Neutral Citation Number: [2008] IEHC 289

THE HIGH COURT
JUDICIAL REVIEW
COMMERCIAL

2007 No. 1303 J.R.
2007 No. 144 COM

IN THE MATTER OF THE FISHERIES (AMENDMENT) ACT 1997, AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 73 OF THE FISHERIES (AMENDMENT) ACT 1997

BETWEEN

DEERLAND CONSTRUCTION LIMITED

APPLICANT

AND
THE AQUACULTURE LICENCES APPEALS BOARD
AND
THE MINISTER FOR COMMUNCIATIONS, THE MARINE AND NATURAL RESOURCES

RESPONDENTS

AND
LETT & COMPANY LIMITED

NOTICE PARTY

Judgment of Mr. Justice Kelly delivered on the 9th day of September, 2008

Introduction
1. The applicant ("Deerland") seeks to quash on *certiorari* a decision of the first respondent ("ALAB") of the 17th of July, 2007, to grant an aquaculture licence to the notice party ("Lett"). Deerland also seeks *certiorari* against the second respondent ("The Minister") in respect of a decision of his to refuse to consider an application for a foreshore lease. This decision was communicated to Deerland by a letter of the 11th September, 2007.

2. *Certiorari* is the principal relief sought against both decisions but certain ancillary declaratory orders are also sought. Originally no fewer than thirty two grounds were relied upon in support of the order sought by Deerland. In the course of pre-trial written submissions and at the hearing these were reduced to eleven in all.

Background
3. Since late in the nineteenth century members of the Lett family have been mussel fishing in Wexford harbour. In 1963 Lett was incorporated and took over the Lett family's mussel beds in that harbour.

4. In October, 1996 Lett applied for an aquaculture licence in respect of those mussel beds. A licence was granted in October, 2001 for those beds with the exception of numbers 30A and 30D in respect of which no decision was made.

5. Deerland lodged an application for planning permission for a hotel and associated car-parking with Wexford Borough Council on the 31st December, 2004 (the hotel permission). A final grant of permission issued from that Borough Council on the 16th November, 2006. The development for which planning permission was obtained extended into part of Wexford harbour and Deerland intended that some land reclamation would require to be undertaken to implement the permission.

6. Deerland lodged a further application in respect of a mixed use scheme on the 13th March, 2006, and a final grant of permission in respect thereof issued on the 3rd September, 2007, (the mixed use permission).

7. Prior to lodging the planning applications, meetings took place between representatives of Deerland, the County Manager and the Junior Minister at the Department of Communications, Marine and Natural Resources who was also a local T.D. for the Wexford area.

8. The two planning applications were submitted in the context of a formally agreed area action plan for the future development of the lands and foreshore which derived from the County Wexford Development Plan and the Wexford Town and Environment Development Plan of 2002.

9. As part of the various planning applications for development, Deerland sought the written consent for the making of such applications from the foreshore section of the Department of the Marine. On the 23rd December, 2004, such a letter of consent was issued in the context of Deerland's application for the hotel permission. On the 28th November, 2005, the Minister's office issued a letter of consent in the context of the application for the mixed use scheme. On the 21st March, 2007, the Minister's office issued a letter of consent to Deerland in the context of a further application for works to be done at the marina.

10. An area of the harbour where land will have to be reclaimed so as to implement Deerland's planning permissions is contained within the area for which the aquaculture licence was ultimately granted by ALAB to Lett on the 17th July, 2007. This creates a major problem for Deerland given that Lett's licence confers exclusive rights on it.

Aquaculture Licence
11. On the 22nd November, 2006, Lett was granted an aquaculture licence by the Minister in respect of beds 30A and 30D. Bed 30D has no relevance to these proceedings.

12. Deerland says that the first information which it received concerning the decision to grant an aquaculture licence was in December, 2006 when a notice was published to that effect in the Wexford People newspaper. Deerland's Managing Director subsequently discovered that an earlier notice for the purposes of public consultation had been placed in the same paper by the Minister on the 15th August, 2006. This notice had not been seen by any of Deerland's personnel and Mr. McPhillips, its Managing Director, says that he was shocked to discover that an application for a licence had been acceded to.

13. Deerland decided to appeal the decision to ALAB and did so on the 21st December, 2006. Needless to say the merits of the appeal are not for consideration in this application for judicial review, but it is to be noted that the appeal raised a number of issues. They included the conflict with the pre-existing hotel permission. The appeal also pointed out an overlap of the area of the site in respect of which the aquaculture licence had been granted and that of the mixed use development about which a decision was then pending.

14. Apart from a letter of the 20th April, 2007, from ALAB indicating that it was extending the four month period allowed to it to make

a decision under s. 56 of the Act, nothing more was heard by Deerland until the 17th July, 2007.

15. On that occasion a letter was sent by ALAB to all parties indicating that a decision had been taken to refuse the appeal and to grant the licence to Lett as if the application had been made to that Board in the first instance.

16. In the week prior to the decision of ALAB, Deerland made applications for a foreshore lease to the Minister. Those applications were dated 10th and 11th July, 2007. They were responded to on 11th September, 2007, with the Minister noting that ALAB had "upheld the aquaculture/foreshore licence as issued to Lett & Co for the Wexford harbour area". The letter went on "please note that as the area concerned in the aquaculture/foreshore licence overlaps a major part of the above applications, this division will not be in a position to process this application any further". Deerland contends that this determination of the Minister is wrong in law for reasons which I need not consider at present.

