APPROVED **[2024] IEHC 524**

THE HIGH COURT
JUDICIAL REVIEW

2021 352 JR

BETWEEN

COASTAL CONCERN ALLIANCE

APPLICANT

AND

MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE
MINISTER OF STATE IN THE DEPARTMENT OF HOUSING, LOCAL GOVERNMENT AND HERITAGE WITH SPECIAL RESPONSIBILITY FOR PLANNING AND LOCAL GOVERNMENT

RESPONDENTS

RWE RENEWABLES IRELAND LTD

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 2 September 2024

INTRODUCTION

1. These proceedings seek to impugn a decision to grant a form of development consent known as a foreshore licence. The foreshore licence had purported to authorise the carrying out of a geophysical survey, associated seabed sampling, and a geotechnical survey, and the deployment of buoy-mounted metocean

equipment. The survey area is approximately ten kilometres off the Dublin Coast, in the vicinity of Kish and Bray Banks.

2. The respondents conceded, during the course of the hearing of the substantive application for judicial review, that the decision to grant the development consent should be quashed. More specifically, it is now conceded that the decision-making process did not comply with the requirements of the Habitats Directive (Directive 92/43/EEC).

3. Notwithstanding this concession, there are a number of issues which remain to be resolved by the court. These issues concern the precise form of relief which should be granted. The principal relief now contended for by the applicant is a declaration to the effect that the developer is not permitted to rely on the survey data, which had been gathered in purported reliance on the foreshore licence, for the purpose of any *future* development consent application. No such relief had been sought in the proceedings as initially pleaded. Accordingly, it has been necessary for the applicant to seek leave to amend its statement of grounds. By agreement of the parties, the amendment application had been listed for hearing at the same time as the substantive application for judicial review.

PROCEDURAL HISTORY

4. The applicant in these judicial review proceedings seeks to challenge a decision to grant a foreshore licence. The decision had been made by the Minister for Housing, Local Government and Heritage ("*the Minister*") on 12 November 2020. The decision had been made pursuant to a recommendation which had been submitted to the Minister for approval by the relevant officials within his

Department ("*the departmental recommendation*"). The Minister confirmed his approval in manuscript on the departmental recommendation.

5. One of the principal grounds of challenge advanced in the judicial review proceedings is that the decision-making process did not comply with the requirements of Article 6(3) of the Habitats Directive. Insofar as relevant to decision-making under the Foreshore Act 1933, the requirements of the Habitats Directive have been transposed into domestic law by the European Communities (Birds and Natural Habitats) Regulations 2011 (SI No. 477 of 2011) ("*the domestic Natural Habitats Regulations*"). The Minister is required, in particular, to comply with regulation 42 of the domestic Natural Habitats Regulations when determining an application for a foreshore licence.

6. It is necessary, therefore, to examine how these requirements were addressed in the decision-making process. The developer had submitted, as part of its development consent application, a report entitled "*Appropriate Assessment Screening & Natura Impact Statement*". In brief, this report indicated that it would be necessary to carry out a stage two appropriate assessment in circumstances where a "*likely significant effect*" upon a small number of European Sites could not be screened out without reliance on mitigation measures.

7. The balance of the report then consists of a Natura Impact Statement ("*NIS*") in respect of the identified European Sites. The proposed mitigation measures are outlined in the NIS. The author reached the conclusion, based on the assessment of the proposed development alone, and in combination with other projects and plans, that there would be no adverse effects on the integrity of any Natura 2000 sites following the implementation of the mitigation measures outlined. The

author was careful to acknowledge that the ultimate decision on appropriate assessment was a matter for the competent authority, i.e. the Minister:

> "On the basis of the content of this report, the competent authority is enabled to conduct an Appropriate Assessment and consider whether the proposed development, either alone or in combination with other plans or projects, in view of best scientific knowledge and in view of the sites conservation objectives, will adversely affect the integrity of any European site."

8. The Department's initial appraisal of the development consent application had been carried out with the assistance of a non-statutory body known as the Marine Licence Vetting Committee ("*MLVC*"). The findings of the MLVC were summarised as follows in the departmental recommendation submitted to the Minister:

> "Appropriate Assessment
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> In accordance with Article 6(3) of the EU Habitats Directive (Directive 92/43/EEC) and Regulation 42 of the European Communities (Birds and Natural Habitats) Regulations 2011 as amended, the Department of Housing, Planning and Local Government undertook an Appropriate Assessment of the proposed project.
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> The applicant submitted an Appropriate Assessment (AA) Screening and Natura Impact Statement (NIS) (Tab 2e) which was assessed by the MLVC Chair. AA screening demonstrated that underwater acoustic noise may have the potential for impacts on the cetaceans listed as features of interest in certain Natura 2000 sites. In the absence of mitigation measures significant impacts could not be discounted, however the implementation of those mitigation measures set out in the supporting document will minimise impacts on habitats and species listed as Features of Interest within the Natura 2000 sites. The MLVC Chair recommended that the implementation of these mitigation measures be included as specific conditions of any licence that may be granted.
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> Based on the above, and the information provided in the NIS submitted by the applicant, the MLVC Chair determined that the proposed development individually, or in combination with other plans or projects, is unlikely to have a significant

> effect on any European site/s subject to specific mitigation measures. The risk of likely significant effects on European sites can be excluded on the basis of mitigation and objective evidence. This determination, with which this Department agrees, is based on the location, scale, extent and duration of the proposed development. (Tab 8).
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> Marine Licence Vetting Committee (MLVC) report (Tab 9)
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> The MLVC considered the Application and Supporting Documents, the NIS and AA review, submissions received during the Public and Prescribed Bodies Consultations and Applicant responses. Considering the nature, scale and location of the proposed work the MLVC concurs with the Appropriate Assessment findings and concludes that, subject to compliance with the conditions set out in Tab 11, the proposed works would not have a significant negative impact on the marine environment, would not adversely impact on any Natura 2000 site and therefore, is agreeable to the grant of the licence to facilitate the proposed development."

