THE COURT OF APPEAL

CIVIL

Costello J.

Faherty J. **Neutral Citation Number [2024] IECA 234**

O'Moore J.

[approved]

[no redaction needed]

Court of Appeal Record Number: 2024/ 3

High Court Record Number: 2022/1022 JR

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 /APPELLANTS

-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 DAC

NOTICE PARTY/ RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on the 25th day of September, 2024

Introduction

1. These proceedings seek judicial review of the decision of the first named respondent, An Bord Pleanála ("the Board") to grant planning permission to develop a windfarm in the Carrownagowan area of County Clare ("the impugned decision"). As part of this challenge the applicants sought reliefs in relation to historic forestry consents in respect of the site and lands adjacent thereto. In a judgment delivered on 27 October 2023 the High Court (Humphreys J.) directed that leave to seek judicial review be discharged or struck out in respect of reliefs relating to historic forestry consents in County Clare, refused an application for an extension of time in which to challenge any of the historic forestry consents and refused an application for discovery in respect of the environmental assessments of those historic forestry consents. The trial judge released the State respondents and Clare County Council from further participation in the proceedings with liberty to apply. The applicants appealed the order, and this is my judgment on the four grounds of appeal which were pursued before the Court of Appeal.

Background

2. The proposed development is of a windfarm and associated works in the townlands of Ballydonaghan, Caherhurley, Coumnagun, Carrownagowan, Inchalughoge, Killokennedy, Kilbane, Coolready and Drummod, Co. Clare. The proposed windfarm is located within the northern slopes of the Slieve Bernagh mountain. The second named respondent ("Coillte") owns 1,283 hectares of forestry within 1km radius of the turbines while 144 hectares of forestry is within private ownership. The majority of the site is in commercial forestry, with some isolated pockets of farmland within the overall site. The intention is to develop the windfarm partly in areas which are currently forested. Prior to the forestry development of the Slieve Bernagh mountain, the habitat was largely upper peatland, a habitat favoured by the Hen Harrier.

3. The Hen Harrier is a designated species under Directive 2009/147/EC of 30 November 2009 on the conservation of wild birds ("the Birds Directive") in the nearby Slieve Aughty mountains special protection area ("SPA") which is eight kilometres north of the site and the Slieve Felim and Silvermines SPA, which is fifteen kilometres southeast of the site. Hen Harriers also nest within the proposed windfarm site. Coillte, the applicant for planning permission, furnished an environmental impact assessment report ("EIAR")

which noted that the upland habitats for Hen Harrier have been significantly modified by plantation forestry.

4. From March 2018 Coillte engaged in public consultation with local residents in relation to the proposed windfarm. Whilst Coillte was the applicant for planning permission, all development rights in respect of the proposed windfarm were transferred from Coillte to FuturEnergy Carrownagowan designated activity company ("FEC"), though the development lands themselves have yet to be transferred. FEC's onshore development rights are held pursuant to an exclusive option for lease, which option allows for entry into a long-term lease prior to the commencement of the construction of the Carrownagowan windfarm.

5. On 30 November 2020 Coillte launched an application for planning permission in respect of the windfarm with the Board as a strategic infrastructure application. The second and third named appellants are residents in local area. The first named appellant is a non-governmental organisation comprising residents in the Carrownagowan area. The appellants each made submissions to the Board in respect of the application. The Development Applications Unit (DAU) of the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media made a submission to the Board raising issues about the impact of the proposed windfarm on the Hen Harrier. The submission stated:-

> "*The cumulative impact assessment needs to consider all pressures operating on the surrounding environment and protected sites. Most specifically, analysis of proposed forestry planting and felling licence applications in the area must be assessed*."

As a result, the Board requested further information from Coillte in relation to these matters.

6. Coillte submitted further information on 12 December 2021 together with a Hen Harrier management plan. The second and third named appellants made further submissions in February 2022 at the invitation of the Board in respect of the further information and the management plan.

7. The Board's inspector prepared a report dated 31 August 2022. The report included an EIAR for the purposes of Directive 2014/52/EU of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment ("EIA Directive") and an appropriate assessment ("AA") as required by Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ("Habitats Directive"). The inspector noted:-

"*7.94. Any loss of currently suitable forestry habitat owing to the project will not be significantly above that which would occur and does occur as a result of the forestry operations at the project site. It is therefore considered the magnitude of the habitat loss described will result in a Long-term, Slight Negative on hen harrier*".

She dealt with cumulative impacts at para. 7.106 as follows:-

"*I note the DAU raised concerns in relation to the cumulative impact assessment and the consideration of all pressures operating in the surrounding environment and protected sites. Particular reference is made to forestry planting and felling licence applications. In response to these concerns the applicant states that forestry will continue and will create temporal and special changes in hen harrier use as is commonplace in commercial forestry operations*."

8. The inspector then considered the putting in place of enhancement lands and concluded:-

"*7.122. Based on the foregoing and the information submitted within the further information response, I am satisfied that the applicant has adequately addressed the concerns of the DAU in relation to the proposed enhancement areas and I am further satisfied that the proposed development and loss of 31.87ha of potentially suitable hen harrier habitat is adequately addressed by way of the proposed 106ha of enhancement lands which will, as mentioned above improve connectivity with the SAC and reduce edge effects at these locations, providing an overall improvement of breeding and foraging conditions within the general area for hen harrier."*

9. In relation to the in-combination effects in connection with forestry, the inspector reviewed the information and concluded at para. 8.112 that "*the development site is unlikely to be of inherent value to the SPA population of Hen harriers*" and at para. 8.116 that "*no exceptional circumstance has been identified to indicate that the development site is an ecologically valuable resource for the SPA population of Hen harrier*."

10. On 29 September 2022 the Board decided to grant planning permission pursuant to s.39E of the Planning and Development Act 2000, as amended ("the 2000 Act").

11. On 23 November 2022 the appellants filed a statement to ground an application for judicial review in respect of the impugned decision. In addition to seeking an order of *certiorari* and an order quashing the impugned decision they sought to challenge "*all and/ or any*" forestry consents granted between 1 June 1988 and the present in relation to the relevant townlands ("the historic forestry consents") for alleged non-compliance with the Habitats Directive, the EIA Directive and/ or the Birds Directive. The appellants argued

that if any of the historic forestry consents granted in the previous 35 years are invalid, it follows that the impugned decision is invalid, on the basis that it is "*cumulative with*" the historic forestry consents. It is contended that the historic forestry consents were not subject to any EIAs or AAs as mandated by EU law or, in the alternative, were subject to inadequate EIAs and AAs. The contention is largely based upon the regimes which have governed forestry within the State.

12. Under the Local Government (Planning and Development) Act 1963, as amended, forestry was regarded as a branch of agriculture. The use of lands for agriculture was exempted development. The EIA Directive (85/337/EEC) introduced a requirement for EIA for initial afforestation projects and peat extraction. The deadline for implementation of the Directive by Member States was 3 July 1988. Ireland initially failed to implement the Directive within the required period and then subsequently the transposing provisions, the European Communities (Environmental Impact Assessment) Regulations 1989 (S.I. No. 349/1989), were ruled to be invalid in Case C-392/96 *Commission v. Ireland* (ECLI:EU:C:1999:431) in a judgment of the Court of Justice of the European Union ("CJEU") delivered in 1999.

