**[2022] IEHC 700**

**THE HIGH COURT**

**COMMERCIAL**

**[2021 No. 1009 JR]**

**[2022 No. 24 COM]**

**BETWEEN:**

**CONCERNED RESIDENTS OF TREASCON AND CLONDOOLUSK**

**APPLICANT**

**AND**

**AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**AND**

**ELGIN ENERGY SERVICES LIMITED**

**NOTICE PARTY**

**JUDGMENT of Humphreys J. delivered on the 16th day of December, 2022.**

**1.** On 11th March, 2021, the developer in this case submitted a planning application for a solar farm and other works to Offaly County Council (reference 21123). The board describes the project as follows: "[t]he proposed development consists of an up to 60 megawatt (MW) solar farm comprising photovoltaic panels on ground-mounted frames, laid out in arrays on an area of approximately 86.7 hectares and interconnected by underground cables. It also comprised 40 single storey invertor stations, 4 steel storage containers, palisade perimeter fencing, double palisade security gates, a permeable gravel access track, 36 pole-mounted on-site CCTV cameras (c. 3m in height), 2 temporary construction compounds/material storage areas, 2 temporary construction stage Moby-Dick type wheelwash systems (with overhead settlement tank), and all associated ancillary development services and works." The "Moby Dick" wheel wash system is of course in homage to Herman Melville's *Moby-Dick o*r, *The Whale* (London, Richard Bentley, 1851).

**2.** The application was accompanied by, among other things, a Natura Impact Statement (NIS) and a Planning and Environmental Considerations Report (PECR). The applicant residents' group and their deponent, Mr. Ruairí Whelan made submissions raising various concerns about the project. The council granted permission on 5th May, 2021 subject to fifteen conditions.

**3.** On 31st May, 2021, the applicant appealed to the board. The appeal document had a series of appendices, appendix 5 being a document entitled "Peer Review of Ecological Information submitted in support of a Planning Application for Proposed Development of Treascon Solar Farm, Portarlington, County Offaly" by Forest Environmental Research and Services Limited.

**4.** On 20th July, 2021, the board refused an oral hearing.

**5.** The board's inspector reported on 31st August, 2021, recommending grant of permission subject to conditions. On 4th October, 2021, the board made a direction reflecting an intention to grant permission generally in accordance with the inspector's recommendation. This was followed on the same date by an order granting permission, subject to fourteen conditions.

**Procedural history**

**6.** The decision of 4th October, 2021 is challenged in the applicant's statement of grounds filed on 29th November, 2021. On 6th December, 2021, Meenan J. made an order directing leave on notice. On 2nd February, 2022, an order was made granting leave to seek judicial review. The matter was entered into the Commercial List on 7th March, 2022 and transferred thereafter to the Commercial Planning and Strategic Infrastructure List. Interim directions were made in the latter List on 14th March, 2022, amended on 28th March, 2022 and 16th May, 2022. On 11th July, 2022, a hearing date was fixed commencing on 1st November, 2022.

**7.** In the meantime, statements of opposition were filed by the board, the State and the developer on 11th May, 2022, 19th May, 2022 and 30th May, 2022. Written legal submissions were delivered by all parties.

**Reliefs**

**8.** As sought in the amended statement of grounds, the reliefs claimed by the applicant are as follows:

(i) An Order of *Certiorari* by way of application for judicial review quashing a decision of An Bord Pleanála ('the Board') of on or about 4 October 2021, to grant planning permission to the Notice Party ('the developer') to build and operate a solar powered electricity generating power station on a c.90 ha site consisting of arrays of solar panels, 40 no. inverter/transformer stations, underground cable trenches and cables connecting the solar arrays to the inverter stations and subsequently to the proposed on-site transmission infrastructure, internal roads and ancillary works on agricultural land within the townlands of Treascon and Clondoolusk, Portarlington, Co. Offaly.

(ii) Such Declaration(s) of the legal rights and/or legal position of the applicant and/or respondents and/or persons similarly situated as the Court considers appropriate.

(iii) A Declaration that the Second and Third Respondents failed to properly transpose Annex II, paragraph 1(a) of Directive 2011/92/EU as amended by Directive 2014/52/EU ('the EIA Directive') into Irish law governing development consents, being the class of project "*Projects for the restructuring of rural land holdings"*.

(iv) A Declaration that Art. 109(2) of the Planning and Development Regulations, 2001, as amended, is incompatible with the State's obligations under Articles 4(2) to 4(6) of Directive 2011/92/EU as amended by Directive 2014/52/EU.

(v) An Order providing for the costs of the application and an Order pursuant to Section 50B of the Planning and Development Act, 2000, as amended and Section 3 of the Environmental (Miscellaneous Provisions) Act 2011, as amended with respect of the costs of this application.

(vi) A stay preventing the operation of the impugned decision until after the matters that are the subject of these proceedings have been decided by the courts.

(vii) Further and other orders including interim orders.

**Materials before the court**

**9.** Materials placed before the court by being uploaded to the ShareFile platform for this case included submissions, books of authorities and certain separate authorities, books of exhibits, books of pleadings, and mapping material, running to a combined record-breaking total of 7,608 pages (exceeding the recent local record in *Brownfield v. Wicklow County Council (No. 7)* [2022] IEHC 662).

**Preliminary issues**

**10.** A number of preliminary issues were raised.

**11.** As regards pleading objections, these are best addressed where they would make a difference under the relevant heading specifically discussed below.

**12.** Separately, the entitlement of the applicant to make the arguments pleaded was also challenged in circumstances where some of the points concerned had not been made before the board. For example, the board argued that the applicant was "precluded" from taking an issue relating to water quality where such an issue had not been made in the appeal to the board. Generally, given the outcome of the points discussed as set out below, it is not necessary to definitively resolve those questions of standing, and I have proceeded on the assumption that the applicant is entitled to make these points.

**13.** In addition, two of the grounds can be got out of the way immediately.

**14.** Core ground 1 states as follows: "[t]he facts and matters relied upon in support of each of the grounds pleaded herein and each of the reliefs sought herein are identified in the verifying affidavit sworn by Ruairí Whelan and the documents exhibited to same affidavit. The said facts and matters together with the contents of the said affidavit and the documents exhibited thereto are incorporated herein by reference. Without prejudice to the forgoing, the central facts and matters relied upon in support of each of the grounds pleaded herein and each of the reliefs sought herein are further identified hereunder." That is not a legal ground as such and should really be in the factual grounds section.

