Neutral Citation Number:[2008] IEHC 111

**THE HIGH COURT**

**2004 No. 544 J.R.**

**BETWEEN**

**VOLKMAR KLOHN**

**APPLICANT**

**AND**
**AN BORD PLEANÁLA**

**RESPONDENT**

**AND**
**SLIGO COUNTY COUNCIL AND MOLONEY AND MATTHEWS ANIMAL COLLECTION LIMITED**

**NOTICE PARTIES**

**Judgment of Mr. Justice Bryan McMahon delivered the 23rd day of April, 2008.**

**I. Introduction**

1. These are judicial review proceedings brought by the applicant for a review of the respondent's (An Bord Pleanála's) decision made on the 30th April, 2004, granting planning permission to the second named notice party ("the Developer") to erect a Fallen Animal Inspection Unit (FAIU) at Achonry, County Sligo. Planning permission for the development in question had initially been refused by the first named notice party (Sligo County Council ("the Council")).

**II. Decision of Planning Authority (Sligo County Council) and the Appeal to An Bord Pleanála**

2. The Council, as planning authority refused the Developer permission for the erection of the FAIU on the 25th November, 2003. The Council gave four reasons for its refusal, three of which were related to the inadequacy of the information furnished in the Environmental Impact Statement ("EIS") and the fourth of which was related to the additional traffic generated by the proposed project. The inadequacies in the EIS referred to related, *inter alia*, to the sampling processes, the testing procedures, the effluent collection and storage and the handling of fallen animals.

3. The appeal from this refusal by the Developer to An Bord Pleanála ("the Board") contained much information and addressed many of the issues referred to by the Council in its refusal. The applicant herein, Mr. Volkmar Klohn, argues that this additional information changed the nature of the proposed project to such an extent that the initial EIS submitted to the Council had become wholly inadequate, with the result that any subsequent Environmental Impact Assessment ("EIA") by the Board was fatally flawed. It is significant to note at this point that although the Board's Inspector advised strongly against granting permission, he accepted that the revisions in the appeal to the proposed development, though considerable, could be considered to be within the "envelope" or nature and extent of the development as originally submitted. He did, however, indicate that "these revisions have not been adequately *assessed* within the form of the EIS" (See p. 12 of the Inspector's report. Emphasis added). Many of the arguments now advanced by the applicant in support of his case, in these proceedings, are adopted from the Board Inspector's report, which arguments, I repeat, were rejected, in the end, by the Board when it decided to grant the permission.

4. The Developer and the Achonry Development Group ("the Group") appealed the Council's refusal to grant planning permission to the Board. The Group, comprised of locals who opposed the development, although supporting the Council's decision, appealed because it wanted to strengthen the conditions imposed by the Council and wished to better position itself as a party, rather than as a mere observer, in relation to its entitlement to participate fully in the process. The applicant (Mr. Klohn), a local organic farmer, although he did not appeal, had certain entitlements as the applicant and was also, at all relevant times, a member of the Group, giving him further opportunities to participate indirectly in the appeal process before the Board.

5. Leave to bring judicial review proceedings against the Board's decision was granted by de Valera J., on the 31st July, 2007, on eight of the nine grounds advanced. The Honourable Judge, however, refused leave on the ninth ground, namely, that An Bord Pleanála's decision was "unreasonable and contrary to plain reason and common sense" (i.e. the ground of "irrationality").

**III. Environmental Issues and Community Directives**

6. In recent years, environmental issues have assumed great significance in social policy in general and in planning and development regulations in particular. This policy concern has expressed itself legislatively in the many directives emanating from the EU on the matter. These, of course, are transposed into Irish law by way of statute or regulation and, to a large extent, this has been done within the existing planning and development system. The approach taken at EU level emphasises the necessity, at national level, for the ultimate decision makers to take environmental factors into account when assessing planning and development projects. The overarching objective of the measures taken in this context is this: the decision makers must be sufficiently informed of all the relevant environmental factors when finally assessing a project for approval. The directives and the national planning laws refer to this process as the Environmental Impact Assessment (EIA). The directives and, indeed, the national legislation reflecting the EU requirements, envisage, therefore, that the decision makers will only be in a position to make a proper assessment if an appropriate process is put in place prior to their adjudication.

7. The initial stage of the process obliges the developer who is seeking permission for his project to file an Environmental Impact Statement (EIS) with his application. In this, he is to identify and address what impact his project will have on the environment. This statement must address basic issues and provide fundamental information. The minimum contents for an EIS are set out in the directives and the implementing regulations. (See below).

8. Although the EIS is intended to be comprehensive, it is rarely definitive. As the first document in the investigation process, it is, at most, the point of departure in an ongoing process. It is intended to launch a process which will attract comment and submissions from other parties, including observations from those with entitlements to participate in the process.. The intention is that, as a seminal document, it sets the agenda for further discussion and deliberation which will, finally, provide a body of information which will enable the decision maker to make its assessment in full possession of the relevant environmental factors.

9. It is also worth emphasising that the EIS is a <u>document</u> submitted by the developer, the terms of which are set when it is submitted. In contrast, the EIA <u>is a process</u> which is an ongoing exercise undertaken by the decision maker. A great deal can happen, and a great deal of information can be accumulated, between the lodging of the EIS by the developer and the final decision by the planning authority or by An Bord Pleanála. Two further points should be noted. First, the content of the EIS is primarily determined by the wording of the relevant regulations (article 94 and Schedule 6, of Planning and Development Regulations 2001 (S.I. No. 600 of 2001)) ("the 2001 Regulations") whereas its <u>adequacy</u> is determined by the decision maker (article 111 of the 2001 Regulations). Failure to supply the minimum contents as mandated by the Regulations may threaten the process, for example, where clear mandatory provisions are ignored. The <u>adequacy</u> of the information supplied in the EIS, however, is primarily a matter for the decision

maker and is thus much more difficult to challenge. Second, the interval between the making of the EIS and the EIA will, inevitably, mean that the decision maker will have gathered information from many other sources by the time a decision is called for by it. Moreover, the assessment process which it is obliged to carry out, the EIA, will no doubt be greatly informed by its own expert knowledge and its expertise in this area, an input that undoubtedly will, in many cases, fill any remaining information deficit in the documents submitted to it. In these circumstances, it is not surprising that a great deal of discretion is left to the decision maker in making this call. From this, it can also been seen that a flaw or deficiency in the EIS submitted by the developer does not invariably inflict a fatal wound on the assessment process, which is carried out at a later phase in the process, with the benefit of additional submissions and observations and informed by its own expertise. The effect a flaw in the EIS will have on the subsequent assessment will, of course, depend greatly on the facts of each case.

