THE HIGH COURT
JUDICIAL REVIEW

[Record No. 2018/178 J.R.]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

PETER SWEETMAN

APPLICANT

AND
CLARE COUNTY COUNCIL

RESPONDENT

AND
TIGL IRELAND ENTERPRISES LIMITED, AN BORD PLEANÁLA AND THE DEPARTMENT OF CULTURE, HERITAGE AND THE GAELTACHT

NOTICE PARTIES

JUDGMENT of Mr. Justice Binchy delivered on the 31st day of July, 2018

1. On 22nd December, 2006, the first named notice party, TIGL Ireland Enterprises Limited ("TIGL") applied to the respondent, Clare County Council (the "Council") for planning permission for a development comprising coastal erosion management works at Carrowmore Dunes, White Strand, Doughmore Bay, Doonbeg, Co. Clare. The proposed development includes the provisions of two protective structures between a golf links at Doonbeg and White Strand, at the northern and southern ends of the beach, adjacent to golf holes requiring protection. On 21st December, 2017, the Council issued a notification of decision to grant planning permission (the "Decision") to TIGL. The Decision was subject to five valid third party appeals to the second named notice party (the "Board"). One of those appeals was brought by the applicant.

2. On 27th February, 2018, the applicant was granted leave to challenge the Decision. In granting leave, Noonan J. stayed, pending determination of these proceedings, consideration of any appeal by the Board. At the same time, Noonan J. gave liberty to the Council and the notice parties to apply to discharge the stay. On 19th April, 2018, the Council issued the motion with which this judgment is concerned, seeking an order pursuant to ss. 50(4) and (5) of the Planning and Development Acts 2000-2017 staying the within judicial review proceedings pending the making of a decision by the Board in respect of the appeal of the Decision. At the hearing of the application, TIGL made submissions in support of the same. The Board and the third named notice party elected not to participate indicating simply that they would be bound by whatever decision the Court might make in the matter.

3. On 26th June, 2018, the Council delivered a statement of opposition and an affidavit of the same date sworn by Mr. Brian McCarthy, senior planner, in opposition to the reliefs sought by the applicant in these proceedings. Before addressing this application, it is helpful, by way of background, to consider the affidavits exchanged by the parties in the substantive proceedings.

4. In his grounding affidavit of 19th February, 2018, the applicant avers as to his credentials as an environmental campaigner who has brought a large number of environmental cases before the courts, including two cases before the European Court of Justice. He has enjoyed a significant measure of success in those cases. He is driven by a concern about the impact which certain types of development have on the countryside, and is in particular concerned that in his opinion, there is a widespread and persistent failure by planning authorities to apply EU law in environmental decision making.

5. He says that he became aware of the development of a golf course at Carrowmore Dunes, Dunbeg, Co. Clare, when it was initially proposed in the 1990s. In 2016, he became aware of the proposals for works to be carried out by TIGL being the works to which the Decision relates. When TIGL made a planning application to the Council, the applicant made a submission in connection with that application. He refers to other submissions also, including those made by An Taisce and the third named notice party, the Department of Culture, Heritage and the Gaeltacht. He refers also to two reports prepared by a Ms. Sheila Downes, environmental assessment officer of the Council. He refers specifically to the conclusion in the second report of Ms. Downes dated 18th December, 2017, just three days before the issue of the Decision by the Council in which she states:-

> "Following receipt of the response to that further information request by Clare County Council it remains difficult for the competent authority to conclude a finding of no adverse effects on the integrity of the European sites concerned with the limited monitoring data available, the complexity of the dynamic beach systems and the uncertainty related to climate change predictions and effects.
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> The purpose of the proposal is to fix the dunes system and prevent further erosion and therefore road action dynamics. This, is contrary to the detailed attributes that define the site specific conservation objectives for the site (for which the target allows for the area to be stable or increasing subject to natural processes including erosion and succession). A scientifically robust demonstration of this scheme's ability to conserve the natural dynamic processes was not presented and with the essential benchmark needed to ensure compliance with the Habitats Directive before the scheme could be permitted."

6. At para. 15 of his affidavit, the applicant states that he considered the Decision and also the full file as it is available on the website of the Council, and he avers that having read all of the documents publicly available he could find no Appropriate Assessment ("AA") undertaken by the Council, as required by Directive 92/43/EEC (the "Habitats Directive"), nor any reference to an AA as having being carried out. He avers that an AA should have been carried out by the Council before making a decision to grant permission. He says that it is entirely unclear from the Decision the basis upon which the Decision was made. He says that the assessments are not apparent and it is impossible to know how the Council resolved the issues raised by the public, the Department and its own officials. He says that he is unable to see any engagement, analysis or consideration of the habitat issues raised in the consideration by the Council, such as will constitute an AA and allow the development to be approved. In particular, he says that he would have expected to see an engagement with the issues set out in the second report of Ms. Downes. He notes that the Decision issued just four days after the second report of Ms. Downes.