**15.** Secondly, core ground 6 states as follows: "Without prejudice to the above, should the Board plead that it conducted an EIA screening for the sub threshold development of a project for the restructuring of a rural landholding (which is denied) then it failed to properly or at all record its consideration and determination in this regard. Moreover, on the state of the legislation currently drafted, the Board would seem to lack the jurisdiction to do so which lies with the Minister for Agriculture Food and the Marine under S.I. No. 456/2011 - European Communities (Environmental Impact Assessment) (Agriculture) Regulations 2011 and in circumstances where the thresholds for a project for the restructuring of a rural landholding prescribed by the Minister for Agriculture Food and the Marine in S.I. No. 456/2011 are not

the same as the thresholds for a project for the restructuring of a rural landholding prescribed under section 176, subsections 1, 2, or 3 of the Planning and Development Act, 2000, as amended. This is a breach of the requirements of the EIA Directive. Further particulars are set out in Part 2 below."

**16.** That ground is expressly totally dependent on the board pleading that it conducted an EIA screening exercise. But since the board did not so plead, then this ground does not arise as a basis for relief on the basis of its own express terms.

**17.** I can now turn to the substantive issues argued. It makes sense to follow the approach of dealing with the domestic law points first and then the EU law points. The latter subdivide between EIA related arguments and non-EIA points. The EIA arguments include issues about both transposition and validity.

**Domestic law issues**

**18.** There were essentially two domestic law issues, independent of any EU dimension:

(i). failure to seek adequate drawings; and

(ii). failure to have regard to relevant considerations.

**Core ground 7 – failure to seek drawings**

**19.** Core ground 7 states as follows: "The impugned decision is invalid in that it contravenes article 22(4)(a) and 22(4)(b)(ii) of the Planning and Development Regulations 2001, as amended, in that the Board failed to require the developer to comply with the obligations for a planning application in respect of any development consisting of or mainly consisting of the carrying out of works on, in, over or under land to be accompanied by 6 copies of such plans (including a site or layout plans and drawings of floor plans, elevations and sections which comply with the requirements of article 23), and such other particulars, as are necessary to describe the works to which the application relates and which describe the works proposed and to enable proper public participation as required by law and the Board erred and acted irrationally by not having any drawings showing the locations of the proposed 40 no. invertors or of the piled foundations of the solar panel array structures and other drawings listed in a schedule of same provided to Offaly County Council. Further particulars are set out in Part 2 below."

**20.** The problem for the applicant in relation to this ground is that the factual premise is incorrect. Drawing 10305-2104-A indicates the locations of the 40 inverters on the site. This is by means of a black rectangle. While the applicant says that it could not identify these locations, given that the applicant bears the burden of proof, it seems to me that any allegation that the material before the board didn't show the rectangles in a legible manner has not been made out.

**21.** The applicant also says that not all maps show the black rectangles. That may well be correct but that does not mean that the maps taken, as a whole, are inadequate.

**22.** There is also considerable narrative detail about the inverters in the PECR and a further drawing of relevance, No. 10305-2140-A.

**23.** A second complaint is made about the absence of information regarding piled foundations of the solar panel arrays. However, it is clear from the developer's material that a great deal of information was contained in the drawings submitted. Again, drawing 10305-

2104-A indicates the locations of the solar panel arrays hatched in green. The legend indicates a maximum height of 2.9 metres although more detailed drawings (see 10305-2141-A) show "typical" heights of 2.9 to 3.5 metres. In this regard, it must be noted that height was not specifically pleaded as a problem.

**24.** While it is true that elements of the design information relate to what are described as "typical" designs, as in *Sweetman v. An Bord Pleanála (Sweetman VXII)* [2021] IEHC 390, [2021] 6 JIC 1601, that is not as much of a problem here where the locations, dimensions and other site constraints are specified to such an extent that the potential latitude open to the developer inherently cannot go beyond the certain limited variation that is permissible in planning law generally, as indicated in *Sweetman*.

**25.** Further details relating to the design of the solar panel arrays are set out in drawings 2130-A, 2131-A and 2141-A, and in the PECR, and details of construction methodology are referred to in the Construction Environmental Management Plan. In the light of the above it seems to me that the factual basis for this complaint has not been established.

**Core ground 9 – failure to have regard to relevant considerations**

**26.** Core ground 9 states as follows: "The impugned decision is invalid in that it contravenes section 37(1)(b) and 34(2)(a)(i) of the Planning and Development Act, 2000, as amended, in that the Board failed to have regard, properly or at all, to the provisions of the Offaly Development Plan 2014 to 2020 and/or the Offaly Development Plan 2021 to 2027, the latter having been adopted by the Members of Offaly County Council by the date of the impugned decision, including objectives and policies of the said plan(s) in relation to flood risk assessments and the requirement for a justification test and the incorporation of such policies and objectives into the Strategic Environmental Assessments conducted on the said plan(s), and the Board failed to have regard, properly or at all, to the Flood Risk Management Guidelines 2009 issued by the Minister of the Environment, Heritage and Local Government under Section 28 of the Planning and Development Act 2000 and to Government Policy as summarised on page 3 of the said guidelines. Further particulars are set out in Part 2 below."

**27.** In written submissions, the applicant complains that the flood guidelines amount to a Specific Planning Policy Requirement (SPPR) which is binding under s. 28 of the 2000 Act. That unfortunately is misconceived. It is inherent in the concept of the "Specific" Planning Policy Requirement that it must be expressly articulated. This is reinforced by the fact that these "Specific" Planning Policy Requirements are made under a different statutory provision (s. 28(1C)) from the general power to issue guidelines (s. 28(1)). The claim that the flood guidelines contain an SPPR is not pleaded so it cannot succeed, but in any event, it is clearly wrong. SPPRs are explicit in all instruments generated under s. 28 to date. There is no such thing as an implied SPPR. To invent such a doctrine would be to totally destroy the careful distinction in legislation between mandatory s. 28 guidelines and those that are subject only to a "have regard to" obligation, and to improperly introduce uncertainty into an area where all actors are required to know the ground rules in advance. The making of an SPPR is not something that can happen by accident.

