



THE SUPREME COURT

[S.C. Nos. 442, 446 & 453 of 2013]

Denham C.J.

O'Donnell J.

McKechnie J.

Laffoy J.

Charleton J.

Between

Thomas Reid

Applicant/Appellant

And

Industrial Development Agency, Ireland And The Attorney General

Respondents/Appellants

**Judgment of Mr. Justice William M. McKechnie delivered on the 5th day of
November, 2015**

Introduction:

1. The first named respondent has invoked the provisions of the industrial development legislation so as to acquire, by statutory compulsion, the lands, premises and hereditaments, of the appellant, which are situated at Blakestown, Maynooth,

County Kildare. Mr. Reid strongly objects to this proposal and in the judicial review proceedings which issued, he challenged its validity on several grounds, all of which were rejected by the High Court in a judgment delivered on the 19th September, 2013. The resulting appeal, which was advanced on the same grounds as those originally presented, now forms the subject matter of this judgment. Depending on the decision arrived at the cross-appeal by each respondent on the question of costs may or may not arise.

2. Of the grounds relied upon, some are of particular interest to the first named respondent in that the exercise by it of compulsory powers is challenged, as being *ultra vires* the parent legislation and secondly, as having been pre-determined by prior judgment, or otherwise as being vitiated by objective bias. In addition, it is alleged that such powers are unconstitutional as being in violation of both personal and property rights given thereby, and also that the same are in breach of the appellant's rights under both the European Convention on Human Rights and the European Convention on Human Rights Act 2003. Therefore, the case, by reason of the issues raised, is of considerable significance to both parties, but obviously for quite distinct and different reasons.

The Lands and the House:

3. Subject to pecuniary legacies which are not relevant, the appellant is the owner in fee simple of the lands and premises comprised in Folio 1104 of the Register of Freeholders, County Kildare. The holding comprises 72 acres of farmland on which is located the family farmhouse known as "Hedsor House" together with associated outbuildings and garden area. These lands were originally operated as a

dairy farm, but since 1996 they have been used for grazing dry stock. The appellant, who is the third generation of Reids' to farm these lands having been acquired by the family in 1904, has lived on the farm all his life, and since he left school in 1979, he has worked fulltime on its operations. He became solely responsible for the enterprise on the death of his father in 1983 and he is now in exclusive occupation of the lands. He wishes to continue to live in his home and to remain a farmer. He therefore has no interest in selling or being forced to sell such lands.

4. "Hedsor House" is a protected structure, registered as such, in the Record of Protected Structures in the Kildare county development plan and has been for several years; it can be dated to *circa* 1760. Neither the house nor the lands are located within any area identified for development in either the county plan or the relevant local area plans. As the holding is situated immediately to the west of the "development" boundary for Leixlip, it is in fact subject to the County Plan (2011 to 2017) rather than to any local plan. Accordingly, the provisions of "Section 10.5" which is headed "Rural Development", apply. This means that the lands which are not specifically zoned shall be regarded as being primarily agricultural in use terms. Furthermore, the land is located in the Rye Water Valley at Carton and it is bound to the west by Carton House Demesne, a Natura 2000 site. The house is also a protected structure, and as expressly stated in the county development plan, it is the local authority's policy to maintain views to and from the house and within the demesne itself. To the east, a short distance away, is the extensive Information and Communications Technology ("ICT") facility operated by Intel. Therefore, when one has to consider the potential for industrial development of these lands the same must

be evaluated having regard to their location and to the proximity of both neighbouring structures and adjoining lands.

The IDA:

5. The first named respondent, which was originally established by the Industrial Development Authority Act 1950, continued to exist in that form until the enactment of the Industrial Development Act 1993 (“the 1993 Act”). Pursuant to s. 5 thereof, a new body to be known as “Forfás” was created, with two agencies to be known respectively as “Forbairt” and the “Industrial Development Agency (Ireland) (IDA)”. The functions of the IDA were specified in s. 8 of the 1993 Act, with s. 9 making provision for the assignment to it of the powers and functions formerly conferred by the Industrial Development Act 1986 (“the 1986 Act”). In 1996, it was made clear that notwithstanding any other statutory provision, the IDA continued to have the powers set out in s. 16 of the 1986 Act. That body has, as its primary focus, the securing of foreign direct investment through establishing, developing and attracting industrial undertakings, into and within the State. It has the power to make investments in and provide support to such undertakings, and also to make available grants and other financial facilities as the occasion allows or demands. Throughout its entire history, the IDA has met considerable success, with the economic impact thus resulting being very significant. This is evidenced by, *inter alia*, strong export performance year-on-year. It also has been a major contributor to innovation, productivity and skill development. In all, the IDA is undoubtedly of strategic and economic importance to the State as a whole.

6. For the purposes of performing its functions, the IDA is invested with several powers including those mentioned in s. 16 of the Industrial Development Act 1986, as amended (“the 1986 Act”). Thereunder the Authority is given power for the purposes specified, to acquire land, either by agreement or compulsorily, and lesser interests in land, such as easements, way-leaves, *etc.* It is the exercise of this power which has given rise to the instant proceedings.

Section 16 of the 1986 Act and the O’Brien Decision:

7. In order to fully understand what follows, it is necessary at this point to quote the relevant provisions of the said s. 16 of the 1986 Act, and also to make reference to *O’Brien v. Bord na Móna* [1983] I.R. 255, (“O’Brien”), which explains the extra statutory procedure adopted by the IDA as part of its compulsory purchase process. Firstly, s. 16 of the Act reads as follows:

“16.—(1) For the purpose of providing or facilitating the provision of sites or premises for the establishment, development or maintenance of an industrial undertaking the Authority may—

- (a) acquire any land either permanently or temporarily and either by agreement or compulsorily;
- (b) acquire (either permanently or temporarily and either by agreement or compulsorily) any easement, way-leave, water-right or other right whatsoever over or in respect of any land or water;
- (c) terminate, restrict or otherwise interfere with (either permanently or temporarily and either by agreement or

- compulsorily) any easement, way-leave, water-right or other right whatsoever over or in respect of any land or water;
- (d) construct, adapt and maintain buildings and other works;
 - (e) provide services and facilities in connection with land;
 - (f) sell, lease or otherwise dispose of land vested in it;
 - (g) make grants to aid persons to—
 - (i) acquire land,
 - (ii) construct and adapt buildings and other works, and
 - (iii) provide services and facilities in connection with land;
 - (h) do any act or thing which may be necessary for or incidental to the doing of anything which the Authority is by the preceding paragraphs authorised to do,

if the Authority—

- (i) considers that industrial development will or is likely to occur as a result, and
 - (ii) is satisfied that the undertaking conforms or will conform to the criteria set out in subsections (3) and (4) of section 21 or section 25 (2).
- (2) The provisions of the *Second Schedule* shall apply to the exercise by the Authority of its powers under this section.
- (3) Nothing in *subsection (1)* shall be construed as affecting the operation of section 130 of the Transport Act, 1944.” (Emphasis added).

I shall refer to the underlined portion of this section from time to time, as “the s. 16 *proviso*”, which, it should be noted, qualifies all of the subparagraphs which immediately precede it.

8. The powers given to Bord na Móna under statute, to compulsorily acquire land, can be considered as being similar in nature to those vested in the IDA. The Board exercised such powers in relation to lands owned by Mr. O'Brien, who challenged both the legality and constitutionality of the conferring provisions. O'Higgins C.J., as was then required by Article 34.4.5° of the Constitution, rejected the claim that ss. 29 and 30 of the Turf Development Act 1946 were invalid having regard to the provisions of the Constitution. Finlay P. then delivered the Court's judgment on the remaining grounds of appeal. That portion of the decision which is of relevance to this case is set out at p. 286 of the report, whereat Finlay P. identified what requirements were necessary in the exercise of compulsory powers so as to satisfy fairness of procedure and be duly compliant with the rules of natural and constitutional justice. In particular, the Court demanded of the acquiring authority that it give ample and fair notice to the owners of such property of its intention to exercise its powers, that such owners be given an opportunity to make representations or objections, and that such be considered by the Board in a judicial matter. Finally, the decision whether or not to exercise the power must be reached on the basis of such considerations. The second category of requirements, which related to the assessment of proper compensation, does not arise for consideration in this case as the Second Schedule of the 1986 Act applies the provisions of the Acquisition of Land (Assessment of Compensation) Act 1919 to such issues. Thus, based on *O'Brien*, the IDA established as part of the procedure an independent adjudication process, which is later referred to in this judgment.