13. A new regime was instituted in 2001. Forestry was removed from planning control and a separate forestry consent regime was created. That regime was administered by the Minister for Agriculture, Fisheries and Food ("the Minister"). The new regime had an EIA requirement and provision for sub-threshold EIA and public notice of applications by way of newspaper advertisement. (European Communities (Environmental Impact Assessment) (Amendment) Regulations, 2001 (S.I. No. 538/2001). The threshold for mandatory EIA for initial forestation was reduced to 10 hectares by the Local Government (Planning and Development) (Amendment) Regulations 2001 (S.I. No. 539/2001) and initial afforestation was deemed exempted development (see Planning and Development Regulations 2001 S.I. No. 600/2001 schedule 5 part II class 1(d)(ii) and schedule 2 part III class 15).

14. The forestry consent system was replaced in 2010 with a new system again administered by the Minister (EC (Forest Consent and Assessment) Regulations 2010 S.I. No. 558/2010). Notices of applications and decisions were now published on the Minister's website. The forestry consent system was again amended in the Forestry Act 2014 and by the Forestry Regulations 2017 (S.I. No. 191/2017) which replaced the 2010 Regulations. From 2017 the new licensing provisions included a requirement that the Minister give notice of the application in a manner determined by the Minister and to make the application documents available for inspection.

15. On 6 March 2023, three and a half months after the appellants commenced these proceedings and filed their statement of grounds, the appellants sought information on the historic forestry consents under the access to information on the environment ("AIE") legislation from both the Minister and Coillte. The latter requested the appellants to narrow the scope of the information sought. The appellants declined to do so. On 19 April 2023 the Minister and on 4 May 2023 Coillte declined the request on the grounds of the scope of the information sought. The appellants did not seek an internal review of the rejections nor appeal to the Commissioner for Environmental Information in relation to the matter.

The proceedings

16. The proceedings are primarily directed at quashing the impugned decision of 29 September 2022. In addition, the appellants seek reliefs in relation to the historic forestry consents and raise three grounds against the State respondents alleging current failure properly to transpose the EIA Directive.

17. Liberty was granted to amend the statement of grounds on 23 November 2022 and again on 12 December 2022 and finally on 30 January 2023. The time to comply with that order was extended on 13 February 2023. On 20 February 2023 leave was granted to the appellants to apply for the reliefs sought in their amended statement of grounds without prejudice to any objection that the respondents might make. The Court did not grant the appellants an extension of time with respect to any aspect of the claim. On 6 March 2023 FEC was added as a notice party.

18. On 18 April 2023 Coillte and FEC issued a motion seeking an order pursuant to the inherent jurisdiction of the courts setting aside leave to apply by way of an application for judicial review insofar as leave was granted in respect of the forestry consent remedies, or in the alternative, striking out the appellants' pleading and or dismissing the appellants' claim insofar as it relates to the forestry consent remedies. On 19 April 2023 the State respondents issued a motion seeking to set aside the order of 20 February 2023 insofar as it granted the appellants leave to apply for judicial review as against the State respondents or in the alternative dismissing the proceedings as against the State respondents pursuant to O.19, r.27 and/or 28 of the Rules of the Superior Courts ("RSC") and/or the inherent jurisdiction of the court as being out of time and/or failing to disclose a cause of action and/or being frivolous and/or vexatious and/or bound to fail.

19. Also, on 19 April 2023 the appellants issued a motion seeking discovery from Coillte and the Minister in relation to the historic forestry consents.

20. In the course of case management, the High Court determined that the nature and scope of the alleged remedial obligation would be determined as a preliminary issue. The three motions and the preliminary issue (together with some ancillary reliefs) were heard together on 17 October 2023.

The pleaded case

21. The reliefs sought and the grounds for both the reliefs and motions are set out in full in the High Court judgment and I respectfully adopt same and thus it is not necessary to repeat them in this judgment. For the purposes of this judgment, it suffices to note that the appellants seek to impugn the validity of all the historic forestry consents for alleged non-compliance with the Habitats Directive, the EIA Directive and the Birds Directive. The appellants have not identified any particular historic forestry consent they allege is invalid but contend that they might be in a position to identify the relevant consents following the making of discovery by Coillte and the Minister. They argue that if any of the historic forestry consents were granted in breach of the assessment requirements of the Directives, it follows that the impugned decision is invalid on the basis that the Board failed to comply with the alleged remedial obligation arising with respect to the historic forestry consents and/ or the proposed development is cumulative with the historic forestry consents. Reliefs 12 to 19 of the third amended statement of grounds relate to the historic forestry reliefs.

- Relief 12 seeks *certiorari* of all and/ or any forestry consents granted between 1 June 1988 and the present for alleged non-compliance with the Directives.
- Relief 13 seeks an order extending time with respect to that claim.
- Relief 14 seeks an order pursuant to s.177B of the 2000 Act that the historic forestry consents were *inter alia* granted in breach of the Directives.
- Relief 15 seeks a mandatory order requiring Clare County Council to serve notice under s.177B of the 2000 Act with respect to the historic forestry consents.
- Relief 16 seeks a declaration that in granting the historic forestry consents the Minster and/ or the State fail to consider whether those works were compatible with the preservation of the Hen Harrier for the purposes of the Birds Directive.
- Reliefs 17 and 18 seek orders requiring Coillte to assess, identify and remediate the negative environmental impacts identified with respect to the Hen Harrier in the Hen Harrier management plan included in the response to the request for further information in the application for planning permission for the proposed development.

- Relief 19 seeks a declaration that that the State failed between 1 June 1988 and 2010 correctly to implement the EIA Directive and the Habitats Directive, and that s.177B of the 2000 Act should be interpreted as applying retrospectively to the historic forestry consents.

22. The grounds which were challenged in the motions issued by the State respondents and the developer respondents are core grounds 4, 6, 8 and 10 and the associated sub-grounds. Grounds 4, 6 and 8 allege a current failure to transpose the EIA Directive which is unrelated to the historic forestry consents or the alleged remedial obligation. Core ground 10 alleges that the impugned decision is invalid as 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 development on the site and failed to have regard to the EIAs and AAs, if any, carried out regarding the forestry developments.

The judgment of the High Court

23. Humphreys J. set out the details of the application for planning permission and the objections made by the appellants and the submission by the DAU. He referred in detail to the further information, the Hen Harrier management plan provided by the developer and quoted extensively from the report of the inspector. He then noted that the Board decided to grant planning permission. He detailed the procedural history of the proceedings and the issues which were not before the Court and quoted in full the reliefs sought in the third amended statement of grounds and the grounds of challenge and the reliefs sought in the three motions before the Court. He ruled that the remedial obligation can be determined as a preliminary issue as the question was whether the appellants' complaints about the remedial obligation "*even get off the ground, having regard among other things to their failure to make this point to the board or the Minister prior to brining* [sic] *proceedings*."

24. He outlined the assessment requirements for forestry under EU law and outlined the reliefs and grounds which were challenged by the respondents in their two motions.

25. He first held that reliefs 10 and 11, being interlocutory or unnecessary reliefs, were not appropriate to be included in substantive reliefs.

26. In relation to reliefs 12 and 16, which sought *certiorari* of the forestry licenses, he first held that they were out of time and then ruled that there was no basis to extend time in relation to the reliefs. The details of this part of the judgment will be considered further in this judgment.

27. Reliefs 14 and 15 related to claims under s.177B of the 2000 Act. He held that these were totally misconceived as the section did not apply "*due to the lack of consents previously issued by the planning authority or the board*". He therefore struck them out on the basis that they were bound to fail and he also noted that the appellants positively asserted in oral argument that there were no such previous consents and, that being so, the jurisdictional requirement for the section was not met.

