**[2024] IEHC 300**

**THE HIGH COURT**
**PLANNING & ENVIRONMENT**

**[H.JR.2022.1022]**

**IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)**

**BETWEEN**

**CARROWNAGOWAN CONCERN GROUP, UTE RUMBERGER AND NICOLA HENLEY**

**APPLICANTS**

**AND**

**AN BORD PLEANÁLA, COILLTE CUIDEACHTA GHNÍOMHAÍOCHTA AINMNITHE, THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE, THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE, IRELAND, THE ATTORNEY GENERAL AND CLARE COUNTY COUNCIL**

**RESPONDENTS**

**AND**

**FUTURENERGY CARROWNAGOWAN DESIGNATED ACTIVITY COMPANY (BY ORDER)**

**NOTICE PARTY**

**(No. 2)**

**JUDGMENT of Humphreys J. delivered on Monday the 20th day of May, 2024**

**1.** European law requires that assessment of effects of a project should be as complete as possible for environmental impact assessment and habitats purposes. Where an error occurs in an appropriate assessment, but the opposing parties bring forward uncontradicted expert evidence to the effect that the error made no difference to the conclusion, should a development consent be quashed for such a harmless error? That is the primary albeit not sole question in the present challenge.

**Judgment history**

**2.** In *Carrownagowan Concern Group & Ors v. An Bord Pleanála & Ors (No. 1)* [2023] IEHC 579, [2023] 10 JIC 2704 I made an order striking out part of the applicant's case. We now come to the substantive hearing of the balance of the proceedings.

**Geographical context**

**3.** The development at issue is for a windfarm and associated works in the townlands of Ballydonaghan, Caherhurley, Coumnagun, Carrownagowan, Inchalughoge, Killokennedy, Kilbane, Coolready and Drummod, County Clare. The area is located north west of Killaloe, near the village of Bodyke (for more on that village see *Minogue v. Clare County Council* [2021] IECA 98, [2021] 3 JIC 2902).

**4.** As stated in the AA screening document, the area of the proposed Wind Farm is located within forested lands on the northern slopes of Slieve Bernagh mountain, approximately 4 km northeast of the village of Broadford, 7 km north-west of Killaloe and 2.5 km south of the village of Bodyke, at its closest point. Lough Derg lies approximately 4 km to the east of the proposed development area.

**5.** The approximate location of the Carrownagowan area is in or near: https://www.google.com/maps/place/Carrownagowan,+Co.+Clare/@52.8364435,-8.5734419,4387m/data=!3m2!1e3!4b1!4m6!3m5!1s0x485b6230f6ab51d9:0xd6bb5494bd7c7fe9!8m2!3d52.8368989!4d-8.5595302!16s%2Fg%2F119tmf4qs!5m1!1e4?entry=ttu.

**6.** The development is proposed to take place effectively within the Slieve Bernagh area. Doon Lough is to the west of the site, and the site drains to Doon Lough *via* the Owenogarney (Ratty) River within the regional Shannon Estuary North catchment. Lough O'Grady is to the north and Slieve Aughty to the further north across the Co. Galway border. An unnamed stream from the site leads to the Annaghmullahaun River which connects the site to Lough O'Grady. Lough O'Grady is in turn connected to Lough Derg to the east, with the Clare/ Tipperary border running through it along a roughly north-south axis.

**7.** By way of context, the birds directive 79/409 provides for relevant areas to be classified as Special Protection Areas (SPAs). The habitats directive 92/43 requires relevant habitats to be classified as Special Areas of Conservation (SACs). SPAs and SACs collectively are known as Natura 2000 sites or simply as European sites.

**8.** While domestically protected areas rather than European sites, natural heritage areas (NHAs) are designated pursuant to s. 18 of the Wildlife (Amendment) Act 2010 for the protection of species or habitats.

**9.** Generally, candidate SPAs (cSPAs) or SACs (cSACs) are treated as European sites. Proposed NHAs (pNHAs) are also generally treated as NHAs – but there are a lot of these. The NPWS helpfully states in public domain material (https://www.npws.ie/protected-sites/nha):

"In addition, there are 630 proposed NHAs (pNHAs), which were published on a non-statutory basis in 1995, but have not since been statutorily proposed or designated. These sites are of significance for wildlife and habitats. Some of the pNHAs are tiny, such as a roosting place for rare bats. Others are large - a woodland or a lake, for example. The pNHAs cover approximately 65,000ha and designation will proceed on a phased basis over the coming years."

**10.** One might have thought that 29 years would be long enough for these designations to take place but things move slowly apparently. Whether that has legal consequences isn't an issue in the present case.

**11.** The AA screening report (pp. 13-15) identifies 14 European sites for screening purposes within 15 km, but only a few of these are relied on by the applicants in their fourth amended statement of grounds.

**12.** The applicant's pleadings refer specifically to the following:

"Slieve Bernagh SAC: an SAC located to the north and south of the Proposed Development, designated as such by the European Union Habitats (Slieve Bernagh Bog Special Area of Conservation 002312) Regulations 2022, S.I. No. 385 of 2022"

"Slieve Aughty SPA: an SPA to the north of the Site designated as such by the European Communities (Conservation of Wild Birds (Slieve Aughty Mountains Special Protection Area 004168)) Regulations 2012, S.I. No. 83 of 2012."

**13.** The formal name for the foregoing ins the Slieve Bernagh Bog SAC and its features are as follows (https://www.npws.ie/protected-sites/sac/002312):

"Slieve Bernagh Bog SAC
Site Details Site code 002312
Designation Special Area of Conservation (SAC)
County Clare
Coordinates Latitude: 52.8393
Longitude: -8.55176
Qualifying Interests
Northern Atlantic wet heaths with Erica tetralix [4010]
European dry heaths [4030]
Blanket bogs (* if active bog) [7130]"

**14.** The formal name for the second mentioned site is the Slieve Aughty Mountains SPA and its features are as follows (https://www.npws.ie/protected-sites/spa/004168):

"Slieve Aughty Mountains SPA
Site Details Site code 004168
Designation Special Protection Area (SPA)
Counties Clare
Galway
Coordinates Latitude: 53.0203
Longitude: -8.60545
Qualifying Interests
Hen Harrier (Circus cyaneus) [A082]
Merlin (Falco columbarius) [A098]"

**15.** The pleadings also refer to the Lough Derg (Shannon) SPA whose features are as follows (https://www.npws.ie/protected-sites/spa/004058):

"Lough Derg (Shannon) SPA
Site Details Site code 004058
Designation Special Protection Area (SPA)
Counties Clare
Galway
Tipperary
Coordinates Latitude: 52.9609
Longitude: -8.32454
Qualifying Interests
Cormorant (Phalacrocorax carbo) [A017]
Tufted Duck (Aythya fuligula) [A061]
Goldeneye (Bucephala clangula) [A067]
Common Tern (Sterna hirundo) [A193]
Wetland and Waterbirds [A999]"

**16.** In terms of NHAs the pleadings refer to the following:

"Doon Lough NHA: a NHA to the west of the site, designated as such by the Natural Heritage Area (Doon Lough NHA 000337) Order 2005, S.I. No. 571 of 2005"

"Lough O'Grady pNHA: a proposed NHA to the north east of the Site, given reference number 001019 by the NPWS."

**17.** The former has the following features (https://www.npws.ie/protected-sites/nha/000337 ):

"Doon Lough NHA
Site Details Site code 000337
Designation Natural Heritage Area (NHA)
County Clare
Coordinates Latitude: 52.8177
Longitude: -8.66683
Qualifying Interests
Peatlands [4]"

**Facts**

**18.** On 30th November 2020, Coillte lodged an application for permission (File Reference ABP-308799-20) to construct the development.

**19.** The application included a Natura Impact Statement for the purposes of the habitats directive, and an EIA report for the purpose of the EIA directive 2011/92/EU.

**20.** Whilst Coillte was the applicant for planning permission, all development rights in respect of Carrownagowan Wind Farm were transferred from Coillte to FEC, although the development lands have not yet transferred. FEC's onshore wind development rights in respect of the relevant Coillte lands are held pursuant to an exclusive option for lease, which option allows for entry into a long-term lease prior to commencement of the construction of Carrownagowan Wind Farm.

**21.** On 27th November 2020, the developer published notice of the making of the application - available for public inspection from 7th December 2020 for a period of 7 weeks.

**22.** The second applicant made a submission on 12th January 2021 and the first named applicant made a submission received on 3rd February 2021.

**23.** The Development Applications Unit (DAU) of the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media also made a submission.

**24.** On 3rd February 2021, the deadline for submissions expired.

**25.** In early 2021, on foot of the DAU submission, the board requested further information from the developer.

**26.** On 8th July 2021, the developer submitted further information.

**27.** The developer submitted a second tranche of further information on 23rd December 2021.

**28.** This further information was advertised, and notified to those who had made submissions in January 2022, and the second and third applicants made submissions on 14th and 16th February 2022 respectively.

**29.** The third named applicant Nicola Henley made a submission in which she reiterated the points she had made in a first, rejected, submission.

**30.** The inspector prepared a report dated 31st August 2022.

**31.** The board adopted a decision on 29th September 2022 granting permission. The board order agreed with the inspector that at screening there was the possibility of significant effects on Slieve Bernagh Bog SAC (002312) and Slieve Aughty Mountains SPA (004168), and that on appropriate assessment such effects could be ruled out. The inspector's conclusion as to the effects being acceptable following EIA was also agreed with.

**Procedural history**

**32.** The proceedings challenging the decision and including a variety of other reliefs were instituted on 23rd November 2022 when papers were filed and the matter was opened before the court. Liberty was given to amend the statement of grounds.

**33.** An amended statement of grounds was filed dated 5th December 2022.

**34.** On 12th December 2022, a further order was made allowing another amendment to the statement of grounds.

**35.** A second amended statement of grounds was filed dated 13th January 2023.

**36.** Further liberty to amend was given on 30th January 2023. On 13th February 2023 the time to comply with that order was extended.

**37.** On the same date the court dealt with a motion from the applicants seeking further information on a pre-leave basis. Paragraph 1 of the motion was adjourned generally. The extension of time for the amended statement was granted under paragraph 2. Costs were reserved by consent.

**38.** Once the papers were in order to the necessary minimum extent, leave was granted on 20th February 2023.

**39.** The order did not grant an extension of time in the absence of a request for that.

**40.** The substantive notice of motion for relief by way of judicial review was dated 1st March 2023.

**41.** On 6th March 2023, FuturEnergy was added as a notice party and the matter was adjourned to 24th April 2023 to allow motions to be brought.

**42.** On 18th April 2023, Coillte brought a motion to strike out.
**43.** On 18th April 2023, the State brought a motion to strike out.
**44.** On 19th April 2023, the applicants brought a motion for discovery,
**45.** On 5th September 2023, written submissions of applicants on the discovery motion were delivered.
**46.** On 6th June 2023, additional affidavits from the State parties were delivered.
**47.** On 6th September 2023, written submissions by Coillte on the motion to strike out were delivered.
**48.** On 6th September 2023, additional affidavits from Coillte were delivered.
**49.** On 7th September 2023, additional affidavits from the State were delivered.
**50.** On 12th September 2023, the State submissions on strike out motion were delivered.
**51.** On 6th October 2023, replying submissions of the applicants were delivered.
**52.** On 10th October 2023, replying submissions of Coillte were delivered.
**53.** On 11th October 2023, replying submissions of the State were delivered.
**54.** The discovery and strike-out motions and the issue of the remedial obligation were then heard on 17th to 19th October 2023. At the hearing it emerged that some pages of the response to Item 1 of the request for further information had not been exhibited formally so the developers agreed to file a short affidavit by 20th October 2023 to exhibit the full document.
**55.** In the No. 1 judgment on 27th October 2023, I made an order as follows:

(i) the leave order be amended under the slip rule so as to delete the reference to certification of two counsel;
(ii) the application for an extension of time as set out in relief 13 be refused;
(iii) on foot of the motions by the opposing parties, the leave order be discharged in respect of:
    a. reliefs 12 and 16; and
    b. core ground 10 and associated sub-grounds insofar as they relate to those reliefs;
(iv) on foot of the motions by the opposing parties, the following be struck out:
    a. reliefs 10, 11, 14, 15, 17-19;
    b. core grounds 4, 6, 8 and associated sub-grounds; and
    c. core ground 10 and associated sub-grounds (other than insofar as they relate to reliefs 12 and 16);
(v) the applicants' motion for discovery and the application to amend that application be refused;
(vi) the State respondents and the council be released from further participation in the proceedings with liberty to apply;
(vii) subject to the foregoing, the applicants are to have liberty to file a further amended statement of grounds within 2 weeks from the date of this judgment on the basis of a clean version to be the filed version and a tracked version being served for information:
    a. reformatting the pleadings in accordance with the format set out in *Stapleton v. An Bord Pleanála* [2023] IEHC 344;
    b. deleting matters that have been struck out or refused, or where the leave order has been discharged, and making any consequential rewording; and
    c. changing the heading so as to provide that the fourth amended statement is filed on foot of the present order and the third amended statement was filed under the orders of 30th January, 2023 and 13th February, 2023 rather than simply the latter;
(viii) the applicants have liberty to file further affidavits from Lorcan O'Toole and Dr Eimear Rooney without prejudice to any argument as to their admissibility in due course, and on the basis that if such an issue is raised the applicants will have to demonstrate that the affidavits should be admitted and that this exercise will be conducted in advance of close of exchange of affidavits if so required by the opposing parties;
(ix) unless the parties apply otherwise by written submission within 7 days, the foregoing order be perfected forthwith thereafter on the basis of no order as to costs; and
(x) the matter be listed for mention on a date to be notified by the List Registrar for further case-management.

**56.** On 23rd December 2024, the order arising from the judgment of 27th October 2023 was perfected.
**57.** That order was appealed by the applicants (Court of Appeal record no. 2024/3) and is listed for hearing on 7th June 2024.
**58.** On 14th February 2024, a hearing date was assigned for the substantive judicial review.

**59.** The substantive matter was listed for hearing on Tuesday 7th May 2024 and was heard on that date and 8th May 2024. Judgment was reserved on the latter date.

**Relief sought - third amended statement of grounds**

**60.** In order to facilitate legibility of reference to the differently numbered paragraphs in the No. 1 judgment and the present judgment, it would be better to set out the reliefs and grounds in both the third and fourth amended statements of grounds, albeit that the third statement is now of historical interest, subject to the appeal.

**61.** The reliefs set out in the third amended statement of grounds are as follows:

"D, Remedies

Preliminary Remedies

1. Directions requiring the First Respondent, the Board, pursuant to S146 of the Planning and Development Act 2000 as amended, to put on its website within such time as the Court may specify, all material relating to Board Decision file reference ABP-308799-20, dated 29 September 2022, relating to a proposed windfarm development at Carrownagowan, County Clare.

2. Directions permitting the Applicants to file an amended Statement of Grounds containing such further particulars and further grounds as it may consider appropriate, subject to leave of the Court in relation thereto, within the period of 8 weeks following the placing on the Board's website in accordance with relief Dl above, of all material relating to Board Decision file reference ABP-308799-20, dated 29 September 2022, relating to a proposed windfarm development at Carrownagowan, County Clare.

3. Directions permitting the First Named Applicant to consider the further information submitted by the Developer between June 2021 and December 2021 relating to Board file reference ABP-308799-20, and granting liberty to the First Named Applicant to file an Affidavit outlining such submission as it would have made had it been aware of the determination of the Board that the said further information was significant and that it was appropriate to allow the making of submissions in relation thereto, as provided for pursuant to S37E(3)(a).

4. Directions of the type outlined at paragraph 81 of the decision in *Reid v Bord Pleanala*, [2021] IEHC 362 requiring the Board to file an Affidavit providing, in respect of Board Decision file reference ABP-308799-20, dated 29 September 2022, relating to a proposed windfarm development at Carrownagowan, County Clare, details of the expertise applied by the Board in respect of the issues raised, including but not limited to the expertise applied by it to independently, demonstrably and impartially, deploy sufficient expertise, detailed scrutiny and a high standard of investigation, and showing it had the resources with which to do so, per paragraph §243 of the judgment of this Court in the case of *Environmental Trust Ireland v Bord Pleanala*, [2022] IEHC 540.

5. Such mandatory order or injunction to the like effect as the Court may consider appropriate.

6. Discovery

Substantive Remedies

7. An Order of Certiorari pursuant to Order 84 of the Rules of the Superior Courts 1986 as amended and Section 50 of the Planning and Development Act 2000 as amended quashing the decision of the First Respondent, An Bord Pleanala (the Board), dated 29 September 2022, file reference ABP-308799-20, and there described as: Proposed Development: The proposed development is for a ten-year permission that will constitute the provision [of] the [following]:

a) nineteen (19) number wind turbines (blade tip height up [to] 169 metres);
b) nineteen (19) number wind turbine foundations and associated hardstand areas,
c) one (1) number permanent [meteorological] mast (100 metre height) and associated foundation and hardstand area,
d) one (1) number substation (110 kilovolts) including associated ancillary buildings (electrical building including [control], switchgear and metering rooms and the operational building including welfare facilities, workshop and office), security fencing and all associated works,
e) upgraded site entrance,
f) new and upgraded internal site service roads (8.4 kilometres of existing tracks to be upgraded and 11.4 kilometres of new service roads to be constructed),
g) provision of an onsite visitor cabin and parking,
h) underground electrical collection and SCADA system linking each turbine to the proposed on-site substation,
i) construction of new roadways and localised widening along the turbine delivery route,

j) two (2) number temporary construction site compounds
k) three (3) number burrow pits to be used as a source of stone material during construction,
l) three (3) number peat and spoil deposition areas (at burrow pit locations),
m) associated surface water management systems,
n) tree felling for windfarm infrastructure, and
o) all associated site development works.

