THE HIGH COURT
JUDICIAL REVIEW

2019 No. 825 J.R.

BETWEEN

MICHAEL DEMPSEY
EVA DEMPSEY
EAMONN COURTNEY
JACINTA COURTNEY

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

ARDSTONE HOMES LTD

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 24 April 2020

OVERVIEW

1. This judgment sets out the reasons for which this court has decided to make a reference to the Court of Justice of the European Union ("***the Court of Justice***") pursuant to Article 267 of the Treaty on the Functioning of the European Union. It should be emphasised that this judgment is, in effect, an interim ruling, confined to the threshold issue of whether a decision by the Court of Justice on the interpretation of the Environmental Impact Assessment Directive is necessary to enable this court to give judgment on the issue which has now arisen in the proceedings before it. The main proceedings will be stayed pending the determination of the reference by the Court of Justice. Thereafter, the parties will be afforded an opportunity to make written and oral

submissions to the High Court on the question of whether, in light of the guidance from the Court of Justice, the proceedings should be struck out.

INTRODUCTION

2. These proceedings have given rise to an important issue of EU law. Specifically, the issue is whether there are ever circumstances in which a national court may be obliged to rule upon an application to set aside a development consent, notwithstanding that the party who initially invoked the court's jurisdiction now wishes to have the proceedings struck out.

3. The issue arises in the context of judicial review proceedings which seek to challenge a decision to grant development consent for a large-scale residential development. One of the principal grounds of challenge advanced in the proceedings involves an allegation that An Bord Pleanála failed to comply with its obligation to state the "main reasons and considerations" for its decision to grant development consent. This is said to represent a breach both of domestic law and of the Environmental Impact Assessment Directive (2011/92/EU) ("***the EIA Directive***").

4. As discussed presently, however, the alleged failure to state the "main reasons and considerations" for the decision may conceal another, perhaps more serious, breach of the public participation requirements of the EIA Directive. In brief outline, it is arguable that, on one reading of the inspector's report at least, improper reliance may have been placed upon the pre- application consultation between An Bord Pleanála, the Developer and the Planning Authority.

5. Counsel for the Applicants indicated on the third day of the hearing before me that a settlement had been reached between the parties, and that his clients were requesting the

court to make an order striking out the proceedings. An Bord Pleanála and the Developer have both indicated their consent to this proposed order.

6. The parties to the proceedings all accept that the court has a *discretion* under domestic law as to whether or not to accede to the application to strike out the proceedings. It has been urged upon the court that the principal factor informing the exercise of this discretion should be the views of the parties themselves. The parties all submit that there is a strong public interest in the settlement of litigation, and that it would undermine this public interest were a court to deliver a judgment in proceedings in circumstances where the parties all now wish the proceedings to be discontinued.

PROCEDURAL HISTORY

7. The within proceedings have been instituted by four local residents who own and occupy houses within the vicinity of a proposed development project ("***the Applicants***"). The proceedings take the form of an application for judicial review of a decision of the Planning Board to grant development consent for proposed residential development ("***the development project***"). The decision to grant development consent was made on 26 September 2019. (Ref. PL09.304632).

8. The development project is subject to the requirements of the EIA Directive. This is because the scale of the development project exceeds the threshold prescribed under domestic law for "urban development projects".

9. The consent application was subject to the special development consent procedure introduced for large scale residential developments under the Planning and Development (Housing) and Residential Tenancies Act 2016 (No. 17 of 2016) ("***the PD(H)A 2016***"). The consent procedure is unusual in that it provides for mandatory consultation between the developer and the competent authorities *prior to* the making of the consent

application ("***pre- application consultation***"). Public participation is not allowed as part of the pre- application consultation. Following the pre- application consultation, the Planning Board may issue an opinion to the effect that the documents submitted with the request to enter into consultations require further consideration and amendment.

10. In the present case, the pre- application consultation took place on 30 November 2018. The Planning Board issued a statutory "opinion" in December 2018, which indicated that a number of matters needed to be addressed, including, *inter alia*, the "density" of the proposed development project. (The concept of housing "density" refers to the number of residential dwellings per hectare).

11. The relevant part of the opinion reads as follows.

> "An Bord Pleanála considers that the following issues need to be addressed in the documents submitted that could result in them constituting a reasonable basis for an application for strategic housing development.
>
> 1. Density
>
> Further consideration/justification of the documents as they relate to the density in the proposed development. This consideration and justification should have regard to, inter alia, the minimum densities provided for in the 'Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas' (May 2009) in relation to such Outer Suburban/Greenfield sites. Particular regard should be had to [the] need to develop at a sufficiently high density to provide for an acceptable efficiency in serviceable land usage given the proximity of the site to Clane town centre, with its established social and community services. The further consideration of this issue may require an amendment to the documents and/or design proposal submitted relating to density and layout of the proposed development."

12. The opinion goes on to address a number of other matters including, *inter alia*, design, layout and unit mix; infrastructural constraints; and surface water management and flood risk assessment.

13. As appears, the Developer was requested to have "particular regard" to the need to develop at a sufficiently high density to provide for an acceptable efficiency in

serviceable land usage given the proximity of the application site to the town centre. The opinion also stated that further consideration of this issue may require an amendment to the documents and/or design proposal submitted relating to density and layout of the proposed development.

14. As explained at paragraph 33 *et seq.* below, the planning legislation expressly provides that the forming of an "opinion" shall not prejudice the performance by the Planning Board of any of its statutory functions, and cannot be relied upon in the formal planning process or in legal proceedings.

15. The Developer had initially proposed, as part of its pre- application consultation with the Planning Board, that the development project would comprise 322 dwellings. The consent application as submitted, however, increased the housing density and sought development consent for 366 dwellings. This increase was, seemingly, made in response to the Planning Board's opinion.

16. One of the principal objections made to the development project during the public participation procedure had been in respect of housing density. The Planning Authority, which is a prescribed competent authority for the purposes of Article 6 of the EIA Directive, submitted that the proposed housing density would be excessive, and would result in a distortion of (i) the settlement hierarchy set out in the County Development Plan, and (ii) the residential capacity set out in the Local Area Plan.

17. The statutory report of the chief executive of the Planning Authority, prepared pursuant to section 8 of the PD(H)A 2016, had recommended that planning permission be refused. The first of the four recommended reasons for refusal reads as follows.

> "1. Having regard to the status of Clane as a Small Town in the Settlement Hierarchy of the Kildare County Development Plan 2017 – 2023, the new dwellings target of 780 units identified for Clane in the Kildare County Development Plan during the plan period up to 2023 and the density indicated within the Clane Local Area Plan 2017 – 2023 for the application site (Key Development Area 2), the

> density and number of residential units proposed would distort the Core and Settlement Strategy figures set out in the Kildare County Development Plan 2017 – 2023, would be contrary to the planned housing provision for Clane as set out in the Plan, would contravene the development strategy of Clane and projected residential capacity outlined for this Key Development Area as set out in the Clane Local Area Plan 2017 – 2023. The proposed development would be contrary to Section 4.3 of the Eastern and Midland Regional Assembly's Regional Spatial Economic Strategy which seeks a graded reduction in residential densities in towns and villages commensurate to the existing built environment. Having regard to the foregoing the proposed development would be contrary to the proper planning and sustainable development of the area."

18. The first named Applicant, in a written submission made to the Planning Board on 5 July 2019, had also raised an objection to the proposed housing density. It was submitted that the proposed housing density of 37.82 dwellings per hectare constituted an overdevelopment of the site. It was submitted that the appropriate housing density would be in the range of 20 – 35 dwellings per hectare.

Planning Board's decision

19. The Planning Board made a decision to grant planning permission on 26 September 2019. The Planning Board's formal decision does not address the issue of housing density in any detail. The decision does, however, confirm that the Planning Board considered the residential density to be acceptable in this location.

20. The conclusion is set out as follows. (It should be emphasised that this is an extract only from the decision, which is a much longer document running to some 17 pages).

> "Conclusions on Proper Planning and Sustainable Development
>
> It is considered that, subject to compliance with the conditions set out below, the proposed development would constitute an acceptable residential density in this location within the development boundary of Clane, would not seriously injure the residential or visual amenity of the area, would be acceptable in terms of urban design, height and quantum of development and in terms of pedestrian and traffic safety. The proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area."

21. The Planning Board's conclusions on its environmental impact assessment are stated as follows.

> "The Board completed an environmental impact assessment in relation to the proposed development and concluded that, subject to the implementation of the mitigation measures set out in the environmental impact assessment report, and subject to compliance with the conditions set out below, the effects on the environment of the proposed development, by itself and in combination with other development in the vicinity, would be acceptable. In doing so, the Board adopted the report and conclusions of the Inspector."

22. Again, this is merely an *extract* from the Planning Board's environmental impact assessment. The record of the assessment is much longer, and examines, *inter alia*, the impact of the proposed development project on biodiversity and on the human population. The issue of housing density is not directly addressed, but the assessment does record as follows.

