Neutral Citation Number: [2009] IEHC 230

THE HIGH COURT

JUDICIAL REVIEW

2007 31 JR

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 AS INSERTED BY SECTION 13 OF THE STRATEGIC INFRA STRUCTURE ACT 2006

BETWEEN

MICHAEL SATKE

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CORK COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Mr. Justice Hanna delivered on the 27th day of March, 2009

The applicant in this case is the owner of lands situated at Audley Cove, Ballydehob in the County of Cork. He is a foreign national, ordinarily resident in Vienna, Austria. Audley Cove is small and secluded, lying to the east of Rossbrin Cove and approximately 7 km. to the southwest of Ballydehob, Co. Cork. The coastal area surrounding the cove is elevated and consists largely of farmland. The cove is accessed by a minor country road, which leads onto a small beach. This beach is used by local residents and holidaymakers alike. There is also, apparently, access to the beach by boat and boats were beached there from time to time.

The applicant's lands adjoin the beach. From the ordnance survey maps produced during the course of the hearing, it is apparent that the foreshore used to form part of the landholding currently owned by the applicant, but time, tide and coastal erosion have taken their inevitable toll over the years. Beyond the beach there is a portion of land belonging to the applicant and then what is described as "a lagoon". Without wishing to offend, this is really more of a large pond, filled with what appears, from the photographs, to be brackish water. It does not take much to realise, almost immediately, that to any family with children enjoying the facilities of this beach, this lagoon constitutes a potential hazard.

It is not in dispute that the applicant, with a view to minimising liability risk from intruders onto his land, proceeded to erect earthworks on his own land between the lagoon and the beach. This comprised an earth and stone embankment, approximately one metre in height and width, and constructed in soil and rubble stone. It is located to the front of the lagoon and on the edge of the beach. Adjacent to this earthwork is an area which has been quarried for stone. It appears that this was unlawfully extracted some years before, by a party with whom we are not concerned in this application. The embankment broadly, but not entirely, follows the line of a pre existing bank or wall or barrier of some description it is not entirely clear what was there - and this pre dated the new embankment back to at least the mid 1990s.

The dispute between the parties is net. The applicant argues that the works in question were an exempted development, within the meaning of Class 4, Part 3 of Schedule 2 to the Planning and Development Regulations 2001 (S.I. No. 600 of 2001), hereinafter referred to as "the 2001 Regulations". The said Schedule stipulates, *inter alia*, the following as exempt from the requirement to apply for planning permission:

> "Class 4: The construction or erection of any wall or fence, other than a fence of sheet metal, or a wall or fence within or bounding the curtilage of a house.
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> 1. The height of the wall or fence, other than the fence referred to in paragraph 2, shall not exceed 2 metres.
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> 2. The height of any fence for the purpose of deer farming or conservation shall not exceed 3 metres."

The respondent, on the other hand, argues that the development did require planning permission and was caught by restrictions pursuant to article 9 of the 2001 Regulations. The material provisions are as follows:

> "Article 9: Development to which article 6 relates shall not be exempted development for the purposes of this Act –
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> (a) if the carrying out of such a development would:
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> > (vi) interfere with the character of a landscape or a view or prospect of special amenity value or special interest, the preservation of which is an objective of a development plan for the area in which the development is proposed or, pending the variation of a development plan or the making of a new development plan, in the draft variation of the development plan or the draft development plan….

(x) consists of the fencing or enclosure of any land habitually open to or used by the public during the 10 years preceding such fencing or enclosure for recreational purposes or as a means of access to any seashore, mountain, lakeshore, riverbank or other place of natural beauty or recreational utility;

(xi) obstruct any public right of way."

Matters began to get troublesome in May, 2006. Correspondence was received by Cork County Council from a local Green Party councillor, Ms. Jackie Hudson, and from Ballydehob Community Council, under the auspices of Muintir na Tiire. They complained of loss of amenity, the removal of an area previously used for the parking of cars and the hauling up of boats and the fact that cars could no longer pass. The letter from Muintir na Tiire made representations on behalf of unnamed parties. Councillor Hudson visited the scene herself. In her second letter of May 26th, 2004, she reiterates her concern and that of the other residents with regard to the loss of amenity, particularly with the summer season coming fast upon them.