All in the [townlands] of Ballydonaghan, Caherhurley, Coumnagun, Carrawnagowan, Inchalughoge, Killokennedy, Kilbane, [Coolready] and Drumnod, County Clare.

8. Such declaration(s) of the legal rights and/or legal position of the applicant[s] and (if and insofar as legally permissible and appropriate) persons similarly situated and/or of the legal duties and/or legal position of the Respondents as the court considers appropriate.

9. A stay pursuant to Order 84 Rule 20(8)(b) of the Rules of the Superior Courts on the operation of the above Board Decision of 29 September 2022, file reference ABP-308799-20, pending conclusion of the present proceedings.

Forestry Consent Remedies

10. Directions of the type outlined at paragraph 81 of the decision in *Reid v Bord Pleanala,* [2021] IEHC 362 requiring the Developer to file an Affidavit providing details of all licences, permissions or other consents granted relating to projects for afforestation, felling or reafforestation of any lands in the townlands of Ballydonaghan, Caherhurley, Coumnagun, Carrownagowan, Inchalughoge, Killokennedy, Kilbane, Coolready and Drummod, County Clare, from 1 June 1970 to date, the dates of such licences, of all forestry related works carried out on those lands during that period (in particular the fire break between the Slieve Bernagh SAC and the afforested area) and of all environmental impact assessments and appropriate assessments carried out in relation to such licences, permissions or consents, and all screening determinations relating to whether such assessments were required, and to provide copies of all documents so identified.

11. Discovery

12. An Order of Certiorari pursuant to Order 84 of the Rules of the Superior Courts 1986 as amended and/ or Section 50 of the Planning and Development Act 2000 as amended quashing all and/ or any decisions taken between 1 June 1988 and the present by the Minister for Agriculture Food and the Marine or any other competent authority, authorising the carrying out of any afforestation, felling and/ or reafforestation project, and all forestry related works (in particular the fire break between the Slieve Bernagh SAC and the afforested area), in the townlands of Ballydonaghan, Caherhurley, Coumnagun, Carrownagowan, Inchalughoge, Killokennedy, Kilbane, Coolready and Drummed, County Clare.

13. An Order pursuant to Section 50(8) of the Planning and Development Act 2000 as amended, or pursuant to Order 84 Rule 21(3) of the Rules of the Superior Courts 1986 as amended, extending time for the bringing of any application referred to in the preceding paragraph.

14. A Declaration for the purposes of S177B of the 2000 Act in relation to all and/ or any such decisions taken between 1 June 1988 and the present by the Minister for Agriculture Food and the Marine or any other competent authority, authorising the carrying out of any afforestation, felling and/ or reafforestation project in the townlands of Ballydonaghan, Caherhurley, Coumnagun, Carrownagowan, Inchalughoge, Killokennedy, Kilbane, Coolready and Drummed, County Clare, to the effect that such decisions relate to a development or project in the administrative area of Clare County Council for which authorisation was granted by the Minister for Agriculture Food and the Marine or such other competent authority as may appear to have issued such authorisation, or by the planning authority or the Board, and for which - (a) an environmental impact assessment, (b) a determination in relation to whether an environmental impact assessment is required, or (c) an appropriate assessment, was or is required, that such consent was in breach of law, invalid or otherwise defective in a material respect because of - (i) any matter contained in or omitted from the application for consent including omission of an environmental impact assessment report (or environmental impact statement) or a Natura impact statement or both that report and that statement, as the case may be, or inadequacy of an environmental impact assessment report or a Natura impact statement or both that report and that statement], as the case may be, or (ii) any error of fact or law or procedural error.

15. A mandatory order or injunction requiring the Council, pursuant to the Order in the preceding paragraph, to serve the notice specified in S177B of the Planning and Development Act 2000 as amended in respect of all and / or any decisions taken between 1 June 1988 and the present by the Minister for Agriculture Food and the Marine or any other competent authority, authorising the carrying out of any afforestation, felling and/ or

reafforestation project in the townlands of Ballydonaghan, Caherhurley, Coumnagun, Carrownagowan, lnchalughoge, Killokennedy, Kilbane, Coolready and Drummod, County Clare, and any other forestry related works (in particular the fire break between the Slieve Bernagh SAC and the afforested area).

16. A Declaration pursuant to Order 84 Rule 18(2) of the Rules of the Superior Courts as amended to the effect that, in authorising the carrying out afforestation, felling and / or reafforestation projects in the townlands of Ballydonaghan, Caherhurley, Coumnagun, Carrownagowan, lnchalughoge, Killokennedy, Kilbane, Coolready and Drummod, County Clare, and any other forestry related works (in particular the fire break between the Slieve Bernagh SAC and the afforested area), the Minister and / or the State has failed to consider and determine whether the carrying out of such projects or works was compatible with the preservation of a species listed in Annex I to the Birds Directives (79/409 and 2009/147), namely hen harrier (Circus Cynaeus), and compatible with maintaining the population of that species at a level which corresponds to ecological, scientific and cultural requirements, or whether the authorisation of such projects or works was compatible with the requirement to take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for hen harrier, for the purposes of Articles 2 and 3 of those Directives.

17. A mandatory order or injunction pursuant to Order 84 Rule 18(2) of the Rules of the Superior Courts 1986 as amended, S160 of the 2000 Act, A6(2) of the Habitats Directive, A9(3) and (4) of the Aarhus Convention, A47 of the Charter, and A4(3) and A19(1) TEU, and/ or some or all of those provisions, requiring the Developer to assess, identify and remediate the negative environmental impacts identified in the Hen Harrier Programme included with its Responses to Requests for Further Information between June and December 2021 (in which the Developer identified such effects in the context of proposals to carry out works to provide compensatory habitat for hen harrier disturbed by the existing forestry project on the site.)

18. Such mandatory order or injunction to the like effect as the Court may consider appropriate.

Non-Transposition Remedies

19. A declaration that the State failed, in the period between I June 1988 and 2010 correctly to implement Al, A2, A3, A4, AS, A6, A8 and/ or A9 of Directive 85/337 on environmental impact assessment as amended and A6 of Directive 92/43 on habitats, and that S177B of the Planning and Development Act 2000 as amended should be interpreted as applying retrospectively to any consent to afforestation, felling and/ or reafforestation project in the townlands of Ballydonaghan, Caherhurley, Coumnagun, Carrownagowan, lnchalughoge, Killokennedy, Kilbane, Coolready and Drummod, County Clare between 1 June 1988 and the present.

20. Such declaration(s) of the legal rights and/or legal position of the applicant[s] and (if and insofar as legally permissible and appropriate) persons similarly situated and/or of the legal duties and/or legal position of the Respondents as the court considers appropriate.

Costs protection

21. A Declaratory Order pursuant to Section 7 of the Environment (Miscellaneous Provisions) Act 2011 as amended, Order 99 of the Rules of the Superior Courts as amended, the inherent jurisdiction of the Court, Article 47 of the Charter on Fundamental Rights of the European Union, Articles 4(3) and 19(1) of the Treaty on European Union, and/ or Article 9 of the Convention on Access to Information, Public Participation In Decision-Making and Access to Justice In Environmental Matters done at Aarhus, Denmark, on 25 June 1998 (the Aarhus Convention), confirming that Section SOB of the Planning and Development Act 2000 as amended and/ or Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011 apply to the Grounds set out at Part E hereof.

Further Orders

22. Liberty to file further Affidavits containing further particulars or expert evidence in support of the grounds already advanced.

23. Liberty to amend grounds on foot of expert advice if and when received.

24. Liberty to amend grounds on foot of any material added to the website of the Board following commencement of the present proceedings.

25. Liberty to amend grounds on foot of any material obtained by the Applicants in relation to the authorisations granted for the planting of forestry in the townlands of Ballydonaghan, Caherhurley, Coumnagun, Carrownagowan, lnchalughoge, Killokennedy, Kilbane, Coolready and Drummod, County Clare.

26. An order referring a question or questions of law for determination by the Court of Justice of the European Union.

27. Further or other relief.

28. Discovery
29. Costs"

**Relief sought – fourth amended statement of grounds**

**62.** In the fourth amended statement of grounds, following the No. 1 judgment, the reliefs had been slimmed down to a more manageable 17 items, as follows:

"Preliminary Remedies

1. Directions requiring the First Respondent, the Board, pursuant to S146 of the Planning and Development Act 2000 as amended, to put on its website within such time as the Court may specify, all material relating to Board Decision file reference ABP-308799-20, dated 29 September 2022, relating to a proposed windfarm development at Carrownagowan, County Clare.
2. Directions permitting the Applicants to file an amended Statement of Grounds containing such further particulars and further grounds as it may consider appropriate, subject to leave of the Court in relation thereto, within the period of 8 weeks following the placing on the Board's website in accordance with relief Dl above, of all material relating to Board Decision file reference ABP-308799-20, dated 29 September 2022, relating to a proposed windfarm development at Carrownagowan, County Clare.
3. Directions of the type outlined at paragraph 81 of the decision in Reid v Bord Pleanala, [2021] IEHC 362 requiring the Board to file an Affidavit providing, in respect of Board Decision file reference ABP-308799-20, dated 29 September 2022, relating to a proposed windfarm development at Carrownagowan, County Clare, details of the expertise applied by the Board in respect of the issues raised, including but not limited to the expertise applied by it to independently, demonstrably and impartially, deploy sufficient expertise, detailed scrutiny and a high standard of investigation, and showing it had the resources with which to do so, per paragraph §243 of the judgment of this Court in the case of Environmental Trust Ireland v Bord Pleanala, [2022] IEHC 540.
4. Such mandatory order or injunction to the like effect as the Court may consider appropriate.
5. Discovery

Substantive Remedies

6. An Order of Certiorari pursuant to Order 84 of the Rules of the Superior Courts 1986 as amended and Section 50 of the Planning and Development Act 2000 as amended quashing the decision of the First Respondent, An Bord Pleanala (the Board), dated 29 September 2022, file reference ABP-308799-20, and there described as:

Proposed Development: The proposed development is for a ten-year permission that will constitute the provision [of] the [following]:

- nineteen (19) number wind turbines (blade tip height up [to] 169 metres),
- nineteen (19) number wind turbine foundations and associated hardstand areas,
- one (1) number permanent [meteorological] mast (100 metre height) and associated foundation and hardstand area,
- one (1) number substation (110 kilovolts) including associated ancillary buildings (electrical building including contra/, switchgear and metering rooms and the operational building including welfare facilities, workshop and office), security fencing and all associated works,
- upgraded site entrance,
- new and upgraded internal site service roads (8.4 kilometres of existing tracks to be upgraded and 11.4 kilometres of new service roads to be constructed),
- provision of an onsite visitor cabin and parking,
- underground electrical collection and SCADA system linking each turbine to the proposed on-site substation,
- construction of new roadways and localised widening along the turbine delivery route,
- two (2) number temporary construction site compounds,
- three (3) number burrow pits to be used as a source of stone material during construction,
- three (3) number peat and spoil deposition areas (at burrow pit locations),
- associated surface water management systems,
- tree felling for windfarm infrastructure, and
- all associated site development works.

All in the town/ands of Ballydonaghan, Caherhurley, Coumnagun, Carrawnagowan, lnchalughoge, Killokennedy, Kilbane, Coo/ready and Drumnod, County Clare.

7. Such declaration(s) of the legal rights and/or legal position of the applicant[s] and (if and insofar as legally permissible and appropriate) persons similarly situated and/or of the legal duties and/or legal position of the Respondents as the court considers appropriate.
8. A stay pursuant to Order 84 Rule 20(8)(b) of the Rules of the Superior Courts on the operation of the above Board Decision of 29 September 2022, file reference ABP-308799-20, pending conclusion of the present proceedings.

Costs protection

9. A Declaratory Order pursuant to Section 7 of the Environment (Miscellaneous Provisions) Act 2011 as amended, Order 99 of the Rules of the Superior Courts as amended, the inherent jurisdiction of the Court, Article 47 of the Charter on Fundamental Rights of the European Union, Articles 4(3) and 19(1) of the Treaty on European Union, and/ or Article 9 of the Convention on Access to Information, Public Participation In Decision-Making and Access to Justice In Environmental Matters done at Aarhus, Denmark, on 25 June 1998 (the Aarhus Convention), confirming that Section SOB of the Planning and Development Act 2000 as amended and/ or Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011 apply to the Grounds set out at Part E hereof.

Further Orders

10. Liberty to file further Affidavits containing further particulars or expert evidence in support of the grounds already advanced.
11. Liberty to amend grounds on foot of expert advice if and when received.
12. Liberty to amend grounds on foot of any material added to the website of the Board following commencement of the present proceedings.
13. Liberty to amend grounds on foot of any material obtained by the Applicants in relation to the authorisations granted for the planting of forestry in the townlands of Ballydonaghan, Caherhurley, Coumnagun, Carrownagowan, lnchalughoge, Killokennedy, Kilbane, Coolready and Drummod, County Clare.
14. An order referring a question or questions of law for determination by the Court of Justice of the European Union.
15. Further or other relief.
16. Discovery
17. Costs"

**63.** We now need to identify what is actually live out of this menu of 17 reliefs. Insofar as the reliefs remain viable after the No. 1 judgment, no preliminary applications were made after the fourth amended statement, so 1 to 5 fall automatically. The order looking for publication of the documents not on the website was sought as interlocutory relief, not as a final order of *mandamus*, and it wasn't pursued as interlocutory relief.

**64.** Reliefs 6 and 7 remain, 8 wasn't pursued, 9 isn't necessary as costs protection is not an issue, and 10 to 13 and 16 were not pursued either.

**65.** That doesn't leave a whole lot substantively other than *certiorari* and a declaration, and limited ancillary orders.

**Grounds of challenge – third amended statement of grounds**

**66.** The core grounds as set out in the third amended statement of grounds were as follows:

"E1. Core Grounds

National Law Grounds

1. The Board failed to put all the documents relating to the matter the subject of the Decision on its website contrary to S146(5) and (7)(a) of the 2000 Act.
2. The Board failed to make a prior determination to the effect that the Proposed Development would constitute strategic infrastructure for the purposes of S37A and Schedule 7 of the 2000 Act, and failed to make a direction as to the plans, particulars or other information which the Board will require for the purposes of consideration of an application, as required by A210(2)(a) of the 2001 Regulations.
2A. The Impugned Decision is invalid because the Board failed to comply with S37E(3)(c) of the 2000 Act and / or A213(1)(h) of the 2001 Regulations in that the Applicant failed to notify Tipperary County Council and Limerick City and County Council of the application for permission, both of which are local authorities from whose functional areas the Proposed Development would be visible and which are therefore required. Additionally or in the alternative the Board failed to obtain any evidence of that notification, and / or failed to satisfy itself as to the making of that notification.

EU Law Grounds

3. The Impugned Decision is invalid because the Board failed to ensure it had sufficient expertise to examine the EIAR in order to ensure its completeness and quality and to carry out an assessment that would be as complete as possible, contrary to S172(1H) of the 2000 Act, and A6 of the EIA Directive and to carry out an assessment that would be as complete

as possible (~~5~~S171A, 5S172, A3(6)), and failed to give adequate reasons to establish that it had access to such expertise (~~5~~S71A, ~~5~~S172, A8a).

4. ~~In the alternative the Decision~~ If the Impugned Decision is not invalid for the reasons set out in the preceding Ground, it must nonetheless be set aside because the State has failed to create an effective procedure of review, in breach of Article 9(4) of the Aarhus Convention, All of the EIA Directive, A47 of the Charter, Article 19(1) of the TEU, and/ or some or all of those provisions and a Decision that fails to comply with the EIA Directive but that cannot be effectively reviewed is necessarily either invalid or incapable of having any effect.

5. The Impugned Decision is invalid because the Impugned Decision is invalid because it fails to incorporate environmental conditions into the decision, and fails to incorporate a description of measures intended to avoid, prevent, reduce or offset effects contrary to S37H(2A), S172(1H), and S172(11) of the 2000 Act read in light of A8a of the EIA Directive; or those subsections constitute an inadequate transposition of A8a.

6. ~~In the alternative the Decision~~ If the Impugned Decision is not invalid for the reasons set out in the preceding Ground, it must nonetheless be set aside because the State has failed to adequately transpose A8a(1) of the EIA Directive contrary to A4(3) and 19(1) TEU and a Decision adopted pursuant to provisions of an Act that fail to give effect to a Directive, where the Board does not apply the interpretative obligation, and / or, where appropriate, the set aside obligation, in order to correctly apply A8a of the EIA Directive, is invalid, void and of no legal effect.

7. The Impugned Decision is invalid because the Board failed to investigate and analyse the information submitted by the Developer, and/ or to carry out as complete an assessment as possible, and therefore its EIA failed to meet the definition of an EIA in S171A when interpreted in accordance with Articles 1, 2 and 3 of the EIA Directive.

8. In the alternative, the State failed adequately to implement the requirement that an EIA must involve as complete an assessment as possible and thereby failed to give full effect to A1(2)(g), A2(1) and A3 of the EIA Directive as required pursuant to A4(3) and A19(1) TEU, and to A288 TFEU which provides that a Directive is binding as to the result to be achieved and a Decision adopted pursuant to provisions of an Act that fail to give effect to a Directive, where the Board does not apply the interpretative obligation, and / or, where appropriate, the set aside obligation, to correct the defect, is invalid, void and of no legal effect.