Preliminary Move:

9. In December, 2011, the IDA (or “the Authority”, as it is referred to in the Act of 1986) made known directly to the appellant and his mother, who prior to her death in the summer of 2012 was the life tenant of the subject lands, its interest in acquiring such lands. The IDA wrote to Mr. Reid and Mrs. Reid on the 12th December, 2011 in similar, but not identical, terms. The letter to Mrs. Reid expressed the IDA’s “genuine interest” in acquiring the lands and requested a meeting to progress matters. The letter sent to Mr. Reid, which followed two face-to-face meetings during which he declined to sell the lands, was a good deal more forthright. Having emphasised the clear mandate which the IDA had from the Government to deliver “on job creation opportunities”, the letter requested an opportunity to have a “...meaningful discussion” with him so that the body’s interest in the lands could be fully outlined. The letter ended by saying:

“Given IDA Irelands remit as government appointed agency with specific responsibility for marketing and winning Foreign Direct Investment it is IDA Irelands duty to progress this matter *via* all alternative means and if necessary the compulsory acquisition of the lands”.

10. A number of further meetings followed, during which it became unconditionally clear that the Reids’ were not interested in disposing of their lands. This prompted a letter from the Authority to Mrs. Reid, dated the 21st February, 2012, in which it was said that the land “...has been identified as strategically important for and in connection with industrial development and we have indicated that it is our preference that the land be acquired by IDA Ireland by agreement”. It goes on to point out its compulsory powers and it continues:

“...given you are not in a position to facilitate an acquisition on a voluntary basis IDA Ireland will now have to consider this option to compulsorily acquire the lands...”

Accordingly, this engagement with both the life tenant and the remainderman can be seen as demonstrating the firm interest of, and the clear intention by, the IDA of acquiring ownership of these lands.

The Compulsory Purchase Process:

11. At a board meeting held on the 7th March, 2012 (“the March 2012 decision”), the IDA decided to commence the compulsory process of acquiring the subject lands. The redacted minutes of that meeting explain that the lands were considered to be of strategic importance and that in the Authority’s view, industrial development “...will or is likely...” to occur on such lands, and further, it was satisfied that “...any undertaking conforms or will conform to the criteria set out in Section 21(3 or 4) or Section 25 of the...” 1986 Act. The decision also authorised the service of a notice of intention to compulsorily acquire with the minutes setting out an intended process that was designed to ensure compliance with fair procedures in line with natural and constitutional justice, as required by analogy with *O’Brien*.

12. The following steps then followed:

(i)

- By document in writing dated the 8th March, 2012, the IDA served, *inter alia*, on the appellant a notice entitled: “Notice of Intention: [for the] Compulsory Acquisition of Land”.

- Having stated that such was an exercise of the powers conferred by s. 16 of the 1986 Act and the Second Schedule thereto, the notice once again repeated the Authority's opinion that:
 - (i) "Industrial development will or is likely to occur as a result of the acquisition of the land to which this notice relates, and
 - (ii) Such industrial undertakings conform (*sic*) or will conform to the criteria set out in subs (3) and (4) of s. 21 and s. 25 of the..." 1986 Act. (the S. 16 *proviso*)
 - The notice invited representations in respect of the proposal and stated that such would be considered before any decision was made;
 - Finally, it also stated that the landowner would be informed of the Authority's decision and the reasons therefor "...following an independent consideration and assessment."
- (ii) In April, 2012, Mr. Conleth Bradley, Senior Counsel, was engaged by the IDA to act as an independent adjudicator/rapporteur into what the letter of appointment said, was the IDA's consideration as to whether it would be appropriate to compulsorily acquire the subject lands: he was asked to submit a report in respect thereof.
- (iii) On 21st May, 2012, following the publication of a notice in the local newspapers of his appointment, a preliminary hearing was conducted by Mr. Bradley S.C. to explain the remit of his engagement. A second such meeting took place on 5th June, 2012.

- (iv) Over three days ending on 6th July, 2012, a hearing was conducted under the auspices of the adjudicator during which an opening statement from the IDA was made, evidence was given by and on behalf of the Authority, as well as other interested parties including Mr. Reid and his mother, Mrs. Reid. Those who gave such evidence were subject to cross-examination, with the extensive documentation which had passed, or which otherwise had been exchanged, also available for consideration. Closing submissions were made by the parties, including for this purpose Kildare County Council, which obviously had an interest in this matter.

13. On the 15th October, 2012, the independent adjudicator submitted a comprehensive report, running to over 60 pages, to the IDA. The same contained a detailed account of the background to the exercise by the IDA of its powers under s. 16 of the 1986 Act, the appointment of and the preliminary steps taken by Mr. Bradley S.C., the exchange of correspondence between the IDA and those who would be affected by the compulsory purchase order, the statements, evidence, documentation and submissions made or given to the adjudicator by the parties, including Kildare County Council, and a number of clarifications resulting from the adjudicator's own intervention. In addition, the report contained a very learned summary of the history and current position of compulsory purchase highlighting the fact that, the vast majority of such statutory schemes had, by now incorporated into the process an external body with power to annul, confirm or amend a compulsory purchase order. However, despite the extensive nature of the report, it must be

stressed that the role of Mr. Bradley S.C. was only one of rapporteur: it did not involve any decision making power or adjudicative function or even some or any rule of an advisory nature.

14. On the 14th November, 2012, the IDA at its board meeting decided to compulsorily acquire the subject lands. Its decision was reduced into written form in a document dated the 23rd November, 2012, and signed by its Chairman, Mr. Liam O'Mahony. After reciting the background, and having stated that the Board considered, the report of the independent adjudicator and the other material referred to, as well as the objections and representations received against its March 2012 decision, the document goes on to record that:

“The Board concluded, in all of the circumstances that industrial development was or is likely to occur as a result of the acquisition of the lands in question and that any such undertaking conforms or will conform to the criteria in s. 21 or s. 25 of the 1986 Act (as amended).”

The Board of the IDA:

“...decided to compulsorily acquire all of the lands comprised in Folio 1104...under s. 16 of the 1986 Act...”

Finally, the necessity of taking a number of formal steps regarding notification of the decision was also noted.

The Issues:

15. Hedigan J. delivered judgment in this case on the 19th September, 2013, and rejected the claims advanced by the applicant. *Reid v. Industrial Development Agency* [2013] IEHC 433. Helpfully, the learned High Court judge set out, at para. 7.0, of his

decision, the issues which arose for his consideration. These were also the substantive matters argued on appeal, but in a somewhat different way and in a slightly re-configured form. The same at this point can conveniently be described as follows:

- (i) The *ultra vires* issue: does s. 16 of the 1986 Act permit the compulsory acquisition of lands not intended for immediate use by the acquiring authority? In effect, does it authorise the creation of “a land bank”?
- (ii) The s. 16 *proviso* issue: on the evidence which it considered, could the Authority have complied with the statutory pre-conditions that “industrial development will or is likely to occur” and secondly, that “the undertaking conforms or will conform to the criteria set out in subsection (3) and (4) of section 21 or section 25(2)” of the 1986 Act: this, where no industrial undertaking has as yet been identified as the intended user of such lands.
- (iii) The bias issue: given his position with the consultancy firm, the Project Management Group, (“PM Group”) did the participation by and role of the Chairman of the Authority in the Board’s decision to initiate the process and in its decision to make a compulsory purchase order (“CPO”) violate the test of objective bias?
- (iv) The absence of a reasoned decision for the making of the CPO.
- (v) The lack of fair procedures in the overall decision-making process.
- (vi) The Constitution and Convention issues: do they arise from the absence of any involvement, by way of confirmation, annulment or amendment, of an external body in the compulsory process?

It should be noted that there is a certain amount of overlap between, or merging of, issues number (i) and (ii) in both the submissions and in the judgment of the High Court.

The High Court Judgment:

16.

(1) **The *ultra vires* issue:**

In interpreting s. 16 along with ss. 21 and 25 of the 1986 Act, Hedigan J. felt that on the plain wording of these provisions, the acquisition power of the Authority is available where any industrial development is “likely” to occur. He emphasised that the word “likely” supports the view that the power is not limited to circumstances where a particular industrial entity has been identified. In effect, he favoured the broad interpretation put forward by the IDA. The learned judge said that this view was necessary so as to allow the Authority to successfully compete in the international marketplace so as to attract industrial enterprise to Ireland. It was particularly important to be able to offer suitable sites “to intending investors [as such] is a powerful inducement” (para. 7.1).. Therefore, this was the interpretation most consonant with the strategy behind the Act.

