[2025] IEHC 15

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2024.0000290]

BETWEEN

ECO ADVOCACY CLG

APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENT

AND
STATKRAFT IRELAND LIMITED

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Wednesday the 15th day of January 2025

1. Nearly five years ago, the developer applied for permission for a wind farm development. That took four years to work through the planning process, with a judicial review of the permission granted (ABP-310312-21) being commenced in late February 2024. With the application of the expedited procedure, a full hearing took place in November 2024, which is pretty good by normal forensic standards. The grounds of challenge relate to lack of publication of material and inadequate appropriate assessment (**AA**) under council directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the **habitats directive**). On the latter point, the applicant effectively re-runs the CJEU decision in the judgment of 15 June 2023, *Eco Advocacy CLG v An Bord Pleanála*, C-721/21, ECLI:EU:C:2023:477, where similar demands for narrative, point-by-point replies to submissions were rejected by the CJEU, on a reference in proceedings brought by the very same applicant. Surprisingly, despite repeating those dismissed claims here, the applicant failed to acknowledge the implications of the points having been dismissed as a basis for relief in the earlier proceedings. When your point doesn't make it back in one piece from Luxembourg, what's the point in pursuing it further in a domestic court at any level? A judgment of the CJEU or for that matter an apex domestic court isn't just an opening suggestion in a further round of negotiation with an applicant. It is meant to resolve the issue for good one way or the other. This applicant's approach of re-arguing such points without anything definitively new sounds, as always, vaguely plausible at first reading, but is in substance a recipe for endless litigation. The developer might say that we got more than a taste of that here.

Geographical context

2. The development concerns the construction of up to eight wind turbines with a tip height of up to 185 metres and all associated foundations and hardstanding areas at Townlands of Dernacart Forest Upper and Forest Lower, Co. Laois.

3. The development site is located on the Garryhinch Bog Group, which involves two subsites, the Garrymore subsite (immediately adjacent to the turbines) and a site to the east of this, the Garryhinch subsite.

4. The Slieve Bloom Mountains Special Protection Area, designated by S.I. No. 184 of 2012 - European Communities (Conservation of Wild Birds (Slieve Bloom Mountains Special Protection Area 004160)) Regulations 2012, is located c. 4.7 kilometres to the southeast of the proposed windfarm and is designated for the protection of the Hen Harrier.

Facts

5. On 17th February 2020, Statkraft Ireland Limited (**Statkraft**) applied to Laois County Council (the **council**) for planning permission for a development comprising the construction of up to eight wind turbines with a tip height of up to 185 metres and all associated foundations and hardstanding areas and all associated works.

6. The applicant lodged a submission on the application with the council on 22nd March 2022.

7. The Development Applications Unit (the **DAU**) of the Department of Culture, Heritage and the Gaeltacht (the **department**) made a submission to the council on 24th March 2022. This is regarded as the first submission of the National Parks and Wildlife Service (**NPWS**).

8. Further information (**FI**) was sought by the council on 2nd June 2020.

9. Statkraft submitted the requested FI on 8th March 2021, including amendments to the environmental impact assessment report.

10. The FI was the subject of a submission from the department / NPWS dated 1st April 2021. This is regarded as the second submission of the NPWS.

11. The council's planner prepared a report dated 27th April 2021, recommending that permission be refused.

12. On 30th April 2021, the council issued its decision to refuse planning permission for the proposed development.

13. Statkraft appealed the council's decision to An Bord Pleanála (the **board**) on 26th May 2021.
14. The applicant also lodged a third-party appeal with the board on 24th May 2021.
15. On 24th June 2021, Statkraft lodged a response to third party appeals with the board.
16. The inspector's report dated 28th September 2022 records that a site inspection was carried out on 25th August 2022. The inspector recommended that permission should be granted for the proposed development, subject to 26 conditions.
17. The board issued a notice to Statkraft under s. 132 of the Planning and Development Act 2000, as amended (the **2000 Act**) on 13th January 2023, requiring Statkraft to submit information on or before 2nd February 2023.
18. Statkraft responded to that request on 31st January 2023.
19. The inspector prepared an addendum report dated 5th December 2023, recommending that permission be granted subject to conditions.
20. A board direction (BD-0149915-23) was made on 20th December 2023, stating that the submissions on file and the inspector's report were considered at the board meetings held on 10th January 2023, 13th April 2023 and 19th December 2023.
21. On 3rd January 2024, the board granted planning permission in respect of the proposed development subject to 26 conditions.

Procedural history

22. The proceedings were issued on 27th February 2024, and the application for leave to apply for judicial review was opened on the same date.
23. The board and Statkraft were served with a courtesy copy of the pleadings on 28th February 2024.
24. On 4th March 2024, I granted leave to apply for judicial review on standard terms for all reliefs and on all grounds with liberty to file an amended statement of grounds to seek a specific relief (now 1A) regarding non-publication of material.
25. The applicant issued an originating notice of motion on 7th March 2024, with a return date of 8th April 2024.
26. The applicant filed an amended statement of grounds on 7th March 2024.
27. The board accepted that s. 50B of the 2000 Act applies to the proceedings by letter dated 15th March 2024.
28. Statkraft accepted that s. 50B of the 2000 Act applies to the proceedings by letter dated 15th March 2024.
29. The date on the basis of the expedited hearing was fixed at the List to Fix Dates on 24th June 2024. That was applied for by the notice party, but given the nature of the project, the expedited procedure applied by default under Practice Direction HC126.
30. The board served its opposition papers on 11th July 2024.
31. Statkraft served its opposition papers on 18th July 2024.
32. The applicant's submissions are undated but were uploaded on 2nd October 2024.
33. The board's submissions are dated 18th October 2024.
34. The notice party's submissions are dated 24th October 2024.
35. Replying submissions from the notice party are dated 7th November 2024.
36. The hearing took place on 19th November 2024. At the end of the hearing I adjourned the matter to Monday 25th November 2024 to consider the question of whether, if a list of standard authorities were to be posted to the List web-page in respect of cases generally, a facility should be provided for additional written submissions in respect of cases in the pipeline at that point, such as potentially the present matter.
37. On 25th November 2024, I informed the parties that while the intention was to issue such a list, it would not necessarily significantly affect the present case, other than in respect of two cases*: Casey v. Minister for Housing* [2021] IESC 42 (Unreported, Supreme Court, Baker J., 16th July 2021) and *Ballyboden Tidy Towns Group v. An Bord Pleanála* [2024] IESC 4 (Unreported, Supreme Court, Donnelly J., 22nd February 2024).
38. However the applicant wanted to contribute going beyond those two matters. Thus, on foot of a request from the applicant, I directed that the applicant could make a further written submission dealing with two new authorities plus whatever they felt it could not deal with in the opening or reply, together with any further comments that it wished to make in relation to the list of cases that the court intended to publish during the week commencing 25th November 2024. The applicant's submission was to be by 6th December 2024 with opposing submissions by 13th December 2024. Given that the applicant's submission could deal with anything they liked, and did not have a word limit, the applicant agreed to a further hearing of 30 minutes (15 minutes for the applicant and 15 minutes shared by the opposing parties) for any final remarks, on 16th December 2024.
39. On 29th November 2024, I arranged (in consultation with the President, of course) for the publication on the Planning & Environment Court web-page the list of potentially frequently used authorities, so the applicant has had access to that insofar as relevant.

40. The applicant then furnished final undated written submissions (commendably limited to 9,077 words although as noted there was no formal limit) which are also commendably clear. These submissions almost make my point for me that clearly-presented advocacy on paper can be as helpful as oral advocacy. Whether one accepts all of the points is another matter of course, as indeed is the question of whether any submission, written or oral, strays beyond the permissible.

41. The notice party and board also delivered replying written submissions. The board was uncompromising, stating in para. 1:

> "1. There are two particularly objectionable aspects to the Applicant's third submissions.
>
> (a) First, they contain points that the Applicant could have but did not make in its previous two written submissions and its oral submissions at the hearing of case. The duration of the hearing had no bearing at all on why such text could not be submitted on either of the prior two occasions they had, particularly given one of those opportunities was to prepare a replying submission to the Board's submission where everything the Board said was already set out.
>
> (b) Second, in relation to Core Grounds 1 and 2, the Applicants third submissions make assertions that are clearly not pleaded and in relation to which leave has not been granted and which cannot therefore be pursued."

42. The matter was then listed for a final top-up oral submission on Monday 16th December 2024 for 30 minutes. At the conclusion of that further hearing, judgment was reserved.

43. Finally, given the unholy level of complaint about the adequacy of time provision, I am going to annex the DAR to this judgment so people can decide for themselves about that. While some of the submissions made to the court as set out there may occasionally read in a rather knockabout manner, it's in the nature of litigation that occasionally there can be, as the cliché has it, moments involving more heat than light, but one has to allow for a certain amount of that and it doesn't take from my confidence in the professionals involved on all sides. That said, given all of the sensitivities, to avoid any suggestion of censoring the record I am including it warts and all rather than try to correct obvious transcription errors and even attribution errors (for example there is at least one missing negative which reverses the meaning of the sentence – but the reader will just have to make allowances). But, giving due latitude for that fair number of errors in the text, it conveys the sense of the hearings reasonably well. I am also annexing the applicant's other key documents in which it had a platform to make its point to illustrate that it did have a reasonable opportunity in that regard.

The court can refer to authorities generally rather than just those cited by parties

44. It is absolutely not the case that if a court thinks of a new case not mentioned by the parties it has to call the parties back in to discuss that. Such a process would be almost always meaningless and would pointlessly lead to endless litigation and massive unnecessary expense. Calling parties back in can arise if the new material is something that changes the court's mind and becomes pivotal to the decision, but not if it is part of that endless ocean of background jurisprudence that lawyers, including judges, carry around with them and that simply reinforces the result the court was going to arrive at anyway.

45. In *O'Doherty and Waters v. Minister for Health* [2022] IESC 32, [2023] 2 I.R. 488, [2022] 1 I.L.R.M. 421, O'Donnell C.J. recognised the legitimacy of the court referring to materials not cited by parties, in referencing Hogan J.'s dissenting conclusions (emphasis added):

> "94. In support of these conclusions, Hogan J. marshals an impressive combination of historical information from the early years of the State, quotations from a large range of Irish authorities, and has regard to the decisions in other jurisdictions such as *Roman Catholic Diocese of Brooklyn v. Cuomo* 592 US – (2020), *Leigh v. Commissioner of Metropolitan Police* [2020] EWHC 527 Admin ("*Leigh*"), a decision of the French Conseil d'État of 6 July, 2020 *Confédération Générale du Travail et autres*, and the decision of the German Constitutional Court of 16 April, 2020, *De: BV ferG*: 2020 VK 2020415.1BVV082820. The judgment also contains some illuminating quotations from Irish and international authorities such as the judgment of Mr. Justice Jackson in *Railway Express v. New York* (1949) 336 US 106. The judgment also shows an impressive understanding of the public health position in respect of Covid-19 over the course of the pandemic in various countries, and of significant events in this jurisdiction.
>
> 95. It bears observation that, almost without exception, these materials, instances and references were not mentioned in the judgments appealed against, the submissions, written or oral, for this Court, and so far as I can see, in the extensive submissions made to the High Court and the Court of Appeal, or indeed, anywhere else in this case. **I do not suggest that this, and in particular such reference to legal material, is in itself by any means a fatal objection. Judges are appointed after extensive practice and build up considerable experience in their role. It is, I think, to be expected that they will bring to any case the legal knowledge which they have amassed. Our**

> **jurisprudence would be poorer, and our decisions less firmly based, if judges were expected to approach each case as if they knew nothing of the law**. This case is undoubtedly enhanced by the wealth of knowledge brought to bear on these matters in Hogan J.'s judgment. In particular, his wide-ranging and nuanced consideration of the development of knowledge of the transmission of Covid-19 as the pandemic developed and his consideration of the constitutional interests involved perhaps highlights the fact that it appears that measures were adopted on the advice of NPHET, which itself, while containing considerable technical expertise, does not appear to contain any person with expertise in constitutional rights or indeed human rights more broadly, and it is not apparent that the process of converting that advice into guidelines and
> sometimes binding regulations involved any separate assessment of these matters.
> 96. However, the sheer breadth and novelty of the material relied on in the judgment point to the fact that the matter focused upon and discussed at length in the judgment is certainly radically, and in my view, fundamentally, different to the case made by the appellants. ..."

46. The initial list of authorities on the Planning & Environment Court Practice Direction web-page (https://www.courts.ie/content/planning-environment-list) published on 29th November 2024 stated the position:

> "Practice Direction HC97 (https://www.courts.ie/content/written-submissions-and-issue-papers) provides that the court has its own book of authorities for various types of application. The current book, dated December 2022 (https://www.courts.ie/acc/alfresco/e384051f-f1aa-4aa5-aa49-b5f21c1149ed/HC97%20-%20Book%20of%20Authorities-updated%20December%202022.pdf/pdf/1), is relevant to a number of interlocutory and other applications.
> It is appropriate to set out a similar published list of some recurring authorities in the Planning & Environment Court of which the parties are deemed to be on notice, and which therefore need not be included in lists of authorities and may be referred to in judgments without being specifically cited.
> Parties are also reminded that the court is required to take judicial notice (which means independently of the parties) of various relevant pieces of law, including in particular:
> (i) Luxembourg caselaw, and the EU treaties and official journal under reg. 4 of the European Communities (Judicial Notice and Documentary Evidence) Regulations, 1972 (S.I. No. 341 of 1972);
> (ii) Strasbourg caselaw under s. 4 of the ECHR Act 2003;
> (iii) the Aarhus Convention under s. 8 of the Environment (Miscellaneous Provisions) Act 2011
> (iv) All primary statute law of the State including law enacted pre-independence and in force in 1922: ss. 2 and 13 of the Interpretation Act 2005;
> Finally, the court has a general entitlement to reference materials in a judgment not specifically cited or included in published lists such as the present one, but if such separate material would change the result the court would otherwise arrive at, the parties would be given notice. In the absence of such notice parties can assume that any such material reinforced rather than changed the result the court was otherwise minded to reach."

47. Such a procedure doesn't disadvantage the parties, so the giving of an option to the applicant to make further submissions on frequently can be seen as a concession, not a right.

48. Applying that here, I was initially minded to mention in the judgment only the two authorities that seemed particularly relevant, but since the applicant didn't want to be confined to that but sought to make a submission of a more general nature, there is no special reason not to mention cases on the list of authorities more generally.

49. These matters are particularly pertinent in the Planning & Environment Court. In remarks at the launch of the court in December 2023, Barniville P. said that "the plan is the work of the court over time will lead to simpler, more effective law – thus supporting planning and environmental decision-making as well as investment." (https://www.courts.ie/news/new-planning-and-environment-court-division-high-court-formally-launched-today) In other words, the court is meant to do more than merely decided individual cases on an atomised basis. It is meant to develop greater clarity in the law. Such an approach is promoted by having regard to key cases on an ongoing basis so as to promote a coherent jurisprudence. Clarity would be disrupted and prevented if one were to be artificially confined to cases which happened almost randomly at times to be mentioned by parties, unless forced to go through elaborate or formal procedures (a pointless and ritualistic requirement that would be a happy hunting ground for nit-picking). So the process of having a Court Book of authorities, which parties are deemed to be on notice of, is doubly important in this area.

Time allocation

50. Within moments of opening the case, the applicant complained that inadequate time had been allowed for the hearing, and raised all sorts of issues such as recourse to appellate courts (somewhat prematurely one might have thought) or judicial review of the applicable procedures. While it is on one view a waste of energy to spend even more energy and time on the time allocation issue, the applicant's almost performative objections at the hearing were such that it seems reasonable to set out the position for future reference.

51. The applicant had 1 hour 45 minutes for a submission of which 15 minutes was reserved for a reply. The applicant claimed that this did not allow them to address ground 1 *at all* and no oral submissions, however brief, were made in that regard. The applicant asserted that other counsel were potentially being "coward[s]" in not objecting to the expedited procedure, claiming that there were objections voiced outside of court but not in court. Challengingly, the applicant emphatically declaimed that the procedure couldn't work and wouldn't work (something it forcefully repeated when it was given the indulgence of the second oral hearing – obviously nothing I can do is going to be accepted other than to provide such time as is dictated by this applicant). Of course the applicant is entitled to its view. How helpful it is to the court, or how otherwise good an idea it is to express such a view in this manner I will leave for others to judge. But either way, I don't agree, for reasons alluded to below. The applicant also claimed that it was "impossible" to present its points within the time allowed and repeatedly claimed prejudice, inability and impossibility. Again I would beg to differ with that view. The way to use a limited time allocation for a legal submission is to identify one's best points, identify (without being obliged to open in full) the key supporting material and the route-map from the material to the relief being requested, give those points one's best shot, briefly neutralise the points put up by the other side, and then sit down.

52. As regards my offer of a further brief top-up hearing, the applicant agreed to those arrangements (see DAR of 25th November 2024) but when its initial time ran out, returned to its *idée fixe* about case management directions regarding duration of hearings, and declaimed that the time limit was "perverse and unjust". This is a misconceived complaint particularly given the multiple opportunities to make its point both in writing and orally. At the outset of the reply, the applicant delivered another lecture to the court on how the expedited procedure was "unfair and unjust" and how instructions were going to be taken from the applicant in relation to challenging it. (Parenthetically, the error in that idea is that it doesn't recognise the Practice Direction is only a framework – it guides and allows default approaches but they aren't totally mandatory, so the issue bites only if and when an individual judge gives an individual case management direction in an individual case, a process that is inherently open to submission, counter-submission, and flexibility. Such a direction could be given even without the Practice Direction or any other scaffolding, so the notion of blaming the Practice Direction for everything is misconceived – albeit that this applicant is far from the only litigant that unfortunately labours under that misconception.)

53. The applicant also complained that other matters in the List were getting more time, referring to one application by a lay litigant. I don't propose to dignify such a he-got-more-ice-cream-no-fair complaint with a reply, because it would render list management unworkable if one accepted the right of any litigant to select some other application randomly and then implicitly demand from the court an explanation why their case was being given less or more time than the other matter. List management has to be carried out in broadly reasonable terms, not on the basis of a perverted interpretation of equality before the law that demands that on top of one's substantive work, the court has to be on standby to instantly explain the differences in treatment between any two cases selected at random.

54. For clarity, it is not the case that oral hearings are meaningless and nor should the fact that I, of necessity, impose a time limit in any given case be portrayed as such. But what does need to be said about oral hearings is as follows.

55. Firstly, in many (if pressed I would say most) situations, the clarity of written pleadings and written submissions is in practice considerably more important than an oral submission, as a result of the impact of a written case both before, during and after a hearing. The written word shapes the court's first reactions, which, to speak pragmatically, can condition how oral submissions are received. And in the cold light of day, a point that sounded good in the moment might not be as easy to assent to or even grasp, and one reverts to the written version as a *tabula in naufragio*. The basic principle is age-old: *scriptum manet*.

56. Secondly, it is not that oral submission is never persuasive or critical, but rather that, speaking statistically, the large majority of cases decide themselves. They aren't all applying settled law to unchallenged facts, but most of them are played on that half of the pitch. There is a limit to how often an advocate can expect to persuade a court that white is black or *vice versa*. Of course there are a small residue of cases where the result is delicately in the balance from start to finish, everything critical is hard-fought to an indistinguishable level, and even the slightest advantage, a metaphorical wind or breeze, could push the verdict over the line by a hair's breadth, when a hair's breadth is enough. In those cases, the gifted advocate earns her fee by profound understanding of

the human condition first and of law second, deep preparation and involvement from the earliest possible stage in the dispute, penetrating judgement and selectivity of argument, persuasive smoothness and affability, a human sympathy for the court and other trial participants, and a sharpness to recognise the winning opportunities in the moment. But realistically, that isn't the majority of cases and certainly not the majority of planning judicial reviews. It isn't even any more than a small fraction of such cases. It certainly isn't this case. Of course, the court remains attentive to the last in looking at any points made, whether it chooses to refer to such points narratively or not. But the structural open-mindedness of the process doesn't detract from the fact that points have an inherent weight depending on their legal merits, or from the fact that such a weight lets itself be felt inevitably to some degree, as soon as the point is introduced, subject to the ongoing process of consideration and reconsideration until the judgment is delivered. No amount of open-mindedness on the part of the court is going to convert a spurious point into a crushingly winning one.

57. So I don't want to be misrepresented as claiming advocacy is irrelevant – far from it. Oral hearings are important but not as all-important as is sometimes made out. That is not doing down the critical role of the bar in achieving justice. Rather it's redressing the inadequate recognition of the bar's role in written advocacy, which is often as or even more important in practice. It is also a legitimate additional recognition of the input of solicitors, which is often very discernible when it comes to the manner in which the case is presented in the overall written materials.

58. But returning to the applicant's complaint of inadequate time here, that complaint is a misunderstanding:

1. The starting point is that there are no fixed policies or rigid approaches in the Planning & Environment Court. Arrangements for expedited hearings are a default in certain types of case, but in any case there can be a variation from the default and each case is considered on its merits. In the present case I did consider the applicant's request for more time and was willing to facilitate that up to a point. I also provided facilitation (the notice party would say, massively excessive facilitation) in additional written submissions and a further short hearing. In principle there is nothing wrong with a default approach in a given situation and in practice it has huge benefits by focusing the parties' attention and expectations on a possible way in which the matter can be dealt with. Without default approaches, albeit subject to variation in a given case, there can be neither law nor order, merely the chaos of single instances, in which every day is a new day and everything, large or small, is up for permanent renegotiation.
2. Case management directions attract a high degree of deference for appellate purposes. As Clarke J. (Denham C.J. and Hardiman J. concurring), pointed out in *Dowling v. Minister for Finance* [2012] IESC 32 (Unreported, Supreme Court, 24th May 2012) at para. 3.1, there is no reality to the achievement of case management benefits if appellate courts were "on anything remotely resembling a regular basis" to entertain appeals against such directions and accordingly a high threshold of irremediable prejudice must be shown (see also *Minogue v. Clare County Council* [2021] IECA 98 (Unreported, Court of Appeal, 29th March 2021) para. 100). As Donnelly J. commented in *Ballyboden Tidy Towns Group v. An Bord Pleanála* [2024] IESC 4 (Unreported, Supreme Court, 22nd February 2024) at para. 51, "the High Court may not always require much time in reaching a decision even on a contested case".
3. This was recently emphasised by the Court of Appeal in *Ballymore Residential Ltd v. Roadstone Ltd* [2021] IECA 167, [2021] 6 JIC 0401 (Unreported, Court of Appeal, 4th June 2021), *per* Collins J.:

   > "6 Appellate courts have also recognised that case management is likely to be an entirely hollow exercise unless appropriate judicial restraint is exercised on appeals from case-management decisions made by the High Court. As it was put by Clarke J in *Dowling v Minister for Finance* [2012] IESC 32, an appellate court 'should only intervene if there is demonstrated a degree of irremediable prejudice created by the relevant case management directions such as could not reasonably be expected be remedied by the trial judge (or at least where the chances of that happening were small) and where therefore, unusually, the safer course of action would be for this Court to intervene immediately to alter the case management directions.' (at para 3.5)"

4. As Charleton J. (Denham C.J. and Hardiman J. concurring) said for the Supreme Court in *Talbot v. Hermitage Golf Club & Ors.* [2014] IESC 57 (Unreported, Supreme Court, 9th October 2014) (emphasis added):

> "The resources of the courts are there for litigants. Those resources are not, however, unlimited. No litigant is entitled to more than what is reasonably and necessarily required for the just disposal of a case **within the context of the other demands on court time**. Whether it is an unrepresented litigant or not, the resources which the courts decide to assign to a case must depend upon: the importance of the legal issues involved; the gravity of the wrong allegedly suffered by the moving or counterclaiming party; the monetary sum involved; and the public interest in the outcome of the case. Courts are entitled, and indeed are **required, to foster their resources**. This is both a matter of public and private interest. Court resources used in litigation are funded by public money. In addition, the parties pay for legal representation. Litigants should not be faced with cases that are longer or more expensive than they need to be for a fair resolution. In many instances, costs if awarded against a losing party may not be recovered. In that regard, **putting reasonable limits on submissions in terms of time and allowing a measured number of hours or days** for each side to litigate their case is both right and appropriate."

5. In her judgment in that case, Denham C.J. (Hardiman J. concurring) said (emphasis added):

> "2. The traditional practice in common law legal systems was that it was the parties and their lawyers who set the pace of a case. The courts did not intervene by actively managing the progress of the litigation process. This approach reflected the **dominant laissez-faire attitude of the nineteenth century**.
>
> However, with the growth in the volume of litigation and the increasing complexity of cases, it became apparent that judges presiding in the **courts must begin to proactively case manage cases** and adopt case management practices and procedures."

6. She referred to ECHR jurisprudence on the right to trial within a reasonable time (emphasis added):

> "7. The European Court of Human Rights has heard a number of cases concerning delays in disposition of cases by national courts. In *Buchholz v. Germany* [1981] ECHR 2, it found that: '...the Convention places a duty on the Contracting States to organise their legal systems so as to allow the courts to comply with the requirements of Article 6 par.1, including that of trial within a "reasonable time."'
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> 8. When considering how proceedings before all civil courts in Germany are governed by the principle of the conduct of the litigation by the parties, the Court considered that such factors: '**do not dispense the judicial authorities from ensuring the trial of the action expeditiously** as required by Article 6.'
>
> 9. Similarly, in *Price and Lowe v. the United Kingdom* [2003] ECHR 409, the Court found that: 'a principle of domestic law or practice that the parties to civil proceedings are required to take the initiative with regard to the progress of the proceedings does not dispense the State from complying with the requirement to deal with cases in a reasonable time.'
>
> 10. The European Court of Human Rights has consistently repeated that sentiment in other cases where there has been delay. See for example the cases of *Mitchell and Holloway v. the United Kingdom* [2002] ECHR 818; and *McMullen v Ireland* [2004] ECHR 404."

7. Denham C.J. also referred to a number of Supreme Court decisions as follows (emphasis added):

> "11. ... This Court stated in *Gilroy v Flynn* [2004] IESC 98 at paragraph 13 that: '**comfortable assumptions on the part of a minority of litigants** of almost endless indulgence must end.'
>
> 12. We have now reached a position in Ireland where as Mr. Justice Hardiman explained in *Cruise v Judge O'Donnell* [2007] IESC 67: 'We live in an era of case management, when **a serious attempt is being made to deal with all litigation, civil or criminal, in an efficient manner**.'

8. Crucially, she referred to the purpose of an oral hearing as being a facility for the court to obtain clarification of submissions – not an entitlement for parties to talk for a period determined by themselves (emphasis added):

> "15. In this case the appellant filed very comprehensive written submissions which the Court received. However, he insisted on reading them out to the Court, and objected to questions from the Court. This is inconsistent with the proper conduct of appeals where full written submissions have been filed. **The main purpose of an oral hearing is for the Court to seek and obtain clarification on the submissions**.
> 16. The learned High Court judge took great care to hear and determine the issues raised by the appellant. I agree with Charleton J. that the conduct of the learned trial judge was exemplary. However, I consider that **the Courts would benefit by a further development and use of case management** so that the best use may be made of **scarce court resources** for the benefit of all litigants."

9. In *Defender v. HSBC France* [2020] IESC 37 (Unreported, Supreme Court, 3rd July 2020), Charleton J. for the Supreme Court (O'Donnell, Dunne, O'Malley and Baker JJ. concurring) said at para. 5 (emphasis added):

> "In the neighbouring kingdom, case management came in consequence of the reforms introduced by Lord Woolf and have been the subject of continual refinement since then. These developments are set out in the judgment of Denham CJ in *Talbot v Hermitage Golf Club* [2014] IESC 57. Emphasised in that judgment, concurring in the remarks also made by Charleton J, is that the courts have limited resources and that such internationally declared obligations as the entitlement of litigants to have a trial heard within a reasonable timeframe mean that no litigant is entitled to demand any undue portion of a public court system. That system exists for the benefit of all litigants. Simply because a great deal of money may be involved, or the issues are complex or are presented as complicated, does not automatically mean that the parties are entitled to: multiple prehearing motions; or can place an undue burden of discovery one on the other; or have a right to call multiple contending experts on the same issue; or to open a case over days; or be granted days or weeks to cross-examine witnesses, traversing in the process linked chains of acres of emails or documents; or, in short, **to have as much time as they feel they want that can become an indulgence of obsession blurred by poor focus**."

10. He went on at para. 12 to emphasise that the court, not the parties, determines the time estimate, and that the court in a long case can adopt even what some might see as brutal methods to stick to that (emphasis added):

> "Further, **in no way is any trial judge bound by the estimates of the parties** but could impose his or her own, subject to being flexible. ... A trial judge can set hours of sitting longer to get through cases, and when holidays are taken, or are not taken at all, is a matter for him or her. **That gets people moving**."

11. He emphasised that such powers have been given a rules basis in the commercial context (emphasis added):

> "13. The trial judge had all such necessary powers. It may be that he tried to exercise them in managing this case in advance. But, such management has to be made to work. The exercise of those powers might usefully have been substituted for generalised complaining. Order 63A of the Rules of the Superior Courts in itself, at rule 5, provides ample and sufficient power whereby the court may order its own procedures and whereby **a trial judge may quietly direct considerably more concision from parties than they may seem at first willing to give**: 'A Judge may, at any time and from time to time, of his own motion and having heard the parties, give such directions and make such orders, including the fixing of time limits, for the conduct of proceedings entered in the Commercial List, as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings.'
> 14. These rules were promulgated for the commercial court but have been extended because of the success that this division of the High Court has demonstrated in getting through work. ..."

12. He then referred to O. 36 r. 42 RSC regarding trial. Sub-rule 42(2) is particularly pertinent (emphasis added):

> "(2) The trial of proceedings shall, **as regards the time available for any step or element, be under the control and management of the**

> **trial Judge**, and the trial Judge may, from time to time, make such orders and give such directions as are expedient for the efficient conduct of the trial consistently with the interests of justice."

13. At para. 16 he said in relation to this (emphasis added):

> "Rule 42, which is not confined to cases admitted to the commercial court, is to similar effect and makes it plain that, on request, parties must provide time estimates and confirms that the trial judge has the authority to manage a case so as to ensure the most effective use of court time, cutting out repetition and encouraging or requiring focus on the issues..."

14. His conclusion at para. 23 was (emphasis added):

> "The point of case management is to **fairly share resources of court time** in a way that is equitable. **Cases have core points** and hearings have points on which decisions move in the balance one way or another. Diffusion in pleadings, directionless witness examinations, multiple experts and mountains of documents both obscure and deemphasise those issues on which cases are decided and hide the key points of testimony. Complex cases, without case management, **waste resources both for the system of justice and for those seeking justice**."

15. A similar point was made in *O'Connor v. Legal Aid Board* [2022] IECA 216, [2022] 10 JIC 0601 (Unreported, Court of Appeal, 6th October 2022) by Faherty J., who cited *Talbot*, *Defender* and *Dowling*, commenting that:

> "... certain case management directions may have such far-reaching effect on one party or the other that immediate appellate intervention is warranted, this case is not such a case. The consolidation order as made by the Judge was made entirely within his discretion and, in my view, does not warrant intervention by this Court."

16. Denham C.J.'s reference to a "minority of litigants" at para. 11 of *Talbot* is not irrelevant here. Most parties don't complain about time limits in the List because they know that any limit falls equally on both sides. Time is not divided equally between the parties but between the positions. The practice is that the time allocation is divided in two with one half given to all applicants and any supporting parties collectively, and one half to all respondents and opposing notice parties collectively. Occasionally there are exotic variations if one has a neutral notice party for example, but those are so rare as to be irrelevant. In this case the applicant did complain about time, but oddly then also seemed to complain that I wanted to discuss that. The reason I am discussing that is because the applicant has chosen to make an issue of it rather than simply getting on with making the best use of the time allocated, which is what the vast majority of parties do and what one should do in such a situation.

17. In *O'Sullivan v. Ireland* [2019] IESC 33, [2020] 1 I.R. 413, [2019] 5 JIC 2301, Charleton J. commented (emphasis added):

> "40. In *Talbot v Hermitage Golf Club* [2014] IESC 57, this Court identified that **there was a limit as to the time and resources that any case could command**. Since **other cases awaited attention by the courts**, judges could and, in appropriate cases, should intervene to ensure the efficient disposal of litigation. Cases should move on and judges are cloaked with sufficient authority to take such decisions as would ensure that this happened. Judges are entitled to move cases on, to ask for and **to enforce reasonable time limits**.
>
> ...
>
> 42. ... Whether litigation is taken into case management on a formal basis or not, it remains the responsibility of trial judges in every case to ensure that steps proposed to the court actually facilitate the necessity to move the case towards a final decision. That can include the steps detailed in Talbot, but must include **the overriding obligation to use the resources of the courts to efficient purpose**. In that respect, counsel for a plaintiff should be in a position to tell any court at any stage as to what their case broadly is and a defendant should be able to elucidate the nature of the contest joined."

18. In *Tracey v. Burton* [2016] IESC 16, 2016 WJSC-SC 24045, [2016] 4 JIC 2501 (Unreported, Supreme Court, 26th April 2016) MacMenamin J. said at para. 45:

> "The time has long past where it is either necessary, or desirable, to permit litigants, or their legal representatives, to read documents or submissions

> 'into the record of the court', or where court time, a scarce public resource, is unnecessarily wasted. Court time is not solely the concern of litigants, or their legal representatives. There is a strong public interest aspect to these issues. Time allotted to the parties may be apportioned by a judge fairly, prior to, or during a hearing. But, such time must be predicated on a realistic appraisal of the time a case, or matter, should, ordinarily and properly, take. As Denham J. pointed out in *O'Reilly McCabe v. Minister for Justice,& Patrick Cusack Smith & Co (Agents of Thomas McCabe, Ward of Court & Minor)* [2009] IESC 52 at par. 33, the constitutional right of access to the courts, while an important right, is not an absolute one. As a corollary of that right, a court must also protect the rights of opposing parties; the principle of finality of litigation; the resources of the courts; and the right to fair procedures which accrue to each party to litigation, as well as plaintiffs."

19. Order 63C RSC is also relevant. While some aspects of the Order are not currently in operation due to the fact that List judges within the meaning of the Order have not been designated, rules 4 and 5 are in operation, as noted by O'Moore J. in *Board of Management of Wilson's Hospital Schools v. Burke* [2023] IEHC 41, [2023] 1 JIC 3104 (Unreported, High Court, 21st January 2023), para. 1. Rule 4 states (emphasis added):

> "4. A Judge may, at any time and from time to time, of that Judge's own motion and having heard the parties, or on the application of a party by motion on notice to the other party or parties, give such directions and make such orders, **including the fixing of time limits, for the conduct of proceedings,** as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings."

20. The domestic jurisprudence reflects international practice. In "Toward Fairer, Quicker, Cheaper Litigation: A Unified Theory of Civil Case Management" *Judicature* Vol. 107 No. 1 (2023) (https://judicature.duke.edu/articles/a-unified-theory-of-case-management/), Carolyn B. Kuhl and William F. Highberger state (emphasis added):

> "Inherent in presiding over disputes as a neutral arbiter is a **need to manage scarce public resources, including judicial time**, juror time, staff time, and the large overhead expense of operating a court system. The task of allocating scarce court time has always been with us: The Roman Forum has ancient ruins of a clepsydra, a water clock, which was **used to limit how long litigants could argue cases**" (citing J.E.R. Stephens, The Advocates of Greece and Rome, 54 Albany L.J. 12, 13 (1896)).

21. Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652 (the **renewable energy directive**) (on which Practice Direction HC126 relies, and for which the transposition date was 1st July 2024) requires the most expeditious procedure for both administrative and judicial proceedings in relation to renewable energy projects.

22. The Court of Appeal recently recognised the relevance of the directive to the speedy processing of judicial review of renewable energy infrastructure decisions in *Power v. An Bord Pleanála* [2024] IECA 295 (Unreported, Court of Appeal, Meenan, O'Moore and Hyland JJ., 5th December 2024), when requesting the expedited procedure from the CJEU, saying (emphasis added) that:

> "29. The Court of Appeal requests the CJEU pursuant to Article 105 of the CJEU's Rules of Procedure to determine this reference pursuant to the expedited preliminary ruling procedure. As noted at paragraph 4 of the above reference, the windfarm was previously permitted, with the original permission being granted on 14 December 2016 under ref. no. PL93.244006. The permission the subject of these proceedings amended the 2016 permission. No construction has taken place on foot of that permission, or the amended permission. The 2016 permission is due to expire on 12 December 2026. If the reference is not determined pursuant to the expedited procedure, the notice party may be deprived of the benefit of the 2016 permission.
>
> 30. ... **EU law requires the most expeditious judicial procedure available at national, regional and local level law for administrative**

> **and judicial appeals in the context of the development of a renewable energy plant** under Article 6(6) of Directive 2018/2001, as amended by Directive 2023/2413. Reference is also made to Commission Recommendation (EU) 2024/1343, para. 2, which requires inter alia, Member States to establish timeframes and lay down specific procedural rules with a view to ensuring the efficiency of the legal proceedings related to access to justice for renewable energy projects and the related infrastructural projects."

23. While the applicant complains that the directive doesn't warrant the "creation" of a new procedure, that is a mischaracterisation. The court has always had inherent power to specify the length of oral submissions. And indeed from one point of view, given that domestic law allows the court to dispense with oral submissions altogether under O. 84 r. 22(8) or r. 24(2)(II), having such submissions at all could even be viewed as problematic because it is not the most expeditious procedure.
24. By way of overall practical context, time limits are not there for punitive or frivolous reasons. The context is the need for overall list management and trial within a reasonable time-frame. With 247 live cases in the Planning & Environment Court as of 16th December 2024 and only three judges, there is a huge potential excess of demand for dates over supply. Literally the only way to provide dates in many cases is for the time allocation to be compressed somewhat. Of course if one looks solely at the individual case on an atomised and decontextualised basis (as courts occasionally are endearingly wont to do) then one can inevitably make a case for more time in any given matter. But that is a self-indulgent approach. Where is that time going to come from? The answer is, from other cases which are not before the court when adjudicating on the case at hand. The principle would appear to be that there must be more time for things on the strict condition that the people whose cases are delayed as a result stay out of sight and thus out of mind. Saying that it's the fault of other branches of government for not providing more resources or for not legislating in some other way may be valid theoretically but as a practical solution it is an irresponsible cop-out. It is as if the Dáil was in session 24/7 to deal with all problems and indeed as if the troubles of the judiciary were top of the list. (It was ever thus – writing in 1977 about the failure to provide judicial accommodation to replace temporary prefab structures erected in London in 1915 during the First World War that remained in use 62 years later, Fenton Bresler said (*Lord Goddard: A biography* (London, Harrap), p. 72): "The law has always come low in the priorities of spending public money.") The issue is what we are going to do in the meantime to help litigants to get their cases to a conclusion if we can. There are two basic options – work to rule and let backlogs build up, or get maximum results out of the resources actually available. The strategic approach at High Court management level is very much the latter. That involves limitations as to the length of hearings. Obviously one endeavours to be satisfied that in a given case the time allocation together with other provision to make one's point gives a reasonable opportunity to a party to make its case, normally by way of a combination of written and oral inputs.
25. By way of overall legal context, as Denham C.J. emphasised in *Talbot*, parties have a right to a hearing within a reasonable time under the Constitution and art. 6 of the European Convention on Human Rights as incorporated in the European Convention on Human Rights Act 2003. They also have rights to expedition under EU law. One can have luxurious Rolls-Royce procedures, or one can have trial within a reasonable time, but one can't have both for all cases in conditions such as exist here. Thomas Sowell put it best – there are no solutions, only trade-offs.
26. The arrangements in the present case for an expedited hearing within one court day (3.5 hours) were fixed in accordance with Practice Direction HC126 which provides expressly for the expedited procedure. The present case attracted the expedited procedure by default under the Practice Direction.
27. The power of the President to issue practice directions, and indeed of any judge to manage the litigation before her, including by specifying time limits, is part of the inherent power of the court. Indeed that applies whether the directions take the form of rules (the power to make rules is also an incident of the inherent jurisdiction of courts to regulate their practice*: Bartholomew v. Carter* (1841) 3 Man & G 125 at 131; 133 ER 1083 at 1086) or something else. In an interesting article by Joan Donnelly, "Inherent Jurisdiction And Inherent Powers Of Irish Courts", 2009 2 Judicial Studies Institute Journal 122

(https://www.ijsj.ie/assets/uploads/documents/pdfs/2009-Edition-02/article/inherent-jurisdiction-and-inherent-powers-of-irish-courts.pdf), the author states:

> "In *Connelly v. D.P.P.* [[1964] A.C. 1245, at 1347], Lord Devlin considered the circumstances in which a court might find itself called upon to utilise its inherent powers to issue Practice Directions: the judges of the High Court have in their inherent jurisdiction, both in civil and criminal matters, power (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the Court's process is used fairly and conveniently by both sides … If jurisdiction is conferred upon a court, it may and should exercise that jurisdiction; and if no procedural machinery has been provided, it is for the Court to provide such machinery as best it can".

