THE HIGH COURT

JUDICIAL REVIEW

2016 No. 637 J.R.

BETWEEN

NIALL HALPIN

(SUING BY HIS MOTHER AND NEXT FRIEND EILEEN HALPIN)

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

MEATH COUNTY COUNCIL

GREENFIELD VENTURES LIMITED

NOTICE PARTIES

JUDGMENT of Mr. Justice Garrett Simons delivered on 24 May 2019.

INTRODUCTION

1. The within proceedings seek to challenge a decision of An Bord Pleanála to grant planning permission for development consisting principally of an "anaerobic digester plant". The anaerobic digestion process has been described in the planning application as involving the natural breakdown of organic material by bacteria in the absence of oxygen. The process inputs will include cow slurry, hen manure and silage. The products of this process are biogas (a mixture of methane and carbon dioxide) and digestate (a compost like organic fertiliser). The biogas is to be fed to a combined heat and power ("CHP") plant which will generate renewable electricity for export to the national grid. The shorthand the "*proposed anaerobic digester plant*" will be used to refer to the development the subject-matter of the impugned planning permission.

2. The proposed anaerobic digester plant is to be located in proximity to a site which is owned by the Applicant's parents. The Applicant has special needs, and in particular, suffers from autism. The intention is to construct a dwelling house on this site for use by the Applicant and a number of other adults with special needs. Planning permission for the development of a dwelling house has been granted by the local planning authority (Reg. Ref. NA/110836). The permission is subject to a condition requiring the applicants to enter into a section 47 agreement restricting occupation of the dwelling to occupancy by the applicants for a period of five years. The shorthand the "*proposed dwelling house*" or the "*proposed residential development*" will be used to describe this development.

3. The site upon which the proposed dwelling house is to be constructed was chosen precisely because it is located in a secluded area. The Applicant and his parents are concerned that if the proposed development of the anaerobic digester plant proceeds then this seclusion will be lost. As discussed presently, one of the issues in the proceedings is whether An Bord Pleanála, as competent authority, had proper regard to the impact which the proposed anaerobic digester plant would have on the proposed dwelling house. In particular, there is a dispute as to whether or not An Bord Pleanála properly addressed its mind to the *separation distance* between the proposed anaerobic digester plant and the proposed dwelling house.

4. The proceedings also raise issues as to whether or not An Bord Pleanála carried out proper screening exercises in respect of the Environmental Impact Assessment Directive, and the Seveso III Directive, respectively.

EARLIER JUDICIAL REVIEW PROCEEDINGS

5. The decision the subject-matter of these judicial review proceedings is the second decision which An Bord Pleanála has made in respect of the proposed anaerobic digester plant. An Bord Pleanála made its first decision on 30 May 2013. The board granted planning permission subject to a number of conditions. This was so notwithstanding that the board's own inspector had recommended that planning permission be refused.

6. One of the two grounds upon which the inspector had recommended refusal reads as follows.

> "1. It is considered that the information submitted during the consideration of the application including the Environmental Report, lacks clarity in relation to the composition and proportions of input feedstock in relation to animal by-product material and other organic material. There is also lack of information on the frequency and volume of removal of digestate. The variation of the feedstock requires a robust plant design and implementation of mitigation and containment measures. The Board is not satisfied, on the basis of the information provided that the proposed development would not be likely to have significant adverse impacts on the environment. The proposed development would thus be contrary to the proper planning and sustainable development of the area."

7. The inspector's rationale for recommending refusal on this ground is elaborated upon as follows at page 40 of her report of 23 April 2013.

> "I consider that the applicant was given every opportunity to demonstrate that potential impacts of the proposed development would not be detrimental to the proper planning and sustainable development of the area. There are issues of clarity in relation to the composition and proportions of input feedstock in relation to animal by-product material, energy crops and other organic material. There is lack of information on the frequency and volume of removal of digestate. The variation of the feedstock requires a robust plant design and implementation of mitigation and containment measures. Potential emissions should not necessitate a potential significant adverse impact on the existing adjacent equine businesses and residential dwellings. I agree with the planning authority that given lack of information in respect of origin of all material and type / composition of the material, volume and frequency of the input and removal of digestate in particular solid waste and the lack of cohesiveness between the written submission and the drawings it is considered that

the proposed development could be prejudicial to public health."

8. The board, in its decision, explained its rationale for not accepting the inspector's recommendation to refuse planning permission as follows.

> "In deciding not to accept the Inspector's recommendation to refuse permission, the Board had regard to EU, National, and County policies on waste management and sustainable energy, and considered that the proposed development was an appropriate form of development in an agricultural area, utilising primarily locally generated agricultural wastes. The Board was satisfied that the level of information on the composition and proportions of feedstock was generally clear, and that any residual concerns could be appropriately addressed by means of condition. The Board was also satisfied that adequate information was available on file in relation to volumes of digestate arising and provision for digestate storage prior to landspreading. The Board also noted that the proposed development would be subject to a waste permit.
>
> Furthermore, the Board had regard to the locational requirement for the proposed development to be in a rural area, close to feedstock sources and landspreading areas. The Board considered that the subject site is not visually prominent, that the proposed development would read as agricultural buildings, and that the visual impact arising would be acceptable within an agricultural landscape. The Board also noted the location of the proposed development outside the draft Tara Skryne Landscape Conservation Area."

9. The board's decision to grant planning permission was challenged in judicial review proceedings bearing the Record Number 2013 No. 609 J.R. These earlier proceedings were taken by the same applicant as in the present case. Those earlier proceedings were compromised, and an order of *certiorari* setting aside the decision of 30 May 2013 was made on consent by the High Court on 8 July 2014. The planning appeal was then remitted to An Bord Pleanála for further consideration.

10. It is not clear from the face of the High Court order of 8 July 2014 as to the precise basis upon which the earlier planning decision was set aside. It appears, however, that at least part of the reason may have been that no screening exercise for the purposes of the Environmental Impact Assessment Directive ("*the EIA Directive*") had been carried out at the time of the first decision. At all events, one of the procedural steps attended to as part of the reconsideration of the remitted appeal was the carrying out of a screening exercise. As discussed presently, the Applicant contends that the screening exercise was erroneous in law.

STEPS TAKEN ON REMITTED PLANNING APPEAL

11. The procedural steps taken by An Bord Pleanála in respect of the remitted planning appeal are set out in detail in the affidavit sworn by the Secretary of An Bord Pleanála, Chris Clarke, on 2 November 2017. The chronology might be summarised as follows.

> 27 January 2015 An Bord Pleanála's inspector prepares addendum to her first report. Inspector recommends planning permission be refused.
>
> 4 March 2015 An Bord Pleanála writes to the parties and invites submissions on any matter relevant to this appeal.
>
> 27 March 2015 The Applicant's father, Joe Halpin, makes a submission to An Bord Pleanála.
>
> 30 March 2015 The Developer makes a submission through its planning consultant, Simon Clear & Associates.
>
> 13 August 2015 Board Direction recording screening determination.
>
> 2 September 2015 Board Direction recording decision to grant permission.
>
> 30 October 2015 Board Direction identifying a need for advice in relation to the COMAH Regulations 2015.
>
> 13 April 2016 Byrne Ó Cléirigh Consulting Engineers Report.
>
> 26 April 2016 Board meet to consider appeal and decided unanimously to confirm the decision to grant permission.
>
> 12 May 2016 Board records screening determination for Seveso III Directive
>
> 9 June 2016 Formal Board Order.

12. As appears from the foregoing, the approach taken by An Bord Pleanála in respect of the remitted appeal was to request the inspector to prepare an addendum to her initial report. The consequence of this is that in reviewing the board's file on the appeal, it is necessary to have regard to both the original inspector's report prepared in the context of the decision of 30 May 2013 and the addendum.

GROUNDS OF CHALLENGE

13. The grounds of challenge can be summarised under three broad headings as follows. First, there is an issue as to whether or not An Bord Pleanála carried out a proper screening exercise for the purposes of the EIA Directive. The Applicant contends that An Bord Pleanála failed to identify the correct *category* of development within which the anaerobic digester plant falls. Specifically, it is said that the proposed development comes within Annex I of the EIA Directive. The carrying out of an environmental impact assessment is mandatory for this type of development. Secondly, it is alleged that An Bord Pleanála erred in determining that the proposed development did not constitute an "establishment" for the purposes of Directive 2012/18/EU on the control of major-accident hazards involving dangerous substances ("*the Seveso III Directive*"). Thirdly, there is an issue as to whether or not An Bord Pleanála properly addressed its mind to the separation distance between the two proposed developments. The Applicant contends that An Bord Pleanála either made a material error of fact, or alternatively, failed to address its mind to this issue. It is submitted that on the papers before An Bord Pleanála there is a discrepancy between the separation distance as stated by the developer (212 metres) and the correct figure (said to be 82 metres).

14. Each of these issues is addressed in turn under separate headings below.

(1). EIA SCREENING DETERMINATION

Introduction

15. Although not expressly stated in the High Court order of July 2014, it seems that An Bord Pleanála's rationale for consenting to an

order setting aside the first planning permission was that no screening exercise for the purposes of the EIA Directive had been carried out in the context of the decision-making process leading up to the grant of the first planning permission. The planning appeal was remitted to An Bord Pleanála, and the second planning decision does record that a screening exercise was carried out. However, the Applicant maintains the position that—notwithstanding the additional steps taken by An Bord Pleanála—the board still has not carried out a lawful screening exercise.

16. In order to put this aspect of the Applicant's case in context, it is necessary to rehearse briefly the relevant requirements of the EIA Directive. (It should be noted that this planning decision is subject to the pre-2017 version of EIA Directive. The EIA Directive was amended by Directive 2014/52/EU but the Member States were not required to implement those amendments until 16 May 2017. In the event, the Irish State did not implement the amendments until 1 September 2018).

17. The EIA Directive requires that certain types of projects which are likely to have a significant effect on the environment be subject to an environmental impact assessment. Crucially, the requirement only applies if the project is of a type that comes within one or other of the Annexes to the EIA Directive. See Case C 156/07 *Aiello*. As discussed presently, the dispute in this case centres largely on the question of whether An Bord Pleanála identified the correct *category* of project.

