

THE HIGH COURT

[2023] IEHC 420

Record Number: 2020/133 JR

BETWEEN

LIGHTHOUSE NETWORKS LIMITED

APPLICANT

AND

THE MINISTER FOR COMMUNICATION, CLIMATE ACTION AND ENVIRONMENT

RESPONDENT

JUDGMENT of Ms. Justice Bolger delivered on the 14th day of July, 2023

1. The applicant seeks an order of *certiorari* quashing the decision of the Minister of 19 November 2019 that the broadband network at the applicant's Kilchreest site in County Galway does not meet the essential characteristics of a Next Generation Access ("NGA") network for the purposes of the National Broadband Plan ("the Plan"). The applicant also seeks related declaratory reliefs. For the reasons set out below, I am refusing this application.

2. The grounds upon which said relief is sought include *inter alia*: (1) that the respondent did not comply with the agreed assessment procedures; (2) the decision was taken in breach of the applicant's right to fair procedures; (3) the decision infringes the applicant's legitimate expectation and; (4) the decision is vitiated by an underlying bias against the applicant's Fixed Wireless Assessment ("FWA") technology. The applicant had initially claimed relief arising from what it had asserted was a breach of its property rights but chose not to pursue that at the hearing. The respondent disputes the factual and legal basis of the applicant's case and asserts that the applicant's challenge is an unlawful collateral challenge to a subsequent, related decision.

Background

3. The applicant provides broadband internet services across parts of counties Galway, Offaly, Clare and Roscommon via a network of fixed transmission points using fixed wireless access ("FWA") technology. The Minister intends to ensure the provision of high speed broadband to all premises in the country by implementing a State aid scheme in those parts of the country where private companies do not invest or have no plans to invest in providing commercial broadband. The Plan requires the Minister to map those areas of the country (the "Intervention Area") where it is not commercially viable for private operators to provide high speed NGA broadband services. The European Commission's State Aid Broadband Guidelines ("SAG") require the State to carry out this mapping exercise in a way that does not distort competition or freeze out private investment.

4. The Plan was launched in 2012. Extensive consultation took place between then and 2015 when "Mapping Future High Speed Broadband Networks October 2015: Criteria for assessment of investment plans" (the "assessment criteria") were finalised by PwC and published by the Minister. In June 2014, a formal public consultation seeking industry views was published. A further formal consultation was published in November 2014 setting out

an initial view of an NBP map and an updated draft of the mapping assessment criteria, again seeking the views of industry. A further consultation was published in March 2015, seeking submissions from commercial operators. A further consultation was published in July 2015 outlining the proposed mapping assessment criteria and the process that would be conducted to determine the Intervention Area, including the technical parameters to be considered. Those five consultations run by the Minister gave commercial operators, such as the applicant, the opportunity to raise any concerns they had about the map or the assessment criteria.

5. The Minister consulted ComReg at each stage of the mapping process. The application for State Aid was formally supported by ComReg via an opinion letter issued in October 2019. The State's mapping of the Intervention Area was approved by the European Commission on 15 November 2019.

The Applicant's engagement with the Minister prior to August 2018

6. The applicant responded individually to one of those public consultations in 2013/14 and collectively as part of a group of operators to the consultations of 2013/14, July 2015, October 2015 and July 2019. The applicant did not question or challenge the assessment criteria when they were published in October 2015. The applicant claims that on a visit to their offices on 21 March 2018, the applicant was informed by the department's officials that FWA technology using license exempt spectrum (i.e. the technology used by the applicant) were not expressly excluded from qualifying as NGA, but that it would be extremely difficult to convince the department that NGA services could reliably be provided by such technology. The applicant claimed they were informed that they would have the benefit of a technical meeting with the Minister's experts to demonstrate the technical operation of their network and verify their test results.

7. The department subsequently confirmed to the applicant in writing on 25 May 2018 that non-LTE Advanced FWA technology using license exempt spectrum was not, and never had been, automatically precluded from qualifying as NGA. The applicant wrote to the Minister on 27 April 2018 seeking confirmation that "*non-LTE Advanced wireless technology using unlicensed spectrum*" would not be automatically excluded. The department replied on 14 May 2018 referring to the assessment criteria, and provided confirmation that "*FWA operators using unlicensed spectrum*" were not automatically excluded from being found to be NGA compliant. The applicant wrote again seeking further clarity. On 25 May 2018, the respondent replied stating that non-LTE Advanced FWA technology using unlicensed spectrum had never been automatically precluded. The applicant claims in the within proceedings this was inaccurate as the Minister had previously made it clear that such technology could not be considered NGA for the purposes of the Plan. Mr. Neary, on behalf of the Minister, in his first affidavit, claims those exclusions had existed but that the rules changed with the publication of the assessment criteria in 2015.

The applicant's application

8. The applicant submitted an application to the Minister in August 2018 pursuant to the assessment criteria to have its technology recognised as NGA for the purposes of the Plan. The applicant sought to be excluded from the intervention area and protected from having to compete with State aided broadband services. The applicant's application related to a single site at Kilchreest near Loughrea, Co. Galway so as to ensure, as a threshold matter, that the Minister would accept the applicant's technology as NGA compliant. The applicant used this site as it was the least suitable and if it was confirmed as NGA compliant, that the applicant would encounter no difficulty in having all its 50 other sites similarly confirmed. That approach was not provided for by the assessment criteria and was not done by agreement with the department or advised to them prior to the applicant's application. Nevertheless, the department did agree to accept what they referred to as "an initial submission". It was always clear that even if the applicant's application in respect of the Kilchreest site had been successful, they would have had to make a further application for recognition of the substantial remainder of its network.

9. The applicant had 271 subscribers connected to the Kilchreest at the time of its application, 146 of which tested by the applicant in order to satisfy the Minister that its network complied with the assessment criteria. The applicant claimed that their tests demonstrated the network's actual capacity and the upload and download speeds available to the subscribers accessing the network, at that time. They claimed this satisfied the assessment criteria (the detail of which is discussed further below). Those views were strongly supported by their expert witness whose report was exhibited in an affidavit to the court.

10. The applicant's application was assessed by the Minister's technical advisers, Analysys Mason ("AM") on the Minister's behalf. AM made a number of requests between September 2018 and May 2019 for clarification and further information to which the applicant provided written responses. The tone of the correspondence from the applicant, AM and the department, confirm their respective strong views that the information and clarifications furnished by the applicant was insufficient and that the analysis of the applicant's application was inadequate and flawed. AM prepared a preliminary report of 22 July 2019 which assessed the application and made preliminary findings on the information that the applicant had furnished. The applicant responded by further submission dated 16 September 2019 to AM's preliminary report and provided some more clarification but also made it clear that they considered that AM had deviated from the assessment criteria and had attempted to impose new requirements not contained therein. AM completed its final report on 17 November 2019. By letter dated 19 November 2019 the Minister refused the application in reliance on AM's findings and recommendations.

Analysys Mason review

11. AM was engaged by the Minister to advise on assessing the applicant's submission against the technical assessment criteria set out in the assessment criteria. AM sought additional information and clarification from the applicant on 17 September 2018, 5 November 2018, 13 December 2018 and 14 April 2019. The applicant responded on 28 September 2018, 16 November 2018, 8 March 2019, 15 May 2019 and 16 September 2019.

12. On 22 July 2019 AM issued a report for the department entitled 'Technical Assessment of Lighthouse's SIR Response' in which AM concluded that the applicant's solution did not meet the technical criteria set out in the assessment criteria because its design could not provide a 30Mbps download speed or a 6Mbps upload speed to the applicant's then current users when they demand it. In September 2019 the applicant responded criticising AM's conclusions as unjustified, infected by bias against the applicant's technology and accused AM of having failed to apply the assessment criteria and having breached the applicant's rights to fair procedures in its assessment of the applicant's application. On 17 November 2019 AM issued a further report to the department entitled 'Technical Assessment of Lighthouse's SIR Response', which was identical to AM's previous report of July 2019. This report was furnished to the applicant under cover letter dated 19th November 2019 from the department's Chief Technical Officer, Patrick Neary who said that the applicant's submission had been assessed and that the department had concluded, having regard to AM's report, that the site did not satisfy the assessment criteria and should not, therefore, be identified as NGA on the Plan's map. It is that decision of 19 November 2019 that the applicant challenges in these proceedings.

The Applicant's Challenges

(i) Failure to comply with the Assessment Criteria

13. The applicant complains that the assessment of its application deviated in material respects from the assessment criteria. Instead of requiring the applicant to demonstrate that the "access network" was designed to deliver the requisite speed "to all users under normal operations" and that the "backhaul network" was designed to deliver the requisite speeds "to all users when they demand it," AM mistakenly applied the latter standard to both backhaul and access networks. The applicant says they could not have appreciated this approach when conducting its tests or preparing its submissions and that this was fatal to

its application. The applicant also says that AM imposed alternative tests and standards without notification after the applicant had completed the tests necessary to provide the technical data specified in the assessment criteria. Thus the applicant was informed of tests it was required to meet at the same time as being informed that it had failed to meet them. The applicant claims the Minister failed to engage with the applicant's point that it was providing real-world data of an existing network.

14. The Minister says that the assessment criteria were followed, and that AM's July 2019 report set out how each assessment was carried out in respect of each parameter of the assessment criteria. AM applied the technical criteria of the assessment criteria to the applicant's application and found that the technology was NGA capable but that the applicant's access network was not delivering NGA services. The Minister said the applicant failed to provide a description of the testing or the scientific methods employed, in spite of repeated requests for same, and therefore did not demonstrate that the technical criteria were met.

