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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Mooreland and Owenvarragh Residents' Association's Application [2014] NIQB 130

IN THE MATTER OF AN APPLICATION BY MOORELAND AND OWENVARRAGH RESIDENTS' ASSOCIATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DEPARTMENT OF THE ENVIRONMENT (PLANNING SERVICE) MADE ON 16 JANUARY 2014 WHEREBY IT GRANTED PLANNING PERMISSION Z/2013/0685F RELATING TO CASEMENT PARK, 88-104 ANDERSONSTOWN ROAD, BELFAST

HORNER J

A. EXECUTIVE SUMMARY

[1] This is a judicial review of the decision made on 16 January 2014 to grant planning permission to the GAA for the redevelopment of Casement Park and in particular for the erection and construction of a 38,000 seater stadium. Leave to

apply for judicial review was granted by Treacy J on 22 May 2014. It is not an appeal. It is no part of the court's role to assess the merits of the planning application made by the GAA. "It is always impermissible for a judge to simply substitute his or her view on the merits of the decision for that taken by the public authority primarily entrusted to take the decision under challenge.": see Larkin and Scoffield on Judicial Review in Northern Ireland at paragraph 1.04.

As Professor Dworkin pithily put it:

> "It is not for the judges to weigh utilitarian considerations of social, economic or political preference."

Rather the court's role is confined here to looking at whether the decision is lawful. As De Smith's Judicial Review (7th Edition) at 1.001 states:

> "Judicial review provides a set of legal standards, enforced through a process of litigation to enable people to challenge the lawfulness of decisions made by public bodies and others exercising public functions."

A court is not equipped nor is it entitled to weigh one material planning consideration against another. It cannot say and should not say whether the socio-economic advantages of a project to the local economy should prevail over the temporary widespread inconvenience and upset which might be suffered in the locality as the result of this project going ahead. That is a matter of planning and/or political judgment. What the court has to do is to make sure that the decision maker has acted lawfully and fairly in making the final decision.

[2] It is against this legal background that the court has upheld some of the grounds of challenge brought by the Mooreland and Owenvarragh Residents' Association ("the Applicant") to the decision of the Department of the Environment (Planning Service) ("the Department") to grant planning permission to the GAA for the redevelopment of Casement Park. **The court most emphatically says nothing about the merits of a new 38,000 seater stadium on the Andersonstown Road on the site of the present Casement Park**. But it does say that the Department has erred in a number of ways. Primarily, it failed under domestic and European law to make a proper assessment of the effect of a capacity audience attending the new stadium both for GAA matches and concerts on the locality and the adjoining road traffic network. There was convincing evidence that the new stadium would sell out for certain matches and/or events. Impermissibly the Planning Service sought to assess the effects of a capacity crowd attending the new ground based on the difference between 32,600 spectators attending the old Casement Park and 38,000 spectators at the new Casement Park – that is a difference of 5,400 additional spectators. This was neither a fair nor lawful approach because the evidence made it

clear that a crowd of 32,600 was never going to attend the present Casement Park now or in the foreseeable future.

[3] The Department did not ask, as it should have done, whether there was any prospect of 32,600 ever attending the old Casement Park either at the present time or in the future. This error was compounded, whether innocently or otherwise, by the failure of the Planning Service to tell the Minister that the police who had been consulted and who had responded in some detail, had forecast traffic chaos and risk to life if there was a capacity 38,000 crowd attending the new Casement Park. There was also no attempt made to assess the significant effects of what can best be described as the additional uses to which the new Casement Park was to be put, namely, among others, conference, bar and restaurant facilities. There are other much less serious errors which I will set out later in this judgment relating to, inter alia, the proposed plan for dealing with the Japanese Knotweed ("JKW") and asbestos. These more minor mistakes will have to be looked at in the context of the lack of promptitude with which proceedings were initiated by the Applicant.

B. INTRODUCTION

[4] On 14 April 2014 the Applicant applied for judicial review of the decision of the Department of the Environment (Planning Service) ("the Department") to grant planning permission for lands at 88-104 Andersonstown Road, Belfast ("Casement Park") for the redevelopment of Casement Park to provide a 38,000 seater capacity GAA stadium with additional facilities for, inter alia, conference, bar/restaurant facilities, community facilities and car parking. The decision was made on 16 January 2014 granting approval for the proposed development.

[5] The application for judicial review was made by the Applicant just before the 3 month period was about to expire. It is a wide-ranging challenge. The GAA, who had hoped to take advantage of the planning permission to develop a completely new, state of the art stadium at Casement Park, was made a notice party. All three parties have contributed in full to the legal and factual arguments which have ranged far and wide over many days.

[6] This challenge, as was acknowledged by all counsel, is a judicial review concerned primarily with the processing of the planning application by the Department. It was not an appeal about the merits of granting planning permission for such a development on this site. As Coghlin J stressed in Re Interface Europe Ltd's Application [1998] NIJB 226 at 234:

> "The task of formulating, co-ordinating and implementing policy for the orderly and consistent development of land is difficult and demanding and may frequently require the resolution of complex problems produced by competing policies and/or conflicting

> interests. Parliament has entrusted the primary responsibility for performing this task to the (Department and Planning Appeals Commission) and not to the court, the role of which is limited to the supervisory function of the judicial review jurisdiction."

This view was echoed by the European Court of Human Rights in Buckley v United Kingdom [1997] 23 EHRR 101 when it said:

> "Town and country planning schemes involve the exercise of discretionary judgment in the implementation of policies adopted in the interests of the community. It is not for the Court to substitute its own view of what would be the best policy in the planning sphere … In so far as the exercise of discretion involving a multitude of local factors is inherent in the chosen implementation of planning policies, the national authorities enjoy a wide margin of appreciation … for reason of their direct and continuous contact with the vital forces of their countries the national authorities are in principle better placed than an international court to evaluate local needs and conditions."

[7] This is not and never can be an appeal about the merits of granting planning permission for such a development at this site. Quite simply the court is concerned in determining whether there is a public law wrong warranting interference. This naturally involves the court in asking whether "any identified flaw was a material one. The test is one of inevitability: can it be said that the flaw can have made no difference, in that the decision inevitably would have been the same. Then only, the court may say the flaw did not vitiate the decision or a remedy is not warranted.": see 4.2 of the Judicial Handbook by Fordham (Sixth Edition).

[8] The judicial review challenge was well organised and thoughtfully structured. It encompassed a broad range of issues including, planning policy, proposed use, the Planning (Environmental Impact Assessment) Regulations ("EIA Regulations"), JKW and asbestos which were on the old Casement site. The comments of Ouseley J in R (Bedford and Clare) v London Borough of Islington and Arsenal Football Club plc [2002] EWHC 2044 Admin at paragraph 8 are apt:

> "No possible point or permutation of a point has been overlooked by counsel for the claimants. I hope I do justice to the variety and ingenuity of his multifaceted arguments. They have put the decision-making process of the London Borough of Islington through a demanding

> legal audit as if a roving commission was being conducted on behalf of all the objectors."

This challenge has involved a forensic examination carried out by the Applicant through its expert witnesses and legal team of the decision making process of the Department. For their part the Department and the GAA have responded to the challenge. All sides have engaged in a frank and stimulating debate about the processes which led to the impugned decision. All the legal teams are to be commended for the effort they have invested in this application. The court is indebted to the breadth and clarity of the arguments advanced both orally and in writing by counsel on all sides. The gist of the main points raised by each side is included in the judgment but the interests of brevity forbid me from setting out the full submissions which have been made by counsel. However, all the points that have been made on behalf of each of the parties, even if they are not expressly referred to in the judgment, have been taken into account in reaching the final conclusion. This has truly been an exhaustive and comprehensive challenge which has been met head on by the Department and the GAA. Having examined and re-examined the points in issue, and allowed the smoke of battle to settle, I have concluded that the application should succeed on a limited number of grounds.

C. BACKGROUND

[9] Casement Park is the headquarters of the Antrim GAA County Board and is the largest venue for Gaelic games in Northern Ireland. The court was told that in excess of 15 hurling and football games at school, club and county level are played there each year. The attendances of the spectators at these games number in their hundreds rather than in their thousands. The ground is also used extensively for training. However, evidence produced for the trial suggests that 40,000 spectators watched Down play Cavan in the Ulster Senior Final in 1968. An estimated 47,000 fans attended Casement Park when Down and Cavan renewed their struggle for supremacy in Ulster. The ground at that time was very different to what it is now. Many thousands of spectators stood on grass banks which surrounded the playing area. In 1992, 32,000 fans attended a semi-final match between Derry and Down. A crowd of 25,000 watched Antrim against Derry on 18 April 2000. 30,000 watched the same teams battle it out for supremacy some 2 weeks later. It also must be appreciated that there are many other matches played at the ground during the course of the year which are of a much lower profile. Other matches and training events are held at the ground during the course of the year which attract much less attention and the audiences are of a much more modest nature.

[10] The unchallenged evidence is that over the past 14 years attendances have in general been modest. Rarely do more than 5,000 now watch games at Casement Park. The Derry v Armagh match on 26 June 2005 was an exception. 27,633 spectators attended on that day. Police evidence suggests that there was an attendance of some 25,000 fans at the Tyrone v Derry match on 21 June 2009.

Approximately 18,000 spectators attended the 'Match for Michaela' which was part concert and part sporting contest to commemorate the life of Michaela McAreavey who had been murdered on her honeymoon. Many of the crowd came from County Tyrone, where Michaela was born and where her immediate family have very close ties. This match was intended to provide important information to assist the Department in determining the effect of large attendances at Casement Park. When the Ulster semi-finals have been played at Clones, crowds of between 27,000 and 35,000 approximately have attended. During the period from 2004-2006 when Croke Park was used for the Ulster final, crowds were reported of the order of 50,000/60,000. At present GAA policy is to play all matches in which it is anticipated there will be substantial crowds at St Tiernach's Park, Clones or Breffni's Park, Cavan. These two grounds have capacities in excess of 30,000, although neither of them can take more than 36,000.

[11] The GAA's strategic review in January 2002 identified a need for grounds capable of accommodating crowds of 40,000/60,000 in each of the four provinces, of which two-thirds of spectators should be seated. Each stadium would then host the provincial final each year. In 2007 Price Waterhouse Coopers LLP ("PWC") following a request by the Department of Culture, Arts and Leisure ("DCAL"), prepared a report on the development of a stadium which would accommodate the three major spectator sports in Ulster - soccer, rugby and Gaelic football. This was to be a single, multi-purpose stadium which would host not only sports events but also concerts. It was anticipated originally that this would be constructed on the site of the Maze/Long Kesh. The GAA was supportive of this approach recognising as they did the problems facing Casement Park in the light of Sport NI's intervention following the publication of the Taylor report in the wake of the Hillsborough disaster. This report had highlighted major safety issues arising out of the inadequate physical state of major sports stadiums across the whole of the United Kingdom. However, in January 2009 the Minister for DCAL indicated that there would be no multi-sports stadium developed at the Maze/Long Kesh. It was literally back to the drawing board for the GAA. Sport NI on behalf of DCAL in October 2009 commissioned FGS McClure Watters to develop an Outline Business Case for the development of three separate stadiums for each of the three major sports. That initial report provided support for a 42,000 capacity all seated stadium incorporating inter alia conferencing facilities and commercial units for rental.

[12] Meanwhile the GAA plan for Belfast 2009-2014 noted:

(i) The importance of Belfast as the second city in the island of Ireland.

(ii) The fact that the last 10 years have been devoted to the concept of a multi-sports stadium at Maze/Long Kesh.

(iii) The importance to the GAA of developing a stadium to accommodate crowds of 40,000-60,000 in Ulster.

(iv) Its preference for a new iconic GAA stadium at Casement Park with a capacity for 42,000 spectators.

(v) The potential of such a stadium to contribute to the regeneration of the Greater Belfast area in general and the Andersonstown Road area in particular.

[13] A Final Business Case followed on from the Outline Business Case in 2013. It was prepared by FGS McClure Watters. This concluded, inter alia, that:

(a) there could only be a capacity of 38,000 for the new stadium because of the constraints of the site; and

(b) that there was potential for the inclusion of community facilities.