> "Given the location of the site within the development boundary of Clane and the distance from the town centre, the landscape and visual impact is considered a moderate positive effect and is considered acceptable."

23. It is well established that the rationale for a planning decision may be found in documents other than the formal decision, and, in particular, may be found in the report prepared by the inspector assigned to make a report and recommendation on the planning application ("***the inspector's report***"). See *Connelly v. An Bord Pleanála* [2018] IESC 31; [2018] 2 I.L.R.M. 453.

24. The issue of housing density is addressed in some detail in the inspector's report. At a key point in her assessment, however, the inspector makes "reference"—to use a neutral term—to the Planning Board's opinion issued as part of the pre- application process.

25. A reference to the pre -application opinion also appears at one point in Section 12 of the inspector's report, which is the section of the report which expressly addresses environmental impact assessment. See §12.13 of the inspector's report as follows.

"Consideration of Alternatives

12.13.1. The submitted EIAR outlines the alternatives examined at Chapter 4 (pursuant to Article 5(1)(d) of the 2014 EIAR Directive and Annex IV). The main alternatives studied comprise alternative design solutions and layouts for a largely residential development. The proposal is predicated on the zoning of the site and site-specific policy objectives in relation to plot ratio and density. Given the site's zoning objective alternative locations were not considered. A number of alternative layouts for the proposed development were considered over the design process. *In addition, the proposals for the development were subject to pre-planning consultation with the Planning Authority and An Bord Pleanála prior to the principles of the proposed layout being finalised. Specifically, the proposed layout and detailed design has been directly informed by An Bord Pleanála's Opinion issued subsequent to pre-planning consultation*.*

12.13.2. The significant environmental issues and potential effects which informed the proposed layout included the alignment of the Clane Link Road as previously approved by the Planning Authority under Part V of the Planning and Development Act 2000 (as amended); landscape and visual impact and impact on amenity of adjoining properties. Other factors which were fundamental to informing and directing detailed design included the design brief established under KDA2 in the Clane Local Area Plan 2017-2023.

12.13.3. Alternative processes are not relevant to the proposal. In my opinion reasonable alternatives have been explored and the information contained in the EIAR with regard to alternatives is comprehensive, provides a justification in environmental terms for the chosen scheme and is in accordance with the requirements of the 2014 EIA Directive."

*Emphasis (italics) added.

Judicial review proceedings

26. The Applicants applied for and obtained leave to apply for judicial review of the Planning Board's decision by order of the High Court (Simons J.) dated 20 November 2019. As part of that application, the Applicants were required to establish that there were "substantial grounds" for questioning the validity of the planning decision. (Section 50 of the PDA 2000).

27. Thereafter, the proceedings were subject to case management in the High Court's Strategic Infrastructure Development List. Directions were given as to the exchange of pleadings, affidavits and written legal submissions. The main proceedings were listed for hearing for three days, commencing on 21 January 2020.

28. The principal ground of challenge advanced by the Applicants is that the Planning Board has failed to provide a proper statement of the "main reasons and considerations" for its decision to grant development consent. The matter is put as follows at paragraph (e) 6 of the Statement of Grounds.

> "6. Neither the decision to grant planning permission nor the notification of the said decision to the applicant record the reasons and considerations for the decision to grant planning permission. This is contrary to Article 11 of the EIA Directive, and section 10(3) of the 2016 Act and is contrary to fair procedures, natural and constitutional justice, and national law on the environment. The decision is also contrary to the obligation to give reasons for administrative action. The said determination is also contrary to Article 9 of the Aarhus Convention."

29. In the course of his submissions to the High Court, counsel on behalf of the Applicants noted that the density of the proposed development was something which was expressly raised by the Planning Board at its pre- application consultation with the Developer. Counsel expressed a concern on behalf of the Applicants that the issue of density may have been prejudged by the Planning Board prior to the public participation stage of the process. (Transcript Day 1, page 82).

> "The higher density, higher altitude requirement emanates from the Board itself in the first instance and then, as I said, when it is challenged and questioned the Board, perhaps unsurprisingly, it having made that recommendation, doesn't seem to satisfactorily engage with what is said and insofar as it does one gets the impression that perhaps the decision was already made here. It is a fait accompli that it is going to be built at a higher density. No proper satisfactory explanation is given anywhere along the way as to how that is in accordance with proper planning and sustainable development and in particular how it is in accordance with my client's expressed need to have residential amenity, and so on."

30. Counsel emphasised that in the (alleged) absence of an adequate statement of the "main reasons and considerations" for the decision to grant development consent, the Applicants were not in a position to formulate a challenge on the grounds of prejudgment. (Day 1, page 133).

> "This is the problem, Judge, this is why reasons are so important, it is because you can't assail the actual decision made unless you know what it actually it is. We don't know what it actually is and we don't know what it actually is. It has a look of a prejudgment based on the densities and that everything here is based on densities, but we can't be certain if that is so because it is not actually clearly stated that that is so and we'll come to that in a moment."

31. Counsel went on to submit that "having already told the developer to increase the density, the Board itself may have had a reluctance to then find that there is in fact a problem with the density". (Day 1, page 135). It was suggested that consideration of the appropriate housing density had happened as part of the pre- application consultation, and that the inspector assessing the planning application was not, in fact, coming to this issue with an "entirely fresh pair of eyes". There was no "fresh or objective consideration" of the issue to be found in the inspector's report. (Day 1, page 136).

32. If counsel is correct in his submissions, then the alleged failure to state the "main reasons and considerations" may conceal another, perhaps more serious, breach of the requirements of the EIA Directive. If the Planning Board had settled on a higher housing density at the pre- application stage—or if the inspector had mistakenly thought that the board had done so—then this would have undermined the effectiveness of the subsequent public participation. If this had occurred, then this might involve a breach of the requirements of Article 6(4) of the EIA Directive, as follows.

> 4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

33. Section 6(9) of the PD(H)A 2016 expressly provides that neither (a) the holding of a pre-application consultation under this section, nor (b) the forming of an opinion, shall prejudice the performance by the Planning Board of any other of its statutory functions and cannot be relied upon in the formal planning process or in legal proceedings.

34. An almost identical statutory prohibition on the placing of reliance upon pre- application consultations in the formal planning process is to be found in the case of strategic infrastructure development (section 37C of the PDA 2000), and in the case of pre-application consultations with a planning authority (section 247 of the PDA 2000). The practical implications of these types of prohibition have been explained as follows by the High Court (Haughton J.) in *O'Flynn Capital Partners v. Dun Laoghaire Rathdown County Council* [2016] IEHC 480, [31] and [32].

> "It follows that, in general, reports and recommendations from planning or other local authority officials prepared in the course of the formal planning process in response to a planning application should not rely upon advice given or received at any statutory pre-planning consultation, and in turn should not be relied upon by the decision maker(s) when considering or determining the application.
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> There will be some circumstances in which it may be permissible for reference to be made to pre-planning consultations. For instance, it is difficult to see how an applicant could realistically object to a simple listing in a planner's report of the pre-planning consultations. It may be that documentation furnished at such a meeting, if furnished with the intention that it would used in a planning application, would not be covered by the s. 247(3) prohibition. It must also be open to an applicant for judicial review who asserts that there was improper reliance by a planning authority on the content of pre-planning consultations in 'the formal planning process' to refer to sufficient material to support a case for breach of s. 247(3). There may be other exceptional circumstances in which evidence from a pre-planning consultation may be admissible, for example, where an egregious comment at such a meeting gives rise to an allegation of actual bias."

35. Returning to the present case, when asked as to why a claim of prejudgment or predetermination had not been pleaded as part of the case, counsel explained that in the

absence of a proper statement of the main reasons and considerations, his clients could not "get to" what was actually decided by the Planning Board.

36. This explanation would appear—at first blush at least—to be consistent with the case law on the duty to give reasons. The judgments, both of the national courts and the Court of Justice, have emphasised that one of the objectives served by the imposition of a duty to give reasons is to ensure that an interested party has enough information to consider whether there might be grounds for challenging a decision by way of judicial review.

37. The purpose behind the provision of reasons has been summarised as follows by Clarke C.J. in *Connelly v. An Bord Pleanála* [2018] IESC 31; [2018] 2 I.L.R.M. 453 (at paragraphs 6.15 and 6.16).

> "Therefore, it seems to me that it is possible to identify two separate but closely related requirements regarding the adequacy of any reasons given by a decision maker. First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review.
>
> However, in identifying this general approach, it must be emphasised that its application will vary greatly from case to case as a result of the various criteria identified earlier which might distinguish one decision, or decision making process, from another."