7. He says that he considers the Decision to be unlawful and lodged an appeal with the Board to this effect because he was reluctant to let the deadline for submission of appeal pass without an appeal being lodged. From the submissions made by counsel on his behalf, he appears to mean by this that he submitted his appeal to the Board in a rush in order to ensure that it was submitted on time. The suggestion is that his appeal is focussed on legal shortcomings in the Decision, more so than on environmental issues, because of time constraints.

8. In conclusion, in his affidavit he says that since the Board cannot determine the lawfulness of the Decision, these proceedings are the only way in which that issue can be determined. He also says that it should not be necessary for the public to appeal every decision of planning authorities, and the public is entitled to expect a lawful determination by planning authorities in the first instance. He avers that this has not happened in this case and that the application of EU law in such cases is increasingly problematic with planning authorities not complying with their EU obligations.

9. In his replying affidavit on behalf of the Council, Mr. McCarthy states that an AA was carried out by a Mr. Gareth Ruane, acting senior executive planner in the Council, and that that is recorded in the determination annexed to the final report of Mr. Ruane. He says that the document was available on the Council's website since 21st December, 2017 (the date of the Decision). He avers that "having considered the application, various submissions, the planner's report the Appropriate Assessment, the Environmental Impact Assessment, and having considered the County Development Plan 2007-2013 I decided, on behalf of the respondent, to grant planning permission for the said development, subject to a number of conditions and I beg to refer to a copy of my order dated 21st December, 2017 …".

10. He further avers that both the Environmental Impact Assessment ("EIA") and the AA were available to members of the public and that those documents set out the reasons for the Council's findings in relation to its assessment of the development. He avers that the applicant has lodged an appeal to the Board in which he complains about the nature of the AA carried out by the Council. He said that when assessing the appeal, the Board will be required to determine the application as if it had been made to the Board in the first instance and it will be required to carry out its own AA. Accordingly, he submits that the appropriate venue for the applicant to ventilate any criticisms that he has as to the impact of the development on the environment is in the context of his appeal to the Board.

11. An affidavit was also sworn in opposition to these proceedings (i.e. the substantive proceedings of the applicant) by Mr. Michael O'Sullivan, Director of Cruagh House Environmental Limited, on behalf of TIGL. He avers that it is evident from the planning report of Mr. Ruane that he considered all the submissions made by third parties and by prescribed bodies and summarised the issues raised in the course of the planning application. He avers that Mr. Ruane did conduct both an EIA and an AA and made determinations following the conduct of each. He exhibits the Council's determinations following upon the EIA and the AA. He said that while the applicant might disagree with the conclusions of the assessments, it is simply incorrect to state that they were not undertaken. In what is more of a submission than an averment as to fact, he says that the appropriate course is for the Board to determine the appeals against the Decision (including that of the applicant), because the Board is statutorily required to consider the planning application *de novo* and is also obliged to carry out both an EIA and an AA (if required).

12. Finally, a further affidavit was sworn on behalf of the applicant by Mr. Andrew Cooper, who describes himself as a geologist and coastal zone management scientist. This was on 15th June, 2018. This affidavit addresses what Professor Cooper considers to be flaws in the contents of both the EIA and the AA by the Council. Professor Cooper appears to be in substantial agreement with the issues raised by the applicant in his affidavit of 19th February, 2018.

Statutory Basis for Application

13. Sections 50(4) and (5) of the Planning and Development Act 2000 (the "Act of 2000), as amended by s. 13 of the Planning and Development (Strategic Infrastructure) Act, 2006 provides:-

> "50(4) A planning authority, a local authority or the Board may, at any time after the bringing of an application for leave for judicial review of any decision or other act to which subsection (2) applies and which relates to a matter for the time being before the authority or the Board, as the case may be, apply to the High Court to stay the proceedings pending the making of a decision by the authority or the Board in relation to the matter concerned.
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> (5) On the making of such an application, the High Court may, where it considers that the matter before the authority or the Board is within the jurisdiction of the authority or the Board, make an order staying the proceedings concerned on such terms as it thinks fit."