18. In some instances, the carrying out of an EIA is *mandatory* for all projects within a particular category irrespective of their size. Thus, for example, an EIA is mandatory for nuclear power stations and other nuclear reactors. In other instances, the EIA Directive sets thresholds by reference to factors such as the scale of the project or its production capacity. If a particular project exceeds the relevant threshold, then the carrying out of an EIA is mandatory. For example, in the case of quarries and open-cast mining, an EIA is mandatory under the EIA Directive where the surface of the site exceeds 25 hectares.

19. The Member States of the European Union, in implementing the EIA Directive, have a discretion to set thresholds for Annex II projects by reference to the nature, size and location of projects. The threshold must not, however, be set at such a level as to exempt in advance whole classes of projects listed in Annex II to the EIA Directive. See Case C 244/12 *Salzburger Flughafen*.

20. For the purpose of planning applications, the relevant categories of project and thresholds are to be found at Schedule 5 of the Planning and Development Regulations 2001 (as amended) ("*the Planning Regulations*"). If a proposed development exceeds the relevant threshold, then it is mandatory to carry out an EIA as part of the decision-making process. If the proposed development is sub-threshold, then it will generally be necessary to carry out a screening exercise in order to determine whether the proposed development is likely to have a significant effect on the environment. This is provided for under Article 109 of the Planning Regulations. The planning decision the subject-matter of these judicial review proceedings *predates* the significant amendments introduced in September 2018 to give effect to Directive 2014/52/EU. The relevant provisions of the pre 2018 version of Article 109 read as follows.

> "109.(1) Where an appeal received by the Board relates to a planning application for a class of development specified in Schedule 5 which exceeds a quantity, area or other limit specified in that Schedule for that class of development, and an EIS was not submitted to the planning authority in respect of the planning application, the Board shall require the applicant to submit an EIS to the Board.
>
> (2) Where an appeal relating to a planning application for sub-threshold development is not accompanied by an EIS, and the likelihood of significant effects on the environment cannot be excluded by the Board, the Board shall make a determination as to whether the development would be likely to have significant effects on the environment and where it determines that the development would be likely to have such significant effects it shall, by notice in writing, require the applicant to submit an EIS and to comply with the requirements of article 112.
>
> […]
>
> (4) The Board shall, in determining under this article whether a proposed development would or would not be likely to have significant effects on the environment, have regard to the criteria set out in Schedule 7 and the determination of the Board, including the main reasons and considerations on which the determination is based, shall be placed and kept with the documents relating to the planning application.".

21. As appears, An Bord Pleanála is required to consider whether the proposed development falls within a prescribed class of development project under Schedule 5 of the Planning Regulations. If so, and the development exceeds the relevant threshold, then an EIA is mandatory. If the development is *sub-threshold*, then the board must make a *determination* as to whether the development would be likely to have significant effects on the environment. This is to be done by reference to the criteria set out in Schedule 7 of the Planning Regulations. This process is often described as a "*screening exercise*", and the resulting determination described as a "*screening determination*".

An Bord Pleanála's approach

22. Returning to the facts of the present case, the approach taken by An Bord Pleanála following on from the High Court order setting aside the first decision and remitting the matter to the board for further consideration was to request its inspector to prepare an addendum to her initial report. It will be recalled that the inspector had recommended the refusal of planning permission in her original report dated 23 April 2013.

23. An Bord Pleanála's inspector, in her addendum to her earlier report, maintained the position that planning permission should be refused. Insofar as the screening exercise was concerned, the inspector concluded that if permission were not to be refused, then the developer should be required to submit an environmental impact statement ("EIS"). The inspector characterised the project as falling within the category of "waste disposal".

> "It is my considered opinion that as per the reasons and considerations set out in my assessment of PL17.241533, copy attached to this report and to Article 109 (2) of the Planning and Development Regulations 2001, as amended and the criteria set out in Schedule 7 of Planning and Development Regulations 2001, as amended, in particular the characteristics of proposed development, 'Location of proposed development' and characteristics of potential impacts that the proposed development would be likely to have significant effects on the environment and therefore should permission not be refused as per my recommendation that the Board should require the applicant to submit an EIS in order that sufficient detailed information is contained on the file to aid a full and informed decision of the significant effects on the environment of the proposed development.
>
> I highlight that Environmental Concerns raised in my preceding report are strongly linked to criteria set out in Schedule 7

under 'characteristics of proposed development', and 'characteristics of potential impacts'.

The site is located approx. 1.3 Km outside the Tara Skryne Landscape Conservation Area. Protected View and Prospect 44 Hill of Tara is a panorama view of national importance. The Hill of Tara is visible from the appeal site. I therefore also highlight that Visual Concerns raised in the preceding report PL.17.241533 are strongly linked to criteria set out in Schedule 7 under 'Location of proposed development'."

24. An Bord Pleanála is not bound, as a matter of law, to follow its inspector's recommendation. (See, by analogy, *Ógalas Ltd. v. An Bord Pleanála* [2014] IEHC 487, [39] to [42]). As discussed presently, An Bord Pleanála ultimately concluded that no EIA was required.

25. Subsequent to the preparation of the inspector's addendum report, An Bord Pleanála wrote to the parties to the planning appeal on 4 March 2015 inviting submissions as follows.

"It is noted that this case had been decided by the Board under PL 17.241523 and that this latter decision was quashed by the Courts.

The file has now been remitted back to the Board for a fresh determination under a new planning appeal register reference number PL 17.244154.

The Board now proposes to consider the appeal afresh, including the carrying out of a screening determination under Article 109(2) of the Planning and Development Regulations 2001 (as amended) and whether or not to require the submission of an Environmental Impact Statement from the developer.

You are invited by the Board to comment on any matter that you consider relevant to this appeal on or before 31st March, 2015. Your submission in response to this notice must be received by the Board not later than 5.30 p.m. on the date specified above."

26. Mr Joe Halpin, the Applicant's father, made a submission dated 27 March 2015. This submission addressed the merits of the planning appeal in general. Mr Halpin's submission did not directly address the question of EIA screening. The submission did address in some detail the *discrete* question of whether the distance between the proposed anaerobic digester plant and the proposed dwelling house had been incorrectly stated. I will return to this aspect of the submission at paragraph 126 *et seq*. below.

27. The Developer, through its planning consultant, Simon Clear & Associates, also made a submission. That submission proceeded on the basis that the proposed development was a sub threshold development in the "waste disposal" category, but concluded that the development was not likely to have a significant effect on the environment and, accordingly, an EIA was not required.

28. An Bord Pleanála's determination is recorded in a board direction dated 13 August 2015. This board direction is expressly referenced in the decision to grant planning permission.

29. The Board direction of 13 August 2015 reads as follows.

"The Board considered that the proposed development falls under Category 11(b) 'Other Projects' of Part 2 of Schedule 5 'Development for the purposes of Part 10' as per the Planning and Development Regulations 2001, as amended, and specifically the category of development comprising the 'Installation for the disposal of waste with an annual intake greater than 25,000 tonnes not included in Part 1 of this Schedule'.

In respect of Article 109 (2) the Board did not consider that the development would be likely to have significant effects on the environment and, therefore, did not require the submission of an EIS under said article. Similarly, in relation to Article 109 (3) the Board concurred with the Inspector's analysis in the addendum report and did not require the submission of an EIS under said article.

In considering Article 109 (4) the Board had regard to the criteria set out in Schedule 7 and concluded as set out below.

1. Characteristics of the proposed development

In relation to the characteristics of the proposed development the Board considered that the size of the proposed development was significantly sub-threshold (10,000 tonnes per annum below the 25,000 tonnes threshold) and did not consider the development would be likely to have significant effects on the environment in combination with other proposed development.

The Board considered that the use of natural resources was relevant principally in relation to the use of water from an existing supply and the use of locally produced farm slurry, manure and silage with a limited quantity (1,000 tonnes per annum) of other feedstock. The Board did not consider the use of these resources would be likely to have significant effects on the environment.

The Board considered the proposed development would consist of a process whereby energy would be recovered from waste with the residual digestate used in a sustainable manner as a fertiliser/conditioner on agricultural land.

In relation to pollution and nuisances the Board noted and concurred with the Inspector that the proposed AD Plant will be subject to and regulated under a Waste Facility Permit to be issued by Meath County Council. The Board did not consider that the pollution and nuisances arising from the proposed development in this rural area would be likely to have significant effects on the environment.

Having regard to the rural location of the proposed development, to the distance of the anaerobic digestion facility from existing and permitted developments, to the substances and technologies used in which bio-gas within the plant is produced and stored in a low pressure environment under non-pressurised conditions with no proposal for bulk storage, the Board considered that the risk of accidents would not be likely to have significant effects on the environment.

2. *Location of proposed development*

In relation to the 'environmental sensitivity of geographical areas' likely to be affected by the proposed development, the Board considered that the area is generally robust having regard to the substantially agricultural nature of the environment and having regard to the number and location of dispersed one off houses in the area. The Board had no particular concerns regarding the impact of the development on natural resources and the absorption capacity of the natural environment.

In respect of the Inspector's concerns regarding visual impact on landscapes of historical, cultural or archaeological significance the board had regard to:

• The limited scale nature and extent of the proposed buildings as indicated in the drawings and documentation on file;

• The location of the structures on lands that are not of particular visual prominence;

• The substantial distance of the proposed development from the Protected View and Prospect 44 Hill of Tara and the presence of numerous trees, hedge rows, dwellings and the M3 motorway and regional roads in between the two locations;

• The location of the proposed development outside the Tara Skryne Landscape Conservation Area; and

considered that the visual impact of the proposed development would not be likely to have significant effects on the environment.

3. *Characteristics of potential impact*

The Board considered the potential significant effects of the proposed development in relation to the criteria set out under 1 and 2 and considered that the impacts arising from the proposed development would be of low level and localised in nature. Similarly, having regard to the nature of the process described, the Board considered the magnitude, complexity and probability of the impact to be low. The Board concluded that the duration and frequency of the low level impacts would be medium to long term and were satisfied these impacts would be reversible on cessation.

EIA screening conclusion

Having regard to Articles 109 of the Planning and Development Regulations 2001, as amended and to the criteria set out in Schedule 7 and the foregoing analysis under 1-3 above, the Board concluded that this development is a sub-threshold development which would not be likely to have significant effects on the environment and, therefore, decided not to require the submission of an Environmental Impact Statement in this instance."