28. In relief 17 the appellants sought an injunction compelling the developers to address matters arising from the further information provided by them in the planning process. The trial judge rejected this. He said that the grant of planning permission requires as condition 1. that it be carried out in accordance with the plans and particulars submitted and that this includes the Hen Harrier management plan and the additional information. At para. 78 he said:-

> "*The idea that before a project has even commenced, an applicant can get some kind of pre-emptive injunction compelling the developer to do what it is required to do anyway, without even the slightest evidence that it isn't going to do that, is simply a non-starter*."

29. The trial judge struck out relief 18 on the basis that it sought generalised and unparticularised mandatory relief which was unnecessary on the facts before the trial judge.

30. He addressed relief 19 – non-transposition by virtue of alleged remedial obligation – in paras. 80-136. The only reference in the pleadings to the remedial obligation was in para. 10.19A of the statement of grounds which pleaded as follows:-

> "*If and insofar as Irish law, properly interpreted in accordance with the interpretative obligation, did not require the carrying out of an assessment which was required by the EIA Directive or the Habitats Directive, or the making of a determination of compliance for the purposes of A1 to A4 of the Birds Directive, the State has failed adequately to implement the requirements of those Directives, and the Impugned Decision is thereby invalid being cumulative with earlier consents that are invalid because they were adopted pursuant to a deficient legal framework, and because the Impugned Decision fails to comply with the remedial obligation in respect of those Decisions*."

31. The trial judge held that the meaning of this plea was unclear on the specific facts of the case before him. He noted that EU law has recognised a remedial obligation in the AA and EIA context, but it had not yet been established in relation to the Birds Directive. He

noted that the remedial obligation goes beyond merely an ability to challenge the decision which lacked assessment and remains relevant even though such a challenge can be precluded by national time limits. If national law precludes the late invalidation of a permission that failed to involve a valid assessment nonetheless the State remains under an obligation "*to nullify the unlawful consequences of that failure*". He said that the remedial obligation covers a multitude of concepts and needs to be understood as having at least four strands which need to be considered:-

> *"(i) where a challenge is brought to a previous consent without assessment;*
>
> *(ii) where a project which has been consented without a full assessment is subject to a further consent application seeking extension or amendment of the previous permission;*
>
> *(iii) where the validity of the previous permission is not challenged but the State and relevant actors are not taking action to remedy, review or carry out the inadequate assessment; and*
>
> *(iv) where infringement proceedings are brought by the Commission*."

32. The trial judge held that the remedial obligation does not have the consequence that any given decision is invalid notwithstanding domestic time limits as normal time limits apply, referring to decision of the CJEU in Case C-261/18 *Commission v. Ireland* (ECLI:EU:C:2019:955) ("*Derrybrien No.2*").

33. In relation to the second point, where a defectively authorised project is sought to be continued, he considered the judgments of the CJEU in the Cases C-201/02 *Wells* (ECLI:EU:C:2004:12) and C-278/21 *Aqua Pri* (ECLI:EU:C:2022:864).

34. At paras. 92 and 93 he held:-

> "*Thus, if EU law assessments were not carried out properly in relation to an original permission, and the developer (or someone benefitting from a previous consent) seeks an extension of the consent, or an amendment of it, the remedial obligation may have the consequence that the body giving consent to such subsequent application is obliged to rectify the failure to conduct a correct assessment originally. If such rectification is not put in place, then a given applicant can challenge the subsequent consent on that basis. This does not extend to a retrospective challenge to the original consent.*
>
> *93. It is hard to see any immediate support for the idea that this would apply to an unrelated development, and the question of whether this is a related development was hotly contested both substantively and in terms of pleadings and evidence."*

35. The trial judge said that he was not required to resolve this controversy because the appellants faced an "*insurmountable stumbling-block*" in that they did not call on the Board to consider the extended form of assessment that would have identified and remediated any adverse effects of forestry activity on the Hen Harrier within the overall area since 1981[1]. At para. 95, when discussing relief 10 and the period in respect of which information on the forestry consents was sought, he stated:-

> *"[The appellants] here push the whole thing onto the board and call it an 'autonomous obligation'. An autonomous obligation? To sort through hundreds of consents over the 53 years identified by the [appellants] in their motion and analyse the existence and extent of any assessments in each – with no route-map, no parameters, no articulated concerns that would guide such an exercise? Law – even European law one is tempted to facetiously add for the benefit of the [appellants] – must be workable, and this preposterous procedure is so obviously unworkable that … it simply self-destructs …".*

36. In relation to the third strand the trial judge said:-

> "*96. The remedial obligation means that any effects of any breach of EU law should be rectified. That presupposes it being established that there has been such a breach, that there are effects of that breach, and that specified action is required to rectify those effects".*

And at para. 105:-

> " *… a litigant could in principle seek to call on the relevant consenting authority to exercise any powers within its competence as to review, revocation or after-the-event assessment, but such a request would be required to be evidentially sustainable, the onus being on the applicant to show a defect in the original assessment that had an environmental effect that required remediation. Recourse to court would only arise in the event of an unlawful failure to exercise such powers."*

He said that applicants may not short circuit the process by coming straight to court seeking "*exotic declarations and reliefs*" and said:

> "*Firstly they need to put their request to exercise specified statutory powers before the appropriate statutory decision-makers together with sufficient information to enable that point to be made, and call on the decision-makers to exercise any*

[1] The date of transposition for Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds.

relevant powers. Only if that is unlawfully rejected could the [appellants] come to court seeking declaratory relief or mandatory orders requiring those powers to be exercised".

On that basis Humphreys J. held that the claim regarding the remedial obligation fails for multiple reasons:-

"(i) the applicants didn't make any such request to the relevant consenting authority prior to litigating;

(ii) the claim against the council under s. 177B of the 2000 Act is misconceived because the council or board hasn't been the relevant consenting authority for afforestation since 2001 and didn't in fact grant any permissions relevant to this in the period prior to that, so can't exercise powers under that section; and

(iii) the applicants haven't come anywhere near even attempting to back up their point with expert or other evidence or even particularising it to any acceptable extent."

37. He said that while the appellants did not know exactly when each element of the forestation took place, their ultimate point did not depend on knowing all of the granular detail. He observed that at all times they had quite a bit of information from which highly focused questions could be asked:-

"*114. … They knew that no planning permissions were granted, so it follows by necessary implication that there were no assessments in relation to forestry works prior to December, 2001 when planning permission ceased to apply. Why not just ask for details of the areas afforested as of that date as compared with in 1981? And they also know … that there aren't any EIA reports for forestry works in the area on the central portal, which presumptively suggests that such assessments don't exist in relation to forestry consents from 2017 to date. So perhaps there are 16 years in the middle where there might have been assessments, or maybe not, but either way the [appellants] are not totally in the dark about all of this and could have extrapolated a lot about the adequacy of assessments to date*."

38. However, he rejected their position on the more fundamental basis that, in the absence of a proper complaint being made to the Minister, the whole complaint was premature in forensic terms. He held that:-

"*117. ….The really crucial thing is that they failed, prior to instituting the proceedings, to properly call on the relevant decision-maker, in the scenario under discussion, the Minister for Agriculture, Food and the Marine, to exercise relevant*

powers within that Minister's competence, failed to specify what powers exactly should be exercised and under what statutory jurisdiction or under what directly effective EU law provision, and failed to present the decision-maker with a plausible factual basis for such a demand."

39. He rejected the complaints that Irish law fails properly to transpose the requirements of the EIA Directive or the Habitats Directive.

40. He concluded in relation to the impugned reliefs that they were either out of time, unnecessary or misconceived even taking the appellants' case at its height and he therefore refused relief 13, discharged the leave order in the case of the out-of-time reliefs 12 and 16 and he struck out the remaining impugned reliefs as being bound to fail.