**IV. The Legislative Context and Environmental Impact Assessment**

10. Section 34 (1) of the Planning and Development Act 2000 provides that where permission is sought for the development of land in accordance with the relevant regulations and all the requirements of the regulations are complied with, the planning authority may decide to grant permission subject to or without conditions, or to refuse it. Section 34(2) provides that the planning authority when making its decision is restricted to considering the proper planning and sustainable development of the area having regard to six items including, *inter alia*, the provisions of the development plan and the provisions of any special amenity area order etc. Section 172 of the same Act provides that where a planning application is made in respect of a development or class of development which may have a significant effect on the environment, the application shall also, in addition to the maters referred to in section 34(2), be accompanied by an EIS. Section 173 (1) provides as follows:

> "In addition to the requirements of section 34(3), where an application in respect of which an environmental impact statement was submitted to the planning authority in accordance with section 172, the planning authority, and the Board on appeal, shall have regard to the statement, any supplementary information furnished relating to the statement and any submissions or observations furnished concerning the effects on the environment of the proposed development.".

11. Part 10 of the 2001 Regulations is headed Environmental Impact Assessment and contains, *inter alia*, provisions relating to the content of the EIS. Article 94 provides as follows:

> "An EIS shall contain–
>
> (a) the information specified in paragraph 1 of Schedule 6,
>
> (b) the information specified in paragraph 2 of Schedule 6 to the extent that –
>
> (i) such information is relevant to a given stage of the consent procedure and to the specific characteristics of the development or type of development concerned and of the environmental features likely to be affected, and
>
> (ii) the person or persons preparing the EIS may reasonably be required to compile such information having regard, among other things, to current knowledge and methods of assessment, and
>
> (c) a summary in non-technical language of the information required under paragraphs (a) and (b)."

12. Schedule 6 more specifically sets out what the EIS must contain and is reproduced here in full.

**"SCHEDULE 6**

**INFORMATION TO BE CONTAINED IN AN EIS**

> 1. (a) A description of the proposed development comprising information on the site, design and size of the proposed development.
>
> (b) A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.
>
> (c) The data required to identify and assess the main effects which the proposed development is likely to have on the environment.
>
> (d) An outline of the main alternatives studied by the developer and an indication of the main reasons for his or her choice, taking into account the effects on the environment.
>
> 2. Further information, by way of explanation or amplification of the information referred to in paragraph 1, on the following matters:-
>
> (a) (i) a description of the physical characteristics of the whole proposed development and the land-use requirements during the construction and operational phases;
>
> (ii) a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used;
>
> (iii) an estimate, by type and quantity, of expected residues and emissions (including water, air and soil pollution, noise, vibration, light, heat and radiation) resulting from the operation of the proposed development;
>
> (b) a description of the aspects of the environment likely to be significantly affected by the proposed development, including in particular:
> - human beings, fauna and flora,
> - soil, water, air, climatic factors and the landscape,
> - material assets, including the architectural and archaeological heritage, and the cultural heritage,

- the inter-relationship between the above factors;

(c) a description of the likely significant effects (including direct, indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative) of the proposed development on the environment resulting from:

- the existence of the proposed development,

- the use of natural resources,

- the emission of pollutants, the creation of nuisances and the elimination of waste,

and a description of the forecasting methods used to assess the effects on the environment;

(d) an indication of any difficulties (technical deficiencies or lack of know how) encountered by the developer in compiling the required information."

13. The *adequacy* of the EIS is dealt with at article 111 of the 2001 Regulations which provides as follows:

" 111. (1) The Board shall consider whether an EIS received by it in connection with an appeal complies with article 94 ….

(2) Where the Board decides that the EIS does not comply with article 94, … it shall issue a notice under section 132 of the Act requiring the applicant to submit such further information as may be necessary to comply with the relevant article."

14. Article113 reads:

"113. Where an appeal involves an EIS, and the Board considers that any submission, observation, document, particulars or other information submitted to it in response to a request or requirement of the Board contains significant additional information on the effects on the environment of the proposed development, the Board shall publish, in at least one approved the newspaper, a notice stating that

(a) significant additional information on the effects on the environment of the proposed development has been furnished to the Board, and

(b) that the further information will be available for inspection or for purchase … and that a submission or observation on the further information may be made in writing to the Board within a specified period on payment of the appropriate fee."

**Community Directives**

15. Council Directive 85/337/EEC of 27 June, 1985 on the assessment of the effects of certain public and private projects on the environment, O.J. L175/40 5.7.1985 as amended by Council Directive 97/11/EC of 3 March, 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, O.J. L73/5 14.3.1997 provides that Member States must adopt all measures necessary to ensure that before projects likely to have a significant effect on the environment are approved, an assessment with regard to their effects is made. (Article 2). Such EIA's can be integrated into existing procedures in the Member States. (Article 2(2)).

16. Article 3 of the Directive defines what the EIA is to do and in determining the direct and indirect effects of a project, what factors are to be identified, described and assessed.

17. Article 5(3) specifies what Member States must require the developer to supply when he is applying for consent for his project.

18. Ireland has responded to its obligations under these Directives in Part X of the Planning and Development Act 2000 and the Planning and Development Regulations, 2001 (see especially article 94 and Schedule 6, reproduced above). The relevant provisions of the Act and the Regulations will be referred to later in this judgment. (It should be noted that Directive 2003/35/EEC of the European Parliament and of the Council of 26 May, 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC OJ L156/17 25.6.2003 amending Directive 85/337/EEC had not come into effect when these proceedings were commenced and for that reason is not relevant to the Court's deliberations.)