9. The impugned Decision is invalid because the Board failed to carry out a proper screening for appropriate assessment of the Application and further information submitted by the Developer for the purposes of S177S of the 2000 Act read in light of A6(3) of the Habitats Directive.

10. The Impugned Decision is invalid because the Board failed to carry out as complete an assessment as possible in that it failed to assess the cumulative effects of the Proposed Development together with the effects of the existing forestry developments on the site, and failed to have regard to the EIA and Appropriate Assessment(s), if any, carried out in respect of those forestry developments and in so doing contravened A2, 3 and 4 of the EIA Directive, and A6 of the Habitats Directive; the Developer erred in law by carrying out projects for which prior EIA and Appropriate Assessment was required without those assessments being carried out and in so doing contravened A5 of the EIA Directive, A6 of the Habitats Directive, and A4(3) and A19(1) of the Treaty on European Union; and the State erred in law in granting the underlying forestry consents for the application contrary to A2, 3 and 4 of the EIA Directive, A6 of the Habitats Directive, and A2 and A3 of the 1979 and 2009 Birds Directives, and substitute consent is required for the purposes of S177B of the 2000 Act."

**Grounds of challenge – fourth amended statement of grounds**

**67.** The core grounds as set out in the fourth amended statement of grounds are as follows:

"Part EI. Core Grounds

National Law Grounds

1. The Board failed to put all the documents relating to the matter the subject of the Decision on its website contrary to S146(5) and (7)(a) of the 2000 Act.

2. The Board failed to make a prior determination to the effect that the Proposed Development would constitute strategic infrastructure for the purposes of S37A and Schedule 7 of the 2000 Act, and failed to make a direction as to the plans, particulars or other information which the Board will require for the purposes of consideration of an application, as required by A210(2)(a) of the 2001 Regulations.

3. The Impugned Decision is invalid because the Board failed to comply with S37E(3)(c) of the 2000 Act and / or A213(1)(h) of the 2001 Regulations in that the Applicant failed to notify Tipperary County Council and Limerick City and County Council of the application for

permission, both of which are local authorities from whose functional areas the Proposed Development would be visible and which are therefore required. Additionally or in the alternative the Board failed to obtain any evidence of that notification, and / or failed to satisfy itself as to the making of that notification.

EU Law Grounds

4. The Impugned Decision is invalid because the Board failed to ensure it had sufficient expertise to examine the EIAR in order to ensure its completeness and quality and to carry out an assessment that would be as complete as possible, contrary to S172(1H) of the 2000 Act, and A6 of the EIA Directive and to carry out an assessment that would be as complete as possible (S171A, S172, A3(6)), and failed to give adequate reasons to establish that it had access to such expertise (S71A, S172, A8a).

5. The Impugned Decision is invalid because it fails to incorporate environmental conditions into the decision, and fails to incorporate a description of measures intended to avoid, prevent, reduce or offset effects contrary to S37H(2A), S172(1H), and S172(11) of the 2000 Act read in light of A8a of the EIA Directive; or those subsections constitute an inadequate transposition of A8a.

6. The Impugned Decision is invalid because the Board failed to investigate and analyse the information submitted by the Developer, and/ or to carry out as complete an assessment as possible, and therefore its EIA failed to meet the definition of an EIA in S171A when interpreted in accordance with Articles 1, 2 and 3 of the EIA Directive.

7. The impugned Decision is invalid because the Board failed to carry out a proper screening for appropriate assessment of the Application and further information submitted by the Developer for the purposes of S177S of the 2000 Act read in light of A6(3) of the Habitats Directive."

**68.** Core ground 3 was withdrawn in the written legal submissions at para. 30.

**Domestic law issues**

**Core ground 1 – s. 146(7)(a) and alleged failure to publish material**

**69.** Core ground 1 is:

"1. The Board failed to put all the documents relating to the matter the subject of the Decision on its website contrary to S146(5) and (7)(a) of the 2000 Act."

**70.** The parties' positions as recorded in the statement of case are summarised as follows:

"Ground 1

26. Ground 1 is that the Board failed to place documents on its website as required by S146(5) PDA. The Board responds that it is not obliged to do so, but accepts that it did not.

27. Board's position on Ground 1. The Applicants accept this ground only goes to declaratory relief. On a holistic overview of all of the circumstances a declaration is not warranted and, in any event, the Applicants underlying contention about what has to be placed on the website in an EIA case is not well founded and it's not clear what the Applicants actually says has to be so placed. The Applicants' claim in suffering prejudice fails because no actual unfairness to these particular Applicants contrary to their rights has been demonstrated. Further, any theoretical prejudice to third parties could not be categorised as major, in the light of all of the materials (including the ... actual decision, the other decision documents generated by the Board (i.e. the Inspector's Report and the Board Direction) and the planning application documents, including the EIAR and the NIS) that were published on the Board's website in this case.

28. Coillte and FEC agree with the Board's position in relation to Ground 1."

**71.** The sub-grounds relating to this complaint are as follows:

"9. S146(5) and (7)(a) of the 2000 Act require the Board to put all the documents relating to the matter the subject of the Decision on its website in perpetuity beginning on the third day following the making by the Board of the Decision; but it failed to do so. As a result the Applicants suffered prejudice because they were unable, in the time available to them, to obtain and analyse all the material that was before the Board, to verify the correctness of the grounds which they seek to advance, and to determine whether there are other grounds of challenge which may be open to them.

10. Insofar as the Board may provide such documents to the Applicant[s] by some other means prior to closure of the pleadings, in order to allow for potential amendment of grounds, a Declaration that the Board is required to place all the documents relating to the matter the subject of the Decision on its website in [perpetuity] beginning on such day as the Court may specify, pursuant to S146(5) and (7)(a) of the 2000 Act is sought as a final order only."

**72.** Section 146(5) to (7) provides as follows:

"(5) Within 3 days following the making of a decision on any matter falling to be decided by it in performance of a function under or transferred by this Act or under any other enactment, the documents relating to the matter—
(a) shall be made available by the Board for inspection at the offices of the Board by members of the public, and
(b) may be made available by the Board for such inspection—
(i) at any other place, or
(ii) by electronic means,
as the Board considers appropriate.
(6) Copies of the documents referred to in subsection (5) and of extracts from such documents shall be made available for purchase at the offices of the Board, or such other places as the Board may determine, for a fee not exceeding the reasonable cost of making the copy.
(7) The documents referred to in subsection (5) shall—
(a) where an environmental impact assessment was carried out, be made available for inspection on the Board's website in perpetuity beginning on the third day following the making by the Board of the decision on the matter concerned, or
(b) where no environmental impact assessment was carried out, be made available by the means referred to in subsection (5)(b) for a period of at least 5 years beginning on the third day following the making by the Board of the decision on the matter concerned."

**73.** The applicants make the implausible point that merely because they got something on the hard copy file it should have been on the website. That doesn't stand up – the mere inclusion of something in the hard copy file doesn't make it a "document relating to the matter" if it wouldn't otherwise be so.

**74.** There are three basic questions – the legal issue as to what has to be put online, the factual issue of whether this was complied with, and the procedural issue as to whether to grant a declaration in the event of a finding of non-compliance.

**75.** The fact that some of the documents were published on the developer's website does not constitute compliance with the statutory provision to publish on the board's website. So that doesn't help the board's defence of this point.

**76.** The statutory intention is that only documents "of the board" need to be published (as set out in the marginal note to s. 146 – "Reports and documents of the Board", which I can look at under s. 7 of the Interpretation Act 2005). However, that isn't confined to documents generated "by" the board, but rather to documents that come into existence, or that become part of the board's statutory processes, by reason of the board being seized of the matter. It does not cover pre-existing documents that were created prior to and independently of the board being seized of the issue and that are not part of the board's deliberative process. Those are not "documents relating to the matter" within the statutory intention. So for example an application form to a council is not a document relating to the matter in the context of an appeal to the board. An expert report submitted to the council however does become a document relating to the matter if it is resubmitted for consideration by the board as part of the statutory appeal process.

**77.** The primary issue is what is the extent of the requirement to put documents online (under sub-s. (7)(a) because this is an EIA case). That in effect boils down to the question of what does "documents relating to the matter" mean.

**78.** The board submits:

"The expansive interpretation of the subsections advanced by the Applicants in this regard appears incongruous with the evidently narrower interpretation of s.146(5) set out by Charleton J. in *Kerry County Council v. An Bord Pleanála* [2014] IEHC 238 at §10-§11. Given this court[']s consideration of matters in Clonres and Reid (No.7), Kerry is simply cited as support for the proposition which appears to have been accepted in Clonres that the terms 'documents relating to the matter' cannot be given a literal meaning."

**79.** We need to be clear what we are talking about here. The board is correct insofar as it rejects the applicants' proposition that "documents relating to the matter" means absolutely everything. That literal interpretation is not sustainable. However that doesn't mean that the phrase must exclude documents that are properly part of the statutory process.

**80.** *Kerry County Council* dealt with a quite different point which was whether failure to keep draft notes was a basis for *certiorari* of a decision. Charleton J., unsurprisingly, thought not:

"Points
6. Counsel for Kerry County Council has helpfully structured the voluminous materials into a number of points that are at the essence of this review. These arguments are:
1. The Board was required to furnish documents publicly within 3 days but the decision of the Board was based on notes taken by one member and then destroyed:

this does not constitute statutory compliance and the reasons given are not those of the Board and, further, are inadequate.

2. The Board, in considering the widths required for the cycleways as contributing to overall road width as 28 meters, decided on the basis of incorrect figures since the Board's decision was based on reckoning that without cycleways the road would be merely 13 metres wide whereas, in fact, drainage etc must be added as to 6 meters on each side, thereby making 25 metres or, at minimum, 24 metres.

3. The Board failed to carry out any appropriate assessment of the information provided by Kerry County Council and failed to make any decision as to whether the proposed alternative trail for cyclists and walkers, the green way alternative, was suitable; thus side-stepping the issue of gradients.

4. That a Board member had done a road trip along the N86, and other routes, reporting to the Board, noting the frequency of cyclists, thus behaving inappropriately and introducing immaterial and prejudicial material.

5. That section 13(5) of the Roads Act, 1993, concerning the approval for roads, required the relevant Minister to consider all road users in considering road schemes for approval, which includes cyclists and pedestrians, and that since this function now is devolved to the Board, there was a total failure to exercise this function; whereby the Board were wrong to confine themselves to a consideration only of proper planning and sustainable development.

7. This case has in common with most other judicial review applications of environmental planning cases that every conceivable point is put in the mix. The result must be that the High Court is required to exercise its discretion as to costs so that only those aspects of the case which succeed bring costs, with the result while those that do not may result in an award of costs the other way. The overall result, as this is an environmental protection case may in any event be no order as to costs. Nonetheless, the Court will consider all these points. Numbers 5, 3 and 2 require to be considered together. Points 1 and 3 will be considered first.

Destroyed notes

8. The first point is insubstantial. The Board had a different view to that of the statutory inspector. This was a proper exercise of its discretion. The matter was debated by the Board at some length, apparently over three hours. The Board came to its conclusion by a vote of 3 to 2. Tasked with noting the reasons, settled through debate, the deputy chairman, Conal Boland took notes, went away, wrote up his jottings and formulated the reasons as they have been quoted. As a matter of policy, notes and papers of members of the Board are destroyed after such meetings. The point made is that this was an inaccurate reconstruction of what was decided or, alternatively, that the note-taker simply made up his own reasons which were only tangentially related to anything which the Board had decided. Conal Boland has given evidence and been cross examined. He emerged as trustworthy and conscientious. Since the Board had previously expressed a view to Kerry County Council on the unsuitability of the road, it was no surprise to him, he said, that the Board stayed with the substance of their original reasoning. What emerged was, therefore, broadly parallel to the letter written by the Board on 7th November, 2012. The reason for refusal was in accordance with a condensed version of that letter with particular reference to its first paragraph. He denied adding vocabulary in writing up the decision. That evidence must be accepted as probable.

9. Further, it is to be presumed that statutory bodies function lawfully as they are designed by legislation. Keeping records of everything is not necessarily a guide to the fundamentals of a decision. In any corporate undertaking, different views will be expressed by different people some of them, as in this decision by a bare majority, widely differing. What matters is the responsibility of the Board as a statutory corporation. In *O'Donoghue v An Bord Pleanála* [1991] I.L.R.M. 750 an issue arose as to the keeping of records by the Board. A sensible view was adopted by Murphy J at p. 759-760 which is equally applicable to the facts of this case: I find it difficult to envisage circumstances in which the failure of an administrative body to keep appropriate records would be of itself sufficient grounds to render its decision a nullity. I suspect that ordinarily the inadequate record would fall to be considered in conjunction with an inexplicable decision. In any event it seems to me that by any criterion the paucity of the records in the present case would not justify quashing the decision of the [Board] which was manifestly within its jurisdiction and for which they did have adequate material.

10. Section 146 of the Act of 2000, as amended, deals with the appointment of an inspector, and consequent reports, and with the furnishing of documents and maps to interested parties. Once a decision is made, the Board is only required under s. 146(5) to inform the public by making 'documents relating to the matter' available for inspection. Since the

> principle of construction applicable requires words to be seen in context, it should be quoted. The subsection reads: (5) Within 3 days following the making of a decision on any matter falling to be decided by it in performance of a function under or transferred by this Act or under any other enactment, the documents relating to the matter—
> (a) shall be made available by the Board for inspection at the offices of the Board by members of the public, and
> (b) may be made available by the Board for such inspection— (i) at any other place, or (ii) by electronic means, as the Board considers appropriate.
> 11. The decision was made available two days after the Board met. That decision mirrors in its wording what the Board had decided. The statutory scheme is thus fulfilled down to its last letter."

**81.** That is only an "evidently narrower" interpretation to the limited extent that it means that an informal draft note which was prepared for the sole purpose of creating a formal document is not a "document relating to the matter". I agree. But if the document reaches a certain level of formality, say a submitted inspector's report, it remains a document relating to the matter even if it is later amended – both versions should be published.

**82.** *Clonres CLG v. An Bord Pleanála (No 2)* [2021] IEHC 303, [2021] 5 JIC 0706 only helps the board to a limited extent. At para. 21 I said that

> "insofar as s. 146(5) of the Planning and Development Act 2000 requires that documents relating to the matter be made available by the board, this cannot include documents relating to a quashed decision. Indeed, to do so could be seen to contaminate the process. It seems to me there is no basis for a suggestion that documents relating to how a remitted file was handled are to be included. Section 146(5) relates to documents that are part of the statutory process, not internal administrative documents."

**83.** So a quashed decision should be removed from the website – that's a consequence of *certiorari,* but that has only limited relevance here.

**84.** Again we need to be clear what is covered by any excluded category. The reference to internal administrative documents means things like memoranda indicating who will be assigned to the case, giving notice of the meeting date and time, and so forth. It doesn't mean that formal documents part of the statutory process don't need to be published.

**85.** The documents fall into five separate categories:

(i) documents that were in fact published on the website;
(ii) documents that were part of the statutory process;
(iii) invalid submissions;
(iv) administrative correspondence; and
(v) internal board memoranda.

**86.** The board classified all of these documents on its own analysis, and in fact I accept their classifications with only two exceptions to which we will come.

**87.** We don't need to worry about the first category – if documents were published, the applicant doesn't have a point even if they didn't have to be published.

**88.** Documents that are part of the statutory process are core to the obligation to publish documents relating to the matter. In principle those can't be excluded by the board from the material to be put on the website.

**89.** As regards invalid submissions, by analogy with *Clonres* these are not properly part of the process and don't need to be published. Indeed doing so could be said to contaminate the process.

**90.** As regards internal board memoranda, *Clonres* indicated that these were not properly documents relating to the matter. They are more closely analogous to the internal notes regarded as falling outside the obligation in *Kerry County Council*.

**91.** Going back to "administrative correspondence", that sounds innocuous but it really depends on whether the correspondence is actually administrative or whether it is part of the statutory process. I think the litmus test for that is asking the question as to whether the document was generated under a statutory provision, or creates legal consequences, or whether failure to generate the correspondence would give rise to a legal wrong on the part of the board. If so then it is a "document relating to the matter" because it is actually a formal part of the process. That makes sense in policy terms because it is something whose existence should be known for the purposes of legal transparency. If it is a superfluous letter that is neither legally required nor of legal import then it is purely administrative and hence not a document relating to the matter. To put it another way, not every piece of paper is of sufficient import to be a "document relating to the matter". An open-ended interpretation would create unworkable vagueness as to the board's publication obligations. The existence or otherwise of what the board called in submissions a "statutory pedigree" is the primary touchstone.

**92.** To take the two examples relevant here, an acknowledgement of a submission is a statutory step – art. 217(2) of the 2001 regulations provides:

"(a) The Board shall acknowledge in writing the receipt of any submission or observation referred to in sub-article (1) as soon as may be following receipt of the submission or observation."

**93.** Secondly, s. 134(3) of the 2000 Act requires notification of a decision on an application for an oral hearing:

"(3) Where the Board is requested to hold an oral hearing of an appeal, referral or application and decides to determine the appeal, referral or application without an oral hearing, the Board shall serve notice of its decision on—

(a) the person who requested the hearing and on each other party to the appeal or referral or, as appropriate, (unless he or she was the requester) the applicant under section 37E, and

(b) each person who has made submissions or observations to the Board in relation to the appeal, referral or application (not being the person who was the requester)."

