Neutral Citation [2013] IEHC 433

THE HIGH COURT

[2013 No. 16 JR]

BETWEEN

Thomas Reid

Applicant

v.

The Industrial Development Agency (Ireland), Ireland and Attorney General.

Respondents

Judgment of Mr. Justice Hedigan delivered on the 19th of September 2013. Application

1. The applicant in these proceedings is seeking an order of *certiorari* quashing the decision of the first named respondent to compulsorily acquire the applicant's home and lands. The applicant also seeks various declaratory reliefs together with damages for breach of his constitutional rights and rights under the European Convention on Human Rights arising from the proposed compulsory acquisition.

Parties
2.1 The applicant is a farmer and owns lands and property at Hedsor House, Blakestown, Maynooth, County Kildare. The first named respondent is a statutory body known as the IDA which is the state agency appointed with responsibility for winning and fostering foreign direct investment for Ireland.

Factual background
3.1 The applicant challenges the validity of the first named respondent's decision of the 23rct November, 2012, to compulsorily acquire the applicant's lands and home at Blakestown, Maynooth, Co.Kildare under s.16 of the Industrial Development Act 1986 (as amended). He also challenges the constitutionality of the legislation underlying the decision and contends that it is in breach of s.3 of the European Convention on Human Rights Act 2003 (hereinafter the "ECHR Act").

3.2 The lands the subject matter of these proceedings are adjacent to Carton Demesne and comprise 72 acres of farmland together with the applicant's family home known as Hedsor House. The Rye Valley directly north of the lands at Blakestown is designated as a candidate Special Area of Conservation (hereinafter "cSAC") therefore the lands are directly adjacent to a Natura 2000 site. Hedsor House is a protected structure and dates to circa 1760.

The lands although unzoned for industrial use are of interest to the IDA as the Intel campus is nearby.

3.3 The IDA was established under the Industrial Development Act 1993. Section 3(2) of the Industrial Development Act 1995 expressly provides that the IDA "shall have the power to acquire, hold and dispose of land and other property or any interest therein.".

Under s.16 of the Industrial Development Act 1986 the IDA is given power to provide or facilitate the provision of sites or premises for the establishment, development or maintenance of an industrial undertaking. These powers include the power to acquire lands, to construct, adapt and maintain buildings and other works, to provide services and facilities in connection with land and to sell or lease lands.

3.4 The IDA has statutory functions vested in it to secure foreign direct investment (hereinafter "FDI") and under s.16 the 1986 Act has the power to compulsorily acquire lands. The IDA's powers under the 1986 Act differ from the powers of local authorities under the Planning and Development Act 2000, under which a County Council seeks to compulsorily acquire land and An Bord Pleanala hears arguments for the acquisition and agrees or refuses to grant a compulsory purchase order (hereinafter "CPO"). Under the 1986 Act the IDA satisfies itself that it can make a CPO. It does this by deciding to acquire the lands, formalising the decision in a "record of decision" and then notifying the party concerned. So unlike local authorities it does not have to go through the CPO process.

3.5 The IDA wishes to acquire the applicant's lands to provide or facilitate the provision of sites or premises for the establishment and development of industrial undertakings in the advanced manufacturing sector. This is the first time that the IDA has sought to exercise its power under s.16 of the 1986.

3.6 On the 7th March, 2012, the IDA entered into the CPO process. It had previously requested to purchase the lands from the applicant and he refused to sell. On the 8th March, 2012, the IDA served him with a Notice of Intention to Acquire. As the applicant was unwilling to sell a form of inquiry was established to look into the IDA's proposed acquisition, which was presided over by Mr. Conleth Bradley S.C. This inquiry ran for five days with the Reid family making representations. The preliminary hearing was held on the 21st May, 2012 at which the applicant was not present. A second preliminary hearing took place on the 5th June, 2012, at which the applicant was legally represented. The substantive hearing began on the 4th July, 2012, wherein the applicant made objections and observations which formed part of the report of the independent adjudicator.

Applicant's Submissions
4.1 Development will or is likely to occur;

It is submitted that the decision to compulsorily acquire the applicant's lands is unsound and exceeds the statutory authority of the respondent. Section 16 of the 1986 Act permits the IDA to compulsorily acquire the applicant's lands or to acquire the lands by agreement.

The power to compulsorily acquire exists in respect of lands where the IDA considers that industrial development will or is likely to occur. However, s.l6 is not a standalone test. The first named respondent must be satisfied that industrial development within the

meaning of s.l6(1) will or is likely to take place but also must be satisfied that the industrial undertaking conforms or will conform to the criteria set out in s.21(3) and (4) or s.25(2) of the Act. Although the IDA seeks to rely on s.25(2) in addition to or by way of alternative to s.21(3) and (4) it is submitted that this section has no application at all to the power to acquire under s.l6(l)(a) referring as it does to the circumstances in which an employment grant may be given.

The applicant argues that to satisfy s.21 of the Act the IDA must know that an industrial undertaking is going to occupy the land being purchased. Section 21(3) provides:-

> "(3) This section applies to an industrial undertaking in respect of which the Authority is satisfied that it-
>
> (a) will produce products for sale primarily on world markets, in particular those products which will result in the development or utilisation of local materials, agricultural products or other natural resources; or
>
> b) will produce products of an advanced technological nature for supply to internationally trading or skilled sub-supply firms within the State; or
>
> (c) will produce products for sectors of the Irish market which are subject to international competition; or
>
> (d) is a service industry as specified by the Minister by order under section 3."

The use of the word "an" the applicant suggests means an identified undertaking. However, the respondent in presenting a case for acquisition of lands does not appear to be relying on evidence that a particular undertaking has been secured to develop the site and it appears therefore that the land is not needed immediately.

The applicant submits that an analogy may be drawn with s.213 (3) of the Planning & Development Act 2000 which deals with the acquisition of land by a local authority for future as opposed to immediate use. Section 213(3) states:-

> "(3) (a) The acquisition may be effected by agreement or compulsorily in respect of land not immediately required for a particular purpose if, in the opinion of the local authority, the land will be required by the authority for that purpose in the future.
>
> (b) The acquisition may be effected by agreement in respect of any land which, in the opinion of the local authority, it will require in the future for the purposes of any of its functions notwithstanding that the authority has not determined the manner in which or the purpose for which it will use the land.
>
> (c) Paragraphs (a) and (b) shall apply and have effect in relation to any power to acquire land conferred on a local authority by virtue of this Act or any other enactment whether enacted before or after this Act."

This section signifies that where the local authority has a purpose in mind e.g. for housing, but where it may not build on the land for another five years owing for example to lack of resources it can buy that land. If the council has no purpose in mind and it wishes to build up a land bank it can only acquire the land by agreement not by CPO.

If anything, the IDA's powers are more curtailed then the powers vested in local authorities given that local authorities are authorised in express terms to acquire land for a future purpose. No such authorisation has been given to the first named respondent.

The applicant argues that he is not advocating a higher threshold than development is "likely" to occur. If the IDA had obtained expert studies indicating the probability of obtaining zoning, as well as ecology reports and conservation reports indicating there were no problems then the applicant could understand how it came to conclude that development would occur. However, the applicant argues, the evidence the IDA relied on did not support the idea that development was even likely to occur and it should have had positive evidence of development being likely before approaching the applicant to acquire his lands.

Moreover, applicant argues that the IDA in its decision did not give the reasons for concluding that industrial development was or is likely to occur as a result of the acquisition of the lands in question. Thus, the applicant submits the respondent failed to reach a reasoned decision as required by the requirements of fair procedures and/or constitutional justice. In this regard the applicant relies on *Deerland Construction Ltd. v Aquaculture Licences Appeals Board* [2008] IEHC 289. This case is authority for the proposition that the mere recital of matters before an adjudicator is insufficient.

That reasons should be given for a body's decision was noted in *Meadows v. the Minister for Justice, Equality and Law Reform* [2010] IESC 3 wherein Murray J. in the Supreme Court commented under the heading "Section 5" of the judgment that:-

> "An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.
>
> Unless that is so then the constitutional right of access to the Courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective."

4.2 *Nemo judex in causa sua*;

The applicant contends that the Industrial Development Act 1986 is unconstitutional (being a breach of Article 40.3 and/or Article 40.5 and or Article 43 of the Constitution) in that it enables a body seeking to compulsorily acquire lands to make its decision to do so without judicial oversight rendering it essentially an arbiter in its own cause. The applicant argues that it should provide for a legitimate contradictor i.e. an objective third party to validate the decision of the authority and in this case make the decision if the project should go ahead at all.

