Neutral Citation Number: [2010] IEHC 290

THE HIGH COURT

2006 1375 P

BETWEEN

PAULA SMYTH AND VINCENT SMYTH

PLAINTIFFS

AND

RAILWAY PROCUREMENT AGENCY AND VEOLIA TRANSPORT DUBLIN LIGHT RAIL LIMITED

DEFENDANTS

AND

ATTORNEY GENERAL

NOTICE PARTY

Judgment of Miss Justice Laffoy delivered on the 5th day of March, 2010.

1. The factual background

1.2 The plaintiffs, a married couple, are the owners of a dwelling house situated at 3, Cambridge Terrace, Dublin 6 (No. 3) and they have occupied it as their private residence since 1992. The plaintiffs' house is a two storey over basement Victorian residence. It has a long rear garden extending approximately 40 metres. At the end of the garden there is a lane which affords access to Northbrook Road. On the opposite side of the lane there is a railway embankment which, until its closure on 31st December, 1958, accommodated the Harcourt Street railway line. The plaintiffs' house is located in a quiet residential area.

1.3 The first defendant was established as an independent statutory body by Ministerial Order pursuant to the Transport (Railway Infrastructure) Act 2001 (the Act of 2001) and it has assumed the role formerly fulfilled by Córas Iompair Éireann (the Board) in relation to the provision and operation of light rail services in the Dublin area. Prior to the establishment of the first defendant, the Board had obtained a light railway order, which was dated 8th September, 1999, from the Minister for Public Enterprise (the Minister) pursuant to the provisions of the Transport (Dublin Light Rail) Act 1996 (the Act of 1996). The Order was entitled Transport (Dublin Light Rail) Act 1996 (Line B – St. Stephen's Green to Sandyford Industrial Estate) Light Railway Order 1999 (S.I. No. 280 of 1999) (the Line B Order). The Line B Order authorised the construction of what has come to be known as the Luas Green Line (the Green Line) from St. Stephen's Green to Sandyford. In 2003 the first defendant commenced the construction of the Green Line. When construction was completed, in April 2004, the Green Line was commissioned on a trial basis. It commenced full operations towards the end of June 2004.

1.4 The Green Line is operated by the second defendant, formerly known as Connex Transport Ireland Limited, and subsequently known as Veolia Transport Ireland Limited, under contract with the first defendant. Both defendants were represented by one legal team. As I understand the position, it is the first defendant, which is a State funded statutory corporation, which is the real respondent to the plaintiffs' claim.

1.5 The Green Line is constructed in part on the alignment of the old Harcourt Street railway line. That is the case in relation to the section thereof at the rear of the plaintiffs' house. During the trial period of the operation of the Green Line, the plaintiffs became aware of the noise impact of the passage of trams on their house and garden. Their first complaint to the first defendant about noise was logged as early as mid-May 2004. The complaint was investigated by the first defendant's Environmental Manager. The position adopted by the first defendant was that noise monitoring in the vicinity of the plaintiffs' house indicated that the noise was within accepted parameters.

1.6 In July 2004 the plaintiffs instructed Mr. Karl Searson, a consulting engineer specialising in acoustics, to conduct noise measurements at their house. Between July 2004 and the hearing of this action, Mr. Searson conducted extensive tests at the plaintiffs' house.

1.7 The plaintiffs' evidence was that they bided their time before taking action to see if they would become accustomed to the noise from passing trams. However this did not happen. Eventually, their solicitors wrote to the first defendant on 9th November, 2005 seeking an undertaking to eliminate the noise impact of the Green Line at the plaintiffs' house. The rejection by the first defendant, through its solicitors, of the plaintiffs' complaints and its refusal to give such undertaking ultimately led to these proceedings, which were initiated by a plenary summons which issued on 27th March, 2006.

2. The case as pleaded in outline

2.1 The plaintiffs' claim is founded in tort. They claim injunctive relief in the following terms:-

> (1) restraining the defendants from operating the Green Line in such a manner as to cause a noise nuisance to the plaintiffs' lawful use and enjoyment of No. 3;
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> (2) directing the defendants to abate the noise nuisance caused by the Green Line to their lawful use and enjoyment of No. 3; and

(3) directing the defendants to erect an appropriate noise barrier to abate the noise nuisance caused to their use and enjoyment of No. 3 by the operation of the Green Line.

They also claim damages for nuisance, negligence and breach of duty, including breach of statutory duty.

2.2 The gravamen of the plaintiffs' claim is that, in operating the Green Line services, the defendants have caused a substantial interference with the enjoyment by the plaintiffs of their house and garden and have thereby committed a nuisance. In particular they allege that, because of the defendants' failure to install an appropriate noise barrier to mitigate noise exposure at No. 3, the plaintiffs are exposed on a daily basis to very serious and aggravating noise nuisance, which totally disrupts their peaceable use and enjoyment of their home. In consequence, their lawful use and enjoyment of their home has been severely undermined and compromised.

2.3 The defendants in their amended defence traverse all of the allegations made by the plaintiffs and specifically deny that they are committing a nuisance, which denial is referred to as their "overriding plea". Without any admission that the noise generated by the operation of the Green Line at No. 3 would otherwise constitute an actionable nuisance at common law, they also raise (in para. 24) a specific defence of statutory authority by way of additional or alternative defence in the following terms:-

> "… the Defendants have at all material times hereto constructed and/or operated the Luas railway system in accordance with the terms of the [Line B Order] made by the Minister … pursuant to s. 9 of the [Act of 1996] following recommendations of an Inspector appointed to conduct a public inquiry in relation thereto and also in compliance with the [Act of 2001]. In the premises it is specifically pleaded that the construction and/or operation of the Luas railway system within the parameters permitted by the [Line B Order] (including the parameters in relation to noise) cannot as a matter of law or alternatively does not as a matter of fact give rise to the nuisance complained of by the Plaintiffs in these proceedings".

2.4 In response to a request for particulars of the "permitted parameters" being relied on by the defendants in that plea, the defendants stated:-

> "The permitted parameters are those set out in the EIS which forms the basis of the public inquiry, the recommendations of the Chairman of the public inquiry and ultimately the Ministerial Order. At all times the noise levels resulting from the operation of the Luas railway system in the vicinity of the plaintiffs' property have been within the range predicted by the said EIS".

The reference to "the EIS" in that reply is to an environmental impact statement (EIS), which had accompanied the application for the Line B Order in accordance with s. 3 of the Act of 1996.

2.5 The defendants also make a special plea that the plaintiffs are not permitted to question the validity of the Order other than by way of judicial review. That plea developed into an argument that these proceedings constitute an unlawful collateral challenge to the Order, although that was not expressly pleaded. However, the defendants do refer to s. 12 of the Act of 1996 and s. 47 of the Act of 2001 in another context, as I will outline later.

2.6 The plaintiffs' reply to the defendants' plea of statutory authority raises issues of constitutional law, in that they plead as follows:-

> (1) by way of special plea, that "to the extent that the defendants are seeking … to establish or rely on an alleged immunity at common law … so as to deny any liability to the plaintiffs for noise nuisance … such an immunity at common law did not survive the enactment of and/or is inconsistent with the Constitution … having regard to the plaintiffs' constitutional rights under Articles 40.3 and 43" thereof; and
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> (2) expressly, that "to the extent that the common law immunity being relied upon by the defendants … has survived and is not inconsistent with the provisions of the Constitution … the defendants are not entitled to rely on the common law immunity in these proceedings in circumstances where no compensation has been paid to the Plaintiffs and/or where no statutory provision has been made for payment of compensation to the Plaintiffs in respect of the noise nuisance being caused to the Plaintiffs in the enjoyment of their family dwelling and in respect of the permanent diminution in the capital value of their property".

2.7 In their reply the plaintiffs have sought, to the extent necessary, additional reliefs in the form of declaratory relief and damages for breach of the plaintiffs' constitutional rights. The declarations they seek are as follows:

> (a) that the immunity pleaded in paragraph 24, being an immunity derived from the common law, is inconsistent with and did not survive the enactment of the Constitution;
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> (b) that the common law immunity being relied on in paragraph 24 is in breach of the plaintiffs' constitutional rights under Articles 40.3 and 43 of the Constitution; and
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> (c) if necessary, that the immunity relied upon in paragraph 24 is, in the absence of compensation being payable to the plaintiffs as of right in respect of the noise nuisance to which they are being subjected by the operation of the Green Line, inconsistent with and did not survive the enactment of the Constitution.

2.8 Apart from raising a question as to the constitutionality of the defendants' reliance on the defence of statutory authority, in their reply the plaintiffs deny that the defendants are operating the Green Line without negligence, their assertion being that it is being operated without reasonable regard to, and care for, the interests of the plaintiffs or in a manner so as to avoid causing a noise nuisance to them. Further they contend that the noise nuisance being caused to the plaintiffs is not the inevitable result or consequence of the defendants operating the Green Line according to statutory authority. The focus of both of those pleas is the absence of suitable noise barriers which would abate the alleged noise nuisance.

2.9 In their rejoinder, the defendants join issue on those pleas. They deny negligence. Specifically, they assert that the level of noise generated by the passing of trams at the rear of No. 3 is "the inevitable consequence" of the operation of the Green Line within the permitted parameters and, thus, in accordance with the statutory authority conferred by the Acts of 1996 and 2001. On the constitutional issues raised by the plaintiffs, the defendants deny that the immunity from suit on which they rely is inconsistent with the Constitution and assert that the plaintiffs are not entitled to the additional relief sought in their reply.

2.10 To complete this very broad outline of the issues raised on the pleadings, in response to the plaintiffs' notice of particulars, the defendants state that they do not plead reliance upon express statutory immunity but on an immunity necessarily implied from the provisions of the Act of 1996 and the Act of 2001 and the Ministerial Orders made thereunder. It is in this context that they refer specifically to s. 12 of the Act of 1996 and s. 47 of the Act of 200l, the provisions which regulate the jurisdiction to challenge the validity of a light railway order.

2.11 The plaintiffs, on the direction of the Court, by their solicitor's letter of 3rd April, 2008, gave notice to the Attorney General under Order 60, rule 2 of the Rules of the Superior Courts 1986 of the constitutional question which arises on the defendants' plea of the defence of statutory authority and the plaintiffs' reply to it. By letter dated 10th July, 2008, the plaintiffs' solicitors informed the Chief State Solicitor that the constitutional question would only be required to be determined if the Court were to find that –

> (a) the defendants have committed and are continuing to commit a nuisance to the plaintiffs in operating the Green Line; and
>
> (b) the defendants have made out a defence of statutory authority on the facts.

It was suggested that the constitutional question should be left over until after the determination of the issues underlying the propositions at (a) and (b) above.

2.12 The Attorney General, by solicitor and counsel, participated in these proceedings. The submissions made on behalf of the Attorney General on the constitutional issues raised by the plaintiffs will be outlined in detail later.

3. The issues as identified by the parties

3.1 This action was at hearing for 16 days. The shape and course of the action was determined by the case as pleaded and the identification by the parties of the issues in their closing submissions.

3.2 Counsel for the plaintiffs identified three issues to be determined by the Court, namely:-

> (1) whether the defendants, in the course of operating the Green Line, have committed a nuisance to the plaintiffs and, if so, whether the nuisance is continuing;
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> (2) if the answer to the first issue is positive, whether the defendants can rely on the defence of statutory authority to avoid liability for nuisance, which involves the constitutional question raised by the plaintiffs as to the existence in Irish law of such defence and whether it can be deployed in the circumstances which prevail here; and
>
> (3) whether, if they are entitled to invoke the defence of statutory authority, the defendants have made out the defence on the facts of this case.

3.3 As counsel for the defendants pointed out, the issues and the order in which they should be determined suggested on behalf of the plaintiffs would involve the Court in determining the constitutional validity of the defence of statutory authority before determining whether the defence was made out on the facts. The defendants did not take a stance on the appropriate sequence, save to indicate that they would not object to all of the non-constitutional issues being determined prior to the constitutional issues.

3.4 The third issue identified by the plaintiffs, on the basis of the traditional common law approach to the defence of statutory authority as set out in the parties' submissions, apart from necessitating the identification of the extent of the defendants' authority as a matter of interpretation of the Act of 1996 and 2001, involves two additional issues raised on the pleadings, namely:

> (a) whether what the plaintiffs complain of as constituting a nuisance is an "inevitable consequence" of the operation of the Green Line in accordance with the authority conferred by statute; and
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> (b) whether the Green Line is being operated by the defendants without negligence, that is to say, with reasonable regard to the interests of others.

3.5 On the basis of the traditional common law approach to the defence of statutory authority, a subsidiary issue flows from the second issue: on whom the burden of proof of negligence or no negligence lies, and, in particular, whether the traditional common law approach, that it is for the defendants to prove that they are not operating the Green Line without regard to the interests of others, is the approach which the Court should adopt. Counsel for the defendants cautiously adduced evidence with a view to showing that the Green Line has been constructed and is being operated with due regard to the interests of persons living in the localities through which it passes.

3.6 An overarching point was made on behalf of the defendants. It was submitted that the plaintiffs cannot ignore, as it was suggested they had done, the fundamental statutory basis on which the defendants are operating the Green Line. That statutory basis is the Line B Order, which was made on the authority conferred by the Act of 1996 and in accordance with its requirements. It was submitted that, in the making of the Line B Order, there had been a predetermination of the level of environmental disturbance resulting from the proposed operation of the Green Line which would not amount to a nuisance, either as a matter of fact or in law. The Line B Order, it was submitted, pervades every aspect of the plaintiffs' case and, in particular, whether the noise levels created by the Luas at the plaintiffs' house constitute a nuisance.

3.7 As will be clear from the conclusions I have reached, which I will outline later, the structure of the plaintiffs' claim and the defence thereto and the plaintiffs' reply to the defence, and the necessity of giving notice to the Attorney General because of the constitutional issue raised by the plaintiffs, has given rise to complexity, both evidentially and as to legal submissions, which I believe have clouded the real issue. The real issue, the liability of the defendants for noise generated by the operation of the Green Line, is primarily determined by what the Acts of the Oireachtas and the secondary legislation under which the defendants operate the Green Line authorise them to do. Therefore, the statutory framework within which the defendants now operate the Green Line and the process by virtue of which they were authorised to construct and operate the Green Line, culminating in the Line B Order, are crucial to the resolution of the issues raised in these proceedings. Accordingly, I propose considering those matters next.

4. Statutory Framework
4.1 Even though it has been superseded by the Act of 2001, the parties made their arguments by reference to the Act of 1996. I propose adopting the same approach.

4.2 In its long title, the Act of 1996 was described as an Act to make further provision in relation to transport and for that purpose to enable the relevant Minister to authorise by order the construction, operation and maintenance by the Board of a light railway serving the City of Dublin and certain surrounding areas and to provide for connected matters. Section 3 provided that the Board might apply to the Minister for a light railway order and that the construction of light rail works should not be undertaken unless the Minister granted such an order under section 9. Section 4 designated the development and operation of a light railway and its maintenance, improvement or repair by the Board an exempt development for the purposes of the Local Government (Planning and Development) Act 1963. In essence, the process for obtaining an order from the Minister under s. 9 was analogous to the function of a planning authority or An Bord Pleanála on a planning application in relation to other types of development.

4.3 What that process entailed was provided for in section 3 and sections 5 to 8 of the Act of 1996.

4.4 Section 3(2) required the application for an order to be accompanied by, *inter alia*, an EIS. Section 5 stipulated what the EIS should and could contain. Sub-section (1) mandated that the EIS should contain certain specified information including:

> (1) the data necessary to identify and assess the main effects which the proposed light railway works were likely to have on the environment (para. (b));
>
> (2) a description of the likely significant effects, direct and indirect, on the environment of the proposed light railway works, explained by reference to their possible impact on various elements, which, insofar as are relevant for present purposes, included human beings, and air and the interaction between the elements referred to (para (c));
>
> (3) where significant adverse effects were identified with respect to any of the matters referred to in para. (c), a description of the measures envisaged in order to avoid, reduce and, if possible, remedy those effects (para. (d)).

It also mandated that the EIS include a summary in non-technical language (para. (f)).

4.5 Sub-section (2) of s. 3 provided that the EIS might include, by way of explanation or amplification of any of the mandatory information required under subs. (1), further information on any of the following matters:

> "(a) the estimated type and quantity of expected emissions resulting from the proposed light railway works when in operation,
>
> (b) the likely significant direct and indirect effects … on the environment of the proposed light railway works which may result from -
>
> *(i)* …
>
> *(ii)* the emission of pollutants, the creation of nuisances and the elimination of waste,
>
> (c) the forecasting methods used to assess any effects on the environment about which information is given under para. (b) …"

4.6 Section 6 required publication of notice of the making of the application for an order in one or more newspapers circulating in the relevant area and the times and places at which the draft order and other documentation, including the EIS, might be inspected. It stipulated that the places should be easily accessible to the public and the documentation should be available there for inspection. The same section provided that a person might make submissions in writing to the Minister in relation to the proposed light railway order or the likely effects on the environment of the proposed light railway works. Section 7 enabled the Minister to seek further information where it was considered that the EIS did not comply with the provisions of s. 5, or that it was otherwise necessary so to do. If the information furnished contained significant data in relation to the likely effects on the environment of the proposed works, the Minister was required to publish a notice in respect of it and to make it available for inspection in the same manner as the EIS.

4.7 Section 8 mandated the Minister to hold a public inquiry into the application in the relevant area and, after consultation with An Bord Pleanála, to appoint a person to be an inspector to hold the inquiry. The duties and powers of the inspector were set out in s. 8. His primary duty was to hold the inquiry and to prepare and submit to the Minister a report in writing of the findings of the inquiry and to include, if he should think fit, any recommendations he considered appropriate. Section 8 stipulated the parties who were entitled to appear and be heard at the inquiry, for example, the Board, land owners and occupiers on whose land it was proposed to construct the works, persons who made submissions to the Minister and "every other interested person".