**28.** All actors in the planning world are or ought to be aware of the vital functional difference between a "have regard to" duty and a "comply with" duty, so it would fundamentally undermine legal certainty to hold that this line can be blurred (see by analogy the comments of Collins J in *Spencer Place v. Dublin City Council* [2020] IECA 268 at para. 28). There is a loose analogy with the requirement, for good historical reasons, that an Act amending the Constitution must describe itself as such. Some things just have to be articulated expressly before they can be accepted. The enactment of SPPRs falls into that category.

**29.** Insofar as there is a complaint that the Offaly Development Plan 2014 to 2020 was not considered, it is expressly cited in the board order.

**30.** Insofar as there is a complaint that the Offaly Development Plan 2021 to 2027 was not considered, it was not in force at the relevant time. The decision was made on 4th October, 2021 and the new plan came into effect on 22nd October, 2021.

**31.** Finally, as regards the guidelines entitled *The Planning System and Flood Risk Management - Guidelines for Planning Authorities* (November 2009), these are referred to expressly by the inspector at para. 7.8 and her analysis was in effect adopted by the board. Insofar as concerns the plea of a failure to have regard to the guidelines, that has not been made out. The guidelines are not subject to a "comply with" obligation in any event, but even if they had been, the applicant has not established that there was any non-compliance, particularly having regard to the location of the inverters on Zone C lands (low probability of flooding) and their classification as water-compatible development.

**EIA issues**

**32.** As the domestic law issues fail, I now turn to the European related issues. As noted above, it is convenient to break these into EIA related issues first and then address non-EIA issues. There were essentially four EIA issues:

(i). breach of the EIA directive by the board;

(ii). breach of the EIA directive regarding information on a central portal;

(iii). non transposition; and

(iv). invalidity of art. 109 (2) of the Local Government Regulations 2001.

**Breach of EIA directive by the board**

**33.** This set of grounds engages a number of core grounds, specifically core grounds 5, 13 and 14, 15 in part, and 16 in part.

**34.** Ground 5 is as follows: "The impugned decision is invalid in that it contravenes art 103(1B)(b) of the Planning and Development Regulations 2001 and the EIA Directive as amended because the Board failed to make a screening determination for an Environmental Impact Assessment for (i) the classes of EIA project that were the subject of the EIA Screening Report prepared by the developer and for (ii) a project for the restructuring of a rural land holding within the meaning of Annex II paragraph 1(a) of the EIA Directive and S.I. No. 456/2011 - European Communities (Environmental Impact Assessment) (Agriculture) Regulations 2011. Further particulars are set out in Part 2 below."

**35.** Core ground 13 is as follows: "The impugned decision is invalid in that it contravenes Article 2(1) of the EIA Directive in that the Board failed to ensure that, before development

consent was given, a project likely to have significant effects on the environment by virtue, inter alia, of its nature, size or location was made subject to a requirement for development consent and an assessment with regard to its effects on the environment and denied the public an opportunity to participate in the consent process. Further particulars are set out in Part 2 below."

**36.** Core ground 14 is as follows: "The impugned decision is invalid in that it contravenes Article 4(3) of the EIA Directive by failing to conduct a screening for EIA that takes into account the relevant selection criteria set out in Annex III of that Directive. Further particulars are set out in Part 2 below." This is, in effect, explained by sub ground 36 which is as follows: "[t]he impugned decision is invalid in that it contravenes Article 4(3) of the EIA Directive by failing to conduct a screening for EIA that takes into account the relevant selection criteria set out in Annex III of that Directive. This ground refers to the failure of the Board to make a screening in accordance with Annex II of the Directive. It had no material before it to screen the Annex II para. 1(a) *class the restructuring of a rural landholding* and insufficient information before it in relation to bird, bat and hedgerow assessments to screen for any other class."

**37.** Core ground 15 is as follows: "The impugned decision is contrary to both Article 2 of the EIA Directive and Article 6 of the Habitats Directive in that it failed to consider the effects of the connection of the proposal to the national grid. This is stated to be by means of underground cable that will be the subject of a separate consent. This development is part of the overall project for which consent was sought, and, as such was required to be assessed cumulatively, and in combination with the proposed development. In failing to do so, the respondent acted in breach of the findings of the Court *in O'Grianna -v- ABP* 2014 IEHC 632." We can postpone the discussion on the habitats directive implications until later in the judgment.

**38.** Core ground 16, in part, is as follows: "[t]he impugned decision is invalid in that it contravenes Article 6 paragraph 3(c) of the EIA Directive in that the Board failed to make available to the public in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information, drawings of the proposed development relied upon by the Board in making its decision including any drawing that may exist of the locations of the proposed 40 no. invertors." The second part of ground 16 can be dealt with more conveniently below.

**39.** A major feature in relation to the EIA points is the fact that the decision authorises a project that will involve the removal of a significant amount of hedgerows. The PECR report, para.4.4.3.1, says that 770 metres of hedgerow to the north of the site will be removed, and in addition, 140 metres to the east and west of the proposed entrances will be removed and relocated ("set back") by 3 metres. The applicant contends that this is "rural land restructuring" that requires EIA, by virtue of para. 1(a) of Annex II of the EIA Directive 2011/92.

**40.** While the notice party argues that removal or relocation of nearly one kilometre of hedgerows is not rural land restructuring, I am afraid that I disagree. Removal of such hedgerows for the purposes of a change of use from agricultural land to a wind farm clearly

changes the land use concerned. There is analogy here with Case C-329/17 *Prenninger v. Oberosterreichische Landesregierung* (Court of Justice of the European Union, 7th August, 2018), ECLI:EU:C:2018:640) (see also *Doorly v. Corrigan* [2022] IECA 6, [2022] 1 JIC 2104).

**41.** I note that the notice party's submissions claim that the removal of hedgerows was not rural land restructuring because it was not an "agricultural" project. But this involves a confabulation of different elements of the regulations and of the directive. The terms of sch. 5 of the Planning and Development Regulations 2001 do not require *rural land restructuring* to be carried out for agricultural purposes even though agricultural purposes *are* required for *other types of developments*. This mirrors the language of, for example, para. 1 (a), (b) and (c) of Annex II of directive 2011/92/EU.

**42.** However, the wider problem for the applicant is that all of these pleas in substance complain about failures *by the board* to conduct EIA. But the board does not have statutory EIA jurisdiction in relation to this particular planning application even if other elements of the wider project would require EIA. It is clear that solar farms in and of themselves are not projects that require EIA (see *Kavanagh v. An Bord Pleanála* [2020] IEHC 259 at para. 44, *Sweetman v. An Bord Pleanála* [2020] IEHC 39 *(Sweetman XV)*)).

