Neutral Citation Number: [2009] IEHC 346

THE HIGH COURT

COMMERCIAL

2008 1071 JR

BETWEEN/

USK AND DISTRICT RESIDENTS ASSOCIATION LTD

APPLICANT

AND

AN BORD PLEANÁLA,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

KILDARE COUNTY COUNCIL

NOTICE PARTY

AND

GREENSTAR RECYCLING HOLDINGS LTD

NOTICE PARTY

Judgment of Mr. Justice John MacMenamin dated 8th day of July, 2009.

1. On 30th July, 2008, the first named respondent ("the Board") granted planning permission to the second named notice party ("Greenstar") for the development and operation of an engineered residential landfill at Usk, Co. Kildare. This facility is intended over a period of ten years to accept annually some 200,000 tonnes of non-hazardous, non-reducible waste. The applicants ("the residents") seek an order of judicial review by way of *certiorari* quashing the Board's decision.

2. In all, the decision contains 25 conditions. These relate broadly, to the manner of construction of the cells; the designation of areas for the deposit of waste material; landscaping; restoration; wildlife; and environmental and archaeological considerations. The conditions also deal with ultimate capping of the various cells or cavities of the landfill once filled with waste.

3. The judgment which follows considers a number of issues relating to the impugned decision, which are arranged in the sequential parts as follows:-

I. a claim of objective bias or want of fair procedures made by the residents;

II. an alleged failure by the Board to address the non-implementation of a previous order of this Court under s. 160 of the Planning Acts in *Usk Residents Ltd. v. Kilsaran Concrete Ltd*. No. 59 MCA, (High Court, Quirke J., 1st December 2004) ("the Kilsaran order"), which directed remediation works to be carried out prior to the institution of the development;

III. a further alleged failure by the Board to address itself to relevant environmental considerations which should by law have been contained in the permission;

IV. a procedural issue with regard to a change in stance taken by Ireland and the Attorney General as regards the permission; and

V. an allegation that the Board unlawfully failed to comply with the European Community Environmental Directives applicable to the development.

Background

4. The residents' legal war of attrition against this development has a long history. Insofar as material, they brought claims against the site's owners, Kilsaran Concrete Ltd. under s. 160 of the Planning and Development Act 2000 ("the Kilsaran proceedings"). They initiated a separate judicial review claim against the Environmental Protection Agency. An earlier set of judicial review proceedings brought against the Board culminated in a judgment of Kelly J. on 14th March, 2007 ("the 2007 High Court judgment"). There, he quashed an earlier decision granting permission, made on 26th July, 2006, but remitted that issue back to the Board for reconsideration. That prior decision and the terms of the 2007 High Court order made thereon are material to this present application.

The proposed development

5. The entire waste facility in question is intended to cover a total of 19.3 hectares, while the footprint of the landfill itself is to be approximately 12.5 hectares.

6. The project is designed to proceed in phases. Greenstar intend to construct specially prepared large cavities on the site, a former quarry, to be numbered from one, (northwest), through to six (southwest). These are to be filled with waste clockwise in numerical sequence, then temporarily capped. There is to be a specially devised lining system for these cavities or cells. Provision is made for leachate collection and management, landfill gas collection and treatment, and ancillary facilities. The developer is required to install a surface water management system prior to the commencement of any other construction work at the facility. According to the application and permission, it is intended that, at the end of this ten-year period, the facility will be restored to agricultural and ecological use.

General outline of the application and other legal proceedings brought by the residents
7. Greenstar lodged its original application for planning on 10th December, 2001. On 8th June, 2004, the Environmental Protection Authority ("E.P.A.") issued a waste licence intended to govern the operation of the landfill. The residents' legal challenge to this ultimately failed. But on 30th September, 2004, the planning authority, Kildare County Council, refused permission for the development. This decision was appealed to the Board. On 27th October, 2004, the Board received first and third party appeals from Greenstar and the residents respectively. Meanwhile, the Usk residents initiated proceedings under s. 160 of the Planning and Development Act 2000, against Kilsaran Concrete Ltd., then, and even now, the actual owners of the quarry. Quirke J. made the "Kilsaran order" on 1st December 2004.

8. Pursuant to s. 160 of the Planning and Development Act 2000, he directed the restoration of the quarry, and restrained any further unauthorised development of the site. Kilsaran was ordered, to restore the lands insofar as practicable to a condition suitable for agricultural use – the appropriate condition to be determined by an expert to be appointed. This was to take due account of safety factors and best environmental practice, as the facility was close to the Usk marshes, a proposed Natural Heritage Area (p.N.H.A.). These restoration works were to be carried out under the supervision and direction of the expert appointed pursuant to the order. Remarkably, this order has not been implemented despite the fact it was made five and a half years ago. The expert has not even yet been appointed. The lands the subject matter of that 2004 court order comprise a significant portion of the lands affected by the intended development.

9. I turn now to the first of the five issues which require determination, the allegation of objective bias.

I. The objective bias issue
10. A full consideration of the bias allegation makes it necessary to outline a further and more detailed chronology of events. On foot of the appeal against Kildare County Council's refusal of permission, the Board's planning inspector held an oral hearing, which took place between 26th and 29th April, 2005. On 19th July, 2005 the inspector furnished her report consequent on that hearing. This recommended refusal of permission for four reasons, which are not at present material. On 24th July, 2006 the Board declined to follow the recommended refusal, and instead decided to grant permission, subject to a range of conditions. On 22nd September, 2006, the residents brought judicial review proceedings challenging the lawfulness of the Board's proceedings. These were transferred into the Commercial List of the High Court. Prior to the hearing of that application, the Board's solicitors indicated by letter dated 23rd January, 2007 that it was conceding the residents' entitlement both to leave and to substantive judicial review.

11. In the concession letter two primary reasons were given for the Board's decision to concede relief. First was the absence of satisfactory records leading to the decision to grant the permission. Second was the fact that for a period of time, the planning files to be maintained by the Board in this matter were, contrary to law, unavailable to the public. The Board's solicitors described both issues as "unusual circumstances". The concession letter contained an outline as to how this situation had arisen.

12. Those judicial review proceedings were heard by Kelly J., on 26th February, 2007. In the light of the concession the main question before him was the form the remedy should take. Two affidavits were sworn on behalf of the Board, one by its chairman Mr. John O'Connor, the second by Mr. Brian Swift, a Board member whose conduct in a number of procedural aspects was criticised by the residents. These affidavits were largely confined to the circumstances surrounding the two reasons just identified.

13. In fairness to the Board, its solicitor's letter went to some lengths to explain why these irregularities had occurred. However there was no further affidavit evidence before that court to address additional allegations by the residents regarding what they said were yet further procedural irregularities by Mr. Swift and a Board official. These related to a series of other alleged failures to follow appropriate procedure in processing the Greenstar application; an apparent absence of explanation as to why these had occurred; documents, Board memoranda and decisions placed out of chronological date sequence on the planning file; and failure to account for the manner in which various recitals and conditions had been devised and communicated between Board members and officials. Had the matter then proceeded to full hearing, these points would have undoubtedly required a full answer in appropriate form. I emphasise that these were allegations only; they were not the subject of a court finding or order.

14. I do not consider that these matters are "*res judicata*" for the purpose of these proceedings. They form part of the factual background for Kelly J.'s decision; and that decision is now the starting point for this aspect of the current judicial review application. What was submitted on behalf of the Board on that occasion, is relevant to the orders, recommendations and observations made in 2007 in relation to the manner in which the Board should subsequently conduct its procedure on remittal. What the Board actually did afterwards must be assessed by reference to the submissions made and the subsequent judgment.

The 2007 High Court judgment and hearing on the form and extent of the remedy
15. In the judgment Kelly J. observed that, whilst the applicants had raised other grounds which might arguably have provided an additional basis for granting *certiorari*, it was not in the interest of anybody that the public time of the court, or the expensive time of the litigants and their advisers, be expended on such exercise. He considered that judicial restraint dictated that the court should confine itself to facts and findings necessary to support an order of *certiorari*, and should not go further.

16. He recalled that he had granted permission to the applicants to amend their statement of ground to comprise a further claim, relating to a further unusual circumstance in which the permission had been granted. In addition to the two reasons given earlier, the Board also accepted that some of its members involved in the decision making panel, had no recollection of any draft conditions being considered at a Board meeting prior to the impugned decision. Other panel members, including Mr. Swift and the chairman, said they did recollect such a discussion. For these reasons the judge permitted an amendment of the residents' grounds so as to include a further plea that the Board had failed adequately to

record its decision approving the conditions attached to its decision of 24th July, 2006.

17. The judgment considered legal authorities relating to the discretion of the High Court to remit an impugned decision for reconsideration. It concluded that the matter should be remitted. The judge observed that the applicants had no complaint as to the way in which the matter had been dealt with up to a specific date, viz. 3rd August, 2005, the date upon which the Board's inspector decided to send to Greenstar what is known as a "section 10 request" for further information. The residents were concerned as to the circumstances in which this request was issued, and the way in which Greenstar's reply was processed after that identified date. They raised serious objection to further steps by which the Board then processed the application. But the judge thought that it would be unjust not to remit the case for further consideration. He observed:-

> *"… to refuse to remit would be disproportionate to the rights and entitlements of Greenstar, having regard to the limited complaints made and even more limited basis upon which certiorari is being granted."*

He added:-

> *"Apart from the great expense and inconvenience which would be caused by sending the project back to the drawing board, it would also lead to an inevitable and disproportionate delay in having the matter finally decided. I am firmly of the view that this is an appropriate case in which the court ought to make an order remitting the matter to the Board. However in doing so, I propose to make a number of recommendations which ought to address the applicant's complaints, real or perceived."*

18. He continued:-

> *"The applicant contends that it has no faith in the impartiality or objectivity of the Board in respect of the development. At various stages in its affidavit evidence it has described the Board as having dealt with the matter in a peculiar, extraordinary, extremely odd or incredible way.*
>
> *I make no adjudication whatsoever on these allegations since they are not germane to what I have to decide. Even if there is a basis for this lack of faith in the Board, the plain fact is that it is the only body authorised to adjudicate on planning appeals. Consequently, even if I refuse to remit the matter and the planning process had to begin all over again, inevitably it would be the Board that will have to decide on the development. Consequently, any loss of faith that the applicant has is something about which nothing can be done since the Board is the sole body appointed by the legislature to make ultimate decisions on planning applications."*

19. But he inserted this rider:-

> *"That said, however, I propose to make a number of recommendations which, without in any way accepting the validity of any of the complaints made by the applicant,* ***will minimise the risk of further judicial review****." (emphasis added).*

The judge referred to the Board's statutory power to reopen an inspector's hearing. He added then:-

> *"It is not open to me to direct the reopening of the oral hearing. Indeed to do so would be quite an improper trespass by me upon the discretion vested in the Board. That said, I ought to record that counsel on behalf of the Board indicated that in his view this would be an entirely proper way for the Board to approach the matter.* ***He furthermore assured me that the Board would, of course, be inclined to follow any legal advice proffered to it in this regard."*** *(emphasis added).*

The judge expressed his recommendation thus:-

> *"With a view to minimising the risk of further judicial review, it would be prudent and correct for the Board to exercise this discretion and to reopen the oral hearing. That would provide a forum for all of the parties to place up-to-date information before the Inspector and also to agitate any other questions considered appropriate."*

20. He then made this important recommendation:-

> *"Counsel informs me that the Board consists of ten members. Only five have had any involvement with this application****. Again, I would think it prudent that henceforth the matter remitted to the Board ought to be dealt with as considered only by or from amongst the other five members of the Board. This suggestion is not to be taken as in any way an acceptance by me of the criticisms which have been made in the affidavits on the part of the applicant. There may or may not be substance in them. It is not necessary for me to adjudicate upon them. The suggestion that I make is to ensure that a risk of further judicial review is minimised."*** *(emphasis added.)*

This was a reference to the further issue which had been raised by the residents to which the Board had not filed replying affidavits. I reiterate that it is unnecessary for the residents' case that I adjudicate on these issues. I have not been asked to do so.

21. The court order made on foot of the judgment, recited that the court "strongly recommended" that an oral hearing be re-opened. It reiterated the recommendation that, on remittal, the issue should be dealt with by members of the Board who had not had a previous involvement in the case. In fact this did not occur, and four of the Board members who participated in the unanimous 2006 decision, then as part of a six person panel, considered and unanimously granted the 2008 application impugned in these proceedings. I turn first to the legal principles generally applicable.

Legal principles applicable to objective bias

22. Objective bias is to be distinguished from subjective bias. To establish the former, it must be shown that there existed some factor, extraneous to the decision-making process, which could give rise to a reasonable apprehension that the decision-maker might have been biased. An overt or declared bias is an example of this. This comes under the heading of pre-judgment. *O'Neill v. Beaumont Hospital Board* [1990] I.L.R.M. 419 was an illustration of this concept.

23. The test Finlay C.J. applied there was whether members of that hospital board had gone so far as to express prior views on the issue before them in a very definite fashion, or if there had been an exercise of a judgment of the *merits* (as opposed to mere form) of the contested questions of fact which would go to determine the issue. As identified in O'Neill, "pre-judgment bias" is the expression of a view on the actual facts or merits of a decision, rather than on the correctness of a procedure or approbation of the actions of a person to whom a decision was delegated. It is an objective test (see Fennelly J. in *O'Callaghan v. Mahon* [2008] 2 I.R. 514.)

24. In an impugned decision of this type, the defence of "necessity" sometimes arises. But it is not a dominant doctrine. This plea was considered by Murphy J. in *O'Neill v. Irish Hereford Breed Society Ltd.* [1992] 1 I.R. 431. He observed that pre-judgment bias could not be tolerated on the basis of necessity in circumstances where it appeared that an alternative panel of a decision-making body (the Council of that Society) could have been established for the particular purpose of making a disciplinary decision. This alternative panel could have been composed of persons other than the members of another committee, known as the "editing committee", in the Society which had already engaged in a preliminary judgment of a matter then going before the entire Council. He observed at p. 628 of the report:-

> *"Even allowing that the editing committee was carrying out a different function from that of the council it seems to me inescapable that those members of the editing committee who attended the meeting on 4th May, 1989, had pre-judged at least some of the crucial facts which fell to be decided by the council on 11th July, 1989, and had committed themselves to a view as to the consequences which should flow from their decision. On the face of it this constitutes bias consisting of pre-judgment. It was not argued that such bias would have to be tolerated on the basis of the doctrine of necessity. It does not seem that such an argument could be made as it would appear that a quorum could have been established for the purposes of rule 13 of the rules of the defendant even in the absence of the members of the council who had sat on the editing committee. On this basis it seems to me that the plaintiff's case must succeed."*

25. The nature of this objective test is perhaps best summarised in the statement of principle made by Denham J. at p. 441 in *Bula Ltd. v. Tara Mines Ltd. (No. 6)* [2000] 4 I.R. 412, referred to by Fennelly J. in *O'Callaghan v. Mahon* [2008] 2 I.R. at 514, p. 668 as being "decisive". In *Bula (No. 6)* Denham J. said:-

> *"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."*

26. In *Mahon*, Fennelly J. (for the majority of the Supreme Court) approved the test in *O'Neil*l, insofar as it was one of a hypothetical observer neither oversensitive nor careless of his own position. This was properly comprehended in the notion of "the reasonable observer". He pointed out that it was necessary that a person who apprehends there is a risk of bias invoke its existence where it is apprehended. He emphasised the objective nature of the test. It is not based on the apprehension, even reasonable apprehension of a party. It is the test that ought to be applied to the evidence in this case.

27. But one significant factor in this objective assessment must be what occurred in the 2007 judicial review, and the clear views of the judge who dealt with that earlier application. He considered the affidavits and submissions made by counsel for the residents and the Board; and thereafter made orders and recommendations to the Board as to how they should conduct their procedure. Clearly this new process on remittal was to be one of substance and not mere form. The recommendations were intended *inter alia* to avoid any perception of unfairness.

28. I do not say that the failure to follow judicial advice is *ipso facto* proof of objective bias. It is here but one aspect connected to the objective reasonableness of the well-informed observer. But the objective views of a judge in giving judgment would be difficult to ignore. The judgment was not appealed. The Board received formal notification of it on 17th April, 2007. What next occurred fell into three stages a) preliminary procedure; b) the renewed inspector's hearing; and c) the Board's reconsideration and grant.

a) The Board's procedure on remittal

29. On 10th May, 2007, Mr. Michael Donlon, a senior executive officer of the Board and a deponent in these proceedings, sent a memorandum to a number of officials. He noted that it had been decided to re-open the Inspector's oral hearing. The memorandum stated that Ms. Mary Cuneen, the inspector who had handled the file earlier would continue in this role, including conducting the re-opened hearing. He recorded that all documentation dating from 10th April, 2006, (including the Board's directions up to 21st August, 2006) had been removed from the appeal file and placed in a "legal file". He said that, on completion of all procedures in respect of the appeal file, the file of documents to go to the relevant Board members, should be sent first to the legal section prior to being sent to that deciding panel for final determination or direction. He wrote:-

> *"This is to give further consideration to the judge's recommendation in respect to which Board members may decide the appeal file."*

30. In fact, the Board does not have a legal section *per se*, but rather a number of officials who deal with legal procedural issues. One should not conclude that this particular part of the memorandum implies that the Board was either seeking or obtaining legal advice. Indeed, remarkably, there is no evidence that the Board moved to obtain legal advice at all prior to embarking on the course of action now to be described.

