Neutral Citation Number: [2006] IEHC 173

THE HIGH COURT

[2005 No. 832 J.R.]

IN THE MATTER OF THE ROADS ACT 1993 AND 1998 AND IN THE MATTER OF AN APPLICATION UNDER SECTION 51 OF THE ROADS ACT 1993 AND IN THE MATTER OF AN APPLICATION UNDER THE PLANNING AND DEVELOPMENTS ACT 2000 – 2004, THE LOCAL GOVERNMENT ACT, 1960 AND THE HOUSING ACT 1966 FOR CONFIRMATION OF A COMPULSORY PURCHASE ORDER AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN

KILDARE COUNTY COUNCIL

APPLICANT

AND
AN BORD PLEANALA

RESPONDENT

Judgment of Mr. Justice John MacMenamin dated the 10th day of March, 2006.

1. In these proceedings the applicant seeks leave to apply for judicial review (i) of a determination by the respondent refusing to approve an application for an Athy Inner Relief Road, made pursuant to s. 57 of the Roads Act 1993, and (ii) an ancillary decision, to annul a compulsory purchase order made by the applicant for the purpose of the said Road.

In order to place the application for its procedural context its necessary to recite some background detail as it emerged in evidence and insofar as relevant to the issues which arise in these judicial review proceedings. Situated on the River Barrow, the Anglo-Norman town of Athy was laid out at a time when its importance as a market town and regional centre was unchallenged by other centres in the county. Its central square, of eighteenth century origins, provided what is thought to be important civic townscape around which future growth and development evolved. Around the centre point, significant urban building development during took place during the nineteenth century. Substantial parts of that development, still remain in the fabric of buildings both restored and unrestored from that era.

2. For almost forty years the applicant has had an objective, to construct an inner relief road or street, to be augmented, ultimately, by an outer relief road or by-pass of the town. While an outer relief road skirting the town was considered, it was not a priority: the project of the inner relief road however remained part of the applicants more immediate plans, included as an objective in the Athy Development Plan published in the year 2000.

3. In that plan it was an objective of the applicant to preserve certain sites of archaeological interest; the town centre containing a number of eighteenth century buildings of a public character, and the St. Michael's and St. John's Lane Cemeteries, both of medieval origin. The medieval street lines at Meeting Lane and St. John's Lane were to be retained and reinforced, where necessary with control on building lines. Visual amenities were to be maintained, particularly the special amenity value of the views of the River Barrow upstream and downstream from the ancient Cromaboo Bridge, and from Horse Bridge. So too were views of the River Barrow across open land to the South and North of the town.

4. The Development Plan of 2000 contains a list of some sixty 18th and 19th century buildings and shop fronts to be maintained.

5. The Plan contains what was termed then an "inner relief street" as a specific objective. The stated need for this was identified in a number of studies from as far back as 1967, including a Development Plan of that year; a 1975 Traffic Study; similar studies in 1996 and 1999, and in consultant reports furnished in 2000 and 2004. The issue also was canvassed in a published plan named the Athy Framework Plan for land use and transportation (enjoying the infelicitous acronym of Athy IFPLUTS).

6. The town is situated at the confluence of the N78 National Secondary Road, and the R413, 417 and 428 Regional Roads. It is now said that the road network through the town is substandard, subject to frequent delays and poses an impediment to the future economic development of the town itself and its hinterlands. The present road network weaknesses are said to be compounded by the traffic "vulnerability" of the town in terms of its available crossings of the River Barrow, which bisects the town north/south, and the Grand Canal which runs diagonally from the north west to south east, just to the west, and thereafter adjoins the River Barrow having run a course parallel to the more westerly boundary of Athy beneath the old Cromaboo and Augustus Bridges.

7. Traffic growth in the last decade has exacerbated the bottle neck problem. The situation has been rendered more complex by a view, once espoused by the applicant, that improvements on the national road network might have the effect of reducing traffic through the town centre of Athy itself. It is accepted that an outer by pass road, acting as a distributor, will probably be required in the medium to long term. However the applicants in these proceedings took the view that this distributor road could not be seen as an alternative to the inner relief scheme, and that both were needed. This same conclusion was reached in the Athy IFPLUTS survey. But the Inner Relief Road remained a priority. To that end the applicants decided to embark on a project of compulsory purchase in 2004.

8. The path of the intended relief road commenced at the western end of the town at a roundabout junction at Upper William Street. It ran perpendicular to the existing main street in an almost southerly direction for a distance of approximately 40 metres, where it would tie into another roundabout junction. It was to turn in an easterly direction through property owned by Tegral Limited, running above the existing ground level to limit the need for excavation. The route would then cross the Grand Canal, west of the Town Centre, approximately 90 metres south of the existing Augustus Bridge via a bridge and "drop lock" structure (a drop lock being, the court was informed, one where the water level of the canal is the same at both outer ends of the lock).

9. Thereafter the road was to continue east from the Grand Canal along an existing street built as part of the relief road (or street) as long ago as 1978. This would require upgrading to meet modern standards. It would continue in an easterly direction through the car park of the Dominican Church, a modern building of some distinction, before rising on a small embankment across the River Barrow via a single span steel large bridge. Across that bridge, and dropping down, the intended route was to pass between the nineteenth century Courthouse and the old alley walls, on an embankment which reduced in height, so that when it is in line with the eastern façade of the courthouse, it would be at the same level of the existing macadam of a car park. Thereafter, it would tie in at a signalised junction with the existing Carlow Monastrevin Road.

The project would involve significant street widening; construction of two bridges and the drop lock. It is stated that this would comply with the Athy Development Plan 2000 and facilitate sustainable development in the town, obviating the risk of extreme congestion. There is a question mark as to the level of the road. However, it is clear that the projected route would follow a path approximately 100 metres south of the main street running through the town.

In all, the proposed development would comprise 1 km to traversing the townlands of Woodstock South, Bleach and Athy in the County of Kildare.

Pursuant to this project, on the 23rd April, 2004 the applicant made a compulsory purchase order in respect of lands situate on the route referred to: the "Kildare County Council Compulsory Purchase (N78 Athy Inner Relief Street) Order 2004.

11. On 19th May, 2004 the applicant lodged with the respondent an application for confirmation of the compulsory purchase order. On the same date an application was lodged by the applicant with the respondent for approval under s. 51 of the Roads Act 1993 of the Road Development then entitled "Athy Inner Relief Street".

12. On 1st June, 2004 the respondent directed the applicant to prepare an Environmental Impact Statement in respect of this compulsory purchase order. While having statutory authority to do so, the applicants had not requisitioned such a study themselves.

13. On 8th October the applicant lodged this Environmental Impact Statement with the respondent. On foot of that document and, other significant documents and information which had been furnished to it on 1st to 4th, and 7th March, 2005, an oral hearing in accordance with s. 51(7)(a)(iii) of the Roads Act 1993 took place in relation to this compulsory purchase order.

14. The Board considered the Inspector's Report with very considerable hesitation the Inspector recommended the project be allowed proceed. It considered other documentation to which reference will be made in the course of this judgment. And with other documentation to which reference will be made later. On 2nd June, 2005, the respondent gave a decision under reference 09/ER/2035 refusing to approve the applicants proposed road development based on three reasons and considerations.

15. On the same day the respondent made a second decision in connection with the proposed road development under reference 09/CH/1235 annulling the compulsory purchase order for reasons and decisions set out therein. It is now necessary to consider these decisions impugned in this application for leave to seek judicial review brought by the applicant, a county council, against the respondent a statutory board.

Statutory Background
16. The decision of the respondent in refusing to approve the proposed road development under s. 51 of the Roads Act 1993 to 1998 (the Road Acts) was made pursuant to s. 215 of the Planning and Development Act 2000 (the 2000 Act) which transferred ministerial functions under the Road Acts to the Board. Likewise the Board's decision to refuse to confirm the compulsory purchase order was made pursuant to the provisions of ss. 213 and 214 of the Act of 2000.

17. Sections 213-215 are contained within Part XIV of the Act of 2000 entitled "Acquisition of Land etc". Section 50 of the 2000 Act applies *inter alia* to decisions of the Board under Part XIV of the Act and therefore applies to decisions of the respondent the subject matter of these proceedings. Thus the applicant is required to show substantial grounds for contending that the decisions of the Board are invalid for leave to be granted.

Substantial Grounds: the test
18. The ingredient elements of "substantial grounds" previously imposed by s. 82(3B) of the Local Government (Planning and Development) Act 1963 as amended by s. 19 of the Local Government (Planning and Development) Act 1992 has been interpreted by the courts on many occasions.

19. As is well known, in *McNamara v. An Bord Pleanála* [1995] 2 ILRM 125 Carroll J. considered the threshold test in the context of s. 82(3B):

> "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 in trying to ascertain what the eventual result would be. I believe 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 been decided in another case) could not be said to be substantial. I draw distinction between the grounds and the arguments put forward in support of those grounds. I do not think I should evaluate each argument in saying whether I consider it 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 this argument at the next stage to those which I believe may have some merit".