**43.** Any interpretation of the legislation in the light of EU law that would impose an obligation on *the board* as opposed to *the State* to conduct EIA here is not available as it would be *contra legem*. Indeed, the board's EIA jurisdiction in relation to rural land restructuring has been expressly excluded and is not contained in the current list relevant to the board's functions, namely sch. 5 of the 2001 regulations.

**44.** Fascinating broader questions were raised in submissions, essentially arguing that the State had failed to transpose the EIA directive correctly by:

(i). allowing one competent authority (in this case the board) to grant permission for one element of a broader project prior to an EIA being carried out on the project as a whole, in circumstances where other elements of the project *do* require EIA; and

(ii). by failing to clarify how the interactions between different competent authorities should work especially in a complex situation like the present (in the present case the wider project has at least four elements, the removal of hedgerows which is ostensibly subject at least to EIA screening if not full EIA; secondly the solar farm itself; thirdly an electricity substation; and fourthly a grid connection). The national legislation in fact compels the developer to make separate planning applications because the substation is strategic infrastructure which requires direct application to the board, the solar farm requires application to the planning authority in the first instance, and consent for the hedgerow removal would ostensibly require at least a screening application to the Minister for Agriculture, Food and the Marine. I am told that in a separate set of proceedings in which judgment is awaited, the question of the extent to which a grid connection may be exempted development has been put in issue.

**45.** Crucially important as these questions are, there are no such pleas here and no claim for declaratory relief in relation to non-transposition in these respects. The need for clarity on these points was demonstrated to some extent by the fact that it was not altogether clear to me that the parties even share the same definitions of various technical terms in this area, particularly:

(i). "dual consent" (broadly and preferably, situations where more than one competent authority is involved in consenting the project or elements of it; there are many sub-variations of situations that could arise in such circumstances, and some parties questionably sought to define "dual consent" as only applying to some of these sub-situations) and

(ii). "in-combination effects" (which has potentially two separate meanings of considering the effects of the particular element being consented, in combination with other elements; or the preferable meaning of the effects of the project as a whole, which could be considerably larger).

**46.** Not only was there no plea in relation to dual consent or in-combination effects but there was no plea in relation to sequencing where multiple consenting authorities have jurisdiction. It seems to me that under those circumstances the interesting points made by the applicant, which essentially amount to a systemic challenge and a claim of failure of transposition generally, do not arise. The applicant has pleaded expressly that *the board* has failed to carry out EIA but the fatal difficulty with that plea is simply that by the legislation governing an application of this type, *the board is not required to carry out EIA;* and nor does EU law require the centralisation of EIA functions in relation to a project into a single authority, let alone into the regular planning process. That is in no way to endorse the domestic legislation - merely to conclude that the particular plea made in the limited form it is made cannot succeed.

**47.** The applicant is not entirely without a remedy because it can always return to court in the event that the developer fails to make an application to the Minister for Agriculture for consent or fails to acknowledge an obligation to do so prior to removing any hedgerows. On the principle that one does not have to wait for actual environmental damage before litigating (which would be a wholly unacceptable doctrine having regard to European law generally and the precautionary principle in particular) the applicant does not have to wait for actual destruction of hedgerows before it could bring such proceedings. However, it must at an absolute minimum call on the developer formally to acknowledge a liability not to remove such hedgerows prior to at least a screening decision under the European Communities (Environmental Impact Assessment) (Agriculture) Regulations 2011 (S.I. No. 456 of 2011) ("the 456/2011 regulations"), allowing for a limited period after notification to the applicant of any screening decision in order to have recourse to the court if thought necessary. In the absence of confirmation being provided in response to such a request, it seems to me that the applicant has a clear route back to the court to agitate such a claim. Maybe the developer may be in a position to demonstrate a valid legal rationale for not so undertaking, or maybe not, but that can all be dealt with in a regular way under such a process.

**48.** Finally, under this heading, while the 456/2011 regulations clearly vest in the Minister the EIA functions regarding restructuring of rural land holdings, some confusion was caused by the fact that the European Communities (Environmental Impact Assessment) Regulations 1989 (S.I. No. 349 of 1989) as amended by the European Communities (Environmental Impact Assessment) (Amendment) Regulations 1999 (S.I. No. 93 of 1999) have not been formally revoked. These regulations include rural land restructuring in the First Schedule as development specified for the purposes of art. 24. However, that is merely a definitional provision and not for all purposes - only "for the purposes of these Regulations". The substantive application of such defined purposes is specified in other legislation, particularly as such legislation was amended by the 1989 regulations. However, the 2000 Act makes provision in s. 176(1) for regulations to prescribe development that would be subject to EIA for the purposes of planning law. That, of course, has been done in the 2001 regulations, particularly sch. 5.

**49.** Of importance here is s. 176(3) of the 2000 Act which provides that "any reference in an enactment to development of a class specified under Article 24 of the European Communities (Environmental Impact Assessment) Regulations, 1989 (S.I. No. 349 of 1989), shall be deemed to be a reference to a class of development prescribed under this section." The effect of that is that the First Schedule to the 1989 regulations, as amended by the 1999 regulations, ceases to have any force or effect because it no longer governs the meaning of development prescribed under art. 24 of the 1989 regulations. So, the fact that the reference to rural land restructuring in that schedule has not been formally revoked is irrelevant because that provision has ceased to have effect, albeit otherwise than by formal revocation. (Another reason, if such were necessary, to continue the process of statute law revision – the express repeal or revocation of legislation that has ceased to be relevant or in force but has not been formally expunged from the statute book.)

**Core ground 16 – breach of EIA directive regarding information on the central portal**

**50.** Core ground 16 reads, in relevant part, as follows: "Contrary to Article 6(5) the relevant information was not all electronically accessible to the public, through at least a central portal or easily accessible points of access, at the appropriate administrative level. Further particulars are set out in Part 2 below."

**51.** The problem for the applicant here is that the central portal is not the responsibility of the board but rather of the Minister for Housing, Local Government and Heritage as set out in s. 172A of the 2000 Act as follows:

> "172A. The Minister shall provide, operate and maintain a website—
>
> (a) to which the public has access,
>
> (b) which contains summary information on applications and notifications of the intention to lodge applications for development consent subject to assessment under the Environmental Impact Assessment Directive or this Act, or both that Directive and this Act, as appropriate, and

(c) for the purpose of providing a point of access to the applications referred to in paragraph (b) and associated information, assessments and decisions held by the authorities to which the applications have been or are to be made."