Procedure
17. Judicial review of the decision of ALAB is governed by s. 73 of the Fisheries (Amendment) Act 1997, ("the 1997 Act"). That section precludes a person from questioning a decision of ALAB otherwise than by way of an application for judicial review and requires that such application for leave be on notice to that Board and other interested parties. The court is enjoined from granting relief unless it is satisfied that the applicant has demonstrated substantial grounds for contending that the decision or determination is invalid or ought to be quashed.

18. The application for judicial review against the Minister falls to be dealt with in the conventional way by means of relief obtained ex parte applying the test prescribed by the Supreme Court in *G. v. D.P.P.* [1994] 1 I.R. 374.

19. For convenience sake the applicant put all of the parties on notice and applied for leave during the course of the hearing. I ruled that the applicant had made out a case for the grant of leave to apply for judicial review against ALAB and the Minister, applying the respective tests which are prescribed in order to obtain such relief.

20. This is my judgment therefore on the substantive application for judicial review on the grounds upon which leave to apply for such was granted.

Issues
21. Three issues are raised in these proceedings. The first deals with the alleged failure of ALAB to give reasons for its decision of the 17th July, 2007. The second deals with the procedures followed by ALAB. The third deals with the status of the letter from the Minister and its propriety and consequences.

ALAB's Decision
22. The following is the decision of ALAB:-

> "Aquaculture Licences Appeals Board
>
> Fisheries (Amendment) Act 1997, (as amended and substituted)
>
> WHEREAS an appeal having been made to the Aquaculture Licences Appeals Board (hereinafter also referred to as "the Board") pursuant to s. 40 of the Fisheries (Amendment) Act 1997, (as amended and substituted) by a company with the name Deerland Construction Limited (hereinafter referred to as "the appellant") against the decision in the notice of decision dated the 23rd November, 2006, issued by the Minister of State and the Department of Communications, Marine and Natural Resources to grant, subject to conditions an aquaculture licence to Lett & Co Ltd (hereinafter referred to as "the applicant") for bottom cultivation of mussels at two sites in Wexford harbour, County Wexford (Department reference T03/030A3 and T03/30D) (Board reference AP5/1/06).
>
> AND WHEREAS the Board, having regard to the appeal and, inter alia, the provisions of the Fisheries (Amendment) Act 1997, (as amended and substituted) decided to determine the appeal by determining the application for the licence as if the application had been made to the Board in the first instance pursuant to s. 40(4)(b) of the Fisheries (Amendment) Act 1997, (as amended and substituted).
>
> AND WHEREAS the Board in considering the appeal took account of the matters referred to in s. 61 of the Fisheries (Amendment) Act 1997, (as amended and substituted) and having regard to the aforementioned, the appeal file and reports of the Board's technical adviser and being satisfied that it is in the public interest to do so, the Board determined at its meeting on the 17th July, 2007, to grant to Lett & Co Ltd an aquaculture licence for the bottom cultivation of mussels located at the two sites (T03/030A3 and T03/30D) in Wexford harbour, County Wexford in accordance with the terms and conditions in the schedule and map attached to the said licence dated the 17th July, 2007.
>
> Mario Minehane
>
> Deputy Chairperson for and on behalf of Aquaculture Licences Appeals Board."

The Statutory Setting
23. Section 7 of the 1997 Act provides that:-

> "Subject to section 8, the licensing authority may, if satisfied that it is in the public interest to do so, licence a person, at a place or in waters specified in the licence, to engage in aquaculture or such operations in relation to aquaculture, and subject to such conditions, as it thinks fit and specifies in the licence."

24. "Aquaculture" is defined in s. 3 of the 1997 Act as meaning:-

> "The culture or farming of any species of fish, aquatic invertebrate animal of whatever habitat or aquatic plant, or any aquatic form of food suitable for the nutrition of fish."

25. Section 8(3) of the 1997 Act provides:-

"An aquaculture licence shall not be construed as taking away or abridging any right on, to or over any portion of the seashore enjoyed by person under a local or special Act, or any charter, letters patent, prescription or immemorial usage or a right of several fishery, without the consent of that person."

26. Section 12 of the 1997 Act states that the licensing authority shall determine an application for a licence by deciding either to grant the licence or a variation of it, or to refuse to grant the licence.

27. Section 15 provides that an aquaculture licence shall be for such period, not exceeding 20 years, as may be specified in the licence.

28. Section 16 provides as follows:-

"(1) A licence is binding on the State and on all persons whomsoever, and, subject to section 8(3), shall operate to enable the licensee to carry on, in accordance with the licence, such operations as are specified in the licence, free from all prior or other rights, titles, estates or interests, if any.

(2) In addition to his or her entitlement under subs.(1), and notwithstanding anything contained in the Fisheries Acts, 1959 – 1995, or any instrument under those Acts, a licensee or any person acting under the directions of a licensee shall, by virtue of, but subject to the conditions of, the licence and the requirements of any regulations made under section 71, have the exclusive right to do within the boundaries or limits specified in the licence anything authorised by the licence or necessary or expedient to conduct the operations specified in the licence."

29. Section 20 of the Act provides:-

"Except as permitted by or under this Act, if any person, by trespass, fishing or otherwise interferes with anything done or being done pursuant to a licence, and the interference is carried on without the permission of the licensee, then, notwithstanding the existence of any public right to fish, the person so interfering shall be guilty of an offence."

30. From these provisions it is clear that an aquaculture licence is a very valuable asset conferring, in effect, exclusive rights to do anything authorised by the licence backed up the sanction of the criminal law.

31. Part 3 of the 1997 Act deals with appeals and related matters. Chapter 1 deals with ALAB, its personnel and procedures. Chapter 2 deals with appeals to ALAB.

