Neutral Citation: [2015] IEHC 193

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 6 JR]

BETWEEN

MARTIN MOONEY

APPLICANT

AND

AN BORD PLEANALA

RESPONDENT

JUDGMENT of Mr. Bernard J. Barton delivered the 26th day of March 2015.

1. By Order dated the 13th of January 2014 ,the respondent was given leave to apply for judicial review in the matter of appeal reference number PL 29N242229 Development Demolition/removal of all pre-fabricated structures on the site and construction of twelve classroom primary school building at Gaelscoil Bhaile Munna, Junction of Santry Way/Coultry Road, Ballymun, Dublin 9 of the 14th of November 2013, signed and dated the 19th of November 2013 and as set forth in the statement of grounds signed by the applicant.

2. In short, the applicant seeks an order of Certiorari to quash the decision of the respondent to grant planning permission for the demolition of the existing pre-fabricated school structures and for the construction of a new permanent school building ("the school") at the junction of Santry Way/Coultry Road, Ballymun, Dublin 9.

3. The grounds upon which the applicant was given leave to apply may be summarised as follows :

(a) The report of the inspector was biased, disingenuous, and defamatory of the applicant

(b) The report deals primarily with the school aspect of the plans and very little if any attention was paid to the car park beside the applicant's home.

(c) That the inspector misquoted the applicant under the grounds of appeal and was therefore disingenuous.

(d) That the inspector's opinion that the school redevelopment should be held to effective ransom over the agreement of such a scheme was defamatory of the applicant.

(e) That the omission by the inspector of a meeting between Ballymun Regeneration Ltd (BRL) and the school dated the 19th of January 2012 whereby BRL noted that forming a large vacant lot with parking and play courts between the new school and the existing premises at 380 Coultry Road as per option (E) presented was not appropriate for the site, constituted a bias on the part of the inspector.

(f) That as the applicant was a disabled person with limited mobility with a legal right to gain access to his home without hindrance via the provided access area outside his house, the inspectors opinion that the driveway was not entirely dependant on access from a particular point in the road given the open nature of the intervening ground and that the applicant had no issue with the rebuilding of the school on the same footprint whilst also expressing the view that the applicant held a view that the masterplan did not necessarily intend the Gaelscoil to stay at its location over the longer term constituted conflicting statements and, in the view of the applicant, indicated bias.

(g) That condition 4 of the grant of permission requiring the school to adhere to the requirements of the planning authority in respect of vehicle access arrangements, footpath interface, parking facilities and standards of development contained in the roads and traffic planning division report would, in effect, require significant changes to the plans submitted and that therefore the application should have been refused.

(h) That the applicant did not get an open and fair hearing under Article 6 of the European Convention on Human Rights in that he was not afforded a right to reply to the first party response with which he had issue and that the meeting where the decision to grant permission was made was not a fair and transparent hearing.

(i) That the applicant was denied certain rights under the Aarhus Convention.

(j) That public participation was sought after the fact that the plans were approved by the Department of Education and Skills prior to the public meetings.

(k) That no consideration was given by the respondent to the applicant's personal health and well-being in allowing an open air car park to be placed along and beyond the applicant's boundary wall.

(l) That having regard to the close proximity of the car park and the entrance/exit there should have been an environmental impact statement to assess the potential damage to the applicant's health due to emissions.

(m) That there were inaccuracies in the planning application under the planning and development acts and the planning and development regulations which rendered the application invalid namely that

(i) The application states only the height of the walls and buildings, not the building as required

(ii) The application was for a two storey building when it was in fact a two and a half storey building

(iii) That there were four previous planning applications for the address given but that these could not be found on file

(iv) That the fore mentioned in the application referred to a site beside 380, Coultry Road, Ballymun, Dublin 9, the applicants home

(v) That there were in fact five applications made by the applicant for the site beside 380, Coultry Road, the missing application being the first application where planning was approved by Dublin City Council to erect two pre-fabricated classrooms on the 3rd of July 1995 and

(vi) Three different addresses were given for the same school.

4. The respondent delivered a statement of opposition dated the 13th of May 2014 which may be summarised as follows :

(a) That the report of the inspector accurately adequately and fairly reported and summarised the submissions made by the applicant to the respondent and was not biased, disingenuous or defamatory as alleged

(b) That the use of the term "ransom" by the inspector was figurative only, was not defamatory and could not constitute a ground for quashing the boards decision

(c) That there was no requirement to address development option (E), as it did not form part of the application

(d) That as the location of the proposed vehicular access and its distance from the public road was evident from the plans and particulars lodged and the report of the council's roads and traffic division dealing with both the eastern and northern boundaries of the site, the applicant's contention that the comments that the road and traffic planning division report was inconsistent with the plans submitted was incorrect in fact and in law

(e) That the question of illegal parking in front of the applicant's house, its causes, and the extent to which it was a planning matter, was assessed with due care by the board's inspector

(f) That the statements of the inspector in the report were not conflicting but rather that the inspector was merely paraphrasing the applicant's appeal submissions and that accordingly her statement accurately represented the submission made

(g) That as the developer's submission to the respondent was confined to issues already raised by the applicant, the decision of the board under s.131 of the Planning and Development Act not to circulate the developer's submissions to the applicant was entirely consistent with the applicant's right to a fair hearing, moreover the reasons for the decision of the board were sent to the applicant on the 21st of November 2013

(h) Since the development did not require or involve an environmental impact assessment that no significance was to be attached to the fact that plans were approved by the developer and the Department of Education and Skills which funds the development before being submitted for permission

(i) That the board considered all matters of planning relevant to the issues raised by the applicant in coming to its decision

(j) That there was no evidence before the board relating to the impact on health of car parking in relation to the applicant's property which the board failed to consider

(k) Any challenge to the validity of the planning application on the grounds that it was inaccurate and invalid was out of time. As a ground for judicial review, that was a matter for the planning authority which validated the planning application, and should have been raised against it within eight weeks of its decision.

