

THE HIGH COURT  
PLANNING & ENVIRONMENT

[H.JR.2020.00001030 JR]

IN THE MATTER OF SECTION 50 OF THE  
PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN

ECO ADVOCACY CLG

APPLICANT

AND  
AN BORD PLEANÁLA

RESPONDENT

AND  
KEEGAN LAND HOLDINGS LIMITED

NOTICE PARTY

AND  
AN TAISCE – THE NATIONAL TRUST FOR IRELAND AND CLIENTEARTH AISBL (BY ORDER)  
AMICI CURIAE

(No. 4)

**JUDGMENT of Humphreys J. delivered on Monday, the 18th of December, 2023**

**Judgment history**

1. In *Eco Advocacy CLG v. An Bord Pleanála (No. 1)* [2021] IEHC 265, [2021] 5 JIC 2704 (Unreported, High Court, 27th May, 2021), I rejected the applicant's domestic law points and decided to refer certain questions relating to EU law.
2. In *Eco Advocacy CLG v. An Bord Pleanála (No. 2)* [2021] IEHC 610, [2021] 10 JIC 0406 I made the formal order for reference.
3. In its Judgment of 15 June 2023, *Eco Advocacy*, C-721/21, ECLI:EU:C:2023:477, the CJEU addressed the questions referred.
4. In *Eco Advocacy CLG v. An Bord Pleanála (No. 3)* [2023] IEHC 644, [2023] 11 JIC 2202 I dismissed the balance of the proceedings in the light of the answers of the CJEU.
5. I am now dealing with leave to appeal and costs.

**Facts**

6. The action is a challenge by way of judicial review of the validity of a permission, granted by the board for a housing development in Trim, Co. Meath. The proposal is for the construction of 320 dwellings at Charterschool Land, Manorlands, in the vicinity of the River Boyne and River Blackwater Special Area of Conservation (SAC) and Special Protection Area (SPA).
7. A pre-planning meeting took place between the notice party and the local authority, Meath County Council, on 3rd September, 2019.
8. A first appropriate assessment (AA) screening report was prepared in November 2019.
9. On 20th December, 2019, the notice party lodged an application for a pre-planning opinion as to whether the development would constitute strategic housing development.
10. On 13th February, 2020, the developer held a pre-planning meeting with the board and on 2nd March, 2020 the board decided that the application needed further consideration or amendment.
11. On 7th April, 2020, conservation objectives for the River Boyne and River Blackwater SAC were adopted by the National Parks and Wildlife Service.
12. A second AA screening report was prepared in June 2020.
13. The formal planning application was submitted on 8th July, 2020.
14. The design provides that during the operational phase of the site, surface water run-off will be collected below ground in attenuation storage tanks. They will operate in conjunction with suitable flow control devices which will be fitted to the outlet manhole of each attenuation tank. A class 1 bypass separator will be installed on the inlet pipe to all tanks in order to treat the surface water and remove any potential contaminants prior to entering the tank and ultimately prior to discharge. The water will outfall to a stream around 100 metres south of the development, a tributary of the Boyne.
15. The Boyne itself is approximately 640 metres to the north of the development. It is part of the River Boyne and River Blackwater SPA (reference number 004232) for which a qualifying interest is the Kingfisher (*Alcedo atthis*) [A229].
16. The River Boyne and River Blackwater SAC (reference number 002299) is approximately 700 metres north of the site. The qualifying interests are Alkaline fens [7230], Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior* (*Alno-Padion*, *Alnion incanae*, *Salicion albae*) [91E0], *Lampetra fluviatilis* (River Lamprey) [1099], *Salmo salar* (Salmon) [1106] and *Lutra lutra* (Otter) [1355].

**17.** An environmental impact assessment (“EIA”) screening report was prepared dated July 2020 as well as an ecological impact assessment which included a number of proposed mitigation measures. A habitats directive screening report was also submitted which concluded that there would be no impact on Natura 2000 sites.