(ii) Concurrency ratio

15. AM mentioned a "concurrency ratio" test of 10:1 for the first time in their clarification questions of 15 April 2019, whereby AM said the applicant had to be able to satisfy 10% of "all users when they demand it" with 30Mbps or 3Mbps per subscriber during the busy hours. The applicant says this test was ultimately amended in the July Report so as to only require the provision of these speeds to "all active subscribers" during busy hours. However applied, the applicant says it formed the cornerstone of AM's assessment of the applicant's network and does not derive from the assessment criteria or SAG but represents AM's view on what was reasonable for an NGA broadband network. The applicant asserted that this was an unlawful imposition of a requirement not contained within the assessment criteria and notified to the applicant after they had submitted their application.

16. The Minister defended AM's application of a concurrency ratio to the applicant's test results as part of the verification process and challenged the applicant's categorisation of it as a new criteria or standard (even though it was described by AM as a 'parameter'). The Minister argued that applying a concurrency ratio is a normal part of engineering design and assessing capacity, both of which are referred to in the assessment criteria, and that it was a reasonable basis on which to assess the applicant's application.

(iii) Failure to Provide the Promised Site Meeting

17. The applicant says that prior to making its submission in 2018 and subsequently in correspondence of December 2019, the Minister had committed to having a site meeting to allow the applicant an opportunity to demonstrate the ability of its network and/or to address any concerns raised by the Minister's experts. In November 2018 the Minister requested the applicant to re-run the tests which would be witnessed by the department officials in person. The applicant agreed and by letter of 16 November 2018 requested an indication of availability, to which no response was received. The applicant claims it was subsequently informed there was no point in this exercise as there could be no possibility of the applicant demonstrating compliance with the assessment criteria.

18. The Minister submits that he was very clear in correspondence on 13 December 2018 that the site visit was conditional on receiving the information that had been sought from the applicant. A number of requests for the information were made. The applicant repeatedly sought more time but never furnished the information. The information was requested again on 15 April 2019, and the Minister warned that "*the Department will have no choice but to carry out its assessment based on the information provided to date*". The information was not provided and the plan to organise an on-site validation was, therefore, never pursued.

19. The applicant could not provide the location of the premises involved in the testing and, according to the Minister, a validation of testing was not therefore possible and a site visit would have been of no benefit. The Minister disputes that any legitimate expectation

arises from the meeting of 18 March 2018, at a time when the applicant was still considering whether they would make any submission.

(iv) Breach of Fair Procedures and Legitimate Expectations

20. The applicant asserts a failure to comply with fair procedures and with what they say were their legitimate expectations to compliance with the assessment criteria and the arrangement of a site meeting. They rely on *Fakih v. Minister for Justice* [1993] 2 I.R. 406 and *Gutrani v. Minister for Justice* [1993] 2 I.R. 427 where they say the Supreme Court has alternated between categorising the obligation to follow agreed procedures in the making of a decision under legitimate expectation and fair procedures and *Keogh v. CAB* [2004] IESC 32, [2004] 2 I.R. 159 where the failure to give effect to a specific undertaking in the Taxpayers' Charter of Rights meant the Revenue Commissioners had failed to ensure fair procedures had been applied. In more recent cases the obligation on bodies not to depart from agreed procedures when exercising administrative decision making powers has been found to be a breach of legitimate expectation; *Garda Representative Association v. Minister for Public Expenditure and Reform* [2018] IESC 4. Whether under the ambit of fair procedures or legitimate expectation, the courts have made clear that where an administrative decision-maker commits to a particular procedure outlining steps to be followed, any attempt to resile from them may invalidate the decision as a breach of fair procedures. Specifically, regarding procedural legitimate expectation, the applicants note the judgment of Barniville J. (as he was then). in *Facebook Ireland Ltd v. DPC* [2021] IEHC 336. The court recognised the starting point of any consideration of the legal principles applicable to legitimate expectation as the test set out by Fennelly J. in *Glencar Exploration Plc v. Mayo County Council (No. 2)* [2001] IESC 64, [2002] 1 I.R. 84. The applicants further rely on the summary of Clarke J. in *Cromane Seafoods Ltd v. Minister for Agriculture* [2016] IESC 6, [2017] 1 IR 119 at p. 142. Clarke J. referred to the requirement that any representation amount to a "clear commitment" and had to be "precise", while Charleton J. stated that there must be "an unambiguous and unequivocal declaration".

21. The Minister disputes that any breach of fair procedures or legitimate expectation arises. The applicant was informed of the assessment criteria that would be used for an existing fixed network and was or ought to have been aware what information was required to be provided before it started to prepare its submission. The information submitted in response to the requirement set out in Appendix A.1 to the assessment criteria was incomplete, with some information not provided and other information not meeting the requirement set out in the assessment criteria, while other information was unclear. The Minister disputes any legitimate expectation to a site meeting as any meeting was always conditional on the furnishing of information by the applicant, which was never forthcoming.

(v) Bias

22. The applicant claims that the materials published, actions taken and statements made throughout the mapping process demonstrate a clear bias against its technology, including the conversations averred to by Mr. Chambers in which he was told by department officials that it would be extremely difficult to convince the Minister that this technology qualifies as NGA. The applicant relies on the decision of the Supreme Court in *Murphy v. DPP* [2021] IESC 75 where the Supreme Court accepted that bias extends to any real possibility of a decision-maker approaching a case with a closed mind or anything other than an objective view. The applicant says the Minister excluded any possibility of altering the map to take account of their technology and there was a predetermined outcome of the assessment process that amounted to a failure to comply with the rules of natural justice; *Kelly v. Minister for Agriculture* [2021] IESC 23, [2021] 2 I.R. 624. The applicant submits that the test is whether the reasonable observer would apprehend unfairness by reason of pre-judgment, not whether the result is predictable; *O'Callaghan v. Mahon* [2007] IESC 17, [2008] 2 I.R. 514.

23. The Minister says the assertion of bias has no basis and is misconceived in circumstances where the applicant was expressly advised, orally and in writing, that since 2015 its technology was no longer excluded from the process. The application of the rule

against bias must take account of the different functions being performed, the legal circumstances of the decision being made, and the legal characteristics of the decision-maker; *Kelly; Orange; Reid v. Industrial Development Agency* [2015] IESC 82, [2015] 4 I.R. 494). Bias may not be inferred from a pattern of erroneous decisions; *Orange; O'Callaghan; Spin Communications Ltd v. Independent Radio and Television Commission* [2001] IESC 12, [2001] 4 I.R. 411.

(vi) A Collateral Challenge

24. The Minister argues that the applicant's entire application is, in fact, a collateral challenge to a separate decision of 19 November 2019 that the applicant has not challenged. On 20 September 2019 the applicant made a separate submission for NGA approval of their entire network. That application was assessed against the same assessment criteria as were applied to the impugned decision. In a decision dated 19 November 2019 (the same day as the impugned decision was issued by the Minister) the Minister made a decision, based on a report from AM dated 18 November 2019, that the applicant's entire network was not NGA compliant. That decision and the report upon which it is based is not the subject matter of any legal challenge and so both that decision and the accompanying report continue to enjoy the presumption of validity; *Smith v. East Elloe Rural District Council & Ors* [1956] AC 736; *Re Comhaltas Ceoltóirí Éireann* (unreported, 5 December 1977). The Minister emphasises that this application for judicial review does not challenge this 'other decision' and objects to an attempt to extend the argument regarding objective bias to this decision, relying on O.84 r. 20(3), *AP v. DPP* [2011] IESC 2, [2011] 1 I.R. 729 and *Alen-Buckley v. An Bord Pleanála* [2017] IEHC 541. This application for judicial review is therefore misconceived as it is really a collateral challenge to the 'other decision'. The Minister takes particular issue with the wording of the applicant's legal submissions seeking *certiorari* from the court quashing the decision of 19 November 2019 "to the effect that the applicant's network does not meet the essential characteristics of an NGA network for the purposes of the NBP..."

25. A further separate and non challenged decision was made when the Plan was approved by the European Commission in a decision dated 15 November 2019. The applicant is not entitled to collaterally challenge this or any other decisions of the respondent in these proceedings; *Shell E & P Ireland Ltd. v. McGrath* [2013] IESC 1, [2013] 1 I.R. 247, *Express Bus v. National Transport Authority* [2018] IECA 236, [2019] 2 I.R. 680 and the observations of the Supreme Court in *Costello v. The Government of Ireland* [2022] IESC 44.

26. The Minister also argues that quashing the impugned decision in relation to the Kilchreest site would be futile given that the entirety of the applicant's network has been found not to be NGA compliant in the other decision. Even if the applicant's Kilchreest site had been deemed to have passed the assessment criteria, there would have been no change to the Intervention Area or map as a submission would have been required for their entire network to determine if the aggregate network was delivering reliable NGA services or not and not simply one site.

27. The applicant asserts that the process pursuant to which it made its submission to exclude its entire network in September 2019 expressly did not include the Kilchreest site. The applicant contends it is not futile for the court to quash the Kilchreest decision even though it failed to secure exclusion for its entire network as it says the process recognises that the Minister can still change the map. The applicant also contends that it has a claim for damages resting on a loss of opportunity to have made its application for the entire network after the Kilchreest site application had been successful.