41. He then turned to core grounds 4, 6 and 8 and associated sub-grounds and held that they were misconceived and must be struck out. In relation to core ground 10, it provides as follows:-

"*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*."

42. He dismissed core ground 10 as follows:-

"*148. Insofar as this complains about failure by the board, this issue is so baroque that there couldn't workably be an autonomous obligation, so the board can't be faulted for failing to do something it was never asked to do. Examples of gaslighting the decision-maker don't get much better than this.*

149. Insofar as the complaint is of error in law by the developers or the State as to the grant of historical consents, that is impermissible if it is a collateral attack on

> *those consents, and pointless if it is not. It is academic either way in the circumstances. Even assuming for the sake of argument that 'the State erred in law in granting the underlying forestry consents for the application', it does not follow that 'The Impugned Decision is invalid'. The [appellants] have missed a step namely the requirement for them to call on the board to carry out a remedial assessment. Also, it is not clear what is meant by the 'underlying' consents 'for the application'. 150. Insofar as a complaint is made that substitute consent under s. 177B is required, that section doesn't apply for reasons explained".*

He therefore directed that the four core grounds must be struck out. He then rejected the request for discovery on the basis the appellants acknowledged that the discovery and disclosure was in support of the impugned grounds and as those grounds now fall away, the discovery/ disclosure motion no longer had any basis because it is purely parasitical on those grounds and so should be refused.

Notice of appeal

43. The notice of appeal sets out six grounds of appeal and requests the Court to make a reference to the CJEU. During the hearing of the appeal, counsel for the appellants confirmed that grounds 4 and 6 had fallen away and were not being pursued. This judgment addresses the remaining four grounds and the request for a reference to the CJEU.

Discussion

Ground 1. Entitlement to raise an issue of EU environmental law before the Court that was not raised before the authority granting consent.

44. The appellants contend that the High Court erred in finding that they could not raise before the court an issue of non-compliance with EU law obligations (in this instance obligations to carry out assessments under the EIA Directive, the Habitats Directive and the Birds Directive) when it had not raised those issues in submissions to the Board. They submitted that objectors are not expected to have to expensively retain their own experts and may expect the Board itself to deploy all necessary expertise in the "*detailed scrutiny*" of planning applications and to do so to a "*high standard of investigation*" (see *Environmental Ireland Trust v. An Bord Pleanála* [2022] IEHC 540, paras. 243-246). They contend that they are entitled to rely on the decision-maker(s) to identify any omissions and defects in the application and, if this is not done, they may raise the point for the first

time in judicial review proceedings (see *Atlantic Diamond v. An Bord Pleanála* [2021] IEHC 322, para. 19*)*.

45. The new issue which the appellants raised for the first time in the High Court was the allegation that the Board had not carried out a cumulative assessment (and in-combination assessment) of the windfarm and the historic forestry development together. The appellants contended that the Board should, for that purpose, itself have sought the assessments carried out in respect to the forestry developments by way of EIA under the EIA Directive, AA under article 6 of the Habitats Directive and consideration of the impact on birds under the Birds Directive, from the applicant for planning permission for the windfarm project.

46. The appellants asserted that those mandatory assessments had not been carried out in relation to the historic forestry consents. This failure gave rise to a remedial obligation under EU law to "*nullify the unlawful consequences of that failure*" (Cases C-196/16 and C-197/16 *Comune di Corridonia & others* (ECLI:EU:C:2017:589). The appellants asserted that the Board has an autonomous obligation to verify that all preceding consents complied with the assessment requirements of EU law and in particular that the Board was required to request the applicant for permission to develop the windfarm to furnish all of the assessments conducted in relation to forestry activities from April 1981 when the deadline for the implementation of the Birds Directive 79/409/EEC expired (or possibly from July 1988 when the deadline for the implementation of the EIA Directive 85/337/EC expired).[2]

47. Humphreys J. rejected the appellants' case on this point in paras. 107 and 117 of his judgment in the following terms:-

> "*107. …[T]he claim regarding the remedial obligation fails for multiple reasons:*
>
> *(i) the applicants didn't make any such request to the relevant consenting authority prior to litigating;*
>
> *(ii) the claim against the council under s. 177B of the 2000 Act is misconceived because the council or board hasn't been the relevant consenting authority for afforestation since 2001 and didn't in fact grant any permissions relevant to this in the period prior to that, so can't exercise powers under that section; and*
>
> *(iii) the applicants haven't come anywhere near even attempting to back up their point with expert or other evidence or even particularising it to any acceptable extent*.
>
> …

[2] The deadline for the implementation of the Habitats Directive 92/43/EEC was on 10 June 1994.

> *117. … The really crucial thing is that they failed, prior to instituting the proceedings, to properly call on the relevant decision-maker, in the scenario under discussion, the Minister for Agriculture, Food and the Marine, to exercise relevant powers within that Minister's competence, failed to specify what powers exactly should be exercised and under what statutory jurisdiction or under what directly effective EU law provision, and failed to present the decision-maker with a plausible factual basis for such a demand. One does not simply walk into Mordor – or into the High Court. Before litigating one has to set the case up properly. If mandatory orders are going to be sought, then generally speaking, and assuming that rectification is a reasonable prospect, one should call on a proposed respondent to rectify the alleged problem, having first supplied enough information to enable her to do so."*
> (abbreviations in the original).

48. In my judgment the High Court was correct to hold that it was not open to the appellants to advance this argument for the first time in the High Court in the circumstances of this case. First, the claim is factually unsustainable. The appellants are all local residents or a group comprising local residents. The area in which they reside has been forested to a greater or lesser extent since the 1980s. They accept that it "*seems probable*" that initial afforestation began before 1981and they acknowledge that there has been felling and reafforestation thereafter. It has not been disputed that they must have been aware in general terms of the forestry activity (planting, felling and replanting) and could, with reasonable diligence, have ascertained that forestry consents were required for the forestry activity which had been taking place for decades in this local area. The appellants did not seek information from the consenting authority or under the AIE in relation to any forestry activity or forestry consents until 6 March 2023**.** As the trial judge observed, while the appellants did not have all the information they sought, at all times they had *"quite a bit of information from which highly focused questions could be asked."*

49. Furthermore, the appellants knew of the proposed development from March 2018 when the developer first began engaging with the local community on the proposed windfarm project. The second appellant attended a number of the public meetings, and the appellants each filed objections to the planning application, which was made in November 2020. The DAU made a submission to the Board raising issues about impacts on the Hen Harrier. This specifically stated that:-

"The cumulative impact assessment needs to consider all pressures operating on the surrounding environment and protected sites. Most specifically, analysis of proposed forestry planting and felling licence applications in the area must be assessed."

50. On foot of this submission the Board requested further information from the developer and the developer submitted further information which included a Hen Harrier management plan. The issue of the Hen Harrier and the impacts of forestry on the environment and in particular its negative impacts on the habitat for the Hen Harrier was thus clearly highlighted. The further information filed by the developer was advertised and the second and third appellants made submissions to the Board on that information in February 2022. Neither submitted that the historic forestry consents had not been subject to assessments as mandated by the EIA Directive or the Habitats Directive (or indeed the Birds Directive). They did not comment on the damage caused to the peatland habitat by the forestry activities nor did they ask the Board to ascertain whether the historic forestry consents had been properly assessed. Neither submitted nor established that any breach of EU law had occurred or asserted that the Board was required to consider the remedial obligation which would flow from an established breach of the requirement under EU law to conduct assessments prior to the consenting of projects. They did not ask the Board to remedy the damage caused by the forestry development.