(2) **The s. 16 *proviso* point:**

The High Court held, with regard to the alleged failure of the IDA to adequately or fully evaluate the intended utility of the site, that the Authority was the expert body nationally to determine whether there

was a likelihood of industrial development. This must therefore “...classically be a function of its own expertise” (para. 7.2). Thus, the jurisdiction of the Court to intervene was very limited. In applying *O’Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, the learned judge was satisfied that there was ample material before the Board upon which the decision arrived at could be satisfactorily based, in particular that element quoted at para. 14 of this judgment.

(3) The bias allegation:

This argument arose out of the fact that at the time of the Board’s decision in March, 2012, and again but more particularly the decision made in November 2012, the Chairman of the IDA was also a non-executive director of the PM Group. This firm produced a Site Selection Report, having been commissioned to so do, in February 2012, which formed a significant part of the materials upon which the Board’s decisions were based. The learned judge, having outlined the applicable test in this jurisdiction as being that stated in *Bula Ltd. v. Tara Mines Ltd. & Ors. (No.6)* [2000] 4 I.R. 412, (“*Bula Ltd. (No. 6)*”), was satisfied that as the Chairman had no role in the appointment of the PM Group as consultants to the Authority, or in the extension of that appointment, or in the preparation of the report, then in those circumstances no reasonable person informed of all of the facts could reasonably come to the conclusion that bias existed, with regard to the decisions made.

(4) **The lack of reasons:**

The learned judge dismissed this ground of challenge on the basis that having regard to the preceding process and his participation therein, the applicant could not have been under any misconception as to the reasons for the decision of the IDA to make the CPO. He was therefore satisfied that even if the formal CPO decision lacked reasons, no detriment had been suffered by Mr. Reid and accordingly, following *McCormack v. An Garda Síochána Complaints Board* [1997] 2 I.R. 489, he dismissed this ground of challenge.

(5) **The constitutional challenge:**

Under this heading, the applicant submitted that his right to constitutional justice had been breached because there was no independent arbiter who had the power to review, by way of amending, confirming or quashing the decision of the IDA to exercise its powers of compulsory acquisition. The judge was entirely satisfied that this ground of complaint was answered comprehensively by *O'Brien*, in which it was held that the exercise by An Bord na Móna of its compulsory powers, which are similar to those vested in the IDA, was an administrative and not a judicial act. In so holding the Supreme Court rejected the views of Keane J., the trial judge. Therefore, the principle of *nemo iudex in causa sua* did not apply. Further, the interference with the applicant's property was the minimum necessary (so as) to achieve the acquisition purposes of the Authority.

(6) **The Convention argument:**

The applicant argued that s. 3 of the European Convention on Human Rights Act 2003, entitled him to have the proportionality of the Board's decision, which involved the confiscation of his family home, determined by an independent body or tribunal. Reference was made to article 8 of the Convention and to *Yordanova & Ors. v. Bulgaria* (App. no. 25446/06) (Unreported, European Court of Human Rights, 24th September, 2012) and *Bjedov v. Croatia* (App. No. 42150/09) (Unreported, European Court of Human Rights, 29th August, 2012), in which the European Court of Human Rights held that where a person is to be deprived of his home, he is entitled to have the proportionality and reasonableness of such decision determined by an independent body. The learned judge however was satisfied that following *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 701, the Court on a judicial review application did have jurisdiction to consider the reasonableness and proportionality of administration decisions, affecting rights such as those at issue in this case. Having been satisfied firstly that the power of compulsory purchase is provided for by law and that its use is designed to achieve the objectives as set out in the 1986 Act, the learned judge then asked whether the decision as made in this case, was arbitrary, unfair, or based on irrational considerations. Secondly, he considered whether the applicant's rights were impaired as little as possible and thirdly, whether the effects on these rights were proportionate to the aim sought to be achieved. On a review of some of the evidence, the Court was satisfied on all of these

matters and also that the proportionality test had been met. Accordingly, this ground of complaint was also rejected.

Submissions of the Appellant:

17. In this appeal, Mr. Reid, the appellant, argues that the High Court did not properly analyse the powers conferred by s. 16 of the 1986 Act. These powers were not correctly considered in the context of an admission by the IDA that it had not, as yet, identified any particular undertaking which, it is intended, will develop these lands. It must therefore follow that the lands are not required for immediate use. That being so, it is submitted that s. 16 does not permit acquisition for “land bank” purposes. Accordingly, the compulsory purchase order as made is *ultra vires* the provisions of section 16 of the Act.

18. The appellant draws a parallel with s. 213 of the Planning and Development Act 2000, which allows local authorities to acquire land for both immediate and future use. It is submitted that according to subs. (3) of s. 213, as interpreted in *Clinton v. An Bord Pleanála (No.2)* [2007] IESC 19, [2007] 4 I.R. 701 (“*Clinton No. 2*”), where a local authority wishes to acquire land compulsorily that is not required for immediate use, it must have a declared purpose for which the property is required, and this must be made known. If the land is required for a future use rather than an immediate use, and where the intended purpose is not known, the land may only be acquired by agreement. In the absence of a comparable provision in the relevant industrial legislation, s. 16 of the 1986 Act cannot be used in the manner in which it has.

19. The admission referred to above (para. 17) is also relevant in another way. As will be recalled, the IDA must comply with the s. 16 *proviso* of the 1986 Act before it can exercise powers of a compulsory nature. Those provisions refer to certain matters that directly relate to the industrial undertaking, which it is intended will develop these lands. It must therefore follow according to the submissions, that some particular undertaking has to be identified against which the provisions of the s. 16 *proviso* can be measured. As no undertaking has been identified to date, the appellant submits that it is therefore impossible to satisfy the *proviso*. Accordingly, the compulsory purchase order is also invalid on this ground.

20. The appellant also submits that any land acquisition under s. 16 of the 1986 Act must be undertaken having regard to the constitutional rights of the land owner. In this light, the interference with the appellant's constitutional rights should be the least necessary. Mr. Reid refers to the twin protection of his property rights under Articles 40.3 and 43 of the Constitution of Ireland. He also refers to his right, to the protection and security of his dwelling under Article 40.5. It is submitted that the trial judge failed to have proper regard to these safeguards. In support, the appellant relies on *The People (D.P.P.) v. Barnes* [2006] IECCA 165, [2007] 3 I.R. 130, *Wicklow County Council v. Fortune* [2012] IEHC 406, and *Clinton (No.2)*. The last mentioned case is extensively cited on his behalf: in particular where Geoghegan J. refers to the protection of the constitutional rights of land owners, where acquisition is not voluntary. The learned judge in setting out a test for such situations said that: "[the] acquiring authority must be satisfied that the acquisition of the property is clearly justified by the exigencies of the common good." (*Clinton (No. 2)* at p. 724) It is argued that this test is not satisfied in the present case.

21. As in the High Court, Mr. Reid raises in this appeal the issue of objective bias with regard to the Chairman of the IDA, who took part in both the original and later decisions to acquire his lands. He was also a director of the firm which carried out a report on the suitability of such lands for IDA's purposes. This position of the Chairman was not as such disclosed: it emerged only very late in the day during the hearing conducted by the adjudicator. It is submitted that the facts as outlined, meet the test set out in *Bula Ltd. (No.6)*, for objective bias, in that a reasonable person informed of all of the facts, would reasonably perceive the existence of such bias.

22. The appellant argues that on the failure to "give reasons issue", the High Court should have had more regard to the two decisions of the Supreme Court in *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 701, and in *Mallak v. Minister for Justice* [2012] IESC 59, [2012] 3 I.R. 297. He alleges that the lack of such reasons has prejudiced his ability to fully challenge the decision(s) made by the IDA.

23. It is also said that the proportionality test as laid down by Costello J. in *Heaney v. Ireland* [1994] 3 I.R. 593, requires that the objective of the restrictions resulting from impugned provisions must be of sufficient importance to warrant overriding a constitutional right, and that in this case, the uncertainty with regard to the industrial undertaking for which the lands would be needed resulted in a lack of proportionality in the decision of the IDA.

24. Finally, the appellant submits that he has a constitutional right to an independent arbiter and that the principle of *nemo iudex in causa sua* applies in this case, even though the trial judge arrived at a contrary conclusion. In this regard, it is claimed that s. 16 of the 1986 Act is unconstitutional as it does not provide for such an arbiter. In addition, he argues that this provision is also in contravention of article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, and of articles 6 and 8 of the European Convention on Human Rights.