32. Section 40(1) provides that a person aggrieved by a decision of the Minister on an application for an aquaculture licence may appeal to ALAB within a specified time by serving a notice of appeal on it. This is what Deerland did in this case.

33. Under s. 40(4) it is provided:-

"Where an appeal is brought under this section and is not withdrawn, the Board shall, subject to subsection (5) determine the appeal by –

(a) confirming the decision or action of the Minister,

(b) determining the application for the licence as if the application had been made the Board in the first instance, or

(c) in relation to the revocation or amendment of a licence, substituting its decision on the matter for that of the Minister."

34. Subsection (5) reads:-

"The Board shall not determine an appeal as provided in subsection (4)(a) except in circumstances referred to in section. 48, 51 or 52."

35. Subsection (6) reads:-

"The determination under subsection 4(b) or (c) of an appeal shall annul the decision or action of the Minister immediately the determination is made."

36. Section 40(8) of the 1997 Act was inserted by s. 10 of the Fisheries (Amendment) Act 2001, and provides that:-

"(8)(a) A determination of an appeal under this section, (including an appeal to which section 52 refers) and the notification of that determination shall state the main reasons and considerations on which the determination is based.

(b) The Board shall, on request from any person, provide a summary of the main reasons and considerations on which the determination of an appeal before the commencement of the Fisheries (Amendment) Act 2001, was based."

37. From this amendment which was effected by the 2001 Act, it is clear that there is an obligation upon ALAB in determining an appeal to state the main reasons and considerations on which the determination is based.

38. Section 41(3) provides as follows:-

"Without prejudice to section 46, an appellant shall not be entitled to elaborate in writing on, or make further submissions in writing in relation to, the grounds of appeal stated in the notice of appeal or to submit further grounds of appeal, and any such elaboration, submissions or further grounds of appeal received by the Board shall not be considered by it.

(4) Without prejudice to section 47, the Board shall not consider any documents, particulars or other information submitted by an appellant other than the documents, particulars or other information which accompanied the notice of appeal."

39. Section 44(2) provides:-

"The Minister and each other party except the appellant may make submissions or observations in writing to the Board in relation to the appeal within a period of one month beginning on the day in which a copy of the notice of appeal is sent to that party by the Board and any submissions or observations received by the Board after the expiration of that period shall not be considered by it."

40. Section 46 provides:-

"(1) Where the Board is of the opinion that, in the particular circumstances of an appeal, it is appropriate in the interests of justice to request a party or other person who has made submissions or observations to the Board in relation to the appeal to make submissions or observations in relation to any matter which has arisen in relation to the appeal, it may, in its discretion, notwithstanding section 41(3), 44(4), 45(4) or 50(4) serve on the party or person a notice –

(a) requesting the party or person, within a period specified in the notice…to submit to the Board submissions or observations in relation to the matter, and

(b) stating that, if submissions or observations are not received before the expiration of the specified period, the Board will, after the expiration of that period and without further notice to the person, pursuant to s. 48, determine the appeal."

41. Section 49(1) provides that:-

"(1) Subject to subsections (2) and (3), the Board of its own motion or at the request of a party, shall have an absolute discretion to hold an oral hearing of an appeal under this Chapter."

42. Section 50 provides that:-

"(1) The Board, in determining an appeal, may take into account matters other than those raised by the parties or by any person who has made submissions or observations to the Board in accordance with section 45, if the matters are matters to which, under section 61, it may have regard.

(2) The Board shall give notice in writing to each of the parties and to each of the persons who have made submissions or observations in relation to the appeal, of the matters it proposes to take into account under subs. (1) and shall indicate in the notice –

(a) in a case where it proposes to hold an oral hearing of the appeal or where an oral hearing of the appeal has been concluded and it considers it expedient to re-open the hearing, that submissions in relation to the matters may be made in writing to the person or persons conducting the hearing or,

(b) in a case where it does not propose to hold an oral hearing of the appeal or where an oral hearing of the appeal has been concluded and it does not consider it expedient to re-open the hearing, that submissions or observations in relation to the matters may be made in writing to the Board,

within a period specified in the notice, being not less than 14 or more than 28 days beginning on the date of service of the notice."

43. Subsection 4 of the section limits the entitlement of a person to elaborate on the submissions or observations made.

44. Section 59 of the 1997 Act provides:-

"Where in connection with the performance by the Board of its functions an inspection is carried out, or an oral hearing is conducted, on behalf of the Board by a person appointed for the purpose by the Board, the person so appointed shall make to the Board a written report on the inspection or hearing, and shall include in the report a recommendation relating to the appeal with which the inspection or hearing was concerned, and the Board shall, before determining the appeal, consider the report and any recommendation contained in the report."

45. This section was also amended by the Fisheries Act of 2001. Section 13 of the 2001 Act effects the amendment. Section 13 reads:-

"Section 59 of the Act of 1997, is amended by the substitution for 'by a person appointed for that purpose by the Board, the person so appointed' of 'by a consultant or adviser engaged under section 35(1) for the purpose of the inspection or oral hearing or an employee of the Board or a person of whose services the Board has availed itself pursuant to section 35C, the consultant, adviser, employee or person'."