4.8 Section 9 dealt with the making of the light railway order. It stipulated the material which the Minister should consider, including the EIS, the report of the public inquiry and the recommendations, if any, contained in it, any submission made by the relevant planning authority, and any additional information furnished under s. 7. The type of order which the Minister could make was set out in s. 9(2). It was an order authorising-

> "(a) the Board to construct, maintain and improve the light railway works specified in the order or any part thereof,
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> (b) the use of the light railway works or any part thereof for the purposes of the operation of a light railway, and
>
> (c) the operation, maintenance and improvement of a light railway or any part thereof,
>
> in such manner and subject to such conditions, restrictions and requirements (and on such other terms) as the Minister thinks proper and specifies in the order …"

There was a requirement for the publication of notice of the making of the order in Iris Oifigiúil and in at least two newspapers circulating in the relevant area.

4.9 Section 10 provided that a lightway rail order should contain such provisions as the Minister considered necessary or expedient and went on to list certain matters which might be covered, such as the specification of land the acquisition of which, and rights in and over land the acquisition of which, were necessary to give effect to the order. It was also provided that the order might contain such provisions as the Minister thought proper for the protection of the public generally, of local communities and of any persons affected by the order.

4.10 Section 12 provided that a person should not question the validity of a light railway order otherwise than by way of application for judicial review under Order 84 of the Rules of the Superior Courts 1986. It imposed a limitation period of two months from the making of the order for bringing such application, unless the Court extended the period for good and sufficient reason. Section 47 of the Act of 2001 now has similar effect save that the period of eight weeks is substituted for two months. Apropos of the defendants' reliance on these provisions as giving rise to implied immunity from common law suits, in my view, the provisions cannot be construed as having been intended to have, or as having, any such substantive effect. Such provisions have procedural effect only.

4.11 Succeeding sections of the Act of 1996 gave the Board specific powers in relation to the implementation of a light railway order, including the carrying out of the works, for example, power to compulsorily acquire land, to enter on land, to lop trees and such like (ss. 13, 14 and 15). As regard compulsory acquisition, a light railway order was deemed to have the same effect as a compulsory purchase order under the Local Government (No. 2) Act 1960 (s. 13). There was provision for compensation for an owner or occupier who should suffer loss, injury or damage or incur expense in consequence of the exercise by the Board of the powers conferred, the compensation to be determined in accordance with the Land Clauses Acts, in default of agreement (s. 14). Of course, none of the statutory powers of acquisition or interference conferred by those provisions were invoked against the plaintiffs. However, they were cited by counsel for the Attorney General as positing various forms of interference with rights of ownership and enjoyment of property which may occur in the course of carrying out the functions of the first defendant, some of which are subject to payment of compensation and others are not, according to their impact on incidents of ownership, while other curtailments of the right to enjoyment of property not specified may be covered by the common law – the tort of nuisance.

4.12 The Act of 1996 was repealed by the Act of 2001 but it was provided that any order made under the Act of 1996 should remain in force. Section 4(2) of the Act of 2001 provides, for the avoidance of doubt, that any order made under the Act of 1996 includes power to operate the railway to which it relates. The authority of the first defendant to operate the Green Line is now derived from the Act of 2001.

5. Application for light railway order in relation to Green Line/EIS

5.1 The application for an order under s. 9 of the Act of 1996 in relation to the proposed Green Line was made in December 1998 by the Board. It was accompanied by an EIS.

5.2 Chapter 5 of Volume 1 of the EIS entitled "Air" dealt, *inter alia*, with the issue of noise both during the construction and the operation of the Green Line. It contained an account of "the methodology adopted in considering the potential impact on the noise environment and the criteria for rating of impacts". The parameter used to describe the noise was LAeq, which was described as "the equivalent continuous noise level measured in dBA", i.e. decibels. The criterion for rating noise impact in the case of the operation, as distinct from the construction, of the Green Line, which is in issue in these proceedings, related to the extent to which LAeq 18 hours is exceeded due to the operation of the Green Line (i.e. passing of the trams) over the pre-existing ambient LAeq level. Exceedances were rated as follows:

> (1) 0 to + 5 dBA as "slight";
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> (2) + 5 dBA to + 10 dBA as "moderate"; and
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> (3) greater than + 10 dBA as "significant".

Some general observations in relation to those ratings were then set out as follows:

> "There is some overlap in these ranges as the smallest change in noise that people can detect is 2 to 3 dBA. In addition, cognisance has to be taken of the absolute noise level since human tolerance to a change in noise levels is greater from a lower base. Thus an increase of 10 dBA from a receiving noise environment of 50 dBA would comprise less of an impact than an increase of 10 dBA from a receiving noise environment of 70 dBA."

5.3 Detailed analyses of the noise impacts were provided in Chapter 7 on an area by area basis. The plaintiffs' house, No. 3, is located in what was designated Area 8, which extends from the Grand Canal to Milltown Viaduct. Section 7.8.5, which dealt with the impact of noise in this area, disclosed that the Green Line would run along the alignment of the former Harcourt Street railway line. Between Grand Parade and Ranelagh Road the level of the existing embankment would be raised by about 1.5 metres. This, in fact, was done and the first plaintiff's evidence was that her first floor bedroom, which is at the rear of No. 3, is in line with the rail track.

5.4 Remedial or reductive measures which were intended to be implemented in advance of and during the operational phase were outlined as follows:

> "To reduce the risk of additional noise from trams going around sharp curves, anti-wear and anti-squeak measures will be applied to the rails….
>
> The suppliers of the LRT trams will be required to incorporate noise control measures in the design of the cars to comply with noise performance specifications.
>
> The provision of acoustic screens will be considered at locations where the LRT runs proximate to noise sensitive receptors."

5.5 Section 7.8.5 recorded a number of exercises which were carried out in the preparation of the EIS with the objective of calculating projected noise levels from the operation of the Green Line and the exceedance of those noise levels over existing noise levels. The results of the exercises were tabulated in s. 7.8.5.

5.6 In the first exercise the existing noise environment was measured at six representative locations in Area 8 along the proposed route, five of which were outside residential properties. The measurements were carried out over two days in August 1996 between

8am and 10pm. At each location the LAeq (based on a mean value of four 15 minute samples) and also the LAmax, being the maximum noise level, were measured and recorded.

5.7 In the second exercise in relation to the operational phase, the noise level expected from the operation of the Green Line at the six representative locations was predicted. Two distinct methodologies were used in this exercise. Where the receptor point was less than 10 metres from the track, the expected noise levels were based on direct measurements carried out on the LRT system in Grenoble. In the case of receptors which were 10 metres or more from the track, the methodology used was that contained in "*Calculation of Railway Noise 1995"* published by HMSO using the source data from Manchester Metro Link. In relation to each of the representative locations, the relevant calculation had regard to the distance of the receptor from the track and "the mean by pass speed" of the tram. For example, in the case of the nearest location to No. 3, 32, Dartmouth Road, the receptor was only three metres from the track and the speed factor in the calculation was 30 kilometres per hour. At that location the LAeq was predicted at 61dBA and the LAmax at 84 dBA.

5.8 The third exercise was to project the noise levels due to the operation of the Green Line and illustrate the exceedance of the projected noise levels in LAeq over the existing and expected ambient levels. In the case of Area 8, a residential area, the existing and expected ambient levels were treated as being the same. In conducting this exercise, in the case of each of four of the representative locations, one being Elmwood Avenue Lower, an assumption was factored in for a 10 dBA reduction because of the installation of an acoustic screen at the location, so that the projected noise level was 10 dBA lower than the predicted level at each of those locations. The outcome of the exercise, the resultant, was arrived at by adding the existing noise and the projected LRT noise logarithmically. The exceedance of the resultant over the measured existing noise level was then arrived at.

5.9 The results of the exercises, as tabulated in table 7.8.5.2.3, having factored in the assumption of a 10 dBA acoustic screen reduction at the relevant locations, rated the exceedances at the six representative locations. In the case of three of the representative locations, the exceedance over existing noise levels was classified as slight, being less than + 5 dBA, and at the other three as moderate, being between + 5 dBA and + 10 dBA. In the case of 32, Dartmouth Road, where no acoustic screen was envisaged, the exceedance was 3 dBA over the existing level of 61 dBA and was classified as slight. It is clear that the figure of 74 dBA which appears in table 7.8.5.2.3 as the resultant in relation to 32, Dartmouth Road is an error and the figure should be 64 dBA.

5.10 It was stated in Section 7.8.5 that during the operational phase noise levels would be "monitored at selected locations to check for compliance with predicted levels".

5.11 As was required by s. 5(1)(f) of the Act of 1996, the EIS contained a summary in non-technical language in Volume 3, which dealt with air impacts including noise. In relation to noise impact during the operational phase, the non-technical summary stated as follows:-

> "During the operational phase of LRT the predicted noise impact varies from none to slight and moderate. Special noise reducing screens are proposed at certain sensitive locations such as at Peter Place, on elevated sections of the former Harcourt Street railway line, where the Line B track would be in close proximity to existing houses. … During the operational phase of LRT, to reduce the risk of additional noise from trams going around tight curves, an anti-squeak treatment will be applied to the rails. The light rail vehicles will incorporate noise control measures to minimise noise effects. With these measures the predicted impact of noise varies from slight to moderate."

6. Public Inquiry/Report of Inspector

6.1 In January 1999 the Minister appointed Judge Sean O'Leary (the Inspector), then a Judge of the Circuit Court, as Inspector for the purposes of conducting a public inquiry into the Board's application for an order under s. 9 of the Act of 1996 in relation to the Green Line. The Inspector furnished his report to the Minister in June 1999, having conducted the public inquiry over seventeen days, concluding on 19th May, 1999. As his report discloses, the Inspector considered a broad spectrum of matters ranging from a first stage, which was concerned with whether there was a *prima facie* need for the proposal and whether that need could be economically met, to a second stage which considered, *inter alia*, whether the scheme was practicable, viable and safe, and then to a third stage of, *inter alia*, assessing the impact of the Green Line on local communities.

6.2 The issue of noise and vibration, which was obviously a key issue raised before the Inspector, was dealt with in paragraph 2.1.4 of the report. The Inspector referred to the fact that evidence had been given to the Inquiry by Mr. Eanna O'Kelly, an acoustic engineering consultant, who had contributed to the sections of the EIS on noise. Mr. O'Kelly testified for the defendants at the hearing of these proceedings. The Inspector stated that "the standards proposed by Mr. O'Kelly" appeared to him "to be reasonable" and that he had accepted "the area by area analysis of Mr. O'Kelly as reasonable and the properties identified by him as appropriate for noise assessment". The Inspector specifically expressed appreciation for the objectivity of the evidence of Mr. O'Kelly in the context that the conditions imposed on, and the concessions made by, the Board "with regard to the provision of acoustic screening of one type or another" were based on his evidence, citing that the offers of solid acoustic screens at Elmwood Avenue and another location had their origin in his evidence.

6.3 The following findings in relation to noise were made by the Inspector and are set out in para. 2.1.4:-

> "In general the Inquiry is satisfied that except for areas of particular sensitivity, such as properties which are very close to or have long boundaries with the line, the noise and vibration impact of the proposals would be slight. Conditions have been proposed where necessary and in particular where, in the opinion of the Inquiry, specific circumstances render additional work necessary. … The Inquiry notes that the applicant will be bound by the terms of the projected noise levels identified in the EIS for both construction and operational phases.
>
> Subject to the foregoing, the noise and vibration aspects of the project appear to be satisfactory."

6.4 The Inspector recommended conditions to the Minister, including specific conditions in relation to abatement of noise at particular locations where representations had been made in the course of the public inquiry. For example, one condition required the agreement of Dublin Corporation (or, in default, a determination by the Minister) on a scheme of noise reduction by means of a solid barrier between the rail track and the houses in Elmwood Avenue Upper, the effect of which would be to reduce the noise level by 10 dBA, as had already been agreed between the parties (*i.e.* the Board and the residents).

6.5 Of more significance for present purposes is the fact that the Inspector also recommended a general condition in relation to monitoring noise emissions and fixing daytime and night-time limits, which was subsequently conditioned into the Line B Order and

replicated therein almost verbatim.

6.6 The plaintiffs neither appeared at, nor made any submission to, the public inquiry. Their evidence was that they were reassured by the statements made at meetings they had attended in relation to the Green Line project, as well as the non-technical summary in the EIS, and they did not feel it necessary to attend the inquiry.

7. The Line B Order

7.1 The Line B Order expressly authorised the construction and maintenance of the works involved in creating the Green Line. It did not expressly authorise the Board to operate of the light rail on the Green Line, but that is now expressly authorised by s. 4(2) of the Act of 2001, so that any lacuna in the Line B Order has been supplied. The works authorised were identified with precision by reference to each area, including Area 8.

7.2 In making the Line B Order, it was expressly provided that the powers granted to the Board shall be exercised subject to the conditions set out in the 11th schedule. The specific conditions in relation to abatement of noise at particular locations, for example, at Elmwood Avenue Upper, were included. The general condition in relation to monitoring noise emissions and fixing daytime and night-time limits recommended in the Inspector's report was included as condition 28, which was in the following terms:-

> "Prior to the commencement of the operation of the light rail system, the Board shall submit to Dublin Corporation and Dun Laoghaire-Rathdown Co. Council for their agreement, a schedule of locations at which it is proposed to monitor the noise emissions from the operation of the light rail system, <u>together with daytime and night-time limits at each location</u>. In the absence of agreement between the Board and the local authorities, the matter shall be determined by the Minister. …
>
> The Board, in drawing up the schedule of locations and limits thereat, shall be <u>bound by the obligations undertaken during the course of the Public Inquiry</u>, into the application of the Board, and recorded in the report of that inquiry." (Emphasis added).

7.3 The crucial issue in determining whether the defendants are, as they contend, operating the Green Line within the parameters permitted by the Line B Order in relation to noise is the determination of what the Line B Order stipulated in relation to the levels of noise that are permissible. While acknowledging that it did so "somewhat obliquely", the defendants submitted that the Line B Order proceeded on the basis that the defendants are bound by the EIS projected noise levels, referring to condition 28. They also submitted that, as no condition was imposed by the Minister relating to noise abatement in the vicinity of No. 3, it must be "inferred" that the Minister accepted that the level of noise produced at that location was lawful and did not constitute an unreasonable interference with property in the area. The evidence given on behalf of the first defendant was that its understanding is that the Line B Order binds it to operate within the noise levels predicted in the EIS and to introduce specific attenuation measures where the noise generated exceeds the existing level by greater than 10 dBA LAeq.

7.4 The first defendant's understanding is correct, in my view. As the words in the second paragraph of condition 28 to which I have added emphasis indicate, the defendants are bound, by reference to paragraph 2.14 of the Inspector's report, which I have quoted, by the terms of the projected noise levels identified in the EIS for the operational phase, with which this case is concerned. But condition 28, as the words to which I have added emphasis in the first paragraph indicate, appears to go beyond the EIS projected standard and to envisage the putting in place of a standard which fixed both daytime and night-time limits. What is clear is that condition 28 mandated that, prior to the commencement of the operation of the Green Line, the first defendant should agree a schedule of locations for noise emission monitoring and also for daytime and night-time limits at each location with the relevant local authority for the area through which the Green Line would pass, which in the case of No. 3 is Dublin City Council. In default of agreement, those matters were to be determined by the Minister.

7.5 I propose considering next whether condition 28 was complied with.

8. Condition 28 complied with?

8.1 There was considerable controversy during the course of the hearing as to whether the first defendant has complied with condition 28. In February 2004, when the commissioning of the Green Line was imminent, the first defendant wrote to both Dublin City Council and Dun Laoghaire-Rathdown Co. Council setting out the text of condition 28 and stating that, in fulfilment of that condition, it was the first defendant's intention that, during the testing and trial running of the commissioning phase of the Green Line, a limited pilot noise survey would be undertaken, which would provide the basis for the selection of the noise monitoring locations. On 3rd June, 2004, Mr. O' Kelly furnished the first defendant with two sets of data. One was the results of monitoring he had carried out at six representative locations along the Green Line, three of which, including 32, Dartmouth Road, were located within Area 8. The second was a list of locations which had been selected for future noise monitoring during the operational stage, the selection being based on the close proximity of the locations to the tram line and because they were residential or hotel properties. Three of the locations selected were within Area 8, but 32 Dartmouth Road was excluded.

8.2 On 8th June, 2004, the first defendant wrote to each of the local authorities. On the basis of Mr. O'Kelly's test results at the six representative locations, it was stated that, overall, while noise from the passing of trams was audible, the test readings indicated that noises associated with the passing of trams at the locations did not contribute to the overall ambient noise level of the area. No further noise monitoring associated with the Luas was proposed at those locations. Each local authority was informed that locations selected by Mr. O'Kelly for future monitoring had been "identified as representative of worst case scenarios". It was proposed that noise monitoring would be carried out at those locations during the operational stage by the operator, the second defendant. Each letter then went on to outline "significant practical difficulties" associated with setting or determining noise limits for locations associated with the operation of Luas. Two principal difficulties were identified. The first was that the majority of sources of ambient noise, road traffic and suchlike, were outside the control of the Green Line operator. Therefore, it was suggested, it was not practical to set noise limits. The second was that the differential of operational noise between daytime and night-time was inappropriate, because the noise associated with the tram was relatively consistent, with the trams generating the same level of noise both day and night. The only variable at a receptor point was the frequency of occurrence of the passage of the trams. Tram frequency would be reduced after 7pm and reduced further after 11.30pm. The proposition put to each local authority, having regard to the foregoing, was as follows:-

> "Therefore, it is not our intention to set limits or to differentiate day time and night time operational noise as detailed in the LRO condition, as the ambient noise of any particular location is largely outside the control of the Luas operator.

> Agreement in relation to the above is sought to close out LRO condition no. 28."

8.3 Following a meeting between officials of Dublin City Council and the Environmental Manager of the first defendant, by letter dated 26th July, 2004, the first defendant wrote to Dublin City Council clarifying the position as follows:

> "RPA operational noise proposal and proposed noise monitoring locations as per RPA letter dated June 8, 2004 are acceptable to DCC in compliance with Line B LRO condition No. 28. DCC accept the content of the letter was not intended as a detailed report but a proposal for agreement in compliance with the LRO condition No. 28."