An officer of the planning department from Cork County Council carried out an inspection of the area on the 16th June, 2004, and in a document entitled "Enforcement Report Sheet", he advises that "…the development was unauthorised and that a foreshore licence would be required, as well as planning permission". In fairness, it should be pointed out that later he had something of a change of heart and queried, to some extent, the correctness of his original views. The applicant engaged the services of Messrs. McCutcheon Mulcahy, Chartered Planning Consultants. They took up the cudgels on behalf of the applicant. No foreshore licence was required, they argued. This proposition was accepted, subsequently, by the County Council. This was not an unauthorised development but an exempted one. Without going into any great detail, it would be fair to say that a most impressive case was made out on behalf of the applicant, *inter alia*, challenging the assertions advanced on behalf of the objectors to the development, if I might so describe them.

The respondent received, from Cork County Council, a referral under s. 5 of the Planning and Development Act 2000, seeking its determination as to whether or not the construction of the earth and stone embankment on the applicant's lands constituted an exempted development within the meaning of the said Act. This referral occurred on the 18th January, 2006. On the 17th February, 2006, a comprehensive and detailed submission was made, on behalf of the applicant, by his planning consultant. In her report, dated 20th July, 2006, Jane Dennehy, Senior Planning Inspector, advised that the development was an exempted development, having regard to the relevant provisions of the Planning and Development Act 2000. She expressed the view, *inter alia*, that the embankment did not come within the scope of article 9(1)(a)(vi), (x) and (xi) of the 2001 Regulations. An Bord Pleanála then issued its finding on the 14th November, 2006. The controversial aspect of that decision is the conclusion by An Bord Pleanála that:-

"The earth and stone embankment comes within the meaning of article 9(1)(a)(vi), (x) and (xi) of the Planning and Development Regulations, as it interferes with the character of the landscape at the end of a public road, accessing the foreshore."

The decision was accompanied by a Board direction, signed by Mr. Brian F. Swift. This document is dated the 10th November, 2006, and it states as follows:

"The submission on this file and the Inspector's report were considered at a Board meeting held on the 27th July, 2006.

The Board generally approved of the terms of the attached draft order, subject to the amendments shown in transcript. The Board decided that the development of a low stone fence at Audrey Cove, Ballydehob, Co. Cork is development, and not exempt development.

In disagreeing with the Inspector who concluded that the development is exempted development, the Board noted that, although the current Development Plan does not contain any specific scenery landscape objectives or any named views and prospects subject to specific objectives that the local road network at Rossbrin and Dereenatra is a designed scenic route. The Board concluded that the work would interfere with the character of the landscape. The Board further noted that the land is at the end of a public road, which brings the public to this section of the coast and is a means of access to the seashore."

The applicant advanced a number of contentions. Firstly, he submitted that the Board failed to note the main reasons and considerations for its decision. The applicant pointed to the documents and says that he cannot identify from it the reasoning of the Board to a sufficient extent as to permit him to come to a decision whether or not he can judicially review it. He further argued that, since the inspector determined the development was an exempted development, the Board failed to have any or any sufficient regard to the inspector's report, and given that the inspector came to the view that she did, this then gave rise to enhanced obligation to give reasons. Further, Mr. Eamon Galligan S.C., on behalf of the applicant, submitted that the board had no or no adequate regard to the evidence presented to it and reached the conclusion unsupported by the evidence and/or relying on the evidence.

In so relying on the evidence, it relied on evidence that was inadequate, unreliable and, in part, at least, hearsay. The Board did not take all relevant considerations into account, Mr. Galligan argued. He argued that the available evidence did not support the application of the restrictions on exemption found in articles 9(1)(a)(vi), (x) and (xi).

On behalf of the respondent, Ms. Nuala Butler S.C. submitted that, insofar as the Board was legally required to give reasons, it had done so and had done so in sufficient measure. The Board was entitled to rely upon the evidence that was laid before it. The applicant, she contended, was trying to nitpick his way through the evidence and turn what was a judicial review application into an appeal against the decision of An Bord Pleanála. The Board were expert in matters of planning permission and it was not the function of this Court to substitute its view for that of the Board. There was ample evidence for the Board to take the view that the development was de exempted under the provisions of article 9 of the 2001 Regulations.