**94.** The board argued that there were 9 documents that fell into the bracket of "administrative correspondence" separate from "the statutory process". With just two exceptions, I agree. The position in relation to those 9 documents is as follows:

(i) statutory receipt of payment – that does not appear to be a statutory document;
(ii) notice to applicant (developer) that application has been received – that does not appear to be a statutory document;
(iii) notice to CEO of Clare County Council regarding application – this does not seem to be a statutory requirement;
(iv) letter to applicant requesting further information – this is not a statutory document under art. 218 but rather simply a non-statutory administrative request for additional copies of existing documents;
(v) letter to applicant (developer) acknowledging additional information – that does not seem to be statutorily required;
(vi) board letter acknowledging observation received from IAA – that is required under art. 217;
(vii) TII - acknowledgement letter from board – in fact TII had no observation to make so the letter acknowledging that falls outside art. 217;
(viii) letters notifying applicant and county council regarding observations made – that does not appear to be a statutory document; and
(ix) notification letters regarding no oral hearing – that is a statutory document under s. 134(3).

**95.** Or to put it another way, this applicants haven't shown that the other seven documents have a statutory pedigree. That doesn't preclude some other applicant being able to do so in relation to an analogous document if it is argued that these applicants have failed to draw attention to some relevant statutory provision (or if the statutory landscape changes, of course – a more than hypothetical qualification in the field of planning law).

**96.** On this basis it seems to me that documents nos. (vi) and (ix) above (documents 61 and 62 in the table below) are properly statutory documents and not mere administrative correspondence. With those two limited exceptions I would accept the board's categorisation of the documents, as reflected in the third and fourth columns below.

**97.** So the overall situation regarding the 84 documents at issue here can be represented by the following table:

| **DATE** (*YY.MM.DD*) | **NAME OR SUBJECT MATTER OF THE DOCUMENT** | **CATEGORY**<br>**1 Documents that are part of the statutory process**<br>**2 Invalid documents (e.g., invalid third-party submissions/observations on the application)**<br>**3 Administrative correspondence (e.g., ABP letters acknowledging receipt of submissions etc)** | **WAS IT PUBLISHED ON THE BOARD'S WEBSITE IN A TIMELY MANNER? Yes or No** |
|---|---|---|---|

| | | | |
|---|---|---|---|
| | | **4 Internal Board Memoranda** | |
| 22.08.31 | 1. The Inspector's Report (ABP-308799-20) | 1 | Yes |
| 22.09.29 | 2. The Board Order (ABP-308799-20) | 1 | Yes |
| 22.09.26 | 3. The Board Direction (BD-011318-22) | 1 | Yes |
| 20.11.30 | 4. EIAR (Volume I: Non-Technical Summary) | 1 | Yes |
| 20.11.30 | 5. EIAR (Volume II: EIAR Main Report – 17 Chapters, EIAR References.pdf and Volume II Table of Contents.pdf) | 1 | Yes |
| 20.11.30 | 6. EIAR (Volume III: Appendices) | 1 | Yes |
| 20.11.30 | 7. EIAR (Volume IV: Photomontages) | 1 | Yes |
| 20.11.30 | 8. Natura Impact Statement (NIS) | 1 | Yes |
| 20.11.23 | 9. EIA Portal Receipt | 1 | Yes |
| 20.11.30 | 10. Planning Application Drawings (including Schedule of Planning drawings) | 1 | Yes |
| 20.11.30 | 11. Planning Application Form | 1 | Yes |
| 20.11.30 | 12. Policy and Planning Context Report | 1 | Yes |
| | 13. Application Fee- receipt of payment | 1 | Yes |
| 20.11.30 | 14. Newspaper Notice, *Clare Champion*, 27th | 1 | Yes |

| | | | |
|---|---|---|---|
| | November 2020 | | |
| 20.11.30 | 15. Newspaper Notice, *Irish Independent*, 26th November 2020 | 1 | Yes |
| 20.11.30 | 16. Application Cover letter to An Bord Pleanála dated 30th November 2020 | 1 | Yes |
| 20.11.30 | 17. Sample Copy of Notice to Prescribed Bodies | 1 | Yes |
| 20.11.30 | 18. Landowner Consents (7 no.) | 1 | Yes |
| 20.11.30 | 19. Site Notice (erected 26th November 2020) | 1 | Yes |
| 19.11.04 | 20. SID Determination by ABP dated 4th November 2019 | 1 | Yes |
| 20.11.30 | 21. Schedule of Notified Prescribed Bodies | 1 | Yes |
| 20.11.30 | 22. Schedule of Pre-application Consultation | 1 | Yes |
| 21.12.21 | 23. Cover Letter dated 21/12/21 | 1 | No |
| 21.12.21 | 24. RFI Response Item 1 | 1 | No |
| 21.07.07 | 25. Cover letter dated 7/7/21 | 1 | No |
| 21.07.07 | 26. RFI Response Item 2 | 1 | No |
| 21.07.07 | 27. RFI Response Item 3 | 1 | No |
| 21.07.07 | 28. RFI Response Item 4 | 1 | No |
| 22.02.18 | 29. Revised Site Notice dated 11/2/22 | 1 | No |
| 22.02.18 | 30. Revised Newspaper Notices, dated 11/2/22 | 1 | No |

| | | | |
|---|---|---|---|
| 22.02.18 | 31. Letters to prescribed bodies, dated 11/2/22 | 1 | No |
| 21.12.21 | 32. Drawing 19107-5061 | 1 | No |
| 21.12.23 | 33. Consent letter re Folios CE29025 and CE5859F 23/12/21 | 1 | No |
| 20.11.23 | 34. Drawing Transmittal Sheet | 1 | No |
| 22.06.14 | 35. Board Direction BD-010865-22 (relating to ABP decision to not hold an oral hearing) | 1 | No |
| 20.12.21 | 36. Letter to Board from Irish Aviation Authority | 1 | No |
| 21.01.12 | 37. Submission - Ute and Konrad Rumberger Pt2 | 1 | No |
| 21.01.09 | 38. Submission - Donal O'Connor | 1 | No |
| 21.01.12 | 39. Submission - Ute and Konrad Rumberger | 1 | No |
| 21.01.13 | 40. Submission - Michael and Siobhan Cooney | 1 | No |
| 21.01.21 | 41. Submission - Tommy Melody and Michael Moloney | 1 | No |
| 21.01.26 | 42. Submission - Oliver Donnellan | 1 | No |
| 21.01.19 | 43. Submission - David McNamara | 1 | No |
| 21.01.28 | 44. Submission - Paul O'Driscoll and Maria Svensson | 1 | No |
| 21.01.29 (received by board) | 45. Submission - Cathal Hogan | 1 | No |

| | | | |
|---|---|---|---|
| 21.01.26 | 46. Submission - Noel and Ailish Daly | 1 | No |
| 21.01.29 | 47. Submission - Shannon Airport Authority DAC | 1 | No |
| 21.01.27 | 48. Submission- Darragh and Deirdre Higan | 1 | No |
| 21.02.03 | 49. Submission - Department of Culture, Heritage and the Gaeltacht (DAU) | 1 | No |
| 21.02.03 | 50. Submission - Shane Dineen | 1 | No |
| 21.02.03 | 51. Submission - Yvonne Harris | 1 | No |
| 21.01.28 | 52. Submission - Hassett Leyden and Associates Architects | 1 | No |
| 21.01.02 | 53. Submission - Ailish and Brian O'Dwyer | 1 | No |
| 21.02.02 (received by Board) | 54. Submission - Brian Penny and Sinead Cooney | 1 | No |
| 21.02.03 | 55. Submission - Irish Aviation Authority | 1 | No |
| 21.01.28 | 56. Submission - Kathleen Horgan and Eamonn Cregan | 1 | No |
| 21.02.03 (received by Board) | 57. Submission - Michael McNamara | 1 | No |
| 21.02.01 | 58. Submission - Oisin Slattery | 1 | No |
| 21.01.29 | 59. Submission - Piotr Kowalewicz and Others | 1 | No |
| 21.01.31 | 60. Submission - Susan McMahon | 1 | No |
| 21.01.19 | 61. TII - Acknowledgement Letter from Board | 1 | No |
| 22.06.14 | 62. Notification Letters regarding no Oral Hearing | 1 | No |

| | | | |
|---|---|---|---|
| 21.01.26 (Ltr board to DMN) | 63. Submission - David McNamara | 2 | No |
| 21.01.29 (ltr board to MC) | 64. Submission - M.Cooney | 2 | No |
| 21.01.27 | 65. Submission - M.Cassidy | 2 | No |
| 21.01.28 (ltr board to RP) | 66. Submission – Rita Pearl | 2 | No |
| 21.01.28 | 67. Submission – Sheila O'Connor | 2 | No |
| 21.01.26 | 68. Submission – M. Tuohy | 2 | No |
| 21.02.03 | 69. Duplicate Marese Tuohy invalid submission | 2 | No |
| 20.11.30 | 70. Statutory receipt of Payment | 3 | No |
| 20.12.04 | 71. Notice to Applicant (Developer) that Application has been received | 3 | No |
| 20.12.04 | 72. Notice to CEO of Clare County Council regarding Application | 3 | No |
| 20.12.11 | 73. Letter to Applicant requesting Further Information | 3 | No |
| 20.12.17 | 74. Letter to Applicant (Developer) acknowledging additional info | 3 | No |
| 20.12.23 | 75. Board letter Acknowledging Observation received from IAA | 3 | No |
| 22.03.29 | 76. Letters notifying Applicant and County council regarding Observations made | 3 | No |
| 20.12.16 | 77. Memorandum Regarding Prescribed Bodies | 4 | No |

| | | | |
|---|---|---|---|
| 20.12.15 | 78. Screening Checklist | 4 | No |
| 22.09.27 | 79. Memorandum Pt1 | 4 | No |
| 22.06.07 | 80. Memorandum Pt2 | 4 | No |
| 22.05.25 | 81. Memorandum Pt3 | 4 | No |
| 22.08.31 | 82. Inspector Discharge Form | 4 | No |
| 22.09.29 | 83. Submission of Draft Order Cover Sheet | 4 | No |
| 22.09.30 | 84. Case Cover Sheet | 4 | No |

**98.** Items 1 to 22 are not problematic because they are already published.
**99.** Items 23 to 62 are documents relating to the statutory process and should have been published.
**100.** Items 63 to 69 were invalid submissions and don't need to be published.
**101.** Items 70 to 76 are administrative correspondence and don't need to be published.
**102.** Items 77 to 84 are internal memoranda and don't need to be published.
**103.** Finally, as to whether to make a declaration, In *Reid (No. 7) v. An Bord Pleanála* [2024] IEHC 27, [2024] 1 JIC 2401 at §134(i) to (ix), I set out relevant circumstances in respect of whether to grant a declaration, and I have considered those here. I appreciate that as failings go, this is not the most major, and I do note the various points made by the board in that regard. What stands out however is that there has been an increasing pattern of cases where relevant documents have not been properly made available in accordance with statute, either at all or in a timely manner. There have just been too many examples of publication failures in recent times, which suggests that further encouragement to improve internal systems in that regard could serve a purpose. Recent examples include:

(i) *Southwood Park Residents Association v. An Bord Pleanála* [2019] IEHC 504, [2019] 7 JIC 1003 (Simons J.) – part of the planning application not posted online during the process – *certiorari* granted;
(ii) *Sweetman v. An Bord Pleanála* [2020] IEHC 39, [2020] 1 JIC 3104 [2021] IEHC 662, [2021] 10 JIC 2601, (McDonald J.) (Sweetman XV) – failure to include notice of the receipt of the appeal of the decision of the Council in the weekly board list – the breach was held to be not insubstantial but it was not necessary to decide on whether to grant *certiorari* because the decision was quashed on other grounds;
(iii) *Sweetman v. An Bord Pleanála* [2021] IEHC 259, [2021] 4 JIC 1403 (O'Regan J.) *(Sweetman XIII*) – failure to publish the decision on the website within the statutory timescale – no relief deemed necessary in the particular circumstances;
(iv) *Save Cork City v. An Bord Pleanála & Ors* [2021] IEHC 509, [2021] 7 JIC 2802 – failure to make NIS available under s. 177AE of the 2000 Act – declaration granted;
(v) *Clifford v. An Bord Pleanála (No. 3)* [2022] IEHC 474, [2022] 8 JIC 1502 – breach of public information requirements of s. 51(4C) and (6C) of the Roads Act 1993 – declaration granted;
(vi) *Keshmore Homes Ltd. v. An Bord Pleanála* [2023] IEHC 369, [2023] 6 JIC 2702 (Phelan J.) paras. 39-62 – failure to publish material on the website held sufficient grounds for an extension of time;
(vii) *Corajio v. An Bord Pleanala,* [2023] IEHC 373, [2023] 6 JIC 2902 (Phelan J.) §§31, 43-66 – failure to notify a party of a decision held sufficient grounds for an extension of time;
(viii) *Reid v. An Bord Pleanála (No. 7)* [2024] IEHC 27, [2024] 1 JIC 2401 – breach of publication requirements under s. 146 of the 2000 Act – declaration granted; and
(ix) *Thompson & Anor v. An Bord Pleanála* [2024] IEHC 101, [2024] 2 JIC 2602 §§15-18, 52 – late notification of the decision, insufficient basis for relief.

**104.** The present case pushes the established breaches in recent years into double figures, to say nothing of alleged breaches which did not have to be determined. Against such a background, declaratory relief serves a salutary public law purpose in upholding the law and fostering compliance. Otherwise, a continued pattern of non-compliance would be without consequence, an unacceptable

situation and one that would do nothing to bring about future compliance. Hence on balance a declaration is appropriate, even bearing in mind the arguments in favour of making no order.

**105.** For the avoidance of doubt, I reiterate that the applicants haven't shown how they were sufficiently disadvantaged by these failures so as to preclude their participation in the process. Indeed that would be difficult in principle because the failures only occurred after the decision was made. Hence *certiorari* is not an appropriate remedy. But the applicants have made out a case for a declaration.

**Core ground 2 – allegedly invalid SID determination**

**106.** Core ground 2 is:

"2. The Board failed to make a prior determination to the effect that the Proposed Development would constitute strategic infrastructure for the purposes of S37A and Schedule 7 of the 2000 Act, and failed to make a direction as to the plans, particulars or other information which the Board will require for the purposes of consideration of an application, as required by A210(2)(a) of the 2001 Regulations."

**107.** The parties' positions as recorded in the statement of case are summarised as follows:

"Ground 2

29. Ground 2 is that the Application is invalid because the Developer did not have a determination from the Board under S37A and S37B PDA allowing it to apply for an 18 turbine windfarm. It did have a determination allowing it to apply for a windfarm of 'between 19 and 24' turbines. The development proposed would have 18 turbines which is outside the scope of the determination.

30. Board's position on Ground 2. This ground is denied. It is based on the erroneous premise that the proposed development for which permission was sought under s.37E was a different development to the proposed development that the Board determined was SID under s.37A of the 2000 Act (under ABP-303105-18) to the extent that said preliminary decision under s.37A could not be relied on in relation to the subject application for permission. The jurisdictional prerequisites to the Board considering the subject application for permission were met in this case.

31. Coillte and FEC argue that the Applicant's reliance on *CHASE v ABP* [2021] IEHC 203 (to the effect that there is an equivalence between change in identity of an applicant for permission and a difference in the proposed development from that set out in the notice) is incorrect. The requirements of section 37A were complied with, and the basis for the Board's decision was the power output of the proposed development (windfarm with a generating capacity of greater than 50MW). Any difference between the development as permitted with the contents of the notice was very minor and the Applicants' argument in this regard is raised as a pure technicality, with no significance attributed to the alleged differences beyond mere supposition.

32. Further, Article 210(2)(a) of the 2001 Regulations which provides for an indication of certain information to a prospective applicant for permission was also complied with. The Board did give such an indication, and the formation of the Board's opinion that a proposed development constitutes strategic infrastructure development has the procedural effect of directing the application down the procedural route under section 37E but does not amount to a binding decision for any other purpose.

33. The Applicants' failure to raise this issue in the substantive procedure before the Board amounts to impermissible gaslighting of the decision-maker."

**108.** The relevant sub-grounds are:

"11. Core Ground 2 is that the Impugned Decision is invalid because the Application was invalid because there was no prior determination by the Board to the effect that the Proposed Development would constitute strategic infrastructure for the purposes of S37A and Schedule 7 of the 2000 Act, and no direction by the Board as to the plans, particulars or other information which the Board will require for the purposes of consideration of an application, as required by A210(2)(a) of the 2001 Regulations.

12. S37A of the 2000 Act provides that an application for permission for a development specified in Schedule 7 shall be made to the Board under S37E and not to the planning authority, provided the Board has made a determination pursuant to S37B that the proposed development would, if carried out, be strategic infrastructure development because it would fall within one or more of three headings. The Board made no determination that the Proposed Development was of a class specified in Schedule 7. Instead, it made a determination that a different development would be strategic infrastructure development. It determined, on or about 22 October 2019 under reference 303105, that a proposed windfarm of 20 to 25 turbines at Carrownagown, County Clare, would constitute strategic infrastructure development as defined in 52 of the 2000 Act (which includes '(a) any

proposed development in respect of which a notice has been served under section 37B(4)(a).') This was not the windfarm for which permission was eventually sought.