46. Part IV of the 1997 Act deals with miscellaneous matters. The first section in that part of the Act is s. 61. It provides as follows:-

"The Licensing Authority, in considering an application for an aquaculture licence or an appeal against a decision on an application for a licence or a revocation or amendment of a licence, shall take account, as may be appropriate in the circumstances of the particular case, of -

(a) the suitability of the place or waters at or in which the aquaculture is or is proposed to be carried on for the activity in question,

(b) other beneficial uses, existing or potential, of the place or waters concerned,

(c) the particular statutory status, if any, (including the provisions of any development plan, within the meaning of the Local Government (Planning and Development) Act 1963, as amended), of the place or waters,

(d) the likely effects of the proposed aquaculture, revocation or amendment on the economy of the area in which

the aquaculture is or is proposed to be carried on,

(e) the likely ecological effects of the aquaculture or proposed aquaculture on wild fisheries, natural habitats and flora and fauna, and

(f) the effect or likely effect on the environment generally in the vicinity of the place or water on or in which that aquaculture is or is proposed to be carried on –

(i) on the foreshore, or

(ii) at any other place, if there is or would be no discharge of trade or sewage effluent within the meaning of, and requiring a licence under section 4 of the Local Government (Water Pollution) Act 1997, and

(g) the effect or likely effect on the man-made environment of heritage value in the vicinity of the place or waters.

47. Two other statutory enactments are relevant. The first is s. 4 of the Fisheries and Foreshore (Amendment) Act 1998, which provides that:-

> "(1) On and from the 10th day of December, 1998, an application for an aquaculture licence shall not be accepted, or if accepted shall not be determined, if the applicant or any person on behalf of the applicant commences to engage in aquaculture at the place or waters to which the application relates before a licence is granted under the Act of 1997."

48. Section 2 of the Foreshore Act 1933, provides:-

> "(1) If, in the opinion of the Minister, it is in the public interest that a lease shall be made to any person of any foreshore belonging to Saorstát Éireann the Minister may, subject to the provisions of this Act, demise by deed under his official seal such foreshore with buildings and other structures (if any) thereon to such person by way of lease for such term, not exceeding 99 years, commencing at or before the date of such lease, as the Minister shall think proper…"

Leave to Apply

49. On the first day of the hearing I gave leave to apply for the following reliefs on specified grounds. They are, insofar as ALAB is concerned, the reliefs sought at paras. 1, 3, 4 and 8. They are as follows:-

> "1. An order by way of judicial review of certiorari quashing the decision of ALAB taken on the 17th July, 2007, to grant a licence for aquaculture to Lett in respect of the geographical area referred to therein.
>
> 3. A declaration that the decision of ALAB taken on the 17th July, 2007, to grant to Lett a licence for aquaculture is ultra vires or invalid having regard to the provisions of the Fisheries (Amendment) Act 1997.
>
> 4. A declaration that the decision taken by ALAB to grant an aquaculture licence to Lett is invalid having regard to the principles of constitutional justice and fair procedures and,
>
> 8. A declaration that in failing to provide reasons for its decision of the 17th July, 2007, to grant an aquaculture licence to Lett, ALAB acted contrary to the rules of natural justice and fair procedures."

50. The grounds for seeking these reliefs are set out at para. E (vi), (xviii), (xix), (xx), (xxi), (xxii) and (xxiv). Those grounds are as follows:-

> "(vi) The decision of ALAB does not contain any statement as to the reasons why it decided to grant the application, or why it decided to treat the application as if made to it in the first instance, or why it decided to refuse the appeal. As a consequence, the decision contravenes natural justice and constitutional fair procedures.
>
> (xviii) The decision of ALAB fails to disclose whether it adequately or at all considered other beneficial uses, existing or potential, or the place or waters concerned, despite the substance of the appeal lodged by the applicant herein, in accordance with s. 61 of the 1997 Act. As a consequence, the said decision is invalid and/or *ultra vires*.
>
> (xix) The decision of ALAB fails to disclose whether it adequately or at all considered the likely effects of the proposed licence or the revocation or amendment thereof, on the economy of the area in which the aquaculture was proposed to be carried on in accordance with s. 61 of the 1997 Act. As a consequence, the said decision is invalid and/or ultra vires.
>
> (xx) ALAB failed to notify the applicant that it intended to take into account matters extraneous to the application and appeal, and in particular the hearsay statement of evidence of officials of the second named respondent, to which Deerland was not given an opportunity to respond, contrary to s. 50 of the 1997 Act. As a consequence, the said decision is invalid and/or *ultra vires*.
>
> (xxi) In light of the information before ALAB, which it knew or ought to have known was not available to the applicant herein, ALAB failed to comply with the principles of constitutional justice and fair procedures and/or was in breach of the principle of *audi alteram partem*, in failing to convene an oral hearing and/or failing to provide Deerland with crucial information of and concerning the appeal. As a consequence, the said decision is invalid and/or *ultra vires.*
>
> (xxii) Further and/or in the alternative, ALAB failed to provide any reason or reasons for its decision to dismiss or dispense with the appeal and, accordingly, acted in contravention of principles of natural justice and constitutional fair procedure. As a consequence of the failure to give reasons, Deerland is prejudiced vis-à-vis to the bringing of this application before the court, since the absence of any reason given for its decision means that Deerland is not in a position to know or put its case as to the irrationality and/or unreasonable nature of the decision.
>
> (xxiv) Further and/or in the alternative, in failing to take into account the submissions of Deerland herein in relation to the Area Action Plan for Wexford harbour, and the planning permission obtained by Deerland in respect of the area for which the aquaculture licence was ultimately granted, the decision is manifestly unreasonable and/or lacking in reasonable

foundation."

51. Leave was given to apply for the following reliefs against the Minister:-

> "5. An order of *certiorari* quashing the decision of the Minister communicated to Deerland by letter dated the 11th September, 2007, to refuse to consider an application or applications for a foreshore lease.
>
> 6. An order of mandamus directing and/or requiring the Minister to consider the applications for the foreshore lease made by Deerland on the 10th and 11th July, 2007.
>
> 7. A declaration that the decision of the Minister dated the 11th September, 2007, is *ultra vires*, and invalid."