Submissions of the First Named Respondent (IDA):

25. The IDA submits that despite the fact that under the 1986 Act it has the power to take possession of the lands and dwelling by compulsion, it instead sought in the first instance, to acquire the lands, by agreement. When this failed it made the decision in issue; which decision was made fairly and lawfully based on the material before it and in accordance with the provisions of s. 16 of the 1986 Act. The IDA emphasises that the appellant was afforded legal representation and that he had the benefit of an expert witness, both at the expense of the IDA: further that he made submissions at the hearing before the adjudicator, as well as been given the opportunity to cross-examine the witnesses called on behalf of the Authority. The process was therefore entirely open and fully transparent.

26. It is denied that the first named respondent has inadequately defined the purpose for which the lands are being acquired; on the contrary, that purpose has at all times been made abundantly clear. It is the position of the IDA that the powers under s. 16 of the 1986 Act are not comparable to the provisions of s. 213 of the Planning

and Development Act 2000 (“the 2000 Act”), which allows local authorities to acquire land. However, the IDA does point out that the case law interpreting s. 213 of the 2000 Act (*Clinton (No.2)*) has confirmed that it is not essential that a particular development purpose be indicated as a justification for acquiring the land. In such instances however, where a particular development purpose has not been identified, the local authority must acquire the land by agreement. With regard to the meaning of the word “purpose” as contained in s. 16 of the 1986 Act, it is the submission of the IDA that the “purpose” for which it seeks to acquire the land is for “industrial development” and that this requirement of s. 16 is thus satisfied in the instant case.

27. The first named respondent states that contrary to the assertion made by the appellant, whilst the subject lands are not zoned and therefore may not currently be used for industrial development, that of itself does not preclude future development for such purposes. It simply means that steps have to be taken to regularise the planning status of the lands.

28. With regard to the decision in *Clinton (No.2)*, upon which the appellant relies, the first named respondent argues that the explanation given by the High Court judge in that case with regard to the meaning of the word “purpose” is correct, as it was upheld by the Supreme Court on appeal. The learned judge, Finnegan P., defined “purpose” as a statutory purpose meaning, any of the statutory purposes under which the Dublin City Council operated. According to the submissions the Court held that, this did not mean a “particular” scheme of development. As a matter of fact the submissions is not correct as a reading of the judgment of Geoghegan J. will demonstrate.

29. With regard to the obligation to give reasons for its decision, the IDA claims that the learned trial judge's conclusions in this regard are correct. The High Court found that the statement by the Board of the IDA that the statutory test contained in s. 16 of the 1986 Act had met, was a sufficient discharge of its duty in this regard. In response to the argument that more detailed reasons should have been provided so as to facilitate any legal challenge, the IDA states that when one considers the overall process which led to its decision, and the extent of the appellant's participation in it, it seems quite evident that Mr. Reid was fully aware, at all times, of the Board's reasons. Furthermore, in *Clinton (No.2)*, the Court rejected a similar argument grounded on the alleged absence of reasons.

30. On the issue of bias, the IDA again adopts the approach of the trial judge. It is stated that the test for objective bias in this jurisdiction is that as outlined in *Bula Ltd. (No.6)*, and other similar cases. The respondent submits that the Chairman of the IDA was a non-executive director of the consultancy firm, which was retained by the IDA to advise in relation to the merits, *inter alia*, of the lands of the appellant. However, the connection of Mr. O'Mahony to this firm was fully disclosed to the IDA when he was first appointed to this position in 2010. The IDA thus argues that this allegation is misplaced and that it is founded on an irrational perception of the situation as apparently held by the appellant. Furthermore, it is pointed out that the Chairman had no involvement in the retainer of the consultancy firm, or in the preparation of the report drawn up by that body. Accordingly, in its submission the test of objective bias, which requires the reasonable apprehension of a reasonable man of perceived or indirect bias, is not met.

31. The learned trial judge was also correct in dismissing the allegation that the making of the CPO was not proportionate, as between the authority and the landowner in accordance with the principles set out in *Meadows*. The IDA in support of this conclusion refers to the fact that the appellant is to be fairly compensated for his lands. Furthermore, in response to the submission that the IDA was acting as a judge in its own case contrary to the principle of *nemo iudex in causa sua*, the IDA relies on *O'Brien*, which it says is consistent with the European Convention on Human Rights and with the Irish Constitution. In *O'Brien*, the Supreme Court noted that the task of securing bog land for the public good was vested in Bord na Móna, and that the use of its compulsory powers was the exercise of an administrative rather than a judicial function (paras. 8 and 16(5) *supra*). The same is true of the IDA. Further, the respondent was not adjudicating upon parties' rights, nor was it making a decision for its own benefit; at all times it was acting solely in the public interest.

32. The first named respondent recognises that the Attorney General is the appropriate party to defend the constitutionality of the provisions in issue, but it reserves the right to add its own submissions if called upon to do so by the Court. Notwithstanding this, it does say that its decision to compulsorily acquire the lands of the appellant does not unlawfully interfere with any of his constitutional rights. It is submitted that none of the relevant rights provide absolute protection, and that such rights are designed primarily, if not solely, to resist unlawful or disproportionate interferences.

The Submissions of Ireland and the Attorney General:

33. In light of the decision arrived at in this judgment, it is not necessary to refer in any detail to these submissions, which correctly were confined to the constitutional and Convention issues. It is sufficient to say that the State supports the continuing applicability of *O'Brien*. As the decision to compulsorily acquire is an administrative one, lying towards the policy end of the decision-making spectrum, the process engaged in was in sufficient compliance with the property rights of the appellant. Accordingly, any of the requirements arising out of either the Constitution or the Convention were satisfied.

Decision:

34. Just as *Carmody v. Minister for Justice, Equality and Law Reform* [2009] IESC 71, [2010] 1 I.R. 635, decided that constitutional issues should be determined before Convention issues, a series of other cases such as *The State (P. Woods) v. Attorney General* [1969] I.R. 385, *M. v. An Bord Uchtála* [1977] I.R. 287, *Murphy v. Roche* [1987] 1 I.R. 106 and *McDaid v. Judge Sheehy* [1991] 1 I.R. 1, have decided that the constitutional validity of any statutory provision should not be embarked upon where an effective remedy based on other grounds is capable of resolving the *lis* between the parties. Therefore, I propose to deal with the matter in that way. Accordingly, I will commence with the issues directly arising out of s. 16 of the 1986 Act, which are both the *ultra vires* point and the *proviso* point (para. 15, *supra*).

The Ultra Vires Point:

35. Under s.16 of the 1986 Act (para. 7, *supra*), the IDA is given power for the purpose of providing or facilitating the provision of sites or premises, for the establishment, development and maintenance of an industrial undertaking, (a) to

acquire lands, (b) to acquire rights over a variety of incorporeal hereditaments, as well as over and in respect of water, and (c) to terminate, restrict or otherwise interfere with the rights last mentioned. The exercise of any of these rights is subject to the terms of the *proviso* specified in that section, *i.e.*, the s.16 *proviso*. Although quoted above (para. 7, *supra*), it is worth referring to that provision once again. It reads:

“...if the Authority –

- (i) considers that industrial development will or is likely to occur as a result, and
- (ii) is satisfied that the undertaking conforms or will conform to the criteria set out in subs (3) and (4) of s. 21 or s. 25(2).”

36. Both of these requirements are cumulative and their joint compliance is a condition precedent to the exercise of the powers conferred by the section. That this is so is not in dispute. Therefore, the Authority must be satisfied: (a) that industrial development will or is likely to occur, and (b), that the industrial undertaking conforms or will conform to the criteria mentioned in s. 21(3) and (4) of the 1986 Act, or s. 25(2) therein. As can thus be seen, the legislature has expressly linked the exercise of compulsory powers to the conditions specified in the s. 16 *proviso*. These conditions, therefore, have been incorporated into and form an integral part of the compulsory purchase process itself. In fact, such requirements equally apply to land acquired by agreement.

37. Section 21 is in Part III of the 1986 Act, which is headed “Industrial Incentives”: thus given the responsibility for providing such support, it is to see

the linkage which I have referred to. Subsections (1) and (2) of s. 21 give the Authority power of a general nature to make grants, and they set out how the maximum amount of any such grant is to be calculated. Subsections (3) and (4) read as follows:

- “(3) This section applies to an industrial undertaking in respect of which the Authority is satisfied that it—
- (a) will produce products for sale primarily on world markets, in particular those products which will result in the development or utilisation of local materials, agricultural products or other natural resources; or
 - (b) will produce products of an advanced technological nature for supply to internationally trading or skilled sub-supply firms within the State; or
 - (c) will produce products for sectors of the Irish market which are subject to international competition; or
 - (d) is a service industry as specified by the Minister by order under section 3 .
- (4) The industrial undertaking shall also satisfy the Authority that—
- (a) financial assistance is necessary to ensure the establishment or development of the undertaking;
 - (b) the investment proposed is commercially viable;
 - (c) it has an adequate equity base;
 - (d) it has prepared a suitable company development plan; and
 - (e) it will provide new employment or maintain employment in the State that would not be maintained without assistance given

under this Act and increase output and value added within the economy.”

