Neutral Citation Number: [2006] IEHC 454

THE HIGH COURT
JUDICIAL REVIEW

[2005 No. 144 J.R.]

BETWEEN

MARGARET POWER

APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENT

AND
WATERFORD COUNTY COUNCIL

NOTICE PARTY

Judgment of Quirke J. delivered the 17th day of January, 2006.
This is an application made pursuant to the provisions of Order 84 of the Rules of the Superior Courts 1986 (S.I. No. 15 of 1986), for leave to seek judicial review of a decision of the respondent An Bord Pleanála (hereafter "the Board") made on the 15th December, 2004, granting approval to Waterford County Council (hereafter "the Council") for the development of a waste management facility at Garrynagree, Dungarvan, Co. Waterford.

The application has been made upon notice to the Board and to the Council as required by the provisions of s. 50(4)(b) of the Planning and Development Act, 2000 (hereafter "the Act of 2000").

The applicant wishes to seek an order of *certiorari* quashing the decision of the Board on the following four grounds;

> 1. That the decision is invalid because it was made in violation of the provisions of Article 6 of Council Directive 92/43/E.E.C. of 21st May, 1992 on "the conservation of natural habitats and of wild fauna and flora", (hereafter "the Habitats Directive").
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> 2. That the decision was invalid because the environmental impact assessment of the development was defective having regard to the provisions of Articles 5 and 6 of Council Directive 85/337/EEC of 27th June, 1985, (as amended by Council Directive 97/11 E.C. of 3rd March, 1997), (hereafter "the E.I.A. Directive").
>
> 3. That the decision was invalid because its terms contravened the provisions of Articles 4 and 7 of Council Directive 75/442/E.C. on waste (hereafter "the Waste Directive") and Article 8 of Council Directive 99/31/EC on the landfill of waste (hereafter "the Landfill Directive").
>
> 4. That the decision of the Board was and is invalid having regard to the provisions of Article 10 of the Treaty establishing the European Community.

Relevant Facts
The following facts are relevant to the application.

1. On 13th June, 2003, the Council applied to the Board pursuant to s. 175 of the Act of 2000 for approval for the development of a waste management facility at Garrynagree, Dungarvan, Co. Waterford. The facility was of the type known as a "landfill". The Council's application for approval was accompanied by an environmental impact statement (hereafter "E.I.S.").

The site of the proposed landfill waste facility is located close to the River Lickey which contains a species of pearl mussel called "*Margaritifera margaritifera*" (hereafter "the pearl mussel"), which is endangered and protected under domestic and European environmental legalisation (including the Habitats Directive).

2. In October, 2001, the applicant, who is the secretary of a group entitled "the Lickey Concern Group" made a complaint to the European Commission alleging a failure on the part of the Government of Ireland to comply with its obligations under the Habitats Directive.

In June, 2003, (after contact and correspondence between the Commission and the applicant and between the Commission and the Government of Ireland), a list of proposed candidate areas for designation as a "Special Areas of Conservation", (hereafter "S.A.C."), was published by the, (then), Minister for the Environment, Heritage and Local Government (hereafter "the Minister"). The list included a site comprising a significant stretch of the River Lickey.

3. By letter dated 30th July, 2003, the Council submitted a report (hereafter "the Natura Report") to the Board. It was entitled "*A Report on the ecology of the River Lickey in the context of the proposed landfill development at Garrynagree*". At paragraph 3.1 under the heading "*Designated Status*" the report referred to the designation of the River Lickey (hydrometric Area no. 18) as a "Candidate Special Area of Conservation" under the Habitats Directive.

The report concluded that the River Lickey was of high ecological value due to the presence therein of various species (including the pearl mussel), which are listed species under the Habitats Directive. It considered that the principal threat to the pearl mussel posed by the proposed landfill development was the release of leachate and of sediment as a result of earthworks during construction giving rise to the risk of siltation through run-off.

The report concluded that management and mitigation measures which had been recommended would result in a "*…positive impact on the habitat of the River Lickey and its capability to support fresh water pearl mussel and other important species."*

4. By letter dated 22nd September, 2003, the Council submitted a revised non-technical summary of the E.I.S. which had earlier been furnished with the application for approval.