38. At a later point in his judgment, Clarke C.J. stated as follows (paragraph 10.2).

> "Indeed, it is worth saying that there may have been times in the past when decision makers felt that their decisions were more likely to be open to successful legal challenge if they gave detailed reasons because, it might have been considered, the giving of detailed reasons allowed parties to assert that the reasons were legally inappropriate. However, the modern position makes clear that it is more likely that a decision will be open to successful challenge because reasons are not given rather than because they are. Decision makers are normally afforded a significant margin of appreciation within the parameters

> of the legal framework within which a particular decision has to be taken. Courts will not second guess sustainable conclusions of fact. As noted earlier, many decisions involve the exercise of a broad judgment and here again the courts will not second guess the decision maker on whom the law has conferred the power to make the decision in question. Giving an explanation as to why the decision maker has concluded one way or the other does not affect that position. What may, however, lead to a successful challenge is if a court concludes that it is not possible either for interested parties or, indeed, the court itself, to know why the decision fell the way it did."

39. The link between the giving of reasons and judicial review has also been referenced by the Court of Justice in Case C-75/08, *Mellor*, [57] to [59], as follows.

> "It is apparent, however, that third parties, as well as the administrative authorities concerned, must be able to satisfy themselves that the competent authority has actually determined, in accordance with the rules laid down by national law, that an EIA was or was not necessary.
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> Furthermore, interested parties, as well as other national authorities concerned, must be able to ensure, if necessary through legal action, compliance with the competent authority's screening obligation. That requirement may be met, as in the main proceedings, by the possibility of bringing an action directly against the determination not to carry out an EIA.
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> In that regard, effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general, that the court to which the matter is referred may require the competent authority to notify its reasons. However where it is more particularly a question of securing the effective protection of a right conferred by Community law, interested parties must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts. Consequently, in such circumstances, the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request (see Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 15)."

40. It should be emphasised that there is no question of this court purporting to decide any issue in respect of prejudgment or predetermination as part of these judicial review proceedings. In the event that, having considered and applied the judgment to be given by the Court of Justice in the Article 267 reference, this court were to proceed to rule

upon these judicial review proceedings, any such ruling would be confined to the case as set out in the pleadings. More specifically, the only issue which would fall for determination in such a scenario would be whether the Planning Board had complied with the duty to state the "main reasons and considerations" for the decision to grant development consent. Mention has been made of prejudgment or predetermination only because it was cited by counsel for the Applicants as illustrating the practical difficulties which the (alleged) absence of a proper statement of reasons can give rise to. Counsel was careful to explain that his clients were not advancing a claim of prejudgment or predetermination, but simply flagging that what they alleged to be an inadequate statement of reasons created a risk that a possible error of law on the part of the Planning Board would remain undisclosed.

SETTLEMENT OF PROCEEDINGS

41. On the morning of the third day of the hearing (23 January 2020), counsel for the Applicants indicated that "progress has been made between the parties", and applied for leave to strike out the proceedings with no further order. This application is supported by the other two parties to the proceedings, namely the Planning Board and the Developer. The parties have confirmed in their written submissions that a "settlement" or "compromise" has been reached between them. The precise terms of the settlement have not been put before the court.

42. The proceedings were then adjourned for further submissions on the question of whether the court could simply allow the parties to withdraw proceedings where it had a concern as to a potential breach of the EIA Directive. The possibility of the making of a reference to the Court of Justice pursuant to Article 267 of the TFEU was also flagged to the parties.

Written legal submissions were filed on behalf of the Planning Board and the Developer, and all parties made further oral submissions on 4 February and 14 February 2020.

43. It is not necessary, at this stage of the proceedings, to make a definitive ruling on the precise jurisdictional basis for the application to strike out the proceedings. This is because, crucially, the parties agree, first, that an order of the court is required, i.e. the judicial review proceedings cannot be discontinued unilaterally by the Applicants; and, secondly, that the court has *discretion* as to whether to accede to the application or not. The parties do, however, suggest that the discretion is limited, and should, generally, be exercised in favour of allowing the settlement of proceedings.

44. It seems to be accepted by all of the parties that the provision made under Order 26 of the Rules of the Superior Courts for the discontinuance of proceedings is inapplicable to judicial review proceedings. It has been submitted, however, that the principles governing the exercise of the court's discretion under that Order apply by analogy.

DUTY TO STATE REASONS: RELEVANT STATUTORY PROVISIONS

45. Article 9 of the EIA Directive provides as follows.

> 1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall promptly inform the public and the authorities referred to in Article 6(1) thereof, in accordance with the national procedures, and shall ensure that the following information is available to the public and to the authorities referred to in Article 6(1), taking into account, where appropriate, the cases referred to in Article 8a(3):
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> (a) the content of the decision and any conditions attached thereto as referred to in Article 8a(1) and (2);
>
> (b) the main reasons and considerations on which the decision is based, including information about the public participation process. This also includes the summary of the results of the consultations and the information gathered pursuant to Articles 5 to 7 and how those results have been incorporated or otherwise addressed, in particular the comments received from the affected Member State referred to in Article 7.

46. Insofar as strategic housing developments are concerned, these requirements have been transposed into domestic law, primarily, by the provisions of section 10 of the PD(H)A 2016 as follows.

> (3) A decision of the Board to grant a permission under section 9(4) shall state—
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> (a) the main reasons and considerations on which the decision is based,
>
> (aa) the reasoned conclusion, in relation to the significant effects on the environment of the proposed development, on which the decision is based,
>
> (ab) if that decision arises from the Board ' s consideration of the environmental impact assessment report concerned and is different from the recommendation in a report of a person assigned to report on the application concerned on behalf of the Board, the main reasons for not accepting the recommendation in the last-mentioned report to refuse permission,
>
> (b) where the Board grants a permission in accordance with section 9(6)(a) , the main reasons and considerations for contravening materially the development plan or local area plan, as the case may be,
>
> (c) where conditions are imposed in relation to the grant of any permission, the main reasons for imposing them,
>
> (d) where a decision to impose a condition (being an environmental condition which arises from the consideration of the environmental impact assessment report concerned) in relation to any permission is materially different, in relation to the terms of such condition, from the recommendation in a report of a person assigned to report on the application for permission on behalf of the Board, the main reasons for not accepting, or for varying, as the case may be, the recommendation in the last-mentioned report in relation to such condition, and
>
> (e) in relation to the granting or refusal of a permission in respect of an application accompanied by an environmental impact assessment report, subject to or without conditions, that the Board is satisfied that the reasoned conclusion on the significant effects on the environment of the development was up to date at the time of the taking of the decision.

(3A) A decision given under section 9(4) in respect of an application accompanied by an environmental impact assessment report and the notification of the decision shall include a summary of the results of consultations that have taken place and information gathered in the course of the environmental impact assessment and, where appropriate, the comments received from an affected Member State of the European Union or other party to the Transboundary Convention, and specify how those results have been incorporated into the decision or otherwise addressed.

SUBMISSIONS OF THE PARTIES

47. Leading counsel on behalf of An Bord Pleanála, Mr Brian Kennedy, SC, submits that the appropriate order to be made is an order, by consent, striking out the application for judicial review on foot of the withdrawal of same. Counsel submits that there is a strong public policy in favour of the settlement of proceedings, citing *Delany and McGrath on Civil Procedure*, (Thomson Round Hall, 4th. ed) at §20-02.

48. This principle is said to apply to judicial review proceedings, citing *Foskett on Compromise* (Thomson Reuters, 9th ed.). Whereas the approval of the courts may be required to give effect to a compromise of judicial review proceedings, the circumstances in which the court can properly decline to give its approval are extremely limited, and are, broadly speaking, confined to cases where the order which the court is being asked to make by the parties would involve illegality or the court exceeding its jurisdiction. Such limited circumstances are, moreover, much more likely to occur where the court is being invited to make substantive orders by consent, rather than where, as here, the court is simply being asked to make an order striking out the proceedings. It is extremely difficult to envisage circumstances in which the simple withdrawal of the proceedings would involve illegality or the court exceeding its jurisdiction.

49. Counsel then turned to a consideration of whether any qualification of these principles is necessitated by reference to EU law. Counsel prefaced his submissions by querying whether any EU law issue properly arises.

50. There is no obligation on a national court to raise matters of EU law which go beyond the ambit of the dispute as defined by the parties themselves if this would oblige the national court to abandon its passive role. The judgments in C-430/93 and C-431/93, *Van Schijindel*, and Cases C-222/05 to C-225/05, *Van der Weerd*, are cited in support of this proposition. It is noted that the former judgment had been cited with approval by the Supreme Court in *Callaghan v. An Bord Pleanála* [2017] IESC 60.

51. Counsel noted that the Court of Justice has identified consumer protection as an area where there may be exceptions to the general principles identified in *Van Schijindel* to the effect that there is no obligation on national courts to raise EU points of their own motion. It does not appear that the Court of Justice itself has yet considered whether similar principles might apply to the protection of the environment. This issue has been considered by Advocate General Kokott in Case C-416/10, *Krizan*. Counsel submits that Advocate General Kokott did not consider that environmental law should be treated in the same way as the law in respect of consumer contracts, but left open the possibility that an exception could in the future be made to the general principles espoused in *Van Schijindel* and *Van Der Weerd* in respect of particular aspects or breaches of EU law, such as a failure to carry out an EIA altogether where one was required.