Decision

1. Collateral challenge

28. On the same day as the impugned decision of 19 November 2019 was issued, the Minister refused a separate application the applicant had made seeking to have its entire network approved as NGA (the "other decision"). That other decision has not been challenged by the applicant and therefore enjoys the presumption of validity; *Cullen v.*

Wicklow County Manager [2010] IESC 49, [2011] 1 I.R. 152, where O'Donnell J (as he was then) quoted Lord Radcliffe in *Smith v. East Elloe Rural District Council* [1956] A.C. 736 at pp. 769 to 770:

"Unless the necessary proceedings are taken at law to establish a cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders".

29. The applicant referred to parts of the application process for the other decision that expressly refer to and/or include the Kilchreest site. It therefore maintains that this other decision, which it accepts it has not challenged, does not cover the Kilchreest site. I do not accept the applicant's assertion that its application for approval of its entire network, somehow excluded the Kilchreest site because the applicant unilaterally decided to make a threshold application in respect of only one of its 50 sites. I do not accept that the applicant's application for approval of its entire network could or did exclude its Kilchreest site and I find support for that from the applicant's cover letter with its application which refers to seeking approval for "our NGA network" and for "our network coverage area". The application does not refer to excluding the Kilchreest site, which is not surprising as it would make little sense for the applicant to have sought approval for its entire network on the basis that such approval was not to cover one of its 50 sites. Insofar as the applicant relies on the department having said that it would not be reassessing previous applications, I consider that to have been a commitment by the department on the basis of a full application for an entire network and not the type of piecemeal, threshold application that the applicant unilaterally decided to make in respect of its Kilchreest site. The commitments made by the department do not render the Kilchreest somehow separate to and removed from the applicant's application for approval for its entire network.

30. The applicant relied on the decision of Murray J. in *Independent Newspapers (Ireland) Ltd v I.A.*, [2020] IECA 19, [2021] 1 I.R. 384, where he said at paragraph 56:-

"A 'collateral attack' in this sense arises in multi-stage decision making processes within which later decisions inevitably depend on and assume the legality of an earlier determination. In that situation, a challenge to the later decision may directly or indirectly present an issue as to the legality of the earlier one. Such an indirect attack is not permissible where the earlier decision could and should have been challenged within a fixed period which has passed. The rationale underlying the relevant case law is that a party who has the benefit of an administrative decision which is not challenged within a legally mandated time frame should not be exposed to the risk of having the validity of that decision subsequently challenged in later proceedings which seek to quash the validity of a subsequent decision (Sweetman v. An Bord Pleanala [2018] 2 IR 250, 264). In deciding whether proceedings are barred by this principle, the essential question depends on whether 'it is clear that a particular question or issue is to be definitively determined at an earlier stage so that there is no possibility to have that issue or question re-opened at a later stage' (id. at p. 265). If the legality of the first decision can be re-opened by a second decision, the challenge to the second decision is not properly viewed as a collateral attack on the first."

The applicant's challenge in the within proceedings is to the Minister's decision in relation to the applicant's site at Kilchreest which is one of fifty sites making up the applicant's entire network. It is entirely possible that this challenge could present an issue as to the legality of the other decision that the applicant's entire network has not been assessed as NGA compliant. The *Independent Newspapers* decision does not, therefore, assist the applicant in convincing me that their challenge to the Minister's decision not to recognise the Kilchreest site as NGA compliant, is not a collateral attack on the other decision.

31. I find that the applicant's application, which was refused in the other decision, did include the Kilchreest site and I am therefore satisfied that the applicant's attempt in the within proceedings to quash the decision refusing approval of the Kilchreest site is a collateral attack on the other decision in which approval for the applicant's entire network, including

the Kilchreest site, was refused on the same basis i.e. a failure by the applicant to satisfy the assessment criteria. In that regard I follow the observations of the Supreme Court in *Krikke v. Barranafaddock Sustainable Electricity Ltd* [2022] IESC 41 and *Costello v. Government of Ireland* [2022] IESC 44 at paragraph 167 of the decision of O'Donnell CJ where he cited *Shell E & P Ireland Ltd. v. McGrath* [2013] IESC 1, [2013] 1 I.R. 147 and *Express Bus v. National Transport Authority* [2018] IECA 236, [2019] 2 I.R. 680 in support of his view that a collateral attack on a planning decision, by analogy "would amount in substance to a circumvention of, for example, the leave requirement contained in s. 50 of the Planning and Development Act 2000".

32. If I am wrong in that and if the applicant is correct in its contention that the other decision did and does not include the Kilchreest site and therefore the refusal of the applicant's threshold application for approval of the Kilchreest site alone is separate to the other decision, then I am satisfied that the outcome of the other decision that continues to enjoy a presumption of validity, is such that it would be futile to quash the decision refusing approval for the Kilchreest site. This is because a decision in the applicant's favour could only, at best, permit the applicant to move to the next stage of its threshold application in seeking approval for its remaining 50 sites, which has already been refused in the other decision. Therefore the relief sought by the applicant would not and could not result in any change to the intervention area as the Minister has already determined, in the other decision, that the applicant's network does not meet the assessment criteria and cannot therefore be assessed as NGA compliant. Both an order of certiorari and the declaratory relief that is sought would be futile.

33. There is no basis for the applicant's case, that seems to have been made very late in the day and is not supported by the pleadings or on affidavit, that a claim for damages (which is not pleaded in this application) would be assisted by the grant of the declaratory relief on the basis that had the Kilchreest application been successful, the applicant seems to suggest it may not have failed in its application for the entire network. No such claim is made out in the pleadings and the applicant was not given leave to pursue same. Indeed it is noteworthy that the fact of the other decision refusing the applicant's application for approval of their network as NGA compliant is not mentioned anywhere in the applicant's pleadings or written submissions.

34. I therefore refuse the applicant's application for certiorari of the impugned decision and associated declaratory reliefs on the basis that those claims are an unacceptable collateral attack on the 'other decision' which is valid and/or that the grant of such relief would be futile in the light of the Minister's refusal to recognise the applicant's entire network as compliant for NGA.

2. The Application of the Assessment Criteria

35. My findings on collateral challenge and futility are sufficient to refuse the applicant's reliefs but in the event that I am incorrect in my conclusions, I will proceed to consider the applicant's case seeking to quash the impugned decision of 19 November 2019 for not having fairly or lawfully assessed the applicant's application pursuant to the assessment criteria. To do so I will firstly consider what the assessment criteria sought from the applicant, I will then examine how those criteria were interpreted and applied by the applicant and on behalf of the Minister. I will examine whether the applicant did comply with the assessment criteria and I will specifically examine the relevance of the 10:1 concurrency ratio that was first mentioned by AM in April 2019. I will examine the evidence presented by the applicant's expert supporting the applicant's case that the assessment criteria were not properly applied. On the basis of my findings in respect of those matters, I will assess whether the applicant has established that the impugned decision was irrational and unreasonable and/or involved a breach of the applicant's rights to fair procedures and/or legitimate expectations.

2(i) The Validity of the Assessment Criteria

36. Whilst this matter has a complex history dating back to the commencement of the mapping exercise in 2012 all the way up to the impugned decision of November 2019, there

are a number of relevant events and processes that that applicant does not challenge, including the mapping exercise and the assessment criteria. The assessment criteria, whilst not under challenge, are particularly central to the applicant's case. The assessment of the applicant's application against the assessment criteria that were adopted on behalf of the Minister is challenged by the applicant but the assessment criteria are not. The assessment criteria enjoy the presumption of validity, for the same reasons as set out above at paragraphs 28-34 in relation to the presumption of validity of the other unchallenged decision.

37. I have also had regard to the decision of Woulfe J. in *Krikke v. Barranafaddock Sustainable Electricity* [2022] IESC 41 at paras 60 and 90:-

"60. Like Donnelly J. in the Court below, I am not convinced that, because the proposed increase in rotor diameter was not expressly referred to in the body of the compliance submission, the decision-letter cannot be read as conveying agreement to such an increase. As Donnelly J. points out, the schematic is expressly referred to in the body of the compliance submission, and it expressly refers to a rotor diameter of 103 metres. The terms "noted" and "agreed" in the decision-letter related back to the material in the compliance submission, which included the schematic.

...

90. On the facts of the present case, it seems to me very difficult for the appellants to argue that the time limits in s. 50 make it in practice impossible or excessively difficult to exercise rights conferred by the EIA Directive, in circumstances where they have never sought to apply for judicial review of the compliance decision and have never tested the operation of the time limit rules."

38. The applicant did not participate individually in the public consultation process that led to the publication of the assessment criteria, in spite of their entitlement to do so. They did not raise any questions about what the assessment criteria meant or how particular phrases therein might be construed by the Minister. The applicant had some engagement with the department between the publication of the assessment criteria and their application of August 2018, all of which related to the applicant's concerns that its technology was excluded from being considered NGA broadband. The applicant never raised any concern or question about any lack of clarity in the assessment criteria as to what they should provide in seeking to be confirmed as NGA compliant or how real world testing might fit within criteria that, they now say, was focused on future networks. They never challenged the inclusion of what was required for a network to be assessed as NGA compliant, including for example link budgets of certain specified values (discussed further below). They never claimed that such information should not be required for the assessment of existing networks. Indeed, Mr. Chambers, director of the applicant company confirmed (at paragraph 7 of his first Affidavit) that when the department wrote to the applicant requesting them to provide *"the relevant information set out in Appendix A.1 [of the PwC Assessment criteria] that its existing network satisfies the technical criteria for NGA broadband set out in section 3.2 of the Assessment Criteria"*, Mr. Chambers noted (at para. 31) that *"[The applicant] welcomes the clear and unequivocal confirmation of the basis on which it could prepare its submission and upon which, and by reference to which, criteria that submission would be based"*. It does not seem from that correspondence that Mr Chambers had any concerns about any lack of clarity in the criteria or in what the applicant was required to do in order to have its network assessed as NGA compliant. His concerns do not seem to have materialised until after AM's initial assessment of the applicant's application.