The summary concluded inter alia that the proposed development would not have any significant effect on the River Lickey. It stated that the pearl mussels had already been adversely affected by forestry activities and that alternative planting on the rest of the site

would significantly improve the breeding grounds for the pearl mussels.

5. Notice of the Council's application to the Board on 13th June, 2003, for approval was advertised by newspaper notice bearing the same date. The fact that additional information (comprising the Natura Report and the revised non-technical summary of the E.I.S.) was published by newspaper notice on 16th October, 2003.

6. Mr. Michael Walsh who is the Deputy Planning Officer of the Board and Mr. Eugene Daly who was a consultant geologist and hydrogeologist were appointed inspectors on behalf of the Board. They carried out a number of inspections of the proposed site on various dates between 27th November, 2003, and the 28th September, 2004.

7. Pursuant to its discretionary power conferred by the provisions of s. 134 (5) of the Act of 2000 the Board directed that an oral hearing in respect of the development should be conducted. This was intended to include and facilitate submissions by interested parties. The hearing was commenced on 22nd June, 2004, in the Park Hotel Dungarvan, Waterford. It was completed on 30th June, 2004.

8. By letter dated 30th March, 2004, the Commission of the European Communities wrote to the Minister for Foreign Affairs indicating inter alia that:

(a) it had registered a complaint against Ireland in 2002 in relation to the proposed landfill development,

(b) it had received additional information from complainants since that date,

(c) the Commission:

"(i) was not convinced that …the proposal of Garrynagree as a 'suitable disposal site..' was consistent with E.U. legislation,

(ii) …would submit that Garrynagree ought not to have been identified as a suitable disposal site and…

(iii) (would submit) ..that the documents (including the E.I.S.) submitted and supporting the proposal lacked detail,

(iv) considered that the selection of Garrynagree as a proposed landfill was inconsistent with Ireland's obligations pursuant to Article 10 of the Treaty establishing the European Community and

(v) ..took the view that Ireland had failed to fulfil its obligations under Article 4 and 7 of the Waste Directive, Article 8 of the Landfill Directive, Article 5 of the E.I.A. Directive and Articles 6 (3) and (4) of the Habitat Directive."

9. The Commission's letter, invited the Government of Ireland, (hereafter "the Government"), in accordance with the provisions of Article 226 of the Treaty establishing the European Community, to submit its observations to the Commission on the latter's view.

No evidence has been adduced in these proceedings indicating whether or not the Government took the opportunity to submit its observations to the Commission upon its observations. No evidence has been adduced indicating that the Commission took action against Ireland as a Member-State of the European Union alleging a breach of European Law by Ireland in relation to any matters which are the subject of these proceedings.

10. The inspectors appointed by the Board submitted their report to the Board. It comprised four substantial and comprehensive volumes.

The third volume (volume (iii)) of the Inspectors Report was written by Mr. Eugene Daly. It concentrated upon geological, hydrological and hydrogeological matters relating to the proposed development.

11. On the 30th November, 2004, the submissions on the Board's file were considered at a board meeting. During that meeting the Board decided, (by a majority of 6 to 1), to "…approve the development generally in accordance with the inspector's recommendations subject to.. (certain).. draft reasons, considerations and conditions". A Direction was issued dated 1st December, 2004, that the development should be approved subject to the draft reasons, considerations and conditions and to the following "Note":

"1. the Board noted the Inspector's concerns that the development as originally proposed (a) would be likely to have significant adverse effects on the environment, particularly on the aquatic environment of the River Lickey proposed c.S.A.C. and, (b) was greatly oversized in terms of the long term landfill needs. For these reasons, the Inspector had recommended the omission of seven of the proposed 15 cells….the Board considered that the omission of cells 1 to 4 inclusive, i.e. those cells nearest to the River Lickey was sufficient to ensure that the proposed development would not be likely to result in significant adverse effects on the environment while at the same time providing adequate capacity to meet future needs….the omission of more than four cells would be excessive and could not be justified in terms of any benefit to the S.A.C…."