The applicant accepts that an independent adjudicator Mr. Bradley S.C. was appointed however he had no decision making function and therefore could not affirm, vary or set aside the respondent's decision. His role was confined to information gathering and the decision-making power continued at all times to reside in the respondent.

The applicant refers to the case of *O'Brien v. Bord na Mona* [1983] IR 255. In that case the applicant challenged the respondent's powers to compulsorily purchase bog land arguing that it was unfair that there was no third party adjudication. The High Court agreed

however the Supreme Court overturned its decision finding that the exercise of the power is constitutional and not judicial, *nemo judex in causa sua* did not prevent it from making a decision to compulsorily purchase and there was no need for a third party. The applicant argues that the authorities and the view of the Oireachtas have progressed since that case and points to the Planning & Development Act 2000 in this regard. This Act makes a third party mandatory for local authorities and the applicant argues that the same should apply to the IDA.

The applicant relies on the case of *Donegan v. Dublin City Council* [2012] IESC 18. Under s.62 of the Housing Act 1966 Dublin City Council can apply summarily for possession and this was found to be in breach of the ECHR. The Court found that where there is a dispute on the merits which cannot be resolved then judicial review is not an adequate remedy and adjudication by a third party is needed. This is since the courts cannot look at the merits in judicial review. The judge held at para.129 that:-

> "Therefore, I do not believe that the remedy of judicial review gives any comfort in the context of the State's obligation to show respect for the right to one's home within Article 8 of the Convention."

The requirements of constitutional justice in the context of the issuance of a search warrant for one's home was the subject of recent scrutiny in the Supreme Court in *Damache v. DPP & Ors* [2012] IESC 11 where a warrant was issued by a superintendent without judicial oversight. The Court found that s.29(1) of the Offences against the State Act 1939 was contrary to Article 40.5 of the Constitution since it permits a search of the applicant's home on foot of a warrant which is not issued by an independent person unconnected with the criminal investigation..

That case related to an administrative act so was similar to the present case. However, the applicant argues that case merely involved an interference with the applicant's home. In the present case the complete removal of the applicant's home is at stake. As Hardiman J. put it in *The People v. Barnes* [2007] 3 I.R 130 at p.144:-

> "Article 40.5 of the Constitution, under the heading 'Inviolability of the dwelling' provides as follows:-
>
> > 'The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.'
>
> This is the modern Irish formulation of a principle deeply felt throughout historical time and in every area to which the common law has penetrated. This is that a person's dwelling house is far more than bricks and mortar; it is the home of a person and his or her family, dependants or guests (if any) and is entitled to a very high degree of protection at law for this reason."

Thus, the applicant argues it must follow that failure to ensure that an independent entity is vested with power to affirm, vary or set aside the IDA's decision to compulsorily acquire the applicant's home is like in *Damache*, constitutionally flawed.

The fact that the applicant may appeal or object to the planning application is inadequate as at that stage he will no longer be in possession of his home. He argues that there is a dispute on the merits in relation to planning and environmental issues like in *Donegan*. These matters will still remain unresolved following judicial review. He argues if he had a chance to ventilate the issues before an independent body such An Bord Pleanala and it was to find that the CPO could go ahead he would have to comply with that decision and could not now make the case that he is making. However, he was never given this opportunity.

The words of Geoghegan J. in *Paul Clinton v. An Bord Pleanála (No. 2)* [2007] 4 I.R. 70 I in the context of the consideration of the lawfulness of a decision to exercise a power to compulsorily acquire are of some of force in the present case. At p. 723 of his judgment he stated:-

> It is axiomatic that the making and confirming of a compulsory purchase order (CPO) to acquire a person's land entails an invasion of his constitutionally protected property rights. The power conferred on an administrative body such as a local authority or An Bord Pleanala to compulsorily acquire land must be exercised in accordance with the requirements of the Constitution, including respecting the property rights of the affected landowner (see *East Donegal Co Operative Livestock Mart Ltd. v. The Attorney General* (1970] I.R. 317). Any decisions of such bodies are subject to judicial review. It would insufficiently protect constitutional rights if the court, hearing the judicial review application, merely had to be satisfied that the decision was not irrational or was not contrary to fundamental reason and common sense."

4.3 Lack of evidence on which to base decision;

Articles 6(3) and (4) of Directive 92/43/EC (hereinafter the "Habitats Directive") require that where lands are adjacent to a cSAC an appropriate assessment or study be undertaken to assess the environmental impact of any acquisition for development or any project where development is likely to have an effect on the site. The project can only proceed if, on the basis of the appropriate assessment, it is concluded that it will have no adverse effects on the integrity of the site, unless the project is necessary for reasons of overwhelming public importance.

Mr O'Leary, the Chief Executive Officer of the IDA, concedes that such a study is required but argues that it is only required at the date the respondent applies for planning permission. The applicant argues that a report commissioned by the respondent and drawn up by the Project Management (PM) Group advised that a study was required to confirm the site's suitability for the purpose envisaged by the respondent and that such report should be completed at the outset i.e. at the time the decision to acquire was taken.

Thus, the applicant submits in failing to conduct this study the respondent did not have enough information to be able to assert that it was likely that industrial development would take place on the lands and it appears that it did not have regard to its own expert's opinion. The applicant contends that in the absence of evidence that the lands will be or are likely to be developed for industrial purposes the respondent's decision to acquire is *ultra vires*.

The applicant asserts that the IDA's belief that the lands will be developed is peculiar since the lands are zoned agricultural which means that in their present state they cannot be acquired for the establishment, development or maintenance of an industrial undertaking. The applicant submits that this cannot be ignored in considering if the lands will or are likely to be developed for industrial purposes.

The applicant notes that the respondent's assertion that such development would not be a contravention of Kildare County Development Plan is contrary to the advice of its own planner (Mr Brogan's) report.

Mr.O'Leary's argues at para. 41 of his affidavit that the valuation consultant on behalf of the late Mrs Catherine Reid, the applicant's mother, Mr. Kevin Me Entaggart, indicated that the lands were of sufficient size to enable potential purchasers to seek rezoning on the basis of a comprehensive development plan. The applicant however argues that any valuer may make similar statements but this is entirely different to relying on a planning proposition by the IDA The respondent also relies on a statement of Mr John O'Malley, planning consultant for Mrs Reid who indicated that the existence of advanced manufacturing in the region give the lands significant planning potential. The applicant argues that Mr O'Malley never addressed the local/Kildare planning context or issues raised by Mr. Brogan regarding the fact it is an unzoned area.

The applicant submits that it is clear from the site selection process reported upon that the lands at Blakestown are far less suitable than the next favoured site assessed in circumstances where the second site is already within the development plan for industrial development and raises none of the planning and environmental concerns which arise in connection with the development of the lands at Blakestown for industrial purposes.

4.4 Pre-determination;

The applicant contends that the respondent pre-determined the outcome by identifying the site to be compulsorily acquired first and then engaging in an evaluation and site selection process directed at justifying this decision. The applicant submits that the IDA may argue that no formal decision had been made which may have technically been correct regarding the CPO. However, there was a decision to acquire voluntarily at least as of December, 2011. This is evident from correspondence and contact with the Reid family from which it was clear that the respondent had decided to buy the lands which said correspondence and contact predated the formulation of "selection criteria" and the conclusion of the selection process.

4.5 Breach of the European Convention on Human Rights;

Aside from Constitutional rights the applicant relies on rights under the ECHR. The first named respondent's decision to compulsorily acquire the lands is subject to the requirements of s.3 of the ECHR Act 2003.This section provides:-

> "3.-(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."

The applicant asserts that this section has been breached by failure to properly weigh and balance the applicant's rights under the ECHR (articles 6 and/or 8 and /or 13 and/or article 1 of protocol 10) in the decision making process and in the decision to compulsorily acquire the lands.

The European Court of Human Rights (hereinafter "ECtHR") has ruled that there must be a reasonable relationship of proportionality between the means employed and the aim to be realised in "the public interest" in interfering with rights protected under the Convention (*Lithgow v.UK*).

It is submitted that this Court must determine whether due to the state's interference or passivity a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

It is the applicant's contention that the acquisition of lands for development for industrial purposes now, in circumstances where grave and substantial questions arise in relation to whether the land could ever be lawfully developed for these purposes, does not strike a fair balance between the competing interests of the applicant and the common good.

The essential object of article 1 of protocol 1 of the Convention is to protect individuals against unjustified interference by the State with the peaceful enjoyment of their possessions. In particular the state is under an obligation to provide judicial procedures that offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly any cases concerning property matters.