The reference to An Bord Pleanála from Cork County Council, under s. 5 of the Planning and Development Act 2000, was not in the nature of a planning appeal. No conditions attached to it. The purpose of the reference is to determine but one issue, in effect: were the earthworks undertaken by the applicant an exempted development or not? That was the

question facing the Board. It does not pre judge the outcome to any application by the applicant to Cork County Council to obtain full planning permission for the works. One must assume that Cork County Council would deal with such an application by Mr. Satke as it would from anyone else, and determine the issues as to whether or not planning permission should be granted. The only significant change, from his perspective in making the application to rectify the planning permission situation, would be that the argument that the development is exempted no longer avails him.

The fact that determination by An Bord Pleanála is based, in part, on the view that the development constituted an interference with the landscape is not necessarily a negative, from the applicant's point of view, and I accept Ms. Butler's argument that the interference can be positive, as well as negative. The determination of the Board does not import, into any application that may come to pass, the assertion that the development is, in fact, an overly intrusive or unnecessary interference.

It is well established that the courts must have due regard and, indeed, deference to the specialist skill and knowledge of planners and of An Bord Pleanála. The law is thus stated by Finlay C.J., in *O'Keeffe v. An Bord Pleanála* [1993] I.R. 39, at pp. 71 to 72:-

> "Under the provisions of the Planning Acts, the legislature has unequivocally and firmly placed questions of planning, questions of the balance between the development and the environment and the proper convenience and amenities of an area within the jurisdiction of the planning authorities and [An Bord Pleanála] 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."

The above extract from the judgment of Finlay C.J. is cited by Keane C.J. in *Grianaìn an Aileach Interpretative Centre Company Limited v. Donegal County Council (No. 2)* [2004] 2 I.R. 625. In that case, the plaintiff had obtained a declaration of the High Court that proposed activities for a visitors centre fell within the range of permissible uses for the centre, which would not fall foul of the planning legislation. Keane C.J. addressed the distinct functions of these courts and planning authorities thus at pp. 637 to 638:-

> "In considering whether the jurisdiction in the particular tribunal body is an exclusive jurisdiction, the following observation of Henchy J., in *Tormey v. Ireland* [1985] I.R. 289 at p. 295 must be borne in mind:-
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> > 'The jurisdiction to try thus vested by the Constitution in courts, tribunals, persons or bodies other than the High Court must be taken to be capable of being exercised, at least in certain instances, to the exclusion of the High Court, for the allocation of jurisdiction would otherwise be overlapping and unworkable.'
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> Thus, in the present case, if the jurisdiction of the planning authority or An Bord Pleanála under s. 5 were invoked, and they were invited to determine whether the uses in controversy were within the uses contemplated by the planning permission or constituted a material change of use for which a new planning permission would be required, either of these bodies might find itself in a position where it could not exercise its statutory jurisdiction without finding itself in conflict with a determination by the High Court. No doubt a person carrying out a development which he claims is not a material change of use is not obliged to refer the question to the planning authority or An Bord Pleanála and may resist enforcement proceedings subsequently brought against him by the planning authority on the ground that permission was not required. In that event, if the enforcement proceedings are brought in the High Court, that court may undoubtedly find itself having to determine whether there has been a material change of use or whether a development is sanctioned by an existing planning permission, as happened in *O'Connor v. Kerry County Council* [1988] I.L.R.M. 660. But for the High Court to determine an issue of that nature, as though it were the planning authority or An Bord Pleanála, in proceedings such as the present, would seem to me to create the danger of overlapping and unworkable jurisdictions referred to by Henchy J."