12. The submissions on the Board's file on 30th November, 2004, included the applicant's submissions. Dr. Evelyn Morkens who is an internationally acknowledged expert in the distribution, water quality requirements, captive breeding and conservation of pearl mussels attended at the oral heading before the inspectors between 22nd and 30th June, 2004 and testified in support of the applicant's contentions. Before the oral hearings she had availed of the opportunity to carefully consider the documents made available to all members of the public as part of the authorisation process. Those documents included the E.I.S, the revised non-technical summary and the Natura report.

13. The file before the Board when it made its decision on 30th November, 2004, contained the letter from the European Commission to the Government inviting observations on the Commission's view.

14. On the 15th December, 2004, the Board by order formally granted the Council approval for the development subject to a number of conditions.

These proceedings were commenced on behalf of the applicant on 16th February, 2005.

Relevant Legislative Provisions
Article 6.2 of the Habitats Directive provides as follows:

> *"Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, insofar as such disturbance could be significant in relation to the objectives of this Directive."*

Article 6.3 of the Habitats Directive provides as follows:

> *"Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site ……the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."*

Article 5.1 of the E.I.A. Directive places upon Members States of the EU an obligation to adopt the appropriate measures to ensure that developers provide particular information in respect of proposed projects.

Article 5.2 of that Directive provides as follows:

> *"The information to be provided by the developer in accordance with paragraph 1 shall include at least:*
>
> *- A description of the project comprising information on the site, design and size of the project,*
>
> *- A description of the measures envisaged in order to avoid, reduce and, if possible remedy significant adverse effects,*
>
> *- the data required to identify and assess the main effects which the project is likely to have on the environment,*
>
> *- a non-technical summary of the information..."*

Article 6 (2) of the E.I.A. Directive (as amended) provides as follows:

> *"Member States shall ensure that any request for development consent and any information gathered pursuant to Article 5 are made available to the public within a reasonable time in order to give the public concerned the opportunity to express an opinion before a development consent is granted."*

Article 8 of the E.I.A. Directive (as amended) provides that:

> *"Results of consultations and the information gathered pursuant to Article 5, 6 and 7 must be taken into consideration in the development consent procedure."*

Article 4 of the Waste Directive provides as follows:

> *"Member States shall take the necessary measures to ensure that waste is disposed of without endangering human health and without harming the environment, and in particular:- without risk to water, air, soil and plants and animals, - without causing a nuisance through noise or odours, without adversely affecting the countryside or places of special interest."*

Article 7 (1) of the Waste Directive (as amended) provides as follows:

> *In order to attain the objectives referred to in Articles 3,4 and 5 the competent authority or authorities referred to in Article 6 shall be required to draw up as soon as possible one or more waste management plans. Such plans shall relate in particular to;*
>
> *– the type, quantity and origin of waste to be recovered or disposed of,*
>
> *– general technical requirements,*
>
> *– any special arrangements for particular wastes,*
>
> *– suitable disposal sites or installations …".*

Article 8 of the Landfill Directive provides that Member States must not issue landfill permits unless first satisfied *inter alia* that

> *"The landfill project complies with all the relevant requirements of this Directive, including the Annexes …".*

Annex 1 of the Landfill Directive dealing with general requirements for all classes of landfills provides that:

> *1.1 The location of a landfill must take into consideration requirements relating to:*
>
> *(a) the distances from the boundary of the site to residential and recreation areas, waterways, water bodies and other agricultural or urban sites…*
>
> *(c) the geogological and hydrogeological conditions in the area;*
>
> *(e) the protection of the nature or cultural patrimony in the area.*

> *1.2 The landfill can be authorised only if the characteristics of the site with respect to the abovementioned requirements, or the corrective measures to be taken, indicate that the landfill does not pose a serious environmental risk."*

Article 10 of the Treaty establishing the European Community provides as follows:

> *"Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievements of the Community's tasks.*

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

The Test for Leave
Section 50 (4) (b) of the Act of 2000 provides *inter alia* that upon an application such as this

> *"…leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed, and that the applicant has a substantial interest in the matter which is the subject of the application."*

It has not been contended on behalf of the Board or on behalf of the Council that the applicant does not have a "*substantial interest*" in the matter which is the subject of these proceedings.