30. The principal criticism which the Applicant makes of the screening exercise carried out by An Bord Pleanála is as follows. It is alleged that An Bord Pleanála erred in law by incorrectly characterising the proposed development as an installation for the "disposal of waste", rather than as an "integrated chemical installation". The two classes are set out below.

31. An Bord Pleanála had proceeded on the basis that the proposed development came within Class 11, Part 2, Schedule 5 of the Planning Regulations as follows.

"11. Other projects

[…]

(b) Installations for the disposal of waste with an annual intake greater than 25,000 tonnes not included in Part 1 of this Schedule."

32. As appears, this class is subject to a threshold, i.e. an annual intake greater than 25,000 tonnes. As the waste input ("*feedstock*") is limited to 15,000 tonnes per annum under Condition No. 2(a) of the planning permission, the board treated the project as sub threshold. An Bord Pleanála proceeded to make a screening determination in accordance with Article 109 and Schedule 7 of the pre-2018 version of the Planning Regulations.

33. Conversely, the Applicant maintains that the proposed development properly falls within Class 6, Part 2, Schedule 5 as follows.

"6. Integrated chemical installations, i.e. those installations for the manufacture on an industrial scale of substances using chemical conversion processes, in which several units are juxtaposed and are functionally linked to one another and which are-

(a) for the production of basic organic chemicals,

[…]

(c) for the production of phosphorous, nitrogen or potassium based fertilisers (simple or compound fertilisers),

(d) for the production of basic plant health products and of biocides,

[…]

34. Crucially, an EIA is mandatory in respect of this class of development project in all cases, i.e. there is no threshold applicable to same.

35. Counsel on behalf of the Applicant, Mr Niall Handy, BL, relies on the EU Commission Guidance on the *Interpretation of definitions of*

project categories of Annex I and II of the EIA Directive (2015) (ISBN 978-92-79-48090-4). The following extracts provide some elaboration upon the concept of "integrated chemical installations". (*Footnotes omitted.)

> "'Integrated', 'juxtaposed' and 'functionally linked'
>
> The first guidance on 'integrated', 'juxtaposed' and 'functionally linked' was provided by case law (see Case C-133/94, *Commission v Belgium*). The Court ruled that 'whether a chemical installation is integrated does not depend upon its processing capacity or on the type of chemical substance processed in it but on the existence of interlinked production units constituting in terms of their operation a single production unit'. It should be noted that this definition applied before Annex I(6) was amended by Directive 97/11/EC.
>
> Therefore, the basis for interpretation of 'integration' would be that various units are present and a linkage between various parts of a chemical plant exists. The functional linkage will be primarily via a process pathway, i.e. the various units of the installation serve a common purpose by producing intermediates or input material (precursors, auxiliary agents etc.) for other units. The various elements of the plant will therefore contribute to producing a finished product (or products), although it is possible that part of the intermediates or input materials produced in the plant will also be placed on the market. Additionally, there may be infrastructural linkage (for example, for energy purposes), but this alone does not constitute a functional linkage.
>
> The term 'juxtaposed' commonly means 'placed side by side' or 'placed next to one another'. However, given the broad purpose of the Directive, there does not appear to be a requirement for any particular unit to be placed immediately next to another, since precursors may be produced on a different part of the site, and transferred by pipeline, conveyor or other forms of transfer to a finishing or process area. Such obviously directly associated activities have a functional connection with the other activities carried out on that site and could have environmental effects.
>
> 'Manufacture on an industrial scale'
>
> Annex I(6) contains no quantitative capacity thresholds but only a reference to 'manufacture on an industrial scale'.
>
> Annex I to the IED provides that the Commission is to establish guidance on the interpretation of the term 'industrial scale' regarding the description of chemical industry activities described in the Annex.
>
> 'Chemical conversion processes'
>
> Annex I(6) makes reference to manufacture on an industrial scale using 'chemical conversion processes'. 'Chemical conversion processes' imply that transformation by one or several chemical reactions takes place during the production process. This also holds for a biotechnological or biological process that is mostly associated with a chemical conversion (e.g. fermentation). An activity involving only physical processing (for instance, simple blending or mixing of substances that do not chemically react, dewatering, dilution, repackaging of acids/bases) would not be covered.
>
> In comparison, in Annex I to the IED, point 4 defines 'production' within the chemical industry as the production on an industrial scale by chemical or biological processing of substances or groups of substances listed under that point."

36. Leading counsel on behalf of An Bord Pleanála, Ms Nuala Butler, SC, submits that the Applicant has failed to adduce any evidence to the effect that the proposed development involves a "chemical process" or that it is an "industrial process". Counsel further submits that the determination of whether a particular proposed development falls within a prescribed class or category is not simply a matter of law.

37. Counsel submits that the board correctly characterised the proposed development as involving an installation for waste disposal. Reference is made in this regard to the judgment in Case C 486/04 *Commission v. Italy ("Massafra incinerator")* which confirms that, for the purposes of the EIA Directive, the concept of "waste disposal" must be construed in the wider sense as covering all operations leading either to waste disposal, in the strict sense of the term, or to waste recovery.

Findings of the court

38. With respect, I think that the legal position is more nuanced than that contended for on behalf of the Applicant. The question of whether any particular development project falls within one of the prescribed classes for the purposes of the EIA Directive is a mixed question of fact and law. Whereas the correct interpretation of the classes set out under the Annexes of the EIA Directive and under Schedule 5 of the Planning Regulations is a matter of statutory interpretation for the courts, the application of the correct statutory interpretation to any particular development will require consideration of the specific factual circumstances.

39. This distinction can be illustrated by reference to *Shannon Regional Fisheries Board v. An Bord Pleanála* [1994] 3 I.R. 449. That case involved a decision to grant planning permission for a pig rearing installation. The relevant threshold for EIA purposes was fixed by reference to "units" as defined. A pig was counted as one unit, whereas a sow was counted as ten units. The question before the court was whether the term "sow" excluded a gilt, i.e. a female pig who has not yet had her first litter.

40. The High Court (Barr J.) emphasised that statutory interpretation is principally a matter for the courts.

> "It was submitted that it is not for this court to arrive at its own definition of 'sow' within the meaning of the regulation as this is a matter solely within the competence of the planning authority and the respondent; that the court ought not to interfere unless it concludes that the definition adopted by them in wholly irrational. In short, if the definition which was adopted is reasonable, it is immaterial that the court might prefer a different definition.
>
> I reject this proposition. Statutory interpretation is solely a matter for the courts and no other body has authority to usurp the power of the court in performing that function. However, this does not imply that a competent body, such as a local planning authority, is not entitled to determine whether, for example, a certain aspect of a proposed development conforms to a statutory requirement. In such a case, where the statutory obligation is clear, the issue is whether the development conforms to it. That is a matter which is peculiarly within the competence of the planning authority and the court ought not to interfere unless there is no reasonable basis on which the decision of the authority might be upheld. In the present case the meaning of 'sow' in the context of para. 1 (e) of Part II of the First Schedule to the European Communities (Environmental Impact Assessment) Regulations, 1989, is not free from doubt and, therefore, it is a matter for the court to interpret the regulation."

41. On the particular facts of the case, the High Court held that An Bord Pleanála had erred in calculating the number of "units". The board should have counted a gilt as ten units. On this reckoning, the proposed development exceeded the relevant threshold, and an EIA should have been carried out.

42. In interpreting the term "sow", the High Court had regard to the rationale for attributing ten units to a "sow", i.e. the fact that pregnant pigs, all of which have a potential for generating through their expected offspring a substantially greater amount of slurry than single pigs, are allocated a greater number of units to reflect that situation.

> "[…] The logic for this formula is perfectly clear. Pregnant pigs, all of which have a potential for generating through their expected offspring a substantially greater amount of slurry than single pigs, are allocated a greater number of units to reflect that situation. When one has regard to the object of the regulation as I have outlined, it follows that there is no practical distinction between a pregnant pig which is a gilt awaiting her first litter and a pregnant pig which already has had one or more litters. It is true that in relation to a pregnant gilt, one cannot be certain that she will farrow successfully as there is no prior experience to go on. However, there is no evidence in this case to cause one to doubt that if there are 396 pregnant gilts in the breeding pens for which retention is sought, the vast majority, if not all, will have normal litters.
>
> If that is so then there is no real distinction in terms of the regulation between a pregnant gilt and a pregnant pig which already has had one or more litters and all should have the same number of units allocated to them, i.e. 10 each. I have no doubt that under the regulation all pregnant pigs should be similarly assessed for allocation of units and I would define a pregnant gilt as being a 'sow' in that context. Such a definition also has the merit of avoiding the serious loophole which arises out of the definition proposed by Mr. Collins and which could vitiate the purpose and intent of the regulation."

43. As appears, the application of the statutory definition to the facts of the case required consideration of the detail of the proposed development in terms of the number of pigs and type of pigs involved.

44. A similar fact-specific inquiry is necessary in the case of the category "integrated chemical installations". As appears from the definition, and from the EU Commission Guidance cited earlier, there are a number of aspects to such installations, in terms of whether the manufacture is on an industrial scale, whether chemical conversion processes are involved, whether there are several units juxtaposed and functionally linked. These are all matters in respect of which an applicant is required to adduce evidence in judicial review proceedings. At no stage has the Applicant in the present case sought to explain why it is that he says the anaerobic digestion process which produces, principally, fertiliser, comes within the definition. Tellingly, the Applicant never addressed this issue in his submission to An Bord Pleanála on the remitted planning appeal. Whereas this failure to raise a legal objection during the course of the administrative stage of the process is not necessarily fatal to the making of the argument in judicial review proceedings (*Grace v. An Bord Pleanála* [2017] IESC 10), it is indicative of an omission on the part of the Applicant to substantiate this aspect of his case at any stage.

45. There would have to be some evidence before the court explaining why it is that it is said that the proposed development comes within the prescribed class or category. An applicant bears the onus of proof in judicial review proceedings, and the Applicant in the present case has failed to discharge this onus. The legal position in this regard is not altered by the judgment of the CJEU in Case C 72/12 *Altrip*. That judgment is concerned with the separate question of whether there is an onus of proof on an applicant to demonstrate that the outcome of the decision-making process would have been different had the procedural error complained of not occurred.