2(ii) Did the Assessment Criteria cover Existing Networks?

39. The applicant claims that the assessment criteria were designed solely for the assessment of future planned networks, whereas the applicant was applying for approval for an existing network and that the assessment criteria were not designed to properly assess

an existing network. The assessment criteria do refer to future planned networks but they also refer to existing plans, for example, at Appendix A in setting out the information required from "all private investors or future operators" and at A.1 in identifying the information an operator is requested to furnish "separately for its existing and planned networks". The department wrote to the applicant on 14 May 2018, confirming that the criteria would apply

"in assessing whether an existing or planned network should be considered NGA broadband and excluded the IA (the "Assessment Criteria"). The relevant criteria applied and information required in respect of existing (rather than planned) networks can be found in Section 3.2 and Appendix A.1 respectively of the Assessment Criteria. It is incumbent on all network operators seeking to have their existing network excluded from the IA to provide the information in Appendix A.1".

The same points were reiterated by the department again in correspondence of 25 May 2018 and 29 June 2018 sent to the applicant. Any concern the applicant may have had arising from the reference in the criteria to planned networks (which the applicant did not express until its application was criticised by AM) should have been assuaged by AM's technical assessment of its application where, at page 1, AM confirmed that their application was "not assessed against the deployment criterion set out in Section 3.3 of the PwC Report because it is an existing network, and therefore the deployment criterion, which relates to planned networks, is not relevant". That reassurance is given again at page 4 of the assessment where AM says "The technical assessment criteria were used in the assessment of existing networks by Analysys Mason....".

40. In any event the applicant itself seems to have conceded in its application that the assessment criteria applied to existing, as well as to planned, networks. At page 4 of its application it said that at that time it only sought "to have its existing in-place NGA network and coverage areas recognised as such by the DCCAE. Lightnet is not seeking approval in respect of any future NGA coverage....".

41. There is no merit to the applicant's assertion that the assessment criteria did not cover existing networks and were designed solely to assess future networks.

2(iii) The criteria identified in the assessment criteria

42. The assessment criteria set out the technical assessment criteria that would be used. They identify the parameters (at 3.2) and how they are linked to the information required from the applicant (at appendix A). Parameters 1.2 and 1.3 were scoped out further in four points that the department said it would consider, all of which were stated to relate to the speed and capacity of the service. Those four points were:

"- *If the proposed technology will deliver a minimum of 30 Mbps download and 6 Mbps upload to each user.*

- *If the access network, using the proposed technology, is designed to deliver 30 Mbps and 6Mbps to all users under normal operations.*
- *If the proposed backhaul network is designed to deliver 30 Mbps download and 6 Mbps upload to all users when the user demands it.*
- *If the distance between the first point of active aggregation and the premise (over which a minimum 30 Mbps and 6 Mbps upload service is to be delivered), has been established using distance modelling and/or link budgets which are supported by evidence assumptions."*

Some phrases within those points were defined further in footnotes. Following those four points, the assessment criteria identifies some of the technical specifications that the Department will examine in reaching a view, including traffic models and property and evidence of testing.

43. Some of the phrases used in the technical criteria led to debate between the applicant and the Minister as to what the criteria meant and what was required of the applicant. The applicant relied on the report prepared by its expert in submitting what certain words or phrases in the technical criteria actually meant. In fact their expert did not offer a meaning for the phrases but simply criticised the phrases for being unclear and ambiguous. That criticism, if valid, goes to the assessment criteria rather than to their application. The assessment criteria were never challenged and enjoy a presumption of validity.

44. If the applicant was of the view that it could not understand what certain phrases in the assessment criteria meant, then they could and should have sought clarification in advance of making their application. The applicant did engage with the department in advance of making their application in August 2018 in relation to their concern that their technology was excluded and the clarification they sought was provided. There was no mention of any lack of clarity or understanding at that time about what any words in the assessment criteria meant or what the applicant understood to be required by the department.

45. In any event, I am not satisfied that the words in question can or should necessarily bear the very technical meanings urged on the court by the applicant, given that many of them are English phrases that can and should be given their ordinary meaning, albeit that they appear in a document pertaining to complicated technology. Some of the phrases are qualified or explained further in footnotes. For example the phrase "*under normal operations*" is defined in footnote 6 as meaning any time other than specified *force majeure* type situation such as maintenance or weather that might take the broadband out of service. Footnote 6 goes on to say that the department "*assesses busy hour assumptions and consider the designed capacity of the access and backhaul networks during the busy hour*". It was common case that the phrase "*busy hour*" means that time of the day when there is most demand for broadband, typically around 8pm. Footnote 7 appears after the phrase "*when the user demands it*" to confirm that the department "*assess busy hour assumptions and consider the designed capacity of the access and backhaul networks during the busy hour*". "*Capacity*" is clearly identified in the technical criteria as something that will be taken into account, as one would expect in an exercise designed to assess the quality of broadband, *inter alia*, for all the provider's users when the users demand it. One does not have to be a technical expert to understand that providing broadband to all the provider's users when they demand it means that a network provider will have to provide a high level of capacity and that assessing capacity will involve looking at how many of those users can access that broadband successfully at any time, including during the busy hour.

46. A further technical requirement is set out at point 4, where the assessment criteria confirm that the department will consider if "*the distance between the first point of active aggregation and the premises has been established using distance modelling and/or link budgets*". This is followed by footnote 8 that explains "*For wireless link budgets, the cell edge probability should be 95% and the cell area probability should be 98% or greater in order for the coverage to be mapped*". This clearly imposes identified required values, i.e. cell edge probability of 95% and cell area probability of 98% or greater, something that can be understood even without a full understanding of what cell area probability and cell area probability actually are. The technical criteria do not clarify what those concepts of cell edge probability or cell area probability are but the criteria clearly advise even a non-technical reader that the department requires a minimum percentage of those concepts for an application to be assessed as technically compliant with the assessment criteria.

2(iv) The interpretation/application of the criteria

47. The applicant interpreted the technical criteria as requiring testing during the busy hour, which they say they did. They say that that their approach of establishing the speeds required during the busy hour was sufficient, even though their test results did not satisfy the 10:1 concurrency ratio which the department required but which was not identified by AM until April 2019. From soon after AM did a preliminary assessment of the applicant's application and highlighted the additional information and clarification that was needed, the applicant made it clear that they disputed AM's entire approach as an unlawful deviation

from the assessment criteria and the imposition of a new requirement not included in the assessment criteria. Their strong disagreement with and criticism of AM's approach and analysis is apparent from their correspondence, for example in their solicitors' letter of 8 March 2019. What was also apparent was the applicant's insistence on maintaining the correctness and suitability of their approach and the absence of any attempt to engage with AM to provide AM with the clarification and information that it said it needed. For example it seems that the applicant accepted in principle the concept of a concurrency ratio in its response to AM's questions of April 2019 in saying that a 20:1 ratio would be more appropriate by reference to the applicant's experience and data published by the UK regulator. At no time from when the applicant became aware in April 2019 of AM's views that compliance with a 10:1 concurrency ratio was necessary, did the applicant take any steps to try to rework their application so as to seek to comply with the 10:1 ratio. Instead they continued to engage in a trenchant criticism of it, but at the same time recognising the appropriateness of a different and higher and static ratio.

48. Mr Chambers, for the applicant, confirmed in his second affidavit (at paragraph 63) that had AM's requirement to provide download and upload speeds concurrently to 10% of the applicant's active subscribers during busy hours and AM's interpretation of the assessment criteria that NGA speeds be available *"to all users when they demand it"* in this way been made clear, that the applicant *"could have easily configured its network so as to ensure each active subscriber had enough bandwidth so as to meet the test"*. However Mr Chambers says the applicant had no way of knowing that AM or the Minister would interpret the assessment criteria as requiring the provision of such speeds *"to all users when they demand it"* as meaning to provide those speeds concurrently to 10% of active subscribers during busy hours. Counsel for the applicant suggested that the applicant's ability to attempt compliance with the 10:1 ratio between when they were first informed of it in April 2019 and the Minister's decision of November 2019, was thwarted by the applicant not being told by the department was the phrase *"active users"* meant. If the applicant is correct and they were genuinely unable to understand what that phrase meant, I fail to see how they can rely on that lack of understanding in justifying their inaction in trying to comply with a 10:1 ratio, when they never asked AM or the department what the phrase meant or was understood by AM to mean throughout the extensive engagement the applicant had with AM and the Department in relation to the assessment of their application between September 2018 and May 2019 as referred to at paragraph 10 above and their subsequent engagement after the AM preliminary report of July 2019, including a detailed submission to that AM report of 16 September 2019.