20. The issue was considered by McKechnie J. in the case of *Kenny v. An Bord Pleanála* (No. 1) [2001] 1 I.R. 565:

> "Against the change in the law brought in and resulting from the enactment of s. 19(3) of the Act of 1992 and in the context of what Finlay C.J. said in *KSK Enterprises v. An Bord Pleanála* [1994] 2 I.R. 128 at p. 135 there can be doubt but that the threshold of "substantial grounds" was intended in my humble view to result in a different and higher threshold than that normally applicable to an application for judicial review under the Rules of the Superior Courts 1986. That a ground had to be reasonable to be substantial could never be disputed. That such a ground also had to be arguable, equally in my view, could not be challenged. Such tests on their own however may not be adequate as both of these descriptions can equally apply when one seeks leave in an ordinary judicial review under Order 84 Rule 20; (see the judgment of Denham J. in *G. v. D.P.P.* [1994] 1 I.R. 374). Indeed, in a consideration of these words one can think of grounds which could be both reasonable and arguable and yet fall significantly short of meeting the threshold of "substantial". The words "trivial or tenuous" are undoubtedly helpful but probably more so as words of elimination rather than qualification. The description of being "weighty" and of "real substance" are in my view of considerable importance in the interpretation of this threshold phrase. However it must also be remembered that, from a base, say, opposite substantial, namely insubstantial, an applicant must navigate the considerable distance in between, and in addition must arrive and meet the threshold whilst still afloat and on course. In truth I feel, whilst many attempts have been made or convey "the equivalent of its meaning" I am not certain that one can better the original phrase itself. In any events these observations of mine are purely an aside as the Supreme Court has once again in the *Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. endorsed the *McNamara* test. In approaching this application in accordance with the above principles it seems to me that there is one further distinction between a hearing of this nature and/or an ex parte application for relief under Order 84 Rule 20. It is, that with this procedure both or all parties are heard, usually a considerable body of evidence though in affidavit form is submitted and usually full argument takes place. Some difference of approach may therefore be justified though one should see *R. v. IRC Exp. Fed of Self Employed* [1982] AC 617 at p. 643 and 644 which passages are quoted with approval by Denham J. in *G. v. D.P.P.* [1994] 1 I.R. 374. Whether or not and whichever, it seems to me that whilst obviously I should not attempt to resolve conflicts of fact or express any concluded view on complex questions of law or indeed anticipate the long term results, nonetheless within existing limitations I should, I feel

make some evaluation of the factual matrix and should where with certainty I can, form some view of the appropriate statutory provisions and the relevant and material case law. On a separate though related point could I say that simply because matters of fact in law may be traversed again if leave is granted, should not in anyway take from, reduce or lessen the appropriate threshold".

In the case of *Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 the Supreme Court has approved the test laid down in *McNamara* as stated by Keane C.J.;

> "In Jackson Way this court considered similar statutory provisions in the Roads Act 1998 which also used the phrase "substantial grounds". Geoghegan J. rejected, given the use of identical words, an argument that the Roads Act applied a different threshold than the planning acts. He went on to interpret "substantial grounds" as follows
>
> "I am satisfied that it was clearly intended by the Oireachtas that stricter criteria be applied to the granting of leave than would be applied on an ex parte application in an ordinary judicial review. Once a court has established that the points at issue in the proposed judicial review are not trivial or tenuous, the court must assess whether there is real substance in the argument and not merely that it is just about open to argument (see *Jackson Way Properties v. Minister for the Environment* (Unreported, 2nd July, 1999)).

21. Most recently in *Arklow Holidays Limited v. An Bord Pleanála and Wicklow County Council* (judgment of 18th January, 2006) Clarke J. stated

> "The test set out in *McNamara* is, therefore well established as the appropriate basis for a consideration of whether there are substantial grounds in any statutory regime where the Oireachtas has determined that such grounds require to be established before leave to challenge can be given. There can be little doubt, as McKechnie J. pointed out in *Kenny v. An Bord Pleanála (No. 1)* [2001] 1 I.R. 565 that the threshold of "substantial grounds" was intended to result in the different and higher threshold than that normally applicable to an application for judicial review under the Rules of the Superior Courts. As McKechnie J. pointed out certain of the phraseology in the *McNamara* test would, in any event apply in leave applications even at the lower or ordinary threshold. As he correctly, in my view pointed out perhaps the greatest guidance as to the distinction between the test applicable in "substantial grounds" cases as opposed to ordinary cases can be greened for the word "weighty" …

He continued:

> "Nonetheless, notwithstanding such process there will always be case where some, or indeed all the grounds advanced remain ones upon which substantial argument can be advanced on either side. There is in my view no basis to be found in any of the authorities for suggesting that the court should attempt to weight the strength of such competing arguments. The process envisaged is that with the assistance of argument from all sides the court has to form a judgment as to whether notwithstanding the points raised by those opposing leave these remain substantial or weighty arguments in favour of the challenge …

The judge concluded:

> Thus where even after having had the benefit of arguments on both sides the court remains of the view that there are substantial or weighty arguments either way, the court should not express on any view on the relevant strengths of those arguments. Rather leave should be grounded and it is for the court dealing with the substantive application to weigh the strengths of the relevant arguments".

Bearing in mind these authorities and the test for "substantiality" this court must now turn to the legal issues which arise in this case and which require to be resolved.

The Roads Acts

22. Under s. 50 of the Roads Act 1993 and 1998 as amended by the European Communities (Environmental Impact Assessment) (Amendment) Regulations 1999 (S.I. 93/1999) it is provided in material part as follows:-

> "50(1)(a) A road authority shall prepare a statement of the likely effects from the environment (hereinafter referred to as an Environmental Impact Statement) of having proposed road development consisting of:
>
> (i) the construction of a motorway
>
> (ii) the construction of a bus way
>
> (iii) any prescribed type of road development consisting of the construction of a proposed public road or the improvement of an existing public road
>
> (b) Where the Minister considers that any proposed road development (other than development to which paragraph (a) applied consisting of the construction of a proposed public road or the improvement of an existing public road would be likely to have significant effects on the environment he shall direct the roads authority to prepare an Environmental Impact Statement in respect of such proposed road development and the authorities shall comply with such direction".
>
> "(2) An Environmental Impact Statement shall contain the following specified information;
>
> (a) a description of the proposed road development comprising information on the site, design and size of the proposed road development;
>
> (b) a description of the measures envisaged in order to avoid, reduce and if possible remedy significant adverse effects;
>
> (c) the data required to identify and assess the main effects which the proposed road development is likely to have on the environment;

(d) an outline of the main alternatives studied by the road authority concerned and an indication of the main reasons for its choice, taking into account the environmental effects;

(e) a summary in non technical language with the above information

(3) An Environmental Impact Statement shall, in addition to, and by way of explanation or amplification of the specified information referred to in subs. (2) contained further information on the following matters:

(a)(i) a description of the physical characteristic of the whole proposed road development and the land use requirements during the construction and operational phases;

(ii) an estimate, by type and quantity, of expected residues and emissions (including water, air, and soil pollution, noise, vibration, light heat and radiation) resulting from the operation of the proposed road development;

(b) a description of the aspects of the environment likely to be significantly affected by the proposed road development, including in particular –

human beings, fauna and flora,

soil, water, air, climatic factors and the landscape

material assets including the architectural and archaeological heritage and the cultural heritage

the inter relationship between the above factors

(c) a description of the likely significant effects including direct, indirect, secondary, cumulative, short, medium and long term permanent and temporary, positive and negative (of the proposed road development on the environment resulting from the existence of the proposed road development – the use of natural resources, the emission of pollutants, the creation of nuisances and the elimination of waste and a description of the forecasting methods used to asses these effects on the environment)

(d) an indication of any difficulties (technical deficiencies or lack of know how) encountered by the road authority concerned in compiling the required information

(e) a summary and non-technical language of the above information;

to the extent that such information is relevant to a given stage of the consent procedure and to the specific characteristics of the proposed road development or type of proposed road development concerned, and of the environmental features likely to be affected, and the road authority preparing the Environmental Impact Statement may reasonably be required to compile such information having regard*, inter alia*, to current knowledge and methods of assessment.

(4)(a) if a road authority, before submitting an Environmental Impact Statement in accordance with s. 51 so requests, the Minister shall, after consulting the road authority concerned and the bodies and persons referred to in (b) subs. (3) of that section give written opinion on the information to be contained in such statement.

(b) the giving of a written opinion in accordance with this subsection shall not prejudice the exercise by the Minister of his powers pursuant to subs. (4) of s. 51 to require the road authority concerned to furnish him with specified additional information in relation to the likely effects on the environment of the proposed road development.

23. Section 51 of the Roads Act as amended provides in material part as follows;

"51(1) A proposed road development shall not be carried out unless the Minister has approved it or approved it with modifications.