9. The determination, for the purposes of the Habitats Directive and regulation 42 of the domestic Natural Habitats Regulations, was formulated as follows in the departmental recommendation:

> "[…] the proposed development individually, or in combination with other plans or projects, is unlikely to have a significant effect on any European sites subject to specific mitigation measures. The risk of likely significant effects on European sites can be excluded on the basis of mitigation and objective evidence. This determination is based on the location, scale, extent and duration of the proposed development."

10. This is the formulation which was approved by the Minister on 12 November 2020. The formulation is erroneous in that it involves an amalgam of the legal tests for a stage one screening determination, and a stage two appropriate assessment, respectively. It is impermissible to have regard to "*mitigation measures*" at stage one. The wording used strongly suggests that the decision-maker did not understand the crucial difference between stage one and stage two,

and, further, did not appraise the development consent application by reference to the requisite legal test.

11. The foreshore licence was subsequently executed on 25 January 2021.

12. Under the version of the Foreshore Act 1933 then in force, there had been an obligation to publish notice of the determination in *Iris Oifigiúil* and in one or more newspapers circulating in the area of the foreshore.

13. The notice of determination was published in *Iris Oifigiúil* on 2 February 2021. Although there was no statutory obligation in force at the time to do so, the notice of determination had also been published on the Department's website on 28 January 2021.

14. The relevant part of the notice of determination reads as follows:

> MAIN REASONS AND CONSIDERATIONS
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> The Minister has had regard to the following matters in determining the application for a Foreshore Licence:
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> - the application for the Foreshore Licence together with accompanying materials;
> - the submissions received from prescribed bodies and the applicant's responses;
> - the submissions received during the public consultation and the applicant's responses;
> - the consent conditions to be attached to the Foreshore Licence, if granted; and
> - the nature of the proposal and its objective;
> - the appropriate assessment of the proposed activities under domestic and EU law, including the Birds Directive and the Habitats Directive, and its conclusions and recommendations in this regard;
> - the screening for environmental impact assessment of the proposed works domestic and EU law, including the EIA Directive, and its conclusions and recommendations in this regard;
> - the environmental assessment of the proposed works by the Marine Licence Vetting Committee ("MLVC") under domestic and EU law, including the EIA, Birds

> and Habitats Directives, and its conclusions and recommendations in this regard; and
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> - the advice of the Marine Environment and Foreshore Section of the Department of Housing, Local Government and Heritage.
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> Having had regard to the foregoing, and in particular having regard to the consent conditions attached to the Foreshore consent, and having agreed with the recommendation of the MLVC, the Minister is satisfied (i) that the proposed activities on the foreshore would not have significant impacts on human health and safety, (ii) that the proposed activities on the foreshore would not have a significant impact on the marine environment or the adjacent European Sites; and (iii) that it is in the public interest to grant the Foreshore consent having regard to the nature of the proposal."

15. As appears from the above, the formulation of the legal test, for the purposes of Article 6(3) of the Habitats Directive, under the notice of determination is *different* from that actually approved by the Minister on 12 November 2020. In particular, the phrase "*significant impact*" is new, and there is no express reference to the mitigation measures in the formulation. This discrepancy between the decision made and the purported notification of the decision has not been explained. At all events, the revised formulation of the legal test is itself incorrect.

16. There is a further error in the notice of determination in that it indicates, mistakenly, that the determination was made by the *Minister of State* at the Department. In fact, the determination had been made by the Minister personally. Indeed, the Minister of State would not have had power to make such a determination at the relevant time. The decision-making function under the Foreshore Act 1933 was only delegated to him on 24 November 2020, i.e. on a date subsequent to the decision. See Housing, Local Government and Heritage

(Delegation of Ministerial Functions) Order 2020 (SI No. 559 of 2020). Again, this discrepancy in the identity of the decision-maker has not been explained.

17. It is convenient, at this point, to jump ahead in the chronology momentarily, and to flag that the respondents have since conceded that the decision-making did not comply with the requirements of the Habitats Directive. Counsel on their behalf confirmed, on the morning of the second day of the hearing (17 July 2024), that the respondents were not opposing the granting of the relief sought at paragraph d (1) of the statement of grounds, i.e. an order of *certiorari*, on the Habitats Directive grounds.

18. It is necessary to return to the chronology in order to provide context for the application for leave to amend the statement of grounds.

19. These judicial review proceedings were instituted by way of an *ex parte* application for leave on 26 April 2021. The High Court (Meenan J.) directed that the application for leave be heard on notice. Leave was granted, unopposed, on 16 June 2021. The proceedings were made returnable to 12 October 2021 with directions that opposition papers be filed in advance of that date.

20. At the leave hearing on 16 June 2021, there had been a brief discussion of a potential application for a stay on the implementation of the foreshore licence. Counsel for the developer indicated that his side intended to oppose any application for a stay on the foreshore licence and would require time to file affidavit evidence. The court granted the applicant liberty to apply in relation to a stay. Counsel for the applicant requested, in open court, that the developer's solicitor keep his side informed of the progress of the activities. The implication being that a stay might not be necessary if the proceedings came on for an early

hearing, prior to the commencement of any significant activities. In the event, no application for a stay was ever made.

21. Opposition papers were filed in January and February 2022, respectively. On 12 July 2023, the substantive application for judicial review was assigned a hearing date of 5 March 2024. The hearing of this case and a related case was estimated to take five days.