52. The grounds upon which leave was given to seek those reliefs against the Minister are as follows:-

> "(xxix) Further, the decision of the Minister to refuse to consider the application made by Deerland for a foreshore lease or leases, dated the 11th September, 2007, is contrary to the public interest.
>
> (xxx) The aforesaid decision of the Minister of the 11th September, 2007, constitutes an abdication by the Minister of his statutory obligation to take a decision in respect thereof.
>
> (xxxi) As a consequence of the foregoing, the Minister is obliged to proceed to consider the application or applications made by Deerland herein."

Absence of Reasons

53. ALAB is under a statutory obligation to ensure that both the determination of an appeal and the notification of that determination, state the main reasons and considerations on which the determination is based. That is provided for in s. 40(8) of the 1997 Act, which in turn was inserted by s. 10 of the Fisheries (Amendment) Act 2001.

54. There can be no doubt but that the notification of the determination failed to comply with this statutory obligation. The notification was in the form of a letter simply recording that the Board had made a final determination on the matter at its meeting on the 17th July, 2007, and enclosing the determination and the licence.

55. I have already reproduced in full the determination of ALAB. Deerland contends that on its face it does not recite any reason for the decision taken to disallow its appeal. ALAB's counsel submitted that the decision on its face stated the main considerations, because it stated the main matters which were considered by ALAB in coming to its conclusion to grant the licence to Lett. Those considerations were enumerated by her as:-

> (a) that the appeal was submitted by Deerland,
>
> (b) the technical report of ALAB's inspector,
>
> (c) the matters which it is required to consider under statute by s. 61 of the 1997 Act.

56. She conceded however, that the reasons for the decision were not to be found on its face, but one had to look elsewhere for them.

57. On the second day of the hearing ALAB's counsel changed tack. She then submitted that the decision on its face did state the reason for it. It was that ALAB was satisfied that it was in the public interest to grant the licence.

58. Her first thoughts were correct.

59. I do not accept that a pro forma recitation of the matters which are contained in ALAB's decision amounts to a compliance with its statutory obligation to state its reasons for such decision. The reference to it being satisfied that it was in the public interest to make the determination is a conclusion reached by it but no clue is given as to how such a conclusion was reached.

60. At this stage there is an abundance of case law indicating what must be done by a body such as ALAB if it is to satisfy its obligation of setting forth the reasons for its conclusions. I mention just a few.

61. In *O'Donoghue v. An Bord Pleanála* [1991] I.L.R.M 750, Murphy J. said:-

> "It is clear that the reason furnished by the Board (or by any other tribunal) must be sufficient first to enable the courts to review it and secondly, to satisfy the person having recourse to the tribunal that it has directed its mind adequately to the issues before it. It has never been suggested that an administrative body is bound to provide a discursive judgment as a result of its deliberations."

62. The matter was again considered by the Supreme Court in *Ní Eilí v. Environmental Protection Agency* (30th July, 1999) where Murphy J. considered and followed the principles enunciated by Finlay C.J. in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, and then went on to say:-

> "Where a decision to grant a licence is made, the position is different. In that event, by definition, objections will have to be made to, and submissions received by the Agency in relation to such objections. If a licence is indeed granted, it might be inferred that those objections had been overruled or the submissions rejected. That would not be an adequate compliance with the Regulation. Those who have gone to the trouble and expense of formulating and presenting serious objections on a matter of intense public interest must be entitled to obtain an explanation as to why their submissions were rejected."

63. In *Mulholland v. An Bord Pleanála* [2006] I.L.R.M. 287, I had to deal with the statutory obligation to give reasons and state considerations which now forms part of the planning code. I said:-

"The obligation at (b) above to state the considerations on which a decision is based is, of course, new. I am of opinion that, in order for the statement of considerations to pass muster at law, it must satisfy a similar test to that applicable to the giving of reasons. The statement of considerations must therefore be sufficient to:-

1. give to the applicant such information as may be necessary and appropriate for him to consider whether he has a reasonable chance of succeeding in appealing or judicially reviewing the decision;,

2. arm himself for such hearing or review;

3. know if the decision maker has directed its mind adequately to the issues which it has considered or is obliged to consider; and

4. enable the courts to review the decision."

64. In *Grealish v. An Bord Pleanála* [2006] I.E.H.C. 310, O'Neill J. stated:-

"As set out above the legal obligation resting on the respondents to explain their decisions is a very light one, one could even say almost minimal. It is well settled that they do not have to give a discursive judgment. They do however, as set out in the judgment of Kelly J., in *Mulholland's* case have to provide sufficient information to enable somebody in the position of the applicant in this case to consider whether he has a reasonable chance of succeeding in judicially reviewing the decision; can arm himself for such a review; can know if the respondent has directed its mind adequately to the issues it had to consider; and finally give sufficient information to enable the court to review the decision. Insofar as two of the main elements of the decision in this case are concerned i.e. reasons and considerations based on scale and non integration, the decision fails on every aspect of the foregoing test. There is literally nothing there to explain why a different conclusion is reached on these issues to that in 1990 or 1997."

65. The above represents just a sample of the case law from this jurisdiction on this topic. I conclude by reference to two English decisions which consider the same question.

66. In *South Bucks County Council v. Porter* [2004] 1 W.L.R. 1953, Brown L.J. summarised the law in relation to the obligation to provide reasons as follows:-

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example by misunderstanding some relevant policy or some other important matter, or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he is genuinely being substantially prejudiced by the failure to provide an adequately reasoned decision."