46. In all the circumstances, the Applicant's allegation that An Bord Pleanála mischaracterised the proposed development has not been substantiated. Accordingly, this ground of judicial review is dismissed.

47. The Statement of Grounds does not contain an express plea to the effect that An Bord Pleanála failed to comply with its requirements under Article 109 and Schedule 7 of the pre-2018 version of the Planning Regulations. Even if such a plea had been advanced, it would not have succeeded. I am satisfied on the evidence before the court that An Bord Pleanála properly applied the criteria under Schedule 7 of the Planning Regulations. The board's direction of 13 August 2015 has been set out in full at paragraph 29 above. The content of same confirms that the members of An Bord Pleanála carefully considered the relevant criteria under Schedule 7 of the Planning Regulations.

48. The Applicant's argument that the screening exercise is vitiated by a failure to understand the correct separation distances between the proposed anaerobic digester plant and the proposed dwelling house falls away as a result of the rejection of the "separation distance" argument under heading (3) below.

(2). SEVESO III DIRECTIVE / COMA REGULATIONS 2015

49. Where an application for planning permission relates to a proposed development which represents an "establishment" for the purposes of the Control of Major Accident Regulations 2015 ("*the COMA Regulations 2015*"), additional requirements must be complied with by the local planning authority and by An Bord Pleanála. These requirements are set out *inter alia* at Part 11 of the Planning Regulations. There are also obligations under the COMA Regulations 2015 themselves (see, for example, Regulations 8 and 24). These provisions of national law implement the Seveso III Directive (Directive 2012/18/EU on the control of major-accident hazards involving dangerous substances).

50. The Applicant maintains that the proposed anaerobic digester plant constitutes a "lower tier establishment" for the purposes of the COMA Regulations 2015. Specifically, it is submitted that the proposed development involves the bulk storage of biogas in excess of 10 tonnes. The biogas will include methane, oxygen and hydrogen sulphide, all of which qualify as Seveso III substances. See page 3 of the Byrne Ó Cléirigh Consulting report.

51. The thresholds under the COMA Regulations are referable to the maximum quantities which are present or are likely to be present at any one time. See Note 3 to Schedule 1 of the COMA Regulations 2015 as follows.

> "3. The qualifying quantities set out above relate to each establishment.
>
> The quantities to be considered for the application of the relevant Regulations of these Regulations are the maximum quantities which are present or are likely to be present at any one time. Dangerous substances present at an establishment only in quantities equal to or less than 2 % of the relevant qualifying quantity shall be ignored for the purposes of calculating the total quantity present if their location within an establishment is such that it cannot act as an initiator of a major accident elsewhere at that establishment."

52. The Applicant's case—as formulated in written and oral submission—turns on whether An Bord Pleanála had erred in concluding that there was *no likelihood* of the 10 tonne limit for biogas being exceeded on the basis that the controlled operation of the facility would not lend itself to build up of large volumes of biogas requiring storage. The Applicant places emphasis on the expert report commissioned by An Bord Pleanála from Byrne Ó Cléirigh Consulting ("*the BOC report*"). The authors of the report had concluded that whereas it was not credible that the full storage capacity at the facility would be used for biogas, they could not determine, based on the information available, what the maximum capacity was and so could not determine if the site could store more than 10 tonnes of biogas at one time. The authors recommended that An Bord Pleanála either (i) impose a condition demonstrating that the maximum quantity of biogas on the site at one time could never exceed 10 tonnes, or (ii) proceed on the basis that the site is a "lower-tier establishment". Counsel submitted that the actual condition imposed by An Bord Pleanála, namely Condition No. 3, failed to give proper effect to the recommendations in the BOC report.

53. In order to adjudicate on this argument, the court would have to embark upon a detailed consideration of the documentation before An Bord Pleanála. Before turning to that task, however, it is first necessary to rule upon an objection raised on behalf of the board.

Pleading point
54. Counsel on behalf of An Bord Pleanála objected that the arguments as advanced at the hearing went beyond the claim as actually pleaded in the Statement of Grounds. In particular, counsel submits that the claim as pleaded is confined to an allegation that the BOC report contains material errors of fact, and an allegation that the EIA screening determination should have been reconsidered. Counsel submits that there is no complaint made that the board failed to have regard to or comply with the BOC report.

55. This aspect of the case is pleaded at paragraphs E.9 and E.10 of the Statement of Grounds as follows.

> "(iv) *Seveso screening report materially incomplete*.
>
> 9. It is pleaded that the Seveso assessment commissioned* by the Board, which assessment was informed by a report dated 13th April 2016 conducted on behalf of the Board by Byrne O'Cleirigh Consultants ('the BOC report'), contains multiple material errors of fact and, in consequence thereof, the decision of the Board is vitiated.
>
> 10. Further, having regard in particular [to] the clear conclusions of the BOC report that a potential Seveso risk could not be excluded by reason of the design of the proposed development, it is pleaded that the Board erred in law in failing to then reconsider its earlier decision and the direction of August/September 2015 in respect of EIA screening, by failing to repeat that EIA screening exercise to include a cumulative consideration of the contents and conclusion of the later BOC Seveso screening report of April 2016."
>
> *Emphasis (italics) added.

56. Counsel on behalf of the applicant, Mr. Handy, BL, submits that there is a typographical error in the Statement of Grounds and that the word "commissioned" in paragraph E.9 (highlighted in italics above) should be understood as meaning "completed". Counsel further submits that the sentence does not make sense otherwise, and it is clear that the allegation that is being made is that An Bord Pleanála completed its assessment by reference to the report.

57. I accept this explanation. The plea at paragraph E.9 distinguishes between the "assessment" and the "BOC report", and it would render the plea meaningless if the phrase "assessment commissioned by the Board" were to be read as referring to "the BOC report". There is obviously a typographical error in the plea, and the ground should be read as if the word "completed" had been used instead of "commissioned".

Findings of the court
58. Order 84, rule 20(3) of the Rules of the Superior Courts provides that an applicant for judicial review should state precisely each ground of challenge, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground. Section 50A(5) of the Planning and Development Act 2000 ("*PDA 2000*") provides that no grounds shall be relied upon in the application for judicial review under Order 84 other than those determined by the court to be substantial under subsection (3)(a).

59. It should be noted that there is a distinction between the *grounds* of challenge and the evidence provided in support of those grounds. Whereas the grounds of challenge must be pleaded within the eight weeks, there is some leeway in respect of the timing of the delivery of evidence in support of those grounds. See *McNamara v. An Bord Pleanála (No. 2)* [1996] 2 I.L.R.M. 339 at 352.

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

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

61. In *McEntee v An Bord Pleanála*, unreported, High Court, Moriarty J., 10 July 2015 the applicant sought to argue, at the full hearing of the judicial review proceedings, that An Bord Pleanála had not adequately evaluated the proposed development in the course of its EIA, or that the EIA was not accurately recorded by the board.

62. Moriarty J. reiterated that it is not appropriate to seek to rely on broad general catch-all pleas which tell the respondent little of the actual basis or nature of the challenge it faces and what the respondent should do to meet the case against it. The judge went

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

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

64. Applying the principles in these three judgments to the Statement of Grounds in the present case, I have come to the conclusion that—on a "fair and reasonable" reading—the case as pleaded is broad enough to encompass the argument advanced at hearing that Condition No. 3 failed to give proper effect to the recommendation in the BOC report.

65. The gravamen of the plea at paragraph E.9 is that the screening assessment for the purposes of the Seveso III Directive contains multiple errors of fact. This ground requires the court to consider the approach taken by An Bord Pleanála to the Seveso III Directive in some detail. The board's direction of 12 May 2016 expressly states that the board "included a condition, as recommended in the Byrne O'Cleirigh report". It is open to the Applicant to argue that the wording of that condition, i.e. Condition No. 3, does not in fact reflect the form of condition recommended in the BOC report, and that this constitutes a material error of fact as pleaded at paragraph E.9.

66. In interpreting the Statement of Grounds, some regard must be had to the fact that the argument advanced by the Applicant would—if well founded—result in a finding that An Bord Pleanála had not properly complied with an important piece of European environmental legislation, namely the Seveso III Directive. The Applicant should not be shut out from even *making* this argument by an overly strict reading of the Statement of Grounds.

An Bord Pleanála's approach to Seveso III Directive / COMA Regulations

67. The Seveso III Directive was dealt with as follows by An Bord Pleanála in the board's direction of 12 May 2016. (A copy of this direction was issued with the decision).

> "Following the decision to grant permission on September 2nd, 2015, the need for further clarification on the Seveso Directive arose and at a further Board meeting on October 21st, 2015, the Board decided to seek expert advice on the matter. The proposed development and the report prepared by Byrne O'Cleirigh were considered at a further Board meeting of all available Board Members held on April 26th, 2016.
>
> The Board decided that it was not necessary to circulate the file to the parties for further comment or to seek a further report from the Inspector.
>
> Based on the technical information provided by the applicant in Chapter 3 of the Environmental Report prepared by Brightwater Environmental (November 2012), and in particular Section 3.6, and based on the clarification in the documentation provided by Simon Clear, Planning Consultant for the applicant, received by the Board on March 30th, 2015 (ref. page 9) the Board was satisfied that the controlled operation of the facility would not lend itself to build up of large volumes of biogas requiring storage. The Board concluded that there was no likelihood of the 10 tonne limit for biogas being exceeded and further concluded that the proposed development would not comprise an 'establishment' for the purposes of the Seveso III Regulations. For the avoidance of doubt, and to align with the report prepared by Byrne O'Cleirigh, the Board included a condition, as recommended in the Byrne O'Cleirigh report, limiting the volume of biogas that can be present on site at any one time to not exceed 10 tonnes.
>
> The Board was satisfied that the no revisions to the EIS Screening exercise, confirmed by the Board on August 13th, 2015, were required.
>
> The Board decided unanimously to confirm its decision to grant permission for the draft reasons, considerations and conditions set out below."

68. As appears, An Bord Pleanála makes express reference to certain "technical information" provided by the Developer. The board also makes reference separately to the expert report which it had commissioned from Byrne Ó Cléirigh ("*the BOC Report*"). The relevant extracts from these documents are set out below.