**18.** The applicant and other bodies made submissions on the application.

**19.** On 11th August, 2020, a submission was made on behalf of An Taisce (the National Trust for Ireland, a statutory planning consultee and the first *amicus curiae* added by order of the court) noting the potential for impact on the European sites.

**20.** On 31st August, 2020, the CEO of the council reported on the application.

**21.** On 6th October, 2020, the board’s inspector reported recommending that permission be granted and concluding, following the EIA and AA screening, that a full assessment was not required.

**22.** On 22nd October, 2020, the board gave a direction to grant permission generally in accordance with the inspector’s recommendation and on 27th October, 2020 permission was formally granted by decision of the board under the strategic housing development procedure.

#### **Procedural history**

**23.** The proceedings were instituted on 21st December, 2020.

**24.** On 14th January, 2021, I granted leave in the present proceedings, the primary relief sought being an order of *certiorari* directed to the decision of 27th October, 2020. Statements of opposition were filed on 5th February, 2021.

**25.** The matter was heard on 23rd to 25th February, 2021, and at the conclusion of the hearing I permitted the applicant to put in a further formal affidavit exhibiting an additional document (the statement of grounds in a separate but relevant set of proceedings) subject to further follow-up written submissions and replies.

**26.** Following further submissions I reserved judgment and in the No. 1 judgment, I rejected certain preliminary objections to the challenge and then rejected the challenge insofar as it was based on domestic law. I also rejected certain EU law points. I decided in principle to refer the remaining EU law questions to the CJEU under art. 267 TFEU.

**27.** When the matter was listed for mention on 12th July, 2021 the solicitor for An Taisce and ClientEarth indicated a willingness to be heard as *amici curiae*. On the applicant’s application, I joined those parties as *amici* on 27th July, 2021. The *amici* did get involved in the reference, although they have not resurfaced after the matter has been resumed by the referring court following the CJEU judgment.

**28.** As noted above, in the No. 2 judgment I made the formal order for reference. That was in the context that only a limited amount of the applicant’s case remained live at that point.

**29.** Following the judgment of the CJEU, written submissions were delivered and the balance of the case was heard on Friday 17th November, 2023 when judgment was reserved. In the No. 3 judgment I dismissed the proceedings in full.

**30.** The applicant has sought leave to appeal. The notice party applied for costs against the applicant. Those applications were heard on 11th December, 2023.

**31.** The parties agreed or at least acquiesced in an approach that the costs of the applications dealt with on that date would be dealt with along the following lines:

	<b>Applicant successful on leave to appeal</b>	<b>Applicant unsuccessful on leave to appeal</b>
<b>Applicant successful in obtaining no order as to costs of the proceedings</b>	The board to pay the applicant’s costs of the leave to appeal application	No order as to the costs of the leave to appeal application
<b>Applicant unsuccessful in whole or in part in resisting an order for costs of the proceedings</b>	The board to pay the applicant’s costs of the leave to appeal application	Immediately following the announcement of the order there would be brief oral submissions on the costs of the applications on 11th December, 2023

**32.** After receiving all submissions, I announced the order being made and indicated that reasons would follow later. In view of the order made, the need for further submissions on costs did not arise.

#### **Law on leave to appeal**

**33.** The law in relation to leave to appeal has recently been summarised in *Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála* [2022] IEHC 231, [2022] 4 JIC 2601 at §32 *per* Barnville J.

**34.** The board submits as follows:

"The clear intention of the Oireachtas is that the decision of the High Court is generally intended to be final: see *Callaghan v An Bord Pleanála* [[2015] IEHC 493; see also *Rushe v An Bord Pleanála* [2020] IEHC 429 and *Rita O'Neill v An Bord Pleanála* [2021] IEHC 58]. This is because one of the objectives of the 2000 Act is to facilitate certainty and expedition for recipients of grants of planning permission: see *Irish Asphalt Ltd. v An Bord Pleanála* [[1996] 2 I.R. 179]. Facilitating a further appeal in circumstances where a CJEU reference has clarified the issues identified in the No. 2 judgment would be contrary to this."