19. A couple of general comments are appropriate at this stage concerning the interrelationship of national law and EU law in this matter. First, as with any EU Directive, each member state must make its own appropriate response, in its own legal system, to ensure that the objectives and targets set out in the Directives are implemented. Each member state will have to determine what relevant adjustment is required, noting, of course, that in responding and transposing the Directive into Irish law the State must do so faithfully and properly. Because of the doctrine of supremacy, if there is a failure by Ireland in this regard, it will be in breach of its Community obligations, which must be upheld by the Irish courts. Second, any national response, legislative or other, as a result of the provisions of the Directives is to be interpreted in a purposive way to give effect to the obligations of the Directives in question. Since the Directives are the source of the legislation, the Irish measures must be interpreted to give effect to the obligations of the Community measures. Third, consideration may have to be given to provisions of the Directive (if any) which are of "direct effect", i.e. which give rights to individuals which, where the provision is clear and unambiguous, the national courts must enforce. This may give rise to consideration of whether relevant provisions of the directive have "horizontal" effect or a "vertical" effect only against the member state in question. Fourth, Irish courts must be aware also that the national provisions may be more demanding than the Directive in question in these matters.

20. There is no suggestion in this case that the State has not properly implemented the Directive's provisions relating to the EIS or the EIA. Neither has there been any strong argument on directly effective provisions, understandably so, since there has been proper transposition. This case is concerned first, with the adequacy of the EIS in view of the nature of the Developer's appeal and second, the allegation that the Board failed to carry out an EIA.

21. Because of these considerations, the appropriate approach in considering the issues before the Court in this case is to evaluate the Board's conduct first in light of the national laws and in light of the national provisions introduced in response to the relevant

Directives. In interpreting the relevant incorporating legislation and regulations, the Court must interpret these purposively having regard to the Directives.

22. If the Board has failed to meet standards under national law then its decision will be open to question. In exercising any discretion it may have, the *O'Keefe* standard ("irrationality") will normally apply. (See *infra*). As already mentioned, however, de Valera J., in granting leave, excluded any question of a challenge based on this ground in the case before this Court.

23. If the decision of the Board passes scrutiny under national law, the next question that arises in the present case is whether the Board's decision can be further reviewed from an EU law point of view. Had the State not properly transposed the Directive, a legal issue could arise relating to the State's measures in this regard. No such general challenge has been made in this case and Kelly J. in *Cosgrove v. An Bord Pleanála and Wicklow County Council* [2004] 2 I.R. 435 has held that any such frontal assault should not be made in judicial review proceedings, but rather by way of plenary summons. This procedural point does not arise in this case and I refrain from any comment on that issue for that reason. In any event, it would be difficult to find fault with the incorporation measures here, which reproduce virtually verbatim the relevant provisions of the Directive. (See, Simons, *Planning and Development Law* , 2nd Ed., (Dublin, 2007), at p. 792, para. 13.250).

**Judicial Review**
24. In approaching judicial review proceedings such as we have before us in this case, certain distinctions must be kept in mind to minimise confusion.

25. First of all, it must be clear, when a decision-making authority is established under legislation, that compliance with the parent act is a prerequisite for any decision to be lawful. Thus, if the parent act mandates that the decision-making authority shall be comprised of three persons, any attempt for less than three persons to deal with the matter will be unlawful. Such compliance is a prerequisite to any lawful action: such compliance is a condition precedent in the decision-making process. Failure to observe mandatory provisions of this nature contained in the parent or establishing legislation is fatal to the process. ("Once the statutory requirements have been satisfied I should not concern myself with the *qualitative nature* of the Environmental Impact Study …" (emphasis added) per McKechnie J. in *Kenny v. An Bord Pleanála (No.1)* [2000] 1 IR 565, at p. 578).

26. Second, when the parent legislation is inspired by EU obligations and is a provision which is intended to incorporate or transpose into Irish domestic law an EU measure, then the authority of the decision maker may be subject to a double-check for legality. In the case of a national measure implementing a directive, such as we have in this case, the authority of the decision maker must comply with the implementing legislation, but the implementing legislation itself, must comply with the directive. Failure by the implementing legislation to properly transpose the directive also exposes to challenge the decision maker's authority to lawfully act. In reviewing a decision by the decision maker in such circumstances the Court will have to ensure that the decision-making process complies with the parent legislation and with the directive. In this exercise, the Court is reviewing the legality of the process and ensuring that it complies with the establishing legislation and is not concerned with the decision itself or the discretion of the decision maker. If, for example, the Directive states that the public must get two months' notice of a proposed project and the national implementing measure reduces this to one month's notice, the Court would be obliged to strike down a decision to adopt the shorter period of notice. This again goes to jurisdiction.

27. Third, a jurisdictional challenge can always be mounted against the parent legislation on the grounds that it is unconstitutional; if, for example, the decision maker is given powers in the legislation which are contrary to constitutional rights provisions (e.g. property rights). Moreover, in such a case, in reviewing the discretion of the relevant authority a higher standard than the *O'Keefe* standard might be warranted (See *Clinton v. An Bord Pleanála* [2007] I.E.H.C. 19).

28. In all of these cases, the task of the court is simple and supervisory: it must ensure that the process conforms with the establishing legislation and with the Constitution. It is no more than an exercise to ensure such compliance.

29. Where the courts, however, are reviewing the discretion entrusted to the decision maker, different considerations apply. In such cases, the court, when defining its supervisory role, will have regard to the will of the legislator and the expertise of the decision maker. In Irish law, in the planning area at least, the courts have shown huge deference to the decision of the appropriate authority, and will normally only interfere when the decision is irrational (the *O'Keefe* standard). Though not without its critics, this is the general rule as set down in the case law. More recently, when the national legislation was inspired by an EU directive and the decision maker is exercising its discretion the question has arisen as to whether the non-demanding *O'Keefe* threshold is appropriate when an EU measure is involved. It would seem more appropriate, in these circumstances, to adopt the standard of review adopted by the EU itself in reviewing the decisions of its own officials. Two reasons can be advanced for such a position: first, the *O'Keefe* standard is too low; second, the adoption of the EU standard will go someway to ensuring uniformity throughout the Community in these matters. (see *SIAC Construction Ltd. v. Mayo County Council* [2002] 3 I.R. 148 and *Sweetman v. An Bord Pleanála* [2007] 2 I.L.R.M. 328, referred to at pp. 838 and 839 of Simons *supra*)

**V. The Appeal Process: The Appeal from the Planning Authority (the Council) to An Bord Pleanála**
30. Section 127 of the Act of 2000 sets out the appeal procedures. Subsection (1)(d) of that section states that the appeal shall state in full the grounds for appeal and subs. (3) prohibits any further submissions to add to or enhance the original appeal thereafter. This "one bite only" procedure clearly envisages some finality to the consultative process.