14. The application is grounded upon an affidavit sworn by Mr. John Shaw, solicitor acting on behalf of the Council dated 16th April, 2018. In this brief affidavit, Mr. Shaw avers that in these proceedings and in his appeal to the Board, the applicant alleges that the Council failed to carry out any proper EIA or any AA contrary to national and EU law. He says that the applicant also alleges that the Council failed to give any or any adequate reasons or considerations for its determination. These allegations are disputed by the Council.

15. Mr. Shaw gives two reasons as to why the within application should be granted:-

> (1) The Board is the body entrusted under the Planning Acts to determine appeals in relation to applications for planning permission and will be considering the merits of the planning application afresh. The Board has the particular expertise to determine the merits of the application and is uniquely placed to consider the issues raised by the applicant in relation to the EIA and AA and will be furnishing reasons for any decision that it takes.
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> (2) If the Board upholds the applicant's appeal, then any challenge to the decision of the Council will be pointless and moot. Furthermore, the Board is required to determine each application as though it had been made to the Board in the first instance, and the decision of the Board operates to annul the decision of the planning authority as from the time when it is given.

Submissions

Submissions of the Council an TIGL

16. Since there is a substantial overlap between the submissions of the Council and TIGL, I will treat them as one, save where otherwise appearing. Firstly, it is submitted that the appeal before the Board is a process that operates *de novo* and its jurisdiction is unaffected by any flaws in the Decision. In this regard the Council relies upon s. 37(1)(b) of the Act of 2000 which provides:-

> "… Where an appeal is brought against a decision of a planning authority and is not withdrawn, the Board shall determine the application as if it had been made to the Board in the first instance and the decision of the Board shall operate to annul the decision of the planning authority as from the time when it was given…".

17. So, it is argued, if the Board upholds the applicant's appeal, the judicial review challenge to the planning permission is pointless and moot. If, on the other hand, the Board upholds the Decision, any suggested invalidity or irregularity of the Decision is irrelevant, in circumstances where the functions of the Board on appeal stem from the provisions of the Planning Acts which provide for a de novo appeal to the Board, notwithstanding any irregularity in the Decision. In this regard the Council relies on a number of authorities, including *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, *The State (Abenglen Properties) v. Corporation of Dublin* [1984] 1 I.R. 381 and *Harding v. Cork County Council & anor* [2006] IEHC 295. O'Keeffe is relied upon to support the proposition that even if there is any legal infirmity in the Decision such as to render it invalid, the Board still has jurisdiction to entertain the planning appeal of the applicant. In the High Court decision in *O'Keeffe*, Costello J. stated at p. 49:-

> "Undoubtedly the point involved in the respondents' submission (namely what legal consequences, if any, flow from an *ultra vires* administrative decision) has given rise to some difference of opinion and, perhaps, confusion in past judicial observations. It is usual to say that an *ultra vires* decision is void and a nullity but it is clear that it is wrong to conclude that such decisions are completely devoid of legal consequences."

Later in the same judgment Costello J said at pp. 52 to 53:-

> "The Oireachtas clearly intended that if a notice of appeal was served within the statutory period then the Board should determine the application as if it had been made to it in the first place, and that it should not have any regard to what had happened before the planning authority. It would follow that I should construe this statute as meaning that no defect in the proceedings before the planning authority should have any bearing, or impose legal constraints, on the proceedings before the Board. The Board had no jurisdiction to consider the validity from a legal point of view of the County Manager's decision … and it seems to me to be contrary to the proper construction of the section now to hold that the Board lacked jurisdiction to entertain the appeal merely because the County Manager's decision was *ultra vires*… I conclude, therefore, that the Board had jurisdiction to entertain this appeal even though the decision of the County Manager might have been made ultra vires…"

18. *Abenglen* is relied upon to support the general proposition that the court should be slow to intervene by way of order quashing administrative decisions, unless in the particular circumstances of the case the alternative remedy of appeal is not adequate. In that case O'Higgins C.J. stated that the issue was "a question of justice" and "while retaining always a power to quash, a court should be slow to do so unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate".