**52.** Thus, if there is an erroneous failure to put material on the central portal, it is a matter for the Minister to account for this. He has not been joined as a respondent, so it is inappropriate for me to grant relief on this basis, even assuming such a failure (see *Clifford v. An Bord Pleanála No. 3* [2022] IEHC 474, [2022] 8 JIC 1502.)

**Core ground 19 – non-transposition**

**53.** As the EIA grounds otherwise fail, I now turn to the non-transposition and validity issue raised against the State. The first of these is set out in core ground 19 as follows: "The impugned decision is invalid because the Second and Third Respondents failed to properly transpose Annex II, paragraph 1(a) of the EIA Directive into Irish planning law, being the class of project "Projects for the restructuring of rural land holdings". Further particulars are set out in Part 2 below."

**54.** More detail is provided in sub-ground 40 which reads as follows: "The impugned decision is invalid because the Second and Third Respondents failed to properly transpose Annex II, paragraph 1(a) of the EIA Directive into Irish planning law, being the class of project "Projects for the restructuring of rural land holdings". As outlined further above, there is a gap in the transposition of this EIA Class. The thresholds set by Ireland for an EIA in the case of the restructuring of a rural landholding that involves the removal of hedgerows along field boundaries are to be found in S.I. No. 456/2011 - European Communities (Environmental Impact Assessment) (Agriculture) Regulations 2011 and the competent authority for making an EIA screening for this type of project is the Minister for Agriculture. There is no class of project restructuring of a rural landholding in Schedule 5 of the Planning and Development Act, 2000, as amended. Section 176 of the Planning and Development Act provides a mechanism for the Minister with responsibility for the planning acts to prescribe for the purpose of that Act EIA classes that are not listed in the planning regulations. This achieved in s.176(3) by deeming classes of development set out in Article 24 of the European Communities (Environmental Impact Assessment) Regulations, 1989 (S.I. No. 349 of 1989), to be a reference to a class of development prescribed in the Planning and Development Act, 2000. While S.I. No. 349 of 1989 was amended by S.I. 93/1999 to impose a threshold for restructuring of a rural landholding of 'area to be restructured > 100 ha' and this may be deemed to be an EIA threshold for the purpose of the Planning and Development Act 2000, the more recent thresholds for this EIA Directive class introduced by Ireland through S.I. No. 456/2011 do not appear to have been the subject of an amendment of S.I. No. 349 of 1989 and are therefore not prescribed for the purposes of the planning regime. This includes thresholds for field boundary removal, interpreted in the Department of Agriculture Guidelines on EIA as removal of hedgerows."

**55.** As the notice party described it, this is a "very narrow" transposition challenge. There is no transposition challenge in relation to the 456/2011 regulations or issues relating to project-splitting such as the interaction between the strategic infrastructure procedure and ordinary planning, and nor is there a transposition challenge in relation to the key matter

regarding the possibility of part of the project being consented before an overall EIA is carried out by someone other than the board, as noted in more detail above. The transposition challenge itself essentially boils down to a complaint that the EIA directive in relation to rural land restructuring has not been implemented "into Irish planning law", that is, in a manner that gives *the board* some jurisdiction over it. The problem with that is that there is no EU obligation to centralise all EIA functions in one decision-maker. Multiple authorities are clearly permissible, as indeed is evident in the text of the 2011 directive itself. The fallacy of the applicant's position is that there is no obligation to transpose EIA into the *planning* legislative regime but only into the *overall* legislative regime. The transposition claim, as pleaded, is misconceived.

**Core ground 20 - alleged invalidity of art. 109 (2) of the 2001 regulations**

**56.** Core ground 20 reads as follows: "[a]rt. 109(2) of the Planning and Development Regulations 2001, as amended, is incompatible with the State's obligations under Articles 4(2) to 4(6) of Directive 2011/92/EU as amended by Directive 2014/52/EU in that it provides for a case-by-case examination of a so called 'sub-threshold development' to determine if an EIA is required, without taking into account the relevant selection criteria set out in Annex III of the EIA directive, without placing any obligation on the developer to provide information on the characteristics of the project and its likely significant effects on the environment, without making available to the public the main reasons for the determination with reference to the relevant criteria listed in Annex III of the directive and without any obligation to make the determination within an appropriate timeframe."

**57.** However, this complaint is mistaken because art. 109(2) of the 2001 regulations does not apply. This is not a sub-threshold development for the purposes of the 2000 Act. The essential reason why not is because the element of the project within the board's jurisdiction is not subject to EIA under the 2000 Act. Given that art. 109(2) doesn't apply to this particular application, this applicant is not adversely affected by it and therefore does not have standing to challenge the validity of that provision. At the risk of repetition, the reason why EIA under the planning legislation is not required is because:

(i). insofar as the element of the project for which consent is sought here is a solar farm, that is not subject to EIA under Annex I or Annex II of the EIA directive or transposing legislation;

(ii). insofar as the project for which consent is sought here involves rural land restructuring by the removal of hedgerows, the EIA function in relation to this element of the development is vested in the Minister for Agriculture; and

(iii). insofar as the wider project involves other elements for which consent is not sought here, specifically the substation and grid connection, the board does not have jurisdiction to carry out EIA save in respect of a situation where an application is made to it for consent that requires EIA to be carried out.

**Other EU law points**

**58.** With the EIA-related matters thus addressed, I can now turn to the other EU law points, which essentially raised issues under four separate directives. Those issues can be summarised as follows.

(i). breach of the water framework directive;

(ii). breach of the SEA directive;

(iii). breach of the habitats directive by reason of erroneous screening out of qualifying interests;

(iv). breach of the habitats directive by reason of an error or lacuna in the appropriate assessment (AA); and

(v). breach of the birds directive.

**Core grounds 8 and 18 – water framework directive**

**59.** Core ground 8 provides as follows: "The impugned decision is invalid in that it contravenes art. 4 of S.I. No. 272/2009 - European Communities Environmental Objectives (Surface Waters) Regulations 2009 as amended by S.I. No. 327/2012 - European Communities Environmental Objectives (Surface Waters) (Amendment) Regulations 2012 in that the Respondent failed in its in so far as its [sic] functions allow, in its duty to comply with the requirements the Water Framework Directive as transposed into domestic law. Further particulars are set out in Part 2 below."