52. Counsel suggests that the potential breach of the EIA Directive identified in the present case is not in the territory identified by the Advocate General. It is further submitted that—even in the consumer contract sphere—there is no case where it has been held that the "own motion" obligation of a court trumps a party's desire to compromise proceedings. The point is also made that at least part of the rationale for the approach

adopted in consumer contract cases is that parties may not have had a genuine opportunity to raise a plea based on the provisions of the Consumer Contracts Directive. That concern does not arise here.

53. Leading counsel on behalf of the Developer, Mr Neil Steen, SC, submits that an unwilling litigant should not be compelled to continue proceedings, citing *Shell E.P. Ireland Ltd v. McGrath (No. 3)* [2007] 4 I.R. 277; *Joint Stock Company Togliattiazot v. Eurotoaz Ltd* [2019] IEHC 342; and *Delany and McGrath on Civil Procedure* (Thomson Roundhall, 4th ed.), §17-13. It is further submitted that the settlement of litigation is generally encouraged by the courts as a matter of public policy, citing *Greencore Group plc v. Murphy* [1995] 3 I.R. 520.

54. Counsel emphasises that an application to strike out proceedings can be made up and until the drawing up of the formal order of the court. Thus, an application to strike out proceedings can be made at any stage prior to an order actually being made by the court, and can be made even if the court has actually handed down judgment. The implication being that such is the paramount importance of the views of the parties that, even where a national court has already delivered a judgment which finds that a development consent is invalid, the court might nevertheless refrain from making a formal order setting aside the development consent were the parties to indicate, post-judgment, that they had compromised the proceedings.

55. It is the parties who determine the parameters of their dispute. The function of the court is to adjudicate on that dispute. It is not to advise the parties as to how they might best prosecute their cases or to rule on issues in respect of which the parties have not requested a ruling. The judgments in *Arklow Holidays Ltd v. An Bord Pleanála* [2011] IESC 29; [2012] 2 I.R. 99, and *Callaghan v. An Bord Pleanála* [2017] IESC 60, are cited in this regard.

56. Counsel further submits that the proceedings do not present an issue of EU law, and that the "reasons" grounds were directed primarily to an alleged breach of the relevant provisions of domestic law, namely section 10 of the PD(H)A 2016, rather than to Article 9 or Article 11 of the EIA Directive.

57. Mr Steen, SC, contended that a national court is not obliged to raise an issue of EU law of its own motion, citing Cases C-430/93 and C-431/93, *Van Schijndel*; Cases C-222/05 to C-225/05, *Van der Weerd*; and Case C-416/10, *Krizan*.

58. Finally, counsel submits that an Article 267 reference is not necessary to enable the court to give judgment. There is no prospect of the court being required to deliver a judgment *contrary* to European law. This is because, if the court accedes to the application to strike out the proceedings, no judgment will be required from it at all. Following the approach in *Arklow Holidays Ltd v. An Bord Pleanála* [2012] 2 I.R. 99, no Article 267 reference should be made. It is further submitted that, so far as the law is concerned, there is in fact no significant uncertainty requiring the intervention of the Court of Justice. The judgment in *Callaghan v. An Bord Pleanála* [2018] IESC 39 is cited in this regard.

59. Counsel for the Applicants, Mr Oisin Collins, made a submission which emphasised that the public interest in the settlement of proceedings applies especially to environmental and planning cases. It is said that one of the "ideas" underlying the EIA Directive is to ensure proper planning and sustainable development and proper environmental control. The settlement of proceedings can sometimes achieve these objectives, e.g. a developer might agree as part of the settlement to put in place measures, such as the planting of trees, which would address the concerns of the litigants. Parties should not be frustrated in settling proceedings.

60. Counsel also drew attention to the practical and logistical difficulties which would arise if applicants were to be forcibly tied to their proceedings. It would create a "very

significant difficulty" were a party, by instituting judicial review proceedings, to be committed to those proceedings, potentially without any capacity to control their own litigation or their own path through that litigation.

61. Counsel concluded his submission by saying that in circumstances where his clients had indicated that they are satisfied, and are asking the court to strike out the proceedings, there would need to be very, very compelling reasons why the court would not do that. Counsel respectfully submits that no such compelling reasons exist in this case.

DETAILED DISCUSSION

ARTICLE 267

62. This judgment is, in effect, a form of interim ruling, and is confined to the threshold issue of whether a decision by the Court of Justice on the interpretation of the EIA Directive is necessary to enable this court to give judgment on the issue which has arisen in the proceedings before it. This judgment is not dispositive of the application to strike out the proceedings. That application will only be determined following the judgment of the Court of Justice on the Article 267 reference. The parties will, of course, be afforded an opportunity to make further written and oral submissions to the High Court before any determination is made on that application.

63. The nature of the Article 267 procedure has been described as follows by the Court of Justice in Case C-416/10, *Krizan*, [64] to [67].

> "As regards the other aspects of the first question referred, it is settled case-law that Article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of European Union law, or consideration of their validity, which are necessary for the resolution of the case (Case C-348/89 *Mecanarte* [1991] ECR I-3277, paragraph 44, and Case C-173/09 *Elchinov* [2010] ECR I-8889, paragraph 26).
>
> Article 267 TFEU therefore confers on national courts the power and, in certain circumstances, an obligation to make a reference to the Court once the national court forms the view, either of its own motion or at the request of the parties, that the substance of the dispute involves a question which falls within the scope of the first paragraph of that article (Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 20, and Case C-104/10 *Kelly* [2011] ECR I-6813, paragraph 61). That is the reason why the fact that the parties to the main proceedings did not raise a point of European Union law before the referring court does not preclude the latter from bringing the matter before the Court of Justice (Case 126/80 *Salonia* [1981] ECR 1563, paragraph 7, and Case C-251/11 *Huet* [2012] ECR, paragraph 23).
>
> A reference for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether that reference is appropriate

> and necessary (Case C-210/06 *Cartesio* [2008] ECR I-9641, paragraph 91, and Case C-137/08 *VB Pénzügyi Lízing* [2010] ECR I-10847, paragraph 29).
>
> Moreover, the existence of a national procedural rule cannot call into question the discretion of national courts to make a reference to the Court of Justice for a preliminary ruling where they have doubts, as in the case in the main proceedings, as to the interpretation of European Union law (*Elchinov*, paragraph 25, and Case C-396/09 *Interedil* [2011] ECR I-9915, paragraph 35)."

NECESSITY FOR ARTICLE 267 REFERENCE

64. The parties have, as summarised earlier, made detailed submissions—both written and oral—to the court. The quality of these submissions is genuinely impressive. In particular, the argument (and supporting authorities) advanced in support of the proposition that there is a public interest in the settlement of legal proceedings, and that the court should not depart from its "passive" role in litigation, are compelling. In nearly any other case, those submissions would have persuaded me to accede to an application to strike out the proceedings. On the peculiar facts of the present case, however, the precise obligations imposed upon a national court by the EIA Directive are not *acte clair*, and a reference to the Court of Justice is necessary to enable me to rule upon the application to strike out the proceedings. (The specific factors are enumerated in the draft of the Article 267 reference, at page 45 below).

65. It is certainly the case that in *private law* proceedings the parties are *dominus litus*, and that leave to discontinue or withdraw proceedings will normally be granted where the proceedings have been compromised or settled as between the parties. However, the within proceedings are *public law* proceedings, and, in particular, invoke the domestic law provisions which give effect to Article 11 of the EIA Directive. If the parties to such litigation are entitled *unilaterally* to discontinue judicial review proceedings at any stage,

even post-judgment, this might *deprive* the national court of jurisdiction to provide a remedy under Article 11 in appropriate cases.

66. The starting point for an analysis of the obligations of a national court in respect of the EIA Directive is the judgment in C-201/02, *Wells*. The Court of Justice summarised the obligations of national competent authorities as follows (at paragraphs 64 to 66 of the judgment).

> "As to that submission, it is clear from settled case-law that under the principle of cooperation in good faith laid down in Article 10 EC the Member States are required to nullify the unlawful consequences of a breach of Community law (see, in particular, Case 6/60 *Humblet* [1960] ECR 559, at 569, and Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 36). Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned (see, to this effect, Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraph 13).
>
> 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 (see, to this effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 61, and *WWF and Others*, cited above, paragraph 70). Such particular measures include, subject to the limits laid down by the principle of 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 as provided for by Directive 85/337.
>
> The Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment."

67. This approach has been consistently affirmed by the Court of Justice. A very recent example is provided by the judgment in Case C-261/18, *Commission v. Ireland (Derrybrien Wind Farm*). See paragraphs 74 and 75 of the judgment as follows.

> "However, Directive 85/337 does not contain provisions governing the consequences of a breach of that obligation to carry out a prior assessment (see, to that effect, judgment of 26 July 2017, *Comune di Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraph 34).

> Under the principle of sincere cooperation provided for in Article 4(3) TEU, Member States are nevertheless required to eliminate the unlawful consequences of that breach of EU law. That obligation applies to every organ of the Member State concerned and, in particular, to the national authorities which have the obligation to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out an environmental impact assessment, for example by revoking or suspending consent already granted, in order to carry out such an assessment (see, to that effect, judgments of 7 January 2004, *Wells*, C-201/02, EU:C:2004:12, paragraph 64, and of 26 July 2017, *Comune di Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraph 35)."

