suggested that an administrative body is bound to provide a discursive judgment as a result of his

deliberations but on the other hand the need for providing the grounds of the decision as outlined by the Chief Justice could not be satisfied by recourse to an uninformative if technically correct formula. For example it would hardly be regarded as acceptable for the Board to reverse the decision of a planning authority stating only that 'they considered the application to accord with the proper planning and development of the authority'."

43. In *Mulholland v. An Bord Pleanála (No. 2)* [2006] 1 I.R. 453; [2006] 1 I.L.R.M. 287 Kelly J. summarised the test to be applied to assess whether a statement of reasons and (in that case) of considerations was adequate as follows:

> "The statement […] must therefore be sufficient to:
>
> (1) give to an applicant such information as may be necessary and appropriate for him to consider whether he has a reasonable chance of succeeding in appealing or judicially reviewing the decision,
>
> (2) arm himself for such hearing or review,
>
> (3) know if the decision maker has directed its mind adequately to the issues which it has considered or is obliged to consider, and
>
> (4) enable the courts to renew the decision."

While this test was enunciated in the context of a leave application and on different facts, it has since been cited with approval in the context of a substantive judicial review in *Grealish v. An Bord Pleanála* The High Court, Unreported, O'Neill J., 24th October, 2006.

44. In *South Bucks. District Council & Anor. v. Porter (No. 2)* [2004] 1 W.L.R., Lord Brown of Eaton-under-Heywood observed in the context of the obligation to provide reasons for a condition:-

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, *the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse influence will not readily be drawn.*" (emphasis added)

He added, however:

> "A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

This latter observation, however, must be seen in the context of the necessity to ensure, as Murphy J. observed, that the courts in exercising their supervisory review jurisdiction will be clear as to the basis upon which the decision was made.

45. The excerpt from the decision in the *South Bucks*. case has been italicised and emphasised for a particular reason in the context of the facts of this case. There should be no scope for significant doubt of law fairness or rationality.

46. For the purposes of its deliberation the Board had before it its inspector's report. In the report the Board's inspector gives as his basis for the recommended condition a reason identical to that ultimately given by the Board itself, namely "in the interests of orderly development". But at an earlier point the inspector goes slightly further, in that, after citing the equivalent condition in the planning authority's decision he states:

> "The Board may wish to consider this issue further, however, I have included a similar condition in my recommendation as I consider that such condition is (a) relevant to the development permitted and (b) *reasonable given the context that the application relates to an application for a retention.*" (emphasis added)

It cannot be denied that this latter observation is somewhat Delphic. At one level it is a simple statement of fact. But it must be seen in the light of a concern, expressed by Weston that in the context of the previous history between the parties it might be interpreted as an indication that in the circumstances it might be legitimate to withdraw the benefit of the planning exemption as some form of sanction or "punishment".

47. Such apprehension would not be entirely without evidential support. Before South Dublin County Council, the planning authority, there was at p. 7 a "record of executive business and manager's order" the statement:

> "The proposed development is considered to be acceptable and should now therefore be granted permission. A condition preventing any further development without planning permission and extinguishing the applicant's exemption rights on the land holding should be included in the conditions due to past failure to comply." (emphasis added)

This report, containing these observations, was also before the Board. These remarks were made in circumstances where, otherwise it was considered that the proposals made by the applicant were unexceptionable. The applicant says: why then were these observations made at all?

48. I would wish it to be understood that reciting rhetorical question this Court I am far from concluding that the imposition of the conditions in questions were in any way actuated by an improper motive. I emphasise, I make no such finding. However, the rhetorical question, in this specific context, indicates a further basis for the observation that in the circumstance where the condition is not one of those generally envisaged in s. 34, there is an enhanced obligation to provide reasons which come within the requirements outlined in the judgments in *O'Donoghue* and *Mulholland*. In this case, with this background, there has been an obligation to state reasons for the condition clearly, cogently, and in a manner to eliminate a reasonably held doubt as to whether there had been an error in law, a misunderstanding or other unlawful basis for the condition. The specific solution did not allow for permit, a formulaic mantra or a ritualistic form of words as being a sufficient rationale. This finding is on the facts of this case.

49. Ms. Niamh Hyland B.L. on behalf of the Board sought to outline a number of circumstances in which the 'reason' given might indeed be justified, rationalised or contextualised. The term 'in the interest of orderly development' might be understood in the

context of the phraseology of an earlier permission, granted in 2003, where permission had been sought for the demolition of existing hangars, the construction of new hangars, office and club house and 180 car parking spaces, together with aircraft parking and associated development works. The permission for the development of the hangars together with adjoining car parking was refused. The permission for the remainder of the development was granted in accordance with plans and particulars, the gist of which was to allow for a full assessment of any substantial intensification of user of the premises. In this context perhaps this was the 'orderly development' referred to.

50. This was indeed a retention permission. It contained within it a specific incorporation of a previous permission granted in 2003. Thus the conditions need not necessarily set out a general principle. The application related to the same applicants and related to the same general *locus* as that previous permission. It might be seen within the same parameters.