[14] In March 2011 the Programme for Government ("PFG") included a key commitment to "develop sports stadiums as agreed with IFA, GAA and Ulster Rugby". It was DCAL who was to deliver this essential commitment within the context of sporting matters. It would appear that various meetings were held which involved the Department, Sport NI and DCAL. It is clear from these meetings that it was recognised that the planning process was a key feature if a redeveloped Casement Park was to be achieved. It was acknowledged that it would be particularly difficult to deliver Casement Park within the timescale of 2015. The reason why this date was so important is made clear in the affidavit of Peter May, Permanent Secretary of DCAL. He avers that:

(a) DCAL has allocated £110M to deliver all three stadiums.

(b) There is no power to raise further money.

(c) £62,508,045 has been allocated to Casement Park. The grant is divided between 3 financial years, namely 2003/2014, 2014/2015 and 2015/2016.

(d) There is no flexibility and the budget is ring-fenced. If it is not used within the timescale, the budget must be surrendered to the Executive for redeployment.

(e) £110m have been allocated to the stadiums' budget which includes Windsor Park and Ravenhill. Any change would require DCAL to submit a new business case to the Department of Finance and Personnel which has no guarantee of approval.

[15] Clearly there was much co-operation behind the scenes between the GAA and the Department, including Roads Service, so as to allow the GAA to achieve the

planning permission sought within the timescale that had been set for funding. Mr Hoy, the roads engineer for the Applicant, implies in his sworn evidence that there was something unhealthy, almost sinister, about the assistance which the Planning Service has given to the GAA. He claims that Casement Park has been made an exception to the requirements placed on other major schemes benefiting from public funding. Unlike these other proposed developments, there has been an absence of scrutiny of the potential effects of the development on the surrounding road network. For the record the court rejects any suggestion, whether express or implied, of any improper behaviour on the part of the Department or the GAA.

[16] Following the validation of the planning application on 24 June 2013 the Respondent applied Article 31 of the Planning Order to the application on the grounds that the proposal would "be of significance to the whole or a substantial part of Northern Ireland" and also because it will "affect the whole of a neighbourhood". The Minister did not consider that a public inquiry was necessary.

[17] In response to the proposed redevelopment of Casement Park, the local residents arranged a meeting on 13 January 2012 at which more than 100, mostly local residents attended. The Residents' Association was established and a constitution adopted in 20 February 2012. A planning expert was obtained from Community Places, Community Planning Consultants, namely Claudine Christy and a Roads Engineer, Martin Hoy, of Hoy Dorman Consultants. C and J Black were retained as the Applicant's solicitors. The Applicant through its members, its experts and its legal team has engaged with the Department, the GAA, local politicians and the relevant Ministers throughout the process. The Applicant has made clear the concerns of its members about the effect that the new stadium will have on their properties and the amenity those properties presently enjoy. The Applicant is determined to fight the planning permission which has been granted. The court was told that local residents are broadly in favour of a much smaller development and that they would not object to a stadium with a capacity of 25,000 spectators. Many of the Applicant's members professed to be supporters of the GAA in general and Gaelic games in particular.

[18] On 15 October 2013 Sergeant McQueen of PSNI, as part of the consultation process, provided a report for the PSNI, to the GAA's experts, RPS, detailing various concerns that the police had about the effect of the proposed development on the road network in general and road safety in particular. In his report Sergeant McQueen made a number of trenchant objections based on what would happen if a capacity crowd of 38,000 attended the new Casement Park. He complained about the ability of the adjacent road network to cope, of problems with a crowd exiting such a ground and the access of emergency services which might give rise to a potential breach of Article 2 of the European Convention of Human Rights (ECHR) that is the right to life. He was concerned about the level of resources required to police such events and, in particular, during the period immediately after the event when the crowd was dispersing.

[19] On 30 October 2013 at a meeting between the Planning Service and Road Service, it was agreed that **subject to the Planning Service confirming in writing that the base figure of 32,600 was correct**, (emphasis added), Road Service "would have no objection to the Casement proposal". In effect that meant that the Road Service's assessment of the proposed stadium on the adjacent road network would be based not on the proposed crowds which would be attracted to high profile events, namely 38,000 spectators, but on the difference between 38,000 spectators and 32,600 spectators, this being the Department's assessment as to what was the "baseline capacity of Casement Park", giving a difference of 5,400 spectators. It was claimed that this extra capacity could be managed by an Events Management Plan ("EMP") which would divert spectators away from the use of private cars. In effect this would result in there being no additional stress on the road network and the junctions in the vicinity because there would be no additional private car traffic or, if there was, it would be effectively managed. On a belt and braces approach, an overflow car park at Boucher Road was also to be made available for any events at Casement Park which would attract substantial audiences. The consequence of this was that Road Service did not carry out any traffic impact assessment designed to assess the effect of a capacity audience at the new stadium on the surrounding road network and junctions.

[20] During the pre-application phase, the Department made a screening decision pursuant to Regulation 7(1)(a) of the Planning (Environmental Impact Assessment) Regulations (NI) 2012 ("EIA Regulations") confirming that the proposed development was an EIA development and that it should be accompanied by an Environmental Statement ("ES"). The ES which was produced in this case is both voluminous and extremely detailed. It does not form part of the application. Instead it accompanies the application.

[21] On 12 December 2013 the Final Development Management Report ("FDMR") was produced and provided to the Minister on 17 December 2013. It identified the main planning considerations as:

> "Government commitment and strategies;
>
> Planning policy context and impact on the surrounding area;
>
> Traffic impact, capacity increase and management of access."

Other matters which were highlighted were the:

> (i) Traffic impact, capacity increase and management of supporters.

(ii) Other environmental considerations.

(iii) Socio-economic considerations.

The FDMR concluded that the proposal meets a commitment of the Programme for Government, aligns with other high level Government strategies and objectives and helps secure delivery of the planning stage of a Government funded project within the required timescale.

Finally, and crucially, it concluded:

> "On balance it is considered that this regional benefit has determining weight and therefore outweighs the adverse residential amenity impacts imposed."

[22] In the FDMR the development was assessed as being suitable. In the report, the author stated at paragraph 2.9:

> "Letters of support highlight a number of potential benefits of the proposed scheme and these are summarised in Appendix 4. It is agreed the proposal provides an opportunity to raise the health and safety standards of the stadium in line with legislative requirements. It is also acknowledged that the proposal has the potential to provide social benefits and increase interest and potential participation in Gaelic games. Economic benefits cited by supporters relating to increased out of state expenditure and job creation have been considered in the previous section of the report. The anticipated benefits of the proposal **will be balanced with all other material considerations** when making a recommendation on this application." (Emphasis added)

No mention was made at all in the FDMR of the extensive police reservations about the project especially in relation to the capacity of the road network to handle the traffic which would necessarily be generated by a capacity audience at the new Casement Park. On 19 December 2013 the Minister announced his decision to grant planning permission, six months exactly from when the planning application had been made. On 16 January 2014 planning permission was granted. There then followed pre-proceedings correspondence from the Applicant before proceedings were instituted on 14 April 2014. The Applicant has the benefit of a protective costs order which limits not only the cost which it has to pay to the Department should it lose, but also limits the costs which it can recover against the Department should it be successful.

[23] The GAA complains that it has already incurred costs of £4.8m on the project, that delay will increase the overall costs of the project by up to £2.7m and that the costs of delay amount to £60,000 per week. The Applicant counters that the majority of costs have been incurred in the pre-construction phase and constitute the risks of development. It asserts that the GAA still does not have vacant possession of Casement Park and that the claims being made by the GAA are an exaggeration. As has been noted the Department emphasises that no money will be available for the project if it is delayed beyond 2015. Since the hearing the importance of this development to Ireland's Rugby World Cup bid has been canvassed widely in the press and on television.

[24] While the Department and GAA have stressed the adverse consequences if planning permission is not granted without delay, the Applicant has also sought to try and colour the court's thinking. While not alleging bad faith or collusion or pre-determined outcome, it has sought to highlight what it alleges is an uncomfortably close relationship between the Department and the GAA.

[25] It is important to stress that the court refuses to be influenced by the financial and sporting advantages or disadvantages which may accrue to either party from any decision it makes. Nor will it shape its decision on the basis of innuendo. This case will be decided by what has been pleaded in the Order 53 Statement, as amended, and by applying the various legal principles to the facts it finds, based fairly and squarely on the various affidavits filed and their exhibits.

D. CASEMENT PARK AND ITS ENVIRONS

[26] The construction of the present Casement Park was finished in 1953. It fronts the Andersonstown Road to the north. When it was being built numbers 1-23 and 2-36 Mooreland Park which abut Casement Park had already been constructed. Later other houses were erected there. Casement Park is now enclosed effectively on the east, west and south by Mooreland Park, Mooreland Drive and Owenvarragh Park respectively. The evidence established that these other houses were erected by approximately 1958. There are 60 residential properties immediately adjacent to the ground.

[27] The history of the use of Casement Park was singularly lacking. Late attempts have been made to add to what was available to the Department when it reached its decision because it became increasingly clear that such information could be critical. The court was told from the Bar that Casement Park had been commandeered by the Ministry of Defence and used as an Army base during the height of the "Troubles". There is no affidavit evidence about when this happened and how long it lasted. Much of the evidence had to be gleaned from the Outline Business Case prepared by FGS McClure Watters in 2010. That information is largely confirmed by the planning permissions that have been granted over the years. There can be little doubt that the Department did not concern itself with the

past use of Casement Park other than looking at the capacity of the ground as recorded in various documents. It certainly did not consider its possible or likely future use. This is confirmed by paragraphs 46-55 of the affidavit of Mr Stinson sworn on 7 July 2014.

[28] The ground itself is somewhat different than it was in 1953. Insofar as is possible to piece together its development over the years, it would appear that in its original manifestation most, if not all the spectators stood on grass terraces, which were open to the elements. In the mid-1990s Casement Park received £3m funding from Making Belfast Work and the grass banks were replaced with concrete terraces containing standing areas and uncovered concrete benches. There is little evidence of what contribution, if any, was made by the GAA to this expenditure. More recently funds were provided by Sport NI under the Stadia Safety Programme to improve the safety of sports grounds in Northern Ireland. The GAA made a contribution of less than 50% of the capital costs. This was used for floodlights and to improve the entrance and exits.

[29] Casement Park may have been a state of the art stadium at the time of its construction, but today, it sits low slung and grey, marked by four columns of floodlights which tower over the ground and the surrounding area. Dejected, decrepit and dilapidated, its glory days appear long gone. The present state of disrepair is a product of the indecision of the past 10 years about its medium and long term future. There can be no doubt that considerable investment is required even to return it to a reasonable state of repair. On one side of the ground is the Andersonstown Road. On the other three sides the ground is hemmed in by residential housing which for the most part crowds against its perimeter wall. The gardens of these houses are neat and tidy. In some of the houses it is clear that the gardens are the object of very considerable devotion. These properties are well maintained and cared for and it is evident that the owners take considerable pride in them. The enthusiasm and determination with which many of these residents have fought this planning application should have come as no surprise. The residents involved in this application see the proposed stadium as posing a threat both to their continuing enjoyment of their properties and also to their value, although the latter cannot be a concern of this court. They claim that their lives will be made completely intolerable on the days of events attracting capacity crowds to the new redeveloped ground. <u>This claim, which is central to their objection, has never been tested because of the approach adopted by the Department to the proposed development of Casement Park.</u>

<u>Grounds of Objection</u>

Order 53 Statement

[30] As I have said the grounds advanced under Order 53 are wide-ranging. The Applicant through its legal team and experts has, to adapt the words of Ouseley J in

R (Bedford and Clare) v London Borough of Islington and Arsenal Football Club plc [2002] EWHC 2044 Admin, put the decision-making process of the Planning Service "through a demanding legal audit as if a roving commission was being conducted on behalf of all the objectors."

[31] The grounds can be summarised briefly as follows:

(i) The description contained in the application for planning permission is inadequate to describe the uses to which the proposed stadium will be put. Inter alia, the Applicant complains that nowhere in the application is there mention of the new Casement Park's proposed use as a major concert venue and that the Department improperly validated the application. Allied to this is the complaint that the Department failed to make adequate inquiry into the uses to which the proposed stadium will be put and thus failed to adequately assess the proposal and fell into an error, namely that this was for a single primary use, the other uses being ancillary. ("Ground 1").