68. The issue which arises in the present case is whether the obligation upon a national court to take all measures necessary, within the sphere of its competence, to remedy the failure to carry out an environmental impact assessment in accordance with the EIA Directive, might extend to an obligation to rule on the substantive or procedural legality of a development consent which has been challenged in judicial review proceedings, notwithstanding that the applicants for judicial review now wish to discontinue their proceedings.

69. The question of whether a national court should abandon its normal passive role in proceedings in order to raise issues of EU environmental law *ex officio* has been considered by Advocate General Kokott in Case C-416/10, *Krizan*. As correctly submitted by the parties in the case before me, the context in *Krizan* was very different in that there was an *ongoing dispute* between the parties as to the validity of a development consent. Here, of course, the parties have now settled their dispute. Nevertheless, it may be useful to consider the Opinion in a little detail.

70. The Advocate General commences her analysis by confirming the orthodox view that a domestic procedural rule which precludes a national court from raising issues of its own motion does not offend against the principle of effectiveness. See paragraphs 156 and 157 of the Opinion as follows.

> "In principle, national law provisions are compatible with the principle of effectiveness if they prevent national courts from raising, *ex officio*, an issue concerning the breach of provisions of European Union law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim.
>
> Such a limitation on the power of the national court may be justified by the principle that, in a civil suit, it is for the parties to take the initiative, and that, as a result, the court is able to act *ex officio* only in exceptional cases involving the public interest. That principle safeguards the rights of the defence and ensures the proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas.
>
> *Footnotes omitted.

71. The Advocate General goes on, however, to note that there is an exception to this approach in the case of Directive 93/13/EEC on unfair terms in consumer contracts ("***the Consumer Contracts Directive***").

72. The Advocate General appears to accept, at the level of general principle, that a similar approach might be justified in the case of the protection of the environment, but moves immediately to distinguish the case before her. See paragraphs 160 to 162.

> "The environment also requires protection and there is a significant public interest in environmental impact assessments which are required by European Union law being carried out correctly.
>
> However, the EIA Directive does not contain a provision which is comparable to Article 6(1) of the Directive on unfair terms in relation to the consequences, for the validity of consents, of defects in an environmental impact assessment. In particular, it does not provide that a consent is to be invalid in the event of defects in the environmental impact assessment.
>
> It can be left open whether completely dispensing with an environmental impact assessment which is required by European Union law must possibly be raised *ex officio*. After all, such an assessment is an important basis for the formulation of objections to a project that are based on environmental law."

73. The Advocate General concluded that there were no special reasons of public interest based on European Union environmental law which imposed an obligation upon the national court to raise, *ex officio* and contrary to national provisions, possible doubts as to the up-to-date nature of the environmental impact assessment at issue in that case.

74. It is at least arguable that the approach adopted by the Advocate General in *Krizan* may need to be reconsidered now, in the light of the more recent case law of the Court of Justice. In particular, at least part of the rationale underpinning the Opinion has been undone as follows. First, the distinction between (i) a complete dispensation with an environmental impact assessment, and (ii) a defective environmental impact assessment, has been rejected by the Court of Justice in Case C-72/12, *Altrip*. The Court of Justice held that the transposition of what is now Article 11 of the EIA Directive cannot be limited solely to cases in which the legality of a decision is challenged on the ground that no environmental impact assessment has been carried out at all. The Court of Justice held that to exclude cases in which an environmental impact assessment has been carried out, but is vitiated by defects, would render largely nugatory the public participation provisions of the EIA Directive.

75. Secondly, the absence from the EIA Directive of an *express* provision, to the effect that a development consent is to be invalid in the event of defects in the environmental impact assessment, would appear to be of less relevance now given the robust approach taken in cases such as Case C-261/18, *Commission v. Ireland (Derrybrien Wind Farm*) (discussed earlier).

76. The Opinion may also be distinguishable on the facts. There, the question at issue was whether a national court should review *ex officio* whether an earlier environmental impact assessment required to be updated. This would, self-evidently, require the national court

to consider technical matters, and might well require the national court to rely on facts and circumstances *other than* those put before it by the parties.

77. By contrast, in the present case, the issue for determination is whether the requirement to state the "main reasons and considerations" for the decision to grant development consent has been complied with. This legal issue falls to be determined, primarily, by reference to (i) the formal decision of the Planning Board; (ii) the report of its inspector; and (iii) the submissions made on the consent application. This documentary material has all been put before the court, and the parties have provided their interpretation of the documentation in their written legal submissions. The Planning Board has completed its oral submission to the court. This court thus already has available to it all of the legal and factual elements necessary for making a determination on the question of whether the statement of reasons is adequate.

78. (Obviously, were the application to strike out the proceedings to be refused, then the Developer would be afforded an opportunity to complete its oral submission and the Applicants afforded a right of reply).

79. Both the Planning Board and the Developer have emphasised that at least part of the rationale for the imposition of an obligation on a national court to raise issues *ex officio* in respect of the Consumer Contracts Directive is that a consumer, being the weaker party, may not have had a "genuine opportunity" to raise issues in respect of the Directive. This language has been echoed in the Opinion in *Krizan*. It is said that, by contrast, in the circumstances of the present case the Applicants had the opportunity to raise any issue that they wanted to in respect of the EIA Directive. The point is made that the Applicants did not, for example, make a plea to the effect that the Planning Board had prejudged or predetermined the question of the appropriate housing density. It is also said that, in any event, the Applicants do not now wish to pursue *any* complaint as

against the decision to grant development consent, but rather wish to discontinue the proceedings.

80. With respect, these arguments tend to downplay the importance of the obligation under the EIA Directive to state the "main reasons and considerations" for the decision to grant development consent. As explained in Case C-75/08, *Mellor*, one of the objectives of a requirement to state reasons is to ensure effective judicial review, by allowing interested parties the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts. The intended beneficiaries of a duty to state reasons are not simply the four Applicants in this case. Rather, all members of the public concerned are entitled to know the "main reasons and considerations" for a decision to grant development consent, and are entitled, in principle, to invoke the review procedure under Article 11 of the EIA Directive (subject to the "sufficient interest" requirement).

81. As counsel for the Applicants put it in the course of his submissions on Day 1 of the hearing, his clients could not "get to" what was actually decided by the Planning Board in the absence of a proper statement of the main reasons and considerations.

82. Finally, I turn to address the following three related arguments advanced on behalf of the parties. First, it is said that the proceedings do not present any issue of EU environmental law. Secondly, it is said that, in the absence of a plea of prejudgment or predetermination, the court is not entitled to go beyond the pleadings and to consider whether the issue of the appropriate housing density had been settled upon prior to the public participation process. Thirdly, it is said that the making of a reference to the Court of Justice is not necessary to enable this court to give judgment. This is because, if the court accedes to the application to strike out the proceedings, no judgment will be required from it at all.

(i). EU environmental law

83. The question of whether the Planning Board has complied with its obligation to state the "main reasons and considerations" for its decision does indeed involve a question of EU environmental law. The proposed development project is subject to the requirements of the EIA Directive. Consequently, the requirements of Article 9 and Article 11 of the EIA Directive are engaged. This is not altered by the fact that the provisions of the EIA Directive have been transposed under the PD(H)A 2016.

84. The Applicants had made a submission to the Planning Board to the effect that the housing density proposed was excessive, and make the complaint in the judicial review proceedings that the Planning Board has failed to provide the main reasons and considerations for its decision. If this complaint were to be upheld—and obviously no determination has yet been made in this regard—it would appear to involve a breach of Article 9 of the EIA Directive and to undermine the effectiveness of Article 11.

85. Counsel for the Developer, in particular, has sought to draw a distinction between the EIA part of the Planning Board's decision and the non-EIA part thereof. With respect, this purported distinction is artificial. The carrying out of an EIA is intended to inform the decision on whether to grant or refuse development consent, and cannot be divorced from that decision. It is correct to say that one of the principal criticisms made by the Applicants of the statement of reasons is in respect of the housing density. It is evident, however, that the issue of housing density had been identified as one of the issues to be addressed as part of the EIA. More specifically, it had been considered as part of the mandatory assessment of "alternatives". Article 5 of the EIA Directive provides as follows.

> 1. Where an environmental impact assessment is required, the developer shall prepare and submit an environmental impact assessment report. The information to be provided by the developer shall include at least:

[…]

> (d) a description of the reasonable alternatives studied by the developer, which are relevant to the project and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the project on the environment;

86. As appears from the passages from the inspector's report set out at paragraph 25 above, the main alternatives studied by the Developer comprised alternative design solutions and layouts for a largely residential development. It is not correct, therefore, to suggest that the housing density was an issue of domestic law only.