**35.** The fact that the applicant has already had the benefit of a reference doesn't in itself preclude leave to appeal, but one must have some regard to the fact that its EU issues have already had a through airing. And the questions on which leave to appeal is sought are EU-heavy ones. Delay is also a factor, because a permission only has a 5 year lifespan. As I pointed out in the No. 3 judgment, the permission granted on 27th October, 2020 has a 5-year validity, and over 60% of the time for implementation of that has now expired due to the litigation. Significant further delay would compromise the prospect of implementation and jeopardise the developer's entitlement to exemption from development levies if the project is not commenced by April, 2024. That isn't something that could even theoretically be rectified monetarily by an order against the applicant, due to the not-prohibitively-expensive rule.

#### **Proposed questions of law**

**36.** The applicant puts forward six proposed questions of law of exceptional public importance.

**37.** As noted above, the questions identified are essentially ones affected by EU law, and we have now had the benefit of a CJEU judgment in that regard. The board comments sharply on this by reference to the criterion that uncertainty must arise from the judgment being appealed against:

"6. Perhaps most singularly for this application, the question of uncertainty comes into sharp focus insofar as the Applicant now seems to say the law is uncertain immediately after the CJEU provided the very certainty this Court sought."

**38.** The first question is:

"What is the standard of pleading to be applied under national or EU law in the context of Order 84 Rule 20 or otherwise. To what extent must grounds be particularised, and to what extent must the provisions at issue be enumerated?"

**39.** This question is an imprecise and mutable as the pleadings that gave rise to it. It invites a roving essay on the field of pleadings. No such essay is appropriate or necessary. No new or impossible standard is being demanded, merely that applicants plead their case (including EU law points) in terms which make it acceptably clear to the other side and the court as to what the point is. That does not require that "the provisions at issue be enumerated" or any other specific rule, as long as the point is acceptably clear. The demand for enumeration is a fictitious standard concocted by the applicant to create an appeal – a standard which, as the developer points out, is being maintained despite the fiction having already been exposed. There is no doubt about this issue. The express terms of O. 84 r. 20 RSC as set out in the No. 3 judgment refer to the obligation to plead precisely each ground. Established pleading rules have been upheld by the Supreme Court on multiple occasions: see e.g. *Casey v. Minister for Housing, Planning and Local Government* [2021] IESC 42, [2021] 7 JIC 1606, (Baker J.) *AP v. DPP* [2011] IESC 2, [2011] 1 I.R. 729, [2011] 2 I.L.R.M. 100, [2011] 1 JIC 2501 (Murray C.J.).

**40.** A similar question was sought to be the basis of an appeal in *Rushe v. An Bord Pleanála* (No. 2) [2020] IEHC 429, [2020] 8 JIC 3101 §§55 – 66 (Barniville J). Paragraph 15 of the judgment records the following question on which leave to appeal was sought:

"What is the standard of pleading in environmental judicial proceedings, and was this Honourable Court correct in concluding that it was not (sic)?"

**41.** That was rejected for reasons that apply here – there is no uncertainty. All the court is doing is applying established rules to the particular pleadings in a particular case. Barniville J.'s treatment of the matter begins at para. 55 in a way that applies here, word-for-word:

"It was quite difficult to follow the Applicants' argument in respect of this question. As noted earlier, in its principal judgment, the court identified and discussed the legal principles applicable to pleading in planning and environmental judicial review proceedings. It did so by reference to O. 84 RSC, the case law of the Irish Courts (including the Supreme Court) and the provisions of s. 50A of the 2000 Act (as amended). These are all well-established principles which are routinely applied in planning cases, including those which give rise to issues of EU law."