67. Finally, in *R. v. Westminster City Council* [1996] 2 All E.R., Hutchinson L.J. said:-

"It is well established that an obligation, whether statutory or otherwise, to give reasons for a decision is imposed so that the persons affected by the decision may know why they have won or lost and, in particular, may be able to judge whether the decision is valid and therefore unchallengeable, or invalid and therefore open to challenge.

There are numerous authoritative statements to this effect…

It is possible to state two propositions which the judgments of ex parte Grahams support. (1) If the reasons given are insufficient to enable the court to consider the lawfulness of the decision, the decision itself will be unlawful; and (2) The court should, at the very least, be circumspect about allowing material gaps to be filled by affidavit evidence or otherwise."

68. The latter part of the quotation from Hutchinson L.J. is apposite because that is precisely what ALAB sought to do in the present case. It has sought to fill the material gaps by affidavit evidence.

69. Mr. Brendan Byrne, Secretary to ALAB, swore an affidavit in these proceedings on the 21st December, 2007. It set out the history of the matter and exhibited copies of the documents contained in the file maintained by him on behalf of ALAB. The only documents excluded were internal memoranda, correspondence with the Board's solicitors and counsel's opinion in relation to a discrete issue upon which the Board sought and received legal advice. The affidavit makes it clear that the Board received both documents and submissions/observations from the Department of Communications, Marine and Natural Resources. It also received submissions on behalf of Lett. It also appointed a technical adviser who requested ALAB to obtain legal advice in respect of matters raised by Lett.

70. The affidavit goes on:-

"The appeal was on the agenda of the Board at its meetings held on 9th January, 6th February, 5th March, 11th April and 8th May, 2007. The appeal was considered by the Board at its meeting on the 6th June and finally determined by the Board at its meeting on the 17th July, 2007."

71. He exhibits the minutes of these meetings.

72. He then says:-

"As appears therefrom, the material appeal brought by Deerland Construction Limited was determined by the members of the Board at their meeting held on the 17th July, 2007. The determination of the appeal by the Board and the notification

of that determination stated the main reasons and considerations on which that determination was made. In addition, the copy minutes show that the Board 'decided to issue a licence as recommended in the technical advisers report'."

73. The minutes of each of these meetings were exhibited. It is clear that the only relevant one is in respect of the meeting which took place on the 17th July, 2007, since that is the meeting at which the decision was made. Indeed it is to be noted that the Board was differently constituted on that occasion than at any of the previous meetings at which the matter had been on the agenda. This is what the Board minutes say on Deerland's appeal:-

> "It was confirmed to the Board that following the last Board meeting the technical adviser had checked to see if the Board had ever issued a single licence in respect of more than one site and that she had found that the Board had done so on a number of occasions.
>
> Following some further discussion the Board decided to issue a licence as recommended in the technical adviser's report."

74. As that minute refers to what went on at the previous meeting, I should record what the minute of that meeting recites:-

> "The technical adviser was asked to join the meeting. She gave a presentation of her report to the Board.
>
> It was noted that the Minister's decision was to grant a licence covering two sites. It was felt that legal advice may be required in relation to this point. The technical adviser was asked to clarify the position regarding the issue of one licence which covers a number of sites which she undertook to do.
>
> Following further discussion among the members of the Board, it was felt that a final determination would have to be deferred for consideration at the next Board meeting."

75. These minutes are as unenlightening as to the reasons for ALAB's decision as is the formal determination issued by it. They tell me nothing of the reasons why ALAB decided as it did.

76. The last straw that could be clutched in endeavouring to argue that reasons could be gleaned from the minutes was by reference to the final sentence of the relevant minute of the meeting of the 17th July, 2007, where it was recited that:-

> "Following some further discussion the Board decided to issue a licence as recommended in the technical adviser's report."

77. The gist of the argument is that as the decision to issue a licence was as recommended in the technical adviser's report, I ought to assume that the Board adopted the technical adviser's report as the basis of its decision and therefore its reasoning is to be found in that decision.

78. In support of this proposition reliance was placed upon a number of cases where the courts might be said to have taken a rather indulgent attitude towards bodies that failed to comply with obligations, either at common law or by statute, to give reasons for decisions.

79. Two decisions in particular were relied upon. The first was that of Finnegan P. in *Fairyhouse Club Limited v. An Bord Pleanála* (Unreported, 18th July, 2001), and the second was my own in *Mulholland v. Kinsella (No 2).*

80. In *Mulholland's* case I said that:-

> "(In *Fairyhouse Club Limited*), of course, the court was dealing with a situation where the respondent did not depart from its inspector's recommendation. In such circumstances, it was not unreasonable to assume that, although the respondent did not expressly say so, it had adopted the inspector's report as the basis of its decision."

81. I am not persuaded that that approach should be followed in circumstances such as the present.

82. My decision in *Mulholland (No. 2)* was heavily influenced by the approach of Finnegan P. in the *Fairyhouse Club* case. It is clear from Finnegan P's judgment that no account was taken of a whole body of case law in England touching on this topic. That corpus of law was conveniently summarised in a decision of Stanley Burnton J. in *Nash v. Chelsea College of Art and Design* [2001] E.W.H.C. Admin 538, delivered one week before the decision of Finnegan P.