It is strongly contended however on behalf of both the Board and the Council that the applicant does not have "*substantial grounds*", (of the kind referred to in that subsection), for contending that the Board's decision is invalid and should be quashed.

The term "*substantial grounds*" in the virtually identical context of s. 82 (3) (b) of the Local Government (Planning and Development) Act, 1963 (as amended by s. 19 of the Act of 1992), was considered by the High Court (Carroll J.) in the case of *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125. It was held to have the following meaning (at p. 130).

> *"In order for a ground to be substantial it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous. However, I am not concerned with trying to ascertain what the eventual result would be. I believe that I should go no further than satisfy myself that the grounds are 'substantial.' A ground that does not stand any chance of being sustained (for example where the point has already been decided in another case) could not be said to be substantial. I draw a distinction between the grounds and the various arguments put forward in support of those grounds. I do not think I should evaluate each argument and say whether I consider it as sound or not. If I consider a ground, as such, to be substantial, I do not also have to say, that the applicant is confined in his arguments at the next date to those which I believe may have some merit."*

That interpretation of the term "*substantial grounds*", (in the context in which it is to be applied in these proceedings), was cited with approval by the Supreme Court in the case of In *Re: Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360. It has been adopted repeatedly by the courts in this jurisdiction and I have no hesitation in adopting it for the purposes of these proceedings.

Although non-compliance with the provisions of a Council Directive is a ground relied upon with increasing frequency as a ground for relief by way of judicial review of planning decisions none of the four grounds which have been relied upon by the applicant come precisely within the category identified by Carroll J. as grounds "*where the point has already been decided in another case…*". Like Carroll J. I draw a distinction between the grounds relied upon and the various arguments put forward in support of those grounds.

Similarly, I do not intend to evaluate each of the arguments which have been advanced in support of the grounds or, if the applicant is successful, to confine her to the arguments which have been advanced in these proceedings.

If the ground relied upon is not trivial or tenuous but is reasonable, arguable and of substance then the applicant will be entitled to seek the relief which she seeks.

I propose to deal with each of the grounds in the sequence in which I have set them out earlier.

1. The Habitats Directive.
The Habitats Directive has been implemented in Ireland by the enactment of the European Communities (Natural Habitats) Regulations, 1997 (S.I.) No. 94 of 1997 as amended, (hereafter "the Habitats Regulations").

Regulation 28 of the Habitats Regulations imposes an obligation upon the Minister to agree, (broadly in the terms of Article 6.3 of the Habitats Directive), to a proposed development within a special area of conservation only when satisfied that the development will "*… not adversely affect the integrity of the site concerned…".*

Section 175 of the Act of 2000, requires the preparation of an E.I.S. in respect of developments of the kind which is the subject of these proceedings. The section precludes development in such cases without approval of the Board.

The applicant argues that the obligations imposed upon the Minister by Regulation 28 of the Habitats Regulations (and imposed upon the State by the provisions of Article 6(3) of the Habitats Directive) must be deemed to have been imposed upon the Board which is the designated State authority to which the Minister's decision making function has been delegated.

It is argued that the Board could only have granted approval for this development if satisfied that the development would not result in any adverse effect upon the conservation objectives of the site. Reliance is placed upon the decision of the Court of Justice in case C-172 /02 – *Landelijke Vereniging tot Behoud Van de Waddenzee v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] E.C.R. 1 – 7405 and in particular paragraph 59 thereof which provides:

> *"Therefore, pursuant to Article 6(3) of the Habitats Directive, the competent natural authorities, taking account of the conclusions of the appropriate assessment of the implications of (the plan or project in question) for the site concerned, in the light of the site's conservation objectives, are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the*

absence of such effects."

The applicant relies upon observations contained within the Inspector's Report to the Board as evidence of a deterioration in water quality in the area concerned and the need for a higher level of water quality in the interest of the conservation of the pearl mussel.

It is contended that in the light of those observations the Board could not have been satisfied that approval of the development would not result in adverse effects on the conservation objectives of the site. It is argued that the Board did not properly consider the question of such adverse effects and was therefore in breach of the obligations imposed upon it by the Habitats Regulations and the Habitats Directive.