(ii). No plea of prejudgment or predetermination

87. The obligation, if any, upon a national court to apply EU law *ex officio* is subject to express limitations. First, the national court must have available to it the legal and factual elements necessary for that task. Secondly, the national court must not go beyond the dispute as defined by the parties in their pleadings. See, generally, *Györgyné Lintner*, C-511/17, EU:C:2020:188.

88. It should be reiterated that there is no question of this court purporting to decide any issue in respect of prejudgment or predetermination. As already explained at paragraph 40 above, in the event that, having considered and applied the judgment to be given by the Court of Justice in the Article 267 reference, this court were to proceed to rule upon these judicial review proceedings, any such ruling would be confined to the case set out in the pleadings. More specifically, the only issue which would fall for determination in such a scenario would be whether the Planning Board had complied with the duty to state the "main reasons and considerations" for the decision to grant development consent. Mention has been made of prejudgment or predetermination only because it was cited by counsel for the Applicants as illustrating the practical difficulties which the (alleged) absence of a proper statement of reasons can give rise to.

89. In the further event that this court were to determine—having heard supplementary submissions from any party who wishes to make such submissions—that the Planning Board had not complied with its obligation to state the main reasons and considerations for the decision to grant development consent, the breach of that obligation would invalidate the planning permission. An issue would then arise as to whether the planning application should be remitted to An Bord Pleanála pursuant to Order 84, rule 27. It would only ever become necessary for the High Court to rule upon an allegation of prejudgment and predetermination were the matter to be pleaded in *fresh* judicial review proceedings seeking to challenge a *fresh* decision to grant development consent. It simply does not form part of the present proceedings.

(iii). Necessity for reference

90. The argument that a reference to the Court of Justice is not necessary to enable this court to give judgment involves an element of begging the question. The precise issue which remains to be determined by this court is whether to accede to the application to strike out the proceedings. The outcome of that application will turn, to a very large extent, on whether there is any obligation imposed upon the court by the EIA Directive to rule upon the validity of the development consent, notwithstanding that the Applicants wish to discontinue their proceedings. This depends entirely on the correct interpretation of the EIA Directive, and this is the precise issue in respect of which the court is seeking guidance from the Court of Justice.

91. It is no answer to this to say "well, if the court decided to accede to the application to strike out the proceedings, it would not then be necessary to deliver a judgment". Such an approach would involve an implicit finding that the court is not required to rule upon the validity of the development consent. Yet, this question of jurisdiction is the very thing in respect of which this court is seeking guidance from the Court of Justice. This

court is required to deliver judgment—one way or the other—on the application to strike out the proceedings. The reference under Article 267 is necessary to enable it to do so.

CONCLUSION AND FORM OF ORDER

92. The EIA Directive obliges a Member State to provide a "review procedure" whereby the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the Directive may be challenged. Irish law provides that the "review procedure" is by way of judicial review proceedings before the High Court pursuant to sections 50, 50A and 50B of the Planning and Development Act 2000.

93. The national courts are obliged, under the principles in C-201/02, *Wells*, to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out an environmental impact assessment, for example by revoking or suspending development consents already granted.

94. The Applicants in the present case invoked the High Court's judicial review jurisdiction in order to challenge the planning permission granted on 26 September 2019, by instituting these proceedings. Two days of the three-day hearing have been completed. The Applicants now wish to withdraw their proceedings, and have requested the court to exercise its *discretion* to strike out the proceedings.

95. This court seeks the guidance of the Court of Justice, by way of a reference for a preliminary ruling under Article 267 of the TFEU, as to its obligations under the EIA Directive. In particular, guidance is sought as to whether the court might be obliged to rule upon the validity of the planning permission notwithstanding that the Applicants now wish to withdraw their proceedings. In principle, judicial review proceedings pursuant to Article 11 of the EIA Directive may have reached a stage after which it becomes too late for an applicant to seek to withdraw those proceedings. The court will

be seised of the proceedings, and if, for example, the court is satisfied that there is a *prima facie* case that the planning permission has been granted in breach of the public participation provisions of the EIA Directive, then it may have to rule on the application for judicial review. This would, of course, be contingent on the court having available to it all of the legal and factual elements necessary for making a determination within the pleadings.

96. The identification of the nature and extent of the national court's obligations in this regard gives rise to very difficult issues of EU law, and requires consideration of the obligations of the court, the rights of the parties, and the public interest in ensuring that the public participation rights under the EIA Directive are vindicated. The fact that there is, generally, a public interest in facilitating the settlement of proceedings cannot necessarily be decisive in this context. Otherwise there might be a risk that an objector, who has grounds for invalidating a planning permission, might be "bought off" by the offer of a financial settlement.

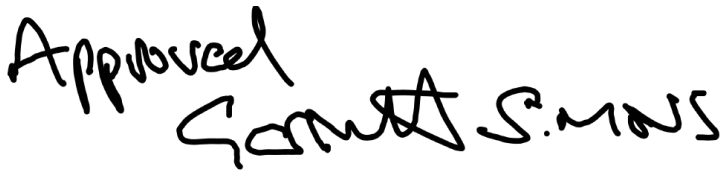
97. This court is simply not in a position to deliver its judgment on the application to strike out the proceedings without the guidance of the Court of Justice on these difficult legal issues. The legal issues are not *acte claire*, i.e. the correct interpretation and application of the EIA Directive is not so obvious as to leave no scope for any reasonable doubt as to the manner in which the questions raised are to be resolved.

98. A draft of the proposed form of reference is attached as an appendix to this judgment.

99. The formal order for a reference will not be drawn up for twenty-one days. If any of the parties wish to bring to the attention of the court any error in the draft reference in the interim, they may do so by emailing the Registrar assigned to this case. This is not, of course, an invitation to re-agitate the merits of making the reference.

Appearances

Oisin Collins for the Applicants instructed by O'Connell Clarke Solicitors
Brian Kennedy, SC and Fintan Valentine for An Bord Pleanála instructed by Philip Lee Solicitors
Neil Steen, SC and Aoife Carroll for the notice party developer instructed by McCann Fitzgerald



APPENDIX: DRAFT REFERENCE

1. THE REFERRING COURT

1. This request for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union ("***TFEU***") is made by the High Court of Ireland (Mr Justice Garrett Simons). The contact details for communications from the Court of Justice are as follows.

    Principal Registrar
    The High Court
    Four Courts, Inns Quay
    Dublin 7, Ireland.

2. THE PARTIES TO THE MAIN PROCEEDINGS

2. The main proceedings have been taken by four local residents ("***the Applicants***"). The Applicants are represented by Mr Oisin Collins of the Bar of Ireland, instructed by O'Connell Clarke Solicitors with an address for service as follows […].

3. The respondent to the main proceedings, An Bord Pleanála ("***The Planning Board***"), is represented by Mr Brian Kennedy, Senior Counsel, and Mr Fintan Valentine, both of the Bar of Ireland, instructed by Ms Alice Whittaker, Solicitor, of Philip Lee with an address for service as follows […].

4. The beneficiary of the impugned development consent, ("***the Developer***"), is represented by Mr Neil Steen, Senior Counsel, and Ms Aoife Carroll, both of the Bar of Ireland, instructed by Mr Brendan Slattery, Solicitor, of McCann Fitzgerald with an address for service as follows […].

3. SUBJECT MATTER OF THE DISPUTE IN THE MAIN PROCEEDINGS

5. The main proceedings consist of an application for judicial review of a decision of the Planning Board to grant development consent for proposed residential development ("***the development project***"). The decision to grant development consent was made on 26 September 2019. The development project is subject to the requirements of the Environmental Impact Assessment Directive (2011/92/EU) ("***the EIA Directive***"). This

is because the scale of the development project exceeds the threshold prescribed under domestic law for "urban development projects".

6. The consent application was subject to the special development consent procedure introduced for large scale residential developments under the Planning and Development (Housing) and Residential Tenancies Act 2016 (No. 17 of 2016) ("***the PD(H)A 2016***"). The consent procedure is unusual in that it provides for mandatory consultation between the developer and the competent authorities *prior to* the making of the consent application ("***pre-application consultation***"). Public participation is not allowed as part of the pre-application consultation. Following the pre-application consultations, the Planning Board may issue an opinion to the effect that the documentation in respect of the proposed development requires further consideration and amendment. In the present case, the pre-application consultation took place on 30 November 2018. The Planning Board issued an opinion in December 2018 which indicated *inter alia* that further consideration/justification was required in relation to the "density" of the proposed development project. (The concept of "density" in this context refers to the number of residential dwellings per hectare). The Developer was requested to have "particular regard" to the need to develop at a sufficiently high density to provide for an acceptable efficiency in serviceable land usage given the proximity of the application site to the town centre, with its established social and community services. The opinion also stated that further consideration of this issue may require an amendment to the documents and/or design proposal submitted relating to density and layout of the proposed development.

7. The legislation expressly provides that the forming of an opinion shall not prejudice the performance by the Planning Board of any of its statutory functions, and cannot be relied upon in the formal planning process or in legal proceedings. (Section 6(9) of the PD(H)A 2016).