31. It will be noted that Kelly J. recommended that all documents which had been created after 3rd August, 2005 should be removed from the file. By court order he directed that all records and entries relating to the decision of 26th July, 2006

should be quashed without further order.

32. By way of further background, the Environmental Protection Agency waste licence issued on 8th June, 2004, was amended on 17th September, 2007. This "technical amendment" included a proposal for a different composition, formulation and construction of the landfill liner. This liner might best be seen as a multi-layered "sandwich" of vital materials designed to insulate each of the six cells or cavities from the other and from the environment. The technical aspects of the liner's construction and composition are considered later.

b) The resumed oral hearing
33. The inspector's resumed oral hearing was scheduled for 23rd October, 2007. The residents became aware only then of the proposal for a different landfill liner. The Board had been apprised of this issue earlier. Counsel for the residents applied for an adjournment in order to take instructions on the point and in order to be in a position to place questions to the expert witnesses. He complained as to the "precipitous" manner in which Greenstar had introduced this new element into the hearing.

34. The hearing ultimately took place on 8th and 9th November, 2007. A number of expert witnesses were called and cross-examined on issues which were identified in a schedule devised by the inspector. On 18th January, 2008, a water expert, retained by the Board, Mr. Gerard Keohane, furnished a report. There he recommended that certain monitoring of water conditions to be part of any permission.

35. On 2nd May, 2008, a letter went from a Board official, Ms. Muiriosa Cassells, to Greenstar's planning consultants, Ciaran O'Malley & Co. This correspondence reflects an issue which arose in correspondence on more than one occasion, that is Greenstar's concerns about the delay in the decision, the likelihood of other landfill closures, and the possibility of a shortfall in waste management capacity. Ms. Cassells pointed out that the oral hearing had been postponed twice; and that there was a backlog of cases deferred due to a high workload resulting from an unprecedented intake of appeals in recent years. She wrote that the Board regretted the delay dealing with the appeal and that it was dedicating priority status to this case and others that it had found necessary to defer. She indicated that it was anticipated that a decision would be made by the Board within a short period of receiving the Inspector's report which was due to be completed shortly. She acknowledged that this was a strategic infrastructure issue.

36. Clearly the Board was under time pressure to make a decision. This impression becomes stronger the further one analyses subsequent events. This letter was one of a number to the same effect.

37. Within a fortnight, on 12th May, 2008 the Inspector issued her report. She again recommended refusal of planning permission. She gave two reasons. The first related to visual impact; the second to the requirements for site restoration as set out in the Kilsaran order, which directed that remediation work be carried out on the site. The inspector felt the range and effect of this order was unspecific. It would have to be determined by the expert as yet not appointed. Its effect could not be predicted therefore. For this reason she considered the potential outcome of the 2004 court order as being so uncertain as to render premature the application for the development. She wrote that there was no certainty in relation to what she termed the "baseline conditions" as outlined in the environmental impact survey upon which the proposed development was predicated. The remediation works had not been determined by the expert arbitrator - the nature of the arbitrator's directions were, she wrote, unknown and unknowable.

c) The Board's consideration
38. On 17th June, 2008, Mr. John O'Connor, the Chairperson of the Board, wrote in a memorandum:-

> *"I discussed the above appeal with the deputy chairperson on 17th June, 2008, in the light of* ***the recommendation of Mr. Justice Kelly that the case be considered by a board comprised of different members from who participated in the quashed decision.*** *Having regard to the facts*
>
> *that -*
>
> *(a) the project in question is a major and significant infrastructural development which would,* ***in accordance with established practice*** *within the Board, be decided at a board meeting involving the chairperson and deputy chairperson, and,*
>
> ***(b) the exclusion of the five members who took the quashed decision would seriously weaken the level of experience and expertise that will be brought to bear on determination of the case at board level;***
>
> ***It was agreed that the most appropriate course would be to convene a meeting of all available board members, (i.e. those who participated previously and those who did not, to decide the appeal).*** *" (emphasis added).*

39. In contrast to the 2007 judicial review proceeding, neither the chairman, nor any other member of the Board, has sworn an affidavit herein. Each of the affidavits were sworn by Board officials. No notices to cross-examine were served in these proceedings.

40. There are four observations to be made here. First, clearly, the Board decided to ignore Kelly J.'s recommendation as to the composition of the deciding panel. The recommendation was intended to avoid the perception of bias. Second, the chairman and deputy chairman maintained that there was an "established practice" that they, specifically, should be involved in significant infrastructural development decisions. The necessary consequence of this was, apparently, that one, or both of them, should be involved in this decision notwithstanding the recommendations from the High Court. The rationale for this stance is not clear. Third, there is the surprising contention that the exclusion of the five members who took the quashed decision would "weaken the level of experience and expertise" available to the Board.

41. One of the exhibits admitted in this case is a letter sent by Ciarán Cuffe, T.D., to the Minister for the Environment, John Gormley, T.D., seeking the *Curriculum Vitae* of five members who were excluded from the ultimate decision. These were exhibited in these proceedings. They do not demonstrate any want of qualification on the part of the five members not so involved. To the contrary, I think they demonstrate a high level of expertise in the planning and environment area.

42. Of course, this is not to cast any reflection on the experience of the chairman and deputy chairman. The Board records show that one or both of them did in fact deal with this type of application. The outcomes varied. The chairman, prior to his appointment, was an Assistant Secretary in charge of planning and development in the Department of the Environment and Local Government. The deputy chairperson was previously a senior Executive Engineer in the Planning Department of Meath County Council. Clearly, then, both were eminently qualified in every way to deal with this issue. The Board decisions ranged from approval to refusal. But this is not the point. In fact there was no statutory rationale or objective justification for specific categories of decision being dealt with by any particular Board members. This is a matter of some importance in the light of one aspect of the defence relied on by the Board, that is to say, that its members were required, in the performance of a legal duty to deal with the remitted application.

43. The fourth point is that as of 17th June, 2008, the chairperson and deputy chairperson in fact envisaged that *all* Board members would decide the appeal. This was to include both those members who had participated previously in the decision and those who had not. This course was not in accordance with any of the 2007 court advices or observations either. As pointed out earlier, there is no evidence that the Board had taken legal advice. One might have thought especial care might have been taken in the circumstances. A statutory body entrusted with decision-making of some national importance which takes it upon itself to ignore the spirit (if not the letter of an order) of the High Court as to how it should proceed in a remittal, surely bears an additional onus to ensure that what it does is fair, in order to avoid the perception of prejudgment in appearance and reality and in accordance with law.

The 2007 recommendations as to the Board's future procedure on remittal
44. A number of the exchanges between senior counsel acting for the Board in 2007 and Kelly J. are material. These were recorded in typed attendances made by one of the residents' solicitors at that hearing. The Board did not dispute their content. In fact these notes were referred to by Counsel for both applicants and respondents in the course of submissions here.

45. In 2007 it was necessary to deal with the "cut-off date", beyond which point the applicants considered that they had been treated unfairly. The judge referred to the documents and memoranda created by the Board after that date. Paraphrasing submissions from counsel for the residents, he made an observation, in graphic terms, in reference to those documents created after 3rd August, 2005:-

> *"They should throw all of them into a bonfire as they have a poor recollection of what happened before then."*

He was referring here to the situation, where as it had emerged, some Board members said that they had little or no recollection of discussing the conditions on the earlier permission. It was asserted by others that the Board met and discussed conditions on 20th June, 2006 but there were no minutes or record of such meeting.

46. These circumstances ultimately led the judge to make the order that:-

> *"In lieu of directing that an order of certiorari do issue,* ***it is ordered*** *that the aforesaid decision dated the 24th day of July, 2006****, and all records and entries relating*** *thereto be quashed without further order." (emphasis added).*

47. The residents incurred significant experts' costs in the first oral inspectors hearing. In the renewed hearing, conducted by the inspector on foot of Kelly J.'s order, the residents incurred further significant costs, which expenses are said to have come to a fraction of their total legal costs. The residents assert that when they embarked on the second oral hearing, they did so on the understanding that the advice, recommendations and orders of the High Court would be followed; that the matter would be heard by members of the Board who had not previously dealt with the matter, and that the matter would be considered afresh. They acted on the understanding that documents and records on file, including the final decision, would not be made available to the newly constituted Board. All of these, they contend, were necessary in order to ensure a fair hearing and to remove any perception of partiality.

48. They say now that if they had been aware that the same members of the Board who had considered the matter were again the decision-makers, they would have had recourse to the courts; they add that if they had been aware that the former planning permission would be used as a template for the permission now impugned, they would not have participated in the second oral hearing at all.

Issues arising from the general principles identified
49. Derived from the authorities, a number of questions then arise. These include:-

(i) To what extent did the Board actually follow the advice in the judgment and order?

(ii) Did some or all of the same Board members who made the 2006 decision make the 2008 decision?

(iii) Did the impugned decision relate to the same issues?

(iv) Was the 2008 decision effectively the same decision made by some or all of the same persons who made the 2006 decision?

(v) Was the 2008 decision a purely "formal" one, or did it involve a consideration of the merits and demerits of the proposal and a furnishing of a reasoned determination?

(vi) Was there a legal or objective rationale for the Board's procedure?

(vii) If there was apparent objective bias can the Board avail of a defence of legal duty?

The panel members who considered the decisions

50. The clear, uncontroverted evidence discloses that the members of the Board, who considered the appeal in 2006, were (i) the Chairperson, Mr. John O'Connor, (ii) Deputy Chairperson, Mr. B. Hunt, and Board members, (iii) Mr. B. Swift, (iv) Mr. K. Kent and (v) Ms. M. Bryan. One might have thought all these Board members might have felt precluded from dealing with the 2008 decision upon remittal in the light of the observations in and intent of the 2007 judgment. The Board did not instruct its counsel to make any submission then of "necessity" or "legal duty", still less any "established practice" in relation to specific members of the Board having a particular expertise, experience, or responsibility. In fact, the judge specifically noted that there were ten members of the Board. The Board did not instruct its counsel to make any legal point about qualifications, or the Board's practice in relation to strategic infrastructure projects.

51. As matters evolved, the full Board did not in fact consider the 2008 application. It was decided to compose a Board panel of six members. But these were not all members who had been envisaged as coming to the matter 'afresh'. In fact, four out of the six selected had participated in and made the first, 2006, decision. The members of the Board on 24th July, 2008, who considered this second determination, were the (i) Chairperson, Mr. John O'Connor, (ii) the Deputy Chairperson, Mr. Brian Hunt, (iii) Mr. K. Kent, (iv) Ms. M. Bryan, (all of whom participated in the 2006 decision); and two additional members who had not, Ms. M. Byrne and Mr. T. O'Connor. The decision was unanimous.

52. Mr. Donlon avers that a different Board member, Ms. M. Byrne, was assigned to be the "presenting member", that is a member charged with putting before the Board the circumstances and relevant facts relating to the application. He also deposed that Mr. Swift, the presenting member on the first occasion the appeal came before the Board and whose procedure had been put in question previously was "not available" for the 2008 decision.

Circumstances of duty?
53. A person who is subject to a disqualification or preclusion in law may be required to decide a matter if there is no other competent tribunal or if it cannot be formed without that person. In such circumstances the doctrine of necessity is applied in order to prevent a failure in decision-making.

54. If it is possible to constitute a different panel or tribunal unaffected by interests of bias no difficulty arises. By way of extreme illustration a case is reported as having come before the Supreme Court of Texas involving an organisation called the "Woodmen of the World" of which all the judges of the court were members. Hence the entire court was deemed to be disqualified from presiding over a case involving that group. In order to meet the situation, the governor of Texas appointed a special court composed of three women (*Johnson v. Darr* 144 Tex. 516 272 S.W. 1098 [1925]) (see Richard E. Flamm *'Judicial Disqualification' 2nd* Ed., (Banks & Jordan Law Publishing Co., 2007 202 N 33 p. 581)).

55. The Board's minutes do not record whether the panel read, or were referred to the Chairman's memorandum of 17th June, 2008. They do not say whether the panel members were shown Kelly J's judgment or order, or whether, as a panel they considered the question of objective bias.

56. In fact there were alternative Board members available. It is said one member of the Board who was not assigned might have faced a potential conflict of interest in the light of previous consultancy work. But there is no indication that he was asked to engage in this decision, still less that he recused himself.

57. A further Board member, Ms. Mary McMahon, was apparently available on the day of the decision, 22nd July, 2008 and signed directions in other decisions. In 2007 the court was told that, for a decision of this nature, the quorum was three Board members. There is no evidence before me that a different but quorate panel of the ten member Board could not have been brought together to consider this issue afresh.

58. Mr. Christopher Clarke, a Board official and a deponent here, outlined the extent of Ms. McMahon's previous involvement in the 2006 decision, which apparently led her to recuse herself from the 2008 consideration. He averred:-

> *"I understand she had attended the oral hearing which preceded the first decision and that she did so in a personal capacity prior to her appointment as a Board member in order to refresh her knowledge of oral hearing procedures. Accordingly,* ***having a prior knowledge of the case before she became a Board member, it was entirely appropriate that she should not participate in the determination of the appeal."***

I find this basis for recusal irreconcilable with the position adopted by the four Board members who, once having made the decision in 2006, chose or were assigned to make it again in 2008. If this cautionary precept had been appropriate for Ms. McMahon, surely *a fortiori* it was applicable to the four members just identified? The logic of the Board's reasoning here is unfathomable.

Documentation from the 2006 consideration before the Board?
59. The Board minutes record that it considered the Inspector's report of 12th May, 2008, as well as all other relevant documentation, including the inspector's previous report of 9th June, 2006, and *all the documents on the file from the receipt of the appeal on 27th October, 2004. Prima facie* one can understand the residents concerns with this averment. What precisely these records were is unclear. One would have expected that every step would have been taken to ensure that there had been full compliance with the spirit and letter of Kelly J.'s order. If it transpired that the "documents" included all documents or memoranda made by the Board after 3rd August, 2005 such would undoubtedly have been a serious breach of the intent of the 2007 judgment.

60. It is necessary here to deal with another aspect of Mr. Clarke's affidavit on behalf of the Board, where he actually referred in specific terms to the recommendation as to who should (or should not) consider the renewed decision. There was therefore, no room for misunderstanding or misapprehension. The Board as a statutory body, as well as its chairman and his deputy, fully understood the nature of the recommendation which had been made by the judge in 2007. It chose not to follow it.

61. Mr. Clarke next deposed that there was *no order* requiring that *all* documents, records and entries relating to the first decision be quashed as alleged in an affidavit sworn on behalf of the residents by a Mr. Patrick Higgins. He expressed himself in this way:-

> *"In any case there was no recommendation in the judgment or order that the documentation in question should be*

removed."

This was true in the strictest sense, but the material after 3rd August 2005, had certainly been the subject of a judicial observation which albeit paraphrasing counsel's submission would not be easily forgotten; that it be "*placed on a bonfire".* But Mr. Clarke then deposes that:-

> "***The Board*** *did not, at any stage, have before it, or have regard to the conditions attached to the First Decision in deciding the appeal." (emphasis added).*

But this carefully phrased statement did not apply to the inspector. Mr. Clarke says the inspector again recommended refusal, and had therefore not included any 'draft conditions' on the Board members' file. This does not answer the question as to what, precisely, the Board members did have before them, what they were told, or what individual members of the Board knew of their own knowledge. They have not sworn affidavits.

62. However, *per contra* the approach taken in *Beaumont*, I do not think this is a situation where I should make inferences or resolve ambiguity in favour of the residents. The evidence is so unclear that I do not feel it would be just to the Board to draw such an adverse inference. The testimony on the point is equivocal, but insufficient to be probative. What actually occurred is now outlined.

Board meetings in July 2008
63. The Board's direction of 22nd July 2008, notes that it had decided unanimously to grant permission and gave its reasons for so doing. It referred the file back to the inspector to draft appropriate conditions which were to be put before a further meeting for approval. On this Mr. Clarke avers:-

"The inspector was of course familiar with the conditions which she had drafted previously and she ***may*** have referred back to them." (emphasis added).

In the midst of a great deal of other hearsay evidence, one might have thought this would not have been a difficult point to check with the inspector. She could have been a deponent. Mr. Clarke deposed that many conditions are applicable to most waste facilities and are relatively standardised. He said that at a further meeting on 24th July 2008, the conditions as drafted by the inspector came back to the Board. In its direction of the same date the Board added one condition, deleted two draft conditions and made certain minor amendments to others.

64. I think that here, the Board seeks to make a distinction between the first meeting of 22nd July, 2008, where the members apparently did not have before them the conditions relating to the first 2006 decision, and the meeting of 24th July, 2008 which actually considered the draft conditions, by then drafted by the inspector who may have referred back to "the 2006 decision". An affidavit by the inspector again could have dealt conclusively with what happened, one way or the other. So too could affidavits from Board members.

Recommended conditions considered and rejected
65. In 2008 one reason for the inspector's recommended refusal was by reason of the undue proximity of dwellings to the landfill. Mr. Donlon deposes the Board fully considered this point in its direction of 22nd July, 2008. He states that in deciding not to accept the inspector's recommendation to refuse permission, the Board had regard to the waste licence granted by the EPA which included conditions requiring a minimum distance of 100 metres between the landfill footprint and the dwelling house, other than for inert waste. This approach is considered in Section III of this judgment.

66. He states that the inspector provided draft conditions to the Board to give effect to these concerns. The majority of these, he says, were accepted by the Board, save those in relation to the monitoring of water as recommended by the inspector. In relation to the implications of the development, and, in particular, the proposed use of a "Bentonite" liner for the Usk marshes, he said the Board took the view that these were matters governed by the EPA licence. (Bentonite is a substance used as a sealant which rapidly expands to fifteen times its volume on contact with water.) This issue arises in Section V of the judgment.