49. In any event, it was the applicant who decided to conduct their tests on a site with 271 paid up subscribers but to only test 146 of them. The Minister submitted to this court that the phrase *"active users"* had to mean the applicant's 271 paid up subscribers. But even if it does not, it would have been a simple exercise for the applicant to have asked AM or the Minister what they considered the phrase in question meant. The applicant chose not to do so and instead to focus on criticising AM and the Minister for not understanding the applicant's data. For example, in the applicant's submission of 16 September 2019 responding to AM's technical assessment, the applicant claimed that *"requests for further information were replete with unacceptable errors in respect of the data already provided and suggest that Lightnet's data had either not been read or had not been read by anyone with the technical expertise to understand it"* (paragraph 56). The submission goes on to condemn AM's construction and application of the requirement in the assessment criteria that minimum download speeds be available to all users *"when they demand it"* (at paragraph 58). This was in spite of the fact that at no time did the applicant, either before or in that submission, seek clarification of what AM or the Minister understood the phrases that they now say they did not understand, meant.

50. The applicant confirmed in their oral submissions that they could have tested on a concurrency ratio of 10:1 between April 2019 (when they say they were first advised of it) and November 2019 (when the Minister made the decision that the applicant seeks to impugn) but only with an understanding of what the phrase *"active users"* meant. For the reasons set out above, I do not find that explanation for the applicant not responding proactively to addressing compliance with the 10:1 concurrency ratio to be convincing. I do

not have to make a definitive finding on what any of those phrases did actually mean in circumstances where I have found that the applicant made no attempt to ask what seems to be a fairly simple question of AM or the department ie what did the phrase "active users" mean and then use the answer provided to try to demonstrate how the applicant's network could, in fact, comply with what the applicant says was a requirement only communicated to them in April 2019.

51. Parameter 1.2 required the applicant to establish that their network provided a "*Minimum download speed of 30 Mbps to all users when they demand it*". The applicant was found not to be able to satisfy that but the applicant claimed this was wrong as parameter 1.2 was explained to be referring to normal operations in the busy hour (Transcript day 2, pages 136-137) and that their tests showed that they were able to provide the required speeds to their connected customers who were using their internet during the busy hour. They said they had demonstrated compliance with parameter 1.2 by reference to what the department had said they were going to consider under normal operating conditions (Transcript day 2, pages 135). Counsel for the applicant described the criteria as "*dealing with the actual capacity in the case of the access*" and that the criteria say "*the access network during the busy hour*" (Transcript Day 2, page 165). The applicant claim that the criteria say nothing about a concurrency ration but simply require a network "*to meet the busy hour*" (Transcript day 2, page 165). Later, in criticising AM for seeking information that the applicant did not provide, Counsel for the applicant said that the department should have assessed whether "*the existing network and the technological solutions deployed there provide in real world the required speeds*" (Day 3, p. 44).

52. A different analysis of what was required by parameter 1.2 was applied by AM, which ultimately led to their conclusion that the applicant's access design network at the Kilchreest site could not comply with that parameter. AM's analysis is succinctly summarised by AM's manager, Khooshiram Oodhorah in his first Affidavit where he states at paragraph 12 as follows:-

"Analysys Mason reviewed, clarified and assessed the information provided by the Applicant and, based on the information provided, concluded that the Applicant's access network design does not meet the technical criteria set out in the PwC assessment criteria. This is principally (though not exclusively) due to our assessment that the Applicant's access network design (deployed at the Kilchreest exemplar site) cannot provide a 30Mbps download speed to the Applicant's current number of users when they demand it and our assessment that the Applicant's access network design cannot provide a 6Mbps upload speed to the Applicant's current number of users when they demand it. The Applicant submitted a list of 287 premises which the Respondent confirmed represented 271 premises (after removing a small number of duplicate premises and other anomalies). To be clear, these parameters under the criteria as set out in the PwC assessment criteria require a consistent download speed of 30Mbps and a consistent upload speed of 6Mbps to all users when they demand it. It is important to note the distinction between a theoretical peak which is often characterised by providing "up to" labelling (for example, up to 30Mbps download) and a guaranteed availability of that speed to all users demanding it which is what is set out in the PwC assessment criteria. The PwC assessment criteria require that the guaranteed availability of speeds at all times "under normal operations" which is defined in footnote 6 of the PwC assessment criteria as meeting the performance parameters under normal operating conditions, that is, at any time except for: any time that is required for pre-planned network maintenance, which requires the broadband service to be taken out of service (typically undertaken during the night when usage is low: instantaneous atypical network usage characteristics: and a force majeure event e.g. extreme weather conditions."

53. The applicant also criticises AM for seeking details of the tests the applicant had carried out. This was in spite of the assessment criteria clearly identifying "*evidence of testing*" as a technical specification that the department may want to examine. Nevertheless the applicant claimed that the test hypothesis was not relevant (Transcript Day 2, page. 106) and challenged the appropriateness of AM's request for information about the tests the

applicant had conducted to demonstrate that their network was NGA compliant. The applicant was unable to provide the information AM sought because they could not replicate the tests and because they had not retained some of the data, but their inability to provide the information does not, in itself, establish that it was unreasonable or unfair for AM to seek sight of the information particularly where the assessment criteria clearly said that the Minister was wish to examine "*evidence of testing*". The applicant chose to conduct tests to establish that their network was NGA compliant without retaining information about those tests and they are responsible for the consequences of that choice. Mr Chambers deposed (at paragraph 44 of his grounding Affidavit) that the tests were performed in anticipation that they would be re-run in front of the department's technical experts and therefore that details sought by AM such as the location of each client unit in the sample group for the link capacity test, was not recorded and the GPS co-ordinates were no longer available and were impossible to engineer. That may be why the information sought by AM was not available but it certainly does not render it unreasonable for AM to have sought it or to have made recommendations to the Minister on the basis of its absence. In assessing distance (referred to above at paragraph 46) it was entirely reasonable that the Minister might have expected information about locations and entirely reasonable that the Minister would have expected evidence of the testing to be available. If the applicant carried out their tests without retaining information about them, they are responsible for that.

54. AM in their Questions for the applicant of 13 December 2018 and reiterated in their Questions of 15 April 2019, set out what they needed to assess the applicant's test design including the exact location of each client unit in the sample group and the configuration of each client unit. The applicant's response of 8 March 2019 explained that the test could not be replicated as the locations had not been recorded but that if this information had been requested in advance of the applicant's tests and its application of August 2018, that it could have been provided. When the point was pressed by AM in its Questions of April 2019, the applicant's response of 15 May 2019 was far from subtle in stating, at 2.5: "*This is a problem of the Department and AM's own making because it did not request that this information be obtained before the test*". That was an extraordinary response to a request for what was clearly the "*evidence of testing*" that is identified in the assessment criteria as one of the technical specifications that will be examined in reaching a view on whether the applicant's network satisfies the speeds required by parameters 1.2 and 1.3. There was nothing unfair or unlawful in AM or the Minister seeking evidence of testing so that the Minister could properly assess the applicant's compliance with the criteria. The applicant's expectation of a site meeting with a re-running of the tests is no excuse for the applicant not having retained the very evidence that the assessment criteria clearly said may require to be examined.

2(v) Did the applicant comply with the assessment criteria?

55. I found the applicant's attitude towards their compliance (or non compliance) with the assessment criteria's requirements around link budgets to be particularly illuminating of the applicant's attitude towards the assessment process that the department had put in place. The assessment criteria (at the fourth point in relation to parameters 1.2 and 1.3, set out at para. 42 above) refers to link budgets as something that will be considered and further explanation is provided at footnote 8 (set out above at para. 46). Clear minimum percentages are imposed by the assessment criteria for cell edge probability and cell area probability. The applicant (at page 8 of its application) was able to confirm that it exceeded the 95% requirement for its cell edge probability at a cell edge probability of 99% but its cell area probability was only 50%, which fell well short of the 98% or greater that was required by footnote 8 of the assessment criteria. The applicant's application includes what seems to be an explanation in relation to that 50% namely "*stations are not mobile and use a high gain antenna professionally*". However the assessment criteria did not allow for any exception to the requirement of 98% or greater for an applicant's cell area probability.

56. AM repeatedly raised queries about the applicant's link budget in its requests for information and clarification arising from the applicant's application of August 2018, on 17 September 2018, 5 November 2018, 13 December 2018 and 15 April 2019. In its final attempt to secure the information it said it required in its Questions of April 2019, AM asked the applicant, once again, to *"Please provide a link budget in Excel which takes downlink and uplink speeds as inputs and calculates distance (i.e. cell radius) as an output."* Even a non technical person can appreciate that this is looking for an excel spreadsheet that feeds speeds into a spreadsheet from which distance is calculated from the speed data that has been provided. For an assessment that is all about assessing whether the applicant's broadband is of sufficiently high speed to be assessed as NGA and which specifically identifies one of the matters to be considered as how a particular distance has been established (the fourth of the four bullet points scoping out how the department will assess compliance with parameters 1.2 and 1.3, set out at para. 42 above), there could have been nothing surprising in AM seeking this information. However the applicant's response, in particular that of May 2019, does little or nothing to even attempt to provide what is sought. Instead it engages in a strongly worded criticism of AM's approach. At 2.1 of the May response, the applicant says it *"does not understand AM's requirement to provide a formula or equation that has "a particular speed" as an input, as this has no relationship to the modulation rate thresholds that govern the actual speed that can be received at a particular location"*. Whether the applicant understands or agrees with it or not, does not cancel out AM's entitlement to seek information that is clearly required by the assessment criteria. The applicant may have believed that there was a better way of doing the assessment, but that does not render AM's approach unlawful.

57. In its final submission of 16 September 2019, the applicant correctly stated at paragraph 63 that AM *"had very clear views as to what was required in terms of data for link budget planning"*. The applicant went on to claim that *"such concerns were not made clear at the commencement of the process"*. That is not so. The link budget data, and in particular the 98% or greater requirement imposed by the assessment criteria for cell area probability was clearly set out to the applicant in the assessment criteria.