**60.** Core ground 18 provides as follows: "The impugned decision is invalid in that it contravenes Article 4(l)(a)(i) to (iii) of Council Directive 2000/60/EC ('the Water Framework Directive'). Further particulars are set out in Part 2 below."

**61.** These are reinforced by sub-grounds 29 and 39. Sub-ground 29 provides as follows: "[t]he impugned decision is invalid in that it contravenes art. 4 of S.I. No. 272/2009 - European Communities Environmental Objectives (Surface Waters) Regulations 2009 as amended by S.I. No. 327/2012 - European Communities Environmental Objectives (Surface Waters) (Amendment) Regulations 2012 in that the Respondent failed in its in so far as its functions allow, in its duty to comply with the requirements the Water Framework Directive ('WFD') as transposed into domestic law. This ground relates to the failure by the Board to assess the impact of the development on the potential for the receiving waterbody, a segment of the River Barrow denoted as waterbody Barrow_090, to achieve its WFD objective 'good' water quality status by 2027 in circumstances where it currently has a status of 'poor' and is 'at risk' of not attaining the WFD objective."

**62.** Sub-ground 39 states as follows: "The impugned decision is invalid in that it contravenes Article 4(l)(a)(i) to (iii) of Council Directive 2000/60/EC ('the Water Framework Directive'). The Court of Justice of the European Union in Case C-46l/13 The Weser Case ruled that Article 4(l)(a)(i) to (iii) of the WFD must be interpreted as meaning that the Member States are required to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status. Accordingly, the Applicant pleads that these are matters that ought to have been considered in the development consent processes and especially so in circumstances where the Environmental Protection Agency has determined that the status

of the waterbody into which the development will drain is 'poor' and that it is 'at risk' of not attaining the objectives of the Water Framework Directive."

**63.** These grounds essentially derive from art. 4 of the water framework directive, 2000/60/EC, and implementing legislation. Article 4(1) of the directive provides in relevant part as follows:

> "[i]n making operational the programmes of measures specified in the river basin management plans:
>
> (a) for surface waters
>
> (i) Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8;
>
> (ii) Member States shall protect, enhance and restore all bodies of surface water, subject to the application of subparagraph (iii) for artificial and heavily modified bodies of water, with the aim of achieving good surface water status at the latest 15 years after the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8;
>
> (iii) Member States shall protect and enhance all artificial and heavily modified bodies of water, with the aim of achieving good ecological potential and good surface water chemical status at the latest 15 years from the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8;
>
> (iv) Member States shall implement the necessary measures in accordance with Article 16(1) and (8), with the aim of progressively reducing pollution from priority substances and ceasing or phasing out emissions, discharges and losses of priority hazardous substances
>
> without prejudice to the relevant international agreements referred to in Article 1 for the parties concerned;".

**64.** That is all well and good, but unfortunately for the applicant it has not been factually established here that impact on water quality was not assessed, or that the development would result in deterioration of water quality. Essentially, the conclusion of the appropriate assessment was that there would not be *any* impact on water quality. Thus, there would not be an adverse impact. Hence, no breach of the directive or the implementing legislation in the sense pleaded has been made out. This is reinforced by the terms of the NIS, s. 5.4, and the PECR, s. 6, which includes reference to mitigation measures.

**Core ground 17 – breach of the SEA directive**

**65.** Core ground 17 provides as follows: "The impugned decision is invalid in that it contravenes Article 4(1) of Directive 2001/42/EC ('the SEA Directive') by contravening the

Offaly County Development Plan without making the environmental assessment referred to in Article 3(1). Further particulars are set out in Part 2 below."

**66.** The applicant argues that by consenting to a development that falls outside the Offaly County Development Plan and ministerial guidelines and in the absence of there being a revised SEA, the board undermined the assessment of obligations under the SEA directive. However, for the reasons explained earlier, the premise of this argument does not arise because the development does not fall "outside" the guidelines in the sense pleaded. Conducting an SEA of guidelines or of the development plan does not give those documents a status that they do not otherwise have, but in any event, regard was had to those documents and non-compliance has not been shown. There is also the technical problem that the board's decision is not a modification of a plan, but if that was the only problem it might have been possible to capture the applicant's point under some other heading (misinterpretation of the plan or guidelines for example).

**Core ground 15 – project splitting for the purposes of the habitats directive**

**67.** Core ground 15 provides as follows: "The impugned decision is contrary to both article 2 of the EIA Directive Article 6 of the Habitats Directive in that it failed to consider the effects of the connection of the proposal to the national grid. This is stated to be by means of underground cable that will be the subject of a separate consent. This development is part of the overall project for which consent was sought, and, as such was required to be assessed cumulatively, and in combination with the proposed development. In failing to do so, the respondent acted in breach of the findings of the Court in *O'Grianna v. ABP* [2014] IEHC 632."

**68.** Core ground 15 insofar as it deals with EIA has been addressed above. The board cannot be faulted for EIA project-splitting where the board did not have an EIA obligation to begin with. That may or may not indicate a lacuna in transposition of the EIA directive, but no such general non-transposition is pleaded as outlined above.

**69.** Insofar as core ground 15 makes a plea of project-splitting for the purposes of the habitats directive, what is pleaded is a failure to consider the effects of the connection of a proposal to the national grid. Unfortunately for the applicant, the factual premise for the complaint is not made out. The PECR report dealt with both the solar farm and the transmission infrastructure including the grid connection (see in particular pp. 1 and 21). Likewise, the NIS particularly at pp. 22 and 35 expressly deals with the in-combination effects by reference to the transmission infrastructure which includes the grid connection, so unfortunately this plea does not arise on the facts.

**Core grounds 2 and 10 – habitats directive – erroneous screening out of qualifying interests**

**70.** Core ground 2 provides as follows: "The decision of 04 October 2021 ('the impugned decision') is invalid in that it contravenes s. 177U(1) of the Planning and Development Act 2000, as amended in that the board erred in screening out from Appropriate Assessment the species *Margaritifera* (Freshwater Pearl Mussel) and *Austropotamobius pallipes* (White-clawed Crayfish) without assessing, in view of best scientific knowledge, if the proposed development, individually or in combination with another plan or project is likely to have a

significant effect on the River Barrow and Nore SAC ('the SAC'). Further particulars are set out in Part 2 below."