(2) A road authority shall apply to the Minister for approval referred to in subs. (1) in relation to a proposed road development and shall submit to the Minister the Environmental Impact Statement prepared in respect of such development …

(4) The Minister may require a road authority which has applied to him for an approval in accordance with subs. (2) to furnish him with specified additional information in relation to the likely effects on the environment of the proposed road development and the authorities shall comply with any such requirement.

(5) Before approving a proposed road development the Minister shall –

(a) consider the Environmental Impact Statement submitted under subs. (2) any additional information furnished under subs. (4) and any submissions made in relation to the likely effects on the environment of the proposed road development …"

24. Section 52 of the Roads Act provides in material part, as follows:

"52(1) whenever the Minister approves a scheme (with or without modifications) under s. 49, the road authority shall thereupon be authorised to compulsorily acquire any land or any substratum of land or any rights in relation to lands specified in the approved scheme and for that purpose, the scheme shall have the same effect as if it were a compulsory purchase order in respect of that land or substratum of land or any rights in relation to land which consequent on a decision made by the road authority, pursuant to s. 10(1) of the Local Government (No. 2) 1960 (as inserted by s. 86 of the Housing Act 1966) had been duly made and confirmed".

25. The Ministerial functions under the Road Acts 1993 and 1998, were transferred to the respondent pursuant to s. 215 of the Act of 2000. It is unnecessary to refer the provisions of s. 212 and 213 of the Act of 2000 which refers to the powers of a planning authority to carry out a compulsory purchase order. Nor is it necessary for the purposes of this judgment to refer in any detail to s. 86 of the Housing Act 1966 which amends s. 10 of the Local Government (No. 2) 1960 and provides for the acquisition of land for roads (other than a motorway scheme under the Roads Act 1993).

Material before the Respondent
While it is no function of this court to consider the merits or demerits of the scheme it is important to advert in more detail to certain of the materials which were before the respondent when it made its decision. This process may be necessarily selective. It is unnecessary for the court to express any view on the contents of the material. However it is essential to consider this material in order to assess whether the respondent acted irrationally or not. The first item which must be considered is the Inspector's report. As indicated earlier it recommended that "on balance" the project should proceed. It contained recitals of evidence from 15 witnesses who testified on behalf of the applicant in the inquiry. It contains material from 43 objectors and sets out in detail the nature of their objections. It also considers in meticulous detail the evidence of eight other parties who made submissions including Mr. Derek Tynan an expert in architecture and urban design. The Inspector's report consists of 89 pages. It considers all aspects of the issue from every relevant-including architectural environmental town planning heritage and traffic effect and consequences standpoint. In particular there is a substantial amount of material which criticises the Environmental Impact Statement and the premises on which it is based.

Some suggestion of the issues which are canvassed in the course of the report may be gleaned from the first paragraph of the preamble of the Inspector's report. He said:

> "In my opening statement to the Hearing, I adverted to the fact that the Council were placing some reliance in traffic studies carried out in the 70s. I stated that there would have been a greater readiness at the time to insert a new street into an urban environment and I presumed that the Council would have regard to that as well as taking into account present environmental awareness …". The report contains many pages dealing with the effect of the project on traffic in the town. It considers in detail the architectural and planning considerations. At p.63 there is a consideration of a report made by a Councillor Taffe and Mr. Lumley from An Taisce dealing with the Environmental Impact Statement. It says:
>
> > "The EIS fails to give proper regard to the status of Athy as a heritage town. While that status is not statutory it is an EU funded programme whereby a number of funding measures are put in place including public realm enhancement that would have included the Emily Square area. It is in fact quite inexplicable that notwithstanding the significance of the town centre that area has still not been designated as an architectural conservation area. Nevertheless, regard should be given to the sort of townscape considerations that have been set out in the recently published DoE Architectural and Protections Guidelines. The very last thing one would expect within such areas is to be running in major new road proposals. There is no other Irish town where such a radical intervention is being put forward affecting the town's central architectural core or the medieval archaeological constraint area to the degree of this. This kind of planning is analogous to the worst type of British post war planning and to the abandoned Dublin Inner City Tangent Route. Nobody is disputing the need for major land use planning and traffic intervention, including construction of new roads and a bridge crossing. This proposal does not achieve re-routing of traffic away from the town centre. It still leaves what is in fact will be increased volumes of traffic to be confronted at both ends of the proposal. As to whether the proposal enhances the quality and status of a heritage town, the project is not linked to any new street scape development or enhancement and it therefore replicating the worst faults of notorious schemes in the past. It is very problematic in its intervention on the Courthouse area. The design and location of the new bridge visually is extremely problematic in its intervention and in its interface with familiar and established views and relationships between the different buildings and features adjacent to it, for instance, the views along the river towards the existing Cromaboo Bridge and Whites Castle and the views from that Bridge towards the protected structure, Abbey House, which is the site of the medieval Dominican Friary. The consideration of alternatives, the specific requirement of an EIS, is limited to reference to an exercise that seems to have been carried out in 1975 which is long out of date and no longer relevant and in respect of which no detailed information is provided and attached to the EIS."

At p. 84 the following may be found as part of the Inspector's assessment of the Environmental Impact Assessment:

> "The EIS shall contain "an outline of the main alternatives studied by the road authority concerned and an indication of the main reasons for its choice, taking into account the environmental effects". This is undoubtedly one of the most contentious issues. On the one hand the Council state that there is no feasible alternative and that the alternatives within the town that were investigated years ago – see Section 2.2 EIS- are as unrealistic now as they were then. On the other hand those opposed suggest that the Council should be looking "outside the box" and should have considered the relative merits of a southern distributor road and/or outer by pass. The Council countered that by saying that those alternatives were also considered in previous studies and rejected. In defence of that position they say that the latest traffic studies carried out since their appointment in 2001 and which also considered the option of an Outer by pass, concluded that the previous findings were still valid …".

The issue of reliance on traffic studies of the 1970s is again canvassed at p. 14 of Day 1 of the transcript by the Inspector Mr. Don Hegarty. On Day 4 some 40 pages of the transcript are dedicated to the evidence of Mr. Derek Tynan, a Master of Architecture in Urban Design and Head of Urban Design with the National Building Agency from a three year period up to 1989, also indicating his involvement with the Heuston Gateway Regeneration Strategy for 2003, the Temple Bar Framework Plan 1991 to 1995 and a number of architectural design awards. This evidence deals in detail with the issues underlying each of the reasons given by the respondent for its refusal.

At p. 164 of Day 4 Mr. Tynan deals with the Environmental Impact Study and criticises the fact that it did not consider alternatives to the Inner Relief Road

> "No alternatives so therefore, you know in the manner in which this is stated one could argue and I would, that the EIS I think required an examination of alternatives. The assumption within the EIS is,
>
> "Thats all over, thats all done, we have done something which we are working on since 1975 and basically thats what is now being proposed".

On the following page Mr. Tynan testified

> "Now I know the argument will be made in relation to traffic, that 60% of the traffic is town generated and various other things, but I would suggest that what is required in terms of how we deal with Athy is not roads in the middle of the town, but rather a sensible traffic management in the town combined with either the Southern Distributor Road or the Outer By-Pass which are here. Lets take the Southern Distributor Road as an example. It would deliver most of the significant requirements in terms of traffic and ultimately it is acknowledged and it was acknowledged and suggested by the DTO yesterday, that the Inner Relief Road itself will ultimately not deliver those. So, I think we should carefully re-visit the fact of whether it is acceptable in front of the Board to say there is simply no material alternatives, at the very time when policy is moving forward to say that there are alternatives. I think in the light of that the inner relief road should be examined and that the appropriate traffic study should be done to examine what contribution the Southern Distributor would make, which would obviate the necessity for driving the inner relief road through the historical central core of Athy and which at the same time that Southern Distributor would significantly contribute to dealing with other issues that have been raised. I think Mr. Taaffe (a Councillor) talked quite cogently yesterday in relation to the benefits of connecting further out here to actually allow a connection across here in other words, that the large housing areas which are been built on the west side of the river would actually be serviced by this rather than dragging people from that back through the town".

On Day 5 the following evidence may be found at p. 92 from Councillor Taaffe one of the objectors:

> "Any decision to proceed with the Inner Relief Road must result in the retention of all vehicular traffic within the centre of Athy. This traffic, whether motor cars or heavy goods vehicles would travel on the new road as well as on part of the existing Leinster Street, Duke Street and William Street which by virtue of their close proximity will effectively create a traffic island at the commercial heart of the town. It can truly be argued that the shopping area of Athy represented by Duke Street and Leinster Street is already despoiled by traffic, 40% of which is through traffic, and that the creation of another road will at least help to disperse that traffic alleviating to some extent the traffic related matters on our main street. Such an analysis is perhaps an over implication of a complex issue. Traffic studies confirm that new roads generate more traffic to the extent that in any given time the short term benefits of providing a road are soon lost. Even if an inner relief road is provided, the increased traffic generated within the centre of the town must lead to an increase in pollution levels, noise, visual intrusion, traffic hazardous (sic) and traffic congestion".