This is more so in cases involving an interference with rights in the home (article 8) such as this one. In this regard the court is referred to various cases of the EctHR.

In *Yordanova & Ors .v. Bulgaria (Application No. 25446/06)* the ECtHR ruled at para. 118 (vi):-

> "Since the loss of one's home is a most extreme form of interference with the right under article 8 to respect for one's home, any person at risk of an interference of this magnitude should in principle be able to have the proportionality and reasonabless of the measure determined by an independent tribunal in the light of the relevant principles under Article 8....Where the national authorities, in their decisions ordering and upholding the applicant's eviction, have not given any explanation or put forward any arguments demonstrating that the applicant's eviction was necessary, the Court may draw the inference that the State's legitimate interest in being able to control its property should come second to the applicant's right to respect for his home."

In *Bjedov v.Croatia* (Application No.42150/09) the EctHR ruled at para. 66:-

> "in this connection the Court reiterates that any person at risk of an interference with her right to home should in principle be able to have the proportionality and reasonabless of the measure determined by an independent tribunal in light of the relevant principles under article 8 of the Convention ...."

In *Buckland v.United Kingdom* (Application No.40060/08) the court ruled at para. 70:-

> "As a result, the applicant was dispossessed of her home without any possibility to have the proportionality of her eviction determined by an independent tribunal. It follows that there has been a violation of Article 8 of the convention in the present case."

4.6 Bias;

The applicant submits that there is an issue of objective bias. The chairman of the first named respondent Mr. Liam O'Mahony took part in the original decision to proceed with the site on Hedsor lands based on a selection process which had been carried out by a firm of which he is director, namely the PM Group. The applicant contends that key selection criteria identified on behalf of the respondent as underpinning the site selection process and the evaluation of the five short listed sites assessed for selection were not

properly applied in the selection of the lands by the PM Group in arriving at their recommendation that the lands be selected. The site was not objectively the most suited of the sites assessed for industrial development.

The test for objective bias is what would the reasonably well informed ordinary person think. The IDA states that Mr O'Mahony had no part in the selection process or obtained no advantage from the selection of the site. The applicant argues that this is irrelevant as he alleges objective bias. The manner in which the selection was conducted is enough to lead to a suspicion on the part of the applicant that the selection was done unfairly and leave him with a reasonable apprehension of bias.

First named respondent's Submissions
5.1 Specific project does not have to be identified;

The first named respondent contends that it did not have to identify or assess a specific project or particular industrial entity before deciding to acquire the lands. It contends its purpose in making the CPO is to acquire the lands for later use. It is important to have a land bank so when a foreign enterprise seeks to establish itself in Ireland the IDA can indicate to them that it may have suitable land.

It is submitted that the appropriate test is that set out in s.l6 of the Industrial Development Act 1986 Act which is a different test to that set out in s.213 of the Planning and Development Act 2000.The IDA submits that the 2000 Act has no application to the exercise by the first named respondent of its powers under s.16 That section provides:-

> "16.-(1) For the purpose of providing or facilitating the provision of sites or premises for the establishment, development or maintenance of an industrial undertaking the Authority may-
>
> (a) acquire (either permanently or temporarily and either by agreement or compulsorily) any easement, way-leave, water-right or other right whatsoever over or in respect of any land or water;
>
> (b) terminate, restrict or otherwise interfere with (either permanent}y or temporarily and either by agreement or compulsorily) any easement, way leave, water-right or other right whatsoever over or in respect of any land or water;
>
> (c) construct, adapt and maintain buildings and other works;
>
> (d) provide services and facilities in connection with land;
>
> (e) sell, lease or otherwise dispose of land vested in it;
>
> (g) make grants to aid persons to-
>
> (i) acquire land,
>
> (ii) construct and adapt buildings and other works, and
>
> (iii) provide services and facilities in connection with land;
>
> (h) do any act or thing which may be necessary for or incidental to the doing of anything which the Authority is by the preceding paragraphs authorised to do,
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> if the Authority-
>
> (i) considers that industrial development will or is likely to occur as a result, and
>
> (ii) is satisfied that the undertaking conforms or will conform to the criteria set out in *subsections (3)* and *(4)* of *section 21* or *section 25 (2).*
>
> 2) The provisions of the *Second Schedule* shall apply to the exercise by the Authority of its powers under this section.
>
> (3) Nothing in *subsection (1)* shall be construed as affecting the operation of section 130 of the Transport Act, 1944."

The respondent argues that s.25 of the Industrial Development Act 1986 has regard to the type of project and if it may warrant a grant under the section. The section does not envisage a specific identity of developer or plan to come into play for the criteria of the section to be met. Section 25 provides that:-

> " 25.-(1) The Authority may make a grant (in this section referred to as an employment grant), on such terms and conditions as it thinks proper, towards the employment of persons in a service industry carried on as a separate undertaking.
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> (2) An employment grant may be made where, in the opinion of the Authority, the service industry would contribute significantly to regional and national development and, in particular-
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> (a) would be commercially viable,
>
> (b) would have good prospects for growth, and
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> (c) would not be developed in the absence of an employment grant.
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> (3) The amount of an employment grant shall be subject to such financial limits as may be fixed from time to time by the Minister with the concurrence of the Minister for Finance.
>
> (4) The Authority shall not, without the prior permission of the Government, give in respect of a particular undertaking an employment grant or grants exceeding in the aggregate £1,250,000."

Until the IDA has purchased the land it cannot make detailed appraisals of it so it argues it would be unrealistic to expect it to have a definitive plan for the land at this stage.

In *Henry A. Crosbie v. Custom House Dock Development Authority* [1996] 2 IR 531 the planning application was meant to be for the National Sports Centre. This was later changed to a waste management centre. The CPO for the applicant's lands was quoted at p.536 of Costello P.'s judgment, and it stated:-

> 'Subject to the provisions of this order, the authority is hereby authorised to acquire compulsorily for the purposes of the Urban Renewal Acts, 1986 and 1987 and, in particular, for the purposes of s.9 of the Urban Renewal Acts, 1986, the land described in the schedule hereto...'

Costello P. went on to say also at p.536:-

> "It is of significance to note that the purpose for which the land was to be acquired was 'for the purposes ofs.9' of the Acts-the order did not specifically limit the purpose of the acquisition to the proposed erection of a National Sports Centre."

Following on from this case the respondent submits that it does not have to identify a specific developer or project in order to justify the invocation of its statutory powers.

The respondent also points to the case of *Clinton v An Bord Pleanala* [2007] 4 IR 701.1n that case the applicant was the owner of land in O'Connell Street, Dublin. He challenged a CPO on the grounds that the statutory requirements in relation to the CPO (being s.213 of the Planning & Development Act 2000) made it necessary for the order to specify the particular development for which the required site was to be compulsorily acquired. Geoghegan J. in the Supreme Court observed at para. 43 of the judgment that in a case where property was or was not "immediately required for a particular purpose" but it was intended for the purpose of future development, "There would be no basis, however, for declaring the Compulsory Purchase Order void for lack of particularity".

5.2 Development likely to occur;

In making its decision on the 23rd November, 2012, the respondent contends that there was more than ample evidence before it to justify it concluding that industrial development will or is likely to occur on the applicant's lands following the compulsory acquisition of the lands by it as provided under s.16 (1) (a) (i) of the Industrial Development Act 1986.

In *O'Keeffe v. An Bord Pleanala* (1993) 1 IR 39 in the Supreme Court at p.72 Finlay J. observed:-

> "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."

The respondent argues that all material presented to the adjudicator was looked at by the board. Mr.O'Leary at para. 20 of his affidavit confirms that the board considered all of the evidence before arriving at its decision:-

> "I confirm that, as a member of the Board of the IDA, I attended meetings of the Board of the IDA to decide on the question of compulsorily acquiring the Applicant's land. I say that the Board members in doing so had before them and considered all of the material generated during the process including the transcripts of the oral hearing, all written evidence and submissions, notices, correspondence and all other material presented both before and at the oral inquiry and the report of the Adjudicator prepared in respect of same".

The respondent argues that industrial development "likely" to occur means on the balance of probabilities and not beyond reasonable doubt. Although some evidence at the oral hearing provided some expert opinion that industrial development will not or is unlikely to occur it was within the respondent's competence and statutory remit to make a judgment call as to whether or not this evidence challenged the evidence to the contrary as presented by the its experts.

The acquisition of the applicant's lands for the purposes of a land bank for future development is not in itself *ultra vires* under the powers of the IDA provided that there are good reasons for the IDA determining that such acquisition is for the purpose of the provision of a particular site and where it considers the industrial development will or is likely to occur as a result of the acquisition of the land. The fact that the lands are not zoned is not crucial to the decision made by the first named respondent and statute does not require that present zoning be changed before the IDA can decide that industrial development will take place.