(l) Without prejudice to the foregoing it was denied that the planning application failed to state the height of the building, that the application misstated the number of storeys in the proposed development, that there was any material misstatement of the number of previous applications or that the applicant was in any way misled by any statement or that the address of the developer was a misstatement. In any event the applicant was not confused by the address details given as he was aware at all times that the application related to the school next door to him and

(m) Finally, insofar as the statement of grounds set out a number of contentions relating to the planning merits of the proposed school those do not constitute grounds of judicial review.

Background

5. It appears that the original and the existing pre-fabricated school on the site opened in 1997. The proposed development in respect of which permission has been granted by the respondent is to be funded by the Department of Education and Skills. The school obtained approval from the department to apply for permission to replace the existing prefabricated structures with permanent buildings on the same site in 2012. Following on from that, an application was made for permission by Application number 3504/12 dated the 22nd November 2012 and registered on the 31st of May 2013 and in respect of which a decision was made on the 24th of June 2013 Decision number P1536 whereby the planning department of Dublin City Council decided to grant permission for the development upon the conditions and reasons set out in that decision.

6. The school in question adjoins the applicant's residence being number 380, Coultry Road, Ballymun, Dublin 9. The applicant objected to the application for permission in writing and this was received on the 26th of November 2012 and has been read by the court. From the decision to grant permission on the 24th of June 2013 the applicant appealed to the respondent (hereinafter the board). The

applicant did not seek leave to judicially review the decision of the planning authority on the grounds that the decision was made upon an application which was inaccurate and invalid or otherwise. The applicant's appeal, dated the 16th of July 2013 and received by the board on the same date, together with maps and photographs contained therein and running to 26 pages in all, conveys in detail the applicant's objection to the grant of permission and his reasons therefore. This has been read and considered by the court.

7. Submissions were also made to the board by Steven Liddle and Associates, Chartered Town Planning and Development Consultants, on behalf of the school in support of the City Council's decision to grant permission. It is clear from a reading of that submission that it sought to address and respond comprehensively to the applicant's grounds of appeal and did so by following the same structure employed by the applicant for the purposes of addressing the issues which he had raised in his appeal. Also apparent from a reading of those submissions is that there were no new matters or issues raised upon which it might be said the applicant ought to have properly been afforded an opportunity to respond.

8. Submissions were also made by the council which were confined to an opinion that, as planning authority, it considered the planning report and conditions attached to the application to be justified by its decision.

Decision of the board.
9. The decision of the board sets out the reasons and considerations for the decision and the conditions upon which it was granted. The conditions attached require the development to be carried out and completed in accordance with the plans and particulars lodged with the application as amended by further plans and particulars received by the planning authority on the 31st of May 2013 except as otherwise required in order to comply with further conditions which are specified and that where any such conditions required details to be agreed with the planning authority the developer was to agree such details in writing with the planning authority prior to commencement of the development and that the development should be carried out and completed in accordance with such agreed particulars.

10. The conditions were :

> (a) The outdoor basketball courts should not be used after 17.00 hours, save in accordance with the grant of planning permission
>
> (b) That all service cables were to be run under ground within the site
>
> (c) That the requirements of the planning authority should be strictly adhered to in respect of vehicular access arrangement, footpath interface, parking facilities and standard development
>
> (d) That water supply and drainage arrangements should comply with the requirements of the planning authority for such works and services
>
> (e) That the applicant would implement the measures to be set out in the submitted mobility management plan in accordance with the requirements of the planning authority
>
> (f) That the development and building works would only be carried out between certain hours which were specified and that deviation from those times would only be allowed in exceptional circumstances where prior written approval had been received from the planning authority
>
> (g) That materials colours and textures of all external finishes would be agreed in writing with the planning authority before commencement of the construction of the school and that the developer was to submit a detailed landscaping plan and to include provision for adequate enclosure of basketball courts and details of all boundary treatments including the eastern boundary in particular, which was to be back planted with semi mature indigenous deciduous species of trees with the further requirement that in the event of any such plants or trees being damaged, removed, or dying within a period of five years from the completion of the development these were to be replaced with similar size and species of trees unless otherwise agreed with the planning authority.

11. The reasons for each of these conditions were also set out in the decision of the board as required by law.

12. In addition to the submissions, the entire planning file, including request for and supply of additional information together with a report from the inspector, a report from the engineering department, a report from the roads and traffic planning division and the water services division as well as other ancillary reports were before the board for consideration.

13. The applicant takes particular issue with the content of the report of the inspector contending that it is disingenuous, discloses bias and contains a statement defamatory of him.

14. The inspector was appointed pursuant to the provisions of s.116 of the Planning and Development Act 2000 as amended. The inspector visited the development site on the 9th and 15th of October 2013 and concluded her report with a recommendation to the board that permission be granted upon the reasons considerations and conditions specified. The report is dated the 23rd of October 2013.