31. To ensure that the parties to the process have full opportunity to participate s. 129 of the Act of 2000 obliges the Board to give a copy of the appeal to each other party and also provides the opportunity for each party to make submissions and observations in respect of the other party's appeal. In the present case, since there were two appellants, the Developer and the Achonry Development Group, each was afforded an opportunity to make observations on the other's appeal. Once this is done, however, the parties can normally make no further contributions. (Section 129 (4)).

32. Submissions and observations by persons other than the parties are also allowed (Section 130) in relation to an appeal on the same basis: only one opportunity is offered and there is no entitlement to make additional submissions or to elaborate further. Time limits also apply.

33. If the Board, however, in an appeal situation, forms the opinion that it is appropriate in the interests of justice, it may call for further submissions or observations (Section 131)

34. Article 73 of the 2001 Regulations permits the Board when considering an appeal to invite the applicant for the permission to submit to the Board revised plans or other drawings modifying the proposal. (This was not done in the present case). Furthermore, where the appeal involves an EIS and the Board considers any submission, submitted to it in response to a request or requirement of

the Board, contains *significant additional information* on the effects on the environment of the proposed development, the Board shall publish an appropriate notice in at least one approved newspaper indicating that significant additional information on the effects on the environment have been furnished and that this further information will be available for inspection during office hours. (The Board in this case did not consider that any such significant additional information had been provided to it and accordingly did not publish any notice in this regard). (See article 113 of the 2001 Regulations).

**VI. Grounds for Judicial Review**

35. The grounds upon which relief is sought in these proceedings can be briefly summarised as follows:

> 1. The EIS did not comply with article 94 and Schedule 6 of the 2001 Regulations. The EIS on foot of which the permission was granted in particular did not contain,
>
> > · first, any adequate outline of the *main alternatives* studied by the developer and/or any adequate indication of the main reasons for its choice, taking into account the effects on the environment as required by article 94 and Schedule 6, paragraph 1(d) of the 2001 Regulations and
> >
> > · second, information relating to the proposed project describing *the interrelationship* between the factors listed in the first three indents in paragraph 2(b) of Schedule 6 of the 2001 Regulations.
>
> 2. As a consequence of the failure to comply with the requirements of article 94 of the 2001 regulations, An Bord Pleanála did not have jurisdiction to determine the application and its determination is *ultra vires*.
>
> 3. The respondent failed to carry out an EIA in relation to the revisions to the project or proposed development submitted in the context of the appeal. An EIA could not be carried out because of the Developer's failure to provide the information required pursuant to article 94 and Schedule 6 of the 2001 Regulations in relation to the revised project. The original EIS was inadequate and there was no new EIS in respect of the revised project.
>
> 4. The decision of the respondent was made in breach of fair procedures insofar as condition number one of the respondent's decision requires the development to be carried out in accordance with plans and particulars lodged with the application, as amended by further plans and particulars received by An Bord Pleanála on the 22nd December, 2003, the 16th February, 2004 and the 25th March, 2004. The latter two submissions, of the 16th February, 2004 and 25th March, 2004, were never forwarded to the applicant or to any of the parties involved in the appeal process so as to enable them to make submissions in relation thereto.

**VII. The Adequacy of the EIS.**

36. The adequacy of the EIS is primarily a matter for the Board in a case such as this. Article 111(1) of the 2001 Regulations specifies:

> "The Board shall consider whether an EIS received by it in connection with an appeal complies with article 94 …"

37. It is recognised in cases such as this that the Court in reviewing the Board's decision will not interfere with the *bona fide* exercise of its discretion in these matters. It is not the Court's function to second-guess the Board and substitute its own decision for that of the Board. The legislature, in its wisdom, vested the power to make such a decision in a body which has expertise and experience in these matters. Such a body is much better qualified and in a much better position to make such technical decisions in this specialised area than the Court, which has to rely on expert evidence to inform it in these cases. The courts will only interfere in such decisions where they appear so irrational that no reasonable authority or decision maker in this position would have made such a determination. (See *infra* for authorities). Although the attitude has been criticised as being over-deferential, this judicial restraint is now well-established in our jurisprudence. Whether it will have to be reassessed in future because of more recent EU Directives in this area remains to be seen. Such a reassessment does not arise in this case, however.

38. It is clear from the wording of article 111, already quoted, that the Board is entrusted with this discretion. The applicant argues that since the Board did not refer explicitly in any note or memorandum to discharging this function, the Court should conclude that the Board did not consider the adequacy of the EIS or whether it complied with article 94 of the 2001 Regulations and Schedule 6. I cannot accept that the absence of such a note should lead to the conclusion suggested. There is no obligation imposed by the Regulations or by general law on the Board to record its deliberations in this regard. Furthermore, one must assume, in such cases and in the absence of any evidence to the contrary, that statutory bodies, such as the Board in this case, exercise their powers and discharge their functions in a lawful and proper manner (See *Lancefort Ltd. v. An Bord Pleanála* [1998] I.E.H.C. 199). The applicant has produced no such evidence in this case. On the contrary, the Board, in giving its decision, under the heading "Reasons and Considerations" stated that:

> "In deciding not to accept the Inspector's recommendation to refuse permission, having regard to the Environmental Impact Statement as originally submitted and to the supplemental submissions at appeal stage, the Board considered there was sufficient information to allow for a proper Environmental Impact Assessment…" (Emphasis added).

39. Finally, article 111(2) of the 2001 Regulations states that: "Where the Board decides that the EIS does not comply with article 94 … it shall issue a notice …". Given this positive and mandatory obligation imposed on the Board when it decided that the EIS was inadequate, and in the absence of any notice being issued, it is not unreasonable to conclude that the Board had indeed considered positively the question of whether the EIS was adequate.