While there is statutory protection for environmental sites in the vicinity of the lands at issue this does not mean that planning cannot take place. The IDA could buy a site and then decide how it is to be dealt with. For example it could choose to facilitate the provision of a site by allowing the site to be used in different ways which do not require planning permission i.e. exempted developments. This could arise when a body has planning permission to carry out industrial development and requires an additional site for a period of time for use ancillary to the development. No planning permission will be required for the ancillary land e.g. a storage area for materials in the main site is exempt. In that situation planning permission is not the be all and end all. The respondent argues therefore that the decision to acquire without planning permission is reasonable and rational.

5.3 Lack of reasons given;

The respondent submits that the process adopted and agreed by it far exceeds any legislative requirements in respect of other legislation pertaining to the procedure to be adopted for landowner's consultation in respect of the compulsory acquisition of land.

The applicant was appropriately represented at the earliest possible stage and all documentation, transcripts, legal and technical reports and submissions were circulated to him, therefore he was privy to the reasoning of the IDA. Moreover, he fully took part in the oral hearing wherein he tested the information, presented his own evidence and heard the IDA's experts.

The reasoning behind the decision making of the IDA is readily to be ascertained from the decision made by the board on the 23rd November, 2012, which identified all of the material and processes which informed its decision making including material comprising evidence in the submissions presented to the adjudicator prior to and during the oral hearing. This was then considered by the first named respondent's board, and is recorded in the decision itself.

Therefore, from the outset it is argued, the applicant knew why the respondent wished to purchase the land and it was unnecessary for the respondent to explicitly state its reasons.

The respondent relies on various authorities which have dealt with the issue of reasons. In *Mc Cormack v. An Garda Siochana Complaints Board* [1997] 2 I.L.R.M 321 Costello P. addressed the issue of failure to state reasons at p.331. He found that:-

> "The Board arrived at an opinion that neither an offence nor a breach of discipline had been disclosed and having done so it made a decision to take no further action in the matter. The reasons for the decision were self-evident; it followed from the opinion the board had reached and there was no need for the board to say so. The applicant's case must therefore be that the board had a duty to provide reasons for its opinion that no breach of discipline and no offence had been disclosed."

He also stated at pp.332-333 that:-

> "It is well established by the courts in England that the rules of natural justice do not require that reasons should be given for administrative decisions...[it] is not the law of this country that procedural fairness requires that in every case an administrative decision making authority must give reasons for its decisions...[i]t seems to me that that issue can largely be determined by considering whether some detriment is suffered by the applicant by the failure of the board to give reasons for the opinion which it reached because if no detriment is suffered then no unfairness can be said to exist."

The respondent argues that the same criteria apply to the instant case.

In *South Bucks DC v Porter* [2004] UKHC 33 the House of Lords held at para. 36 that:-

> "Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequate reasoned decision."

The respondent also points to *Clinton (No.2)* in arguing that the applicant is wrong to contend that there is a flaw in the CPO because a specific project is not provided. The respondent submits that this case is authority for the proposition that a body is not required to give in-depth reasons where even if the lands are not required for immediate use it is clear that they are required for future use. At para. 14 of his judgment Geoghegan J. quoted the decision of An Bord Pleanala:-

> 'AND WHEREAS An Bord Pleanala has concluded that the acquisition by the local authority of the lands included in the order is necessary for the purposes of facilitating the implementation of the Dublin City Development Plan and that the said objections cannot be sustained against the said necessity.'

The applicant in that case had taken issue with the wording of the CPO by Dublin City Council in that it only mentioned it was needed for "development purposes".

The court found that there was not much difference between the Council's and An Bord Pleanala's wording ("necessary for the purposes of facilitating the implementation of the Dublin City Development Plan") and although the wording of Dublin City Council was more terse it was regarded as acceptable by the Court since although there was no immediate need for regeneration this would be the ultimate need. It was clearly the reason for the CPO and therefore the purposes set out in the CPO by Dublin City Council were adequate.

At Para. 43 the Court held:-

> "Since, of its nature, this particular purpose did not involve a definite form of development to achieve regeneration, the second respondent was not obliged to make such a determination. In those circumstances the purposes set out in the compulsory purchase order were adequate, though I would prefer the wording used by the first respondent. There would be no basis however for declaring the compulsory purchase order void for lack of particularity".

A letter dated the 15thJune, 2012, from Gallagher Shatter Solicitors to the applicant's solicitors, Con O'Leary & Company, specifies what the IDA wished to do with the lands. The letter states that the IDA is seeking to acquire the lands to provide sites for the development of industrial undertakings in the advanced manufacturing sector which will produce products for sale on the world market.

Thus, the respondent contends that the applicant cannot have been in any doubt as to the underlying reasons of the board in arriving at its conclusion. It submits that the applicant is only raising an argument now regarding the reasons given to seek to have a decision that he does like quashed.

5.4 Proportionality;

The respondent contends that it fully considered the proportionality of seeking to CPO the applicant's lands.

The Industrial Development Act 1993 sets out the functions of the IDA.

Section 8 provides that:-

"The functions of the IDA shall be, as an agency of Forfás

> a) to promote the establishment and development, in the State, of industrial undertakings from outside the State,
>
> (b) to make investments in and provide supports to industrial undertakings which comply with the requirements of the enactments for the time being in force".

At para. 13 of Mr O'Leary's affidavit he confirms that:-

> "The lands in Blakestown are particularly important strategic lands for the particular type of industrial development identified by the IDA".

He refers to the fact that a number of successful enterprises are already located in the area and their success is related to the appropriateness of the sites identified by the IDA. At para. 17 he further states that he believes that:-

> "the lands at Blakestown are of national and economic importance to the State in winning FDI in the advanced manufacturing sector."

It is evident therefore that the acquisition of these lands is in the public interest and meets the agenda provided for under legislation

Yordanova related to circumstances in which a house was taken by way of repossession without facility being given to the homeowners to make a compassionate plea against it. The first named respondent argues that unlike that case it gave the applicant every chance to make his case.

Para.18(v) of the ruling in *Yordanova* stated:-

> "Where the national authorities, in their decisions ordering and upholding the applicant's eviction, have not given any explanation or put forward any arguments demonstrating that the applicant's eviction was necessary, the Court may draw the inference that the State's legitimate interest in being able to control its property should come second to the applicant's right to respect for his home (ibid).

In this case the respondent has demonstrated why it requires the land and it is thus distinguishable from *Yordanova*.

In *Buckland* where a gypsy had been disposed of her home the court found at para. 70:-

> "As a result, the applicant was dispossessed of her home without any possibility to have the proportionality of her eviction determined by an independent tribunal. It follows that there has been a violation of Article 8 of the Convention in the present case."

The applicant submits that it met the needs of proportionality by way of the hearing conducted by Mr. Bradley S.C. This may not have been an independent tribunal however the respondent asserts that the applicant now has access to such a tribunal in the form of the Judicial Review proceedings before this Court.

5.5 Allegation of Bias;

The chairman of the IDA Mr O'Mahony was appointed as such in February 2010 and at that stage he was already a non-executive director of the PM Group but he had no role in the preparation of the PM report which advised on the merits of the relevant lands intended for acquisition.

The test, the first respondent, submits is not if Mr Reid thinks there is something wrong with the process undertaken or even if the court does. The test for objective bias is if the reasonable man who is properly informed of all the circumstances of the matter would have any apprehension of an unfair process of decision-making rising from the business connection of Mr O'Mahony with the PM Group. It is submitted that no apprehension in the instant case would arise on the part of the reasonable man.

The case law does not envisage a flawed process arising from such a business connection In *Bula Limited v. Tara Mines Limited & Ors* (No.6) [2000] 4 IR 412 the issue at hand was the possible bias on the part of members of the Supreme Court because of previous legal advice given by them to the parties some years earlier. No bias was found in that case.

At para. 49 of his affidavit Mr.O'Leary's states in relation to the allegation:-

> "....it is not accepted that the ranking analysis or scoring of the sites is not objectively justified. As is apparent from the information ventilated during the course of the Oral hearing, the PM report was prepared by Mr Tony Me Grath. The Chairman of the IDA, Mr Liam O'Mahony, had no involvement in the appointment of the PM Group to advise the Executive of the IDA ....or...relating to the compilation of the PM Group Report..."