**42.** The board's demolition of the pleading-related questions is, if anything, an understatement: "13. They are also formulated and argued for in a way that completely distorts the case and what this Court held. This Court applied the law on pleadings. It did that, in particular, at §47-48. It set out the points the Applicant sought to make at trial and compared them to the pleadings and held they were not in the pleadings. The Applicant makes no effort to engage with this. The Applicant just says the Court held against it on pleadings because

numbers were missing. This completely and entirely misreads §47-48. Further, absolutely no attempt has been made to show how §47-48 contain any error when placed against the settled and clear law on pleading.”

- 43.** The developer omits any attempt at verbal sugar-coating:  
“it is submitted that the Certificate Application is misconceived in law, and entirely without merit or basis in fact.”
- 44.** Indeed it goes further:  
“The Applicant hid behind the impermissible generality of the case advanced by it to delay the determination of these proceedings. Whenever this Court has determined a point against the Applicant a new point is revealed in an effort to keep the proceedings alive. This was readily apparent throughout the course of the oral hearing where the case advanced by the Applicant bore little resemblance to that pleaded, or indeed articulated in written submissions.”
- 45.** These criticisms are robust but, I’m afraid, completely valid. The developer’s characterisation applies to all proposed questions for reasons we will examine.
- 46.** The second question is:  
“Is an applicant permitted to ‘develop’ an argument at the hearing of a case or, is an applicant bound in its legal submission to the precise formulation or wording of the initial pleading?”
- 47.** That’s a no-brainer unfortunately. No doubt arises about the answer to that.
- 48.** The third question is:  
“What is the obligation in respect of reasons for EIA screening and should an EIA screening decision be accompanied by express, discrete and specific reasons?”
- 49.** This question simply ignores the judgment of the CJEU. It arises from the second referred question, which was premised on the hypothesis to the first referred question being answered in the affirmative. That didn’t happen. Since EU law doesn’t save the applicant’s pleadings, we never get to the merits on this particular issue.
- 50.** The applicant makes a big deal out of having made passing reference in the pleadings to a lack of reasons, and claims that this amounts to adequate pleading. While as usual such complaints sound plausible on a first reading, there are multiple fatal problems with that submission which become apparent when one widens the lens out from the artificial and partial way in which the issue has now been framed by the applicant.
- 51.** The critical problem with that is that the reasons complaint is drafted in the pleadings on the basis of having looked only at the reasons in the inspector’s report. When one takes that in tandem with Appendix A to the inspector’s report (not mentioned by the applicant in the statement of grounds), which in turn adopts by implication the developer’s documents, it is clear that a wide range of matters were expressly considered in the screening process.
- 52.** As I set out in the No. 1 judgment at paras. 45 and 46:  
“45. Much of the pleaded complaint about the inspector’s conclusion in relation to EIA screening seems to be based on a false premise, which is that the sole analysis of this issue is in the body of the inspector’s report. The ground as pleaded unfortunately more or less ignores appendix A which sets out the considerations in more detail.  
46. One turns then to Appendix A, but the applicant hasn’t pleaded any specific complaint about that appendix in the statement of grounds, or about its adoption by reference or by implication of the developer’s documents ...”
- 53.** The applicant impermissibly tries to manufacture an issue of reasons by illogically ignoring part of the record, without specifically pleading that there is some legal reason why the board order cannot lawfully incorporate Appendix A to the inspector’s report, and the documents referenced in Appendix A, by implication, which is the second fatal problem. Domestic law is against the applicant on the latter point, and there was no plea that such an outcome was mandated by EU law, which is why (in the absence of any positive answer to the first referred question) the CJEU didn’t answer that question.
- 54.** The applicant’s rather injured approach to this issue is summarised in para. 15 of its submissions on leave to appeal, referring to the second referred question:  
“15. This question appears to be freestanding and the suggested answer is in accordance with the applicant’s case, pleadings and submissions. This question was not answered by the CJEU. In the circumstances, it is unclear why the applicant has not obtained relief on this ground. Moreover, the Court has given a clear exposition of its views of the legal obligations. This has not been rejected by the CJEU. It has never been suggested that the applicant’s pleading was deficient in respect of the criticisms made in respect of the reasons given. In fact, both the Court and the Commission identified clearly the pleadings in this respect. The CJEU itself decided that this Honourable Court had found that this issue had not been pleaded (as set out at paragraph 18 of its judgment). It is unclear on what basis