It is not part of the function of this Court to opine on what is or is not an exempted development. In the final analysis, of course, no statute can preclude this Court from addressing the lawfulness of a decision when made. The position is well described by Edwards J. in *Sherwin v. An Bord Pleanála* [2007] I.E.H.C. 227 at pp. 23 to 24. (I should observe that in the following quotation, Edwards J. cites an extract from the judgment of Keane C.J. in *Criminal Assets Bureau v. Hunt* [2003] 2 I.R. 168. The same extract is cited by Keane C.J. in the above quoted judgment from the *Grianaìn an Aileach* case):-

> "The first thing to be said is that it is not for this court to express any view as to whether the works in question are or are not exempted development. It is well established that such an issue should be exclusively determined by the planning authority and, on appeal, by An Bord Pleanála. See the decisions of the Supreme Court in *O'Keeffe v An Bord Pleanála* [1993] 1 I.R. 39 and *Grianaìn an Aileach Interpretative Centre Company Limited v. the County Council of the County of Donegal* [2004] I.E.S.C. 41. Also, the decision of the High Court in *McMahon v. Dublin Corporation* [1997] 1 I.L.R.M. 227 and *Palmerlane Limited v. An Bord Pleanála and Another* [1999] 2 I.L.R.M. 514. Nevertheless, this Court is not precluded, in the context of a judicial review from considering whether or not such a decision was made intra vires and in accordance with law or, alternatively, *ultra vires* and contrary to law. In *Criminal Assets Bureau v. Hunt* [2003] 2 I.R. 168, Keane C.J., made this point when he stated:-
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> > 'There is today in existence a huge range of tribunals and other bodies, of which the Appeal Commissioners in Revenue cases are just one example, which determine matters in controversy between parties and whose functions and powers are properly categorised as "limited functions and powers of a judicial nature" [within the meaning of Article 37.1 of the Constitution]. It is not uncommon for the legislation establishing such tribunals to provide for a limited form of appeal to the High Court from its decisions, usually confined to questions of law. However, in every case, the High Court retains its power under the Constitution to determine whether such bodies have acted in accordance with the Constitution and the law and such jurisdiction cannot be removed from the High Court by statute.'"

In order to succeed in invoking the jurisdiction of this Court to review the decision of an expert tribunal, in particular An Bord Pleanála, it is fair to say that the applicant must reach a high threshold. The applicant in this case contends that the Board had no adequate or such woefully inadequate evidence afforded it to enable it come to the conclusion it did. This is not the applicant's sole stance. Even if there were a sufficiency of evidence, one has to look at the way in which the Board employed that evidence, if at all, in reaching the conclusion that it did.

On the question of the presence of any or any adequate evidence being before the Board, counsel for the respondent placed reliance on the seminal decision of Finlay C.J. in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. This is a clear and

definitive statement of the law. It is often quoted, but bears repeating here.

> "Griffin J. in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642, in agreeing with the principles laid down by Henchy J, quoted with approval the speech of Lord Brightman in *R. v. the Chief Constable of North Wales, ex p. Evans* [1982] 1 W.L.R. 1155, where he stated as follows at p. 1160:-
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> > "Judicial review is concerned not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power…. Judicial review, as the words imply, is not an appeal from a decision but a review of the manner in which a decision was made."
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> With this statement of the position with regard to judicial review, I would also agree.

It is clear from these quotations that the circumstances under which a 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 appellant 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.

Under the provisions of the Planning Acts the legislature has unequivocally and firmly placed questions of planning, questions of the balance between development on 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 and competence and experience of planning questions. This court is not vested with that jurisdiction, nor is it expected to, nor can it, exercise discretion with regard to planning matters.

I am satisfied that in order for an applicant for judicial review to satisfy a court that a 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 has before it no relevant material which would support its decision."

Can it, therefore, fairly be said that the respondent had no evidence supportive of its decision before it or, as an alternative, that the evidence before it was so paltry and unreliable as to mandate disregarding it? Certainly, it cannot be doubted that a formidable corpus of evidence was presented on behalf of the applicant and skilled argument was advanced by his planning consultants. Confronting this impressive array of argument and evidence was, Mr. Galligan S.C. argued, two letters from a local Green Party councillor and one from Ballydehob Community Council, under the auspices of Muintir na Tiire. These were largely hearsay, it is submitted, and in any event, related to the ongoing construction work at the time when the bank was being constructed and, in particular, the impact of that work on the amenity, a situation which had long since ceased to exist by the time the appeal came before An Bord Pleanála.

I am not persuaded that the applicant is correct. In the first instance, it is clear from her letter of 14th May, 2004, that Councillor Hudson visited Audley Cove herself, presumably on the 13th May, 2004. The focus of her concern is the end result of the digger's work, rather than the digger itself. Her complaint is that the earth bank has resulted in interference with car access from the public road across the back of the beach and that cars can no longer pass. She complains that car parking has been drastically reduced from this important public amenity. She also complained, *inter alia*, about the removal of vegetation and her concern was on the potential impact with the upcoming tourist season. It was not so much the work she was complaining about, it was the construction itself.