22. As events transpired, the developer decided not to carry out all of the activities authorised by the foreshore licence. The developer, instead, applied for a second foreshore licence, the scope of which would include certain activities which were originally to have been carried out under the foreshore licence impugned in these proceedings. These activities would now be carried out in reliance on the second foreshore licence. The practical consequence of this is that the (now more limited) range of activities, which were to be carried out pursuant to the first foreshore licence, had been completed by 12 May 2021. Indeed, most of these activities had already been completed prior to the institution of these judicial review proceedings on 26 April 2021. More specifically, certain surveying activities had commenced on 14 February 2021: the ecological surveys had been completed by 19 March 2021, the geophysical surveys by 12 May 2021.

23. On 14 February 2024, an issue was raised, for the first time, that the proceedings had become moot and should be struck out in circumstances where so much of the activities authorised by the foreshore licence as were now to be carried out in reliance on same had been completed. This issue was raised in correspondence from the Office of the Chief State Solicitor. The Minister was given liberty to issue a motion seeking to have the proceedings struck out as moot ("*the strike out application*"). The strike out application was then assigned

the hearing slot which had previously been allocated to the substantive application for judicial review. The strike out application was heard before me on 5 March 2024. The strike out application was dismissed by reserved judgment delivered on 21 March 2024, *Coastal Concern Alliance v. Minister for Housing, Local Government and Heritage* [2024] IEHC 139.

24. One of the arguments relied upon by the applicant, in resisting the strike out application, had been that there remained a live controversy between the parties as to whether the survey data, gathered pursuant to the foreshore licence, could be relied upon in a *future* application for development consent. For the reasons explained in my judgment on the strike out application, this supposed controversy did not form part of the case as pleaded. The applicant was given liberty to bring an application for leave to amend their statement of grounds. See paragraphs 55 and 56 of the judgment as follows:

> "The *additional* relief sought in the present proceedings is of a different character. The applicant seeks to advance the novel proposition that—in the event a breach of EU environmental law has been established—the developer should be deprived of the benefit of the survey data obtained pursuant to the impugned development consent. This form of relief goes well beyond the type of ancillary or consequential relief which the parties to judicial review proceedings would be expected to anticipate would flow from a finding that a development consent is invalid. Without in any way trespassing upon the underlying merits of the arguments in favour of such relief, it has to be said that such novel relief should have been pleaded in express terms. There is nothing in the statement of grounds which gives any indication of an intention to seek such novel relief. It simply does not form part of the pleaded case.
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> Counsel for the applicant indicated at the hearing of the strike out motion that his client may wish to apply for leave to amend its statement of grounds to include a plea in this regard. Accordingly, the applicant is given liberty, if it so wishes, to bring an application for leave to amend. Any motion is to be filed by 19 April 2024 and to be made returnable before me, for mention, on 2 May 2024. The

> respondents and notice party will, of course, be afforded an ample opportunity to object to any such application to amend. In particular, they will be heard on the question of prejudice and delay."

25. The applicant duly issued a motion, on 23 April 2024, seeking leave to amend the statement of grounds. By agreement of the parties, the amendment application had been listed for hearing at the same time as the substantive application for judicial review.

26. The substantive application for judicial review was heard over two days commencing on 16 July 2024. Judgment was reserved.

APPLICATION FOR LEAVE TO AMEND STATEMENT OF GROUNDS

27. It is necessary to determine the application for leave to amend the statement of grounds first, before turning to consider the precise form of relief which should be granted. This is because it is only when the parameters of the pleadings are fixed that one can determine what relief should be granted.

28. Order 84, rule 23 of the Rules of the Superior Courts provides for an application to amend a statement of grounds as follows:

> "(2) The Court may, on the hearing of the motion or summons, allow the applicant or the respondent to amend his statement, whether by specifying different or additional grounds of relief or opposition or otherwise, on such terms, if any, as it thinks fit and may allow further affidavits to be used if they deal with new matters arising out of an affidavit of any other party to the application.
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> (3) Where the applicant or respondent intends to apply for leave to amend his statement, or to use further affidavits he shall give notice of his intention and of any proposed amendment to every other party."

29. Notwithstanding that, strictly speaking, a formal notice of motion may not be required under the rules, the almost invariable practice is for the party seeking leave to amend to issue a motion.

30. The principles governing an application for leave to amend a statement of grounds in judicial review proceedings have been authoritatively stated by the Supreme Court in *Keegan v. Garda Síochána Ombudsman Commission* [2012] IESC 29, [2012] 2 I.R. 570. The Supreme Court commenced its analysis with the following general observation on the interaction between time-limits and the amendment of pleadings (at paragraphs 31 and 32 of the reported judgment):

> "Persons are permitted to seek review of administrative decisions which affect them within prescribed times and on grounds in law which they propose and which the courts grant them leave to argue. The object of the system is to strike a fair balance between the certainty and security of administrative decisions and the rights of persons affected by them who wish to contest them.
>
> The strict imposition of time limits is mitigated by the power of the court to permit an application outside the permitted time, provided the court is persuaded that there is good reason for the delay and that no other party is adversely or unfairly prejudiced."

31. The Supreme Court went on to state that an applicant, who seeks leave to amend, must explain his delay and his failure to include the proposed new ground in his original statement of grounds. The Supreme Court rejected an argument that it is a precondition to an amendment being permitted that *new facts* had come to light, which could not be known at the time leave to apply for judicial review was obtained:

> "[…] There is no reason, in logic, to impose on an applicant a criterion of newly discovered fact to justify an application to amend, when an application for an extension of time is not subject to any equivalent condition."

32. The Supreme Court then referenced non-exhaustive examples of the type of circumstances which might justify leave to amend: (i) the new ground might arise out of the answer to the proceedings made by the respondent in its statement of opposition; (ii) the new ground might be based on material of which the applicant was unaware at the time of the application for leave to apply for judicial review; or (iii) the new ground might involve a significant point of law which had previously been overlooked as a result of a clear error on the part of the applicant's lawyers.