58. The applicant says in that final submission that it *"used the industry standard Pathloss program to generate the coverage maps"* (at paragraph 63). The Pathloss programme is praised by the applicant's expert as a better and more sophisticated tool to carry out a link budgeting exercise. Whether that is correct or not, a full Excel-based link budget was what was required by the department which was to be supported by *"evidenced assumptions"* (as per point 4 in relation to 1.2 and 1.3 set out at para. 42 above). Counsel for the applicant said that *"link budget planning and data has been provided"* (Transcript Day 4, pages 174 to 175). However AM said it was not. It is clear that it was not provided in the format as required by the assessment criteria including cell area probability of 98% or greater. The applicant provided the cell area probability at 50%, which was validated by its expert who claimed that AM carried out the wrong tests. In his second affidavit, at paragraph 75, Mr Burns explains that the applicant *"was not concerned to prove that the cell edge of its coverage area extended beyond the most distant of its connected customers. Lightnet was content to draw the line at that distance because it already knew, by virtue of that existing connection, that it could provide NGA service that far."* (at para. 75)

59. In its submissions to this court, the applicant sought to justify its non-compliance with the minimum 98% requirement. Counsel for the applicant said the purpose of the link budget was to project in a coverage area, i.e. a prediction, but that the applicant was not *"engaged in a prediction, they were attempting to establish a reality of connection which already exists"* (Transcript Day 4, page 166). This was consistent with the applicant's approach throughout their submissions, i.e. that AM required them to furnish information they considered they *"should not have had to provide"* (Transcript Day 4, page 169), that *"anything that was required for the test as prescribed in the assessment criteria was provided"* (Transcript Day 4, page 170) and that *"[I]t wasn't up to the Department/Analysys Mason to indicate what kind of information or evidence should be put forward by Lighthouse in order to demonstrate its ability to meet these standards, it was for Lighthouse to decide what kind of evidence to put forward"* (Transcript Day 4, page 172). Those views were supported by the applicant's expert who described the assessment criteria's requirements

for link budgets and polygonised coverage data as “*redundant and unhelpful to all parties*”. He even went as far as saying that AM had a “*fixation on link budgets*” which he said was “*inappropriate to the assessment of an existing network*” (Mr Burns’ second Affidavit at paragraph 72). Whether one agrees with the requirements of the assessment criteria or not, such requirements must be adhered to in order for an application to succeed. The fact that the applicant’s expert considered the analysis of cell area and cell edge probability (which I am taking must have included the minimum values for both as set out in the assessment criteria and discussed at para. 46 above) to have been irrelevant to mapping an existing network does not assist this court in assessing the validity of the assessment against those criteria that was carried out. I am satisfied, for the reasons set out at paras. 39-41 above, that the assessment criteria did cover existing as well as future networks and I am therefore satisfied that the assessment criteria required certain cell area and cell probability values for both. The applicant and their expert may not agree that this should have been required by the assessment criteria but their disagreement is irrelevant where the court is only asked to assess the validity of the application of the criteria rather than the validity of the assessment criteria themselves.

60. The applicant’s counsel claimed that AM’s criticism of that information gap was “*not relevant to the test, to the assessment which was being carried out*” (Transcript Day 4, page 186). This was explained further by the applicant’s claim that link budgets are relevant for a future, rather than an existing network (Transcript Day 5, page 38), a view supported by the applicant’s expert. The applicant submitted that the court’s task was to look at the assessment criteria and the information to be provided for an existing network and “*to take a view as to whether or not one needs to provide information about other potential future subscribers, or future customers, in the area that we might seek to connect with in the future.*” I do not agree. The assessment criteria required a link budget with certain specified values. The department was entitled to impose this requirement. There was nothing irrational or unreasonable, in the *Meadows* sense, in their doing so. The fact that the applicant and their expert disagreed with the requirement and identified what they said was a better way of doing what was required is neither here nor there.

61. The assessment criteria are valid. The court has been asked to assess the legality of how they were applied. The assessment criteria require a link budget with specified minimum values. A link budget with the required values was not provided by the applicant, in spite of repeated requests by AM. Instead, the applicant criticised AM for seeking what they asserted, supported by their expert, was irrelevant information. Whether it was relevant or irrelevant, it was information required by the assessment criteria. If the applicant considered the information sought to be irrelevant, it could have raised that point in the consultation process that took place before the assessment criteria were published. Alternatively, it could have sought to challenge the assessment criteria at the appropriate time. At a minimum one would expect that the applicant would have sought to engage with the department on this point prior to submitting their application for NGA approval in August 2018. Whilst they did engage with the department about matters on which they required clarification before putting in their application (in particular that their technology was not being excluded, as set out at para. 44 above), they said nothing about the link budget values that were clearly required by the assessment criteria. It is not open to the applicant to seek to challenge the imposition of those requirements because they were of the view that the values required were irrelevant to their application, a view that they seem to have kept to themselves until concerns were raised about the applicant’s compliance with those requirements of the assessment criteria.

2(vi) *The Imposition of a Concurrency Ratio Test during the assessment process*

62. The applicant criticises AM for introducing dimensioning and a concurrency ratio in its assessment of the application, which the applicant says was never part of the assessment criteria and therefore constituted an unlawful imposition of a requirement after the applicant had completed its application. The Minister denies the imposition of a new requirement and argues that the concurrency ratio was simply part of the engineering and capacity issues that are in the assessment criteria. “*Capacity*” is expressly identified in the assessment criteria as something the department may wish to examine. The assessment criteria also

confirms, at 3.1, that assessing whether a criterion is met is not a mechanical application of rules but also involves “*qualitative, professional judgement*”.

63. I am satisfied that the concept of a concurrency ratio links directly to capacity, as confirmed by counsel for the applicant (Transcript Day 2, page 110) when he defined concurrency ratio as “*the maximum number of subscribers who are permitted to share a given amount of bandwidth on the basis that they may use it simultaneously*”. I am satisfied that the assessment criteria allows for consideration of a concurrency ratio in identifying capacity as one of the technical specifications that will be examined and in including a qualitative professional judgement as part of the assessment criteria. Even though that tool used to identify capacity is not expressly referred to in the assessment criteria, its application in assessing capacity should not have come as a surprise to the applicant (if indeed it did). I find support for that in Mr Chamber’s averments in his grounding Affidavit where, at paragraph 45, he sets out his view, which he says is supported by a 2012 paper that he cites, that “*a concurrency ratio should not be dimensioned as a simple static value*” and that “*Analysys Mason’s application of a static, one-size-fits-all, concurrency ratio betrays a fundamental misunderstanding of the mathematical underpinnings involved*”. The applicant’s expert was equally critical of the 10:1 ratio, describing such a “*static contention ratio*” as “*highly inappropriate*” but he does not identify what ratio, if any, would have been more appropriate. Mr Chambers does say at paragraph 46 of his Affidavit that a concurrency ratio of 20:1 would be more appropriate. A similar proposal of a 20:1 concurrency ratio was also made by the applicant at paragraph 65 of its submission of September 2019 to AM’s technical assessment. Mr Chambers does not criticise the use of the concurrency ratio but rather he criticises the value of the concurrency ratio that AM used and proposes a concurrency ratio of a different, but still static, value.

64. AM’s application of a concurrency ratio did not equate to a new test of which the applicant should have been advised in advance and given an opportunity to meet. The applicant knew or ought to have known it had to meet a test of capacity and that a qualitative professional judgement would be applied as part of the assessment. That was all set out in the assessment criteria. The applicant failed to meet the assessment criteria by reference to a concurrency ratio of 10:1, the basis for which was explained by AM both in its responses to the applicant’s submissions during the application process and in the evidence on affidavit and the submissions made to this court. The application of that concurrency ratio by AM in its assessment of the capacity of the applicant’s network does not render the application of the assessment criteria or the Minister’s decision not to approve the applicant’s network as NGA compliant unfair or unlawful.

2(vii) The Applicant’s Expert

65. The applicant relied on the opinion of its expert witness, David Burns, whose report was exhibited to a short affidavit in which he set out his positions and experience. In a later affidavit Mr Burns confirmed he had previously been asked by the applicant to provide a report commenting on the applicant’s application of August 2018 against the assessment criteria. He also confirmed that he is cognisant of his duties as an expert witness and says he has complied with them. Two of AM’s employees swore affidavits commenting and questioning both Mr Burns’ independence and his analysis. Mr Burns swore a lengthy replying affidavit in which he asserted his independence and provided a detailed analysis and critique of the assessment criteria and how AM had misapplied them to the applicant’s application. He set out his firmly held view that the applicant’s network is NGA compliant and his criticism of AM’s approach in their assessment of the applicant’s application for having ignored real world data in order to rely solely on a theoretical exercise. He concluded that had the Minister or AM communicated its interpretation of the assessment criteria to the applicant in advance of the applicant’s application, that it is “*entirely possible*” that the applicant would have been able to demonstrate compliance with AM’s requirements.

66. Mr Burns has ten years experience working in the wireless industry and sets out much of that experience in his report under the heading ‘Qualifications and Experience’. He is the chairman of the UK Wireless Internet Services Providers Association which is the UK’s recognised trade body for the FWA industry and the MD of one of the UK’s largest internet

service providers. He is a director and founder of Wireless Coverage Ltd, a UK business specialising in network design and modelling. He identifies various projects in which his company has been involved, including preparing a detailed coverage model of all of Ireland for 28 FWA operations as part of their submission to the department in the 2019 mapping consultation that ultimately led to the applicant's application for approval of its network. He does not identify any educational qualifications either in his report or his affidavit, which would suggest that he does not have any qualifications relevant to the matters on which he is furnishing an expert opinion. He does not cite any scientific study, paper, textbook or accepted principles to support his analysis of the assessment of the applicant's application or his opinion that the applicant's network is NGA compliant in accordance with the assessment criteria.