69. The first document referred to is the Environmental Report prepared by Brightwater Environmental (November 2012). §3.6 of the report reads as follows.

> "3.6 Processing Technology
>
> The CHP technology has been described in Section 3.2. The material for processing will be stored in the reception/mixing tank of the off-farm reception shed. In this tank all materials will be mixed and macerated to 12m by Landia Long shaft motor pump (Type MPG-1).
>
> There will be an opening point between the pump and the pasteuriser to allow manual size verification using a 12mm grill. Any material greater than 12mm will be re-circulated around the tank where it will be macerated further. The material will be re-tested again to confirm the particle size is met before any more material is processed. The pump will be maintained as per the manufacturers instructions.
>
> […]
>
> 3.6.2 Gas storage, control and safety
>
> The biogas will be stored in the headspace above the biomass in the digester tanks and under a double membrane gas tight top. The composition of the biogas will be 50-60% CH4, 40-50% CO2 , 1% 02 and trace H2S typically < 750ppm.

The biogas composition is monitored on a continual basis by the plant.

Moisture will be removed from the biogas prior to combustion by means of ground flow condensation. All condensate will be collected and returned directly to the digester.

Hydrogen sulphate content will be maintained below 750ppm by a managed biochemical mechanism operated by the plant, where O2 levels are balanced in order for specific micro-organisms in the digester to convert the H2S to solid elemental sulphur. The sulphur falls into the digestate and is eventually removed with the digestate for use as fertiliser. Both the mechanism for removing moisture and H2S are established common practice in AD plants.

The biogas within the plant is produced and stored under non-pressurized conditions. Long term storage (build-up) of gas does not occur on this site. Gas production is managed so that it matches demand by the CHP unit. Combined storage capacity on site is less than 24 hrs. Otherwise the system is full gas tight. Normal risk assessment, method statements and emergency plans will be undertaken by the owner in advance of operating the plant."

70. The next document referred to is the Simon Clear & Associates submission. It will be recalled that this submission was made on 30 March 2015 in response to a written request from An Bord Pleanála sent to all parties to the remitted planning appeal. Pages 8 and 9 read as follows.

"A consideration here may be whether non-pressurised flammable substances are stored in bulk. It has been confirmed that AD/CHP is a constant operation process whereby gases produced are flared off on production, unless burned as fuel in the CHP. Large quantities of flammable gases and vapours are not stored, processed, or released as part of the ordinary operation of anaerobic digester facilities.

The digester containers operate at a temperature stablished between 38°c - 42°c. The heat produced on site in the CHP will be re-used to maintain temperature in the system, for heating the pasteurisation equipment and can be used to dry liquid digestate.

The bio-gas will be stored in the head above the biomass in the digester tank, under a double membrane gas-tight top. The proposed development uses a soft texture dome roof to the digester silos. The bio-gas within the plant is produced and stored in a low pressure environment under non-pressurised conditions. There is no proposal to have bulk bio-gas storage in place at the facility. A flare-off safety device is incorporated as a safety feature, which is automatically turned on to burn gas off surplus gas should it accumulate.

Where no bulk storage component is involved, the low level of gas accumulation does not present a 'major accident' risk as defined in the EC (Control of Major Accident Hazards Involving Dangerous Substances) Regulations 2006 (SI No. 74 of 2006)."

71. (It will be noted that the submission refers to the earlier 2006 Regulations. The COMA Regulations 2015 came into effect subsequently on 1 June 2015).

72. The third document referred to is the BOC report. The conclusions and recommendations of that report are set out as follows at §5 thereof.

"5. CONCLUSIONS AND RECOMMENDATIONS

The only material that we have identified at the proposed Greenfield Ventures facility that qualifies as a Seveso substance is biogas.

Based on our assessment of the three vessels that will be used to store biogas, the normal operating inventory of biogas at the site is likely to be less than 10 tonnes, which is the threshold for qualification as a lower tier establishment.

However, based on our understanding of the process the maximum biogas storage capacity at the site will vary, depending on the liquid levels in the vessels. The total capacities of these vessels is sufficient to store up to 21.57 tonnes at atmospheric pressure, or 23.73 tonnes if the vessels were pressurised to 1.1 bar.

It is not credible that the full tonnes capacity could be used for biogas storage, as this would require the removal of all liquid from the vessels and that they were filled to capacity at the same time with biogas. However, we cannot determine, based on the information available, what the maximum capacity is and so we cannot determine if the site could store more than 10 tonnes of biogas at one time.

For this reason we recommend that if, APB decides to grant permission for the development, there would be a condition imposed so that the operator would have to:

- Demonstrate that the maximum quantity of biogas present on the site at one time could never exceed 10 tonnes. This would have to be done by implementing suitable operational controls to limit the biogas quantities (e.g. monitoring liquid levels in tanks, monitoring biogas concentrations in the vapour spaces of the tanks, use of flaring to manage inventory if required or other measures).

OR

- Proceed on the basis that the site is a lower tier establishment and prepare and issue a notification to that effect. In this case the operator will also need to ensure that they meet the requirements of SI 209 of 2015 (the Seveso III Regulations)."

73. Condition No.'s 1, 2 and 3 of the planning permission provide as follows.

1. The development shall be carried out and completed in accordance with the plans and particulars lodged with the application, as amended by the further plans and particulars submitted on the 13th day of November, 2012, except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to

commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.

Reason: In the interest of clarity.

2. (a) The overall annual tonnage of feedstock accepted at this Anaerobic Digester plant shall be as set out in the planning documentation submitted and shall not exceed 15,000 tonnes per annum.

(b) Planning permission shall be required for any change in the mix of wastes accepted at the facility.

Reason: In the interests of clarity.

3. The maximum quantity of biogas present on site at any one time shall not exceed 10 tonnes.

Reason: To ensure that the facility will not comprise an establishment for the purposes of the Seveso III Regulations in the interests of clarity."

Legal submissions on behalf of Applicant

74. Counsel on behalf of the Applicant submits that An Bord Pleanála failed to have regard to the recommendations of the BOC report. The report had recommended that An Bord Pleanála either (i) impose a condition demonstrating that the maximum quantity of biogas on the site at one time could never exceed 10 tonnes, or (ii) proceed on the basis that the site is a lower-tier establishment. Counsel submitted that the actual condition imposed by An Bord Pleanála, namely Condition No. 3, failed to give proper effect to the BOC report. In contrast to what was recommended in the BOC report, Condition No. 3 is in bald terms and merely states that the maximum quantity of biogas present on site at any one time shall not exceed 10 tonnes. There is no indication under the condition as to how this is to be achieved.

75. Counsel also draws attention to the fact that An Bord Pleanála expressly states in its direction of 12 May 2016 that the proposed development will be subject to a waste facility permit.

> "In deciding not to accept the Inspector's recommendation to refuse planning permission the Board had regard to sustainable energy and waste policies and considered that the proposed AD plant was an acceptable, and sustainable, form of development on these farm lands in close proximity to the source of agricultural wastes and to locations which are suitable for the spreading of digestate. The Board considered that sufficient information was attached to the file in relation to the composition, proportions and the source of feedstock, digestate volumes and digestate storage prior to spreading to enable the Board to make an informed decision. *The Board noted that the proposed AD Plant would also be subject to and regulated under a Waste Facility Permit to be issued by Meath County Council."*
>
> *Emphasis (italics) added.

76. This was described by counsel as "kicking the can down the road", by leaving over operational controls to the local authority when these were matters which should have been prescribed under the planning permission itself. Reliance was placed in this regard, by analogy only, on the judgment of the CJEU in case C-201/02 Wells. Although the judgment in *Wells* concerns multi-stage decision-making in the specific context of the EIA Directive, counsel submits that it is indicative of a more *general principle* that environmental concerns should be taken into account at the earliest possible stage of the decision-making process. On this interpretation, it would not be open to An Bord Pleanála to leave over the issue of the precise operational controls to be dealt with subsequently by another competent authority, namely the local authority exercising its functions under the Waste Management (Facility Permit and Registration) Regulations. This is especially so given the detailed recommendations in the BOC report.

77. Counsel also relies on a report prepared on behalf of the Applicant by AWN Consulting. This report is dated 27 July 2016 and has been exhibited as part of the proceedings.

78. The Applicant relies, in particular, on the following from the AWN Consulting report.

> "3.0 ASSESSMENT OF RISK
> Having reviewed the planning file, there are a number of flaws in the planning decision which AWN wish to highlight:
>
> Item 1
>
> It is noted that a limit (to less than 10 tonnes) on biogas stored on-site was proposed as part of the planning assessment by An Bord Pleanála to ensure that the site would not be a Seveso site, but it is simply not possible that this could be enforced, as biogas production and composition is dependant on incoming waste types and the biodegradability of the waste, and therefore there will be considerable variation in biogas generation and methane concentration. The 10 tonne limit is based on three fundamental flawed premises, which are as follows:
>
> (i) The BOC report assumes a biogas methane concentration of 60% and indeed states in Section 3.3.2 that 'as biogas comprises up to 60% methane', whereas biogas methane concentrations of up to 75% have been noted in operational anaerobic digestion facilities (from MES, T.Z.D. de; STAMS, A.J.M.; ZEEMAN, G. (2003): Chapter 4. Methane production by anaerobic digestion of wastewater and solid wastes. In: REITH, J.H. (Editor); WIJFFELS, R.H. (Editor); BARTEN, H. (Editor) (2003): Biomethane and Biohydrogen. Status and perspectives of biological methane and hydrogen production, published by Netherlands Agency for Energy and the Environment.
>
> (ii) The report also assumes a pressure of 100 mbar, whereas storage pressures could be higher dependant on whether water storage or gas sphere storage is applied.
>
> The Bord has to come to an incorrect decision to say the site should store no more than 10 tonnes of biogas because the

reality is the site has the capacity to store greater than 10 tonnes and also biogas composition can vary considerably.

In the Notes to Schedule 1 of S.I. 209 of 2015 (the COMAH Regulations) it is stated:

'The quantities to be considered for the application of the relevant regulations of these regulations are the maximum quantities which are present or likely to be present at any one time'

Given the variation in biogas methane concentration noted above, the variation in storage pressures which could occur and the fact that the facility has the volumetric capacity for sufficient biogas to be present to be above the relevant Seveso threshold, the site is clearly likely to be a Seveso site, as the dangerous substances are likely to be present in sufficient quantities.