As will be observed, subs.(3) is satisfied if any one of the specified matters is met, whereas each of those mentioned in subs.(4) must be in place before that provision is complied with.

38. Section 25(2) reads:

“(2) An employment grant may be made where, in the opinion of the Authority, the service industry would contribute significantly to regional and national development and, in particular—

- (a) would be commercially viable,
- (b) would have good prospects for growth, and
- (c) would not be developed in the absence of an employment grant.”

39. The issues thus arising are whether these provisions when properly interpreted in the contextual setting in which they are positioned, permit the acquisition of lands not required for immediate use. That is, has the IDA power to assemble a land bank otherwise than by agreement (the *vires* point), and secondly, in circumstances where the Authority has not identified the industrial user which will ultimately benefit from such acquisition, how can it be satisfied, as it must be, that the conditions precedent, as outlined in the *proviso* for the exercise of compulsory powers, have been met? As expressed, it might be thought that these two matters closely resemble each other, but the emphasis relative to the *vires* issue is on the power to acquire land not required for

immediate use, but which would be available if and when a potential industrial user might require it, whenever that might be. On the other hand, the emphasis regarding the *proviso* point, is on due and proper compliance with the statutory preconditions.

40. The right to own what is one's own is as ancient as the earliest form by which unit groups of society regulated the affairs of those within them. Intrinsic to such a right is an entitlement to undisturbed enjoyment of one's property and if necessary, the right to rebuff all unwelcome interferences with it. This right has always been recognised as a bedrock of the common law, with Blackstone describing it as the "third absolute right inherent in every Englishman..." (*Commentaries on the Laws of England* (176: Vol. 3: 138)). In 1937, the right acquired recognition at the highest level of our legal order. It has been endorsed in several other Constitutions throughout the world and it can be found expressly conferred in many international instruments such as the Universal Declaration of Human Rights, the European Convention of Human Rights ("the Convention") and the Treaty on the Functioning of the European Union, as well as in the EU Charter, to name but a few. Its importance therefore is at the forefront of democratic institutions worldwide.

41. Article 40.3.1° of the Constitution gives protection at a fundamental, personal rights level to the property rights of every individual. That protection is enhanced by the provisions of Article 43 which acknowledge that the right to private ownership of external goods, which it describes as a natural right, inures to man by virtue of his rational being and treats its historical origin as being "antecedent to positive law". These provisions are phrased in general terms and embrace virtually all forms of property, whereas Article 40.5 offers specific protection as regards one's dwelling

house, describing it as being “inviolable”. All of these constitutional provisions, but in particular those first mentioned, inform each other.

42. Like the vast majority of rights conferred at the individual level, it has been recognised for a considerable period that, from time-to-time the enjoyment of such rights may have to accommodate the wider needs of society as a whole. Accordingly, provision has been made that the exercise of such rights “...ought, in civil society, to be regulated by the principles of social justice” and could be restricted with a “view to reconciling their exercise with the exigencies of the common good” (Article 43.2.1° and 43.2.2° of the Constitution). Therefore, whilst the right to have and to retain one’s property is safeguarded at the highest level possible within our system of law, nevertheless, when it becomes necessary to facilitate the common good, there will inevitably be, to some degree or other, an interference with the exercise of these rights. (See *Central Dublin Development Association v. Attorney General* [1975] 109 I.L.T.R. 69, for a useful summary of these constitutional provisions).

43. The exercise of compulsory powers against the wishes of an objecting landowner is clearly a major interference with the property rights of such person. Keane J. in *O’Brien* said at p. 270:-

“In each case, the person exercising the function is determining whether the constitutionally guaranteed rights of the citizen in respect of his private property should yield to the exigencies of the common good.”

Though reversed on other grounds, this passage remained untouched by the Supreme Court. Much the same was said by Costello P. in *Crosbie v. Custom House Dock*

Development Authority [1996] 2 I.R.531, both of which observations were endorsed specifically by Geoghegan J. in *Clinton (No.2)*.

44. Whilst the existence of such a power, across a wide variety of public bodies or bodies performing public functions which dates as far back apparently as 1541, has been upheld by the Courts for many years, nonetheless certain well described principles have now been established, which depending on circumstances will be applied in determining the outcome of any challenge to the invocation of such a power. For the purposes of this case the following can be said:-

- (i) The conferring and exercise of statutory powers in this regard, must accord with the Constitution and must respect and implement the principles of both natural and constitutional justice. There has never been any doubt but that such applies to any state interference with property rights (*Foley v. Irish Land Commission* [1952] I.R. 118, *Nolan v. Irish Land Commission* [1981] 1 I.R. 23).
- (ii) The impact on the right to private property, which can vary from the minimal to the absolute, as in this case where the entire holding including the family dwelling house is sought to be expropriated, must be justified or necessitated by the exigencies of the common good, which will of course have regard to the principles of social justice.
- (iii) Even where so justified, compensation will normally be an important aspect of constitutional protection.
- (iv) The conferring and exercise of such power must be granted and carried out in such a way that the impairment of the individual's rights must not exceed that which is necessary to attain the legitimate object sought

to be pursued. In other words, the interference must be the least possible consistent with the advancement of the authorised aim which underlines the power.

- (v) Such power must be expressly conferred by statute on the body which seeks to implement it. Further, where constitutional rights are abrogated by statutory intervention, such provisions must be construed to give effect to above principles.
- (vi) As the 1986 Act is a post-constitutional statute, there is a presumption, *inter alia*, that all steps taken within and as part of the compulsory process will be duly compliant with the aforesaid principles. (*East Donegal Co-operative Livestock Mart Ltd v. The Attorney General* [1970] I.R. 317).

45. Whilst I readily recognise the real distinction between the exercise of compulsory purchase powers, with the provision of compensation as provided for by law and the rights which a search warrant confers on the gardaí, nonetheless there is some similarity in that constitutional rights are being lawfully interfered with in both cases, potentially resulting in very serious consequences for those affected by the exercise of such powers. Accordingly, the observations which I have emphasised in the following passage by Keane J. in *Simple Imports Ltd v. Revenue Commissioners*, is apt to apply. At p. 250 of the report the learned judge said:-

“Search warrants, such as those issued in the present case, entitle police and other officers to enter the dwelling house or other property of a citizen, carry out searches and (in the present case) remove material which they find on the premises and, in the course of so doing, use such force as is necessary to gain

admission and carry out the search and seizure authorised by the warrant.

These are powers which the police and other authorities must enjoy in defined circumstances for the protection of society, but since they authorise the forcible invasion of a person's property, the courts must always be concerned to ensure that the conditions imposed by the legislature before such powers can be validly exercised are strictly met." (emphasis added)

Therefore, in addition to the matters listed in the preceding paragraphs, any condition(s) precedent must be strictly adhered to before the exercise of such power can be regarded as valid.

46. It has never been denied by the IDA that at the date of the making of the CPO, it did not have a particular industrial undertaking in mind for which these lands were being acquired. That this is so appears irrefutable from the evidence, in particular from the affidavit of Mr. Barry O'Leary sworn on 8th March, 2013. Having stated that the subject lands are particularly, strategically important for the particular type of industrial use identified by the IDA, Mr. O'Leary at paras. 9, 10 and 12 thereof states that:

"9. IDA's property solutions is a pivotal component in winning these new investments and job targets...Having appropriate and timely property solutions tailored to the needs of prospective multi-national clients has been the key contributor to winning FDI for Ireland. The imperial records of international research have demonstrated the rationale for a pro-active national property development programme. The availability of suitable property solutions is a key element in the decision-making process undertaken by prospective investors. Therefore the availability

of quality property solutions is a critical component underpinning the winning of FDI and jobs. This is especially true where FDI require large scale infrastructure including utilities, access and communications.

10. The model of acquisition and development of suitable and appropriate sites by IDA is both proven and established and underpins the securing and winning of global investments in Ireland...Furthermore, this model has enabled the development of clustering in the physical, academic and related business spectrums. Therefore it cannot be overly emphasised the importance of being able to acquire lands so that in negotiations with a particular industry or undertaking, either where that industry or undertaking wishes to expand its existing operations or where it seeks to choose Ireland for the first time for its investment, IDA can point to land which it can secure for such an investment and this can make the difference between Ireland securing high quality investment relative to other countries with which it competes on a world level.