19. On this point, reliance is placed upon the following passage of Clarke J. in *Harding*:-

> "4.12 It seems to me likely, therefore, that an appeal will be regarded as an adequate remedy in a two stage statutory or administrative process unless either:-
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> (a) The matters complained of in respect of the first stage of the process are such that they can taint the second stage of the process or effect the overall jurisdiction; or
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> (b) the process at the first stage is so flawed that it can reasonably be said that the person concerned had not been afforded their entitlement to a proper first stage of the process in any meaningful sense.
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> 4.13 Thus, for example, where a planning authority may be found (as O'Donovan J. found in *Eircell*) to have ridden 'roughshod over principles of constitutional justice and fair procedures' it could reasonably be concluded that the applicant in that case (notwithstanding having available an appeal to the Minister) would have been deprived of the reality of any meaningful first stage. Where, however, the matters complained of are not such as would either give rise to a reasonable apprehension that the second stage would itself be tainted, have its jurisdiction removed, or were such as could be said to have deprived the applicant concerned of a meaningful first stage, then it seems to me that an appeal should, ordinarily, be regarded as an adequate remedy and this court should not entertain an application for judicial review in respect of the first stage".

20. TIGL relies on the same authorities as the Council, but also relies on the decision of the Supreme Court in the case of *Okunade v. Minister for Justice* [2012] 3 I.R. 152. That case involved a challenge to a deportation order which, if not stayed pending the outcome of the judicial review proceedings brought by the applicant, would have resulted in the deportation of the applicant and his family before the validity of the order was determined. In the course of his judgment, Clarke J. gave consideration to the presumption of validity of administrative acts, until determined otherwise:-

> "[92] However, there is a further feature of judicial review proceedings which is rarely present in ordinary injunctive proceedings. The entitlement of those who are given statutory or other power and authority so as to conduct specified types of legally binding decision making or action taking is an important part of the structure of a legal order based on the rule of law. Recognising the entitlement of such persons or bodies to carry out their remit without undue interference is an important feature of any balancing exercise. It seems to me to follow that significant weight needs to be placed into the balance on the side of permitting measures which are *prima facie* valid to be carried out in a regular and orderly way. Regulators are entitled to regulate. Lower courts are entitled to decide. Ministers are entitled to exercise powers lawfully conferred by the Oireachtas. The list can go on. All due weight needs to be accorded to allowing the systems and processes by which the lawful power is to be exercised to operate in an orderly fashion. It seems to me that significant weight needs to be attached to that factor in all cases."

21. TIGL submits that neither it nor the Council are actually seeking to rely on the administrative measure under challenge i.e. the Decision, but rather wish for the appeal against the Decision to proceed, and that this passage in the decision of Clarke J. in *Okunade* is supportive of the proposition that the stay on the appeals before the Board should be lifted, and the appeals should be seen through to conclusion.

22. In *Okunade*, Clarke J. set out a number of principles which he considered to be applicable in applications to grant a stay of administrative actions pending the outcome of judicial review proceedings, as follows:-

> "(a) the court should first determine whether the applicant had established an arguable case; if not the application must be refused, but if so, then;
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> (b) the court should consider where the greatest risk of injustice would lie. In doing so the court should:-

(i) give all appropriate weight to the orderly implementation of measures which were *prima facie* valid;

(ii) give such weight as was appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and,

(iii) give appropriate weight (if any) to any additional factors which arose on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings;

but also,

(iv) give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful;

(c) in addition the court should, in those limited cases where it may be relevant, have regard to whether damages were available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages; and,

(d) in addition, and subject to the issues arising in the judicial review not involving detailed investigation of fact or complex questions of law, the court could place all due weight on the strength or weakness of the applicant's case."

23. It is accepted that having met the test to obtain leave to apply for judicial review of a planning decision, the Court must have been satisfied that the applicant had substantial grounds, and he therefore must be considered to have an arguable case for the purposes of subpara. (a) above.

24. In relation to the question as to where the greatest risk of injustice lies, and the criteria set out in subpara. (b) above, it is submitted that the balance of convenience lies in allowing the statutory appeal process, which has been invoked by the applicant himself, to continue to a conclusion. The stay granted in favour of the applicant at the leave stage precludes the Board not just from determining the appeal of the applicant, but from even considering the appeal, pending the determination of these proceedings. Counsel for TGIL refers to the decision of the High Court (O'Sullivan J.) in *Martin v. An Bord Pleanála* [2002] 2 I.R. 655. That was a case which involved a challenge to procedures adopted by the Board itself in the appeals process. In considering an application to stay the consideration of the appeal by the Board, O'Sullivan J. stated at p. 671:-

> "The first respondent [the Board] has a statutory duty not only to consider the appeals before it but to do so within a time frame identified by statute as particularly limited, in the first instance, to a period of four months. There is a public dimension to the considerations of the court on this aspect of the application - namely the interests of the public in the efficient despatch by the first respondent of the appeals which come before it."