28. While one sometimes hears the view that practice directions are not law, that isn't the case from numerous points of view. Domestic statute law, in respect of remote hearings, and rules of court in respect of numerous matters (see O. 63A r. 31, O. 63B r. 37, O. 63C r. 22, O. 67A rr. 3, 18, O. 99 r. 8, O. 117A r. 4, O. 127 RSC), make provision for various matters to be specified by practice directions. More generally, the inherent power of the court to regulate its practices including by practice direction has an inherent legal basis.

29. In that regard, the just-mentioned article also notes that: "The question as to whether a Practice Direction is strictly binding in law, and whether a litigant can be called to account and penalised for failure to comply with its provisions, is uncertain although in at least one common law jurisdiction this has been answered in the affirmative", citing at n. 95 *Gittins v. W.H.C. Stacy and Son Pty Ltd* [1964] 82 W.N. (Pt. 1) N.S.W. 157 (https://nswlr.com.au/view-pdf/1964-5-NSWR-1793). In that case, the Supreme Court of New South Wales decided that "the Court has power to order its own business and to impose some sanction, such as costs, upon failure to adhere to the procedure laid down". The procedure in question was set out in a Practice Note and not rules of court. Manning J.'s comment was particularly apposite – speaking of the submission that the Practice Note was invalid or void, he said that such arguments "show a complete lack of appreciation of the real position". Brereton J. said that it was "desirable but by no means necessary" that the court should publicly state how it orders its business, through instruments such as the Practice Note in that case.

30. The reference to "at least one" common law jurisdiction is now an understatement. As the Vanuatu Civil Procedure rules state regarding practice directions, "When they are issued, lawyers must abide by them and they may be enforced: *Langley v. North West Water Authority* [1991] 3 All ER 610 at 613-4" (also citing *Gittins*) (https://www.paclii.org/vu/Vanuatu_Civil_Court_Practices/Full_Chapter_PDF/Chapter_2_Civil_Procedure_Rules.pdf).

31. Closer to home, I am going to confess to a shock of recognition on reading *Langley v. North West Water Authority* [1991] EWCA Civ J0327-15, [1991] 1 W.L.R. 697 (https://vlex.co.uk/vid/langley-v-north-west-793881881). Lord Donaldson M.R. set out the context, which is distinctly relevant to the present situation and similar complaints (emphasis added):

> "3. **There was a time when** the role of the civil courts in this country was to be available to hear disputes, it being **left entirely to the parties to decide the pace at which the litigation should be conducted**. The increase in the amount of litigation which has occurred over the years has given rise to a re-appraisal of that role. As is the way with the law, and it is not necessarily any the worse for that, it has not taken place overnight or in any dramatic and ill-considered form, but **has been evolutionary in nature**.
>
> 4. In recent years the Liverpool County Court has been amongst the busiest in the country and it has taken a series of **local pioneering initiatives designed to reduce delays. This is wholly to be applauded.** His Honour Judge Nance together with Mr. Registrar Wilkinson and a small committee acting in consultation with, and with the full co-operation of, the Law Society, the Bar and other members of the legal profession, devised what His Honour Judge Hamilton described as a 'Code of Practice' for county court trials in Liverpool. In the nature of things experience has shown the need for modifications from time to time, either generally or in relation to particular types of claim. Thus a special regime was introduced for industrial

deafness claims. All this is in line with the recommendations of the Review Body on Civil Justice which reported in 1988 (Cmnd. 394). It is also a step on the way towards fully court controlled case management foreseen and recommended by Lord Griffiths with the agreement of Lord Keith of Kinkel, Lord Roskill, Lord Oliver of Aylmerton and Lord Goff of Chieveley in *Department of Transport v. Chris Smaller (Transport) Limited* [1989] A.C. 1197, 1207.

5. **No such system will work unless solicitors loyally adhere to the 'Code of Practice'.** If, in special circumstances, the legitimate interests of their client require some departure, they should explain the problem to their opponent and, if necessary, apply to the court for special directions.

6. A feature of the 'Code of Practice' is a series of automatic directions dealing, amongst other things, with medical reports which have to be exchanged within 10 weeks of the date of those directions. This creates no problem for plaintiffs, who can assemble their expert, including medical, evidence before issuing the proceedings. From the point of view of defendants, however, it creates a very tight timetable. With a view to avoiding the necessity for defendants seeking extensions of time for the exchange of medical reports, with a consequent risk of postponement of the hearing date and the inevitable postponement of the time at which they are in a position to make an offer of settlement or payment into court, the 'Code of Practice' contains the following provision (paragraph 11.2):—

> '*Hospital Records*. As we have seen, the new directions include provision for the simultaneous exchange of medical reports. In an effort to enable the defendant's solicitor to obtain his medical report more quickly, the plaintiff's solicitor will be expected to send the plaintiff's written authority to inspect any hospital records with the service copy of the particulars of claim if he has not already done so. In this way, it is hoped to secure an earlier rather than later simultaneous exchange of medical reports.'

7. Mr. Gerard Wright Q.C., appearing for Mr. Makin and undoubtedly reflecting his views, referred to this dismissively as an 'exhortation' and contrasted it unfavourably with a statutory County Court rule, a direction given in relation to the particular litigation, whether automatically or specifically, or a Practice Direction given by the Lord Chancellor under C.C.R. Order 50. He is correct in saying that it is expressed in terms of expectation and to that extent might be said to be exhortatory, but when the court is concerned with the conduct of solicitors, who are officers of the Supreme Court, it should not be necessary to employ mandatory language. The reality is that the 'Code of Practice' entitled 'Liverpool County Court. The Listing of Trials. An Explanatory Memorandum', which was issued in November 1987 to take effect from 4th January 1988 was a local Practice Direction and I will so refer to it. **Although there is no statutory authority for making local Practice Directions, none is needed because every court has inherent jurisdiction to regulate its own procedures,** save insofar as any such direction is inconsistent with statute law or statutory rules of court. It is no doubt for this reason that C.C.R. Order 50 empowers the Lord Chancellor to 'issue directions for the purpose of securing uniformity of practice in the County Courts'."

32. The Master of the Rolls went on to refer to the refusal of the solicitor concerned to engage with the Code of Practice, and rejected his explanations in that regard, saying (emphasis added):

> **"A more plausible explanation is that Mr. Makin was living in a bygone age in which solicitors conducted litigation at speed and in a manner which suited their personal convenience".**

Substitute parties for solicitors, and that bygone spirit was unfortunately alive and well in the present case in terms of the applicant's attitude to the application of the expedited procedure.

33. The Master of the Rolls' conclusion was uncompromising (emphasis added):

> "It is the duty of both litigators and advocates to uphold the legitimate interests of their clients fearlessly, **subject only to their duty to the court and to justice**. Had Mr. Makin been doing this, no question of rebuke and still less of any personal liability for costs could have arisen. Sadly that was

not the case. **His conduct of the plaintiff's case was deplorable judged only in terms of her interests. Judged in terms of his duty to the court and to justice, it was inexcusable. The courts will not allow anyone to frustrate their efforts to provide better and quicker methods of determining disputes, if they have jurisdiction to devise and implement them.**"

34. The critical point is that even a totally non-statutory "local" practice direction in the form of a code of practice or explanatory memorandum issued by a judge in charge of a particular List (not the president of a court) was capable of having legal effects. Sure, the fact that it imposed duties on solicitors reinforced that conclusion, but that is obviously not remotely exhaustive of the court's power to order its own business.
35. The complaint that the Practice Direction is non-statutory is in any event incorrect. It was expressly made "in accordance with the general authority of the President of the High Court and section 11(12) and (13) of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020". Those sub-sections expressly govern remote proceedings (see the definition of "relevant proceeding" in sub-s. 11(17)) but in effect reinforce the inherent authority of the President in relation to proceedings generally. The fact that there is a statutory direction for default expedited hearings in renewable energy cases insofar as concerns remote proceedings makes it implausible that a similar direction in relation to physical proceedings is unfair.
36. Even taking the applicant's complaint at its height, the application of the Practice Direction in a given case is a judicial act of case management and within the legitimate and inherent power of the court to strike a balance between the positions of the various parties in a given case. While consensus is always welcome, if that is unavailable, such a balance may involve accepting one position in preference to another.
37. The Practice Direction was subjected to extensive advance consultation, and the objections to the procedure were relatively limited in that context, with some views positively supportive or seeking an extension of its remit. These consultations were publicised on courts.ie, reinforced by notice to subscribers to the List email circulation list.
38. A fourth round of similar public consultation took place more recently in relation to possible rules of court, and again the feedback was nothing like as critical as what the applicant posits here.
39. A fifth round of consultation with stakeholders then took place at the level of the Planning & Environment Court Users' Group.
40. The attempt to portray the expedited procedure as something generally reviled but which people (other than this applicant) are too cowardly to object to in court, is a complete distortion. Numerous parties have positively applied for it in open court – nobody compelled or shamed them into doing that. Such a practice doesn't suggest a widespread revulsion at the concept of expedition. It's easy to assert the existence of silent majorities because you don't need to produce evidence of that. But most people who claim to be leading silent majorities eventually turn around to address their troops, only to find nobody there.
41. On the contrary, numerous practitioners both publicly and privately have welcomed the introduction of the expedited procedure, sometimes in almost embarrassingly positive terms.
42. Numerous parties, including applicants, that haven't applied for the expedited procedure have consented when some other party has applied. Some applicants have positively argued for expedition for particular categories, for example appeals under the access to information on the environment directive.
43. An example of how the expedited procedure has worked well is the hearing in Annagh Wind Farm v. An Bord Pleanála [H.JR.2024.0001069], where under the procedure, the case was substantively heard just under four months from the date the proceedings were initiated. That sort of outcome has to be regarded as illustrating the potential benefits. Coolglass Wind Farm v. An Bord Pleanála [H.JR.2024.0001244] went one better, where the hearing under the expedited procedure took place 2.5 months from the initiation of the proceedings.
44. The fact that objectors are a minority statistically doesn't mean their views won't be considered as appropriate but such views can't always be decisive.
45. The submissions of the parties on the time to be allowed are a relevant consideration when the time allocation is being fixed and were considered, but ultimately the time allocation is one for the court, as the Practice Direction states expressly.

46. The applicant's views are not the only ones that count. On some occasions, the parties, or most of them, agree to request additional time even within the expedited procedure. That didn't apply here. I also had to have regard to the views of the board and the notice party, neither of which asked the court to provide for additional time above and beyond the 3.5 hours as a default.
47. The arrangements for the present hearing were fixed some time ago – June 2024. The time to debate the time allocation is when it is being fixed, not at the hearing which by definition is to be conducted within the envelope so previously fixed. The applicant's approach here reminds one of the futility of parliamentarians reacting to a guillotined debate by protesting about the guillotine during the allotted time. That only wastes time – the correct approach is to work within the time fixed – in both contexts.
48. By way of wider context, both O. 84 r. 22(8) and r. 24(2)(II) RSC as amended in 2011 allow the court to dispense with oral submissions altogether. So an expedited procedure is a relatively mild restriction by comparison.
49. Some cases can in practice be dealt with satisfactorily by a purely or almost entirely written process. A couple of examples – following *Walsh v. An Bord Pleanála* [2022] IEHC 172 (Unreported, High Court, 1st April 2022), further proceedings were instituted in relation to the developer's alleged failure to comply with a tree-planting agreement. Ultimately that was resolved save as to costs, at which point the parties asked the court to determine the costs issue entirely on the papers, which I did (making a limited order in favour of the applicant and making no order as to other costs). And in *An Taisce v. An Bord Pleanála (No. 5)* [2024] IEHC 692 (Unreported, High Court, 6th December 2024), module IV of the proceedings relating to SEA issues was dealt with almost entirely on the basis of written submissions with a brief mention on the following Monday morning. Admittedly I was leaning towards referral of, rather than decision on such issues, but the point is nobody asked for a specific oral hearing. Generally though one wouldn't be rushing to dispense with oral hearings unless the parties agreed to that or there was some applicable legal imperative to that effect. Another recent example was *Raidió Teilifís Éireann v. Commissioner for Environmental Information* [2024] IEHC 729 (Unreported, High Court, 20th December 2024), where, having received written submissions on a module of the proceedings, nobody requested an oral hearing so the Monday mention was treated as the trial date for legal costs adjudication purposes. Simons J. recently gave judgment in *Right to Know CLG v. An Taoiseach* [2024] IEHC 713 (Unreported, High Court, 20th December 2024) where by agreement no oral hearing was required. So again, by comparison with a purely written procedure, a time limit for oral submissions is only a mild restriction.
50. The time requested by parties in one particular case has an impact on other cases, which while not a matter of concern to any given party, is nonetheless a matter that the court not only can but must have regard to in the interests of justice. The Supreme Court has stressed this repeatedly in the jurisprudence cited above. As of 16th December 2024, there are 247 live cases in the List (for comparison, as of 5th November 2024 this had increased by 73% since the assignment of a third judge just over a year before in October 2023, and has shown a massive year-on-year increase since the precursor List inherited 12 planning-type cases from the Commercial List in October 2020) which is far more than can be accommodated given existing resources if all cases are to be allocated multiple days each. In a document-heavy and judgment-heavy list, time must be afforded for reading and writing as well as sitting. The only way in which priority cases can be given a hearing date is by allowing an expedited stream for a category of cases that warrant it. It's not possible to provide a Rolls-Royce service for all customers unfortunately – there has to be a reasonable balance between priority, urgency and duration. Each case is different and clocks in at a different level in the order of priorities. In that regard the court applies objective factors. If people want to look at matters in a blinkered way by asking if additional time could be given to any individual case in isolation, the answer is, *of course*, in *all* cases, *always* yes. But from a systemic point of view, the absence of an expedited procedure would mean that significantly more cases would not get a date, significantly more would be adjourned from one List to Fix Dates to the next, and significant backlogs would build up very rapidly with no way out of that. Very quickly, any given List to Fix Dates would only be able to allocate cases adjourned from the previous List to Fix Dates, with no space for new urgent cases. Of course that impact is hidden to those who want to focus just on one case.

But from a list management point of view, as reflected in the presidential Practice Direction, an expedited stream doesn't just make sense – it is essential to keeping on top of the massive incoming work flows.

51. It is not the case that equality before the law demands that all cases be given an equal hearing time, either as to date or duration. For effective case management to work, a court can and indeed must apply prioritisation between cases, so that more significant or urgent cases are heard earlier, and if necessary over a shorter time scale, than non-urgent cases which can legitimately wait for a longer time slot to be allocated.
52. Far from it being the case that the expedited procedure "can't work", as repeatedly declaimed on behalf of the applicant here, the reverse is the case. The List can't work without it. As of 9th December 2024, there were 101 cases listed in the next List to Fix Dates (about one full year's work for three judges), and given that dates are now to be fixed on a monthly basis, and accounting for time already spoken for and necessary writing and reading time, there were only about 18 sitting days available for the month in question for those cases. That means that unless there is strong take up of the expedited procedure, or other strong case management measures, about 94% of cases would not get a date in the next List, and will roll over, making the problem even worse for the following List, and so on progressively.
53. The commercial context of this is also important. While the List takes all planning and environment cases, the majority have a significant commercial impact. This is one such case. In such a context, there is a strong case for pragmatic trade-offs between debating all points at leisure but with a long wait for hearing dates, versus a tight time frame for oral submissions, additional flexibility for written submissions, and a much quicker hearing date. The applicant here is untroubled by such considerations as an environmental NGO with near absolute costs protection. But the court has to take a wider view beyond the interests of an applicant alone.
54. In courts of rather greater import than the present one, considerably shorter periods are allowed for oral hearings. If one doesn't sit down in the US Supreme Court after 30 minutes, they call security. They don't pamperingly inquire with counsel how long might suit.
55. The extensive nature of the statement of grounds here offers a first opportunity to set out one's points in detail together with supporting legal argument. There is currently a generous word limit of 10,000 words in a normal case, although even that limit did not apply at the time of the initiation of this case.
56. An applicant also has a further opportunity to develop the case evidentially in the grounding affidavit.
57. Standard directions in the List provide for applicants to also be allowed file a replying affidavit and do not preclude a further go-around by way of a third affidavit, on application in that regard.
58. In addition an applicant in the List can file written legal submissions with a generous word limit of 10,000 words. The limit of 5,000 words in Practice Direction HC97 that normally applies to judicial review is expressly disapplied by para. 111(a) of Practice Direction HC126.
59. The expedited procedure already involves an additional opportunity for an applicant that is not available in a normal case. Under the procedure, an applicant has the right to deliver a second and replying written legal submission in advance of the hearing in addition to its initial written submission.
60. The Practice Direction also envisages that the word limits are general, and on application to the court, these can be extended. This applicant in this case made no such application save for the final submission.
61. So by the time an expedited case gets to a hearing, an applicant will have had five opportunities by default to make a written case even without availing of the right to apply for further such opportunities – the statement of grounds, the grounding affidavit, the replying affidavit, the written submission and the replying submission. An oral hearing is a final touch, not the totality of the presentation.
62. At the end of the applicant's initial period of 1 hour 30 minutes, I offered the applicant additional time "within reason". The applicant refused that and said that they would "leave [the opposing parties] at it".
63. Following submissions by the opposing parties, I again offered additional time or the opportunity to give further written replying submissions when the applicant was making its reply – those options were also rebuffed.

64. More fundamentally, the approach of attacking the time allocation at the hearing is not conducive to the smooth conduct of the hearing. That possibly will come across from the DAR.

65. The approach adopted of using such finite time by engaging in reading out large slabs of written material is also, if the applicant doesn't mind me saying so in a constructive spirit, misplaced. (Denham C.J. made a not unrelated point in *Talbot* at para. 15.) Where time is limited one has to give the court the headline points and summarise the key information and arguments, rather than open documents *verbatim* as if time was not an issue. With such an approach, of course the time will run out before one has opened everything – while I couldn't possibly comment, a cynic might say maybe that's the point because otherwise you can't claim prejudice. But a better course is to work within the time directed and give the detail in one's written submissions or signpost where it is to be found on the papers.

66. The approach adopted of frequently interrupting the opposing parties and accounting for that by reference to the alleged inadequate time given to the applicant was also, if the applicant doesn't mind me saying so with respect to all concerned, a misplaced strategy. Both sides get equal time, *i.e.*, the applicant with any supporting parties collectively, and all opposing parties collectively. Any desire for an increased quantum of time is not a basis for increased interruptions.

67. At one point in submissions the applicant suggested (without notice) they would need to seek an adjournment to get an expert report. That is a misconceived proposition in the context of case-managed proceedings where the lack of evidence was an issue raised throughout by the opposing parties and where the onus is on the applicant. Hearings can't be aborted because of something that an applicant could have addressed in advance but didn't. Sensibly the applicant didn't pursue that in any way and it wasn't meant as much more than an ineffectual shot in the air.

68. Looking at the whole issue of time more generally, it is not the case that lengthy submissions equate to effective submissions. Parties are not normally disadvantaged by making their best points briefly and then sitting down. One almost sure-fire way to exhaust the limited intellectual and energetic resources and sympathies of the court (I speak for myself here) is to weary the court with preambles and lengthy limbering-up to a punchline that never seems to arrive. The applicant didn't go down that road, but it did perhaps rely excessively on reading out slabs of text. A more narrative, story-telling, approach tends to be more impactful (but maybe I am just speaking for myself again there). The overall point remains that more time at an oral hearing doesn't equate to a more effectively presented case or a greater likelihood of success, in and of itself. Or to put it negatively – limiting the time for hearing for objective reasons doesn't in itself necessarily or even normally disadvantage the parties.

69. The complaint that other cases are getting two or three days (and implicitly that there is some horrendous unequal treatment that shocks the conscience of the superior courts) isn't valid. This is comparing apples and oranges because in such other cases the parties are seeking a different balance in the trade-off between duration and expedition. Such other cases are either not subject to a default expedited procedure or not subject to an application in that regard. Where parties don't take up the expedited procedure, it isn't generally imposed by the court, and the hearing date will be further into the future. Different cases have different time allocations for different reasons because each case is different – in terms of the inherent urgency, the date of initiation, the nature of the reliefs, any particular EU or domestic legal requirements applying to a particular category of case, and the attitude of and applications by the parties. Expedited hearings can be accommodated in a more proximate way – as the timeline in this case illustrates. There are no solutions, only trade-offs – it would be off the scale in terms of irrationality to condemn the expedited procedure on the grounds that some people don't take it up and thus get longer hearings (hence absurdly alleging inequality – absurd because such longer hearings will generally be considerably later in time, so one is comparing two totally different things) – or to condemn the expedited stream on the grounds that it limits the length of oral submissions, without also taking into account the huge advantages of such a procedure on the metrics of speed, commerciality, impact on other cases, and compliance with EU law.

70. The complaint that oral advocacy is important because it allows parties to interact with the court has some validity (Denham C.J. made that very point in *Talbot*), but

in the sense advocated by the applicant here, we should not exaggerate. Empirically speaking, and leaving aside the present case, parties irrationally grumble far more about judicial interventions than about the lack of interventions. The former complaint is unfounded at the level of principle – the court is doing the parties a favour by sharing what is on its mind and giving them a chance to reassure and correct. But parties don't have a right to such a favour – it is up to the individual court in the individual case. And here, the implicit demand for engagement with the court is illogical when coupled with a complaint about time. Nothing deters a court from contributing to the discussion more effectively than a protest by a party that it doesn't have enough time to get through its speaking note. The latter type of complaint is particularly misplaced where a judge is willing to debate the issues, but strangely that isn't universally understood. When a party says in effect that they can't respond to the court's questions because they want to get through their pre-prepared speaking points, one's spirits sink at the missed opportunity. There are few things that deflate the court's enthusiasm quite as rapidly as that type of response. Again I am not attributing that latter quirk to this applicant who was happy to respond to any of my queries, whether in oral submissions or in writing. Nor am I suggesting that there can be no limit to judicial interventions – certainly there are strong advisory limits when it comes to disrupting the giving of oral evidence. There are also some categories of litigant, such as those acting in person, who will need some modest uninterrupted time to make their case rather than be entirely subjected to quick-fire Q&A from the court. Professionally represented parties are generally more willing to engage in debate with the court, and that is all to the good, as Denham C.J. highlighted. But even they should be given some modest run at things if they want it.

71. Lengthy hearings also increase costs, and where the not-prohibitively-expensive rule applies, the costs of extended hearings sought by applicants will fall on all other parties. This can't be compensated for in costs if an applicant is unsuccessful. A costs-protected applicant may therefore be called on more than most to cut its cloth, seeing as other parties will be paying their own way without any meaningful recourse in costs whatsoever. Charleton J. made similar points in the jurisprudence cited above. The minimisation of costs and expenses has got to be part of the objectives of any case management system.

72. In any given case, the court also has the benefit of pleadings, affidavits and exhibits, written submissions, authorities, other materials uploaded, and access to the DAR or transcript or both. The notion that the court is dependent wholly or even mainly on the oral hearing may have had more validity at an earlier stage of the journey of the common law, but in the 21st century it is simply inaccurate and out of date.

73. Stating the obvious, but the applicant itself decided how to divide time between submission and reply (1:30 and 0:15). Mid-hearing, I suggested leaving more time for the reply – that was spurned. I offered more time for reply when we got to that point – that was also spurned. Nobody made the applicant make such choices.

74. On the facts this is a more than appropriate case for the expedited procedure given that there are only two core grounds and no constitutional-type case against the State. Cases in the List don't particularly get more net than this one – that isn't to suggest that a more complex case shouldn't also get the expedited procedure if someone wants it. The applicant acknowledges this feature to an extent at para. 18 of replying submissions: "this case [is] rare in that it is one of only a handful of recent judicial reviews having no more than two core grounds".

75. If one is in doubt about that, one can turn to the summary at the end of the body of this judgment, which I hope evidences the fact that underneath the welter of papers there are only a limited number of points which can be explained fairly briefly. On one view, 1 hour 45 minutes is an excessive amount of time to devote to points that can be stated simply, but all I need to say for present purposes is that it is enough and doesn't create any unconstitutional or otherwise unfair denial of the applicant's rights, especially when coupled with all of the other opportunities to lay its case before the court through various written means.

76. In addition to all other matters, in the end the applicant did get the right to put in a further submission without word-limit, and to a further oral contribution of 15 minutes.

77. With a mild spoiler alert, perhaps I can be allowed to mention that I am going to grant the applicant relief and costs up to a point. That doesn't suggest (to me at

any rate) that the applicant is being massively hard done by or being cast aside without reasonable consideration.

78. Also, for what it's worth, this isn't a case that is being decided without reasonable consideration from my point of view. If I were to impermissibly allow the reader a peek behind the curtain, the present judgment has involved a local record 64 draft versions, well surpassing the previous 48-draft record-holder of *An Taisce v. The Minister for Housing, Local Government and Heritage (No. 1)* [2024] IEHC 129 (Unreported, High Court, 6th March 2024) (a case that also held the personal recent record in my case, nothing to boast about, and no more than a trivial footnote, for page length and word count (121 pages and 92,375 words), surpassed by the present case at 157 pages and 117,085 words albeit that most of that is in annexes).

79. More seriously, the complaint that when time is limited, explanation of the papers effectively comes out of the applicant's time isn't valid. The Practice Direction is explicit that papers don't need to be opened and should be taken as read. So the traditional moving party's burden to open everything doesn't apply in the List.

80. An applicant's fallacy, clearly shared to some degree by this applicant, that they have to do all the hard work in submissions and respondents come in lazily with template objections as to inadequate pleadings or the like, is a misconception. The reality is that, in the cases where an applicant makes points that are open to refutation, it takes much more effort – often an order of magnitude more – to debunk error than to propagate error.

81. Obviously, case management directions including time limits as to the duration of oral submissions can't please everybody. But the court should be and inevitably is very conscious of the need to ensure that each party has a reasonable and fair opportunity to make its case. Nobody is arguing that the court is totally at large in terms of case management or that it should unfairly shut out the parties from making their points at all or deny them even a brief and limited reasonable time. I have endeavoured to keep those requirements in mind here. For the avoidance of doubt, I don't believe that the applicant has been materially (still less unfairly) disadvantaged. I have given careful consideration *inter alia* to the pleaded issues and the supporting material on its affidavits, in its written submissions and in oral submissions. Overall it is more than obvious that the applicant has had a reasonable opportunity to make its case in the present circumstances. In an ideal world I would give every litigant more time, but we don't live in an ideal world – the time allocation for this case and for cases subject to the expedited procedure generally is a reasonable compromise between the interests of the parties, respecting their need to have an opportunity to make their case in any given matter including this one, and the doing of justice generally within a reasonable time and within the resources actually available, as the Supreme Court jurisprudence cited above envisages.

82. To illustrate the situation one can turn to the annexes to this judgment which set out the applicant's **ten** opportunities to make its case – its grounding affidavit, statement of grounds (superseded by the amended statement), the supplemental affidavit, three sets of submissions, the summary in the statement of case, and three listing days, albeit that the middle date wasn't particularly substantive. As regards some of the annexed material, there may be some minor conversion errors because the applicant failed to upload all of its documents in word document format, so I have had to engage in the labour-intensive exercise of file format conversion. The applicant's own documents are 30,727 words (this doesn't include exhibits so is a huge underestimate). The DAR (excluding indices) is 46,278 words and one could allow an extremely conservative 40% of that to the applicant, which is 18,511 words. Allowing a modest 20% of the statement of case (4,237 words) gives another 847 words. This all comes to a total of 50,085 words which is novel-length – more than *The Great Gatsby* (F. Scott Fitzgerald, 1925, Scribner). If a party can't make a single winning point to achieve *certiorari* in a barrage of words as long as a bestseller, then denying that party the right to keep going on for a few more hours or even a few more days is unlikely to make much of a difference or to be a terrible injustice of any sort.

83. Bearing all of that in mind, what ultimately gives the lie to the idea that the expedited procedure makes it unduly difficult to advance one's point is that *the other parties managed to capitalise on it*. There are some passages in the board's oral submission that refute the applicant's critical arguments in under a page, a process that reaches an apex of sorts in the notice party's oral submission where in about 10 lines, the applicant's whole case on core ground 2 is utterly demolished – a submission that

was articulated in a period measured in seconds rather than minutes. A constraining procedure that demands that parties achieve oral advocacy at the supreme level of the opposing parties here would limit time to a few minutes each. So a generous hour and 45 minutes (or in this case, two hours) for an applicant gives every party a reasonable chance. *If the opposing parties can do it, an applicant can do it*. The motto *Nolumus mutari* is about professional independence, not a battle cry to oppose changing conditions. If on the other hand people have been doing things in a more traditional or time-consuming way for such a period of time that they are unwilling or unable to adapt, then that's on them, not on me.

59. The punchline is that no injustice is done to a party by not allowing that party to keep talking for as long as they see fit, as long as they have had a reasonable opportunity to set out their case, whether in writing, orally, or a combination of both, as directed by the court. This applicant has had such an opportunity.

Relief sought

60. The reliefs sought in the amended statement of grounds are as follows:

"An Order of Certiorari by way of application for judicial review quashing a decision made by the Respondent ('the Board') on or about 3 January 2024 to grant planning permission to the Notice Party ('the Developer') on appeal for development consisting of the construction of up to 8 no. wind turbines with a tip height of 185 metres and all associated foundations and hardstanding areas, cables, substation and associated works at Dernacart, Forest Upper & Forest Lower, Mountmellick, Co. Laois.

1A. Without prejudice to the certiorari relief, a Declaration that the decision contravenes section 146(7) of the Planning and Development Act, 2000 as amended, and public participation requirements of EU law, because the Board failed to make available for inspection on its website the amended Environmental Impact Assessment Report.

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

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

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

5. Further and other orders including interim orders."

Grounds of challenge

61. The core grounds of challenge are as follows:

"Domestic Law Ground

1. The impugned decision is invalid because it is contrary to fair procedures and contravenes section 146(7) of the Planning and Development Act, 2000, as amended because the Board failed to make available for inspection on its website the amended Environmental Impact Assessment Report, which by law must be made available on the website in perpetuity beginning on the third day following the making by the Board of the decision on the matter. Further particulars are set out in Part 2 below.

EU Law Ground

2. The impugned decision is invalid because it contravenes Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ('the Habitats Directive') as transposed by s. 177U and s. 177V of the Planning and Development Act 2000, as amended, and in accordance with the case law of the CJEU by:

- failing to conduct a screening, properly or at all, to assess if the project is likely to have a significant effect on the Slieve Bloom Mountains SPA, either individually or in combination with other plans or projects, to determine if those sites should be subject to Appropriate Assessment ('AA').
- failing to carry out an Appropriate Assessment without lacunae and which contains complete, precise and definitive findings and conclusions capable of dispelling all reasonable scientific doubt as to the effects of the proposed works on the Slieve Bloom Mountains SPA (judgment of 25 July 2018, Grace and Sweetman, C-164/17, EU:C:2018:593, paragraph 39 and the case-law cited).
- failing to identify and examine the implications of the proposed project for species to be found outside the boundaries of the SPA where those implications are liable to affect the conservation objectives of the site. Case 461/17 Holohan.

Further particulars are set out in Part 2 below."

The climate context – some general legal principles

62. Insofar as relevant, some relevant legal principles concerning the climate context which have been rehearsed in previous caselaw include the following:

(i) The climate emergency represents a critical risk to human and natural life on earth *Friends of the Irish Environment v. Government of Ireland* [2020] IESC 49, [2021] 3 I.R. 1, [2020] 2 I.L.R.M. 233, [2020] 7 JIC 3107; *Klimaseniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, 9 April 2024.

(ii) Government policy is a relevant factor to be considered in the planning process: ss. 37(2)(b), 37N(4), 143(1) of the 2000 Act.

(iii) Government policy favours significant substitution of renewable energy for fossil fuel consumption: see policies listed in *Toole v. Minister for Housing (II)* [2024] IEHC 610 (Unreported, High Court, 1st November 2024).

(iv) The National Planning Framework must be considered by the board under s. 143(1)(c), a framework that also supports the low carbon objective.

(v) Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC established mandatory targets for the consumption of energy from renewable sources by member states.

(vi) The Climate Action and Low Carbon Development Act 2015 as amended in 2021 provides for a national carbon objective and for plans, strategies, frameworks and carbon budgets to that effect together with a wide duty on Government and public bodies to act consistently with the legislation (ss. 14B and 15).

(vii) Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council (the Governance Regulation) was adopted to implement the Paris Agreement commitments.

(viii) Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (the European Climate Law) establishes the framework for achieving climate neutrality.

(ix) Council Regulation (EU) 2022/2577 of 22 December 2022 lays down a framework to accelerate the deployment of renewable energy. Article 3(1) introduces a presumption of overriding public interest for renewable energy projects for the purpose of the birds, habitats and SEA directives, and provision is made for the acceleration of such projects.

(x) The renewable energy directive also provides for a presumption of overriding public interest and for accelerated timelines including requiring judicial remedies to be the most expeditious available in national law.

(xi) In *Klimaseniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, 9 April 2024, the ECtHR found a violation of art. 8 of the ECHR which encompasses a right to effective protection from the serious adverse effects of climate change. There was a breach of the positive obligations thereby imposed in terms of establishing a relevant domestic regulatory framework relating to budgeting for and limiting emissions. In addition, the failure by the domestic courts to accept the applicants' standing to litigate was a breach of art. 6.1 of the ECHR. The judgment is of relevance in domestic law via the ECHR Act 2003.

Judicial review – some general legal principles

63. Some relevant legal principles concerning judicial review which have been rehearsed in previous caselaw include the following:

(i) There is a **presumption of validity** for administrative decisions: *per* Finlay P. in *In re Comhaltas Ceoltóirí Éireann* (Unreported, High Court, 5th December 1977) and *per* Keane J. in *Campus Oil v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88 at 102.

(ii) The court must keep **separation of powers** firmly in mind: *Sinnott v. Minister for Education* [2001] IESC 63, [2001] 2 I.R. 545; *TD v. Minister for Education* [2001] IESC 101, [2001] 4 I.R. 259.

(iii) **Policy choices** are for other branches of government: see by analogy *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) "Members of

this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices." *per* Roberts C.J. slip op p. 6.

(iv) Judicial review is **not an appeal on the merits** and it is not for the court to substitute its view for that of the decision-maker: *per* Finlay C.J. in the *State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 at p. 654; *per* Denham J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701 at p. 743; Lady Hale in *R (Cart) v. Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663 at para. 47: "it is not difficult to dress up an argument as a point of law when in truth it is no more than an attack upon ... factual conclusions"; and *per* Clarke J. (McKechnie and Dunne JJ. concurring), in *Sweeney v. Fahy* [2014] IESC 50 (Unreported, Supreme Court, 31st July 2014) at paras. 3.8-3.15.

(v) Insofar as concerns **evaluative conclusions,** the weight to be given to the evidence is quintessentially a matter for the decisionmaker: *per* Birmingham J. in *M.E. v. Refugee Appeals Tribunal* [2008] IEHC 192 (Unreported, High Court, 27th June 2008) at para. 27.

(vi) **Onus on applicant** – the onus of proof remains on the applicant at all times: *per* Denham J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701 at p. 743; *Cork County Council v. Minister for Housing, Local Government and Heritage (No. 1)* [2021] IEHC 683 (Unreported, High Court, 5th November 2021) at §57; *Monkstown Road Residents Association v. An Bord Pleanála* [2022] IEHC 318 (Unreported, High Court, 31st May 2022) at para. 96 *per* Holland J.; *Sherwin v. An Bord Pleanála* [2023] IEHC 26, [2023] 1 JIC 2701 (Unreported, High Court, 27th January 2023) at para. 85; the onus remains on an applicant even when in a constitutional challenge it is proved that constitutional rights have been interfered with – *O'Doherty and Waters v. The Minister for Health* [2022] IESC 32, [2023] 2 I.R. 488, [2022] 1 I.L.R.M. 421 *per* O'Donnell C.J. at para. 116.

(vii) **Should not read as invalid** – a decision must be read in a way that makes sense and is lawful – it is not the case that decisions must be read in the most erroneous way possible so that applicants can get their order of *certiorari* (*e.g. Rostas v. DPP* [2021] IEHC 60 (Unreported, High Court, 9th February 2021) at §50; *St. Margaret's Recycling v. An Bord Pleanála* [2024] IEHC 94 (Unreported, High Court, Phelan J., 20th February 2024) at §57). Related to that is that a decision should be read in a way that renders it valid rather than invalid: see *Mulloy v. An Bord Pleanála* [2024] IEHC 86 (Unreported, High Court, Holland J., 12th March 2024) at §178 (citing *O'Donnell v. An Bord Pleanála* [2023] IEHC 381 (Unreported, High Court, 1st November 2023); *M.R. (Bangladesh) v. The International Protection Appeals Tribunal & Anor* [2020] IEHC 41 (Unreported, High Court, 29th January 2029) at §7; *Save Roscam Peninsula CLG v. An Bord Pleanála (No. 6)* [2024] IEHC 335 (Unreported, High Court, 7th June 2024) at §64); a decision should be read "not solely from an applicant's point of view (an impossible standard), but from the starting point of it being valid rather than invalid where possible. One has to stand back and ask what the decision is fundamentally saying (*O'Donnell & Ors v. An Bord Pleanála* [2023] IEHC 381 [Unreported, High Court, 1st November 2023] (para. 54)" in *St. Margaret's Recycling v. An Bord Pleanála* [2024] IEHC 94 (Unreported, High Court, Phelan J., 20th February 2024) at §57; thus for example "unhelpful" statements should not be read as inconsistent with statutory factors if the decision can be read as valid – *E.M. v. Minister for Justice and Equality* [2024] IESC 3 (Unreported, Supreme Court, 21st February 2024) *per* Dunne J.