12. The M4 cluster in North Kildare equally presents significant opportunities for winning new investment and jobs. This M4 cluster currently supports the employment of approximately 7,500 in IDA client companies, Intel and HP..."

47. As a result of and based on this evidence, the only reasonable conclusion which can be drawn is that the intended acquisition of Mr. Reid's lands is not because such lands are presently required by the IDA, but rather that such are for future use, so

that if and when a particular undertaking should seek to development them, they would be immediately available at such time. In consequence, it is suggested on behalf of Mr. Reid that what the IDA is in fact doing is acquiring a “land bank” for potential and prospective future use. Such characterisation is, I think, legitimate in light of Mr. O’Leary’s evidence.

48. It is not suggested that the power to acquire by compulsion lands intended for future use is to be found anywhere other than within s.16 of the 1986 Act. Disregarding the s. 16 *proviso* for a moment, that section in conferring such powers is in standard form and shares the phraseology used with many other statutes, which also provide for such power, including s.213(2)(a) of the Planning and Development Act 2000 (“the 2000 Act”), which heavily featured in much of the debate in this case. In fact, subs.(3) was even more prominent for a number of reasons which I will refer to in a moment. The entire section reads as follows:

“213.—(1) The power conferred on a local authority under any enactment to acquire land shall be construed in accordance with this section.

(2) (a) A local authority may, for the purposes of performing any of its functions (whether conferred by or under this Act, or any other enactment passed before or after the passing of this Act), including giving effect to or facilitating the implementation of its development plan or its housing strategy under section 94, do all or any of the following:

- (i) acquire land, permanently or temporarily, by agreement or compulsorily,

(ii) acquire, permanently or temporarily, by agreement or compulsorily, any easement, way-leave, water-right or other right over or in respect of any land or water or any substratum of land,

(iii) restrict or otherwise interfere with, permanently or temporarily, by agreement or compulsorily, any easement, way-leave, water-right or other right over or in respect of any land or water or any substratum of land,

and the performance of all or any of the functions referred to in subparagraphs (i), (ii) and (iii) are referred to in this Act as an “acquisition of land”.

(b) A reference in paragraph (a) to acquisition by agreement shall include acquisition by way of purchase, lease, exchange or otherwise.

(c) The functions conferred on a local authority by paragraph (a) may be performed in relation to—

(i) land, or

(ii) any easement, way-leave, water-right or other right to which that paragraph applies,

whether situated or exercisable, as the case may be, inside or outside the functional area of the local authority concerned.

(3) (a) The acquisition may be effected by agreement or compulsorily in respect of land not immediately required for a particular purpose if, in the opinion of the local authority, the land will be required by the authority for that purpose in the future.

- (b) The acquisition may be effected by agreement in respect of any land which, in the opinion of the local authority, it will require in the future for the purposes of any of its functions notwithstanding that the Authority has not determined the manner in which or the purpose for which it will use the land.
- (c) Paragraphs (a) and (b) shall apply and have effect in relation to any power to acquire land conferred on a local authority by virtue of this Act or any other enactment whether enacted before or after this Act.
- (4) A local authority may be authorised by compulsory purchase order to acquire land for any of the purposes referred to in subsection (2) of this section and section 10 (as amended by section 86 of the Housing Act, 1966) of the Local Government (No. 2) Act, 1960, shall be construed so as to apply accordingly and the reference to “purposes” in section 10(1)(a) of that Act shall be construed as including purposes referred to in subsection (2) of this section.”

49. As can immediately be seen, the basic power to compulsorily acquire land as given in s.16(1)(a), (b) and (c) of the 1986 Act is virtually the same as that outlined in s. 213(2)(a)(i), (ii) and (iii) of the 2000 Act. However, that is where the similarity between the sections stops. Of striking note is the fact that in 2000, the Oireachtas saw fit to include subs.(3) of s. 213, whereas of course no such provision is to be found in the 1986 Act.

50. The analysis of this subsection as contained in *Clinton (No.2)* is of course of interest, but the subsection’s real significance for the issue presently under discussion

is not so much as to what constitutes a “particular purpose”, but rather that the provision also deals with land required for future use. Under s. 213(3)(a) of the 2000 Act, compulsory powers are available where land is so required, but only where the particular purpose for its acquisition is already known and disclosed by the local authority. Under subs.(3)(b) of s. 213, land cannot be compulsorily acquired for future use where the authority has not determined the manner in which, or the purpose for which, the lands will be so used. Therefore, the subsection deals with two related but quite distinct matters, namely the presence or absence of a “particular purpose” grounding the use of such powers, and secondly, the acquisition of a land holding for future use.

51. It must be presumed that the Oireachtas had a particular reason for inserting subs.(3) into s.213 of the 2000 Act. Evidently, it must have thought that the basic acquisition powers set out in subs.(2) did not, or at least did not without ambiguity or uncertainty, cover the acquisition of land required only for future use. Thus the conferring of powers on local authorities to do so. The various conditions attaching to such power does not in any way take from the perceived necessity to confer it. In fact, one can see quite a discerning approach by the Oireachtas as regards future use, in that it has distinguished between circumstances where the lands are and are not earmarked for a particular purpose. In conferring compulsory powers in the former situation, the legislature in a controlled way is facilitating the orderly functioning of a local authority, whereas in denying such a power where land banking is the sole purpose, it is reflecting due respect for a landowner’s property rights. This is entirely consistent with the constitutional provisions and case law above mentioned. Whether the balance so provided for is sufficient in all circumstances is not a matter for this

judgment. It is the enactment of a specific provision dealing with future use which is significant.

52. The resulting contrast between the provision, which is relied upon in this case as conferring a similar power and s. 213 of the 2000 Act, is striking. In my view, s.16 of the 1986 Act does not confer any power on the IDA to acquire lands not required for immediate use, but which might be utilised at some future time. For such to be the case, there would have to be an express statutory provision to that effect. That is not to be found in the 1986 Act or in any other statutory enactment to be read therewith. In light of the constitutional protection given to property rights, and in applying the appropriate principle of construction as outline above, it seems to me that the 1986 Act cannot be read in the manner suggested by the Authority, even through the process of implication. Accordingly, I will hold that the making of the compulsory purchase order on 14th November, 2012, in respect of Mr. Reid's lands, to be *ultra vires* s. 16 of the 1986 Act.

The Section 16 Proviso Issue:

53. As noted above, the exercise by the IDA of the power conferred by s.16 of the 1986 Act is subject to the "*proviso*" mentioned in that Act (para. 7, *supra*). Both the first and second requirements of it must be satisfied. Concentrating on the second of these, as it is less contentious and as it does not depend on having to assess the weight of the conflicting evidence given on the planning and environment issues, it is evident that as a pre-condition to the exercise of such power, the IDA must be satisfied "...that the undertaking conforms or will conform to the criteria set out in subsections (3) and (4) of section 21 or that mentioned section 25(2)". It is surprising that even at

this juncture of the proceedings, the IDA has not expressly rested its defence to this challenge on either s.21 or s.25 of the 1986 Act, but continues, apparently, to rely on both, even if the s.25 reference in the documentation is very much a fallback position.

54. Whichever, Mr. Reid argues that in such circumstances on the material available as of November, 2012, it was impossible for the IDA to be satisfied that the *proviso* had been complied with. In particular, without having identified a specific undertaking, it would not be possible to conclude that the requirements of s. 21(3) and (4) or s. 25(2) of the 1986 Act, have been or will be met. Accordingly, he argues that the exercise by the IDA of its s. 16 powers in this case is *ultra vires* the provisions of that section as the necessary preconditions have not been met.

55. The Authority on the other hand seems to suggest as an answer that, based on its historical record of dealing only with undertakings capable of satisfying these requirements, it was entitled to form the view in November, 2012, that the specified criteria would be met, whoever the industrial undertaking might ultimately be and whenever that entity might be identified. Accordingly, it argues that the terms of the s.16 *proviso* have been met.

56. Section 21(3)(a), (b) and (c) of the 1986 Act essentially relate to the production of products by the undertaking concerned. Satisfying any one of these three options will suffice. Paragraph (a) requires the production of such products for sale “primarily” on world markets and that such producers will engage with local materials, agricultural products or other national resources. Paragraph (b) refers to products in the technological sector which when developed will be offered for sale

either internationally or to skilled firms within the State. Paragraph (c) refers to products for the Irish market, but which are subject to international competition, and finally, para. (d) gives an option for compliance with this subsection that the undertaking is “a service industry” as specified by ministerial order made under s.3 of the Act. This option has not been relied upon in this case.