(ii) The Department wrongfully accepted that the existing stadium should be deemed to have an appropriate starting point, fall back or base line of 32,600 spectators. This resulted in the Department, inter alia, assessing an uplift of 5,400 spectators, that is a difference between the current alleged capacity of the ground and the intended capacity of the new stadium, namely 38,000. This was unlawful, being, inter alia, a misdirection, an error of law, "Wednesbury unreasonable", legally irrelevant and inconsistent with the approach taken in respect of the related applications of Windsor Park and Ravenhill and contrary to the EIA Regulations. ("Ground 2").

(iii) The Department has ignored its own Transport Assessment Guidelines 2008 and failed to properly consider and/or apply Policy AMP6, Planning Policy Statement 3 and/or Policy OS4 of Planning Policy Statement 8. ("Ground 3").

(iv) The Department has failed to give adequate weight to the concerns of the PSNI about road safety and/or road capacity should the new stadium operate to full capacity. Allied to that, the Department failed to advise the Minister in the FDMR of the PSNI view on these issues. ("Ground 4").

(v) The Department has failed to apply the EIA Regulations to other additional uses which include the provision of conference facilities, restaurant and bar facilities, community facilities and concert use and/or to consider alternative sites. ("Ground 5").

(vi) The Department unlawfully took into account the commitment in the Programme for Government ("PFG") to develop a new GAA stadium when considering this application and/or attributed to that commitment a disproportionate weight. ("Ground 6").

(vii) In granting permission the Department misdirected itself and/or failed to apply its policy OS4 of PPS 8. ("Ground 7").

(viii) The Department acted unlawfully by failing to hold a public local inquiry under Article 31(2) of the 1991 Order. ("Ground 8").

(ix) In granting planning permission the Department failed to properly consider the environmental effects of the development in relation to asbestos and land contamination and impermissibly postponed consideration of these to the period after the grant for planning permission. ("Ground 9").

(x) In granting planning permission the Department erred in believing that the solution for JKW was the best practice and could actually be achieved and/or failed to comply with the EIA Regulations. ("Ground 10").

(xi) The Department failed to consider and assess whether the ground as designed was safe to accommodate and, in particular, evacuate 38,000 spectators. ("Ground 11").

E. DELAY

[32] A preliminary point was raised on the basis that there had been a failure to comply with Order 53 Rule 4 in that the application was not made promptly albeit that it had been made just within the 3 month period. Obviously in respect of any of the grounds based on a failure to comply with EC Directive 2011/92/EU "on the assessment of the effects of certain public and private projects on the environment" the 3 month longstop provision applies: see R (Buglife) v Medway Council [2011] EWHC 746 at paragraph [63]. Accordingly, it was immaterial that the proceedings were only launched just before the 3 month period had expired.

[33] However in respect of all the domestic law grounds, the requirement in respect of promptitude remains especially in planning cases. Kerr LCJ said in Re Hill's Application [2007] NICA 1 at paragraph [33] that there was "need for great expedition in the presentation of applications for leave to apply for judicial review in planning cases".

[34] The issue of delay has not been raised by agreement at the leave hearing. Instead the parties had agreed with the approach taken by Sedley LJ in R (Lichfield Securities Limited) v Lichfield District Council [2001] EWCA Civ 304 when he said that "undue delay should be placed on the agenda at the substantive hearing". This was also the approach adopted by Gillen J in Re Sheridan Millennium Ltd's Application [2007] NIQB 27.

[35] There is an obvious difference between cases involving developers challenging the granting of planning permission to one of their competitors and who have access to substantial funds and legal advice and to a residents' association struggling to organise and raise funds to make an application to contest an unwelcomed development in their locality. As Maguire J said in Re Musgrave Retail Partners (NI) Limited's Application [2012] NIQB 109: "… there is no rule of thumb as to what constitutes a timely application ...".

[36] I consider that there was undue delay on the part of the Applicant which has not been satisfactorily explained. However, I consider that the application raises issues of public importance and the Applicant comprising as it does a group of residents, should be given some latitude. In the circumstances I am of the view that the appropriate way forward is to proceed to decide all the issues in this judicial review on the merits. However, it will be necessary to decide what is the appropriate relief to grant, given the delay in bringing the proceedings. Mr Orbinson QC in his book "Planning and Judicial Review" at page 16 states:

> "... At the substantive hearing the Court may in its discretion decline to grant relief it would otherwise have granted, because of that lack of promptitude/delay."

That is the approach that commends itself to the court.

F. STATUTORY FRAMEWORK

[37] Article 3 of the Planning (Northern Ireland) Order 1991 ("the 1991 Order") sets out the general functions of the Department. The Department is required to "formulate and co-ordinate policy for securing the orderly and consistent development of land and the planning of that development."

[38] Part IV of the 1991 Order deals with planning control. Clearly the redevelopment of Casement Park is a development which requires planning permission and that is not contentious. Article 20 states:

> "(1) Any application to the Department for planning permission –
>
> (a) shall be made in such manner as may be specified by a `development order';
>
> (b) shall include such particulars, and be verified by such evidence, as may be required by a development order or by any

directions given by the Department thereunder."

Article 21 of the 1991 Order (and the EIA Regulations) require any planning application to be advertised in the locality. This is to allow those most affected by the development to be aware of proposals for that area and, if they object, to lodge grounds of objection.

[39] Article 25 has the effect that Planning Policy Statements ("PPS") are material considerations and must be taken into account. For the Department to do this it must not only consider them, it must also understand them.

[40] The Planning (General Development) Order (Northern Ireland) 1993 sets down the form and content of each type of application for planning permission. Article 7 requires applications to be made in a form issued by the Department and "to include the particulars specified in the form". Question 7 of the application requires the details of the proposed development, including the purpose for which the land/buildings are to be used to be set out. The form states expressly:

> "It is vital that a full and detailed description of the proposal is provided. Give as much detail as possible including the number of homes/apartments".

The Applicant complains that the description did not comply with the statutory regime because of its failure to mention the use of the stadium for concert use without which the whole project would apparently not be financially viable.

[41] Article 31 provides:

> **Special procedure for major planning applications**
>
> "31.(1) Where, in relation to an application for planning permission, or an application for any approval required under a development order, the Department considers that the development for which the permission or approval is sought would, if permitted—
>
> (a) involve a substantial departure from the development plan for the area to which it relates; or
>
> (b) be of significance to the whole or a substantial part of Northern Ireland; or
>
> (c) affect the whole of a neighbourhood; or

(d) consist of or include the construction, formation, laying out or alteration of a means of access to a trunk road or of any other development of land within 67 metres of the middle of such a road, or of the nearest part of a special road;

the Department may within two months from the date of the application serve on the Applicant a notice in such form as may be specified by a development order applying this Article to the application.

(2) For the purpose of considering representations made in respect of an application to which this Article applies, the Department may cause a public local inquiry to be held by the planning appeals commission.

(3) Where a public local inquiry is not held under paragraph (2), the Department shall, before determining the application, serve a notice on the Applicant indicating the decision which it proposes to make on the application; and if within such period as may be specified in that behalf in the notice (not being less than 28 days from the date of service thereof) the Applicant so requests in writing, the Department shall afford to him an opportunity of appearing before and being heard by the planning appeals commission.

(4) In determining an application to which this Article applies, the Department shall, where any inquiry or hearing is held, take into account the report of the planning appeals commission.

(5) The decision of the Department on an application to which this Article applies shall be final.

(6) In this Article "road" includes a proposed road and "special road", "trunk road" and "proposed road" have the same meaning as in the [1980 NI 11] Roads (Northern Ireland) Order 1980."

In the instant case the Applicant complains that the public inquiry was necessary to consider all the representations of the local residents.

[42] The EIA Regulations were brought in to give effect to Directive 2011/92/EU ("the Directive"). Recital 7 of the Directive provided:

> "Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of **the likely significant environmental effects** if those projects had been carried out. That assessment should be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the public likely to be concerned by the project in question." (Emphasis added).

Article 1(1) of the Directive states:

> "This Directive shall apply to the assessment of the environmental effects of those public and private projects which are **likely to have significant effects on the environment**." (Emphasis added).

Article 2(1) states:

> "Member States shall adopt all measures necessary to ensure that, before consent is given, projects **likely to have significant effects on the environment** by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. Those projects are defined in Article 4." (Emphasis added).

It is clear that the purpose of the Directive is to identify developments such as the instant one and to ensure that an adequate assessment of their likely significant effects on the environment and how those effects may be mitigated, is made before the development can proceed. In addition the process is intended to ensure that there is adequate public scrutiny of the significant environmental effects and their mitigation.

[43] Under the EIA Regulations, environmental information is defined at Article 2(2) as meaning:

> "The Environmental Statement, including any further information and any other information, any representations made by anybody require by these regulations to be consulted and any representations duly

made by any other person about the likely environmental effects of the proposed development."

ES is defined as meaning:

> "A statement that includes such of the information referred to in Part 1 of Schedule 4 as is reasonably required to assess the environmental effects of the development on which the Applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, which includes at least the information referred to in Part 2 of Schedule 4."

Part 1 of Schedule 4 sets out a number of matters for inclusion in the environmental statement. Paragraph 1(a) requires a description of the physical characteristics of the whole development and the land-use needs during the construction of the operational phases. Paragraph 3 requires a description of the aspects of the environment likely to be significantly affected by the development.

Paragraph 4 states:

> "A description of the **likely significant effects of the development on the environment**, which should cover the direct effects and any indirect, secondary, cumulative, short, medium and long term, permanent and temporary, positive and negative effects of the development, resulting from:
>
> (a) The existence of the development;
>
> (b) The use of natural resources;
>
> (c) The emission of the pollutants, the creation of nuisances and the elimination of waste …" (Emphasis added).

Part 2 of Schedule 4 requires a description of the development, a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects, the data required to identify and assess the main effects which the development is likely to have on the environment and an outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for his choice taking into account the environmental effects.

[44] Under Article 25(1)(a) of the 1991 Order the Department has three choices in respect of any planning application made to it. It can grant the application unconditionally. It can grant the planning permission subject to such conditions as it considers appropriate. Finally, it can refuse the planning application outright.

G. RELEVANT LEGAL PRINCIPLES

[45] In Re Bow Street Mall [2006] NIQB 28 Girvan J set out the relevant legal principles which should apply to judicial review of planning decisions. I have endeavoured to follow them. I set out the judge's clear and comprehensive summary in full:

> "[43] A number of clearly established principles of central relevance in the case emerged from the authorities and can be stated briefly as follows:
>
> (a) The judicial review court is exercising a supervisory not an appellate jurisdiction. In the absence of a demonstrable error of law or irrationality the court cannot interfere. The court is concerned only with the legality of the decision making process. If the decision maker fails to take account of a material consideration or takes account of an irrelevant consideration the decision will be open to challenge. (per Lord Clyde in City of Edinburgh Council v Secretary of State [1998] 1 All ER 174).
>
> (b) It is settled principle that matters of planning judgment are within the exclusive province as the local planning authority or the relevant minister (per Lord Hoffmann in Tesco Stores v Secretary of State [1995] 2 All ER 636 at 657).
>
> (c) The adoption of planning policy and its application to particular facts is quite different from the judicial function. It is for Parliament and ministers to decide what are the objectives of planning policy, objectives which may be of national, environmental, social or political significance and for those objectives to be set out in legislation, ministerial directions and in planning policy guidelines. The decision of ministers will often have acute social, economic and environmental implications.

They involve the consideration of the general welfare matters such as the national and local economy, the preservation of the environmental, public safety and convenience of the road network and these transcend the interests of particular individuals (see R (Alconbury Limited) v Secretary of State [2003] 2 AC 327 per Lord Slynn, Lord Nolan and Lord Hoffmann).

(d) Policy decisions within the limits imposed by the principles of judicial review are a matter for democratically accountable institutions and not for the courts (per Lord Hoffmann in Alconbury at 327).

(e) In relation to statements of planning policy they are to be regarded as guidance on the general approach. They are not designed to provide a set of immutable rules. The task of formulating, co-ordinating and implementing policy for the orderly and consistent development of land may require the resolution of complex problems produced by competing policies and their conflicting interests. Planning policies are but some of the material considerations that must be taken into account by the planning authority in accordance with the 1991 Order (per Carswell LCJ in Re Lisburn Development Consortium Application [2000] NI JB 91 at 95( ) – (e), per Coghlin J in Re Belfast Chamber of Trade Application [2001] NICA 6.