25. It is submitted on behalf of TIGL that there is a public interest in the orderly operation of the scheme for determination of planning appeals, which leans in favour of lifting the stay imposed on the Board in considering the appeal of the applicant, and instead placing a stay on these proceedings pending the determination of the applicant's appeal. The Board has a statutory objective of determining appeals within a period of eighteen weeks, and to date the Board has not been able to consider the appeal due to the existing stay, and refusal of this application will further prolong the process.

26. It is further submitted that there are additional factors which would suggest that the public interest is better served by permitting the Board to determine the appeals. This involves the threat to the infrastructure of the golf course for as long as the works the subject of the planning application remain to be undertaken. In the event of damage to the golf course by reason of the delay in carrying out the works which TIGL considers necessary to protect the course, there is likely to be a loss of employment as a result, which would not arise in the event that the Board determined the appeal in favour of TIGL.

27. On the other hand, there would be no prejudice at all suffered by the applicant if the existing stay is discharged and the Board determines the appeals. In that event, there are a number of possible outcomes. The Board could refuse TIGL planning permission, which clearly would not prejudice the applicant. The Board could seek further information from TIGL. This again could not prejudice the applicant. The Board could grant planning permission to TIGL. If the Board grants a lawful permission, then that is as much as the applicant is entitled to; if the applicant considers the decision of the Board to grant planning permission to be unlawful, then he could seek to challenge that decision, and at that point seek a stay on the implementation of the planning permission.

28. It is submitted that damages would not be an adequate remedy and in any case the applicant has not given an undertaking as to damages and would not be in a position to give any meaningful undertaking as to the same.

29. As to the final consideration articulated by Clarke J. in Okunade, i.e. the strength or weakness of the applicant's case, it is submitted that such an assessment only arises where the risk of injustice is evenly balanced. It is submitted that the risk of injustice is not evenly balanced in this case as there is no risk of injustice at all to the applicant, whereas TIGL will be deprived of the second stage of the decision making process mandated by statute if this application is refused. Since the proposed development is very time sensitive, there is a risk of significant injustice to the applicant unless this application is granted.

Submissions of the Applicant

30. It is submitted on behalf of the applicant that the issues raised by these proceedings will not in fact be resolved by the Board on appeal. It is the applicant's contention that the Decision is unlawful because the Council has failed to comply both with the EIA Directive 2011/92/EU (as amended) and the Habitats Directive. The Board, in determining the appeals, will not make any determination as to the lawfulness of the Decision.

31. The applicant claims that he was not in a position to form a proper planning appeal against the Decision on its merits, by reason of time constraints. In that respect he says that his appeal was lodged *de bene esse*, and raises only legal grounds. It is submitted on behalf of the applicant that he is entitled to a determination as to the lawfulness of the Decision of the Council, as the statutory body that is first charged with considering and adjudicating upon the planning application of TIGL.

32. While acknowledging that an appeal to the Board is a *de novo* appeal, the applicant contends that he is at a disadvantage since the Decision, he contends, will operate in some way favourably to TIGL. On the other hand, had the Council refused the Decision, any

appeal by TIGL would be at a disadvantage as the Council would have concluded either that the development would have adverse environmental effects or that there was a reasonable scientific doubt about the environmental effects of the development. Such a finding on the part of the Council would have been very difficult to overcome at appeal stage, it is submitted.

33. The applicant submits that insofar as the Council and TIGL argue that the existence of the appeal to the Board constitutes an adequate remedy, this could be said in every challenge to a decision of a Council acting as planning authority. It is submitted that on this argument, no decision of a planning authority could be reviewed because there is always an alternative remedy in the form of an appeal to the Board. If that were so, there would be no need for the statutory right to judicial review of planning decisions as provided in s. 50 of the Act of 2000.

34. It is submitted that there have been many cases in which decisions of local authorities, acting as planning authorities, and *Abenglen* affirms that the existence of a right of appeal does not prevent the Court from acting. *Abenglen* confirms that if an appeal is only concerned with planning merits, then that may be the correct remedy (rather than a judicial review). However, where the issues involved concern the legality of the decision of a planning authority, and in particular issues concerning the jurisdiction of a planning authority, then judicial review is the appropriate remedy. The applicant relies on the following passage from the decision of the Supreme Court in *Abenglen* at p.393:-

> "The question immediately arises as to the effect of the existence of a right of appeal or an alternative remedy on the exercise of the court's discretion. It is well established that the existence of such right or remedy ought not to prevent the court from acting. It seems to me to be a question of justice. The court ought to take into account all the circumstances of the case, including the purpose for which *certiorari* has been sought, the adequacy of the alternative remedy and, of course, the conduct of the applicant. If the decision impugned is made without jurisdiction or in breach of natural justice then, normally, the existence of a right of appeal or of a failure to avail of such, should be immaterial. Again, if an appeal can only deal with the merits and not with the question of the jurisdiction involved, the existence of such ought not to be a ground for refusing relief. Other than these, there may be cases where the decision exhibits an error of law and a perfectly simple appeal can rectify the complaint, or where administrative legislation provides adequate appeal machinery which is particularly suitable for dealing with errors in the application of the code in question. In such cases, while retaining always the power to quash, a court should be slow to do so unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate."