this determination was made by the CJEU and it is entirely unclear how the applicant's pleading at paragraph 14 of the statement of grounds is deficient. Again, this is giving rise to uncertainty."

**55.** There are so many canards and non-sequiturs in that paragraph that it is hard to know where to start. The second referred question was not free-standing. It begins on the condition if the answer to the first question is yes. It is not unclear why the applicant did not obtain relief on this ground. The reason was that the applicant did not plead that EU law requires that there should be an express, discrete and/or specific statement as to what documents exactly set out the reasons of the competent authority. Making a general complaint as to lack of reasons does not constitute such a plea. The applicant is correct that my views on the merits were not rejected by the CJEU; they just weren't reached. The matter can be revisited in some future case where such a plea is made. The applicant is correct in one sense that I didn't suggest that the pleadings were deficient insofar as they complained about the reasons given. What I did suggest and indeed find was that there as a complaint that reasons were not present but the complaint had an answer - such a criticism was misplaced because the reasons were set out in more detail in Appendix A to the inspector's report and the documents referred to in that. It isn't unclear why the CJEU found that the issue in the second question hadn't been pleaded - because it wasn't pleaded and I so found. The pleaded issue is much more general and non-specific. The applicant refers to "this issue" in a paragraph that confusingly conflates those two issues. It is not "entirely unclear" how the applicant's pleading is deficient. The applicant just doesn't want to hear it. It isn't rocket science - the plea is of inadequate reasons generally, not a failure to identify what documents contain the reasons specifically. And even the general plea is based on a misreading of the papers.

**56.** The law on reasons has already been clarified by the Supreme Court: *Connelly v. An Bord Pleanála* [2018] IESC 31, [2021] 2 I.R. 752, [2018] 2 I.L.R.M. 453, [2018] 7 JIC 1701. No further clarification is necessary or appropriate or makes any difference here. The basic problem is that the pleadings here were drafted on a basis that completely ignored the reasons in Appendix A to the inspector's report and the documents referred to in that, and the applicant has been trying to denyingly scramble out of that hole ever since. The applicant only thought of the issue about identifying the specific documents subsequently. It is not a point made on the pleadings and thus does not come within the leave order.

**57.** The fourth question is:

"What is the obligation on a competent authority to engage with and give reasons in respect of submissions made to it in the context of screening for AA? In particular where two substantive submissions are made by statutory consultees is there an obligation to deal with the matters raised?"

**58.** Again the CJEU has answered that and the No. 3 judgment simply applied that to the facts here.

**59.** The fifth question is:

"Is there an obligation on a competent authority to produce an express discrete and or/ specific statement as to what documents exactly set out the reasons of the competent authority in the context of screening for AA?"

**60.** Again, this conveniently ignores the CJEU judgment. The same problem arises as for the third appeal question above. It arises from the second referred question, which was premised on the hypothesis to the first referred question being answered in the affirmative, which it wasn't. This issue wasn't pleaded and EU law doesn't compensate for that.

**61.** The sixth question is:

"If intention or effect is not the appropriate test to demarcate the distinction between standard design features as identified in *Eco Advocacy Case C-721/21* and mitigation measure identified in *People Over Wind Case C-323/17*, should the characterisation as to whether a measure is a standard design feature or a mitigation measure be judged by reference to the outlook of the planning authority in whose functional area the development is occurring and/or the weight of scientific evidence before the Board?"