The letter then went on to state that the ongoing management of noise during the operational stage of the Luas Green Line was the responsibility of the operator, the second defendant.

8.4 The local authorities accepted the proposition put forward in the letter of 8th June, 2004, Dublin City Council in writing and Dun Laoghaire Rathdown County Council orally. There was no further consideration of implementation of condition 28.

8.5 On those facts, in my view, condition 28 has not been complied with, because the first defendant has not agreed daytime and night-time limits at the locations agreed to by the local authorities nor, in default of agreement, sought a determination of the Minister. That separate issues in relation to noise monitoring may have arisen as to the contractual liability of the contractors involved in the construction phase to the first defendant is irrelevant. That Mr. O'Kelly subsequently, in September 2004, furnished a report to AMB Joint Venture, the consortium which designed and constructed the Green Line, dealing with the monitoring of noise levels since the coming into operation of the Green Line does not alter that finding. Nor does the fact that later in October 2006 and in March 2007 Mr. O'Kelly furnished reports on the monitoring of noise levels on the Green Line to the second defendant, the operator, alter that finding. In short, the first defendant deliberately decided not to comply with its obligations under condition 28. Despite the concurrence of the two local authorities, in my view, condition 28 has not been "closed out" and the first defendant is still bound by it.

8.6 Counsel for the defendants submitted that, even if condition 28 was not complied with, that would make no material difference to the situation at the plaintiffs' house. It was submitted that it is not the case that there are no limits on noise emissions as a result of the operation of the Green Line. The limits by reference to the EIS, which I have already outlined, apply. In particular, it was submitted that the Order permits the operation of the Green Line through residential areas without acoustic screens provided the noise levels do not exceed the pre-existing ambient noise levels by ten decibels or more. Conversely, where there is such an exceedance, the Line B Order requires that abatement measures be taken, including the provision of acoustic screens because of the undertaking given by reference to the EIS in the course of the public inquiry. Counsel for the defendants contended that the results of the tests carried out by Mr. Searson fall within the parameters of the EIS projections. The evidence supports that contention, as was accepted by counsel for the plaintiffs. I will consider the legal implications of that fact later.

9. Structure of judgment

9.1 On the basis of the foregoing analysis of the statutory framework within which the Green Line is operated, I consider that the resolution of the issue as to whether the defendants are operating the Green Line at the rear line of No. 3 in accordance with law turns on the extent of the authority conferred and the obligations imposed on the first defendants under the Acts of the Oireachtas and the secondary legislation which I have examined. That is a matter of construction of the Acts and the Line B Order and their application to the facts.

9.2 Nonetheless, I consider it prudent to outline and comment on the legal submissions made by the parties on the issues as they perceived them, having summarised the evidence.

10. The evidence – an overview

10.1 A very considerable body of evidence was adduced in this case which took up about 13 days of the hearing. The evidence ranged far and wide. However, in my view, in considering the issues which arise for determination, the evidential focus can be relatively narrow. The factual basis of the plaintiffs' complaint is that, since the commencement of the operational phase of the Green Line, their normal use and enjoyment of their home has been totally disrupted and undermined by reason of the noise levels created by the trams as they pass at the rear of their home, particularly at night, when they experience serious sleep disturbance. They contend that the noise levels created as the trams pass breach acceptable noise standards as prescribed by national and international standards agencies. Further, they contend that the defendants have not exercised reasonable care towards them, in that they have failed to mitigate that consequence by erecting noise reducing screens along the rail line at the rear of their home. Leaving aside the legal and evidential issues, such as on whom the onus of proof of a particular factual matter lies, that is the evidential basis of their claim in nuisance and their answer to the without negligence defence.

10.2 It was made clear by their counsel that the defendants accept the *bona fides* of the plaintiffs, although they are perceived as asserting individual (*i.e*. private) concerns against the defendants, who are charged with carrying out *bona fide* public purposes.

10.3 There were matters raised in evidence which were not really in controversy. There is no controversy about the social utility of the Luas system. There is no controversy that light rail transport is quiet relative to other forms of transport, such as DART, mainline rail and road traffic.

10.4 There was, however, controversy as to what was represented by officials of the Board prior to the making of the Line B Order in relation to the noise factor in the course of their engagement with members of the public in the Ranelagh area and elsewhere, through information leaflets which were circulated to the public and at public meetings. It was certainly represented on behalf of the Board that Luas would be "surprisingly quiet" or "surprisingly silent". It was accepted by Mr. Michael Sheedy, the Director of Light Rail with the first defendant, who had been involved in the project since its inception, that it was represented at the time that there would be no significant problems with noise. The position of the first defendant was that what has happened in reality is that the number of people, whether in relation to the Green Line or the other Luas Line, the Red Line, who have found noise to be a particular problem is absolutely minimal.

10.5 The perception of the plaintiffs and their neighbours of the representations made on behalf of the Board was different. The evidence of the first plaintiff was that she accepted that there would be virtually no noise impact from Luas on her home and, if there was going to be an impact, the first defendant would take remedial steps by erecting acoustic screens along the Green Line. It was pleaded in the plaintiffs' statement of claim, and it was argued on their behalf, that assurances given by the representatives of the Board in its information literature, at meetings and in the EIS gave rise to a legitimate expectation that the first defendant would put

in place noise reduction measures so as to ensure that no unacceptable noise nuisance would be caused to the plaintiffs in the lawful use and enjoyment of their home.

10.6 On the evidence, I find that the Board did not make any representation or give any assurance or undertaking prior to the making of the Line B Order on the basis of which the plaintiffs could have had a legitimate expectation that the first defendant would provide, and that there is not otherwise an obligation on the defendants to provide, acoustic screens on the Green Line at the rear of No. 3 having regard to the noise impact which the operation of the Green Line has had on No. 3 as disclosed in the evidence.

10.7 Essentially, two types of evidence were given as to the nature of that impact. One was evidence given by the plaintiffs and their near neighbours of their personal experiences since the Green Line came into operation. The other was expert evidence. It was based broadly on the tests carried out by Mr. Searson and Mr. O'Kelly, which established the actual noise levels created by the tram passes at the rear of No. 3 and, in the case of Mr. O'Kelly, at a proxy location at Northbrook Road, and how the results related to the EIS predictions and to the national and international standards invoked by Mr. Searson.

11. Evidence of the experiences of the plaintiffs and their neighbours

11.1 The plaintiffs and their neighbours who gave evidence testified as to the peaceful and tranquil nature of the immediate environment of Cambridge Terrace, a terrace of eleven residential properties. Even though located in a suburban area close to the city centre, I am satisfied that prior to the coming into operation of the Green Line, Cambridge Terrace was, as the first plaintiff described it, "a very quiet enclave".

11.2 The plaintiffs and their neighbours complained about the adverse impact of the tram passes on the amenity of their long south west facing back gardens. The second defendant testified that, since the Luas Green Line operation commenced, it is difficult to hold normal conversation in the garden and, as a result, over time the plaintiffs have stopped using the garden for entertainment and have used it a lot less to relax in. There was similar testimony from their next door neighbour in 4, Cambridge Terrace, Mr. Joe Geoghegan.

11.3 In relation to the interior of No. 3, the plaintiffs complained that the noise of the trams is very intrusive in the kitchen and dining area on the first floor. Mr. Geoghegan also testified as to the disruptive effect of the tram noise on the living areas of his house.

11.4 The plaintiffs and their neighbours also complained of the noise impact in the bedrooms at the rear of their houses. In fact, sleep disturbance was described by counsel for the plaintiffs as the single greatest complaint they have. The main problem for the plaintiffs is trying to get to sleep at night. The first plaintiff described what happened when Luas went into full operation and the problem she encountered with noise in the bedroom. She likes to sleep with the window open. She likes to go to bed about 11pm or 11.30pm. The last tram passes the house at about 1am. She found that, as she started to fall asleep, a tram would pass and the noise would prevent her sleeping. Until the last tram had passed there was not a long enough interlude between the trams to enable her to fall asleep. She has tried to get used to the noise but she has not been successful. Her solution is to go to bed later and to close the windows occasionally. Sometimes she sleeps at the front of the house, but the master bedroom is at the back of the house. As I have stated, since the elevation of the railway embankment that room is in line with the tram track.

11.5 Mr. Geoghegan testified that it was a major disappointment and a major shock to him when the Green Line came into operation. He finds the noise in the bedroom with the windows open terribly disruptive at night and described its effect as being "almost like an alarm clock" in wakening him up. The first tram goes by shortly after 5am. Frequently he gets up at that time because he is awake and cannot get back to sleep.

11.6 There were also complaints from witnesses about flashing lights and noise when maintenance works are being carried out on the track occasionally at 2am to 3am. Mr. Sheedy's evidence was that it is necessary to carry out maintenance work at night because otherwise disruption to the Luas service would be too significant.

11.7 All of the residents of the Ranelagh area, including the plaintiffs, who gave evidence were of the view that the level of noise from the Green Line has increased since it went into operation in 2004. The plaintiffs pointed out that the situation is exacerbated around Christmas when extra late night trams are in service. The last tram can pass as late as 3.30am, if not later.

11.8 One could be in no doubt about the *bona fides* of the plaintiffs and their neighbours on the basis of their evidence. One matter which I do not consider to be of any particular significance to the resolution of the issues which fall for determination in this case, although it does point to the *bona fides* of the plaintiffs and their neighbours, was the evidence of Mr. Fergus Mulligan, the owner and occupier of 44, Oakley Road, Ranelagh. Mr. Mulligan, apart from testifying as to his own personal experience, which was that the noise from the tram passes at his home is very intrusive, gave evidence in relation to dealings by residents in the Oakley Road area directly, and through local representatives, with the first defendant in relation to the provision of an acoustic screen at that location. On the evidence, it is clear that there was interaction and, at least, agreement in principle in relation to the installation of a Plexi glass screen at Oakley Road, if the residents were prepared to pay for its installation. The possibility of a similar solution at Cambridge Terrace was mooted. However, nothing came of the proposal in relation to Oakley Road.

12. Expert analysis of the plaintiffs' experiences

12.1 A strong theme in the defence, which strays into the realm of expert evidence, was that the plaintiffs are particularly sensitive to noise. Even though two of their neighbours, Mr. Geoghegan and Mr. Mulligan, testified as to similar effects of the noise on them as were experienced by the plaintiffs, the defendants urged that the plaintiffs, as regards sensitivity to noise, should be regarded as being within a very small percentage of the population who respond similarly to such noise. That theme was based on the evidence of Mr. Rupert Taylor, an expert in the field of acoustics, noise and vibration control with international experience, who testified on behalf of the defendants.

12.2 Mr. Taylor explained that, while noise can be measured physically in terms of engineering units, the results of those measurements have no direct meaning unless they are related to the effect of noise on people through research, by studying the effect on a population of people. The research gives a means of relating a measured noise level to the probability that a person within a population will respond in a particular way, whether by annoyance, sleep disturbance or hearing damage. Taking the noise levels due to tram passes at No. 3 recorded by Mr. Searson, which, for comparison purposes, Mr. Taylor translated to Lden level "in the low 50s", Mr. Taylor's evidence was that research indicates that such level of noise disturbance results in 2.5% of the population being highly annoyed, 10% of the population being annoyed and 25% of the population being a little annoyed. On the basis of that research (carried out by Miederma and Oudshoorn and published in *Environmental Health Perspectives*, Volume 109, No. 4, April 2001), Mr.

Taylor deduced that the plaintiffs are not among the group classified as ordinary; rather they are highly sensitive and are representative of a very small proportion of the population who would be expected to have the high annoyance which they have demonstrated – 2.5% of the population.

12.3 Mr. Taylor also referred to the phenomenon well known in the study of human reaction to noise called habituation. When there is a change in the noise environment, residents react in the short term to a greater extent than they do over a longer period. Mr. Taylor deduced that there may have been no habituation on the part of the plaintiffs. One of the plaintiffs' neighbours who testified, Mr. Patrick Linders, of 5, Cambridge Terrace, in his evidence, seemed to describe the habituation effect, in that he acknowledged that one grows used to the change in noise levels with the passage of time.

12.4 Mr. Taylor's evidence based on his interpretation and application of the research results to the plaintiffs was not contradicted by contrary expert evidence. Its implications will be considered later.

12.5 Another theme which ran through the defendants' case was to a large extent based on what I consider may properly be described as Mr. Taylor's assessment of the plaintiffs' evidence of their experiences as related by them in Court. That theme was that the plaintiffs would not notice and, consequently, would not benefit from, any noise mitigation measures adopted by the defendants at the rear of No. 3. It is difficult to understand how, even if that were the case, it could debar the plaintiffs from a remedy to which they would be otherwise entitled. Aside from that, so far as the thrust of Mr. Taylor's evidence was that the Court should infer that the plaintiffs would not benefit from any reduction in noise levels effected by the installation of acoustic screens, I do not think it appropriate to draw such an inference on the basis of their reaction to events late in 2007. The evidence shows that due to rail grinding in the vicinity of Cambridge Terrace in November 2007 noise levels were reduced – "very dramatically reduced" – according to Mr. Taylor. When asked to comment on the plaintiffs' evidence to the effect that they had not noticed the reduction, Mr. Taylor's evidence was that he was at a loss to understand how a very substantial reduction in loudness could not have been noticed. However, the evidence shows that by July 2008, when Mr. O'Kelly took measurements, the noise levels had reverted to the pre-grinding level. As I understand the evidence of both Mr. Sheedy and Mr. O'Kelly, they acknowledge that the noise reduction due to the rail grinding was not lasting in its effect. That being the case, in my view, the plaintiffs' evidence of their personal experience is understandable.

13. Expert evidence

13.1 In outline, the plaintiffs' case based on the scientific evidence, which is primarily the results of the tests carried out by Mr. Searson and his conclusions on the basis of those test results, is that the noise levels created by the operation of the Luas in No. 3 breached acceptable noise standards. As a consequence, it was argued on their behalf, that, with a view to reducing the noise levels to an acceptable level, acoustic barriers should be installed to protect No. 3. The evidence of the plaintiffs' expert, Mr. Searson, was that such screens should be capable of being installed at a moderate cost to the defendants.

13.2 At the outset, it is important to record that, in relation to all of the tests carried out by Mr. Searson, no question arose as to the manner in which the tests were conducted or the accuracy of the results. What was seriously in controversy, however, was the propriety of the application of guidelines and standards relied on by Mr. Searson to the results, having regard to the alleged difference between the methodology underlying the guidelines and standards and the methodology employed by Mr. Searson. The relevance of those guidelines and standards was also seriously in issue.

13.3 The results of all of the tests carried out by Mr. Searson were put in evidence, together with his reports in which he analysed the test results. As I have stated at the outset, Mr. Searson was first retained by the plaintiffs in July 2004. On four different occasions between 27th July, 2004 and 5th April, 2006, he conducted in all 55 tests, some outdoor, on the patio at the rear of No. 3, and some indoors, in the master bedroom of No. 3. The results of the tests were annexed to and analysed in his first report, which was dated 12th April, 2006. Some of the tests were conducted in daytime and others at night. The test results include the indicators recorded in the EIS in relation to the representative locations dealt with in the EIS – LAeq and LAmax – and also the LAe (otherwise SEL), being the average decibel level reduced to one second. A number of controversies arose in relation to Mr. Searson's test results and his analysis and application of them.

13.4 One controversy related to the appropriateness of the time period to which the LAeq related, many of Mr. Searson's tests relating to periods as short as ten seconds or fifteen seconds, the duration of a tram pass. As a non-scientific person, I find it difficult, but unnecessary, to express a preference on the appropriateness of periods of short duration as against periods of longer duration, or on Mr. Searson's argument that the latter have a dilutant effect. Having said that, I am acutely conscious that, in comparing Mr. Searson's test results with the predictions in the EIS and in the application of guidelines and standards which he called in aid, it is necessary to ensure one is comparing like with like before drawing inferences. Similarly, I find it difficult, but unnecessary, to come down on one side or the other on another controversy – as to whether LAmax (Mr. Searson's contention) or SEL (Mr. Taylor's contention) is the more reliable indicator of sleep disturbance.

13.5 Other controversies in relation to the scientific evidence arose from Mr. Searson's criticism of the methodology adopted in the EIS. Leaving aside the question whether, as a matter of law, any criticism of such methodology can be brooked in a Court with a view to overriding or side-stepping the implementation of the elements of the Line B Order derived from the EIS almost a decade after it was made, to which I will return, those criticisms were answered by Mr. Taylor in his evidence. As to the adequacy of the EIS methodology in general, Mr. Taylor's evidence was that it followed conventional practice at the time of its preparation, but he did recognise that the methodology for predicting and regulating noise impact has evolved over the past decade. For instance, another indicator which is increasingly used in the measurement of environment noise, Lden, which takes account of the differences in noise between day, evening and night time, was the subject of much discussion at the hearing. It is based on LAeq but adds a 5dB weighting for evening and a 10dB weighting for night time. It is recommended in the *Guidelines for the Treatment of Noise and Vibration in National Road Schemes* (Revision 1, 25th October, 2004) published by the National Road Authority (NRA guidelines), because it is the preferred European Union indicator.

13.6 The evidence was that the NRA guidelines objectives have been conditioned by An Bord Pleanála, which under the Act of 2001 now performs the function formerly performed by the Minister in making an order under s. 9 of the Act of 1996, into the order made in 2007 under the Act of 2001 in relation to Luas Line A1 (Belgard to Saggart extension). Further, Ms. Ann Lillis, the Environmental Manager with the first defendant, testified as to the first defendant's recent policy in relation to noise mitigation measures by referring to the position adopted in relation to the line she referred to as "Metro North". Her evidence was that the first defendant decided to adopt the NRA design goal of 60 Lden as a matter of practice.

13.7 Mr. Taylor's evidence was that, on the basis of Mr. Searson's tests, the Lden night time measurement at No. 3 is comfortably

below the NRA guideline threshold. Though invited to do so in cross-examination, Mr. Searson declined to comment on whether, by weighting his results by 10dBA for night-time, the results would be within the NRA guidelines threshold.