15. Following an introduction in relation to the proposal, the report considers in detail the description of the site, boundary development features, parking, an overview of the proposed development, accommodation facilities, layout and design, consideration of the civil engineering report and photographs, a tree survey, archaeological impact assessment, ecological desktop studies and screening of appropriate assessments, a mobility management plan, a landscape development plan, a letter of authorisation from Ballymun Regeneration Ltd, a letter of confirmation of voluntary status from the school, minutes of preplanning application meetings, a letter of support from Ballymun Regeneration Ltd, a schedule of drawings, a flood risk assessment, a relevant planning history, the decision and conditions attached of the planning authority, internal and technical reports, the planning authority's submissions and letters of support, the Ballymun Regeneration Ltd masterplan, the Dublin City Development plan, consideration of the planning guidelines and guidance documents, the applicants grounds of appeal and concludes with the inspector's assessment and recommendations.

16. The report recommendations were considered by the board before determining the matter as is required by s.146 of the Act.

17. The summation of the applicant's grounds of appeal at para. 6.1 of the report, disclose that the inspector appropriately appreciated these highlighting with specificity the impact the development was to have on the amenity of the applicant's dwelling and

adjacent proposed entrance and car park including loss of open space, boundary treatment, siting of the school, associated traffic nuisance and hazards, alternative siting and media reports of anti social behaviour and all with reference to the applicant's submission in relation to these matters.

18. The inspector's report also summarises in some detail the submissions made on behalf of the school by Steven Liddle and Associates.

19. Amongst other matters, the inspector's report recited the issues raised in the appeal and which may be summarised as being;

(a) Principle of the development at the location and on an open site

(b) Impact on residential amenity – loss of open space – boundary issues – nuisance

(c) Traffic implications – congestion –nuisance

(d) Antisocial behaviour, height of buildings, use of basketball courts after certain hours, parking and obstruction, disturbance and distraction of visual amenity by siting of car park, lack of clarity in plans as to siting of the school extension, misstatement of masterplan objectives for the school and the applicant's view of the development and its affects on him.

20. These issues are dealt with in a detailed and discursive fashion in the inspector's assessment under a number of headings which were

(a) **Principal of development**, where the Ballymun Masterplan ,sustainable land use , the school site, the Coultry Action Area Plan, form and scale of the development as a completion of the streetscape are all considered,

(b) **Loss of open space and layout** objections, which were identified as

(i) No provision in plans

(ii) Breach of building line

(ii) Visual impact

(iii) Attraction of antisocial behaviour.

The first three of these were considered under subheadings of 'conflict with plans' and 'building line/visual impact' and the fourth under the heading of 'residential amenity'.

(c) **Residential Amenity** dealt with issues of 'antisocial behaviour' as well as 'loss of open aspect', 'layout' and 'disturbance'. Traffic implications and appropriate assessment screening were each considered individually.

(d) **Transport implications** which dealt with traffic congestion, parking, and included consideration of the Mobility Management Plan, and

(e) **Appropriate Assessment Screening** which included consideration of the conservation objectives of the National Parks and Wildlife Service as the report of the consultant ecologist advising that the redevelopment would not have any significant adverse affects on the Natura site network .

21. Accordingly, on its face the report discloses that these matters raised by the applicant were understood and considered by the inspector.

22. The applicant also takes issue with the report of the council's traffic and planning division contending that it is inconsistent with the plans submitted in that the report stated that the school was being constructed at the north western corner of the site and did not refer to the eastern side of the site which was Coultry Road. However, that report, when dealing with the question of vehicular access to the car parking area, specifically refers to the new 5.2 metre wide vehicular entrance onto Coultry Road and identifying it as being at the furthest point from the junction between Coultry Road and Santry Way. On the face of it the traffic division was aware not only of the location of the school but also the location of the road and access points for vehicular and pedestrian traffic for the school.

23. With regard to the vehicle access, which included the school's proposals for a reduction in the number of pupils being brought to school by car, the roads and transport planning division expressed a view that the number of parking spaces provided was appropriate and accepted the school drop off arrangements proposed.

Submissions

24. Both parties made written and oral submissions. A number of the grounds in respect of which the applicant had been given leave were not advanced in the course of the hearing. However, having regard to the fact that the applicant was neither legally advised nor represented , against a background of a complaint that he had not had a fair hearing by the board ,and with the assent of the board ,some latitude was afforded to him in relation to the making of his case at the hearing.

Grounds advanced in respect of which leave was given

25. The applicant complains that the inspector's report was biased, disingenuous and defamatory.

26. With regard to the contention that the report was defamatory of the applicant he cited a particular phrase contained in a sentence in part of the inspector's assessment at para. 13.4 under the heading "residential amenity" which reads "…*I do not consider that the school redevelopment should be held to effective ransom over the agreement of such a scheme*."

27. The applicant maintains that as he was the only objector this statement could only be a reference to him. He submitted that this statement discloses bias on the part of the inspector in that she considered the objection by him as being obstructive. He had not

nor was it his intention to bring defamation proceedings. He relied on the decision of this court in *Tolan v. An Bord Pleanala* [2008] IEHC 275 which was an appeal from the Circuit Court in an action for damages and a mandatory injunction directing the defendant to remove from the planning file a letter written by a third party. The court awarded damages and ordered the defendant to remove the offending letter from the file.