**62.** But while the law was uncertain prior to the reference (the applicant quotes the No. 1 judgment as if it were still operative), the law now is that "account may be taken of the features of that plan or project which involve the removal of contaminants and which therefore may have the effect of reducing the harmful effects of the plan or project on that site, where those features have been incorporated into that plan or project as standard features, inherent in such a plan or project, irrespective of any effect on the site", as stated by the CJEU. The applicant now quibbles with how to define a "standard feature", but that is a new issue, without any basis in evidence or the pleadings. Such a quibble is an unpleaded *esprit d'escalier* point that does not arise out of the judgment. As the developer submits correctly, "the Applicant now seeks to advance what it purports to be a new issue concerning SUDS and which it claims requires clarification".

**63.** As the developer points out, the status of the SUDS measures has already been dealt with evidentially:

“The CJEU went even further and observed, at §50 of its judgment, that the facts of this particular case are such that the SUDS measures were incorporated into the development project as standard features inherent in the project irrespective of any effect on the site. The Applicant cannot suggest anything to the contrary; not least because of the uncontroverted evidence before this Court (and the CJEU) to that effect. On behalf of the Developer, Noreen McLoughlin averred to the inherent nature of SUDS measures in a development such as this. [Affidavit of Noreen McLoughlin sworn on 4 February 2021, §§18 – 19] Mark Heslin, on behalf of the Developer, made similar averments, noting that reliance had been placed on the Greater Dublin Strategic Drainage Study when devising the development, and referencing the draft Meath County Council Development Plan 2021 – 2027 also. [Affidavit of Mark Heslin sworn on 4 February 2021, §§7 – 10] The Applicant did not respond to those averments.”

**64.** Considering the six questions individually or collectively, the leave to appeal application is manifestly without any merit whatever.

**65.** Even if not, the public interest test would militate against a further appeal. Further delay without pressing legal reason would certainly defeat the developer’s entitlement to exemption from development levies (conditional on construction starting by April, 2024) but would most likely defeat the permission altogether given its 5-year lifespan. Renewal of permission, even if it were to be favourably considered, would be legally dependent on construction having substantially commenced prior to the application, which could be precluded by further delay. None of this can be compensated for by any meaningful order of cost, undertakings, or otherwise. All losses would just fall on the developer.

#### **Costs of the proceedings**

**66.** The notice party applies for the following:

“15.1. An Order for costs as against the Applicant in respect of any and all aspects of the proceedings not falling within the scope of s. 50B of the 2000 Act; and / or

15.2. An Order for costs as against the Applicant in respect of any and all aspects of the proceedings falling within the scope of s. 50B of the 2000 Act in circumstances where the Notice Party contends that the Court should depart from making no Order as to costs (as provided for under s. 50B(2) of the 2000 Act) by reason of ss. 50B(3)(a) and / or (b) of the 2000 Act.”

**67.** A frivolous application is one “that was futile, or misconceived or hopeless in the sense that it was incapable of achieving the desired outcome”: *Nowak v. Data Protection Commissioner* [2012] IEHC 449, [2013] 1 I.L.R.M. 207, [2012] 3 JIC 0702 (Birmingham J.) cited in Murdoch and Hunt’s *Law Dictionary* 6th ed p. 740.

**68.** Vexatious proceedings involve something more – “Proceedings brought with no prospect of success and for the purpose of annoying the other party”: *Oxford Law Dictionary* 10th Ed, p 743. That involves motive, which I don’t think has been sufficiently developed evidentially here to allow any such finding. The developer’s complaints in that regard fall nearer the assertion end of the spectrum than that of admissible and sufficient proof. Obviously there is little love lost between the parties but that in itself doesn’t make the claim vexatious.

**69.** The argument that some of the case falls outside s. 50B fails because all aspects of the proceedings are covered by s. 50B of the 2000 Act, as the notice party ultimately appeared to accept – see *Heather Hill Management Company CLG v. An Bord Pleanála* [2022] IESC 43; [2022] 2 I.L.R.M. 313, [2022] 11 JIC 1004 (Murray J.).