33. The Supreme Court emphasised the relevance of the *nature* of the impugned decision (at paragraph 36 of the reported judgment):

> "[…] The nature of the decision under attack may also be relevant. If it is one which benefits the public at large or a large section of the public, a challenge may have corresponding disadvantages for a large number of people. This may explain why special and stricter statutory rules have been introduced in cases of public procurement, planning and development, and asylum and immigration. The courts will have regard to the public policy considerations which have prompted the adoption of such rules."

34. The Supreme Court identified, as an important consideration in an application for leave to amend, the *scope* of the proposed amendment. Having noted earlier that the courts are reluctant to admit new grounds which amount to advancing an entirely new cause of action, the Supreme Court then stated as follows (at paragraph 37 of the reported judgment):

> "Amendment may be more likely to be permitted where […] it does not involve a significant enlargement of the applicant's case. To the extent that leave has already been granted, the public interest in the certainty of a decision is already under question. An additional ground may not make any significant difference, particularly if it is based, as in the present case, on a pure matter of law. A court might take a

> different view, if the new ground were likely to give rise to further exchange of affidavits relating to the facts."

35. Leave to amend was allowed in *Keegan* having regard, in particular, to the absence of any significant prejudice to the respondent. There had been no change in the nature of the *relief* sought, and the new ground entailed a pure question of law. As to delay, the Supreme Court held that the delay between the institution of the proceedings and the application for leave to amend was significantly counterbalanced by the failure of the respondent to keep the applicant informed of important events for several years.

36. The principles governing an application to amend have been considered more recently by the Court of Appeal in *North Westmeath Turbine Action Group v. An Bord Pleanála* [2022] IECA 126. The position is summarised as follows (at paragraph 44):

> "While it is, of course, entirely appropriate that applications to amend judicial review proceedings – and particularly proceedings governed by a special statutory regime such as that provided for in sections 50 and 50A PDA – should be carefully scrutinised, such proceedings are, in principle, open to amendment pursuant to Order 84, Rule 23(2) RSC. While Rule 23(2) makes no express reference to amending the relief claimed (as opposed to the grounds on which relief is sought) the State Respondents accept – correctly, in my view – that the court has power in an appropriate case to permit the amendment of the relief, including by the addition of further relief. Ultimately, the touchstone for determining whether to permit an amendment under Rule 23(2) RSC – as it is under Order 28 RSC – is the interests of justice: *Keegan v Garda Síochána Ombudsman Commission* [2012] 2 IR 570, per Fennelly J (O'Donnell and McKechnie JJ agreeing), at para 21. Protecting the constitutional right of access to the court is an important consideration in this context: *Keegan*, at para 29. The assessment of whether the interests of justice weigh in favour of amendment or not will depend on the particular facts and circumstances: *Keegan* at para 23. Ultimately, the Court in *Keegan* allowed the amendment, even though the additional grounds '*raised an entirely new ground in law*' and, to that extent, substantially enlarged the original grounds (para 38).

> A factor favouring the amendment was that, if not permitted, the appellant would be 'deprived of a serious argument.'"

37. At paragraph 54 of the judgment, the Court of Appeal held that Order 84, rule 23(2) does not require that every amendment application must be approached as if it involved a late application for leave: that is the appropriate approach only where a substantially new case is sought to be made.

38. The Court of Appeal held that the High Court had erred, in principle, in refusing leave to amend, noting that the State respondents had been on notice of the complaints from before the expiry of the statutory time-period and that the declaratory relief sought to be added by way of amendment arose directly and naturally out of the existing grounds in the statement of grounds. (Leave to amend was ultimately refused for other, unconnected reasons relating to the fact that the balance of the proceedings had already been heard by the High Court).

39. It is necessary next to apply the principles identified in the case law discussed above to the circumstances of the present proceedings. In particular, it will be necessary to have regard to (i) the nature of the administrative decision the subject-matter of the judicial review; (ii) the scope of the proposed amendments; (iii) the prejudice, if any, caused to the respondents or the developer; and (iv) the explanation, if any, offered for the delay.

40. The administrative decision impugned in these proceedings is a decision to grant development consent. As such, any delay in the notification of the existence of a legal challenge, and of the grounds thereof, has the potential to cause prejudice. Part of the rationale underlying the three month time-limit prescribed for judicial review proceedings under Order 84 is that the beneficiary of an administrative decision should know, within a short period of time, that the decision is subject to a legal challenge. The same rationale applies to an amendment to the

statement of grounds which involves a significant enlargement of the legal challenge by the introduction of a substantially new case. The beneficiary of a development consent is entitled to know, in short course, the nature and the extent of the legal challenge, with a view to their making an informed choice as to how to respond. If, for example, the beneficiary of the development consent considers that the grounds of challenge are frivolous or vexatious, they might be prepared to commence the authorised activity prior to the hearing and determination of the judicial review proceedings.

41. Here, the proposed amendment to the statement of grounds indisputably involves a significant enlargement of the legal challenge. The amendment, if allowed, would introduce an entirely new claim against the developer. As initially pleaded, no relief had been sought against the developer. The reliefs sought were all directed to the respondents *qua* the competent authorities which had made the decision to grant development consent. The developer's interest in the proceedings lay in the fact that it was the beneficiary of the development consent. Under the proposed amendment, by contrast, the developer would be on hazard of declaratory relief being granted against it directly. This would change the entire complexion of the case from the developer's perspective. Indeed, it would necessitate the making of a formal order altering the developer's status in the proceedings from that of a mere notice party to that of a respondent.

42. As appears from the case law discussed earlier, the courts are reluctant to admit new grounds which amount to advancing an entirely new cause of action. This stems, in part at least, from the practical consideration that to allow an applicant to make a new case is likely to cause prejudice, or, at the very least, delay.