51. Whatever may be the difficulty in obtaining information in relation to the older historic forestry consents, since 2001 there has been ample notification to the public of applications for and the grant of forestry consents. Since 2001 the Minister has been the relevant decision-maker in relation to forestry consents. Between 2001 and 2006 applications for forestry consents have been advertised in local newspapers. Since 2006 applications for afforestation licences and grants have been filed online and are accessible to the public. Since June 2017 applications for felling licences have also been available online.

52. In addition, it was open to the appellants to make an application pursuant to the European Communities (Access to Information on the Environment) Regulations 2007-2018, which transposes into law the provisions of Directive 2003/4/EC of 28 January 2003 on public access to environmental information, at any time prior to the commencement of these judicial review proceedings. In particular, it would have been open to any of the appellants to make such an application to the Minister and/ or Coillte in light of the proposed development of the windfarm of which they were aware from November 2020 at the latest.

53. In the affidavits filed in the judicial review proceedings, the appellants do not explain their failure to engage with or challenge the validity of the historic forestry consents prior to the application for permission to develop the windfarm at Carrownagowan. In support of their assertion that there has been a failure to comply with the assessment obligations mandated by the EU Directives they produce no direct evidence that there has been even one instance where EU law has been breached or identified even one consent which was thereby rendered invalid. Instead they point to the dates when the forestry commenced and to the fact that forestry was treated as exempted development and accordingly not subject to assessment for a period of time or that the legal regime regarding consents failed properly to transpose the assessments obligations of the State and then asked the Court to assume that all historic forestry consents (or an unidentified number) were invalid for want of proper assessment. This is an impermissible recourse to inference and assumption and, as such, cannot suffice as the basis for an application for judicial review. As the High Court pointed out, the appellants have not taken steps themselves to establish the relevant facts.

54. Thus, in my judgment, it follows that the appellants (a) knew or ought to have known about the forestry development which had taken place in the locality and (b) could have sought further information in relation to any forestry consents granted in respect of the forestry development either through the website or by requesting the Minister or Coillte to answer reasonable requests for environmental information and (c) they had the opportunity to raise any issues of concern in relation to environmental assessments of the historic forestry consents if they had wished to. Therefore, they may not raise this issue for the first time in these proceedings. It is simply not grounded on any facts. When an applicant seeks leave to bring judicial review proceedings at a minimum the proceedings must be grounded on facts which could in law substantiate their claims.

55. Secondly, the appellants have not pleaded with sufficient particularity the remedial obligation which they assert they are entitled to raise for the first time in these judicial review proceedings, not having raised the issue before the decision-maker, the Board. The appellants' case is defined by their pleadings, in particular, their statement of grounds. In judicial review proceedings, applicants may be granted leave to seek judicial review of a particular decision or decisions on the basis of all or some of the grounds which they plead in their statement of grounds. In this case, the appellants have been permitted to amend their statement of grounds three times and thus they have had more than a fair opportunity adequately to present whatever case they sought to plead. They have not in fact pleaded

that the windfarm project forms a part of any forestry or forestry related project or that it is a continuation or extension of any forestry project. Accordingly, it is not open to the appellants to contend that the windfarm project is in fact part of the historic forestry projects or any of them. On its face, the application for planning permission to develop the windfarm is different from and unrelated to any forestry project: if permission to develop the windfarm is refused, it will have no impact upon any forestry activities and, in the alternative, if permission is granted, it does not authorise the continuation or commencement of any forestry activities which require to be authorised by the Minister, not the Board.

56. It follows, in my judgment that the appellants may not advance any case which is predicated upon the windfarm project being part of or a continuation of the historic forestry developments and this Court must approach matters on the basis that the windfarm project is different from and unrelated to the historic forestry developments.

57. The appellants have identified no case law to support the proposition that an obligation arises to remedy a prior failure to conduct an EIA or AA in respect of one project which is different from and unrelated to the project for which consent is sought. On the contrary, in *An Taisce v. An Bord Pleanála* [2015] IEHC 633 White J. rejected an identical submission when he held:-

> "*36. The court is considering the legality of the planning permission for the power plant. It is not considering the legality of peat extraction on the relevant bogs. It has already decided that it has no jurisdiction to impugn the EPA licenses or to consider if the peat extraction is exempted development. The relevance of the peat bogs to the application before this Court is that it supplies the fuel source for the power plant and to that extent, in applying Article 3 of the directive, should the respondent have taken into consideration, the indirect effects on the environment of this extraction.*
> *37. The respondent had no responsibility to remedy the alleged deficiencies of the Environmental Protection Agency in the licensing of the bogs. These were separate developments on separate sites, albeit connected to the power plant as its main source of fuel and only source of peat."* (emphasis added).

For this reason, the High Court held that there was no remedial obligation on the Board to address the prior deficiencies in the environmental assessment history of the peat bogs. In my view, the principle applies with equal force to the facts in this case. The mere fact that the windfarm development is to be on a site which insofar as it is not part of the windfarm would continue to be used as forestry is not sufficient to engage the remedial obligation

upon which the appellants rely. As it is not open to the appellants to argue that the windfarm project is in fact part of and related to some or all of the forestry projects, it follows that they may not rely upon the jurisprudence in relation to the remedial obligation to ground a case that the impugned decision is invalid because of the (alleged) failure of the Board properly to conduct a cumulative and in-combination assessment of the windfarm application and in particular its failure to identify and address the remedial obligation which arose as a result of the asserted historic breaches of EU law. This is because the appellants have not adequately pleaded the case they sought to argue in these proceedings, which is not permissible.

58. Insofar as the appellants contend that they ought to be permitted to advance this argument, the CJEU has consistently upheld national rules requiring a complaint to be properly pleaded. This failure properly to plead their case cannot be resuscitated by a claim that they must be permitted to advance the claim because they raise issues of a breach in EU law. Reliance on EU law does not mean the automatic non-application of domestic procedural rules, which is the import of the appellants' submission on this point. (see Case C-721/21 *Eco Advocacy CLG* (ECLI:EU:C:2023:477)**,** para. 29):

> "...*EU law must be interpreted as not precluding a national procedural rule according to which, first, an application for judicial review, both under national law and under provisions of EU law ... must state precisely each ground, giving particulars where appropriate and identify in respect of each ground the facts or matters relied upon as supporting that ground and, second, an applicant may not rely upon any grounds or any relief sought at the hearing other than those set out in that statement."*

59. Thirdly, the appellants' argument that the Board had an autonomous obligation to verify that the historic forestry consents had been assessed in accordance with the requirements of the EIA Directive and the Habitats Directive in order for it to carry out a valid cumulative assessment and in-combination assessment of the windfarm application is, in my judgment, without merit. Where a development consent has been granted without the necessary assessments mandated by the EIA Directive and the Habitats Directive this may give rise to a remedial obligation. However this does not mean that in every case where the receiving environment has been affected by previous developments the relevant consenting authority must carry out an enquiry into the possibility of a historic contravention of the assessment obligations and/ or verify that all preceding consents complied with the assessment requirements of EU law as an essential element of its

cumulative assessments and in-combination assessment of the application before it. In oral submissions to the High Court counsel for the appellants submitted that compliance with the remedial obligation was "*a precondition to the Board having jurisdiction*" to grant permission for the windfarm project. In oral submissions to this Court, counsel submitted that there was an autonomous obligation on the Board to ask the applicant for planning permission for the windfarm to provide the Board with the assessments which had been conducted by other parties for the "*forestry consents*" – presumably all of them – to enable the Board to conduct an EIA and an AA of the windfarm application. Absent this material, it was said, the Board could not conduct any assessments as required by EU environmental law. Unsurprisingly, counsel could not identify any authority for this far-ranging proposition.