13. Schedule 7 of the 2000 Act provides that a windfarm with more than 25 turbines or generating more than 50MW of electricity will be strategic infrastructure. The Proposed Development involves a windfarm of 19 turbines. The power output of the Proposed Development is not stated and the Application does not provide any indication of power output. The EIAR for the Proposed Development proceeds on an assumption (Chapter 2, §2.2) that 'For purpose of the planning application and the analysis conducted in this EIAR, [it] has considered a wind turbine composed of a tower with a maximum height of 101 meters and a maximum rotor diameter of 136 meters resulting in an overall maximum tip height (blade in the vertical position) of 169 meters.' The EIAR for the Proposed Development does not specify the actual wind turbine for which permission is sought and there has been no determination that the actual Proposed Development meets the requirements of S37A and Schedule 7. The Proposed Development is therefore not one in respect of which the Board has determined what the plans, particulars or other information it will require.

14. A210(2)(a) of the 2001 Regulations requires the Board to make such a determination in the course of a pre-application consultation. The Board did not do so. Insofar as the Board made any determination in respect of a proposed development on the Site under file reference ABP-303105-19, that determination did not contain a determination for the purposes of A210(2)(a). Accordingly, the application for permission pursuant to S37E was invalid."

**109.** Hence we need to be clear what the actual pleaded complaint is. In essence it is as follows:

(i) the SID determination did not relate to this development, *inter alia* because of a different number of turbines;

(ii) it is not stated how the present application complies with the SID requirement of generation of 50MW or what the size of the actual turbine will be and hence it has not been validly determined that the statutory SID criteria are met; and

(iii) the board failed to make a direction as to the plans, particulars or other information which the Board will require for the purposes of consideration of an application, as required by A210(2)(a) of the 2001 Regulations.

**110.** Insofar as the complaint is that the application changed, that in itself is not a problem. As the board submits:

"The scheme on its face envisages that the application may change. Indeed, as a very basic proposition it has to be accepted that at the pre-application stage the application does not have be fully formed nor does an EIAR or NIS have to be prepared. It is beyond obvious that an EIAR or NIS may reveal environmental constraints that require difference or nuance in a proposal. It is simply incongruous to suggest that – given the subject matter of the s.37A tests – that one would have to keep coming back to the Board whenever the requisite environmental examinations may reveal the need to eliminate or move a turbine."

**111.** *Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála* [2021] IEHC 203, [2021] 3 JIC 1904(Barniville J.) is irrelevant as that related to a different issue, a change in the identity of the applicant.

**112.** The application has not changed in terms of the central fact that it meets the SID criterion. The Inspector's Report of 22nd October 2019 states at §5.1.1:

"Having regard to the nature and scale of the proposed facility comprising in the region of 20-25 no. turbines and having a total power output of c.90 MW, it is my opinion that the proposed development comes within the scope of class 1 of the Seventh Schedule of the Strategic Infrastructure Act, 2006 (as amended) being a wind farm having a total output greater than 50 megawatts."

**113.** She concludes at §7.1:

"On the basis of the above, it is my opinion that the proposed development would exceed the threshold set out in the Seventh Schedule of the Strategic Infrastructure Act, 2006, as amended by the Planning and Development (Amendment) Act, 2010 as, with the development of 20 no. turbines with a power output of c.90MW it would have a power output in excess of the 50MW specified."

**114.** This was adopted by the board and remains the position – this is a project with a power output in excess of 50MW and otherwise meets the SID criteria, in the lawful view of the board.

**115.** Contrary to the wording adopted by the inspector, the seventh schedule concerned appears in the Planning and Development Act 2000, as inserted by the Planning and Development (Strategic Infrastructure) Act 2006, not in the 2006 Act (whose short title is given incorrectly in the report), and as amended by the Planning and Development (Amendment) Act 2010.

**116.** The seventh schedule to the 2000 Act includes the following:

"An installation for the harnessing of wind power for energy production (a wind farm) with more than 25 turbines or having a total output greater than 50 megawatts."

**117.** The application met that at all material times, as found by the board.

**118.** There is something seriously non-goal-congruent about the complaint made by the applicants under this heading. The removal of one of the turbines was designed to increase the separation distance and provide for better protection for Hen Harrier – one of the professed concerns of these applicants and a centrepiece of their concerns in the No. 1 judgment. The State in that module rather wickedly suggested that the applicants weren't really all that concerned about Hen Harrier but were using them as a convenient basis to object to the wind farm. For a court to hold that the developer had condemned its project to invalidity by reason of having made pro-environmental adjustments would be to undermine the objectives of domestic and European legislation, and a court should lean against such a conclusion unless the law compels such a result. The law doesn't compel such a result here.

**119.** Insofar as the complaint is that the actual application does not meet the SID definition, or that it wasn't clear that it did, exact details are not required as long as it is clear that the development is SID: *Massey v. An Bord Pleanála* [2021] IEHC 783, [2021] 12 JIC 2123 at §20-§21. *Callaghan v. An Bord Pleanála* [2018] IESC 39, [2021] 1 I.R. 81,[2018] 2 I.L.R.M. 373, [2018] 7 JIC 3103(Clarke C.J.) at 376 is to the same effect.

**120.** Here, the details at the s. 37A stage were enough to enable the board to be satisfied that the SID definition was met. The details required at the s. 37E stage was obviously required to be greater, but they also made clear that the definition was satisfied. So there is simply nothing in this point.

**121.** Insofar as the art. 210 complaint is concerned, this hasn't been made out on the facts. The record of the second pre-application consultation with Coillte on 8th August 2019, at section 4.0, expressly records that the procedures for the making of an application to An Bord Pleanála were outlined to the prospective applicant, while the records of the first and second pre-planning applications clearly demonstrate that the board indicated to Coillte what would be required in terms of information for the purposes of the consideration of an application.

**122.** The concept that the developer wasn't duly informed of the requirements is negatived on the facts by the fact that the actual application made was accompanied by the necessary information. Article 210 doesn't mean – indeed can't mean – that every detail of the plans and particulars have to be finalised at the pre-application stage. That would contradict the scheme envisaged by primary legislation which requires far less detail at the pre-application stage. It would also be unworkable. In any event the applicants concede that some information was provided for the purposes of art. 210(2)(a) (para. 23 of submissions).

**123.** In oral submissions, the board rather tartly called this "another clever point in a series of clever points that just presumes its own suppositions" and I'm afraid that is basically what we are looking at here. The objection has no actual merit or substance and that's before we even get to the point that the applicants weren't actually harmed by any alleged failure by the board to advise the developer in more detail as to what to submit. Neither was anybody else, and nor was the process contaminated in any identified tangible way. Nor did the lack of more detailed guidance harm the environment or any other objective interests. Any shortcoming in documentation is superseded by the actual application and the power to seek further information, which was exercised. Beyond sending the case down the SID route, the s. 37A decision isn't meant to be binding as to decision-making in later stages of the process: *Callaghan v. An Bord Pleanála* [2018] IESC 39, §7.12.

**124.** As the points made by the applicants lack merit, I don't need to get into the issue of whether the points can be made at all by reason of not having been raised with the board during the consenting process (see the judgment of 15th October 2009, *Djurgarden*, C-263/08, ECLI:EU:C:2009:631, and the judgment of 14th January 2021, *Stichting Varkens en Nood,* C-826/18, ECLI:EU:C:2021:7).

**EU law issues**

**Core ground 4 - expertise**

**125.** Core ground 4 covers both the board's expertise and allegedly erroneous EIA. We can deal with expertise now and postpone the ground insofar as it alleges substantive error in the EIA until we reach core ground 6.

**126.** Core ground 4 is:

"4. The Impugned Decision is invalid because the Board failed to ensure it had sufficient expertise to examine the EIAR in order to ensure its completeness and quality and to carry out an assessment that would be as complete as possible, contrary to S172(1H) of the 2000 Act, and A6 of the EIA Directive and to carry out an assessment that would be as complete as possible (S171A, S172, A3(6)), and failed to give adequate reasons to establish that it had access to such expertise (S71A, S172, A8a)."

**127.** The parties' positions as recorded in the statement of case are summarised as follows:

"Ground 4

38. The remainder of Ground 4 is that expertise is required to assess these matters, and the Board did not have, or did not show that it had, sufficient expertise to conduct the EIA (Ground 4, §27-29).

39. Board's position on remainder of Ground 4. This ground is denied and is based on an erroneous premise. The Board is not required to prove it has sufficient expertise to conduct the EIA that it carried out merely because the Applicants contend by way of non-expert assertion that the Board lacks sufficient expertise. The non-expert assertions of the Applicants (who are litigants in this action and are not independent) are not a basis for and do not establish any lack of expertise on the part of the Board for EIA purposes. Pursuant to the 2000 Act, the Board is the competent authority for the purposes of examining the adequacy of the EIAR and carrying out an EIA and is assisted in this regard by its Inspectors and is deemed to have the necessary expertise. There is no independent or free-standing duty on the Board to give reasons establishing that it had access to any given level of expertise of the kind that the Applicants essentially allege exists.

40. Coillte and FEC argue that the cases advanced in support of the alleged requirement to demonstrate expertise are not authority for the Applicants' proposition. The Board is required to have, or have access to sufficient expertise to examine the EIAR. This is the expertise of a critic, not an author. The case advanced by the Applicants related to no more than a complaint that the Board have not made an explicit statement regarding its expertise. Moreover, the Applicants have failed to substantively prove that the qualifications of the Board were deficient."

**128.** The relevant sub-grounds as regards expertise are as follows:

"21. Core Ground 4 is that the Impugned Decision is invalid because the Board failed to ensure it had sufficient expertise to examine the EIAR in order to ensure its completeness and quality (S172(1H)) and to carry out an assessment that would be as complete as possible (S171A, S172, A3(6)), and failed to give adequate reasons to establish that it had access to such expertise (S171A, S172, A8a).

22. Full particulars of this Ground will be provided when the Board has confirmed the identity and expertise of all individuals involved in considering the EIAR and carrying out the EIA on its behalf.

[flaws alleged]

…

26. The Applicants drew these matters to the attention of the Board, but they do not have any specialist technical expertise, and rely on their right to have the application determined by an independent expert body carrying out a detailed scrutiny of an application in the public interest, and at no significant cost to the individual.

27. Expertise in peat slides, groundwater flows, water quality, impacts on birds, fauna and flora, which appear likely to require expertise and qualifications in geology, hydrology and or hydrogeology, ornithology, ecology and environmental science, are all likely to be required in order to carry out an examination and analysis of the information submitted by the Developer and to verify its robustness.

28. The Board has failed to ensure that it had, and/ or failed to consider and determine whether it had, sufficient expertise to examine the EIAR submitted by the Developer, and it thereby failed to comply with S172(1H) of the 2000 Act, and/ or with that subsection read in accordance with A6. It has also failed to ensure that it had sufficient expertise to carry out an EIA, in particular to carry out an examination and analysis sufficient to identify, describe and assess the likely significant effects of the Proposed Development on the environment, and to ensure that such EIA is as complete as possible. Accordingly the Board failed to comply with S171A and S172 of the 2000 Act, and with those Sections read in accordance with the EIA Directive, in particular Al to A9 thereof.

29. In addition, or in the alternative, the Board failed to include in its decision reasons sufficient to establish that it had sufficient expertise to carry out the obligations set out above, and accordingly the reasoned conclusions in the Impugned Decision are insufficient to comply with S37H(2) of the 2000 Act, or with S37H(2) read in accordance with A8a(l) of the EIA Directive."

**129.** So again we need to unpack the actual pleaded complaint under the heading of expertise. It seems to be:

(i) the board did not actually have or have access to the required expertise; and

(ii) the board did not include in the decision reasons sufficient to establish that it had or had access to such expertise.

**130.** As regards whether the board lacked the required expertise, that has to be established evidentially. The applicants certainly haven't done that.

**131.** The board submitted that applicants generally sometimes postulate various failings in Irish law. But the legal system "has given the applicants a suite of weaponry" to pursue this point but they haven't pursued that to a conclusion. The reliefs sought in the fourth amended statement of grounds include a D3 which involves disclosure of the board's expertise. Nothing was pursued under that heading. In oral submissions, the board said that this was a case of failing to heed Lady Macbeth's advice (act 1 sc. 7):

> "But screw your courage to the sticking place,
> And we'll not fail."

**132.** Had the applicants screwed their courage to the sticking place they might have pursued discovery to actually enable them to make this point, but while claimed in the fourth amended statement of grounds that was effectively abandoned because no such application was brought to fruition.

**133.** As the board submits:

> "30. Respectfully, this point does not get off the ground in circumstances where the Applicants have pleaded (§26, E(Part 2), Fourth Amended Statement of Grounds) that they themselves have no specialist technical expertise and they have not advanced or adverted to any scientific evidence to impugn the rationality of the Board's conclusions for EIA purposes. The non-expert assertions of the Applicants (who are litigants in this action and are not independent: see *Environmental Trust Ireland v. An Bord Pleanála* [2022] IEHC 540 at §93, §96; *Murphy v. An Bord Pleanála* [2024] IEHC 59 at §13, §14) are not a basis for and do not establish any lack of expertise on the part of the Board for EIA purposes."

**134.** As regards whether the board failed to give reasons demonstrating the required expertise, that is a complete misconception. It is up to an applicant to show that the expertise is lacking, not up to a decision-maker to prove that she has the expertise. There is no legal requirement as postulated by the applicants here. As the board submits:

> "33. The Applicants submissions (§74) contend that 'in terms of the EIA Directive, the requirement to show expertise is an explicit legal provision' but then don't identify any such provision that so requires. ...
>
> 34. Further, there is no independent or free-standing duty on the Board to give reasons establishing that it had access to any given level of expertise of the kind that the Applicants essentially allege exists. Neither Article 8a(1) of the EIA Directive or s.37H(2) or of the 2000 Act is the source of or provides for such a reasons requirement. There is no textual basis in that sub-article of the EIA Directive or in that section of the 2000 Act that sets out such a requirement."

**135.** Calling that a reasons requirement in domestic law doesn't add anything. A decision-maker isn't required to prove her expertise, barring any specific legal rule in a particular context requiring her to do so. No such rule exists in this context.

**136.** There is an analogy between the bogus argument here that the board has to prove its expertise and the bogus argument that judges have to prove their authority. In his leading overview of the area of organised pseudolegal commercial argument (OPCA*), Meads v. Meads* 2012 ABQB 571, Rooke ACJ says as follows:

> "[286] In some instances an OPCA litigant may argue that a defect of some kind renders a court or judge without authority. An OPCA litigant may attempt to identify that defect by demanding that the court prove its authority is valid and genuine.
>
> a. Oaths
>
> [287] A very common demand is that a judge provide some indication of valid authority. Commonly that demand is for documentation, such as a certificate of appointment, or a copy of an oath of office*: R. v. Lindsay*, 2006 BCSC 188, 68 W.C.B. (2d) 718, affirmed 2007 BCCA 214; *Ramjohn v. Rudd,* 2007 ABQB 84 at para. 9, 156 A.C.W.S. (3d) 38; *Bank of Montreal v. McCance*, 2012 ABQB 537 at para. 7. In Alberta Treasury Branches v. Klassen, 2004 ABQB 463 at para. 25, 364 A.R. 230, an OPCA representative added the following post-script to his submissions:
>
> > If you had jurisdiction on June 7th, even under an Admiralty Court, you must have taken an Oath. Can you provide me with a copy of your Oath, like other professions must provide to show copies posted) of their certification, they are legitimate and not imposters? It would be appreciated since it is demanded in Sec. 9.12,b of the Provincial Court Act. ('transmitted forthwith')
>
> [288] Curiously, these litigants do not appear aware that judicial appointments are published as an Order-in-Council.
>
> [289] It is well established that a judge or court officer is presumptively authorized to act as they do, and rather the OPCA litigant who claims some deficiency or bias must prove that deficiency. In *R. v. Crischuk*, 2010 BCSC 716 at paras. 36-38, affirmed 2010 BCCA 391, 2010 D.T.C. 5141, Justice Barrows explained that onus in this manner:

> 37 ... His position appears to be that simply announcing a challenge to the authority of the judge or the Crown to occupy the positions they occupy is sufficient. It is not. There must be some evidence that casts into doubt that which otherwise appears regular on its face. There is no evidence to doubt Judge Hogan's status. Thus, this ground of the appeal, to the extent it relates to Judge Hogan's failure to produce a certified copy of his oath of office, has no merit. [Emphasis added.]

See also: R. v. Lemieux, 2007 SKPC 135 at para. 12.

[290] An OPCA litigant sometimes demands that a judge swear various oaths and follows with an allegation that a failure to do so defeats the court's authority. That is what appeared to happen in *Kilini Creek/Patricia Hills Area Landowners v. Lac Ste. Anne* (County) Subdivision and Development Appeal Board, 2001 ABCA 92 at para. 2, 104 A.C.W.S. (3d) 1142. Justice McClung's response was succinct:

> Reverend Belanger demands that I take an oath (for his use) that acknowledges the supremacy of God and the Charter of Rights. I have declined this opportunity.

b. The Court Proves It Has Jurisdiction and Acts Fairly

[291] Other reported demands to demonstrate judicial authority include:

- 'are you a public servant?': *Dempsey v. Envision Credit Union*, 2006 BCSC 1324 at paras. 31, 32, 33, 60 B.C.L.R. (4th) 309;
- that the court 'state its jurisdiction': *Hajdu v. Ontario* (Director, Family Re[s]ponsibility Office), 2012 ONSC 1835 at para. 20; and
- a court disprove it acts 'in colour of law': *Hajdu v. Ontario* (Director, Family Re[s]ponsibility Office), 2012 ONSC 1835 at para. 22.