43. In almost any other case, a pivot of the type being attempted here would inevitably result in the refusal of leave to amend. There is, however, one peculiarity of the present case which *might* have resulted in leave to amend being granted had the amendment application been brought earlier. The present case is very unusual in that not only did the developer commence the activities authorised under the impugned development consent prior to the expiration of the limitation period, the developer had, in fact, completed certain of the activities. A developer who chooses to implement a development consent prior to the expiration of the limitation period prescribed for judicial review proceedings cannot sensibly complain thereafter that they might have done something different if only they had known what the grounds of judicial review would be. By moving precipitously to implement the development consent, they take "*sight unseen*" any statement of grounds which might subsequently be served prior to the expiration of the time-limit.

44. The precise purpose of the three month time-limit is to ensure that a developer is on notice, in a relatively short period of time, both of the existence of a legal challenge and of the grounds thereof. A developer, who awaits the expiration of the limitation period, can legitimately complain if there is a subsequent attempt to significantly enlarge the grounds of challenge, by introducing what is, in effect, an entirely new cause of action. A developer who has commenced the authorised activity prior to the expiration of the limitation period does not have nearly as strong a complaint. Whereas a developer is not legally obliged to defer the implementation of a development consent until after the limitation period has expired, a developer who does press on in the interim does so at their own risk.

45. On the chronology of the present case, most of the authorised activities, in respect of which the developer now intends to rely upon the impugned development consent, had largely been completed as of the date of the hearing of the *inter partes* leave application on 16 June 2021. (It will be recalled that the developer has elected not to carry out certain of the authorised activities pursuant to the first foreshore licence, preferring instead to include these as part of the application for a second foreshore licence). Had this fact not already been known to the applicant as of 16 June 2021, it would have come to the applicant's attention had it engaged in correspondence with the developer's solicitors (as had been intimated to the court that the applicant would do). If an application for leave to amend the statement of grounds had been brought shortly thereafter, it likely would have been allowed. The fact that most of the (more limited) activities had been completed is not something which the applicant could reasonably be expected to have anticipated in advance. The documentation accompanying the development consent application had indicated that the survey would commence within two years following the award of the foreshore licence and had been expected to take between four to five months to complete. The metocean monitoring equipment had been expected to remain on-site for a minimum of five years.

46. Moreover, the developer could not sensibly have asserted prejudice, in June or July 2021, in circumstances where the developer had taken a risk in carrying out any activities *prior* to the expiration of the time-limit for judicial review.

47. In the event, however, the applicant did not take any procedural steps to address the fact that activities had been carried out pursuant to the impugned development consent. The applicant did not, for example, pursue the issue in

correspondence, still less did it seek a stay on the implementation of the development consent or seek leave to amend its statement of grounds. The applicant's complacency continued unabated following another significant milestone in the proceedings, namely, the receipt of a letter on 21 November 2022 confirming that the foreshore licence would, in effect, be spent by December 2022. The only response made by the applicant to this had been to indicate, in correspondence dated 17 January 2023, that it would be contending that the survey data could not be relied upon subsequently.

48. Even upon receipt of the motion papers in the strike out application in February 2024, the applicant still did not seek leave to amend. It was only during the course of the hearing of the strike out application on 5 March 2024 that it was indicated, for the very first time, that the applicant might seek leave to amend. No meaningful attempt has been made, in the subsequent affidavit grounding the application for leave to amend, to justify this delay.

49. For the reasons which follow, the application for leave to amend the statement of grounds is refused. The application for leave to amend has been brought some three years after the proceedings were first instituted. No proper explanation has been provided for this delay. As appears from the chronology above, the applicant has been on notice, since June or July 2021, that the developer had commenced activities pursuant to the impugned development consent. If the applicant had wished, in response to this reality, to reorient its case to one directed against the developer and their use of the survey data for the purposes of future development consent applications, the applicant should have brought an application to amend in or about June or July 2021. It would cause significant prejudice to allow the applicant to introduce what is, in effect, an entirely new

cause of action at this late remove. The developer has adduced evidence which outlines the negative implications which would be caused by an order precluding the use of the survey data for the purpose of an intended application for a wind farm array. It is said, for example, that the requirement to have to carry out further surveys would entail a financial cost in excess of seven million euros and would cause delays of at least eighteen to twenty-four months (on the most optimistic estimate). It is further said that the delay might result in the loss of the opportunity to avail of certain subsidies and schemes; the potential loss of the time-limited maritime area consent; and might even result in the proposed wind farm array being abandoned entirely.

50. Had the developer known that declaratory relief of the type now sought to be introduced were being claimed against it, the developer would have had the opportunity to expedite the hearing and determination of these judicial review proceedings. The fact that this entirely novel relief was not disclosed earlier has had the consequence that no urgency attached to these proceedings, and they were, instead, allowed to become becalmed for several years. It is likely that a very different pace would have been adopted otherwise.

51. Counsel for the applicant has placed much emphasis on the fact that the developer began to implement the development consent prior to the expiration of the three month time-limit for judicial review. It is submitted that, by so doing, the developer deprived themselves of legal certainty. With respect, whatever force this argument may have had in June or July 2021, it is long since exhausted. The fact that a developer moved before the expiration of the limitation period does not confer *carte blanche* upon an applicant to delay indefinitely thereafter. Whereas the developer's conduct may well have meant that an application for

leave to amend would have been successful in June or July 2021, it does not excuse the applicant's delay over the intervening three years.

52. Finally, for completeness, it should be explained that the relevance of the anticipated negative implications is, for present purposes, confined to the application to amend. It is not being suggested, at this point, that an otherwise well-founded and properly pleaded claim for declaratory relief would have to be refused merely because it would cause financial hardship to a developer.

DECLARATORY RELIEF AGAINST DEVELOPER NOT JUSTIFIED

53. For the reasons explained under the previous heading, the application to amend the statement of grounds has been refused. It follows that the claim for declaratory relief against the developer does not form part of the pleaded case. For completeness, however, and lest the refusal of the application to amend be held to be incorrect on appeal, it is proposed to address *de bene esse* the merits of the claim for declaratory relief.