28. The board submitted that judicial review was concerned with the manner in which the decision was reached and was not a review of the merits of the decision. It might be said that the particular phrase was unhappily expressed but it had been taken completely out of context and when read in context could not be taken as a personal comment directed at the applicant. Even if the statement of the inspector was in some way defamatory that was a private law matter for which the remedies were in damages and injunctive relief but not judicial review. The alleged defamation did not go to the validity of the board's decision, however, it was accepted that bias is a ground for judicial review. When read in context it was submitted that the inspector was clearly dealing with the loss of open aspect/anti-social behaviour complaint and was not making a personal reference to the applicant.

29. Apart from the fact that Tolan was a defamation action and not involving judicial review the offending letter in that case originated from an outside third party and not from within the planning authority. In this case the inspector's comment was made in the context of the complaint of anti-social behaviour which, it is clear from the assessment, was being taken seriously and for consideration by the inspector. It was submitted that the inspector was doing no more than expressing a view that the issue could be addressed if necessary and if desired and that agreement to the scheme referred to in minutes of earlier meetings appended to the application should not be allowed to hold up the development.

30. The applicant did make a written submission in relation to a particular comment by the inspector which he maintained was disingenuous in relation to his response to the school's application in relation to the development as one which would provide a safe comfortable and delightful environment for students and teachers alike. However, when taken in context, a reading of the applicant's appeal and the inspector's report discloses what appears to be a reasonable and not inaccurate summation of the applicant's point of view on this matter.

31. In regard to the complaint of bias in general the applicant felt that he had not been treated fairly by the inspector in that it was his view that he had not received a fair hearing and that the inspector was motivated by malice towards the applicant. He felt that the inspector and the board had ignored his submissions and that the board had failed to give proper reasons for its decision: In particular he felt the board should have given reasons as to why it was rejecting his submissions.

32. The board submitted there was no evidence to suggest either subjective or objective bias on its part or on the part of the inspector. It was accepted by the board that objective bias would arise where a reasonable person would apprehend that the applicant would not receive a fair hearing and would, if proved ,permit intervention by the court to quash a decision and in this regard cited the judgment of Denham J. in *Bula v. Tara Mines* [2000] 4 I.R 412 at 441.

33. On the question of subjective bias, which it was submitted a non-lawyer would understand as bias, namely, that the adjudicator had come to the matter with his mind made up in advance and that the matter was prejudged or that the adjudicator was possessed of some personal interest which lead to a particular conclusion in spite of the evidence, it was accepted by the board that that too could form the basis for intervention by the court and in this regard cited the decision of Denham J. in *Dublin Well Woman Centre Limited v. Ireland* [1995] 1 I.L.R.M 408.

34. It was submitted by the board that the inspector's report, when compared with the submissions made by the parties, was a fair and accurate report of the submissions. It was accepted that in the making of a recommendation the inspector had to reach a conclusion and make a recommendation which had the effect of favouring one party or the other, however, it was submitted that reaching such a conclusion at the end of a process of consideration was not evidence of bias but rather simply the exercise of a jurisdiction conferred under statute. There was no evidence that the inspector or the board were motivated by bias of either type.

35. The applicant submitted that the inspector had failed to have any consideration for and had omitted reference to a meeting between Ballymun Regeneration Ltd and the school dated the 19th of January 2012 where Ballymun Regeneration Ltd had noted that forming a large vacant lot with parking and play courts between the new school and the existing terrace at 380 Coultry Road as per option (E) was not appropriate for the site.

36. It was submitted that this showed bias on the part of the inspector. It was submitted by the Board, however, that that option did not form part of the school's application and accordingly it was not appropriate and did not fall to be considered by the inspector.

Roads and Traffic Planning Division Report

37. Insofar as this report described the construction of the school building by a reference to compass points that was not advanced at the hearing. In so far as the report specified the vehicular entrance of the development as being approximately 10m from the kerb line of the public road, and which the applicant submitted was inconsistent with the plans to such an extent that significant changes to the plans submitted would be required, it was his evidence that the distance from the entrance to the kerb line was just over 4m whereas the report was inaccurate in that it referred to the entrance as being approximately 10m from the kerb line of the public road.

38. It was submitted by the board, however, that the conditions attached to the permission and in particular condition 4 required the school to comply with the requirements of the Planning Authority and which related to a number of matters not just the footpath and car park interface. There was no requirement to comply with any particular statement contained in the roads division report. Even if there was a misstatement as to distance in that report it was approximate only and not stated to be a requirement. Furthermore, if it became manifest that the reference to an approximate distance of ten metres was incorrect that could be dealt with on the basis of condition 1 attached to the decision. The permission did not require the development to be carried out in such a way as to have the interface ten metres from the development. It could not be said that by reason of condition 4 there was a requirement that the development was to be carried out in such a way as to have a ten metre interface between the development and the road. In support of its submission the board cited *Boland v. An Bord Pleanala* [1996] 3 I.R. 435

39. Insofar as the applicant's submission could be said to constitute a complaint that the board's decision was unreasonable and irrational the board relied on the decision in *O'Keeffe v. An Bord Pleanala* [1991] 3 I.R. It was submitted that there was no evidence that the board had acted unreasonably or irrationally in the sense outlined by the court in that decision. The board had before it evidence on foot of which it was entitled to come to the conclusion it reached on this matter and that that was entirely reasonable.

40. The board submitted that questions of planning, questions of balance between development and the environment and the proper convenience and amenities of an area are placed by statute within the jurisdiction of planning authorities and the board which are

expected to have special skill, competence and experience in planning questions. That is not a jurisdiction which is invested in the court. The board had before it relevant materials to support the making of its decision and there was no evidence to the contrary.