[292] Other OPCA litigants claim judicial bias, influence, or conspiracy. However, a litigant who advances that kind of claim has an obligation to provide positive evidence to support the alleged conspiracy*: R. v. Sydel*, 2010 BCSC 1470 at paras. 27-29, see also *R. v. Sydel*, 2010 BCSC 1473 at paras. 18-23, 39, [2011] 1 C.T.C. 200, affirmed 2011 BCCA 103, leave refused [2011] S.C.C.A. No. 191."

**137.** Such arguments are obvious nonsense. So is the argument that a respondent in judicial review has to prove its own expertise, or demonstrate in the proceedings that it has conducted a proper assessment. Of course the board has certain identifiable and limited autonomous duties in the decision-making process, but once we come to the judicial review, the onus is on the applicants: see respectively per Hogan J. in *An Taisce v. An Bord Pleanála* [2022] IESC 8, [2022] 2 I.R. 173, [2022] 1 I.L.R.M. 281, [2022] 2 JIC 1602 at para. 121, *Sherwin v. An Bord Pleanála* [2023] IEHC 26, [2023] 1 JIC 2701.

**138.** The overarching problem here is that given the choice between trying to book a ticket to Luxembourg to raise abstract questions of law versus actually coming to grips with the factual situation, the applicants have chosen the easy option. It simply isn't correct that the lack of volunteered reasons as to expertise prevents the applicants from knowing whether the board has expertise, or prevents recourse to domestic procedures to investigate that issue. Those procedures were available – the applicants simply didn't activate them.

**Core ground 5 – alleged duty of textual incorporation**

**139.** Core ground 5 is:

> "5. The Impugned Decision is invalid because it fails to incorporate environmental conditions into the decision, and fails to incorporate a description of measures intended to avoid, prevent, reduce or offset effects contrary to S37H(2A), S172(1H), and S172(11) of the 2000 Act read in light of A8a of the EIA Directive; or those subsections constitute an inadequate transposition of A8a."

**140.** The parties' positions as recorded in the statement of case are summarised as follows:

> "Ground 5
>
> 41. Ground 5 is that the Board failed to comply with A8a of the EIA Directive because it failed to incorporate its reasoning into its decision, with particular reference to Conditions 1 and 5; and it failed to identify specifically each significant effect, the measures envisaged to avoid, prevent, reduce or offset each effect, and whether the particular measure would avoid, or prevent, or reduce, or offset the effect.
>
> 42. Board's position on Ground 5. This ground is based on an erroneous premise, namely the Applicants mistaken interpretation as to the requirements of Article 8a of the EIA Directive and of the Board's Decision and the conditions attached to same. The misconception that subtends this ground is the Applicants contention that there is a heretofore unidentified requirement that all the matters referred to in Article 8a(1)(a) and (b) of the EIA Directive must be embodied and explicitly recited/itemised in a single decision document and that it is unlawful to incorporate the contents of documents by reference to same, which is incorrect and not the law. There was no non-compliance with Article 8a as alleged or at all.

43. Coillte and FEC argue that the interpretation placed on Article 8a of the EIA Directive is incorrect and that the language used does not entail a requirement to identify specifically each effect in terms of reciting every aspect thereof in the body of the decision. The Board's decision included a Reasoned Conclusion and, where appropriate, conditions relating to environmental conditions. There is no textual basis for the Applicants' contention features and measures must be listed separately, and by reference to their envisaged purpose, which is a requirement invented by the Applicants."

**141.** The relevant sub-grounds are:

"30. Core Ground 5 is that the Impugned Decision is invalid because it fails to incorporate environmental conditions into the decision, and fails to incorporate a description of measures intended to avoid, prevent, reduce or offset effects contrary to S37H(2A), S172(1H), and S172(11) of the 2000 Act read in light of A8a of the EIA Directive; or those subsections constitute an inadequate transposition of A8a and a Decision adopted pursuant to provisions of an Act that fail to give effect to a Directive, where the Board does not apply the interpretative obligation in order to correctly apply A8a of the EIA Directive, is invalid, void and of no legal effect.

31. The Decision fails to incorporate environmental conditions contrary to A8a(l) which requires that the decision to grant permission shall incorporate any environmental conditions attached to the decision. The importance of incorporation is that it facilitates understanding of the Decision by the Developer, the public concerned and the local authority which is competent to enforce the terms of the Decision. That objective cannot be as easily fulfilled where the precise conditions are not included within the text of the Decision.

32. Condition 1 of the Impugned Decision requires construction of the Proposed Development in accordance with the plans and particulars submitted. This is not a condition for the purposes of A8a(l), but merely a statement of the obvious proposition that the project authorised is only the project for which permission was sought, and no more.

33. Condition 5 of the Impugned Decision requires the Developer to ensure that all construction methods and environmental mitigation measures set out in the Environmental Impact Assessment Report, the Natura Impact Statement and associated documentation are implemented in full. The Board erred in law in failing to include the requirements to which it refers within the text of the Impugned Decision.

34. S37H(2A) of the 2000 Act requires that the decision and notification of the decision adopted on an application made pursuant to S37E must include a summary of the results of consultations and information gathered in the course of the EIA, but does not require incorporation of conditions into the decision. S172(1H) of the 2000 Act provides that the Board may, in carrying out an EIA, have regard to and adopt in whole or in part any reports prepared by its officials or by consultants, experts or other advisers. It does not provide that such reports must be incorporated in the decision.

35. The requirement to incorporate under A8a is not satisfied by merely adopting a document prepared by experts employed by the Developer: it requires incorporation of specific conditions into the body of the Decision; and adopting documents by reference to plans or particulars contained generally in the application is not compatible with the principle of legal certainty which is one of the general principles of European law which, pursuant to A19(1) of the Treaty on European Union, informs the proper interpretation of the EIA Directive.

36. The Board is in any event not empowered by S172(1H) of the 2000 Act to adopt a report prepared by consultants, experts or other advisers of the Developer, only by consultants, experts or advisers engaged by it.

37. The Board has breached its duty pursuant to A4(3) and 19(1) of the Treaty on European Union to apply the 2000 Act in accordance with the object and purpose of A8a of the EIA Directive, by failing to incorporate the precise conditions imposed into the text of its Decision, and by seeking to include them by reference only.

38. The Decision further failed to incorporate a description of features envisaged to avoid, prevent, reduce or offset significant effects, and to identify which objective they are envisaged to achieve. For the reasons set out above, the features envisaged to avoid, prevent, reduce or offset significant effects must also be incorporated in the Decision.

39. The correct interpretation of A8a requires the decision maker to identify which objective each measure is envisaged to achieve avoidance, prevention, reduction or offsetting, and to incorporate same into the text of the Decision. The importance of incorporation is that it facilitates understanding of the Decision by the Developer, the public concerned and the local authority which is competent to enforce the terms of the Decision. That objective cannot be as easily fulfilled where the features envisaged and the function they perform are not included within the text of the Decision.

40. The Board's Reasoned Conclusion on the Significant Effects of the Proposed Development concludes, first, that 'adequate mitigation measures are proposed' in relation to negative impacts on human health and population from noise, traffic and dust, but does not itemise those measures. It concludes, secondly, that negative impacts on biodiversity will be 'mitigated by a suite of measures outlined in the Construction and Environmental Management Plan contained in Appendix 3-1 of the Environmental Impact Assessment Report', but does not itemise those measures either. Thirdly, it concludes that negative impacts on water could arise, but will be 'mitigated by measures outlined within the application'; but again it does not itemise those measures.

41. Fourthly, the Board's Reasoned Conclusion concludes that negative impacts of noise and dust from construction will be 'mitigated through adherence to best practice construction measures'; but once again it does not itemise those measures. Fifthly and finally, the Board's Reasoned Conclusion concludes that negative impacts of noise and dust from construction will be 'mitigated through the implementation of a traffic management plan and a construction management plan'; but does not itemise the measures in those plans.

42. The Board thereby failed to describe the measures proposed within the Decision; and moreover failed to specify whether each individual measure would have the effect of avoiding, preventing, reducing or offsetting the impact of the Proposed Development on the environment.

43. The requirement to incorporate measures intended to avoid, prevent, reduce or offset the impact of a proposed development on the environment is not satisfied by including such measures generally without identifying their effect, since an assessment is not as complete as possible unless it is clearly established whether a measure will avoid the risk of an impact altogether, merely serve to prevent its occurrence, reduce its impact, or allow it to happen but take some other action to make up for it.

44. S172(11) of the 2000 Act requires the Board to attach to its decision 'such conditions, if any, to the grant as it considers necessary, to avoid, prevent or reduce and, if possible, offset the significant adverse effects on the environment of the proposed development,' but does not require it to incorporate into its decision a description of any features of the proposed development and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects as required by A8a(l) of the EIA Directive.

45. The Board has breached its duty pursuant to A4(3) and 19(1) of the Treaty on European Union to apply the 2000 Act in accordance with the object and purpose of A8a of the EIA Directive, by failing to incorporate into its Decision a description of any features of the proposed development and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects as required by A8a(l) of the EIA Directive."

**142.** While wordy, the whole job-lot is based on the same single false premise, namely that when art. 8a of the EIA directive refers to a requirement to "incorporate", this means in the form of textual narrative *in extenso*.

**143.** Article 8a(1) provides:

"1. The decision to grant development consent shall incorporate at least the following information:

(a) the reasoned conclusion referred to in Article 1(2)(g)(iv);

(b) any environmental conditions attached to the decision, a description of any features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment as well as, where appropriate, monitoring measures."

**144.** That does not express or imply an obligation to set out the details at length in the decision itself. It requires only *incorporation*, not *textual incorporation* in extenso. The latter would be unnecessary if not almost pointless and would not serve the required purposive interpretation applicable to EU law. The applicants' scenarios as to the alleged benefits of putting everything in the decision are strained and contrived.

**145.** As the board submits:

"39. The misconception that subtends this ground is the Applicants contention that there is a heretofore unidentified requirement that all the matters referred to in Article 8a(1)(a) and (b) of the EIA Directive must be embodied and explicitly recited/itemised in a single decision document and that it is unlawful to incorporate the contents of documents by reference to same, which is incorrect and not the law. No authority whatsoever expressly supporting the Applicants interpretation has been brought forward. None of the cases referred to at the relevant section of the Applicants submissions (§84-§100) support the interpretation proffered by the Applicants."

**146.** In any event, this is simply a technical gotcha point. Even if counterfactually the board did have to set everything out *in extenso*, the applicants aren't disadvantaged because what the board is saying in this particular case is clear from the material. The point is simply without merit on any analysis.

**Core grounds 4 and 6 – peat slides etc. and EIA**

**147.** As noted above, European law requires that assessment of environmental effects of a project should be "as complete as possible" for EIA (the judgment of 3rd March 2011, *Commission v Ireland*, C-50/09, ECLI:EU:C:2011:109) and habitats purposes.

**148.** The allegedly flawed EIA assessment is primarily pleaded under ground 6 but the applicants also locate it in core ground 4.

**149.** Core grounds 4 (in relevant part) and 6 are:

"4. The Impugned Decision is invalid because the Board failed ... to carry out an assessment that would be as complete as possible (S171A, S172, A3(6)), ...

6. The Impugned Decision is invalid because the Board failed to investigate and analyse the information submitted by the Developer, and/ or to carry out as complete an assessment as possible, and therefore its EIA failed to meet the definition of an EIA in S171A when interpreted in accordance with Articles 1, 2 and 3 of the EIA Directive."

**150.** The parties' positions as recorded in the statement of case are summarised as follows:

Ground 4 and 6

"35. Part of Grounds 4 and 6 is that the Board failed to carry out as complete an EIA as possible in relation to peat slides and their potential impact on Doon Lough and Lough O'Grady (Ground 4, §23-26, and Ground 6, §46-51).

36. Board's position on said parts of Grounds 4 and 6. The said parts of Grounds 4 and 6 are denied, same comprise mere assertions unsupported by evidence. The EIA that the Board completed in respect of the proposed development was carried out in accordance with the requirements applicable to that assessment. The issue of peats slides and their potential impact on Doon Lough and Lough O'Grady was expressly addressed in the materials that were before the Board and was assessed by the Board and its Inspector. By the said parts of Grounds 4 and 6, the Applicants in substance attack the EIA on its merits, which is impermissible in judicial review.

37. Coillte and FEC agree that the EIA was carried out in accordance with the requirements applicable to that assessment and that this is a merits-based challenge."

**151.** The relevant sub-grounds are as follows:

"21. Core Ground 4 is that the Impugned Decision is invalid because the Board failed to ensure it had sufficient expertise to examine the EIAR in order to ensure its completeness and quality (S172(1H)) and to carry out an assessment that would be as complete as possible (S171A, S172, A3(6)), and failed to give adequate reasons to establish that it had access to such expertise (S171A, S172, A8a).

...

23. Without prejudice to the above, the assessment carried out by the Board was not as complete as possible. It failed to carry out a complete assessment of the likelihood of peat slides, the severity of their impacts if they occurred, and the measures that would avoid them, prevent them, reduce them, or offset their effects. It failed to assess the likely pressure which road construction material laid on top of peat would have on the stability of the peat; the adequacy of the berms around the peat deposit areas to prevent a peat slide; the impact of concrete foundations and the weight of wind turbines on the stability of surrounding peat; the impact of 24m diameter foundations on the flow of groundwater within the surrounding peat. It considered that any peat slide that did occur would not impact on downstream SAC or SPA sites, because any discharged silt would remain in Doon Lough and/ or Lough O'Grady.

24. It failed to identify, describe and assess the impact of such siltation on Doon Lough and/ or Lough O'Grady, or on the species of fauna and flora present in them.

25. It failed to identify, describe and assess the impact on these sites having regard in particular to the fact that the first is designated as a Natural Heritage Area pursuant to S18 of the Wildlife (Amendment) Act 2000 and the Natural Heritage Area (Doon Lough NHA 000337) Order 2005, S.I. No. 571 of 2005, and that the second is a proposed Natural Heritage Area identified in the Survey and Mapping of Habitats in Mid Clare Survey Findings Report prepared by RPS Environmental Consultants for Clare County Council in December 2010. ..."

**152.** As regards the sub-grounds under core ground 6, these provide:

"46. Core Ground 6 is that the impugned Decision is invalid because the Board failed to investigate and analyse the information submitted by the Developer, and/ or to carry out as

complete an assessment as possible, and therefore its EIA failed to meet the definition of an EIA in S171A when interpreted in accordance with Articles 1, 2 and 3 of the EIA Directive.

47. Full particulars of this Ground await compliance by the Board with the Directions sought at D4.

48. In the interim and without prejudice thereto, the matters which the Board failed to investigate and analyse include the likelihood of peat slides resulting from the addition of road material on top of existing peatland, the likely quantity of silt deposited into Doon Lough and/ or Lough O'Grady as a result of any such slide, and the likely impact on the fauna and flora of those lakes from any such slide.

49. These were matters which the Applicants drew to the attention of the Board in written submissions, and which the Board and its inspector accepted were a possibility without interrogation to determine where or whether the Developer had addressed them, and/ or, if it had, whether the manner in which it did so was adequate.

50. In fact, Apart from noting that Doon Lough and Lough O'Grady would attenuate silt discharge further down the river (by retaining it within the lakes), the Board's Inspector did not address these matters and the Board itself failed to consider the impact of such discharges (which it accepted were possible) on Doon Lough which is a NHA and Lough O'Grady which is a pNHA.

51. In the circumstances the assessment carried out by the Board was not a complete assessment for the purposes of S171A and 172 of the 2000 Act."

**153.** The basic answer to the applicants' complaints is that the board considered the question of peat slides and validly satisfied itself as to the issue of risk in that regard. The inspector's report states as follows at para. 7.214 onwards:

"Lands and Soils

7.214. Section 9 of the submitted EIAR assesses and evaluates the potential for significant impacts on lands and soils and geology. Investigations undertaken by the appellant comprised desk studies of the windfarm site, the grid connection route and the surrounding study area, alongside geotechnical investigations during 2019, including 790 peat probes, a peat stability assessment and the logging of findings.

7.215. According to the baseline assessment, blanket peat is the dominant soils type on the northern lower lying section of the site and also on the more elevated eastern and western sections of the site, along with pockets of deep poorly drained mineral soils. Poorly draining peaty soils are mapped in the central and south-central area of the site (towards the summit of Slieve Bernagh). Areas of rock outcrop are mapped close to the Coumnagaun River channel, as well as at the western and northern edge of the site. Peat depth range from 0.05 to 4 metres. 20 no. trial pits have also been completed by MWP between 08th July 2019 – 21st August 2019.

7.216. There are no geological heritage sites locally at the proposed development site. The closest geological heritage site is located in a small quarry at Ballymalone approximately c.3.1km northeast of the proposed development site.

7.217. I note that a peat stability assessment was undertaken in relation to the wind farm site only, and is attached in appendix 9-2 of the EIAR. It is important to note at this juncture that the applicants have had regard to the Peat Landslide Hazard and Risk Assessments: Best Practice Guide for Proposed Electricity Generation Developments prepared by the Scottish Government in 2017, in the assessment examination of peat stability in the development site.

7.218. The applicant states that the Carrownagowan wind farm was designed from the outset with a constraints-driven approach to place turbines in low-risk areas. Extensive walkovers and surveys of the site between May 2018 and November 2019 were carried out, with initial constrains relating to the set back from housing, watercourse buffering, buffering of designated areas and areas of high conservation forestry, and buffering of areas of ecological interest. After analysis which is outlined in section 9.2.7.1 of the EIAR, it was concluded that at 24 no. infrastructure locations the risk ranged from Negligible through Very Low for the majority of the site to Low.