57. The requirements of s.21(4)(a) to (e) of the 1986 Act must be individually complied with. Accordingly, the industrial undertaking concerned must, *inter alia*, have an investment proposal which is commercially viable, it must have an adequate equity base, it must have a suitable company development plan and it must be such as will provide new employment or maintain existing employment in the State.

58. It is not altogether clear as to how the alternative provision to ss. 21(3) and (4) of the 1986 Act can apply in this particular case, but as the IDA has left this as an option, it is necessary to briefly consider its provisions. Firstly, under s.25(2), the industrial undertaking would have to be “a service industry” within the meaning of s.3 of the Act. Secondly, such an undertaking would have to contribute significantly to regional and national development and in particular, would have to be commercially viable, would have to have good prospects for growth and “would not be developed” in the absence of an employment grant. Once more, these matters are cumulative and each would have to be satisfied before the requirements of the section are met.

59. It seems quite clear from s. 16 of the 1986 Act that the legislature did not confer compulsory powers on the IDA to be exercised solely by reference to the functions assigned to it by the legislation. This is unlike the powers conferred on

many other bodies, for example, local authorities. Rather, it established a further precondition in the requirements specified in s.16 of the 1986 Act, which heretofore I have referred to as the *proviso*. Therefore, on every occasion upon which such power is exercised, those requirements have to be satisfied.

60. In my view, it could not possibly be an answer to suggest that since the IDA deals only with “industrial undertakings”, that fact of itself can give rise to a finding that the *proviso* has been met. One can imagine several entities comfortably coming within the definition of “industrial undertakings”, but who, for whatever reason, cannot satisfy the criteria. Accordingly, the assessment of due compliance must be case specific. This means that an individual evaluation of the circumstances surrounding each exercise of compulsory power must be undertaken as part of this assessment. Obviously, the timing of this examination relates to the date when the powers are being exercised.

61. It is, I think, impossible on any construction of s. 16 of the 1986 Act, for any entity so charged with this responsibility, to come to a conclusion that the *criteria* above outlined in s. 21(3) and (4) of the Act can be met in circumstances where the identity of the undertaking concerned is not known and thus of necessity, its capacity to meet such requirements has not and cannot be established. It must be presumed that the Oireachtas had good reason to design the scheme in this way. Whilst the meeting of the *criteria* was obviously intended to focus on the IDA, the provision also offers protection to the landowner in that his lands cannot be compulsorily acquired unless these requirements are met. Therefore, the scheme within which land may be

compulsorily acquired in the present context has certain statutory parameters, which must be adhered to.

62. As previously stated, it is troublesome that the IDA has not been in a position to state whether, from its perspective, s. 21(3) and (4) of the 1986 Act are the relevant statutory provisions or whether it is s. 25(2) thereof. I am not at all sure that relying on both is a correct implementation of the section, although the point does not directly arise. What I am sure about however is that such a position reinforces the view which I have formed on this issue. Consistent with the reasoning above, I am likewise satisfied that it would be impossible without a particular undertaking having been identified to come to a conclusion that the provisions of s. 25(2) of that Act have been or can be met.

63. In these circumstances, I believe that the preconditions as specified in s. 16 of the 1986 Act for the exercise by the IDA of its compulsory powers have not been satisfied. On that basis, I would also set aside the compulsory purchase order as made.

The Bias Argument:

64. The issue on this aspect of the case, is the positions held by Mr. Liam O'Mahony, who at the relevant time was the Chairman of the IDA but who was also a non-executive director of the PM Group. It is said that when the relevant facts constituting the background are known, this connection is such as to breach the objective bias test, and accordingly, the decisions with which he was involved, should be vitiated on that ground.

65. In February, 2008, Mr. O'Mahony joined the PM Group as a non-executive director and he continued to hold that position right throughout the process complained of in these proceedings. One year later, he was appointed as Chairman of the IDA and as such, he participated in the two key decisions made by that Board involving Mr. Reid. These were the original decisions to initiate the compulsory process made in March, 2012, and secondly, and of crucial importance, the final decision in making the CPO in November, 2012.

66. The PM Group was placed on a panel of professional consultants retained by the IDA in either 2007 or 2008, which pre-dated Mr. O'Mahony joining the Authority. Their contract in this regard was renewed or extended in November, 2011. The involvement of the PM Group, in the issues relevant to this case, has been set out in various affidavits filed by the parties in these proceedings. The evidence shows that the Group was commissioned to assist the IDA in reviewing what land options were available to it, in particular along what had been described as the M4 Corridor or M4 Cluster in North Kildare. This involved a site evaluation process within five sites, which were examined and individually classified on the basis of fourteen different criteria. The results were produced in a document headed "Comparative Evaluation Matrix". The subject lands were positioned as the favourite site with lands at Parsonstown, Lexlip being ranked next.

67. This evaluation formed part of a report first compiled on the 14th February, 2012, and it was later updated during the course of that year. The author of the report, Mr. Tony McGrath, Associate Director of the Group, appeared before the independent

adjudicator in support of its recommendation to the IDA. This report and associated material was before the Board of the IDA when making the March, 2012 decision, but even more significantly, when making the CPO decision in November, 2014. Whilst it was not the only document so considered, it cannot be argued or denied that it was one of a handful of key reports upon which the decision to compulsorily acquire Mr. Reid's lands was based.

68. Both before the independent adjudicator and in these proceedings, the appellant has made the argument that the selection criteria as set out in the report, was not properly applied in arriving at the group's ultimate recommendation. It is said in this regard that two key criteria were notably missing, as a result of which, *inter alia*, the subject lands could not have been described, in any objective sense, as being the most suitable of those looked at for the purposes of industrial development. The first criterion related to planning and the second involved environmental issues. In illustrating this objection, the appellant points out that the report states, correctly so, that industrial development on the subject lands would give rise to a material contravention of the development plan and that it would require rezoning, whereas the second favourite site would not suffer from these constraints, as it was within the development boundary of the Leixlip local area plan. Thus, it is asked: how could both parcels of lands, from a planning perspective, be equally scored? On the environmental issue, the complaint made relates to the alleged failure to mention the necessity for conducting an appropriate assessment under Council Directive 92/43/EEC of 21 May, 1992 on the conservation of natural habitats and wild fauna and flora, O.J. L206/7 22.7.1992 ("the Habitats Directive"). These are but examples of what is alleged to be a flawed report by the PM Group.

69. Let it be immediately said that both the PM Group and the IDA strongly reject these complaints. They do so on a number of grounds. However, it is not necessary to examine such grounds, because it is no part of this Court's function to resolve any conflict in this regard. The reason why reference has been made to these allegations is simply to outline the background within which the complaint of objective bias is made and must be considered.

70. There is one other argument raised by the appellant which is relevant in this context. He claims, as he has at all stages of the process, that by reason of the IDA's contract with the family prior to this report being compiled, being therefore at a time when it had no technical knowledge about these lands, the Authority had predetermined the acquisition issue, and thus, the engagement of the PM Group for the purposes identified was an exercise in *ex post facto* justification. He further says that the obtaining of this report was facilitated by the close links between Mr. O'Mahony and the PM Group. Again, the Authority strongly denies this assertion, but once more its agitation forms an important part of the background within which this issue must be considered.

71. The allegation in legal terms is one of objective bias: no complaint is made that Mr. O'Mahony was motivated by actual bias. In fact, it must be clearly understood that his ground of challenge is not intended to and does not have the effect of impacting upon his personal integrity in any way. Rather, it is the conventional language of lawyers to describe the basis of a particular challenge, made in the context of a difficult legislative procedure which is inadequate and which requires the

Board of the IDA to perform acquisition functions without detailed guidance or safeguards.

72. The test for this class of objection is now well established: in short, it is the reasonable suspicion or reasonable apprehension test: whilst the latter description has been preferred in *Bula Limited v. Tara Mines Limited (No.6)* [2004] I.R. 412 (“*Bula (No.6)*”), both terms continue to be used interchangeably. No longer is there any real suggestion that the once alternative approach, namely a real likelihood of bias, should be considered. The test now to be applied is centrally rooted on the necessity of establishing and maintaining the confidence of the public in the integrity of public administration generally. Thus, the *prism* through which the issue must be considered is that of a reasonable observer’s perception of what happened: therefore as has been said on numerous occasions what the parties, the witnesses or even us judges think, is not decisive. It is what the reasonable person’s view is, albeit a person well informed of the essential background and particular circumstances, of the individual case.