35. It is submitted in this case that the matters raised by these proceedings go to the jurisdiction of the planning authority. In particular, it is submitted that the Council did not have jurisdiction to grant planning permission to TIGL without first being satisfied that the test for an AA as set out by this Court (per Finlay Geoghegan J.) in the case of *Kelly v. An Bord Pleanála* [2014] IEHC 400 had been applied by the planning authority, and having done so, that the planning authority had determined that the proposed development would not adversely affect the integrity of any relevant European site and, on the basis of complete, precise and definitive findings and conclusions, there was no reasonable scientific doubt as to the absence of the identified potential effects.

36. In advancing submissions on behalf of the applicant, counsel placed very significant emphasis on the strength of the applicant's case in the substantive proceedings. On the basis of that case, it is argued that the Council had no jurisdiction to grant the Decision, and this is not something which will be addressed at all by the Board in the appeals process.

37. Finally, the applicant places significant reliance on the recent decision of the Supreme Court in the matter of *Connelly v. An Bord Pleanála* [2018] IESC 31. In that case the central issue with which the Court was concerned related to the adequacy of the reasons given by the Board in its decision. The case involved an application for development of a wind farm. The Court was satisfied that the reasons given for the decision of the Board in that case were adequate to enable any interested party to know the reasons for the decision and to consider whether there was any legitimate basis for seeking to mount a challenge to the same. The Court quashed the decision of the Board in that case however because it found that the AA conducted by the Board was defective, since neither the decision itself nor any of the materials referred to in the decision contained the sort of complete, precise and definitive findings that are required to underpin a conclusion that no reasonable scientific doubt remained as to the absence of any identified potential detrimental effects on a protected site. In other words, the Decision of the Board was not taken in compliance with the criteria identified by Finlay Geoghegan J. in *Kelly v. An Bord Pleanála*. The applicant relies on this decision in support of his argument that the planning authority – whether the planning authority of first instance or the Board – may only grant planning permission when all doubt as to the impact of the development on a protected site has been removed. It was submitted on behalf of the applicant that there is no evidence in the Decision that all such doubt has been removed. Therefore, the Council did not have jurisdiction to grant permission to TIGL. The applicant relies upon the following passage in the decision of Clarke C.J. in *Connelly*:-

> "8.15 Thus, it seems to me as a result of the foregoing analysis that the overall conclusions which must be reached before the Board has jurisdiction to grant a planning consent after an AA is that all scientific doubt about the potential adverse effects on the sensitive area have been removed. However, there seems, as a matter of EU law, to be a separate obligation to make specific scientific findings which allow that conclusion to be reached. This is apparent from the above passages from *Kelly* and the European case law therein cited."

38. The applicant also relies on the decision of this Court (Kelly J.) in *Mulholland v. An Bord Pleanála (No. 2)* [2006] 1 I.R. 453, in which Kelly J. gave consideration to the requirement imposed upon planning authorities pursuant to s. 34(10)(a) and (b) of the Act of 2000 to give reasons for planning decisions and to state the main reasons and considerations on which a decision is based, as well as an obligation to state the main reasons for not accepting the recommendation of a planning inspector. Kelly J. stated, at para. 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:-
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> (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."

39. It is submitted that any appeal against a decision of a planning authority will be inherently compromised by the failure of the planning authority to comply with these obligations. Therefore, an appeal cannot be an adequate remedy for the complaint advanced in these proceedings.

Discussion and Decision

40. In bringing these proceedings, the applicant says that he is motivated by a desire to see European law pertaining to environmental matters properly applied by planning authorities. He says that it should not be necessary for the public to appeal every decision of planning authorities to the Board to ensure the proper application of European law. The public is entitled to a lawful determination at first instance. I mention this again because it is apparent from the decision of the Supreme Court in *Abenglen* that the purpose for which the proceedings have been brought by the applicant is relevant in the consideration of the adequacy of the alternative remedy of the appeal to the Board.