Neither the PM Group nor Mr O'Mahony had anything to gain from the choice of the site. Neither party had any connection with any developer therefore the first named respondent cannot understand what advantage the applicant alleges. Consequently it argues that his challenge on the grounds of objective bias is misplaced.

2nd named respondent's submissions
6.1 Unfair and contrary to the constitution that no independent arbiter;

The second named respondent argues that the provisions of the Industrial Development Act 1986 (as amended) enjoy a presumption of constitutionality and the onus lies fairly with the applicant in seeking to demonstrate that the provisions are unconstitutional.

It is submitted that the applicant's case is based on a mischaracterisation of the nature of the decision making process under s.l6 of the 1986 Act. The applicant seeks to portray the decision as a judicial or quasi-judicial decision and then argues that the decision must meet the strict requirement for independence which is applicable to a judicial decision. He contends that it is unfair that there is no independent arbiter appointed with the power to confirm, amend or refuse the first named respondent's decision to acquire his lands. The respondent notes that this very issue has been settled by previous judgments.

In *O'Brien v. Bord na Mona* the applicant sought to challenge the constitutionality of a statutory power of compulsory acquisition vested in Bord na Mona under the Turf Development Act 1946. The grounds for the challenge were summarised by O'Higgins J. at p.280/281:-

> "Secondly, and in the alternative, it was submitted that the absence of any procedure contained in the Act of 1946 for appeal against the making of a compulsory acquisition order, or for the confirmation by an external authority or outside tribunal of the making of a compulsory acquisition order, constituted a breach of both the articles concerned."

The Supreme Court made a distinction between a judicial function, which attracts the full rigors of the *nemo judex* principle, and an administrative function which does not, but which does however attract a requirement to act judicially i.e. observe fair procedures and constitutional justice. O'Higgins J. held at p.282 that:-

> "In a great number of instances, persons carrying out acts which are clearly in their essence administrative (and, particularly, in cases where such acts affect property rights) have under our law an obligation to act fairly and, in that sense, judicially in the carrying out of those acts and in the making of the decisions involved in them. They can and will

> be reviewed, restrained and corrected by the Courts if they act in a manner which is considered to be arbitrary, capricious, partial or manifestly unfair. In that sense it can be said that such persons carrying out administrative acts have an obligation to act judicially; but so to say does not determine the question as to whether, within the category of different functions, they are administrative actions or judicial actions....[i]n the view of the Court it is necessary in this case to examine and consider the structure and intention of the Act of 1946 in order to determine whether Bord na Mona, in making a decision to acquire land or property rights compulsorily, is exercising a function or power of a judicial nature. If it is, then it cannot be a judge in its own cause. But... if it is acting in discharge of an administrative function, it would have an obligation to act fairly and properly but would not necessarily be inhibited from deciding the question as to whether or not to acquire."

The Court characterised the function of Bord na Mona as administrative and not judicial. It accordingly found that the absence of a scheme for confirming the decision by an external authority was not unconstitutional and the *nemo judex* principle did not apply.

Similarly, the respondent argues that its decision is an administrative one and does not attract the same requirement for independence and impartiality as attends a judicial decision.

The respondent refutes the notion that *O'Brien* is old law and submits that the principle in that case was more recently stated by the Supreme Court in *O'Cleirigh v. Minister for Agriculture* [1998] 4 I.R. 15 which concerned the assessment of compensation for the loss of public office.

More recently in *Ballyedmond v. Commissioner for Energy Regulation* [2006] IEHC 206 Clarke J. discussed the nature of the consideration relevant to a decision to acquire land compulsorily. He described the role of the Commission for Energy Regulation as follows at para. 3.2:-

> "It seems to me that the role of the Commission, when exercising its remit in relation to decisions concerning the grant of consent to the construction of a pipeline and the making of acquisition orders necessary for the construction of such a pipeline, is similar to the role of the Labour Court as described in *Ashford Castle*, with both bodies exercising a role at the end of the spectrum where such a body can be expected to bring to bear, in reaching its conclusions, its own expertise on the issues concerned. Included in such expertise will be a facility in the assessment of expert evidence within its own field."

At another point in the judgement at para. 4.1 he stated as follows:-

> "In considering whether or not to approve of the pipeline project as a whole and, in particular, to specify the route of that pipeline by making acquisition orders in relation to rights over properties along that route, the Commission is not carrying out the sort of role which requires it to make specific findings of fact *per se*. It may well have to come to conclusions as to certain factual matters as part of its overall assessment of the question of whether it should approve of the project and in determining whether the route proposed should be followed. However those matters are not necessary "proofs" in themselves, in the sense in which that term might be applied to specific factual matters that need to be established in order that a court may come to a conclusion or, indeed, in order that a statutory or administrative body may come to a similar type of conclusion. Questions such as cost, archaeological consequences, engineering difficulty and the like are but a means to an overall end which is to determine whether the project, as proposed, should go ahead."

The acquisition of land for industrial development is in the common good and in the public interest. Such development involves the consideration of a range of matters by the IDA: these include *inter alia* economic, financial and social aspects. These are matters in respect of which a court is not well equipped to make a decision, therefore the respondent contends it is legitimate for the legislature to entrust that function to a specialist body such as the IDA. The IDA has no interest in the decision to compulsorily acquire land such as to affect its independence or impartiality and thus does not attract a requirement for independence and impartiality applicable to a judicial/quasi judicial body.

6.2 Availability of judicial review is sufficient;

The respondent argues that if this Court was to find any shortcomings in its role as an in impartial decision-maker such are remedied by the existence of judicial review before the High Court which has the power to correct any error made. This, the respondent submits, operates as a safety mechanism ensuring that affected persons are afforded fair procedures/constitutional justice. The applicant seems to have overlooked this fact and the role of judicial review in general.

In *Clinton* the Supreme Court emphasised the right of a landowner affected by compulsory acquisition to make an application for judicial review with Geoghegan J. holding at para. 46:-

> "The power conferred on an administrative body such as a local authority or An Bord Pleanala to compulsorily acquire land must be exercised in accordance with the requirements of the Constitution, including respecting the property rights of the affected landowner....Any decisions of such bodies are subject to judicial review."

The decision making process the respondent argues must be looked at in the round and this includes the right to judicial review. This is confirmed by the case law of the European Court of Justice which notes that in examining whether a particular decision making process complies with article 6 of the ECHR it is necessary to have regard to the decision making process in its entirety e.g. *Albert and Le Compte v.Belgium* [1983]5.E.H.R.R 533.

A similar question to that raised by the applicant in this case was rejected in the UK House of Lords in R (*Alconbury Developments Ltd. v. Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23- namely whether a decision to acquire land compulsorily may only be made by an administrative body which is independent and impartial. The House of Lords found that the Secretary of State's jurisdiction to make compulsory purchase orders was consistent with article 6 of the ECHR. The House placed emphasis on the fact that the Secretary of State's decision is amenable to judicial review before the courts and this was sufficient to constitute "full jurisdiction" for the purposes of article 6.

6.3 Article 6 of ECHR;

The respondent denies that an independent correct procedure capable of meeting the requirements of article 6 of the ECHR has not been adopted by the state. It relies on *Alconbury* wherein Lord Slynn at paras. 40-50 stated:-

> ".... The question the European Court has shown, is whether there is sufficient judicial control to ensure a determination by an independent and impartial tribunal subsequently.....[t]he common law has developed specific grounds of review of administrative acts and these have been reflected in the statutory provisions for judicial review such as are provided for in the present cases....The legality of the decision and the procedural steps must be subject to sufficient judicial control. But none of the judgments before the European Court of Human Rights requires that the court should have "full jurisdiction" to review policy or the overall merits of a planning decision".

The respondent argues the same grounds of judicial review are available in this jurisdiction and the structure here as in the UK is adequate.

The ECtHR in *Bryan v. United Kingdom* (App no.19178/91) at paras. 44-45 found that full jurisdiction does not mean a full appeal is necessary to be present and judicial review is sufficient.

> "In particular, as is not infrequently the case in relation to administrative-law appeals in the Council of Europe member States, there was no rehearing as such of the original complaints submitted to the inspector; the High Court could not substitute its own decision on the merits for that of the inspector; and its jurisdiction over the facts was limited (see paragraphs 25 and 26 above). However, apart from the classic grounds of unlawfulness under English law (going to such issues as fairness, procedural propriety, independence and impartiality), the inspector's decision could have been quashed by the High Court if it had been made by reference to irrelevant factors or without regard to relevant factors; or if the evidence relied on by the inspector was not capable of supporting a finding of fact...."