73. The more fuller formulation of the test is seen from the judgment of Denham J., as she then was, in *Bula (No.6)* at p. 441, where the learned judge said:-

“[In this jurisdiction]...the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues...it is an objective test – it invokes the apprehension of the reasonable person.”

See also *Kenny v. Trinity College (“Kenny”)* [2007] IESC 42, [2008] 2 I.R. 40.

74. The engagement of the reasonable person is the vehicle by which the courts apply the underlying policy of the test: to do so effectively however, that person must be reasonably informed. A variety of approaches have been adopted so as to define the parameters by which the extent of this information is determined. *Dublin Wellwoman Centre Ltd v. Ireland* [1995] 1 I.L.R.M. 408 and *Ryan v. Law Society of Ireland* [2002] 4 I.R. 21, are two such cases where the matter was considered. In *Kenny*, Fennelly J., at p.45, with whom the other members of the Court agreed, had this to say on the topic:-

“The hypothetical reasonable person is an independent observer, who is not over sensitive and who has knowledge of the facts. He would know both those which tended in favour and against the possible apprehension of a risk of bias. Thus, he would know that the judge and a senior architect in the responsible firm were brothers, but would also know that the architect brother had no involvement in the development.”

This observation, like those outlined in the other cases cited, is pitched at both a general and a specific level. This interplay is essential as the particular facts of each case are all important in determining an issue such as this.

75. In light of the authorities and in view of the known and undisputed circumstances in this case, I am satisfied that it is not necessary to further explore, at the level of principle, what information the reasonable person should in general have. This is because in my view, on any reading of the available material, the information which he must be presumed to have falls comfortably within the broad jurisprudence as established.

76. Could I perhaps however add three observations to the above, firstly, in my view the test remains the same right throughout the ambit of public administration: given that the underlying purpose of the test is confidence in the objectivity of all such persons and bodies, it would be invidious if the standard should differ as between one entity and another. Secondly, what is important to note about the role of the IDA in the compulsory purchase process is that the Board was not simply exercising a function in public administration but rather, having regard to the structure which it set up and within which the subject decisions were taken, it was in effect carrying out a quasi-judicial function. In effect, the Board was not being asked to act upon “recommendations” of a fact finding body but rather was made the decision maker itself, admittedly on evidence gathered by Mr. Bradley, but unquestionably not so assessed by him. Arguably if that had occurred, matters may be different. However, the situation meant that Mr. O’Mahony, and indeed the other Board members, were made the principal and decisive decision makers in respect of “proposals” which necessarily involved a consideration of the P.M report. Thirdly, it is well established that even though the relevant decisions of the IDA were taken by a multi-member Board, and the allegation of bias is against one member only, nonetheless if sustained, the decision of the entire body is invalid. *O’Driscoll v. Law Society of Ireland* [2007] IEHC 352 at para. 56. *Connolly v. McConnell* [1983] I.R. 172.

77. In my view, the observer would know the following:

- The history of the house, the farm and the Reids’ ownership of this holding.

- The functions of the IDA, its role in attracting foreign investment and its overall national importance.
- The interest which the IDA expressed in these lands and the negotiation/contact which had taken place in December 2011 and early 2012.
- The objection by Mr. Reid and his mother to selling the lands and their commitment to retain the holding and to continue farming, as heretofore.
- The decision taken by the Board of the IDA on the 7th March, 2012, to commence the statutory process, and the decision taken on the 14th November of that year to make a CPO in respect of such lands.
- That Mr. Bradley S.C. had been appointed as a rapporteur, that he had conducted a hearing during which the appellant was given an opportunity to test the IDA case and to make his own case, that he had submitted a proposal and the IDA setting out in effect the material which he had been given and the evidence which he had heard.
- That the IDA was the sole decision maker at every step of the process with no external entity being involved.
- That the critical decisions were based on reports from different professionals which included a report, of some significance, on site selection and site evaluation suitability.
- The involvement of the PM Group in this process.
- The relationship between the PM Group and Mr. O'Mahony.

- The fact that Mr. O'Mahony was not involved in the initial appointment of the PM Group or in the decision to extend the contract. Likewise, neither was he involved in the preparation of such a report.
- The substance and tenor of the allegations made in these proceedings and of the IDA's response thereto.

78. The level of knowledge across this strand of information would, for the most part, be at a general level, as for example the reasonable person would not necessarily have precise details of the content of the PM Group's report. In other areas such as the negotiations conducted between the IDA and the family and the decision to compulsorily acquire, he would have information at a somewhat more detailed level. In short however, the independent and detached observer would be reasonably informed, at what could be regarded as an informed level, of the most salient factors touching upon the context in which the allegation of bias is made.

79. In the circumstances as described above, might a reasonable observer possessed of the information as set out have a reasonable apprehension that when considering the CPO decision, Mr. O'Mahony, and thus the Board of the IDA, might attach to the report of the PM Group some added weight or greater influence, by reason of his relationship with that firm? Might such a party reasonably feel that some extra dimension could be in play because of this association? I believe that there is every probability that this might be so. Mr. O'Mahony was the Chairman of the IDA. He evidently filled the most senior role that the Authority had. As such, he would preside over Board meetings and presumably, he would navigate through the items on the agenda. Moreover, he would have taken charge of the relevant meetings

and regulated their conduct and affairs. In such a role he must be assumed to have a position of influence. This might not have the same consequences or be open to the same interpretation if the compulsory process involved some external body at confirmation or annulment stage. But it did not. Knowing the importance which the IDA attached to these lands, might the observer doubt that the Chairman might not be in position to remain as objective and as impartially detached from the decision, in view of the connecting factor, as otherwise he might have been expected to be? In my view, such observer could reasonably have so concluded. On this basis, I would also set aside the decision to compulsorily acquire.

80. In view of my decision on s.16 of the 1986 Act involving the *ultra vires* and the *proviso* issues, and given my conclusion on the bias issue, the result must inevitably be the setting aside the decision of the IDA to compulsorily acquire Mr. Reid's lands. That being so, I do not propose to consider the other grounds of appeal as set out at para. 15 (iv) and (v), *supra*. In such circumstances, it is also clearly not necessary to deal with either the Constitution or the Convention issues. However, in light of the submissions advanced by the first named respondent as to the importance of those issues to the IDA, some observations, even those purely of an *obiter* nature, may be permitted on these matters.

Obiter Observations:

81. As will be noted from what has previously been stated, the IDA is the only body involved from commencement to finalisation under the 1986 Act, with the process of compulsorily acquiring lands of an objecting landowner. It is the entity which identifies what lands might be suitable for its purposes, and the body which

decides whether or not to acquire, either by way of agreement or as in this instance by compulsion. If the agreement route proves successful, then the matter is at an end. However, where recourse to the alternative vehicle is necessary, the resulting process necessarily involves the making of a decision where the interest of the acquiring body stands at one corner and the property rights of the landowner at the other. A major conflict is thus created which must be decided upon. Even in the context of *O'Brien*, where the Court's decision was that the making of a compulsory purchase order is an administrative act and not a judicial act, nonetheless it has become increasingly obvious since that decision that by far the most satisfactory way of having this conflict resolved is to separate the decision making process between the policy driver on the one hand and the acquisition decider on the other. Much like the exercise of power by a planning authority and other bodies, where the external adjudicator is An Bord Pleanála, which is, and is important to be seen as, objectively impartial in its decision making function, positioned as it is between the Authority's interest in ultimately advancing the public good and the landowner's vested interest in preserving his constitutionally protected rights.

82. The desirability of achieving this separation of function is becoming more evident and it can be seen from the fact that there remains only a handful of statutory regimes where some external body is not involved in the ultimate decision of the process. In his helpful report dealing with this matter, Mr. Bradley S.C. identifies the scheme underlying *O'Brien*, and he refers to the IDA as being probably one of the only two substantial bodies where the legislature has not moved to adjust these outdated practices so as to bring them more in conformity with what might now be

regarded as being a more enlightened approach to providing both the procedural and substantive protection which the Constitution affords to personal property rights.

83. It must also be recalled that since *O'Brien*, the State has incorporated the European Convention of Human Rights into our domestic law in the manner specified, in the 2003 Act. Whether giving a direct cause of action or *via* the interpretive obligation contained in s.3 therein, the obligation so undertaken by the enactment of this legislation may well influence any future decisions on the constitutionality and/or Convention compliance of a statutory scheme, such as that which is involved in this case.

84. As stated however, these are but observations and are not intended otherwise. In particular, if and when the issue should become necessary to resolve, the entire matter would have to be considered afresh.

85. For the above reasons, I would allow the appeal on the grounds as stated.