As a result, applying the precautionary principle the site should be registered as a Seveso site and the appropriate modelling undertaken to determine the likely off-site impacts of a fire and explosion scenario.

Given that the nearest digester is located within 45 metres of the proposed dwelling house, a vapour cloud explosion at the digester is likely to have catastrophic and lethal impacts on the proposed dwelling house."

79. In conclusion, counsel submits that Condition No. 3 is inoperative and unenforceable. It is further submitted that the condition could not be severed and that if it is found to be invalid, then the entire planning permission must be set aside.

Legal submissions on behalf of An Bord Pleanála
80. In response, counsel for An Bord Pleanála submits that it is clear, on a proper reading of the board's decision, that An Bord Pleanála was not, in fact, purporting to follow precisely the recommendations in the BOC report. Rather, the board had reached its own independent conclusion that there was no likelihood that the threshold of 10 tonnes would be exceeded. It is apparent from the structure of the relevant paragraph of the board direction of 12 May 2016 that the board's conclusion, i.e. that there was no likelihood of the 10 tonne limit being exceeded, had been reached on the basis of the technical information provided by the Developer. (The relevant extracts have been set out earlier in this judgment, at paragraphs 69 and 70). The reference to the BOC report only appears *after* this conclusion has been stated.

81. Counsel also makes the point that whereas in theory the tanks would have sufficient capacity to store gas in excess of the 10 tonnes threshold, this simply would not arise in practice. First, to do so would require the removal of all other materials and, in circumstances where the biogas is an *output* of the process, it would require the removal of the very materials which create the biogas. Put shortly, in order to fill the tanks with biogas, one would have to remove the feedstuff, e.g. the cow slurry, hen manure and silage, and thus eliminate the fermentation process which produces the biogas.

82. Secondly, attention is drawn to the fact that there is no intention *to store* gas at the facility and rather the facility is to operate on a continuous basis. Reference is also made to the use of flaring. On this analysis, there simply will not be a build-up or storage of gas in the quantities involved for the purposes of the Seveso III Directive.

83. Counsel for An Bord Pleanála also submits that Condition No. 3 must be read in conjunction with Condition No. 1 and Condition No. 2. (These have been set out earlier at paragraph 73). Condition No. 1 stipulates that the development shall be carried out and completed in accordance with the plans and particulars lodged with the application, as amended by the further plans and particulars submitted on 13 November 2012. Accordingly, the processing technology described in, *inter alia*, the first document referenced in the board's direction must be complied with. Curiously, there is no reference in Condition No. 1 to the *additional documentation* provided by Simon Clear on 30 March 2015. Condition No. 2 specifies the input and, accordingly, is said to affect the output, including gaseous emissions.

84. In summary, counsel submits that whereas the BOC report had identified a theoretical possibility that if the entire of the capacity of the tanks (including their adjustable membranes) were to be used for the storage of biogas (to the exclusion of the feedstuff), then this could exceed the 10 tonne threshold. The Board did not share this residual concern, but instead reached a definitive conclusion that the controlled operation of the facility would not lend itself to a build-up of large volumes of biogas requiring storage. The Board "for the avoidance of doubt" did attach a condition, but this was not intended to be the condition recommended by the BOC report.

85. Insofar as the AWN Consulting report is concerned, counsel submits as follows. First, counsel formally objected to the admissibility and/or relevance of this report given that it does not form part of the materials which were before An Bord Pleanála. See also pages 5 and 6 of An Bord Pleanála's written legal submissions. The judgment in *Hennessy v. An Bord Pleanála* [2018] IEHC 678 is cited. Secondly, the argument that the AWN Consulting report indicates that the BOC report contains material errors of fact is rejected. Counsel submits that the AWN Consulting report criticises the failure to carry out a Seveso assessment, i.e. it is not so much directed to the *threshold issue* of whether the Seveso III Directive was triggered, as directed to a summary of what procedural requirements would have followed had it been found that the Seveso III Directive applied. The AWN Consulting report is said to melt away once it is understood that it is predicated on treating the site *as if* it was a lower-tier establishment.

86. Counsel dismisses the argument that Condition No. 3 is inoperable, saying that if the developer cannot comply with the requirements of the condition then the proposed development cannot proceed. Reliance is placed in this regard on the judgment of the Court of Appeal in *People Over Wind v. An Bord Pleanála* [2015] IECA 272, [45]. Counsel notes that there is nothing in the documentation which suggests that the requirement under the condition cannot be achieved.

87. Finally, counsel also rejects the argument that the reference in the board's decision to the fact that the proposed anaerobic digester plant is subject to a requirement for a waste facility permit represents an improper attempt to "kick the can down the road". The fact of the matter is that the legislative scheme is such that the proposed development will, as a matter of law, require a waste facility permit. There is no difficulty with one decision-maker acknowledging that a second decision-maker is involved. The processing technology has been fully described in the planning application, and now forms part of the permission via Condition No. 1. If it is operated in accordance with the detailed documentation, and in addition is subject to a waste facility permit, under separation legislation, the board is entitled to take these matters into account.

Findings of the court
88. The first ground of challenge advanced by reference to the Seveso III Directive is that An Bord Pleanála's (screening) assessment contains multiple material errors of fact. This criticism appears to extend both to An Bord Pleanála's own assessment and to the BOC report. In this regard, the AWN Consulting report is highly critical of the BOC report. This indicates that the Applicant is dissatisfied

with both the board's own assessment and the assessment contained in the BOC report.

89. At bottom, the Applicant's case amounts to an allegation that An Bord Pleanála erred in reaching the conclusion that there was no likelihood of the 10 tonne limit for biogas being exceeded and that, accordingly, the proposed development would not comprise a "lower tier establishment" for the purposes of the Seveso III Directive. In circumstances where there is no suggestion that the board misinterpreted the COMA Regulations 2015, nor misidentified the applicable threshold, the determination of whether the Seveso III Directive applied is quintessentially a question of fact and degree within the expertise of An Bord Pleanála. (See, by analogy, *Harrington v. An Bord Pleanála* [2006] 1 I.R. 388, [94] (assessment of the extent of what constitutes an "establishment" falls to be considered and assessed by reference to highly technical matters and not simply by reference to an unspecified and uncertain legal definition). The function of this court, as per *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, is to determine whether there was material before An Bord Pleanála which is capable of justifying its conclusion. This court does not have jurisdiction to address the issue de novo.

90. The rationale for this approach of curial deference to the decision-making of An Bord Pleanála has been explained as follows in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 at 72/3.

> "Under the provisions of the Planning Acts the legislature has unequivocally and firmly placed questions of planning, questions of the balance between development and the environment and the proper convenience and amenities of an area within the jurisdiction of the planning authorities and the Board which are expected to have special skill, competence and experience in planning questions. The court is not vested with that jurisdiction, nor is it expected to, nor can it, exercise discretion with regard to planning matters.
>
> I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision."

91. This principle has been more recently affirmed by Denham J. in *Meadows v. Minister for Justice Equality and Law Refor*m [2010] IESC 3, [2010] 2 I.R. 701, [25].

> "(vi) where the legislature has placed decisions requiring special knowledge, skill, or competence, for example as under the Planning Acts, with a skilled decision maker, the court should be slow to intervene in the technical area;"

92. Even applying curial deference, I am satisfied that—on the very unusual facts of the present case—the conclusions which An Bord Pleanála reached in relation to the Seveso III Directive were unreasonable and irrational in the sense that there was simply no material before the board capable of justifying its conclusions.

93. In this regard, there are two aspects of the board's direction of 12 May 2016 which are of concern. First, the board concluded that there was no likelihood of the 10 tonne limit for biogas being exceeded. This conclusion was said to be based on the "technical information" provided by the Developer. However, when one considers the documentation actually relied upon by An Bord Pleanála, it is incapable of supporting this conclusion. (The relevant extracts have been set out at paragraphs 69 and 70 above).

94. The information is presented in the most vague and general terms. There is no detail provided as to how the proposed anaerobic digester plant is to be operated. No indication is given of the volume of gases to be produced. There is no attempt to identify what fractions of the biogas produced will constitute substances for the purposes of the Seveso III Directive or the COMA Regulations 2015. The statement that "long term storage (build-up) of gas" does not occur at the site is unexplained: no figures are given for the volume of gas involved nor what is meant by "long term". No explanation is provided for the statement that the "combined storage capacity on site is less than 24 hrs".

95. There is no express reference to the threshold of 10 tonnes nor any statement that this would not be exceeded. Indeed, both submissions on the part of the Developer predated the coming into force of the COMA Regulations 2015 on 1 June 2015.

96. These omissions have to be seen against a factual background where the actual capacity of the tanks could, *in theory*, accommodate in excess of 21 tonnes of biogas. (See BOC report, page 10). Even allowing that the full of capacity would not be dedicated to biogas, no one reading these two submissions on behalf of the Developer could know whether the lesser figure of the 10 tonne threshold would be exceeded.

97. The lack of detail in the information provided by the Developer had previously been criticised by the inspector in her report of 23 April 2013 (albeit not in the specific context of the Seveso III Directive). The BOC report also states that the authors could not determine, based on the information available, what the maximum capacity of the vessels/tanks is and could not determine if the site could store more than 10 tonnes of biogas at one time. Whereas An Bord Pleanála is not, of course, bound by the recommendation in these reports as a matter of law, it is telling that both the inspector and the experts considered the information to be deficient.

98. I have carefully considered the materials relied upon by An Bord Pleanála, and there is nothing which supports the conclusion purported to have been reached by An Bord Pleanála.

99. As appears from An Bord Pleanála's verifying affidavit, the members of An Bord Pleanála, in October 2015, had been alive to the possibility that the development might trigger the then newly commenced COMA Regulations 2015, and this is the reason the board had commissioned the BOC Report. See paragraph 4(q) of Chris Clarke's affidavit of 2 November 2017, and the exhibited board direction of 30 October 2015. Notwithstanding this, the board ultimately purported to resolve this issue by reference to the documentation *previously* submitted by the Developer and not by reference to the expert report.