(f) If a planning decision maker makes no inquiries its decision may in certain circumstances be illegal on the grounds of irrationality if it is made in the absence of information without which no reasonable planning authority would have granted permission (per Kerr LJ in R v Westminster Council ex parte Monahan [1990] 1 QB 87 at 118(b) – (d). The question for the court is whether the decision maker asked himself the right question and took reasonable steps to acquaint himself with the relevant information

to enable him to answer it correctly (per Lord Diplock in Tameside).

(g) Where the Department has issued an art. 31 notice indicating the Department's proposed decision the Applicant is entitled to expect that it will be implemented in the absence of some good reason to the contrary. It is open to the Department to change its mind for sufficient reasons and give a different final decision on the application if it is desirable in the public interest to do so (per Carswell LCJ in Re UK Waste Management Application [1999] NI 183).

(h) In the context of planning decision the decision making process may take place in stages. Thus, for example, a resolution by a local authority proposing to permit or refuse a planning application may be later followed by a grant or refusal of planning permission. The decision of the planning authority passing the resolution does not grant the permission but it is susceptible to review as will be the later decision to grant or refuse planning permission. An Applicant will not be precluded from challenging the latter if he acts timeously after the grant or refusal on the ground that he should have challenged the earlier step (R (Burkett) v Hammersmith & Fulham [2002] 1 WLR 1593 (I).

(i) The planning decision-maker's powers include the determination of the weight to be given to any particular contention. He is entitled to attach what weight he pleases to the various arguments and contentions of the parties. The courts will not entertain a submission that he gave underweight to one argument or failed to give any weight at all to another (per Forbes in Sedon Properties v Secretary of State for the Environment [1978] JPL 835)."

[46] It is possible to stress the importance of not expecting the decision-maker to "provide a learned disquisition of relevant legal principles or to repeat each and every detail of the relevant facts …" per Judge LJ in Oxton Farm and Another v Selby District Council and Another (18/4/1997). Perhaps the last word on the

subject should go to Sir Thomas Bingham MR in Clarke Homes v Secretary of State for the Environment (1993) 66 P&CR 263 at 271 when he said:

> "I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of this decision letter without excessive legalism and exegetical sophistication."

[47] Some of the grounds are freestanding and some of the grounds are interlinked. The court will deal with each ground of challenge separately except where it is more convenient to deal with two or more together.

H. DISCUSSION

[48] The short summaries which follow of the grounds relied on by the parties (and I have referred to the Department and the GAA together as the Respondent) do less than justice to the nuanced and well thought out arguments advanced both orally and in writing by counsel for the respective parties. They are not intended to be comprehensive. Where some point has been omitted it has been done so as to try and prevent "unwelcome prolixity," a fault, according to one commentator, to which planning judgments are especially susceptible.

Ground 1

[49] The Applicant says that the description in the application of the uses to which the proposed developed stadium could be put was inadequate and in particular it failed to include any reference to its intended use as a concert venue when such a use was essential to the project's very viability. Further, by failing to make any or adequate inquiry about its proposed uses the Department improperly concluded that it was for a single primary use rather than for a mixed use. The Respondent says that any concert or other non-sporting uses not identified within the permission are not authorised primary uses. These other uses are necessarily ancillary to the primary use and therefore do not constitute development for the purposes of the 1991 Order. It is not for the Department to seek to identify additional primary uses for which a planning Applicant has not sought permission nor for it to seek to identify any potential ancillary uses.

[50] An application for planning permission is made to the Department and it is for the Department to consider that application under Article 25 of the 1991 Order. If an Applicant does not adequately describe the primary uses to which he intends to put the development, then that is at the Applicant's risk. If the Applicant

subsequently seeks to make use of it for purposes which are not ancillary, then, that Applicant will be faced with the risk of enforcement action. There is no obligation on an Applicant to set out the ancillary uses to which the development might be put. In Telford and Wrekin Council v Secretary of State for Communities [2013] EWHC 79 at [33] Beatson LJ said:

> "I first summarise my understanding of the effect of the authorities put before me on the construction of a planning permission (and of the conditions in it) (The summary incorporates the principles set out by Elias LJ in Hulme's case 13):
>
> *(1) As a general rule a planning permission is to be construed within the four corners of the consent itself, ie including the conditions in it and the express reasons for those conditions unless another document is incorporated by reference or it is necessary to resolve an ambiguity in the permission or condition: R v Ashford DC, ex parte Shepway DC [1998] PLCR 12 at 19 (Keene LJ): …*
>
> *(2) The reason for the strict approach to the use of extrinsic material is that a planning permission is a public document which runs with the land. Save where it is clear on the face that it does not purport to be complete and self-contained, it should be capable of being relied on by later landowners and members of the public reading it who may not have access to extrinsic material: Slough Estates v Slough Borough Council [1971] AC 952 at 962 (Lord Reid) …*
>
> *(3) It follows from (2) that in construing a planning permission:*
>
> *(a) The question is not what the parties intended but what a reasonable reader would understand was permitted by the local planning authority; and*
>
> *(b) Conditions must be clearly and expressly imposed, so that they are plain for all to read. ..*
>
> *(4) Conditions should be interpreted benevolently and not narrowly or strictly (see Carter Commercial Development Ltd v Secretary of State for the Environment [2002] EWHC 1200 Admin at 49 per Sullivan J and given a common sense meaning …*

(5) *A condition will be void for uncertainty only if it can be given no meaning or no sensible or ascertainable meaning and not merely because it is ambiguous or leads to absurd results: Fawcett Properties v Buckingham County Council [1961] AC 636, 676 per Lord Denning …*

(6) *If there is an ambiguity in a condition it has to be resolved in a common sense way, having regard to the underlying planning purpose for it as evidenced by the reasons given for its imposition: Seven Oaks DC v First Secretary of State [2004] EWHC 771 (Admin) per Sullivan J at 38 …*

(7) *There is no room for an implied condition of planning permission. This principle was enunciated in Trustees of Walton on Thames Charities v Walton & Weighbridge District Council [1970] 21 P&CR 411 at 497 …*

(8) *Where planning permission containing conditions has been granted in a decision by an inspector allowing an appeal and a condition is ambiguous, it is possible to construe it in the context of the decision letter as a whole: Hulmes case at (13)a …"*

Article 30 of the 1991 Order leaves no room for doubt. It provides:

> "30(1) Without prejudice to Articles 34-38, any grant of planning permission to develop land shall (except insofar as the permission otherwise provides) enure for the benefit of the land and for all persons for the time being having an estate therein.
>
> (2) Where planning permission is granted for a building, the grant of permission may specify the purposes for which the building may be used; and if no purpose is so specified the permission shall be construed as including permission to use the building for the purpose for which it is designed".

[51] However, the fact that a planning permission has been granted for a primary use does not stop an ancillary use being made of the property. In Jillings v Secretary of State for the Environment [1984] JPL 32 Forbes J said:

> "The actual and lawful use of these premises as at 1 January 1964 was for the purpose of the hiring out of boats. The 1976 planning application, on its true construction, merely permitted the erection of a building in which industrial processes could be carried on as long as those industrial processes were ancillary to the primary purpose of the use of the planning unit as a whole, namely, the hiring of boats. Having got that far, it is not right to suggest that a building in which those industrial processes are carried out is itself a general industrial building within Class 4. It is nothing of the kind. It is part of a bigger whole and does begin to fall within Class 4.
>
> The other side of the coin is that because the manufacturing processes carried on in the building and, indeed, possibly in the land itself as well, have grown to such an extent that in the Inspector's view they have themselves become a primary purpose and not a purpose ancillary to the use of the unit as a whole, that becomes a material change of use because the unit is now being used not solely for the purpose of a hire boat concern but for a mixed purpose of hiring boats and manufacturing boats for sale …"

[52] Moore in A Practical Approach to Planning Law (9th Edition) at 7.110 says:

> "Almost side by side with the development of the law relating to the planning unit has been the development of the principle that land may have a dominant or permanent use, to which other uses may be subservient or ancillary. Hence, in determining the use of buildings or land, it may be that regard should be had to a larger unit of which the building or land in question is merely a part. So that if land and buildings are together used for a single dominant or primary purpose, it is that purpose which determines the character of the use of the whole unit without regard to any ancillary uses to which individual parts of the unit may be put."

He goes on to say at 7.119:

> "There is a now well-established principle that the right to use land for some dominant or primary purpose includes the right to use it for any purpose which is

> ancillary to that primary or dominant purpose. The addition of an ancillary use, therefore cannot be a material change of use."

In the FDMR the Minister was advised that the potential exists at Casement Park in the new development for other "occasional ancillary uses for example, concerts as it does with the existing Casement Park". This is an accurate description of what is intended and should not be controversial. It is certainly not unlawful.

[53] Further, the description "GAA stadium" anticipates a stadium where Gaelic games will be held and where there may be other activities such as occasional concerts. Croke Park has been host to many concerts, albeit on an occasional basis over the years, ranging from U2 to the Red Hot Chilli Peppers. It will be up to the GAA to ensure that any proposed use of Casement Park for musical events, pursuant to the planning permission, remains ancillary. If it does not, then it will face enforcement action. The court also rejects any argument that a planning authority has some independent duty to investigate the use to which a property might be put once planning permission is granted. The risk of non-compliance and subsequent enforcement action lies with the party seeking the planning permission and carrying out the development, not the planning authority. If the use of Casement Park in the future for concerts ceases to be ancillary and becomes a primary use, and this will have to be judged in the light of all the circumstances, then that will be a major change of use for which the GAA should be called to account. In the instant case the decision-maker was aware from the ES about the likely frequency of concerts and when these will take place.

The further claim that a condition(s) should have been included in the permission to regulate future use and to ensure that ancillary uses remained truly ancillary is unsustainable and not one in respect of which the court should intervene.

Ground 2, Ground 3 and Ground 4

[54] The Applicant claims that the Department has acted unlawfully in only assessing an uplift of 5,400 spectators in respect of the proposed new stadium. The Applicant says that this is a sleight of hand designed to keep hidden the pernicious effects of the proposed new 38,000 seater capacity stadium on the existing road network in general and the proximate road junctions in particular. The Applicant complains that this approach conceals the intolerable conditions that local residents will have to endure on the days when a capacity or near capacity crowd attends the new stadium. The Department says that it has acted lawfully and appropriately as the proper approach is to assess the difference between what exists on the site (or what could lawfully exist on the site) and what will be there should planning permission be granted. It claims that assessing the proposal against what is known as the "fall-back position" is both lawful and sound and should not be controversial.

[55] If the Department erred in the way it has approached the fall-back position it goes to the very heart of this judicial review. This is because it means that the Department could not have lawfully carried out the balancing exercise of all the material considerations, which it accepts is crucial to its final decision. It precluded the decision-maker from fairly weighing in the balance, for example, the adverse impact on the road network and on residential amenity of capacity crowds at Casement Park because the effect of such attendances had not been lawfully and adequately assessed. It is therefore important to look at the fall-back position as it is understood in planning terms. There has been much discussion and some controversy about the test for the fall-back position and how it should be taken into account. For example what assessment does the decision-maker have to make as to the likelihood of such a state of affairs existing either at the time of the application or in the future?

[56] In Snowden v Secretary of State for the Environment and the City of Bradford Metropolitan Council [1980] JPL 749 the Divisional Court in England and Wales had to consider an enforcement notice which was issued in respect of the maintenance and parking of vehicles in connection with a haulage business and the storage of scrap vehicles, containers and tyres on the site used for a greengrocer's business. Donaldson LJ said that the complaint was that the inspector had failed to make any comparison between what was known as the "fall-back" position of the Applicant, namely what they could have done without any change in the planning position and what they were doing for which they would like to have planning permission. If the evidence was that the resumption of the fall-back use would be just as objectionable as the proposed use, it would clearly be pointless to insist on discontinuance of the latter. However, it was also necessary to consider if there was a **real likelihood** that the person to whom the enforcement notice was directed would in fact lawfully use the premises for some other purpose if the enforcement notice was upheld because then the person deciding whether or not to uphold the enforcement notice ought to make comparisons between the relevant evils which face the local community.