Further in *Chapman v. United Kingdom* (App. no. 27238/95) the ECtHR again said that judicial review which is limited to classic grounds of legality affords adequate judicial control of administrative decisions. At para. 124 the court noted:-

> "It finds in this case that the scope of review of the High Court, which was available to the applicant after a public procedure before an inspector, was sufficient in this case to comply with Article 6 § 1. It enabled a decision to be challenged on the basis that it was perverse, irrational, had no basis on the evidence or had been made with reference to irrelevant factors or without regard to relevant factors. This may be regarded as affording adequate judicial control of the administrative decisions in issue."
>
> Therefore the respondent submits that it fulfils requirements under the ECHR as the applicant has recourse to judicial review.

The ECtHR in its judgment in *Zumtobel v. Austria* (App.No.12235/86) at para.31 upheld a limited form of judicial review in the specific context of the compulsory acquisition of land.

> "As regards the review effected by the Administrative Court, its scope must be assessed in the light of the fact that expropriation -the participants in the proceedings all recognise this - is not a matter exclusively within the discretion of the administrative authorities, because Article 44 para. 1 of the Provincial Highways Law makes the lawfulness of such a measure subject to a condition: the impossibility "of constructing or retaining a section of highway which is more suitable from the point of view of traffic requirements, environmental protection and the financial implications" (see paragraph 16 above). It was for the Administrative Court to satisfy itself that this provision had been complied with. In this respect the present dispute may be distinguished from the Obermeier v. Austria case (judgment of28 June 1990, Series A no. 179, p. 23, para. 70).

Just as on the facts of *Zumtobel* the decision to buy the land compulsorily under the IDA 1986 is not a matter "exclusively within the discretion of" the relevant administrative authority i.e. the IDA. Any decision to acquire land compulsorily must fulfil the statutory criteria specified under Section 16.This means that there is no need for the decision maker to be independent as long as the applicant can then go before the High Court and is sufficient to fulfil the obligations of Article 6 ECHR.

If the applicant can show that the test under s.l6 is not satisfied the CPO will fail. However the respondent contends that he has failed to do so and the Court should therefore dismiss his application.

6.4 Reliance on other case-law is misplaced;

The applicant relies on *Damache* and concedes that if he was only relying on 0'Brien he would lose the constitutional argument. He argues that the law has moved on since *O'Brien*. The respondent denies this is the case and submits that *O'Brien* and *Damache* have the same legal principles and are in fact reconcilable.

The respondent contends therefore that the applicant is incorrect to rely on *Damache*. The circumstances in that case are not analogous to the type of decision at issue in the present case. *Damache* related to the issuing of a search warrant, which by definition must have some element of surprise. The person affected has no opportunity to seek judicial review in advance of the execution of the warrant, the only safeguard being the person who signs the warrant. In contrast a CPO is not self-executing and the person affected has an entitlement and an effective chance to take judicial review proceedings before the decision is implemented.

Moreover, the IDA has no vested interest in the decision to make a CPO since it is not buying the land for itself. This is in marked contrast to *Damache* where the Gardaí had a real interest in an investigation.

Decision

7. The issues that arise in this case may be set out under the following headings:

> (a) The power of the IDA to compulsorily acquire land- must there be positive evidence that there is going to be a development on the land before they can move to acquire,
>
> (b) The IDA failed to evaluate the site before deciding to acquire. There was no sufficient evidence before it upon which it could make this decision,
>
> (c) The decision was vitiated by objective bias due to the presence of Mr. Liam O'Mahony on the Board as Chair and his position as an nonexecutive director of PM,
>
> (d) There were no reasons or no proper reasons given by the IDA in its decision,

(e) The constitutional case- *nemo iudex in causa sua*,

(f) The European Convention on Human Rights issue- the action of the IDA was disproportionate- judicial review does not provide an independent tribunal capable of independently evaluating the fairness and proportionality of the decision made.

7.1 The power of the IDA to compulsorily purchase

This power is provided by s. 16 of the Industrial Development Act 1986. This provides as follows:-

"(1) For the purpose of providing or facilitating the provision of sites or premises for the establishment, development or maintenance of an industrial undertaking the Authority may -

(a) acquire any land either permanently or temporarily and either by agreement or compulsorily;

if the Authority -

(i) considers that industrial development will or is likely to occur as a result, and

(ii) is satisfied that the undertaking conforms or will conform to the criteria set out in subsections (3) and (4) of section 21 or section 25 (2)."

Section 21 of the Act allows for the making of a grant by the first named respondent and provides further: -

"(3) This section applies to an industrial undertaking in respect of which the Authority is satisfied that it-

(a) will produce products for sale primarily on world markets, in particular those products which will result in the development or utilisation of local materials, agricultural products or other natural resources; or

(b) will produce products of an advanced technological nature for supply to internationally trading or skilled sub-supply firms within the State; or

(c) will produce products for sectors of the Irish market which are subject to international competition; or

(d) is a service industry as specified by the Minister by order under section 3."

(4) The industrial undertaking shall also satisfy the Authority that-

(a) financial assistance is necessary to ensure the establishment or development of the undertaking;

(b) the investment proposed is commercially viable;

(c) it has an adequate equity base;

(d) it has prepared a suitable company development plan; and

(e) it will provide new employment or maintain employment in the State that would not be maintained without assistance given under this Act and increase output and value added within the economy."

Section 25 provides for the Authority to make a grant on such terms or conditions as it thinks proper towards the employment of persons in a service industry and it further provides as follows: -

"(2) An employment grant may be made where, in the opinion of the Authority, the service industry would contribute significantly to regional and national development and, in particular-

(a) would be commercially viable;

(b) would have good prospects for growth, and

(c) would not be developed in the absence of an employment grant."

Thus it provides quite simply that for the purposes of providing or facilitating the provision of sites for the establishment, development or maintenance of an industrial undertaking, the authority may, *inter alia*, acquire either by agreement or compulsorily land where, *inter alia*, it considers that industrial development will or is likely to occur as a result of its acquisition thereof. On a plain reading this envisages circumstances where the industrial development is likely to occur as a result of the IDA's acquisition of a particular site. Thus the Act provides that the industrial development will likely occur as a result of the compulsory purchase. On the applicant's argument the opposite would be the case. The compulsory purchase would occur as a result of the individual development. Moreover, the inclusion of the word "likely" seems to me to support the IDA's case that this power is not limited to circumstances where a particular enterprise has been identified. It seems to support an interpretation that allows the acquisition of sites which may be used to attract any appropriate development rather than a specific one as contended for by the applicant. The reference to "sites" or "premises" also seems to support this broader interpretation. If the power were intended to be limited to a particular development, it seems more probable that the wording of the Act would have referred to a particular site. On this interpretation, therefore, it would seem that the power provided is to acquire suitable lands that can then be used by the IDA as an incentive, notably to foreign industrial enterprises to come to Ireland. The evidence is that this ability to provide a particularly suitable site to intending investors is a powerful inducement. It seems to me that the broader interpretation contended for by the IDA is the one most consonant with the strategy behind the Act. This strategy is to allow the IDA to successfully compete in the international market place to attract an industrial enterprise to Ireland with all the economic benefit that flows therefrom.

7.2 Failure to evaluate the site

The applicant's case in this regard seems based upon certain evidence he provided to the hearing as to the unlikelihood of industrial development on his lands due to certain planning and environmental issues. Yet the IDA is clearly the expert body nationally to

determine whether industrial development is likely or not. It must classically be a function of its own expertise. Thus, the jurisdiction of the Court to intervene is very limited. It must be satisfied that there was no relevant material before the Board when it made its decision to acquire these lands. See *O'Keeffe v. An Bard Pleanala* [1993] 1 I.R. 39. In this regard it should first be noted that s. 16 and s. 25 cited above require substantial criteria to be fulfilled before the IDA can exercise its power of compulsory purchase. As is clear therefrom, the IDA must satisfy itself of matters that are almost exclusively within its own particular area of expertise. Here there appears in the transcript of the oral hearing, in the extensive written evidence, in the submissions made by the parties and in the adjudicator's report, all of which was before the Board of the IDA when it decided to invoke its power of compulsory purchase, an amplitude of evidence upon which the Board could rely to reach its decision. I do not believe it was seriously argued that this was not so.

Thus the Court cannot intervene on this ground.

7.3 Objective bias

The test is well known. It involves questions of perception of a likelihood of bias as opposed to actual bias. It is set out by Denham J., as she then was, in *Bula Ltd. v. Tara Mines Ltd. & Ors. (No.6)* [2000] 4 I.R. 412 at p. 441:

> "... it is well established that the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test- it invokes the apprehension of the reasonable person."