13.8 Turning to the specific criticisms of the methodology used in the EIS expressed by Mr. Searson or implicit in his evidence, on the basis of Mr. Taylor's evidence, I am satisfied that the criticisms do not stand up. First, I accept that it would be completely impracticable, in the preparation of an EIS for a project of the magnitude of the Green Line, to take measurements at so many potentially affected locations that would indicate that measurements should have been taken in the rear gardens of, or inside, the houses at Cambridge Terrace. In making that observation I am not overlooking the fact that the railway embankment was raised at the rear of the gardens in Cambridge Terrace or the significance attached by the plaintiffs' witnesses to the alignment of the track, and, in particular, the significance attached by Mr. Searson to the fact that the master bedroom in No. 3 has a direct line of sight to the rail line. If the rear of No. 3 had been selected as a representative location, I think it probable that the prediction would have been moderate impact, as Mr. Taylor opined. Secondly, Mr. Taylor's evidence was that inside noise assessments are never done in the preparation of an EIS and other evidence corroborates that. Mr. O'Kelly's evidence was that there is a standard reduction of 15 dBA in the LAeq 18 hour level, when one moves from outdoor to indoors and that the difference internally with a window shut rather than open is in the region of 12/13 dBA to 15 dBA, suggesting a mechanism for estimating interior measurements from exterior measurements. Thirdly, Mr. Taylor rejected criticism of the EIS on the ground that night time measurements had not been taken in its preparation. His evidence was that the LAeq 18 hour index, which was used, is a long established procedure and gives a fair proxy for an entire 24 hour exposure to transportation noise, although, as I have stated, he acknowledged that environmental assessment is evolving and noted that the Lden index is now being used in environmental assessment. Mr. O'Kelly's view was that, if Luas trams operated at 3am or 4am, he would deem it appropriate to take night time measurements, but not otherwise.

13.9 In addition to the tests conducted between 2004 and 2006, Mr. Searson conducted a further 53 tests at No. 3 on various dates between the end of July 2007 and the end of June 2008 and he analysed and commented on the results of those tests in his reports of 8th November, 2007, 16th November, 2007, 30th April, 2008 and 25th June, 2008. Mr. Searson and Mr. O'Kelly jointly conducted noise measurements within the master bedroom of No. 3 on the 11th July, 2008 with the window open. Mr. O'Kelly put the results of those tests in evidence. Mr. O'Kelly had also included No. 3 in monitoring tests for the second defendant which he conducted in June 2007. At the end of 2007 and in July 2008, Mr. O'Kelly conducted tests for the first defendant at a location on Northbrook Road which was chosen as a proxy for No. 3.

13.10 For a variety of reasons, direct comparability between the test results put before the Court by Mr. Searson and the EIS prediction in relation to the nearest representative location to No. 3, 32, Dartmouth Road, is difficult, an important factor being the different time period of measurement for the purposes of the LAeq level. However, Mr. Searson accepted in cross-examination that the noise produced by the passage of trams as reflected in the results of his tests was generally within the parameters predicted in the EIS. In relation to the LAmax, to which Mr. Searson attached much importance, there was no exceedance of the prediction in the EIS for 32, Dartmouth Road in any of the outdoor tests conducted by him at No. 3, nor was there an exceedance in the tests carried out by Mr. O'Kelly at the proxy location at Northbrook Road on 6th July, 2008. It was accepted by the witnesses on behalf of the defendants that the average speed of the Luas at the rear of Cambridge Terrace is 60 kilometres per hour, twice the speed factor on which the prediction in relation to 32, Dartmouth Road was based. It was also accepted that noise level increases as speed increases. Nonetheless, the evidence is that the noise levels emanating from passing trams at No. 3 are within the parameters predicted in the EIS. I so find.

13.11 The significance of that finding, that the noise levels generated by the trams at the rear of No. 3 are within the parameters envisaged in the EIS, will be considered later. The plaintiffs' contention that the noise levels created by the operation of the Green Line are in breach of acceptable noise standards to which, it was contended, the defendants must have regard, is not, and could not be, based on any infringement of the noise levels envisaged in the EIS on the basis of which the Line B Order was made. That contention is based on Mr. Searson's opinion that the noise levels generated by Luas at No. 3 should conform with the criteria outlined in two publications, namely:

> (1) *Guidelines for Community Noise*, published on behalf of the World Health Organisation in 2000 (the WHO guidelines); and
>
> (2) *Sound insulation and noise reduction for buildings – Code of Practice* (BS 8233:1999) (the BS Code).

13.12 The WHO guidelines were adopted by an expert taskforce which met in April 1999. The guidelines have not been adopted as a binding standard in this jurisdiction. The aspect of the guidelines relied on by Mr. Searson is to be found in table 4.1, which is headed "Guideline values for community noise in specific environments". The element of that table on which Mr. Searson primarily focused was the guideline in relation to the interior of bedrooms. The table puts the level beyond which noise may give rise to sleep disturbance at night at 30 dB based on LAeq 8h measurement and at 45 dB on LAmax measurement.

13.13 Mr. Taylor criticised Mr. Searson's promotion of the WHO guidelines as an appropriate standard on a number of grounds. First he emphasised that the WHO guidelines are not a formal publication of the WHO. He was not aware of any country which had adopted the guidelines as a standard. In general, he stated that, while they are good standards to strive for, they are actually in practice unachievable in residential areas as a whole and it would never be possible to develop land and transportation systems while achieving the levels specified. Secondly, Mr. Taylor made the point that it is not possible to make a comparison between Mr. Searson's LAeq results and the LAeq thresholds in the guidelines without recalculating Mr. Searson's results to produce a value of LAeq 8h to compare like with like in table 4.1. In other words, he contended that Mr. Searson had misapplied the guidelines. Thirdly, in reliance on the commentary in the WHO guidelines which preceded table 4.1, Mr. Taylor opined that SEL, not LAmax, is the more consistent measure of single noise events with an effective duration of ten to thirty seconds, such as a tram pass. He put the threshold in SEL values corresponding to LAmax of 45 dBA at 55 to 60 dBA. Mr. Taylor's conclusion, applying the guidance correctly, that is to say, treating the SEL as the best indicator, to Mr. Searson's results was that, there was a slight excess above what was suggested in the guidelines as the level and number of events (not to exceed SEL values of 55 to 60 dBA more than ten to fifteen times per night) for good sleep, but the excess was not material.

13.14 During cross-examination Mr. Taylor stated that the Court should have regard to the totality of the evidence, particularly the relationship between noise levels and observed community response. He stated that he was not suggesting that the Court should disregard the WHO guidelines, which he described as an important document widely referred to, but also widely misunderstood and applied in a wrong manner. He continued:

> "I have attempted to show that the position at 3, Cambridge Terrace is at about the borderline between the point at which, if the noise were greater, you would start looking at noise barriers. But it is just at the top of the range. Looking at yet another document, the Draft Dublin Action Plan says it's a quiet area. Given all the consequences of a decision

requiring noise barriers which Mr. Sheedy explained, it does not appear necessary to require them here."

13.15 The reference to the Draft Dublin Action Plan was a reference to the *Dublin Agglomeration Draft Action Plan relating to the assessment & management of environmental noise*, a public consultation document which was published by the four local authorities in the Dublin area in July 2008 pursuant to the Environmental Noise Regulations 2006 (S.I. 140/2006), implementing the Environmental Noise Directive (2002/49/EC). While it was common case that No. 3, even with Luas passing at the end of its back garden, falls within the 41.5% of residential addresses within the Dublin City Council area within the definition of a "quiet area" for the purposes of the Draft Dublin Action Plan, I consider that Mr. Searson was correct in stating that it does not go to the issues in this case, which relate to the noise effects of the passing of the trams on the occupiers of No. 3.

13.16 Turning to the BS Code, its scope is explained in para. 1 as follows:

> "These criteria and limits are primarily intended to guide the design of new or refurbished buildings undergoing a change of use rather than to assess the effect of changes in the external noise level."

Mr. Searson relied on table 5, which sets out "indoor ambient noise levels in spaces when they are unoccupied". For "reasonable resting/sleeping conditions" in bedrooms, the maximum level for good conditions is a LAeq of 30 dB, whereas for reasonable conditions it is 35 dB. Further, it is stated that for a reasonable standard in bedrooms at night, individual noise events should not normally exceed 45 dB LAmax. In relation to the LAeq measurement, Mr. Taylor pointed out that para. 7.3 indicates that, in the case of bedrooms, the time period to which the LAeq relates is eight hours, so that the difficulty in relation to applying the WHO guidelines to Mr. Searson's LAeq results applies equally to the application of the BS Code. Mr. Taylor explained that, while the BS Code pre-dated the WHO guidelines, its draftsmen drew inspiration from an earlier version from the WHO guidelines. In any event, it was common case that the BS Code is intended as setting a standard for sound insulation and noise reduction in building design rather than for defining the impact of transport corridors on adjacent buildings.

13.17 For completeness, it should be pointed out that while, in addressing the evidence in relation to the WHO guidelines and the BS Code, I have concentrated on the criteria stipulated therein in relation to inside bedrooms, Mr. Searson also relied on the recommended "outdoor living area" level in the WHO guidelines in relation to the plaintiffs' garden patio area and contended that it was infringed.

14. The plaintiffs' case for acoustic screens

14.1 On the basis that the levels recommended in the WHO guidelines and the BS Code have been exceeded, Mr. Searson's evidence, in harmony with his various reports, was that noise mitigation or attenuation barriers should be installed at the rear of No. 3 with a view to significantly reducing what he described as the "wholly unacceptable noise intrusion" from the operation of the Green Line.

14.2 Mr. Taylor, in his direct evidence, acknowledged that, if an acoustic screen was installed as required by the plaintiffs, the noise level at No. 3 would be less. However, as to whether there is an objective requirement for an acoustic screen at that location his opinion was:

> "In the context of generally applied criteria used internationally, we are at a point above which you would start to look at the practicability of acoustic screens but only if the noise levels were materially greater than they are at present. We are about at the boundary of the point where in other systems and other assessment approaches you start to look at the practicability of acoustic screens."

That is consistent with his response in relation to the WHO guidelines, which I have quoted earlier.

14.3 Ms. Lillis, in testifying in relation to the adoption by the first defendant of the NRA guidelines, having explained what that means in practice as regards provision of noise barriers, expressed the belief that, in the case of No. 3, the trigger for such mitigating measures under the NRA guidelines would not be reached on the basis of the level of noise being generated by trams at that location.

14.4 In his first report, Mr. Searson also recommended another measure to mitigate noise intrusion in No. 3 – the upgrading of the rear windows at the rear of No. 3 – which, in Mr. O'Kelly's opinion, should have been implemented by the plaintiffs. However, this has not been done, although the evidence was that the plaintiffs' neighbour in No. 5, Mr. Linders, had added the Ventrolla system to the windows of his house to improve the performance of the windows in terms of draught and sound proofing. There was a minor controversy as to whether adopting mitigation measures within No. 3 would be worthwhile. Mr. O'Kelly was of the view that the installation of double glazed windows fitted with a sound attenuated ventilator would be both very effective and cost effective. On the other hand, the first plaintiff envisaged difficulties in relation to making such changes, because No. 3 is a protected structure and planning permission would be necessary for such works. In any event, as the first plaintiff pointed out, that solution would not remedy the intrusion in the garden and patio areas. The plaintiffs' position is that the installation of acoustic screens is the solution to which they are entitled. A number of evidential issues arose in relation to screening.

15. Evidence in relation to acoustic screens

15.1 The evidence discloses that, after the Line B Order was made, consideration was given by consultants and advisers of the first defendant, and its predecessor, the Board, to the construction of acoustic screens at certain locations which had not been designated for acoustic screens in the EIS or the Line B Order.

15.2 For instance, in June 2000 Mr. O'Kelly had, in a letter to the Light Rail Project Office of the Board, suggested that acoustic screens would be required at certain locations, including 32, Dartmouth Road, being properties which were "extremely close to the line". In fact, as the EIS discloses 32, Dartmouth Road is only 3 metres from the line. Mr. O'Kelly expressed the view that it would be good practice to consider putting barriers at those locations. However, his suggestion was not taken up and it was decided to wait and see whether the EIS predictions would be met. Mr. O'Kelly's evidence was that the monitoring he carried out following the coming into operation of the Green Line indicated that the predictions in the EIS were, in fact, not reached, let alone exceeded.

15.3 Later, in April 2003, in a report prepared by Sinclair Knight Mertz (SKM), who were advising the AMB Joint Venture, it was recommended that mitigation measures which went beyond those required in the EIS be taken. The recommendations included a proposal for reflective barriers at 32, Dartmouth Road. The SKM recommendation was made on the basis of a predicted increase in the LAeq 18h at various sites, which it was anticipated would bring them above the +10 dBA over the pre-existing threshold. On the evidence, I am satisfied that the recommendations made by SKM in relation to the installation of reflective barriers and low-height noise barriers on Line B in the Ranelagh area did not relate to Cambridge Terrace.

15.4 Overall, I have come to the conclusion that the recommendations made by Mr. O'Kelly and SKM at the pre-commissioning stage do not support the plaintiffs' case for acoustic screens at No. 3 evidentially. Nor do the actions taken by the first defendant in relation to noise issues at the Hilton Hotel and Peter's Place, both locations outside Area 8 on the north side of the Grand Canal, in early 2005 support the plaintiffs' case. Particular factors arose at those locations, which required to be, and were, addressed, which distinguished them from other locations, for example No. 3. The plaintiffs' case stands or falls on whether, as they contend, the defendants are creating a nuisance at No. 3 or, if it arises, are negligent in the operation of the Green Line.

15.5 In the reply given by Mr. Taylor during his cross-examination which I have quoted earlier, he hinted at the consequences which would flow from the first defendant agreeing, or being ordered by the Court, to provide acoustic screening at the rear of No. 3. There is no doubt that the evidence indicates that it could have serious financial consequences for the first defendant because it would set a precedent which might give rise to demands from other occupiers of properties located along the Green Line and the other tram lines operated by the first defendant for similar screens. There was evidence that there are over 600 buildings along the Green Line from Charlemont to Churchtown in closer proximity to the track than No. 3. Some of those buildings are flat complexes which would have more than one receptor. It is not possible to quantify the financial consequences.

15.6 However, I have to say that I found the evidence adduced on behalf of the defendants of the likely cost of installing acoustic barriers at No. 3, the so-called "Rough Order of Magnitude" estimate, which ranged from €382,000 (a barrier 1.5 metre high, allowing for a 5% risk) to €560,000 (a barrier 2 metres high with a 25% risk) utterly unconvincing as a genuine estimate of the probable cost at that single location. It is to be noted that, in responding to a request for particulars of the cost incurred by the defendants in the erection of noise barriers on the Luas system, the total cost was given as €138,007.35 by the defendants.

15.7 Other possible adverse consequences of erecting a barrier at the rear of No. 3 were adverted to in the evidence. The existence of a barrier on the plaintiffs' side of the track could give rise to potential problems for occupiers on the far side of the track. Not all residents want barriers along the Green Line, it was suggested. Graffiti has been a problem on acoustic barriers. At some locations anti-social behaviour has been associated with barriers. In this context Ballymount Castle on the Red Line was mentioned, where youths have congregated inside barriers and stoned trams, resulting in trams having to be taken out of service because of broken tram windows. Mr. Taylor in his evidence pointed to the potential for creating a different noise problem at the bridge over Northbrook Road, if a barrier stretching from Cambridge Terrace were to be attached to that bridge. The context in which that evidence was adduced on behalf of the defendants was in support of a submission made by counsel for the defendants, which is a cornerstone of the defence of the plaintiffs' claim, that a public inquiry of the type provided for in the Act of 1996 is a more appropriate forum for dealing with the type of issues which arise from the construction and operation of a light rail system than a court adjudicating in relation to a single location in an action in tort. The vehicle of the public inquiry enables a holistic view to be taken of all of the issues which affect the statutory undertaking seeking the light railway order and the persons who are going to be affected by it, it was submitted. In my view, that proposition cannot be gainsaid. Counsel for the defendants did, however, acknowledge that a case in nuisance could arise against the statutory undertaker, and would arise in relation to the Green Line, if the operation of the Green Line exceeded the noise parameters in the EIS, which the first defendant has undertaken to comply with.

16. Evidence to disprove negligence on the part of the defendants

16.1 The defendants adduced evidence to meet the evidential burden that they were operating the Green Line "without negligence".

16.2 The witnesses called on behalf of the defendants, principally Mr. Sheedy, testified in relation to the general implementation of the Line B Order in the construction and operation of the Green Line and, in particular, the measures which have been adapted to minimise the level of noise generated. As a general proposition, I am satisfied that the defendants have fulfilled the promises in the EIS in relation to anti-wear and anti-squeak measures and requiring that the trams incorporate noise control measures.

16.3 Insofar as negligence on the part of the defendants is an issue, I consider that on the plaintiffs' case it must be limited to whether the failure to provide acoustic screens to mitigate the level of noise from passing trams to which the plaintiffs are subjected at No. 3 is a failure to act with reasonable regard for the plaintiffs' interests.

17. Collateral challenge to Line B Order

17.1 At this juncture, it is convenient to dispose of one of the arguments advanced on behalf of the defendants – that, in substance, in prosecuting these proceedings, the plaintiffs are advancing a collateral challenge to the validity of the Line B Order, which is unlawful, because it has not been brought by way of judicial review in accordance with s. 12 of the Act of 1996. The argument is that, in contending that the level of noise permitted by the Line B Order may be restrained by injunction or, alternatively, that the installation of noise abatement measures additional to those prescribed in the Line B Order may be directed by injunction, the plaintiffs are indirectly challenging the Minister's determination as to the permitted level of noise in operating the Green Line without provision of noise abatement measures as embodied in the Line B Order.

17.2 The sense in which the epithet "collateral" is customarily used in this context is that the challenge is made in proceedings which are not themselves designed to impeach the validity of a decision or instrument. Whether these proceedings are properly regarded as a collateral challenge to the Line B Order depends on an analysis of the case as pleaded and argued.