**71.** Core ground 10 provides as follows: "The impugned decision is invalid in that it contravenes Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ('the Habitats Directive') by failing to conduct a screening, properly or at all, to assess if the project is likely to have a significant effect on European sites, either individually or in combination with other plans or projects, to determine if those sites should be subject to Appropriate Assessment ('AA'). Further particulars are set out in Part 2 below."

**72.** The problem for the applicant in relation to these grounds as pleaded is that at the screening stage the board *did not* screen out any of the qualifying interests for the relevant SAC, being the River Barrow and River Nore SAC (code 002162) which is 155 metres to the south of the site. The board noted that the Slieve Bloom SPA is 20 km away. The hen harrier is a qualifying interest, but the development site was outside the range of that species. Given that the SAC was screened in, and no qualifying interests were excluded in that regard, the plea simply does not arise on the facts.

**Core grounds 3 and 11 – habitats directive - error or lacuna in Appropriate Assessment**

**73.** Core ground 3 provides as follows: "The impugned decision is invalid in that it contravenes s.177V(1) and s.177V(2) and s.177V(5) of the Planning and Development Act, 2000, as amended in that the Board erred in failing to carry out an Appropriate Assessment properly or at all in the cases of the species *Margaritifera* (Freshwater Pearl Mussel) and *Austropotamobius pallipes* (White-clawed Crayfish) where it had initially made a determination under section 177U(4) that an Appropriate Assessment was required for all qualifying interest species and habitats of the SAC, and then subsequently screened out both species from the full Appropriate Assessment by erroneously concluding that each species "*occurs outside of any possible range of influence of the proposed development"* and by failing to take into account properly or at all the matters it ought to have taken account of in s. 177V(2) of the Planning and Development Act 2000, as amended and by failing to give reasons for its decision, properly or at all. Further particulars are set out in Part 2 below."

**74.** Core ground 11 provides as follows: "The impugned decision is invalid in that it contravenes Article 6(3) of the Habitats Directive in failing to contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works. Further particulars are set out in Part 2 below."

**75.** This is reinforced by sub-ground 23 which provides as follows: "The impugned decision is invalid in that it contravenes s.177V(1) and s.177V(2) and s.177V(5) of the Planning and Development Act, 2000, as amended in that the Board erred in failing to carry out an Appropriate Assessment properly or at all in the cases of the species *Margaritifera* (Freshwater Pearl Mussel) and *Austropotamobius pallipes* (White-clawed Crayfish) where it had initially made a determination under section 177U(4) that an Appropriate Assessment was required for all qualifying interest species and habitats of the SAC, and then subsequently screened out both species from the full Appropriate Assessment by erroneously

concluding that each species "*occurs outside of any possible range of influence of the proposed development*" and by failing to take into account properly or at all the matters it ought to have taken account of in s.177V(2) of the Planning and Development Act, 2000, as amended and by failing to give reasons for its decision, properly or at all. This ground is connected to the previous ground and relates to the fact that by incorporating a second screening into the Stage II Appropriate Assessment process to *screen out* the FPM and the Crayfish, a step which did not engage with best scientific information, the Inspector, in her AA adopted by the Board, did not come to the complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt that are required in law."

**76.** In submissions the applicant complains about the template-like nature of the board order including the "formulaic" section entitled "matters considered". The applicant says that the stage 2 AA screening adopted by the inspector could be used in any case and is "highly generic". The problem with these submissions is that the inspector is impliedly relying on the developer's material and the applicant has not pleaded any complaint regarding the form of the decision here that would engage the points made in *Eco Advocacy v. An Bord Pleanála (No. 1)* [2021] IEHC 265, [2021 5 JIC 2704 and *Eco Advocacy v. An Bord Pleanála (No. 2)* [2021] IEHC 610, [2021] 10 JIC 0406

**77.** Turning to the matters that *are* pleaded, the board accepts that the NIS and the Appropriate Assessment contain an erroneous statement. Paragraph 6.1.4 of the NIS states that without mitigation there would be potential for effect on *inter alia* the white clawed crayfish, but the more detailed stage 2 analysis states at Table 6.1 that "no pathway exists as proposed development is located downstream of the recorded population". The board accepts that this is an error (see submissions para. 35(c)).

**78.** This error was effectively cut and pasted from the developer's application documents into the board's material. To approve a development once while cutting and pasting developer's errors into the board's decision-making documents is of course unfortunate (*Atlantic Diamond v. An Bord Pleanála* [2021] IEHC 322 para. 39, [2021] 5 JIC 1403, noted, Douglas Hyde (2021) I.P.E.L.J. (1), 30-31). Twice might perhaps be thought careless (*Reid v. An Bord Pleanála* [2021] IEHC 362 paras. 77 and 78, [2021] 5 JIC 2705). Luckily for the board, we don't have a record immediately to hand of Oscar Wilde's thoughts on difficulties happening on a third occasion. But it all goes to emphasise the need for thoroughly independent and detailed expert scrutiny by the statutory decision-maker.

**79.** Despite this, the board offers a stiff defence which is essentially that the material read as a whole contradicts the error such that it is clear that it is an error, and secondly that the logic of the inspector's report is such that even without the error there is not going to be an effect on the qualifying interest because of the lack of impact on the SAC generally. The inspector concludes that following the implementation of mitigation, the construction and operation of this proposed development will not adversely affect the integrity of River Barrow and River Nore SAC in view of the site's conservation objectives.

**80.** Taking the board decision, inspector's report and supporting material as a whole it seems to me that the error in respect of the location of the white-clawed crayfish falls into the category of harmless error, by analogy with Case C-72/12 *Gemeinde Altrip v. Land*

*Rheinland-Pfalz*, Court of Justice of the European Union (Second Chamber), 7th November, 2013, ECLI:EU:C:2013:422. The Appropriate Assessment as a whole is adequate to remove all scientific doubt notwithstanding the error concerned, particularly having regard to the lack of conflicting material before the board, and so, with a certain amount of misgiving, I do not think that the applicant has made out a basis for *certiorari* here. To put it another way, the error is not sufficiently central to the actual inflection point of the inspector's analysis. The analysis essentially endorsed the conclusion of the NIS at s. 9 which was to the effect that "the only potential significant risk (in the absence of mitigation) to the River Barrow and River Nore SAC is the potential reduction in water quality from the release of suspended soils and/or pollutants into the surface water system" and that "[f]ollowing the application of the detailed mitigation measures, potential adverse impacts will be avoided. Consequently, it is determined that there will be no risk of adverse effects on the qualifying interest habitats and species, or on overall site integrity nor in the attainment of their specific conservation objectives for the River Barrow and River Nore SAC." If the overall conclusion is that the site is not going to be affected, then that must apply to a species within the site even if it is erroneously stated that one of the species is not present. That might make a difference in some cases but here it is clear from the overall material that the white-clawed crayfish is not going to be adversely affected.