(viii) It is not for the applicant **to dictate the procedures** to be adopted: see for example *per* Ryan P. in *A.B. v. Minister for Justice and Equality* [2016] IECA 48, [2016] 2 JIC 2602, 2016 WJSC-CA 1525 at para. 43.

Domestic issues

Core ground 1 – Failure to publish material – some general legal principles

64. Key elements of the law relevant to a failure by the board in relation to publication requirements which have been rehearsed in previous caselaw include:

(i) **After the event** – The failure to publish something after the decision has been made can't logically affect the validity of the decision: A decision doesn't become invalid if it isn't published. See by analogy *Casey v. Minister for Housing, Planning and Local Government* [2021] IESC 42, [2021] 7 JIC 1606 (Unreported, Supreme Court, Baker J., 16th July 2021): It was held that the absence of publication does not result in

the invalidity of a foreshore licence; see *Clonres CLG v. An Bord Pleanála (No. 2)* [2021] IEHC 303, [2021] 5 JIC 0706 (Unreported, High Court, 7th May 2021) at §101; *Clifford v. An Bord Pleanála (No. 1)* [2021] IEHC 459 (Unreported, High Court, 12th July 2021) at §77; *Clifford v. An Bord Pleanála (No. 3)* [2022] IEHC 474, [2022] 8 JIC 1502 (Unreported, High Court, 15th August 2022) at §38; *Reid v. An Bord Pleanála (No. 7)* [2024] IEHC 27 (Unreported, High Court, 24th January 2024); *Carrownagowan Concern Group v. An Bord Pleanála (No. 2)* [2024] IEHC 300 (Unreported, High Court, 20 May 2024) at §104-§105; *Kennedy v. An Bord Pleanála* [2024] IEHC 570 (Unreported, High Court, 7th October 2024) at §120, §144-§146.

(ii) **Evidence of prejudice required** – adverse impacts require evidence rather than being impermissibly introduced by way of legal submissions (*Monkstown Road Residents' Association & Ors. v. An Bord Pleanála & Ors.* [2022] IEHC 318 (Unreported, High Court, Holland J., 31st May 2022) at §54).

(iii) **No *ius tertii*** – An applicant can't assert the constitutional or fair procedures rights of a third party absent exceptional circumstances (*Cahill v. Sutton* [1980] I.R. 269; *Hellfire Massy Residents Association v. An Bord Pleanála* [2021] IEHC 424, [2021] 10 JIC 1302 (Unreported, High Court, 13th October 2021) at §54(i)).

(iv) **Declaratory relief is a possibility** – A failure to comply with notification requirements that is in breach of the law but has not on the facts prevented the particular applicant in the proceedings at hand from engaging with the process may be marked with a declaration rather than more imperative relief depending on the circumstances (see caselaw above).

Core ground 1 – lack of publication of material

65. Core ground 1 is:

"1. The impugned decision is invalid because it is contrary to fair procedures and contravenes section 146(7) of the Planning and Development Act, 2000, as amended because the Board failed to make available for inspection on its website the amended Environmental Impact Assessment Report, which by law must be made available on the website in perpetuity beginning on the third day following the making by the Board of the decision on the matter. Further particulars are set out in Part 2 below."

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

"[Preliminary objection:]

28. It is Statkraft's position that the declaratory relief sought at paragraph D(1A) of the Amended Statement of Grounds is not grounded upon any specific pleas in that there are no specific pleas as to how the Board has allegedly breached the public participation requirements of EU law and the Applicant has failed to comply with the requirements of Order 84, rule 20 of the Rules of the Superior Courts in this regard.

29. It is the Applicant's position that it has pleaded and properly particularised a breach of s.146 (7) of the Planning and Development Act, 2000, as amended, which is a transposition of public participatory obligations under the EIA Directive, substituted by European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018 (S.I. No. 296 of 2018), reg. 12(b), in effect as per reg. 2(1).

30. The Board understands the Applicant's position [*semble* and] will deal with the merits of it.

[Merits]

Applicant' Position –

32. The Board created a webpage, on its own website, for the planning appeal, upon which it created links to 67 documents which are segments taken from the developer's EIAR, arranged out of their proper sequence, and which up to the time of their correction in August 2024 were named on their face with a randomly generated coding system from which the content of the documents cannot be recognised, making it very difficult for members of the public to access the EIAR and Natura Impact Statement and Appropriate Assessment Screening Report on the Board's website and did so contrary to fair procedures and s.146(7) of the Planning and Development Act, which requires the EIAR to be made available for inspection on the Board's website.

33. The Board further erred in posting to its website original versions of the EIAR and Natura Impact Statement and Appropriate Assessment Screening Report that do not incorporate the later amendments made to these documents by the Developer in its Further Information response to Laois County Council of March 2021, contrary to s.146(7) of the Planning and Development Act.

Board's Position –

34. First, the EIAR and AA as submitted in the first instance are published on the 'View associated documents' section of the relevant page of the Board's website. Second, the

further information submitted to the Council (which is what the Applicant is calling the further amendments) was / is accessible via the link on the Board's website that says 'Click here for details of the original planning case submission to Laois County Council'. There is no breach of s.146(7) in those circumstances.

35. Further, whereas the titling of the documents is as described in the affidavits, the material was available and this complaint itself does not establish any particular illegality.

36. In terms of relief, the Board has set out the position in pleadings and submissions – there was full participation without complaint, no prejudice has been suffered and, at all points, all the relevant information was in fact available and there is no legal way for the Applicant to rely on third party rights to make its case.

Statkraft's Position –

37. The EIAR, NIS and AA Screening Report were uploaded to the Board website. While the Applicant alleges that the manner in which the documents were uploaded made it difficult for members of the public to access the documents and was contrary to fair procedures, the Applicant was not prejudiced by this and has not provided any particulars of any alleged unfairness. Indeed, the Applicant participated fully in the appeal before the Board.

38. Insofar as the Applicant alleges that the EIAR, NIS and AA Screening Report posted on the Board website do not incorporate later amendments made to those documents on foot of a response to a request for further information made by the Council, the uploading of documents to the Board's website is primarily a matter for the Board to address. Furthermore, the complaint made is that the documentation at issue was not uploaded appropriately to the website after the Board's decision was made. As such, the complaint made is a technical complaint which relates to the post-decision process and does not warrant the quashing of the Board's decision and does not amount to grounds upon which to grant an order of Certiorari.

39. Even if the Applicant is correct in respect of its complaint on Core Ground 1, due to an absence of prejudice, the only potential relief available is a declaration, and it does not warrant the quashing of the Board's Order.

40. Insofar as the Applicant seeks declaratory relief on the basis of an alleged breach of the public participation requirements of EU law in connection with Core Ground 1 such relief is not grounded on any specific pleas and Statkraft maintains its Preliminary Objection (which has already been outlined above)."

67. As regards the pleading objection, the problem that a court can't grant relief if there is no supporting ground for it is the scenario we have here. The declaration sought at relief 1A claims breach of:

(i) s. 146(7) of the 2000 Act; and

(ii) "public participation requirements of EU law".

68. The first point has a supporting ground – core ground 1. In addressing that, I will of course have regard to any underlying EU obligation transposed by that section – the subsection concerned was inserted by the European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018 (S.I. No. 296 of 2018).

69. The second point however, if it adds anything (and nothing has been identified), isn't supported by any ground. Therefore it can't arise as a basis for relief. The applicant doesn't seem to lose a whole lot by that problem because it can rely on the 2018 regulations, and thus on relevant EU law, under the first heading (which is the main point made by the applicant in the statement of case).

70. Turning now to the merits, was there a failure to publish material as required? There are three categories of document that warrant discussion.

71. Firstly, as regards the environmental impact assessment report (**EIAR**) and the stage 1 AA screening report and Natura Impact Statement (**NIS**) that were submitted to the council, they were published on the "View associated documents" section of the relevant page of the board's website (the complaint about non-publication at all has to be distinguished from the issue of the manner of publication).

72. Secondly, as regards the changes to this material, the applicant talks about an "amended EIAR" but there is no such document and no physically amended EIAR – what is in issue is the FI (which refers to amendments that should be made to the EIAR). The FI was not "on" the board's website in the sense of being on the pleanala.ie domain, but there was a link on the board's website to the planning application page on the website of the council on which the notice party's March 2021 further information response documentation was posted (https://www.pleanala.ie/en-ie/case/310312) includes an option that states "Click here for details of the original planning case submission to Laois County Council" which links to the council's page, and "View Scanned Files" brings up the page on which the relevant further information response is published).

73. Thirdly, as regards the documents hosted by the board, they were given incomprehensible file names in what the board calls a "hexadecimal" way, *i.e.*, a mixture of numbers and letters.

74. Formally insofar as the relief is concerned, the supporting grounds are:

> "3. While the Board has created a webpage, on its own website, for the planning appeal, it has placed a significant number of documents thereon which are segments taken from the developer's Environmental Impact Assessment Report, arranged out of their proper sequence, and named on their face with a randomly generated coding system from which the content of the documents cannot be recognised, making it very difficult for members of the public to access the EIAR and Natura Impact Statement and Appropriate Assessment Screening Report on the Board's website and did so contrary to fair procedures.
>
> 4. The Board further erred in posting to its website original versions of the EIAR and Natura Impact Statement and Appropriate Assessment Screening Report that do not incorporate the later amendments made to these documents by the Developer in its Further Information response to Laois County Council of March 2021."

75. Sub-ground 3 has validity, to which we will turn shortly. Sub-ground 4 is misconceived – there was no consolidated EIAR that incorporated amendments, so there wasn't anything to publish in that form.

76. Oddly enough, the applicant didn't seek relief in relation to the problem in sub-ground 3. The only relief sought relates to the issue in sub-ground 4. Relief 1A is:

> "1A. Without prejudice to the certiorari relief, a Declaration that the decision contravenes section 146(7) of the Planning and Development Act, 2000 as amended, and public participation requirements of EU law, because the Board failed to make available for inspection on its website the amended Environmental Impact Assessment Report."

77. That isn't appropriate for two reasons.

78. Firstly, there was no such obligation since there was no such document.

79. Secondly, by definition "the decision" doesn't "contravene[e]" s. 146(7), since that section relates to publication *of* the decision, it isn't a provision that is contravened *by* the decision.

80. Turning back to the merits and analysing the legal implications of the facts here, the situation with the three categories of publication is as follows.

81. As regards the first heading, there is no plausible issue with the original EIAR and associated documents not having been published at all – whether the manner of publication was defective is issue (iii) below.

82. Secondly, as regards the FI, one can see an argument that the board shouldn't outsource publication of documents to other bodies, even councils, just as it shouldn't do so to private parties. It thereby loses control over continued publication or hosting. However unfortunately for the applicant this point isn't pleaded. The relevant grounds only cover the other two categories specified in sub-grounds 3 and 4. I can grant unpleaded relief within the grounds, but not unpleaded relief that isn't covered by the grounds. So we can leave this issue to a case where it arises.

83. Thirdly as regards the documents on the board's website, the various file names are now comprehensible (https://www.pleanala.ie/en-ie/case/310312, accessed 15th December 2024) having been updated by the board's ICT section on or about 23rd August 2024. But that wasn't so initially. The putting online of documents with incomprehensible file names clearly does not constitute effective publication or making available. Compliance with legal requirements doesn't mean ineffective compliance. It requires real and practical compliance that will be effective in vindicating any underlying rights, which in this instance are of EU law relevance. Especially in such context, the giving of information has to be reasonably accessible, not *pro forma*. That didn't happen here.

84. It is accepted that s. 146(7)(a) applies. The notice party submits:

> "13. Statkraft submitted an EIAR, and the Board carried out an EIA in respect of the Proposed Development. As such, section 146(7)(a) of the 2000 Act is engaged and requires that 'documents relating to the matter' (within the meaning of section 146(5) of the 2000 Act) are available for inspection on the Board's website in perpetuity beginning on the third day following the making by the Board of the decision on the matter concerned. It is accepted by Statkraft that the EIAR is a document that falls within the category of 'documents relating to the matter' (see Carrownagowan Concern Group v An Bord Pleanála (No.2) [2024] IEHC 300)."

85. Mr Cummins' affidavit for the applicant at para. 27 refers to a list of file names on the board's website as it existed at that time. The list is as follows – note that the right-hand column of narratives (EIAR and so on) **did not appear** on the board's website but were added by Mr Cummins in an explanatory way:

> "List of file names on site of An Bord Pleanála An Bord Pleanála Case reference: PL11.310312 Planning Authority Case Reference: 2078 https://www.pleanala.ie/en-ie/case/310312

No	Alphanumeric file names on Board's website	File Description (not on Board's website)
1	0248ef64-c1aa-4f0d-abdf-5a1e884273a5.pdf [PDF]	Bottomless Culvert Detail
2	0352c2c1-d9e4-4e60-af0e-959266b11b7e.pdf [PDF]	Site Entrance Layout
3	08701d70-24e1-4bf2-96e0-2635308d4f41.pdf [PDF]	Site Fence Details
4	0a51662e-dfd8-42ed-88e2-5334982043e6.pdf [PDF]	Substation Compound Sections
5	10d0c62b-717a-454a-a602-e129c0ec65f9.pdf [PDF]	EIAR
6	11f928e7-3fbf-4344-bf12-96823639323f.pdf [PDF]	Typical Cross Section Through Floating & Excavated Access Track
7	1f4b7e9f-5a35-49ee-a3b7-9c7ac23dc92a.pdf [PDF]	EIAR – Vol 3 – Appendices
8	230bc368-73f8-4361-bf0f-cba9901b81a0.pdf [PDF]	EIAR – Vol 2 – Main – Index
9	252e792e-f056-4ef4-878b-10c273e1fb63.pdf [PDF]	EIAR – Vol 2 – Chapter 12 – Biodiversity
10	29c66cc7-5d42-4241-9cf1-9c70a9b63517.pdf [PDF]	Appendix 8 – Noise & Vibration
11	3196a3d7-53c8-4250-8005-6dfe7af39f55.pdf [PDF]	1:1000 Site Layout Plan Sheet 7 of 8
12	33bcd369-4a14-497c-9302-419231935fb8.pdf [PDF]	Appendix 4.1 – Landowners Consent
13	36747336-17a4-4d37-9548-c35845ff6ad7.pdf [PDF]	Substation Compound Layout Plan 1:200 Scale
14	39ea95f2-0792-44d7-b9c7-fdfd3ac37ac8.pdf [PDF]	Appendix 10-1 – Turbine Delivery Route Report
15	3adb6cce-0280-49cf-8aea-4a5099794be1.pdf [PDF]	Appendix 12-1 – Stage one Appropriate Assessment Screening Report & Natura Impact Assessment
16	3d4e7e41-34a5-49d4-9850-247e280e58d3.pdf [PDF]	Substation Compound Elevations
17	41b48b27-9d5f-4d80-b7f1-42207249b93f.pdf [PDF]	Appendix 7 – Shadow Flicker Modelling Data & Results
18	447615ff-4b28-41b1-9622-28412e7cde6c.pdf [PDF]	1:1000 Site Layout Plan Sheet 5 of 8
19	47aa6a5e-2901-4a5e-bb78-6f47f5310d5d.pdf [PDF]	Typical Met Mast Details
20	48283eb5-9827-4b7c-980d-133530e88666.pdf [PDF]	Volume 2 – EIAR – Introduction
21	484e52b1-c4d0-418b-816e-0beacdc21f8c.pdf [PDF]	1:10,000 Site Location Map – Sheet 2 of 3
22	49642756-1763-430b-b9ab-617f10f15fef.pdf [PDF]	Typical Holding Tank Details
23	596f8191-6f7a-493e-a119-88382be806f0.pdf [PDF]	Appendix 14.1 – Photos of Existing Hydrology Features
24	64cdc2ce-26a7-4a4f-bfc2-989cd3031d6d.pdf [PDF]	Volume 2 – Main EIAR – Chapter 16 – Air Quality & Climate
25	66863127-abf8-4f11-bec1-916898e09b01.pdf [PDF]	1:1000 Site Layout Plan Sheet 1 of 8
26	6a12eec5-a2e2-433e-acb8-ee622802e771.pdf [PDF]	Volume 2 – Main EIAR – Chapter 3 – Policy
27	6aa6fbee-f411-4912-a3b2-5946c0762ccf.pdf [PDF]	Appendix 16.1 – Input Data For Carbon Calculator
28	6c068c33-17ce-4956-a95a-e4e9064226e8.pdf [PDF]	Volume 2 – Main EIAR – Chapter 13 – Land, Soil & Geology
29	71426143-39ad-4727-904e-1638e3e11d9f.pdf [PDF]	Typical Site Trap Details in Drainage Ditch
30	768b0ad8-f586-4675-971b-70cb08894732.pdf [PDF]	Appendix 11.1 – Visual Impact Assessment & Viewpoints

31	7f37d6e2-7989-4e03-9d16-4b30430f4a38.pdf [PDF]	EIAR – Volume 1 – Non-Technical Summary
32	86b3ee0f-d079-4577-ad4f-debd861791fb.pdf [PDF]	1:1000 Site Layout Plan Sheet 4 of 8
33	8b3037f5-74db-42d7-b0e8-fe13cced8e93.pdf [PDF]	Volume 2 – Main EIAR – Chapter 4 – Description of the Proposed Development
34	8ef9bb3f-35d8-4af4-86a8-b9e745b79c4c.pdf [PDF]	Appendix 13.1 – Peat Stability Survey

"

86. Such a load of gibberish is unacceptable in terms of the requirement that documents "shall be made available" under s. 146(5) and/or (7) of the 2000 Act. Again let me stress it was only the left-hand side of the above table that appeared on the board's website, not the right-hand descriptions. Availability is not an empty box-tick. It must mean reasonably available and accessible in a practical manner to the persons to whom the communication is addressed, here the public at large. All legislation must be read reasonably. Sure you can pick up any enactment and fatuously say that this allows abuses. But every enactment has to be read in sense that is constitutional, EU-compliant and ECHR-compliant: *East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] I.R. 317; judgment of 13 November 1990, *Marleasing SA v La Comercial Internacional de Alimentacion SA.*, C-106/89, ECLI:EU:C:1990:395 and ECHR Act 2003 – as being impliedly qualified by the need to act reasonably and lawfully. I made a related point in *Dowling v. An Bord Pleanála* [2024] IEHC 249, [2024] 5 JIC 0103 (Unreported, High Court, 1st May 2024) that information provided to an applicant must be accessible and accurate for ECHR purposes.

87. However, such a conclusion doesn't mean that *certiorari* is warranted. As pointed out by the opposing parties, the reasons why that is inappropriate are:

(i) The pleaded reason as to why the decision is invalid doesn't make sense – the "decision" can't "contravene" s. 146.

(ii) Relatedly, publication of the decision is definitionally after the event. A decision doesn't become invalid if it isn't published: *Casey v. Minister for Housing* [2021] IESC 42 (Unreported, Supreme Court, Baker J., 16th July 2021). The applicant's attempt to distinguish *Casey* is very unconvincing. Insofar as the applicant asserts that "the obligation to publish a complete and intelligible EIAR was a condition precedent to the making of the EIA and the jurisdiction to bring into effect the planning decision", that doesn't make sense because making the EIA happens first and publication arises three days after the decision. So a subsequent act can't be a "condition precedent" for a prior act.

(iii) There can be no *ius tertii* here – an applicant can't assert the rights of third parties: *Hellfire Massy v. An Bord Pleanála* [2021] IEHC 424 (Unreported, High Court, 13th October 2021) at §54(i).

(iv) There is no demonstrated prejudice to the applicant: *Clifford and Sweetman v. An Bord Pleanála* [2021] IEHC 459 (Unreported, High Court, 12th July 2021) at §77; *Clifford v. An Bord Pleanála (No. 3)* [2022] IEHC 474 (Unreported, High Court, 15th August 2022) at §38; *Reid v. An Bord Pleanála (No. 7)* [2024] IEHC 27 (Unreported, High Court, 24th January 2024); *Carrownagowan Concern Group v. An Bord Pleanála* [2024] IEHC 300 (Unreported, High Court, 20th May 2024) at §105; *Kennedy v. An Bord Pleanála* [2024] IEHC 570 (Unreported, High Court, 7th October 2024) at §120, §144-§146. The applicant's claims of difficulties caused to it by the error are sheer assertion and speculation, and I agree with the notice party that:

> "20. Insofar as the Applicant states in its legal submissions at §41 that the alleged breaches caused 'practical difficulties for the Applicant in the limited time available to bring the proceedings', there is no evidence of this whatsoever. Furthermore, insofar as the Applicant states that this 'leaves the decision open to further challenges from other litigants who have not yet understood the EIAR published by the Board on its website is incomplete' that is simply not correct."

(v) Even if counterfactually the problems were of a kind that would warrant *certiorari* in principle if impacts were proved, adverse impacts require evidence rather than being impermissibly introduced by way of legal submissions (*Monkstown Road Residents' Association & Ors. v. An Bord Pleanála & Ors.* [2022] IEHC 318 (Unreported, High Court, Holland J., 31st May 2022) at §54).

(vi) This is a new point and not a case of egregious disregard of previously clarified legal obligations. In fairness to the board, while they have picked up a lot of adverse judgments about failures in terms of information and publication, the variety of legal provisions they have to deal with explains to some extent the fact that these

judgments are all related to distinct publication provisions. The board are not recidivist offenders, if they can forgive the analogy – their non-compliances are creative and involve new problems, rather than it being the case that they repeat previous problems without regard to the caselaw.

88. The applicant in replying submissions complains that without the EIAR, one can't construe the decision:

> "13. Further, the amended parts of the EIAR (see the sections marked in red in the further information response document at Tab 11a of the grounding affidavit) include updates to the mitigation measures in the EIAR, without which it is not clear how the Applicant (and the public into the future) is to interpret Condition 4 of the impugned decision which states: The developer shall ensure that all construction methods and environmental mitigation measures set out in the Environmental Impact Assessment Report and associated documentation are implemented in full, save as may be required by conditions set out below. Reason: In the interest of protection of the environment."

89. As always, this sounds vaguely plausible at first sight. But it is a mile removed from a situation where it is evidentially established that *this applicant actually was* disadvantaged in the process in some way that warrants *certiorari*. The applicant did after all download the documents and isn't claiming that it didn't know there was an EIAR or a FI document that amended it. There is no actual prejudice. Just a maybe-someone-someday-perhaps type of scare argument. That isn't a basis for quashing an otherwise valid decision.

90. This and related arguments also go well beyond the pleadings. I agree with the board's final replying submission that:

> "23. There are no pleaded grounds alleging that condition 4 of the grant of permission is only operable if section 146(7) of the 2000 Act is complied with and that the Applicant has been 'indirectly prejudiced'. There is no pleaded case that the Board failed to publish the Further Information response along with the EIAR before the Board decision was made. There is no pleaded case that the mere fact that the Further Information response is not hosted directly on the Board's website directly causes issues in respect of policing/enforcing the conditions attached to the impugned grant of permission (there is only speculative assertion advanced via legal submission). The assertion (§36) that it is unclear how condition 4 is to be interpreted is unpleaded and also baseless and premised on the flawed approach of reading the Board's Decision in way that renders same invalid rather than valid. The law as to the strict requirements regarding pleadings is consistent and clear. Parties cannot go beyond the grounds pleaded, either by way of averments in subsequent affidavits or in their legal submissions to the court (see e.g., Heavey v. An Bord Pleanála [2024] IEHC 480 at §9 and §10; Freeney v. An Bord Pleanála [2024] IEHC 427 at §101-§107; Rushe v. An Bord Pleanála [2020] IEHC 122 at §108, §113; O'Donnell v. An Bord Pleanála [2023] IEHC 381 at §107-§112; Carrownagowan Concern Group v. An Bord Pleanála [2024] IECA 234 at §55 and §91; Concerned Residents of Treascon and Clondoolusk v. An Bord Pleanála [2024] IESC 28 at §39-§43; Duffy v. An Bord Pleanála [2024] IEHC 558 at §21 et seq). In addition, even it was pleaded, the assertion that s.146(7) of the 2000 Act has a preclusive legal effect on the operability or implementation of the Board's Decision or condition 4 to same is misconceived in law and advanced without any supporting authority or any textual basis in the 2000 Act or the EIA Directive."

91. I also agree with the notice party that "Insofar as the Applicant states in its legal submissions at §41 that the alleged breaches caused 'practical difficulties for the Applicant in the limited time available to bring the proceedings', there is no evidence of this whatsoever" (replying submissions para. 20).

92. Insofar as the applicant claims that lack of transparent publication "leaves the decision open to further challenges from other litigants who have not yet understood the EIAR published by the Board on its website is incomplete", that is not a basis for *certiorari* for multiple reasons. Any other litigation is hypothetical. Furthermore the submission appears to confuse incompleteness with lack of transparent publication. The EIAR is not incomplete, it was simply amended by the FI. Both documents exist and need to be read together – that isn't unlawful. The unlawfulness was in using incomprehensible and inaccessible filenames, but to get *certiorari* an applicant generally has to show some impact on her own rights, not on someone who may wander along someday.

93. But the non-compliance is of a type that warrants being marked by a declaration, not least due to ongoing issues in numerous cases with strict compliance with the board's publication requirements, now well into double figures in recent years (as adverted to above). While it's not quite a case of adverse orders must continue until morale improves, such relief does serve as ongoing encouragement to the board to get a firmer handle on its systems of publication and information to reduce such issues going forward. To that extent I agree with and accept the applicant's submission at para. 20 of replying submissions that:

"20. In terms of declaratory relief, in Grafton Group PLC v An Bord Pleanála [2023] IEHC 725, the Applicant had sought a declaration that the Board erred in law in failing to put a copy of the EIAR on its website contrary to the requirements of Article 114 of the 2001 Regulations. The court in Grafton Group (Farrell J.) found that on balance, 'it cannot be said that the grant of declaratory relief would serve no purpose, as it corrects the Board's erroneous interpretation of its obligations and there are no other countervailing factors in the instant case which would weigh against the grant of the declaration sought. I do not find that there is a compelling reason to refuse to grant a declaration.' Similarly, a relief, even if declaratory, would serve a purpose here in that it would encourage the avoidance of such barriers to public participation in the future."

94. In the interests of transparency, can I be forgiven for saying that it's tempting – very tempting – to just dismiss core ground 1 altogether on the basis that the relief actually pleaded is without substance, or indeed on the basis that the applicant chose not to make any oral submissions about it, but with all appropriate doubts and hesitations I would be inclined to think that the applicant deserves the event, having demonstrated an infirmity in the publication or making available of the material in an effective manner, such infirmity being within the scope of the pleaded grounds. Thus I would be prepared to relief (albeit not the relief pleaded by the applicant) in the form of a declaration based on relief 1A but relating to the problem at sub-ground 3. That is permissible because the proposed relief falls within the grounds as they are pleaded (*Treascon* per Murray J.). The wording is set out later in this judgment.

EU law issues

Core ground 2 – Inadequacy of assessments – some general legal principles

95. Some relevant legal principles regarding inadequacy of assessments which have been rehearsed in previous caselaw include the following:

(i) Inadequate EIA or AA : AA must dispel all reasonable scientific doubt (art. 6 habitats directive) and EIA must be as complete as possible: judgment of 3 March 2011, *Commission v Ireland*, C-50/09, ECLI:EU:C:2011:109.

(ii) However it is "for the national courts to carry out a thorough and in-depth examination of the scientific soundness of the 'appropriate assessment'…": judgment of 7 November 2018, *Coöperatie Mobilisation for the Environment UA and Vereniging Leefmilieu v College van gedeputeerde staten van Limburg and College van gedeputeerde staten van Gelderland*, joined cases C-293/17 and C-294/17, ECLI:EU:C:2018:882 at para. 101.

(iii) As with any evaluative conclusion by a decision-maker, the AA evaluation is one in the first instance for the decision-maker: Lord Carnwath in *R. (on the application of Champion) v. North Norfolk District Council* [2015] UKSC 52, [2015] 1 W.L.R. 3170 at para. 41; the judgment of Sales L.J. in *Smyth v. Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, [2015] P.T.S.R. 1417 at para. 83; judgment of 7 November 2018, *Holohan v An Bord Pleanál*a, C-461/17, ECLI:EU:C:2018:883 at para. 44; and *R. (on the application of Wyatt) v. Fareham Borough Council* [2022] EWCA Civ 983, [2023] P.T.S.R. 1952, [2022] 7 W.L.U.K. 197, [2023] Env. L.R. 14.

(iv) But the onus of proof to show, normally by evidence, or demonstrating a flaw on face of material) that AA/EIA was defective lies on the applicant. *An Taisce v. an Bord Pleanála & Ors*. [2022] IESC 8, [2022] 2 I.R. 173, [2022] 1 I.L.R.M. 281 *per* Hogan J. at para. 124; *Carrownagowan Concern Group v. An Bord Pleanála* [2024] IEHC 300 (Unreported, High Court, 20th May 2024) at §191(v); *Nagle View Turbine Aware Group v. An Bord Pleanála* [2024] IEHC 603 (Unreported, High Court, 1st November 2024) at para. 115.

(v) The onus of proof cannot be discharged by mere assertion (*Joyce Kemper v. An Bord Pleanála* [2020] IEHC 601, [2020] 11 JIC 2402 (Unreported, High Court, Allen J., 24th November 2020) at §9; *Murphy v. An Bord Pleanála* [2024] IEHC 59 (Unreported, High Court, Bolger J., 6th February 2024) at §14), nor does mere assertion create scientific doubt for AA purposes (*Harrington v. An Bord Pleanála* [2014] IEHC 232, [2014] 5 JIC 0909 (Unreported, High Court, O'Neill J., 9th May 2014); *Murphy v. An Bord Pleanála* [2024] IEHC 59 (Unreported, High Court, Bolger J., 6th February 2024) at §14; *Power v. An Bord Pleanála* [2024] IEHC 108, [2024] 2 JIC 2802 (Unreported, High Court, Holland J., 28th February 2024) at §129; *Duffy v. An Bord Pleanála* [2024] IEHC 558 (Unreported, High Court, Holland J., 27th September 2024) at §40-§41).

(vi) Apart from (i) failure to consider something that the decision-maker was autonomously required to consider, (ii) patent flaw on the face of the materials, or (iii) other legal error, any other form of inadequate consideration or failure to dispel

scientific doubt has to be established by admissible evidence (normally expert evidence) in the judicial review showing either that reasonable doubt was created by the material before the decision-maker at the time (albeit not limited to what was adduced by the applicant specifically), or that such material even if uncontradicted would on its face have created doubt in the mind of a reasonable expert: *An Taisce v. An Bord Pleanála (No. 2)* [2021] IEHC 422, [2021] 7 JIC 0205 (Unreported, High Court, 2nd July 2021) at §7 and §8; *Carrownagowan Concern Group v. An Bord Pleanála* [2024] IEHC 300 (Unreported, High Court, 20th May 2024) at §191(v); *Kennedy v. An Bord Pleanála* [2024] IEHC 570 (Unreported, High Court, 7th October 2024) at §105; that is consistent with the general law: *O'Doherty and Waters v. The Minister for Health* [2022] IESC 32, [2023] 2 I.R. 488, [2022] 1 I.L.R.M. 421 *per* O'Donnell C.J. If admissible evidence is put forward demonstrating scientific doubt arising from the decision-maker's approach, and such evidence is contradicted, in the absence of cross-examination then such a conflict must be resolved against the applicant: *RAS Medical Ltd v. The Royal College of Surgeons in Ireland* [2019] IESC 4, [2019] 1 I.R. 63, [2019] 2 I.L.R.M. 273.

(vii) While the standard for the decision-maker's carrying out of AA is removal of reasonable scientific doubt as to effects on the integrity of European sites by reference to their conservation objectives, and by the application of best scientific knowledge, that does not require the decision-maker to disprove "any effect whatsoever" even those having "no appreciable effect" or "hypothetical risk": opinion of Advocate General Kokott of 29 January 2004 in *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij*, paras. 102-106; judgment of 7 November 2018, *Holohan v An Bord Pleanál*a, C-461/17, ECLI:EU:C:2018:883 at paras. 33–37; Holland J. in *Heather Hill Management Company CLG v. An Bord Pleanála* [2022] IEHC 146, [2022] 3 JIC 1603 (Unreported, High Court, 16th March 2022), citing *R Mynydd Y Gwynt Ltd v The Secretary of State for Business, Energy and Industrial Strategy* [2016] EWHC 2581 (Admin), [2016] 10 W.L.U.K. 396, [2017] Env. L.R. 14 (at para. 259).

(viii) Absence of reasonable doubt therefore does not mean "absolute certainty" (paras. 44, 58, 59, and 61 of the CJEU's judgment and paras. 102 to 108 of the Advocate General's opinion in *Waddenzee*, and the judgment in *Holohan*, at paras. 33-37, Lord Carnwath in *Champion* at para. 41).

Core ground 2 – inadequate AA

96. Core ground 2 is:

"2. The impugned decision is invalid because it contravenes Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ('the Habitats Directive') as transposed by s. 177U and s. 177V of the Planning and Development Act 2000, as amended, and in accordance with the case law of the CJEU by:

- failing to conduct a screening, properly or at all, to assess if the project is likely to have a significant effect on the Slieve Bloom Mountains SPA, either individually or in combination with other plans or projects, to determine if those sites should be subject to Appropriate Assessment ('AA').
- failing to carry out an Appropriate Assessment without lacunae and which contains complete, precise and definitive findings and conclusions capable of dispelling all reasonable scientific doubt as to the effects of the proposed works on the Slieve Bloom Mountains SPA (judgment of 25 July 2018, Grace and Sweetman, C-164/17, EU:C:2018:593, paragraph 39 and the case-law cited).
- failing to identify and examine the implications of the proposed project for species to be found outside the boundaries of the SPA where those implications are liable to affect the conservation objectives of the site. Case 461/17 Holohan.

Further particulars are set out in Part 2 below."

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

"Applicant' Position –

41. The Applicant pleads that the Board failed to comply with art. 6(3) of the Habitats Directive when it screened out the hen harrier at the Stage I screening stage. The Inspector's AA screening, adopted by the Board, states at page 34 (Table 1) 'commuting / foraging hen harrier may utilise the site'. This finding, considered in light of expert submissions from the NPWS and experienced birdwatchers about the significance of the bog area immediately to the north for the conservation of the species (access to which may require the hen harrier to commute through unsafe turbine operations with insufficient

clearance between its flight height and the swept area of the turbine blades), and the proven use of the adjoining bog by a tagged hen harrier from the SPA, ought to have triggered the requirement for Stage II AA. In these circumstances, the Board's failure to conduct an Appropriate Assessment on the impacts of the proposed development on the hen harrier was contrary to Art. 6(3).

42. The screening obligation in Art 6(3) of the Directive has been transposed into Irish domestic law by s. 177U of the Planning and Development Act, as amended, which provides, inter alia that screening for appropriate assessment of an application for consent for proposed development shall be carried out by the competent authority to assess, in view of best scientific knowledge, if that proposed development, individually or in combination with another plan or project is likely to have a significant effect on the European site. Part of the Applicant's case is that the Board erred in failing to have proper regard to the concerns raised by the NPWS in relation to the accuracy of the survey methodology used by the developer. The AA screening conducted by the Board was not conducted in view of best scientific knowledge or objective information, contrary to the Directive and or its domestic transposition. As a result, the screening and AA were flawed, and the Board was deprived of jurisdiction to make the decision.

Board's Position –

43. The Applicant's position is effectively that the NPWS submissions meant there was relevant doubt which was not removed. This is just not the case when one reviews the first submission, then the further information specifically on this point, and then the second submission. The high level approach by the Applicant simply does not engage with the actual issues (which are dealt with in the Board's submissions) and reflects, indeed, the point that the Applicant raised none of these issues at any stage before the planning authority or even the Board (despite bringing their own appeal against a refusal). When properly considered it can be seen that the issues raised by the NPWS were fully dealt with by the Developer and this was fully understood by the Inspector and the Board.

Statkraft's Position –

44. With regard to the Applicant's plea that the Board failed to conduct a proper screening for AA in respect of the Slieve Bloom Mountains SPA, the Inspector screened out the Slieve Bloom Mountain SPA for three reasons, namely (i) absence of recordings of the Hen Harrier, (ii) lack of suitable habitat at the proposed site and (iii) the distance between the proposed site and the Slieve Bloom Mountains SPA. The Inspector provided reasons for deciding that an AA was not required, and such reasons were adopted by the Board.

45. In respect of the single flight recorded in the 'Report on Hen Harrier Winter Roost Surveys at Garryhinch Bog Group, Co. Offaly/Laois 2020/2021 dated March 2021 (and which was submitted to the Council as an appendix to the Further Information Response), it is clear from the Inspector's Report that the Inspector was aware of and considered this additional material (at §3.2.1 and §7.40).

46. The Applicant also alleges that the Inspector, and by extension, the Board, failed to have regard to concerns raised by the NPWS (which is a reference to the Department of Culture, Heritage and the Gaeltacht) regarding the supplemental Hen Harrier survey prepared on behalf of Statkraft. This is not correct. §3.3 of the Inspector's Report, notes that the Department of Culture, Heritage and the Gaeltacht had raised concerns that impacts to Hen Harrier had not been adequately assessed.

47. The Inspector had regard to the second NPWS letter dated 1 April 2021, which was on the Board file. The Inspector clearly recorded the submissions of the prescribed bodies and engaged with the issues raised. The Board's Order also records that, in respect of Appropriate Assessment, the Board considered 'all other relevant submissions'.

48. The Applicant further pleads that the Board failed to identify and examine the implications of the Proposed Development for species outside of the boundaries of the Slieve Bloom Mountains SPA, where those implications are liable to affect the conservation objectives of the SPA. In this regard, the Applicant alleges that the Inspector placed too much weight on a finding that there was no suitable Hen Harrier habitat within the site of the Proposed Development. However, this ignores the additional findings of the Inspector to justify the screening out of the SPA namely, the absence of recordings of the Hen Harrier and the distance between the site of the Proposed Development and the Slieve Bloom Mountains SPA.

49. The Applicant pleads that the Board failed to carry out an AA without lacunae to dispel all reasonable scientific doubt as to the effect of the Proposed Development on the Slieve Bloom Mountains SPA.

50. Statkraft's response to Third Party appeals dated June 2021, confirmed at §3.2.8 that the turbines would have a tip height of 185 meters and a rotor diameter of 170 meters.

> Furthermore, the Collision Risk Model dated December 2019 (Appendix 12.7 to the EIAR) stated at Table 4.1 that a hub height of 100 meters was being applied and that at this height there would be a clearance of 15 metres.
> 51. The screening assessment in the Inspector's Report was carried out on 28 September 2022 - i.e. after Statkraft provided its response to Third Party appeals dated June 2021 to the Board and at a time when the Inspector had the EIAR and appendices).
> 52. Statkraft responded to the Board's request for further information in respect of the turbine description which included as Appendix 2 Drawing No. P1892-0400-0001 C entitled 'Turbine Details'. That response confirmed that consent was being sought for 8 turbines with (i) tip height of 185 m, hub heights of 100 m and rotor diameter of 170 m.
> 53. The Inspector, in her Addendum Report dated 5 December 2023 (i.e. after Statkraft's response to the further information sought by the Board) states at §3.4 that 'the details submitted within the further information request do not have any impact on the Appropriate Assessment carried out in relation to the development and the conclusions of the Appropriate Assessment remain as per my original report.'.
> 54. The Board stated in its order dated 3 January 2024 that it 'agreed with and adopted the screening assessment and conclusion carried out in the Inspector's Report'.
> 55. As such, it is denied that the Inspector and / or Board failed to properly assess the change in circumstances for a transiting Hen Harrier due to the selection of the 100 metres hub height, and it is denied that the Board erred in failing to reverse its previous decision to screen out the Slieve Bloom Mountains SPA when it received Statkraft's Response on 31 January 2023."