17.3 On one analysis, the defendants' argument is based on a misconception of the plaintiffs' case. The plaintiffs' claim is a claim in tort, which has been met by a defence of statutory authority. The reply of the plaintiffs, which expressly denies that they are seeking to question the validity of the Line B Order, is to challenge the constitutionality of the defendants' reliance on the defence of statutory authority. The plaintiffs dispute that the Line B Order has the effect contended for by the defendants, namely, that it predetermines, as a matter of law, the permitted noise levels and the requirements for noise abatement measures on the Green Line. Whether the plaintiffs or the defendants are correct on that point, turns on the proper construction of the Line B Order. It is not a question of the validity or otherwise of the Line B Order.

17.4 An alternative analysis is that, insofar as Mr. Searson's evidence criticised the methodology used in the EIS, it could be regarded as an attack on the Inspector's report and on his recommendations and, ultimately, on the Line B Order, and, as such, a collateral challenge to its validity. However, those criticisms have been already discounted on the basis of Mr. Taylor's evidence.

17.5 As a general proposition, in my view, the defendants' invocation of s. 12 does not, to use a colloquialism, cut the plaintiffs off at the pass.

18. Legal principles relied on by the parties in their submissions

18.1 The linear structure of these proceedings – a claim at common law in nuisance seeking equitable and common law remedies in

the context of the operation of a public transport system, a denial of liability and of nuisance, *inter alia*, on the basis of statutory authority, a challenge to the constitutionality of the defence of statutory authority raised, and the involvement of the Attorney General under Order 60 because of the constitutional issue raised by the plaintiffs – should render it possible for the Court to determine only the issues which require to be determined and, in particular, to exercise restraint in relation to the constitutional issue. However, having regard to the manner in which the plaintiffs have identified the issues, as outlined earlier, and the manner in which counsel for the plaintiffs and the defendants have structured their submissions, I reiterate that I consider it prudent to outline and comment on the legal principles relied on in the submissions, before setting out the issues which I consider the Court must determine and my conclusions on those issues.

18.2 In doing so, I propose to subsume the submissions under the following broad headings for the following reasons:

(a) the general characteristics of the common law tort of nuisance, because the plaintiffs' claim is founded on that tort;

(b) how the common law principles applicable to the tort of nuisance are applied having regard to the impact of planning decisions, whether zoning decisions or particular planning permissions, on the locality of, and on the activities which are alleged to create, the nuisance, because, while acknowledging that a planning permission as opposed to statutory authority cannot override private law rights, counsel for the defendants laid particular emphasis on the interplay between the tort of nuisance and planning decisions and its importance in determining what level of noise can legally be regarded as a nuisance;

(c) the defence of statutory authority in English law, because both the plaintiffs and the defendants viewed English law as the *fons et origo* of the defence and relied on English authority;

(d) the defence of statutory authority in Irish law, because, apart from the contention that nuisance at common law has not been established by the plaintiffs, the defendants' answer to the plaintiffs' claim is reliance on the authority conferred on the defendants by the Line B Order which was made pursuant to the Act of 1996;

(e) the constitutional dimension to the application of the defence of statutory authority in Irish law, as posited on by the plaintiffs; and

(f) the submissions of the Attorney General, in which I have found guidance as to the approach the Court should adopt in identifying the fundamental considerations and what requires to be determined.

19. The characteristics of the tort of nuisance

19.1 The definitive statement of what is required to establish the tort of private nuisance is to be found in the judgment of the Supreme Court in *Hanrahan v. Merck Sharpe & Dohme (Ireland) Limited* [1988] I.L.R.M. 629. In that case, in which the plaintiffs claimed damages for injury to their personal health and injury to the health of, abnormalities in, and the death of, their cattle, which it was alleged were caused by the escape of toxic gases and acid vapours from the defendant's pharmaceutical factory, and personal inconvenience and discomfort suffered by them, mainly by reference to smells, Henchy J. identified the legal basis of the claim in nuisance being advanced by the plaintiffs as follows (at p.633):-

> "To provide a basis for the award of damages for the private nuisance relied on, the plaintiffs have to show that they have been interfered with, over a substantial period of time, in the use and enjoyment of their farm, as a result of the way the defendants conducted their operations in the factory. The plaintiffs do not have to prove want of reasonable care on the part of the defendants. It is sufficient if it is shown as a matter of probability that what they complain of was suffered by them as occupiers of their farm in consequence of the way the defendants ran the factory."

19.2 On the question of the onus of proof, Henchy J. stated (at p. 634):-

> "It is common case that the probative aspect of a claim in nuisance has been correctly expressed by Gannon J. in the following passage from his judgment in *Halpin & Ors. v. Tara Mines Ltd*. (High Court, 1973, No. 1516P, 16 Feb. 1976):-
>
> > 'A party asserting that he has sustained material damage to his property by reason of an alleged nuisance must establish the fact of such damage and that it was caused by the nuisance as alleged. It is no defence to such a claim, if established, that the activities complained of were carried out with the highest standards of care, skill and supervision and equipment or that such activities are of great public importance and cannot conveniently be carried out in any other way. In so far as the nuisance alleged consists of interference with the ordinary comfort and enjoyment of the property of the plaintiff, his evidence must show sensible personal discomfort, including injurious affection of the nerves or senses of such a nature as would materially diminish the comfort and enjoyment of, or cause annoyance to, a reasonable man accustomed to living in the same locality. To my mind the reasonable man connotes a person whose notions and standards of behaviour and responsibility correspond with those generally pertaining among ordinary people in our society at the present time, who seldom allows his emotions to overbear his reason, whose habits are moderate and whose disposition is equable'.
>
> It is clear from the authorities on the law of nuisance that what an occupier of land is entitled to as against his neighbour is the comfortable and healthy enjoyment of the land to the degree that would be expected by an ordinary person whose requirements are objectively reasonable in all the particular circumstances. It is difficult to state the law more precisely than that."

19.3 Later in his judgment, having recorded that the trial Judge had found that there was undoubtedly evidence that on a number of occasions the processes carried on in the defendants' factory were responsible for offensive odours, which were legitimately and reasonably objected to by the plaintiffs and many others living in the area of the factory, but had gone on to find that the odours were not on such a scale or intensity as to justify an award of damages, Henchy J. stated that that conclusion was incorrect and was a misinterpretation of the relevant law, continuing (at p. 640) as follows:-

> "As I have pointed out earlier in this judgment, by reference to the cited passage from the judgment of Gannon J. in *Halpin & Ors. v. Tara Mines*, where the conduct relied on as constituting a nuisance is said to be an interference with the plaintiffs' comfort in the enjoyment of his property, the test is whether the interference is beyond what an objectively reasonable person should have to put up with in the circumstances of the case. The plaintiff is not entitled to insist that

> his personal nicety of taste or fastidiousness of requirements should be treated as inviolable. The case for damages in nuisance …. is made out if the interference is so pronounced and prolonged or repeated that a person of normal or average sensibilities should not be expected to put up with it. It is not necessary that the interference by objectionable smell should be so odious or damaging that it affects the plaintiffs' health. It is enough if it can be said that a reasonable person in the plaintiffs' circumstances should not be expected to tolerate the smell without requiring the defendants to make financial amends. I consider the plaintiffs have made out such a case."

19.4 In the *Hanrahan* case scientific evidence had been adduced that the results of monitoring of ambient air concentrations in the vicinity of the factory and on the plaintiffs' farm were well within the guidelines used by many authorities. Henchy J. treated the scientific evidence as only showing what "could or should have happened in the way of damage by toxic emissions". In the light of the evidence of what did happen in the way of toxic damage, he considered that the defendant's evidence could not be held to rebut the plaintiffs' case, stating that theoretical or inductive evidence cannot be allowed to displace proven fact.

19.5 The principles set out in *Hanrahan* were applied by the High Court (O'Sullivan J.) in *Molumby & Ors. v. Kearns & Ors*. (Unreported, 19th January, 1999). The plaintiffs in that case lived in a suburban residential area in south Dublin and one of their complaints was that noise and fumes associated with traffic movement on an adjoining industrial estate constituted a nuisance. There were also planning issues in the case. In his judgment, having referred to the judgment of Henchy J. in the *Hanrahan* case as capturing the essence of the tort of nuisance in Irish law, and having stated that ultimately the question of nuisance was one of impression, O'Sullivan J. went on to apply the *Hanrahan* principles to the evidence which had been adduced, stating as follows:-

> "In forming an impression on the evidence I have had regard to all of the evidence, but in particular I note that the acoustic experts were in reasonably close agreement as between themselves, and concluded that the impact of the noise in the back garden of the Molumbys' house was such as would give rise to a serious consideration of prosecution. This does not mean, I think, as submitted by counsel for the defendants, that it was a 'marginal' case. The evidence shows that an increase over background of 6 decibels, and certainly 10 decibels, is such as to give rise to an expectation of community response. It was 'marginal' only in the sense that the readings indicated that the measure of a 10 decibel excess over background had been just achieved. I do not think, however, that this is a 'marginal' case in the context of the ordinary law of nuisance. On the contrary, I consider that the recurring movements of the larger vehicles which occur in the lane adjoining the plaintiffs' residences and in particular immediately adjoining the Molumbys' residence, breaches what the plaintiffs and in particular the Molumbys as occupiers of their land are entitled to as against the occupiers of the industrial estate, to use the phraseology employed by Henchy J. in *Hanrahan*.
>
> I do not think the plaintiffs and in particular the Molumbys have been afforded 'the comfortable and healthy enjoyment' of their property on the basis set out by Henchy J. in *Hanrahan*. In reaching this conclusion, I have had regard to all the evidence and not just the evidence of the acoustic experts. I have regard to the evidence of [the planning officer]. I think the locality in which these events have occurred is one which, on the one hand, is zoned residential in the most recent development plan so that the policy of the planning authority is to protect the amenities of residences. On the other hand, the plaintiffs' houses front on to a busy national route taking traffic to the West from Dun Laoghaire Harbour. Furthermore I accept that the probability is that the industrial estate is authorised by a permission granted under the previous planning code but this is also true of the houses occupied by the plaintiffs.
>
> I treat the locality not as exclusively residential but as a residential area, so zoned, adjoining a busy road in front and with an industrial estate authorised by appropriate planning permission, in its midst."

19.6 On the basis of that finding, O'Sullivan J. granted an injunction restricting access to the industrial estate by commercial vehicles to 8.15am to 6.15pm on Monday to Friday and 9am to 1pm on Saturday. He also imposed other restrictions, for example, limiting speed and prohibiting the running of engines during loading and unloading.

20. Impact of planning decisions

20.1 While the last paragraph from the judgment of O'Sullivan J. in the *Molumby* case quoted above addresses the impact of planning decisions, zoning and planning permissions, in the determination of whether a nuisance exists, the issue is considered more directly in the most recent Irish authority on noise nuisance to which the Court has been referred: the decision of the High Court (Charleton J.) in *Lanigan & Ors. v. Barry & Ors*. [2008] IEHC 29. In that case the defendants operated a motor racing track in South Tipperary in an area which was predominantly agricultural. The plaintiffs' stud farm was within one kilometre, as the crow flies, of the motor racing track. The stud farm was about 15 metres higher than the racing track, which had no natural acoustic barrier. The plaintiffs' complaint was that their lives had been made unbearable by the noise generated by car racing and motor use of various kinds at the defendants' premises. The action was brought in tort for nuisance, but there were also planning law issues in the case. Having outlined the evidence of the plaintiffs and other lay witnesses and the evidence of the noise experts who had testified, Charleton J. stated (at para. 17):-

> "I am satisfied that the noise experienced by the plaintiffs involves a pervasive, persistent, frequent and intolerable intrusion. In reaching this conclusion, I am more influenced by the human reactions of the plaintiffs and their witnesses than by any scientific evidence. Without the scientific evidence, a compelling case has been made of a severe nuisance by noise, and I accept it as such."

20.2 Earlier, Charleton J. had noted the differences between the ambient noise and the race track noise levels that had been recorded both outside (between 14 and 24 decibels unweighted) and inside (between 11 and 12 decibels unweighted) the stud farm premises. He commented (at para. 15):-

> "A difference of 10 decibels unweighted, however, gives rise to the likelihood of complaints while differences at the level recorded, I am satisfied, are likely to be intolerable to anyone with normal sensitivities. Even within Tullamaine Castle differences of 11 and 12 decibels have been recorded at the Castle before one adds the 5 decibels weighting".

The references to "5 decibels weighting" in that passage is a reference to evidence, which Charleton J. accepted, that a 5 decibel weighting should be added on to the scientific reading where the noise is tonal in character and especially offensive.

20.3 In dealing with the law on nuisance, Charleton J. focused on the nature of the area in which the premises the subject of the complaint are located, commenting that what would be a nuisance in quiet areas of Dublin 4 would not necessarily constitute an actionable tort in the industrial heartland of West Dublin. In a passage on which counsel for the defendants relied, he considered the

relevance of planning permission in considering whether an actionable nuisance had occurred. At para. 22 he stated:-

> "In considering the issue as to the amenity of an area, regard should be had to its immediate history and its character prior to the commencement of the activity complained of. The character of a neighbourhood may, however, change. This may be due to economic depravation or to the development within the area of enterprises and structures which change its character. In that regard, the wider question as to how an area is to develop is to be determined in accordance with the Planning and Development Act, 2000. The legislation is an example of the application of democratic principle to the important question as to how the area in which a citizen lives, or carries on his or her business, may change. … Were the legal mechanism of the scrutiny of planning permission not to exist and were it not the case that notice must now be given in a direct manner through what is in effect an advertisement as to what may happen at the site of a proposed development, then persons might feel aggrieved at being taken by surprise when a factory, set of apartments or some house extensions, suddenly spring up beside them. The legal mechanism is there, however, to allow participation in decisions which may affect the environment, the value of property and the nature of such quiet and comfort as may be the settled expectation of people in any particular area. Therefore, where planning consent is given after due process for a development, including a change of use, the issue as to what is a nuisance will be determined according to the character of that neighbourhood as authorised by relevant planning permissions and as declared by the development plan."

20.4 Charleton J. went on to quote a passage from the judgment of Buckley J. in *Gillingham Borough Council v. Medway (Chatham) Dock Co. Ltd*. [1992] 3 All E.R. 923 at p. 934, as representing an apposite approach. To put the quotation in context, Buckley J., not having been referred to any case which had directly considered "the interplay between planning permission and the law of nuisance", had quoted part of the first passage from the speech of Lord Wilberforce in *Allen v. Gulf Oil Refining Limited* [1981] 1 A.C. 1001 to which I will refer later, in which the nature of the defence of statutory authority is summarised, and he continued:-

> "Doubtless one of the reasons for this approach is that Parliament is presumed to have considered the interests of those who will be affected by the undertakings or works and decided that benefits from them should outweigh any necessary adverse side effects. I believe that principle should be utilised in respect of planning permission. Parliament has set up a statutory framework and delegated the task of balancing the interests of the community against those of individuals and of holding the scales between individuals to the local planning authority. There is the right to object to any proposed grant, provision for appeals and inquiries, and ultimately the minister decides. There is the added safeguard of judicial review. If a planning authority grants permission for a particular construction or use in its area it is almost certain that some local inhabitants will be prejudiced in the quiet enjoyment of their properties. Can they defeat the scheme simply by bringing an action in nuisance? If not, why not? It has been said, no doubt correctly, that planning permission is not a licence to commit nuisance and that a planning authority has no jurisdiction to authorise nuisance. However, a planning authority can, through its development plans and decisions, alter the character of a neighbourhood. That may have the effect of rendering innocent activities which, prior to the change, would have been an actionable nuisance…"

20.5 By way of general observation, insofar as it is relevant, the *Gillingham Borough Council* case was unusual, in that the plaintiff planning authority was trying to restrain what was alleged to be a public nuisance, in circumstances where the activity complained of was permitted by a planning consent which had been granted by the plaintiff five years previously. The claim failed when judged "by reference to the present characteristics of the neighbourhood pursuant to the planning permission".

20.6 Counsel for the defendants also relied on the more recent English authority, *Watson v. Croft* [2008] 3 All E.R. 1171, as demonstrating the extent to which something authorised by a planning decision, particularly, a "strategic" planning decision, can be taken to have changed a neighbourhood to the extent that a complaint about the thing authorised cannot thereafter constitute a nuisance. In that case the claimants were seeking to limit, by injunction, the defendant's operation of a motor circuit on the basis that the noise from the motor circuit constituted a nuisance. The circuit had a complicated use and planning history. Planning permission had been granted in 1963 for use for motor and motorcycle events. Ultimately in 1998, following a public inquiry, planning permission had been granted to the defendant for continued use for those purposes on the basis of a unilateral undertaking given by the defendant under a statutory provision in the United Kingdom planning code, which has no analogue in this jurisdiction. The undertaking regulated the noise levels which were permitted at the circuit. An issue in the case was identifying the nature and character of the neighbourhood relevant for assessing the question of nuisance and, in particular, whether the effect of the planning permissions and the undertaking were such that the character of the neighbourhood must be determined by reference to activities undertaken at the circuit subsequent to the planning permissions and to the undertaking.

20.7 In dealing with that issue, at first instance, Simon J. outlined two principles, which are "reasonably well settled". The first was that a planning authority has no jurisdiction to authorise a nuisance, although it may have power to permit a change in the character of the neighbourhood (para. 41). The *Gillingham Borough Council* case was cited and the passage quoted earlier from the judgment of Buckley J. was quoted. The second principle was that the issue of whether a permissive planning permission has changed the character of the neighbourhood, so as to defeat what would otherwise constitute a claim in nuisance, is a question of fact and of degree (para. 47).

20.8 Simon J. identified different approaches by the courts to the second issue. One was exemplified by the judgment of Peter Gibson L.J. in *Wheeler v. Saunders* [1996] Ch 19 (where the Court of Appeal held that a planning permission to establish an intensive pig farm did not involve considerations of community or public interest) from which he quoted the following passage (at p. 19):

> "The Court should be slow to acquiesce in the extinction of private rights without compensation as a result of administrative decisions which cannot be appealed …"

20.9 The other approach was exemplified by the following passage from the opinion of Lord Hoffman in *Hunter v. Canary Wharf Ltd*. [1997] A.C. 655 (which, insofar as it was material to the *Watson* case, concerned interference of television reception by a building development), on which counsel for the defendants laid particular emphasis (at p. 710):

> "The power of the planning authority to grant or refuse permission, subject to such conditions as it thinks fit, provides a mechanism for control of the unrestricted right to build which can be used for the protection of people living in the vicinity of a development. In a case such as this, where the development is likely to have an impact upon many people over a large area, the planning system is, I think, a far more appropriate form of control from the point of view of both the developer and the public, than enlarging the right to bring actions for nuisance at common law. It enables the issues to be debated before an expert forum at a planning inquiry and gives the developer the advantage of certainty as to what he is entitled to build."