The material above is, as indicated earlier, necessarily selective. However it is necessary to identify it as being material which was before the respondent at the time it made its decision. It is also in the face of this material that the applicant must argue that the decision of the respondent was unreasonable as defined by case law, erroneous and contrary to fair procedure.

It is now necessary to consider in more detail the reasons given by the respondent for their refusal of the application.

The Reasons Given by the Respondent

The First Reason: Traffic
26. The first reason was as follows

> "The proposed N78 Athy Inner Relief Street development which originated in the 1970s as an inner relief road to serve the town in the context of traffic flow patterns identified in surveys carried out in July 1975. Having regard to the existing traffic demand patterns, to the permitted road developments in the region, including the N9/N10 Mullamast-Athy Link Road and to the areas of land zoned for development in the Athy Development Plan 2000, it is considered that the proposed inner relief road would fail both as a street and as relief road because it would continue to bring traffic, including heavy commercial vehicles through the town centre. The Board noted in particular the line of the Southern By-Pass (objective T1) in the current Athy Development Plan which would provide for a crossing of the River Barrow approximately 500 metres to the south of the proposed inner relief road at a point where the necessity of crossing the Grand Canal is obviated which route also provides for a crossing of the railway line and offers opportunities for providing linkages between the growing eastern southern and western suburbs of the town while leaving the townscape of its historic core intact. The proposed road development would therefore have adverse effects on the environment".

First Reason: The Applicants Case:
27. In essence Mr. James Macken S.C. on behalf of the applicant seeks to impugn the first reason given and the considerations contained in the refusal to approve the purported scheme on the basis that it gave rise to an unreasonable and irrational conclusion by the respondent in that there was no evidence before the respondent to enable it to come to the conclusion that there was an alternative to the inner relief street in the form of the Southern By-Pass. The applicant contends that the respondent also made an error under this heading in coming to the conclusion that because it was of the view that the proposed development would have an adverse effect on the environment, that in itself, was a sufficient reason to reject and/or refuse the proposed scheme.

The applicant relies here, and throughout the application on the State (Daly) v. Minister for Agriculture [1987] I.R. 161 *Simonovich v. An Bord Pleanála* (Unreported Lardner J. 24 July, 1988), *Seery v. An Bord Pleanála* (Unreported Finnegan J. 2 June 2000) and *MA Ryan v. An Bord Pleanála* (Unreported, Peart J. 6 February, 2003) to the effect there must be material before a decision maker which can support his decision and that such decision maker must take note of the probative weight and value given to such expert evidence as opposed to that which comes from other witnesses less expert. The Board had before it very considerable documentary material, including the Environmental Impact Statement and the Inspector's Report from the Enquiry ordered and the observation of many objectives to the project.

However when one carefully examines the reason as expressed it is not framed by reference to the Southern By-Pass at all. Rather the framework for the reason was by reference to the view taken by the respondent that the Athy Inner Relief Road would fail both as a street and as a relief road because it would continue to bring traffic, including heavy commercial vehicles through the town centre. Was this reason arrived at without lawful basis? Has the applicant has been able to identify any legal or evidential basis for its contentions as to the absence of material or irrationality of a reason which, even *prima facie*, appears not unreasonable. I am not so persuaded. It seems to me that this was it a reasonable conclusion which the Board was entitled to reach. Having reached that conclusion was it appropriate for the Board to grant approval? Neither the conclusion that the road would fail in its purpose nor the view that it would continue to bring traffic to Athy have been challenged by the applicant. These being conclusions the applicant was entitled to reach the applicant cannot sustain any claim that this reason was unreasonable.

31. Under the heading of the "first reason" a second aspect of the applicants case arises an assertion that the respondent came to the conclusion that there was an alternative to the inner relief street in the form of the Southern By-Pass. Is this so? In fact, a close

examination of the reason demonstrates that the respondent did not come to such a conclusion nor is any such conclusion recorded in the decision. The decision of the respondent was confined to refusing approval for the proposed road development the subject of the application before it. It decided to refuse that particular road proposal. In explaining its substantive decision, the respondent referred to the objective in the development plan relating to the Southern By-Pass which is a clearly relevant consideration in the context of the respondent assessing the suggested inner relief street solution. On behalf of the respondent Mr. Brian Murray S.C. submitted that the Board was conscious that it was not its function to prescribe what the applicant might do to alleviate the acknowledged traffic problems in the context of its refusal of the inner relief street proposal. But he contended that the onus is on the applicant to consider and assess the situation in the light of the respondents decision and to devise other solutions to the traffic problems. In this respect will be noted that that the respondent concluded that the question of consideration of alternatives had not been adequately addressed in the Environmental Impact Statement.

32. Later in this judgment the application to this case of the decision of the Supreme Court in the case of *O'Keeffe v. An Bord Pleanála* [1993] I.R. 59 will be addressed more centrally. For present purposes however it is sufficient to say that the question of whether the road was to be approved was vested in the respondent and in determining that question the evaluation of evidence, and the application of the appropriate legal criteria was also a matter for the respondent. It has not been shown that there was no sufficient evidence on which the respondent could or did arrive at the conclusion that the road development as proposed by the applicant would fail in its objective. That being the case I do not consider a basis has been established for interfering with this aspect of the reasoning of the respondent.

33. A further challenge to the first reason relates to the finding that the project would have an adverse effect or impact upon the environment. In paragraph 25 of the statement of grounds it is alleged that the respondent made an error of law in coming to the conclusion that, because it was of the view that the proposed development would have an adverse effect on the environment that in itself this was a sufficient reason to reject and/or refuse the proposed scheme.

34. However it seems that in this regard also the applicant has based its case upon a decision which does not appear to be contained in the reasons given by the respondent. The applicant has not been able to point to any evidence to suggest that the Board determined that it must refuse approval for the road development if it considered that this would have an adverse effect on the environment. The respondent accepts that the EIA process is purely procedural and that the EIA legislation does not require an authority to refuse approval for a development solely on the basis that it would have adverse effects on the environment. On the contrary, adverse environmental effects may be mitigated to the extent that these adverse effects are diminished or eliminated.

35. Furthermore it is submitted that the respondent determined in its discretion that the proposed inner relief road would fail both as a street and a relief road and for that reason, in combination with the other reasons specified, refused approval for the development. I agree. The mere fact that this also involved a matter that can be described as an adverse environmental effect does not and could not alter the validity of such conclusion.

In summary therefore the applicant has been unable to demonstrate a legal or evidential basis for its contentions either as to the alleged unreasonableness or any error in law with regard to the first reason.

The Second Reason Town Impact
36. The second reason furnished by the respondent was that

> "Having regard to the composition of protected structures and other buildings of architectural and archaeological importance and interest in the medieval core of Athy, to existing historic street patterns in the area and to the relationship of these elements of the built environment to the River Barrow, it is considered that the proposed road development would materially and adversely affect the character of the town centre of Athy and would detract from its townscape qualities, particularly in the Emily Square/Back Square area by reason of visual intrusion, noise and general disturbance arising from the introduction of vehicular traffic, including heavy commercial vehicles into a sensitive urban environment, interference with the pattern of urban spaces, proximity to protect structures, including the Cromaboo Bridge and the modern Dominican church on the west side of the river, and intrusion on a Zone of Archaeological Protection. The proposed road development would conflict with the provisions relating to preservation, conservation and the improvement of amenities contained in the current Athy Development Plan and would therefore be contrary to the proper development and sustainable development of the area".

37. In summary three grounds of challenge are asserted. First that the respondent acted ultra vires in that it has cross related road schemes, and planning reasons from the Planning and Development Act 2000. Second that the reason is irrational because (as alleged) the Board assigned significance to objectives relating to protected structures and buildings of archaeological and architectural interest in the town of Athy while ignoring or dismissing the proposed road development. Third the Board acted irrationally because while it stated that the development would affect the character of the town of Athy because of the introduction of vehicular traffic, in fact the evidence was that there was already vehicular traffic coming into Athy. These will be considered in turn.

38. In this connection the court was referred to the decision in the case of *Ashbourne Holding v. An Bord Pleanála and Cork County Council* (Unreported, Kearns J. 21st March, 2001) at p. 10 wherein reference was made to the resulting "recipe for chaos" which would result from the conditions attached to the applicants planning permission by the respondent. In that case the court held that the applicant had satisfied the requirements of the *O'Keeffe* test in that there was deemed to be no "relevant material" before the respondent which would justify overthrowing the expert report proffered by the applicant.

39. The applicant submits that the current extent of traffic congestion within the town of Athy has now, by reference to any objective standards, exceeded critical levels. The average annual daily traffic flow is in the region of circa 20,000 vehicles per day. This includes heavy goods vehicles moving through narrow and circuitous streets. The "recipe for chaos" caused by the irrational and unreasonable decision of the respondent has, the applicants contend, condemned Athy to traffic congestion for the foreseeable future.