98. The issue in the present case is not so much the requirements for AA (see e.g. *Waddenzee* C-127/02, *Kelly v. An Bord Pleanála* [2014] IEHC 400, [2014] 7 JIC 2503 (Unreported, High Court, 25th July 2014) *per* Finlay Geoghegan J.), which are not massively in dispute. Rather things boil down to whether the applicant has demonstrated a defect in AA on the evidence.

99. The applicant tries to manufacture a conflict of jurisprudence between *Reid v. An Bord Pleanála (No. 2)* [2021] IEHC 362 (Unreported, High Court, 27th May 2021) (the board has to exclude doubt not merely make a reasonable decision on AA) and *Environmental Trust Ireland v. An Bord Pleanála* [2022] IEHC 540 (Unreported, High Court, Holland J., 3rd October 2022) (an opponent's expert can't have a veto on AA screening merely by asserting doubt). But there is no conflict. Both propositions are valid and are easily reconciled.

100. The fallacy promoted by the applicant is the misconception that it is the mere assertion of doubt that creates doubt and that thereby invalidates a conclusion of no scientific doubt. But an applicant has to do more than assert – it has to demonstrate the doubt, and to do so by reference to the material before the decision-maker or matters that the decision-maker had to consider autonomously.

101. In principle the board can prefer the position of one expert to another. But if the terms of reference of so doing involve the exclusion of doubt, the board must do so in a way that achieves that objective rather than being merely reasonable (because other views may also be reasonable – "reasonable" primarily means having supporting evidence, so if there is conflicting evidence then a multiplicity of views would pass muster on that test – that wouldn't satisfy the habitats directive's requirement to exclude scientific doubt). As the notice party correctly submits (submissions para. 36):

> "The judgment of the CJEU in Case C-461/17, Holohan v An Bord Pleanála (ECLI:EU:C:2018:883) supports this position and as stated at §52 of that judgment, Article 6(3) of the Habitats Directive must be interpreted as meaning that, where the competent authority rejects the findings in a scientific expert opinion recommending that additional information be obtained, the 'appropriate assessment' must include an explicit and detailed statement of reasons, capable of dispelling all reasonable scientific doubt concerning the effects of the work envisaged on the site concerned."

102. How then does an applicant displace a board's preference for the views of one expert over another? Unfortunately the normal way to do that (apart from some patent error on the face of the material) is to put up an expert in the judicial review to state that a reasonable expert in the position of the board would have seen the conclusion as flawed. Such a statement is evidential but it isn't enough if contradicted because the applicant bears the onus of proof (*Cork County Council v. Minister for Housing, Local Government and Heritage (No. 1)* [2021] IEHC 683 (Unreported, High Court, 18th November 2021) at §57) – the applicant still has to prove that proposition by cross-examination.

103. Generally in the present case, the applicant falls at the hurdle of failing to provide evidence to demonstrate doubt. Error in the board's assessment can't simply be read in because the board disagreed with the NPWS, provided that reasons are given. If reasons are given, which they were here, an applicant can't rely on assertion but (unless the reasoning is flawed on its face) has to dislodge those evidentially, for example by proving scientific doubt: see generally *Harrington v. An*

Bord Pleanála [2014] IEHC 232 (Unreported, High Court, O'Neill J., 9th May 2014); *Joyce Kemper v. An Bord Pleanála* [2020] IEHC 601 (Unreported, High Court, Allen J., 24th November 2020) at §9; *An Taisce v. An Bord Pleanála (No. 2)* [2021] IEHC 422 (Unreported, High Court, 2nd July 2021) at §7 and §8; *Murphy v. An Bord Pleanála* [2024] IEHC 59 (Unreported, High Court, Bolger J., 6th February 2024) at §14; *Power v. An Bord Pleanála* [2024] IEHC 108 (Unreported, High Court, Holland J., 28th February 2024) at §129; *Carrownagowan Concern Group v. An Bord Pleanála* [2024] IEHC 300 (Unreported, High Court, 20th May 2024) at §191(v); *Duffy v. An Bord Pleanála* [2024] IEHC 558 (Unreported, High Court, Holland J., 27th September 2024) at §40-§41; *Kennedy v. An Bord Pleanála* [2024] IEHC 570 (Unreported, High Court, 7th October 2024) at §105.

104. The CJEU decision in the judgment of 15 June 2023, *Eco Advocacy CLG v An Bord Pleanála,* C-721/21, ECLI:EU:C:2023:477, is important here given that the present case is to a substantial extent a re-run of the arguments rejected in that case:

> "The fifth question
>
> 31 By its fifth question, which it is appropriate to examine before the fourth question, the referring court asks, in essence, whether Article 6(3) of Directive 92/43 must be interpreted as meaning that, where a competent authority of a Member State decides that an appropriate assessment is not necessary, it is obliged to state, in an explicit and detailed manner, the reasons on which it bases its decision, so as to dispel all reasonable scientific doubt concerning the effects of the proposed plan or project for the site concerned and to remove expressly and individually each of the doubts raised in that regard during the public participation process.
>
> 32 Neither Article 6(3) of Directive 92/43 nor any other provision of that directive lays down requirements as to the statement of reasons for decisions taken pursuant to Article 6(3).
>
> 33 That said, it should be recalled, in the first place, that the right to good administration, in so far as it reflects a general principle of EU law, has requirements that must be met by the Member States when they implement EU law. Among those requirements, the obligation to state reasons for decisions adopted by the national authorities is particularly important, since it puts their addressees in a position to defend their rights under the best possible conditions and decide in full knowledge of the circumstances whether it is worthwhile to bring an action against those decisions. It is also necessary in order to enable the courts to review the legality of those decisions (judgment of 9 November 2017, *LS Customs Services*, C-46/16, EU:C:2017:839, paragraphs 39 and 40 and the case-law cited).
>
> 34 In the second place, Article 6(3) of Directive 92/43 establishes an assessment procedure intended to ensure, by means of a prior examination, that a plan or project not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site (judgment of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, paragraph 117 and the case-law cited).
>
> 35 Article 6(3) distinguishes two stages in the prescribed assessment procedure.
>
> 36 The first, the subject of that provision's first sentence, requires Member States to carry out an appropriate assessment of the implications for a protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on the site. The second, the subject of the second sentence, which arises following the appropriate assessment, allows such a plan or project to be authorised only if it will not adversely affect the integrity of the site concerned, subject to the provisions of Article 6(4) of Directive 92/43 (judgment of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, paragraph 119 and the case-law cited).
>
> 37 In that regard, first, it follows from the Court's case-law that the requirement of an appropriate assessment of the implications of a plan or project under Article 6(3) of Directive 92/43 is conditional on there being a likelihood or a risk that the plan or project will have a significant effect on the site concerned. Having regard to the precautionary principle, in particular, such a risk is deemed to be present where it cannot be ruled out, having regard to the best scientific knowledge in the field, that the plan or project at issue might affect the conservation objectives for the site. The assessment of that risk must be made in the light, in particular, of the characteristics and specific environmental conditions of the site concerned by such a plan or project (judgment of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, paragraph 134 and the case-law cited).
>
> 38 Second, it is settled case-law that an appropriate assessment of the implications of a plan or project implies that, before the plan or project is approved, all the aspects of the

plan or project which can, either individually or in combination with other plans or projects, affect the conservation objectives of that site must be identified, in the light of the best scientific knowledge in the field. The competent national authorities are to authorise an activity only if they have made certain that it will not adversely affect the integrity of that site. That is so where there is no reasonable scientific doubt as to the absence of such effects (judgment of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, paragraph 120 and the case-law cited).

39 In accordance with the case-law, that assessment may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the site concerned (judgments of 25 July 2018, *Grace and Sweetman*, C-164/17, EU:C:2018:593, paragraph 39 and the case-law cited, and of 7 November 2018, *Holohan and Others*, C-461/17, EU:C:2018:883, paragraph 49).

40 Such a requirement entails that the competent authority should be in a position, following an appropriate assessment, to state to the requisite legal standard the reasons why it was able, prior to the granting of the authorisation at issue, to achieve certainty, notwithstanding any opinions to the contrary expressed, that there was no reasonable scientific doubt with respect to the environmental impact of the work envisaged on the site concerned (see, to that effect, judgment of 7 November 2018, *Holohan and Others*, C-461/17, EU:C:2018:883, paragraph 51).

41 Such requirements to state reasons must also be satisfied where, as in the present case, the competent authority approves a project likely to have an effect on a protected site without requiring an appropriate assessment within the meaning of Article 6(3) of Directive 92/43.

42 It follows that, although, where a competent authority decides to authorise such a project without requiring an appropriate assessment within the meaning of that provision, EU law does not require that authority to respond, in the statement of reasons for such a decision, one by one, to all the points of law and of fact raised by the interested parties during the administrative procedure, the said authority must nevertheless state to the requisite standard the reasons why it was able, prior to the granting of such authorisation, to achieve certainty, notwithstanding any opinions to the contrary and any reasonable doubts expressed therein, that there was no reasonable scientific doubt as to the possibility that that project would significantly affect that site.

43 In the light of the foregoing considerations, the answer to the fifth question is that Article 6(3) of Directive 92/43 must be interpreted as meaning that although, where a competent authority decides to authorise a plan or project likely to have a significant effect on a site protected under that directive without requiring an appropriate assessment within the meaning of that provision, that authority is not required to respond, in the statement of reasons for its decision, to all the points of law and of fact raised during the administrative procedure, it must nevertheless state to the requisite standard the reasons why it was able, prior to the granting of such authorisation, to achieve certainty, notwithstanding any opinions to the contrary and any reasonable doubts expressed therein, that there was no reasonable scientific doubt as to the possibility that that project would significantly affect that site."

105. So there is no duty of point-by-point rebuttal. The board has to state to the requisite standard its reasons why it was able to exclude doubt.

106. Doubt is therefore not to be inferred merely because there is a contrary expert, NGO or other view that requires rebuttal. It is up to the decision-maker by giving reasons to come to a decision on removal of doubt.

107. This is the logic of Holland J.'s judgment in *Environmental Trust Ireland v. An Bord Pleanála* [2022] IEHC 540 (Unreported, High Court, 3rd October 2022) at para. 264 – the fact that an expert sees a reasonable scientific doubt isn't determinative. The board or other decision-maker must first assess whether such a view creates a reasonable doubt. If it does, it isn't enough if there is also science that reasonably supports the developer. That's how Holland J.'s view is readily reconcilable with the point that a mere reasonableness standard isn't enough.

108. In the present matter, previous official surveys had taken place between 2013 and 2016. The AA screening report showed no Hen Harrier observed on-site in surveys carried out. Appendix 12.4 s. 2.5 refers to "anecdotal evidence from a local that a hen harrier was observed on several occasions on the cutaway bog immediately north-east of the proposed wind farm site, hen harrier roost checks were undertaken in this area".

109. The NPWS' first observations suggested that surveys were inadequate. Mr Ricky Whelan and Birdwatch Ireland noted the last data had been collected in 2016. Mr Whelan's submission to

the council of 20th March 2020 referred to a sighting by him on 28th October 2019 on the first of three site visits.

110. The board requested further information. It can be reasonably assumed that at the time of requesting the further information, the board was not satisfied that all reasonable scientific doubt as to effect on European sites had been excluded.

111. Following the FI there was a second observation from the NPWS, making *inter alia* particularly relevant points:

(i) the guidance on which the surveys were done specifies that watches at roosts should be done at least once a month from October to March but the developer's efforts were limited to five months; and

(ii) the "known roost" at Garryhinch bog has not been identified.

112. The inspector says at para. 7.40:

"7.40 Having reviewed the NIS, the supporting documentation and the further information submitted, I am generally satisfied that it provides adequate information in respect of the baseline conditions, identifies the potential impacts, uses best scientific information and knowledge and provides details of mitigation measures. I am satisfied, that the information provided is generally sufficient to allow for appropriate assessment of the development.

Stage 1 Screening

7.41 Notwithstanding the submission of a NIS, it is prudent to review the screening process to ensure alignment with the sites brought forward for AA and to ensure that all sites that may be affected by the development have been considered.

7.42 Having regard to the information and submissions available, nature, size and location of the proposed development and its likely direct, indirect and cumulative effects, the source pathway receptor principle and sensitivities of the ecological receptors, I consider the following European Sites are relevant to include for the purposes of initial screening for the requirement for Stage 2 appropriate assessment on the basis of likely significant effects."

113. The table of sites includes the following in relation to Slieve Bloom SPA:

"

European Site Name & Code	Distance	Qualifying Interest	Source-pathway-receptor	Considered further in screening
Slieve Bloom SPA (Site code 004160)	c.4.8km south west of site.	Hen Harrier (Circus cyaneus) [A082]	Commuting Hen Harrier may pass over the site.	Yes, commuting / foraging hen harrier may utilise the site.

"

114. The report goes on:

"Screening Determination

7.43 The Screening Report submitted screens out all Natura 2000 sites on the grounds that there is a lack of suitable habitat in the case of the Slieve Blooms SPA and that the others are removed from the development and will not be affected by disturbance with the exception of River Barrow and Nore SAC. In relation to the Slieve Blooms SPA of which Hen Harrier the single qualifying interest I note that Hen Harrier were not recorded at the site during extensive bird surveys. It is also mentioned within the EIAR that there is no suitable Hen Harrier habitat within the development site. Hen harriers are ground nesting birds that breed in moorland, young conifer plantations and other upland habitats at elevations of between 100 and 400 metres above sea level. The proposed windfarm is between 80m od to 73m od. The core foraging range for hen harrier during the breeding season is 2km, with a maximum range of 10km (SNH, 2016). In the majority cases, the core range should be used when determining whether there is connectivity between the proposal and the qualifying interests. Maximum distances should only be used in exceptional circumstances e.g. if there is suitable habitat within the proposed development site and no other suitable foraging habitat exists outside the site. As the proposed wind farm site does not have suitable habitat, the core foraging range of 2km will be used for the assessment. Hen Harrier typically only travel 1km to source alternative nest sites (SNH, 2016). Given the absence of hen harrier recordings during the ornithological surveys and the lack of suitable habitat at the proposed wind farm site, in addition to the distance between the proposed wind farm and the SPA, it is considered that no effects will occur by virtue of disturbance or displacement on hen harrier or the Slieve Blooms SPA.

7.44 It is for this reason that the Slieve Blooms SPA was screened out. I consider the applicants approach in this regard to be reasonable and note that the Council did not raise any concerns in this regard within the assessment of the application.

> 7.45 I have considered the European sites as listed above and consider that the applicant's approach is reasonable. Based on my examination of the NIS report and supporting information submitted, the scale of the development, its likely effects by way of the potential to contaminate or create disturbance to qualifying interests of the River Barrow and Nore SAC (002162) by way of water pollution and sedimentation during construction, I would conclude that a Stage 2 Appropriate Assessment is required for this Natura 2000 site. It is important to note that mitigation measures have not been considered in the Appropriate Assessment Screening"

115. In summary, it is not the case that impacts on the SPA *via* the Hen Harrier were screened out on an unlawful or non-factual basis. There were three reasons for this decision:

(i) Lack of relevant observations – in particular lack of observed flight path of Hen Harrier on the actual site within the range of the turbines. Insofar as the applicant asserts that the inspector failed to have regard to the fact that Hen Harrier may use the site, this is manifestly unsustainable on the facts. Insofar as the applicant contends that the board erred in preferring Statkraft's analysis to that of the NPWS as to the extent of surveys required, that is a scientific complaint which has to be established evidentially. The applicant hasn't done that. If the applicant's complaint is a failure to have regard to the NPWS submissions generally, or the second submission in particular, that hasn't been established evidentially either.

(ii) Lack of suitable habitat on the site – that was accepted by the Environmental Assessment Unit (**EAU**).

(iii) Distance between the site and the SPA. That is simply a fact.

116. Insofar as it is alleged that the board failed to consider impacts on Hen Harrier outside SPA boundaries, that hasn't been established evidentially. Indeed as noted the inspector makes express reference to the possibility of Hen Harrier using the site. The inspector's approach must be taken as an implicit (and indeed virtually explicit, given her wording) acceptance of the developer's science. That includes §4.4 of "Report on Hen Harrier Winter Roost Surveys at Garryhinch Bog Group, Co. Offaly/Laois 2020/2021", dated March 2021, submitted as part of the further information response to the council which states:

> "The assertion that hen harriers from the SPA will fly through the proposed turbines en route to the Garryhinch subsite is speculative. Given that no hen harriers have been recorded within the proposed Dernacart wind farm site over two years of bird surveys, it strongly suggests that this is not the case on the basis of the scientific data gathered. We also believe that the assertion that hen harriers will fly through the proposed turbines is likely to be incorrect for a number of additional reasons. First, the birds can easily enter the Garryhinch subsite from the northwest of Garrymore subsite, avoiding the turbines altogether, which seems likely, given the documented 250-500 m avoidance distance for hen harriers flying near operational wind turbines in the scientific literature (Pearce-Higgins, et al. 2009). Second, if the birds do indeed follow the rivers Barrow or Owenass out of the SPA, they may well enter the Garryhinch subsite from the northwest or southeast, again, avoiding the turbines altogether. Third, the turbines are located at least 500 m from each other, providing sufficient space for hen harriers to pass between turbines."

117. Insofar as the applicant places reliance on the *2022 National Survey of breeding Hen Harrier in Ireland, Irish Wildlife Manual 147*, dated February 2024 (IWM 147), that post-dates the board's decision and logically is not a ground to quash that decision.

118. Insofar as it is argued that the board or inspector merely adopted the developer's stance without consideration, such a proposition has to be established evidentially. The applicant hasn't done that: see *Carrownagowan v. An Bord Pleanála* [2024] IEHC 300 (Unreported, High Court, 20th May 2024) at §157.

119. Insofar as the applicant diligently trawls the caselaw for mentions of Hen Harrier, that is of course informative but doesn't get us very far. Assessment of impacts on any species are a matter to be judged by reference to the evidence in the individual case.

120. To further analyse the applicant's point here it will be appropriate to look in detail at the points made in the sub-grounds. To state the obvious, while the applicant's case has evolved and mutated across the various versions offered, it's the pleaded case that ultimately counts.

121. Sub-ground 5 is:

> "The Board at its meeting held on 19 December 2023 recorded in its Board Direction that it 'agreed with and adopted the screening assessment and conclusion carried out in the Inspector's report'; however, the Inspector erred and led the Board into error, and the Board erred in conducting an Appropriate Assessment only on the River Barrow and River Nore SAC located c. 600 metres to the west of the proposed development when it also should have conducted an Appropriate Assessment on the Slieve Bloom Mountains SPA located c. 4.7km to the southeast of the development, and erred in having no proper regard to the

conservation objectives for the Hen Harrier bird species when it knew or ought to have known that an Appropriate Assessment ('AA') of the implications of the proposed windfarm for the Slieve Bloom Mountains SPA in view of the site's conservation objectives was required because it could not be excluded, on the basis of objective information, that the proposed development, individually or in combination with other plans or projects, would have a significant effect on a the European site."

122. That is largely a place-holding complaint which asserts rather than explains why impact on Slieve Bloom Mountains SPA shouldn't have been screened out. The actual basis of that argument is in later sub-grounds.

123. Sub-ground 6 is:

"The Inspector herself confirmed at Table 1.0 of her report that 'commuting / foraging hen harriers from the Slieve Bloom Mountains SPA may utilise the site' of the proposed development and the Applicant here pleads that this was a sufficient finding in law for her to conclude that a Stage II Appropriate Assessment ought to have been carried out, yet she acted contrary to art 6(3) of the Habitats Directive and s.177U of the Planning and Development Act when at paragraph 7.43 of her report she proceeded to then screen out the Hen Harrier from AA for erroneous reasons and the Board was led into error by adopting the Inspector's screening."

124. Again that is effectively place-holding – asserting that the reasons are inadequate doesn't tell us why the reasons were inadequate. For that plea we need to look at subsequent grounds.

125. Sub-ground 7 is:

"The Inspector erred when she stated: 'In relation to the Slieve Blooms SPA of which Hen Harrier the single qualifying interest I note that Hen Harrier were not recorded at the site during extensive bird surveys.' In making this statement and in relying on it as a reason for screening out the SPA from further assessment, the Inspector failed to have regard to the Hen Harrier flight was recorded in a supplemental survey conducted by the Developer's consultants in 2021 and reported as Further Information to the Planning Authority in March 2021. This Hen Harrier was identified flying over the peatland directly adjoining the windfarm and close to the proposed location of turbines. If this was a foraging or roosting Hen Harrier from the SPA then its flight from the SPA could have taken it through the windfarm site. Furthermore, the scientific experts in the National Parks and Wildlife Service (NPWS), on assessing the FI response, was of the opinion that the Developer's survey methodology was not appropriate, and it was possible that other Hen Harriers were present during the survey but undetected, and the Inspector erred by not having any regard to the views of the NPWS regarding the supplemental Hen Harrier survey and led the Board into error."

126. This does contain an acceptably specific complaint:

(i) "[T]he Inspector failed to have regard to the Hen Harrier flight was recorded in a supplemental survey conducted by the Developer's consultants in 2021 and reported as Further Information to the Planning Authority in March 2021." The problem with that is that the inspector did not fail to have regard to the flight. That is recorded in the further information which was before the inspector. The applicant confuses lack of narrative discussion with lack of consideration. The latter has not been proved and does not follow from the former.

(ii) "This Hen Harrier was identified flying over the peatland directly adjoining the windfarm and close to the proposed location of turbines. If this was a foraging or roosting Hen Harrier from the SPA then its flight from the SPA could have taken it through the windfarm site." But that is scientific comment on the material before the decision-maker, and moreover comment that is speculative on its own terms. Any lacuna or scientific doubt arising from this issue would have had to have been established evidentially, which hasn't been done. One has to also note the very light nature of the evidence relied on by the applicant. All they have on the relevant subsite itself is a single Hen Harrier. And even that flight was north of and clear of the blade range of the turbines. That isn't a whole lot to go on even without the other problems.

(iii) "Furthermore, the scientific experts in the National Parks and Wildlife Service (NPWS), on assessing the FI response, was of the opinion that the Developer's survey methodology was not appropriate, and it was possible that other Hen Harriers were present during the survey but undetected, and the Inspector erred by not having any regard to the views of the NPWS regarding the supplemental Hen Harrier survey and led the Board into error." Again, this complaint falls foul of the confusion already referred to, namely the problem that the inspector and board don't have to

narratively discuss everything. The pleaded complaint is one of lack of consideration – that is clearly incorrect and certainly hasn't been made out on the facts here.

127. Sub-ground 8 is:

"Regarding the Developer's further information on the risk to the Hen Harrier species, the NPWS in its second submission to Laois County Council dated 1 April 2021, stated the following about the Garryhinch roost site located within a bogland area which adjoins the proposed development:

'The Garryhinch winter roost site has been the subject of several years of targeted surveys as part of the Irish Hen Harrier Winter Survey. Up to six hen harriers have been recorded roosting communally at this site, including a juvenile bird tagged in the Slieve Bloom Mountains Special Protection Area (SPA) which lies within 8 km of the proposed development site. This bird provides evidence of a pathway between the SPA and the nearby roost site.

The NPWS notes that a Hen Harrier Winter Roost Survey of Garryhinch Bog took place the (sic) 2020/2021 on six dates (30/10/2020, 19/11/2020 11/12/2020, 13/01/2021, 26/01/2021) from the end of October 2020 and until the end of February 2021, totalling 18 hours of surveying, to supplement winter roost checks conducted on 26/10/2018, 22/11/2018 and 11/12/2018.

As pointed out in the NPWS's original submission, Scottish Natural Heritage recommend survey for a minimum of two years to allow for variation in bird use between the years. The NPWS considers the winter roost checks conducted on 26/10/2018, 22/11/2018 and 11/12/2018 were inadequate, given the size of the area of suitable winter roost habitat adjacent to this proposed wind farm development, and should not be counted as part of the two years of surveying recommended. Therefore only 5 months of adequate surveying has taken [place].

The Further Information [submitted to Laois County Council by the Developer] points to the fact that the 2020/2021 winter roost surveys recorded only a single hen harrier at the Garryhinch bog site subsite across 18 hours of survey time over five months as evidence of its insignificance. It is noted that guidance on which the survey was based specifies that watches at roosts should be carried out at least once a month from October to March on the first day of the month or as close to the first as possible. The NPWS notes that any potential hen harrier usage of the roost site in most of October 2020 and March 2021 was missed due to the timing of the survey. O'Donoghue (2021) found that over a third of known roosts were occupied on less than 50% of watches and points out that this is an important consideration for surveys and investigations to inform planning and land-use change decisions. Satellite tracking data has shown that individual hen harriers may use different roosts in different years, perhaps dependent on site specific circumstances or other factors yet to be confirmed.

Scottish Natural Heritage advise that roost sites within 2km of proposed development should be identified. The known roost site at Garryhinch Bog has not been identified. The single hen harrier sighted was lost from view before it could have, potentially, been followed back to a roost site. The bird appears to have been lost from sight within the vantage point 2 viewshed., during daylight hours at 15:34 (dusk was 17:07 on this date)'

Other errors are also identified by the NPWS in its letter. The matters referred to by the NPWS constitute a lacuna and reasonable scientific doubt in respect of the effects on the Hen Harrier. In the circumstances the Board lacked jurisdiction to grant planning permission for the proposed development."

128. The problem with this is that it assumes a direct read-across from a submission expressing doubt to a conclusion of doubt. That is incorrect – and the CJEU has definitively answered that in *Eco Advocacy*.

129. The law is not that an adverse submission creates doubt, but that the decision-maker has to do more than find reasonable supporting material in the event of conflict, it has to come to a lawful conclusion of no doubt and to give reasons for a conclusion of no doubt. The inspector did that on behalf of the board, and if the applicant wants to displace that, evidence would be required. That wasn't forthcoming.

130. Sub-ground 9 is:

"The NPWS in its letter of 1 April 2021 concluded:

'Given the inadequacy of the surveying pointed out above, the NPWS is of the opinion that this conclusion and any subsequent categorisation of the importance of the winter roost site for hen harrier is not supported by best scientific evidence. The NPWS remains concerned that the impacts of the proposed project, on the conservation objectives of the Slieve Bloom Mountains SPA, have not been adequately assessed.'"

131. That is just a statement of fact as to the NPWS opinion. In itself it doesn't prove invalidity.

132. Sub-ground 10 is:

"Furthermore, the Inspector placed too much weight on her finding that there is no suitable Hen Harrier habitat within the site for the proposed windfarm and failed to identify and examine the implications of the proposed project for Hen Harriers found outside the boundaries of the SPA and outside the windfarm, where those implications are liable to affect the conservation objectives of the site, including the risk of birds from the SPA flying through the windfarm site to access the known Hen Harrier roost site immediately to the north. The SPA is located to the south west of the windfarm, and the two bogs where Hen Harriers are known to have visited from the SPA are located directly to the north and north east of the windfarm site (the extensive records of hen harriers in that area include a record of a hen harrier identified which had been tagged in the SPA). There is a possibility that the birds would have to fly through the windfarm to reach the winter roost site on the bog and the Inspector erred in failing to consider this possibility while screening out the Hen Harrier and the Board erred in adopting her conclusions. The Board has failed to carry out and record a lawful screening assessment as required by national and EU law (and in particular in accordance with Kelly and the Opinion of Advocate General Sharpeston [*sic*] in Sweetman)."

133. That is scientific criticism of the board. Complaints like "too much weight" or "[t]here is a possibility" are factual assertions which need to be demonstrated by expert evidence. That hasn't been done.

134. Sub-ground 11 is:

"The Inspector erred in failing to have regard to the significant scientific doubt raised by the NPWS. The Inspector's report does not appear to refer to the second NPWS letter at all, i.e. the letter of 1 April 2021 submitted by the NPWS in response to the further information submitted by the developer to the Board. The NPWS highlighted the absence of best scientific evidence to support the Developer's conclusion that there is no longer a winter roost for the Hen Harrier on Garryhinch Bog. The concerns of the NPWS scientists that there has been no adequate assessment of the impacts of the proposed project on the conservation objectives of the Slieve Bloom Mountains SPA, was not considered by the Inspector and as a result her report led the Board into error."

135. This repeats the errors in the foregoing grounds and fails for the same reasons. The claim of the point being "not considered" confuses consideration with narrative. The inspector isn't required to "refer" to the NPWS correspondence in the sense pleaded, that is by narrative discussion, as long as reasons are given for excluding doubt. That was done. The CJEU has addressed this in *Eco Advocacy*, where the same applicant made the same point, unsuccessfully, about the board's failure to expressly address submissions by specific bodies. Yet losing so definitively at apex level in Europe hasn't taken a feather out of the applicant, to stick with an ornithological metaphor.

136. Sub-ground 12 is:

"At paragraph 7.44 of her report, the Inspector erred by misinterpreting the planning reports of Laois County Council, when she states that 'the Council did not raise any concerns [regarding the Slieve Bloom SPA] within the assessment of the application'. Laois County Council incorporated into its Request for Further Information the concerns raised by the NPWS in its first letter to the Planning Authority dated 24 March 2020. When the Further Information Response was received, the Council sent it to the NPWS for further comment. The reply of the NPWS dated 1 April 2021 was incorporated into the final report of the Council's planner. The planning report sets out in full the conclusions of the NPWS. No AA screening was conducted by Laois County Council because there was no development consent granted, due to the decision to refuse planning permission because of gaps in the EIAR information on bats. The Laois planner recommended refusal on the basis of a 'critical failing in the assessment process' for bats. The fact that the reasons for Laois deciding to refuse was on this very narrow point when there were so many other weaknesses in the Developer's proposal, including in relation to the assessment of other ecology, was the basis of the other two appeals to the Board including that of this Applicant. Laois County Council did not raise the NPWS concerns any further than it did because it did not undertake an AA screening on the effects of its decision to refuse planning permission."

137. The court should read a decision as valid rather than invalid if a valid reading is reasonably available: see *MR (Bangladesh) v. The International Protection Appeals Tribunal & Anor* [2020] IEHC 41 (Unreported, High Court, 29th January 2020) at §7; *Rostas v. DPP* [2021] IEHC 60 (Unreported, High Court, 9th February 2021) at §50; *O'Donnell v. An Bord Pleanála* [2023] IEHC 381 (Unreported, High Court, 5th July 2023); Phelan J. in *St. Margaret's Recycling v. An Bord Pleanála* [2024] IEHC 94 (Unreported, High Court, 20th February 2024) at §57; *Mulloy v. An Bord Pleanála* [2024] IEHC 86 (Unreported, High Court, Holland J., 12th March 2024) at §178; *Save Roscam v. An Bord Pleanála (No. 6)* [2024] IEHC 335 (Unreported, High Court, 7th June 2024) at §64.

138. The applicant's submission reads the decision the other way around as invalid rather than valid. The decision can simply be read as a statement of fact that the SPA was not a ground of refusal of the application by the council. That is simply a fact.

139. Sub-ground 13 is:

> "The Board was not satisfied with the lack of definition of the project defined in the planning application as being 'up to 8 turbines' and 'up to 185 metres' tip height and sought further information from the Developer about the turbine description. The information in the Developer's original AA Screening Report was collated in the absence of any decision on final hub height and rotor diameter. There was no decision on the final design of the turbines when the AA Screening report was prepared in December 2019 or when it was amended in March 2021 following the FI response to Laois. The noise assessments in the EIAR had assumed that turbines with a hub height of 106 metres would be selected."

140. Unfortunately this ground suffers from similar confusions. It assumes rather than provides a basis to establish that the AA was defective because the development had been particularised further to the original application. That doesn't follow. The mere fact that the design was somewhat more defined when approved doesn't have the effect that having regard to earlier material renders the decision invalid. We can also note that the ground provides no pathway between the issue raised and *certiorari* – because there is no such pathway.

141. Sub-ground 14 is:

> "When the Developer, in response to the Board's request for further information on the turbine specification, confirmed for the first time in January 2023 that the turbine to be installed would be 170 m in diameter and have a hub height of 100 m, it ought to have been clear to the Inspector that this would have meant that the turbine blades would sweep closer to the ground than if the hub height had been 106 metres for a 185 metre high turbine, one of the options that had been considered in the EIAR. The effect of the confirmed turbine dimensions is that the turbine will sweep as close as 15 metres to the ground, placing transiting Hen Harriers at risk of colliding into a blade or being swept up into the rotating blades. The Inspector in failing to recognise this risk erred in having no regard to the observation of the Developer's consultant, at page 27 of the March 2021 Further Information Response to the Planning Authority, who said: 'The scientific literature shows that hen harriers are renowned for flying at low heights of 10-20 m, which is usually below rotor swept heights' which suggested that the understanding of the authors of the original AA Screening Report and the amended AA Screening Report from March 2021 was that the clearance would in fact be greater than 20 metres, i.e. that the normal flight line of the Hen Harrier would be below the turbine blades. This would have been the case had the 106m hub height option in the EIAR (assumed for the assessment of noise) been selected. A turbine of 185m tip height and hub of 106 metres would have ground clearance of 27 metres, putting a transiting hen harrier flying in a band of 10 to 20 metres over ground at less risk of collision. The Inspector and the Board erred in failing to properly assess the change in circumstances for a transiting Hen Harrier due to the selection of the 100 m hub height rather than the 106 m hub height identified as one of the options in the original EIAR and erred when neglecting to reverse its previous decision to screen out the Slieve Bloom Mountains SPA when it received from the Developer in January 2023 confirmation of the turbine dimensions."

142. The error is well-hidden here but it's there alright. When the applicant pleads that the FI "suggested that the understanding of the authors of the original AA screening report and the amended AA screening report from March 2021 was that the clearance would in fact be greater than 20 metres", it is impermissibly seeking to advance factual matters by legal argument. Such a suggestion isn't evidence and the point hasn't been established. The applicant hasn't in fact demonstrated that there was any "change in circumstances" whereby the developer's assessment related to a higher blade height. On the contrary, Statkraft's response to third party appeals dated June 2021, at §3.2.8 refers to a clearance of 15 metres and the collision risk model dated December 2019 (Appendix 12.7 to the EIAR) stated at Table 4.1 that a hub height of 100 metres was being applied and that at this height, there would be a clearance of 15 metres. So that was the standard all along.

143. The more fundamental reason why Hen Harrier were not seen as a significant issue was the lack of Hen Harrier on the site, with no suitable roosting areas on site (not disputed by NPWS), a substantial distance to the SPA (not disputable) and very limited specimen sighting on the site (possibly disputed but the inspector's report hasn't been shown to breach the test in *Eco Advocacy*). Generally under this heading we need to recall that the habitats directive does not require "absolute certainty" because that would be "disproportionate": Advocate General Kokott in *Waddenzee* (in paras. 102 to 106 of her opinion).

144. The applicant in replying submissions doubles down on the various criticisms of the board's treatment of the NPWS' views, but doesn't convincingly address the problem that such expert scientific matters are not matters for legal submission but require evidence – evidence that is lacking here.

145. The applicant sought to explain the lack of an expert by saying they had tried to get one but experts wouldn't give evidence against wind farm developers for fear of not getting work in the field. That is not something I can resolve on the basis of a mere concern expressed in oral submissions, but such a concern, even if it has some validity, doesn't get an applicant over an evidential gap in their application. Mr Cummins is not independent of the applicant obviously, and Mr Whelan was actively involved in submissions on the project (on 20th March 2020), so neither are independent experts in the sense of the caselaw such as to make their opinions admissible.

146. Finally, as noted above, there are elements of significant mutation across the ten versions of the applicant's case (set out in the annexes). But the only version that critically matters for the purposes of a reasoned judgment is that pleaded in the statement of grounds. Insofar as other points were made, the matters stated generally in this judgment apply as to why those points are rejected, but in any event insofar as unpleaded points were made, the rejection of such points doesn't require further reasons.

Discretion

147. Paragraph 41 of the board's statement of opposition pleads the issue of discretion, as does the notice party at para. 42 of its statement.

148. The relevant factors include the following as well as all other relevant circumstances and submissions.

149. Firstly as in *Reid v. An Bord Pleanála (No. 7)* [2024] IEHC 27 (Unreported, High Court, 24th January 2024) at para. 74, the notice party is blameless in relation to the wording of the decision, and it would be disproportionate to quash the decision on the particularly fact-specific point here. The notice party consulted Birdwatch Ireland and the EAU, and did extensive field surveys, as well as responding in detail to points made. If the inspector could be criticised for not having more elaborate reasoning, which I don't accept, it would be disproportionate to view that as a ground for *certiorari*.

150. Also as in *Reid (No. 7)* at para. 75, "it is highly relevant for the purposes of such a discretionary exercise that the applicant's appeal to the board didn't make any specific points about appropriate assessment" in relation to Hen Harrier, which is the focus of submissions to the court despite never having been agitated as an issue by the applicant in its appeal.

151. Finally, as the board submitted, it hasn't been shown that further assessments would have made any difference.

152. In the circumstances here, in the event that (counterfactually) I was satisfied that there was an omission in assessment, I would have exercised discretion against *certiorari*.

153. The applicant complained that the respondents didn't plead the basis of discretion and thus that they are not entitled to argue for such an order. I think the answer to that is that it is highly desirable that the grounds for discretion are pleaded, but failure to particularise the possible grounds isn't absolutely fatal in that specific context given the inherent nature of discretion itself. While it's true that the rules of court in relation to pleadings are in principle equally demanding on applicants and opposing parties, in a limited number of situations there is a flexibility inherent in the nature of the very point being made.

154. If I am wrong about that and if this is not pleaded, I would exercise discretion of my own motion. The court itself has to be satisfied as to the correctness of granting relief: *Ballyboden Tidy Towns Group v. An Bord Pleanála* [2024] IESC 4 (Unreported, Supreme Court, Donnelly J., 22nd February 2024). That implies that the court has an entitlement to exercise discretion itself even if a party doesn't plead that.

155. The applicant misconstrues *Ballyboden* by submitting that "Particularly in the light of the sensitivities of the Hen Harrier outlined herein and the fact in the instant case we are dealing only with a Stage 1 AA, it is respectfully submitted that the Court cannot lawfully exercise its discretion to overlook the glaring lacunae in the within assessment". I am not overlooking glaring lacunae. I am saying that if, counterfactually, the board's reasoning is not such as to fully comply with the requirement to exclude all reasonable doubt as to effects adverse to the integrity of European sites, there are multiple reasons not to quash the decision on that basis – not least the fact that the Hen Harrier was of no apparent concern to the applicant when it made its submissions to the board. As in *Carrownagowan v. An Bord Pleanála* [2023] IEHC 579 (Unreported, High Court, 27th October 2023) at para. 118, Hen Harrier look like something of a flag of convenience in an applicant's quest to quash a windfarm permission. If the applicant cared so much about the biodiversity issues it now puts front and centre of its case, maybe it might have championed those matters when making submissions to the board. The fact that it didn't do so can't be irrelevant to whether *certiorari* would be a just and proportionate response to any counterfactual flaw in the decision.