60. In order to examine this proposition, it is important to analyse the extent of the remedial obligation as set out in the jurisprudence of the CJEU in order to understand the scope of the obligation which may arise where EU law has not properly been observed.

61. In *Wells* the CJEU held that Member States are required to "*nullify the unlawful consequences of a breach of Community law*" and

> "*65. Thus, it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment … [s]uch particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337.*
>
> *66. The Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment.*
>
> *67. The detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness) …"*

62. Thus, a Member State is required to make good any harm caused by the failure to carry out an EIA of an existing project and it may revoke or suspend a consent already granted or it may carry out a belated assessment *of the existing project*. The obligation is on the competent authorities of Member States *within their sphere of competence* to take the appropriate steps.

63. Recently in the case of *Aqua Pri*, in a judgment of 10 November 2022 the CJEU held:-

> *"39. … even where the authorisation of a project which has been adopted in breach of [the assessment obligation] is definitive, that project cannot, however, be regarded as having been lawfully authorised with regard to that obligation, such that the Member State concerned is required, under the principle of sincere cooperation provided for in Article 4(3) TEU, to eliminate the unlawful consequences of the breach which it has committed by taking all measures necessary within the sphere of its competence to remedy it…*
>
> *40. In particular, as the Advocate General noted, in essence… where a project has been authorised following an assessment which does not comply with the requirements of the first sentence of Article 6(3) of Directive 92/43, the competent national authority must carry out a subsequent review of the effects of the implementation of that project on the site concerned, on the basis of Article 6(2) of that directive, if that review constitutes the only appropriate measure for avoiding that implementation from leading to deterioration or disturbance that could have had a significant effect on the site concerned…*
>
> *41. However, such a subsequent review, based on Article 6(2) of Directive 92/43, is not the only appropriate measure that the competent national authority may, in a situation such as that at issue in the main proceedings, be called upon to adopt.*
>
> *42. In fact, as is apparent from the case-law of the Court, EU law does not preclude that authority from revoking or suspending the authorisation already granted in order to carry out a new assessment in accordance with the applicable requirements, provided that those measures take place within a reasonable period of time and that account is taken of the extent to which the person concerned may have been able to rely on the lawfulness of that authorisation, or even, in certain exceptional cases provided for by the applicable rules of national law, for the authority to regularise the situation, which must then not only comply with those requirements, but also take*

place under conditions which exclude any risk of circumvention or non-application of the rules of EU law..." (emphasis added).

64. In this case the developments which are said to contravene EU law are the historic forestry consents. The jurisprudence of the CJEU requires authorities "*within the sphere of their competence"* to *"nullify the unlawful consequences of that failure"*. It has stated that the authorities may revoke or suspend earlier consents or require that a new assessment in respect of those projects be carried out. The authorities may do so provided the remedial measures take place within a reasonable period of time. In the context of this case, this would involve revoking or suspending the historic forestry consents or a new assessment of each individual forestry consent, some of which were granted decades ago.

65. One of the few points which is not in dispute in this case is that the Board is not competent in relation to forestry consents. Competence in that sphere rests with the Minister. There is nothing in the EU jurisprudence to support the proposition that the Board is deprived of its jurisdiction to grant planning permission for a separate development in circumstances where any conceivable remedial obligation is outside its competence to rectify. It follows therefore that even taking the appellants' case in relation to the remedial obligation at its height, it does not deprive the Board of jurisdiction to grant planning permission for the windfarm.

66. The case law establishes that a development consent obtained in contravention of the EIA Directive and/ or the Habitats Directive may not be treated as valid for all purposes. (see *Wells*; Case C-275/09 *Brussels Hoofdstedelijk Gewest* (ECLI:EU:C:2011:154); Case C-348/15 *Stadt Wiener Neustadt* (ECLI:EU:C:2016:882); and *Comune di Corridonia*). It does not follow from this, in any case in which the receiving environment has been affected by previous development, that the authority to which an application for an unrelated development consent is made must carry out an enquiry into the possibility of a historic contravention of the assessment obligations in relation to earlier projects. Still less does this follow when there is no material before the decision-maker to suggest such a state of affairs. There is no obligation to seek assessments which were conducted in relation to earlier consent decisions when there is no reason to suppose that the earlier consents were in any way invalid.

67. The appellants argue that members of the public are entitled to rely upon the expertise of the decision-maker and that it will identify omissions and defects in the application before it. The appellants contend that if that is not done then they may raise any such omission or defect for the first time in judicial review proceedings challenging the

decision of the decision-maker. This is correct if the omission or defect relates to the application in respect of which consent is sought. But that is not the factual situation here. The appellants go so far as to say that a decision-maker must check all prior development consents in respect of the site to ascertain if there were earlier omissions or defects in earlier grants of development permission. In my judgment this far-reaching submission is unsupported by any authority and stretches the concept of a decision-maker's autonomous obligation far beyond the bounds of any reasonable limit.

68. The reliance placed by the appellants on the decision of the Supreme Court in *Balz v. An Bord Pleanála* [2019] IESC 90, para. 45 is misplaced. O'Donnell J. (as he then was) stated:

> *"45. It is of the utmost importance that planning authorities and the Board, on appeal (or, as is increasingly the case, the Board in those circumstances in which direct application can be made to it for permission), should carry out their functions as professionally and competently as possible. The system of appeal (or first instance application) to an independent expert body was a great advance when introduced in 1976. The imbalance of resources and potential outcomes between developers on the one hand, and objectors on the other, means that an independent expert body carrying out a detailed scrutiny of an application in the public interest, and at no significant cost to the individual, is an important public function."*

69. In my judgment this passage does not support the contention that a party who participates in the planning process without taking legal advice may then seek to judicially review the outcome of the process, having then obtained legal advice, based upon an argument that the decision-maker had failed to do something it was not required to do and which it had not been called upon to do and for which there was no evidence to suggest it was necessary for it to do.

70. The appellants also sought to rely upon the decision of the High Court in *Environmental Trust Ireland v. An Bord Pleanála* [2022] IEHC 540. At paras. 235 and 241 Holland J. held:

> ***"***235. *Further, public participation is generally and by its nature inexpert. It is laypeople venturing into often highly technical areas and often very many different highly technical areas…. That layperson is thus often and unavoidably faced with the bewildering task of interrogating, in a relatively brief time, multifarious expert reports on arcane and technical issues, and their interactions, with a view to finding in the haystack the needle with which to try to puncture the planning application."*

> …. *"241. On that view, that objectors are not expected to have to retain their own experts in making submissions in the planning process, it may on particular facts be unfair to criticise objectors for raising an issue for the first time in judicial review or for deploying an expert for the first time in judicial review – especially where that issue is one which the Board should have considered in fulfilling its autonomous obligation to investigate and to deploy its own and sufficient expertise, to fully understand the developer's material in all its aspects and to analyse the application accordingly. Not least, the issues may have been narrowed and focussed by the impugned decision such that, in approaching judicial review, the need for and choice of expert in a particular area and not in another may have become more apparent to the objector, and an expert can be retained on an issue which was actively put before the Board and/or on an issue which was not raised by objectors who now say the Board's decision reveals a failure, of its autonomous obligation, to address that issue."* (emphasis added).

In my view these passages likewise do not assist the appellants as the question of the lawfulness of the assessments carried out (or not carried out as the case may be) in respect of the historic forestry consents was not one which the Board was required to consider, especially absent any evidence-based request to do so. Even then, as it was outside of its competence to *"nullify the unlawful consequences"*, it is by no means clear what it could have done differently had it obtained the information the appellants assert it would have obtained had it requested same from Coillte.