41. It is implicit from the affidavit of the applicant that he is of the opinion that planning authorities do not take seriously their obligations to apply European environmental law in planning matters. Whether or not that is so is not a matter for determination in these proceedings. On this application the core consideration is whether or not the alternative remedy of an appeal to the Board – which the applicant has exercised – is an adequate remedy for his grievances.

42. It has been argued on behalf of the applicant that the issues raised by him in his appeal are legal issues and these cannot be addressed by the Board. I will deal first with the jurisdiction argument. It is accepted by the Council and TIGL that a planning authority does not have jurisdiction to grant planning permission without conducting an AA in accordance with law. Taking the applicant's case at its height, and assuming that it is correct that the AA undertaken by the Council is flawed, does the resulting absence of jurisdiction in the grant of the Decision mean that an appeal is not an adequate remedy?

43. In my view it does not. I think that this question was answered by Costello J. in *O'Keeffe*. Even if the AA was flawed, and the Council did not have jurisdiction to grant permission to TIGL, the Board nonetheless does have jurisdiction to entertain the applicant's appeal from the Decision. The reason for this is quite straightforward: while this argument is couched in terms of jurisdiction, in substance what the applicant is saying is that the conclusions of the Council were arrived at in error. Manifestly, the errors alleged are of a kind that can be corrected by the Board on appeal, because the Board can and must conduct its own AA in its consideration of the appeal.

44. Section 37(1)(b) of the Act of 2000 makes it clear that the appeal to the Board is a *de novo* appeal and the decision of the Board on the appeal operates to annul the decision of the Council. Is the statutory annulment of the Decision, following upon the issue of a decision by the Board, any different to the principal relief sought by the applicant in these proceedings, i.e. the quashing of the Decision? It seems unlikely. For that reason alone, the alternative remedy of an appeal is likely to be adequate in most cases, barring circumstances of the kind referred to by Clarke J. in *Harding.*

45. Moreover, it is plain that any of the failures alleged against the Council by the applicant in these proceedings can be addressed by the Board in the conduct of the appeal. While on the one hand accepting that the appeal process operates *de novo,* on the other hand the applicant has argued that in some way he will be disadvantaged in the appeal process because the Council has determined in favour of TIGL. He then develops this argument by arguing further that had the Council made a decision rejecting the planning application, the Board would be influenced by the Council's reasons for such rejection.

46. This argument must be rejected. Either the appeal to the Board operates *de novo* or it does not. It is abundantly clear from s. 37 of the Act of 2000 that it does so operate. To this I would add that such an argument could be made in relation to all appeals. If the argument were accepted, it would inevitably mean that a stay on judicial review could never be granted pending an appeal. In any case there is no evidence at all to suggest that the decision of a planning authority of itself advantages the successful party in an appeal from that decision to the Board.

47. The applicant has also argued that if the Council and TIGL are correct, all judicial reviews will be required to await the determination of appeals to the Board. However, this is not correct. It is clear from authorities such as *Abenglen* and *Harding* that there are cases when it is appropriate for the court to intervene. As the Supreme Court said in *Abenglen,* it is a question of justice and the court ought to take into account all of the circumstances of the particular case. But it is clear from the decision of the Supreme Court in Harding that in the vast majority of cases the appeal will be regarded as an adequate remedy in a two stage statutory process. In *Harding*, Clarke J. identified two possible exceptions. The first is that the matters complained of are such that they can taint the second stage of the process. This has not been asserted here other than in the very general way to which I have referred above i.e. that the Board will be influenced by the decision of the planning authority. That however is clearly not what Clarke J. meant by the process being tainted. The second exception is that the process at the first stage is so flawed that it can reasonably be said that the person concerned (i.e. the applicant in this case) – was not afforded his entitlement to a proper first stage of the process in any meaningful sense. This has not been asserted at all in this case.

48. The applicant's arguments that reasons were not given for the Decision appear to have been based, in substantial measure, on a misunderstanding. In his application to ground judicial review, the applicant claims that it is entirely unclear from the Decision and the planning file the basis upon which the decision to grant planning permission was made. During the course of the hearing, it was indicated that the applicant, when viewing the Decision online, had not seen the first and second schedules to the Decision wherein are set out the reasons for the Council's conclusions on the EIA and the AA of the development. How this came about is unclear, but the Council maintains that the Decision, in its entirety, was available for viewing online at all times.