The First Challenge to the Second Reason: Road Schemes and Planning Reasons
40. Section 51(5) of the Road Act lists three factors which the respondent should consider before approving a proposed road development. These are

> (a) the EIS, additional information and any submissions made in relation to the likely effects on the environment of the proposed road development.

(b) the views of the prescribed authority in Northern Ireland (this is obviously inapplicable in the instant case)

(c) the report and any recommendation of the Inspector conducting a public local enquiry in relation to the CPO of land where evidence is heard in relation to the likely effects on the environment of the proposed land development.

41. But Section 51(5) only prescribes three particular matters to which the respondent must consider. The section does not specifically limit the Board's consideration to the matters mentioned. Indeed s. 218(4) of the Act of 2000 provides that ss. 135, 143 and 146 of the Act shall apply and shall have effect in relation to the functions transferred to the Board under ss. 214 and 215 of the Act.

42. Section 143 of the Act states

"143. Board to have regard to certain objectives.

1. The Board shall in performing its function have regard to the policies and objectives for the time being of the government, a state authority, the Minister, planning authorities and any other body which is a public authority whose functions have or may have, a bearing on the proper planning and sustainable developments of cities towns or other areas whether urban or rural".

43. Thus the concept of proper planning and sustainable development is incorporated, by implication into the s. 51 consideration process. The fact that the confirming, both under s. 51 and under the compulsory purchase order procedure has been transferred from the Minister to the Board indicates that the adjudication must involve consideration of proper planning and sustainable development. This is borne out by s. 218(4) of the Act of 2000. Indeed the applicants own application for approval of the scheme pursuant to s. 51 of the Roads Act submits documentation certifying that the proposed development is in accordance with proper planning and sustainable development of the area and is in conformity with the current Kildare County Development Plan and the current Athy Development Plan.

44. In any event s. 51(5)(a) and (c) expressly require the respondent to consider the EIS. Section 51(2) and (3) of the Roads Act require that the EIS contain information regarding the effects of the proposed development on, inter alia, the landscape, material assets, including the architectural and archaeological heritage and cultural heritage (see s. 50(3)(b)). Likewise s. 50 of the Roads Act requires that the EIS contain information regarding the likely effects of the proposed development on the environment resulting from, *inter alia*, the use of natural resources, the emission of pollutants and the creation of nuisances. (See in this respect s. 50(3)(c) of the Roads Act). These effects were considered in the EIS.

45. Furthermore the effects of the proposed developments on, *inter alia*, the landscape, material assets, including the architectural and archaeological heritage and cultural heritage were addressed in submissions made on behalf of the applicant at the oral hearing.

46. Thus the impact of the proposed development on the architectural and archaeological heritage of Athy was one of the core issues raised by all parties in respect of this development. Hence the matters addressed in the second reason for the respondents decision not to approve the road development were directly related to matters covered in the EIS, observers submissions, and the Inspector's report (including the oral hearing).

The applicant was afforded the opportunity to address these prior to the decision of the respondent or the oral hearing. Indeed, having regard to the provisions of s. 51(4)(a) and (c), the respondent was obliged to consider these matters. In this respect, while s. 51 does not explicitly refer to proper planning and sustainable development, the matters addressed in the send reason for the Board's decision are incorporated in the consideration of the environmental effects of the development.

47. Furthermore had the Board not directed that the proposed road development be submitted to it for approval under the Roads Act, the procedure set out in Part XI of the Act of 2000 would have applied to the proposed inner relief road as it would have constituted development by local and state authorities. Under Part XI of the procedure the manager of a local authority is required to prepare a report evaluating whether or not the proposed development would be consistent with proper planning and sustainable development of the area having regard to the provisions of the Development Plan (see s. 179(3)(b)(ii)) of the 2000 Act. The interpretation contended for by the applicant would lead to an undesirable lack of consistency in that considerations for proper planning and sustainable development of the area which would be of relevance under Part X procedure could no longer be considered because the proposed road was instead subjected to s. 51 procedure.

The Second Challenge to the Second Reason: Protected Structures and Road Development

48. At the outset one might question whether this ground is an attempt to review the merits of the Board's assessment made by the Board. The respondent states that contrary to the applicants assertion it did not ignore the road objectives in the Athy Development Plan; that it was aware of the said objectives from the information provided by the applicant and the Inspector's report. The respondents submit that they had regard to all the material before it which included evidence both in support of, and against the proposed development. It is further submitted on behalf of the respondent that it was engaged in a balancing exercise and there was sufficient evidence for it to decide to refuse approval for the said development in the exercise of its discretion as the expert decision making body.

49. But when considered objectively it seems to me that the two grounds in question here (ground 22 and ground 23 of the statement of grounds) are, in reality, an attack on the weight that the Board placed upon the competing policy objective expressed in the Development Plan. The weight which ought to be attached to the objectives in the context of the Board's assessment of the proposed road development plan is a matter for the Board. Thus while relevance is a matter of law for the court weight is a matter of discretion for the decision maker. In *Tesco Stores Limited v. Secretary of State for the Environment* (1995) 1 WLR 759 Lord Keith stated:

"It is for the courts if the matter is brought before them to decide what is a relevant consideration. If the decision maker wrongly takes the view that some consideration is not relevant, and therefore has no regard to it, the decision cannot stand and must be required to think again. But it is entirely for the decision maker to attribute to the relevant consideration such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the *Wednesbury* sense … regard must be had to (material consideration) … but the extent, if any, to which it should effect the decision is a matter entirely within the discretion of the decision maker".

In the same case Lord Hoffman commented

> "The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of proper judgment which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty, (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore, involves no view about the part, if any, which it should play in the decision making process. The distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the secretary of state".

(See also *City of Edinburgh Council v. Secretary of State for Scotland:* [1998] 1 ALL ER 174; *and R. v. Director General of Telecommunications ex parte Cellcom Limited* [1999] COD 105.

50. Moreover I think that the language used by the applicant at paragraph 22 of its statement of grounds underlines an essential and fatal aspect to this part of the case. It asks the court to decide that the Respondent should have afforded *more weight* to one aspect of the statutory plan. This is precisely what the court should not be asked to do: the question of weighing evidence is only and solely a matter for the statutory decision making body. Were the position otherwise, the court would be making the determinations of facts and evidence which the legislature has consigned to a specialist statutory body. It would constitute the court as an appellate body therefore, as opposed to a reviewing Tribunal.

The Third Challenge to the Second Reason: Existing Vehicular Traffic
51. The same considerations apply a fortiori to the third ground invoked in connection with the second reason. The question of whether the proposed development will affect the character of the town because of traffic is an obvious matter of fact and evidence. It cannot be said that traffic would not have had this effect. Instead the point which is made is that because there was already an amount of traffic in the town the respondents decision was irrational. This is an adjudication on the merits.

52. In any case the second reason given by the respondent did not in fact address itself solely to the impact of traffic *per se*; what it concerned was the impact of the *road development* which it related to visual intrusions, noise and general disturbance arising from the traffic as well as interference with the pattern of urban spaces, proximity to protected structures and intrusion on a zone of archaeological protection. These factors cannot be severed from the conclusions of the Board in relation to traffic; they present a composite conclusion arrived at having regard to all of the evidence before the respondent as to the impact of the road itself. They are a legitimate conclusion by a decision making body.

The Third Reason
53. The third reason furnished by the board was:

> "3. It is considered that the environmental impact statement is deficient in not adequately addressing the alternatives to this inner relief route in the context of present land use patterns, traffic movements, road developments and environmental constraints".

The applicant says there was a want of compliance to section 50(2) of the Roads Act 1993 and 1998 as amended. The provisions of the statute has been recited earlier in the course of this judgment.

In order to consider the applicants case here in its context it is necessary to advert to a portion of the evidence adduced by affidavit. On the materials which have been referred to earlier as been before the Board it is quite clear that the necessity or justification for the purposed Athy Inner Relief Road was at all times to the forefront of the applicants case and the observers submissions to the respondent both in writing and at the oral hearing. Written submissions were received by the Board from the following bodies: Canal Ways Ireland, Frank Taaffe, Peter Sweetman and Associates, Councillor Frank English, An Taisce and Athy Urban Development Group. All of these submission are forwarded by the respondent to Kildare County Council upon receipt and well in advance of the oral hearing. Furthermore as appears from the Inspector's report the necessity and justification for the proposed inner relief street in the context of potential alternatives including the Southern By-Pass was one of the most contentious issues at the oral hearing and was fully ventilated at that time. Written submissions of Patrick Healy and the Athy Urban Development Group made at the oral hearing deals specifically with that issue. It is clear that at all times the applicant was aware of the nature of all the observations and submissions on the proposed inner relief road and in the central issue of the necessity or justification for it in the context of potential alternatives including the Southern By-Pass. The applicant made responses to this issue at the oral hearing.