71. I would reject the appellants' first ground of appeal because

- it is not supported by any evidence;
- it is premised on a case which is not pleaded; and
- it purports to extend the remedial obligation far further than existing case law, is not grounded on any principle of EU law which requires this extension and would significantly undermine the principle of legal certainty.

May the appellants challenge the validity of the historic forestry consents?

72. There were more than three hundred historic forestry consents issued from the 1980s until an indeterminate date prior to the institution of these proceedings in respect of the lands within the red line (the proposed development site boundary) and adjacent thereto. The High Court found that the appellants were out of time under either Order 84 of the RSC or s.50 of the 2000 Act. Humphreys J. also held that the appellants had not made out

a case for the extension of time in relation to a single consent under either provision. He therefore dismissed all direct challenges to the forestry consents on the basis that they were out of time and an extension of time could not be granted.

73. The appellants argued that the time limits did not apply or, if they did, that the court was required to extend time where it was said that the EU remedial obligation arose. This argument was rejected by the Supreme Court in *Krikke v. Barranafaddock Sustainable Electricity Ltd* [2022] IESC 41. Hogan J. stated at para. 16 of his judgment that even if the decision was unlawful "*so that the decision was in principle liable to be quashed, the effect of s.50(2) of the 2000 Act is nonetheless now to shield that decision from judicial challenge*". Woulfe J. in his judgment, with whom the majority of the Court agreed, held that provided the principles of equivalence and effectiveness are complied with, a Member State is entitled to provide particular procedural routes that a person challenging a development or development consent must take and that s.50(2) applied to both issues of pure domestic law and to matters of EU law. In *Stadt Wiener Neustadt* the CJEU recognised that reasonable time limits are compatible with EU law. In *Derrybrien No.2* the CJEU considered the time limits provided in s.50 (which includes the possibility of an extension of time) and did not condemn them as breaching the principles of equivalence and effectiveness. It follows therefore that there is no requirement to disapply national procedural rules in this case and accordingly the High Court was correct to hold that the reliefs sought in respect of the historic forestry consents were bound to fail as being out of time, there being no basis upon which to extend time for any challenge to any of those consents.

Ground Two: The requirements of EU law cannot be set aside on the basis that they are difficult to apply.

74. This ground of appeal refers to para. 95 of the judgment where the High Court held:-

> "*The [appellants] here push the whole thing [the review of the legal validity of the historic forestry consents] onto the board and call it an "autonomous obligation". An autonomous obligation? To sort through hundreds of consents over the 53 years identified by the applicants in their motion and analyse the existence and extent of any assessments in each – with no route-map, no parameters, no articulated concerns that would guide such an exercise? Law – even European law one is tempted to facetiously add for the benefit of the [appellants] – must be workable, and this preposterous procedure is so obviously unworkable that… it self-destructs*".

75. In the preceding paragraph the trial judge rejected the appellants' case based on an autonomous obligation on the Board to address the remedial obligation said to arise from the alleged failures to conduct assessments correctly in respect of the historic forestry consents. The trial judge's reason for rejecting the submission was because the appellants did not call on the Board to consider an extended form of assessment that would have identified and remediated any adverse effects of forestry activity on the Hen Harrier within the area overall since 1981. The suggestion that the trial judge in para. 95 of his judgment set aside the requirements of EU law on the basis that they "*were difficult to apply*" is, in my opinion, to misread para. 95. In para. 95 the trial judge is pointing out that the obligation contended for by the appellants is obviously unworkable and that it is not a requirement of EU law. He is not saying that EU law requires the review contended for by the appellants but that it is too difficult to apply in the circumstances of this case (or indeed any other) and can accordingly be disregarded or dispensed with.

76. The High Court held that the remedial obligation was not triggered for the Board on the facts of this case. That conclusion was not based on the number of historic forestry consents that the appellants said were invalid and should be reviewed by the Board. Rather, as was pointed out in the written submissions of the State respondents, what is relevant is whether the Board was on notice that there was a relevant previous permission that was granted in breach of EU law: what was "*unworkable*" was the contention that a remedial obligation would arise where there was no such evidence or even argument before the Board.

77. I agree with the decision of Humphreys J. in his subsequent judgment in *Reid v. An Bord Pleanála* [2024] IEHC 27 where he said at para. 62(iv):-

> "*To condemn the board after the event for an alleged failure, never put to it, to engage in an unworkable, roving, autonomous obligation to consider any and all previous decisions whether by it or other bodies such as the EPA to see if there was anything that could be improved on the EIA/AA front, would be to create an extreme standard by reference to which the whole process of decision-making would grind to a halt.*"

78. In this case the appellants in effect assert that the Board was obliged to carry out a practically unlimited exercise of its own motion. Given the scope of the appellants' argument, it is not unreasonable to describe such a task as "*obviously unworkable*". That does not mean, however, that the trial judge was holding that the requirements of EU law

may be set aside because they are difficult to apply. In my judgment he did not so hold, and I would accordingly reject this ground of appeal.

Ground Three: The appellants are entitled to wide access to justice and that principle is undermined where commercial interests are considered paramount.

79. In relation to this ground of appeal the appellants assert that the High Court found that the commercial context of planning law mitigates against the extension of time in planning cases and that this is a basis to refuse the extension of time to challenge the validity of projects carried out without assessments that are required by EU Directives. In support of this ground of appeal counsel relied on para. 72 of the judgment.

80. At paras. 68-71 the trial judge explains why time should not be extended to permit the appellants to challenge the historic forestry consents. He held that there was no basis to extend time and that the appellants had not established that they were unaware of the possibility of forestry works and would have remained unaware of same even exercising a reasonable degree of diligence in the circumstances. The Court said that awareness of the forestry works would have put them on notice of the likelihood of the existing consents, but they did not take any steps to inform themselves on that point. At para. 70 the trial judge accepted the argument of the notice party that the appellants "*knew or ought to have been aware of the carrying out of historic forestry activity for several years. The [appellants] did not attempt – let alone attempt 'diligently' – to obtain any further information or relevant documents since that time*". Humphreys J. held that their actions were not consistent with acting diligently to follow up information that was publicly available. He then proceeded to observe in para. 72:-

> "*To repeat points made elsewhere, the problem with the applicants' argument is the commercial context of the time limit for planning cases:* Kelly v. Leitrim County Council *[2005] IEHC 11, [2005] 2 I.R. 404, [2005] 1 JIC 2704, (Clarke J.),* Shell E & P Ireland Ltd v. McGrath *[2013] IESC 1, [2013] 1 I.R. 247, [2013] 1 JIC 2201 (Clarke J.) at §7.11,* Drumquin Construction (Barefield) Ltd. v. Clare C.C. *[2017] IEHC 818, [2017] 12 JIC 1908 (Coffey J.). This is a broad principle that applies in other commercial contexts:* Arthropharm (Europe) Ltd v. The Health Products Regulatory Authority *[2022] IECA 109 (Murray J.). This is a context where there is prejudice to private law actors, not a purely human rights or public law context:* O'Riordan v. An Bord Pleanála *[2021] IEHC 1, [2021] 1 JIC 2102*."

81. In my judgment this ground of appeal is misconceived. In the first place, there is no indication that the trial judge gave "*paramount*" consideration to the commercial interests in play.