67. Mr Burns said at paragraph 6 of his replying affidavit that his work qualifies him as an expert. Whilst Mr Burns' ten years experience in the wireless industry could be valuable and relevant to the court, it is surprising that an expert witness whose only expertise comes from their work experience, who has identified no educational or academic qualifications or scientific studies and who has not referred to any reference works, academic works, papers or accepted principles, would be proffered to the court to assist the court in making its findings on very technical matters where a number of highly qualified individuals on behalf of the applicant and the respondent have put forward their very different and often contradictory views.

68. An issue of further concern to the court is whether Mr Burns is a truly independent witness, as one would expect from an expert witness whose task it is to assist the court. Mr Burns identified in his report that his company had prepared a detailed coverage model of all of Ireland for 28 FWA operations as part of their submission to the department in the 2019 mapping consultation. He did not confirm in his report that one of those 28 FWA operators was the applicant. This highly relevant fact was identified by Patrick Kidney, a partner with AM and one of the Minister's deponents in an affidavit replying to Mr Burns' first affidavit in which he exhibited his report. Mr Kidney, in questioning Mr Burns' independence, described him as a wireless ISP advocate, a wireless operator and a product supplier to the applicant. Mr Burns, in a lengthy replying affidavit, confirms that the applicant was one of the group of 28 FWA operators to which Mr Burns' company provided assistance with the 2019 mapping consultation submission but that he was not engaged by the applicant for that and his company was not engaged by the applicant to assist it with its individual mapping submission. The introduction to that report of 30 September 2019, that is authored by Mr Burns, says it was prepared at the request of the 28 wireless internet service providers (which we now know included the applicant). It goes on to say that the companies wanted to *"demonstrate with as much scientific rigour as possible the number of houses passed by their significant investment in broadband infrastructure throughout Ireland and indeed the proposed NBP intervention area. Operators would like to see the NBP harness this private investment already made, which would deliver far higher value for the public purse."* It is clear that Mr Burns' report is aimed at providing the applicant and its fellow wireless internet services providers with scientific evidence of their broadband coverage in order to assist them in persuading the department that their areas of coverage should not be included in the intervention area. That is very similar to the ultimate aim of the decision that is challenged in the within proceedings i.e. the applicant's application for recognition that its Kilchreest site was NGA compliant.

69. The fact of Mr Burns involvement in providing assistance to the applicant and 27 other FWA operators with their collective submission to the 2019 mapping consultation, which he did not disclose to the court until it was highlighted by Mr Kidney, is a matter which goes to his independence and should have been clearly identified in his report.

70. In his report under the heading 'FWA and Next Generation Access ("NGA") Technology', Mr Burns engages in an overview of FWA networks and how they have been recognised in the UK as NGA compliant. In the last paragraph of his nearly three pages of endorsement of FWA technology, he refers to having *"previously had occasion to review Lightnet's operations and the manner in which Lightnet deploys its chosen technology"* which he describes as *"exemplary"*. It is not clear what was the previous occasion on which he

reviewed the applicant's "exemplary" operations. Whether it was when he advised the 28 FWA operators including the applicant or another occasion, it is another point of concern in terms of Mr Burns' independence and the weight to be attached to his expert evidence.

71. I am also concerned with the contents of Mr Burns report and, consequently, the extent to which his comments could be of assistance to the court as an expert witness' independent opinion should be. It is almost trite law to say that an expert witness must not be an advocate for either side, regardless of who is paying their fee, but rather should be a source of specialised and independent assistance to the court on which the court can rely having regard to the expert's expertise and their understanding and application of their duties to the court. In providing such assistance to the court, the expert will set out their opinion and conclusions. For those opinions and conclusions to have any utility, the expert should identify the facts and analysis on which they are based. In this case, which involves very technical issues, Mr Burns stated at paragraph 7 of his replying affidavit, that his sole concern in the preparation of his report was to consider whether AM "have correctly applied the test set out in the Assessment Criteria to the material submission by the Applicant". He concludes at paragraph 83 of his replying affidavit, that "having carried out a full assessment of the data provided by Lightnet in respect of its submission of August 2018 against the Assessment Criteria it is clear to me that the Lightnet solution is properly classified as NGA, if that term is interpreted, as required by the Assessment Criteria, in a manner which adheres to the SAG". However when one examines his report, it strays considerably beyond a consideration of AM's assessment of the applicant's application against the assessment criteria and does not demonstrate or vouch a full assessment of the applicant's data. Seven pages of his report covers his analysis of the assessment criteria, from which he concludes there are gaps in the definitions and a lack of clarity about what is required which he says renders it impossible for the applicant to know the department's understanding of the requirements. He condemns a number of words and phrases in the assessment criteria as ambiguous, the technical information requested of the applicant as inefficient and, in effect, irrelevant and the focus of the assessment criteria as narrow in perspective, describing it as "strange" that the assessment criteria has only focussed on the matter of interference.

72. However the assessment criteria are not, and never have been, challenged. Therefore, Mr Burns' criticism of them is irrelevant and is of no assistance to the court in its task of assessing the application of those criteria to the applicant's application. Whether the requirements of the assessment criteria are good, bad or indifferent is of no consequence. They are the requirements and must be complied with, regardless of the expert's view that there is a better and more efficient way of assessing a network as NGA compliant.

73. The report goes on to assess AM's technical assessment reports of July and November 2019 as "misconceived". By the time he swears his replying affidavit his criticism has become somewhat more trenchant and towards the end of his affidavit, at paragraph 80, he describes AM's approach as "so unreasonable as to be irrational". He makes a vague and unsubstantiated claim that AM failed to "engage adequately with the data provided". He asserts that a review of the applicant's data "demonstrates without doubt" that it was sufficient for a positive assessment in accordance with the assessment criteria and in particular that the applicant's data demonstrated that customers could access NGA speeds. He accuses AM of having made mistakes and having flaws in their analysis. However, there is no clear summary of the relevant facts on which these extravagant claims are based or an account of the mistakes and flaws or an analysis of the data such as to demonstrate compliance with the assessment criteria as one would expect in order to ground an opinion that the applicant's application should have been assessed as NGA compliant. Indeed the confidence with which Mr Burns asserts that the applicant's data was sufficient to establish that its network is NGA compliant and that AM departed from the tests for NGA in the assessment criteria, is somewhat inconsistent with the claimed ambiguities and lack of clarity that he condemns in the assessment criteria as having made it impossible for the applicant or any other operator to know the department's understanding of the requirements of the assessment criteria.

74. Mr Burns strayed into advocating for an alternative and, in his view, better method of assessment than that applied by AM. For example, he says that AM's criticisms of the data

the applicant provided on link budgets are misplaced and AM finding fault with the applicant's cell edge and cell areas answer of 99% and 50% showed, in his opinion, that AM carried out the wrong test. However, as discussed at para. 46 above, the assessment criteria required minimum values of 95% and 98% and therefore the applicant's answer of 50% simply could not comply with the assessment criteria's requirements. Mr Burns' view that AM's requirement of 98% was arbitrary and irrelevant does not change the fact that the unchallenged and currently valid assessment criteria required 98%. Mr Burns may have identified an alternative or even a better way of assessing an application for a network to be assessed as NGA compliant (and I make no such finding) but it is not for this court to assess the relative values of the applicant's approach as versus AM's approach but rather to determine whether AM's approach properly and lawfully complied with the assessment criteria. Mr Burns' criticism of the criteria and his presentation of alternative methods of assessment is irrelevant to that determination.

75. I have therefore found Mr Burns' opinion to be of limited assistance to the court in assessing the analysis of the applicant's application as against the assessment criteria.

3. The Legal Consequences of the how the Assessment Criteria were applied

76. The applicant claims that the assessment criteria were not properly applied and led to a decision that was unreasonable and irrational; the Minister's failure to properly apply the assessment criteria breached their rights to fair procedures; the late imposition of the concurrency ratio breached their legitimate expectation as to how they expected the assessment criteria would be applied. I consider each of those legal claims below.

3(i) Irrationality

77. The applicant asserts that the manner in which the assessment was done by AM on behalf of the Minister and what they say was the failure to properly apply the assessment criteria, led to a decision of 19 November 2019 that was so disproportionate as to be irrational, relying on *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701. It is not the task of this Court to determine whether the applicant and its expert were right or wrong in their view that the applicant's network is NGA and that the applicant was able to establish the speeds required by the assessment criteria at the busy hour in a different way to the methodology required by the assessment criteria. The applicant's challenge is to the Minister's application of the assessment criteria. However much of the applicant's submissions seemed to have focussed on the methodology and verification process applied by AM on behalf of the Minister, rather than on their own application of the assessment criteria.