40. Although I have come to this conclusion in this case, it should be borne in mind that Directive 2003/35/EC had not come into force when the facts of this case arose. Because of the greater emphasis in this Directive on public participation (see especially, article 10a) in future, it might be prudent for the Board to confirm positively that it has made such a determination whenever it arises.

41. I conclude, therefore, that the Board did consider the EIS adequate, and that it complied with the provisions of article 94 and Schedule 6, and that in doing so it did not act irrationally in the sense that no reasonable authority, given the information that it had, could reasonably have come to this conclusion.

42. More specifically, however, the applicant states that the EIS in the present case did not conform with the requirements of

paragraph 1(d) of Schedule 6 insofar as it did not contain "[a]n outline of the main alternatives studied by the developer and an indication of the main reasons for his or her choice, taking into account the effects on the environment."

43. Further, with equal specificity, the applicant complains of the inadequacy of the EIS in its failure to properly address the requirement in paragraph 2(b) of Schedule 6 which requires:

> "Further information, by way of explanation or amplification of the information referred to in paragraph 1, on the following matters:-
>
> …
>
> (b) a description of the aspects of the environment likely to be significantly affected by the proposed development, including in particular:
>
> - human beings, fauna and flora
>
> - soil, water, air, climatic factors and the landscape,
>
> - material assets, including the architectural and archaeological heritage, and the cultural heritage,
>
> - *the inter-relationship between the above factors*;" (Emphasis added.)

44. The argument is that, as a consequence of the failure to comply with the requirements of article 94 of the 2001 Regulations, An Bord Pleanála did not have jurisdiction to determine the application and its determination is *ultra vires*.

45. Each of these arguments will be considered in turn.

> (a) Schedule 6, para. 1(d), specifies one of the grounds to be contained in an EIS. It is significant, at the outset, to note that para. 1(d) uses language that is not overly demanding in that regard. All that is required of the Developer is that he provide an "outline of the main alternatives studied by the developer and an indication of the main reasons for his or her choice ...". (Emphasis added). One cannot deduce from such loose and forgiving language an obligation that is very specific in its demands. This conclusion is reinforced when one compares the language in para. 1(d) with the more specific indicative phraseology used in the previous sub-paras., i.e. at 1(a), 1(b) and 1(c).

46. In my mind there can be little doubt that the EIS complies with this low threshold. At para. 1.1 of the EIS there is a heading entitled "Alternatives Examined". Paragraph 1.1.1 is entitled "Description of Alternative Locations". Another para. 1.1.2 is headed "Alternative Designs".

47. It is also worth noting that the development consent procedure does not require the Board to carry out an EIA of the possible alternatives (either as to location or design and operation of the possible development).

48. For completeness sake, I reproduce para. 1.1 headed "Description of Alternative Locations" which appears in the EIS. Certainly, it may not be comprehensive but it falls short of being inadequate.

> "*Moloney and Matthews Limited* reviewed a number of potential sites for the reports proposed facility with most deemed unsuitable. These disadvantages were principally in terms of inadequate road infrastructure and number and proximity of residences. A site which *Moloney and Matthews Limited* deemed relatively suitable was located at Cully, Curry, Co. Sligo. *Matthews and Moloney* submitted a planning application to Sligo County Council for a fallen animal inspection unit at Cully, Curry, Co. Sligo in January 2001. Following subsequent request for additional information by Sligo County Council and a significant number of objections by a statutory bodies and local residence groups, which *Moloney and Matthews Limited* addressed, planning permission was refused by Sligo County Council. It was subsequently concluded by *Matthews and Moloney* that an appeal to An Bord Pleanála would not be successful and should not be processed. [*At the hearing, it was agreed that the application was in fact withdrawn*]
>
> *Moloney and Matthews Limited* subsequently identified a new, more suitable site at Achonry, Tubbercurry, Co. Sligo. The area around the site is not densely populated with only six residences within 1km radius of the site. The site is also located in the southern half of Sligo within 6km of Mayo County boarder, which would be seen as an advantage with regard to proximity of clientele. Having assessed potential possibilities of future development within their fallen animal collection business, *Moloney and Matthews Limited* have concluded that there is scope for developing this site at Achonry."
>
> (b) The "interactions" argument, is based on the requirement (at para. 2(b) of Schedule 6) that the EIS should contain a description of the aspects of the environment likely to be significantly affected by the proposed development, including, in particular,
>
> - human beings, fauna and flora;
>
> - soil, water, air, etc.;
>
> - material assets, including architectural, archeologically and cultural heritage;
>
> - the interrelationship between the above factors. (It is worth noting that the Directive uses the word "interaction" instead of "interrelationship").

49. Significantly, the interrelationship argument advanced by the applicant can only find support in the Irish 2001 Regulations (Schedule 6, para. 2). Article 3 of the relevant Directive does not require these factors, listed therein, and their interaction, to be contained in the EIS. The Directive only requires these factors and their interaction to be identified and described in the Environmental Impact Assessment. Any failure, therefore, to place them in the EIS cannot be in breach of the Directive and is purely a national matter. In this respect the Irish Regulations are more demanding than the Directive.

50. Paragraph 4.10 of the EIS deals specifically with the interaction under the heading "Non-Technical Summary". Moreover, the various matters listed in para. 2(b) are each dealt with in a substantive way at various points in the body of the EIS and under their respective headings. For example, to give but two instances, the potential impact of odour and transport are considered substantively in relation to the relevant heading at para. 2(b) in the section of the EIS dealing with potential environmental impacts and proposed mitigation measures. Odour is dealt with under the heading "Air" at para. 4.1.1.4 and mitigating measures at para. 4.1.2.1 of the EIS. Under the heading of "Effect on Population" (at para. 4.5.1.1), its potential impact is again considered and identified as one of the potential long term effects on local properties (at para. 4.5.1.4). Although there is no formal heading entitled "interaction of these elements", they are addressed substantively at various parts of the EIS and feature in the "Non-Technical Summary". Similarly, traffic flow is identified as a factor likely to generate noise both in the construction and operation phases at para. 4.1.1.2 and is also considered as an aspect of its impact on human beings (at paras. 4.5.1.1 and 4.5.1.6) on the landscape (at para. 4.7.2.2) and on adjacent properties (at para. 4.9.2). A similar exercise in relation to other relevant factors would disclose a similar picture.