54. The applicants say that the requirement as regards consideration of "alternatives" was properly dealt with in the Environmental Impact Statement (EIS) submitted by the applicant (in connection with the proposed road development as stipulated by s. 50(2) as amended) and that the said Environmental Impact Statement did not contain any deficiencies as stated in the third reason provided by the respondent in their decision to refuse the applicants application for refusal of the proposed road development and in coming to the conclusions set out in reason 3 that the said EIS was deficient was unreasonable and irrational.

In the alternative they say at no time during its consideration of the applicants s. 51 application did the respondent advise the applicant that any aspect of the Environmental Impact Statement was considered to be deficient nor did the respondent invoke the provisions of s. 51(4) (cited earlier) which empowers the Minister to require a road authority which has applied to him for an approval in accordance with subs. (2) to furnish him with specified additional information in relation to the likely effects on the environment of the proposed road developments and the authority shall comply with any such requirement; and thereafter consider such addition in relation to the likely effects of the environment of the proposed development under s. 51(5) of the Act.

Because the respondent did not request the applicant to furnish any additional information in connection with the Environmental Impact Assessment, the applicant was it is contended deprived of the opportunity to submit additional information which the respondent may have sought, or thought to be necessary to remedy the alleged deficiency in the Environmental Impact Report submitted by the applicant.

The applicant adds that the applicant had a legitimate expectation and/or reasonable expectation that if there were any perceived deficiencies in the Environmental Impact Statement submitted by them to the respondent that the respondent would inform them of such deficiencies and request further information in order to assist the respondent in their Environmental Impact Assessment. They conclude that in the circumstances the respondent failed to comply with the requirements of fair procedures and/or constitutional and natural justice in the manner in which it failed to notify the applicant of the purported deficiencies in the Environmental Assessment

report submitted by the applicant and in their failure to request additional information from the applicant in order to offer the applicant an opportunity to adequately address the purported deficiencies complained of by the respondent.

55. S. 50(2) of the Roads Act 1993 as amended by s. 14 of the European Communities (Environmental Impact Assessment Amendment) Regulations 1999 S.I. 93/1999 sets out the requisite information which should be contained in an EIS and at paragraph 50(2)(d) and paragraph 50(2)(f) reference is made to the requirement that an EIS contain "an outline of the main alternatives studied by the road authority concerned and an indication of the main reasons for its choice taking into account the environmental effects, and also "where appropriate an outline of the main alternatives (if any) studied and an indication of the main reasons for choosing the proposed alternative, taking into account the environmental effects".

56. The applicants submit that the requirement as regards "considerations of alternatives" was properly dealt with in the EIS submitted by the applicant and did not contain any of the deficiencies stated by the applicant in their decision to refuse the applicants application. In this regard they make reference to the said EIS prepared by the applicant which makes specific reference to the various paragraphs of the EIS which deals with the "alternatives considered. Therefore the applicants contend that the respondents decision as set out in reason 3 namely that the EIS was deficient unreasonable and irrational in the light of the EIS which was before the respondent. There could be no objective justification for such a reason. The applicant rely on *The State (Daly) v. Minister for Agriculture* [1987] I.R. 161 wherein it was stated:-

> "The court must ensure that the material upon which the Minister acted is capable of supporting his decision".

And in the case of *Simonovich v. An Bord Pleanála* High Court, Unreported, Lardner J. 24th July, 1988 that judge stated

> "It is true that neither the Inspector nor the Board was bound by the law of evidence which applies in the courts. They are however concerned to evaluate the evidence including the weight of the evidence and the cases presented to them by the parties and they must act reasonably. In my view this requires that there must be aware and take note of the difference in probative weight and value of evidence given by an expert on matters of historic fact as compared to the evidence given by a non expert".

57. In this connection the respondent relies on dicta in the following cases namely: *The State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642; *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, *Mulhall v. An Bord Pleanála* (Unreported, High Court, McCracken J. March 21st 1996); *Seery v. An Bord Pleanála* (Unreported, High Court, Finnegan J. June 2nd 2000); *Ashbourne Holdings Limited v. An Bord Pleanála* [2002] 2 ILRM 321. These set out the well known criteria on "irrational" decisions.

58. The respondent also relies on *MA Ryan & Sons Limited v. An Bord Pleanála* (Unreported, High Court, Peart J. 6th February, 2003); A*er Rianta Cpt v. Commissioner for Aviation Regulation*, (Unreported, High Court, O'Sullivan J. 16th January, 2003). The latter judgment is referred to later in more detail.

59. The applicants draw specific attention to the usage of the word "shall" in s. 51(5)(a) which, they submit places a mandatory/obligatory requirement on the respondent, when exercising its function under s. 51 to consider the EIS and any additional information furnished under subs. (4). The applicants submit that the decision of the respondent under s. 50 relates to an important infrastructural project. The public interest in the decision of this type is expressly recognised by the legislature itself in the provisions of s. 50 and s. 51 which provides for an EIS and a public inquiry.

60. Mr. Macken S.C. and Mr. John Alymer S.C. for the applicants contend that the respondent in exercising its functions under s. 51 of the Roads Act as amended should have taken reasonable steps to ensure fair procedures and the principles of natural justice be not breached. In *East Donegal Co-Operative Limited v. Attorney General* [1971] I.R. 317 Walsh J. as is well known stated:-

> "The presumption of constitutionality carried with it not only the presumption that the constitutional construction is the one intended by the Oireachtas but also that the Oirechtas intended that the procedures, discretions and adjudications which are permitted, provided for or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice (the applicants also refer to the cases of *The (State) Genport v. An Bord Pleanála* [1983] ILRM 12 and *O'Callaghan v. Clifford* [1993] 3 I.R."

61. The applicants say that the respondent did not request the applicant to furnish any additional information in connection with the Environmental Impact Assessment that the respondent was charged with the undertaking and as a consequence the applicant was deprived of the opportunity to submit such additional information which the respondent might have sought or thought to be necessary to remedy the purported deficiency in the Environmental Impact Statement submitted by the applicant. In this submission the applicants rely particularly on dicta in the following well known cases*: Simonovich v. An Bord Pleanála* (Unreported, High Court, Lardner J. 24th July, 1988); *Frenchurch Properties Limited v. Wexford County Council* [1992] 2 I.R. 268; *Navan Tanker Services Limited v. Meath County Council* [1998] 1 I.R. 166*; McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 49 and *Stack v. An Bord Pleanála* (Unreported, High Court, O'Neill J. July 11 2000) on the issues of fair procedures.

62. In the case of *Ryan v. An Bord Pleanála* the court stated

> "It is of course the case that in accordance with the principles of natural justice the applicant must have had an opportunity to be heard in relation to any facts upon which the Board's decision is based".

63. The counsel submits that where the legislature has provided a remedy whereby any possible breach or error on the part of the respondent might be remedied and such an alternative remedy is not invoked, then the decision making process taken by the respondent must be subject to review and scrutiny.

64. The applicant relies on the case *of O'Callaghan v. Members of the Tribunal of Inquiry into Planning Matters* (Unreported, 7th July, 2004) where O'Neill J. stated

> "Whether the encroachment into the constitutional right is justified depends upon the validity of the factors relied upon to justify it and given, that what is thought to be justified is a breach of, or encroachment into a constitutional right, the factors put forward to justify them are properly to be assessed with the kind of caution or circumspection which may be aptly described as anxious scrutiny".

65. As indicated earlier the applicant for reasons not vouchsafed to the court, chose not to prepare an EIS report prior to the CPO on 23rd April, 2004, nor prior to its application to the Board for confirmation of the Compulsory Purchase Order on 19th March, 2004. The

EIS was actually prepared on foot of a direction issued by the respondent on 1st June, 2004, directing the applicant to prepare an EIS in respect of the proposed road development. As appears from the summary of legislation earlier, this direction was issued pursuant to s. 50(1)(b) of the Roads Act. Section 50(2)(d) provides that an EIS shall contain an outline of the main alternatives studied by the road authority concerned and an indication of the main reasons for its choice, taking into account the environmental effects. Furthermore s. 51(2) of the Roads Act provides that a road authority shall submit to the Board the EIS prepared in respect of such development. Section 51(4) provides that the board may require a road authority which has applied to it for approval of the proposed road development to furnish it with specified additional information in relation to the likely effects on the environment of the proposed road development.

66. Thus where the respondents consider that an EIS is inadequate or deficient there are three options open to it. These are

> (a) the Board can reject the application as invalid at the outset on the basis that the EIS fails to comply with the statutory requirements;
>
> (b) in the second place the Board may require a road authority to furnish it with specified additional information in an attempt to render the EIS adequate, or
>
> (c) the Board may instead refuse permission on the basis that the EIS whilst meeting statutory requirements is nonetheless deficient in a number of respects.