20.10 Counsel for the defendants underlined the last two sentences in that quotation as being of particular significance. However, Simon J. did not apply the approach adumbrated by Lord Hoffman, by showing deference to the 1998 decision of the planning authority with which he was concerned, because he considered that it was the defendant who dictated what would and would not take place, including the noise level, in the process leading to the decision (para. 56). It was observed by Simon J., immediately after the quotation from the opinion of Lord Hoffman, that it is more likely that a change of the character of a neighbourhood can be identified where there has been a "strategic" planning decision affected by considerations of public interest (para. 50). On the facts, Simon J. concluded that the decision to grant planning permission in 1998 could not be properly regarded as a strategic decision affected by considerations of public interest. Even though noise from racing had occurred for 40 years, Simon J. did not accept that the character of the neighbourhood had been changed, despite the gradual development of the circuit with an intensification of the level of noise. He held that nuisance had been established and awarded damages rather than granting an injunction.

20.11 In a passage to which counsel for the plaintiffs pointed (at para. 57), Simon J. stated:-

> "I do not accept the defendants' contention that it is 'wrong and contrary to public policy for a common law court to travel over the same ground and to come up with an inconsistent conclusion'. It seems to me that this submission comes close to a contention that the planning permission is determinative of the issue of private nuisance in a case such as this. There may be sound arguments in favour of such a contention; but it does not represent the present state of the law. What is essentially an administrative decision does not extinguish private rights without compensation".

20.12 On a recent appeal in the *Watson* case, in its decision of 5th January, 2009, the Court of Appeal ([2009] 3 All E.R. 249) upheld the finding of Simon J. of nuisance, but granted an injunction to the claimants. The Chancellor re-stated the basic principles (at para. 32) as follows:

> "First, it is well established that the grant of planning permission as such does not affect the private law rights of third parties. … Second, the implementation of that planning permission may so alter the nature and character of the locality as to shift the standard of reasonable user which governs the question of nuisance or not."

20.13 The emphasis in the Chancellor's judgment, in outlining the second principle, was on the implementation of the planning permission. The Chancellor rejected the proposition that planning permission, without implementation, is capable of affecting private rights "unless such effect is specifically authorised by Parliament".

20.14 The statutory process (now governed by the Act of 2001), which formerly culminated in the making by the Minister of a light railway order under the Act of 1996, as regards what might be loosely called its planning and development aspects, may properly be regarded as a process resulting in a strategic planning decision, as counsel for the defendants submitted. But there is more to the statutory process on foot of which the defendants are operating the Green Line than that. It is a statutory process which authorises a public project for the creation of transport infrastructure and for the operation of a public transport system. For that reason, I consider the authorities on the impact of planning decisions in the context of the law of nuisance to be of little relevance in determining whether the operation of the Green Line at the rear of No. 3 gives rise to an actionable nuisance at common law, notwithstanding that the principle to be derived from the *Gillingham Borough Council* case was seen by Buckley J. as an offshoot of the doctrine of statutory authority.

21. The defence of statutory authority in English law.

21.1 The authority in the United Kingdom on the defence of statutory authority most frequently cited in the courts in this jurisdiction, and relied on by the defendants in this case, is the decision of the House of Lords in *Allen v. Gulf Oil Refining Limited*. It concerned one of a number of actions taken by local residents against the defendant which, on the authority of an Act of Parliament, had constructed an oil refinery and subsidiary works and was operating the refinery in their locality. The actions were based on allegations of nuisance from noxious odours, vibrations and offensive noise levels. The defence on which the defendant was relying was statutory authority. For the reasons set out later, I consider this decision of little, if any, persuasive value in identifying the relevant principles applicable in this jurisdiction. Indeed it is to be noted that in Wade on *Administrative Law* (9th Ed., 2004) at p. 753, there is implicit criticism of the decision. It is pointed out that the House of Lords made no mention of "the principle of the railway cases". The editor comments that the decision "seems to have weakened, if not removed, the protection which it gave to persons injured by the operations of public authorities and bodies with statutory powers", which the author characterised as "an injustice which Parliament has felt bound to remedy" (by the Land Compensation Act 1973).

21.2 The statement of principle from the speech of Lord Wilberforce, which was, in part, quoted by Buckley J. in the *Gillingham Borough Council* case, is to be found at p. 1011 and is in the following terms:-

> "We are here in the well charted field of statutory authority. It is now well settled that where Parliament by express direction or by necessary implication has authorised the construction and use of an undertaking or works, that carries with it an authority to do what is authorised with immunity from any action based on nuisance. The right of action is taken away: …. To this end there is made the qualification, or condition, that the statutory powers are exercised without 'negligence' – that word here being used in the special sense so as to require the undertaker, as a condition of obtaining immunity from action, to carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons: … It is within the same principle that immunity from action is withheld where the terms of the statute are permissive only, in which case the powers conferred must be exercised in strict conformity with private rights …"

21.3 Aside from the constitutional considerations which are of paramount importance in this jurisdiction, the application of the foregoing principle by the House of Lords in the *Allen* case, in my view, is of little relevance or practical assistance in resolving the issues in this case for a number of reasons. First, the matter came before the House of Lords as a preliminary issue on a point of law, in a manner which the House of Lords itself considered to be unsatisfactory, in that no findings of fact had been made. Secondly, the Act in issue was a private Act of Parliament. Thirdly, there was no public inquiry process. Fourthly, there was an issue of construction of the Act and, in particular, whether, in the absence of an express authorisation in the Act, it authorised by implication the defendant to use or operate an oil refinery. Lord Wilberforce found that it did. On that basis, he considered how the action should proceed in the following passage (at p. 1013), which I quote because of the significance attached to it at the hearing by counsel for the plaintiffs:

> "The respondent alleges a nuisance, by smell, noise, vibration etc. The facts regarding these matters are for her to prove. It is then for the appellants to show, if they can, that it was impossible to construct and operate a refinery upon the site,

> conforming with Parliament's intention, without creating the nuisance alleged, or at least a nuisance. Involved in this issue would be the point discussed by Cumming-Bruce L.J. in the Court of Appeal, that the establishment of an oil refinery, etc., was bound to involve some alteration of the environment and so of the standard of amenity and comfort which neighbouring occupiers might expect. To the extent that the environment has been changed from that of a peaceful unpolluted countryside to an industrial complex (as to which different standards apply …) Parliament must be taken to have authorised it. So far, I venture to think, the matter is not open to doubt. But in my opinion the statutory authority extends beyond merely authorising a change in the environment and an alteration of standard. It confers immunity against proceedings for any nuisance which can be shown (the burden of so showing being upon the appellants) to be the inevitable result of erecting a refinery upon the site … however carefully and with however great a regard for the interest of adjoining occupiers it is sited, constructed and operated. To the extent and only to the extent that the actual nuisance (if any) caused by the actual refinery and its operation exceeds that for which immunity is conferred, the plaintiff has a remedy".

21.4 Counsel for the plaintiffs emphasised the references in that quotation to the impossibility of constructing and operating a refinery on the site conforming with Parliament's intention without creating a nuisance, and to immunity against action in nuisance only arising where the nuisance alleged is the inevitable result of erecting the refinery on the site. It was submitted that the creation of the noise nuisance contended for at No. 3 is not the inevitable result of the operation of the Green Line, because it is open to the defendants to reduce the level of noise which the plaintiffs have to endure from passing trams by the simple expedient of the erection of an acoustic barrier. Even assuming that the plaintiffs, on the basis of the application of common law principles, are exposed to an actionable noise nuisance, in my view, that submission is not a correct application of the principle stated by Lord Wilberforce to the plaintiffs' circumstances. It does not address the real question which would have to be addressed if one was to apply the *Allen* principles – whether the operation of the Green Line in accordance with the Line B Order, which was made in pursuance of the Act of 1996, and is being operated pursuant to the Act of 2001, inevitably results in the plaintiffs being subjected to the level of noise created by the passing trams. The answer turns on the proper construction of the Line B Order. In broad terms, the answer is that it does, unless the level of the noise which is being generated by the passage of trams at the rear of No. 3 is such that it exceeds the threshold above which the defendants are obliged by the terms of the Line B Order to provide acoustic screens or otherwise mitigate the noise.

21.5 Counsel for the plaintiffs also focused on the following passage from the speech of Lord Edmund-Davies (at p. 1015), in which, having highlighted the difficulty of having to deal with the matter at an interlocutory stage, he stated:-

> "As yet there has been no trial to determine whether the working of the refinery, which began operation in 1967, does constitute any nuisance (inevitable or avoidable), or whether Gulf has been guilty of negligence. Those issues are in themselves capable of having considerable legal and factual complexity. The burden will be on the plaintiff to prove nuisance or negligence, arising from the construction or operation of the refinery. On the other hand, it would be for the defendant to establish that any proved nuisance was wholly unavoidable, and this quite regardless of the expense which might necessarily be involved in its avoidance, whereas he will clear himself of negligence if at the end of the day it emerges that any discomfort suffered by the plaintiff arose despite his exercise of *reasonable care*."

21.6 What counsel for the plaintiffs invited the Court to extrapolate from that passage was that, where the defence of statutory authority is invoked, the onus is on the plaintiffs to prove nuisance and then the onus shifts to the defendants to show that the nuisance was wholly unavoidable irrespective of the expense involved in its avoidance. Counsel for the defendants submitted that such approach does not represent the law in this jurisdiction or, indeed, in the United Kingdom, referring to an oft cited passage from the speech of Viscount Dunedin in *Manchester Corporation v. Farnworth* [1930] A.C. 171. The defence of statutory authority was explained by Viscount Dunedin (at p. 183) as follows:-

> "When Parliament has authorised a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorised. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense of appreciation, which cannot be rigidly defined, of practical feasibility in view of the situation and of expense".

21.7 I think it is instructive to put that passage in context. As the headnote discloses, that case concerned an action by a farmer against the defendant, Manchester Corporation, for an injunction and damages on the ground of nuisance by the emission of poisonous fumes from the chimneys of an electrical generating station erected by the defendant in the neighbourhood of his farm. The defendant pleaded that the acts complained of were done in pursuance of the powers conferred by an Act of Parliament. The farmer had been unsuccessful at first instance. However, the Court of Appeal, by a majority, had granted the farmer an injunction and damages on the basis that the defendant had failed to prove that it had taken all reasonable precautions to prevent the nuisance. The House of Lords affirmed the decision of the Court of Appeal, on the basis that the defendant had failed to prove that it had used all reasonable diligence to prevent its operations from being a nuisance to its neighbours. So the quoted passage from the speech of Viscount Dunedin does not tell the whole story, in that the House of Lords clearly recognised that the immunity from action in nuisance conferred by statute is premised on the statutory undertaker proving that it has carried out the authorised works and conducted the authorised operations with all reasonable regard and care of the interest of others.

21.8 The form of order made by the House of Lords, at the suggestion of Viscount Dunedin, throws light on what he meant by " a certain common sense appreciation … of practical feasibility in view of situation and of expense". The unqualified injunction which had been granted by the Court of Appeal was modified so that the defendant could apply to have it discharged on establishing that it had exhausted all reasonable modes of preventing mischief to the plaintiff and submitting, presumably by way of undertaking, to adopting in the future those modes and any reasonable but more effective modes discovered in the future. While the defendant was expected to implement current best practice, it was implicit that expense was a factor to be taken into account in determining what was reasonable.

21.9 It is interesting to note that in *Wade* (*op. cit*) at p. 755, the editor states in reference to the quoted passages from Viscount Dunedin's speech, that the "criterion of inevitability" will depend in each case on the true implications of the empowering statute, which may pose difficult questions of construction.

21.10 Finally, in relation to the *Allen* case, both sides referred the Court to the following passages from the speech of Lord Roskill (at p. 1023):-

> "Where Parliament by express words or necessary implication authorises the construction or use of an undertaking, that

> authorisation is necessarily accompanied by immunity from any action based on nuisance. The underlying philosophy plainly is that the greater public interest arising from the construction and use of undertakings such as railways, must take precedence over the private rights of owners and occupiers of neighbouring lands not to have their common law rights infringed by what would otherwise be actionable nuisance. In short, the lesser private right must yield to the greater public interest.
>
> … But the immunity to which I have just referred is not unqualified or unlimited. The statutory undertaker must in return for the rights and privileges which he has thus obtained exercise his powers without negligence, a word which has been interpreted as meaning reasonable regard for the interests of others".

21.11 Lord Roskill found those principles, which do not differ materially from the principles enunciated by Lord Wilberforce earlier, in decisions of the House of Lords over the preceding 150 years dealing with the construction of Acts similar to the Act of 1965 under consideration in the *Allen* case.

21.12 Although, as I have indicated, counsel for the plaintiffs resorted to aspects of the *Allen* case to distinguish or support the plaintiffs' position, the nub of the plaintiffs' response to the defendants' reliance on the defence of statutory authority was that an analysis of the decisions from which the defence of statutory authority originated indicates an approach to construction which cannot be adopted in this jurisdiction. Counsel for the plaintiffs submitted that in those cases, which were mainly concerned with the operation of railways, the courts, in England, in interpreting the Acts conferring powers to operate the railways, had construed them as giving an implied power to create a nuisance. That was certainly the case where the empowering Act expressly authorised the running of trains on a railway authorised to be operated on a particular line, but it was not so if the empowering Act merely authorised the construction of the railway, without expressly providing for the use of trains, hence the implicit criticism in Wade of the decision of the House of Lords in the *Allen* case for failure to have regard to this aspect of the "railway cases" from the nineteenth century. As the recent edition of the English text on the law of torts relied on by counsel for the plaintiffs – *Clerk and Lindsell on Torts* (19th Ed., 2006) – indicates at paras. 20-68 to 20-77, the source of statutory authority as a defence to actions in tort as currently applied in the United Kingdom is the decision of the House of Lords in the *Allen* case and the defence applies whether the statute in issue makes provision for the injured party being compensated or not.

21.13 In any event, whatever approach is adopted by the Courts in the United Kingdom, as counsel for the plaintiffs submitted, the traditional methodology of construction of Acts of Parliament is subordinated in this jurisdiction to the requirements of the Constitution.

22. The defence of statutory authority in Irish law

22.1 Legislative authority as a defence to an action in nuisance is explained as follows in McMahon & Binchy on *Law of Torts* (3rd Ed., Butterworths) (at para. 24.93) as follows:

> "Legislation may in express terms authorise the commission of what would be a nuisance at common law or it may by necessary implication do so. Conversely, legislation may specifically preserve the right of action in nuisance, despite legislative authority for the commission of certain undertakings. In other cases, where legislation authorises conduct which may constitute a nuisance, the person or authority so acting must not behave in a negligent fashion."

22.2 McMahon and Binchy refer to s. 55 of the Air Navigation and Transport Act 1936 (as now contained in s. 47 of the Air Navigation and Transport Act 1988) as an example of express authority to commit a nuisance. That section provides that an action will not lie in trespass or nuisance by reason only of the flight of aircraft over any property, subject to compliance with certain statutory requirements. The *Allen* case is cited as authority for implied authorisation. Nineteenth century Acts authorising gasworks are given as examples of cases where the action in nuisance is preserved. Indeed, an area of dissent in *Manchester Corporation v. Farnworth* between Viscount Dunedin and the other Law Lords was whether the statute in issue there was a "special Act" within the meaning of the Electric Lighting (Clauses) Act 1899, which expressly provided that nothing in a special Act should exonerate the undertakers from any action or other proceedings for nuisance in the event of nuisance being caused or permitted by them.

22.3 The Court was referred to a number of decisions of the High Court in which the existence in this jurisdiction of the defence of statutory authority was recognised: *Kelly v. Dublin County Council* (Unreported, O'Hanlon J., 21st February, 1986), in which the speech of Lord Wilberforce in the *Allen* case was referred to; *Clifford v. Drug Treatment Centre Board* (Unreported, McCracken J., 7th November, 1997), another authority in which the dictum of Lord Wilberforce was cited, as well as Viscount Dunedin's "slightly differently" put statement of the principle in Manchester Corporation v. Farnworth, which I have already quoted; and *Superquinn v. Bray UDC* [1998] 3 I.R. 542. In all of those cases, the traditional common law formulation of the defence was applied without reference to the Constitution. However, none of those authorities was concerned with the type of legislation at issue in this case, which authorises a public authority to create the infrastructure for a major public transport facility in a particular location and to operate the transport facility in that location.

22.4 In the *Kelly* case, which contains the most incisive analysis of the defence, the complaint of nuisance arose from the use by the defendant local authority of land behind the plaintiffs' dwelling house for the purpose of storing vehicles and materials in connection with extensive road works being carried on in the vicinity. O'Hanlon J. found that the road works were being carried out by the defendant in exercise of its statutory powers under the Local Government Act 1925 and amending Acts and that the authority thereby conferred was imperative, not merely permissive, and therefore absolute. Having found that the plaintiffs had established an actionable nuisance, O'Hanlon J. went on to consider whether it could be shown that there was a defence to the claim by reliance on the defendant's statutory powers stating:

> "Work carried out in exercise of what has been referred to as an 'absolute' statutory power (such as I have held to exist in the present case) does not give rise to a claim for damages for nuisance resulting therefrom in the absence of negligence in the manner in which the statutory powers are exercised."

O'Hanlon J. went on to quote the following passage from Keane on *The Law of Local Government in the Republic of Ireland* (the Incorporated Law Society, 1982) (at p. 52):

> "Where a statute authorises the doing of a particular act by a local authority, no action will lie at the suit of any person in respect of that act even if it causes damage, provided it is done without negligence."