51. One cannot be overly formalistic in considering the arguments advanced by the applicant in relation to these matters. To adopt such an approach would stifle commendable progress and render the planning system unworkable. Bearing in mind that the assessment is a dynamic process which is much more important than the original EIS, which merely sets out the agenda, and that substance is more important than form, the crucial question is: whether the EIS is so deficient as to prevent a subsequent proper assessment by the decision maker or is such as to deprive the relevant parties in the process (or the public where relevant) of a real opportunity to participate. Furthermore, to accept the applicant's arguments in these matters would mean that the Court would be second guessing the Board, something I am not willing to do in this case for the reasons already stated. Finally, what the Board, itself, said in giving its decision, under the heading "Reasons and Considerations" should be noted:

> "In deciding not to accept the Inspector's recommendation to refuse permission, having regard to the Environmental Impact Statement as originally submitted and to the supplemental submissions at appeal stage, the Board considered there was sufficient information to allow for a proper Environmental Impact Assessment of the proposed development."

**VIII. Breach of Fair Procedures**

52. Condition number one attached to the Board's grant of permission reads as follows:-

> 1. "The development shall be carried out in accordance with the plans and particulars lodged with the application as amended by the further plans and particulars received by An Bord Pleanála on the 22nd day of December, 2003, the 16th day of February, 2004 and the 25th day of March, 2004, except as may otherwise be required in order to comply with the following conditions. For the avoidance of doubt this permission relates only to those works and activities specified in the Statutory Notices.
>
> **Reason**: In the interest of clarity"

53. The applicant makes the case that the Board acted unlawfully in failing to allow the appropriate persons to make comments in respect of the submissions of the Developer of the 16th February, 2004 and the 25th March, 2004. He makes the point that the Board, in this decision, admits that the original application has been "amended" by the submissions dated the 16th February, 2004 and the 25th March, 2004 and, as such, could not have been covered by the original EIS.

54. The submission of the 16th February, 2004, was the response by the Achonry Development Group to the Developer's appeal. The submission of the 25th March, 2004 was the Developer's response to the observations of Mr. Klohn. The applicant states that these ought to have been circulated to the applicant for his further comment. Specifically, the applicant alleges that the Board's action in this matter was invalid for two reasons. First, he states that article 113 of the 2001 Regulations which requires the advertisement of additional submissions in certain circumstances (with the consequent opportunity to make submissions or observations thereon) was not observed. Second, he argues that as a matter of fair procedures both he and the Achonry Development Group ought to have been furnished with these submissions and given the opportunity to make further representations. Both of these arguments will be discussed in turn.

**Article 113**

55. Article 113 of the 2001 Regulations provides as follows:-

> "Where an appeal involves an EIS, and the Board considers that any submission, observation, document, particulars or other information submitted to it in response to a request or requirement of the Board contains significant additional information on the effects on the environment of the proposed development, the Board shall publish, in at least one approved newspaper, a notice stating that
>
> > (a) significant additional information on the effects on the environment of the proposed development has been furnished to the Board, and
> >
> > (b) that the further information will be available for inspection … and that a submission or observation on the further information may be made in writing to the Board …."

56. Close reading of the section indicates that it only applies in the first instance to submissions etc. made to the Board "in response to a request or requirement of the Board …". Neither the submissions received on the 16th February, 2004, nor on the 25th March, 2004, were requested by the Board and, accordingly, article 113 does not apply. More generally, however, the Board's obligation to publish under article 113 only arises when "the Board considers" that such submissions etc. contain "significant additional information". Whether the submissions of the 16th February and the 25th March contained such significant additional information is a matter for the Board to determine and article 113 clearly confers a discretion on the Board in that respect. Two administrators of the Board, when they considered the submissions of the 16th February, 2004 and the 25th March, 2004, concluded that they contained no significant additional information and the Board, obviously, when it made its decision, adopted that view. It is well established law now, in this jurisdiction, that the courts will not second-guess the Board in the exercise of this discretion. The Board's discretion can only be attacked on the grounds of irrationality propounded by Henchy J. in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] 1 I.R. 642,which approach was applied with particular force to planning decisions in *O'Keefe v. An Bord Pleanála* [1993] 1 I.R. 39. This position has been well established and it is sufficient to refer to one case to illustrate the strength of the principle as it is applied now in our Superior Courts.

57. In *Kinsella v. Dundalk Town Council* [2004] I.E.H.C. 373 the application of a similar, though not identical, provision in the 2001 Regulations was considered when the applicants sought to have the respondent's (the Town Council's) decision to grant planning

permission quashed. The application for permission was accompanied by an EIS. Further information was sought by the respondent Council from the applicant and, on receipt of same, the respondent decided that it did not contain significant and additional data under article 35 of the 2001 Regulations and that, therefore, there was no need to publish a notice or invite submissions or observations. Kelly J. observed that a consideration of articles 33 and 35 made it clear that the mere fact that additional information was requested under article 33 did not mean that information had to be advertised and circulated. The following quote expresses the law in forceful language and I adopt it as an accurate statement of the law.