67. The Board in its direction of 24th July, 2008, stated that it had decided to omit certain of the inspector's recommended conditions, as it considered that these matters were addressed in the conditions attached to the EPA licence. These dealt with surface water and ground water management, respectively. Mr. Donlon states the Board omitted the inspector's other recommended conditions for that reason. These directions also form part of the residents' case as outlined later in Sections III and V of the judgment.

68. On 24th July, 2008, the Board panel considered the file. It approved the inspector's draft conditions, subject to amendments which were noted in manuscript on a copy of her draft Schedule. These were attached to the direction. The Board panel added a condition, set out in the direction, in relation to the origin of the waste to be accepted and the records required in relation to the waste received.

The same substantive permission?
69. The Board denies that the planning permission of 30th July was granted in identical form to that previously granted. It claims that there were "material differences" between the two permissions, although it accepts the conclusion was substantially the same as that of 2006. Mr. Donlon states that this is not surprising given that both decisions were positive decisions granting planning permission for the same landfill development, and the conditions in respect of each were drafted by the same inspector. Both he and Mr. Clarke say that by their nature, landfill developments will tend to require similar matters to be regulated by condition, and therefore, the conditions attaching to any such development, if permitted, would tend to be in similar terms. One must then consider in detail the Board's decision in order to determine whether these distinctions establish any demonstrable difference.

Analysis of the permission
70. Such an analysis starts with the obvious: what was before the Board in 2008 was undoubtedly the same general issue as arose in 2006. The same application had, after all, been remitted by the court in 2007. The two determinations are respectively of ten and eleven pages. The 2008 decision is amended to refer more specifically to s. 54(3) of the Waste Management Act 1996 (as originally enacted). There is a reference in the second condition to the proximity principle, an issue dealt with in 2008, but not 2006. Condition 5 in the 2008 decision contains an amendment by the addition of certain words referring to the role of the Environmental Protection Agency. The phraseology in the preponderance of the twenty

five conditions, is absolutely identical to that in the 2006 decision. In others, it is so similar as to make no difference. There are occasional very small stylistic distinctions, such as the addition of commas, or the substitution of letters or Roman numerals, in indenting sub-paragraphs which themselves are in the same sequence.

71. An objective observer would have little difficulty in seeing the symbiotic relationship between the two. The proposition that they are truly distinct and different further stretches credibility when one observes that the general sequence of conditions is the same. Of course there are some distinguishing features. There is one entirely new condition. But it is impossible to credit that the same overall phraseology over eleven closely printed A4 pages could be coincidental. The residents rely strongly on all these similarities. They say the matter speaks for itself. This proposition might have been countered by affidavit. There was no such evidence. The case is to be decided by reasonable inference based on the balance of probabilities and on the weight of the admissible evidence. Applying that standard, I am constrained to conclude that the 2006 decision was used as a template for that made in 2008.

72. The objective evidence demonstrates too, that the decision made by the Board was one of substance. It was not a mere matter of procedure or form. It was on the same application, ultimately returned to the Board for its approval. Four members of the panel who considered the matter in 2006 were the same as those in 2008. The decision to deploy those four members appears to have been a conscious one. It is true that the Board had to consider some additional material arising from the inspector's report of 2007. But this material related largely to technical amendments to the waste licence. It did not change the nature or identity of the permission.

73. In summary, there were therefore very substantial departures from the 2007 judgment, the very object of which was to avoid the appearance of bias on remittal. These departures, and what has been described, taken together, allow only for the conclusion, that a reasonable objective observer, would apprehend that there had not been an impartial decision making process.

No opportunity to invoke bias

74. The residents were never made aware of the composition of the panel of the Board. They were never placed in a position where they could invoke bias or raise any objection. Had the Board obtained the expert legal advice which was available to it in defence of both of these review hearings one could venture to suggest none of this would have occurred. But as to the merits of the case, I regret I must find the attempted explanations and rationalisations by the Board officials deeply unconvincing. In my judgment objective bias arose by reason of the matters identified. An objective observer could only conclude that four of the six panel members had substantively determined the issue previously. Thus having regard to all the outlined circumstances they had prejudged the issue. But can the procedures which were adopted be nonetheless legally justified?

The Board's defence of legal duty

75. The defence advanced by the Board essentially relies on the assertion of legal duty. But this defence is, in fact, a sub-species of the principle of necessity. It may be a defence to objective bias. It can arise in two ways: first if the person who makes the decision is biased but cannot effectively be replaced, *e.g.* if a quorum cannot be formed without him; and second, where an administrative structure makes it inevitable that there is an appearance of bias. But do any of these considerations arise in the instant case? It has not been shown that they do. The quorum was three members. There was no objective legal reason why the chairman or deputy chairman, or for that matter, any of the other persons who made the first decision, could not have been replaced. The Board's administrative structure did not make it inevitable that there might even be an appearance of bias. The judicial recommendations of 2007 were specifically framed with this in mind. It is clear that a quorate panel of the Board could have been assembled, and considered the matter de novo, but this was not done. If there had been a difficulty in this the parties might have been informed to ascertain their position. The Board never raised the point before. There is ample authority as to how, in applying or avoiding the doctrine of necessity a decision making body may remove that part of it which is "infected" with bias, for example by the recusal of those members of a committee who have made a prior determination which might bear on an impugned decision. But these four panel members did not do so or take any steps to avoid the difficulty.

76. An interesting issue may arise in another case as to whether or not the doctrine of necessity is now possible to assert in the face of a "right" to an independent impartial tribunal under article 6(1) of the European Convention on Human Rights. I will express no view on this point.

The legal authorities relied on by the Board

77. The Board relied on further legal authorities in defence of the allegation of objective bias. These are *D.D v. Gibbons & Anor.* [2006] 3 I.R. 17; *Coughlan v. Patwell* [1993] 1 I.R. 31 and from British Columbia, *Bennett & Ors. v. The Superintendent of Brokers & the British Columbia Securities Commission* [1994] CAN. L II 912 (BCCA), 1994, 30 Admin. Law Review, (2nd) 283.

78. *D.D* was a case where the applicant objected to a district judge hearing an application for a full care order in respect of a child, the applicant's daughter, where that judge had granted an interim emergency care order, and where he had previously simply varied the applicant's access to her son by way of a previous order. On the second day of hearing the applicant requested that the judge recuse himself.

79. In the High Court on review, Quirke J. observed that district judges frequently heard and determined interim applications where they must later make final determinations. He found that the respondents' making of the interim order unfavourable to the interests of the applicant would not cause an objective or informed person in the position of that party to apprehend that the judge who had made that order would not bring an impartial mind to bear on the final determination on a similar issue between the parties.

80. None of this is analogous to the instant case. What is at stake here is not a relationship, but a near identity of what was considered and decided. The same fundamental issue had been determined before by four of the six decision-makers. There was no "legal duty" such as might arise with a District Judge assigned to an area, being constrained to hear a case on remittal. The applicant in *D.D* was late in making the application and relied on the point only on the second date of the hearing when she could reasonably have raised that point at the outset. Such an opportunity never arose here at all.

81. *Coughlan* was a case where the applicant appeared in the district court before the respondent district judge on foot of summonses. He alleged that the particulars on the summons regarding his identity had been wrongfully obtained in deliberate and conscious breach of his constitutional rights. The district judge refused him an opportunity to argue the

legality of the summons and duly convicted him. The conviction was quashed. However the matter was remitted back to the district judge, who convicted the applicant in circumstances where that judge's previous orders were null and void. This remittal was to consider the case in accordance with law and the constitutional rights of the applicant. The judge on remittal was undoubtedly engaged in the performance of a legal duty to hear the case in accordance with law. He was assigned to do so. He had made no decision of substance in the sense that would give rise to prejudgment. The issue of objective bias does not appear to have been considered in any significant way in that authority.

82. I do not consider *Bennett* can be considered either a persuasive authority or a true objective bias case by reference to the Irish authorities. The Bennetts were insurance brokers who allegedly had engaged in improper dealings of shares. Shares had been dealt with by the Bennetts on the basis of insider information provided to them by another. The Securities Commission had heard little of the evidence in relation to the complaint.

83. A number of preliminary proceedings had however been brought by the applicants. One of those involved the disqualification of one of the three Commissioners of the British Columbia Securities Commission.

84. After a delay of eighteen months a panel of the commissioners assembled itself. The applicant asked that the new four-person panel then assembled disqualify two of its members, these being the remaining two members of the original panel. It was contended that these commissioners would be "biased" by reason of having participated in deciding *preliminary* applications unsuccessfully made by the applicants to the original panel which the applicants wished to renew before the reconstituted panel. A further reason why the two commissioners' impartiality was impugned was that they might appear to be "tainted" through association with the partiality apprehended on the part of the three disqualified commissioners. The two commissioners challenged had also taken part in those preliminary determinations. The situation therefore was that two of the remaining commissioners might be asked to reconsider procedural issues which they had already decided in a preliminary way. Taylor J. considered the circumstances where judges and members of statutory tribunals are required from time to time to reconsider the previous decisions with impartiality. He said:-

> *"Other things apart, it is, of course, reasonable to apprehend that a decision-maker presented for a second time with the same question on the same evidence and argument, will be likely to decide that question in the same way.*
>
> *But does this have anything to do with bias?"*

The judge answered the question in this way:-

> *"The answer surely must be that if the decision maker has decided the matter properly in the first place, that is to say free from extraneous or other improper influence…and in light of the previous decision of this court there can now be no suggestion here to the contrary… then the fact that the second decision turns out to be the same as the first will show no more than that the decision maker continues to take the same view, as before, of the law and evidence. That surely has nothing to do with bias. There may well be an apprehension of consistency of judgment when the same matter is raised for the second time before a judicial or quasi judicial decision maker, and the party against whose interest the first decision went will understandably prefer for that reason that the matter be considered the second time.*
>
> *But surely it is impossible that a reasonable apprehension of consistency in judgment on the part of a decision maker in dealing with the same matter a second time can be equated with reasonable apprehension of bias. The first is an apprehension that the decision maker will again see the law and evidence in the same way as on a previous occasion; the second is an apprehension that the decision maker will ignore law or evidence and decide instead on the basis of extrinsic and improper considerations."*

85. I would make the following observations on these judicial views. The prior decisions in *Bennett* were preliminary not determinative. The allegation of "taint by association" was by any standards, unconvincing. The position which arose was directly one of legal duty giving rise to necessity in the real sense. Furthermore I do not consider that the test in *Bennett* is in accordance with Irish law on objective bias as outlined earlier. Taylor J. said that the situation of the commissioners seemed analogous to a judge presiding at a second trial after the first had been concluded at an early stage by a declaration of mistrial having nothing to do with the judge's conduct. But that is nothing like the situation here.

86. The position the Board found itself in was that it had appeared before the High Court, its decision having been impugned. It raised no objection to the suggestion that the matter should go back to be considered by a different panel. There was no duty upon any particular member of the Board to deal with the issue. To the contrary, there was a recommendation from an unimpeachably objective source that they should not. Yet, nonetheless, four of the six first decision-makers participated in the second decision.

87. *Bennett* is in my view to be seen as an extreme case of legal duty. It is certainly not cited in the text books as being the leading authority in Canada on objective bias (see *Committee for Justice and Liberty v. National Energy Board* [1978] 1 S.C.R. 369 at 394-395). Indeed, none of the cases cited in *De Smith's Judicial Review* (6th ed.) as being Canadian authorities on the issue of objective bias are even referred to in *Bennett*, perhaps demonstrating the risks of what has been termed "judicial cosmopolitanism". Bennett's reliance on duty did not address the question of whether a decision could have been made by an alternate panel. The case was not cited in *O'Callaghan v. Mahon* [2008] 2 I.R. 514, in which a number of Canadian Supreme Court authorities were referred to.

88. More fundamentally, were there any doubt on the question, it is quite clear that as a matter of Irish law a finding of objective bias can be made even against a judge in the performance of his or her legal and constitutional duty *qua* judge (*Dublin Wellwoman Centre Ltd. v. Ireland* [1995] 1 I.L.R.M. 408). The "taint" there was not personal prejudgment, but the perception of it by dint of the judge's membership of a council which had expressed views on a sensitive social and moral issue. The circumstances there were far more remote than in the instant case, yet the Supreme Court held the judge should have recused herself so that there would be no appearance of bias. As explained earlier it is not dominant doctrine and can never supplant a reasonable fear of bias properly based on evidence and reasonable inference.

89. For the reasons outlined, the evidence establishes objective bias on the part of four out of the six decision-makers by way of prejudgment of the same issue. It has not been justified by way of legal defence. I must therefore find that the residents are entitled to have the decision quashed on this ground. Without prejudice to this conclusion, I further consider other issues as they arise in Parts II, III and V below.

II The section 160 challenge

90. As a second aspect of their claim, the residents assert that the Board failed to have any adequate regard to the Kilsaran order made by the High Court, by Quirke J. under s. 160 of the Planning and Development Act 2000. The broad terms of that order have been identified earlier. Its effect was to direct the full restoration of the site to a condition suitable for an agricultural after use. The Board found in its 2008 decision that this was "a legal matter". By implication therefore it held this not a planning consideration within its remit. Given the terms of the 2004 order, the issue arises as to the adequacy of the reasons the Board gave for its decision not to accept the inspector's observation that the application was premature. Was the determination that this was a "legal matter" an adequate reason?

91. The High Court order in the Kilsaran proceedings provided that an expert was to be appointed to prepare a restoration scheme to be implemented by that company. No terms of reference were fixed other than that the lands comprising the site of the proposed development were to be restored to a condition where they would be suitable for agriculture after use. It is very easy to envisage that compliance with the order in an old quarry could involve quite radical remediation. Even now, in 2009, no scheme has yet been prepared, still less implemented for this purpose. Before the inspector, Greenstar accepted the order was not negotiable and would need to be fully implemented before development of the site could commence. The Board concluded on this point:-

> *"With regard to the Inspector's recommended second reason for refusal (prematurity in advance of compliance associated with High Court order in relation to restoration), the Board considered that this is a legal matter. This conclusion was a repetition of the conclusion reached in 2006 on the same point."*

92. This point received quite extensive consideration in both the inspector's reports. In 2006, she specifically recited the terms of the Kilsaran order. She observed that the lands the subject matter of that court order formed a significant portion of the appeal site area. In 2008 she wrote that the terms of the order and its potential consequences:-

> *"…. go (to) the very heart of the proposed development in that:*
>
> *(a) Precedence must be given to site restoration in advance of any development works taking place there;*
>
> *(b) The development, therefore, proposed in the current application can only be effected by either removal of those restoration materials from site or the retention of them on site for use in the proposed developments (i.e. provision of the 1 metre clay liner);*
>
> *(c) If the restoration material is to be removed from the site, I consider that planning permission would first be required for such works;*
>
> *(d) In the event that planning permission were granted for removal of restoration material there is not any certainty that the exact baseline conditions described in the EIS and associated supplementary information would ultimately obtain;*
>
> *(e) If the restoration materials were to remain on site for use in landfill construction there would potentially be significant variations to the baseline conditions described in the current EIS, and associated supplementary information;*
>
> *(f) Furthermore, in the event of restoration materials on site not being suitable for use in landfill construction, the developer has suggested that the 3 metre deep layer of subsoil and the 1 metre deep compacted soil liner could be replaced by bentonite enhanced sand (BES); if this were to be the case, then in the case of the 1 metre clay liner this again would result in a variation to the predicted traffic impacts given that the BES would require to be imported onto the site."*

93. The inspector fairly noted that at the renewed oral hearing, Greenstar were asked to evaluate the impacts of post-EIS quarrying on the availability of material reserves on the site. They stated that Kilsaran had removed material which was proposed for use with the "bentonite" in the landfill liner construction, but that there were other ways of providing for the landfill liner by bringing material onto the site. The inspector observed that even prior to there being any restoration works; post-EIS quarrying might have undermined the balance of available materials on the site, with ultimate repercussions for potential traffic impacts. The original EIS dates as far back as 2001. In an observation which mirrors the inspectors, the Board considered that the works associated with the provision of the three metre deep subsoil layer (required under s. 3.13.1 of the EPA licence) was not a matter for consideration by it despite its traffic impacts, as it was a requirement attached to the waste license which post-dated the EIS and planning application. The important issue of the mandatory interaction between the Board and the Agency is considered in Section V. of the judgment.

94. In 2006, the inspector wrote that Greenstar had submitted to her then; (i) that the development to which the application related was the proposal to develop an engineered landfill at Usk Quarry; (ii) that the subject matter and the Kilsaran order were entirely different, and (iii) that in those circumstances the provisions of the Kilsaran order was not material and outside the Board's jurisdiction.

95. The inspector observed that she was unable to concur with any of this, that restoration of a significant portion of the appeal site to a condition suitable for agricultural use, *"placed a constraint on the proposed development of the overall site as a landfill facility as described in the EIS"*. She referred to the fact that planning permission might be required to remove the restoration materials off site to attain the baseline conditions described in the EIS. Alternatively, should the developer choose to retain the restoration materials on site for use in the landfill construction, she considered that this would require substantive reworking of the EIS or the provision of a new EIS to reflect significant changes likely in the baseline conditions.

96. On this basis she concluded that the proposed development was premature in advance of the implementation of the Kilsaran High Court order and a subsequent demonstration by the developer that the development as described in the EIS could be carried out by reference to the baseline conditions and associated impacts described therein.