54. As appears from the case law discussed at paragraphs 71 to 74 below, the national authorities of a Member State are required to make good any environmental harm caused by the failure to carry out an assessment of a development project (where such an assessment was required under the Habitats Directive or the Environmental Impact Assessment Directive). The novelty of the declaratory relief sought by the applicant in the present case is that it is addressed to the developer. It is sought to deprive the developer of any benefit of the survey data gathered pursuant to the impugned development consent. This is sought to be achieved by making declaratory orders which preclude the use of

the survey data for the purpose of any *future* application for development consent. There are at least two principled objections to this approach as follows.

55. The first objection is that it purports to make the Habitats Directive directly applicable against a private developer. This is contrary to the orthodoxy that—in the absence of national implementing legislation—a European Directive, as opposed to a European Regulation, cannot be enforced by a Member State against an individual. This orthodoxy has recently been reiterated, in the specific context of the Habitats Directive, in *Latvijas valsts meži*, Case C-434/22 ("*no obligation can be imposed on individuals solely on the basis of that directive*").

56. It is correct to say that a private developer might suffer adverse repercussions as the result of a failure of a competent authority to comply with its obligations under the Habitats Directive. A Member State is required to suspend or nullify a development consent which has been granted in breach of EU environmental legislation. To this extent only, such legislation might be regarded as giving rise to adverse repercussions even in the absence of specific national implementing legislation to this effect. The ECJ has held, however, that such adverse repercussions do not entail giving impermissible "*inverse direct effect*" to the provisions of an EU directive: *Wells*, Case C-201/02, EU:C:2004:12. It may, however, be necessary for the relevant Member State to provide financial compensation in this regard (*ibid*).

57. The declaratory relief sought by the applicant in the present proceedings goes far beyond that. Here, the applicant seeks to invoke the provisions of the Habitats Directive to enforce a novel remedy against the developer. The applicant seeks an order, albeit dressed up in the language of a declaration, which

would be enforceable against the developer if breached. There is nothing under national implementing legislation which allows for such a remedy.

58. The second objection is that an *ad hoc* punishment or penalty of the type which the applicant seeks to impose on the developer does not advance the purposes of the Habitats Directive. The applicant's stated rationale for seeking the declaratory relief is to deter other developers from seeking to contravene the Habitats Directive. This rationale is apparent, in particular, from proposed ground E.52 of the *draft* amended statement of grounds.

59. The applicant seeks to rely, in this regard, on pronouncements in the case law of the ECJ to the effect that national legislation, which allows for the *retrospective regularisation* of development projects that have been carried out in breach of EU environmental law, should not have the effect of encouraging developers to forgo submitting to screening and environmental assessment. No such considerations arise in the circumstances of the present case. This is not a case of a rogue developer who failed to apply for development consent in the expectation that, if caught out, they could readily apply for retrospective development consent. Rather, the developer here had fully complied with its obligations *qua* developer under the Habitats Directive and the national implementing legislation. In particular, the developer, through its agents, correctly identified the proper legal test and provided sufficient information to the decision-maker to allow it to determine the application for a foreshore licence in accordance with the requirements of Article 6(3) of the Habitats Directive. The developer cannot be blamed for the fact that the decision-maker fell into legal error thereafter. Even if it were permissible to do so, it would not advance

the objects of the Habitats Directive to "*punish*" a developer who has fully complied with its obligations.

ORDER OF CERTIORARI AND ANCILLARY RELIEF

60. Having addressed—and dismissed—the application to amend the statement of grounds, it is next necessary to consider what relief should be granted by reference to the original pleadings.

61. The respondents have conceded what is described as core ground one in the statement of grounds. This is the ground which alleges a failure to comply with the requirements of the Habitats Directive. The respondents have also conceded that an order of *certiorari* ought to be made in accordance with paragraph (d)(1) of the statement of grounds.

62. The fact that a respondent has conceded that an order of *certiorari* should be granted is not necessarily determinative. Rather, in accordance with the principles in *Ballyboden Tidy Towns Group v. An Bord Pleanála* [2024] IESC 4, it is still necessary for the High Court to be satisfied, on the evidence and the submissions made to it, that the setting aside of the impugned decision by way of *certiorari* would be a lawful exercise of its supervisory judicial review jurisdiction. I am so satisfied for the reasons which follow.

63. It may help to frame the analysis by recalling that the Habitats Directive envisages a two stage process. This process has been described as follows by the Court of Appeal (Butler J., Ní Raifeartaigh and Meenan JJ concurring) in *Hayes v. Environmental Protection Agency* [2024] IECA 162 (at paragraph 118):

> "The Habitats Directive is largely non-prescriptive of the form which an AA must take. That detail has been filled in

> by the CJEU and, in this jurisdiction, by the national implementing measures which are to be found in Part 5 of the EC (Birds and Natural Habitats Regulations) 2011. The language of Art. 6(3) of the Directive suggests that the process will have two stages. Initially a decision must be made as to whether the project is likely to have a significant effect on any EU site. This is described as the screening stage and it is accepted that the threshold is a low one. If the project is likely to have a significant effect on an EU site, the decision maker must then carry out a full appropriate assessment to ascertain whether the project will *'adversely affect the integrity of the site'* having regard to its conservation objectives. It may be useful to note that the initial threshold of significance does not distinguish between positive and negative effects on EU sites but the substantive test, when a full AA is carried out, focuses on adverse or negative effects on the integrity of the site. […]"

64. Here, the documentation accompanying the application for development consent had concluded that, *absent the use of mitigation measures*, it could not be excluded that the authorised activities would have a significant effect on five specified European Sites. It followed, therefore, that it was necessary to carry out a stage two appropriate assessment. This is because it is impermissible, at the screening stage, to take account of mitigation measures, i.e. the measures intended to avoid or reduce the harmful effects of the development project on a European Site. (*People Over Wind*, Case C-323/17, EU:C:2018:244).