8. The Developer had initially proposed, as part of its pre-application consultation with the Planning Board, that the development project would comprise 322 dwellings. The consent application as submitted, however, increased the housing density and sought development consent for 366 dwellings. This increase was, seemingly, made in response to the Planning Board's opinion.

9. One of the principal objections made to the development project during the public participation procedure had been in respect of housing density. The Local Planning Authority, which is a prescribed competent authority for the purposes of Article 6 of the EIA Directive, submitted that the proposed housing density would be excessive, and would result in a distortion of (i) the settlement hierarchy set out in the County Development Plan, and (ii) the residential capacity set out in the Local Area Plan. The first named Applicant, in a written submission made to the Planning Board, had also raised an objection to the proposed housing density.

10. The main proceedings have been instituted by four local residents who own and occupy houses within the vicinity of the proposed development project ("***the Applicants***"). The principal ground of challenge advanced by the Applicants is that the Planning Board has failed to provide a proper statement of the "main reasons and considerations" for its decision to grant development consent. In the course of his submissions to the High Court, counsel on behalf of the Applicants noted that the density of the proposed development was something which had been expressly raised by the Planning Board at its pre-application consultation with the Developer. Counsel expressed a concern on the part of the Applicants that the issue of density may have been prejudged by the Planning Board prior to the public participation stage of the process. Counsel emphasised that in the (alleged) absence of an adequate statement of the "main reasons and considerations" for the decision to grant development consent, the Applicants were not in a position to formulate a challenge on the grounds of prejudgment.

11. If counsel is correct in his submission, then the alleged failure to state the "main reasons and considerations" may conceal another, perhaps more serious, breach of the requirements of the EIA Directive. If the Planning Board had settled on a higher density at the pre-application stage, then this undermines the effectiveness of the subsequent public participation. It should be reiterated that prejudgment or predetermination is not pleaded in the proceedings, but rather has been cited by counsel as an example to illustrate the difficulties which a failure to state reasons can present.

12. As explained under the next heading below, a legal challenge to the validity of a development consent granted by the Planning Board is subject to a special statutory judicial review procedure. An applicant is required to obtain the leave (permission) of the High Court before they can bring the proceedings. The Applicants in the present case applied for and obtained leave to apply for judicial review by order of the High Court

dated 20 November 2019. Thereafter, the proceedings were subject to case management in the High Court's Strategic Infrastructure Development List. Directions were given as to the exchange of pleadings, affidavits and written legal submissions. The main proceedings were listed for hearing for three days, commencing on 21 January 2020.

13. On the morning of the third day of the hearing, counsel for the Applicants indicated that the parties had reached a settlement, and applied to the court for an order striking out the proceedings. This application is supported by the other two parties to the proceedings, namely the Planning Board and the Developer.

14. The parties to the main proceedings all accept that the referring court has a *discretion* under domestic law as to whether or not to accede to the application to strike out the proceedings.

4. RELEVANT PROVISIONS OF NATIONAL LAW AND OF EU LAW

Planning and Development (Housing) Act 2016

15. The decision to grant development consent was made pursuant to the Planning and Development (Housing) and Residential Tenancies Act 2016 (No. 17 of 2016) ("***the Planning and Development (Housing) Act***"). The Act is unusual in that it provides that applications for "strategic housing development" (as defined) are to be made directly to the Planning Board (as opposed to a first-instance application to the Local Planning Authority, with a right of appeal thereafter to the Planning Board).

16. Insofar as relevant, the key legislative provisions are as follows. First, it is mandatory for a proposed applicant for development consent to engage in pre-application consultations with the Planning Board and the Local Planning Authority. The Irish Supreme Court has recognised in the context of a similar pre-application procedure that it is a requirement of domestic law that same must not undermine public participation at the subsequent consent application stage. See *Callaghan v. An Bord Pleanála* [2018] IESC 39; [2018] 2 I.L.R.M. 373 at [7.10].

> "It seems to me to clearly follow that, unless the relevant legislation contains clear provision to the contrary, the proper interpretation of legislation involving a two stage process must be that any matters determined at an earlier or preliminary stage where an interested party is not entitled to be heard must remain open for full re-consideration at the stage when a final decision potentially affecting the rights or obligations of any individual is to be made. It follows in

> turn that the default position in this case must be that the Board cannot be bound or influenced by its earlier decision to go down the SID route when considering the strategic importance of the proposed development in the context of making a final decision as to whether to grant permission."

17. The Supreme Court expressly recognised that domestic law ensured compliance with EU law. See *Callaghan*, at paragraph [6.4].

> "There is no doubt that it is well established in European Union law in the environmental area that, in cases where Union law applies, a party must be entitled to be heard at a stage in the process where all relevant matters are still alive in the sense that the final decision on those matters can still be influenced. To put the same principle in the negative it is impermissible that a party be deprived of the opportunity to be heard at a stage where material final decisions are made on some aspect of the consent process, thus depriving the relevant party of the opportunity to seek to influence that aspect of the decision."

18. Section 6(9) of the Planning and Development (Housing) Act expressly provides that neither (a) the holding of a pre-application consultation under this section, nor (b) the forming of an opinion, shall prejudice the performance by the Planning Board of any other of its statutory functions and cannot be relied upon in the formal planning process or in legal proceedings.

19. Article 297(3) of the Planning and Development Regulations 2001 provides as follows.

> (3) Where, under section 6(7) of the Act of 2016, the Board issued a notice to the prospective applicant of its opinion that the documents enclosed with the request for pre-application consultations required further consideration and amendment in order to constitute a reasonable basis for an application for permission, the application shall be accompanied by a statement of the proposals included in the application to address the issues set out in the notice.

20. Secondly, the Planning and Development (Housing) Act gives effect to the EIA Directive by requiring the carrying out of an environmental impact assessment ("***EIA***") in respect of consent applications for strategic housing development. This is done by applying the provisions of the parent legislation, the Planning and Development Act 2000, to such applications. The carrying out of an EIA was mandatory in respect of the proposed development project the subject of the main proceedings in circumstances where the site area of 11.442 hectares exceeded the relevant threshold prescribed under the Planning and Development Regulations 2001 for "urban development projects".

21. The Planning Board is under a statutory duty to state the "main reasons and considerations" for its decision to grant development consent. This is provided for under domestic law at section 10(3) and (3A) of the Planning and Development (Housing) Act, as follows.

> (3) A decision of the Board to grant a permission under section 9(4) shall state—
>
> (a) the main reasons and considerations on which the decision is based,
>
> (aa) the reasoned conclusion, in relation to the significant effects on the environment of the proposed development, on which the decision is based,
>
> (ab) if that decision arises from the Board ' s consideration of the environmental impact assessment report concerned and is different from the recommendation in a report of a person assigned to report on the application concerned on behalf of the Board, the main reasons for not accepting the recommendation in the last-mentioned report to refuse permission,
>
> (b) where the Board grants a permission in accordance with section 9(6)(a) , the main reasons and considerations for contravening materially the development plan or local area plan, as the case may be,
>
> (c) where conditions are imposed in relation to the grant of any permission, the main reasons for imposing them,
>
> (d) where a decision to impose a condition (being an environmental condition which arises from the consideration of the environmental impact assessment report concerned) in relation to any permission is materially different, in relation to the terms of such condition, from the recommendation in a report of a person assigned to report on the application for permission on behalf of the Board, the main reasons for not accepting, or for varying, as the case may be, the recommendation in the last-mentioned report in relation to such condition, and
>
> (e) in relation to the granting or refusal of a permission in respect of an application accompanied by an environmental impact assessment report, subject to or without conditions, that the Board is satisfied that the reasoned conclusion on the significant effects on the environment of the development was up to date at the time of the taking of the decision.

> (3A) A decision given under section 9(4) in respect of an application accompanied by an environmental impact assessment report and the notification of the decision shall include a summary of the results of consultations that have taken place and information gathered in the course of the environmental impact assessment and, where appropriate, the comments received from an affected Member State of the European Union or other party to the Transboundary Convention, and specify how those results have been incorporated into the decision or otherwise addressed.

100. (These provisions of domestic law give effect to the requirements of Article 9 of the EIA Directive).

Statutory judicial review

22. Proceedings which seek to question the validity of a decision of the Planning Board to grant development consent for strategic housing development are subject to a special statutory judicial review procedure under sections 50, 50A and 50B of the Planning and Development Act 2000. The following features of the procedure emphasise that the proceedings are public law proceedings, rather than simply a *lis inter partes*. First, an individual seeking to bring such proceedings must obtain the prior leave (permission) of the High Court to do so. The intending applicant must persuade the High Court that there are "substantial grounds" for questioning the validity of the impugned decision. This is a higher threshold than that governing conventional, non-planning judicial review. Secondly, an applicant is not required to demonstrate an impairment of right. This emphasises the public interest / public law element of the proceedings. Thirdly, there are special rules governing costs. Relevantly, the default position is that each of the parties is to bear their own costs. Different principles apply where the applicant succeeds in obtaining relief in the proceedings or where a party has been guilty of litigation misconduct.