100. The second aspect of concern is that the members of An Bord Pleanála appear to have thought that they were attaching the condition as recommended in the BOC report. In truth, the condition actually imposed, namely Condition No. 3, falls far short of the type of condition envisaged by the authors of the BOC report. Contrary to the recommendation, Condition No. 3 does not require the Developer to demonstrate that the maximum quantity of biogas present on the site at one time could never exceed 10 tonnes. The condition is not prescriptive in respect of the "suitable operational controls" to be implemented in order to limit the biogas quantities, e.g. monitoring liquid levels in tanks, monitoring biogas concentrations in the vapour spaces of the tanks, use of flaring to manage inventory if required or other measures.

101. Put shortly, Condition No. 3 merely states an outcome, but does not require the Developer to demonstrate compliance with that

outcome, nor does the condition put in place any controls to ensure that that outcome is achieved.

102. Thus the board was mistaken in thinking that it had attached the recommended condition. Notwithstanding the skilful submissions of counsel, I cannot accept that the board merely attached a condition "for the avoidance of doubt" but that this condition was not intended to be the condition recommended by the BOC report. The board's direction expressly states that the board included a condition as recommended in the BOC report. See also paragraph 11 of Mr Clarke's affidavit.

103. Insofar as the argument that Condition No. 3 should be read in conjunction with Condition No. 1 is concerned, it is to be noted that there is no reference in the latter condition to the further information submitted on behalf of the Developer in March 2015. Thus that information does not form part of the plans and particulars with which the Developer is required to comply.

104. The facts of the present case are distinguishable from those in *People Over Wind v. An Bord Pleanála* [2015] IECA 272, [38] in that the condition at issue in that earlier case required matters to be agreed with the local planning authority prior to the commencement of development.

105. It is also a cause of concern that An Bord Pleanála appears to have placed much emphasis on the fact that the proposed anaerobic digester plant would be subject to the requirement to obtain a waste facility permit from the local authority. Whereas this statement is correct as a matter of law, the concern is that An Bord Pleanála may have thought it appropriate to leave over details of the regulation of the operation of the proposed development to the local authority. The two legislative codes do complement each other. However, the obligation to ensure compliance with the Seveso III Directive is primarily a matter to be dealt with under the planning legislation. (See generally, Case C 53/10 *Land Hessen*). This flows from the structure of the legislation, and, in particular, from the fact that a local authority has no specific function under the Waste Management (Facility Permit and Registration) Regulations in respect of the Seveso III Directive.

106. For the sake of completeness, I should note that all parties agreed that a waste facility permit does not trigger the special provision made for the interaction of the planning legislation with the waste management legislation under section 257 of the PDA 2000.

107. In summary, the board's direction of 12 May 2016 contains an error of fact insofar as it states that the board had included a condition as recommended in the BOC report. This error of fact is material and significant in that it relates to a critical issue in the planning appeal, namely whether it was necessary to comply with the requirements of the Seveso III Directive. Such an error of fact compromises an error of law vitiating An Bord Pleanála's decision to grant planning permission.

108. Turning now to the ground pleaded at E.10, this ground is directed to the alleged failure of An Bord Pleanála to reconsider its earlier screening determination for the purposes of the EIA Directive. As appears from the board's direction, the board did, as a matter of fact, address its mind to the question of whether it was necessary to revisit the earlier screening determination in the light of its determination in respect of the Seveso III Directive. To a large extent, this ground is predicated on an assumption that the facility is subject to the Seveso III Directive. For the reasons set out above, I have concluded that the screening exercise carried out by An Bord Pleanála for the purposes of the Seveso III Directive is invalid. This is not necessarily to say that an assessment will have to be carried out. It is, however, not possible to reach a finding on E.10 at this time.

Failure to circulate the BOC report

109. Before concluding on the issue of compliance with the Seveso III Directive, it is appropriate to make a number of observations in respect of the failure of An Bord Pleanála to circulate the BOC report. In circumstances where no specific ground of challenge has been pleaded to the effect that the failure to circulate the BOC report represented a breach of fair procedures, the observations which follow are strictly speaking *obiter dicta*.

110. It would have been preferable if the report had been circulated and if the parties had been given an opportunity to make submissions thereon. There had been significant legislative changes between the date of the initial submission of the initial appeal in January 2013 and the date of the (second) decision of An Bord Pleanála in June 2016. Specifically, the COMA Regulations 2015 came into effect on 1 June 2015. An Bord Pleanála, very properly, appears to have taken the view that it should apply the new regulations to its decision-making processes.

111. The failure to circulate the BOC report presents the following practical difficulty for the application of the *O'Keeffe* principles to the facts of the present case. The rationale for the *O'Keeffe* principles has been set out at paragraph 90 *et seq*. above. The implicit assumption underlying this rationale is that An Bord Pleanála will have had all relevant material before it and, having weighed this material, reached a decision. The court should be reluctant to intervene with the board's decision-making given that the board has an expertise in planning matters which the court does not enjoy.

112. Had An Bord Pleanála circulated the BOC report, the parties would have had an opportunity to make submissions on same. The Applicant could at that stage have submitted a report by his experts, AWN Consulting. An Bord Pleanála could then have reached a decision based on full materials. A court hearing an application for judicial review against such a procedural background would have no difficulty in applying the *O'Keeffe* principles. The court would simply have to satisfy itself that there was material before An Bord Pleanála which was capable of justifying its decision.

113. By contrast, on the facts of the present case, the court finds itself confronted with two rival reports only one of which has been considered by An Bord Pleanála as part of the decision-making process. The court does not have the planning expertise which would allow it to decide between the two rival reports. The logic of *O'Keeffe* works against the board in this regard.

114. An Bord Pleanála has raised an objection that the AWN Consulting report is inadmissible in circumstances where it does not form part of the materials which were before An Bord Pleanála. In most cases, this objection would be a good one. There is an obligation on a party to a planning appeal to put before the board the materials it wishes to rely upon. It is not open, generally, for an objector to adduce new material for the first time before the High Court. See *Hennessy v. An Bord Pleanála* [2018] IEHC 678.

115. Different considerations apply in the present case. The fact that An Bord Pleanála decided not to circulate the BOC report had the practical consequence that the first opportunity which the parties to the appeal, including the Applicant, had to address the report was in these judicial review proceedings. Given the importance of the Seveso III Directive issues, the board should have circulated the BOC report in order to allow the other parties to comment on same.

(3). SEPARATION DISTANCES

116. The Applicant contends that the planning application submitted by the Developer misstates the separation distance between the

proposed anaerobic digester plant and the Applicant's proposed dwelling house. In particular, it is submitted that the correct separation distance is 82 metres, whereas the planning documentation suggests a separation distance of 212 metres.

117. This ground of challenge is pleaded as follows in Part E of the Statement of Grounds.

> "3. In his submission to the Board dated 27th March 2015 in respect of the appeal the subject of the within proceedings, Joe Halpin (the Applicant's father) identified material factual inaccuracies in the appeal before the Board. In particular, the identification by Greenfield of the nearest dwelling houses (including permitted developments) was incorrect upon the original planning application and the appeal, and this inaccuracy has been repeated by the Developer in the remitted appeal the subject of the within proceedings. The correct distance to the nearest permitted dwelling house is circa. 82 metres from the nearest digestate storage tank. It is pleaded that in its considerations leading to its decision dated 9th June 2016, the Board erred in failing to have regard to these material facts, and it is therefore pleaded that the material errors of fact vitiate the impugned decision.
>
> 4. Further / in the alternative, if the Board did have regard to the factual discrepancies described herein before, it did not (a) address these discrepancies and/or (b) it did not determine and/or resolve them, and in doing so the Board erred in law in making its decision dated 9 June 2016.
>
> 5. Further, in circumstances where the said factual errors and/or omissions subtended all of the Board's considerations resulting in the decision dated 9 June 2016, the Board erred in failing to consider or, in the alternative, decided upon wider matters where the correct factual matrix was not applied to the Boards considerations."

118. In support of this plea, the Applicant has exhibited a report of Mr Cathal Boylan of Boylan Engineering. Mr Boylan sets out the following separation distances.

> "3. The approximate separation distance between the site boundary of the proposed Greenfield Ventures development and Niall Halpin's proposed house site is 20m
>
> 4. The approximate separation distance between the site boundary of the proposed Greenfield Ventures development and Niall Halpin's proposed well is 25m.
>
> 5. The approximate separation distance between the site boundary of the proposed Greenfield Venture development and Niall Halpin's proposed site is 62m.
>
> 6. The approximate separation distance between the proposed Digestate Storage Tank forming part of the proposed Greenfield Ventures development and Niall Halpin's proposed site boundary is 37m.
>
> 7. The approximate separation distance between the proposed digestate storage tank forming part of the proposed Greenfield Ventures development and Niall Halpin's proposed house is 82m.

119. There appears to be a typographical error in the above in that the description of the distance being measured under (3) and (5) appears to be the same, i.e. site boundary to proposed house site, whereas the figures given differ (20 metres v. 62 metres). Counsel on behalf of the Applicant indicated that the figure at (5) should refer to the distance between site boundary and the proposed dwelling house itself.

120. Mr Boylan has also attached maps to his report which indicate the position from which the measurements have purportedly been taken.

An Bord Pleanála's approach

121. It will be recalled that when the planning appeal was remitted to An Bord Pleanála, the board did not seek a fresh report from its inspector, i.e. the inspector was not asked to prepare a new or an updated report. As discussed, the inspector did prepare an *addendum* to her original report, which addendum is confined to an assessment and recommendation to the board as to whether or not the planning appeal required an EIA

122. It appears, therefore, that the original report of 23 April 2013 continues to be relevant to the remitted planning appeal, and that, in reviewing the board's decision, regard can be had to the original report.

123. The Applicant has placed particular emphasis on the fact that the section of the original report which assesses the impact of the proposed anaerobic digester plant on residential amenity does not expressly address the impact on the Applicant's proposed dwelling house. It is necessary to set out in full the relevant passages from §11.4 of the inspector's report as follows.