When making its decision the Board was required to consider a very substantial amount of evidence and material. Much of that evidence and material was provided by way of expert scientific evidence and the material contained in the reports of its Inspectors, Mr. Michael Walsh, who is the Deputy Planning Officer of the Board, and Mr. Eugene Daly who is a Consultant Geologist and Hydrogeologist.

The Board also considered a very substantial quantity of expert testimony from other expert witnesses including the testimony of Dr. Moorkens who is an acknowledged international expert on the conservation of the pearl mussel and upon environmental science and management.

It has been argued that the evidence of Dr. Moorkens should have been preferred to that of Mr. Daly by reason of Dr. Moorkens' particular expertise upon the conservation of the pearl mussel. However it is also argued on behalf of the applicant that the evidence of the Board's own inspector was not adequately considered by the Board when it reached its decision.

The Inspector expressed his concern (see Inspector's Report Vol. 2 at pp. 41, 42 and 53) as to the potential effect which the development might have upon the aquatic environment and in particular the potential for discharges of silt–laden water into the river.

However these concerns were clearly considered by the Board which made its approval subject to conditions which were expressly intended to address those concerns.

The applicant has conducted an exhaustive review of the expert testimony and material which was before the Board. She argues that the Board has not adequately addressed the environmental impact upon the area of the development which is proposed.

Mr. Collins S.C. has argued eloquently that the decision of the Board is invalid because it has been made in violation of the provisions of Article 6 of the Habitats Directive and Regulation 28 of the Habitats Regulations.

However it seems to me that his argument in relation to alleged breaches of the Habitats Directive is based upon the contention that the evidence and material before the Board did not support the Board's decision.

The fundamental ground relied upon in support of the argument that the applicant should be granted leave to seek to quash the decision is, in fact, based upon that contention.

The courts will not intervene by way of judicial review to quash decisions of administrative tribunals (such as the Board) in the absence of evidence of illegality. The function of the court in an application for judicial review is limited to determining whether or not an impugned decision was legal, not whether or not it was correct.

It is decidedly not a function of this court to substitute itself for the Board for the purpose of determining whether it believes that the decision made was the correct one. This court has neither the jurisdiction nor the competence to undertake such an exercise.

In the "*Notes*" attached to its Direction dated 1st December, 2004, the Board specifically noted the Inspector's concern "*…that the development as originally proposed (a) would be likely to have significant adverse effects on the environment, particularly on the aquatic environment of the River Lickey proposed cSAC…".* The grant of approval was made subject to specific conditions intended to eliminate such effects.

It is not contended that the decision of the Board was unreasonable or irrational in the sense outlined by the Supreme Court in "*The State (Keegan and Lysaght) v. The Stardust Victims Compensation Tribunal* [1986] I.R. 642 and *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. On the evidence such a contention could not have been sustained.

In the circumstances I am not satisfied that the first ground relied upon by the applicant in these proceedings comprises a "*substantial ground*" for the relief sought within the meaning ascribed to that term by s. 50(4)(b) of the Act of 2000. Accordingly the application for leave to seek relief on that ground is declined.

2. The E.I.A. Directive.
Article 5.2 of the E.I.A. Directive requires that particular information be provided to the decision making body by aspiring developers. The information to be furnished must include a description of "*..measures envisaged to avoid, reduce and, if possible, remedy significant adverse affects and the data required to identify and assess the main affects that the project is likely to have on the environment…"*.

Article 6(2) of the E.I.A. Directive requires that information gathered pursuant to Article 5 should be made available to the public "*… within a reasonable time in order to give the public concerned an opportunity to express an opinion before a development consent is granted…"*.

Thereafter the "*…results of consultations and information gathered pursuant to Article 5, 6 and 7 must be taken into consideration in the development consent procedure*" – (see Article 8 of the Directive).

No breach, by the Board, of the European Communities Environmental Impact Assessment Regulations 1989 – 2001 (hereafter the E.I.A. Regulations) has been alleged. The applicant wishes to seek relief solely on the ground of non-compliance with the E.I.A. Directive.