EU LAW

23. The principal provisions of EU law engaged are Articles 6, 9 and Article 11 of the EIA Directive.

5. REASONS FOR MAKING THE REFERENCE

24. The referring court is currently considering an application to strike out the main proceedings. The parties to the main proceedings all accept that the referring court has a *discretion* under domestic law as to whether or not to accede to this application to strike out the proceedings. It has been urged upon the referring court that the principal factor informing the exercise of this discretion should be the views of the parties themselves. The parties all submit that there is a strong public interest in the settlement of litigation, and that it would undermine this public interest were a court to deliver a judgment in proceedings in circumstances where the parties all wish that the proceedings be discontinued.

25. Counsel for the Developer, in particular, has submitted that such is the paramount importance of the views of the parties that even where a national court has already delivered a judgment which finds that a development consent is invalid, the court might nevertheless refrain from making a formal order setting aside the development consent were the parties to indicate, post-judgment, that they had compromised the proceedings.

26. The referring court recognises that in private law proceedings the parties are *dominus litus*, and that leave to discontinue proceedings will normally be granted where the proceedings have been compromised or settled as between the parties. However, the main proceedings are *public law* proceedings, and, in particular, invoke the domestic law provisions which give effect to Article 11 of the EIA Directive. The referring court is also cognisant that a national court is obliged to take all measures necessary, within the sphere of its competence, to remedy the failure to carry out an environmental impact assessment in accordance with the EIA Directive (*Wells*, C-201/02, EU:C:2004:12). If the parties to litigation are entitled unilaterally to discontinue judicial review proceedings at any stage, even post-judgment, this might *deprive* the national court of jurisdiction to provide such a remedy in appropriate cases.

27. The referring court thus respectfully seeks the guidance of the Court of Justice on how to reconcile (i) the principle that a national court normally adopts a passive role to proceedings, with (ii) the proper discharge of its obligations under Article 11 of the EIA Directive and/or the remedial obligation identified in *Wells*, C-201/02, EU:C:2004:12.

28. The referring court notes that the Court of Justice has held in other contexts that a national court may be obliged to apply EU law *ex officio*. In particular, there is now an established

line of case law in respect of Directive 93/13/EEC on unfair terms in consumer contracts ("***the Consumer Contracts Directive***") which indicates that a national court may be obliged to apply EU law *ex officio* where it has available to it the legal and factual elements necessary for that task. This is subject always to the limitation that the court must not go beyond the dispute as defined by the parties in their pleadings. See, generally, *Györgyné Lintner*, C-511/17, EU:C:2020:188.

29. The question of whether a similar obligation might arise in the context of the EIA Directive had been considered by Advocate General Kokott in *Krizan*, Case-416/10, EU:C:2012:218. The specific issue which arose on the facts of *Krizan* was whether an earlier environmental impact assessment required to be reviewed and updated in circumstances where a number of years had elapsed since the assessment had been carried out. The Advocate General stated that the environment requires protection, and that there is a significant public interest in environmental impact assessments which are required by European Union law being carried out correctly. On the particular facts of *Krizan*, however, the Advocate General concluded that there were no special reasons of public interest based on European Union environmental law which imposed an obligation upon the national court to raise, *ex officio* and contrary to national provisions, possible doubts as to the up-to-date nature of the environmental impact assessment at issue in that case.

30. On the facts of *Krizan*, the question at issue was whether a national court should review *ex officio* whether an earlier environmental impact assessment required to be updated. This would, self-evidently, require the national court to consider technical matters, and might well require the national court to rely on facts and circumstances *other than* those put before it by the parties. By contrast, in the present case, the issue for determination is whether the requirement to state the "main reasons and considerations" for the decision to grant development consent has been complied with. This legal issue falls to be determined, primarily, by reference to (i) the formal decision of the Planning Board; (ii) the report of its inspector; and (iii) the submissions made on the consent application. This documentary material has all been put before the court, and the parties have provided their interpretation of the documentation in their written legal submissions. The Planning Board has completed its oral submission to the court. This court thus already has available to it all of the legal and factual elements necessary for making a determination on the question of whether the statement of reasons is adequate.

31. Of course, the referring court would be departing from its usual passive role to the extent that it would be delivering judgment in proceedings where the party who invoked its jurisdiction now wishes to withdraw those proceedings.

32. The referring court suggests that the nature of the obligation, if any, of a national court to continue to determine proceedings will depend on factors such as (i) the gravity of the breach of the EIA Directive alleged in the proceedings; (ii) the implications of the alleged breach for effective public participation; (iii) the stage of the proceedings at which the applicants first indicate that they wish to discontinue the proceedings; and (iv) the ability of the national court to determine the issues on the basis of the factual materials put before it by the parties and on the basis of the dispute as defined by the parties in their pleadings.

33. The following features of the main proceedings appear to be relevant in this regard. First, the principal allegation made in the proceedings is that the Planning Board has failed to state the "main reasons and considerations" for its decision to grant development consent. If well-founded, this would represent a breach of Article 9 of the EIA Directive. It would also undermine the effectiveness of the "review procedure" under Article 11 of the EIA Directive. See, by analogy, *Mellor*, Case C-75/08, EU:C:2009:279, [57] to [61].

34. Secondly, the Applicants have expressed the concern that the (allegedly) inadequate statement of the main reasons and considerations may conceal a separate breach of the public participation requirements of the EIA Directive, namely that certain issues may have been prejudged at the pre- consent application consultation between the Planning Board and the Developer. If such a breach had occurred, it would represent a breach of the obligation under Article 6 of the EIA Directive that members of the public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2), and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

35. It should be reiterated that prejudgment does <u>not</u> form part of the grounds pleaded in the main proceedings. Nevertheless, the existence of this concern on the part of the Applicants highlights the importance of ensuring that the requirements of Article 9 of the EIA Directive are complied with. Effective judicial review presupposes that interested parties must be able to defend rights conferred by EU law under the best possible

conditions, and to have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts (*Solvay*, Case C-182/10, EU:C:2012:82, [59]).

36. Thirdly, the main proceedings were at a very advanced stage prior to the Applicants applying for leave to strike out the proceedings. The exchange of pleadings, affidavits and written legal submissions had been completed. The oral hearing itself was almost completed: two days of the three-day hearing had been concluded, and the respondent, the Planning Board, had completed its presentation to the court. The referring court thus already has available to it the legal and factual elements necessary to rule on the substantive or procedural legality of the impugned development consent. It would also be able to do so without going beyond the case as pleaded by the parties.

37. Finally, and as already discussed at paragraph 30 above, the determination of the legal issues raised does not necessitate the referring court having to consider technical or scientific matters, such as, for example, might arise in a challenge which alleges that the *quality* of the environmental impact assessment which had been carried out had been inadequate.

38. In accordance with §18 of the Recommendations to National Courts (2019/C380/01), the referring court respectfully offers its view on the answer to be given to the questions referred for a preliminary ruling as follows.

39. Where a national court's jurisdiction to review the substantive and procedural legality of a development consent pursuant to Article 11 of the EIA Directive has been invoked, the national court should refuse an application to strike out the proceedings if the following conditions are met (i) the pleadings in the case are closed and the hearing of proceedings has commenced; (ii) there is a *prima facie* case that the development consent has been granted in breach of the public participation provisions of the EIA Directive; and (iii) the national court already has available to it the legal and factual elements necessary to rule on the substantive or procedural legality of the impugned development consent and would be able to do so without going beyond the case as pleaded by the parties. In a scenario where these conditions are met, the national court should refuse to strike out the proceedings. The parties should then be offered the opportunity to complete the hearing in the ordinary way, but if they decline this offer, the court should then proceed to prepare its judgment.

6. QUESTIONS REFERRED FOR A PRELIMINARY RULING

1. Is a national court whose jurisdiction has been invoked pursuant to a judicial review procedure which gives effect to Article 11 of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment ("***the EIA Directive***")* obliged to rule on the substantive or procedural legality of the impugned development consent, in circumstances where it has available to it the legal and factual elements necessary for that task, notwithstanding that the applicants for judicial review now wish to discontinue their proceedings.

2. Does the obligation upon a national court to take all measures necessary, within the sphere of its competence, to remedy the failure to carry out an environmental impact assessment in accordance with the EIA Directive (*Wells*, C-201/02, EU:C:2004:12), extend to an obligation to rule on the substantive or procedural legality of a development consent which has been challenged in judicial review proceedings, notwithstanding that the applicants for judicial review now wish to discontinue their proceedings.

3. Does the answer to Questions 1 and 2 above depend on factors such as (i) the gravity of the breach of the EIA Directive alleged in the proceedings; (ii) the implications of the alleged breach for effective public participation; (iii) the stage of the proceedings at which the applicants first indicate that they wish to discontinue the proceedings; and (iv) the ability of the national court to determine the issues on the basis of the factual materials put before it by the parties and on the basis of the dispute as defined by the parties in their pleadings.

* Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment CELEX 32011L0092