83. Stanley Burnton J. summarised the position as follows:-

> "In my judgment, the following propositions appear from the above authorities:
>
> (i) Where there is a statutory duty to give reasons as part of the notification of the decision, so that (as Law J. put it in Northamptonshire County Council *ex parte* D) 'the adequacy of the reasons is itself made a condition of the legality of the decision', only in exceptional circumstances if it all, will the Court accept subsequent evidence of the reasons.
>
> (ii) In other cases, the Court will be cautious about accepting late reasons. The relevant considerations include the following, which to a significant degree overlap:
>
> (a) Whether the new reasons are consistent with the original reasons.
>
> (b) Whether it is clear that the new reasons are indeed the original reasons of the whole committee.
>
> (c) Whether there is a real risk that the later reasons have been composed subsequently in order to support the tribunal's decision, or are a retrospective justification of the original decision. This consideration is really an aspect of (b).
>
> (d) The delay before the later reasons were put forward.
>
> (e) The circumstances in which the later reasons were put forward. In particular, reasons put forward after the commencement of proceedings must be treated especially carefully. Conversely, reasons put

forward during correspondence in which the parties are seeking to elucidate the decision should be approached more tolerantly."

84. The first of those propositions is particularly relevant in this case since the legislature by the amendment effected in 2001 positively required ALAB to state its reasons and considerations in its determination. The giving of these reasons and indeed their adequacy is a condition of the legality of the determination of ALAB.

85. Support for this approach is also to be found in Simons Planning and Development Law, 2nd Ed. 2007.

86. Simons in dealing with the obligation to provide the main reasons and considerations for a planning decision has this to say:-

> "Some confusion has arisen in the case law as to whether a failure to state the reasons may be remedied by the giving of proper reasons subsequently…The better view is that a failure to state reasons at the time of the decision invalidates the decision under Irish law, and same should be set aside in judicial review proceedings. The statutory obligation is to give reasons contemporaneous with the decision, both in the decision itself and in the notification of it, and one cannot therefore be satisfied by the giving of reasons subsequently. One of the objectives of the duty to give reasons is to facilitate a challenge to the decision, whether by way of statutory appeal or by way of an application for judicial review. The bringing of such a challenge is subject to very tight statutory time limits, and the failure to give reasons at the time of the decision would frustrate the preparation of a focused challenge within time." (My emphasis)

87. I agree with the author's "better view". The failure by ALAB to state its reasons for the decision in suit meant that the decision was invalid.

88. On dealing with recourse to a planning inspector's report in the absence of reasons being given on the face of the decision, Simons observes, following an analysis of the case law, that:-

> "One device often employed by the courts to overcome the paucity of reasoning in the formal statement of reasons was to supplement same by reference to the planning officer's, or the inspector's internal report. The reasoning contained in the report would, in effect, be imputed to the planning authority or An Bord Pleanála. With respect, this practice is undesirable and hopefully, will not survive the amendments introduced under s. 34(10). The statutory requirement (now) is that the decision itself states the main reasons and considerations on which it is based. The report is not part of the decision, and thus no matter how detailed the reasons contained therein, it cannot be regarded as fulfilling the statutory requirement. This would be the position even were the formal decision to include an express cross reference to the report, such as 'the Board decided to grant permission in accordance with the inspector's recommendations'. The decision itself must state the main reasons and considerations.
>
> If, contrary to what is suggested above, it is acceptable to supplement the formal decision by reference to the contents of the planning reports, this should only be done where the formal decision expressly adopts the recommendations, findings and conclusions of the inspector or the planning officer. One of the more questionable aspects of the earlier case law was the eagerness with which the courts were prepared to assume that the members of the Board were in full agreement with the inspector."

89. I entirely agree with the views of the author as stated in this passage.

90. This approach appears to me to capture what the legislature had in mind when ordaining that a body such as ALAB should state its reasons. It is not too much to expect that a body such as ALAB carry out its statutory obligation in the precise terms in which the legislature has directed. It did not do so here.

91. I do not see why an applicant such as Deerland should not know from reading the decision the reasons for it. That is what the legislature expressly required when it passed s. 10 of the Fisheries (Amendment) Act 2001. It is not good enough that an applicant, in order to find out the reasoning, if any, should have to trawl through Board minutes and then through a technical adviser's report running to some 52 pages in order to try and glean the reasons for the decision in suit.

92. Even at that it is to be noticed that ALAB did not utilise the formula suggested in the final paragraph which I have quoted from Simons work, but contented itself by merely saying that it decided to issue a licence as recommended in the technical adviser's report.

93. Even if I am wrong in the approach which I have adopted and a more indulgent view of ALAB's performance should be taken, I note that the technical adviser made a single recommendation based on eight separate conclusions. Is the court to assume that some or all eight conclusions were concurred in by ALAB? If just some, which ones? And what of their juxtaposition with s. 61 of the 1997 Act?

94. It has also been suggested that no prejudice was suffered by Deerland because it was put in receipt of the technical adviser's report within a few days of being told of ALAB's decision. True it is that the technical adviser's report was furnished to Deerland within days of the decision in suit, but the actual approach of ALAB only became clear in the course of these proceedings and in particular, when the affidavit of ALAB's secretary was sworn and filed. In any event the advisor's report provides no insight into the mind or reasoning of ALAB.

95. In these circumstances I am satisfied that ALAB failed to comply with its statutory obligations in relation to the stating of the reasons for the determination made by it and consequently *certiorari* must go to quash that determination.

96. This disposes of the first of the three issues. The second relates to the procedures followed by ALAB. Normally I would proceed to deal with that question at this stage. However, having regard to the facts of this case and the way in which the question of both aquaculture licences and foreshore leases fall to be dealt with by the executive I do not believe that it is necessary to do so. Rather I will consider the effects of the order of *certiorari* which I have just granted on the position which obtains between the parties.