In her second letter of 26th May, 2004, she raises the topic of alternative locations for car parking. However, she clearly expresses, on behalf of four, albeit unnamed, local individuals, concern about the loss of access to the public amenity. She says that these people wish to see it restored without delay. The letter of 18th May, from Muintir na Tiire refers to the final *fait accompli*. There is no complaint there about the ongoing works. The letter complains about the effect of the embankment within the area that was "traditionally used for hauling up and storing boats" which, the letter alleges, was now completely removed. There was also a complaint about vehicular parking and turning.

During the course of the applicant's submissions to An Bord Pleanála, there does not appear to be any major challenge to the complaints about the absence of car parking space or room for hauling up and storing boats. Therefore, for what it is worth, the evidence from Councillor Hudson and Muintir na Tiire, in letter form, was available to the Board in reaching its decisions. It may not be the most compelling evidence in the world. Had the Board been persuaded by the evidence from the planning consultants, one could scarcely have had grounds for complaint, as far as the law goes. But that is the point. The respondent, in my view, had available to it sufficient credible evidence upon to which to deliberate and adjudicate on the issues before it, provided, of course, it did so in accordance with law and with due regard to the applicant's legal and constitutional rights.

In addition, of course, it had the body of documentation to be found in its file available to it. This included maps and photographs of the locus in quo. It is not a matter for this Court to determine what body of evidence is to be preferred. The weight to be attached to the totality of the evidence, including all of the other evidence, including maps, photographs, et cetera, is within both the area of authority of An Bord Pleanála and, importantly, the domain of its expertise. Whether or not such matters as a site inspection by the Board the absence of which was reproached by Mr. Galligan - should occur, was entirely a matter within the remit of the respondent. *Nota bene* the decision of the Supreme Court in *Grianaìn an Aileach Interpretative Centre Company Limited v. The County Council of the County of Donegal* (see above).

The applicant argues that the respondent's decision is bad in law and that no or no sufficient reasons are given. This is particularly so, since in concluding as it did, the Board departed from the inspector's report. This gave rise to an enhanced obligation to give reasons, Mr. Galligan argued. I do not think so. Without reciting it here, s. 5 of the Act of 2000 does not create a statutory obligation to give reasons. This contrasts, for example, with the requirement in s.

34(10) of the Act, to give reasons for a grant or refusal of planning permission departs from the inspector's report.

We must not forget that the process in which the parties are engaged. This was not a process of planning permission or no. Though no doubt momentous enough in its own way, the effect of the decision is much more limited. The applicant must now seek to rectify his planning permission, but he enters on that process, no doubt, with confidence that any application he might bring will be fairly and lawfully heard and determined by the planning authorities. Certainly, this court must and does assume that such will come to pass.

With regard to the giving of reasons, there have been a number of local recent decisions. In *Deerland Construction v. The Aquaculture Licences Appeals Board* [2008] I.E.H.C. 289, Kelly J. observed that there was an abundance of case law in relation to the obligations of a public body to set forth the reasons for its conclusion. He refers to the same, as follows at pp. 27 to 29:-

> "In *O'Donoghue v. An Bord Pleanála* [1991] I.L.R.M. 750, Murphy J. said:-
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> > '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.'
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> The matter was again considered by the Supreme Court in *Ní Eilí v. Environmental Protection Agency,* ([1999] I.E.S.C. 84) 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 at p. 25:-
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> > '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.
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> In *Mulholland v. An Bord Pleanála* [2006] 1 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 at p. 298:-
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> > '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 consideration must therefore be sufficient to:-
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> > 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;
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> > 2. arm himself for such hearing or review;
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> > 3. know if the decision maker has directed its mind adequately to the issues which it has considered or is obliged to consider, and
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> > 4. enable the courts to review the decision.'"