[57] In New Forest District Council v Secretary of State for the Environment [1996] 71 P & Cr 189 Nigel Macleod QC sitting as Deputy High Court Judge held when considering the fall-back position that there was no distinction between the test of real likelihood and one of real possibility (both expressions had been used in Snowden). The contrast is between real likelihood or real possibility and no such possibility. It is not appropriate to apply a higher standard than the real possibility test. He also went on to hold that there is no general rule that no consideration can be treated as material unless the harm which is of concern is sworn to be more likely to occur than not. The contrast is between real likelihood or real possibility and no such possibility and it is not appropriate to apply a higher standard than the real possibility test.

[58] In Brentwood Borough Council v Secretary of State for the Environment and Gray (1996) 72 P & Cr. 61 Mr Christopher Lockhart-Mummery QC sitting as Deputy High Court Judge, said at page 65:

> "In considering the grant of planning permission for development A, the decision-maker must have regard to the ability of the Applicant to implement an existing or deemed planning permission for an alternative development B, which may have broadly similar planning implications. In shorthand, he must have regard to the Applicant's ability to implement a **fall-back** planning permission. This principle is now well established. In considering this question of fall-back, however, the prospects of it taking place must be real and not merely theoretical."

[59] In R v Secretary of State for the Environment and Havering Borough Council [1998] Env. LR 189 Mr Lockhart-Mummery QC turned to the issue of fall-back. He said at page 196:

> "The requirement to have regard to the consideration imports a requirement on the decision-maker to have before it sufficient material so that the consideration can be assessed. In the context of fall-back cases this all reduces to the need to ask and answer the question: is the proposed development in its implications for impact on the environment, or other relevant planning factors, likely to have implications worse than, or broadly similarly to, any use to which the site would or might be put if the proposed development were refused? By **might** I do not mean a merely theoretical possibility which can hardly feature in the balance (see, especially, the Brentwood case). For a fall-back suggestion to be relevant there must be a finding of an actually intended use as opposed to a mere legal or theoretical entitlement. Beyond these general statements, which are ones of simple common sense, I suggest that the court should be wary of laying down detailed hoops for the decision-maker in his, or her broad powers and duties under Section 70(2), especially bearing in mind that there will be doubtless many other factors relevant to the eventual decision."

[60] In South Buckinghamshire District County Council v Secretary of State for the Environment and Berkeley Homes Limited (1999) PLCR 72 Mr George Barlett QC sitting as Deputy High Court Judge considered the role of the decision-maker where there was a fall-back position, at page 79:

> "In my judgment where, as in the present case, the decision-maker is deciding whether planning permission for the development applied for should be granted in order to avoid the greater harm that would result from the resumption of some particular lawful use of the application site, it is inescapably necessary that he should consider the likelihood of such resumption taking place. This is so, it seems to me for two reasons. First, unless resumption of the use is a realistic possibility, it would be Wednesbury unreasonable to treat the harm that would result in such resumption as a reason for granting planning permission for the new development. Secondly, the degree of probability of the use being resumed will, or at least may, be a material consideration, to be weighed by the decision-maker along with the harm that the use would cause and the other pros and cons of the new development proposed. If the harm that would arise from the resumed use would be very serious, it may well be that a lower degree of probability of its resumption would be sufficient to justify the grant of permission than in the case of less serious harm. The assessment of the probability and the weight to be attached to it in the overall planning judgment, however, are matters for the decision-maker."

[61] In Samuel Smith Old Brewery (Tadcaster) v Secretary of State for Communities and Local Government (2009) EWCA Civ. 333 the Court of Appeal had to consider an order of the High Court dismissing the appellant's application to quash the first Respondent's decision to grant the third Respondent, conditional planning permission. In his judgment Sullivan J dealt with the argument as to what "a real prospect" meant in the context of the fall-back doctrine although the case was primarily concerned with how likely it was that planning permission, if granted, would be used. He said, obiter, at paragraph [21]:

> "In order for a prospect to be a real prospect, it does not have to be probable or likely; a possibility will suffice. It is important to bear in mind that **fall-back** cases tend to be very fact-specific. One might

> envisage a case where it is thought by the Inspector or the Secretary of State that the fall-back position – for example, an old planning permission which was still capable of implementation – would be very damaging indeed if it was to be implemented. The point did not arise in Brentwood, where it was being argued that the impact of that which was permitted development will be much the same as the impact of the development for which planning permission was being sought. However, in a case where the adverse consequences of implementing the fall-back position would be very significant, Mr Village accepted that there would be no reason why the Secretary of State could not conclude, as a matter of planning judgment, that even if the risk of implementing the fall-back position was very slight indeed – an outside chance perhaps – the seriousness of the harm that would be done, if planning permission was not granted and the fall-back position was implemented, was such that the risk was not acceptable so that planning permission should be granted."

[62] In Gambone v Secretary of State for Communities in Local Government (2014) EWHC 952 (Admin), which appears to be the most recent authority on the doctrine of fall-back, Ian Dove QC sitting as a Deputy High Court Judge considered the issue of fall-back at paragraphs [22]-[37] of his judgment. In particular he said:

> "[25] The fall-back argument is in truth no more or less than an approach to material considerations and circumstances where there are, or may be, the opportunity to use land in a particular way, the effects of which will need to be taken into account by the decision-maker. This involves a two stage approach. The first stage of that approach is to decide whether or not the way in which the land may be developed is a matter which amounts to a material consideration. It will amount to a material consideration on the authorities, in my view, where there is a greater than theoretical possibility that that development might take place. It could be development for which there is already planning permission, or it could be development that is already in situ. It can also be development which by virtue of the operation of legal entitlements, such as the

> General Permitted Development Order could take place.
>
> [26] Once the question of whether or not it is material to the decision has been concluded, applying that threshold of theoretical possibility, the question which then arises for the decision-maker is as to what weight should be attached to it. The weight which might be attached to it will vary materially from case to case and will be particularly fact sensitive. Issues that the decision-maker will wish no doubt to bear in mind are as set out in the authorities I have alluded to above such as the extent of the prospect that that use will occur. Allied to that will be a consideration of the scale of the harm which would arise. Those factors will all then form part of the overall judgment as to whether or not permission should be granted. It may be the case that development that has less harm than that which is being contemplated by the application is material applying the first threshold, and then needs to be taken into account and weight given to it.
>
> [27] However, the question of whether or not there is more or less harm applies at the second stage of the assessment and not at the first stage when deciding whether or not such existing land use entitlements, as may exist in the case, should be regarded as material. In short, there is nothing magical about a fall-back argument, it is simply the application of sensible legal principles to a consideration of what may amount to a material consideration, and then the application of weight to that in context in order to arrive at the appropriate weight to be afforded to it as an ingredient in the planning balance."

The court drew this authority to the attention of the parties and all sides agreed that it accurately reflected the current law as it is understood.

[63] It is possible to extract the following guidance from these authorities.

(i) Fall-back is fact specific.

(ii) The use of fall-back must be clearly identified.

(iii) There must be assessment of whether the fall-back position is ever going to occur.

(iv) If the fall-back position is more than theoretical, then it is a matter for planning judgment what weight should be given to it.

(v) The decision-maker should then carry out a balancing exercise of what is an acutely fact sensitive task by weighing the effects of the fall-back position in the balance.

[64] It is not necessary for the court to discuss in detail the various statutes that deal with planning use rights. Suffice to say that all breaches of planning control are currently subject to a limitation period of 5 years for service of an enforcement notice: see Section 132 of the Planning Act (Northern Ireland) 2011. The following propositions should not be controversial:

(a) Casement Park acquired immunity for use as a sports stadium upon the commencement of the Planning (Northern Ireland) 1972 Order, as it had been used as a stadium for that purpose between 1968 to 1972.

(b) If this is incorrect, Casement Park acquired immunity as a sports stadium in 1976, four years after the date of commencement of the 1972 Order.

(c) If not, it acquired immunity in 2003, following amendment of the Planning (Northern Ireland) Order 1991 (assuming 10 years use as a sports stadium between 1993-2003).

(d) If not, it acquired immunity at the latest by November 2011, following introduction of the Planning (Northern Ireland) Act 2011 (assuming use as a sports stadium between 2006-2011).

[65] It is clear that the Department thought that it was sufficient merely to look at the capacity of the ground to assess planning use rights. This is obvious from paragraph 41 of the FDMR. It states:

> "The site currently operates as a GAA stadium with maximum capacity in the region of 32,600. The application involves an increase in maximum capacity by approximately 5,400 to accommodate up to 38,000 seated supporters. Whilst restriction on the maximum capacity may be imposed for health and safety reasons, the existing venue could be refurbished to overcome any such issues to allow it to operate to its maximum capacity.

> Those objecting to the proposal have pointed to lower attendance figures for recent matches and contend that it is therefore inappropriate to use a maximum capacity figure as the baseline for the assessment of this application. This matter has been considered by the Department. Whilst recent attendance figures at Casement Park may be lower, the stadium is capable of hosting matches to its maximum capacity at any time on any number of occasions. It is therefore considered the existing use rights of the site are material to the determination of his application and this would also apply to the use of the existing entrance and exit points. …"

[66] The abandonment of the right to use land for a particular purpose, means that it cannot be used without obtaining planning permission. The question therefore is whether the cessation of use is merely temporary or permanent: see Hartley v Minister of Housing and Local Government [1969] 3 All ER page 158 at 160. In Hughes v Secretary of State for the Environment, Transport in the Regions [1999] JPL 83, the Court of Appeal emphasised that in considering the issue of abandonment, it was necessary to have regard to all relevant circumstances and the test of whether there had been a permanent cessation of use was one that had to be viewed through the eyes of a reasonable man with knowledge of all the relevant circumstances. This is especially relevant give that this ground was fundamentally altered by removing the grass terracing and replacing it with concrete terraces and seating at some date unknown in the 1990's. The Department was bound to consider whether previous planning use rights had been abandoned at that stage. If, as seems likely they were, it was then important to look at, inter alia, the use of the ground following these major structural alterations and then to assess as to what planning use rights Casement Park presently enjoys.

[67] The Applicant complains that the Department failed to assess the planning use rights of Casement Park at all. The Department seemed to proceed on the basis that the capacity of the ground and the planning use rights were one and the same. Although, Mr Dunlop on behalf of the GAA points out that there are a number of documents evidencing a capacity of between 31,000-33,000 for Casement Park, to which the Department had access, there is still force in the complaint that the Department never actually looked at the issue of what were the existing planning use rights and confined itself to looking at the capacity of the ground at different times.

[68] Mr Dunlop, in a powerful submission, urged the court to consider what the decision-maker would have done if the GAA had applied for a certificate of lawfulness of existing use or development ("the Certificate") under Article 83A of the Planning (NI) Order 1991. He points out that a safety certificate for the ground

assesses the capacity as being 31,661, and that such a certificate would have been there for the asking. He suggested that this should be used as a touchstone when looking at this issue.

[69] Mr Scoffield QC, for the Applicant, contended:

(a) the residents would have had an input before a decision was made on whether or not a certificate should be granted;

(b) the burden would have been on the GAA to prove to the Department what it was doing on the site for the last five years so as to render it immune from enforcement;

(c) the Department would not have had to grant a certificate on the basis of the evidence;

(d) the evidence at its very height would never have been for a ground where 32,600 could attend lawfully.

[70] There does seem force in Mr Scoffield's claim that it was inconceivable that if such a certificate had been applied for it would have been granted on the basis that it was lawful to use the stadium up to a capacity of 32,600 given its use in the preceding five years. In any event, major works requiring capital investment would have had to have been carried out by the GAA if such a crowd was to attend Casement Park lawfully. But at least if that approach had been adopted the Department would have been duty bound to consider the existing use rights of Casement Park. The problem for the Department is that it seems that it was only just before this case was due to be heard that the realisation dawned on the Respondent that capacity and existing use rights are not necessarily synonymous and that capacity and fall-back cannot necessarily be used interchangeably.

[71] Finally, and crucially, the Department in considering the fall-back position, did not go on to ask itself whether there was a prospect of Casement Park ever hosting a game with an attendance of 32,600. On the evidence before this court, if the Department had asked such a question, which it was bound to do, it would almost have certainly answered it in the negative.

My reasons for so concluding are as follows:

(i) Casement Park is run down and dilapidated. It requires substantial capital expenditure. While the GAA may well have the money to spend on this, it is certainly not evident from their past behaviour that such work would have been carried out unless it was grant aided: for example see the work carried out in the early 1990s. There is no evidence that such grants would have been

available from the Government for this type of work and certainly no inquiry or assessment was made.