97. In her 2008 report, the inspector referred back to what she had said in 2006. She reiterated that the reason which she had given was still applicable, as even updated information provided by the third party appellants at the reconvened hearing stated that the arbitrator had still not made any recommendations with regard to site restoration.

98. Mr. Michael Donlon, in his affidavit on behalf of the Board simply states that:-

> *"The Board took a different view, noting that it considered this as a legal matter" and by implication not a planning matter.*

99. No other rationale for this view is given, in what can only be seen as an issue of fundamental importance. The inspector was undoubtedly correct: the issue went to the very heart of the development. One can only comment that the omission to give any additional reason is deeply surprising. What did this mean in terms of compliance with the 2004 court order? It was totally unclear. The inspector's views were plainly expressed. The compliance point may have had a *legal aspect*; but to dismiss the order in its effect as purely "a legal matter" was surely wrong. Even if it is not wrong, it involves a doubtful use of the term "legal". The inspector's reasons for recommending refusal were plainly based on substantive *planning* considerations. Even if the Board had legitimately taken a different view, surely it was necessary to give adequate reasons for that view in so fundamental a matter.

The duty to give adequate reasons

100. In *Mulholland v. An Bord Pleanála (No. 2)* [2006] 1 I.R. 453; [2006] 1 I.L.R.M. 287, Kelly J. summarised the test to be applied to assess whether a statement of reasons and (in that case) of considerations was adequate as follows:-

> *"[The statement…] must therefore be sufficient to:*
>
> *(1) give 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 his mind adequately to the issues which it has considered or is obliged to consider, and*
>
> *(4) enable the courts to renew the decision."*

101. In *Weston v. An Bord Pleanála & Ors* (Unreported, High Court, MacMenamin J., 14th March, 2008) as well as citing Mulholland, I referred to the speech of Lord Browne of Eaton-Under-Heywood in *South Bucks District Council & Anor v. Porter (No.2)* [2004] 1 W.L.R., in the context of the obligation to provide reasons for a condition. He observed:-

> *"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues' disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example by misunderstanding some relevant policy or some other important matter, or by failing to reach a rational decision on relevant grounds. But such adverse influence will not readily be drawn." (Emphasis added)*

102. Here it is necessary to reiterate that the application made on 10th December, 2001, predates the coming into effect of the Planning and Development Act of 2000. It falls to be determined under the Local Government and Development Act 1963. While the provisions of s. 34(10) of the Act of 2000 do not govern this application, therefore, the respondent was nonetheless under a duty to give adequate reasons in respect of its decision (see *Mulholland*, and *Weston*; also *Talbot v. An Bord Pleanála* (Supreme Court, 23rd July, 2007) and *O'Donoghue v. An Bord Pleanála* [1991] I.L.R.M. 750). *O'Donoghue* was a decision made under the Act of 1963. Murphy J. observed that what was required was not a "discursive judgment". But it must be sufficient to make clear what the decision-maker had in mind and to allow a review court to consider its validity.

103. The inspector clearly indicated that the environmental baseline of the site would be altered by the restoration works. There was surely much force in this observation. Sheer common sense would dictate that this would present a real problem in respect of the proposed development. No restoration had taken place. There was no description of the proposed restoration of the site. Thus it would be impossible to assess the environmental impacts of the proposed development. The consequence of this would be to give rise to real uncertainty and to create a problem environmentally. It is not necessary for this Court to conclude whether these views were definitive but to ignore them required justification.

104. The 2004 court order remained in force. But in fact, in one sense there were in 2008 no "legal issues" awaiting resolution. The permission speaks to the present and the future. The High Court order made by Quirke J. was "not negotiable". It was not suggested at any stage by any party that this order might be vacated, could be ignored or that it was not going to be brought into effect. Given this "precedence" as acknowledged by the inspector, there were no legal matters remaining but rather a definite environmental and planning consequence arising from the restoration of the site, by reason of necessary compliance with the court order.

105. It was unclear too whether the restoration project, when finalised by the independent expert appointed by the court would require the importation on site of large quantities of material, whether simply bentonite itself or "BES" (bentonite enhanced soil) to give effect to the restoration. It was unclear whether material would have to be removed from the

quarry in order to give effect to the restoration proposals. Thus the entire face of the site as described in the planning process might be subject to irrevocable alteration by restoration work. The implications and environmental impacts of this restoration work were unclear and remain so.

106. *Prima facie* there would appear to be irreconcilable inconsistency between any full and timely compliance with the terms of the 2004 court order on the one hand, and works on site for the development which might involve the production and processing of Bentonite Enhanced Soil, necessary for landfill liner in the waste facility. It is unclear as to how this work could be sequenced. It is unclear how the entire waste facility permission was to be reconcilable with the section 160 order. It is hard to ignore the possibility that the s. 160 order might be put in a position subservient to the progression of the development in accordance with the permission. Even if it was a "legal matter" the Board had a duty to address it by giving reasons for its decision.

107. In fact I do not think that this issue was "a legal matter" (even accepting this odd terminology). It was essentially a purely planning matter which arose from a legal decision of the High Court. To reconfigure the issue to avoid planning consequences was in my view, a failure on the part of the Board to address itself to the necessity to give adequate reasons. Adequate reasons were particularly required here in the light of the planning effect of any compliance with the court order made five-and-a-half years ago.

108. For these reasons I consider the residents are entitled to judicial review on this ground. Without prejudice to this conclusion I now turn to further issues raised.

III. Failure to impose conditions with regard to environmental mitigation measures – noise, dust and fine particulate matter

109. Part III deals with relevant matters allegedly ignored in the permission. The two matters in question relate to the environmental impact first, of noise, dust and fine particulate matter on the air, and secondly, of water from the facility on surrounding groundwater including at the Usk marshes, a potential Natural Heritage Area (pNHA). The issues which arise may be considered partly as "free standing" points on which the residents seek relief. But, as already explained in Part II, the self-denying ordinance which the Board imposed on itself here, is a harbinger of a recurrent theme in this judgment, that is whether the Board and the E.P.A. interacted in their deliberations so as to ensure that there was a full environmental assessment and therefore lawful planning consent in compliance with the Environmental Impact Directives. The first issue, that *of noise, dust and fine particulate matter*, is sufficiently clear to be considered on its own terms. But it cannot be divorced from the detailed consideration of the EIA Directive in Part V herein. The second aspect, that of risks to *water* in the Usk marshes is more conveniently dealt with in Part V of this judgment. As will be seen, I do not consider the evidence on the latter issue to be sufficiently clear in itself as to warrant judicial review. The evidence is not such as to show that a fundamentally relevant matter had been ignored in the permission on that question.

110. At the reconvened hearing which took place in October/November 2007, the Board's inspector heard evidence in relation to noise and dust mitigation measures which were to be employed by the developer in the construction of the landfill liner. The production or use of Bentonite Enhanced Soil would undoubtedly create noise, dust or fine particulate matter on site to varying degrees. Whatever the extent of this, the matter was of real environmental importance in the construction process of the landfill liner, described in more detail in Section V of the judgment. This testimony was further augmented in cross-examination of the Greenstar experts at the 2007 hearing. This evidence appeared to have satisfied the inspector that the environmental impact survey (E.I.S.) had been adequately updated which in turn informed her recommendation. These issues were particularly important not only for the residents collectively but also in particular for the Corrigan family, on the question of dust and fine particulate matter.

111. The Corrigans live 31.5 metres from the landfill footprint. It is not by any standards a substantial distance. A number of the members of the family have severe respiratory health concerns. Mr. Joe Corrigan has one functioning lung. The Corrigan children are asthmatic. Sharon Corrigan, a daughter, is a permanent carer for her mother who has chronic respiratory disease requiring the use of bottled oxygen. She resides daily in the Corrigan house and nightly in her own house, some 150 metres from the proposed site. She is a member of the applicant company. They and the residents generally clearly had a substantial interest in the issue of this development. I consider that a member of the Corrigan family as a member of the applicant company is entitled to assert this aspect of their interest through the applicant company. One of the points considered at the inspector's report in October/November, 2007 was in relation to the mitigation measures concerning the dust effect to be employed by the developer in the construction of the landfill liner. It was plainly a matter of great significance to any member of this family as the nearest neighbours to the site. It undoubtedly constitutes a legitimate, indeed a "substantial interest", and is sufficient to satisfy any *locus standi* test.

112. The second schedule to the permission granted by the Board in 2008 contained conditions. It made reference to certain dates upon which information had been received from the Board. The permission required that the development should be carried out in conformity with the particulars received on those specific dates. But surprisingly, those identified did not include the date of the reconvened oral hearing in November, 2007, where the particular issue of noise and dust aspects of the B.E.S. production was discussed exhaustively. The explanation for this was that the Board felt that this was a matter for the Environmental Protection Agency, in the performance of the latter's statutory role to prevent environmental pollution from the "activity" that is, the operation of the facility.

113. The residents submit that the Board failed to address itself to this material consideration and that consequently the decision itself was thereby made without jurisdiction.

114. Where a decision-maker fails to have regard to a relevant consideration in a reviewed decision such error may be one which will go to jurisdiction. It may thus render the decision "irrational" in that sense.

115. By way of illustration, in *White v. Dublin City Council* [2004] 1 I.R. 536, in the Supreme Court, Fennelly J. considered a planning inspector's failure to require a notice party in a development to advertise important modified plans as "irrational" in that it did not take into account the likelihood that members of the public might wish to object. The judge observed of this failure:-

> *"This was no doubt an understandable oversight on the part of a person exercising an expert planning function. Nonetheless I am satisfied given the very particular circumstances of this case that he did not give proper consideration to the radical effect of the required modification (to an amended application). In that sense it was*

unreasonable and irrational."

116. However the gravity of the alleged want of jurisdiction must be measured by reference to its planning context. It must be seen in the light of clear cogent evidence which establishes irrationality in the particular sense used in *White*. It is not to be seen as a surrogate merits-based review. The function of the court is to ensure legality is observed, not to place itself in the position of the decision-maker.

117. One of the criteria in *White*, now applied here, is the effect of the omission on the rights of persons who are affected by the impugned decision. In that case, the inspector's failure was an omission to advert to the rights of one neighbour to object to the modification of a planning permission which were significant enough to require the publication of a new public notice directing attention to modified plans. Here the Corrigans, particularly and the residents generally, were affected by the Board's failure to address itself appropriately to its own jurisdictional remit and to ensure that highly relevant planning matters such as noise and dust were the subject of conditions in the permission granted.

118. In her 2008 report, the inspector said:-

> *"The proposed development as set out in the EIS and associated and updated supplementary plans, drawings and documentation will be premature in advance of identification of compliance work associated with that order and subsequent uncertainty that the baseline conditions as described in the EIS and upon which the impacts of the proposed development have been predicated can still be obtained. The proposed development would therefore be contrary to the proper planning and sustainable development of the area…"*

119. But the Board in its decision stated:-

> *"In deciding not to accept the inspector's recommendation to refuse permission the Board had particular regard to national policy,* ***the waste licence granted by the Environmental Protection Agency, which includes conditions requiring a minimum distance of 100 metres*** *between the landfill footprint and any dwelling house (other than for inert waste) and the location of the site close to the national road system.* ***The Board considered that the impacts on nearby houses referred to by the inspector in her first recommended reason for refusal were adequately addressed in the Environmental Impact Statement and in the developer's submissions to the reconvened oral hearing in October/November, 2007****. The Board noted the separation distances together with intervening topography and vegetation, the proposed phasing of the development and the planting of a hedgerow and belt of deciduous trees around the perimeter of the site. The Board also considered the* ***temporary nature*** *of the proposal and accepted that the restoration scheme will integrate the completed site into the surrounding landscape." (emphasis added).*

Thus it entirely omitted to impose any such conditions whatsoever in the permission. It concluded these had been "addressed" in the waste licence by the Environmental Protection Agency. It is no answer to say that the conditions in the waste licence applied equally as much to the activity of operating the facility as to the construction phase. While conditions as to noise and dust were dealt with in the licence they were not dealt with as planning matters by the Board as construction issues requiring to be properly conditioned by the Board. I regret the contention that as a matter of practicality noise and dust emanations from the construction process could not be separately monitored from those from the activity. Construction and activity need not always, or even often, coincide in time. The environmental affects could be monitored separately.

120. It is quite clear the Board actually sought to consider the issue of dust and noise mitigation measures. The question was highly material. It informed both the inspector's considerations and those outlined by the Board in its decision. However, unfortunately, none of the quoted section of the Board's decision, all of which is obviously highly material, was reflected in, or is the subject of any condition imposed on the development. The consequence therefore was serious, as the issue could not be the subject matter of any planning undertaking, or any legal duty enforceable by the planning authority, or any other party.

121. It was clearly inadequate for the Board merely to state that it had "considered" the impacts on nearby houses referred to by the inspector, or for it to have concluded that these were adequately addressed in the environmental impact statement, or the EPA in its waste licence, or in the developer's submissions to the reconvened oral hearing in October/November, 2007. This all begs the question, why were these issues which appeared in the conditions of the EPA licence not made planning conditions in the permission? The point is directly addressed in Part V of the judgment.

122. The new landfill liner proposals proposed by the developer included the use of bentonite enhanced soil. BES preparation on site had the potential to give rise to significant noise, dust and fine particulate matter in the vicinity of the dump in the local environment and the Corrigan house in particular. These would not be limited to a temporary period in time as the evidence disclosed; what was intended is a phased development over a period of years with each cell being constructed in accordance with need. Thus it was envisaged that the certain "construction" phases involving the cells would in fact take place over a period of years, not months. It was misleading too for the Board to use the word "temporary" in the final two lines of the quotation earlier insofar as it might be interpreted that it would merely have a short term effect on the commencement of the development.

123. These issues are of course of particular importance to the Corrigans but also had a more general bearing to the other residents, and to the planning authorities. That these were "relevant" and "material" considerations to jurisdiction is inescapable. They were inextricably linked to the Board's duty to ensure compliance with the Environmental Impact Directive so as to ensure there was a lawful planning context.

124. They were sufficiently important for the Board in its decision to advert to the Waste Licence granted by the EPA including noise monitoring and the conditions requiring a minimum distance of 100 metres between the landfill footprint and any dwelling house other than for inert waste and the location of the site close to the national road system. It hardly does justice to the development to state that what was being considered here was "temporary", the term used by the Board in the grant of permission, given that the lifetime of the development is a period of ten years. I consider the absence of the imposition of any such conditions demonstrates the Board acted "irrationally" in this particular circumstance as it failed to direct itself to a relevant planning consideration, on matters which had a high likelihood of

affecting the outcome of the determination, and which, as a matter of law went to jurisdiction identified in *White*. While these points may have been considered by the EPA, they were also matters which fell within the statutory remit of the Board. As "environmental pollution matters" explained and defined later, they may have been apparently within the EPA remit. But they also were highly relevant environmental planning matters which required the Board to impose conditions for enforcement. I consider the Board failed to have regard to this material consideration. I will grant judicial review on these grounds as well as those in Parts I, II and V herein.

125. The further claim relating to the Board's alleged omission to accept recommendations as to monitoring water levels in the Usk marshes can only be fully understood against the background of the duties of the Board and the Agency under the E.I.A. Directive and is considered in Part V of this judgment. As I have indicated the evidence on this issue was by no means as clear. I do not consider the residents have satisfied the *White* test that the Board's conduct here constituted a failure such as would go to jurisdiction.

IV Whether the State, though joined as a defendant, may seek subsequently to impugn the Board's decision?
126. The State was joined as a respondent to the proceedings in order to address certain aspects of the relief sought by the residents. One of these was the alleged failure adequately to transpose or implement Directive 97/11/EC Directive 85/337/EEC as amended by Directive 97/11/EC ("the EIA Directive"). (The version of the Directive at issue in this case is the text prior to further amendment by Directive 2003/35/EC.) This particular ground for relief against the State was one of a substantial number withdrawn by the residents at the opening of the case. On the second day of the hearing, in seeking to ascertain whether each of the parties was necessary to the proceedings, I asked counsel for the Attorney General and the State to indicate whether he required to remain in the case in these circumstances.

127. Mr. Garrett Simons S.C. indicated that while joined as a defendant, the State would now be supporting the residents in respect of one relief still sought by the them, namely for "a declaration by way of judicial review that the decision of the first named respondent (i.e. the Board) to grant planning permission was made contrary to the requirements of Directive 85/337/EEC on the Environmental Impact Assessment of certain public and private developments." Counsel indicated that in view of this alleged failure by the Board it was now the State's contention that the planning decision was invalid. The Board had received no intimation of this change in position in advance. I consider this was unfortunate. It certainly had the consequence of significantly prolonging the hearing.

128. Counsel for the State subsequently provided "an issue paper". This outlined the State's proposal to make submissions as to the Board's alleged misinterpretation of s. 54(3) of the Waste Management Act 1996, ("W.M.A.1996") and its misunderstanding of the division of functions between it and the Environmental Protection Agency. The State claimed that, as a result of this misunderstanding the Board, did not approve or condition any aspect of the development where the activity would cause "environmental pollution". (The full terms of s.54 (3) W.M.A. 1996 are set out at para. 204 of the judgment). The intent behind this part of the W.M.A. 1996 was to identify functional areas which were to fall within the remit of the EPA, and from which the Board was to be precluded from acting, being essentially matters relating to the risk of "environmental pollution" from the "activity". These issues, at one level, certainly fell within the remit of the EPA. But was this an exclusive jurisdiction? This general point had not been raised before by Kelly J. at all. In fact, the semi-submerged issue of s. 54(3) jurisdiction surfaced in the Board's considerations only after the renewed inspector's oral hearing in 2008. It was briefly referred to on occasion in the inspector's 2006 report. It will be recollected, that evidence was heard from Greenstar's experts about the new nature of the landfill liner at the renewed inspector's hearing in 2007. This in turn led to consideration of the Board's jurisdiction, or lack of it, in very stark terms.