The information provided by the developer and made available to the public included the E.I.S. Report, the Natura Report (dated 30th July, 2003) and the revised non-technical summary of the E.I.S.

Thereafter an oral hearing was held which commenced on the 22nd June, 2004 and was completed on 30th June, 2004.

That oral hearing was advertised to interested members of the public who attended and participated in the hearing.

A substantial part of the oral hearing was occupied with evidence and submissions relating to the effect which the project was likely to have on the environment and the "*…measures envisaged in order to avoid, and if possible remedy significant adverse effects…"* on the environment.

The applicant complains that the original E.I.S. was defective and inadequate. However the original E.I.S. was part only of the information provided by the developer pursuant to the provisions of Article 5.2 of the E.I.A. Directive.

On the evidence the Board was satisfied that the information provided by developer was sufficient to comply with the provisions of Article 5.2 of the E.I.A. Directive. It was within the jurisdiction of the Board to so decide (see *Kenny v. An Bord Pleanála (No. 1)* (2001) 1 I.R. 565).

It has not been alleged that the Board's decision to treat the information as adequate was irrational or unreasonable in the sense outlined by the Supreme Court (Finlay C.J.) in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39.

The applicant relies upon the observations of the Commission of the European Communities contained in a letter to the Minister for Foreign Affairs dated 30th March, 2004. In its letter the Commission expressed the view that the documents submitted for the purposes of the E.I.A. Directive lacked detail and did not provide adequate information on the construction and operation phases of the proposed development and the mitigation measures proposed to address the impact of those phases. It took " *the view*", that Ireland had "*failed to fulfil its obligations under.."* Article 5 of the E.I.A. Directive.

The applicant contends that the view expressed by the Commission is sufficient, by itself, to require a finding by this court that the applicant's similar contention comprises a "*substantial ground*" for leave to seek the relief which the applicant wishes to seek.

I do not agree. The Commission's observations and views were made and expressed in the context of a complaint made by the applicant to the Commission. No evidence was adduced in these proceedings which would enable this court to discover how the Commission arrived at its "*view*". It may have been a preliminary view based upon the applicant's complaint. The letter concludes with an invitation to the Government to submit to the Commission its "*observations*" upon the Commission's "*view*" indicating that in default the Commission "*.. may, if appropriate, issue a Reasoned Opinion as provided for in the …Article".*

The letter dated 30th March, 2004 containing the Commission's observations and views was before the Board when it made its decision. On the balance of probabilities the Board took its content into account when making its decision. It was within its jurisdiction to decide upon the adequacy of the material which informed its decision. It is not the function of this court to substitute itself for the Board in order to discover whether it would reach the same conclusion. The requirements of the E.I.A Directive as to public notification and participation were complied with. The public, including the applicant, was provided with access to all of the documentation which was before the Board. It was enabled to, and did, participate fully in the planning process.

It follows from what I have just found that I do not consider that the second ground advanced on behalf of the applicant comprises a "substantial ground" within the meaning ascribed to that term by s. 50(4)(b) of the Act of 2000.

3. The Waste Directive and the Landfill Directive.
It is contended on behalf of the applicant that the decision made by the Board was invalid because its terms contravened the provisions of Articles 4 and 7 of the Waste Directive and Article 8 of the Landfill Directive.

Again the applicant relies upon the observations of the Commission of the European Communities as contained in its letter to the Minister for Foreign Affairs dated 30th March, 2004, wherein the Commission expressed the view that: "*…Garrymagree ought not to have been identified as a suitable disposable site for the purposes of Article 7 …(of the Waste Directive)… in the currently applicable Waste Management Plan*" and expressed the "*view*" that the State had failed to comply with the provisions of Articles 4 and 5 of the Waste Directive and Article 8 of the Landfill Directive. I have indicated earlier that I do not believe that the Commission's view must necessarily be accepted as having established a "*substantial ground*" for the purposes of these proceedings.

In these proceedings the Board has granted permission for the development of a waste management facility. The evidence has established that the State authority which is empowered, (by ss. 39 and 40 of the Waste Management Act, 1996), to grant a waste licence for the operation of such a facility and required to operate and control emissions from the facility is the Environmental Protection Agency (hereafter the E.P.A.).