(ii) There were no grounds for concluding that the GAA on its own would invest capital sufficient to make the ground safe for 32,600 (assessed a number of years ago as being of the order of £5-6m) especially when it would have involved an application for planning permission to replace the existing stand which had no guarantee of success.

(iii) The GAA already have two stadiums which can seat 32,000 or more at Clones and Cavan. The overwhelming likelihood is that the bigger games would continue to be played at those grounds.

(iv) The weight of the evidence clearly establishes that a "tumble weed" approach to the ground would have been adopted. The Department's submissions on what would follow, if the impugned planning permission was quashed, were as follows:

> "No stadium, no redevelopment, and the residents will be left with the do-nothing scenario sketched out in the business plan and the environmental statement."

The Chairman of the Casement Park Project Board and a member of the Ulster Council GAA, Mr Daly went further in his affidavit. He said:

> "32. As can be seen in the said report, the premises are no longer fit to be used as a sports ground, and do not meet the legislative requirements. In fact, they are dangerous and cannot be made up to current standards and, thus, Casement Park in its present format, is not suitable and cannot be used as a public sports ground.
>
> 33. Given the absence of any other occupation of the site, as a result of the potential loss of funding to redevelop the site, there is simply no prospect of ACB continuing to operate Casement Park. The sports ground will not be maintained and ACB will simply cease to retain an electricity connection and other services to the site. Thereafter it will be mothballed until such times in the future as redevelopment can be re-negotiated. Obviously, this is an option of last resort and it will be extremely detrimental to the objectives of the GAA and, indeed, it will deny the people of Ulster the opportunity to have a purpose built, modern stadium for Gaelic games within the North of Ireland."

For the avoidance of doubt this is read in the context of a ground where there had been indecision and uncertainty about government plans over the past 10 years.

[72] The approach to Casement Park differed markedly to that adopted to Ravenhill and Windsor Park. Both these grounds were held to have pre-existing planning rights of 12,300 and 14,000 respectively. The evidence was that in the past 10 years Ravenhill had accommodated crowds of 18,000 plus. In the case of Windsor Park a crowd of 14,098 had attended for the Harry Gregg Testimonial. There was an attendance at an international in September 2011 of 15,079. The Department had every reason to believe that such attendances would continue at these grounds whether they were redeveloped or not. This contrasts starkly with Casement Park where there was no cogent evidence that it was ever going to play host to crowds of 20,000 in the future never mind one of 32,600.

[73] The conclusion that the Department had erred in assessing the effect only of an additional 5,400 spectators on the road traffic network ties in with the Department's own planning policies. PPS 3 on Access, Movement and Parking under policy AMP6 Transport Assessment, states:

> "In order to evaluate the transport implications of a development proposal the Department will, where appropriate, require developers to submit a transport assessment."

5.36 states:

> "The control of development offers the opportunity to consider proposals in terms of **their impact on existing transport movements and infrastructure** within the context of wider Government policy aimed at achieving more sustainable travel patterns through a change in transport behaviour." (Emphasis added)

[74] In PPS 8: Policy OS4 it states in respect of intensive sports facilities that:

> "In all cases development of intensive sports facilities will be required to meet all the following criteria: `The road network can safely handle **the extra vehicular traffic the proposal will generate** and satisfactory arrangements are provided for site access, car parking, drainage and waste disposal'." (Emphasis added)

[75] In its Guidelines entitled "Transport Assessment" the Department states:

> "The purpose of the Transport Assessment is to provide enough information for DOE and DRD to understand how the proposed development is **likely** to function in transport terms. Assessing the transport impacts in a systematic manner contributes towards understanding how more sustainable travel patterns may be achieved through changing travel behaviour. Transport Assessment also subsumes a former process of Traffic Impact Assessment". (Emphasis added).

Paragraph 3.4 records that a detailed Transport assessment will be required where the development or redevelopment is considered "to be likely to have significant transport implications, no matter the size."

Paragraph 4.73 states:

> "While the aim is to encourage non-car access to developments it is inevitable that vehicle use will be generated. For some developments traffic generation could be considerable. In such cases and as an integral part of the Transport Assessment a developer may be required to provide additional information in the form of traffic impact analysis. This analysis should be sufficient to enable the Planning Service and Road Service to reach a view on the likely impact of the development on traffic flows locally. The Institution of Highways and Transportation Publication *Guidelines for Traffic Impact Assessment* should be used by developers in preparation of such analysis".

It goes on to record that the Traffic Assessment must cover traffic and highway issues and parking and paragraph 4.111 deals with Traffic Impact Analysis.

[76] These policies are designed to look at what exists on the ground (or is likely to exist on the ground) and then compare it with the **likely** effects of the new development on the road network. It makes good sense. These carefully crafted policies are not intended to permit the likely effects of a proposed development on the road network to be tested against a model which does not exist and in respect of which there is no prospect of it existing in the immediate or medium term. The Department was wrong, both legally and factually, to assure the Road Service that the base figure for its calculations of 32,600 was correct.

[77] Further, the EIA Regulations are designed to allow the Department as per the EC Directive to determine the "likely significant effects of that development on the environment". This requires the developer to provide a baseline modelled on what

presently exists on site or, in some cases a moving baseline, where there are likely to be changes to what exists on site in the future and then to measure that baseline against the effects of the development. Again, this makes good sense. There can be no point in assessing the significant effects on the environment if the assessment is to take place on the basis of a model which does not exist and in respect of which there is no good evidence that it will exist in the future.

[78] In "Environmental Impact Assessment" by Stephen Tromans QC (2nd Edition) at chapter 4, the author says at 4.43:

> "Establishing the baseline environment. The baseline conditions describe the environment that exists before the changes that are brought about by the proposed project. It provides a benchmark against which the impact of the project can be compared. In most cases this will be consistent with the existing conditions, but it is still necessary to account for change in environmental conditions that are **likely** to occur in the absence of the project. It is rare that any environmental conditions are a constant and do not change over time." (emphasis added)

[79] In The Queen (on the application of Blewett) v Derbyshire County Council [2003] EWHC 2775 (Admin) Mr Justice Sullivan said at paragraph 32:

> "Where there is a document purporting to be an environmental statement, the starting point must be that it is for the local planning authority to decide whether the information contained in the document is sufficient to meet the definition of an environmental statement in Regulation 2 of the regulations …"

Paragraphs 33 states:

> "The local planning authority's decision is, of course, subject to review on normal Wednesbury principles": see R v Cornwall County Council ex parte Hardy [2001] (JPL 786) per Harrison J at paragraph 65.

Paragraph 34 states:

> "Information capable of meeting the requirements of Schedule 4 of the regulations must be provided: see Hardy (Ibid)."

[80] In R (on the application of Burkett) the Hammersmith and Fulham London Borough Council & Anor [2003] All ER page 1 at paragraph 8(iv) Newman J said:

> "The purpose of the Directive, is met by the Regulations, is to secure the establishment of procedures and processes whereby development which is likely to have significant effects on the environment will only be authorised after proper assessment of the likely significant effects".

I will come back to deal with the EIA Regulations later in this judgment in a little more detail.

[81] On the evidence adduced the Department made no assessment of the baseline, whether moving or otherwise, against which the significant effects of the environment could be judged. Instead, it appears that the Department merely determined what the capacity of the ground was and took this as the baseline. This was both an inadequate and unlawful approach and it meant that the **likely significant effects** of full capacity attendances at the ground were not and could not be adequately assessed.

[82] For all those reasons the court concludes that the approach of the Department in assessing the impact of the new proposed development at Casement Park on the road network and adjoining junctions by looking only at an uplift of 5,400 spectators attending the new stadium was in the circumstances, an unlawful one.

[83] The Applicant also complains that the PSNI were consulted about the effect of the proposed development on the road network in general and road safety in particular. However, PSNI's response, and in particular the response of Sergeant McQueen, who represented the PSNI, was ignored and the Minister made his decision in ignorance of the view of the PSNI. The Department contends that the PSNI representations were taken into account and the weight that is to be attached to them is a decision for the decision-maker. The views proffered by Sergeant McQueen can be ignored because he did not reflect the PSNI position and was acting as a "lone wolf". PSNI did confirm that they were in agreement "broadly in principle with the measures (in the EMP) which may require further refinement".

[84] It is important to look at the contemporaneous documents. On 21 November 2012 RPS, the planning experts, acting for the GAA record at a meeting with Sergeant McQueen, who was representing the PSNI, described as a "key stakeholder in the organisation of a Casement Park match" that "traffic and parking are major issues in and around the stadium". It notes that "in traffic/congestion terms Casement Park presents the greatest headache to the PSNI …". It notes that at the "Michaela Harte match on 3 November 2012 there was sustained congestion 1.5

hours before the match. Sustained queuing along Andersonstown Road, Kennedy Way from the Stockman's roundabout was observed".

It records that:

> "Officers had to override signals at Stockman's Lane roundabout to manage the queuing on the motorway off-slips. This resulted in queuing being held up on the Stockman's Lane approach."

The note goes on to say that the PSNI did not believe that the Stockman's Lane junction "can cope with any more private vehicles". The main complaint recorded at the meeting related to the use of private vehicles in respect of events at Casement Park and the potential they had for traffic chaos.

[85] On 6 May 2013 Sergeant McQueen raised further traffic problems which would be associated with the proposed development of Casement Park. He noted that 38,000 was 50% more than any attendance in the last 12 years and that there would need to be a "massive turnaround in travel habits to get the 13,000 extra fans all to come by bus". He concluded:

> "I believe the road network infrastructure in this area will not at present support a 38,000 capacity crowd at Casement Park without a massive change in travel habits of those attending matches."

[86] On 21 June 2013 Sergeant McQueen emailed the GAA's planning experts in respect of the traffic management plan and stated:

> "1. Agreed broadly in principal (sic) with the measures which may require further refinement.
>
> 2. Is willing to sit on the Event Management Board.
>
> 3. Will continue to take an active role in Event Management Planning."

[87] On 15 October 2013 he provided the GAA with "PSNI Submissions re Casement Park redevelopment". There can be no doubt that these are provided by Sergeant McQueen on behalf of the PSNI to reflect the PSNI's view. It is sufficient to highlight the salient issues raised by Sergeant McQueen in the report:

(i) An increased likelihood of the need to close the Andersonstown Road to countrywards traffic from Kennedy Way if a capacity crowd attends Casement Park.

(ii) The risk of further delays on the M1 "and increased risk to local communities if Blue Lights need to respond to emergencies in the local community".

(iii) Problems with 38,000 exiting the ground. This will involve deploying "disproportionately large amounts of resources and impacting on the local communities of Owenvarragh and Moorland in a negative manner".

(iv) Whilst the police were broadly in agreement with the measures proposed for reduced vehicle movement and traffic congestion the police were doubtful over the "feasibility/effectiveness of these measures in changing the mode of travel of Ulster GAA fans."

(v) He complained that no surveys had been carried out at GAA championship matches as these would have had a different spectator profile from those attending the Match for Michaela.

(vi) The police talked of the need for there to be a seismic change in the mode of travel by fans.

(vii) The police considered that there would "appear to be insufficient traffic capacity in Lower Kennedy Way to deal with the capacity crowd of 38,000 at Casement Park".

(viii) Sergeant McQueen considered there will be a problem with a traffic jam on Lower Kennedy Way if the extra 13,000 fans came by bus/public transport and that emergency vehicle and local community access would be adversely affected during this period.

(ix) His considered there would be a problem with inconsiderate parking in the vicinity of Casement Park.

(x) At the Tyrone/Derry match on 21 June 2009 25,000 fans attended Casement Park. "On that occasion police experienced serious traffic congestion issues both at entrance – 10 mile tailback on M1 citybound and exit – traffic took 2 hours to clear the front of Casement Park and Andersonstown Road and came to a virtual standstill on Upper and Lower Kennedy Way and the Andersonstown Road". He went on to highlight the problems that this would give rise to for Blue Light Emergency Services and that a traffic gridlock of this nature will also "present serious issue for local residents, businesses and customers keen to get on about their normal routine".