156. In that regard I accept the board's final submission on this issue:

> "34. Thus in the context of judicial review as a discretionary remedy, by its nature, even if unopposed or conceded by a decision-maker, the Court must be persuaded that relief ought to be granted, which necessarily and implicitly entails an evaluation of the matter by the Court and conceptually the possibility that relief can be refused in the exercise of discretion even in a case where the Board has conceded the relevant ground. Consistent with this is the following point made by Baker J. in Casey at §38:
>
> '38. The adversarial system does not mean that a judge is not actively engaged with the argument and course of the trial, and that the decision of the judge is a syllogism, a logical conclusion arrived at by deduction, and without intelligent questioning and active assessment of law and fact: see the recent observations of Humphreys J. in Marioara Rostas v. The Director of Public Prosecutions [2021] IEHC 60 at paras. 41-42).'
>
> 35. Further, as observed by Fennelly J. in De Róiste v. Minister for Defence [2001] 1 IR 190 at 220 'an order of certiorari is always, as a matter of principle, discretionary'. There is nothing in the 2000 Act that displaces the nature of judicial review as a discretionary remedy. Certiorari can, for example, be a disproportionate remedy that the Court therefore declines to grant, in the particular circumstances of a given case (see e.g., Toole v. The Minister for Housing, Local Government and Heritage [2024] IEHC 610 at §163; McCallig v. An Bord Pleanála & Ors [2013] IEHC 60 at §121; Waltham Abbey/ Pembroke Road Association v. An Bord Pleanála and Others [2022] IESC 30 at §53; Murtagh v. An Bord Pleanála [2023] IEHC 345 at §§74-75)."

Proposed reference to the CJEU

157. The applicant not having sought a reference to Luxembourg in the statement of case, or in its original written legal submissions, or in the replying submissions, or at the oral hearing, now at the eleventh hour in final submissions says as follows:

> "50. If it is not acte clair that art. 6(3)(b) of the EIA Directive (when read in conjunction with the obligation under art. 6(5) to take the necessary measures to ensure that the relevant information is electronically accessible to the public at the appropriate administrative level) requires the Member State to make available to the public at the stage of an administrative appeal, the most up to date version of the EIAR available at the start of the appeal process, the Applicant would support a preliminary reference under art. 267 of the TFEU."

158. That of course, as always, sounds reasonable at first sight. But there are insuperable problems.

159. The amended statement of grounds did not rely on art. 6(3) in this sense. It only refers to that provision by reference to defective assessment, not defective publication. The publication issue is pleaded, at core ground 1, in purely domestic terms. So the point ends there: *Concerned Residents of Treascon* applies. Pleadings are not merely an opening salvo to provide some initial air cover while an applicant digs in for long-drawn-out trench warfare. They define the contours of the case for its duration, and therefore of the points that can legitimately be made at any stage and at any level.

160. A further problem (if further problems were needed, which they aren't) with it is that *it is acte clair* that an EIAR should be made available to the public concerned "within reasonable time-frames", under art. 6(3) of directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (the EIA directive). What is a reasonable time-frame may be open to a little bit of debate but one has to start with the assumption that it is a time frame sufficiently expeditious as to facilitate the right of public participation. That wouldn't be particularly different in practice from the applicant's proposed standard of "at the stage of an administrative appeal".

161. So the issue isn't the interpretation point irrelevantly proposed by the applicant. It is the fact that this applicant had access to the material and participated in the process, and hasn't evidentially demonstrated prejudice, even if maybe some other hypothetical person not before the court hypothetically might have been disadvantaged. That is just far too tenuous a basis to grant relief in the form of *certiorari*, as opposed to a declaration – which I am granting.

162. Any reference to the CJEU has to be rooted in the facts and evidence. Under art. 267 TFEU, a reference is only permissible if it is "necessary" to the decision. This isn't necessary – therefore a reference would be inadmissible. The right or obligation of courts of any instance, even final instance, to refer doesn't apply to points that are not necessary any more than it applies to points that are in substance ones of application rather than interpretation (see *An Taisce v. An Bord Pleanála & Ors. (No. 3)* [2022] IESC 8, [2022] 2 I.R. 173, [2022] 1 I.L.R.M. 281 *per* Hogan J. at para. 156.)

163. Similarly, the applicant seeks a second reference, also not hitherto signalled, on the issue of discretion:

> "57. The Court invited submissions in relation to the finding of the Supreme Court in Ballyboden Tidy Towns Group v An Bord Pleanala [2024] IESC 4 (Donnelly J.) in relation to the Board's role in granting relief, even in circumstances where certiorari is not opposed. The Applicant is not entirely sure of the significance of this case to the within proceedings. Insofar as it maybe suggested that the Court retains a discretion not to grant relief notwithstanding a finding that there is a lacuna in the AA conducted by the Board, the Applicant again points out as found in Kelly that the carrying out of a valid AA is a jurisdictional sine qua non. Particularly in the light of the sensitivities of the Hen Harrier outlined herein and the fact in the instant case we are dealing only with a Stage 1 AA, it is respectfully submitted that the Court cannot lawfully exercise its discretion to overlook the glaring lacunae in the within assessment. Certainly, as a matter of EU law, the exercise of a discretion in such a manner and in such stark circumstances is not acte clair and would require a reference to the Court of justice."

164. There are three fundamental problems with that submission.

165. Firstly it misrepresents the facts. There is no stark or glaring lacuna. At the absolute height of the applicant's case, a severe critic might say that the reasoning could be read as leaving open an interpretation that didn't dispel all reasonable doubt. I don't agree with that, but that's the maximalist reading from an applicant's point of view. So the question is based on a false and scaremongering premise.

166. Secondly, the issue is *obiter* for the simple reason that I find that the applicant hasn't evidentially established the existence of any lacuna at all or other legal flaw in the board's reasoning. Calling AA jurisdictional is *nihil ad rem* if an applicant can't show that the AA screening was flawed. Discretion is only relevant on an if-I-am-wrong basis. An *obiter* point by definition can't be "necessary" for the purposes of art. 267 TFEU. There is thus no jurisdiction to refer. Any such purported reference at any level would be inadmissible.

167. Thirdly, there is no tangible basis for doubt as to the EU law compatibility of the role of discretion in relation to withholding imperative as opposed to declaratory relief. The court's discretion is equivalent as between EU and domestic rules, and in situations such as those here, doesn't make the exercise of EU law rights impossible or unduly difficult insofar as concerns this applicant.

168. That said, it is certainly the case that refusing all relief, even declaratory relief, in the case of a breach of EU law, could be impermissible, if what is in issue is failure to transpose a directive at all. The CJEU held to this effect in its judgment of 17 March 2021, *UH v An tAire Talmhaíochta Bia agus Mara and Others*, C-64/20, ECLI:EU:C:2021:207:

> "36 Accordingly, the Court [of Justice] alone may, exceptionally and for overriding considerations of legal certainty, grant a provisional suspension of the effects of a rule of EU law with regard to a national law that is contrary to it (see, to that effect, judgment of 28 July 2016, *Association France Nature Environnement*, C-379/15, EU:C:2016:603, paragraph 33 and the case-law cited).
>
> 37 In those circumstances, Article 288 TFEU precludes a national court of a Member State from disregarding the obligation imposed on that state to transpose a directive on the ground that that transposition is purportedly disproportionate as it might prove costly or serve no purpose on account of the forthcoming application of a regulation intended to replace that directive, with which the law of that Member State is fully compatible.
>
> 38 It follows that, under Article 288 TFEU, the referring court, which has found that the national legislation is incompatible with Directive 2001/82, is required to uphold the application for a declaration that Ireland is under an obligation to remedy the incorrect transposition of that directive.
>
> 39 It follows from all of the foregoing that Article 288 TFEU must be interpreted as precluding a national court – which, in the context of proceedings laid down in national law for that purpose, finds that the Member State to which it pertains has failed to fulfil its obligation to transpose correctly Directive 2001/82 – from refusing, on the ground that it appears to it that the national legislation is consistent with Regulation 2019/6 which repeals that directive and will be applicable with effect from 28 January 2022, to make a declaration that that Member State has not correctly transposed that directive and is required to take remedial steps in that regard."

169. The characteristically informative and accessible opinion of Advocate General Bobek delivered on 14 January 2021, *UH v An tAire Talmhaíochta Bia agus Mara and Others*, ECLI:EU:C:2021:14 was a bit more permissive, and also more relevant to the issue of individual decisions:

> "58. On the contrary, by taking the aforementioned elements into account, the national court is doing nothing more than carrying out its judicial function which is to find, for each dispute, the most appropriate solution by looking at the specific context and all the relevant

circumstances. Again, the principles of effectiveness of EU law and of effective judicial protection cannot be interpreted as imposing upon national courts any (senseless) automaticity.

59. True, the fact that the discretion of the national courts concerns not only the form of relief to be granted, but also whether it would be worthwhile to grant any relief at all, may suggest that, at least in some cases, an individual is completely deprived of any form of judicial protection and the effectiveness of the relevant EU rules would not be ensured.

60. Nevertheless, in my view, that would not be a reasonable conclusion. Indeed, to the best of my knowledge, there are procedural principles or mechanisms in all legal systems that are designed to avoid situations in which a blind and automatic application of the rules would produce an unjust or disproportionate outcome, or lead to a solution that serves no useful purpose. In that regard, I can think of, for example, rules relating to the sound administration of justice and judicial economy, or rules against abuse of rights or of process, and frivolous or vexatious litigation. Accordingly, there is nothing intrinsically unlawful in the fact that, despite an applicant formally acting within his rights and his claims being well founded, in very exceptional cases (and I place emphasis on very exceptional cases), he may not obtain the form of relief that he sought. Again, whether that outcome might be justified depends on the circumstances and the context of each individual case."

170. Indeed the judgment of 7 November 2013, *Gemeinde Altrip and Others v Land Rheinland-Pfalz,* C-72/12, ECLI:EU:C:2013:712 provides an example of a similar pragmatic approach. But again, even on a best-case scenario from an applicant's point of view, I amn't considering refusing all relief, merely mitigating the extent of the relief to be granted. Whatever the relief, costs of the issue will follow in any event, for what that's worth. If this point wasn't actually *obiter*, and anything turned on it, and if I were to hold that the assessment was defective but the decision should not be quashed on a discretionary basis, one might look at considering whether to direct further assessments. That in itself is at least in some circumstances a permissible vindication of EU law, which doesn't require automatic quashing of everything but acknowledges a remedial obligation which can be achieved in various ways. That said, again in favour of the applicant, the judgment of 3 July 2008, *Commission v Ireland*, C-215/06, ECLI:EU:C:2008:380 implies that decisions reached in breach of assessment can't simply be set right by subsequent assessment, but would normally have to be invalidated absent exceptional circumstances, provided, implicitly, that the breach of EU law did in fact have an effect that requires rectification. But since we don't get to that point there's no need to consider it further. The one thing that one can be certain of is that rushing to Luxembourg on this is at the absolute best (from an applicant's viewpoint) premature unless and until I am proved wrong about the applicant's failure to discharge the onus of proof, and about all of the other obstacles that the applicant hasn't surmounted before such a point could properly arise.

Consequential orders

171. Provisionally, as regards costs, the applicant should get costs limited to the issue on which it won. If further litigation costs are incurred, there is no obvious reason why the board should not seek to set those off, if the applicant is unsuccessful in the leave to appeal context or in any hypothetical appellate context.

Summary

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

(i) The complaint about inadequate time for the oral hearing was unfounded – taking the applicant's opportunities to make its case together by way of a combination of written material and oral presentation, the applicant had a reasonable opportunity to put forward its case overall.

(ii) The complaint about non-publication of an amended EIAR/ NIS/ AA screening is unfounded on the evidence as there were no such documents as physical documents. Rather there was a separate FI document which was separately published. Any complaint about publication of material on the council's website is not pleaded. The complaint about public participation isn't properly pleaded because it is not supported by any ground but the applicant isn't disadvantaged by that because the breach of s. 146 of the 2000 Act *is* properly pleaded.

(iii) The complaint that matter was not properly made available on the board's website because it was given incomprehensible file names has been made out. However this does not either logically or on the facts affect the validity of a decision already made. Failure to properly publish a decision or supporting material does not render the decision invalid. The issue can properly be marked with declaratory relief rather than *certiorari*.

(iv) The CJEU has already clarified that the board is not required to dispel scientific doubt as to impacts on a European site by way of a point-by-point reply to submissions. Rather it is required to give sufficient reasons to dispel all reasonable doubt. Hence

there is no infirmity in the board not replying expressly to the NPWS second submission. The onus is on the applicant to show that the reasons for a conclusion of no real impact were insufficient, an onus which has not been discharged on the evidence here. Essentially the applicant fails to take on board the fact that it has already lost in Luxembourg on this point in previous proceedings.

(v) If I am wrong about the foregoing, I would exercise discretion to refuse relief having regard to the failure to show evidentially that additional assessment would have made any difference, the disproportionate impact on the developer, and the applicant's failure to raise the relevant issues in its submissions to the decision-maker. The plea that the application should be dismissed on discretionary grounds is not impermissibly vague.

(vi) The grant of relief in judicial review is a matter for the court, whether it is contested or not. Thus the court can exercise discretion of its own motion if it considers that relief should not be granted, even if discretion isn't pleaded. Therefore if I am wrong that discretion is inadequately pleaded, I would exercise such discretion of my own motion to dismiss the proceedings for the reasons set out above.

Order

173. For the foregoing reasons, it is ordered that:

(i) the proceedings be dismissed insofar as they seek relief other than declaratory relief and costs;

(ii) unless any party applies otherwise by written legal submission by 22nd January 2025:

(a) the foregoing order be perfected forthwith thereafter in the absence of any written submission by that date setting out detailed submissions in support of any further order;

(b) there be a declaration that the respondent was in breach of s. 146(7)(a) of the Planning and Development Act 2000 between on or about 6th January 2024 and 23rd August 2024 by making available documents with incomprehensible file names thereby failing to make such documents available in an effective and reasonable manner;

(c) there be an order for costs to the applicant against the respondent in respect of the proceedings, limited to the costs that would have been incurred had the applicant confined its proceedings to the issue on which it prevailed, and that any issue as to the extent of the costs that would have arisen in that circumstance be determined, in default of agreement, in the legal costs adjudication process;

(d) there be no order as to costs in favour of or against any other party; and

(e) the execution as opposed to the adjudication of such costs order be stayed until the final determination of the proceedings, and in the event that further litigation costs are occasioned to the respondent by unsuccessful legal steps in the proceedings taken by the applicant, including steps to contest the provisional order, any application for leave to appeal, or any steps occasioning costs at appellate level, the respondent have liberty to apply for its costs occasioned by such steps and for an order that those costs be set off against the costs now ordered in favour of the applicant, up to but not exceeding the amount of such costs; and

(iii) the matter be listed on Monday 27th January 2025 to confirm the foregoing.

ANNEXES – THE APPLICANT'S OPPORTUNITIES TO MAKE ITS CASE

Annex I – applicant's grounding affidavit of 27 February 2024

THE HIGH COURT
JUDICIAL REVIEW
Record Number 2024/290 JR
Between:
ECO ADVOCACY CLG
Applicant
-and-
AN BORD PLEANALA
Respondent
-and-
STATKRAFT IRELAND LIMITED
Notice Party

AFFIDAVIT OF KIERAN CUMMINS

I, KIERAN CUMMINS, Planning and Environmental Consultant of … County Meath, aged 18 years and upwards, MAKE OATH and say as follows:

1. I am the Company Secretary of the Applicant company in these proceedings, an Environmental Non-Governmental Organisation established in 2015 to advocate on issues of planning and environmental law, biodiversity, sustainability, energy supply, employment, natural resources, conservation, and policy.

2. I make this affidavit with in knowledge of the Applicant and with its authority.

3. These proceedings are a challenge by means of Judicial Review to a decision made by the Respondent ('the Board') on or about 3 January 2024 to grant planning permission to the Notice Party ('the Developer') on appeal for development consisting of the construction of up to 8 no. wind turbines with a tip height of up to 185 metres and all associated foundations and hardstanding areas, cables, substation and associated works at Dernacart Forest Upper & Forest Lower, Mountmellick, Co. Laois. By means of a response dated 31 January 2023 to a further information request from the Board, the Developer confirmed that the number of turbines to be constructed is 8 and the dimensions of each are to be 170 m diameter and 100 m hub height.

4. I have read the Statement of Grounds and I beg to refer to it when produced. I hereby confirm that so much therein as relates to my own acts and deeds is true and so much of it as relates to the acts of any and every other person, I believe to be true.

5. I beg to refer to a booklet of exhibits in this matter which I have marked with the letters "**KC 1**" and signed my name prior to the swearing hereof.

6. The proposed Dernacart windfarm is located approximately 3 kilometres north of Mountmellick town and adjoins the Bord Na Mona ('BNM') owned Garrymore Bog on its northern boundary. Garrymore Bog in turn is bordered by the larger Garryhinch bog to its east and together they are described by their owner BNM as the 'Garryhinch Bog Group'. The Slieve Bloom Mountains Special Protection Area ('the SPA') is located c. 4.7 kilometres to the southeast of the proposed windfarm. I beg to refer to various maps, prepared by the Developer in the course of the impugned process, which illustrate the proximity of the proposed wind farm to the Garryhinch Bog Group and to the SPA, pinned together and exhibited at **TAB 1A, 1B and 1C** of the book of exhibits.

7. It will become apparent from the evidence of the National Parks and Wildlife Service and others (exhibited further below) there is a known winter roost for Hen Harrier birds within this peatland area described by BNM as the Garryhinch Bog Group. I say and believe that the flight path for birds flying from the SPA to the winter roost site could take them through the site of the proposed windfarm.

8. The SPA was designated under the Birds Directive for the conservation of the endangered Hen Harrier species and is also protected under the Habitats Directive. The Slieve Bloom Mountains is a Ramsar Convention site and a Biogenetic Reserve within the European Network of Biogenetic

Reserves. Part of the Slieve Bloom Mountains SPA is a Statutory Nature Reserve (S.I. 382/1985). The SPA is also protected by S.I. No. 184/2012 - European Communities (Conservation of Wild Birds (Slieve Bloom Mountains Special Protection Area 004160)) Regulations 2012. I beg to refer to conservation objectives and a site synopsis prepared by the National Parks and Wildlife Service for this SPA, pinned together and exhibited at TAB 2A and 2B of the booklet of exhibits.

9. In February 2024, the NPWS published the 2022 National Survey of breeding Hen Harrier in Ireland, Irish Wildlife Manual 147. This report postdates the impugned decision and is exhibited here for the sole purpose of assisting the High Court in interpreting the significance of the conservation objectives for this SPA, and the measures therein, for delivering the objectives of the Birds Directive and Habitats Directive. I beg to refer to a copy of said Irish Wildlife Manual 147 exhibited at **TAB 3** of the booklet of exhibits.

10. The planning process for the proposed Dernacart windfarm commenced with the publication of a notice in the Irish Independent on 6 February 2020, giving notice to the public of the making of the planning application to Laois County Council. The planning application was submitted on or about 17 February 2020. I beg to refer to a copy of said site notice for the *'construction of up to 8 no. wind turbines with a tip height of up to 185 metres'* and ancillary works, exhibited at **TAB 4** of the booklet of exhibits.

11. The planning application was accompanied by an Environmental Impact Assessment Report ('EIAR') which included *inter alia* Chapter 12 (Biodiversity); Appendix 12.1 (Appropriate Assessment Screening Report and Natura Impact Statement); and Appendix 12.4 (Ornithology Report). 1 beg to refer to said Chapter 12 and Appendix 12.1 and 12.4 of the EIAR pinned together and exhibited at **TAB 5A, 58 and 5C** of the book of exhibits.

12. The Hen Harrier and Slieve Bloom SPA were screened out by the Developer in the AA Screening Report because no hen harriers had been detected during vantage point surveys conducted on 3 days during 2018. For this reason, the Hen Harrier and its SPA were excluded from further assessment in the Developer's NIS.

13. On or about 23 March 2020, Birdwatch Ireland made a submission highlighting that the site of the proposed development is in the area of an important winter roost for the Hen Harrier and that 5 birds had been identified in the windfarm area in a survey conducted over the winter of 2013/2014. Monitoring of the site ceased in 2016 and Birdwatch Ireland stated that there was no recent survey data available but that they were aware of a sighting in 2019 recorded by a local bird watcher Ricky Whelan. I beg to refer to a copy of said submission by Birdwatch Ireland exhibited at **TAB 6** of the booklet of exhibits.

14. On or about 20 March 2020, a submission was made by Ricky Whelan. He states that he personally observed "one ringtail type Hen Harrier" on the evening of 28 October 2019 on Garryhinch Bog. He also recorded the sighting of a Short-eared Owl on the same date. Mr Whelan states that he is fully of the opinion, given his experience of the site and the species, that Hen Harriers are still using the Garryhinch Bog site as a winter roost location and that they had been missed by surveyors who carried out the bird surveys for the developer. I beg to refer to a copy of said submission by Ricky Whelan exhibited at **TAB 7** of the booklet of exhibits.

15. On or about 22 March 2020, Eco Advocacy made a submission. I beg to refer to a copy of said submission by Eco Advocacy exhibited at **TAB 8** of the booklet of exhibits.

16. On or about 23 March 2020, I made a submission on behalf of a local group Mountmellick Wind Turbine Impact. I beg to refer to a copy of said submission by Mountmellick Wind Turbine Impact, exhibited at **TAB 9** of the booklet of exhibits.

17. On or about 24 March 2020, the NPWS made a submission recommending that further information be sought in relation to the Hen Harrier. I beg to refer to a copy of said NPWS letter (the first NPWS submission) exhibited at **TAB 10** of the booklet of exhibits.

18. The NPWS stated:
"During winter hen harriers gather at suitable, safe, communal roost sites at night from which they can radiate and hunt across the hinterland during the short winter days. The proposed development lies close to such a site. The winter roost site has been the subject of several years of targeted surveys as part of the Irish Hen Harrier Winter Survey. Up to six hen harriers have been recorded

roosting communally at this site, including a juvenile bird tagged in the Slieve Bloom Mountains Special Protection Area (SPA) which lies within 5km of the proposed development site. This bird provides evidence of a pathway between the SPA and the nearby roost site."

19. On or about 2 June 2020, Laois County Council sought further information which was provided by the Developer in the form of a report prepared on 8 March 2021 and appendices to said report. Of significance to these proceedings is Appendix 4-2 to the further information report which concerned the Hen Harrier. I beg to refer to a copy of said Further Information Report and its Appendix 4-2 pinned together and exhibited at **TAB 11A and 11B** of the booklet of exhibits.

20. As part of the further information response, the developer conducted a new Hen Harrier survey and recorded therein a single occurrence of a hen harrier crossing over the Garrymore Bog and the Garryhinch Bog to the north of the proposed turbines. The Developer's conclusion was that this was insignificant. For the convenience of the Court I have extracted the flight path figure from the Appendix 4-2 already exhibited. I beg to refer to said Hen Harrier flight path map exhibited at **TAB 12** of the booklet of exhibits.

21. The aforementioned Appendix 4-2 of the FI response incorporated amendments to the EIAR, AA Screening Report and NIS.

22. The Further Information response was forwarded by Laois County Council to the NPWS. By letter dated 1 April 2021, the NPWS responded. I beg to refer to a copy of said letter of 1 April 2021 exhibited at **TAB 13** of the booklet of exhibits.

23. The NPWS in its letter of 1 April 2021 criticised the survey methodology used by the Developer in the study that informed its Further Information Response concluding:
"Given the inadequacy of the surveying pointed out above, the NPWS is of the opinion that this conclusion and any subsequent categorisation of the importance of the winter roost site for hen harrier is not supported by best scientific evidence. The NPWS remains concerned that the impacts of the proposed project, on the conservation objectives of the Slieve Bloom Mountains SPA, have not been adequately assessed."

24. On or about 30 April 2021, Laois County Council decided to refuse planning permission, adopting the recommendation of its planner. I beg to refer to a copy of said decision of Laois County Council and the report of its planner, pinned together and exhibited at **TAB 14** of the booklet of exhibits.

25. The Laois CC planner, while acknowledging the conclusion of the NPWS, did not get to the stage of conducting an Appropriate Assessment or screening for same, because his recommendation, on the advice of an unnamed external consultant, was to refuse development consent because of the failure to properly mitigate impacts on bats, from 6 of the turbines, in accordance with the Environmental Impact Assessment Directive.

26. Three First Party Appeals were made to An Bord Pleanala. On or about 26 May 2021, the Developer appealed the Laois County Council decision to An Bord Pleanala. On or about 24 May 2021, Mountmellick Wind Turbine Impact appealed to An Bord Pleanala. While the group agreed with the decision of Laois County Council to refuse planning permission, the group was concerned that the refusal, being limited to the impact from 6 of the turbines on bats, did not reflect the other flaws in the planning application. On or about 24 May 2021, Eco Advocacy also appealed the decision to An Bord Pleanala, again because it was believed that the Laois refusal was not as extensive as it could have been. I beg to refer to a copy of the 3 Appeals, pinned together and exhibited at **TAB 15** of the booklet of exhibits.

27. The Board created a webpage, on its own website, for the planning appeal. Extracts from the EIAR have been posted to the Board's webpage but they are not in any particular order, and they are not labelled with any recognisable code or names, making it very difficult to inspect the file. As far as I can make out, the version of the EIAR and NIS and AA Screening Report posted to the Board's website does not include amendments made by the Developer in the Further Information response to Laois County Council. I beg to refer to a link to the Board's webpage for this appeal exhibited at [link]

28. The Board appointed an Inspector to report on the Appeal. On or about 28 September 2022 the Inspector made her report. I beg to refer to a copy of said report exhibited at **TAB 16** of the booklet of exhibits.

29. The Inspector made an Appropriate Assessment screening. I say that the Inspector made several errors in making her AA screening which was subsequently adopted by the Board.

30. The Inspector at Table 1.0 of the Inspector's Report found that there was a possibility that commuting / foraging hen harriers from the Slieve Bloom Mountains SPA may utilise the site of the proposed development. I am advised and believe that this finding meant that a Stage II Appropriate Assessment ought to have been carried out. But the Inspector, at paragraph 7.43 proceeded to then screen out the Hen Harrier for erroneous reasons. She stated: "In relation to the Slieve Blooms SPA of which Hen Harrier the single qualifying interest I note that Hen Harrier were not recorded at the site during extensive bird surveys." This finding is not representative of the totality of the surveys conducted by the Developer. Not only was a Hen Harrier flight recorded by the Developer's consultants in 2021 (in the peatland directly north of the turbines) and reported as Further Information to the Planning Authority, the NPWS, on assessing the FI response, was of the opinion that the Developer's survey methodology was not appropriate, and it was possible that other Hen Harriers were present during the survey but undetected.

31. The Inspector in concluding that there is no suitable Hen Harrier habitat within the development, site neglected to observe the bog/ moorland habitat directly to the north and north east of the windfarm site and the extensive records of hen harriers in that area including a record of a hen harrier identified on that bog which had been tagged in the SPA. The Inspector does not appear to have had any regard at all to the significant scientific doubt raised by the NPWS, or the absence of best scientific evidence supporting the conclusion of the Developer that there is no longer a winter roost for the Hen Harrier on Garryhinch Bog. The concerns of the NPWS scientists that there has been no adequate assessment of the impacts of the proposed project on the conservation objectives of the Slieve Bloom Mountains SPA, was not considered by the Inspector.

32. I say and believe that at paragraph 7.44 of her report, the Inspector has misinterpreted the report of the Laois County Council Planner, when she states that "the Council did not raise any concerns [regarding the Slieve Bloom SPA] within the assessment of the application". The Laois Planner set out in full the conclusions of the NPWS, but did not engage further with them, seemingly because no Appropriate Assessment screening was conducted when the project was to be refused development consent for EIA reasons. The Laois planner recommended refusal on the basis of a "critical failing in the assessment process" for bats. The fact that the reasons for Laois deciding to refuse was on this very narrow point when there were so many other weaknesses in the Developer's proposal, including in relation to the assessment of other ecology, was the basis of the other two appeals to the Board including that of this Applicant. The failure of Laois County Council to conduct an AA Screening is not any defence for the Inspector's errors.

33. The Board was not satisfied with the lack of definition of the project as 'up to 8 turbines' and 'up to 185 metres' tip height and sought further information about the turbine description. I say and believe that the AA Screening conducted by the Developer was in fact carried out in the absence of any decision on final hub height and rotor diameter. There was no decision on the final design of the turbines when the AA Screening report was prepared in December 2019, indeed the noise assessments in the EIAR of the same date had assumed that turbines with a hub height of 106 metres would be selected.

34. When the Developer confirmed that the turbine to be installed would be 170 m in diameter and have a hub height of 100 m it ought to have been clear to the Inspector that this would have meant that the turbine blades would sweep as close as 15 metres to the ground. It is of significance that the Developer, at page 27 of the Further Information Response to the Planning Authority, prepared in March 2021 stated:
"The scientific literature shows that hen harriers are renowned for flying at low heights of 10-20 m, which is usually below rotor swept heights (Whitfield and Madders, 20069)."

35. None of this was considered by the Inspector, when she decided in her addendum report of 5 December 2023 that the developer's decision to use the selected turbine configuration would have no impact on the AA Screening Report which had screened out the Hen Harrier. I beg to refer to a copy of said Addendum Inspector's Report exhibited at **TAB 17** of the booklet of exhibits.

36. The Board met on 19 December 2023 and recorded in its Board Direction that it "agreed with and adopted the screening assessment and conclusion carried out in the Inspector's report". I beg to refer to a copy of said Board Direction exhibited at **TAB 18** of the booklet of exhibits.

37. By Order dated 3 January 2024, the Board granted planning permission for the windfarm. I beg to refer to a copy of said Board Order exhibited at **TAB 19** of the booklet of exhibits.

38. There is no condition in the Board's Order specifying the tip height, or diameter or hub height of the turbine.

39. I pray this Court to grant the reliefs sought in the Statement of Grounds.

SWORN by **KIERAN CUMMINS** …

Filed by O'Connell Clarke, St Mary's Abbey, Capel Street, Dublin 7, Solicitors for the Applicant, on this day of 2024

Annex II – applicant's amended statement of grounds of 4 March 2024

THE HIGH COURT
JUDICIAL REVIEW
Record Number 2024/290JR
Between:
ECO ADVOCACY CLG
Applicant
-and-
AN BORD PLEANÁLA
Respondent
-and-
STATKRAFT IRELAND LIMITED
Notice Party

Amended STATEMENT TO GROUND AN APPLICATION FOR JUDICIAL REVIEW

Amended by Order of Mr Justice Humphreys on 4 March 2024

A. Name of Applicant: Eco Advocacy CLG
B. Address of Applicant: Tammon, Rathmolyon, County Meath
C. Description of Applicant: Environmental Non-Governmental Organisation

D. Reliefs Sought:
1. An Order of *Certiorari* by way of application for judicial review quashing a decision made by the Respondent ('the Board') on or about 3 January 2024 to grant planning permission to the Notice Party ('the Developer') on appeal for development consisting of the construction of up to 8 no. wind turbines with a tip height of 185 metres and all associated foundations and hardstanding areas, cables, substation and associated works at Dernacart, Forest Upper & Forest Lower, Mountmellick, Co. Laois.

1A. Without prejudice to the *certiorari* relief, a Declaration that the decision contravenes section 146(7) of the Planning and Development Act, 2000 as amended, and public participation requirements of EU law, because the Board failed to make available for inspection on its website the amended Environmental Impact Assessment Report.

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

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

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

5. Further and other orders including interim orders.

E. Grounds upon which the reliefs are sought:

PART 1 - CORE GROUNDS

Domestic Law Ground

1. The impugned decision is invalid because it is contrary to fair procedures and contravenes section 146(7) of the Planning and Development Act, 2000, as amended because the Board failed to make available for inspection on its website the amended Environmental Impact Assessment Report, which by law must be made available on the website in perpetuity beginning on the third day following the making by the Board of the decision on the matter. Further particulars are set out in Part 2 below.

EU Law Ground

2. The impugned decision is invalid because it contravenes Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ('the Habitats Directive') as transposed by s. 177U and s. 177V of the Planning and Development Act 2000, as amended, and in accordance with the case law of the CJEU by:

- failing to conduct a screening, properly or at all, to assess if the project is likely to have a significant effect on the Slieve Bloom Mountains SPA, either individually or in combination with other plans or projects, to determine if those sites should be subject to Appropriate Assessment ('AA').
- failing to carry out an Appropriate Assessment without lacunae and which contains complete, precise and definitive findings and conclusions capable of dispelling all reasonable scientific doubt as to the effects of the proposed works on the Slieve Bloom Mountains SPA (judgment of 25 July 2018, Grace and Sweetman, C-164/17, EU:C:2018:593, paragraph 39 and the case-law cited).
- failing to identify and examine the implications of the proposed project for species to be found outside the boundaries of the SPA where those implications are liable to affect the conservation objectives of the site. Case 461/17 Holohan.

Further particulars are set out in Part 2 below.

PART 2 – PARTICULARS OF CORE GROUNDS

Ground E1

3. While the Board has created a webpage, on its own website, for the planning appeal, it has placed a significant number of documents thereon which are segments taken from the developer's Environmental Impact Assessment Report, arranged out of their proper sequence, and named on their face with a randomly generated coding system from which the content of the documents cannot be recognised, making it very difficult for members of the public to access the EIAR and Natura Impact Statement and Appropriate Assessment Screening Report on the Board's website and did so contrary to fair procedures.

4. The Board further erred in posting to its website original versions of the EIAR and Natura Impact Statement and Appropriate Assessment Screening Report that do not incorporate the later amendments made to these documents by the Developer in its Further Information response to Laois County Council of March 2021.

Ground E2

5. The Board at its meeting held on 19 December 2023 recorded in its Board Direction that it "agreed with and adopted the screening assessment and conclusion carried out in the Inspector's report"; however, the Inspector erred and led the Board into error, and the Board erred in conducting an Appropriate Assessment only on the River Barrow and River Nore SAC located c. 600 metres to the west of the proposed development when it also should have conducted an Appropriate Assessment on the Slieve Bloom Mountains SPA located c. 4.7km to the southeast of the development, and erred in having no proper regard to the conservation objectives for the Hen Harrier bird species when it knew or ought to have known that an Appropriate Assessment ('AA') of the implications of the proposed windfarm for the Slieve Bloom Mountains SPA in view of the site's conservation objectives was required because it could not be excluded, on the basis of objective information, that the proposed development, individually or in combination with other plans or projects, would have a significant effect on a the European site.

6. The Inspector herself confirmed at Table 1.0 of her report that "commuting / foraging hen harriers from the Slieve Bloom Mountains SPA may utilise the site" of the proposed development and the Applicant here pleads that this was a sufficient finding in law for her to conclude that a Stage II Appropriate Assessment ought to have been carried out, yet she acted contrary to art 6(3) of the Habitats Directive and s.177U of the Planning and Development Act when at paragraph 7.43 of her report she proceeded to then *screen out* the Hen Harrier from AA for erroneous reasons and the Board was led into error by adopting the Inspector's screening.

7. The Inspector erred when she stated: "In relation to the Slieve Blooms SPA of which Hen Harrier the single qualifying interest I note that Hen Harrier were not recorded at the site during extensive bird surveys." In making this statement and in relying on it as a reason for screening out the SPA

from further assessment, the Inspector failed to have regard to the Hen Harrier flight was recorded in a supplemental survey conducted by the Developer's consultants in 2021 and reported as Further Information to the Planning Authority in March 2021. This Hen Harrier was identified flying over the peatland directly adjoining the windfarm and close to the proposed location of turbines. If this was a foraging or roosting Hen Harrier from the SPA then its flight from the SPA could have taken it through the windfarm site. Furthermore, the scientific experts in the National Parks and Wildlife Service (NPWS), on assessing the FI response, was of the opinion that the Developer's survey methodology was not appropriate, and it was possible that other Hen Harriers were present during the survey but undetected, and the Inspector erred by not having any regard to the views of the NPWS regarding the supplemental Hen Harrier survey and led the Board into error.

8. Regarding the Developer's further information on the risk to the Hen Harrier species, the NPWS in its second submission to Laois County Council dated 1 April 2021, stated the following about the Garryhinch roost site located within a bogland area which adjoins the proposed development:

"The Garryhinch winter roost site has been the subject of several years of targeted surveys as part of the Irish Hen Harrier Winter Survey. Up to six hen harriers have been recorded roosting communally at this site, including a juvenile bird tagged in the Slieve Bloom Mountains Special Protection Area (SPA) which lies within 8 km of the proposed development site. This bird provides evidence of a pathway between the SPA and the nearby roost site.

The NPWS notes that a Hen Harrier Winter Roost Survey of Garryhinch Bog took place the (sic) 2020/2021 on six dates (30/10/2020, 19/11/2020 11/12/2020, 13/01/2021, 26/01/2021) from the end of October 2020 and until the end of February 2021, totalling 18 hours of surveying, to supplement winter roost checks conducted on 26/10/2018, 22/11/2018 and 11/12/2018.

As pointed out in the NPWS's original submission, Scottish Natural Heritage recommend survey for a minimum of two years to allow for variation in bird use between the years. The NPWS considers the winter roost checks conducted on 26/10/2018, 22/11/2018 and 11/12/2018 were inadequate, given the size of the area of suitable winter roost habitat adjacent to this proposed wind farm development, and should not be counted as part of the two years of surveying recommended. Therefore only 5 months of adequate surveying has taken [place].

The Further Information [submitted to Laois County Council by the Developer] points to the fact that the 2020/2021 winter roost surveys recorded only a single hen harrier at the Garryhinch bog site subsite across 18 hours of survey time over five months as evidence of its insignificance. It is noted that guidance on which the survey was based specifies that watches at roosts should be carried out at least once a month from October to March on the first day of the month or as close to the first as possible. The NPWS notes that any potential hen harrier usage of the roost site in most of October 2020 and March 2021 was missed due to the timing of the survey. O'Donoghue (2021) found that over a third of known roosts were occupied on less than 50% of watches and points out that this is an important consideration for surveys and investigations to inform planning and land-use change decisions. Satellite tracking data has shown that individual hen harriers may use different roosts in different years, perhaps dependent on site specific circumstances or other factors yet to be confirmed.

Scottish Natural Heritage advise that roost sites within 2km of proposed development should be identified. The known roost site at Garryhinch Bog has not been identified. The single hen harrier sighted was lost from view before it could have, potentially, been followed back to a roost site. The bird appears to have been lost from sight within the vantage point 2 viewshed., during daylight hours at 15:34 (dusk was 17:07 on this date)"

Other errors are also identified by the NPWS in its letter. The matters referred to by the NPWS constitute a lacuna and reasonable scientific doubt in respect of the effects on the Hen Harrier. In the circumstances the Board lacked jurisdiction to grant planning permission for the proposed development.

9. The NPWS in its letter of 1 April 2021 concluded:

"Given the inadequacy of the surveying pointed out above, the NPWS is of the opinion that this conclusion and any subsequent categorisation of the importance of the winter roost site for hen harrier is not supported by best scientific evidence. The NPWS remains concerned that the impacts

of the proposed project, on the conservation objectives of the Slieve Bloom Mountains SPA, have not been adequately assessed."