Furthermore, this reasonable person is an independent observer, not oversensitive and with knowledge of all the facts material to the issue including those that tended in favour and those against the possible apprehension of risk. See *Kenny v. Trinity College* [2008] 21.R. 40 at p. 45. In the circumstances of this case, the Chair of the IDA was a non executive director since February 2009 of a consultancy firm, Project Management Group (PM). This Group was retained by the IDA to advise in relation to the lands in question. He had no role in the appointment of PM by the Board in February 2008 to join a panel of consultants to advise on site selection. This appointment was extended in November 2011. He had no role in this extension. He had no role in the preparation of the PM report on the applicant's lands involved herein. Added to these considerations which must be taken as being within the applicant's knowledge is the fact that no body has any particular interest in the findings of the PM report. No specific developer exists who may benefit, no identifiable benefit could accrue either to the Chairman or to PM. By contrast, Mr. Alexander's exclusion from this process by the IDA was made because he was a director of Hewlett Packard who it was thought might be one of the parties interested in developing the relevant site. Clearly the Board was alert to the possibility of a perception of bias. It seemed to me that no reasonable person informed of all these facts could reasonably come to the conclusion that the decision made was vitiated by a reasonable perception of bias. Thus, this ground also fails.

7.4 Failure to give reasons for its decision

The obligation on an administrative body to give reasons for its decision is very limited. In *McCormack v. An Garda Siochana Complaints Board* [1997] 2 ILRM 321, Costello P. stated as follows (at p. 331):

> "The Board arrived at an opinion that neither an offence nor a breach of discipline had been disclosed and having done so it made a decision to take no further action in the matter. The reasons for the decision were self-evident; it followed from the opinion the Board had reached and there was no need for the Board to say so.
>
> The applicant's case must therefore be that the Board had a duty to provide reasons for its opinion that no breach of discipline and no offence had been disciosed."

Later, at p. 332, he continued:

> "It is well established by the courts in England that the rules of natural justice do not require that reasons should be given for administrative decisions ...
>
> [It] is not the law of this country that procedural fairness requires that in every case an administrative decision-making authority must give reasons for its decisions.
>
> It seems to me that that issue can largely be determined by considering whether some detriment is suffered by the applicant by the failure of the Board to give reasons for the opinion which it reached because if no detriment is suffered then no unfairness can be said to exist."

Has the applicant suffered some detriment due to the failure of the IDA to give reasons for its decision? In the light of all of the process that has occurred herein since first the IDA approached the applicant in 2011 with a vie{to purchasing his land, including the hearing where the applicant was fully represented, it is not possible to avoid the conclusion that he is fully aware of the reasoning behind this decision. He cannot establish any prejudice caused by the form of the decision by the IDA of the 23rd November, 2012 even if it assumed that it did not give reasons or sufficient reasons.

7.5 The constitutional issue- *nemo iudex in cause sua*

The applicant raises claims under the Constitution and the European Convention on Human Rights. This Court must first address the constitutional issues before turning, if necessary, to the Convention issue. See *Carmody v. Minister for Justice and Equality* [2010] 1 I.R. 635 at 650.

The applicant's case is that his right to constitutional justice is breached herein because there exists no independent arbiter with the power to amend, confirm or quash the IDA's decision to acquire his lands. Clearly the onus lies on the applicant to rebut the presumption of constitutionality of the Industrial Development Act set out above.

In this case what is challenged is not the power of the State to compulsorily acquire land. This power exists beyond doubt in Irish law- see *O'Brien v. Bard na Mona* [1983] I.R. 255. The applicant argues that there should, however, be some form of independent arbiter to determine whether this should be permitted in individual cases. It seems to me, however, that the judgment in *O'Brien* deals squarely with this claim where (at p. 281) O'Higgins C.J. states as follows:-

> "Secondly, and in the alternative, it was submitted that the absence of any procedure contained in the Act of 1946 for appeal against the making of a compulsory acquisition order, or for the confirmation by an external authority or outside tribunal of the making of a compulsory acquisition order, constituted a breach of both the Articles concerned."

This seems precisely the claim that is made here. Answering this claim in the *O'Brien* case, O'Higgins C.J. continued as follows (at p. 282):-

> "In a great number of instances, persons carrying out acts which are clearly in their essence administrative (and, particularly, in cases where such acts affect property rights) have under our law an obligation to act fairly and, in that sense, judicially in the carrying out of those acts and in the making of the decisions involved in them. They can and will be reviewed, restrained and corrected by the Courts if they act in a manner which is considered to be arbitrary, capricious, partial or manifestly unfair. In that sense it can be said that such persons carrying out administrative acts have an obligation to act judicially; but so to say does not determine the question as to whether, within the category of different functions, they are administrative actions or judicial actions: *cf Fisher v. Irish Land Commission; McDonald v. Bard na gCon and Loftus v. The Attorney General*.
>
> In the view of the Court it is necessary in this case to examine and consider the structure and intention of the Act of 1946 in order to determine whether Bord na Mona, in making a decision to acquire land or property rights compulsorily, is exercising a function or power of a judicial nature. If it is, then it cannot be a judge in its own cause. But on the other hand, if it is acting in discharge of an administrative function, it would have an obligation to act fairly and properly but would not necessarily be inhibited from deciding the question as to whether or not to acquire."

And further (at p. 283) he continued:-

> "The statute must, therefore, be viewed as constituting a decision that the common good requires that bogland should be available for compulsory acquisition. The task of securing that objective was vested in Bord na Móna, a statutory corporation.
>
> Viewed in that light, it would appear clear that the decision as to whether or not any particular area of land should be acquired for the attainment of that objective should be effectively vested in Bord na Móna. There is not any other authority of the State, executive or judicial, which should make the decision in principle as to whether, balancing the desirability of the production of turf on the one hand and the interests of an individual owner of land on the other, the production of turf or the agricultural interests of the landowner should prevail.
>
> Such a view of the purpose and effect of the statute does not vest in Bord na Móna an arbitrary or capricious power. Nor is it exempt in any way from review by the Courts should it, in any particular instance, act from an indirect or improper motive or without due fairness of procedure or without proper consideration for the rights of others.
>
> This Court is satisfied that, subject to these very considerable restrictions, the making of, or refusal to make, an order for compulsory acquisition is essentially an administrative act.
>
> Having reached that conclusion, the Court is further satisfied that neither the absence of a right of appeal from the decision of Bard na Móna to acquire a particular area of land or property right, as distinct from the right to review the exercise of that right, nor the absence of a scheme for a confirming external authority constitutes a breach of any of the plaintiffs constitutional rights."

It seems to me that this case is on all fours with *O'Brien*. The acquisition of bogland was in the common good. So too beyond question must be the task of acquiring land for industrial development. In the same way the function of acquiring land in Bord na Móna is identical with that of the IDA. Both are exercising administrative functions. The IDA, therefore, is not exercising any judicial function. The Act does not endow an arbitrary or capricious power. As with Bord na Móna, IDA must act with due fairness, with consideration for the rights of others and must act from proper motives. If it does not the Court may intervene. However, no right of appeal from the decision to acquire nor the absence of an external authority to confirm constitutes a breach of the applicant's constitutional rights. In particular, the principle of *nemo iudex in causa sua* does not apply to the type of decision the IDA has made herein. The decision made is one involving a consideration of industrial, economic and social policy which is classically the type of function entrusted to a public body such as the IDA which is clearly a body with considerable expertise in these matters.

In this case the IDA having decided they were interested in the applicant's lands approached him. He was not prepared to sell. Thus the IDA decided to embark upon a compulsory purchase process. The Board served a notice of intention to acquire. It established an inquiry under the chairmanship of Conleth Bradley, S.C. Legal representation was granted to the applicant. The right of the applicant to make objections, representation and observations and the right to call his own expert witnesses was confirmed. The IDA was required to submit a statement of its case with a précis of the evidence it intended to rely upon. The applicant was given the opportunity to respond. It was agreed that some parties could raise particulars in relation to issues arising. There were two preliminary hearings and the full hearing commenced on the 4th July, 2012 and continued until the 6th July. In the course of this inquiry it is clear that every avenue of approach was investigated. All parties had the fullest opportunity to put their case. All the expert reports were available for examination and comment. It is clearly apparent that the IDA was fully aware of, and I find fully committed to, the fairest possible procedure to allow the applicant test the IDA's own rationale for acquiring the land and also to propose his own alternatives. No fault can be found by me with this process. The inquiry body was, it seems to me, a very satisfactory *modus operandi* when one accepts that no obligation existed for an independent or external body with decision making powers. As found above, the IDA was making an administrative not a judicial decision. Thus the obligation was to act fairly and included in this was the obligation to act proportionately. This means that it must act for a legitimate purpose, any interference with rights must be the minimum necessary to achieve its purpose and it must act in accordance with law. Should it fail to do any of these, the Court has jurisdiction to intervene but not otherwise. It seems to me on the evidence before the Court that the IDA did act fairly and for a legitimate purpose and that the interference with the right of the applicant to his property was the minimum necessary to achieve its purpose and that it acted in accordance with the law. As to whether its actions were proportionate, I will deal with that under the next heading.