Changes in proposed landfill liner
129. Before ruling on the procedural issue, is necessary first to specifically describe the extent of the change in the landfill liner between 2004 and 2007, in order to understand the State's revised stance.

a) The EPA 2004 stipulation as to the landfill liner in the original waste licence
130. The original EPA waste licence envisaged that the landfill lining for all waste deposition areas should comprise as a minimum (i) a subsoil layer of at least 3 metres deep with a hydraulic conductivity of less than or equal to 1 x 107 m/s; and (ii) formation levels of landfill base as shown by an illustration in the Environmental Impact Statement, in any event to be higher than the water table. Where inert waste or materials were to be placed outside the non-hazardous liner, in addition to the landfill base requirements referred to above, it was to comprise, at minimum, side walls consisting of a mineral layer of a minimum thickness of 1 metre with a stipulated level of hydraulic conductivity. Where non-hazardous waste was to be placed, in addition to the landfill base requirements referred to above, the liner was to comprise a composite liner consisting of a one-metre layer of compacted soil with a hydraulic conductivity of a stipulated level overlain by a 2mm thick high density polyethylene (HDPE) layer as well as geo-textile protection layer placed over that layer. The licence stipulated a 500mm thick drainage layer placed over the geo-textile layer with an identified level of hydraulic conductivity of pre-washed uncrushed granular rounded stone (16 – 32mm grain size), incorporating leachate collection drains or an equivalent to be agreed with the Agency. The sidewalls were to be designed and constructed to achieve an equivalent protection. These were substantially changed by the technical amendment to the licence granted by the E.P.A in 2007.

The revised landfill liner provided for by the EPA 2007 technical amendment
131. The technical amendment to the Waste Licence of 17th September, 2007, introduced different and amending conditions. The landfill base for all waste deposition areas was to comprise as a minimum: (a) leak detection under a drainage layer and either natural or synthetic draining to a sump; and (b) formation levels of landfill placed higher than the water table.

132. Where inert waste or materials were to be placed outside the non-hazardous liner, including the landfill base requirement, it was now as a minimum to comprise of:-

> A Bentonite Enchanced Soil (BES) layer of a minimum thickness of 0.5 metres and of a stipulated hydraulic conductivity with sidewalls to be **designed and constructed** to achieve an equivalent protection.

I emphasise these three words as they identify clearly the boundary line beyond which the Board concluded it had no legal role, that is, any question relating to environmental pollution said to arise from the activity in question.

Where non-hazardous waste was to be placed the landfill liner in addition to the landfill base requirements referred to

above was now to comprise: -

> (a) a composite liner consisting of 0.5m layer of BES with an identified hydraulic conductivity overlain by a thick high density polyethylene (HDPE) layer or equivalent approved by the Agency.
>
> (b) a geo-textile protection layer of proven protection performance placed over the HDPE layer; a 500mm thick drainage layer placed over the geo-textile layer with a minimum level of hydraulic conductivity of pre-washed, uncrushed granular rounded stone (16-32mm grain size incorporating leachate collection drains (or equivalent to be agreed with the Agency) and the sidewalls were to be *designed and constructed* to achieve an equivalent protection. The detailed design of the liner was to be in accordance with the Agency's Landfill Manual.

133. The amended licence further provided that a comprehensive ***"construction quality control/construction quality assurance"*** protocol for all containment engineering works was to be submitted to it for approval as part of the specified *engineering* works. But clearly all these requirements also were connected to *construction* of the liner by way of contrast to the day to day operation of the facility.

134. From the emphasised words above, it will be seen that the E.P.A. technical amendment comprised matters appertaining to the technical and material composition of the liner. But it also involved points relating to what might ordinarily be seen as the construction of that liner, but seen from the functional standpoint of the Agency, that is the reduction of risk from "environmental pollution". This task was entrusted to the EPA itself, originally set up by the Environmental Protection Agency Act 1992.

Submissions on the legal role of the State in this case
135. The State wished to contend the Board had failed lawfully to direct itself in relation to relevant construction and development considerations which should have fallen to it (as opposed to the EPA) to consider. It asserted that such omission had legal and jurisdictional consequences by reason of a consequent failure by the Board to comply with the Directive 2003/35/EEC, the Public Participation Directive.

136. This judicial review took the form of telescoped proceedings by direction of the High Court. They therefore comprised an application for leave, and if that threshold was met, thereafter an issue for substantive judicial review. The original pleadings filed by the State as respondents were; (a) a statement of intended opposition, and (b) an affidavit of Mr. Ronan Mulhall. In both, the State had made it clear that it was opposing the residents' case on transposition and application of the Directive. The State pleaded that, where the ground relied on by the residents related to the decision of the Board no response was required from the State. But it had further pleaded that:-

> *"For the avoidance of doubt no admission by the second and third named respondents is made in relation to any of the matters pleaded as against the Board."*

Thus the State placed the onus on the residents to demonstrate the Board's want of jurisdiction. In seeking to now impugn the decision, therefore, the State was moving from a position generally supportive of the Board to one of outright opposition.

137. In response to this, counsel for the Board, Ms. Nuala Butler S.C., indicated that the State was effectively seeking to adopt the role of a "co-applicant". In these new circumstances she objected that the State had no legal standing to intervene on the issues between the residents and the Board, and that once the reliefs claimed against it had been withdrawn, it was no longer properly a party to the proceedings. The Board asserted that the State had not participated in any substantive way in the planning process; it was therefore in the same position as any other potential applicant insofar as challenges to decisions of the Board were concerned. If the State had wished to challenge the Board's decision it should have done so within the specified time periods and demonstrated compliance with the *locus standi* criteria in planning matters.

138. The Board observed that as the legislation at issue preceded the Planning and Development Act 2000 (as amended), it appeared likely that there were at most only a handful of cases still being decided under this previous legislation. It did not understand there to be any legitimate public interest in having the interpretation of this legislation clarified, nor in having the question as to the existence of any *lacuna*e in the legislation ventilated.

139. This novel situation necessitated further written and oral submissions. I indicated that I would consider these *locus standi* points, that I would issue rulings immediately thereafter, and furnish my reasons in this judgment. I ruled in favour of the State – but directed that it should henceforth proceed in the case as a notice party, and not as respondent. That which follows is my reasoning.

Ruling on the *locus standi* of the Attorney General and the State
140. At the outset I consider that the State was properly joined as respondent to the proceedings. The residents originally sought relief alleging failure in the transposition of various EC Directives including the Environmental Impact Assessment Directive. By virtue of Article 10 EC and Article 249 EC the State is the entity ultimately responsible for any failure in the transposition of any EC Directive. While the residents had withdrawn a range of pleas against the State, they now limited the extent of their claim to the proposition that the Board's interpretation and application of the EIA Directive remained a "live issue". The residents did not serve a notice of discontinuance on the State. Thus the State remained a party to the proceedings.

141. I emphasise that because of what occurred, no transposition issue remained in contention in the case. The residents withdrew that plea. Therefore I expressly refrain from expressing any view on the question.

142. In its decision, the Board decided that it was precluded from assessing any potential "environmental pollution" impact arising from the construction of the landfill liner because of s. 54(3) of the W.M.A. 1996. The issue for this court to address became therefore one between the residents and the State who now both had made common cause, against the Board, an emanation of the State, on two rival interpretations of the then s. 54(3) of the W.M.A. 1996, one of a number

of measures enacted by the legislature to implement the EIA Directive.

143. Greenstar's planning application was brought pursuant to s. 26(1) of the Local Government (Planning and Development) Act 1963. In dealing with such application the planning authority (or the Board on appeal) is restricted to considering the proper planning and development of the area of the authority (including the preservation and improvement of the amenities thereof) with regard being had to the provisions of the development plan, any special amenity area order relating to the said area and other matters referred to.

144. It is clear that s. 54(3) of the unamended W.M.A. 1996 assigned the task of considering the risk of environmental pollution from an activity to the Environmental Protection Agency.

145. The issue of the respective roles of the Board and the Agency arose in a relatively recent decision of the Supreme Court, *Martin v. An Bord Pleanála* [2007] 2 I.L.R.M 401. There the court considered and analysed the respective roles of both statutory bodies in the context of planning consent and the requirement under EC law to ensure that there shall be no *lacuna* in the respective statutorily defined roles of either body.

146. A further contention by the State was that the Board's determination was invalid because it had failed properly to apply or implement Directive 2003/35/EC (The Public Participation Directive), and that, despite having sought additional information in relation to the landfill liner for the purposes of the renewed inspector's hearing from Greenstar, it had erroneously concluded that assessment of this material was outside its jurisdiction.

147. I was further informed that there was currently pending before the Court of Justice a case in which similar alleged *lacuna*e and lack of co-ordination between the Board and the Agency had been raised by the European Commission in a complaint against Ireland. (*Commission v. Ireland* E.I.A. Directive – dual assessment, lodged 4th February, 2009.) From the State's submission, I infer the Commission alleges non compliance with Articles 2 and 4 of the E.I.A. Directives as amended. As yet no information other than a summary of the pleadings is available.

148. Counsel for the State said the basis of its reconfigured role arose from its duty under EC law to ensure that both transposition, and application of the Directives was effected in a clear and precise manner; and by reason of a concern that, in failing to apply the principles outlined in *Martin*, the Board's interpretation could lead to potential confusion and uncertainty in the law.

149. In determining this issue I also had regard to the following circumstances. The State was already joined in the proceedings as a party, albeit qua respondent. This was not a situation where a court was being asked at a late stage to join a new party to an already extant judicial review. The position was rather that the State, already a party, wished to put forward a new case, albeit at variance from that which it had originally espoused. While it had been cast, in the role of a respondent, should such ascription of role necessarily precludes it from subsequently adopting a stance opposed to that of the Board? A further weight in the balance was whether in the terms of O. 84 of the Rules of the Superior Courts' the State had a "legitimate interest" in continuing to make submissions on the jurisdiction issue, whether or not it had *locus standi* as understood in planning law.

The role of the Attorney General in protection of the public interest

150. In general the Attorney General has a role in protecting the public interest. This role was described in the High Court (Kennedy C.J.) in *Moore & Ors. v. The Attorney General* [1930] 1 I.R. 471:-

> *"Also he has the authority to assert the rights of the public by action in the courts."*

151. In *TDI Metro Ltd. v. Delap (No. 1)* [2002] 4 I.R. 337 at p. 344 Denham J. observed that, as well as the Attorney's authority to assert the rights of the public by action, this "action" may also be by way of reaction, *qua* notice party.

152. In the same judgment she referred to Prof. James Casey's work *The Irish Law Officers* at p. 148 where he stated:-

> *"The Attorney General's role as intervener in civil proceedings is not confined to the situations covered by O. 60. There is authority for the proposition that he may intervene whenever some aspect of the public interest comes into play."*

The judge continued:-

> *"Reference was made by counsel to in Re Solicitors Act 1954 [1960] I.R. 239 where Maguire C.J. stated at p. 255:-*
> 'Even though the Attorney General need not attend, the Court welcomes his help when as here an issue of considerable public importance is raised.'"

She added:-

> *"The court was asked to consider another instance where the Attorney General intervened in the case. In Brady v. Cavan County Council [1999] 4 I.R. 99 Keane J. (as he then was) stated at p. 102:*
> '…the Attorney General who intervened in the proceedings and was heard by this Court because, as it was submitted on his behalf, issues of **general public concern were raised.**'"(emphasis added).

She concluded:-

> *"If there is a doubt as to the public interest as submitted by the Attorney General, the court in exercising its discretion should lean towards the application of the Attorney General enabling him or her to be joined in the proceedings."*

153. My conclusion was that, in the words in O. 84 of the Rules of the Superior Courts, the Attorney and the State had such a legitimate interest in pursuance of the points identified, as being of general public concern. That interest derived from the Attorney's position as guardian of the public interest, and by reason that the issues raised a question of public policy in which the Executive had a legitimate view and a desire to be heard thereon. This arose in particular because of

the obligation of the State (and this Court) to observe and implement the precepts of EC law in its considerations. Any issue of some other statutory *locus standi* derived simply from the planning statutes, was to my mind, subservient to these overarching considerations.

154. By way of illustration, *TDI* was a case where the Attorney sought actually to be joined as a party even at the appeal stage, clearly a much more extreme situation than here. Even then the Supreme Court was prepared to exercise its discretion so as to countenance such intervention, as the issue was one of public concern, whether a County Council had a statutory power to prosecute indictable offences. While, as TDI points out, the Attorney is not entitled, to intervene as of right, a court has discretion to allow a party to be joined therein if it is necessary in the interests of justice, and where there is no specific rule of law excluding the addition of the parties at that stage of the proceedings.

155. The State had already been joined in these proceedings. There could be no question here of having to join or add a party therefore. Instead I formed the view that the position was analogous to a defendant in civil proceedings making a case adverse to the interests of another defendant, albeit in the absence of any procedure in the rules regarding judicial review procedure, for the service of a notice of indemnity or contribution. A respondent and notice party frequently found themselves in adversarial positions in judicial review matters. Applying these considerations, I ruled that the appropriate course should be that the Attorney General and the State should instead be joined as a notice party rather than as respondent, having tendered certain undertakings in relation to any cost issues, and that those submissions should then precede those of counsel for the Board.

156. This ruling, on these facts, is not to say that there may not now exist a far wider entitlement for the Attorney to participate in proceedings if there has been a serious breach by a public authority of its obligation to comply with the requirements of an EC Directive. Such an entitlement could well again be based on Article 10 EC and Article 249 EC, and the undoubted fact that the State is the entity ultimately responsible for any failure in the transposition or application of an EC Directive. A serious breach by a public authority of obligations under a Directive may expose the State to the risk of infringement proceedings under Article 226 EC and also to possible fines. As the judgment of the European Court of Justice in case C-215/06 *Commission v. Ireland* demonstrates, infringement proceedings may be based on a breach in respect of even one single development project.

157. It is not difficult to envisage circumstances therefore where the State would have a legitimate interest, now significantly broader and deeper than hitherto, in being heard on the question of the interpretation or application of a Directive. Such an entitlement will of course carry with it a fiduciary dimension, to ensure that insofar as practicable, the court is fully and objectively apprised of all relevant considerations to the issue raised.

158. I now turn to the last substantive question outstanding, as it arises within the procedural framework thus set.

Part V. Compliance with EU Directives

159. The residents originally sought a declaration in this case that the Board's decision not to assess the environmental impact of the new liner and to grant planning permission was made contrary to the requirements of the EIA Directive. This, it was submitted, requires the authority or authorities so charged to interact so as to give effect to the Directive's aims. They sought to move beyond the provisions of national law, and to rely directly on the provisions of the Directive itself. However, they now argue otherwise, on the basis that national legislation had correctly implemented the Directive, but it had not been properly applied by the Board which ignored the "construction" aspects of the landfill liner. By virtue of its annual intake in excess of the threshold of 25,000 tonnes annually, it is not in dispute that the landfill development required an environmental impact assessment by virtue of its listing at para. 11(b) of Part II of the First Schedule of the ECC Environmental Impact Assessment Regulations, 1999.

The terms of the original EPA licence

160. The EPA waste licence of 8th June, 2004, ("the licence") included very detailed new conditions in relation to the composition of the liner. To recapitulate, the "technical amendment" to this was made at the request of the developer on 17th September, 2007. The bentonite liner was to be substituted for a clay liner. This liner was to be made by mixing bentonite with sand and gravel in a ratio of 1:10, producing what is termed a "BES liner" (bentonite enhanced soil). The developer made amendments to the EIS in respect of the change of liner. These were presented to the reconvened inspector's oral hearing in October/November 2007, where the residents' counsel cross-examined on this material.

161. The inspector considered the operation of the BES liner in detail in her report. She issued a s.10 notice for further information on the issue. But she concluded that issues of air quality and noise pollution impacts derived from preparation of the BES liner (albeit on site) were matters within the exclusive competence of the EPA under s. 54(3) of the Waste Management Act 1996, and that the Board was thereby entirely *precluded* from assessing any potential environmental pollution impacts arsing from the construction of that liner.

162. She considered that, as a planning issue, the replacement liner was not a material alteration to the proposed development under the planning code, in that it did not impact on the site location, the type or quantities of waste proposed for disposal, or the construction and operational life of the landfill. She observed that in relation to the visual impacts there would be unlikely to be any view of the mobile batching plant proposed for production of BES on site from outside the site boundary.

The Board's decision

163. The Board referred in its decision to the granting of the licence by the EPA, including the technical amendment. In giving its reasons not to accept the inspector's recommendations for refusal of permission it referred to the waste licence. It accepted the inspector's identification of its jurisdiction vis-à-vis the EPA.

164. Counsel for the residents and for the State both now contended that the EPA's statutory function was to license the "activity" being carried out at the proposed development. It was not therefore concerned with the construction of the facility or any other environmental planning impacts. In particular both counsel pointed to the apparent incongruity in the inspector's s. 10 request which referred to the construction impacts of the proposed liner; the fact that the reconvened oral hearing was primarily concerned with that matter; and, by contrast, the Board's failure to carry out any assessment of this material in the context of the overall planning consent.