**Core grounds 4 and 12 – birds' directive**

**81.** Core ground 4 provides as follows: "The impugned decision is invalid in that it contravenes art. 27 (4) of S.I. No. 477/2011 - European Communities (Birds and Natural Habitats) Regulations 2011 because the Board, in the exercise of its functions, insofar as the requirements of the Birds Directive and the Habitats Directive are relevant to those functions, failed to *strive to avoid* pollution or deterioration of habitat used by the *Cygnus Cygnus* (Whooper Swan) as a result of the proposed development. Further particulars are set out in Part 2 below."

**82.** Core ground 12 provides as follows: "The impugned decision is invalid in that it contravenes Article 5(d) of the Birds Directive 79/409/EEC, amended and codified as Directive 2009/147/EC, in so far as the decision failed to contain any measures to prohibit the deliberate disturbance of the Whooper Swan. Further particulars are set out in Part 2 below."

**83.** These grounds are reinforced by sub-grounds 24 and 34. Sub-ground 24 provides as follows: "The impugned decision is invalid in that it contravenes art. 27 (4) of S.I. No. 477/2011 - European Communities (Birds and Natural Habitats) Regulations 2011 because the Board, in the exercise of its functions, insofar as the requirements of the Birds Directive and the Habitats Directive are relevant to those functions, failed to *strive to avoid* pollution or deterioration of habitat used by the *Cygnus Cygnus* (Whooper Swan) as a result of the proposed development. This ground relates to the failure by the Inspector and the Board to have any proper regard to the presence of Whooper Swans close to the site boundary as recorded by the residents and submitted to the process by means of photographic and video evidence. The Inspector disregarded this evidence on the basis that the Whooper Swans (a species listed in Annex I of the Birds Directive) were not recorded as being on the site on

the 4 dates that the author of the developer's NIS conducted 'walk over' inspections of the site. This is an unreasonable restriction on the obligation in domestic law to strive to avoid deterioration of the habitat this species and is irrational given the weight of evidence provided by the public and the fact of historic records of the species visiting this area."

**84.** Sub-ground 34 provides as follows: "The impugned decision is invalid in that it contravenes Article 5(d) of the Birds Directive 79/409/EEC, amended and codified as Directive 2009/147/EC, in so far as the decision failed to contain any measures to prohibit the deliberate disturbance of the Whooper Swan. By Article 5(d) deliberate disturbance of birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of the Birds Directive is prohibited. "Deliberate" actions in this context are understood to be actions by a person who knows, in light of the relevant legislation that applies to the species involved, and the general information delivered to the public, that his action will most likely lead to an offence against a species, but intends this offence or, if not, consciously accepts the foreseeable results of his action. Cases C-103/00 and C-221/04."

**85.** The first problem for the applicant is that art. 5(d) of the birds directive is about the establishment of a general system. It does not impose individual obligations on specific competent authorities such as the board. The text of art. 5 reads as follows:

> "[w]ithout prejudice to Articles 7 and 9, Member States shall take the requisite measures to establish a general system of protection for all species of birds referred to in Article 1, prohibiting in particular:
>
> (a) deliberate killing or capture by any method;
>
> (b) deliberate destruction of, or damage to, their nests and eggs or removal of their nests;
>
> (c) taking their eggs in the wild and keeping these eggs even if empty;
>
> (d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive;
>
> (e) keeping birds of species the hunting and capture of which is prohibited."

**86.** Annex I of the birds directive includes the following species:

> "Anseriformes
>
> Anatidae
>
> *Cygnus bewickii (Cygnus columbianus bewickii)*
>
> *Cygnus Cygnus* …"

**87.** The second problem is that the European Communities (Birds and Natural Habitats) Regulations, 2011 (S.I. No. 477 of 2011) ("the 477/2011 regulations") do not apply. Regulation 42(20) states as follows: "[f]or the avoidance of doubt, notwithstanding the fact that the making, adoption and consent procedures relating to plans and projects which fall under the Planning and Development Acts 2000 to 2011 do not come within the scope of these regulations, a public authority shall, pursuant to Article 6(3) of the Habitats Directive, take cognisance of such plans and projects in assessing any effects that might arise when such plans or projects are considered in combination with any activities, plans or projects

for which the public authority is undertaking screening for Appropriate Assessment or Appropriate Assessment." There is no pleaded argument that the 477/2011 regulations fail to transpose the birds directive by excluding the duties under art. 4(4) of the birds directive from the planning process. Article 4(4) itself is not pleaded albeit that it is the provision underlying regulation 27(4) of the 2011 regulations.

**88.** It seems to me that the wording of the 477/2011 regulations is such as to exclude consent functions under planning legislation. All that the applicant would be left with then would be a challenge to the validity of the 2011 regulations or a declaration as to non-transposition, or a claim that art. 4(4) of the birds directive is directly effective. None of these claims are contained in the pleadings as they stand, and it seems to me that in fairness to the opposing parties it would be just simply too much of a stretch to read in any of those pleas.

**89.** It is true that the board was at one point in oral submissions prepared to engage with art. 4(4), on the assumption that conforming interpretation of reg. 27(4) was available, but once it became clear that such a conforming interpretation would be *contra legem* due to reg. 42(20), the board, legitimately I think in the circumstances, retreated from its willingness to engage with that argument. In those circumstances I think that the complaint as it is pleaded cannot succeed, albeit that that is not to preclude an applicant from expressly pleading a potentially more legally viable transposition complaint in some other case, at which point its merit or otherwise would be properly before the court.

**Order**

**90.** Having regard to the foregoing, the order will be:

(i). that the proceedings be dismissed; and

(ii). that the matter be listed for mention for any consequential orders on a date to be notified by the List Registrar.