7.6 The European Convention on Human Rights

The applicant relies on s. 3 of the ECHR Act 2003 which requires that, subject to any statutory provision or rule of law, every organ of the State shall perform its functions in a manner compatible with Ireland's obligations under the provisions of the Convention. This, the applicant argues, requires that he should have available to him the possibility to have the proportionality of the deprivation of his

home caused by the compulsory purchase thereof, determined by an independent tribunal. See *Yordanova v. Bulgaria, Bjedov v. Croatia and Buckland v. United Kingdom* (cited above). In these cases the European Court of Human Rights has decided that in circumstances where a person is to be deprived of their home, Article 8 requires that they have in principle the opportunity to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8.

Is the IDA or was the independent inquiry such an independent tribunal? It seems to me that the independent inquiry was a part of the IDA decision-making process. As noted above, it was a fair and proper forum in which the applicant was given every opportunity to make his case on any ground that he wished. It must be noted that no plea *ad misericordiam* in relation to the loss of his home was actually raised at that hearing. I would have some doubt as to whether this whole process could be regarded as an independent tribunal which could consider the Article 8 issues that the European Court of Human Rights has decided is required. Although it has no particular interest in preferring one site over another, nonetheless the IDA does have its own particular interest in the sense of its perception of what or which land was most suitable in the light of its policy in relation to industrial development. I do not think, however, that the Court needs to resolve this issue. In my view, if there was any doubt as to the jurisdiction of this Court in judicial review to consider the reasonableness and proportionality of compulsory purchase, that doubt has been resolved. Firstly, the Supreme Court in O'Brien (cited above) requires the IDA to act with due fairness of procedure and with proper consideration for the rights of the applicant. In the event it did not do so, clearly this Court can intervene. Secondly, in *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 70I, the Supreme Court harking back to the essence of Henchy J.'s seminal judgment in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642, found that the proportionality of any out that interfered with constitutional rights was something the Court of judicial review could examine. Denham J., as she then was, stated (at para. 179) as follows:

> "179. My conclusion is as follows. In determining the reasonableness of an administrative decision which affects or concerns constitutional rights the standard to be applied is that stated by Henchy J. in *The State (Keegan) v. Stardust Compensation Tribunal* (cited above). This has been set out previously in the judgment, but for clarity I restate it here. Henchy J. stated at p. 658:-
>
> > 'I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted *ultra vires*, for the necessarily implied constitutional limitation of jurisdiction in all decision making which affects rights or duties require, *inter alia*, that the decision maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision.'
>
> 180 This test includes the implied constitutional limitation of jurisdiction of all decision making which affects rights and duties. *Inter alia*, the decision maker should not disregard fundamental reason or common sense in reaching his or her decision. The constitutional limitation of jurisdiction arises, *inter alia*, from the duty of the courts to protect constitutional rights. When a decision maker makes a decision which affects rights then, on reviewing the reasonableness of the decision:-
>
> (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on irrational considerations;
>
> (b) the rights of the person must be impaired as little as possible; and
>
> (c) the effect on rights should be proportional to the objective."

Thus, this Court in judicial review has jurisdiction to examine the proportionality of taking the appellant's home by means of compulsory purchase. The Court must ask itself the same questions referred to above.

> (1) Is the compulsory purchase provided by law and thus connected to the objective of the legislation, is it arbitrary, unfair, or based on irrational considerations?
>
> (2) Are the applicant's rights as little impaired as possible?
>
> (3) Are the effects on his rights proportionate to the objective?

7.7 Applying this test to the circumstances of this case, I find firstly that the proposed compulsory purchase is provided for by law and is clearly intended to achieve the legislative objective of encouraging industrial development in Ireland. It is neither unfair, arbitrary nor based on irrational considerations. In dealing with the applicant, the IDA has, as I have found above, adopted a fair procedure in which every possible objection could be made and every alternative proposed by the applicant could be examined. The lands in questions as averred by Mr. O'Leary in his affidavit are, in the view of the IDA, the most suited for purpose. This last is a value judgment of an expert body with which this Court cannot intervene save for irrationality which plainly is not present. This decision was made on the basis of ample evidence for and against. It is thus neither arbitrary nor unfair.

7.8 The rights of the applicant to his house in particular have been considered. In the final paragraph of the IDA decision dated the 23rd November, 2012, the Board decided that some arrangement should be made to defer taking Hedsor House and to leave the occupant in possession for a transitional period to be agreed. Thus the IDA seem to me to be attempting to minimise the impact on the applicant's rights as best they can in the light of the ultimate objective which is to take the lands. It goes without saying that this will probably fall far short of leaving the applicant in his home permanently. It is, however, the most that can practicably be done to minimise the effects of the compulsory purchase upon him.

7.9 Lastly, the Court must consider the proportionality of the compulsory purchase. On the one hand is the significance of the applicant's home. Hedsor House is not only the applicant's home, it is a house of historic importance. It is a protected structure. It was built in 1760. It is apparently named for the land agent of the Carton estate of the Dukes of Leinster. It has been occupied by the applicant's family for over a century. It has, thus, not only historic but great family value. These are considerations that must weigh heavily in the balancing of interests with which the Court is here involved. Elements of homelessness that arose in the Strasbourg cases are not, of course, present here. The applicant will be fairly compensated for his land and house. The decision as above noted provides that there will be appropriate consideration given to transitional arrangements for allowing the applicant stay in the house as long as possible. The alleged unlikelihood of development is not something I can consider since "likely" is the criterion and that is something within the expertise of the IDA to assess. Nothing I have heard or read herein could lead the Court to intervene in the decision of the IDA that development was likely if the lands were acquired. Nonetheless, in the end the applicant loses his lands and his home. It is a heavy loss he is asked to bear. Weighed in the balance against this is the need, never greater than now, for

industrial development in Ireland. The affidavit of Barry O'Leary herein sets out a profoundly impressive array of facts that show the immense importance of attracting foreign direct investment in Ireland. The success of the IDA in achieving this has resulted in the location in Ireland of eight of the top ten companies in the world in ICT, eight of the top ten companies in the world in pharmaceuticals, fifteen of the top twenty five countries in the world in medical devices and more than fifty per cent of the world's leading financial services companies. Forfás statistics for 2011 show that IDA client companies spend €18.8bn. in the Irish market.

Payroll expenditure was €7.3bn. Expenditure on Irish sourced materials was €1.7bn. and IDA client companies spent €9.6bn. on Irish sourced services. Over 150,000 people are employed in Ireland by IDA client companies. Specific targets in the IDA's Horizon 2020 include 105,000 new jobs, 640 investments and annual client spend of€1.7bn. in research, development and innovation. High-end manufacturing, global services and research development and innovation are target areas. Focus is on information and communications technology, life sciences, financial services, content industry, consumer and business services and diversified industries and engineering.

To achieve this the IDA must compete at the highest level internationally. Every advantage must be taken and utilised to succeed in this most vital of competitions. It is obvious that nothing less than one hundred per cent effort required at every level in order to succeed in winning investment from competitors just as anxious to succeed. The evidence is that the lands in question located in the so-called M4 corridor present an ideal opportunity for development. Mr. O'Leary avers that the lands are of national and economic importance to Ireland in the struggle to win further foreign direct investment. This was acknowledged by the planning consultant, David Mulcahy, called on behalf of the applicant. This is an expert assessment made by the first respondent and is clearly based on the fullest analysis of the target market and the lands in question. It is not an assessment with which this Court can interfere.

7.10 It seems to me that, weighing these two cases in the balance, this Court is driven to the conclusion that the national interest must outweigh the individual. The need, never greater, to increase employment and generate business demands that many sacrifices be made. Here the burden falls heavily on one party and the Court must and does have sympathy with him. However, the examination of the proportionality of the compulsory acquisition of these lands must conclude that it is proportionate to the objective sought taking into account the applicant's undoubted property rights and his rights under Article 8 of the Convention.

7.11 Thus, I find that all the grounds raised in this application fail and I must refuse the reliefs sought.