[88] While the police were broadly supportive of the measures to be taken to reduce private transport at Casement Park events there is no hint that the police considered that these measures were sufficient on their own to deal with what Sergeant McQueen had identified as the consequence of a capacity crowd of 38,000 attending a match at Casement Park, namely traffic mayhem. For the avoidance of doubt the court rejects any criticism that the proposed EMP was not adequate to deal with an additional 5,400 spectators. The court does not find that such a conclusion was perverse or "Wednesbury unreasonable". The difficulty lies not with the EMP but with the decision to make the assessment on the basis of an uplift of 5,400 additional fans who would be attending the new Casement Park.

[89] The report to the Minister did not mention or even hint at the PSNI's view about what effects a capacity crowd at the new Casement Park would have on the surrounding road network and local community. Any attempt to suggest that Sergeant McQueen did not represent the official view of PSNI is misguided. The Minister was kept in the dark about these very real concerns which Sergeant McQueen had voiced repeatedly on behalf of PSNI. The Minister was entitled to make up his own mind on **all the evidence** and to attach such weight as he thought appropriate to the view of the PSNI. He was not obliged to agree with the PSNI. But it was not lawful to keep the view of the PSNI from him, whether deliberately or accidently. Having consulted the PSNI, its view was a material consideration that the Minister was entitled to weigh in the balance. He was denied that opportunity. No satisfactory explanation has been given to the court for failing to brief the Minister on the PSNI's view. It follows that any decision he might make, in the absence of such information, was irretrievably flawed.

[90] It is significant at 5.3 of the report to the Minister it states:

> "The Department has consulted with DRD Road Service. Road Service is satisfied that through the implementation of these measures the disruption on the surrounding road network should be minimised to adequately deal with the increase in capacity."

[91] This is correct so far as it goes. It does not however mention that at a meeting between Road Service and the Department it was "agreed that, **subject to Planning confirming in writing that the base figure of 32,600 was correct, Road Service would offer no objection to the Casement proposal.**" (Emphasis added). It is difficult not to detect that Road Service was unhappy about the approach being adopted and required Planning Service to put it in writing before embarking on an exercise of the assessment of only 5,400 additional spectators.

[92] There was a fundamental flaw in the approach of the Department when it assessed what the effects a capacity crowd attending Casement Park would have. It was an unlawful approach, whether under domestic law or under European law,

simply to look at an uplift of 5,400 spectators. This did not reflect the reality. To then ignore the view of PSNI as put forward by Sergeant McQueen, that capacity crowds at the new Casement Park could bring traffic chaos in their wake together with other associated risks and problems, compounded the original error.

Ground 5

[93] The Applicant claims that the Respondent has ignored the EIA Regulations in respect of the additional uses it proposes for the stadium. In particular, it complains that activities such as bar/restaurant use, the provision of conference facilities, car parking and community facilities have not been assessed. The Department denies that this has breached the EIA Regulations.

[94] There is no doubt that the bar/restaurant, conference and community facilities all are likely to give rise to significant environmental effects under Schedule 4 Part 1 of the EIA Regulations depending on the intensity of the use. The substantial bar and restaurant facilities for the new development, which are open to the general public, could generate substantial traffic, both motorised and pedestrian. There seems to be an absence of consideration of any of these matters in the ES. Consequently, no consideration has been given to any measures envisaged to "prevent, reduce and where possible offset any significant adverse effects on the environment" as per paragraph 5 of Schedule 4 Part 1. No attempt has been made by the Department to deal with any potential adverse effects by way of condition, for example, by limiting the number of hours when, the restaurant and/or bar could open.

[95] The fact that the ES is not comprehensive is not fatal. The courts have made it clear that going through the ES with a fine toothcomb in the hope of finding "significant effects" or mitigation measures which have not been covered does not automatically invalidate the application. In R (Blewett) v Derbyshire County Council [2003] WHC 2775 Sullivan J said at paragraph 41 that the requirement that "an EIA application (as defined by Regulation 5) must be accompanied by an environmental statement is not intended to obstruct such development" and that "it is an unrealistic counsel of perfection to expect that an Applicant's environmental statement will always contain the **full information** about the environmental impact of a project".

[96] However, in this case full engagement with the residents or the general public was not possible because they were never given any idea of the nature or intensity of the use of these additional facilities and therefore what their significant effects would be. How many cars could be expected to visit the stadium for community use, how often would there be conferences, how many people would attend these conferences, who is going to use the parking spaces available within the ground?

These matters have already been the subject of detailed consideration as they were considered to be vital to the overall viability of this scheme. The accountants, RSM McClure Watters had prepared a Full Business Case for the redevelopment of Casement Park. They had been able to assess the income from conferences and venue hire, from car parking on non-match days, from catering and from other event income. In 2018 this was estimated to produce a turnover of some £400,000 per annum. Although there may be some overlap with catering, it is clear that these other activities are intended and expected to generate substantial revenues and so contribute to the overall success of the project. In those circumstances the significant effects which they are likely to have had on the environment should have been assessed and consideration given to any measures which might be necessary to mitigate their adverse effects. Accordingly there has been a failure to comply with the EIA Regulations in respect of these proposed uses relating to these additional facilities.

[97] The answer to the further complaint that suitable alternative sites were not considered by the Department is quite simple. There is no requirement to do so. Ouseley J dealt with this argument succinctly in R (Bedford and Clare) v London Borough of Islington and Arsenal Football Club Plc when he said at paragraph 224:

> "What needs to be covered in the Environmental Statement are the alternatives which the developer has considered. This the Environmental Statement did. Regulations do not require alternatives which have not been considered by the developer to be covered, even though the local planning authority might consider that they ought to be considered."

In this case the evidence of the GAA is that only one location was suitable for development and that this was Casement Park. No other alternatives were considered and this court has no basis for looking behind such evidence.

Ground 6

[98] The Applicant claims the decision to treat the commitment contained in the PFG as a determining factor when considering the application for planning permission was plain wrong. If it is a planning consideration, and it is not accepted that it is, the Department, it asserts, has misunderstood the meaning and the application of this commitment and/or has given it an obviously disproportionate weight. The Applicant claims that it does not serve a planning purpose. There is no specific location, no design or capacity identified in any of the three stadiums it is hoped will be developed by IFA, the IRFU and the GAA. There is no commitment that the Department will do anything (as opposed to DCAL providing funding for it). This is underlined by the fact that none of the milestones identified in the PFG includes the grant of planning permission. Further, it confuses need with

desirability. The Respondent accepts that the commitment to develop sports stadiums with the IFA, GAA and Ulster Rugby is not location specific or trammelled by size or scale. But the Department asserts that the Applicant has failed to consider the objectives which lie behind it, namely the promotion of GAA sport, the promotion of Northern Ireland as a destination for major sporting events and the increased socio-economic activity that a successful venue will attract and the benefits that will flow as a consequence.

[99] It is clear that it is for Parliament to determine what are "the objectives of planning policy". It was Government policy to develop a GAA stadium along with soccer and rugby ones. It was also government policy to do so in conjunction with the GAA (and IFA and IRFU). It is implicit that this necessarily involves substantial input from the GAA as to the nature, location and size of the stadium that could deliver these benefits. The same approach was taken with the IFA and the IRFU in respect of Windsor Park and Ravenhill. There was no requirement on the GAA to put forward a selection of possible locations as the Applicant claims. What the GAA offered and what was accepted by the Government was the re-development of Casement Park. Of course, the Government could have required the GAA to put forward a number of different locations. It could have required the GAA to put forward a number of different types of stadiums. It chose not to do so and left it to the GAA to decide what project could deliver the type of ground which would attract the crowds necessary to make the development a success. The court considers this to be a policy objective relating to land use. It was a policy decision to allow the GAA, along with the IRFU and the IFA to select what project they thought could best be developed to suit their particular needs and ensure capacity crowds for the games and events they would host at these new stadiums. The weight to be given to such material considerations is a matter of planning judgment and not one which this court is equipped to make. "Matters of planning judgment are within the exclusive provenance of the local planning authority …": see Lord Hoffman in Tesco Stores Ltd v Secretary of State of the Environment [1995] 1 WLR 759 at 780. The challenge on this ground fails.

Ground 7

[100] The Applicant claims that the siting, size and scale of the proposed development are contrary to planning policy and that the Department acted in a wholly unreasonable way in failing to give adequate weight to the report of the NIEA Landscape Architect's Branch. Further, it argues the Respondent failed to apply Policy OS 4 of PPS 8 in assessing what was an unacceptable loss of amenity for the local residents. The Respondent says that what weight the Department gives to any report, and there were a number of reports, is a matter of planning judgment subject to Wednesbury unreasonableness. It claims that its reliance on expert evidence was perfectly reasonable in the circumstances. It also alleges that it applied the correct test under OS 4 and that the Applicant and its advisors have been guilty

of taking a far too legalistic approach to the planning documents in general and the FDMR in particular.

[101] Ms Christy, the planning expert retained by the Applicant, in her first affidavit makes a number of cogent points about the siting, size and scale of the proposed development and claims that insufficient weight has been given to the report of NIEA LAB which raised a number of different objections in a report of 30 July 2013. But contrary views have been expressed by the Ministerial Advisory Group and also by the DOE's own design group. The reports prepared by these two groups are not critical of the design or impact of the proposed stadium. Accordingly, it was for the Department to make a decision, in other words to exercise planning judgment. It preferred the advice of the Ministerial Advisory Group and the DOE design unit over the NIEA LAB. That is a decision which was open to the Department to make. There is no evidence before the court that it was Wednesbury unreasonable. The Applicant does not begin to overcome the hurdle that the response of the Department was outwith the reasonable spectrum of responses of a decision-maker in the place of the Department.

[102] A much more difficult dispute relates to the loss of amenity. It is claimed that Mr Stinson in his report to the Minister did not understand the policy, PPS8 OS4 or if he did understand it, he misapplied it. Mr Stinson has referred to the policy as being "largely compliant" and that significant adverse residential amenity impacts were not caused to "the majority of the properties adjacent to the site". Mr Stinson swore an affidavit in this judicial review where he says at paragraphs 42 and 43:

> "42. Having taken account of all of the consultation advice, the representations of residents and considered the matter for itself, the judgment of the Department was that the impacts upon residential amenity on some properties would be significant but that overall they were not unacceptable. It therefore considered these aspects of Policy OS4 were satisfied.
>
> 43. In paragraph 4.24 of the DMR, it was stated that the development `**largely compliant with policy OS4 of PPS8**'. Similarly in paragraph 10.1 it was stated that the policy is **generally considered to comply with the relevant planning policy**. Both of these comments reflected the fact that significant adverse impacts upon residential amenity were identified, but that overall they were not considered to be unacceptable. In reaching a final decision on whether the adverse impacts were unacceptable the Department formed a balanced judgment by balancing those impacts against all other material considerations in the case which included the

> regional benefit of the new stadium in contributing to the achievement of a key commitment within the Programme for Government and benefitting regional economic growth, the contribution of the new stadium would make to the regeneration of the local environs and the direct and indirect socio-economic benefits to the area and city region. The Department's consideration of all these factors is set out in paragraphs 10.1 and 10.2 of the DMR."

[103] The following points may be made about the FDMR. These are:

(i) The report carefully considers of the impact of the proposed stadium on the adjacent residents.

(ii) It is clear that in doing so it is applying PPS8 of policy OS4.

(iii) A very detailed investigation had been carried out into the potential effects of the proposed stadium. There had been an in depth assessment made under BRE in order to assess the impact of the development on the adjacent properties.

(iv) There had been a series of site visits to assess the proposed effect of the new stadium on the adjacent properties in different conditions and at different times.

(v) It is not disputed that a number of properties will be adversely affected by the proposed stadium.

[104] While the report could perhaps be better worded, it is important to remember that it is not and does not intend to be a legal document. I consider that Mr Stinson in acting for the Department did apply the right test and that he did conclude that the impacts overall were "not unacceptable". The matter is put beyond doubt by Mr Stinson in his affidavit when he said that:

> "Considering all these matters, the view of the Department was that the impact upon residential amenity at these locations would be significant but that it was not unacceptable."

The court is not prepared to go behind this sworn evidence. It is not for the court to substitute its own view for that of the Department on the effects of the proposed stadium on the adjacent properties. There is no substance in the challenge to the decision to grant planning permission for this ground.