7.219. Further investigation was carried out for the entire site which included an Infinite Slope Stability Analysis (ISSA) using the peat probe data and slope data from the LiDAR DEM to calculate the Factor of Safety (FoS) against peat slide for each location probed. ISSA analysis was completed at 790 locations.

7.220 I note that the DAU raised concerns within their submission in relation to peat stability in the context of changes to the hydrology and flow patterns within the site. Additional queries were raised in relation to whether the rainfall prediction rating had considered Climate Change predictions into the Hazard Rating Criteria. Similar issues were also raised

within the third party submissions whereby reference is made to a peat slide in the area in the 1980's.

7.221. The applicant specifically addresses these concerns within the further information response to item no. 2. With regard to the hydrological conditions of the site it is stated that conditions will remain unchanged, due to the hydrological mitigation measures proposed within section 8 of the EIAR. The applicant has considered landslides such as that which occurred in 2020 and states that none of the hydrological conditions that were present in other slides occur at or in close proximity to the proposed wind farm layout at Carrownagowan. All existing watercourses, designated areas, areas of high conservation forestry and areas of ecological interest have been buffered by design. It is stated that MWP also analysed the historical peatslide at Slieve Bearnagh in 2003 and concluded that the slide was associated with deep peat coincidental with a break in slope. The proposed development has been designed to avoid these conditions.

7.222. The applicant states that this was achieved by using the area excluded by buffering and ecological constraints and excluding areas of high slope from the output of the ground slope analysis. Significant site investigation works including peat probing, shear vane measurements, and trial pitting were carried out within the development site. Data from the peat probing and the slope analysis output from the Lidar DEM was overlaid on these layer areas allowing flat areas of deeper peat leading to breaks in slope to be identified and thus avoided for new infrastructure.

7.223. It is reiterated by the applicant within the further information response that the peat stability risk assessment was undertaken in a two-step fashion with the final conclusion being that peat landslide presented a Negligible Risk to the infrastructure of the Wind Farm.

7.224. As aforementioned in relation to the hydrological regime, it is stated that there is no proposal within the wind farm layout to alter or change in any significant manner the existing hydrology of the site, all existing drainage pathways will be maintained. The wind farm is designed to utilise the existing Coillte road and drainage network as much as possible. This will have a reducing effect on the peat stability risk associated with construction risk at new work faces.

7.225. With regard to climate change considerations in relation to rainfall levels, it is stated that by adding 20 % it would have the effect of increasing the Negligible risk level of peat slide areas to Very Low. None of the Low locations would increase to Low-Moderate and therefore it would not change the output of the existing PSRA.

7.226. With regard to queries relating to the fire break referred to within the EIAR, I note that Section 2.4 of the further information response to item no. 2 provides a detailed description of this feature. It is stated within this section that the fire break was inspected during the EIAR baseline characterisation of the site. The break excavation ranges from 2-3m deep and 8-10m wide and is a definitive slice into the peat mass, representing a clear and significant break in the peat mass and its associated hydrology.

7.227. I note that the firebreak separates the SAC from the proposed development site. South of T1, T2, T3, T4, T8, T12, T13, it is apparent that the SAC occurs on higher ground above the proposed wind farm site. East of the proposed wind farm site the SAC occurs over the brow of a hill, and the ground within the SAC slopes away from the proposed wind farm site. There is no pathway for a peat slide on the proposed wind farm site to travel towards Slieve Bernagh SAC. It is clear that the SAC is physically separated from the development site, I am therefore satisfied based on the information submitted within both the EIAR and the FI response that the applicant has adequately addressed the issues raised within the DAU submission and other third party submissions in this regard.

7.228. It is stated within section 9.4.1.2 of the EIAR that the total volume of peat to be excavated is 131,837m3 and the total volume of spoil is 124,899m3. It is proposed to reuse 35% of the excavated materials as site won aggregate and the remainder will be reused as landscaping, roadside berms and placement in deposition areas at the 3 no. borrow pits.

7.229. Potential construction impacts relate to the mobilisation of soils through peat slippage or erosion and the potential for contamination to occur in relation to hydrocarbons. Peat stability has been examined above and I am satisfied that the site does not pose a significant threat to such an event.

7.230. In terms of the operational phase of the development there may be a requirement for minor excavations in the event of an infrastructure fault occurring. There is also a potential for leaks to occur in relation to the transformer equipment within the substation element of the development.

7.231. Potential effects in relation to the decommissioning of the development will be similar to that of the construction phase.

7.232. Major accidents are considered in the context of peatslide which as aforementioned has been examined above."

**154.** More generally, there are a number of fundamental misconceptions in the applicants' submissions under this heading – so much so that it borders on a crash-course in applicants' fallacies generally.

**155.** In the No. 1 judgment we encountered two basic fallacies, the misconception that Europe in general (and the judgment of 4 December 2018, *The Minister for Justice and Equality and The Commissioner of An Garda Siochana v. Workplace Relations Commission*, C-378/17, ECLI:EU:2018:979 in particular) is always available to elevate a point to the level of *certiorari,* and secondly the belief that elaborate legal superstructures rather than facts are of most interest to judges and will be more likely to determine the outcome of cases. We now meet a few more such points.

**156.** The first additional applicant's fallacy is the proposition that acceptance of a developer's material is a breach of the duty to independently decide. But such acceptance does not in itself constitute a failure to assess the application (see e.g., *Balscadden Road SAA Residents Association Limited v. An Bord Pleanála* [2020] IEHC 586, [2020] 11 JIC 2501 at §25; *Aherne & Ors v. An Bord Pleanála & Ors* [2015] IEHC 606, [2015] 10 JIC 0605 (Unreported, High Court, Noonan J., 6th October, 2015), *Ratheniska Timahoe and Spink (RTS) Substation Action Group v. An Bord Pleanála & Anor.* [2015] IEHC 18, [2015] 1 JIC 1402 (Unreported, High Court, Haughton J., 14th January, 2015), *Dunnes Stores v. An Bord Pleanála* [2016] IEHC 226, [2016] 5 JIC 0405 (Unreported, High Court, Hedigan J., 4th May, 2016), *Sweetman v. An Bord Pleanála* [2016] IEHC 277, [2016] 5 JIC 0407 (Unreported, High Court, McDermott J., 4th May, 2016), *McEntee v. An Bord Pleanála* (Unreported, High Court, Moriarty J., 10th July, 2015), *Clifford & Anor. v. An Bord Pleanála & Ors.* (No. 2) [2021] IEHC 642, [2021] 10 JIC 1502).

**157.** It cannot simply be asserted that the developer's material was accepted without consideration. That has to be proved – by evidence - which hasn't been done.

**158.** Indeed consideration of the developer's material is required, not just by domestic law but also by the EIA directive. Recital 23 to directive 2014/52 says:

"With a view to reaching a complete assessment of the direct and indirect effects of a project on the environment, the competent authority should undertake an analysis by examining the substance of the information provided by the developer and received through consultations, as well as considering any supplementary information, where appropriate."

**159.** Recitals 32 and 33 provide:

"(32)

Data and information included by the developer in the environmental impact assessment report, in accordance with Annex IV to Directive 2011/92/EU, should be complete and of sufficiently high quality. With a view to avoiding duplication of assessments, the results of other assessments under Union legislation, such as Directive 2001/42/EC of the European Parliament and the Council (15) or Directive 2009/71/Euratom, or national legislation should, where relevant and available, be taken into account.

(33)

Experts involved in the preparation of environmental impact assessment reports should be qualified and competent. Sufficient expertise, in the relevant field of the project concerned, is required for the purpose of its examination by the competent authorities in order to ensure that the information provided by the developer is complete and of a high level of quality."

**160.** The effect of this is that an EIAR should be of sufficient quality that it is capable of being accepted. To show that such acceptance constituted a failure of analysis by the board there would need to be evidence, normally scientific evidence, demonstrating a flaw in the assessment on its face or showing that a reasonable and well informed expert would have seen the analysis as flawed. Then any such disagreement has to be brought home, by cross-examination if necessary. An applicant can't simply engage in a merits-based disagreement with the result in the context of judicial review in the High Court. The applicants fall foul of that principle. That's the problem that occurred in *Hellfire Massey Residents Association v. An Bord Pleanála & Ors* [2021] IEHC 424, [2021] 7 JIC 0201 at 56-57, and *Reid v. An Bord Pleanála (No. 2)* [2021] IEHC 362, [2021] 5 JIC 2705. History repeats itself here.

**161.** There isn't some sort of legal shortcut to get to that stage. Since 2018, section 171A of the 2000 Act (as substituted by European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018 (S.I. No. 296 of 2018), reg. 16) has required "examination, analysis and evaluation". It's up to an applicant to show a failure in that exercise – that hasn't been done. Examination, analysis and evaluation doesn't preclude acceptance of the position of one of the process participants. A court can accept the submission of one party – that doesn't amount to a failure in examination, analysis and evaluation. A statutory decision-maker can do likewise.

**162.** Here, the applicant's complaints about a lack of complete assessment have not been properly made out on that basis. Peat stability and the risk of peat slides are extensively considered for example in the inspector's report (see e.g., §3.5, §3.6, §3.8, §5.1, §7.8, §7.20, §7.214 to 7.232 and §7.236).and the EIAR (see e.g. the Peat Stability Assessment at Appendix 9-2 of the EIAR, and §§9.2.7.1 and 9.4.1.5 of the EIAR).

**163.** The applicants submit, for example, that:

> "Throughout this part of the report, the Inspector is merely reporting what was said. She is not analysing it or evaluating it in any other way whatsoever. This is not an assessment, merely a summary – and a summary, moreover, that addresses only the procedural steps taken, not the substantive issues."

**164.** But this is to commit the further applicant's fallacy of mis-reading the material in a way that renders it invalid rather than valid. Where the decision-maker recites the materials and then appears to rely on them in coming to a conclusion, that amounts a tacit acceptance, at least in the absence of some special feature rendering that an unavailable interpretation. Here such an interpretation is totally available and indeed obvious. The inspector says at para. 8.66:

> "I have considered additional European sites as listed above, as well as those considered within the applicants NIS, and consider that the applicant's approach is reasonable. Based on my examination of the NIS report and supporting information submitted, the scale of the development, its likely effects by way of the potential to contaminate or create disturbance to qualifying interests of the Slieve Aughty Mountains SPA (004168) and Slieve Bernagh Bog SAC (002312) by way of water pollution and sedimentation and noise disturbance and vibration during construction, I would conclude that a Stage 2 Appropriate Assessment is required for these Natura 2000 sites. It is important to note that mitigation measures have not been considered in the Appropriate Assessment Screening."

**165.** That is an exercise of judgement, not an abdication of it, any more than the court abdicates its function if it agrees with an applicant, or an opposing party, or quotes its submissions. Generally if a party's submission says something at least as well if not better (sometimes considerably better) than the court had otherwise been inclined to put matters, it's worth quoting. That isn't an abdication, and neither is the inspector abdicating here insofar as she references the developer's material with express or implied approval.

**166.** The submissions go on to unleash another canard with the third applicant's fallacy that lack of narrative discussion equates to lack of legal consideration:

> "56. The same point arises in relation to the consideration of impact on Doon Lough, where the Inspector does not consider the issue at all in the context of EIA and impact on Doon Lough. She does consider it indirectly in the context of AA screening, where she recites at §8.5 and Table 1.0 what the Developer has said in relation to impact on the Danes Hole / Poulnalecka SAC, Lower River Shannon SAC, and River Shannon and River Fergus SPA, that 'there is no meaningful hydrological connectivity to this site as connectivity is via Doon Lough c3.5km SW of the site before ultimately draining to this' SAC / SPA. This, of course, is not a consideration of impact on Doon Lough itself at all."

**167.** What can one say about this except that the inspector says she has considered the issues and the applicants haven't proved otherwise. Lack of narrative detail sufficient to satisfy an applicant (an impossible standard anyway) does not constitute a failure in substantive consideration.

**168.** The applicants misunderstand *Sherwin v. An Bord Pleanála* [2024] IESC 13, [2024] 4 JIC 1105, and on the basis of that misunderstanding, argue that failure to mention shows lack of consideration. That decision doesn't establish anything of the sort. The situation there was that the board purported to grant permission in the face of apparently contrary provisions of the development plan. The board only had jurisdiction to materially contravene the plan on certain conditions. In the absence of any acknowledgement of the relevant provisions of the plan or any purported explanation of how the development was compatible with them, or more realistically, of why a material contravention should have been allowed by reference to the statutory tests, the decision-making process was flawed. The background essentially is the principle that the plan should be complied with, save where a basis for material contravention is demonstrated. Furthermore there wasn't anything before the board to support a contravention in the situation, because the city council's concerns under the critical headings weren't covered in the developer's material contravention statement. It is a complete misconception to ignore the context and to distort *Sherwin* to suggest that any given decision-maker has to expressly deal by way of narrative discussion with anything and everything or else be held to have failed to consider matters.

**Core ground 7 – hydrological connection etc. and AA**

**169.** Core ground 7 is:

> "7. The impugned Decision is invalid because the Board failed to carry out a proper screening for appropriate assessment of the Application and further information submitted

by the Developer for the purposes of S177S of the 2000 Act read in light of A6(3) of the Habitats Directive."

**170.** The sub-grounds are:

"52. Core Ground 7 is that the impugned Decision is invalid because the Board failed to carry out a proper screening for appropriate assessment of the Application and further information submitted by the Developer for the purposes of S177(5) of the 2000 Act read in light of A6(3) of the Habitats Directive.

53. Particulars of this Ground are as follows. The Board's inspector erred in finding there was no hydrological connection between the development Site and the Lough Derg SPA: in fact when it was accepted in the EIAR (Table 8-15 and §8.6.19) that there was a pathway along the Annaghmullahaun river to Lough O'Grady, and that Lough O'Grady flows into Lough Derg, and this establishes a pathway. In addition, whether there will be attenuation to prevent discharges is a matter for assessment, not for screening.

54. The Appropriate Assessment screening document submitted by the Developer, asserted that there was no hydrological connection because the development area drains to the west, to the Owenogarney River (§7.7, p22.) The EIAR, also submitted by the Developer, contradicts this: it finds a likely connection via surface water because 'An unnamed stream flows north from the site entrance, and crosses the TDR, and flows on to enter Lough O'Grady'. (Table 8-15.) The EIAR found that impacts to Lough O'Grady would be prevented by 'construction phase drainage mitigation'. (§8.6.1.9.)

55. The Board's Inspector found that there was no hydrological connection between the site and Lough Derg. (p103 of her Report.) She also found that an unnamed stream flows from the north of the Site and enters Lough O'Grady. ('flows to the north close to the windfarm site entrance and enters Lough O'Grady', p67, §7.182.) The Board agreed with and adopted the Inspector's screening conclusion.

56. There is a conflict between the conclusions reached by the Inspector in the EIA and the conclusions reached by her in the screening for Appropriate Assessment. The only information before her was that there was a pathway but that mitigation measures would avoid an effect.

57. Mitigation measures cannot be relied on as a reason not to carry out an assessment.

58. In those circumstances likely significant effect cannot be excluded on the basis of objective information, since the information relied on is contradictory, and the conclusion is based on mitigation measures.

59. There is a hydrological pathway from the Proposed Development to Lough O'Grady along a stream that flows from the site into the Annaghmullahaun River which in turn flows into Lough O'Grady, and Lough O'Grady flows into Lough Derg, establishing a hydrological pathway for which assessment is required.

60. The Board erred in adopting its Inspector's Report and ruling that there would be no impact on the Lough Derg SPA, and that the NIS was not required to address this impact."

**171.** The parties' positions as recorded in the statement of case are summarised as follows:

"Ground 7

44. Ground 7 is that the Board erred in finding that there was no hydrological connection between the site and the Lough Derg SPA, when in fact there was, and accordingly the appropriate assessment under the Habitats Directive was not sufficient to eliminate all reasonable scientific doubt as to absence of effect.

45. Board's position on Ground 7. The Board's Decision is not invalid as alleged at Ground 7. The appropriate assessment (AA) that the Board completed in respect of the proposed development was carried out in accordance with the requirements applicable to that assessment The premise of the Applicants complaint is not accepted. The Board disputes the interpretation and legal significance of the perceived inconsistency in said documents as pleaded by the Applicants, in circumstances where such documents are open to being interpreted a way that makes sense and renders same consistent and valid rather than invalid. The Applicants have not demonstrated that the evidence and materials that were before the Board were so flawed on their face that a reasonable expert would have objected to them - the only expert evidence adduced in these proceedings (namely the uncontested expert evidence adduced by the Notice Party) is to the opposite effect. Insofar as it can be said that there is an inconsistency between the AA Screening Report and the EIAR in relation to there being a hydrological connection between the application site and Lough Derg via Lough O'Grady, it is not a connection of the kind/nature that the Applicants allege. The Applicants' pleaded case contends there is a 'contradiction' but only refers to two things being in contradiction - the AA Screening Report (§7.7, internal page 22) and the EIAR (Table 8-15 and para. 8.6.1.9). But that is not the contradiction the Applicants say it is, the Applicants are incorrect in their interpretation of those documents and the Inspector's

Report. Further, the Inspector and the Board did not rely on mitigation measures (i.e. measures intended to avoid or reduce the harmful effects of a plan or project on a European Site) in order to screen out the requirement for stage 2 AA as alleged or at all. It is also clear from the materials before the Board and the uncontested expert evidence in this case, that there will be no significant impacts on Lough O'Grady from the proposed development. Without prejudice to the foregoing, if the Court were to determine that there is an inconsistency and/or an error as between the AA Screening Report (§7.7, internal page 22) and the EIAR (Table 8-15 and para. 8.6.1.9) and a corresponding inconsistency and/or error in the Inspector's Report in relation to there being a hydrological connection between the application site and Lough Derg, in taking the Board's Decision, Inspector's Report and supporting material as a whole, same is in the category of harmless error and relief should therefore be refused.