41. At the hearing the applicant stated that he did have parking issues and in respect of which leave had been granted but he did not want to make further submissions in that regard.

42. Detailed written submissions were made by the board in relation to this aspect of matters in which it was contended that there was nothing which would authorise unlawful parking. The roads transport planning division considered the number of parking spaces provided to be appropriate and accepted the school drop off arrangements comprised in a mobility management plan contained in appendix E of the planning application. It is clear from the report of the inspector and the decision of the board that this matter was considered and in that regard conditions were imposed which were intended to ensure implementation of that plan in accordance with the requirements of the council.

43. Whilst the applicant was given leave in relation to his complaint that he did not receive an open and fair hearing under Article 6 of the European Convention on Human Rights he did not advance this at the hearing. However, it was submitted that he could not glean from the reasons, consideration and conditions attached to the decision how it was that the Board had arrived at the decision nor whether they had considered his appeal. As far as he was concerned he had simply been ignored. He had not been invited to any pre-planning meeting. He felt he had been badly treated. There was in his view an inadequacy of detail in the reasons given for the decision. He did not advance a specific argument that he ought to have been given a right to reply to the submissions made on behalf of the school in relation to his appeal. Insofar as that might be said to have been encompassed by his general complaint that he did not receive a fair hearing and that the Board ignored his submissions the Board submitted that it has discretion to circulate a submission for further comment if it feels the circumstances of the case require it. That power is exercised in accordance with the rules of natural justice which fully reflect the provisions of Article 6 of the Convention.

44. Whilst the Board is empowered by virtue of the provisions of s.130 to invite a party to reply it was not bound to do so but has discretion and in that regard *Evans v. An Bord Pleanala* (High Court, unreported 7th November 2003) and *Wexele v. Bord Pleanala* [2010] IEHC 21were cited. The Board submitted that the school made its application to the local authority which prepared its reports and took a decision. That material was available to the applicant when he lodged his appeal. There was no new additional material before the Board arising from the appeal and which might have warranted the Board exercising its discretion to invite a reply to submissions made on behalf of the school. If the Board was to avoid an "endless ping pong" it must be able to determine whether any such submission raises new issues that the other side has not already had an opportunity to comment upon and if not, to terminate the circulation of submissions at that stage. It was submitted that in this case the Board had exercised its discretion appropriately; there were no new issues on which the applicant should have received the right to comment and the applicant had not identified any such issues at the hearing.

45. With regard to the applicant's complaints about a lack of detail in the Board's decision to grant permission, it was submitted on behalf of the Board that what it is required to do in this respect is provided for by s.34 (10) of the 2000 Act whereby the decision is required to state the main reasons and considerations on which the decision is based and where conditions are imposed in relation to the grant of any permission to state the main reasons for the imposition of any such conditions. In this regard the Board relied upon *O'Donohue v. Board Pleanala* [1991] ILRM 750 and *Mulholland v. Board Pleanala* [2006] 1 I.R. 453.

46. In the circumstances of this case it was submitted that the reasons for the decision were adequately stated in the decision itself. In relation to the parking issue which had been a concern of the applicant, the Board required the school to implement the terms of the mobility management plan which had been submitted in order to reduce traffic and held that the proposed school development would not seriously injure the amenities of the area. Accordingly, it was submitted that the Board was cognizant of and had given consideration to the appellants concerns.

47. The applicant had complained that the minutes of the meeting did not reveal the reasoning of the board; however, in reply the board submitted that it was not the minutes but rather the decision which contained these. In relation to his complaint that he did not receive a transparent and open hearing, the Board submitted that that was simply not the case. The evidence of the decision in itself disclosed that his grounds of the appeal were considered by the Board which made a determination and gave reasons for its decision. There was no evidence that the Board failed to give due consideration to the appeal before it or that it had failed to understand and properly determine the issues which arose. Accordingly, there was no basis in law which would justify the court in making an order of *certiorari*.

48. The applicant submitted that the Aarhus Convention applied and that the decision of the Board had the result of frustrating the Convention. He believed that the Board's decision was unlawful because the environment in which he lives will be affected in a way that would place him in a position of danger. The Board submitted that this was not a decision of the type to which the Convention applied but in any event he had a full right to participate in the decision making process under Irish law, including the right to make submissions and the right to appeal the decision of the council and which rights had exercised.

49. It was accepted by the Board that it was required to treat the applicant fairly and had done so. It had exercised its statutory function under ss.34 and 37 of the Act of 2000 to determine whether the development was in accordance with proper planning and sustainable development of the area in which it was proposed to carry that out. The applicant made submissions to the council and when it made a decision he exercised his right to appeal to the Board which then exercised its jurisdiction to grant the permission subject to conditionally and having considered his appeal. There was no evidence before the court to suggest that it had failed to do so.

50. The applicant complained about the size and location of the proposed car park of the school and although he had been given leave on the ground that there ought to have been an environmental impact statement this was not advanced at the hearing. In any event the Board submitted that the applicant lacked standing to argue such a point and that there was no substance in it in any event as there was no evidence before the Board which would have required it to have subjected the appeal before it to any EIA process. It was not a development listed in the European Directive or in the Aarhus Convention.