Ground 8

[105] The Applicant says that because of the issues raised and the defects in the decision-making process there should have been a public local inquiry as a matter of procedural fairness and/or discharge of the Department's duty of adequate inquiry in relation to this application. The Respondent says that the Department was entitled to conclude that a public local inquiry was unnecessary. The FDMR at 11.2 said:

> "The Department may cause a local public inquiry to be held where it is considered that the inquiry will provide this information to inform the Department in making a final planning decision. It is noted that the consultation responses have indicated that a satisfactory level of information has been submitted to enable consultees to advise the Department on specific technical issues. A key test for the Department in deciding the process route is whether a public local inquiry is necessary to provide a forum for presentation in consideration of issues arising from the representations received and which need to be assessed to allow the Department to determine the application. In this case it considered that an Article 31 public inquiry is not required to consider representations on the application and a Notice of Opinion be issued."

[106] As Weatherup J found in National Trust's Application (An application for judicial review by the National Trust for places of Historic Interest or Natural Beauty) [2013] NIQB 60.

> "The Minister was aware of the issue about the holding of a public inquiry. There are no judicial review grounds for setting aside the decision not to hold a public inquiry."

[107] There is nothing that has been said or written that would permit a court to conclude that such a conclusion was perverse or wholly unreasonable. There is no suggestion that the Department did not take into account relevant considerations: see Thallon v Department of the Environment [1982] NI 53 at 56 and Re Bow Street Mall at paragraph [46].

Ground 9

[108] The Applicant says that the measures proposed by the GAA and accepted by the Department to deal with Japanese Knotweed ("JKW") on site had been premised on the basis that the advice of the NIEA was that JKW had not extended beyond the boundaries of the Casement Park site when in fact it had. The Respondent says it was only at a late stage of the application that the spread of JKW into the adjacent

gardens was drawn to its attention. The Department says that the GAA will now have to adapt the management plan of what it proposes to do to counter this threat.

[109] There can be no doubt that there are criminal and civil sanctions available if, in the course of construction, the GAA's contractor causes the JKW to spread: see 15(2) of the Wildlife (NI) Order and the potential for an injunction and/or damages on the basis of negligence and/or nuisance. While the spread of JKW beyond the present site may not be a material planning consideration, the risk of the work causing its spread to adjacent properties is potentially one. It is most certainly a matter for consideration under the EIA Regulations as the spread of JKW would constitute a "likely significant effect".

[110] It is noted that annexed to the planning permission was Informative 26 which stated:

> "The Applicant's attention is drawn to Article 15 of the Wildlife (Northern Ireland) Order 1985 (as amended) under which it is an offence for any person to plant or otherwise to cause to grow in the wild any plant included in Part II Schedule 9 of the Order which includes Japanese Knotweed. This highly invasive plant species has been recorded on site and control measures must be taken to ensure that any works do not cause it to spread either on or off the site."

[111] The advice from the NIEA was that there were three methods of dealing with JKW. These were:

(a) long term treatment with herbicides;

(b) excavation disposal at a landfill site (which is considered a last resort although it can be completed within a very short period of time); and

(c) excavation of a deep burial and/or bunding on the site prior to treatment with herbicides.

[112] Herbicides were considered to be the most effective treatment but their use gave rise to problems with local water courses. In any event such treatment also meant that there could be no development on the site for a period of up to five years. There was also a problem if excavation was chosen as a means to try and eradicate JKW. In order for this to be successful there had to be excavation horizontally for a distance of some seven metres. This is simply impossible because many of the gardens abut the boundary wall and this would require excavation to those gardens. No permission to excavate them has been sought nor is it likely to be obtained.

[113] The fact is that it is not possible for the Applicant to exercise the best practice for the removal of JKW because of:

(a) The timescale for development.

(b) The constraints of the site and in particular the boundary wall.

Other means to eradicate JKW will have to be employed. These are likely to require excavation and off-site disposal: see para 3.5 of the JKW Management Plan. While this might be considered satisfactory in the overall context, the builder will necessarily be unable to exercise best practice for the removal of JKW.

[114] The Minster was informed that "there is no evidence to suggest that the Applicant (GAA) will not exercise best practice in its management of JKW". The Minister should have had drawn to his attention that best practice was not possible in the removal of JKW because of the constraints of time and the locality where the JKW was growing. However, given the lack of promptitude with which proceedings were initiated this issue on its own would not have been sufficient to imperil the planning permission which had been granted.

Ground 10

[115] The Applicant complains that the ES is deficient in that it has failed to set out the measures which it envisages will avoid, reduce or if possible remedy the significant effects of asbestos and has dealt with this risk by including a negative condition in the planning permission. The Department disputes both these grounds of challenge.

[116] In the ES it is noted there is a risk, inter alia, of inhalation of sub-soil contaminants, specifically asbestos, during construction. At present the asbestos on the site lies inert in the soil and is harmless to humans. If it was disturbed and released into the atmosphere, then there is the obvious potential that it could be inhaled by anyone working on the site or by those living immediately adjacent to it.

[117] The remediation recommended is that as part of the site redevelopment protective measures are adopted: see Generic Quantitative Risk Assessment at (viii) of Key Issues. It goes on to say that dust inhalation should be minimal with regards to the asbestos but does accept that "pathways associated with inhalation of dust may be active with regards to off-site receptors such as residents during proposed earth works …".

[118] It says that the outlined remedial strategy will require to be updated as further information becomes available and the detailed design is completed. This should be "submitted and agreed with the Department prior to the commencement of construction".

[119] The ES goes on to say:

(i) The Control of Asbestos Regulations apply. This is correct insofar as it goes. What it does not say, is that they only apply to those working on site and not to those in the locality.

(ii) There is little guidance provided by government publications.

(iii) It is recommended that there should be a consultation with the Environmental Health Department of Belfast City Council and a detailed methodology for removal of asbestos should it be submitted to the Department prior to commencement of work.

(iv) There is also a recommendation for air tests to be taken at least twice a day at three different locations in the boundary.

In addition there was a problem with ground water identified and that there were potential risks associated with "upward" hydrostatic pressures which had been considered in the design and construction of the basement car parking structures.

[120] These issues were dealt with by the imposition of conditions.

(i) Condition 17 provided that before construction work started a hydro-geological assessment demonstrating the risks from groundwater had been effectively assessed and design of the basement structure and secant pile walls had to be submitted to the Department.

(ii) Condition 18 provided that "a detailed remediation strategy should address all unacceptable risks to environmental receptors identified in RPS, Casement Park's Statement Redevelopment Generic Quantitative Risk Assessment, had to be submitted and agreed in writing before work was carried out. This strategy had to identify all unacceptable risks on the site, the remedial objective/criteria and the measures which are proposed to mitigate them. "The remediation measures shall be implemented as approved prior to the development becoming operational."

(iii) Condition 26 required that no site works associated with the development were to be commenced until a Construction Environmental Management Plan in accordance with the details set out in the Environmental Settlement including the designation of an Environmental Measurement Manager for the development had been submitted to and agreed in writing with the Department.

(iv) Condition 27 provided that no work shall take place until a Method of Work Statement for the construction works had been agreed.

[121] Planning decisions and environmental protection are often closely connected. The environmental impact assessment is a junction where environmental and planning law meet. The purpose of such an assessment is to make sure that planning decisions which will have significant effects on the environment are taken by bodies will full information as to what is involved and also to ensure that the public can exercise the necessary degree of scrutiny of them and participate fully in the decision-making process.

[122] It is necessary to remember that environmental impact assessment is "a dynamic process, which starts with a statement from the developer but does not end with the statement": see R (Burkett v London Borough of Hammersmith and Fulham [2003] EWHC Admin 1031 at paragraph 8(vi).

Newman J went on to say in that case at paragraph 9(vii):

> "The information made available must be sufficient to enable a member of the public to exercise his or her democratic right to respond to the significant effects identified in the Environmental Statement and to examine the project to see whether it is likely to give rise to any effects not identified in any the Environmental Statement."

[123] As Sullivan J said in R (Blewett) v Derbyshire County Council [2003] EWHC 277 at paragraph 41:

> "In an imperfect world it is an unrealistic counsel of perfection to expect that an Applicant's environmental statement will always contain the **full information** about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting environmental information provides a local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the regulations … but they are likely to be few and far between."

[124] This passage was approved by the House of Lords in R (Edwards) v Environmental Agency [2008] UKHL at paragraph [38].

[125] The courts have made clear that an ES does not have to cover every possible scrap of environmental information. It is wholly unrealistic to expect that the environmental information included in the ES will be complete.

[126] There is also no doubt that some matters can be left over to a later date. This can include details such as a landscaping scheme or an environmental permit to regulate the details of waste to be deposited at the time developmental permission is granted: see Smith v Secretary of State for the Environment [2003] EWCA 262 at paragraph [28].

In R v Cornwall County Council ex parte Jill Hardy (Unreported 22 September 2000) Harrison J said that:

> "The decision to defer a description of a likely significant adverse effect and any measures to avoid, reduce or remedy it to a later stage would not be in accordance with the terms in Schedule 3 … and would conflict with the underlying purpose of the Directive."

Subsequent authorities in England and Wales have taken a more relaxed view.

[127] In the present case given the potential dangers of inhalation of asbestos dust, the court has to decide whether it is sufficient to defer the consideration of mitigation measures until after the planning permission has been granted. It can be difficult to know where the line should be drawn and it is a matter which has troubled this court. However, there does seem to be much force in what Waller LJ said at paragraph 27 of Smith v Secretary of State for the Environment, Transport and Regions:

> "… the Planning Authority or the Inspector will have failed to comply with Article 4(2) if they attempt to leave over questions which relate to the significance of the impact on the environment, and the effectiveness of any mitigation. This is so because the scheme of the regulations giving effect to the Directive is to allow the public to have an opportunity to debate the environmental issues, and because it is for those considering whether the consent to the development should be given to consider the impact and mitigation after that opportunity has been given."

[128] In this case, despite the very real risks which may be created by the disturbance of the inert asbestos during the construction process and the possible release of asbestos particles into the atmosphere, the residents have been precluded from taking part in a debate about the mitigation measures which should be put in place to ensure that they do not inhale any asbestos fibres when the building work is being performed. In those circumstances the Department has failed to comply with Article 4(2) of the EIA Regulations.

Ground 11

[129] The Applicant claims that the safe evacuation of the ground is a material planning consideration and that the Department should have considered it at the time of granting full planning permission. The Respondent denies that it is a material planning condition and says that if it is, it was entitled to leave that issue to be dealt with under the relevant statutory regime set up to deal with the safety of sports grounds.

[130] It is true that material considerations are merely matters which are "related to the purpose of planning legislation, which is to regulate development and the use of land in the public interest" (see paragraph 41 of PPS1). I accept that simply because another regulatory regime may cover this particular issue does not mean that it is not material in planning terms. Public safety can be a material consideration: see the Planning Encyclopaedia at Sections p70.18 and p70.39.

[131] It is also true as the Applicant points out that the police have already drawn attention to difficulties that might arise in safely evacuating a new Casement Park filled to capacity. However, in order for the ground to operate it requires a certificate under Article 5 of the Safety of Sports Grounds (Northern Ireland) Order 2006. Regulation 5(1) states:

> "A safety certificate shall contain such terms and conditions as the council considers necessary or expedient to secure reasonable safety at the sports ground when it is in use for the specified activity or activities, and the terms and conditions may be such as to involve alterations or additions to the sports ground."

[132] Without a safety certificate a sports ground cannot be used. However, there is a regulatory regime in place to ensure sports grounds are safe and can operate safely. There are detailed provisions to allow matters relating to the safety of spectators, including their evacuation, to be considered by those with an expertise in this field. The Chief Constable and the Fire and Rescue Service Board are involved in this process. There is a settled procedure and a transparent appeal process. It is lawful in the court's view for the Department to grant planning permission without considering the issue of safe evacuation when the Department knows that this issue

will be the subject of detailed consideration by Belfast City Council under a settled regulatory regime in the sure knowledge that the ground cannot be operated unless the council has been satisfied that it can be safely evacuated. Such an approach by the Department cannot be said to be Wednesbury unreasonable as it clearly comes within the range of reasonable responses open to the Department. Accordingly, I do not consider that this ground has any merit.

I. CONCLUSION

[133] The Applicant succeeds in this judicial review on the grounds which I have set out in my judgment. As agreed, I will hear counsel on the issue of the relief that I should grant given the court's conclusions and the lack of promptitude with which proceedings were initiated.