65. The legal test for a stage two appropriate assessment requires the national competent authority to assess the implications of the development project for the European Site concerned in view of the site's conservation objectives and taking into account the protective measures forming part of that project aimed at avoiding or reducing any direct adverse effects for the site, in order to ensure that it does not adversely affect the integrity of the site. (*T.C. Briels*, Case C-521/12, EU:C:2014:330).

66. The height of the threshold to be satisfied at stage two has been authoritatively explained as follows by the Court of Appeal in *Hayes v. Environmental Protection Agency* [2024] IECA 162 (at paragraph 121):

> "The height of the threshold that must be met in terms of scientific certainty before a decision maker can positively conclude that a development will not have an adverse effect on the integrity of an EU site is evident from a number of decisions of the CJEU (for example *Waddenzee* Case C-127/02 [2004] ECR 1-7405; *Commission v Spain* Case C-404/09 [2011] ECR 1-11853 and *Sweetman v An Bord Pleanála* Case C-258/11 ECLI:EU:C:2013:220). These establish *inter alia* that all aspects of a project capable of having an effect on the site must be identified in light of the best scientific knowledge in the field; the decision maker must be satisfied that *'no reasonable scientific doubt remains as to the absence of an adverse effect'*; that an assessment will not be appropriate if it contains gaps or lacunae and lacks complete, precise and definitive findings or conclusions capable of removing all such scientific doubt. In summarising the effect of these decisions Finlay Geoghegan J. stated in *Kelly* that *'if an appropriate assessment is to comply with the criteria set out by the CJEU in the cases referred to then it must, in my judgment, include an examination, analysis, evaluation, findings, conclusions and a final determination'*."

67. It is a question of fact and degree as to whether, in any particular case, the competent authority applied the correct legal test under the Habitats Directive, or, alternatively, asked itself the wrong question. The court of judicial review will look to the *substance* of the decision-maker's analysis. (*Kelly v. An Bord Pleanála* [2019] IEHC 84). The failure of a decision-maker to reproduce the exact words contained in the case law is not necessarily fatal, at least not where a stage two appropriate assessment has been screened out.

68. The distinguishing feature of the present case is that it is apparent, from the procedural history (above), that there was a failure, at all points of the decision-making process, to distinguish between the legal tests for a stage one screening determination, and a stage two appropriate assessment, respectively. The

language employed gives rise to a very real concern that the decision-maker did not fully comprehend the distinction between stage one and stage two, and, indeed, might not even have appreciated that stage two had been triggered. The obligations upon a decision-maker at stage two are more onerous. It is essential that, when viewed in the round, the record of the decision-making indicates that the more exacting test has been applied. This is especially so where the decision-maker is not an expert decision-maker such as An Bord Pleanála or the Environmental Protection Agency. Here, the decision-maker was the Minister as *persona designata* under the Foreshore Act 1933. The record should have demonstrated that the correct legal test for a stage two appropriate assessment had been explained to the Minister. Far from doing this, the record (including the departmental recommendation and the notice of determination) appears to suggest, in the recitals, that the appropriate assessment had *already* been carried out (presumably by the MLVC or the departmental officials) prior to the Minister's decision. Whereas the Minister should, of course, have regard to expert advice, the ultimate responsibility for making the necessary determinations for the purpose of the Habitats Directive resides with him as the designated competent authority. Confidence in the decision-making process is further undermined by the fact that the notice of determination indicates, mistakenly, that the determination was made by the *Minister of State* at the Department.

69. In all the circumstances, the concession by the respondents was sensibly made. The error of law operates to invalidate the decision to grant the foreshore licence. It should be reiterated that the developer bears no responsibility for this error. The application documentation had set out the correct legal test clearly.

70. In circumstances where a development consent has been granted in breach of EU environmental law, the default position is that the development consent should be set aside, and consideration given to the carrying out of some form of remedial assessment for the purpose of the Habitats Directive or the EIA Directive, as the case may be.

71. The obligations upon the national authorities (including where relevant the national court) are well established. The national authorities must take measures to eliminate the unlawful consequences of that breach of EU law. This principle has been reiterated as follows, in the context of the EIA Directive, by the ECJ in *Commission v. Ireland (Derrybrien Wind Farm)*, Case C-261/18, EU:C:2019:955 (at paragraphs 75 to 77):

> "Under the principle of sincere cooperation provided for in Article 4(3) TEU, Member States are nevertheless required to eliminate the unlawful consequences of that breach of EU law. That obligation applies to every organ of the Member State concerned and, in particular, to the national authorities which have the obligation to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out an environmental impact assessment, for example by revoking or suspending consent already granted, in order to carry out such an assessment (see, to that effect, judgments of 7 January 2004, *Wells*, C-201/02, EU:C:2004:12, paragraph 64, and of 26 July 2017, *Comune di Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraph 35).
>
> As regards the possibility of regularising such an omission a posteriori, Directive 85/337 does not preclude national rules which, in certain cases, permit the regularisation of operations or measures which are unlawful in the light of EU law, provided that such a possibility does not offer the persons concerned the chance to circumvent the rules of EU law or to dispense with their application, and that it should remain the exception (judgment of 26 July 2017, *Comune di Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraphs 37 and 38).
>
> An assessment carried out in the context of such a regularisation procedure, after a plant has been constructed

> and has entered into operation cannot be confined to its future impact on the environment, but must also take into account its environmental impact from the time of its completion (see, to that effect, judgment of 26 July 2017, *Comune di Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraph 41)."

72. The Advocate General (at paragraph 36 of his opinion) emphasised that the remedial obligation applies even if the project has already been completed:

> "[…] in the event of breach of the obligation to carry out a prior environmental impact assessment of a project likely to have significant effects on the environment, Member States are required to adopt all necessary measures to ensure that such an assessment, or a remedial assessment, is carried out after consent has been granted, even if the project is under way or has already been completed. Where national law allows, the competent national authorities are required to suspend or set aside the consent already granted, so as to enable it to be regularised or a new consent to be granted that meets the requirements of the directive."