10. Furthermore, the Inspector placed too much weight on her finding that there is no suitable Hen Harrier habitat within the site for the proposed windfarm and failed to identify and examine the implications of the proposed project for Hen Harriers found outside the boundaries of the SPA and outside the windfarm, where those implications are liable to affect the conservation objectives of the site, including the risk of birds from the SPA flying through the windfarm site to access the known Hen Harrier roost site immediately to the north. The SPA is located to the south west of the windfarm, and the two bogs where Hen Harriers are known to have visited from the SPA are located directly to the north and north east of the windfarm site (the extensive records of hen harriers in that area include a record of a hen harrier identified which had been tagged in the SPA). There is a possibility that the birds would have to fly through the windfarm to reach the winter roost site on the bog and the Inspector erred in failing to consider this possibility while screening out the Hen Harrier and the Board erred in adopting her conclusions. The Board has failed to carry out and record a lawful screening assessment as required by national and EU law (and in particular in accordance with *Kelly* and the Opinion of Advocate General Sharpeston [sic] in *Sweetman*).

11. The Inspector erred in failing to have regard to the significant scientific doubt raised by the NPWS. The Inspector's report does not appear to refer to the second NPWS letter at all, i.e. the letter of 1 April 2021 submitted by the NPWS in response to the further information submitted by the developer to the Board. The NPWS highlighted the absence of *best scientific evidence* to support the Developer's conclusion that there is no longer a winter roost for the Hen Harrier on Garryhinch Bog. The concerns of the NPWS scientists that there has been no adequate assessment of the impacts of the proposed project on the conservation objectives of the Slieve Bloom Mountains SPA, was not considered by the Inspector and as a result her report led the Board into error.

12. At paragraph 7.44 of her report, the Inspector erred by misinterpreting the planning reports of Laois County Council, when she states that "the Council did not raise any concerns [regarding the Slieve Bloom SPA] within the assessment of the application". Laois County Council incorporated into its Request for Further Information the concerns raised by the NPWS in its first letter to the Planning Authority dated 24 March 2020. When the Further Information Response was received, the Council sent it to the NPWS for further comment. The reply of the NPWS dated 1 April 2021 was incorporated into the final report of the Council's planner. The planning report sets out in full the conclusions of the NPWS. No AA screening was conducted by Laois County Council because there was no development consent granted, due to the decision to refuse planning permission because of gaps in the EIAR information on bats. The Laois planner recommended refusal on the basis of a "critical failing in the assessment process" for bats. The fact that the reasons for Laois deciding to refuse was on this very narrow point when there were so many other weaknesses in the Developer's proposal, including in relation to the assessment of other ecology, was the basis of the other two appeals to the Board including that of this Applicant. Laois County Council did not raise the NPWS concerns any further than it did because it did not undertake an AA screening on the effects of its decision to refuse planning permission.

13. The Board was not satisfied with the lack of definition of the project defined in the planning application as being '*up to 8 turbines*' and '*up to 185 metres*' tip height and sought further information from the Developer about the turbine description. The information in the Developer's original AA Screening Report was collated in the absence of any decision on final hub height and rotor diameter. There was no decision on the final design of the turbines when the AA Screening report was prepared in December 2019 or when it was amended in March 2021 following the FI response to Laois. The noise assessments in the EIAR had assumed that turbines with a hub height of 106 metres would be selected.

14. When the Developer, in response to the Board's request for further information on the turbine specification, confirmed for the first time in January 2023 that the turbine to be installed would be 170 m in diameter and have a hub height of 100 m, it ought to have been clear to the Inspector that this would have meant that the turbine blades would sweep closer to the ground than if the hub height had been 106 metres for a 185 metre high turbine, one of the options that had been considered in the EIAR. The effect of the confirmed turbine dimensions is that the turbine will sweep as close as 15 metres to the ground, placing transiting Hen Harriers at risk of colliding into a blade or being swept up into the rotating blades. The Inspector in failing to recognise this risk erred in having no regard to the observation of the Developer's consultant, at page 27 of the March 2021 Further Information Response to the Planning Authority, who said: "The scientific literature shows

that hen harriers are renowned for flying at low heights of 10-20 m, which is usually below rotor swept heights" which suggested that the understanding of the authors of the original AA Screening Report and the amended AA Screening Report from March 2021 was that the clearance would in fact be greater than 20 metres, i.e. that the normal flight line of the Hen Harrier would be below the turbine blades. This would have been the case had the 106m hub height option in the EIAR (assumed for the assessment of noise) been selected. A turbine of 185m tip height and hub of 106 metres would have ground clearance of 27 metres, putting a transiting hen harrier flying in a band of 10 to 20 metres over ground at less risk of collision. The Inspector and the Board erred in failing to properly assess the change in circumstances for a transiting Hen Harrier due to the selection of the 100 m hub height rather than the 106 m hub height identified as one of the options in the original EIAR and erred when neglecting to reverse its previous decision to screen out the Slieve Bloom Mountains SPA when it received from the Developer in January 2023 confirmation of the turbine dimensions.

PART 3 – JURISDICTIONAL GROUNDS

15. The Applicant's standing to take these proceedings derives from having participated in the planning process and its role as an Environmental Non-Governmental Organisation established for the purposes of the protection of the environment.

PART 4 – FACTUAL GROUNDS

1. The facts and matters relied upon in support of each of the grounds pleaded herein and each of the reliefs sought herein are identified in the verifying affidavit sworn by the Applicant's deponent Kieran Cummins and the documents exhibited to same affidavit. The said facts and matters together with the contents of the said affidavit and the documents exhibited thereto are incorporated herein by reference. Without prejudice to the forgoing, the central facts and matters relied upon in support of each of the grounds pleaded herein and each of the reliefs sought herein are further identified hereunder.

2. The proposed Dernacart windfarm is located approximately 3 kilometres north of Mountmellick town and adjoins the Bord Na Mona ('BNM') owned Garrymore Bog on its northern boundary. Garrymore Bog in turn is bordered by the larger Garryhinch bog to its east and together they are described by their owner BNM as the 'Garryhinch Bog Group'.

3. The Slieve Bloom Mountains Special Protection Area ('the SPA') is located c. 4.7 kilometres to the southeast of the proposed windfarm and is designated for the protection of the Hen Harrier. Hen Harriers from the SPA have been known to roost on the peatlands immediately to the north of the proposed windfarm. The flight from the SPA to the Garryhinch Bog roost site could take Hen Harriers through the site of the proposed development.

4. The SPA was designated under the Birds Directive for the conservation of the endangered Hen Harrier species and is also protected under the Habitats Directive. The Slieve Bloom Mountains is a Ramsar Convention site and a Biogenetic Reserve within the European Network of Biogenetic Reserves. Part of the Slieve Bloom Mountains SPA is a Statutory Nature Reserve (S.I. 382/1985). The SPA is also protected by S.I. No. 184/2012 - European Communities (Conservation of Wild Birds (Slieve Bloom Mountains Special Protection Area 004160)) Regulations 2012.

16. In February 2024, the NPWS published the 2022 National Survey of breeding Hen Harrier in Ireland, Irish Wildlife Manual No. 147. This report postdates the impugned decision and has been exhibited by the Applicant for the sole purpose of assisting the High Court in interpreting the significance of the conservation objectives for the Hen Harrier in this SPA, and the measures therein, for delivering the objectives of the Birds Directive and Habitats Directive.

17. The planning process for the proposed Dernacart windfarm commenced with the publication of a notice in the Irish Independent on 6 February 2020, giving notice to the public of the making of the planning application to Laois County Council. The planning application was submitted on or about 17 February 2020.

18. The Hen Harrier and Slieve Bloom SPA were screened out by the Developer in the AA Screening Report because no hen harriers had been detected during vantage point surveys conducted on 3 days during 2018. For this reason, the Hen Harrier and its SPA were excluded from further assessment in the Developer's NIS.

19. On or about 23 March 2020, Birdwatch Ireland made a submission highlighting that the site of the proposed development is in the area of an important winter roost for the Hen Harrier and that 5 birds had been identified in the windfarm area in a survey conducted over the winter of 2013/2014. Monitoring of the site ceased in 2016 and Birdwatch Ireland stated that there was no recent survey data available construction but that they were aware of a sighting in 2019 recorded by a local bird watcher Ricky Whelan.

20. On or about 20 March 2020, a submission was made by Ricky Whelan. He states that he personally observed "one ringtail type Hen Harrier" on the evening of 28 October 2019 on Garryhinch Bog. Mr Whelan states that he is fully of the opinion, given his experience of the site and the species, that Hen Harriers are still using the Garryhinch Bog site as a winter roost location and that they had been missed by surveyors who carried out the bird surveys for the developer.

21. On or about 22 March 2020, Eco Advocacy made a submission to Laois County Council.

22. On or about 23 March 2020, Mountmellick Wind Turbine Impact made a submission to Laois County Council.

23. On or about 24 March 2020, the NPWS made a submission recommending that further information be sought in relation to the Hen Harrier. The NPWS stated:

"During winter hen harriers gather at suitable, safe, communal roost sites at night from which they can radiate and hunt across the hinterland during the short winter days. The proposed development lies close to such a site. The winter roost site has been the subject of several years of targeted surveys as part of the Irish Hen Harrier Winter Survey. Up to six hen harriers have been recorded roosting communally at this site, including a juvenile bird tagged in the Slieve Bloom Mountains Special Protection Area (SPA) which lies within 5km of the proposed development site. This bird provides evidence of a pathway between the SPA and the nearby roost site."

24. On or about 2 June 2020, Laois County Council sought further information which was provided by the Developer in the form of a report prepared on 8 March 2021 and appendices to said report. Of significance to these proceedings is Appendix 4-2 to the further information report which concerned the Hen Harrier.

25. As part of its further information response, the Developer conducted a new Hen Harrier survey and recorded therein a single occurrence of a hen harrier crossing over the Garrymore Bog and the Garryhinch Bog to the north of the proposed turbines. The Developer's conclusion was that this was insignificant.

26. Appendix 4-2 of the FI response incorporated amendments to the EIAR, AA Screening Report and NIS.

27. The Further Information response was forwarded by Laois County Council to the NPWS. By letter dated 1 April 2021, the NPWS responded.

28. The NPWS in its letter of 1 April 2021 criticised the accuracy of the survey methodology used by the Developer in the study that informed the Further Information Response to Laois County Council. The NPWS concluded:

> "Given the inadequacy of the surveying pointed out above, the NPWS is of the opinion that this conclusion and any subsequent categorisation of the importance of the winter roost site for hen harrier is not supported by best scientific evidence. The NPWS remains concerned that the impacts of the proposed project, on the conservation objectives of the Slieve Bloom Mountains SPA, have not been adequately assessed."

29. On or about 30 April 2021, Laois County Council decided to refuse planning permission, adopting the recommendation of its planner.

30. The Laois CC planner, while acknowledging the conclusion by the NPWS regarding the Hen Harrier, did not get to the stage of conducting an Appropriate Assessment or screening for same, because his recommendation, on the advice of an external consultant, was to refuse development consent because of the failure to properly mitigate impacts on bats, from 6 of the 8 turbines, contrary

to the Environmental Impact Assessment Directive. The report of the external consultant was not put on the public file.

31. Three First Party Appeals were made to An Bord Pleanála including from the Developer and the Applicant in these proceedings.

32. The Board created a webpage, on its own website, for the planning appeal. Extracts from the EIAR have been posted to the Board's webpage but they are not in any particular order, and they are not labelled with any recognisable code or names, making it very difficult to inspect the file. The version of the EIAR and NIS and AA Screening Report posted to the Board's website does not include amendments made by the Developer in the Further Information response to Laois County Council.

33. The Board appointed an Inspector to report on the Appeal. On or about 28 September 2022, the Inspector made her first report.

34. The Inspector made an Appropriate Assessment screening. The Applicant pleads that the Inspector made several errors in making her AA screening which was subsequently adopted by the Board.

35. The Inspector at Table 1.0 of the Inspector's Report identified that there was a possibility that commuting / foraging hen harriers from the Slieve Bloom Mountains SPA may utilise the site of the proposed development.

36. The Inspector, at paragraph 7.43 proceeded to then screen out the Hen Harrier for erroneous reasons. She stated: "In relation to the Slieve Blooms SPA of which Hen Harrier the single qualifying interest I note that Hen Harrier were not recorded at the site during extensive bird surveys." This observation takes no account of the Hen Harrier flight recorded by the Developer's consultants in 2021 and reported as Further Information to the Planning Authority, or the fact that the NPWS, on assessing the FI response, was of the opinion that the Developer's survey methodology was not appropriate, and it was possible that other Hen Harriers were present during the survey but undetected.

37. The Inspector concluded that there is no suitable Hen Harrier habitat within the development site but neglected to have regard to the bog/ moorland habitat directly to the north and north east of the windfarm site and the extensive records of hen harriers in that area including a record of a hen harrier identified on that bog which had been tagged in the SPA. The Inspector does not appear to have had any regard at all to the significant scientific doubt raised by the NPWS, or the absence of best scientific evidence supporting the conclusion of the Developer that there is no longer a winter roost for the Hen Harrier on Garryhinch Bog. The concerns of the NPWS scientists that there has been no adequate assessment of the impacts of the proposed project on the conservation objectives of the Slieve Bloom Mountains SPA, were not considered by the Inspector.

38. At paragraph 7.44 of her report, the Inspector has seemingly misinterpreted the report of the Laois County Council Planner, when she states that "the Council did not raise any concerns [regarding the Slieve Bloom SPA] within the assessment of the application". The Laois Planner set out in full the conclusions of the NPWS, but did not engage further with them, because no Appropriate Assessment screening was conducted when the project was to be refused development consent for EIA reasons. The Laois planner recommended refusal on the basis of a "critical failing in the assessment process" for bats, i.e. a breach of the EIAR Directive.

39. The Board was not satisfied with the vague definition of the project as '*up to 8 turbines*' and '*up to 185 metres*' tip height and sought further information about the turbine description. The AA Screening conducted by the Developer was carried out in the absence of any decision on final hub height and rotor diameter. There was no decision on the final design of the turbines when the AA Screening report was prepared in December 2019, indeed the noise assessments in the EIAR of the same date had assumed that turbines with a hub height of 106 metres would be selected.

40. When the Developer confirmed to the Board in response to a request by the Board for further information that the turbine to be installed would be 170 m in diameter and have a hub height of 100 m, it ought to have been clear to the Inspector that this would have meant that the turbine blades would sweep as close as 15 metres to the ground.

41. It is of significance that the Developer, at page 27 of the Further Information Response to the Planning Authority, prepared in March 2021, before the 100m was chosen, had stated:

"The scientific literature shows that hen harriers are renowned for flying at low heights of 10-20 m, which is usually below rotor swept heights (Whitfield and Madders, 20069)."

42. The assumption made by the Developer's consultants, when screening out the Hen Harrier from Stage II AA in December 2019 and when preparing the amendments to the AA Screening Report as part of the FI Response to the Council in March 2021, was that the normal flight line of the Hen Harrier would be below the turbine blades. Had the 106m hub height been retained, then a turbine of 185m tip height would have a rotor radius of (185 – 106) = 79 metres. In that configuration, the clear space a hen harrier would have to fly under the turbine would have been 106m – 79m = 27 metres from the ground. Had the 106 m hub height option been chosen, a Hen Harrier flying at 20 metres off the ground would have been 7 metres below the turbine blade. But because the 100 metre hub and 170 metre diameter was chosen, the Hen Harrier flying at 20 metres above ground would be at risk of crashing into the rotors which will come as close as 15 metres to the ground.

43. None of this was considered by the Inspector, when she decided in her addendum report of 5 December 2023 that the developer's decision to use the selected turbine configuration would have no impact on the AA Screening Report which had screened out the Hen Harrier.

44. The Board met on 19 December 2023 and recorded in its Board Direction that it "agreed with and adopted the screening assessment and conclusion carried out in the Inspector's report".

45. By Order dated 3 January 2024, the Board granted planning permission for the windfarm.

46. **Name and Address of the Solicitor for the Applicant**: O'Connell Clarke Solicitors, Suite 142, The Capel Building, Mary's Abbey, Dublin 7.

Oisin Collins SC
Margaret Heavey BL

Dated this 6th day of March 2024.

Signed:_____
O'Connell & Clarke Solicitors
Solicitors for the Applicant

Annex III – applicant's supplemental affidavit of 9 September 2024

THE HIGH COURT
JUDICIAL REVIEW
Record Number 2024/290 JR
Between:
ECO ADVOCACY CLG
Applicant
-and-
AN BORD PLEANALA
Respondent
-and-
STATKRAFT IRELAND LIMITED
Notice Party

SUPPLEMENTAL AFFIDAVIT OF KIERAN CUMMINS

I, KIERAN CUMMINS, of …, Co Meath, Horticulturalist, aged 18 years and upwards, MAKE OATH and say as follows: -

1. I am the Company Secretary of the Applicant company in these proceedings, an Environmental Non-Governmental Organisation established in 2015 to advocate on issues of planning and environmental law, biodiversity, sustainability, energy supply, heritage, sustainable employment, natural resources, conservation, and policy. I beg to refer to the proceedings had herein when produced.

2. I make this affidavit with in knowledge of the Applicant and with its authority for the purpose of replying to the opposition papers. I do not intend to reply to each, and every point raised against me in opposition, much of which is legal argument and will be addressed by Counsel on my behalf in legal submissions. Where I do not reply to a matter raised it should not be taken in any way as an acceptance by me of what is pleaded in opposition.

3. So much of this Affidavit as relates to my own acts and deeds is true and so much of it as relates to the acts of any and every other person, I believe to be true.

4. In my grounding affidavit, I made certain averments about the effect on the hen harrier of the changed design of the turbines. I pointed out that under the first design (i.e. the design used in the noise assessment) where each turbine was to have a hub height of 106 metres and blade length of 79 metres, this meant that when the blade was at its closest point to the ground there would have been a 27 metre 'gap· for the hen harrier to fly under. The Board argues that this is an overly technical point for a non-expert to make but I say and believe that this is a simple subtraction exercise which has been within my knowledge since I was a child. The calculation is 106 minus 79 equals 27.

5. The developer then altered the design of the turbine by changing the hub height to 100 metres and the turbine circle diameter to 170 metres. A circle diameter of 170 metres means that the radius of that circle is 85 metres long. I worked that out by dividing the number 170 by 2. Division is also something that I learned in 'sums class' as a child.

6. Therefore, 85 metres is the new length of the turbine blade, which is half the diameter of the circle. The effect of the longer blade and the shorter hub height is to narrow the gap between the ground (i.e. the bottom of the hub) and the lowest point of the tip of the rotating blade. This means that the new 'gap' for the hen harrier to fly under is calculated (using simple subtraction) as 100 minus 85 equals 15. This means that the 'gap' for the hen harrier to fly under the turbine is only 15 metres in the new configuration, whereas it was a 27 metre gap in the old configuration. I say that these are simple mathematics, well within my capacity and the capacity of any non-mathematician on the Board of An Bord Pleanala.

7. This is clearly a problem for the hen harrier, because, as pointed out by the Developer, at page 27 of the Further Information Response to the Planning Authority, prepared in March 2021 and exhibited by me in my grounding affidavit, "The scientific literature shows that hen harriers are

renowned for flying at low heights of 10-20 m, which is usually below rotor swept heights (Whitfield and Madders, 20069)."

8. It was only by means of a response dated 31 January 2023 to a further information request from the Board, that the Developer confirmed that the dimensions of the turbines are to be 170 m diameter and 100 m hub height. This was well after the December 2019 AA screening had screened out the Hen Harrier from Stage II AA.

9. In response to the Board's criticisms that my pleas about the risk to the Hen Harrier are not being raised by an 'expert' in these proceedings, I can confirm that Eco Advocacy has expertise in ornithology and that my affidavit is based on my own knowledge and experience. I have been a birdwatcher since my childhood and there are other experienced birders in the organisation. We could not have anticipated that the Board's decision would fail to reflect the experts of the National Parks and Wildlife Service who identified the flaws in the Board's Hen Harrier assessment as it did, or that the Board would fail to have any proper regard to the submissions of the experts in Birdwatch Ireland or the expertise of Ricky Wheelan, a very experienced ornithologist.

10. As pointed out by the NPWS in both of its submissions, the Hen Harrier roost survey that was conducted as part of the bird surveying for this proposed development was insufficient to demonstrate beyond reasonable scientific doubt that the site is not relied upon by Hen Harriers for roosting. Only 5 months out of the recommended 2 years or survey work was carried out and an insufficient number of watchers were used. As pointed out in the various submissions and guidance, Hen Harriers roost on the ground, often amongst the heather and other dense vegetation. Flight lines of birds going into roost can often be obstructed by taller scrub vegetation and trees. In addition to the operation of the wind turbines, the amount of human disturbance, loss of vegetation, and the new access paths for mammalian predators which would result from the current proposals due to the construction of access roads together with the construction of wind turbines would also denigrate this important habitat. But the first step, before any of these matters can be considered, is to conduct a proper survey, and as pointed out by the experts in the NPWS, this was not done.

11. In reply to the Board's pleas about the use of alphanumeric file names on its website instead of names describing the content of each file, I say and believe while the Board pointed to a short sample of these files, there are in fact 67 such files. I beg to refer to a list of said filenames, together with a proper description of their contents, exhibited at **TAB 1** of the booklet of exhibits.

12. I say and believe that the amendments to the EIAR are omitted from this list of files. The Board claims that any duty it has to place on its own website a copy of the missing files is met by including a link to the Council's website. I say and believe that while the missing parts of the EIAR can be found within a file on the Council's website that includes other documents, the EIAR addendum is not identified by file name as an addendum to the EIAR.

13. Also, the Board, under the heading "application is subject to an EIA procedure" provides a link entitled 'view associated documents' which contains the list of 67 files with the aforementioned impenetrable filenames, none of which is the EIAR addendum or alterations to the NIS or AA Screening Report, as far as I can make out. I say and believe that any reader of the Board's website was entitled to believe that the link 'view associated documents' contained all the documents associated with the EIA conducted by the Board. This calls into question what was actually before the Board during the EIA and any AA screening / AA conducted by it.

14. I pray this Court to grant the reliefs sought in the Statement of Grounds.

SWORN by **KIERAN CUMMINS** …

Filed by O'Connell Clarke, St Mary's Abbey, Capel Street, Dublin 7, Solicitors for the Applicant, on this day of 2024

Annex IV – applicant's written legal submissions of 2 October 2024

Record Number 2024/290JR
THE HIGH COURT
Between:
ECO ADVOCACY CLG
Applicant
-and-
AN BORD PLEANÁLA
Respondent
-and-
STATKRAFT IRELAND LIMITED
Notice Party

OUTLINE LEGAL SUBMISSIONS ON BEHALF OF THE APPLICANTS

Introduction:

1. These proceedings concern a decision made by the Respondent ('the Board') on or about 3 January 2024 to grant planning permission to the Notice Party ('the Developer') on appeal for development consisting of the construction of up to 8 no. wind turbines with a tip height of 185 metres and all associated foundations and hardstanding areas, cables, substation and associated works at Dernacart, Forest Upper & Forest Lower, Mountmellick, Co. Laois ('the proposed windfarm'). The Board's planning file is numbered 310312.

2. There are two core grounds; an EU law ground that the decision was made contrary to **Article 6(3) of Council Directive 92/43/EEC ('the Habitats Directive')** as transposed by **s. 177U and s. 177V of the Planning and Development Act 2000**, and a domestic law ground that the complete Environmental Impact Assessment Report was not placed on the Board's website, contrary to **s. 146(7) of the Planning and Development Act, 2000, as amended.**

3. The proposed windfarm is to be located approximately 3 kilometres north of Mountmellick town on a site that adjoins the Bord Na Mona ('BNM') owned Garrymore Bog on its northern boundary. Garrymore Bog in turn is bordered by the larger Garryhinch bog to its east and together they are described by their owner BNM as the 'Garryhinch Bog Group'. This adjoining bog area is of significance to the proceedings because it is known to be used by hen harrier birds connected with the nearby Special Protection Area. To access the bog habitat, hen harriers from the SPA may need to fly through the site of the proposed windfarm. Their typical flight height is within the rotation area / minimum swept height of the turbine blades.

4. The Slieve Bloom Mountains Special Protection Area ('the SPA') is located c. 4.7 kilometres to the southeast of the proposed windfarm and is designated for the protection of only one qualifying interest - the hen harrier, a large bird of prey.

5. The hen harrier population in Ireland has declined significantly since the facts that were before the Court of Justice in Case C 164/17 Grace and Sweetman, a leading case concerning the foraging habitat of this rare bird of prey. There has been a population decline of one third (33%) between the most recent survey in 2022 and the previous national survey in 2015 (See NPWS survey results in Exhibit Tab 3 Grounding Affidavit of Kieran Cummins). At the current rate of decline, the NPWS believes that population extinction could be expected within 25 years. The Slieve Bloom Mountains SPA plays a very important role in the conservation of the species. The SPA held three successful nest sites and fledged a total of six chicks in 2022, a significant percentage of the 31 no. total number of chicks fledged in all SPA sites in Ireland for that year.

6. Hen Harriers from the SPA are known to roost on the peatlands immediately to the north of the proposed windfarm ('the Garryhinch bog roost site'). At its closest location, a direct flight path from the SPA to the Garryhinch Bog roost site would bring the birds through the site of the proposed turbines (see maps at Exhibits Tabs 1A, 1B and 1C of grounding affidavit).

The Planning Process:

7. The planning application was initially made to Laois County Council and was accompanied by a Natura Impact Statement; but the hen harrier and its SPA were screened out by the Developer for

Stage II Appropriate Assessment because none of the birds had been detected during the Developer's own vantage point surveys conducted on 3 days during 2018. (See AA Screening and NIS Tab 5b Grounding Affidavit).

8. Birdwatch Ireland made a submission to the Planning Authority highlighting that the site of the proposed development is in the area of an important winter roost for the Hen Harrier and that 5 birds had been identified in the windfarm area in a survey conducted over the winter of 2013/2014. Birdwatch was aware of a sighting in 2019 recorded by a local bird watcher Ricky Whelan. (Submission at Tab 6 Grounding Affidavit)

9. The local ornithologist Ricky Whelan made a submission to the Planning Authority stating that he personally observed "one ringtail type Hen Harrier" on the evening of 28 October 2019 on Garryhinch Bog. Mr Whelan states that he is fully of the opinion, given his experience of the site and the species, that Hen Harriers are still using the Garryhinch Bog site as a winter roost location and that they had been missed by surveyors who carried out the bird surveys for the developer. (Submission at Tab 7 Grounding Affidavit).

10. In March 2020, the NPWS made a submission to the Planning Authority citing the recording of an SPA tagged bird in the bog area as "evidence of a pathway between the SPA and the nearby roost site" and recommended that further information be sought in relation to the Hen Harrier. (First submission of NPWS at Tab 10 Grounding Affidavit)

11. The Planning Authority sought further information which was provided by the Developer in the form of a report prepared on 8 March 2021 and appendices to said report. Of particular significance to these proceedings is Appendix 4-2 to the further information report which concerned the hen harrier. As part of its further information response, the Developer conducted a new hen harrier survey and recorded therein a single occurrence of a hen harrier crossing over the Garrymore Bog and the Garryhinch Bog to the north of the proposed turbines. The Developer's conclusion was that this was insignificant. (Further Information at Tabs 11A, 11B and 12 of Grounding Affidavit).

12. The Further Information response was forwarded by Laois County Council to the NPWS. The NPWS in its response of 1 April 2021 criticised the accuracy of the survey methodology used by the Developer and concluded: "The NPWS remains concerned that the impacts of the proposed project, on the conservation objectives of the Slieve Bloom Mountains SPA, have not been adequately assessed." (NPWS second submission at Tab 13 of Grounding Affidavit)

13. On or about 30 April 2021, Laois County Council decided to refuse planning permission, adopting the recommendation of its planner. The Laois CC planner, while acknowledging the conclusion by the NPWS regarding the Hen Harrier, did not get to the stage of conducting an Appropriate Assessment or screening for same, because his recommendation, on the advice of an external consultant, was to refuse development consent because of the failure to properly mitigate impacts on bats (an Environmental Impact Assessment reason). The report of the external consultant was not put on the public file. (Laois County Council refusal and planner report at Tab 14 Grounding Affidavit).

The Planning Appeal

14. Three First Party Appeals were made to An Bord Pleanála including from the Developer and the Applicant in these proceedings. (Copies of Appeals at Tab 15 of Grounding Affidavit)

15. The Board appointed an Inspector to report on the Appeal. On or about 28 September 2022, the Inspector made her first report, within which she made an Appropriate Assessment screening. The Applicant pleads that the Inspector made several errors in making her AA screening which was subsequently adopted by the Board. (First Inspector Report at TAB 16 of Grounding Affidavit). The effect of the Inspector's AA screening was that the hen harrier species from the Slieve Bloom Mountains SPA was screened out from further assessment in the Stage II AA Screening which proceeded to assess aquatic species in the River Barrow and River Nore Special Area of Conservation.

16. The Inspector at Table 1.0 of the Inspector's Report identified that there was a possibility that commuting / foraging hen harriers from the Slieve Bloom Mountains SPA may utilise the site of the proposed development. The Inspector, at paragraph 7.43 proceeded to then screen out the Hen Harrier for erroneous reasons. She stated: "In relation to the Slieve Blooms SPA of which Hen Harrier the single qualifying interest I note that Hen Harrier were not recorded at the site during

extensive bird surveys." This observation takes no account of the Hen Harrier flight recorded by the Developer's consultants in 2021 and reported as Further Information to the Planning Authority, or the fact that the NPWS, on assessing the FI response, was of the opinion that the Developer's survey methodology was not appropriate, and that it was possible that other Hen Harriers were present but undetected.

17. The Inspector concluded that there is no suitable Hen Harrier habitat within the development site but neglected to have regard to the bog/ moorland habitat directly to the north and north east of the windfarm site and the extensive records of hen harriers in that area including a record of a hen harrier identified on that bog which had been tagged in the SPA. The Inspector does not appear to have had any regard at all to the significant scientific doubt raised by the NPWS, or the absence of best scientific evidence to support the conclusion of the Developer that there is no longer a winter roost for the Hen Harrier on Garryhinch Bog. The concerns of the NPWS scientists that there has been no adequate assessment of the impacts of the proposed project on the conservation objectives of the Slieve Bloom Mountains SPA, were not considered properly or at all by the Inspector.

18. At paragraph 7.44 of her report, the Inspector had regard to an irrelevant finding that "the Council did not raise any concerns [regarding the Slieve Bloom SPA] within the assessment of the application". The Laois Planner did set out in full the conclusions of the NPWS, but did not engage with them, because no Appropriate Assessment screening was conducted in circumstances where the planning application was refused by Laois for EIA reasons. The Laois planner recommended refusal on the basis of a "critical failing in the assessment process" for bats, i.e. a breach of the EIA Directive.

19. At the beginning of the appeal stage, the Board was not satisfied with the Developer's vague definition of the project as '*up to 8 turbines*' and '*up to 185 metres*' tip height and sought further information about the turbine description. The response to this further information request is directly relevant to the hen harrier issues because the AA screening conducted by the Developer had been carried out in the absence of any decision on final hub height and rotor diameter. There was no decision on the final design of the turbines when the AA Screening report was prepared in December 2019. For the purposes of conducting noise assessments, the December 2019 EIAR had assumed that turbines with a hub height of 106 metres and blade length of 79 metres would be selected, the use of which would have meant that when the blade was at its closest point to the ground there would have been a 27 metre 'gap' for the hen harrier to fly under. (see supplemental affidavit of Kieran Cummins).

20. The Developer confirmed to the Board in response to a request by the Board for further information that the turbine to be installed would be 170 m in diameter and have a hub height of 100 m which meant that the space between the ground and the lowest point of the rotating turbine blade was now reduced to 15 metres. The Inspector had no regard to the fact that the Developer's decision to screen out the hen harrier from Stage II appropriate assessment had been made before the turbine design was changed to make the '15 metre gap'. The Developer's own expert, at page 27 of the March 2021 Further Information Response to the Planning Authority had stated: "The scientific literature shows that hen harriers are renowned for flying at low heights of 10-20 m, which is usually below rotor swept heights (Whitfield and Madders, 20069)." (Tab 11A Grounding Affidavit)

21. Had the original turbine design been chosen, a hen harrier flying at 20 metres off the ground would have had 7 metres clearance under the turbine blade tip. But because the 100 metre hub and 170 metre diameter was chosen, the hen harrier flying at 20 metres above ground would be at further risk of crashing into the rotors which will come as close as 15 metres to the ground, i.e. within the typical flight path height of the birds. None of this was considered by the Inspector, when she decided in her addendum report of 5 December 2023 that the developer's decision to use the selected turbine configuration would have no impact on her previous AA Screening conclusions. (Addendum Inspector Report Tab 17 Grounding Affidavit).

22. The Board met on 19 December 2023 and recorded in its Board Direction that it "agreed with and adopted the screening assessment and conclusion carried out in the Inspector's report".

23. The Board created a webpage, on its own website, for the planning appeal. Extracts from the EIAR have been posted to the Board's webpage but they were not in any particular order, and they were not labelled with any recognisable code or names, making it very difficult to inspect the file. This difficulty in accessing EIAR information was only addressed by the Board in August 2024 when English names were substituted for the indecipherable alpha numeric codes used up to then

(Replying Affidavit of Pierce Dillon dated 19 September 2024). The version of the EIAR and NIS and AA Screening Report posted to the Board's website does not include the amendments made by the Developer in the Further Information response to Laois County Council.

Legal Submissions

24. By Art. 6(3) of the Habitats Directive:

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

25. The European site relevant to these proceedings was designated by S.I. No. 184/2012 - European Communities (Conservation of Wild Birds (Slieve Bloom Mountains Special Protection Area 004160)) Regulations 2012. Part of the Slieve Bloom Mountains SPA is a Statutory Nature Reserve (S.I. 382/1985). The Slieve Bloom Mountains is also a Ramsar Convention site and a Biogenetic Reserve within the European Network of Biogenetic Reserves. The conservation objective of the SPA is to *restore* the favourable conservation condition of the Hen Harrier.

26. The test for an Appropriate Assessment under art. 6(3) is explained in paragraphs 38-41 of the judgment of the CJEU in case **C-165/17 Edel Grace and Peter Sweetman v An Bord Pleanála**:

> 38. Article 6(3) of the Habitats Directive establishes an assessment procedure intended to ensure, by means of a prior examination, that a plan or project not directly connected with or necessary to the management of the area concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of the area (see, to that effect, judgment of 17 April 2018, Commission v Poland (Białowieża Forest), C-441/17, EU:C:2018:255, paragraph 108 and the case-law cited).
>
> 39. The assessment carried out under that provision may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected area concerned (see, to that effect, judgment of 12 April 2018, People Over Wind and Sweetman, C-323/17, EU:C:2018:244, paragraph 38 and the case-law cited).
>
> 40. The fact that the appropriate assessment of the implications of a plan or project for the area concerned must be carried out under that provision means that all the aspects of the plan or project which can, either by themselves or in combination with other plans or projects, affect the conservation objectives of that area must be identified in the light of the best scientific knowledge available in the field (see, to that effect, judgment of 17 April 2018, Commission v Poland (Białowieża Forest), C-441/17, EU:C:2018:255, paragraph 113 and the case-law cited).
>
> 41. It is at the date of adoption of the decision authorising implementation of the project that there must be no reasonable scientific doubt remaining as to the absence of adverse effects on the integrity of the area in question (see, to that effect, judgment of 17 April 2018, Commission v Poland (Białowieża Forest), C-441/17, EU:C:2018:255, paragraph 120 and the case-law cited).

27. In the **AG Opinion in Case C 258/11 *Sweetman***, Adv-Gen Sharpston set out the following explanation of Article 6 of the Habitats Directive, including the terms 'likely' and 'significant effect' used at the first stage (the screening stage) to determine if an Appropriate Assessment is warranted [underlining added]:

> "43… Paragraph 2 imposes an overarching obligation to avoid deterioration or disturbance. Paragraphs 3 and 4 then set out the procedures to be followed in respect of a plan or project which is not directly connected with or necessary to the management of the site (and which is thus not covered by paragraph 1) but which is likely to have a significant effect thereon.

Collectively, therefore, these three paragraphs seek to pre-empt damage being done to the site or (in exceptional cases where damage has, for imperative reasons, to be tolerated) to minimise that damage. They should therefore be construed as a whole.

44. Article 6(2) imposes a general requirement on the Member States to maintain the status quo. The Court has described it as 'a provision which makes it possible to satisfy the fundamental objective of preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, and establishes a general obligation of protection consisting in avoiding deterioration and disturbance which could have significant effects in the light of the directive's objectives'. The obligation Article 6(2) lays down is not an absolute one, in the sense that it imposes a duty to ensure that no alterations of any kind are made, at any time, to the site in question. Rather, it is to be measured having regard to the conservation objectives of the site, since that is why the site is designated. The requirement is thus to take all appropriate steps to avoid those objectives being prejudiced. The authenticity of the site as a natural habitat, with all that that implies for the biodiversity of the environment, is thus preserved. Benign neglect is not an option.

45. Article 6(3), by contrast, is not concerned with the day-to-day operation of the site. It applies only where there is a plan or project not directly connected with or necessary to site management. It lays down a two-stage test. At the first stage, it is necessary to determine whether the plan or project in question is 'likely to have a significant effect [on the site]'.

46. I would pause here to note that, although the words 'likely to have [an] effect' used in the English-language version of the text may immediately bring to mind the need to establish a degree of probability – that is to say that they may appear to require an immediate, and quite possibly detailed, determination of the impact that the plan or project in question might have on the site – the expression used in other language versions is weaker. Thus, for example, in the French version, the expression is 'susceptible d'affecter', the German version uses the phrase 'beeinträchtigen könnte', the Dutch refers to a plan or project which 'gevolgen kan heben', while the Spanish uses the expression 'pueda afectar'. Each of those versions suggests that the test is set at a lower level and that the question is simply whether the plan or project concerned is capable of having an effect. It is in that sense that the English 'likely to' should be understood.

47. It follows that the possibility of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of Article 6(3). The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an appropriate assessment. There is no need to establish such an effect; it is, as Ireland observes, merely necessary to determine that there may be such an effect.

48. The requirement that the effect in question be 'significant' exists in order to lay down a de minimis threshold. Plans or projects that have no appreciable effect on the site are thereby excluded. If all plans or projects capable of having any effect whatsoever on the site were to be caught by Article 6(3), activities on or near the site would risk being impossible by reason of legislative overkill.

49. The threshold at the first stage of Article 6(3) is thus a very low one. It operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken of the implications of the plan or project for the conservation objectives of the site. The purpose of that assessment is that the plan or project in question should be considered thoroughly, on the basis of what the Court has termed 'the best scientific knowledge in the field'. Members of the general public may also be invited to give their opinion. Their views may often provide valuable practical insights based on their local knowledge of the site in question and other relevant background information that might otherwise be unavailable to those conducting the assessment.

50. The test which that expert assessment must determine is whether the plan or project in question has 'an adverse effect on the integrity of the site', since that is the basis on which the competent national authorities must reach their decision. The threshold at this (the second) stage is noticeably higher than that laid down at the first stage. That is because the question (to use more simple terminology) is not 'should we bother to check?' (the question at the first stage) but rather 'what will happen to the site if this plan or project goes ahead; and is that consistent with "maintaining or restoring the favourable conservation status" of the habitat or species concerned?'. There is, in the present case, no dispute that if the road scheme is to proceed a part of the habitat will be permanently lost. The question is simply whether the scheme may be authorised without crossing that threshold and bringing into play the remaining elements of Article 6(3) (and, if necessary, Article 6(4)).