67. The distinction between the *level of deficiency* in an EIS sufficient to justify rejection of the application at the outset; and level of deficiency in an EIS leading to a refusal of permission on the merits has arisen in case law.

68. In the decision at first instance of the High Court of England and Wales in R. on the application of *Blewett v. Derbyshire County Council* [2004] JPL 751 Sullivan J. observed

> "39. This process of publicity and public consultation is those persons who consider that the environmental statement is inaccurate or inadequate or incomplete an opportunity to point out its deficiencies.

Under Regulation 3(2) the local planning authority must, before granting planning permission, consider not merely the environmental statement, but the "environmental information" which is defined by Regulation 2 as the "environmental statement including any further information, any representations made by anybody required by these regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development". He continued

> "40. In the light of the environmental information the local planning authority may conclude that the environmental statement has failed to identify a particular environmental impact, or has wrongly dismissed it as unlikely or not significant. Or the local planning authority may be persuaded that the mitigation measures proposed by the applicant are inadequate or insufficiently detailed. *That does not mean that the document described as an environmental statement falls outwith the definition of an environmental statement within the Regulations so as to deprive the authority of jurisdiction to grant planning permission. The local planning authority may conclude that planning permission should be refused on the merits because the environmental statement has inadequately addressed the environmental implications of the proposed development, but that is a different matter altogether. Once the requirements of Schedule 4 are read in the context of the Regulations as a whole it is plain that a local planning authority is not deprived of jurisdiction to grant planning permission merely because it concludes that an environmental statement is deficient in a number of respects*". (emphasis added).

That judge added

> "41. Ground 1 in these proceedings is an example of the unduly legalistic approach to the requirements of Schedule 4 of the Regulations that has been adopted on behalf of the claimants in a number of applications for judicial review seeking to prevent the implementation of development proposal. The Regulations should be interpreted as a whole and in a common sense way. The requirement that an "EIA application" (as defined in the Regulations) must be accompanied by an environmental statement is not intended to obstruct such development. As Lord Hoffman said in *R. v North Yorkshire County Council ex parte Brown* [2000] 1 A.C. 397 at p. 404 the purpose is "to ensure that planning decisions which may affect the environment are made on the basis of full information". In an imperfect world it is an unrealistic counsel of perfection to expect that an applicants environmental statement will always contain the "full information" about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environment statement may well be deficient and made provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting "environmental information" provides the local planning authority with as full a picture as possible. *There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations (Tew was an example of such a case) but they are likely to be few and far between"*. (emphasis added).

69. The decision of the Court of Appeal in the same case turned on a different point namely an allegation that the County Council had failed to consider the best practicable environmental options [2004] EWCA MC Civ 1508. The principles at first instance outlined are therefore apposite and applicable.

70. It is clear that there must be a clear and principled distinction between the exercise of a statutory discretion and the interpretation of a statute. Thus, whereas the interpretation of statutory provisions which trigger the requirement for environmental impact statement is a question of statutory construction for the courts (*Maher v. An Bord Pleanála* [1999] 2 ILRM 198); the consideration of the quality or adequacy of the information on the likely environmental impact of a proposed development involves the exercise of a statutory discretion for the discretion.

71. The decision of McKechnie J. in *Kenny v. An Bord Pleanála (No. 1)* [2001] 1 I.R. 565 at p. 578 is apposite:

> "19. Once the statutory requirements had been satisfied I should not concern myself with the qualitative nature of the environmental impact study or the debate on it had before the Inspector. These are not matters of concern to this court. The fourth notice party and the respondent, as these parties must under the Regulations, were satisfied as to the Environmental Impact Statement with the Inspector and the respondent who also being satisfied with the evidence, both documentary and oral produced at the oral hearing. That in my view concludes the matter".

McKechnie J. was invited to reconsider that portion of his judgment on an application for a certificate of leave to appeal under s. 82(3B)(b)(i) of the Act of 1963. The applicant argued that this constituted a fundamental error of law in that the planning authority and/or the Board would have exclusive jurisdiction to determine the adequacy of an EIS. That judge rejected this argument on the basis that his earlier judgment was premised on the basis that all relevant regulatory and statutory requirements had been complied with; that a failure to comply with the statutory requirements could render the resulting decision open to challenge on *ultra vires* grounds and that a challenge on the *O'Keeffe* principles to the rationality of deeming EIS adequate would always remain open to an applicant (see *Kenny v. An Bord Pleanála (No. 2)* [2001] 1 I.R. 704); see also the judgment of Murphy J. in *Arklow Holdings v. Wicklow County Council* which confirms that the adequacy of an EIS is only open to review on the basis of irrationality).

72. The approach adopted by McKechnie J. is consistent with that of the courts of England and Wales (see *R. v. Rochdale Metropolitan Borough Council ex parte Millne* (2001) 81 P & CR 27. The decision of the High Court in that decision was upheld by the Court of Appeal in an unreported decision of Pill and Chadwick LJ on December 21st, 2000:

> "In my judgment what is sufficient is a matter of fact and degree. There is no blue print which requires a particular amount of information to be supplied. What is necessary depends on the nature of the project and whether, given the wording of (Article 2 of the Directive), enough information is supplied to enable the decision making body to assess the effect of the particular project on the environment. I agree with Sullivan J. that the court cannot place itself in the position of reconsidering the detailed factual matters considered by the local planning authority. Equally I accept that the court does have a role and there may be cases where the court can and should intervene and hold *that no reasonable local authority could have been satisfied with the amount of information which it was supplied in the circumstances of the particular case*".

73. Under the statutory regime the respondent is entrusted with considering the adequacy of the EIS. It is the exercise of the statutory discretion which the applicants now seek to challenge. A challenge can only be mounted on contention that the decision of the Board was unreasonable or irrational and that the well established principles laid down in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 therefore apply. The question therefore arises as to whether the applicant can demonstrate that the respondents decision that the EIS was deficient may be challenged on the grounds contemplated by the Supreme Court in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. In that case Finlay CJ speaking for the Supreme Court rejected the applicants challenge to a decision on the grounds of irrationality and in doing so set a high threshold for a claim of irrationality to be made out:

> "It is clear from these quotations that the circumstances under which the court can intervene on the basis of irrationality with the decision maker involved in an administrative function are limited and rare. It is of importance, and I would think of assistance to consider not only as was done by Henchy J. in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 the circumstances under which the court can and should intervene but also in brief terms, and not necessarily comprehensively, to consider the circumstances under which the court cannot intervene

The court cannot interfere with the decision of an administrative decision making authority merely on the grounds that

> (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or
>
> (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it.

These considerations described by counsel on behalf of the appellants as the height of the fence against judicial intervention by way of review on the grounds of irrationality of decision, are of particular importance in relation to questions of the decisions of planning authorities.

Finlay C.J. added

> "Under the provisions of the planning acts the legislature has unequivocally and firmly placed questions of planning, questions of balance between development and the environment and the proper convenience and amenities of an area within the jurisdiction of the planning authorities and the Board which are expected to have special skill, competence and experience in planning questions. The court is not vested with that jurisdiction, nor is it expected to, nor can it, exercise discretion with regard to planning matters."

He concluded

> "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.

As was indicated by this court in *P & F Sharpe Limited v. Dublin City and County Manager* [1989] I.R. 71, the onus of establishing all that material is on the applicant for judicial review, and if he fails in that onus he must fail in his claim for review. Accordingly on the first submission made by the appellants, on this issue on this appeal, I would hold with them and allow the appeal."

The question must now be considered whether there was evidence before the Board to conclude as it did. It is not a question for this court to consider whether it agrees with the evidence or not.

74. Some of the information contained in the EIS in relation to the consideration of alternatives to the inner relief road was significantly out of date. As indicated earlier the project dated back as far as the late 1960s. The issue was dealt with in a report from 1975. It was part of the Athy Development Plan in 1990. It does not appear that the EIS made any real attempt to consider the alternatives in the light of the factors highlighted in the third reason for the Board's decision. Instead the EIS merely studied minor variations to the proposed design of the inner relief road. But all this must be taken in the context of the recital of evidence and material furnished to the applicants, and the material identified as having been before the Inspector and thereafter the Respondent. Can it then be contended that the reason was irrational in the light of this material and evidence? The court can only conclude the answer to this is no.

The Second Challenge to the Third Reason: Fair Procedures

75. The next matter for consideration relates to the applicants contention that the respondent acted in breach of fair procedures by failing to invoke s. 51(4) of the Roads Act. This provision confers upon the respondent a discretion or power to request further information as to the likely effects on the environment of the proposed road development. The Board may request additional

information where, in its discretion, it decides that additional information is necessary in order to enable it to determine the application before it. However it seems to me that it is also open to the respondent to decide, in its discretion that it has adequate information to conclude that approval should be refused on the merits because, *inter alia*, the EIS has inadequately addressed the environmental implications of the proposed development.