**70.** As regards the claim for costs due to frivolity, one might distinguish between the case prior to the CJEU judgment and the subsequent hearing together with the leave to appeal application.

**71.** As regards the case up to the CJEU hearing, while some of the points advanced were weak, the application overall could not be considered one which merited a departure from the no order as to costs rule. It’s only fair to point out that some points were quite legitimate and generated differing views not only as between the referring court and the CJEU but within the process of European dialogue. Obviously the CJEU judgment is definitive but the fact that there were other views expressed negatives any contention that the case up to that point was in or anywhere remotely near the frivolous category.

**72.** As regards how the applicant dealt with matters thereafter, matters are slightly different. The developer was blunt in submitting that the applicant’s refusal to accept defeat in Luxembourg was frivolous. The board was only marginally more diplomatic, submitting that some of the applicant’s points were “unstated” and that insofar as the applicant professes a complete inability to understand things that have already been spelled out by the court already, this was down to “wilful ignorance”. Many, perhaps most, people would say that a wilfully ignorant, unstated proposition was frivolous, but sensibly the board declined to use that term in order to avoid being

drawn into an unnecessary issue on costs. Even though I think that the board's analysis is totally legitimate, ultimately where we are on this issue is that reasonable people could disagree about whether the applicant has engaged in frivolous applications following the Luxembourg judgment. I am therefore going to give the applicant the benefit of the doubt.

**73.** I would emphasise however that our system is based on "a government that is supposed to rule (and to be restrained) through the written word": *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1998) per Scalia J., dissenting. The rule of law connotes a system whereby not just public but also private law actors are held to the objectivity inherent in a system of law and government constrained by logic and language. In a system of law governed by such an objective framework, parties are not entitled to their own private reality. Words must have meaning. Even on a generous view, the applicant's reaction to its defeat in Luxembourg came uncomfortably close to the outer suburbs of frivolity. The arguments made involved so much distortion of the factual, legal and procedural context as to confound normal attempts to engage rationally with them. A cynic might say that the applicant's contorted attempts to present a beaten docket as a winning one would do credit to Isaac Wunder himself.

**74.** Appellate courts have a role here, if they don't mind me saying so very respectfully. It isn't sufficient to advance an appeal on an unpleaded point to identify that a party has pleaded an issue about topic X. It must have pleaded the actual point being sought to be advanced. Once can compare the questions raised now with the applicant's pleadings and draw one's own conclusions. Any loose application of this principle by appellate courts, were that ever to occur which I am sure it wouldn't, merely encourages the sort of goalpost-shifting that has been attempted here. The law is clear that the rules of pleading apply at all levels of the system. It is not the case that different rules apply in appellate or apex courts, and indeed one might venture to say that there is no logical reason why this would be the case. That would eliminate the logical and principled case for pleading rules at any level, because anyone confined by such rules could simply appeal to a level where the rules did not apply. At the risk of stating the obvious, it is not the law that pleading rules are only for the little people. Nor is it the case that pleading rules don't apply if the point sought to be made is interesting or important or if a party blows hard to that effect. First instance courts are, I think, just as keen to give attention to interesting or important points as are appellate courts (even leaving aside the point that nearly all cases are interesting and important to those involved in them), but are also just as required not to reach those points if they are not pleaded. The present case illustrates the problem of mutable pleadings. As pointed out by the developer, the applicant's position basically is that if the original pleaded point isn't interesting enough, the applicant has others. That is a process that can go on indefinitely as each point is reconfigured in the light of the latest judgment or procedural development.

**75.** The applicant feels hard done by and considers that matters have gone awry because it possibly could have won the case if it had been held to have pleaded matters correctly. But that's part of the whole point of pleadings. The pleading rules are not there only to provide a second reason alongside merits to reject bad points. Their real bite is in requiring the court to reject potentially good points if those points are not adequately articulated on the papers. That is a feature, not a bug.