82. Secondly, the paragraph in question is in that part of the judgment which considers whether to grant an extension of time to challenge the historic forestry consents. On appeal it was accepted that the appellants could not obtain an extension of time to challenge the historic forestry consents under either Order 84 or s.50 of the 2000 Act. It was also accepted in oral submissions that the reference to the commercial context in para. 72 was in the context of the principles applicable to applications for extensions of time to challenge decisions. It was further accepted that there was no reference to commercial interests (whether of paramount importance or otherwise) in any discussion of the appellants' right of access to justice. Thus, the argument that the appellants' entitlement to wide access to justice is undermined as commercial interests are considered paramount simply does not arise on the facts in this appeal.

83. It is also important to observe that time limits which respect the principles of equivalence and effectiveness are compatible with EU environmental law. The time limits in Order 84 and s.50, which provide for the extension of time in certain circumstances, are undoubtedly compatible with those principles. The precluding of a challenge which is time barred is consistent with the appellants' rights of access to justice. There is nothing offensive to any of these principles in recognising the commercial context when assessing whether to grant an extension of time in which to challenge any particular decision. The fact that commercial considerations may be weighed by a court does not in any way undermine the appellants' right to a wide access to justice. Their argument is simply a *non sequitur*.

83. In oral submissions it was suggested by reference to a judgment by Humphreys J. in a different case that in these proceedings the trial judge applied an unduly strict approach to pleadings and time limits. That argument has only to be stated to be rejected. What must be assessed is the trial judge's decision as expressed in his written judgment in these proceedings and there is nothing to suggest that in these proceedings he applied an unduly strict approach to either the pleadings or the time limits for challenging any of the historic forestry consents. For these reasons I would reject this ground of appeal.

Ground Five: Discovery in relation to the historic forestry consents.

84. At para. 154 of his judgment Humphreys J. dismissed the application for discovery succinctly:-

> "*The [appellants] acknowledged that the discovery and disclosure was in support of the impugned grounds. As those grounds now fall away the discovery/ disclosure motion no longer has any basis because it is purely parasitical on those grounds, and so should be refused*."

In their written submissions the appellants argued that the evidence they seek by way of orders for discovery "*is needed at this stage, to show why the claim is well founded and should not be struck out. It cannot be refused because the claim has already been struck out.*" This submission is simply incomprehensible. If a claim has been struck out – as in this case – then discovery can never be either relevant or necessary as there is no issue to which it could be either relevant or necessary. It is also well established that the validity or otherwise of a decision will be assessed by reference to the materials which were considered by the decision-maker. If the materials were relevant to the application for consent and ought to have been considered by the decision-maker but were not in fact before the decision-maker and so not considered, then that fact alone is sufficient in the context of judicial review and discovery of the omitted materials is not required. On the other hand, if the materials were neither relevant nor considered by the decision-maker, then discovery is neither relevant nor necessary in the judicial review proceedings impugning the decision. Either way, in the context of the case advanced by the appellants, the discovery sought is not relevant or necessary and so, applying the normal principles governing discovery, discovery should be refused.

86. I am accordingly satisfied that the trial judge did not err in refusing the discovery sought by the appellants and I would reject this ground of appeal also.

Request for a preliminary reference to the CJEU

87. In their notice of appeal, the appellants request the Court to refer two questions "*of interpretation of European Union law*" to the CJEU:

> "*Is the procedure in Irish law for invoking the remedial obligation in relation to failure to carry out a prior assessment under the EIA Directive (2011/92) and Habitats Directive (92/43) sufficiently clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps*

accordingly, in order to comply with the principle of legal certainty in European Union law?

Is a state owned company entitled to claim that the difficulty of identifying documents establishing compliance (or non-compliance) with the assessment obligations under the EIA Directive, Habitats Directive and Birds Directive, are a good reason to refuse leave to challenge that compliance in circumstances where the splitting of a forest into over 300 individual parcels of land for purposes of authorisation is the source of that difficulty?".

88. No reference to the CJEU is required for this Court to decide this appeal. The proposed questions do not arise out of any of the grounds of appeal or the statement of grounds. In relation to the first proposed question, the procedure in Irish law for invoking the remedial obligation is not in fact an issue in these proceedings. It is well established that it is not appropriate to make a reference where the alleged issue is hypothetical (see Case C-112/16 *Persidera* (ECLI:EU:C:2017:597), para. 24: and Cases C-222/05 to C-225/05 *van der Weerd* (ECLI:EU:C:2007:318, para. 22).

89. In relation to the second proposed question, there is no pleaded issue in relation to project splitting. Further, the difficulty expressed by Coillte in identifying documents requested under the application made by the appellants under the AIE Regulations is not an issue in these proceedings and is not an issue which requires to be resolved to determine this appeal.

90. Accordingly, I would refuse the request for a reference to the CJEU in these proceedings.

Conclusions

91. The notice of appeal in this case contained six grounds for appeal. Two were not pursued or were abandoned during the hearing of the appeal. It is therefore not necessary to address the issues presented by those grounds of appeal. Many issues were canvassed in argument in both written and oral submissions by the appellants which did not relate to the grounds of appeal or the statement of grounds. Accordingly, they did not fall for consideration and have not been addressed in this judgment for that reason. Raising points in affidavits or written submissions does not render those points issues in the action. In judicial review proceedings, where leave of the court must be obtained, the courts have consistently required applicants to be precise in their pleadings and applicants are held to the case in respect of which they obtain leave to seek judicial review absent any order

permitting an amendment of the statement of grounds. In this case the appellants have been afforded three opportunities to amend their statement of grounds and must therefore be held to their pleadings in the circumstances.

92. On the facts of this case, the appellants were not entitled to raise for the first time before the Court the issue of the Board's alleged autonomous obligation to consider whether a remedial obligation arose in respect of the historic forestry consents in the context of its cumulative and in-combination assessment of the application for planning permission in respect of the windfarm at Carrownagowan.

93. The High Court did not purport to set aside the requirements of EU law on the basis that they are difficult to apply and accordingly the second ground of appeal is misconceived and must be rejected.

94. While the appellants are entitled to wide access to justice, that principle was not undermined by the reference of the trial judge to commercial interests when considering the principles applicable to applications for the extension of time to challenge planning and environmental law consents. The High Court did not consider commercial interests to be paramount in the context of the appellants' entitlement to "*wide access to justice*" and accordingly that principle was not undermined by the decision of the High Court, *a fortiori* where the appellants conceded that they were not entitled to an extension of time in which to challenge any of the historic forestry consents.

95. The discovery sought by the appellants was ancillary to their claim that the Board should have engaged with a remedial obligation in relation to the historic forestry consents. As this aspect of their claim no longer forms part of the proceedings, no question of discovery in relation to this issue can arise. The High Court was correct in so holding and as this Court has upheld the strike out/ setting aside of leave to seek judicial review of the claims relating to the historic forestry consents, it follows that this Court also should conclude that discovery in relation to these issues does not arise.

96. No issue of the interpretation of European law arises in these proceedings which requires to be referred for the opinion of the CJEU. I would accordingly refuse the request for a reference of a preliminary issue to the Court.

97. This Court thus affirms the decision of the High Court. However, this Court cannot conclude its judgment without referring to the use of slang or colloquialisms in a formal judgment of the High Court. The judgment refers to "*gaslighting*" the decision-maker and equates the issuing of judicial review proceedings with walking "*into Mordor*". Thus the judgment can only be understood by reference to literary tropes which may or may not be

properly understood by a reader and which certainly lack the precision required in judgments of the High Court. This is inappropriate and this Court deprecates the tendency to do so. Judgments must be written in clear, understandable language but that does not mean that it is appropriate to resort to slang or colloquialisms (other than in quotes): it is not. To do so militates against the precision and clarity required in judgments of the High Court.

98. Faherty and O'Moore JJ. have authorised me to indicate their agreement with this judgment.