165. In the context of E.U. law and the W.M.A. 1996, the jurisdictional issues are whether the Board unlawfully failed to have adequate regard to the environmental impacts associated with the construction of the landfill liner; whether it was

in fact precluded by s.54(3) W.M.A. 1996 from assessing any potential environmental pollution impact; whether it was precluded from assessing potential environmental impact, other than pollution, from the construction of the liner; and the consequence of such findings in light of the Public Participation Directive.

Interpretation of s. 54(3) of the Waste Management Act 1996
166. It is necessary to consider first, the nature of the process in which this Court must engage in the interpretation of a statutory provision such as s.54 (3) of the Act of 1996. Were these questions simply and solely ones of fact, the Board might enjoy a wide margin of discretion.

167. But the Board itself determined the range of its jurisdiction. It refrained from an assessment of the environmental impact of the construction of the landfill liner. This is a point which goes to the heart of the alleged "non-exercise" of jurisdiction. The question is not what the Agency did, but what the Board failed to do – that is whether it omitted to address itself to a relevant issue, with the result that it failed lawfully to exercise its jurisdiction. What the Agency did is therefore secondary, unless the Agency had an exclusive jurisdiction, not vested in the Board at all. These are issues of law. They go to the essence of jurisdiction. The issue of statutory interpretation is a matter for the High Court.

168. Maher v. An Bord Pleanála [1999] 2 I.L.R.M. 198 is a helpful authority. There the matter at issue was also the interpretation of the EC (EIA) Regulations 1989. That case concerned the interpretation of the term "sow" and a sow's progeny, for the purpose of calculating the relevant development threshold.

169. Kelly J. ruled that the interpretation of the Regulation was a question of law and not one within the planning expertise of An Bord Pleanála. He observed:-

> *"In my view the question of the proper interpretation of the Regulation is a matter of law which must be decided upon in this application. The previous approach of (An Bord Pleanála) is not directly relevant nor shall I take it into account in considering the question."*

170. The interpretation of s. 54(3) of the Act of 1996 is equally a question of law. It is not a matter in which An Bord Pleanála can properly maintain it enjoys a particular expertise, or in respect of which legal deference should be shown. It is not open to the Board here or elsewhere to configure an issue of law as one of fact or vice versa, and thereby, by a process of interpretive metamorphosis render the issue solely a matter for it, and not the court. The questions which must be considered are whether or not the Board through its inspector asked itself the right jurisdictional questions from the outset, and whether it lawfully and within jurisdiction considered the provisions of s. 54(3) and the definition of "environmental pollution". Did it therefore act irrationally in the sense identified in White v. Dublin City Council (discussed earlier in this judgment) by asking itself the wrong question, and misdirect itself as to its jurisdiction?

The derivation of the jurisdiction difficulty
171. An analysis of the material here demonstrates that much of the difficulty derives from confusing definitions of "construction", "operation" and "activity" which stretched back as far as the original Environmental Impact Statement in 2001. The difficulty identified did not stop with the EIS. It ran like a seismic faultline, manifesting itself in a number of ways through the entire planning process. It is to be found in the waste licence granted by the EPA in 2004. It emerged next in the Board's grant of planning permission in 2006. It obtrudes more clearly in the technical amendment to the waste licence granted by the EPA in 2007. It is manifest in stark form in the inspector's report of April 2008. It reaches critical point in the Board's permission.

172. There is little to be gained from unnecessarily detailed references to any of the documents to which I have just referred. It is sufficient now, based on such documentation, to sketch the overall context in which this process of elision between "activity", "operation" and "construction" took place.

Definition of "operational stage" in the EIS
173. The 2001 Environmental Impact Statement contained a description of what it called the "operational stage" of the facility, which included aspects of development likely to cause a visual impact. But the phases said to be part of that operational stage included *"excavation and levelling of the site"; "construction of landfill cells"; "waste deposition"; "overall phasing of cells and operations within the site";* vehicle movements on the site (i.e. waste collection, vehicles, compactor, loading, shovel and dump truck); and vehicle movements to and from site.

174. Even at that point therefore construction and operation were treated as overlapping to such an extent that the EIS authors saw them all as part of the one "operation" process.

Definition of activity by the EPA in the 2004 waste licence
175. The same difficulty is reflected in the 2004 waste licence. There, the EPA licensed "activities" pursuant to s. 40(1) of the Act of 1996. As will be explained later the licence contained categories of "activity" which were also identified in the Third Schedule of that Act. In this licence the same "activities" identified included: class 1 – *"deposit of waste on, in or under land (including landfill); the activity to be limited to the deposit of onto land in the area"; class 4 – "surface impoundment, including placement of liquid or sludge discards into pits, ponds or lagoons"; and class 5 – "specially engineered landfill including placement into lined discreet cells which are capped and isolated from one another and the environment".* The following quotation about such "class 5 activity" – again from the waste licence – epitomised the problem:

> *"This is the principal activity (sic). This activity is limited to the construction of the landfill in distinct phases consisting of specially engineered lined cells, the deposit of non-hazardous, commercial, industrial and residual municipal waste into these lined cells and the collection of leachate and landfill gas…"*

Construction and activity are therefore seen as part of the one process.

176. The EPA in granting the licence therefore, designated as one of the *activities* licensed not only the placement of waste *into* the cells, but also the phased *construction* of the landfill consisting of specially engineered lined cells. This definition, reflecting category 5 of the third schedule of the Act of 1996 is of particular importance in the light of the

reliance placed upon it by the Board in justifying its interpretation of construction as being part of the activity, thus beyond its jurisdiction and an issue only for the EPA.

The inspector's 2006 report
177. The same jurisdictional confusion emerges in the inspector's report of 2006. In the course of that report she dealt with the potential impacts of this proposed development on the nearby Usk marshes, a proposed Natural Heritage Area (p.N.H.A.). She referred to the residents' submission to the effect that de-watering during construction, deterioration in water quality and from the impacts of dust, landfill gas and noise all had potential to disrupt the ecological balance of that p.N.H.A. She commented:-

> *"Given that section 54(3) of the 1996 Waste Management Act as originally enacted applies to the current case, the only impacts which the Board may consider in respect of impacts generated by the proposed development on the pNHA are those emissions resulting from construction of ancillary on-site facilities (those exclude construction of the landfill itself), destruction of or significant interference with habitats and flora and fauna as a result of any construction works on site, and finally impacts on surface and ground water flow and supply."*

The Board's 2006 decision
178. The Board's decision in 2006 did not specifically refer to the difficulty which was identified by its inspector. It contained no special reference to s. 54(3) of the Waste Management Act 1996. However it did allude to the Waste Management Plan and the grant of the EPA licence to which reference was made in the 2008 permission as explained earlier. But interestingly, the 2006 permission did on occasion refer specifically in the conditions, to *"the construction phase of the proposed development"*. These references are in relation to concerns to prevent risk to surface or subsurface waters from spillage of oil, fuel or chemicals, and also in dealing with conditions relating to temporary settlement ponds to accommodate discharges of site surface water run off during that "construction phase" of the proposed development. The reason given for these ponds was *"to prevent surface water pollution during the construction phase of the proposed development".* The phraseology of this condition is significant in light of the questions which arose in 2008 as to where the "construction phase" began or ended. What appeared obvious in 2006 was far from obvious in 2008. By then construction and activity had merged in the Board's approach so as to preclude the Board from environmental assessment.

179. Similarly in the context of conditions with regard to noise these were said in 2006 to be imposed:-

> *"to protect the amenities of property in the vicinity of the site during the* ***construction phase of the development****."*

This particular point is dealt with in more detail below, with reference to the 2008 permission.

Definitions contained in the EPA 2007 technical amendment to the waste licence
180. I have outlined how the "technical amendment" to the waste licence in 2007 comprised largely of a new identification of the composition of the landfill lining. This consisted of a BES layer of minimum thickness and hydraulic conductivity. The amendment provided:-

> *"A comprehensive Construction Quality Control/Construction Quality Assurance protocol for all containment engineering works shall be provided to the Agency for approval as part of the Specified Engineering Works (condition 3.2). The BES layer may not be covered by the HDPE liner until fully certified to the satisfaction of the Agency."*

These are clearly broad parameters, which overlapped into the question of the liner construction as well as its composition. But how precisely, the amendment would environmentally impact on the development was not assessed in, or in the process of granting, the new licence.

The inspector's report 2008
181. The problem of jurisdictional demarcation became most evident in the inspector's report furnished in April 2008. It loomed large in her discussion of a number of alternative proposals put forward by the developer only in the course of the renewed oral hearing in considering to how BES would either be manufactured on site or brought thereon. One apparently hypothetical part of this proposal was to grind or mill fine gravel particulates on site and mix them with crystalline silica in an undefined manner. Crystalline silica may be carcinogenic and may have particularly harmful health qualities which, she considered, would raise an unacceptable risk to the community on public health grounds. This suggested aspect of the proposal was apparently mooted only for illustration purposes. In fairness it was not pursued by the developer.

182. An alternative proposed was that bentonite would be mixed with sand on the site but that this sand would not be of the very fine quality described just above.

183. In her 2008 report the inspector was clearly deeply concerned in relation to the question of noise and dust. Among her concerns were that large quantities of bentonite might have to be imported on site by truck, thereby multiplying by many times traffic count and noise, and that the production of BES would require what are called material screeners as well as "some short term crushing" process. However the developers earlier noise impact prediction had been based on the use of material screeners only without any crusher noise and therefore, she thought, seriously underestimated the noise emissions resulting from BES manufacture now envisaged. She also noted that noise from milling or mixing processes in the production of BES had not been taken into account, nor had the tonal or impulsive qualities of noise emissions. She observed that, as the EPA licence did not permit such noise emissions, it was vital that the Board attached such a condition to construction works. She added that the Board should consider imposing a condition requiring continuous noise monitoring while construction works were carried out at the site as the EPA licence only required such monitoring for 30 minutes per quarter when the site was "operational". That term was significant – these works would not be complete in the first few months of the ten year life of the development.

184. A further issue raised by the residents at the renewed oral hearing was the contention that it was impossible to assess part of the environmental impact of the development in the absence of any knowledge as to the filter efficiency which was to be used in the production of BES on the site. This was of particular importance having regard to the close proximity of the site to a number of residents.

185. The developer responded to these concerns by stating (i) that the proposed batching of the BES would be carried out within an enclosed facility, (ii) that the material proposed for use in batching would contain a certain amount of moisture which would inhibit the spread of dust. Quite clearly these issues were of substantial environmental significance.

But the inspector concluded:-

> *"I consider that the developers submission to the reconvened oral hearing, in conjunction with the responses solicited from the developer during cross-examination in regard to dust emissions, update the original EIS in a satisfactory manner and fulfil the requirements of the EIS Directive as set out in national legislation. I consider, however, that:*
>
> *- as the construction of the landfill liner is intrinsically linked to the operation of the landfill;*
>
> *- as the composition of the liner falls within the remit of the EPA;*
>
> *- and that the current application for the proposed development was received in advance of the commencement of the 2000 Act;*
>
> *- the Board is precluded from assessing any potential environmental pollution impact arising from the construction of the landfill liner."*

With regard to noise impact she commented:-

> *"Again as the construction of the landfill liner is intrinsically bound up with this operation, I consider that the Board is precluded from assessing the potential environmental pollution aspects of these impacts other than by way of satisfying itself that the developer has perfected the environmental impact statement in regard to noise impacts by identifying same, assessing same and proposing appropriate mitigating measures."*

186. Clearly such an approach, were it lawful, would have created a *lacuna* as regards the environmental *assessment*, as distinct from mere *consideration* of the effect of the new landfill liner. The inspector said she considered the EIS had been perfected by noting that the main noise source from the batching plant would be the generator which would move around the site in accordance with the construction sequence of the liners. She observed that the batching plant would not come closer than between 150 – 200 metres of the Corrigan household. She said that the noise from the plant had been included in the overall noise predictions for the site and that mitigation would be provided in the form of noise barriers. Her view was that the noise prediction assessment assumed a worse case scenario, namely, that all plant would be working during the operational phase of the development at a distance of approximately 80 metres from the nearest noise sensitive receptor, namely, the Corrigan household. She wrote that the developer acknowledged that during the "construction" phase of the development the plant was likely to be located 40 metres from the nearest noise sensitive receptor, i.e. the Corrigan household, but it had correctly noted that higher noise levels were tolerated during what she termed the "construction" phase of any development over limited periods of time. She said that the developer also acknowledged that while it was unlikely that the gravel used for mixing with bentonite to produce the BES there would be concentrated in their entirety in close proximity to the Corrigan household, this was not impossible.

187. It will be seen that all these observations would take place in what the inspector phrased as the "construction" phase of the development. But of course this construction phase is to be distinguished from that which might take place simply at the commencement of the development in view of the phased nature of the work at the facility.

She then concluded:-

> *"However as I have noted in regard to dust emissions and impacts, the noise emissions and impacts associated with the construction of the landfill liner are by virtue of the fact that the liner's construction is bound up intrinsically with the operation of the landfill, not subject for assessment by the Board other than a regard to the clarification and perfection of the environmental impact statement which I consider has been done satisfactorily in the current case."*

188. It is surely significant that the inspector here again referred to the "*construction*" of the landfill liner, albeit in the context of being bound up "intrinsically" with the operation of the landfill. It will also be recollected that, however categorised, the construction involved was not of one, but six, phased cells over the ten-year life of the facility. I will be finding in this judgment that this was an issue which required complete assessment for the purposes of a development consent, in compliance with the Directive.

189. But the inspector held that the developer had in fact complied with the 1989 EC (Environmental Impact Assessment) Regulations. She considered that the proposed development complied with the requirements in respect of the construction and operation of the proposed landfill. She considered the presentations provided at the reconvened hearing clarified more precisely the likely significant effects of the development on the environment.

190. She herself specifically raised the issue of what she regarded as the possibility of a "legislative *lacuna*" between the EPA licensing system and the planning process, and the implications of such *lacuna* for the proposed bentonite liner. She also actually drew the attention of the Board to the case of *Martin v. An Bord Pleanála* [2007] 2 I.L.R.M. 401 to which reference will be made in greater detail.

However she limited herself to stating with regard to *Martin*:-

"…that case centred on the extent to which the division of responsibility between the Board and EPA adequately gives effect to the requirements of Council Directive 85/337/EC; the judgment in that case confirmed that EIA must be carried out before consent is given, that the Directive provides for more than one body to be involved in the consent process and that the combination of assessments carried out by an Bord Pleanála and the EPA combined meet the requirements of the Directive."

191. *Martin* deals with broader and more fundamental themes than that simple description. Unfortunately, the inspector did not address herself to the situation which might arise if the assessments carried out by the Board and the EPA did not totally combine, or in the words of the Directive "interact" so that interwoven, they could be the basis of a planning consent under the national legislation and the Directive. She simply concluded that the judgment confirmed that any division of powers between the EPA and An Bord Pleanála prior to the commencement of the 2000 Act did not result in a *lacuna* which could undermine or invalidate a development consent where such consent consisted of the decision of An Bord Pleanála and EPA together. But saying this did not make it so, especially in the circumstance where the EPA had licensed and the Board allegedly had no role in this form of potential environmental pollution.

192. She stated that the Board was required to assess the proposed development under the legislative provisions which obtained prior to the commencement of the 2000 Act. But the amended bentonite liner had been permitted only under legislation enacted even later than 2000, in fact by s. 38 of the Protection of the Environment Act 2003, discussed later herein. This ostensibly permitted amendment by a statutory process enacted in 2003 which post-dated even the 2000 PDA. But by contrast, she stated that it was appropriate that the proposed landfill development at Usk be assessed by the Board under the pre-2000 Act legislative provisions. It is difficult to reconcile these two findings, one as to the inapplicability of the Act of 2000, the other as to the applicability of a procedure enacted three years later.

The Board's 2008 decision
193. The Board refrained from imposing any conditions in relation to matters which it considered fell within the remit of the E.P.A. To recapitulate, it recited in the First Schedule to the permission:-

"…having regard to national policy relating to waste, the Waste Management Plan for Co. Kildare 2005-2010, the proximity of the site to the national road system, the granting of a licence by the Environmental Protection Agency (licence register No. W0161-01) and the technical amendment A thereto(and the provisions of s. 54(3) of the Waste Management Act 1996 (as originally enacted), it is considered that, subject to the conditions set out in the Second Schedule, the proposed development would be acceptable in terms of its impact on the amenities of the area and of property in the vicinity, would not be prejudicial to public health, would be acceptable in terms of traffic, safety and convenience and would be in accordance with the proper planning and development of the area.

In deciding not to accept the inspector's recommendation to refuse permission the Board had particular regard to national policy, the waste licence granted by the environmental protection agency which includes conditions requiring a minimum distance of 100 metres between the landfill footprint and any dwelling house (other than for inert waste) and the location of the site close to the national road system. The Board considered that the impacts on nearby houses referred to by the inspector in her first recommended reason for refusal were adequately addressed in the environmental impact statement and in the developer's submission to the reconvened oral hearing in October/November 2007. The Board noted the separation distances together with the intervening topography and vegetation, the proposed phasing of the development and the planting of a hedgerow and a belt of deciduous trees around the perimeter of the site. The Board also considered the temporary nature of the proposal and accepted that the restoration scheme will integrate the completed site into the surrounding landscape…."

194. The net effect of this was that the Board effectively recused itself from making or considering any assessment in relation to a matter which plainly had an environmental pollution impact.