> 51. It is plain, however, that the threshold laid down at this stage of Article 6(3) may not be set too high, since the assessment must be undertaken having rigorous regard to the precautionary principle. That principle applies where there is uncertainty as to the existence or extent of risks. The competent national authorities may grant authorisation to a plan or project only if they are convinced that it will not adversely affect the integrity of the site concerned. If doubt remains as to the absence of adverse effects, they must refuse authorisation."

28. The Inspector's AA screening, adopted by the Board, states at page 34 (Table 1) "commuting / foraging hen harrier may utilise the site". This conclusion, with the broader context of the submissions from the NPWS and experienced birdwatchers about the significance of the bog area immediately to the north for the conservation of the species, access to which may necessitate the hen harrier to commute through unsafe turbine operations with insufficient clearance between its flight height and the turbine blades, ought to have triggered the requirement for Stage II AA. In these circumstances, the Board's failure to conduct an Appropriate Assessment on the impacts of the proposed development on the hen harrier was contrary to Art. 6(3).

29. In Case C-127/02 *Waddenzee*, paragraphs 39–44 the CJEU addressed the question of when an AA is required (emphasis added) - "…The environmental protection mechanism provided for in Article 6(3) … does not presume that the plan or project considered definitely has significant effects on the site concerned but follows from the mere probability that such an effect attaches to that plan or project. … In case of doubt as to the absence of significant effects such an assessment must be carried out. … The first sentence of Article 6(3) must therefore be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives <u>if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects".</u>

30. The screening obligation has been transposed into Irish domestic law by s. 177U of the Planning and Development Act, as amended, which provides, *inter alia* that screening for appropriate assessment of an application for consent for proposed development shall be carried out by the competent authority to assess, <u>in view of best scientific knowledge</u>, if that proposed development, individually or in combination with another plan or project is likely to have a significant effect on the European site. Part of the Applicant's case is that the Board erred in failing to have proper regard to the issues raised by the NPWS in relation to the accuracy of the survey methodology used by the developer or to the remaining concerns of the NPWS that the impacts of the proposed project on the conservation objectives of the SPA have not been adequately assessed. The AA screening conducted by the Board was not conducted in view of best scientific knowledge or objective information, contrary to the Directive and or its domestic transposition.

31. The requirements of the 2nd stage of Appropriate Assessment, are summarised by Finlay-Geoghegan J in **Kelly v An Bord Pleanála [2014] IEHC 400**.

32. As Adv-Gen Kokott clarified in Case C-239/04 - Commission v Portugal: "Under …Article 6(3)…it is not sufficient…to prove ex post facto that a project had no negative impact. On the contrary, any reasonable scientific doubt as to the absence of adverse effects on the integrity of the site must be removed before the project is authorised."

33. In **Case C 721/21 Eco-Advocacy** the CJEU has identified that a decision screening out AA must meet the same standards as an AA itself -

> "39 … that assessment may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the site concerned (… Grace and Sweetman, C 164/17… paragraph 39 and the case-law cited, and … Holohan and Others, C 461/17… paragraph 49).
> 40 Such a requirement entails that the competent authority should be in a position, following an appropriate assessment, to state to the requisite legal standard the reasons why it was able, prior to the granting of the authorisation at issue, to achieve certainty, notwithstanding any opinions to the contrary expressed, that there was no reasonable scientific doubt with respect to the environmental impact of the work envisaged on the site concerned (see, to that effect…Holohan and Others, C 461/17 … paragraph 51).
> 41 Such requirements to state reasons must also be satisfied where, as in the present case, the competent authority approves a project likely to have an effect on a protected site

without requiring an appropriate assessment within the meaning of Article 6(3) of Directive 92/43.

42 It follows that, although, where a competent authority decides to authorise such a project without requiring an appropriate assessment within the meaning of that provision, EU law does not require that authority to respond, in the statement of reasons for such a decision, one by one, to all the points of law and of fact raised by the interested parties during the administrative procedure, the said authority must nevertheless state to the requisite standard the reasons why it was able, prior to the granting of such authorisation, to achieve certainty, notwithstanding any opinions to the contrary and any reasonable doubts expressed therein, that there was no reasonable scientific doubt as to the possibility that that project would significantly affect that site."

34. As set out earlier, the screening assessment conducted by the Inspector and adopted by the Board had lacunae in relation to the hen harrier. Reasonable scientific doubt raised by the NPWS, and other experts, remains after the Board's screening.

35. In Case **C-461/17 *Holohan and Others***, the CJEU found that Article 6(3) of the Habitats Directive must be interpreted as meaning that an 'appropriate assessment' must, on the one hand, catalogue the entirety of habitat types and species for which a site is protected, and, on the other, identify and examine both the implications of the proposed project for the species present on that site, and for which that site has not been listed, *and the implications for habitat types and species to be found outside the boundaries of that site*, provided that those implications are liable to affect the conservation objectives of the site.

36. In the context of *Holohan*, the Inspector's screening, adopted by the Board, took an overly narrow view of the scope for hen harrier habitat within the turbine site. The Inspector appears to have regarded the absence of hen harrier habitat site *within the turbine area* as a factor of significance, but had no proper regard to the location of the windfarm within a potential commuting corridor between the SPA and the bog site immediately to the North. The fact that the hen harrier's commuting path, outside the SPA, could take it into direct conflict with the swept height of the rotating turbine blades, was not given proper regard to by the Inspector or the Board.

37. In ***Reid v An Bord Pleanála* (No. 2) [2021] IEHC 362**, Humphreys J. found that "the traditional, unmodified, O'Keefe wording, that the decision stands if there is material to support it, simply can't be right in the AA context". It cannot be possible for the decision maker's errors here to be justified on the basis of the Board having any material at all before it as per the test for irrationality in planning matters is set out in O'Keefe v An Board Pleanála [1993] 1 IR 39. The material before the Board was flawed and incomplete and in the view of the NPWS, the State's experts in the area of nature conservation, did not represent best scientific information. The Inspector's screening assessment, which the Board adopted, was contradictory and misinformed.

38. An invalid screening exercise deprives the decision maker of jurisdiction to grant development consent – see e.g. Sweetman v An Bord Pleanála [2020] IEHC 39; **Kelly v An Bord Pleanála [2019] IEHC 84**; Connelly v An Bord Pleanála [2018] IESC 31. The Board had no jurisdiction to make the decision that it made, in these circumstances.

39. Furthermore, the Applicant pleads that the impugned decision is invalid because it is contrary to fair procedures and contravenes section 146(7) of the Planning and Development Act, 2000, as amended because the Board failed to make available for inspection on its website the amended Environmental Impact Assessment Report ('the EIAR'), which by law must be made available on the website in perpetuity beginning on the third day following the making by the Board of the decision on the matter.

40. The Board, by amending its website during August 2024 to substitute English language names for previously unintelligible alpha numeric code names of 67 component parts of the EIAR, appears to have conceded that up to then, the EIAR had not been made properly available for inspection on its website. A similar issue arose on the facts of **Clifford v An Bord Pleanála (No. 3) [2022] IEHC 474** in relation to the public notification obligations under s.51 of the Roads Act, 1993, as amended.

41. It remains the case that the amendments to the EIAR made by the developer in its Further Information response to Laois County Council have not been made available on the Board's website in the list of documents described by the Board on its webpage as being 'associated' with the EIA

procedure. The effect of this is that the amended EIAR has not yet been published on the Board's website. This caused practical difficulties for the Applicant in the limited time available to bring the proceedings and also leaves the decision open to future challenges from other litigants who have not yet understood that the EIAR published by the Board on its website is incomplete.

42. For the reasons set out above and as will be expanded upon in oral submissions, the Applicant asks this Honourable Court to grant the reliefs sought in the Statement of Grounds.

Oisin Collins SC
Margaret Heavey BL
5,588 words

Annex V – applicant's replying written legal submissions of 6 November 2024

THE HIGH COURT
PLANNING AND ENVIRONMENT
Record Number 2024/290 JR
ECO ADVOCACY CLG
Applicant
-and-
AN BORD PLEANALA
Respondent
-and-
STATKRAFT IRELAND LIMITED
Notice Party

OUTLINE REPLYING LEGAL SUBMISSIONS ON BEHALF OF THE APPLICANT

Preliminary Objection of Notice Party

1. The Notice Party raises a preliminary objection about part of the relief at paragraph D(1A) and contends that the underlined segment is not supported by particularised grounds:

"Without prejudice to the certiorari relief, a Declaration that the decision contravenes section 146(7) of the Planning and Development Act, 2000 as amended, and public participation requirements of EU law, because the Board failed to make available for inspection on its website the amended Environmental Impact Assessment Report. "

2. The Applicant's position is that it clear from the amendment history of section 146(7), namely footnote F606 of the annotated consolidated version of the Act maintained by the Law Reform Commission, that s. 146(7) was substituted on 1 September 2018 by the European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018 (S.I. No. 296 of 2018), reg. 12(b), in effect as per reg. 2(1).

3. S.I. No. 296 of 2018 on its face was made for the purpose of giving further effect to Directive 2011/92/EU of the European Parliament and of the Council of 13 December 20111 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014, i.e. to give effect to the amendments to the EIA Directive introduced by the amending directive 2014/52/EU.

4. The new Section 146(7) of the Planning and Development Act introduced by S.I. 296 of 2018 provides that where an environmental impact assessment was carried out, the documents relating to the matter [as referred to in subsection 5] shall be made available for inspection on the Board's website in perpetuity beginning on the third day following the making by the Board of the decision on the matter concerned.

5. As the stated purpose of this provision is to give effect to the amended EIA Directive, it plainly relates to the public participation requirements in Article 9(1) of the amended EIA Directive, namely:

Article 9(1): When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall promptly inform the public and the authorities referred to in Article 6(1) thereof, in accordance with the national procedures, and shall ensure that the following information is available to the public and to the authorities referred to in Article 6(I), taking into account, where appropriate, the cases referred to in Article 8a(3):
(a) the content of the decision and any conditions attached thereto as referred to in Article 8a(1) and (2):
(b) the main reasons and considerations on which the decision is based, including
information about the public participation process. This also includes the summary of the results of the consultations and the information gathered pursuant to Articles 5 to 7 and how those results have been incorporated or otherwise addressed, in particular the comments received from the affected Member State referred to in Article 7...

6. The Applicant is entitled to plead a breach of section 146(7) as a breach the public participation requirements of EU law given the legislative origins of the provision.

Reply to legal submissions concerning Core Ground E1

7. Both opposing parties contend that even if the Applicant is correct in respect of its complaint on Core Ground 1, due to an absence of prejudice, the only potential relief available is a declaration, and it does not warrant the quashing of the Board's Order. The Applicant agrees that declaratory relief is appropriate, but only if the Court decides that in these circumstances *certiorari* is not appropriate. The Applicant argues in the first instance that *certiorari* is an appropriate relief for this ground.

8. It is important to note first that according to the replying affidavit of Pierce Dillon (for the Board) sworn on 19 September 2024, the list of 'associated documents' (i.e. associated to the EIA procedure) that currently appears on the Board's website is a list that has been updated by the Board's ICT section on or about 23 August 2024.

9. Three issues arise from this recent 'update'. Firstly there was a considerable delay between the Applicant's flagging of the issue at the commencement of these proceedings in February 2024 and the correction of the issue in September 2024 and this has not been explained by the Board. Secondly, the list of 'associated documents' as they appear now, bear no resemblance to the appearance and order of the files that were presented to the public when the decision was made. The documents have been renamed in the English language (they were previously titled with unintelligible alpha numeric strings) and an element of order has been introduced (the documents as they originally appeared are listed in the left hand column of the table in exhibit Tab 2 of the replying affidavit of Kieran Cummins for the Applicant, with their original document names and in the jumbled order that they originally appeared); thirdly, the Board's 'updated' list of documents associated with the EIA procedure still do not include the amendments to the EIAR made by the developer at the Further Information stage of the Planning Authority process.

10. In paragraph 9 of its legal submissions, the Board acknowledges that amendments to the EIAR (within the further information submitted to Laois County Council) are not on the Board's website and then proceeds to give 'directions' to the missing parts of the EIAR which are apparently to be found on the Planning Authority website. The Board explains that in order to access the complete EIAR, the public (presumably after somehow realising that the version on the Board's own website is incomplete) must click on a link that says *"Click here for details of the original planning case submission to Laois County Council"* and on clicking that link must find and open the *"View Scanned Files"* section of the relevant page on the Council's *website 'on which the relevant further information response is published'*. The Board in effect leaves the follower of its directions at the front door of the Council's webpage with no instructions about how to identify and find the missing documents inside. Further, the Board does not attempt to assist the reader with regard to the notice on Planning Authority page advising that "A PDF viewer is required to view PDF files". The warning on its own site directly underneath the 'Click here' button warns the reader: "An Bord Pleanala is not responsible for the content of external sites''.

11. In Reid v An Bord Pleanala [2024] IEHC 27 (Intel Judgment No. 7) at paragraphs 122 to 131, Mr Justice Humphreys set out a long list of cases to that point (the judgment was delivered on 24 January 2024) where the court had considered complaints against the Board with regard to public notification. The outcome of this analysis was a test (*certiorari* v declaratory relief) at paragraph 132:
132. One can summarise the position regarding breach of publication requirements and similar obligations as follows:
(i) If it is clear that the applicant was not in any way prejudiced by the breach, then certiorari is generally not appropriate unless there is an egregious disregard of legal requirements (Clifford No. I, Save Cork) but the court can consider whether a declaration may be the correct relief' Thus a breach that merely impacts on a hypothetical third party participant is one that does not prejudice the applicant and so would normally only ground declaratory relief in the absence of egregious disregard of legal requirements:
(ii) A breach that involves failure to publish material that was part of the application (Southwood) or failure to take a step that had a meaningful impact on the integrity of the process could be capable of at least indirectly prejudicing an applicant so as to warrant consideration of certiorari:
(iii) A minor breach may not warrant a declaration if it is once-off, historic or academic such that no purpose is served by a declaratory relief (Sweetman XIII, Carrownagowan): and
(iv) On the other hand, a breach that is not minor, because for example it would have been significant on those to which it applied (Sweetman XV) or that it was capable of repetition or was part of a pattern (Clifford No. 3), may warrant a declaration.

[underlining added]

12. On the facts of this case, the material presented on the Board's website was incomplete, wrongly labelled, arranged in no recognisable sequence and could not be said to have complied with the obligation in s.146(7) to **make available for inspection on the Board's website** in perpetuity beginning on the third day following the making by the Board of the decision on the matter concerned, **the documents relating to the matter**. In these circumstances, there was an egregious disregard of the statutory requirements and for a prolonged period after the issue came to light. Indeed, the omission of part of the EIAR from the Board's website has still not been corrected.

13. Further, the amended parts of the EIAR (see the sections marked in red in the further information response document at Tab 11a of the grounding affidavit) include updates to the mitigation measures in the EIAR, without which it is not clear how the Applicant (and the public into the future) is to interpret Condition 4 of the impugned decision which states:

The developer shall ensure that all construction methods and environmental mitigation measures set out in the Environmental Impact Assessment Report and associated documentation are implemented in full, save as may be required by conditions set out below.
Reason: In the interest of protection of the environment.

14. It is of significance also that Condition 4 refers to the mitigation measures that are in the 'associated documentation', which can be interpreted as the list of 'associated documents' on the Board's website. A condition of this type is only operable if s.146(7) is complied with and the associated documents that include mitigation measures are all on the Board's website.

15. This is a similar situation to the facts as described in the judgment of Mr Justice Simons in *Southpark Residents Association v An Bord Pleanala* [2019] IEHC 504. The issue in that case, the failure to publish online an updated bat report, is summarised at paragraph 56 of the judgment:

56. The right to effective public participation has been undermined as a result of the failure to post the report on the website. Moreover, there is a continuing consequence of this omission in circumstances where the mitigation measures have, in effect, been incorporated into the planning permission by dint of Condition No. 8. A person reading this condition, who then sought to examine the documentation on the website, would be left with the mistaken impression that the 2017 version of the mitigation measures applied. This has the potential to undermine the right of access to the courts within the eight-week time period allowed under section 50 of the FDA 2000. The fact that Article 301(3) requires the website to be available for eight weeks after the planning decision indicates that it is relevant for the purpose of access to the courts.

16. The updated mitigation measures missing from the Board's website include the following measures stated to apply to **any** of the target bird species in the EIAR (this includes the hen harrier) being amendments to s. 12.6.1.7 of the EIAR:

"Where nests are found, works will be halted an exclusion zone (determined by the bird species and to he agreed with the local authority) will be erected around the nest. An exclusion area of 500m shall he installed for any target species noted in this EIAR (e.g Merlin, Kestrel, Snipe, etc). The nest will be monitored by the project ecologist/ECoW from outside the exclusion zone until it is determined that the nestlings have fledged, or the nest has failed. Only then will works be allowed to re-commence."

17. The omission of complete mitigation measures from the pre-amendment version of the EIAR on the Board's website is in the words of Humphreys J. in *Reid capable of at least indirectly prejudicing an applicant*. The Applicant here is an eNGO and a charity engaged in environmental protection. Any ongoing reliance it may have on local members of the public to protect the environment by 'policing' the mitigation measures on the ground, is compromised by the absence of a complete EIAR and mitigation measures on the Board's website. In that respect, the Applicant is, at least, indirectly prejudiced.

18. In terms of direct prejudice, this case rare in that it is one of only a handful of recent judicial reviews having no more than two core grounds. The Applicant's evidence about the difficulties encountered when attempting to access the EIAR is to be considered in the context of the limitations to the number of grounds pleaded.

19. The direct prejudice has extended into these proceedings. An example of this is a Collision Risk Model dated December 2019 (supposedly at Appendix 12.7 to the EIAR), which is relied upon by the Notice Party in its written submissions. That document is also missing from the EIAR on the Board's website (the numbering sequence suggests that other appendices of the EIAR also appear to be missing) and does not appear to be on the Council's website, even when following the directions set out by the Board in its submissions.

20. In terms of declaratory relief, in *Grafton Group PLC v An Bord Pleanala* [2023] IEHC 725, the Applicant had sought a declaration that the Board erred in law in failing to put a copy of the EIAR on its website contrary to the requirements of Article 114 of the 2001 Regulations. The court in Grafton Group (Farrell J.) found that on balance, "it cannot be said that the grant of declaratory relief would serve no purpose, as it corrects the Board's erroneous interpretation of its obligations and there are no other countervailing factors in the instant case which would weigh against the grant of the declaration sought. I do not find that there is a compelling reason to refuse to grant a declaration." Similarly, a relief, even if declaratory, would serve a purpose here in that it would encourage the avoidance of such barriers to public participation in the future.

Reply to legal submissions concerning Core Ground E2

21. The Board's blunt characterisation of the 'core issue' at paragraph 15 of its submissions is concerning : "This is a wind farm and obviously birds including the Hen Harrier are of concern."

22. This misses the very point of the Slieve Bloom Mountains SPA designation by S.I. No. 184/2012 - European Communities (Conservation of Wild Birds (Slieve Bloom Mountains Special Protection Area 004160)) Regulations 2012. The regulations were made "in order to ensure the survival and reproduction of the species to which Article 4 of the [Birds] Directive relates, including in particular the [Hen Harrier] and having taken account of the matters referred to in Article 4 of the [Birds] Directive". Per Art. 7 of Council Directive 92/43/ EEC ("the Habitats Directive').

23. Article 4 of the Birds Directive is much narrower focus than just 'birds'. It ensures the protection of the most threatened birds, those listed in Annex I of the Directive and regularly occurring migratory species not so listed. By article 7 of the Habitats Directive, article 4 of the Bird's Directive also incorporates the obligations arising under article 6 (3) of the Habitats Directive, which by Case C-461/17 *Holohan* must examine the implications of the proposed project for the species for habitat types and species to be found outside the boundaries of that site, provided that those implications are liable to affect the conservation objectives of the designated site. In this way, the designation of the Slieve Bloom Mountains SPA encapsulates a broader obligation to the threatened Hen Harrier species that reaches beyond the boundaries of the SPA.

24. As is evident from the NPWS conservation objectives document for this SPA exhibited at Tab 2A of the grounding affidavit the conservation condition of the Hen Harrier in the Slieve Bloom Mountains SPA is <u>not favourable</u> and there is a target to restore it to a favourable conservation condition.

25. In February 2024, the NPWS published the 2022 National Survey of breeding Hen Harrier in Ireland, Irish Wildlife Manual 147. This report postdates the impugned decision and was exhibited by the Applicant at tab 3 of the grounding affidavit for the sole purpose of assisting the High Court in interpreting the significance of the conservation objectives for this SPA, and the measures therein, for delivering the objectives of the Birds Directive and Habitats Directive. This report indicates that there has been a 25% decline in Hen Harrier breeding pairs in the Slieve Bloom area since the year 2000. The report records that in 2022 there were 8 confirmed breeding pairs in the SPA and 6 confirmed fledglings. These are not just 'birds'. They are very rare birds. The importance of their protection is emphasised by the fact that in the course of the process leading to the impugned decision the NPWS made not one but two submissions criticising the developer's analysis of the risk posed by the development to the conservation of the Hen Harrier.

26. In March 2020, the NPWS made a submission to the Planning Authority citing the recording of an 'tagged bird' from the SPA in the bog area as "evidence of a pathway between the SPA and the nearby roost site" and recommended that further information be sought in relation to the Hen Harrier. (First submission of NPWS at Tab 10 Grounding Affidavit).

27. The further information response was submitted to Laois County Council in March 2021. It comprised a main report and numerous appendices. The main report and the Hen Harrier appendix are exhibited at Tab 11A and 11B of the grounding affidavit. The Board's interpretation of the survey work conducted by the developer is set out at paragraph 27(c) of its written submissions as follows:

At section 3.1 it is said that across 18 hours of survey effort conducted across five months, only a single hen harrier was observed at the Garryhinch subsite during the winter of 2020/21. The flight path is reproduced at Figure 3.1 and it is recorded in Section 3.2 that no hen harriers were observed in the surrounding hinterland survey. No roosts were identified.

28. The Further Information response was forwarded by Laois County Council to the NPWS. By letter dated 1 April 2021, the NPWS responded ('the second NPWS submission'). The Board's interpretation of the NPWS response is set out at paragraphs 29 to 32 of its written submissions. There appears to be some confusion in this interpretation, and it does not appear to be supported by an affidavit. For the assistance of the Court and to help clarify the situation the text of the second NPWS submission (signed by Connor Rooney of the Development Applications Unit of the Department of Tourism, Culture, Arts, Gaeltacht, Sports and Media) is reproduced in full here:

"The National Parks and Wildlife Service (NPWS) refers to its original submission dated 26th March 2020 and included as an attachment in email. The NPWS would like to point out that a key point in its submission which was not included in the Further Information request was the need to assess the potential for this project to undermine the conservation objectives/or hen harrier in the Slieve Bloom Mountains Special Protection Area (SPA), by virtue of the known connection between this SPA and the Garryhinch hen harrier winter roost site.

The Garryhinch winter roost site has been the subject of several years of targeted surveys as part of the Irish Hen Harrier Winter Survey. Up to six hen harriers have been recorded roosting communally at this site. including a juvenile bird tagged in the Slieve Bloom Mountains SPA, which lies within 8 km of the proposed development site. This bird provides evidence of a pathway between the SPA and the nearby roost site.

The NPWS notes that a Hen Harrier Winter Roost Survey of Garryhinch Bog took place the (sic) 2020/2021 on six dates (30/10/2020, 19/11/2020, 11/12/2020, 13/01/2021, 26/01/2021, 21/02/2021), from the end of October 2020 and until the end of February 20: 1, totalling 18 hours of surveying, to supplement winter roost checks, conducted on 26/ 10/ 2018, 22/11/2018 and 11/12/2018.

As pointed out in the NPWS's original submission, Scottish Natural Heritage recommend survey for a minimum of two years to allow for variation in bird use between the years. The NPWS considers that winter roost checks, conducted on 26/10/2018, 22/11/2018 and 11/12/2018 were inadequate, given the size of the area of suitable winter roost habitat adjacent to this proposed windfarm development, and should not he counted as part of the two years of surveying recommended. Therefore only 5 months of adequate surveying has taken [place]. Underlining added.

The Further Information points to the fact that 2020/2021 winter roost surveys recorded only a single hen harrier at the Garryhinch bog subsite across 18 hours of survey time over five months as evidence of its insignificance. It is noted that guidance on which the survey was based specifies that watches at roosts should be carried out at least once a month from October to March, on the first day of the month or as close to the first as possible. The NPWS notes that any potential hen harrier usage of the roost site in most of October 2020 and March 2021 was missed due to the timing of the survey. O'Donoghue (2021) found that over a third of known roosts "Were occupied on less than 50% of watches and points out that this is an important consideration for surveys and investigations to inform planning and land use change decisions. Satellite tracking data has shown that individual Hen Harriers may use different roosts in different years, perhaps dependent on site specific circumstances or other factors yet to be confirmed.

Scottish Natural Heritage advise that roost sites within 2km of proposed wind farm development should be identified. The known roost site at Garryhinch Bog has not been identified. The single hen harrier sighted was lost from view before it could have, potentially, been followed back to a roost site. The bird appears to have been lost from sight within the vantage point 2 view shed, during daylight hours at 15:34 (dusk was 17:07 on this date) (Figure No. 3.1. Appendix 4.2. Hen Harriers). Guidance on which the 2020/2021 survey was based states that Roosts can be located by observing hen harriers in the late afternoon and watching them back to the roost. This guidance

goes on to say that 'to count the birds, a roost should be watched from a suitable vantage point from late afternoon until dusk (1.5 hours before sunset to half an hour after sunset or until it becomes too dark to see: Gilbert et al.. 1998).' Satellite tracking data has shown that individual Hen Harriers may return to the same roost sites on a multi-annual basis and therefore location of the roost site is important to survey design. It is also important in terms of assessing the impacts of disturbance and damage cited in the Further Information response.

The conclusion from the hen harrier report (Appendix 4-2) was:

> "Taken together, it seems likely that while the Garryhinch subsite may have been used as a hen harrier winter roost between the 2013-2016 period, this is no longer the case and if the Garryhinch subsite is still used as a winter roost by hen harrier at all, then it is infrequently and in a limited way and does not represent a core roosting area."

Given the inadequacy of surveying pointed out above, the NPWS is of the opinion that this conclusion and any subsequent categorisation of the importance of the winter roost site for hen harrier is not supported by best scientific evidence. The NPWS remains concerned that the impacts of the proposed project, on the conservation objectives of the Slieve Bloom Mountains SPA, have not been assessed.

ls mise le meas

Connor Rooney
Development Applications Unit''

29. The Board's written legal submissions do not reflect an understanding of the points raised by the NPWS in its submissions and the Board does not appear to have sought advice from ornithologists or other experts of the standard of the NPWS to assist it in understanding the NPWS submissions. The Board is clearly wrong when it says at paragraph 30 of its submissions that "the NPWS has not engaged with Section 2.4 (of Appendix 4-2 of the FI response) and the Survey Schedule which highlights, in fact, that surveying was done between October and February and done once a month. Full details are in Table 2.1 with the February date being 21 February 2020". Here the Board has misunderstood the criticism made by the NPWS which is that 2 vears of survey work is required and that surveys must be done once a month in a monthly pattern. The NPWS has engaged with section 2.4 and Table 2.1 and has found the survey to be contrary to best scientific practice.

30. Again there is misunderstanding at paragraph 31 of the Board's written submissions where it is stated (with an emphasis that suggests apparent frustration): "..the whole *point* is that these studies have not identified the roost which the NPWS appear to be assuming remains on the basis of data from (at the latest, 2016). Indeed, the NPWS actually say this pointing out that the "known roost at Garryhinch bog has not been identified" but with respect that is the whole *point*." [emphasis in original]. The actual criticism that the NPWS makes is that the roost needs to be found by the developer if the impacts of the windfarm are to be assessed in accordance with best scientific practice and that it could have been found if the single hen harrier sighted had not been lost from view and if the surveying had been properly conducted.

31. At paragraph 38 of the Board's submission the following is stated:

"An objective view of the papers before the Court is that the Inspector and Board were clearly aware of the concern of the NPWS regarding the possible effect of the development on flight paths of Hen Harriers to an off-site and ex situ roost. That concern was not un-met as it was the specific subject of the Further Information by the Developer including Appendix 4-2 of same which was designed to deal with that specific point.

32. This again is an inaccurate representation of the facts insofar as it suggests that the further information response containing Appendix 4-2 was made to the Board to address the concerns of the Board. The response was made to the Planning Authority and was followed by a second submission by the NPWS which was made to the Planning Authority. The Board here is repeating the error of its Inspector by assuming that the further information response dealt completely with the possible effect of the development on flight paths of Hen Harriers to an off-site and ex situ roost. The second NPWS submission makes it clear that the impacts on the hen harrier remain unassessed. (Note this further information is from the same documentation missing from the Board's website as pleaded in Core Ground 1)

33. In light of the NPWS submissions, it is difficult to understand why the Board believes that its Appropriate Assessment screening, which screened out the hen harrier from further assessment could be compliant with s.177U(1) of the Planning and Development Act, as amended, which provides that a screening for appropriate assessment of an application for consent for proposed development shall be carried out by the competent authority to assess, in view of best scientific knowledge, if that proposed development, individually or in combination with another plan or project is likely to have a significant effect on the European site.

34. As explained in the Opinion of Advocate General Sharpston in Case C-258/11 Sweetman (paragraph 50) the test for 'likely' at screening stage is no more than *'should we bother to check?'* It is more than evident from the material that was before it and in particular the advice and concerns of the NPWS, that the answer to this question is yes, the Board ought to have bothered to check the implications for the Slieve Bloom Mountains SPA in view of the site's conservation objectives for the hen harrier.

35. The advice of the NPWS is founded on the statutory footing of art. 48 of S.I. 477/2011 whereby the Minister for Heritage may provide advice and guidance to any public authority in relation to any question as to whether that public authority is obliged to carry out screening for Appropriate Assessment or Appropriate Assessment in relation to a particular plan or project. This is no *'expert's bare assertion'* (paragraph 6(9) of the Board's submissions), but considered submissions made by experts with specific knowledge of the SPA and its conservation interest and a statutorily based role to make such submissions. The minister is also a statutory consultee within the planning legislation.

36. The Board also creates some confusion with regard to its analysis of the turbine ground clearance issue, as explained at paragraph 40 of its submissions.

> "As to the point about the blades and clearance distance, the point seems to be that for the purposes of EIAR a turbine was assumed at 106m hub height, and 79m blade (meaning the blade would leave 27m clearance) when it rotates. The turbines proposed are 170m in diameter (meaning 85m blades) and 100m hub height giving 15m clearance on rotation. The Applicant's case is that the Inspector and Board had "no regard" to this. That is simply wrong. The Inspector's Addendum Report clearly has regard to this.? " (sic).

37. The Applicant's plea in fact relates to a breach of Art 6(3) of the Habitats Directive and is particularised at paragraph 14 of its Statement of Grounds

> "The effect of the confirmed turbine dimensions is that the turbine will sweep as close as 15 metres to the ground, placing transiting Hen Harriers at risk of colliding into a blade or being swept up into the rotating blades. The Inspector in failing to recognise this risk erred in having no regard to the observation of the Developer's consultant, at page 27 of the March 2021 Further Information Response to the Planning Authority, who said: "The scientific literature shows that hen harriers are renowned for flying at low heights of 10-20 m, which is usually below rotor swept heights" which suggested that the understanding of the authors of the original AA Screening Report and the amended AA Screening Report from March 2021 was that the clearance H1ould in fact be greater than 20 metres, i.e. that the normal flight line of the Hen Harrier would be below the turbine blades. This would have been the case had the 106m hub height option in the EIAR (assumed for the assessment of noise) been selected. A turbine of 185m tip height and huh of 106 metres would have ground clearance of 27 metres, putting a transiting hen harrier flying in a band of 10 to 20 metres over ground at less risk of collision. The Inspector and the Board erred in failing to properly assess the change in circumstances for a transiting Hen Harrier due to the selection of the 100 m hub height rather than the 106 m hub height identified as one of the options in the original EIAR and erred when neglecting to reverse its previous decision to screen out the Slieve Bloom Mountains SPA when it received from the Developer in January 2023 confirmation of the turbine dimensions."

38. It is clear from paragraphs 7.43 and 7.44 of the Inspector's Report that the Inspector simply adopted the developer's screening which screened out the hen harrier:

"Screening Determination
7.43 The Screening Report submitted screens out all Natura 2000 sites on the grounds that there is a lack of suitable habitat in the case of the Slieve Blooms SPA and that the others are removed from the development and will not be affected by disturbance with the exception of River Barrow and

Nore SAC. In relation to the Slieve Blooms SPA of which Hen Harrier the single qualifying interest I note that Hen Harrier were not recorded at the site during extensive bird surveys. It is also mentioned within the EIAR that there is no suitable Hen Harrier habitat within the development site. Hen harriers are ground nesting birds that breed in moorland, young conifer plantations and other upland habitats at elevations of between 100 and 400 metres above sea level. The proposed windfarm is between 80m od to 73m od. The core foraging range for hen harrier during the breeding season is 2km, with a maximum range of 10km (SNH, 2016). In the majority cases, the core range should be used when determining whether there is connectivity between the proposal and the qualifying interests. Maximum distances should only be used in exceptional circumstances e.g. if there is suitable habitat within the proposed development site and no other suitable foraging habitat exists outside the site. As the proposed wind farm site does not have suitable habitat, the core foraging range of 2km will be used for the assessment. Hen Harrier typically only travel 1km to source alternative nest sites (SNH, 2016). Given the absence of hen harrier recordings during the ornithological surveys and the lack of suitable habitat at the proposed wind farm site, in addition to the distance between the proposed wind farm and the SPA, it is considered that no effects will occur by virtue of disturbance or displacement on hen harrier or the Slieve Blooms SPA.

7.44. <u>It is for this reason that the Slieve Blooms SPA was screened out. I consider the applicants approach in this regard to be reasonable</u> and note that the Council did not raise any concerns in this regard within the assessment of the application." [underlining added]

39. The issue of the clearance height through which the hen harrier could transit the site to reach the roost site on the Garryhinch Bog adjoining the windfarm simply was not addressed by the Inspector. In adopting the developer's AA screening, the Inspector was adopting an analysis that was done at a time when the only proposed turbine dimensions gave a clearance of 27 metres, i.e. high enough for the hen harrier to fly under. Page 16 of the AA screening (Tab SB of the grounding affidavit) refers to the "lowermost height passed through by the rotor blade tips (typically about 20 - 30 metres above ground level). The proposed turbines subsequently changed to give a clearance of 15 metres above ground level, which according to a source cited by the developer is not high enough to avoid collision between bird and turbine. The Inspector's addendum report, which was commissioned by the Board specifically to address the subsequently confirmed turbine dimensions, does not mention the *Appropriate Assessment* screening or the hen harrier. It confirms that the newly confirmed turbine dimensions will not change the conclusions of the Appropriate Assessment on the River Barrow and Nore SAC. The Inspector approached the issue from the position that the screening was in the past.

40. This is not changed in any way by the information offered by the Notice Party at paragraph 49 and 50 of its submissions because the Inspector simply adopted the developer's AA Screening of December 2019 which had clearly assumed that there was proper clearance and did not revisit the clearance issue or the hen harrier screening in the supplemental Inspector Report.

41. What is of interest in paragraphs 49 and 50 of the Notice Party's submissions is that they rely on the Collision Risk Model dated December 2019 (Appendix 12.7 to the EIAR) which is another document missing from the EIAR on the Board's website and also does not materialise on the Council's website if the Board's directions to that site from its own webpage are followed.

42. Furthermore, the issue of the hen harrier avoiding the constructed turbines (paragraphs 44 and 58 of the Notice Party's submissions) simply should not arise in an AA screening. It both an anticipated mitigation measure and a possible adverse effect. If the birds avoid the windfarm, what evidence is there that they will not also avoid their roost habitat?

43. For the reasons set out above and in the Applicant's earlier written submissions and pleadings, which will be expanded upon in oral submissions, the Applicant asks this Honourable Court to grant the reliefs sought in the Statement of Grounds.

Oisin Collins SC Margaret Heavey BL
5,250 words (not including text of NPWS letter of 1 April 2021)

Annex VI – statement of case of 8 November 2024

The High Court
Planning And Environment
Judicial Review
Record Number: 2024/290 JR
Between:
Eco Advocacy CLG
Applicant
-And-
An Bord Pleanála
Respondent
-And-
Statkraft Ireland Limited
Notice Party

Statement Of Case

Section A - details of the outcome of any previous potentially relevant judgments in litigation between the parties, giving neutral and other citations in each case.

1. No relevant previous judgments.

Section B - the facts in a chronological narrative

Note: The following is a high-level summary of the factual background regarding the planning application and its determination. The parties reserve the right to refer to all evidence contained in the pleadings.

2. On 17 February 2020, Statkraft Ireland Limited ("**Statkraft**") applied to Laois County Council ("**the Council**") for planning permission for a development comprising the construction of up to 8 no. wind turbines with a tip height of up to 185 metres and all associated foundations and hardstanding areas and all associated works at lands in the townlands of Dernacart, Forest Upper and Forest Lower, Co. Laois.

3. The Applicant lodged a submission on the application with the Council on 22 March 2022.

4. The Development Applications Unit ("the DAU") of the Department of Culture, Heritage and the Gaeltacht ("**the Department**") made a submission to the Council on 24 March 2022. This is regarded as the first submission of the National Parks and Wildlife Service ('NPWS').

5. Further Information was sought by the Council on 2 June 2020 and Statkraft submitted the requested further information on 8 March 2021, which included amendments to the Environmental Impact Assessment Report.

6. The Further Information was the subject of a submission from the Department / NPWS dated 1 April 2021. This is regarded as the second submission of the National Parks and Wildlife Service ('NPWS').

7. The Council's Planner prepared a Report dated 27 April 2021 recommending that permission be refused.

8. On 30 April 2021, the Council issued its decision to refuse planning permission for the proposed development.

9. The Applicant lodged a third-party appeal of the Council's decision with An Bord Pleanála ("**the Board**") on 24 May 2021.

10. Statkraft appealed the Council's decision to the Board on 26 May 2021.

11. The Board appointed a Senior Planning Inspector to prepare a Report in relation to the subject appeal.

12. The Inspector's Report dated 28 September 2022 records that a site inspection was carried out on 25 August 2022. The Inspector recommended that permission should be granted for the proposed development, subject to 26 conditions.

13. The Board issued a notice to Statkraft under section 132 of the Planning and Development Act 2000, as amended ("**the 2000 Act**") on 13 January 2023, requiring Statkraft to submit information on or before 2 February 2023.

14. Statkraft responded to that request on 31 January 2023.

15. The Inspector prepared an Addendum Report dated 5 December 2023, recommending that permission be granted subject to conditions.

16. Board Direction (BD-0149915-23) was made on 12 December 2023, stating that the submissions on file and the Inspector's Report were considered at the Board meetings held on 10 January 2023, 13 April 2023 and 19 December 2023.

17. On 3 January 2024, the Board granted planning permission in respect of the proposed development subject to 26 conditions (ABP-310312-21).

Section C - the procedural history of the matter in a chronological narrative as well as any factual developments following the commencement of the proceedings, to be outlined at the appropriate point of the chronological narrative of the procedural history.

18. The proceedings were issued on 27 February 2024.

19. The application for leave to apply for judicial review was opened on 27 February 2024 for the purposes of stopping the clock.