46. Coillte and FEC argue that the Applicants have not pleaded any issue in relation to the objectivity of the evidence submitted in the AA and cannot raise this an issue in the submissions for the first time. The Affidavit of Gerard Hayes provides commentary and explanation in relation to the hydrological pathway issue and avers to an opinion that no alteration is necessary to the conclusion reached in the Screening for Appropriate Assessment that the potential for significant effects on the Lough Derg (Shannon) SPA can be excluded at screening stage.

47. The Applicants have not advanced the case that there is any likelihood of effects on qualifying interests of the Lough Derg (Shannon) SPA or adduced any evidence in support of such a proposition. The Applicants go no further than to raise the fact of a hydrological link between part of the site and the Lough Derg (Shannon) SPA, which link is some considerable distance from the limited works proposed within the relevant catchment.

48. The Applicants' arguments are hypothetical and there was no material before the Board to create real doubt."

**172.** As regards the legal context, art. 6 of the habitats directive provides as follows:

"Article 6

1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."

**173.** There are two issues:

(i) is there an error in the AA analysis? and

(ii) if so does this warrant *certiorari*?

**174.** On the first issue, §7.7 of the AA screening document which said there was "no hydrological connection between the development area and the SPA as the development area is drained to the west". Table 1.0 in the AA screening finds no impact on the Lough Derg (Shannon) SPA because:

"there is no hydrological connection between the development area and the SPA as the development area is drained to the west by the Owenogarney (Ratty) River within the

regional Shannon Estuary North catchment, which ultimately drains to this SPA via Doon Lough, c.20km downstream."

**175.** Mr O'Duffy for the applicants has shown that the north eastern portion of the site discharges towards Lough O'Grady along the Annaghmullaghaun River rather than towards Bunratty and the west.

**176.** The Affidavit of Gerard Hayes, Senior Aquatic Ecologist with Malachy Walsh and Partners, filed on 1st March 2024, effectively accepted the existence of the postulated hydrological connection.

**177.** The board suggested that the connection had been acknowledged all along, and that one could see such a connection on maps provided. That is not in isolation entirely implausible but that does contradict the narrative wording of the AA screening document. The contradiction constitutes an error however one wants to describe it.

**178.** The inspector's report includes the following at p. 100-103:

| European Site Name & Code | Distance | Qualifying Interest | Source-pathway-receptor | Considered further in screening |
|---|---|---|---|---|
| … | … | … | … | … |
| Lough Derg (Shannon) SPA (004077) | 4.2km east of T13 7.6km east of grid connection | Cormorant (Phalacrocorax carbo) [A017] Tufted Duck (Aythya fuligula) [A061] Goldeneye (Bucephala clangula) [A067] Common Tern (Sterna hirundo) [A193] Wetland and Waterbirds [A999] | There is no hydrological connection to this site. Site is within foraging distance to SPA. | No, The habitats within the project are unsuitable for the SCIs of this SPA. Furthermore, there is no hydrological connection between the development area and the SPA as the development area is drained to the west by the Owenogarney (Ratty) River within the regional Shannon Estuary North catchment, which ultimately drains to this SPA via Doon Lough, c. 20km downstream. |

**179.** On its own terms that is simply incorrect. Admittedly the inspector is quoting the developer there, but that works both ways – a decision-maker can accept a developer's reasoning but she also has to accept the developer's erroneous wording. That implicitly is what happened here.

**180.** That takes us to the second issue which is whether this warrants *certiorari.* Mr Hayes stated as follows, omitting a passage that refers to mitigation, which is not especially relevant at the screening stage:

"Explanation and commentary

18. While there is a hydrological pathway between the development site (in the sense of the redline boundary of the overall windfarm site as in the planning application) and the Lough Derg SPA, this pertains only to that part of the site that falls within the Graney

Anamullaghaun sub-catchment, which ultimately drains towards Lough Derg. No turbines are proposed to be erected here; no substations will be constructed here; and no borrow pits will be established here. Only minor works are proposed in this area, specifically the upgrade and widening of an existing forest road over a length of approximately 1.4km, with a footprint of approximately 1.15 ha. These works, which have similarities to works already carried out as part of ongoing forestry management, are located near the site entrance. It would therefore have been more accurate to say that there is no hydrological connection between the main development area and the Lough Derg SPA, as that area is drained to the west by the ... Owenogarney (Ratty) River within the regional Shannon Estuary North catchment, which ultimately drains to the River Shannon and River Fergus Estuaries SPA via Doon Lough, c.20km downstream.

19. In relation to the part of the site that ultimately drains towards Lough Derg, there is a tributary stream within the site, near the site entrance, which flows north and joins the Anamullaghaun River (also referred to as the Coolreagh Beg Stream) which enters Lough O'Grady. The flow distance (along natural watercourses) from the site entrance to Lough O'Grady is 6.23km. Lough O'Grady is a lake comprising c. 46 ha. The Scarriff/Graney River then flows for approximately 6.37km between Lough O'Grady and Lough Derg.

20. In my professional opinion, for the reasons set out herein, the fact that there will be limited development within the part of the proposed development site that drains towards Lough Derg does not alter the conclusion at §7.7 of the Screening for Appropriate Assessment that the potential for significant habitat loss/alteration effects, disturbance/displacement effects, habitat or species fragmentation effects or water quality/resource effects on the Lough Derg (Shannon) SPA can be excluded and the Inspector and the Board were correct in determining that Lough Derg (Shannon) SPA was not required to be subject to stage 2 Appropriate Assessment.

21. The red line planning boundary for the proposed development comprises a total land area of 749.69ha: see §2.3.1.1 and Figure 2-7 of the EIAR; §3.4 and Figure 2 of the NIS; and Figure 2 of the Screening for Appropriate Assessment. Within that, the development footprint area for the wind farm infrastructure and the delivery route works areas is 30.47ha (§2.3.3.1 of the EIAR and §3.4 of the NIS). As addressed in further detail in the Affidavit of Michael Gill, the footprint of the works within the part of the proposed development site that drains towards Lough Derg (i.e. within the Graney Anamullaghaun sub-catchment) is less than 4% of the total development footprint. Accordingly, all turbines, the substation site and all borrow pits and most of the associated infrastructure – amounting to c.96% – are located in areas that do not drain ultimately to Lough Derg.

22. In respect of the drainage of part of the proposed development site towards Lough Derg:

a) There is a tributary stream within the site near the site entrance which flows north and joins the Anamullaghaun River: Figures 8.1 and 8.5 of the EIAR.

b) The Anamullaghaun River flows into Lough O'Grady. Much of the Anamullaghaun River is classified as a depositing river due to its low gradient, and will therefore allow settlement of suspended solids. This is apparent from Figure 8.1 of the EIAR.

c) As appears from the Affidavit of Michael Gill, the combined flow path distance (along natural watercourses) from the site entrance to Lough O'Grady is 6.23km along the tributary stream and Anamullaghaun River.

d) The outflow from Lough O'Grady is the Graney/Scariff River, which discharges into Lough Derg. The distance from the mouth of the Anamullaghaun River to the Graney River outflow is greater than approximately 910m. This is apparent from Figure 8.1 of the EIAR.

e) Being a lake with a surface area in excess of 46 hectares, Lough O'Grady does not flow. Accordingly, much of the sediment load from rivers entering the lake settles, and sediments are not transferred out of the lake due to lack of currents. This is apparent from Figure 8.1 of the EIAR.

23. The only means by which the proposed development could impact the Lough Derg (Shannon) SPA is by indirect impacts on water quality in Lough Derg.

24. However, as set out in further detail in the Affidavit of Michael Gill, while a hydrological pathway exists to Lough Derg from a small section of the proposed site at the site entrance, the actual potential for any impact to occur at Lough Derg is limited (and in practice approaches zero) by distance, by the nature of the intermediate watercourses (being depositing rivers), by the scale and nature of the works proposed within the catchment, by the significant hydraulic and dilution buffer that occurs within Lough O'Grady, and by the very significant dilution and attenuation potential available from the wider contributing catchment that also flows to Lough Derg via the Graney/Scarriff River.

25. [omitted as relates to mitigation] … In the highly unlikely event that substances from the works site did reach the Anamullaghaun River, some would settle out before reaching Lough O'Grady, a high percentage would settle out in Lough O'Grady and yet more would settle in the Graney River upstream of Lough Derg. Considering the relatively small contribution of the Anamullaghaun River to the Graney River system, any water quality effects would be reduced to negligible due to dilution. In addition, watercourses exhibit natural recovery with distance downstream of a pollution source, due to dilution/assimilation uptake of substances by trophic processes.

26. In addition, Surface Water Regulations (SI 272/2009 as amended) define EQSs (environmental quality standards) which in turn define WFD status. It is important to note that biological water quality, as measured by the EPA at the lowermost station in the Graney River (400m d/s Scarriff Bridge, 25G040400) was Q3, equivalent to WFD Poor Status, in 2021.

27. In light of the foregoing, it is not conceivable that the proposed development will affect water quality in the Graney River or Lough Derg.

28. As appears from the Screening for Appropriate Assessment, included at Appendix 1 to the NIS, (p.14) the qualifying interests of the Lough Derg (Shannon) SPA are 'wetland and waterbirds' and the species Cormorant, Tufted Duck, Goldeneye, and Common Tern. The conservation objective for the Lough Derg (Shannon) SPA is 'To maintain or restore the favourable conservation condition of the wetland habitat at Lough Derg (Shannon) SPA as a resource for the regularly-occurring migratory waterbirds that utilise it' (NPWS, 2022).

29. There is no potential for the proposed development to affect water quality in Lough Derg and therefore there will be no impacts on birds or the habitats they utilise in Lough Derg. Therefore, the Carrownagowan wind energy site does not present any risk to maintaining the favourable conservation condition of the Lough Derg (Shannon) SPA.

30. In light of the foregoing, in my professional opinion, the fact that there will be limited development within the part of the proposed development site that drains towards Lough Derg does not alter the conclusion at §7.7 of the Screening for Appropriate Assessment that the potential for significant effects on the Lough Derg (Shannon) SPA can be excluded at screening stage and the Inspector and the Board were correct in determining that Lough Derg (Shannon) SPA was not required to be subject to stage 2 AA."

**181.** Hence, insofar as there was an error, the evidence is that this was a harmless error: judgment of 7th November 2013, *Altrip*, C-72/12, ECLI:EU:C:2013:712 para. 49.

**182.** The applicants have not challenged Mr Hayes' affidavit in any way whether by replying affidavit, cross-examination or otherwise and so can't be said to have evidentially dislodged the averments to the effect that any error is harmless and that there is a near-zero prospect of any effect, let alone significant effect, on European sites.

**183.** Therefore the applicants' arguments that mitigation was taken into account at the screening stage don't arise. The evidence is clear that even without considering mitigation there are no significant risks to European sites.

**184.** The attempt to reframe this as a domestic law point doesn't add anything. Nothing multiplied by two is still nothing. Such an insubstantial issue doesn't trigger a legal obligation for additional reasons or other domestic legal paraphernalia.

**Requested reference to the CJEU**

**185.** The parties' positions as recorded in the statement of case are summarised as follows:

"Referral

'h. in the event of any request for a reference to the CJEU, a statement of any proposed question(s).'

49. It is submitted that the following question should be referred for determination by the Court of Justice of the European Union:

- Is the following condition –

o 'The developer shall ensure that all construction methods and environmental mitigation measures set out in the Environmental Impact Assessment Report, the Natura Impact Statement and associated documentation are implemented in full, by the developer in conjunction with the timelines set out therein, except as may otherwise be required in order to comply with the following conditions.'

- Sufficient to comply with the obligation in A8a of the EIA Directive, that reasons must be incorporated in the decision, or does A8a require that the consent must itself state precisely what conditions are imposed?

- Does the requirement in A8a of the EIA Directive, that the decision must incorporate a description of any features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects, require the decision maker to specifically identify which effect – avoidance, prevention, reduction or offsetting – each

individual measure will have, or is it sufficient for the decision maker to find that the measures as a whole will collectively have those four effects – without specifically determining which effect the particular measure will have?

- Is the decision maker required to state, in the decision or elsewhere, what expertise it applied for the purposes of complying with A5(3) of the EIA Directive, so that a person seeking to challenge the validity of the decision can take a view as to whether there are grounds to challenge the adequacy of the expertise applied, or is it presumed until the contrary is proven that the decision maker had such expertise?

50. Board's position on proposed CJEU reference. There is no basis for the CJEU reference sought by the Applicants. No plausible basis has been shown for the extremely expansive interpretation offered by the Applicants. No authority whatsoever expressly supporting the Applicants position has been brought forward. The reference procedure isn't for any and every possible imaginative question – only for questions on which there can be a real dispute (Reid v. An Bord Pleanála (No.7) [2024] IEHC 27 at §89; Toole v. Minister for Housing (No. 3) [2023] IEHC 378 at §§86-87).

51. Coillte and FEC share the Board's position in relation to the proposed CJEU reference."

**186.** The first and second bullet points essentially go to the same postulated interpretation of art. 8a of the EIA directive. But no plausible basis has been shown for the interpretation favoured by the applicant. No jurisprudential or other material has been brought forward supporting the view that the concept of incorporation requires such a formalistic interpretation.

**187.** A similar problem applies to the third point. No jurisprudence or other relevant material has been brought forward to support the notion that the board somehow has to prove its expertise.

**188.** No doubt warranting a reference to Luxembourg has been demonstrated under any of these headings or indeed under any other heading whatever in the present case.

**189.** More generally, the questions are totally abstract and do not arise on the facts:

(i) there is no evidence that there is any actual imprecision or doubt as to what conditions were imposed here;

(ii) there is no evidence that the board failed to identify anything specific the identification of which was properly called for on the basis of the actual material before it;

(iii) there is no evidence that the board lacked the necessary expertise to an extent that warrants it being condemned for failure to specify anything in that regard; and

(iv) the applicants failed to activate normal and available domestic procedures such as discovery, interrogatories or otherwise so as to investigate the issue of the board's expertise, so in such circumstances the complaint is abstract and unnecessary (and thus falls outside art. 267 TFEU).

**Costs**

**190.** My proposed default order as to costs is that the applicants should get the costs that would have been incurred had they confined their proceedings to the issue on which they prevailed. Subject to what follows, any issue as to the extent of the costs that would have arisen in that circumstance can be determined, in default of agreement, in the legal costs adjudication process. However I would propose as a default order that such costs include one day of the substantive hearing, and for the avoidance of doubt the order excludes any costs the subject of the no order as to costs made on foot of the judgment of 27th October 2023.

**Summary**

**191.** In outline summary, without taking from the more specific terms of this judgment:

(i) The board failed to publish all of the documents relating to the matter on its website as required by s. 146(7)(a) of the 2000 Act. That obligation covers documents that are part of the statutory process, whether created by the board or otherwise. It does not cover invalid submissions, purely administrative non-statutory documents, or internal memoranda, or indeed pre-existing documents that were not brought into being in connection with or for the purposes of the appeal or proposed appeal (or other application or proposed application to the board).

(ii) A proposed project the subject of a pre-application decision under s. 37A of the 2000 Act may evolve at the formal application stage, as long as the SID criteria continue to be met and as long as the applicant for permission remains the same. No impermissible changes have been demonstrated here.

(iii) The board is not obliged to demonstrate its own expertise. It is up to a judicial review applicant to disprove such expertise, something which has not been achieved here.

(iv) The duty to incorporate conditions under art. 8a of the EIA directive does not require textual incorporation *in extenso* and can be achieved by the incorporation of reference to other documents.

(v) It is up to a judicial review applicant to show that either EIA or AA were erroneous or inadequate, a process which (except in the case of error on the face of the materials that does not require expertise to detect) requires evidence to that effect. The applicants have not evidentially established an inadequacy here.

(vi) An element of the inspector's analysis was incorrect, but the evidence establishes that that is immaterial here. The applicants have not countered that evidence by replying affidavit or cross-examination.

(vii) No material supportive of the applicants' extensive interpretation of EU law has been produced that would take their points out of the category of being *acte clair* against them. In any event their proposed questions do not properly arise on the facts.

**Order**

**192.** For the foregoing reasons, it is ordered that:

(i) subject to any specific written legal submission, consistent with the judgment, made by either party as to the precise wording of the declaration, such submission to be made within 14 days from the date of this judgment, there be a declaration that the board failed to publish all of the documents relating to the matter on its website as required by s. 146(7)(a) of the 2000 Act insofar as relates to the documents at nos. 24 to 62 inclusive in the table set out in the judgment;

(ii) the proceedings be otherwise dismissed;

(iii) unless any party applies otherwise by written legal submission within 14 days from the date of this judgment, the foregoing order be perfected forthwith thereafter on the basis of an order for costs (including the costs of written submissions) being awarded to the applicants against the first named respondent, limited to the costs that would have been incurred had the applicants confined their proceedings to the issue on which they prevailed, and that any issue as to the extent of the costs that would have arisen in that circumstance be determined, in default of agreement, in the legal costs adjudication process provided that such costs include one day of the substantive hearing, and excluding any costs the subject of the no order as to costs made on foot of the judgment of 27th October 2023, and there be no order as to costs in favour of or against any other party; and

(iv) the matter be listed on Monday 10th June 2024 to confirm the foregoing.