76. Insofar as the applicant says that the Board ought to have notified it that the EIS was considered deficient and/or to have afforded it an opportunity to submit additional information there are a number of relevant factors. The issue of the necessity or justification for the proposed Athy inner relief street was clearly at all times to the forefront of both the applicants case and the observers' submissions to the Inspector, both in writing and at the oral hearing. These submissions were forwarded by the respondent to the applicants upon receipt and *well in advance of the oral hearing*. Further as appears from the Inspector's, report the necessity/justification for the proposed road and the consideration of an alternative was "undoubtedly" one of the most contentious issues at the oral hearing and was fully ventilated there. At that hearing the applicant was enabled to make its full response to these issues and the respondent was entitled to conclude that the matter had been ventilated by all parties. Thereafter the respondent was entitled to reach a decision on the basis of the written and oral submissions of all parties to the Board.

77. It is irrelevant whether or not there was an "official letter" from the respondent. The applicant had every opportunity to make whatever point it wished in the light of the matters advanced at the Inspector's hearing and to which their intention had been directed by others. The provenance of the information is relevant. Nor can an issue of fair procedures be said to arise, when at all stages, the applicants knew that the adequacy or inadequacy of the EIS was in question. It was not necessary for the respondent to raise these issues. The issues were already there in stark terms had been raised by others and been passed on by the Board. Thus the arguments advanced by the applicant on this issue come within the category of what has been identified as "trivial and tenuous".

78. With regard to the threshold which the applicant must cross it is apposite also to refer to the decision of O'Sullivan J. delivered on 16th January, 2003 in the case of *Aer Rianta Cpt Applicant and the Commissioner for Aviation Regulation Respondent* and by Order of the High Court *Aer Lingus Limited and Ryanair Limited Notice Parties* (judgment of O'Sullivan J. delivered 16th January, 2003 Unreported). In dealing with the threshold for irrationality O'Sullivan J. put the issue in trenchant terms at p. 69 of the judgment

> "It is not necessary in this part of my judgment to cite again the lapidary statements of principle from Lord Chief Justice O'Brien and Chief Justice O'Higgins, Finlay and Hamilton.
>
> At the heart of jurisprudence on irrationality review lies the distinction between error and invalidity. A decision is not invalid because it is wrong. It is not invalid because it is very wrong, fundamentally wrong or even absolutely wrong. These epithets are intended to criticise a decision in much the same way as the corrector of an examination paper might condemn the feeble efforts of a weak student or even the weakest student but they do not attempt the castigation reserved by the courts for the chancer who turns up for the exam and writes down absurdities which display no attempt at a meaningful relationship between what is written and the questions asked or, it maybe, the obtuse blockhead whose attempt at achieving such relationship is whimsical, fanciful or hopelessly idiosyncratic. His answers are indeed an insult to the intelligence: both the examiners and his own – but the feeble efforts of the poorest students are in a different category: blameworthy it may be but not an outrage or an affront to the intelligence" …

That judge continued;

> "the type of grievous errors so reviewable is of a completely different order. It is not reached by the extension of the line on which are to be found mere errors, serious errors, multiple errors and fundamental errors because that is a line of rational attempt no matter how misguided the outcome. But the kind of error that produces invalidity is one which no rational or sane decision maker, no matter how misguided could essay to be reviewably irrational. It is not sufficient that a decision maker goes wrong or even hopelessly or fundamentally wrong: he must have gone completely and inexplicably mad: taken leave of his senses and come to an absurd conclusion. It is only when this last situation arises or something akin to it that a court will review the decision for irrationality". A court will not interfere to adopt the graphic phrase of O'Sullivan J. because the decision maker has "gone astray in the exercise of his discipline".

Summary
79. On the basis of these findings the applicant has not established substantial grounds to justify the grant of leave to such judicial review in relation to any of the three reasons furnished.

Application to amend statement of grounds
80. For completeness I should now deal with two matters. Paragraph 25 a statement of grounds seeking leave states

> "The respondent also in the first reason submitted for the refusal to approve the purported road development, made an error in law in coming to the conclusion that because it was of the view that the proposed development would have an adverse effect on the environment, that itself was a sufficient reason to reject and/or refuse the proposed scheme".

In the course of outlining the case Mr. Macken S.C. on behalf of the applicant sought to amend the statement of grounds set out above by the addition of the words

> "… without considering and referring to the provisions of the Athy Development Plan 2000 which refer to the Athy Inner Relief Street as an objective. It became clear in the course of these submissions made on behalf of the applicant that in fact that this was not a mere clarification. Because in the course of argument authorities were cited which demonstrated that the true issue which were sought to be argued in relation to this particular ground appertained to the obligation to give reasons; a potential issue as to the level of reasoning necessary, and the degree of reference necessary to the Athy Development Plan in the respondents decision.

81. The court determined that this was effectively a new ground. It had regard to the fact that the decision which is impugned in these proceedings was made eight months ago. The applicants are permitted a period of eight weeks within which to seek leave for judicial review by way of notice of motion. In certain exceptional circumstances the time may be extended but this can only be for good and sufficient reason. (See *Ní Eilí v. Environmental Protection Agency* [1997] 2 ILRM 458 and *Ní Eilí v. Environmental Protection Agency* (Unreported, Supreme Court, 30th July, 1999) where the still applicable principles are considered. No such review were advanced in this application which was made in the absence of formal evidence or notice.

82. Having regard to the fact that the application was therefore effectively to establish a new ground, and in the absence of any

"good and sufficient reason" to extend the time, the court I declined to the application to amend.

83. A further issue, then arises.

Each of the three reasons tendered by the respondent may be identified as No. 1 "The Traffic Ground"; No. 2 "The Town Impact Ground"; No. 3 The EIS Ground".

84. The first ground was challenged for irrationality and adverse impact upon the environment. The second ground was challenged for reasons relating to road schemes and planning reasons; protected structures and road development and with regard to existing vehicular traffic. The third reason relates to the question of deficiencies or otherwise in the EIS, and fair procedures.

It will be seen therefore that while there is *some degree* of relationship between the three grounds it cannot be said that there inextricably intertwined. The basis for each is distinguishable. The reasons have been rehearsed in the course of this argument and do not require to be set out further here. The fact that there may be an overlap of legal principles does detract from the fact that each of the reasons given by the Board is in essence free standing and can be distinguished *inter se*.

In *Talbot v. An Bord Pleanála* and Others Peart J. 21st June, 2005 that judge had to consider a situation which would arise where even if the applicants in those judicial review proceedings were to succeed in a challenge to one ground for refusal by the Board they would be left with the inevitable prospect that in any further application they might make, the remaining grounds of refusal would remain and they would have gained nothing of benefit from the successful outcome of the judicial review proceedings which they had brought.

85. In the course of his judgment therein Peart J. stated

> "Relief by way of judicial review is discretionary. In other words even if the court considers that the applicant has shown substantial grounds for contending that the decision is invalid or ought to be quashed, and that he enjoys standing in a matter, the court can in the particular circumstances of the case refuse leave to grant relief by way of judicial review. One of those circumstances is where it would be futile in the sense that no real benefit would accrue to the applicant even if, having been granted leave the applicant were to be successful in the substantive hearing and the decision was quashed. Ms. Hyland referred the Court to judgments such as those of O'Higgins C.J. and Henchy J. in the Supreme Court in *Cahill v. Sutton* [1980] 269 and *Brady v. Donegal County Council* [1989] ILRM 282. Albeit in the context of a constitutional challenge to statutory provisions the former case makes clear the caution which the court must exercise to ensure that access to the court is reserved to those for whom there is some benefit from any order which might be made.

In that context Peart J. then considered the well known authorities of *The State (Abenglen Properties) v. Corporation of Dublin* [1984] I.R. 381*; Farrell v. Farrelly* [1988] I.R. 201 and *Heavey v. The Pilotage Committee* (Unreported, 7th May, 1992, Blayney J.). While the facts of the instant case are somewhat different, the principle as set out by Peart J. might arise in an appropriate case. Having made findings in relation to each of the reasons individually, it is not necessary to decide on this point here. The discretion to grant leave, or to the substantive relief of judicial review itself, must be exercised having regard to all the circumstances of the case, even where the court may be satisfied that some breach of rules or procedure might have occurred. It is well established that the court will not act in vain. There are circumstances where a court will refuse relief otherwise available were to do so would serve no useful purpose. Thus even if a court were to fall into error regarding one of a number of grounds it could nonetheless refuse either a grant of leave or substantive judicial review were it to hold that relief should not be granted in relation to other separate or discrete determinations which would continue to provide a basis for the continuing validity of the decision impugned.

The Compulsory Purchase Order

86. Finally it should be stated that counsel for the applicant has correctly accepted that it follows that were the court to refuse leave in relation to the decision impugned in this case it would follow that the leave sought challenging the annulment of the compulsory purchase order would fail also.

87. Having regard to the circumstances therefore the court will decline the application for leave in relation to both decisions of the respondent made herein on the 21st of June 2005.