73. A similar remedial obligation arises under the Habitats Directive. See, for example, *AquaPri*, Case C-278/21, EU:C:2022:864 (at paragraphs 37 and 38).

74. The recent case law of the ECJ has emphasised that the obligation to make good any harm caused by the failure to carry out an appropriate assessment where required is one imposed on the national authorities. It is not one which is directly applicable to private developers. This distinction has been explained as follows in *Latvijas valsts meži*, Case C-434/22, EU:C:2023:966 (at paragraph 88):

> "[…] Article 6(3) of the Habitats Directive, read in the light of the principle of sincere cooperation, must be interpreted as requiring the Member State concerned, in particular the competent authorities of that Member State, to adopt measures in order to remedy any significant effects on the environment of works carried out without the appropriate assessment of those effects, provided for in that provision, having been carried out beforehand and to make good the damage caused by those works. By contrast, it does not oblige that Member State to require individuals to make good such damage in cases where it is attributable to them."

75. In most cases where a development consent has been quashed in judicial review proceedings, the relevant developer will seek to secure a replacement development consent. Typically, a developer will either (i) seek an order remitting the development consent application to the competent authority with a direction to reconsider it and reach a decision in accordance with the findings of the High Court, or (ii) seek to make an application for retrospective development consent. In either contingency, the relevant competent authority will be empowered to carry out a remedial assessment which will consider not only the future impact of the project on the environment but also its historical impact.

76. The circumstances of the present case are different. Here, the developer has carried out so much of the activities purportedly authorised under the impugned development consent as it intends to. Accordingly, the developer does not seek remittal nor retrospective development consent. At first blush, therefore, it might seem that if there is to be a remedial assessment, it will have to occur other than in the context of decision-making on an application for development consent.

77. In most cases where a developer does not seek a replacement development consent, the party objecting to the development project which has been carried out will usually pursue enforcement proceedings. There is precedent, at the level of the High Court, to the effect that it is legitimate to carry out a form of remedial assessment within the context of enforcement proceedings: *Fowler v. Keegan Quarries Ltd* [2016] IEHC 602.

78. It is not apparent from the submissions to date that the enforcement route is open in the present case. Certainly, the court has not been referred to any domestic legislative provision which would allow for a private individual or entity to take enforcement action in respect of an activity, carried out pursuant to a foreshore

licence, which licence has since been set aside as invalid. The Foreshore Act 1933 itself does not provide for private enforcement action.

79. It seems, therefore, that the only enforcement mechanism available under domestic law whereby the environmental damage, if any, caused by the implementation of an (invalid) foreshore licence may be remedied is under the domestic Natural Habitats Regulations. These regulations implement not only the development consent provisions of Article 6(3) of the Habitats Directive, but also give effect to the general duty, under Article 6(2), to take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated. The regulations do not, however, allow a private individual or entity to take enforcement action. The powers under regulations 36 and 38 are only available at the instance of the Minister.

80. Having regard to the absence of an enforcement mechanism available at the suit of the applicant, it seems that the only mechanism by which this court can comply with its duty to address a breach of the Habitats Directive is to make an order *remitting* the development consent application for reconsideration. If, having reconsidered the matter by deploying the correct legal test, it is determined that development consent should be granted retrospectively for the (more limited) activities carried out, then the question of enforcement action will not arise. If, conversely, it is determined that development consent should be refused, then it will be necessary to consider whether the activities carried out pursuant to the quashed foreshore licence caused significant disturbance of the species for which the five European Sites have been designated: if so, then consideration will have to be given as to how this environmental harm might be

remedied. This may or may not entail some form of enforcement action against the developer: see regulations 36 and 38 of the domestic Natural Habitats Regulations.

81. It is, of course, highly unusual to make an order for remittal in circumstances where the developer has not sought same. Here, the developer had already surrendered the foreshore licence in advance of the hearing of the substantive judicial review proceedings and in advance of any court order quashing the decision to grant the foreshore licence. Nevertheless, an order for remittal is necessary in circumstances where there is no other order which offers a procedural route to ensure that any environmental damage caused is remedied.

82. The remittal will be made to the Minister for Housing, Local Government and Heritage in circumstances where he had been the original decision-maker. It would not be apposite to redirect the matter to any other entity—whether a Minister, a Minister of State, or the newly established Marine Area Regulatory Authority—to whom licensing functions have subsequently been transferred, delegated, or conferred. This is because it is the *original* application which is being reconsidered.

CONCLUSION AND PROPOSED FORM OF ORDER

83. For the reasons explained herein, and in the earlier judgment, *Coastal Concern Alliance v. Minister for Housing, Local Government and Heritage* [2024] IEHC 139, the following orders will be made.

84. An order refusing the motion, issued on 23 April 2024, seeking leave to amend the statement of grounds.

85. An order of *certiorari* setting aside the decision, made on 12 November 2020, and formally published in *Iris Oifigiúil* on 2 February 2021, to grant a foreshore licence to the notice party (Ref: FS007029).

86. An order, pursuant to Order 84, rule 27 of the Rules of the Superior Courts, remitting the application for a foreshore licence to the Minister for Housing, Local Government and Heritage with a direction to reconsider it and reach a decision in accordance with the findings of the High Court.

87. These proceedings will be listed for submissions as to the precise form of order and in relation to the incidence of costs. The parties are requested to correspond with each other and to identify a convenient date in October for such a listing.

Appearances

James Devlin SC and Margaret Heavey for the applicant instructed by Harrington & Company
Feichín McDonagh SC and Emma Synnott for the respondents instructed by the Chief State Solicitor
David Browne SC and Christopher Hughes for the notice party instructed by Philip Lee LLP