Section 40 of the Waste Management Act, 1996 (as amended) expressly provides that the E.P.A. shall not grant a waste licence for an activity unless it is satisfied that the activity, if carried out subject to the conditions attached to the licence, will not cause environmental pollution and will comply with the provisions of the Landfill Directive.

The legislation enacted by the Oireachtas for the transposition of the Waste Directive and the Landfill Directive has not been challenged in these proceedings. The State has, by that legislation, designated the E.P.A. as the appropriate competent authority for ensuring compliance with Articles 4 and 7 of the Waste Directive and Article 8 of the Landfill Directive. The Board has, *inter alia*, been designated by the State as a competent authority with responsibility to approve or reject proposed planning developments on the grounds of proper planning and sustainable development within specific areas.

The applicant cannot sustain her claim that the decision of the Board was invalid for failure to comply with the provisions of the Waste and Landfill Directives. The obligation to comply with the provisions of the Waste and Landfill Directives rests upon the State. The State has sought to discharge that obligation by the enactment of legislation imposing responsibility for compliance upon a State agency, (the E.P.A.). That legislation has not been challenged and must be deemed lawful for the purposes of these proceedings. The E.P.A. is a State agency separate and distinct from the Board.

Extensive powers have been conferred upon the E.P.A. to enable it to perform its statutory functions and obligations. They include the monitoring of waste disposal in the context of environmental protection and extensive enforcement measures directed towards preventing or limiting environmental pollution resulting from waste disposal activity. (see ss. 55 A and 56 A of the Waste Management Act, 1996).

The contention that a planning decision made by a State body, (the Board), should be quashed as unlawful for failure to comply with

obligations which do not rest upon the Board and have been imposed lawfully upon another State agency cannot be deemed a "*substantial ground*" for the relief which the applicant wishes to seek.

It follows that leave is refused on that ground.

4. Article 10 of the Treaty establishing the European Community.
Article 10 of the E.C. Treaty imposes a general obligation to ensure fulfilment of the obligations arising out of the Treaty and abstinence from measures which could jeopardise the attainment and the objectives of the Treaty.

The applicant relies upon the decision of the Court of Justice in Case C-201/02 R, *(on the application of Wells) v. Secretary of State for Transport, Local Government and the Regions* [2004] E.C.R. 1-723 as authority for the proposition that Article 10 imposes a duty upon the Board to give effect to Community law and to take full account thereof in reaching its decision. This court acknowledges the existence of that duty and respectfully adopts the principle identified by the Court of Justice in that case.

However the ground relied upon by the applicant under this heading is general in nature and comprises an overall claim or argument that the Board, by its decision, has failed to give effect to Community law and to take full account of Community law in makings its decision.

In summary, it is contended on behalf of the applicant that, when makings its decision, the Board failed to comply with the provisions of a number of Directives of the Council (i.e. those relied upon by the applicant as the first three grounds for the relief sought).

It is argued that the failure on the part of the State to comply with those Directives comprises a failure to comply with the obligations imposed by Article 10 of the Treaty.

It is claimed also that the Board's decision is in breach of the State's obligation to "*…abstain from any measure which could jeopardise the attainment of the objective of the Treaty."*

However the applicant has failed to establish "*substantial grounds*" in support of her contention that the Board is in breach of the various Council Directives referred to earlier.

A general allegation that the board has failed to comply with Community Law, which is based upon contentions which have not been sustained can hardly be deemed "*substantial grounds*" for the relief sought.

It is contended that the Board is in breach of principles of Community law by failing to "*abstain from any measure which could jeopardise the attainment of the objective of the Treaty*". This ground, if sustained, would require a review by the court of all of the expert and other testimony and material which was before the Board when it has made its decision. It would require the court to substitute itself for the Board in order to consider and analyse all of the material that came before the Board. The court would be required to arrive at its own view as to what, if any measure, would jeopardise the attainment of the objectives of the Treaty.

As I have already indicated the function of this court in judicial review proceedings such as these is limited to determining whether or not the impugned decision was legal, not whether or not the court would have made the same decision.

It follows from all the foregoing that the relief sought on behalf of the applicant is refused.