51. Finally, the applicant was given leave in relation to what he claimed were inaccuracies in the planning application under the planning Acts and the development regulations and in respect of which he had sought a declaration that the application was invalid, on five grounds, but only two of which were advanced at the hearing. These related to the alleged failure of the application to state the height of the building and that the application was for a two storey building when it was, he contended, for a two and half storey building.

52. It was submitted on behalf of the Board that the plans clearly showed the height of the building as required by Article 23 (l) (1)

(f) of the regulations and in this regard drawing number 0507 dated the 26th of October 2012 gives a building height of 11.975 metres. The application clearly stated that it was a two storey building, but that one end of it was higher to match the size of neighbouring developments. Paragraphs 2.2, 3.4 and 3.5 of the application dealt with those matters. The applicant had submitted that there was a discrepancy in the application insofar as it referred to the North West corner of the site as a two and half storey building. It was submitted by the Board that that was not in fact what it said but rather that the location of the school's general purpose room allowed the building to form a two and half storey element at the corner of the site meaning that it was higher than a normal two storey building but not having three floors. The additional height was included because the other buildings on the corner were three and four storeys high and that the height of the school was stepped down as it approached the applicant's house, however, as a matter of fact there were never more than two floors in the building and there was no evidence to indicate that the applicant nor anyone else was confused or misled by description or by the map.

53. At the hearing the applicant had made submissions in relation to the ownership of the school and its entitlement to apply for permission, contending that the school did not own the property, moreover, he sought to challenge the validity of the decision on the grounds that it constituted a material contravention of the city development plan, that the Board had not complied with its own code of conduct and that there were deficiencies in the application forms.

54. As has already been indicated, the applicant was unrepresented and so a certain amount of latitude was afforded to him by the court. Whilst the applicant was heard in relation to these matters such latitude cannot extend to a point where it would work an injustice to other parties before the court. The grounds in respect of which he was given leave do not extend to those issues and no application was made to amend and include further grounds.

55. The court is confined therefore, in its decision, to the matters properly before it and which were advanced at the hearing.

56. It was submitted on behalf of the Board that the court was concerned with the process and its legality and not with the merits of the decision of the Board. The Board was obliged to take into consideration all matters relevant to its decision, had to apply fair procedures and had to act reasonably.

57. It was submitted that the Board did not act ultra vires and that there was no evidence before the court which would warrant the court in coming to a conclusion that the inspector and the Board had done anything other than comply with the requirements of the law.

58. The applicant fairly accepted, I thought, that the whole planning process was complex and that when faced with a voluminous amount of documents in the council file he was at a disadvantage. He was unaware that he could have applied for judicial review of the original decision of the planning authority or that he could have or should have applied for an amendment of the grounds in these proceedings which would have enabled him to make other submissions to the court.

The law.
59. When the court is exercising its jurisdiction to judicially review a decision it is not concerned with the merits of that decision but rather with an assessment of the manner in which the decision has been made. The exercise of that jurisdiction is not in any sense an appeal from the decision but rather the jurisdiction exercised is supervisory in nature.

60. Under s.50 of the Planning and Development Act 2000 (as amended by the Planning and Development (Strategic Infrastructure) Act 2006 an applicant for judicial review must have a "sufficient interest" to bring the proceedings. It was accepted by the Board that the applicant is an appellant and a neighbour of the proposed development and that accordingly has a sufficient interest to bring these proceedings.

Jurisdiction
61. The court has a jurisdiction to intervene to quash the decision of an administrative officer or tribunal on grounds of unreasonableness or irrationality so where, for example, a decision is fundamentally at variance with reason and common sense or where the making of the decision has flagrantly rejected or disregarded fundamental reason or common sense it may be quashed.

62. Whilst the court may intervene to quash a decision on a competent matter on the grounds that it was so unreasonable that no reasonable authority could ever have come to it proving a case of that kind would require something overwhelming. See *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223. The Court cannot interfere with the decision of an administrative decision making authority merely on the grounds that it is satisfied that on the facts as found it would have raised different inferences and conclusions or is satisfied that the case against the decision made by the authority was much stronger than the case for it.

63. When considering an application for judicial review in respect of a decision made by a planning authority or the Board, the jurisdiction of the court is limited in respect of certain matters and was described in the judgment of Finlay C.J. in *O'Keeffe v. An Bord Pleanala* at p.71 as follows:

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

Onus of proof
64. The onus of proof in an application for judicial review lies with the applicant. The requirement in that regard placed on an applicant who seeks to impugn a decision on the grounds of unreasonableness or irrationality was described by Finlay C.J. p.72 in *O'Keeffe* as follows:

> *"I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision making authority had before it no relevant material which would support its decision."*

Bias as a ground for judicial review.

65. Bias may be said to be subjective or objective. Objective bias may be said to arise where a reasonable person would apprehend that the applicant would not or did not receive a fair hearing and in this regard Denham J. in *Bula v. Tara Mines* [2000] 4 I.R. 412 at 441 stated:

> *"…it is well established that the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test - it invokes the apprehension of the reasonable person."*

66. Subjective bias may be said to consist of actual bias such as where the decision maker has come to the matter in question with a pre-determined outcome or judgment or where some personal or vested interests has led the decision maker to a particular conclusion in spite of the evidence. With all the complexities of society in the modern world the public perception of impartiality of the courts is fundamental to the administration of justice and in respect of bias Denham J. in *Dublin Well Woman Centre Ltd v. Ireland* [1995] 1 ILRM 408 stated

