

THE HIGH COURT

JUDICIAL REVIEW

2018 No 593 JR

IN THE MATTER OF SECTIONS 50 50A AND 50B OF THE PLANNING
AND DEVELOPMENT ACT 2000

WEDNESDAY THE 18TH DAY OF MAY 2022

BEFORE MR JUSTICE BARNIVILLE
BETWEEN

CORK HARBOUR ALLIANCE FOR A SAFE ENVIRONMENT

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

INDAVER IRELAND LIMITED

FIRST NAMED NOTICE PARTY

AND

INDAVER NV TRADING AS INDAVER IRELAND

SECOND NAMED NOTICE PARTY

The above-entitled action coming on for hearing before this Court on the 19th 20th 21st 22nd 26th 27th 28th and 29th days of March 2019 the 27th day of May 2019 and on the 5th day of June 2019 for mention pursuant to Originating Notice of Motion dated the 24th day of July 2018 on behalf of the Applicant by way of an application for judicial review for the following Reliefs

- (1) An Order of *Certiorari*, by way of Judicial Review, quashing the decision of the Respondent dated 29 May 2018 (the "*Impugned Decision*") to grant planning permission for the development of a Waste to Energy Facility (a Waste Incinerator), and ground works more particularly described in the schedule hereto (the "*Incinerator Development*") on the basis of the grounds set out in section E herein;

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- (2) If necessary or appropriate, an Order of Certiorari, by way of Judicial Review, quashing the environmental impact assessment and/or the appropriate assessment purportedly carried out by the Respondent on 23 May 2018;
- (3) A declaration that:
 - (i) The Board had no jurisdiction to grant planning permission to the First Named Notice Party pursuant to section 37E PDA and / or that the Board erred in failing to have any or any proper regard to the issue of jurisdiction and/or the Applicant's submissions and observations relating thereto;
 - (ii) The Board erred in law in making the Impugned Decision given the absence of required landowner consent to the application and/or the Board erred in failing to have any or any proper regard to the issue of ownership of the lands on which the Incinerator Development was to take place and/or landowner consent for the planning application;
 - (iii) The Board unlawfully and in breach of its duties under the Planning and Development Act, 2000:
 - (a) permitted the Developer to split the Incinerator project into two planning applications for the purposes of avoiding the provisions of the Seveso III Directive and/or the Domestic Seveso Regulations with a resultant failure to carry out EIA of the entire project at the earliest opportunity and/or with a resultant prospect of incremental development and / or
 - (b) the Board failed to have any or any proper regard to the issue of project splitting.
 - (iv) The Impugned Decision was in breach of Natural and Constitutional Justice and/or Fair Procedures and/or in breach of the public participation procedures set out in Article 6 of the EIA Directive;

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- (v) The Board failed to carry out an Environmental Impact Assessment or Appropriate Assessment prior to deciding to grant development consent;
- (vi) The Board failed to carry out an assessment of the impact on health and/or failed to comply with its obligation to carry out EIA by relying upon the role of the Environmental Protection Agency in granting an IPPC Licence;
- (vii) The EIS did not outline what alternative sites were considered by the applicant for permission and/or the reasons for choosing the Development Lands as the site for the Incinerator Development and the EIA purportedly carried out by the Board was inadequate in this regard and / or the Board
 - (a) Took into account irrelevant considerations in the form of site selection studies carried out in 2000/2001 rather than for the purposes of the subject planning application;
 - (b) Was in breach of the provisions of the EIA Directive and the Planning Regulations in carrying out an assessment, whilst acknowledging that the site selection process was not de novo for the purposes of the planning application
 - (c) Failed to require the kind of studies of alternative sites required by Article 5 of the EIA Directive and domestic regulations implementing that requirement.
 - (d) Failed to carry out any adequate EIA in respect of the fundamental issue of site selection.

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- (viii) The Board's conclusions regarding the suitability of the site from a planning perspective were unreasonable and unsustainable in circumstances where the Board:
 - (a) Took into account irrelevant considerations in the form of site selection studies carried out in 2000/2001 rather than for the purposes of the subject planning application;
 - (b) Determined that the site was suitable for the proposed development whilst acknowledging that the site selection process was not de novo for the purposes of the planning application
- (ix) The Board
 - (a) failed to comply with the requirements of section 37E(2) PDA and the decision of the Board not to seek the expertise of Dr. Gordon Reid or any other expert to comment upon the further information received in October 2017 (in circumstances where the Board had no expertise in the relevant field and was at that point wholly reliant upon experts commissioned by the Developer whose data had been revealed on two (2) occasions as fundamentally flawed and unreliable) was irrational and / or contrary reason and common sense.
 - (b) The Board failed to consider a relevant consideration namely the reliability of the AWN data and/or the dioxin modeling results tendered by the Developer and/or the revelation of false and/or unreliable evidence, in this respect, at the Oral Hearing;
- (x) The Board failed to carry out a proper EIA and/or failing to assess the impact of the Incinerator Development on human health and/or the Board's conclusions in this regard were unreasonable and/or the Board's failure to have any regard to and/or to address the evidential issues identified

above is, in itself, sufficient to vitiate the Impugned Decision.

- (xi) The Inspector failed to provide the Board with a Fair and/or Complete and/or Sufficient Report and/or, that as a result, the Board failed to take into account relevant considerations and/or the Board failed to comply with Article 3 of the EIA Directive and Part X of the Planning and Development Act, 2000 as amended by failing to analyse, evaluate and / or assess information obtained by the public pursuant to Article 6 of the EIA Directive;

- (4) Further and other reliefs.