> "A consideration of articles 33 and 35 makes it clear that the mere fact that additional information is requested under article 33 does not mean that such information must be advertised and circulated to other parties under article 35. It is only when such information contains significant additional data that the procedure of advertisement etc. prescribed in article 35 applies.
>
> The decision as to whether the information obtained on foot of an article 33 request contains significant additional data is one for the planning authority. 'Significance' is primarily a matter of planning expertise to be decided upon by the planning authority.
>
> This Court, in exercising its judicial review jurisdiction, is not a court of appeal on the merits from the exercise by a planning authority of its statutory function. I decline the invitation extended to me by counsel for the applicant to sit in the chair of Mr. Ewbanks and decide for myself whether or not the information supplied by Coverfield on foot of the article 33 request contained significant additional data. He contends that I would be in just as good a position as Mr. Ewbanks to make such a decision. The acceptance of such an invitation would be a usurpation of the power of the Town Council. I remind myself of the observations of Lord Brightman in *R. v. Chief Constable of North Wales Police ex parte Evans* [1982] 1 W.L.R. 155 at pp. 1173 to 1174 where he said:-
>
> > 'Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power… [j]udical review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made'.
>
> I quoted that statement in *Flood v. Garda Síochána Complaints Board* [1997] 3 I.R. 321 and I went on to say at p 346:-
>
> > 'Even if this Court would have reached a conclusion different from that of the respondent, it is not entitled on judicial review to substitute its view in that regard for the one formed by the entity charged by statute with forming the appropriate opinion. This limitation on the power of judicial review must be borne in mind so as to ensure that this Court does not trespass on matters in respect of which it has neither competence nor jurisdiction. I would not be justified in interfering with the decision of the respondent merely on the grounds that on the facts presented to it, I would have reached different conclusions. Once I am satisfied (as I am) that the appropriate procedures were followed and that the decision impugned is not irrational, the decision of the respondent must be upheld'.
>
> Those observations apply with equal force to this case and are supported by a recent dictum of Quirke J. in *McEvoy v. Meath County Council* [2003] I.R. 208 at 225 where he said:-
>
> > 'In dealing with applications of this kind for judicial review of decisions of administrative and other bodies, the court is not concerned with the merits of the decision. It is concerned with the manner in which the decision maker has exercised the power, i.e. the legality of the decision.
> >
> > It is no part of my function in these proceedings to make any kind of determination in relation to conflicting views expressed by expert or other witnesses of the meaning or effect of the guidelines or as to their appropriate application by means of a development plan or otherwise. I am required to discover whether the respondent, when the making and adopting the Meath plan, informed itself fully and gave reasonable consideration to the guidelines with a view to accommodating the objective and policies contained in them'.
>
> The task of assessing whether "significant additional data" is contained in a response involves the exercise of planning expertise and judgment which this Court does not have and is precisely the kind of question which falls within the competence of an expert decision maker. This Court can only interfere with such a decision within the strict limitations of its judicial review jurisdiction which I have already outlined.
>
> The net question which falls for consideration at this stage is therefore whether or not the applicant has demonstrated substantial grounds in support of its contention that the decision of the Town Council of 25th June, 2004, was irrational." (Emphasis added)
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> (See also *Kenny v. An Bord Pleanála (No.1)* [2001] 1 I.R. 565, at p. 578, McKechnie J.; *Kildare County Council v. An Bord Pleanála* [2006] I.E.H.C. 173, at para. 73)

58. Applying these principles to the present case, I am not prepared to interfere with the Board's discretion in concluding that the submissions on the 16th February, 2004 and the 25th March, 2004, did not contain "significant additional information on the effects on the environment of the proposed development". Under the *O'Keefe* principle, this decision can only be reviewed for irrationality and, given the nature of these documents, I am not prepared to come to this conclusion. In any event, this option is not open to the applicant in the present case, as de Valera J., in granting leave for judicial review, expressly refused leave to the applicant to challenge the Board's decision on the ground that the Board's decision was "unreasonable and contrary to plain reason and common sense". ([2007] I.E.H.C. 244, judgment delivered on the 31st July, 2007)

59. The second argument advanced by the applicant in this context, is that his right to fair procedures was denied and, in particular, that he was denied further opportunity to comment on the submissions made on the 16th February, 2004 and the 25th March, 2004, in breach of fair procedures and, in particular, in breach of the *audi alteram partem* rule.

60. In assessing this argument it should be remembered that, in the present case, the applicant and the Achonry Development Group, of which he was a member, participated fully and actively in the whole process from the very beginning. Both had made submissions in

response to the appeal lodged by the Developer. The Group, itself an appellant, had been supplied with all relevant submissions and observations and the applicant, as an observer and a member of the Group, was fully aware of the submissions. A brief look at the chronology of the events in the initial application and the appeal discloses how thorough the process was and, in these circumstances, it is difficult to conclude that the applicant or the Group lost any significant opportunity to be fully heard. The consultation process is not interminable: if the applicant was afforded the opportunity to further respond, would the Board then have to provide the developer with an additional right of reply? There must be an end to the consultative process at some stage and, in view of the fact that the Board considered that there was nothing new in the submissions of the 16th February or the 25th March, it was entitled to put a halt to the submission and observation phase of the process. It was entitled to move to the deliberation and the decision phase. In contentious planning applications it is, on occasion, understandable that local feelings will run high and, while it is important that objectors and others be given their say, it is inevitable that a point will come when the decision maker must bring an end to the consultation process and proceed to make his decision. In reviewing this decision in the light of fair procedures requirements one must be mindful of striking a fair balance between the competing interests. One is dealing here with principles which should be applied in a sensible and robust fashion. In entertaining an argument from an objector who says that he was short-changed in the participation, one is entitled to stand back and look at the overall picture bearing in mind, at all times, the discretion given to the decision maker. Before one would conclude that the applicant has not been given a fair hearing, one would need to conclude that justice has been seriously offended. Given the level of participation and the level of information available to the applicant in this case, I do not believe that there has been any breach of fair procedures.

61. In the Achonry Development Group submission on the appeal lodged by the Developer there is reference to a table which identifies the differences between the planning application as originally made and the alleged amendments in the appeal. These differences were identified on the 8th February, 2004, that is, over a week before the submissions of the 16th February, 2004 and more than 6 weeks before the submissions of the 25th March, 2004. In these circumstances, the applicant was given full opportunity to make submissions as to what he saw as the fundamental changes in the Developer's approach. Both the applicant and the Group with which he was associated submitted their views to the Board in a timely fashion on these matters.