49. Whether or not the reasons are adequate to justify the Decision is a matter that, not only can be determined by the Board on appeal, but are most appropriately dealt with by the Board (as distinct from by way of judicial review) insofar as they relate to environmental matters. While it is no function of the Court on this application to engage with the adequacy of the reasons, the Court does need to be satisfied that the Council has complied with its obligations under s. 34(10) of the Act of 2000 at least to the extent so as to enable the applicant to consider his prospects of succeeding in appealing or judicially reviewing the Decision (as per the decision of Kelly J. in *Mulholland*). Insofar as the applicant contends that the Decision does not give sufficient reasons for this purpose, he does so only in general terms, and apparently under a misunderstanding that reasons for the Decision were not given. Since it is clear from the face of the Decision that reasons were given, this argument cannot succeed.

50. It is also contended that the Council did not give reasons, as it is required to do by s. 34(10) of the Act of 2000, for departing from the recommendations of its own Inspector. At the hearing of this application, the Council did not draw to my attention where such reasons are given in the Decision. It may be therefore that the Council has not complied with this specific obligation, although that would be a matter to be determined at a full hearing. But for the purposes of this application it seems to me that since the Council has otherwise given detailed reasons for the Decision, the applicant should have had available to him such information as was

necessary for the purposes of considering his prospects of succeeding in appealing or judicially reviewing the Decision. To this I might add that while the applicant contended that, owing to the intervention of the Christmas period, he was under some considerable pressure to finalise and submit his appeal, he must have been labouring under some misunderstanding because the Decision was made on 21st December, 2017 and the applicant lodged his appeal on 29th December, 2017. He would in fact have had until 28th January, 2018 to lodge his appeal. He would therefore have had available to him sufficient time to attend the offices of the Council and inspect hard copies of all documents and to acquaint himself fully with the reasons for the Decision, before filing his appeal.

51. Finally, I have considered the decision of the Supreme Court in *Okunade*. Firstly, as a general proposition, it seems to me that *Harding* applies a more appropriate test to the question as to whether or not an appeal from a planning authority to the Board is an adequate remedy. *Harding* specifically addresses that point. *Okunade*, on the other hand, was concerned with an administrative decision that had arrived at its final stage, and the question that the Court was faced with was whether that final decision should be stayed pending the outcome of judicial review proceedings. That is more analogous to an application to stay a decision of the Board. And it was in that context that the Supreme Court was considering, in *Okunade*, the question of giving all appropriate weight to the orderly implementation of measures which are *prima facie* valid. Such a consideration cannot arise where the measure concerned is already under a statutory appeal to an appellate body. Similarly, there is no question of giving weight to the consequences of the applicant being required to comply with the measure under challenge, where it is under appeal through the statutory process.

52. While it is clear from authorities such as *Abenglen* and *Harding* that the Court retains a discretion to entertain challenges to decisions of planning authorities by way of judicial review, it is equally clear that the scope for such challenges is limited. Clarke J., in *Harding,* set out a very specific test which, as I have said above, the applicant has failed to meet. The test in *Abenglen* is less specific and arguably more generous insofar as it is simply described as being a question of justice. This obviously gives rise to a consideration of the issue of prejudice. The applicant has said that in bringing these proceedings he wants no more than to ensure that the standards of European environmental law are applied to the proposed development. More specifically, he wants planning authorities in the first instance to comply with their obligations in this regard. But no matter how valid that is as an objective, it must be regarded as a secondary consideration. The Oireachtas has expressly provided for appeals to the Board in order to address any deficiencies in planning decisions made at first instance. That is the whole purpose of the appeals system. The applicant has failed to identify even the slightest prejudice which he will suffer if his appeal proceeds to a determination by the Board.

53. As against that, TIGL can identify very definitive potential prejudices. It is true that they are only "potential" prejudices, but they are very real. The fact is that a storm from the Atlantic Ocean could at any time cause very significant damage to the property and amenities of TIGL. If such an event were to occur, not only would TIGL suffer damage, there is every possibility of a consequential loss of employment and tourist revenue in the locality. From the point of view of TIGL, the sooner the works it wants to do are carried out, the less likely the occurrence of damage to its property, with all attendant consequences. There cannot be the slightest doubt but that the question of justice must be answered emphatically in favour of TIGL, by allowing the applicant's appeal to proceed to the Board for determination without further delay. Accordingly, it is appropriate to grant the Council the reliefs which it seeks in paras. 1 and 2 of the notice of motion herein to the intent that the within judicial review proceedings shall be stayed pending the making of a decision by the Board on the appeals, and the stay granted by Noonan J. when granting leave preventing the Board from considering or determining the appeals should be vacated.