> *"The concept of bias developed through cases considering material interest. It also arose in cases of prejudgment, prior involvement and personal attitudes and beliefs. There are two fundamental streams of thought within this wider concept. Firstly, that there should be no actual bias i.e. a subjective test. And secondly, that there should be no reasonable apprehension that there is bias i.e. the objective test. Both of these streams of thought are equally important in the broad river of justice."*

67. Principles of natural justice and the adoption of fair procedures in the discharge of statutory obligations by a planning authority or the Board have been considered in a number of cases in the context of s.131 of the Act which provides

> *"Where the Board is of opinion that, in the particular circumstances of an appeal or referral, it is appropriate in the interests of justice to request—*
>
> *(a) any party to the appeal or referral,*
>
> *(b) any person who has made submissions or observations to the Board in relation to the appeal or referral, or*
>
> *(c) any other person*
>
> *to make submissions or observations in relation to any matter which has arisen in relation to the appeal or referral, the Board may, in its discretion, notwithstanding section 127 (3), 129 (4), 130 (4) or 137 (4)(b), serve on any such person a notice under this section—*
>
> *(i) requesting that person, within a period specified in the notice (not being less than 2 weeks or more than 4 weeks beginning on the date of service of the notice) to submit to the Board submissions or observations in relation to the matter in question, and*
>
> *(ii) stating that, if submissions or observations are not received before the expiration of the period specified in the notice, the Board will, after the expiration of that period and without further notice to the person, pursuant to section 133 , determine the appeal or referral."*

68. In *Wexele v. Bord Pleanala* [2010] IEHC 21 where the provisions of the section fell for consideration Charleton J. stated

> *"19. To a limited extent, the principles of natural justice have an influence on the interpretation of this section. The Board is not obliged to bring every fresh submission to the attention of a party to the appeal and to ask for further observations. The first principal applicable is that of utility. The scheme under the Act is not to be replaced with a mechanical application of the notion derived from civil law that everything before the decision maker must also be before the parties and that everything which is submitted must be known to all sides and that they must be given a reasonable opportunity to counter to with submissions of their own. That is clearly outside the scheme of the Planning and Development Act, 2000.*
>
> *20. Fundamentally, if a complaint is made that an applicant was shut out of making a submission that party must show that they have something to say. What they have to say must not be something that has already been said. Nor can it be a reiteration in different language of an earlier submission. If a party is to meet the onus of alleging unfairness by the Board in cutting them out of making a submission they must reveal what has been denied them, what they have to say and then discharge the burden of showing that it had been unjust for the Board to cut them out of saying it. In Ryanair v. An Bord Pleanla, [2004] 2 I.R 334 the applicant had been invited to make a submission under s. 131 but the time limit imposed by statute had not been adhered to. The question, as Caoimh J. saw the matter was what else the applicants would have been able to say had the statutory opportunity been afforded to them. As a matter of fact Caoimh J. held that, the applicant had made a submission."*

69. Where a complaint of unfair procedures is made, the question which the court has to ask is whether or not the matters which might reasonably have been expected to result in the planning authority or the Board in granting or refusing permission or to impose conditions have been considered or whether in the making of the decision an injustice has been perpetrated through a new and objectively significant matter being brought into the equation of which the appellant had no notice. See *Wexele v. Bord Pleanala* infra.

Statement of reasons and considerations in the decision.

70. Section 34 (10) of the Act of 2000 obliges a planning authority or the Board to set out the reasons and considerations for its decisions and if any conditions are imposed, the reasons for the imposition of such conditions.

71. As to that obligation Murphy J. in *O'Donoghue v. Bord Pleanala* [1991] ILRM 750 stated:

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

72. A similar test is to be applied in relation to the decision maker's considerations and of this Kelly J. stated in *Mulholland v. Bord Pleanala* [2006] 1 I.R. 453

> *"34 The obligation at (b) above to state the considerations on which a decision is based is, of course, new. I am of opinion that, in order for the statement of considerations to pass muster at law, it must satisfy a similar test to that applicable to the giving of reasons. The statement of considerations must therefore be sufficient to:-*
>
> > *(1) give to an applicant such information as may be necessary and appropriate for him to consider whether he has a reasonable chance of succeeding in appealing or judicially reviewing the decision;*
> >
> > *(2) arm himself for such hearing or review;*
> >
> > *(3) know if the decision maker has directed its mind adequately to the issues which it has considered or is obliged to consider; and*
> >
> > *(4) enable the courts to review the decision."*

The Aarhus Convention.
73. Article 6 of the Convention provides that public participation in the decision making process is to be gauranteed in cases listed in the annex of cases likely to have a significant effect on the environment

> *"1. Each party*
>
> *(a) shall apply the provisions of this Article with respect to decisions on whether to permit proposed activities listed in annex 1;*
>
> *(b) Shall, in accordance with international law, also apply the provisions of this Article to decisions on proposed activities not listed in annex 1 which may have a significant effect on the environment. To this end, parties shall determine whether such proposed activity is subject to these provisions;"*

Obligations of a planning authority and the Board on an application for permission.
74. The obligations placed on a planning authority and the Board on an application for permission is provided for by ss. 34 and 37 of the Act of 2000. These require the planning authority (s.34) and the Board (s.37) to determine whether the development, the subject matter of the application, is in accordance with the proper planning and sustainable development of the area in which it is proposed to carry out the development.