22.5 As a matter of construction, O'Hanlon J. held that, while the defendant had absolute powers in relation to the road maintenance and construction works referred to in the Act of 1925 and amending Acts, the same statutory authorisation of an absolute character did not extend to the provision and use of a depot for vehicles and materials. However, O'Hanlon J. acknowledged that there were

statements of law – a decision of the Court of Appeal in England and a statement in Clerk and Lindsell on *Torts* (15th Ed., 1982) – which tended to support a contrary view. O'Hanlon J. went on to consider whether the plea of "no negligence" had been established. He held that it had not been established and that the plaintiffs were entitled to succeed in their claim for damages.

22.6 Doubt has been cast on the applicability of the principle established by the decision of the House of Lords in the *Allen* case in Irish law in Hogan and Morgan on *Administrative Law in Ireland* (3rd Ed., 1998). In particular, doubt has been cast on the application of "general techniques" of statutory interpretation as established by the English Courts, in the light of the provisions of Articles 40.3 and 43. Following a summary of the effect of the decision of the House of Lords in the *Allen* case, it is stated (at p. 829):

> "It is difficult to believe that an Irish Court would reach the same conclusion were it faced with a case with similar facts. If the statute plainly extinguished neighbouring land owners' rights to sue in respect of such nuisance, an Irish court would probably rule that such provisions amounted to an unconstitutional attack on the plaintiffs' rights to sue in tort (which is a species of property right protected by Article 40.3) or to recover compensation in respect of this State interference with their property rights.
>
> Alternatively, if the statute was silent on the matter, an Irish court, applying the presumption of constitutionality, would probably rule that as there was no overt legislative intention to act in an unconstitutional fashion, it must be presumed that the legislator did not intend to deprive the plaintiffs of their right to sue in respect of the nuisance caused by the operation of the refinery. In short, cases such as [*Electricity Supply Board v. Gormley* [1985] I.R. 129] show that there may have to be a complete reappraisal of the principles of law governing the citizen's right to recover damages or compensation in respect of administrative decisions which injuriously affect his property rights. It is true that a great many statutes already confer a right of compensation, but even where no such express right has been granted the effect of Articles 40.3 and 43 of the Constitution is probably such as to oblige the Courts to imply such a right, or, at the very least judicially create the right to sue the administrative body concerned in tort".

22.7 The generality of the first paragraph in that quotation is qualified in the footnotes. The reference to a finding of an unconstitutional attack is qualified by excluding a situation where it could be said that the interference was justified by considerations pertaining to the common good. The reference to the plaintiff's rights to sue in tort is explained on the ground that otherwise the existing tort law would be "plainly inadequate", citing Henchy J. in the *Hanrahan* case.

22.8 Referring to preceding commentary in that text, at pp. 809/810, on the issue of whether it is competent for the Oireachtas to establish special rules of immunity from suit, it is suggested in McMahon and Binchy (*op. cit*) (fn. 251, p. 710) that it may be that the constitutional protection of individual personal rights under Article 40.3 in Ireland would encourage a narrow interpretation of legislative authorisation.

22.9 The plaintiffs' reply to the plea of statutory authority raised by the defendants in their defence reflects the commentary in Hogan and Morgan, both on the issue of statutory construction and entitlement to compensation. I will now consider how the plaintiffs developed the argument at the hearing.

30. Constitutional dimension as relied on by the plaintiffs

30.1 It was submitted on behalf of the plaintiffs that, unlike the position in England, in this jurisdiction nuisance is not merely a tort at common law. Protection of citizens from nuisance is part of the personal and property rights of the citizen protected by Article 40.3 and Article 43 of the Constitution. On this point, counsel for the plaintiffs relied on the following passage from the judgment of Henchy J. in the *Hanrahan* case (at p. 635):

> "The plaintiffs have also invoked the Constitution in support of their argument as to the onus of proof. They contend that the tort relied on by them in support of their claim is but a reflection of the duty imposed by the State by Article 40.3 of the Constitution in regard to their personal rights and property rights. The relevant constitutional provisions are:
>
> > '1. The State guarantees in its laws to respect, and as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
> >
> > 2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.'
>
> I agree that the tort of nuisance relied on in this case may be said to be an implementation of the State's duties under the provisions as to the personal rights and property rights of the plaintiffs as citizens. The particular duty pointed to by the plaintiffs is the duty to vindicate the personal right to bodily integrity and the property right to their land and livestock."

30.2 That passage requires to be put in context. The plaintiffs in the *Hanrahan* case had argued that, rather than the onus of proof of nuisance by the defendant being on them, the onus should shift to the defendant to disprove that it was responsible for the nuisance. The observations of Henchy J. addressed the invocation by the plaintiffs of the Constitution in support of their argument. Henchy J. went on to make the following general observations on the Court's competence in providing remedies where constitutional rights are invoked:

> "So far as I am aware, the constitutional provisions relied on have never been used in the courts to shape the form of any existing tort or to change the normal onus of proof. The implementation of those constitutional rights is primarily a matter for the State and the courts are entitled to intervene only when there has been a failure to implement or, where the implementation relied on is plainly inadequate, to effectuate the constitutional guarantee in question. … A person may of course in the absence of a common law or statutory cause of action, sue directly for breach of a constitutional right (see *Meskell v. C.I.E.* [1973] I.R. 121); but when he founds his action on an existing tort he is normally confined to the limitations of the tort. It might be different if it could be shown that the tort in question is basically ineffective to protect his constitutional right. …
>
> It is also to be noted that the guarantee to respect and defend personal rights given in Article 40.3.1 applies only 'as far as practicable' and the guarantee to vindicate property rights given in Article 40.3.2 refers only to cases of 'injustice done'. The guarantees, therefore, are not unqualified or absolute."

In the *Hanrahan* case, the plaintiffs' argument in relation to the onus of proof was rejected by the Supreme Court.

30.3 It was the recognition by Henchy J. that the tort of nuisance is part of the implementation of the State's duties under Article 40 which was the launching pad for the plaintiffs' constitutional argument, which was two-pronged.

30.4 First, it was the plaintiffs' contention that, on the assumption that their constitutionally protected rights are in issue, the Act of 1996 must be construed strictly and, in the absence of an express and unambiguously framed provision, it cannot be construed so as to empower the defendants to create and to subject and expose the plaintiffs to a noise nuisance caused by the operation of the Green Line, citing *In Re Viscount Securities* [1978] 112 ILTR 17 and *State (F.P.H. Properties S.A.) v. An Bord Pleanála* [1987] I.R. 698 and commentary from Dodd on *Statutory Interpretation in Ireland* at p. 304. Therefore, so the argument goes, the defendants cannot rely on the defence of statutory authority or, alternatively, such defence should only be given effect to in a manner which does not infringe the plaintiffs' constitutional rights, which is practicable by the erection of an acoustic noise barrier between the rail line and No. 3.

30.5 The second prong was that the consequence of giving effect to the defence of statutory authority would be that the plaintiffs would suffer continuing interference with their property rights without payment of compensation, which, it was submitted, on the authority of the decision of the Supreme Court in *ESB v. Gormley* [1985] I.R. 129, is not constitutionally permissible. What was in issue in that case was a challenge to the constitutionality of s. 53(3) of the Electricity (Supply) Act 1927, as amended, which empowered the ESB to place an electric line across land of a third party subject to giving the owner or occupier of the land, who has failed to give consent, seven days notice of the intention so to do. The Supreme Court held that such power was a power to impose a burdensome right over land, but it was a requirement of the common good. The provision was nonetheless invalid having regard to the provisions of Article 40.3 of the Constitution because it was not necessitated by the principles of social justice nor the exigencies of the common good. As Finlay C.J. pointed out (at p. 151), the existence of a right to compensation was clearly practicable, because the ESB did in fact pay compensation in accordance with the guidelines it had agreed with the Irish Farmers' Association and another provision of the Act of 1927 dealing with the power of compulsory acquisition of land and of easements and rights over land was accompanied by an express right to compensation on the part of the land-owner.

30.6 By analogy, counsel for the plaintiffs submitted, to apply the doctrine of statutory authority so as to impose a continuing burden over the plaintiffs' property without providing adequate compensation is not necessary by the principles of social justice nor the exigencies of the common good and is not constitutionally permissible.

31. The submissions of the Attorney General

31.1 As I have stated, the plaintiffs gave notice to the Attorney General under Order 60 of the constitutional issues raised in the plaintiffs' reply to para. 24 of the amended defence and, in particular, of their claim for declaratory relief to the effect that, to the extent that the defendants seek to rely on the defence of statutory authority to deny that they have liability to the plaintiffs in respect of ongoing noise nuisance, such defence or immunity is inconsistent with and did not survive the enactment of the Constitution. In summary, the constitutional issues only arise if –

> (a) the plaintiffs have established facts which, aside from whatever defence or immunity is open to the defendants by reason of the fact that the Green Line is being operated in pursuance of statutory authority, would justify a finding that the operation of the Green Line at the rear of No. 3 constitutes a nuisance at common law vis-à-vis the plaintiffs, and
>
> (b) the defendants have established that they are operating the Green Line within the parameters of the authority conferred by the Line B Order and without negligence.

As I understand the submissions made on behalf of the Attorney General, it is acknowledged that the plaintiffs are not precluded from claiming that the powers and obligations of the first defendant under the Acts of 1996 and 2001 and the Line B Order have been carried out negligently and pursuing an action in tort for negligence. That proposition is also accepted by the defendants. It is undoubtedly correct.

31.2 Throughout the submissions made on behalf of the Attorney General, there are to be found a number of themes of a very fundamental nature, which are the foundation of the submissions made by his counsel.

31.3 First, by virtue of Article 15.2 of the Constitution the sole and exclusive power of making laws for the State is vested in the Oireachtas and the subordinate legislatures which it may create or recognise.

31.4 Secondly, the Act of 1996 and the Act of 2001, being Acts of the Oireachtas, are presumed to be constitutional, unless and until the contrary is established. Counsel for the Attorney General referred to the judgment of *Walsh J. in East Donegal Co-Operative Ltd. v. Attorney General* [1970] I.R. 317.

31.5 Thirdly, the plaintiffs have not challenged the validity of any provision of the Act of 1996 or of the Act of 2001 having regard to the provisions of the Constitution, nor have they raised any issues as to the constitutionality or fairness of the hearing conducted by the Inspector prior to the making of the Line B Order, nor have they challenged the rationality or the constitutionality of the Line B Order itself. The time limit within which such a challenge to the validity of the Line B Order should have been brought was pointed to and the time limit was justified on the basis that it was necessary in the public interest in securing early delivery of public transport projects which the Act of 1996 and the orders made thereunder authorise. It was emphasised that, absent any challenge to the constitutionality of the Acts of 1996 and 2001, the plaintiffs' claim is limited to one of interpretation. That is the first prong of the plaintiffs' argument.

31.6 Fourthly, although submitting that the principle of proportionality, in the sense explained by Costello J. in *Heaney v. Ireland* [1994] 3 I.R. 593 (at p. 607), does not arise because there is no constitutional challenge to the Act of 1996, a proposition which I do not accept as being correct, it was asserted that there is no question of any lack of proportionality attaching to that Act. The Act, it was submitted, represents a balanced, rational and proportionate measure to secure in a timely and viable fashion the common good of the citizens of Dublin by providing a fair and effective mechanism for securing, within reason, an appropriate balance between the rights attaching to private property and the public good. In this context, reference was made to the fact that the Act provides for an EIS, an extensive process of notice and information, and ultimately a public inquiry into the application for the light railway order. It was submitted that the public inquiry represents a proportionate and appropriate mechanism for reconciling the potentially conflicting desires and demands of those who may consider themselves affected by the proposal. Resonating the defendants' submission, such an inquiry, it was suggested, is in many respects a more appropriate approach to achieving fairness among all interested parties than

individual legal actions for nuisance. By way of illustration, the point was made that the erection of an acoustic screen in the interest of one party may block out the view of a neighbour or reflect noise towards a neighbour.

31.7 Counsel for the Attorney General expressed a view on one aspect only of the evidence. That was that no evidence had been adduced that the operation of the Green Line has effected a permanent diminution in the market value of No. 3, a point also made by counsel for the defendants, which is the case.

31.8 The Attorney General's analysis of the plaintiffs' "constitutional arguments against immunity" are summarised as five propositions and each is responded to.

31.9 First, the plaintiffs contended that they have suffered an invasion of their constitutional rights under Articles 40.3 and 43.

31.10 The response of counsel for the Attorney General was that the property rights enshrined in the Constitution are not absolute. The State may, as occasion requires, limit by law the exercise of those rights with a view to reconciling their exercise with the exigencies of the common good. If the enjoyment of the plaintiffs of their property has been affected by the operation of the Green Line, applying the proportionality test as formulated in *Heaney v. Ireland*, such operation does not constitute an infringement of their constitutional rights, as the infringement is proportionate to the exigencies of the common good in the operation of a light rail system in the interests of the community at large, including the plaintiffs.

31.11 Secondly, the plaintiffs contended that the courts and the State have a primary obligation to prevent invasions of the citizens' rights under the Constitution.

31.12 In response, counsel for the Attorney General accepted that it is the primary duty of the courts to prevent invasions of constitutional rights. However, the means by which such rights are vindicated are not generally by action taken to enforce those rights *per se*, but by recourse to established torts. Counsel referred to the following passage from the judgment of Barron J. in *Sweeney v. Duggan* [1991] 2 I.R. 274 (at p. 285) in the context of an argument, in reliance on Article 40.3.2, that there was a direct action for breach of the citizens' right to bodily integrity:

> 'In my view there is nothing in that provision to assist them. It gives them no more than a guarantee of a just law of negligence, which in the circumstances exists'."

31.13 Thirdly, it was the plaintiffs' case that the tort of nuisance exists to protect and vindicate the plaintiffs' personal right to property and property rights under Articles 40.3 and 43.

31.14 Counsel for the Attorney General, while generally implicitly acknowledging that proposition, pointed to the non-absolute nature of the protection afforded by the constitutional guarantees invoked by the plaintiffs. The position advanced by counsel for the Attorney General was that of the tort of nuisance exists to protect personal and property rights of the citizen, and constitutes a balance between the rights of property owners inter se and between the rights of property owners and the rights of the public. In maintaining a just balance between the rights of the individual and those of the community, it had long been a feature of the common law before 1937 that what was done as a statutory obligation or under statutory authority was not actionable as nuisance, because it did not have attaching to it the necessary quality of illegality which must attend the commission of any tort. Since 1937 it is axiomatic that what has been enjoined by presumptively constitutional legislation, enacted in what is presumptively in the common good, could not, unless the legislation itself was unconstitutional, infringe the rights protected by the law of nuisance. In other words, as I understand the argument, in the absence of a successful challenge to the constitutionality of the Act of 1996, the Court must presume that actions authorised by the Acts of 1996 and 2001 and the Green Line Order, if performed without negligence, are lawful. Indeed counsel for the Attorney General submitted that the Court would be purporting to legislate if it were to give a remedy for nuisance in this case.

31.15 Fourthly, the plaintiffs asserted that it is not permissible to curtail constitutional rights by implication in a statute or statutory instrument.

31.16 Counsel for the Attorney General rejected that proposition and submitted that, given the existence of the presumption of constitutionality, legislation such as the Act of 1996 can curtail a citizen's right of action by its very existence and requirements. The decisions in the *Viscount Securities* case and the *F.P.H. Properties S.A.* case were distinguished as being concerned with the construction of ambiguous statutes. Counsel for the Attorney General acknowledged that there may be situations in which it is necessary to expressly provide for immunity from action in tort, but neither the Act of 1996 nor the Line B Order made thereunder is such a case, because of the extent to which the powers, functions and obligations of the defendants, the things to be done by them and the places in which they are to be done and the conditions to be observed in doing them are set out in detail.

31.17 Fifthly, the plaintiffs contended that the defendants are not entitled to rely on the common law immunity in these proceedings because no statutory provision for payment of compensation to the plaintiffs in respect of noise nuisance exists, either expressly or by implication, nor has compensation been paid to the plaintiffs.

31.18 Counsel for the Attorney General characterised this part of the plaintiffs' claim as unstateable, given that there has been no challenge to either the Act of 1996 or the Line B Order. If there had been such a challenge, it would have failed, it was submitted, having regard to the decision of the Supreme Court in *Dreher v. Irish Land Commissions* [1984] ILRM 94 and a decision of the Supreme Court in *ESB v. Gormley*, other than that relied on by the plaintiffs. Counsel for the Attorney General pointed to the fact that, in the latter case, the Supreme Court distinguished between the consequences of two activities of the ESB. The first was the aspect relied on by the plaintiffs – the effect of placing pylons on Mrs. Gormley's land, which permanently interfered with her capacity to use it, which was not permissible without provision for payment of compensation with a mechanism for independent statutory assessment. The other was the cutting or lopping of trees, shrubs or hedges so as to make and keep the existence of a major electricity line, the provision for which was held not to be invalid having regard to the Constitution.

31.19 It was in this context that counsel for the Attorney General pointed to the absence of evidence as to a permanent diminution in the value of No. 3, concluding that what the plaintiffs are seeking, effectively, is compensation by way of general damages. The point was made that it is difficult to see how a scheme could be put in place to deal with the type of situation which had arisen here, where the plaintiffs had not anticipated that the operation of the Green Line would adversely affect them until it went into operation. Aside from that, the position adopted on behalf of the Attorney General was that, in any event, the statutory provisions and the Green Line Order are proportionate in their balance and are in accordance with the Constitution in representing a minor infringement of the rights which attach to private property in the interests of the common good and, as such, they do not constitute an unjust attack on those rights.

31.20 The position adopted on behalf of the Attorney General on the lack of provision for compensation, in my view, highlights the largely theoretical basis on which the constitutional issues were raised and refuted. While, primarily with the objective of establishing that the Green Line is not being operated in a negligent fashion, the defendants gave the Court a broad picture of the operation of the Green Line, it is difficult to see on what basis the Court could, in the context of this case, reach a conclusion whether the implementation of the Acts of 1996 and 2001 and the operation of the Green Line would only represent a "minor infringement" of the plaintiffs' property rights.