- (5) The costs of these proceedings.”

in the presence of Counsel for the Applicant Counsel for the Respondent and Counsel for the First Named and Second Named Notice Parties

On the application of Counsel for the parties IT WAS ORDERED that the proceedings herein be reported by a Shorthand Writer

Whereupon and on reading the documents specified in the Schedule hereto

And on hearing said respective Counsel

The Court was pleased to reserve Judgment herein on the said 5th day of June 2019

And the same coming on accordingly for Judgment on the 19th day of March 2021 and Judgment having been delivered electronically

And the Court by Order dated the 27th day of April 2021 fixing the 8th day of June 2021 for the hearing of *inter alia* the issue of remittal to the Respondent herein

And the application on behalf of the Applicant pursuant to Notice of Motion dated the 3rd day of June 2021 coming on accordingly for hearing on the 8th day of June 2021 and for oral submissions by the parties in relation to *inter alia* the issue of remittal to the Respondent

And the matter being adjourned and being listed on the 18th day of June 2021 the Court was pleased to reserve Judgment herein in relation to the said issue of remittal

And the same coming on accordingly for Judgment on the 1st day of October 2021 and Judgment having been delivered

And the Applicant applying for a Certificate for Leave to Appeal to the Court of Appeal pursuant to section 50A(7) of the Planning and Development Act, 2000 (as amended) the decision of the Court delivered in the said Judgment of the 1st day of October 2021

And the said application coming on for hearing on the 26th day of November 2021 and upon reading the written legal submissions filed on behalf of the respective parties

The Court was pleased to reserve Judgment herein

And the same coming on accordingly for Judgment on the 26th day of April 2022 and Judgment having been delivered

And the matter being listed this day for final Orders herein and in relation to the issue of Costs

The Court Doth grant an Order of *Certiorari* quashing the decision of the Respondent dated the 29th day of May 2018 to grant planning permission for the development of a Waste to Energy Facility and ground works on the basis of Ground Number 4 (objective bias) of the grounds set out in section E of the Applicant's Amended Statement of Grounds

And in lieu of directing that an Order of Certiorari do issue IT IS ORDERED that the aforesaid decision dated the 29th day of May 2018 and all records and entries relating thereto be quashed without further Order

And IT IS ORDERED that the planning application dated the 13th day of January 2016 be remitted to the Respondent for further consideration in accordance with the terms of the Court's Judgment of the 19th day of March 2021 and in accordance with law to a point in the statutory decision making process immediately prior to the 23rd day of October 2017 (being the date on which the Board decided not to afford the Applicant and others the opportunity of responding to further information and submissions received from the applicant for permission)

And the Court Doth Declare that an application for permission for development under section 37E of the Planning and Development Act, 2000 (as amended) should be made by the "prospective applicant" under sections 37A to 37D without prejudice to the power of An Bord Pleanála where necessary and appropriate to amend the name of the Applicant in the application should it not have been made in the name of the "prospective applicant" and to make any necessary consequential amendments thereto

And the Court Doth Direct that An Bord Pleanála upon remittal do correct the name of the Applicant in the remitted planning application so that it reads "*Indaver NV t/a Indaver Ireland*" rather than "*Indaver Ireland Ltd*" and do make any other changes directly arising from or consequential on the change in name

And IT IS ORDERED pursuant to s. 50A(7) of the Planning and Development Act, 2000 (as amended) that the Applicant's application for leave to appeal the decision to remit the planning application as aforesaid be and same is hereby Refused

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And IT IS FURTHER ORDERED that the Applicant be awarded 80% of the costs of these judicial review proceedings (but 100% of the stenography costs incurred by it) to include reserved costs but save for and excluding the costs of and associated with the following three elements:

- (i) The Applicant's motion for discovery and related application for an Order directing An Bord Pleanála to swear certain matters on oath
- (ii) The hearing in respect of the terms of final substantive orders which dealt with the Notice Party's application for remittal and associated issue of the appropriate relief in respect of Ground 1
- (iii) The Applicant's application pursuant to Section 50A(7) of the Planning and Development Act 2000 for leave to appeal against the High Court's decision on remittal

And IT IS FURTHER ORDERED in respect of item (i) that the Respondent do pay the Applicant 25% of the costs of its motion for discovery and related application for an Order directing the Respondent to swear certain matters on oath

And the Court Doth make no order as to Costs in respect of items (ii) and (iii) hereinbefore referred to

And IT IS FURTHER ORDERED that all Costs so awarded be adjudicated in default of agreement

PAULINE CUSACK
REGISTRAR
Perfected 1/6/2022

Noonan Linehan Carroll Coffey
Solicitors for the Applicant

Fieldfisher Solicitors
Solicitors for the Respondent

Matheson
Solicitors for the First and Second Named Notice Parties

Schedule hereinbefore referred to

1. High Court Order dated the 24th day of July 2018
2. Notice of Motion dated the 24th day of July 2018
3. Amended Statement Required to Ground an Application for Judicial Review
4. Verifying Affidavit of Mary O'Leary filed on the 17th day of July 2018
5. Affidavit of Gordon Reid filed on the 17th day of July 2018
6. Affidavit of Joe Noonan filed on the 17th day of July 2018
7. Statement of Opposition of the Respondent dated the 23rd day of November 2018
8. Verifying Affidavit of Chris Clarke filed on the 23rd day of November 2018
9. Affidavit of Mary Kelly filed on the 23rd day of November 2018
10. Affidavit of Conall Boland filed on the 23rd day of November 2018
11. Statement of Opposition of the Notice Parties dated the 30th day of November 2018
12. Affidavit of Jackie Keaney filed on the 30th day of November 2018
13. Affidavit of Paul Johnston filed on the 3rd day of December 2018
14. Second Affidavit of Gordon Reid filed on the 4th day of January 2019
15. Second Affidavit of Mary O'Leary filed on the 5th day of January 2019
16. Second Affidavit of Joe Noonan filed on the 7th day of January 2019

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