195. Both the Board and the inspector appear to have accepted at face value this jurisdictional demarcation. They appear to have considered it was imposed upon them by the EPA waste licence and the technical amendment. They did not sufficiently address the legal consequence of the fact that, by virtue of the manner in which the procedure had operated, the environmental pollution effect of the new proposed landfill liner had not been, and would not be fully assessed. It is difficult to avoid the conclusion that the Board and the inspector were seeking to "paper over the cracks" which had emerged in the assessment procedure. The question therefore arises as to how the Board should have approved the demarcation of roles, even if it considered it had been pre-empted by the E.P.A.'s stipulations so far as they were set out in the waste licence and its technical amendment. It is necessary to address whether the Board and its officials were correct in their approach to distinguishing between construction issues and "environmental pollution issues" as defined in s. 5(1) of the Waste Management Act 1996. There "environmental pollution" is defined as meaning:-

"… in relation to waste, the holding transport recovery or disposal of waste in a manner which would to a significant extent endanger human health or harm the environment and in particular –

(a) create a risk to waters, the atmosphere, land, soil, plants or animals

(b) create a nuisance through noise, odours or litter, or

(c) adversely affect the countryside or places of special interest…."

Before presenting my reasoning and conclusions on the EIA issues, I wish, for the sake of further context, to turn to the question of Board's alleged omission to accept recommendations as to monitoring water levels on the Usk marshes, as briefly alluded to in Part III of this judgment.

Monitoring water levels in the Usk marshes
196. The residents assert the Board unlawfully failed to accept certain conditions recommended by the inspector

governing the monitoring of the groundwater levels and their potential impact on the Usk marshes.

197. It is said that conditions with regard to flow and recharge as distinct from the chemical composition of the groundwater should have been included in the Board's conditions. It was undisputed that there was evidence before the Board of a hydraulic link between the site and the nearby pNHAS. However the EPAs conditions as to ground and surface water, did not solely relate to the chemistry of the water. The EPA imposed conditions relating to surface water management, groundwater and monitoring conditions and frequencies. These conditions deal with water levels and not simply its composition. The inspector recommended the imposition of similar requirements but this recommendation was not followed. These recommended conditions also related to water levels in the catchment area. It would be incorrect therefore to conclude that the omission by the Board of such conditions would be in any degree as fundamental as the omission with regard to noise, dust and fine particulate material.

198. On behalf of the residents, a hydrological consultant, Mr. Cecil Shine expressed the view that the EPA waste licence conditions were not orientated at, and did not achieve the same result as, those suggested by the inspector. But this is not conclusive. The inspector was concerned that as a result of hydraulic linkage between the proposed development and the Usk marshes (a proposed Natural Heritage Area) that the construction of the landfill site might affect groundwater flows and recharge in the marsh area. Accordingly she recommended as part of the commencement of development that monitoring be commenced in respect of the water levels in that area. But can it be said conclusively that the question had not been addressed?

199. The EPA waste licence was not mainly concerned with the laying of the landfill liner and implications therefrom. Its focus was as to the possibility of water pollution from the operation of the landfill facility. Thus putting the matter at its simplest the EPA was concerned with water quality from the operation while the inspector's recommended condition was concerned with water quantity and flow from the installation of the liner.

200. It would appear that the inspector, Ms. Mary Cuneen and the consultant hydrologist, Mr. Ger Keohane, took the view that these conditions were not *fully* dealt with in the waste licence. But this is quite different from concluding that such omission could go to jurisdiction. The evidence simply does not go far enough on this issue to give rise to a basis for judicial review. I specifically refrain from saying that such an issue could not give rise to review – it could, if only the evidence was clear on the point. The Board nevertheless determined that the EPA waste licence was sufficient in this regard and decided on the deletion of these recommended conditions. All of this is indicative of the same problem – the role demarcation between the Board and the EPA. It may therefore, at best, be seen as further corroborative evidence on the alleged disjoined effect of the demarcation line as it ran throughout the permission process. But the evidence is insufficient to demonstrate a want of jurisdiction. Mr. Keohane observed:-

> *"In general though I feel that the impacts on water supply to the marshes will not be significant and the provision of monitoring conditions will cover any lingering doubts."*

This is not a starting point for judicial review.

I now turn to the issues of interpretation and application of national law in the light of the Directives. The interpretation of 'old law' is necessarily a somewhat demoralising an arid exercise.

General principles of interpretation
201. First I turn to a number of general principles of interpretation. Clearly the provisions of national implementing legislation must be interpreted in the light of the purposes and objectives of the EC Directives in particular the EIA Directive. A national court is required, when applying provisions of domestic law adopted for the purposes of transposing obligations laid down by a Directive, to consider the whole body of rules of national law. It must interpret them, as far as possible, in the light of the wording and purpose of the relevant Directive in order to achieve an outcome consistent with the objective pursued by the Directive itself (see case C 397/01 *Pfeiffer and others v. Deutches Rote Kreuz* [2004] ECR I-8835).

202. The courts have adopted a harmonised approach to the interpretation of the EIA Directive on a number of occasions (*Maher v. An Bord Pleanála* [1999] 2 I.L.R.M. 198; *O'Connell v. Environmental Protection Agency* [2003] 1 I.R. 530).

The object of the Directive and its application in national law
203. What then is the objective of the EIA Directive? As was pointed out in the *Commission v. Germany* (case C 431/92 [1995] ECR 1-2189):-

> *"Article 2 of the Directive lays down an unequivocal obligation, incumbent on the competent authority in each Member State for the approval of projects, to make certain projects subject to an assessment of their effects on the environment."*

Article 2 of Directive 85/337/EEC as amended by Council Directive 97/11/EC provides:

> *"(1) Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia of their nature, size or location are made subject to a requirement* ***for development consent and an assessment with regard to their effects****. These projects are defined in article 4.*
>
> *(2) The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive." (emphasis added).*

In the implementation of the clear terms of the Directive therefore, the obligation of the State is unequivocal. All measures must be adopted to ensure there is a fully compliant environmental assessment as the basis for development consent.

204. *To an extent*, the actual conduct of the hearing by the inspector was consistent with national legislation. *To a point,* the consideration of the environmental impacts accorded also with the objectives of the EIA Directive as amended. However this must be seen in the context of the State's submission that there was a deficiency of such seriousness in the procedure and conduct of the *Board as to go to jurisdiction*. This is said to be the failure of the inspector and the Board to carry out an environmental impact assessment *as opposed to mere consideration* of the new dimensions of the project which included the landfill liner in accordance with the applicable requirements of EC law. It is said this arose because of the mistaken perception held by the inspector and the Board that they were precluded from so doing by virtue of s. 54(3) of the 1996 Act.

Section 54(3) of the W.M.A.1996 provides:-

> *"… (3) Notwithstanding section 26 of the Act of 1963 or any other provision of the Local Government (Planning and Development) Acts, 1963 to 1993, where a waste licence has been granted or is or will be required in relation to an activity, a planning authority or An Bord Pleanála shall not, in respect of any development comprising or for the purposes of the activity—*
>
> (a) decide to refuse a permission or an approval under Part IV of the Act of 1963 for the reason that the development would cause environmental pollution, or
>
> (b) decide to grant such permission subject to conditions which are for the purposes of prevention, limitation, elimination, abatement or reduction of environmental pollution from the activity,
>
> and accordingly—
>
> *(i) a planning authority in dealing with an application for a permission or for an approval for any such development shall not consider any matters relating to the risk of environmental pollution from the activity;*
>
> *(ii) (ii) An Bord Pleanála shall not consider any appeal made to it against a decision of a planning authority in respect of such an application, or any submissions or observations made to it in relation to any such appeal, so far as the appeal, or the submissions or observations, as the case may be, relates or relate to the risk of environmental pollution from the activity."*

205. A proper consideration of the point must of course acknowledge that the process which the Board was undertaking here was not one conducted by virtue of the Planning and Development Act 2000, which introduced a new section, 54(3)(A), which provided that when a waste licence is or might be required, the Board despite the existence of that waste licence, may, if it thinks the development "unacceptable" on environmental grounds request the Agency to make observations in relation to the development, and any EIS submitted. The Board may then make its decision on the appeal.

206. The key test in the 2000 Act is whether the Board considers the development "unacceptable". The current position in Irish law therefore might allow for consideration of a broader range of issues on an interactive basis between the Board and the Agency. The test now applicable specifically relates to "emissions" from the "*operation*" of the activity in question.

207. However it is necessary to guard against an interpretation of the original 1996 legislation solely through the prism of the amendments which have now somewhat clarified the position. The question is whether these changes amounted to a substantive amendment, or whether they were merely a clarification.

208. The Board in turn strongly relies on the positive jurisdiction invested in the Agency on the grant of a licence as provided for in s. 40(4) of the Waste Management Act 1996. It says the issue fell to be determined by the Agency alone, and not by the Board. Section 40(4) provides:-

> *"(4) The Agency shall not grant a waste licence unless it is satisfied that—*
>
> *(b) the activity concerned, carried on in accordance with such conditions as may be attached to the licence, will not cause environmental pollution,*
>
> *(c) the best available technology not entailing excessive costs will be used to prevent or eliminate or, where that is not practicable, to limit, abate or reduce an emission from the activity concerned…"*

209. Pursuant to section 40(1)(A) of the Act of 1996 the Agency was empowered to grant to the applicant a waste licence subject to or without conditions or to refuse to grant the applicant such a licence. To this end, by virtue of s. 40(2) of the Waste Management Act 1996 the Agency was mandated to:-

> *"(a) carry out or cause to be carried out such investigations as it deems necessary or as may otherwise be prescribed for the purposes of such consideration or review,*
>
> *(b) have regard to—*
>
> (i) …
>
> (ii) (I) any environmental impact statement in respect of proposed development comprising or for the purposes of the waste activity concerned, which is submitted to the Agency under and in accordance with a requirement of, or made pursuant to, regulations under section 45…"

As well as:-

> "(II) any submissions or observations made to the Agency in relation to the environmental impact statement,

(III) such supplementary information (if any) relating to such statement as may have been furnished to the Agency by the applicant or licence holder under and in accordance with a requirement of, or made pursuant to, regulations under section 45…"

210. The Board says that the Agency exercised this statutory jurisdiction in the case of the new landfill liner. Thus it was *ipso facto* precluded from dealing with the matter as it related to "an environmental pollution activity" issue, which was a matter solely for the Agency.

211. Did the national legislation, to be interpreted in the light of the objects of the Directive, in fact grant an exclusive jurisdiction to the Agency, or were there circumstances in which the exercise of function by the Board and the Agency might in fact, and should, on occasion, overlap? Duplication of course would only occur if the Board and the Agency carried out the same statutory function on the same issue from the same statutory environmental perspective. An "overlap" by contrast would arise if the Board and the Agency in the fulfilment of their respective roles were to impose conditions on the same general issues in the performance of their respective statutory functions.

212. The respective assignment of roles between the Board and the Agency was effected by article 6 of the European Communities (Environmental Impact Assessment) Amendment Regulations 1994. Those roles are summarised in *O'Connell v. Environmental Protection Agency* [2003] 1 I.R. 530 at p. 547 in the judgment of Fennelly J. *O'Connell* was a case involving a sub-threshold development. As is pointed out there the Directives permit the environmental impact assessment to be carried out or to be conducted by one or more authorities (see *O'Connell* at p. 541). But the EPA does not have an independent or free standing role to call for the submission of an EIS. Thus although there is an obligation on the EPA in certain instances to carry out an EIA it cannot commence this process itself, and can only carry out an EIA where the application before it had been preceded by a planning permission.

Specific interpretative principles applicable in the case of ambiguity
213. It is necessary then also to recollect further specific principles of interpretation which are to be applied. As Fennelly J. pointed out in *O'Connell v. Environmental Protection Agency* [2003] 1 I.R. 530 at p. 553:-

> *"Irish law implementing Directives should be interpreted in the light of the objectives imposed on the State by the provisions of the Directives with a view to giving effect to community law. However it is a matter for the Member State to decide how that result is to be achieved. When applying national law, whether adopted before or after the Directive, the national court called upon to interpret the law must do so, so far as possible, in the light of the wording and purpose of the Directive so as to achieve the result which it has in view… It is more natural to interpret an existing provision of the law, even in the event of ambiguity, so as to make that meaning conform to community law than to insert a provision into a particular national law so as to give it a meaning it does not naturally bear."*

214. As will be seen, any issue of interpretation here does not necessitate the insertion of words into national legislation. However if necessary any ambiguity is to be resolved purposively to ensure that the objects of the Directive are achieved. That object then, is to ensure that fully compliant assessments are carried out on projects of this nature. The legislation must be interpreted and applied also so as to give effect to the "unequivocal" obligation. I turn first to the provisions of national legislation which were relied on in the course of argument.

215. The Board heavily relied on s. 4(3) of the Waste Management Act. This defines *"disposal in relation to waste"* as including:-

> *"any of the activities specified in the Third Schedule and 'waste disposal' shall be construed accordingly."*

One might be forgiven for observing this is at least a semi-circular definition, in what has been referred to, more than once, as the "maze" of enactments in this area.

216. Thirteen categories of activity are identified in the Third Schedule to the Waste Management Act 1996. They range from treatment, bio-degradation, impoundment, placement into ponds, biological and chemical treatment, storage, release into the sea bed, blending, re-packaging and storage. As will be seen therefore they are all self evidently activities engaged in as a method of treating waste. They are the activities carried out *to* or *on* waste. The mirror image of the categories of activity identified in the waste licence is self-evident.

Some of these Third Schedule activities are identified as being *inter alia*:-

> *"(1) deposit on, in or under land …"*

This was subsequently amended so as to now read:-

> *"(1) deposit on, in or under land (including landfill)" (article 6(a) EC amendment of Waste Management Act Regulations 1998 S.I. 166/1998).*

The Third Schedule also contains category 5:-

> *"(5**) specially engineered landfill including placement into lined discreet cells which are capped and isolated from one another and the environment**." (emphasis added).*

The word "landfill" is of particular relevance – in particular whether it is, in effect a participle intended to mean "*landfilling*" in its broader sense, or whether it is, in Mr. Simons' phrase, a "*verbal noun*". In support of the latter contention, I note that the French text of relevant part of the Directive (viz. Annexe IIA, para. D5, on which the above-quoted Irish provision is based) refers to 'mise en decharge specialement amenagee …'.

217. The Board relies on the broad interpretation. It submits that the waste disposal "activity" which is identified in the Third Schedule involves by reference to category 5, the "*engineering*" of "*specially engineered landfill*". Thus, it is said this would include construction of the liner. In turn the Board contends that this waste disposal activity is to be equated with the definition of "*environmental pollution"* included as s. 5(1) of the Waste Management Act 1996 viz.:-

> "*…the holding, transport, recovery or disposal of waste…."*

Then the Board says the issue of the engineering of the specially engineered landfill properly falls into the province of the EPA and could not be dealt with at all by the Board.

218. First, even applying national or common law principles of interpretation it is questionable why one category in the entire Schedule, among all the activities described which are to be done to waste would, exceptionally, here, involve what would appear to be preparatory construction work to the cells. A more natural interpretation of the waste disposal activity in question is to interpret the term "*specially engineered landfill including placement into lined discreet cells…"* conjunctively and inclusively as being an activity which is carried out to waste. The waste is therefore "*landfilled*" or "placed" into lined discreet cells. I consider that this is a more natural interpretation of the term by reference to the other categories identified in the same provision.

219. Secondly, it must be emphasised that what is in question here are "*waste disposal activities".* They are not simply "disposal activities".

220. It is therefore helpful to refer to the definition of "*waste*" contained in s. 4(1) of the Waste Management Act 1996. It is defined there as being any substance belonging to sixteen categories of things outlined in the First Schedule to the Act of 1996. These include:-

> "*…products, materials, substances and residues…"*

But the definition goes further. The products, etc. are defined in the section as being *inter alia* things which the owner "*discards*" or is "*required to discard".* It is surely an artificial and strained interpretation of the words to suggest that "*specially engineered landfill…"* as interpreted by the Board involves this essentially "construction" phase of the landfill, when it is specifically identified in the third schedule as being a "*waste* disposal activity". The landfill liner is not "discarded" by any person. Nor is it a thing which a person is "required to discard". Therefore it is not "waste". (See *Commune de Mesquer v. Total France S.A.* [2008] E.C.R. 4501, para. 38). If it is not waste by definition it cannot come within the category of being a "waste disposal activity". ***All*** the other activities contained in the schedule are all activities which are done ***to*** the waste itself. These include "incineration" to which more detailed reference is made in *Martin*. The term "waste" must be interpreted purposively too, having regard to aims of the Waste Framework Directive. The landfill liner is not "waste" in the sense of being discarded. To the contrary it is intended to be deployed usefully.

221. Thirdly, even if there were an ambiguity, and I do not think there is, I consider that such ambiguity must be interpreted purposively in the manner outlined in *O'Connell* so as to give effect to the object of the Directive. An interpretation which would allow for a *lacuna* or the absence of an assessment of a development or any part thereof which has a significant environmental impact would not be an interpretation giving effect to those objects.

222. Finally, I think there is common sense to the interpretation. The first construction of the landfill liner in the first cell takes place before there is any waste being disposed of at all. Could it then be said that there is a "waste disposal activity" in that cell before there is any waste at all? I think not. A similar observation applies to the construction of each successive cell. The activity relates to the previous cell which is being landfilled.

223. In my view, the Third schedule to the Act, and in particular category 5 should be given a narrow and conjunctive interpretation which is harmonious with and sympathetic to the objective of the Directive, that is the "unequivocal" obligation on the competent authority to assess environmental effects.