32. Conclusions on the legal principles applicable to the issues

32.1 Because of the complexity of this case as pleaded and argued, as the foregoing outline of the background, the statutory framework, the evidence and the legal principles relied on by the parties in their submissions indicates, there is a real risk, as the saying goes, that one would "lose sight of the wood for the trees". Therefore, I think it is crucial to identify and correctly apply the legal principles which determine whether the plaintiffs are entitled to any of the reliefs they claim.

32.2 The tort of private nuisance affords the type of remedy which the plaintiffs claim in this action to a person in the position of the plaintiffs, the owner and occupier of property, who establishes that a neighbouring occupier is conducting operations on a neighbouring property in a manner that constitutes nuisance in accordance with common law principles which are well settled. The remedy may be an equitable remedy by way of injunction or a common law remedy in the form of an award of damages, or both. The test as to whether nuisance has been established is the test set out by the Supreme Court in the *Hanrahan* case.

32.3 As Henchy J. stated in the passage from his judgment in the *Hanrahan* case quoted earlier, on which the plaintiffs relied in advancing their argument based on the Constitution, the tort of nuisance may be said to be an implementation of the State's duties under the provisions as to personal rights and property rights of citizens guaranteed by the Constitution. It is one of the laws by which the State defends and vindicates the plaintiffs' personal rights to bodily integrity and their property rights in accordance with Article 40.3.

32.4 The law is not immutable. However, as was submitted on behalf of the Attorney General, the sole and exclusive power of making laws is vested in the Oireachtas under the Constitution. In making laws, the Oireachtas can change the law. What Lord Wilberforce was saying in the *Allen* case when he stated that the "right of action is taken away" was that Parliament could change the law. In this jurisdiction the Oireachtas in changing the law must do so in a manner which is consistent with the Constitution.

32.5 In the case of an Act of the Oireachtas passed after the coming into force of the Constitution, there is a presumption of constitutionality. In the *East Donegal Co-Operative* case, Walsh J. referred back to the decision of the Supreme Court in *McDonald v. Bord na gCon* [1965] I.R. 217 stating (at p. 340):

> "It was pointed out in that case that there was a presumption of constitutionality operating in favour of all such statutes and it was stated at p. 239 of the report that 'one practical effect of this presumption is that if in respect of any provision or provisions of the Act two or more constructions are reasonably open, one of which is constitutional and other or others are unconstitutional, it must be presumed that the Oireachtas intended only the constitutional construction and a Court called upon to adjudicate upon the constitutionality of the statutory provision should uphold the constitutional construction. It is only when there is no construction reasonably open which is not repugnant to the Constitution that the provision should be held to be repugnant."

Walsh J. continued at p. 341:

> "Therefore, an Act of the Oireachtas, or any provision thereof, will not be declared to be invalid where it is possible to construe it in accordance with the Constitution; and it is not only a question of preferring a constitutional construction to one which would be unconstitutional where they both may appear to be open but it also means that an interpretation favouring the validity of an Act should be given in cases of doubt. It must be added, of course, that interpretation or construction of an Act or any provision thereof in conformity with the Constitution cannot be pushed to the point where the interpretation would result in the substitution of the legislative provision by another provision with a different context, as that would be to usurp the functions of the Oireachtas. In seeking to reach an interpretation or construction in accordance with the Constitution, a statutory provision which is clear and unambiguous cannot be given an opposite meaning. At the same time, however, the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice."

32.6 In this case, there is no challenge to the validity of the Act of 1996 or of s. 4 of the Act of 2001 before the Court. Subject to what was stated earlier in relation to Mr. Searson's evidence in the context of dealing with the defendants' collateral challenge argument, there is no challenge to the public inquiry held prior to the making of the Line B Order or to the making of the Line B Order, nor could there be at this remove. Accordingly, the Court must start from the position that the relevant provisions of the Act of 1996 and s. 4 of the Act of 2001 are valid having regard to the provisions of the Constitution and that the Line B Order was validly made. The relevance of the passages from the judgment of Walsh J. quoted above for present purposes is because of the exposition therein of what has become known as the "double construction" rule, which was relied on by counsel for the plaintiffs in replying to the Attorney General's submission. The "double construction" rule has to be borne in mind when it comes to considering what the defendants are empowered to do by the Act of 1996 and by s. 4 of the Act of 2001 and by the Line B Order and applied if appropriate.

32.7 In the context of the issues which arise between the plaintiffs and the defendants in this case, the effect of the presumption of constitutionality is that what the defendants are authorised by the Line B Order to do, when done in compliance with that Order and the statutory provisions under which it was made, is done lawfully and cannot constitute a civil wrong. When the defendants pleaded in paragraph 24 of their amended defence that they had constructed and are operating the Green Line in accordance with the terms of the Line B Order and that such operation cannot as a matter of law give rise to the nuisance complained of by the plaintiffs, what they are saying is: the law allows us to operate the Green Line as we are operating it, and we are operating it lawfully. If, as a matter of fact, the defendants are correct, in that they are operating the Green Line in accordance with the terms of the Line B Order, they are not relying on a common law immunity from suit. They are saying that they are operating in accordance with a law which carries a presumption of constitutionality.

32.8 It was the plaintiffs who characterised the plea in paragraph 24 of the amended defence as a plea of a "common law immunity".

The defendants in their rejoinder addressed the "immunity" concept. While that may have been the traditional characterisation of the stance adopted by a defendant, in my view, when, in this case, the defendants are relying on the authority of an Act of the Oireachtas and an order made thereunder, that characterisation cannot be correct. It may be that, if the defendants , as a matter of fact, are operating the Green Line in accordance with the terms of the Line B Order, they may be considered as enjoying something akin to an immunity, in the sense that the law treats them differently in their operation of a public transport facility than it treats the ordinary individual in the use of his property. For example, if the operation of the Green Line, in accordance with the Line B Order, generates noise to a level which would be regarded as otherwise constituting a nuisance and they are authorised by law to do that, it could be said that they are immune from suit in nuisance when compared to, say, a provider of entertainment who constructed a Ferris wheel on the Harcourt Street line embankment, which generated noise to the same level, who would be liable in tort to the property owners and occupiers in the locality.

32.9 Having said that, in my view, the core issue on the defence pleaded by the defendants in paragraph 24 is whether the defendants are acting lawfully, as they contend. That is a matter of the construction of the Line B Order in the context of the statutory provisions and the statutory process within which it was made. There is no doubt, as the passage from Dodd referred to by the plaintiffs' counsel and the authorities cited therein illustrate, that the courts have held that enactments which interfere with constitutional rights are to be strictly construed. One example given by Dodd of what strict interpretation means – that, where there is a genuine doubt or ambiguity as to interpretation, a permitted meaning that is less restrictive of the constitutional right should be presumed to be the intended one – is an aspect of the "double construction" rule. As Dodd points out, a strict interpretation does not exclude the possibility of necessary implications, quoting Hamilton P. (as he then was) in *Byrne v. Grey* [1988] I.R. 31 at p. 38 to the following effect:

> "These powers encroach on the liberty of the citizen and the inviolability of his dwelling as guaranteed by the Constitution and the courts should construe a statute which authorises such encroachment so that it encroaches on such rights no more than the statute allows, expressly or by necessary implication…"

32.10 While both the English and Irish authorities cited by the parties illustrate that there have been cases in the past in which the application of the traditional formulation of the defence of statutory authority required the Court to determine a variety of matters depending on the context – whether the powers conferred by the statute in issue were imperative rather than permissive; where the onus of proof lay in relation to the various elements of the claim and the defence; the correct meaning and application of the concept of "without negligence"; and what constituted "inevitable consequence" – in the context of this case, in my view, such approach is unnecessary. The first defendant is a statutory body, which, by virtue of s. 4(2) of the Act of 2001 has power to operate the Green Line in accordance with the terms of the Line B Order. If, as a matter of the proper construction of the Line B Order, the defendants are entitled to operate the Green Line at the rear line of No. 3 in the manner in which they are operating it, they are operating it in accordance with law, that is to say, in accordance with an Act of the Oireachtas and the secondary legislation made under it, both of which enjoy the presumption of constitutionality and that is a complete answer to the plaintiffs' claim. Alternatively, if the defendants are not operating the Green Line at that location in accordance with the terms of the Line B Order, the ordinary principles of common law apply in the defence to the plaintiffs' claim for nuisance. In either event, in my view, no question arises of the existence of a common law doctrine of immunity or of consistency or otherwise of such a doctrine with the Constitution.

32.11 Following on from that last observation, there are no circumstances in which the plaintiffs could be entitled to the declaratory relief which they seek in their reply.

33. Conclusion as to the authority conferred by the Acts and the Line B Order

33.1 The issue as to the authority of the first defendant in this case relates to the operation of the Green Line. On the authority of s. 4(2) of the Act of 2001 the defendants have power to operate the Green Line by virtue of the Line B Order. It must be implicit in the primary and secondary legislation that the Green Line will not be operated in a negligent manner.

33.2 I have already outlined the provisions of the Line B Order which I consider are material. First, the exercise by the defendants of the powers conferred by the Line B Order is subject to compliance with the conditions set out in the 11th schedule thereto. The provisions of the 11th schedule are mandatory. As regards the general condition imposed in the 11th schedule in relation to noise, condition 28, the defendants are obligated to comply with the undertaking given during the course of the public hearing, by reference to paragraph 2.1.4 of the Inspector's Report, to operate the Green Line within the projected noise levels identified in the EIS. Further by virtue of the first paragraph of condition 28, the first defendant was under a duty, prior to the commencement of the operation of the Green Line, to agree a schedule of monitoring locations for noise emissions, together with daytime and night-time limits at each location, with the relevant local authority or, in the default of agreement, to procure a determination from the Minister. The first defendant decided not to comply with that obligation. In my view, the first defendant is in breach of condition 28.

33.3 Although it is not expressly stated in the first paragraph of condition 28, it must be implicit that, following agreement on, or determination of, the relevant locations and the daytime and night-time limits at each location, the Green Line would be operated in compliance with those limits in the future. Otherwise, the exercise envisaged in the first paragraph of condition 28 would be a meaningless exercise.

33.4 As regards the interface between the second paragraph of condition 28 and the first paragraph, in my view, the clear intention from the two paragraphs is that the thresholds created by the EIS predictions would not be exceeded in the formulation of the daytime and night-time limits. Apart from that, the daytime and night-time limits would be a matter for agreement, or determination, as the case may be, and, in my view, it is reasonable to assume that the intention of the Minister was that they could have been fixed below the EIS thresholds.

33.5 The implications of the foregoing findings are that the first defendant has not established that it has been operating the Green Line strictly in accordance with the terms of the Line B Order since it was commissioned in 2004. Therefore, it is not open to the first defendant to say that it is operating the Green Line strictly in accordance with the statutory authority conferred by the Act of 2001 and that is a complete answer to the plaintiffs' claim. Therefore, it is necessary to consider whether the defendants are correct in their contention that the plaintiffs have not established a case in nuisance at common law.

34. Nuisance established?

34.1 The kernel of the plaintiffs' case in nuisance is that the evidence as to the operation of the Green Line at the rear of No. 3 clearly demonstrates that the plaintiffs are being subjected by such operation to serious noise nuisance, including serious sleep disturbance. There is no doubt on the evidence that the plaintiffs subjectively perceive that the operation of the Green Line is interfering with the ordinary comfort and enjoyment of their home. However, as the authorities which have been considered earlier

indicate, the existence of nuisance is established by applying an objective standard. The nub of the matter is whether the evidence establishes that the plaintiffs' complaints about the level of noise being generated and their requirement that an acoustic barrier be installed to mitigate noise is objectively justified. To adopt the words of Henchy J., do their complaints and requirements measure up to what "would be expected by an ordinary person whose requirements are objectively reasonable in all the particular circumstances"?

34.2 Even though the Line B Order has not been strictly complied with in the operation of the Green Line by the defendants since 2004, because of non-compliance with condition 28, the process which led to the making of the Line B Order in accordance with the Act of 1996, and its outcome, in my view, is a wholly reliable indicator as to what the ordinary person whose requirements are objectively reasonable would expect in terms of noise control and noise mitigation in the operation of the Green Line. Every person who was likely to be affected by the operation of the Green Line had a statutory entitlement to make submissions to the Minister and to attend at the public inquiry conducted pursuant to the Act of 1996 and to make submissions, *inter alia*, on the proposals in the EIS in relation to noise and to noise mitigation. The question of noise was addressed at the public hearings and in the Inspector's report. He took cognisance of the views of the members of the public who appeared and made representations. On the basis that the projected noise levels identified in the EIS would be observed, and subject to compliance with conditions in relation to specific areas, and the general condition in relation to monitoring and fixing daytime and night-time limits, the Inspector found that the noise aspects of the project appeared to be satisfactory. There has been no challenge to that finding. Therefore, I consider that the Court is entitled to treat the Inspector's finding as the starting point of identifying the yardstick to be applied in determining the objective test. But for the fact that it has not been fully implemented, as conditioned into the Line B Order by the first defendant, it would be conclusive.

34.3 I do not consider it necessary to reiterate my observations and findings on the evidence, save to say that I have come to the conclusion that the most significant finding of fact, on the basis of Mr. Taylor's evidence and Mr. Searson's acknowledgement, is that the noise levels being generated by the operation of the Green Line at the rear of No. 3 are within the parameters of the EIS predictions. However, in the light of what I consider to be the proper construction of the Line B Order and, in particular, condition 28, it is necessary to consider what daytime and night-time limits would have been agreed to, or determined, if the first defendant had complied with condition 28 prior to the commencement of the operation of the Green Line in 2004 and to consider whether the operation of the Green Line are the rear of No. 3 would have come within those limits.

34.4 It is clear from the evidence that best practice in relation to the assessment of environmental noise has evolved since the EIS in relation to the Green Line was prepared in accordance with the Act of 1996. It is also clear that the first defendant has had the NRA guidelines standard imposed on it in the interim and more recently has adopted it, as the evidence of Ms. Lillis established.

34.5 That leads to consideration of what, as a matter of probability, daytime and night-time limits would have been agreed, or determined, in accordance with condition 28, had it been complied with. Three and a half years elapsed between the making of the Line B Order and the initial commissioning of the Green Line. While the point is academic having regard to the facts, and, for that reason, I consider it inappropriate to express a definitive view on the point, it could be argued, by analogy to the dictum of Viscount Dunedin in *Manchester Corporation v. Farnworth*, that, as a matter of law, in fixing the limits, then current best practice should, and would, have been applied. On the basis of the evidence, I think it reasonable to assume that the standard set out in the NRA guidelines, which were in gestation in the period in question, represented the then current best practice.

34.6 However, even if the daytime and night-time limits had been fixed as required by condition 28 and if the standard set in the NRA guidelines had been applied in fixing them, I am satisfied on the basis of the evidence of Mr. Taylor and of Ms. Lillis that the noise generated by the Green Line at the rear of No. 3 would not have exceeded those limits.

34.7 I have come to the conclusion on the evidence that, if daytime and night-time limits had been agreed or determined as required by condition 28 in early 2004, it is highly improbable that the limits would have been fixed by reference to either the WHO guidelines or the BS Code. On that factual basis, non-compliance with the elements of those guidelines on which Mr. Searson relied as evidencing that the passage of the trams at the rear of No. 3 constituted a nuisance, cannot be regarded as a breach of condition 28, or, as is elaborated on below, as constituting an actionable nuisance.

34.8 In summary, I hold that by operating the Green Line at the rear of No. 3 within the noise levels predicted in the EIS, which are conditioned into the Line B Order in the second paragraph of paragraph 28, and, as it happens, by operating within the more rigorous daytime and night-time levels more recently imposed on, and adopted by, the first defendant, the Green Line is being operated without infringing the comfortable and healthy enjoyment of No. 3 that would be expected by an ordinary person whose requirements are objectively reasonable in the particular circumstances which prevail. Therefore, I am satisfied that the plaintiffs have not established nuisance.

34.9 In this case, the first defendant did not comply with the first paragraph of condition 28, as it should have done. That became obvious as a result of discovery in this case. If it had complied with condition 28 and if, which I have found is probable, the daytime and night-time limits set would have accommodated the level of noise being generated at the rear of No. 3, as I have made clear, that would have been the end of the matter. The defendants would be operating the Green Line in accordance with the law and there could be no question of the perpetration of a civil wrong on the plaintiffs. Where, in pursuance of a statutory process of the type formerly provided for in the Act of 1996, and now provided for in the Act of 2001, standards are established for permitted environmental effects and impacts of the construction and operation of a major public infrastructure, such as a public transport system, those are the standards by reference to which the statutory undertaker is authorised and required to act. In such circumstances, it is not open to an occupier of property in the vicinity of the infrastructure to contend that some other standard should be applied. In this case, in my view, as a matter of law, it was not open to the plaintiffs to contend that the Green Line must be operated in accordance with the WHO guidelines or the BS Code requirements so as to avoid committing a nuisance.

34.10 Apart from that factor, which is the crucial factor, it is difficult to conclude that the WHO "inside bedrooms" guideline could be regarded as an appropriate standard in the context of making provision for a system of public transport in an urban area. While an issue arises as to whether one is comparing like with like in measuring Mr. Searson's test results against the WHO guidelines, the guideline in relation to the "inside bedrooms" threshold being based on an eight hour LAeq, some of the indoor measurements taken by Mr. Searson in the master bedroom exceeded or were just below the guideline threshold of 30 dBa, where the measurement was taken when there was no tram passing. For example, in the case of test 35 and test 38, LAeq of 31.8 dBa and 32.3 dBa respectively were recorded by Mr. Searson, in the bedroom, in each case with the window ajar, in the absence of a tram pass. That gives credence to Mr. Taylor's opinion that compliance with the WHO guidelines would render the development of a public transport system in a residential area impossible.

34.11 On the basis of the totality of the evidence, and as a matter of law, I am satisfied that the plaintiffs have not made out the case in nuisance which they set out to establish.

35. Decision and order

35.1 As the plaintiffs have not established nuisance at common law their claim must be dismissed. There will be an order to that effect.