In my view, the decision of An Bord Pleanála, together with the direction from Mr. Swift, adequately informs the applicant of the thinking and reasoning behind the decision. The respondent has come to the view that the development is de exempted by article 9, with particular reference to sub article (vi), (x) and (xi). It is important to point out that these are stand alone provisions. Their applicability, the applicability of any one of them, or indeed, any other of the sub articles of article 9, would suffice to de exempt a development. In interpreting the various criteria, in the light of the available evidence, the respondent should, of course, take the wording in its natural and ordinary meaning. The respondent should do so in a manner which engages ordinary common sense and not nitpick among the minutiae of the criteria.

It is clear that the Board's view is influenced by the fact that the area in question is designated as a scenic route in the Cork County Development Plan 2003, 2nd Ed., Vol. 2, entitled "Specific Objectives: Heritage and Amenity". Page 106 of the said Plan identifies the roads at Rossbrin and Dereenatra as being a scenic route. This covers the relevant area. The title in the margin states "Objectives: Scenic Route - Views and Prospects". The applicability of 9(1)(a)(vi) is further advanced by ENV 3-5, at p. 99 of the Plan, which precedes the lists of scenic routes set out in the Plan and states:-

> "It is a particular objective to preserve the character of those views and prospects, obtainable from scenic routes identified in this plan. These routes are shown on the scenic amenity maps in volume 4 and listed in volume 2 of this plan."

In my view, it could validly be argued that this captures what is required in sub article (vi). This position is in no way diminished, as was argued, by the absence of a more focused and detailed local process, see ENV 3 6. This was an embankment at the end of a public road. It had, according to the evidence, swallowed up boat space, car parking areas and was a much more extensive mass than had preceded it. On this aspect, the decision of An Bord Pleanála is not, in my view, amenable to legal challenge. So, too, in my view, was the Board entitled to rely on article 10.

Mr. Galligan, *inter alia*, sought to refer to the dictionary definition of "enclosure". I find myself in agreement with Ms. Butler that this approach was, in the circumstances, inviting angels to dance on pinheads. There was evidence, clearly relied on by An Bord Pleanála (see correspondence from Green Party councillor and Muintir na Tíire) *inter alia*, that the bank consumed an area of ground where boats had been hauled up by members of the general public. Further, where once two motor cars, driven by visitors to the beach, could pass each other in accessing or eggressing the beach, now no longer could they do so because of the expansion of the bank. Therefore, I cannot accept the argument that the background circumstances of the case cannot be accommodated within the framework of sub article (x). Turning to sub article (xi), it seems to me that there was no evidence before the respondent of any public right of way over the applicant's land. There is certainly no evidence of any public right of way on the lagoon side of the embankment.

Briefly, to recap, I am satisfied that the Board was entitled to take the view that there was an interference with the character of the landscape, *inter alia*, whose preservation was an objective in the County Development Plan. Such interference was not necessarily malign. The development could be held to fence or enclose lands habitually open to the public for access and for recreational purposes. That would appear to be as far as the evidence goes. A right of way is a distinct legal concept. I cannot find any evidence to entitle the respondent to invoke sub article (xi). Thus, as a reason for de exempting the development, it is fatally flawed in law, as far as that decision goes. Mr. Galligan, on behalf of the applicant, pressed me that if one reason fell, the whole decision must fall. He relied on the decision of the Supreme Court in *Talbot and Another v. An Bord Pleanála and Others* [2008] I.E.S.C. 46.

That case involved an appeal from a refusal of leave in the High Court to bring judicial review proceedings to quash a decision of An Bord Pleanála and Kildare County Council refusing planning permission to the applicants. The refusal of planning permission was founded on two elements. Firstly, the applicants were not within that class of persons entitled to a positive presumption in their favour in their application for planning permission for one off homes, which was provided for by the Kildare County Development Plan 1999. The second element comprised various planning reasons specific to the proposed development. Only the first of the foregoing elements was advanced in the High Court. No leave was sought or argument made with regard to the planning reasons. What then occurred is thus described, in the judgment of Fennelly J., at pp. 8 to 10, at paras. 19 22 inclusive of the judgment:-