224. I turn now to decided authority which I think reinforces this necessary interpretation.

Martin v. An Bord Pleanála

225. It will be recollected that the inspector stated that this legal authority to which she referred the Board in her report centred on the extent to which the division of responsibility between the Board and the EPA adequately gave effect to the requirements of the Environmental Impact Directive. The inspector stated that the combination of assessments carried out by the Board and the EPA met the requirements of that Directive. I have already commented on the questionable validity of this conclusion based on those facts alone.

226. However, I think that her summary presented only part of what was decided by the Supreme Court in *Martin*. It omitted a particularly significant issue so far as the deliberations of the Board were concerned.

227. *Martin* identified a number of highly relevant points in the context of the Directive. First, that an EIA must be carried out prior to the grant of a development consent, which consent may be granted by an authority or authorities. Second, such consent may be encompassed by the decisions of the two authorities (the Board and the EPA taken together). Third, in accordance with the Directive, the jurisdiction of the Board and the EPA can be exercised at different points in time. But fourth, an essential requirement is that, in the words of the Directive itself, the two authorities must "interact" to produce a comprehensive assessment of the environmental features of the development.

228. Having considered the terms of s. 54(3) of the Act of 1996, Murray C.J. proceeded to deal with the jurisdictional limitation between the two bodies. He pointed out at p. 406 of the judgment:-

> "*…the underlying rationale for such a limitation on the functions of the Board is that as regards developments or projects which are required to obtain a waste licence from the Environmental Protection Agency (hereafter the 'EPA') the risk of 'environmental pollution from the activity' is a matter to be assessed by that Agency when*

deciding whether to grant such a licence. This division of responsibility for environmental assessment has, as its purpose, the avoiding of duplicating of functions by the Board and the EPA in the case of such development or projects. It means that in such a case the Board carries out an EIA for the purposes of the construction element of the project and the EPA carries out an EIA in respect of the activity that will be carried out in the operation of the plant to be constructed."

229. In *Martin* the development in question was an incinerator waste management facility. It involved a range of structures housing all the requirements necessary for this activity including furnace, turbine buildings and stack. In order to proceed with the construction and operation of the facility the applicant was required by national law to obtain planning permission consent in the first instance from the planning authority, and, in the event of an appeal, from the Board. As in this case, it was required to obtain a waste licence from the Environmental Protection Agency pursuant to the provisions of the Waste Management Act 1996. Here also both the planning permission and the waste licence were necessary for the development. This was so that there should be a coherent planning consent based on an assessment derived from the assessment processes carried out by the agencies.

230. Here, as in *Martin* the Board carried out an EIA before it granted planning permission subject to certain conditions. This was consistent with article 2(1) of the Directive which required that Member States should adopt all measures necessary to ensure that before planning consent was given projects likely to have significant effects on the environment were subjected to the requirements for development consent and an assessment with regard to their effects.

231. In *Martin* no issue was taken with the substance of the EIA carried out by the Board within the ambit of its statutory competence. However the assessment conducted by the Board did include matters which affected environmental pollution arising from the construction of the relevant plant. The critical issue is that the Supreme Court pointed out clearly that environmental pollution arising from the *construction* of the plant was an issue which fell within the remit of An Bord Pleanála. Murray C.J. pointed out that the limitation on the Board was that it was simply precluded from considering any matter relating to *"the risk of environmental pollution from the activity"* as opposed to construction, that is to say the EPA was to deal with activity arising from the *operation* of the waste management facility once it had been constructed. This reflected the terms of s. 54(3) of the Act of 1996 which precluded the Board from approving, refusing or conditioning:-

"…any development comprising or for the purposes of the activity…"

identified in a waste licence.

Application of Martin

232. By virtue of the concessions which have been made by the residents at the outset of this case, this court is procedurally precluded from any further consideration of the transposition of any of the applicable Directives in this case whether they be the EIA Directives or the landfill Directives. The point which this court is called upon to decide is as to the application of the Directive by the Board and no other issue.

233. As a matter of precedent in national law this Court is constrained to follow the jurisdictional principles which have been identified in *Martin v. An Bord Pleanála*. It is quite clear that the demarcation line identified there is between environmental pollution derived from the construction of facility (which fell to be dealt with by the Board) as opposed to environmental pollution generated by the activity of the facility to be dealt with by the Agency.

234. I consider it follows that a question of environmental pollution caused by construction of the facility fell to be dealt with by the Board. The landfill liner question was a construction issue. The Board failed to deal with it. It was not dealt with otherwise. Consequently the Board was in breach of its duties under the EIA Directive. It is not the function of this court to make any more general comment on the nature or degree of interaction between the Board and Agency derived from the then applicable national law, now amended. The findings must be confined to this case.

235. The logical consequence of this is that the Board should not have been over- respectful of the perceived statutory remit of the EPA as exercised in the waste licence. Undoubtedly the Agency did deal with "engineering" aspects of the development. They have been outlined earlier, are contained in the waste licence and in the technical amendment. But this did not absolve the Board from its duty of interpretation and application of the Act in the light of the Directive, even if there might, on this occasion, have been an apparent overlap of function. This was a phased development, a concept by no means unknown in planning law.

236. Put simply, I conclude the Board exercised a misconceived self-denying ordinance, and drew its own jurisdictional line in the wrong place; that it should have dealt with environmental pollution caused by the construction works; but instead created a boundary fence to its own jurisdiction to accommodate what it mistakenly saw as a territorial incursion by the Environmental Protection Agency. As a matter of law, I think the Board could not be precluded from assessing the environmental impacts of the landfill liner. The contrary was true. This was an issue relating to environmental pollution which might be caused by the construction of the facility, not its activity. To adopt any other approach or to conflate "construction" with "operation" or "activity" would do violence to the line of demarcation identified in *Martin*. To adopt an interpretation of the national legislation so as to give effect to the Board's own definition of its role would be to defeat the objects of the Directive. It would mean that part, at least, of the development had not been preceeded by an EIA and would thereby be rendered unlawful. (See *Commission v. Ireland* [2008] E.C.R. 1, "Derrybrien Wind Farm case" C215/06.) Neither course of action is justified in law.

237. It is unnecessary, for the purposes of this judgment, to consider in further detail what the Board suggests may have been the "problematic" nature of the power only conferred upon the EPA under s. 42 B (1)(c) of the Waste Management Act 1996, as inserted by s. 38 of the Protection of the Environment Act 2003, to amend the licence. Even assuming the so-called "technical amendment" to have been lawfully made, I do not consider s. 41 (2)(a)(v) of the Waste Management Act 1996, solely, or exclusively, empowered only the EPA to condition the construction of the landfill liner. The Board relied on that provision of the 1996 Act which states:-

"2. Without prejudice to the generality of section 40 (1)(a), conditions attaching to a waste licence granted under

this power -

(a) shall as appropriate . . . .

(v) specify requirements of a technical nature to be complied with for the purpose of controlling emissions arising from, or which are the result of an activity concerned including -

(i) requirements relating to the design, construction, provision, operation and maintenance of the facility concerned or any plant thereof."

To interpret this provision so as to confer exclusive jurisdiction upon the EPA again has the effect of creating a legislative *lacuna*. It had the consequence that the Board either would have no role in relation to matters such as design or construction, or alternatively, such role as is left to it by the EPA. Potentially, such an interpretation might give rise to a difficulty because the EPA is not empowered to obtain an EIS itself, but, rather, must carry out an assessment on the basis of an EIS report which is obtained by the Board. To give effect to the objectives of the Directive, it seems to me the Act had to be interpreted in a manner which might occasionally have given rise to an apparent overlap, but not duplication in roles between the Board and the Agency. But it could not permit of any *lacuna*. Such a position would give rise to a situation where there would be no assessment of the environmental impact of the landfill liner as it was put before the inspector and the Board and therefore non-compliance with the objective of the Directive as to development consent. This would defeat the duties of the State as outlined in the Directive itself and the legal authorities identified earlier.

238. Making sense of the Irish legislation through the prism of Martin means that at a minimum, a process of complementarity between the two bodies was required. In a sense, the Board was required to 'go the extra mile' to ensure that this was met. In saying this, I appreciate that the Board and indeed the inspector had a most awkward task of navigating through Irish law, as it then was.

239. This is not a situation where a mere deficiency in an EIA might be remedied, a position envisaged by McMahon J. in *Klohn v. An Bord Pleanála* [2008] I.E.H.C., or in *Edwards v. Environment Agency* [2008] U.K.H.L. 22.

240. The Board was undoubtedly entitled to remit the updating of the EIA to the oral hearing. It permitted extensive submissions and cross-examination in respect of the updated information. The jurisdictional deficiency, however, was to fail to assess the environmental pollution which might be caused by the construction process necessary to install the landfill liner. This deficiency goes to jurisdiction.

The public participation directive

241. There follows a further logical consequence from the failure of either the Agency or the Board to carry out a complete lawful Environmental Impact Assessment. This arises from the fact that, insofar as an Environmental Impact Assessment was necessary, such a process whenever carried out would be predicated upon public participation, in particular the right of the public to participate in the EIA process.

242. Directive 2003/35/EC (the Public Participation Directive) significantly amends Council Directive 85/337/EEC, (the EIA Directive). Thus by virtue of article 4 of the latter instrument there are outlined provisions for information provided by the Environmental Impact Assessment and Public Consultation, full details of which are outlined in that article of the Public Participation Directive. The intent is to give the public early and effective opportunities to participate in environmental decision making procedures as defined in the Directive. Article 8 of the 2003 Public Participation Directive includes as one of the matters to be dealt with in Annex of the EIA Directive:-

*"any **change to** or extension of projects listed in this Annex where such a change or extension in itself meets the thresholds if any, set out in this Annex." (emphasis added).*

This was a change to the project. It is not in dispute that this landfill site is encompassed in the Annex. The omission here is a serious one. The Commission v. Ireland [2006] ECR 1-10787 clearly demonstrates that there exists a right of public participation. The renewed inspector's hearing allowed for public participation, but there was thereupon no environmental assessment. Thus there has been non-compliance with this Directive also. (See the judgment of the Court of Justice in case C66/06 *Commission v. Ireland* (20th November, 2008) which is of particular relevance as it specifically dealt with such failure.)

243. I should add Annex II of the Public Participation Directive identifies the list of projects subject to the minimum requirements of the Directive: these include subcategory 13: *"any change or extension … to projects already authorised and in the process of being executed which may have significant adverse effects on the environment".* I am holding that this provision is triggered here.

Does this want of jurisdiction give rise to judicial review?

244. It is necessary then to consider whether or not these deficiencies constitute good grounds for relief by way of judicial review. It is clear that the error here goes to jurisdiction. The Board failed to address itself to the right question. Section 54(3) properly interpreted should have been the basis of the Board's jurisdiction to ensure compliance with the Directive.

245. By virtue of article 10 of the Treaty the court is required to give effect to EC Law, and, here, to give effect to the EIA Directive. See Martin, and *R. (Wells) v. Secretary of State for Transport* (Case C-201/02).

246. In this context *Wells* is of particular assistance in that it relates to the consequence of non-compliance with a Directive requirement.

247. The case concerned an old planning permission for mining in a quarry. It was necessary to apply to the relevant planning authority for the possibility of the imposition of fresh conditions. The question which arose was whether in the context of these additional fresh conditions a further EIA was necessary or if it could be argued it was a "pipeline project", in other words, one where the original consent of the old planning permission predated the coming into force of the Directive. Therefore it might be thought that the exercise in terms of any new conditions was simply "filling in" detail in relation to a valid consent and therefore not necessitating an EIA. It is therefore in some ways analogous to the case

in suit.

248. The European Court of Justice concluded otherwise. It stated that if what was in question was more than the simply "filling in of details" there was a requirement for a fresh EIA. At para. 64, page 67 of the Report the Court observed:-

> *"As to that submission, it is clear from settled case-law that under the principle of cooperation in good faith laid down in article 10EC, the Member States are required to* ***nullify*** *the unlawful consequences of a breach of Community law."*

I think the true effect of this observation cannot be subsumed by any question of "substantial compliance" or judicial discretion in the jurisprudence of a national court.

Having referred to *Frankovich v. Republic of Italy* (Case C-6/90) [1991] E.C.R. the court observed:-

> *"Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned."*

Thus the obligation to nullify is owed by this Court. In this case, the fact that the switch to a BES liner might have been more beneficial to the long-term does not obviate the duty of this Court to ensure the correct process was followed in relation to its construction.

249. The situation in *this* case was not one where there was a failure to observe *"some procedural steps which were clearly superfluous"* in the words of Lord Hoffman in *Berkeley v. Secretary of State for Environment* [2000] U.K. H.C. 36. There can be no EIA where there has been no assessment. The consideration of the issues by the inspector lacked that ultimate sine qua non. It was Hamlet without the prince.

250. In *R. (Wells) v. Secretary of State for Transport* (Case C-201/02) [2004] 1 C.M.L.R. 31, the Court of Justice referred to The Commission v. Germany (Case C-431/92) [1995] E.C.R. I-2189. It observed then:-

> *"65. Thus it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment."*

Having referred to the Dutch *Kraaijefveld* case and the *WWF* case the court observed:-

> *"… such particular measures include, subject to the limits laid down by the principle or procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question.*
>
> 66. The Member State is, likewise required to make good any harm caused by the failure to carry out an environmental impact assessment.
>
> 67. The detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness)."

251. Thus, discretionary considerations as to whether an assessment would have made a significant difference do not come into the equation. The EIA, a prerequisite to development consent, simply did not cover the entire development. This legal issue goes fundamentally to jurisdiction. In failing to address itself to a relevant legal consideration, and in asking itself incorrect legal questions, the Board manifestly erred in excess of its jurisdiction. The decision was for these reasons "irrational" in the *White* sense.

Further comment

252. Judicial review this granted might also arguably be seen from a different perspective which could lead to the same outcome. The following observations are made obiter dictum.

253. In *S.I.A.C. Construction Ltd. v. Mayo County Council* [2002] 3 I.R. 148, a public procurement case, Fennelly J. was at pains to emphasise that within its jurisdiction, the courts would show great deference to planning authorities and to An Bord Pleanála which have a wide range of discretion. The courts, of course, must not substitute their assessment of the facts for those of the authority concerned. However, if the relevant decision-maker starts off on the wrong point, or, if (as in the present case), a decision-maker erroneously concludes that construction impacts were not a matter for it, then there has been no lawful assessment. There has therefore been a failure lawfully to exercise jurisdiction, now one of the limbs of the national judicial review tests.

254. In its original formulation the *O'Keeffe* test might perhaps have been inadequate to address the remedy required. But the law has evolved. Considerations which might have seemed appropriate even three or four years ago must be seen in the light of the evolution of national law and Directive requirements, as cited to the courts.

The extent of evolution in the standard of review may be demonstrated by more recent case law. In *S.I.A.C.* Fennelly J. pointed out:-

> *"… [the] common threads that run through any system of review of administrative decisions especially where the primary decision function is administrative or governmental. The function of the courts is to guarantee legality*

though that notion itself has a number of elements, some procedural and some substantive."

255. *S.I.A.C.* was, as stated above, a public procurement case. But more recent High Court authorities have pointed out that the original O'Keeffe test may require reconsideration in the light of article 10(a) of the EIA Directive as now amended (see *Klohn v. An Bord Pleanála* [2008] McMahon J. I.E.H.C. 111).

256. Clarke J. in *Sweetman v. An Bord Pleanála No. 1* [2007] I.E.H.C. 153 observed that, now, Irish Judicial review law goes "a long way towards (and indeed may well meet) the requirement for review required by the Public Participation Directive". (See also the opinion of Advocate General Kokott in *Commission v. Ireland* Article 10A, EIA Directive Case C 427/07 which *inter alia* addresses the specific issue of the scope of national judicial review procedure necessary in order to permit challenge to the substantive or procedural legality of decisions.)

257. It appears difficult to discern a procedural or substantive difference between the test applied by Fennelly J. in S.I.A.C. albeit in that context, and the standard of review referred to in article 10(a) of the Directive, that of "substantive or procedural legality". Clearly this stops short of any question of an appeal on the merits. (See decision of Cooke J. in *Cairde Chill An Disirt Teoranta v. An Bord Pleanála and Others* [2009] I.E.H.C. 76 for a discussion of the effect of Article 10A). In the case of this waste facility, the manifest error was a matter of law going to jurisdiction. Any further issue such as the identification of an alternative standard of review such as "anxious scrutiny" does not therefore arise here. The point is one of clear law.

Remedy
But the foregoing is as I have indicated an observation made *obiter*. Whatever route is adopted the court is required, in the words of *Wells* to "nullify the unlawful consequences of a breach of community law". The procedure for such annulment is by way of judicial review quashing the decision of the Board in accordance with *White* principles.

258. Put in classic judicial review terms the Board asked itself the wrong question in identifying its jurisdiction (*White v. Dublin City Council* [2004] 1 I.R. 545). It misdirected itself as to its powers and duties. This led to irrationality. The true question was: "What are the Board's duties so as to give effect to the objects of the Directive?"

259. The authority and duty of the courts is therefore derived by the application of national judicial review principles but formulated so as to give effect to the consequences of the finding under E.C. law, that is to annul the decision.

260. For the reasons outlined, therefore, I consider that judicial review by way of *certiorari* should be granted on these grounds also.

Conclusion
261. I will hear counsel on the form and extent of the remedy in the light of the respective findings in Parts I, II, IV and V of this judgment.