75. In this case the position of the Board in the appeal is to determine the application as if it had been made to the Board in the first instance. The effect of the decision of the Board operates to annul the decision of the planning authority as and from the time when it was given and subsections (1) (2) (3) and (4) of s.34 shall apply subject to any necessary modifications, in relation the to the determination of the application by the Board on appeal under s.37 as they apply in relation to the determination under s.34 of the application by the planning authority.

76. An application for permission is only valid if it complies with the provisions of s.34 of the Act and the planning and development regulations 2001. Article 22 of the regulations makes provision for the requirements that must be satisfied to render a planning application valid and Article 23 provides for those requirements in respect of plans, drawings, and maps referred to in Article 22. Article 26 makes provision for the consideration as to compliance with the requirements of a number of Articles including Article 22 and for the procedures to be followed upon compliance or otherwise. in *Hayes v. Bord Pleanala* (unreported, 1998) 7 JIC 3004) it was held that minor infringments of the regulations would not render an application invalid provided such error did not mislead the public or work to the disadvantage of the planning authority or the public. Errors which are so trivial or so technical or so peripheral or otherwise so insubstantial do not have the effect of rendering the application invalid provided that the regulation has been substantially and adequately complied with. See *Monaghan UDC v. Alf-a-bet Ltd* [1980] ILRM 64.

Decision.
77. The hearing in this case proceeded over five days and having considered the evidence, documentation placed before the court, the submissions made by the applicant and on behalf of the Board ,the decision of the court in relation to the matters properly before it on the grounds in respect of which leave was given and which were advanced at the hearing are as follows

78. The Board in considering the inspector's report was not confined to the content of that report insofar as it recited the applicant's grounds of appeal. The Board had those submissions before it and was not, therefore, dependant only on the inspector's summation of the applicant's appeal when being considered. Even if it was so dependant, when read as a whole ,as it must be, the inspector's report could not ,in my view, reasonably found a conclusion by the court that the inspector had been disingenuous nor could it found a conclusion of bias towards the applicant. Moreover, the statement by the inspector that she did not consider that the school redevelopment should be held to effective ransom over an agreement in relation to a scheme, which the applicant claims was being defamatory of him, has been taken completely out of context .When read in context the statement refers to the minutes of earlier meetings appended to the application which included a suggestion of incorporating residual open space into the development which might still be preceded with if desired rather than being a personal reference to the applicant and with the inspector going on to observe that the development did not inhibit nor was it designed in a manner which made it dependent on the residual open space being retained.

79. It is apparent from a reading of the inspector's assessment that, when addressing the applicant's appeal, she was cognisant of and took his concerns into consideration. It is also clear from her assessment that the inspector took into account the other reports and materials available to her, including submissions made on behalf of the school and the council, before making her decision. The report was prepared on the basis of two inspections of the site made by her as well as on all of the materials before her and that having done so she made a reasoned recommendation to the Board to grant permission. Her report was, in the view of the court, balanced and fair to all of the parties concerned.

80. There was no evidence that the Board was either subjectively or objectively biased in its determination of the appeal before it. On

the contrary the evidence of materials available to the court disclosed that the Board complied appropriately and properly with its obligations and that the reasons considerations and conditions imposed were in compliance with the law. There was no obligation on the Board to provide a discursive response to the applicants appeal merely that his appeal should have been properly taken into consideration. There was no cogent evidence upon which to found a conclusion that the Board did otherwise than take all matters into consideration, including the applicant's appeal, in determining the matter before it and in making its decision.

81. With regard to the applicant's submission that he did not get a fair hearing, it is quite clear that in determining the application for permission on the applicant's appeal that the Board had considered the appeal and having done so was satisfied on all of the other materials before it that the planning application and proposed development complied with the appropriate planning and development requirements.

82. The applicant's submission that the process infringed his rights and failed to comply with the provisions of the Aarhus Convention is in my view misconceived. There was no evidence to support that submission. Fair procedures were adopted by the Board and in this regard the applicant exercised his rights under law to participate in the decision making process which included his right to appeal the decision of the planning authority to the Board. He was given a fair and full opportunity to make his objections and to express his concerns, which he did. No new issues were raised by the school in response to the applicant's appeal which would have warranted the Board in exercising its discretion under s.131 of the Act to afford him a right to respond. As it is the court is satisfied that in exercising its discretion not to afford the applicant a response, the Board acted within jurisdiction and in accordance with the law.

83. Insofar as it was submitted that the decision of the Board is in conflict with the council's roads and traffic planning division report such as would require a substantial alteration to the development for which permission has been granted; even if there was an error in what was no more than an approximate measurement, there is no requirement nor condition that would require the development to proceed on the basis of that measurement being a precise and correct statement of fact nor anything about the decision that the development be carried out otherwise than in accordance with the plans and specifications lodged with the application. There was no evidence that resulted in the Board or anyone else being misled by anything contained in that report.

84. Finally, as to the submission that the decision should be declared invalid on the grounds of inaccuracy concerning the absence of a specified height to the building and that the development constituted two and half storeys, it is clear from the application that the development allowed for the building to form a two and half storey element at the corner of the site, moreover, drawing number 0507 gives a specific building height of 11.975 metres. The development does not, in any event, provide for the development of a third floor. There was no evidence that the plans specifications and maps were misleading to the applicant or to anyone else or that the decision to grant permission is anything other than that in respect of which permission to develop was sought.

Conclusion
85. Having thus concluded that the applicant has failed to discharge the onus of proof in relation to the grounds in respect of which he was given leave and which were advanced at the hearing, the court will make an order dismissing the proceedings.