**76.** Even if I am wrong in declining to hold that the applicant has acted frivolously or vexatiously there are still a number of reasons not to award costs against it:

- (i) while costs are a lot more regimented than they used to be, there must still be a residue of discretion in situations like this, which I would exercise against any costs order in all of the circumstances;
- (ii) the certainty in the area of costs that was achieved by *Heather Hill* was very hard-won, and any court would have to hesitate before opening up new areas of doubt. That seemed to be the board's essential rationale for steering clear of this issue – again commendably pragmatic on their part;
- (iii) even assuming that I were to award some form of costs against the applicant, such costs could not be prohibitively expensive – see the judgment of 15 March 2018, C-470/16, *North East Pylon*, ECLI:EU:C:2018:185: that requirement would lead to spin off complications such as how to investigate and assess that by reference to the applicant's means, and a measuring of such costs, and assuming for the sake of argument that, having due regard to the Aarhus Convention, I were to award non-prohibitively-expensive costs against the applicant for the post-Luxembourg phase, the costs of the process to measure those costs would far outweigh the costs themselves, plus it would also significantly delay the perfection of the order which in turn would create further unnecessary delay and uncertainty over the status of the permission (so really I am trying to save the developer from itself here by avoiding that quagmire);

- (iv) the applicant has a point that the leave to appeal procedure effectively involves asking a court to accept that its own judgment raises issues worthy of appeal, so given the inherent nature of that process the court should be slow to penalise an applicant that seeks to review the court's judgment; and
- (v) finally, on a perhaps overly pragmatic note, a costs order would just add to the applicant's sense of discombobulation to no useful end. The inevitable leapfrog leave to appeal application will tell a stirring and dramatic story of reasonable pleadings dashed aside incorrectly by a dastardly and errant trial court, and of powerfully important, critical and potentially winning points unaddressed as a result. What's the point in amplifying that artificial sense of grievance without achieving some tangible benefit for the winning parties? Insofar as "important" points made during the hearing were not the basis of relief, that's because they weren't pleaded. That isn't the trial court cruelly doing down the applicant – far from it. The trial court indulged the applicant considerably by allowing a further affidavit against objection, dismissing some of the pleading objections, joining supportive *amici curiae*, referring the applicant's unpleaded points conditionally and suggesting positive answers to all of the referred questions - so much so that the developer is emboldened to say outright that "The Applicant has been afforded significant (and, it is respectfully submitted, excessive) latitude by this Court throughout these proceedings" (para. 63 of submissions on leave to appeal). The applicant essentially has to find blame elsewhere for its own failure to plead properly, and I see no tangible benefit to reinforcing that narrative by making what would in any event be an almost completely symbolic costs order.

**77.** So I am making no order as to costs including costs of the present applications.

**78.** By way of final clarification, none of the foregoing should be construed as any kind of blanket criticism of the applicant. Matters only went off the rails following the CJEU judgment, when the applicant didn't seem to be able to bring itself to see that it had lost. Prior to that point the applicant was nowhere near the realm of the frivolous, and indeed has achieved one lasting procedural legacy from this case, which is to give its name to the system, now codified in the guidance notes to Practice Direction HC124, of making submissions to assist a reference under Article 267 TFEU. Such a footprint in the sands of procedure is more than most applicants achieve, so I hope it can take some comfort from that.

**Costs of the present applications**

**79.** In line with the algorithm set out above it follows that there would also be no order as to the costs of the leave to appeal and costs applications.

**Order**

**80.** For the foregoing reasons, the order made on 11th December, 2023 was that:

- (i) leave to appeal be refused; and
- (ii) the order dismissing the proceedings and the foregoing order dismissing the leave to appeal application be perfected forthwith on the basis of no order as to costs of the proceedings (including no order as to the costs of written submissions and as to costs before the CJEU or as to the costs of the application for leave to appeal or as to the application for costs of the proceedings).