> "11.4 Impact upon residential amenity and value of property in the area
>
> Undoubtedly, a certain degree of disturbance will arise during the construction period, largely from construction noise (and particularly from excavation) and traffic. However, construction is a temporary process, and the area is not densely populated, *with the nearest dwelling in excess of 150 metres, approximately from the subject site*, *and some 200 metres, approximately*,* from the centre of construction activity (i.e the location of CHP building). I would therefore consider that appropriate site management and mitigation measures in respect of noise and construction hours will ensure that no unacceptable adverse impact to residential amenity will arise during the construction period.
>
> During the operational stages of the development the enclosed nature of the facility, and the proposal to carry out all operational procedures within the enclosed building will provide substantial noise mitigation. The enclosed nature of the digester and storage areas should also contain odour. Adverse impact from the latter is most likely during off-loading. The design of the proposal, however, whereby a tanker will offload via a closed loop system into the AD will ensure the potential for odour release is minimised. I have concern however with respect to potential issues in relation to biodegradable waste material. It is stated in the Environmental report that there are issues in relation to the material developing a strong odour prior to coming onto the site, particularly if it has been stored in non-ventilated plastic bags or if the material has high moisture content.
>
> It is my opinion that in the context of the nature of the facility and transportation of waste material to and from same that the development has the potential to adversely impact on amenities. However the issue here is not clear cut, albeit

observers to the appeal cite odour problems as being a material consideration*, I note all adjoining residences are in excess of 100m from the appeal site.** The development I believe must be considered in the context that it is in a rural area where odours from agricultural activities occur. It is my opinion that odour complications would strongly be related to process and is contingent of the proper management of the facility and the need to have controls and mitigation measures in place. While I have cognisance to the measures proposed by the applicant I consider that there is lack of information relating to the biofilter, composition and proportions of input feedstock and volume frequency / storage of out digestate.

Observers to the appeal have strongly highlighted potential and perceived potential harm to equine industry in the immediate area. Given that mal odour and poor air quality is harmful to respiratory health of equines.

Subject to appropriate construction management and operational supervision and standards, I am satisfied that the proposal would not have an unacceptable adverse impact on neighbouring properties and would not adversely impact upon the value of property in the area. The use of sealed tankers for haulage would ensure that odour release is prevented during transport, and ensuring a sealed nature would minimise the potential for spillages during the transportation of raw materials and finished product. I would recommend that appropriate conditions in respect of sealing and covering of vehicles be attached in the event that permission is granted.

*Emphasis (italics) added.

124. As appears, it is indicated that the distance between the nearest dwelling and the proposed anaerobic digester plant development is in excess of 150 metres approximately, and the distance between the nearest dwelling and the centre of construction activity, i.e. the location of the combined heat and power ("CHP") plant is 200 metres approximately.

125. It is important to note, however, that subsequent to the remittal of the planning appeal to An Bord Pleanála pursuant to the High Court order of 8 July 2014, the board wrote to the parties in 4 March 2015 and invited further submissions.

126. Mr Joe Halpin, the Applicant's father, made a submission dated 27 March 2015. This submission addressed the merits of the planning appeal in general. The submission makes the point *inter alia* that there was no consideration or mention in any report commissioned by the Developer to the specific needs of the proposed residential development for four adults with special needs. It is suggested that the proposed dwelling house is not even mentioned in many of the reports which purported to examine impact on neighbouring properties and environments. In this regard, it was contended that the proposed dwelling house was omitted altogether from the Moore Group Archaeological & Environmental Services' visual impact assessment pages 7, 13, 23 and 24, and that the Brady Hughes consultant report omitted mention of the proposed dwelling house.

127. Specific criticism was made of the report submitted by Brightwater Environmental as follows.

"In the Brightwater Environmental Preliminary Review (March 2012) there again is no mention of our sons home on page 5, 7, 8.

In the Brightwater Environmental Report (November 2012) the distance between our site and the proposed Anaerobic Plant is significantly inaccurate.

In fact, that distance varies considerably depending on which report you are reading. On page 8 of the Brightwater Environmental Preliminary Environmental Review they state the nearest house to the east (our son's house) is 220mtr. as measured from the site boundary. This is inaccurate as the residence is actually only approx. 37mtr. from the site boundary."

128. The Board's decision makes express reference to the proposed dwelling house as follows. Under the heading "Main Reason and Considerations", it is stated that coming to its decision, the board had regard, *inter alia*, to:

"the pattern of existing and permitted development in the vicinity of the site including the dwelling permitted by Meath County Council under planning register reference number NA/110836,"

129. The planning register reference number is that of the Applicant's proposed dwelling house.

Legal submissions

130. Counsel on behalf of the Applicant submits that a material error of fact on the part of a decision-maker will, in certain circumstances, constitute an error of law which vitiates the decision. Counsel cites in this regard the judgments in *Seery v. An Bord Pleanála*, unreported, High Court, Quirke J., 26 November 2003, and *Mulhall v. An Bord Pleanála,* unreported, High Court, McCracken J., 21 March 1996.

131. Counsel draws attention to the following reference in the Environmental Report prepared in November 2012 by Brightwater Environmental. Potential receptors are addressed as follows at § 2.2, at page 8 of the report.

"2.2.1 Neighbouring properties
There are a number of neighbouring properties to the site. For the purposes of the noise, odour and air impact assessments the six closest properties to the proposed plant were considered as potential receptors for the modelling process (see Marshall Day Report, Appendix A). These dwellings are detailed in Table 2.2.1 and are illustrated on figure 2.2.1.

[…]

2 Proposed residential property to the East 212"

132. Counsel also relies on the reference in the Marshall Day Report at page 16 of 27. Again, the distance is described as 212 metres.

133. Counsel submits that there is nothing in the board's direction which indicates how An Bord Pleanála resolved this issue of identification of the separation distance between the proposed anaerobic digester plant and the proposed dwelling house. It is suggested that this means that An Bord Pleanála either failed to address the issue or failed in its statutory obligation to state the

main reasons and considerations for its decision. Reliance is placed in this regard on the judgment of the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31; [2018] 2 I.L.R.M. 453.

134. In response, counsel on behalf of An Bord Pleanála, Ms Butler, SC, submits that there is no error in the calculation of the separation distances. The discrepancies alleged on behalf of the Applicant are readily explicable once one understands that the different figures refer to different parameters. More specifically, the points from which the distances are being measured are not the same. In some instances, the figure refers to the distance between a particular point on one site and the *boundary* of the other site. In other instances, the figure refers to the distance between the proposed combined heat and power building ("CHP") and points on the Applicant's site. The CHP had been chosen as a point of reference in circumstances where this is the location where the waste materials are first received and, accordingly, noise, odour and other impacts are centred at this location.

135. Counsel on behalf of An Bord Pleanála also draws attention to the fact that the board's decision expressly records that the board had regard to the pattern of existing and permitted development in the vicinity of the site including the dwelling permitted by Meath County Council, i.e. the proposed dwelling house on the Applicant's site.

Findings of the court

136. There is no evidence before the court that An Bord Pleanála erred in its understanding of the separation distances between the two premises. Rather, the existence of different figures is a function of the fact that the points from which distances are being measured are not the same. It is clear that in referring to a distance of 150 metres in her report, the inspector was considering *existing* dwellings. The report cannot, however, be read in isolation. The report had been prepared in the context of the first decision, and dates from April 2013. By the time An Bord Pleanála came to make its second decision in June 2016, it did so against a fuller set of documents. In particular, An Bord Pleanála had the benefit of the detailed submission made on behalf of the Applicant by his father Mr Joe Halpin in March 2015. This submission expressly referenced a concern that the separation distances had been misstated. The board would have been aware that the Applicant's principal objection to the proposed development of an anaerobic digester plant related to their concern as to the impact which that development would have on their proposed residential development. The board's decision expressly references the planning permission for the proposed residential development.

137. In all the circumstances, I am satisfied that there is no error of fact which would justify this court setting aside the decision to grant planning permission. The facts of the case are entirely distinguishable from *Seery v. An Bord Pleanála* (cited earlier). In *Seery*, incorrect separation distances had been relied upon in the decision.

138. Insofar as it is alleged on behalf of the Applicant that An Bord Pleanála was obliged to resolve a conflict or dispute in respect of the identification of the correct separation distances, this argument falls away once it is understood that there was no conflict. Rather, the different figures are entirely explicable by the fact that the parameters being measured were different.

CONCLUSIONS

139. An Bord Pleanála was correct in characterising the proposed anaerobic plant digester as an "installation for the disposal of waste" for the purposes of EIA Directive. There is no evidence before the court which suggests that the proposed development should instead have been characterised as an "integrated chemical installation". From first principles, the limited treatment applicable to the waste appears to fall short of an integrated chemical process. At all events, the Applicant has failed to discharge the onus of proof upon him and has put no evidence before the court which would suggest that the activity should be characterised as an "integrated chemical installation". The EIA screening determination was therefore lawful.

140. There is no evidence before the court that An Bord Pleanála erred in its understanding of the separation distances between the two premises. Rather, the existence of different figures is a function of the fact that the points from which distances are being measured are not the same.

141. I am satisfied that—on the very unusual facts of the present case—the conclusions which An Bord Pleanála reached in relation to the Seveso III Directive were unreasonable in the sense that there was no material before the board capable of justifying its conclusions. There are two aspects of the board's direction of 12 May 2016 which are of concern. First, the board concluded that there was no likelihood of the 10 tonne limit for biogas being exceeded. This conclusion was said to be based on the "technical information" provided by the Developer. However, when one considers the documentation actually relied upon by An Bord Pleanála, it is incapable of supporting this conclusion. The second aspect of concern is that the members of An Bord Pleanála appear to have thought that they were attaching the condition as recommended in the BOC report. In truth, the condition actually imposed, namely Condition No. 3, falls far short of the type of condition envisaged by the authors of the BOC report. Contrary to the recommendation, Condition No. 3 does not require the Developer to *demonstrate* that the maximum quantity of biogas present on the site at one time could never exceed 10 tonnes. The condition is not prescriptive in respect of the "suitable operational controls" to be implemented in order to limit the biogas quantities, e.g. monitoring liquid levels in tanks, monitoring biogas concentrations in the vapour spaces of the tanks, use of flaring to manage inventory if required or other measures.

PROPOSED ORDER

142. Given my findings in respect of the Seveso III Directive issue, I propose to make an order of *certiorari* setting aside the decision to grant planning permission. I will hear the parties on whether the matter should be remitted to An Bord Pleanála for further consideration, or whether it would be preferable that any further consideration take place in the context of a fresh application for planning permission.