Effect of *Certiorari*

97. Having quashed the determination of ALAB it is clear that Lett do not have an aquaculture licence in respect of Bed 30A. I do not accept the argument that was made to the effect that if the determination of ALAB was quashed, the decision of the Minister in relation to the aquaculture licence would stand.

98. That proposition runs entirely contrary to the provisions of s. 40(6) of the 1997 Act. That subsection provides:-

> "The determination under subsection (4)(b) or (c) of an appeal shall annul the decision or action of the Minister immediately the determination is made."

99. The argument made to the effect that the Minister's original grant of the aquaculture licence would revive if ALAB's decision were quashed on *certiorari* is not correct. That could give rise to absurd results and also is in the teeth of the subsection which I have just quoted.

100. Once ALAB made its determination (albeit a defective one) the Minister's decision was annulled. It does not revive because ALAB's decision has been quashed.

101. The situation is analogous to that which was dealt with by the Supreme Court in *The State (Abenglen Properties Limited) v. Dublin Corporation* [1984] I.R. 381, where Walsh J. stated:-

> "In my view a decision which, when questioned, is found to be ultra vires or unsustainable in law for any reason is nonetheless a 'decision' for the purposes of the default provisions."

102. Thus the decision of ALAB whilst invalid as a matter of law, still has some legal effects in that when made it automatically annulled the licence granted by the Minister.

103. The net effect therefore of quashing ALAB's determination is that there is now no aquaculture licence in place for Bed 30A.

104. It is in this context that I now consider both the two remaining issues and the question of remittal of the matter to ALAB.

The Remaining Issues

105. If I refuse to remit the matter to ALAB, its decision stands quashed and Lett does not have an aquaculture licence in respect of Bed 30A. It will have to apply afresh for such a licence. The licensing authority is the Minister. It is also the Minister who has the authority to grant a foreshore lease. In the Minister's letter of the 11th September, 2007, it is stated as follows:-

> "Further to your two applications on behalf of Deerland Construction Limited, I note that the Aquaculture Licence Appeals Board have upheld the aquaculture/foreshore licence as issued to Lett for the Wexford harbour area.
>
> Please note that as the area concerned in the aquaculture/foreshore licence overlaps a major part of the above applications this division will not be in a position to process this application any further.
>
> If you have any further queries, please do not hesitate to contact me at 01 6783318."

106. I read that letter not so much as a refusal on the part of the Minister, but rather as a statement that he is precluded from dealing with the matter having regard to the provisions of s. 16 of the 1997 Act.

107. Under the terms of that section the licence granted by ALAB to Lett was binding on the Minister as an emanation of the State. As that licence authorised Lett to carry on its aquaculture activities free from all prior or other rights, titles, estates or interests, the Minister took the view that the grant of a foreshore licence release would undermine the rights of the original licensee.

108. Now however, that the aquaculture licence has been quashed the Minister is not so constrained and will be in a position to consider any application made by Lett for an aquaculture licence and any application made by Deerland for foreshore rights. He can deal with these applications in tandem.

109. Thus this matter can be resolved where it ought to be resolved, by the two contending parties seeking from the licensing authority at first instance whatever rights they wish to obtain in respect of Wexford harbour.

110. In such circumstances it is not necessary for me to consider the precise status of the Minister's letter of the 11th September, nor to make any order in respect of it. It is clear from its terms that the only reason why the Minister was unable to make a decision on the request was because of the existence of the determination of ALAB which has now been quashed. The Minister can now proceed to determine the matter on its merits given that ALAB's decision no longer stands.

111. It is all the more appropriate that the Minister as the licensing authority should deal with both contenders in circumstances where I am told the actual amount of territory is something less than 250sqm and may be as little as 100sq m. The Minister as the licensing authority is the person to deal with this at first instance.

112. It is also urged upon me that I might remit the matter back to ALAB with the view to it stating its reasons. Having regard to the considerations which I have just outlined I do not consider that that would be appropriate in the circumstances.

113. Neither would it be appropriate to remit the matter back to ALAB with a view to it considering Deerland's appeal afresh.

114. The order which I make is one which will allow the licensing authority at first instance i.e. the Minister, to decide on the competing alleged rights and entitlements of Deerland and Lett in respect of this comparatively small area of land in Wexford harbour.

Procedural Fairness

115. In the light of what I have already said it is unnecessary for me to deal in any detail with the arguments made by Deerland as to the procedures which were followed by ALAB. In essence it contended that it had been deprived of fair procedures by not having sight of a number of documents until after ALAB had taken its decision and indeed until replying affidavits were sworn in the present proceedings.

116. Deerland also made complaint that the technical adviser appointed by the Board noted in her report that there was a lacuna in the documentation on the departmental file. In an attempt to fill this gap:-

> "Contact was made with Mr. Declan O'Rourke; he explained what happened in the intervening years and submitted an additional letter of explanation of the events that had taken place over the ten year period from the application to publication of the Minister's decision."

117. I do not have to address these complaints in any detail since I have already decided that the determination of the Board ought to be quashed. However, having regard to those complaints and the responses to them, I would have been disinclined to remit the matter to ALAB purely for the purpose of stating its reasons.

118. In the overall context I am satisfied that a just result is achieved by quashing ALAB's decision and refusing to remit it. On the Minister's letter of the 11th September, 2007, I make no order in the expectation that the Minister will deal with the matter as I have indicated.

Disposal

119. ALAB's determination of 17th July, 2007, insofar as it relates to Bed 30A is quashed. The matter will not be remitted to ALAB. There will be no order against the Minister in the expectation that he will deal with any applications concerning Bed 30A as indicated in this judgment.