51. A further explanation, by no means unreasonable in itself, is the undoubted fact that the applicant had accepted, in the course of submissions to the planning authorities, that this application should not be dealt with in isolation and treated with, and in the context of, the previous permission. A further possible explanation might be in the interest of residential amenity – undoubtedly an issue in the locality in view of the proximity of dwelling houses close to the development and the fact that it was a retention permission with the potentiality of intensification of user.

52. However, the very fact that these various plausible reasons were canvassed in submissions as attending the condition begs a further question, why then were none of them specifically given by the Board when it furnished its reasons?

53. Furthermore, in the context of this case, the fourth of the reasons given by Kelly J. in *Mulholland* comes into focus: the supervisory role of the court. A distinction may exist between what an applicant subjectively "well knows" as to context or meaning, by way of a reason sufficient to satisfy a contrast to the court in the exercise of its statutory role.

54. An applicant may know the parameters within which an application was made and its relationship to a previous permission. But the fact that such applicant may have this information does not in all circumstances provide an end point to the duty to provide objectively justifiable reasons, such that the supervisory jurisdiction of the court may be exercised. An applicant while knowing the context may not necessarily be aware of all the elements which form part of a consideration in the inspection process the manner in which a matter is placed before a decision maker, or the decision itself.

55. It is in this legal and factual context therefore that an enhanced duty existed in the instant case. The very purpose of the duty to give reasons is to remove lingering doubts as to motive or rationale. Such doubts are not always removed by formulaic recitals.

56. In *Killiney and Ballybrack Development Association Limited v. The Minister for Local Government & Anor.* [1987] I.L.R.M. 878 at 81, counsel for the respondent Minister had sought to justify conditions imposed by the respondent Minister on the basis of instructions received from his client but which had not been contained in the condition itself. To this Henchy J. responded:

> "I do not accept, however, that a development permission may be construed with the aid of extrinsic matter of this kind put forward as an elaboration of formal written reason given for one of the conditions of the permission. The condition in question must stand or fall by its written terms and conditions."

The observation in that case applies a *fortiori* in the instant case, both upon the statutory basis from which the condition derives and also the evidential context placed before this Court.

57. In the factual context of this case, and having regard to the unusual evidential features identified, I do not consider the reason given for the condition was sufficient to comply with the statutory duty of the Board. In the light of what is now known more was required to remove any reasonable apprehension in law, irrationality or doubt as to propriety of purpose. Consequently, I consider that the applicant is entitled to judicial review on this basis.

Proportionality and the Convention Act of 2003

58. In the course of argument, counsel on behalf of the applicant submitted that, even if the court were to declare that the court had acted in excess of jurisdiction in failing to give adequate reasons that nonetheless, consideration should be given to a third facet of the claim, that is to say, whether the condition which had been imposed was proportionate and whether the applicant's rights under Article 1 of the First Protocol of the European Convention on Human Rights was engaged.

59. I do not think that this would be an appropriate course of action for this Court to adopt. I make this finding for the following reasons. First, any finding in relation to the issue of proportionality might necessarily carry with it an element of prescription, that is to say, an indication or an implication to the Board as to the manner in which it should proceed in the future. As Carroll J. found in *Phillips v. The Medical Counsel* [1992] I.L.R.M. at p. 469, judicial review does not exist to direct procedure in advance but to make sure that bodies which have made decisions susceptible of review have carried out their duties in accordance with natural and constitutional justice and in accordance with fair procedures. For this Court to seek to prescribe the manner in which the Board should proceed on any reconsideration would necessarily fetter its discretion. Still more would any direction to the effect that the Board should proceed in a particular way.

60. Second, the very finding which has been made in the course of this judgment has the effect that the question of Convention rights are not engaged. As a starting point for the invocation of Convention rights there must be a clear and identified procedure and a "determination" giving rise to circumstances where the applicant may rely upon Convention rights. Such rights do not arise pre-emptively or in hypothetical circumstances. (See *Salabiaku v. France* 10519/83 [1988] E.C.H.R.; *Barberá v. Spain* (Application No. 10590/83, judgment of the European Court of Human Rights, 6th December, 1988) and *Kennedy v. The Director of Public Prosecutions and the Attorney General* [2007] IEHC 3.)

61. It will be noted that s. 3 of the European Convention on Human Rights Act, 2003 provides:

> "3-(1) Subject to any statutory provision (other than this Act) or rule of law every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.
>
> (2) A person who has suffered *injury, loss or damage as a result of a contravention of section 1* may if no other remedy in damages is available institute proceedings to recover damages in respect of the contravention in the High Court." (emphasis added).

62. The effect of the order already made is to remove the basis for the invocation of Convention rights. Any 'injury, loss or damage'

has been rendered unlawful by the previous finding. It is not a function of the court to prescribe or consider hypotheses. There is a fundamental distinction between the findings which have been made in this Court as to the lawfulness of the condition, and any hypothetical observations which might be made on this condition or of any other condition or the reason therefor. Still more do these observations apply in relation to any question of a mandatory order (or order with such effect) as to how the Board should proceed. The court will therefore confine itself to granting an order of judicial review on the second ground and will remit the matter to the Board to be considered in accordance with the law applicable.