78. The assessment criteria advised a potential applicant how the department will assess a provider's network and what will be considered in determining whether their network can be recognised as NGA. That may not be the only way of making such an assessment. The applicant and its expert clearly believe that there is a different and better way of doing so, but it is not the task of this court to determine the quality of the assessment criteria set against a different method of assessment, or to prefer a different methodology. Rather, the court must determine whether the assessment criteria published by the department in 2015 as the basis on which the applicant's network would be assessed, were properly and lawfully applied. I am satisfied that they were. AM's submissions were assessed by the department, as were the applicant's submissions responding to them. The letter from Mr Neary on behalf of the department of 19th November 2019 to the applicant addresses the issues that the applicant had raised and explained that many of them were previously addressed in correspondence. Not agreeing with the applicant's submissions does not mean they were not properly considered. The Minister's decision to accept AM's report in full does not mean it was not properly assessed.

79. The applicant is not entitled to quash the decision arising from the validation methods that the Minister has chosen to apply, unless there is clear evidence of a high level of *O'Keeffe v. An Bord Pleanala & Ors* [1993] 1 I.R. 39/*Meadows* unreasonableness. A claim that there is a better way of validating a network as NGA or a claim that the applicant's validation of

its network as NGA meets the same end result as the method identified by the Minister, does not come close to establishing the required level of unreasonableness or unfairness required to come within the *O'Keeffe/Meadows* standard.

80. The legal test of irrationality and unreasonableness has been summarised well by Charleton J, in the Supreme Court decision in *Burke v. The Minister for Education* [2022] IEHC 1, [2022] 1 I.L.R.M. 73 at paragraph 15 where he said:

"As to whether a decision of a tribunal or of an administrative body is reasonable has become an independent ground in addition to jurisdiction and a fair approach to adjudication. Essentially, a decision must not be so devoid of sense as to fly in the face of calculable reason; State (Keegan) v Stardust Tribunal [1986] 1 IR 642, O'Keeffe v An Bord Pleanála [1993] 1 IR 39, and this includes that the proportionality of the decision may make it reasonable; Meadows v Minister for Justice, Equality and Law Reform [2010] 2 IR 701 at [171]. Another way of expressing the concept is that no reasonable tribunal or administrative authority could come to the impugned decision. That separate ground, however, is historically derived from a fundamental administrative law principle that tribunals and instruments of administration are not set up to act unreasonably. This principle is of wide-ranging embrace and includes, for instance, a requirement that arrest powers be based on rational, though not necessarily extensive, suspicion. Thus, an irrational decision, carrying a definite flavour of repulsion to reason and to balance, exceeds jurisdiction and may consequently be impugned by judicial review. "

81. In applying that standard of review to the decision of the Minister impugned here, I find it does not come close to the required level of lack of common sense, unreasonableness, irrationality or excessive jurisdiction.

3(ii) Breach of Fair Procedures/Legitimate Expectations

82. The applicant says that the Minister's failure to assess its application in accordance with the assessment criteria was a breach of fair procedures and a breach of its legitimate expectation that the assessment criteria would be followed and that a site visit would take place.

83. The applicant's application of August 2018 was assessed as non NGA compliant after a long and detailed process that went on over many months. It was accurately described by Mr Neary, the department's Chief Technology Officer, in his letter of 19 November 2019 responding to the applicant's final submission of September 2019 as follows:

"Lightnet's piecemeal approach to disclosing relevant information throughout this process has necessitated needless iterations of information requests which it now purports to rely on in asserting that its right to fair procedures have been breached. Needless to say, the Department fully refutes this assertion. Indeed, as is evidenced by the significant level of engagement with Lightnet over an 18 month period, the Department is satisfied that it has more than adequately facilitated the provision of relevant information from the Assessment Criteria in arriving at its finding in the attached finalised AM Report."

84. What I have set out above at paras. 55-61 illustrates the reasonableness of the questions and queries raised by AM and the unreasonableness of the responses from the applicant. The applicant was not subjected to unfair procedures. It was given ample and repeated opportunity to furnish the information and clarification that AM properly sought pursuant to the assessment criteria. The applicant chose not to do so and whether that was because it did not agree with what AM was seeking or because it considered there was a better way of assessing its network or because it had not retained evidence of its testing does not establish that they were unfairly treated in the assessment of their application against the assessment criteria.

85. The assessment criteria do not refer to a site visit. Neither does the applicant's initial application mention the need for, or any expectation of, a site visit or any expectation the applicant seems to now say it had arising from the meeting it had with department officials in March 2018 that such a visit would take place and would allow them the opportunity to validate their test results. The department officials did commit to a site visit but this was always on the basis that the applicant would comply with their expert's requests for clarification and additional information. In spite of the applicant repeatedly seeking time from AM to furnish the information AM had sought before the site visit could take place, the information sought was not forthcoming. One of the important things that AM was trying to clarify was the methods employed for the tests that the applicant had conducted (including hypothesis, test design, measurement, experiment and results), which the applicant said was not relevant and in any event was not available as the circumstances of the tests could not be replicated as they did not retain any records of the locations of the tests. Without that hypothesis, it is difficult to see what the purpose of a site visit would have been as whatever the Minister or his technical advisers may have been shown by the department, they would have still been left as much in the dark about the hypothesis of the tests as ever.

86. The applicant relies on *Fakih* and *Gutrani* which it says shows the Supreme Court alternating between categorising an obligation to follow agreed procedures in the making of a decision under either or both headings. However any such breach to follow agreed procedures is categorised, the burden of proving the breach clearly rests on the applicant. For the reasons set out above in relation to the assessment of the applicant's application pursuant to the assessment criteria and the circumstances in which the site visit did not take place, the applicant has not discharged the burden on them to prove a failure to follow agreed procedures or to comply with a site visit which they were entitled to expect.

87. I have found on the facts that the assessment criteria were applied by the Minister in accordance with what the Minister published and on which basis it was agreed a provider's application would be assessed. Had the facts suggested a failure to comply with the assessment criteria to which the Minister had committed and based on which the applicant made its application, then whether in accordance with *Fakih* or *Latchford and Sons Ltd v. Minister for Industry and Commerce* [1950] I.R. 33, a provider who complied with the assessment criteria may have been entitled to have their network approved as NGA. However, no such non-compliance occurred here and the Minister was entitled to find, as he did with the assistance of his technical advisers, that the applicant had not complied with the assessment criteria. The fact that the assessment criteria involved some level of subjectivity on the part of the assessor does not deprive the impugned decision of its legitimacy as it is expressly provided for in the assessment criteria where, under 3.1 it notes that the evaluation of binary parameters is not a purely mechanical exercise as "*a subject matter expert view will be required to assess whether the plan proposed fully meets a minimum requirement*".

3(iii) Bias against the applicant's technology.

88. The applicant claims that the Minister entertained an underlying bias against its technology such that its application was never likely to be successful. The applicant went into considerable detail about the background to the publication of the assessment criteria in 2015 to support its case that, in spite of the criteria not referring to the previous exclusion of that technology and of the express oral and written assurances that the department gave to the applicant, that in fact the Minister had pre-determined that the applicant's technology would not satisfy the requirements of NGA and that this tainted the entire decision.

89. There is nothing in the assessment criteria to suggest that the applicant's technology was excluded. The department expressly assured the applicant that its technology was not excluded at a meeting in March 2018 and in correspondence of 25 May 2018, before the applicant completed its application. That was not always the department's views, as they confirmed in an earlier 2014 meeting which took place before the publication of the 2015 assessment criteria. At that time the department was engaged in consultation in order to hear and take on board any concerns of the industry and the correspondence and meeting of 2018 confirms that they had changed their views about the applicant's technology. The

fact they held a different view in 2014 does not prove the applicant's suspicions about the department's bias against their technology, particularly in the light of the express assurances furnished to the applicant orally and in writing prior to their application. AM's July technical assessment of the applicant's application in which AM found that the applicant's technology was capable of delivering the required speeds, albeit the Minister ultimately concluded that the applicant's site configuration and technical solutions did not meet the technical assessment criteria, also supports the conclusion that the assessment criteria did not implicitly exclude the applicant's technology or include a bias against it.

Conclusions

90. The applicant asked the Minister and the Minister agreed to assess whether the broadband network at the applicant's Kilchreest site in County Galway met the essential characteristics of an NGA network for the purposes of the National Broadband Plan. That required the applicant's application of August 2018 to be assessed in accordance with the assessment criteria the Minister had published in 2015. The Minister, with the assistance of his technical advisers, conducted an assessment that was a detailed and technical process conducted over a fifteen month period involving a number of requests for information and clarification and exchange of views. The Minister concluded that whilst the applicant's network was NGA compliant, that its network design did not meet the technical criteria set out in the assessment criteria.

91. The applicant has not established the level of irrationality, unreasonableness and unfairness that would be required for them to secure the reliefs they have sought. A difference of opinion on what approach should have been adopted is not sufficient and their criticism of the assessment criteria of 2015 verges on irrelevant. As with any detailed and technical assessment exercise, it is possible that not every word of AM's detailed technical assessments is fully correct. It is also possible that there were alternative and/or better methods of conducting the exercise. However I am not tasked to make findings on those possibilities. I am satisfied that the assessment conducted complied sufficiently with the assessment criteria and adhered to the Minister's legal obligations, including those of fair procedures and any applicable legitimate expectations, in so far as was required by law.

92. I therefore refuse this application.

Indicative View on costs

93. My indicative view on costs is that, in accordance with Section 169 of the Legal Services Regulation Act 2015, costs should follow the event and that the Minister is entitled to their costs. I will put the matter in before me on 28th July at 10.30am to deal with costs and such final orders as are required and if either party wish to lodge written submissions they should ensure they are with the court at least 48 hours before the matter is back before me.

Counsel for the applicant: Noel Travers SC, Bernadette Quigley SC

Counsel for the respondent: Conleth Bradley SC, Gerard Meehan SC