> "19. When the matter came on for hearing in the High Court before Peart J., counsel for the Board submitted that the learned judge should, in his discretion, decline the application on the basis that, even if the relief sought were granted, it would confer no benefit upon the appellants. Thus, the application should be refused because, even if the Court were to allow leave to seek judicial review on the grounds sought, the appellants would still be faced with the second ground of refusal, and that a victory in relation to reason number 1 would avail them nothing. The Court would be indulging in a futile and pointless exercise in exercising its discretion by granting leave. The learned judge addressed this issue first. In view of the conclusion he reached, he did not give any consideration to the actual grounds advanced on behalf of the appellants in seeking leave.
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> 20. He posed for himself the question whether success in their application for judicial review "could reasonably avail the applicants at all in the long run." It seemed to him that the court's decision could not touch on the second ground of refusal. Thus the question arose *"as to the inevitability or otherwise of that same ground being found to be applicable in any reconsideration of the appeal, or any fresh application which might be made for permission to the County Council."*
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> 21. He reviewed the planning history of both the appellants' site and the adjoining site for which their son and his wife had sought permission. Both had made two unsuccessful applications. The reasons for refusal other than that relating to the "positive presumption," related to broader planning considerations. The learned judge concluded:
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> > "Certainly there can be no prospect whatsoever from the history of the application, both in respect of these applicants as well as their son and daughter in law, and the reasons stated therein for refusal, that even if this Court were to find a frailty in the first ground of refusal related to the interpretation of and application of the positive presumption in relation to the applicants, the applicants would be left with the inevitable prospect that in any further application which they might make, the remaining grounds of refusal would remain and they would have gained nothing of benefit from any successful outcome of these judicial review proceedings."
>
> 22. Thus, he exercised his discretion to refuse leave to apply for judicial review *"on the basis that no benefit can result in any event from success in the application at the end of the day.""*

Peart J. certified two points of appeal to the Supreme Court. They were:-

> "1. Is the Court, when hearing the application for leave on notice pursuant to the provisions of s. 50 of the Planning and Development Act, 2000 as amended, entitled to exercise its discretion to refuse leave to seek judicial review on the ground that no benefit would in any event accrue to the applicant?
>
> 2. If the court is so entitled to refuse leave on that basis, is it permissible to reach a conclusion that leave should be so refused by drawing an inference from the material put before the Court on the application for leave that any future application for planning permission would be refused in any event on a ground or grounds which was/were not sought to be impugned in the proceedings for judicial review?"

Peart J. had not entered into consideration of the appellants' primary argument, namely that of a positive presumption. Operating on the basis that the learned trial judge reached his decision on the hypothesis that the appellants would have been successful on that ground, Fennelly J. said at para. 29 of his judgment:-

> "29. However, a person entitled to the positive presumption may be in a better position to persuade the planning authority to decide in his favour, depending, of course, on the strength of the countervailing planning considerations. In other words, I do not think that those considerations are necessarily in a watertight compartment, uninfluenced by the status, vis-à-vis the issue of positive presumption, of the applicant for permission. I merely say that it would be open to a planning authority or the Board to modify their position. I would not wish to say any more and I certainly do not state that they would or should modify their position. There is no doubt that the planning history constitutes very strong evidence that the appellants face an uphill battle in seeking to obtain planning permission. However, I am satisfied that a judge is not entitled to presume in advance what the outcome of an application will be. That is exclusively a matter for the statutory bodies charged with those functions."

The *Talbot* case was an appeal against refusal of leave to quash a refusal of planning permission and dealt with, in a way, possible speculation that had the applicants in that case been deemed to be qualified under the scheme, that their position might, might have improved with regard to the other planning conditions. The situation here is very different. Firstly, this is not a leave application. This is an application for full judicial review. Secondly, I am satisfied, as I have already stated, that each of the criteria in article 9 are stand alone criteria, and unlike *Talbot*, I feel we can say, with

reasonable certainty, that the result would be the same, absent the erroneous reference to sub article (xi). It is clear, in my view, that the reasoning indicated by the invocation of sub article (vi) is in no way affected by any belief in a reference to a right of way. It is wholly independent of the consideration of any right of way and, it seems to me, unlikely in the extreme that any change in that position could be contemplated.

Though perhaps more closely aligned, sub article (x) still does not deal with the question of a right of way and, in my view, it still stands. I repeat that the outcome means here not that the application is deprived planning permission but he must seek to rectify the position of his planning permission. It does not, in any way, presage his failure in any such application. I refuse this application for judicial review.