62. Furthermore, neither Mr. Klohn's affidavit nor the affidavit of Mr. O'Sullivan (the expert engaged by the Group) put the documents dated the 16th February, 2004 and the 25th March, 2004, before the Court or made any attempt to identify the elements of the permitted development which are alleged to have been proposed for the first time by the Developer in February or March 2004. The documents were in fact exhibited by the respondent's (the Board's) expert for ease of the Court. Where the applicant has failed to exhibit these documents, has failed to identify what he claims are new significant matters in those documents and where the Board has discretion to determine if there is "significant additional information" to which, in the absence of irrationality, I must defer, I am not prepared to find for the plaintiff in these circumstances. (Moreover, again because of de Valera J.'s order granting leave, the irrationality argument cannot be advanced by the applicant in this regard). It is clear from an examination of the facts that the applicant both individually and as a member of the Achonry Development Group had ample opportunity to be heard. Both made submissions to Sligo County Council on the original proposal. When permission was refused, the Group appealed so that it would have all the rights of a party in the appeal process. Both the applicant and the Group made submissions on the Developer's appeal and, in the case of the Group, these were extensive submissions. The Board published the notice of the appeal and the fact that it had received an EIS. The Group made submissions, through its environmental consultants, on the EIS and while the applicant decided not to make submissions he could have done so had he wished. As a member of the Group it must also be assumed that he was fully aware of the Group's submission. Finally the Group also responded as an appellant to the observations of Mr. Klohn and those of Achonry National School Board of Management. In these circumstances it is difficult to conclude that the applicant's right to be heard was infringed.

63. The approach I have taken in this case finds support in the judgment of Murphy J. in the *State (Havarty) v. An Bord Pleanála* [1987] I.R. 485. In that case

64. Murphy J. made the following statement, at p. 493, which is of relevance to our case:

> "The essence of natural justice is that it requires the application of broad principles of commonsense and fair play to a given set of circumstances in which a person is acting judicially. What will be required must vary with circumstances of the case. At one end of the spectrum it will be sufficient to afford a party the right to make informal observations and at the other constitutional justice may dictate that a party concerned should have the right to be provided with legal aid and to cross-examine witnesses supporting the case against him. I have no doubt that on an appeal to the planning board the rights of an objector – as distinct from a developer exercising property rights – the requirements of natural justice fall within the former rather than the latter range of the spectrum. This flows from the nature of the interest which is being protected, the number of possible objectors, the nature of the function exercised by the planning board and the limited criteria by which appeals are required to be judged and the practical fact that in any proceedings whether oral or otherwise there must be finality. Some party must have the last word. The substantive reality of the present case is that the prosecutrix and the Sefton Residents' Association put forward a detailed professional argument before the planning authority in the first instance and the planning board in relation to the appeal. I can appreciate their concern that they might have wished to expand upon their argument or to raise counter-arguments to those made in reply by the developers but I have no doubt that the real substance of their case was before An Bord Pleanála and duly considered by it. If there was in fact a material conflict of evidence that could not have been resolved by additional submissions or observations. Disputes of that nature could only be adequately dealt with in an oral hearing."

65. Murphy J. goes on to qualify this, at pp. 493 and 494, in the following terms:-

> "To avoid misunderstandings perhaps I should make it clear that I do not accept and I have not accepted any general proposition that An Bord Pleanála could discharge its obligation to an interested party by delivering part only of the appellant's submission to any person entitled to receive the same. I could imagine cases in which further communications from the developer extended the original submission so radically as to constitute a different or additional case and in that event natural justice might well require An Bord Pleanála to postpone its decision until it had afforded interested parties an opportunity of commenting upon the revised submission. However, as I say, in the present case it seems to me that whilst the prosecutrix and her planning adviser do feel strongly that they would wish to have had an opportunity of amplifying the arguments which they had made I believe that the requirements of natural justice have been met so that there are no grounds for granting the order sought."

66. On the facts of our case, I do not consider that there was such a radical change between what the Developer originally proposed and what was to be found in his appeal to bring it within the exception contemplated by Murphy J.

67. In this *dicta*, Murphy J. was also emphasising policy considerations which dictate the need for finality in a process such as we

have in this case. Clearly there comes a point when submissions and comments must end and this is certainly contemplated in the scheme adopted in the planning process itself (See *K.S.K. v. An Bord Pleanála* [1994] 2 I.R. 128).

68. It was not raised in argument that the standard of judicial review expressed in Irish jurisprudence is inadequate in cases where the national legislation implementing EU Directives is at issue. Do the *O'Keefe* principles apply in such cases also? Because the matter was not raised I do not have to address it here. Suffice to say that the case before the Court related to facts and decisions made prior to coming into effect of Directive 2003/35/EC which amends Directive 85/337/EEC and strengthens the right of public participation in the process (see especially article 10a). Whether the *O'Keefe* standard will have to be reviewed and/or recalibrated in future to satisfy EU requirements must wait for further consideration in an appropriate case. The issue has been adverted to in recent case law in the context of public procurement contracts in *SIAC Construction Ltd. v. Mayo County Council* [2002] 3IR 148. (See also Simons, *supra,* p. 791, in the context of the express right given under article 10a of Directive 85/337/EEC as inserted by Directive 2003/35/EC to access to a review procedure before a court of law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the Directive. See also *Sweetman v. An Bord Pleanála* [2007] 2 I.L.R.M. 328).

**IX. Conclusion**

69. From my examination of the facts of this case I am satisfied that the arguments advanced by the applicant do not warrant this Court's intervention. I am satisfied that there has been no significant breach of the relevant implementing regulations or of the obligations imposed by the Directive as argued. If there were minor defects or irregularities in the EIS they were not of such a scale as to be significant and they were not such as to prevent substantial compliance with the Directive, a proper EIA by the Board or such as to deny justice to the applicant. (See *Murphy v. Wicklow County Council* [1999] I.E.H.C. 225. See also *Commission v. Germany (Case C-431/92)* [1995] ECR I-2189, where the ECJ itself held that substantial compliance with Directive 85/337/EEC was sufficient where, although the Directive had not been transposed into domestic law, the process had been subjected to an EIA under its domestic procedures. See also Scannell, *Environmental and Land Use Law*, (Dublin, 2006), at p. 381)

70. From what I have said above, it is clear that not only did the Board meet the *O'Keefe* standard, it acted, in my view, reasonably throughout the process and was respectful at all times of the EIA it was obliged to carry out, as well as its more general obligations under the Irish 2001 Regulations and under Directive 85/337/EEC. In reviewing the legality of the Board's decision, the exercise I have carried out effectively applies the relevant principles of Community law (See *SIAC Construction Ltd. v. Mayo County Council , supra* and *Upjohn Ltd. v. The Licensing Authority established by the Medicines Act 1968 and Others (Case C-120/97)* [1999] ECR I-223).