20. The Board and Statkraft were served with a courtesy copy of the pleadings on 28 February 2024.

21. On 4 March 2024, Mr Justice Humphreys granted leave to apply for judicial review on standard terms for all reliefs and on all grounds with liberty to file an amended statement of grounds.

22. The Applicant issued an Originating Notice of Motion on 7 March 2024 with a return date of 8 April.

23. The Applicant filed an amended Statement of Grounds on 7 March 2024.

24. The Board accepted that section 50B of the 2000 Act applies to the proceedings by letter dated 15 March 2024.

25. Statkraft accepted that section 50B of the 2000 Act applies to the proceedings by letter dated 15 March 2024.

26. The Board served its opposition papers on 11 July 2024.

27. Statkraft served its opposition papers on 18 July 2024.

Section D - the legislative/ EU law provisions under which relief is sought or governing that relief, giving hyperlinks to the revised Acts or formal or informal consolidated version.

a. Planning and Development Act 2000 (Law Reform Commission consolidation)
   i. Section 146
   ii. Section 177U
   iii. Section 177V

b. Habitats Directive
   i. Article 6(3)

Section E - the preliminary issues if any and a short summary of the parties' respective positions on these.

Statkraft's Position
28. It is Statkraft's position that the declaratory relief sought at paragraph D(1A) of the Amended Statement of Grounds is not grounded upon any specific pleas in that there are no specific pleas as to how the Board has allegedly breached the public participation requirements of EU law and the Applicant has failed to comply with the requirements of Order 84, rule 20 of the Rules of the Superior Courts in this regard.

Applicant's Position
29. It is the Applicant's position that it has pleaded and properly particularised a breach of s.146 (7) of the Planning and Development Act, 2000, as amended, which is a transposition of public participatory obligations under the EIA Directive, substituted by European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018 (S.I. No. 296 of 2018), reg. 12(b), in effect as per reg. 2(1).

Board's Position
30. The Board understands the Applicant's position will deal with the merits of it.

Statkraft's Position (post receipt of the Applicant's Replying Submissions)
31. The Applicant seeks to rely on the EIA Regulations in opposing Statkraft's preliminary objection regarding the relief sought at paragraph D(1A). The Applicant has not pleaded this point and is not entitled to amend its Statement of Grounds either via this statement of case or its written submissions, and Statkraft maintains its objection.

32. Furthermore, Statkraft objects to the Applicant's attempt to raise new points in its Replying Submissions of 6 November 2024, which are not pleaded and which are raised for the first time 13 days before the hearing. The Applicant is provided with a facility under the expedited procedure to respond to the opposing parties' submissions, but it is not an avenue for the Applicant to raise new points for the first time. In particular, Statkraft objects to the Applicant attempting to now advance the following points:

> (i) Core Ground 1 - that condition 4 to the planning permission is only operable if section 146(7) of the 2000 Act is complied with and that the Applicant has been "indirectly prejudiced" (see §13-§17),
> (ii) Core Ground 1 - that the limited number of grounds pleaded in this case is in some way attributable to the Board website and that the Applicant has been directly prejudiced by this (see §18),
> (iii) Core Ground 1 - that the CRM is missing from the Board's website (see §19 and §41), and
> (iv) Core Ground 2 - that the AA screening incorrectly took account of "anticipated mitigation measures" (see §42).

Section F - details of any reliefs or grounds on the pleadings that are not being pursued;

33. N/A

Section G - a ground-by-ground or (in non-JR proceedings) issue-by-issue summary of the submissions of each party, giving about 1 or 2 paragraphs per ground/issue to broadly summarise each party's case

Note: The following is a high-level summary of the respective positions of the parties in respect of each ground of challenge, and the parties intend to rely on the pleas contained in the Statement of Grounds and Statements of Opposition.

<u>Core Ground 1</u>

Applicant' Position –
34. The Board created a webpage, on its own website, for the planning appeal, upon which it created links to 67 documents which are segments taken from the developer's EIAR, arranged out of their proper sequence, and which up to the time of their correction in August 2024 were named on their face with a randomly generated coding system from which the content of the documents cannot be

recognised, making it very difficult for members of the public to access the EIAR and Natura Impact Statement and Appropriate Assessment Screening Report on the Board's website and did so contrary to fair procedures and s.146(7) of the Planning and Development Act, which requires the EIAR to be made available for inspection on the Board's website.

35. The file list that currently appears on the Board's website is a list that has been updated by the Board's ICT section on or about 23 August 2024. This updated list still does not include the amendments to the EIAR made by the developer at the Further Information stage of the Planning Authority process or the Collision Risk Model ('CRM') dated December 2019 (said to be at Appendix 12.7 to the EIAR), which is relied upon by the Notice Party in its written submissions. The CRM does not appear to be on the Council's website either, even when following the directions set out by Counsel for the Board in its submissions.

36. The Board further erred in posting to its website original versions of the EIAR and Natura Impact Statement and Appropriate Assessment Screening Report that do not incorporate the later amendments made to these documents by the Developer in its Further Information response to Laois County Council of March 2021, contrary to s.146(7) of the Planning and Development Act.

Board's Position –

37. First, the EIAR and AA as submitted in the first instance are published on the "View associated documents" section of the relevant page of the Board's website. Second, the further information submitted to the Council (which is what the Applicant is calling the further amendments) was / is accessible via the link on the Board's website that says "Click here for details of the original planning case submission to Laois County Council". As regards the Applicant's contentions at paragraph 35 above, the Applicant asserts that the Collision Risk Model (CRM) dated December 2019 (which is at Appendix 12.7 to the EIAR) does not appear to be on the Board's website or the Council's website. That assertion is incorrect, the CRM dated December 2019 is on the Board's website and on the Council's website. It is on the Board's website at internal page 206 onwards at the link "310312 - eiar appendix 12.2.pdf [PDF]" under the 'View associated documents' link on the Board's website (https://www.pleanala.ie/en-ie/case/310312). The CRM dated December 2019 (Appendix 12.7 of the EIAR) is also on the Council's website which was / is accessible via the link on the Board's website that says "Click here for details of the original planning case submission to Laois County Council" and by then clicking the 'View Scanned Files" tab, then the "View" button for the link "Drawings-General Volume1-5 Appendices, Drawings, Photomontages etc" at then item "24" (at internal page 206 of 255) contains the CRM dated December 2019. The Further Information Response submitted to the Council in response to the Council's Request for Further Information (which is what the Applicant is calling the further amendments) was / is accessible via the said link on the Board's website that says, "Click here for details of the original planning case submission to Laois County Council" and by clicking the "View" button for the 4 no. "F.I Received Doc." links. The original EIAR was and is on the Board website, and the Further Information response submitted to the Council was and is available on the Board's website via the link to the Council's website. There is no breach of s.146(7) in those circumstances.

38. Further, whereas the titling of the documents is as described in the affidavits, the material was available and this complaint itself does not establish any particular illegality.

39. In terms of relief, the Board has set out the position in pleadings and submissions – there was full participation without complaint, no prejudice has been suffered and, at all points, all the relevant information was in fact available and there is no legal way for the Applicant to rely on third party rights to make its case.

Statkraft's Position –

40. The EIAR, NIS and AA Screening Report were uploaded to the Board website. While the Applicant alleges that the manner in which the documents were uploaded made it difficult for members of the public to access the documents and was contrary to fair procedures, the Applicant was not prejudiced by this and has not provided any particulars of any alleged unfairness. Indeed, the Applicant participated fully in the appeal before the Board.

41. Insofar as the Applicant alleges that the EIAR, NIS and AA Screening Report posted on the Board website do not incorporate later amendments made to those documents on foot of a response to a request for further information made by the Council, the uploading of documents to the Board's website is primarily a matter for the Board to address. Furthermore, the complaint made is that the documentation at issue was not uploaded appropriately to the website *after* the Board's decision was

made. As such, the complaint made is a technical complaint which relates to the post-decision process and does not warrant the quashing of the Board's decision and does not amount to grounds upon which to grant an order of *Certiorari*.

42. Even if the Applicant is correct in respect of its complaint on Core Ground 1, due to an absence of prejudice, the only potential relief available is a declaration, and it does not warrant the quashing of the Board's Order.

43. Insofar as the Applicant seeks declaratory relief on the basis of an alleged breach of the public participation requirements of EU law in connection with Core Ground 1 such relief is not grounded on any specific pleas and Statkraft maintains its Preliminary Objection (which has already been outlined above).

Statkraft's Position (post receipt of the Applicant's Replying Submissions)
44. For the avoidance of doubt, the response to further information submitted by Statkraft to Laois County Council contained amendments to the EIAR and the NIS. These amendments are shown in "italic red" in the response to further information. It is not the case that an updated / amended EIAR or NIS was submitted as part of the response to further information.

45. Contrary to what is asserted for the first time in the Applicant's Replying Submissions dated 6 November 2024, the CRM is on the Board website. No affidavit evidence has been filed or sought to be filed to support this assertion (which is incorrect). The CRM document can be found on the Board website for Board Ref 310312 if one opens '310312 - eiar appendix 12.2.pdf [PDF]'.

Core Ground 2

Applicant' Position –
46. The Applicant pleads that the Board failed to comply with art. 6(3) of the Habitats Directive when it screened out the hen harrier at the Stage I screening stage. The Inspector's AA screening, adopted by the Board, states at page 34 (Table 1) "commuting / foraging hen harrier may utilise the site". This finding, considered in light of expert submissions from the NPWS and experienced birdwatchers about the significance of the bog area immediately to the north for the conservation of the species (access to which may require the hen harrier to commute through unsafe turbine operations with insufficient clearance between its flight height and the swept area of the turbine blades), and the proven use of the adjoining bog by a tagged hen harrier from the SPA, ought to have triggered the requirement for Stage II AA. In these circumstances, the Board's failure to conduct an Appropriate Assessment on the impacts of the proposed development on the hen harrier was contrary to Art. 6(3).

47. The screening obligation in Art 6(3) of the Directive has been transposed into Irish domestic law by s. 177U of the Planning and Development Act, as amended, which provides, inter alia that screening for appropriate assessment of an application for consent for proposed development shall be carried out by the competent authority to assess, in view of best scientific knowledge, if that proposed development, individually or in combination with another plan or project is likely to have a significant effect on the European site. Part of the Applicant's case is that the Board erred in failing to have proper regard to the concerns raised by the NPWS in relation to the accuracy of the survey methodology used by the developer. The AA screening conducted by the Board was not conducted in view of best scientific knowledge or objective information, contrary to the Directive and or its domestic transposition. As a result, the screening and AA were flawed, and the Board was deprived of jurisdiction to make the decision.

48. The Notice Party relies on the Addendum Inspector Report dated 5 December 2023 (i.e. after Statkraft's response to the further information sought by the Board) which states at §3.4 that "the details submitted within the further information request do not have any impact on the Appropriate Assessment carried out in relation to the development and the conclusions of the Appropriate Assessment remain as per my original report.". As explained in the Applicant's replying submissions, this has no relevance because the Addendum Inspector Report starts from the position that the AA Screening, which screened out the hen harrier, was correctly done and at that point only considers the impact of the turbines details submitted in the further information on the conclusions of the Appropriate Assessment (i.e. phase 2).

Board's Position –

49. The Applicant's position is effectively that the NPWS submissions meant there was relevant doubt which was not removed. This is just not the case when one reviews the first submission, then the further information specifically on this point, and then the second submission. The high-level approach by the Applicant simply does not engage with the actual issues (which are dealt with in the Board's submissions) and reflects, indeed, the point that the Applicant raised none of these issues at any stage before the planning authority or even the Board (despite bringing their own appeal against a refusal). When properly considered it can be seen that the issues raised by the NPWS were fully dealt with by the Developer and this was fully understood by the Inspector and the Board. As regards paragraph 48 above, insofar as the Applicant means to suggest that certain details in relation to the turbines (i.e., the tip height of 185m, the hub height of 100m and the rotor diameter of 170m and the 15m clearance height in relation to same) were not available to the Inspector at the time of her first report on the subject appeal (which is dated 28 September 2022) that is not correct (see e.g., §3.2.8 of the Notice Party's Response to Third Party Appeals dated June 2021 and Table 4.1 of the Collision Risk Model (CRM) dated December 2019 at Appendix 12.7 of the EIAR). The CRM stated at Table 4.1 that a hub height of 100m was being applied and that at this height, there would be a clearance of 15m. Thus the CRM, which was submitted to the Council as part of the planning application (and which was part of the materials that were before and considered by the Inspector in preparing the first Inspector's Report dated 28 September 2022), used a 15m clearance height, and so the turbine specification confirmation by the Notice Party (in response to the Board's request for further information), upon which the Applicant purports to rely at §14 of the Amended Statement of Grounds, makes no difference insofar as concerns the Board and its Inspector's consideration and assessment of collision risk (and has not been shown or demonstrated evidentially by the Applicant to make a difference), and no errors occurred as alleged by the Applicant or at all.

Statkraft's Position –

50. With regard to the Applicant's plea that the Board failed to conduct a proper screening for AA in respect of the Slieve Bloom Mountains SPA, the Inspector screened out the Slieve Bloom Mountain SPA for three reasons, namely (i) absence of recordings of the Hen Harrier, (ii) lack of suitable habitat at the proposed site and (iii) the distance between the proposed site and the Slieve Bloom Mountains SPA. The Inspector provided reasons for deciding that an AA was not required, and such reasons were adopted by the Board.

51. In respect of the single flight recorded in the 'Report on Hen Harrier Winter Roost Surveys at Garryhinch Bog Group, Co. Offaly/Laois 2020/2021 dated March 2021 (and which was submitted to the Council as an appendix to the Further Information Response), it is clear from the Inspector's Report that the Inspector was aware of and considered this additional material (at §3.2.1 and §7.40).

52. The Applicant also alleges that the Inspector, and by extension, the Board, failed to have regard to concerns raised by the NPWS (which is a reference to the Department of Culture, Heritage and the Gaeltacht) regarding the supplemental Hen Harrier survey prepared on behalf of Statkraft. This is not correct. §3.3 of the Inspector's Report, notes that the Department of Culture, Heritage and the Gaeltacht had raised concerns that impacts to Hen Harrier had not been adequately assessed.

53. The Inspector had regard to the second NPWS letter dated 1 April 2021, which was on the Board file. The Inspector clearly recorded the submissions of the prescribed bodies and engaged with the issues raised. The Board's Order also records that, in respect of Appropriate Assessment, the Board considered "all other relevant submissions".

54. The Applicant further pleads that the Board failed to identify and examine the implications of the Proposed Development for species outside of the boundaries of the Slieve Bloom Mountains SPA, where those implications are liable to affect the conservation objectives of the SPA. In this regard, the Applicant alleges that the Inspector placed too much weight on a finding that there was no suitable Hen Harrier habitat within the site of the Proposed Development. However, this ignores the additional findings of the Inspector to justify the screening out of the SPA namely, the absence of recordings of the Hen Harrier and the distance between the site of the Proposed Development and the Slieve Bloom Mountains SPA.

55. The Applicant pleads that the Board failed to carry out an AA without lacunae to dispel all reasonable scientific doubt as to the effect of the Proposed Development on the Slieve Bloom Mountains SPA.

56. Statkraft's response to Third Party appeals dated June 2021, confirmed at §3.2.8 that the turbines would have a tip height of 185 meters and a rotor diameter of 170 meters. Furthermore, the Collision Risk Model dated December 2019 (Appendix 12.7 to the EIAR) stated at Table 4.1 that a hub height of 100 meters was being applied and that at this height there would be a clearance of 15 metres.

57. The screening assessment in the Inspector's Report was carried out on 28 September 2022 - i.e. after Statkraft provided its response to Third Party appeals dated June 2021 to the Board and at a time when the Inspector had the EIAR and appendices.

58. Statkraft responded to the Board's request for further information in respect of the turbine description which included as Appendix 2 Drawing No. P1892-0400-0001 C entitled 'Turbine Details'. That response confirmed that consent was being sought for 8 turbines with (i) tip height of 185 m, hub heights of 100 m and rotor diameter of 170 m.

59. The Inspector, in her Addendum Report dated 5 December 2023 (i.e. after Statkraft's response to the further information sought by the Board) states at §3.4 that "the details submitted within the further information request do not have any impact on the Appropriate Assessment carried out in relation to the development and the conclusions of the Appropriate Assessment remain as per my original report.".

60. The Board stated in its order dated 3 January 2024 that it "agreed with and adopted the screening assessment and conclusion carried out in the Inspector's Report".

61. As such, it is denied that the Inspector and / or Board failed to properly assess the change in circumstances for a transiting Hen Harrier due to the selection of the 100 metres hub height, and it is denied that the Board erred in failing to reverse its previous decision to screen out the Slieve Bloom Mountains SPA when it received Statkraft's Response on 31 January 2023.

Statkraft's Position (post receipt of the Applicant's Replying Submissions)
62. Insofar as the Applicant suggests at §39 of its Replying Submissions (and at §45 of this document) that §3.4 of the Inspector's Addendum Report relates to Stage 2 Appropriate Assessment and not also Stage 1 Screening for Appropriate Assessment, this is not accepted, and Statkraft will rely on the text of that report for its plain and ordinary meaning.

Section H - in the event of any request for a reference to the CJEU, a statement of any proposed question(s).

63. None proposed.

Dated 8th November 2024

Annex VII – DAR of 19 November 2024

Bill No: H.MCA.2024.0000280

THE HIGH COURT, DUBLIN

_____

19 November 2024

_____

ECO ADVOCACY CLG

v.

AN BORD PLEANÁLA

_____

Counsel for the Applicant: Mr Collins, SC

Ms Heavey, BL

Counsel for the Respondent: Mr Foley, SC

Mr S Hughes, BL

Counsel for Notice Party: Ms Murray, SC

Ms E O'Callaghan, BL

Eco Advocacy CLG v. An Bord Pleanála

19 November 2024

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REGISTRAR: Now, 2024/290 JR, Eco Advocacy CLG v. An Bord Pleanála.

MR COLLINS: Yes, Judge. I appear for the applicant in this matter with Ms Heavey instructed by O'Connell Clarke solicitors.

JUDGE: Thank you very much, Mr Collins.

MR FOLEY: May it please the Court. I appear for An Bord Pleanála, the respondent, with Mr Stephen Hughes, instructed by Mr Craig Farrar of Fieldfisher solicitors.

JUDGE: Thanks very much, Mr Foley.

MS MURRAY: Good morning, Judge. I appear for the notice party, Statkraft Ireland Limited, with Ms Ellen O'Callaghan instructed by Philip Lee solicitors, Judge.

JUDGE: Thanks, Ms Murray.

MR COLLINS: Yes. Good morning, Judge. We have agreed between us that the time available, which I think we've estimated at three and a half hours, would be divided between us. I'm getting 105 minutes, Judge, which I will take 15 minutes of in reply. So, I would anticipate I'll be about an hour and a half this morning.

JUDGE: Yes. Sounds good, okay.

MR COLLINS: Well, unfortunately, Judge, I have to say I don't think that's anywhere near enough time as I have said on a number of occasions and I'm quite certain of it in a case with three bankers' boxes, to try and do what I have to do in an hour and a half this morning just simply isn't going to be possible.

JUDGE: Well, let's be sure well, I don't want to exhaust time by talking about time but what I can say to you is I am open to the concept of supplementing if you feel that there are important things

MR COLLINS: Well, if the Court was willing to give me three days I'll take them, Judge, but I can't take an extra 15 minutes or an hour

JUDGE: No but supplementing by kind of a follow up written submission in kind of a day or two after the hearing.

MR COLLINS: Again I think that we have done that before in other cases, Judge, and while it's helpful to a degree undoubtedly

JUDGE: Yes.

MR COLLINS: it's not an answer or a substitute for what we do which is oral advocacy.

JUDGE: Well, okay. But listen this was a decision made some time back and also at a higher pay grade than my own. So, look, why don't you just go on

MR COLLINS: Well, Judge, that's the practice direction.

JUDGE: Yes.

MR COLLINS: But, I'm sorry, we have a constitution and we have right of access to the courts and that's supposed to be a proper meaningful right of access to the courts. It's not trumped by a practice direction. The practice nobody has gone out and voted for the practice direction. It isn't a statutory instrument. It's not a piece of legislation. It is simply a practice direction of the High Court which has been approved, albeit by the powers that be, but in my respectful submission that can't trump the right of people to come to court to make submissions in a case and to do so at a pace that is appropriate and to do so to an extent that is appropriate. And a case like this fitting into I was an hour and a half getting leave before Judge Holland yesterday, more than that, in fact I was nearly two hours in a case of

JUDGE: Really. What case was that?

MR COLLINS: It's the Moore Street Preservation Trust case.

JUDGE: Okay.

MR COLLINS: Now, that's the case

JUDGE: And you got your order though did you?

MR COLLINS: I certainly did, Judge. Thank you. A heavily amended order, Judge, but an order nonetheless.

JUDGE: Well, I have confidence in you but I suppose I'm not going to be dealing with that case just because I am too involved in that particular geographical area.

MR COLLINS: No, I understand that. I understand that difficulty entirely, Judge.

JUDGE: Yes.

MR COLLINS: But it is an example.

JUDGE: Sure.

MR COLLINS: A leave application is taking as long, longer, than I have today.

JUDGE: Okay. Well, look again I don't want to waste too much time, Mr Collins, but

MR COLLINS: No, certainly not, Judge.

JUDGE: first of all just if it helps, right, first of all I hear you, okay, and secondly, you know, I'm willing to try and be flexible up to a point. Thirdly there are additional options but the overarching point is the really well, there's a couple of aspects but the really important one is that the European Union has decreed that the most expeditious procedure must be applied to these kind of cases. It doesn't dictate the results obviously but that's the directive.

MR COLLINS: But, Judge, with the greatest of respect, the directive does no such thing. What the directive directs is that the most expeditious route that is available is utilized. This is already that.

JUDGE: Yes.

MR COLLINS: This is a case managed procedure in what was commercial planning and environmental lists. Now, the planning and environmental list. That is as good as it gets in our jurisdiction. There's no mandate under the directive to magic up or invent a new expedited procedure that's even faster than what's already there and there's no outer limit on how fast that could be. And we can decide three hours is too long, why not 30 minutes?

JUDGE: Well, okay. Well, look I think you have made your point. I want you to be happy though. So, let's do your best within the time and

MR COLLINS: Well, Judge, I will and I don't want to waste any more of my time but I just think it's important and I think this issue isn't going to go away. I mean the bar is structured in a way where people come in and present cases in a certain manner. I have been doing it for 25 years now. People have been doing it, that's in the bar today, for 50 and 60 years. Others have been doing it for centuries before that. That's the manner in which historically cases have always been run. For some reason, unique to this division, this approach has been taken and I have struggled over the last two days to try and work out what I would open and what I wouldn't open in an hour and a half. It's just simply not enough time in a case of this magnitude to go through all of the evidence and to go through all the features and facets of the case and the law and all the rest of it. It's about the same amount of time as would be afforded to a fairly rudimentary discovery application anywhere else.

JUDGE: Look, we have had a good exchange of perspectives on it, Mr Collins, I go back to my point that all I do want you to be happy and, No. 2, I am willing to be flexible within reason on that. So, will we just leave that there and come back to it if necessary.

MR COLLINS: May it please the Court. It's just I think unfortunately it's just something that I think has to be recorded.

JUDGE: Yes. That's okay.

MR COLLINS: Eventually I think it will have to make its way into another forum, be it by way of appeal or indeed a separate judicial review of the practice direction itself, Judge, and all of these things are under contemplation because this kind of shoehorning doesn't seem to me to fit the scope of either the Act, Convention or the Directive.

JUDGE: Okay. Well, I have confidence in you to make your best points within the time allowed, Mr Collins.

MR COLLINS: Well, the first thing I'm going to do, Judge, is I will not be addressing the point in relation the first core ground, Judge. I simply don't have time to do that in the time available. I can only deal with Habitats Directive and I'll do as best I can a job on that. Now, as it happens there is a point in the Habitats Directive that doesn't seem to me to be answered anywhere by the respondent. So, to that extent, it is a relatively straightforward point, Judge, and can be presented at a high level. The Court is fully cognisant obviously with the principles at stake in the Habitats Directive. The Court knows fully what article 6.3 and article 6.4 require in terms of an appropriate assessment under the directive and that's what's at issue in this case. The Court will also be familiar with the case law surrounding the obligations and the refinement of those obligations that that case law provides. And a great deal of the case law that has brought clarity on the operational Habitats Directive has arisen not only in this jurisdiction but has arisen in this jurisdiction in the context of wind farms and indeed it has even arisen in the context of this jurisdiction in the context of wind farms in the context of the Hen Harrier. So, we have a great similarity between the case that's before the Court today and a great many other cases that have gone before this case which have, as it were, set out the principles at issue and what's principally at issue in this case, Judge, is the screening assessment of An Bord Pleanála in relation to the Hen Harrier and whether or not that screening assessment accords with the principles of the Court of Justice and indeed our own national courts in relation to how that is to be approached.

In that regard, Judge, in terms of screening assessment perhaps the clearest statement of the obligations in that regard is set out by Advocate General Sharpston in case C 258/11 Sweetman which I know the Court is very familiar with and that concerned the test in article 6.3 and article 6.3, as the Court will be aware, says that "Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives."

So, if there is a possibility of a significant effect, then it follows that you must conduct an appropriate assessment. Now, while 6.3 uses the words likely or the word likely, Advocate General Sharpston conducted an analysis of multiple language versions of the directive and what we set out in paragraph 27 of our submissions that in effect the likelihood or probability is reduced in those other language versions to a mere possibility and Judge Sharpston interpreted expressly the directive as meaning the mere possibility of an effect, not a de minimis possibility, but a possibility of an effect is sufficient to trigger the obligations under article 6 and that's set out at paragraphs 43 onwards of Advocate General Sharpston's opinion where she says, "Paragraph 2 imposes an overarching obligation to avoid deterioration or disturbance. Paragraphs 3 and 4 then set out the procedures to be followed in respect of a plan or project which is not directly connected with or necessary to the management of the site (and which is thus not covered by paragraph 1) but which is likely to have a significant effect thereon. Collectively, therefore, these three paragraphs seek to pre empt damage being done to the site or (in exceptional cases where damage has, for imperative reasons, to be tolerated) to minimise that damage. They should therefore be construed as a whole."

And then at 45, "Article 6(3), by contrast, is not concerned with the day to day operation of the site. It applies only where there is a plan or project not directly connected with or necessary to site management. It lays down a two stage test. At the first stage, it is necessary to determine whether the plan or project in question is 'likely to have a significant effect on the site'."

Paragraph 46, "I would pause here to note that, although the words 'likely to have an effect' used in the English language version of the text may immediately bring to mind the need to establish a degree of probability..." and this is important, Judge "...that is to say that they may appear to require an immediate, and quite possibly detailed, determination of the impact that the plan or project in question might have on the site the expression used in other language versions is weaker. Thus, for example, in the French version, the expression is 'susceptible d'affecter', the German version uses the phrase..." and I'm not going to attempt the various German or other Dutch, et cetera, translations, Judge. "Each of those versions suggests that the test is set at a lower level and that the question is simply whether the plan or project concerned is capable of having an effect. It is in that sense that the English 'likely to' should be understood." And that, Judge, we say is the critical paragraph and the critical analysis. If the project is capable of having an effect it needs to be subjected to a stage 2 for preassessment.

Now, in this case I'm sure the Court has seen the papers and the submissions and the grounds but we have a Hen Harrier, known Hen Harrier roost located proximate to the site and we have expressions of concern from bird watch Ireland, from a Mr Whelan and we have expressions of concern from the APWS about first of all the possibility of the Hen Harrier frequenting the site and second of all the surveying methodology that was employed by the developer and the developer's agents in carrying out their Hen Harrier survey. Having regard to those concerns expressed, Judge, there is clearly a possibility that this development can have an effect on the Hen Harrier. This project is capable of having an effect on the Hen Harrier. And that light trigger it pulled and it seems to me that there is no satisfactory or other explanation as to why that has not in this instance prompted a stage 2 appropriate assessment. We're not talking about a refusal. And I know the Court is concerned about the application of IROPI and the contemplated use of that in the context of renewable energy but that's 6 (4). We haven't even got to the second stage of 6 (3) in this assessment and what has to happen and what must happen in every development, irrespective of whether it is a renewable development or another development, whether it is one that's going to produce some positive benefit in the form of renewable energy or not, the process is essential and the process must be properly followed and there's no imperative in allowing the process to be undermined and, with the greatest of respect, Judge, we say that here we have a very clear case. Frankly it is astonishing that after 15 years of the development of the Habitats Directive in this jurisdiction that An Bord Pleanála is still not only making decisions like this but defending them in court rooms because as clear a breach of the Habitats Directive you will struggle to find, even on the existing authorities and those are the ones that I suppose were the pioneers at the time and those were the ones that were setting out the rule structure and the approach that's supposed to be taken to a decision such as this and clearly in this case that test hasn't been met and the inspector's report is astonishingly poor in this case. It has completely overlooked this particular issue. The assessment gets diverted into the River Nore and the River Barrow SAC. There is no real attention properly given to the matters that are of concern in relation to the Habitats Directive in the context of the SPA, the Slieve Bloom SPA and I'll take the Court to that in short order but the Court will see that the focus, shall we say, of the inspector's analysis is elsewhere and that appears to give rise to this lacunae in the assessment in the context of the Hen Harrier.

Sweetman continues, Judge, or Judge Sharpston continues in Sweetman, "The requirement that the effect in question be 'significant' exists in order to lay down a de minimis threshold. Plans or projects that have no appreciable effect on the site are thereby excluded. If all plans or projects capable of having any effect whatsoever on the site were to be caught by Article 6(3), activities on or near the site would risk being impossible by reason of legislative overkill."

49. "The threshold at the first stage of Article 6(3) is thus a very low one. It operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken of the implications of the plan or project for the conservation objectives of the site. The purpose of that assessment is that the plan or project in question should be considered thoroughly, on the basis of what the Court has termed 'the best scientific knowledge in the field'." And that again, Judge, is critically important because here undoubtedly the NPWS possess the best independent scientific knowledge in the field and they have deprecated this assessment.

"Members of the general public may also be invited to give their opinion. Their views may often provide valuable practical insights based on their local knowledge of the site in question and other relevant background information that might otherwise be unavailable to those conducting the assessment. The test which that expert assessment must determine is whether the plan or project in question has 'an adverse effect on the integrity of the site', since that is the basis on which the competent national authorities must reach their decision. The threshold at this (the second) stage is noticeably higher than that laid down at the first stage. That is because the question (to use more simple terminology) is not 'should we bother to check?'" Which is all that we are asking here, Judge, is that the Board actually properly check whether or not there is a likely or an adverse effect on the integrity of the site. "But rather 'what will happen to the site if this plan or project goes ahead; and is that consistent with "maintaining or restoring the favourable conservation status" of the habitat or species concerned?'. There is, in the present case, no dispute that if the road scheme is to proceed a part of the habitat will be permanently lost. The question is simply whether the scheme may be authorised without crossing that threshold and bringing into play the remaining elements of Article 6(3) (and, if necessary, Article 6(4)). 51. It is plain, however, that the threshold laid down at this stage of Article 6(3) may not be set too high, since the assessment must be undertaken having rigorous regard to the precautionary principle." So again we're being asked to apply the precautionary principle and again how can that be done in circumstances where the NPWS has expressed its concerns about first of all the Hen Harrier and second of all the methodology and has

particularly, in its most recent submission, said that they have significant doubts about the scientific standards that were applied in the context of the assessment and there is no answer to that to be found anywhere in the Board decision or any answer to be found in the Board's inspector's report. In fact you don't even have any proper engagement with this issue at all by the inspector. It seems to have just slipped by under the radar unnoticed.

And then, Judge, lest there be any concern in relation to that being the opinion of an advocate general rather than a decision of a court, we do have Kelly v. An Bord Pleanála, [2014] IEHC 400 wherein those specific paragraphs, Judge, were expressly endorsed by Judge Finlay Geoghegan in this court room if I'm not mistaken.

MR FOLEY: We are ... Judge Finlay Geoghegan's court room.

MR COLLINS: It was for a while, yes.

MR FOLEY: It seems like a long time ago.

JUDGE: The 25 years weren't wasted, Mr Collins.

MR COLLINS: Sorry, Judge?

JUDGE: The 25 years weren't wasted.

MR COLLINS: Not all of them, Judge, not all of them. There's a few moments along the way. Well, we'll talk about that later. Judge, then if we could I am not going to take the Court through the pleadings, Judge, and I hope if there's any concerns about the pleadings that they'll be raised with me and that or I won't run into a pleading

JUDGE: Okay. The concern as I understand it

MR COLLINS: May it please the Court.

JUDGE: I mean we can get into this briefly if you like is that there's no ground supporting the complaint about public participation in relation to relief 1A. So, it kind of relates to core ground 1. I'm not sure whether there's a pleading covered on core ground 2. Now, I'm not sure the pleading problem at core ground 1 really makes a lot of difference because you have pleaded in effect the 2018 regulations inferentially by pleading section 46 (7).

MR COLLINS: (7), yes.

JUDGE: So, it's a bit of a technical skirmish, I'm not sure you really I'm not sure you lose a whole lot with that.

MR COLLINS: I don't think so, Judge.

JUDGE: Yes.

MR COLLINS: But as I said for the purposes of today I'm more concerned with

JUDGE: Yes.

MR COLLINS: EU law ground at No. 2.

JUDGE: Okay. If there is a pleading point in core ground 2 I'm not sort of fully conscious of it but we will hear about it later if there is one.

MR COLLINS: May it please the Court.

JUDGE: Yes.

MR COLLINS: Well, in those circumstances, Judge, I'll pass over the again it's unfortunately a feature of the foreshortened period of time, we don't have the time to explore all of these issues perhaps in the detail that we might otherwise do but I just am conscious that I don't want to be in a situation where an issue arises in relation to a pleading and I haven't addressed it.

JUDGE: No, absolutely. Well, if it consoles you as of right now I'm not really conscious there's a major issue there.

MR COLLINS: May it please the Court. Good. Then, Judge, I have I was going to take the Court if I could to the actual inspector's report. If the Court looks at agreed core book 1, it's at tab 4 of that. I know it's somewhat reverse engineering but again with the time limit I think it's better the Court just goes straight to see what was decided. But if the Court looks at page 31 of 90 there we have the section of reports and inspector's report dealing with appropriate assessment. And again what that says is, at 7.3.4, "The NIS dated December 2019 has been prepared by Fehily Timoney on behalf of the applicant. The NIS describes the proposed development, its receiving environment and relevant European Sites in the zone of influence of the development. It was informed by a desk top study, maps and ecological and water quality data from a range of sources and site surveys, including bird surveys which comprised of a total of 4 site visits between mid April and early July 2018 and mid April and early July 2019. Wader surveys which comprised three visits in total per breeding season i.e. between early April and late June 2018, and early April and late June 2019." And then various secondary species are then outlined.

"With regard to Hen Harrier roost checks were undertaken in an area of cut away bog due to local anecdotical evidence. Fixed point watches were undertaken at dusk to target potential roosting hen harriers. The survey comprised three visits undertaken at regular intervals (monthly) between October and December. All raptor observations were recorded on field maps." First of all, Judge, as the Court will see in a -- momentarily, the -- there was more than local anecdotal evidence of hen harrier activity in the vicinity of this site. In fact, there were well established records of new -- of a roost on nearby lands which were recorded by the NPWS and various other independent individuals for a long number of years going back to the early 2000s.

But, in any event, Judge, we have then the screening itself is -- commences in relatively short order on the next page, at page 32, and we have -- if the Court moves on a couple of pages, we will see that the Slieve Blooms SPA appears on page 34 internal, which is described as being 4.8 kilometres south-west of the site. The identified qualifying interest is the hen harrier and then we have the effects: "Commuting hen harrier may pass over the site." "Yes", is -- in terms of what it said there, Judge, just so the Court knows if the Court goes back to, "Consider it further in screening," is that -- or final paragraph or box or column and we have: "Yes, commuting foraging hen harrier may utilise the site."

So, at a very high level screening at this stage, this juncture in the process, we have an identification by the developer of a source pathway receptor comprising the commuting hen harrier and we have: "Whether or not considered further in screening." "Yes. Commuting foraging hen harrier may utilise the site." Judge, if I went no further that would trigger the Sharpston test for a -- for the state to do appropriate assessment. There is a possibility of these qualifying interests under the SPA crossing the site and we all know that wind farm development and hen harriers don't necessarily co-exist peacefully, Judge. So, again, it's a clear identification of a possible effect and it's just simply, it seems, not taken any further than that.

Then we have the screening determination at 7.4.3. The screening report submitted: "Screens are all mature, 2000 sites, on the grounds that there is a lack of suitable habitat in the case of Slieve Blooms SPA and that the others are removed from the development and will not be affected by disturbance with the exception of the River Barrow and Nore SAC. In relation to the Slieve Blooms SPA of which the hen harrier is the single qualifying interest I note that hen harrier were not recorded at the site during the extensive bird surveys." Well, first of all that seems to be wrong. There is a record of hen harrier in the vicinity of the site at -- during one of the surveys and there is further evidence from Mr Whelan of other sightings in the vicinity of the site at other locations.

"It is also mentioned within the EIAR that there is no suitable hen harrier habitat within the development site." Again, that seems to be wrong also because what they seem to be talking about in the context of habitat is nesting habitat and I'll take the Court to that in due course.

"Hen harriers are ground and nesting birds…" -- and that's correct, Judge, they are. They're also ground roosting birds but -- "… They breed in moorland, young conifer plantations and other upland habitats at elevations between 100 and 400 metres above sea level. The proposed wind farm is between 80 metres and 73 metres Ordnance datum. The core foraging range for hen harriers during the breeding season is 2 km with a maximum range of 10 km. In the majority of cases the core range should be used when determining whether there is connectivity between the proposal and the qualifying interests. Maximum distances should only be used in exceptional circumstances, for example, if there is suitable habitat within the proposed development site and no other suitable foraging habitat exists outside the site. As the proposed wind farm site does not have suitable

habitat the core foraging range of 2 km will be used for assessment. Hen harrier typically only travel 1 km to source alternative nest sites. Given the absence of hen harrier recordings during the ornithological surveys and the lack of suitable habitat of the proposed wind farm site in addition to the distance between the proposed wind farm and the SPA, it is considered that no affects will occur by virtue of disturbance or displacement on hen harrier or the Slieve Blooms SPA."

Now, Judge, that is, it seems, the critical paragraph because the next paragraph at 7.4.4 says: "It is for this reason that the Slieve Blooms SPA was screened out. I consider the applicant's approach in this regard to be reasonable and note that the council did not raise any concerns in this regard within the assessment of the application." Now, that, Judge, is the extent of the assessment. It's hopeless. It is simply hopeless.

The, as I said a moment ago, focus, is clearly on the nesting capability of the hen harrier. It hasn't been suggested anywhere that I'm aware of that this is a nesting site. During the breeding season hen harriers go to suitable areas, usually of cut away forest or whatever, they nest on the ground, they breed, the forage, they do all of the things that are described in this paragraph. The rest of the year they range widely and roost communally and use habitats such as the habitat on the site. It's a different six or eight months of the year to the six or the four months of the year that they spend nesting elsewhere and -- but this is focused only on nesting and not only that but it said: "Hen harriers are ground nesting birds that breed in moorland and upland habitats at elevations between 100 and 400 metres." Because this site is not between 100 and 400 metres, and it's actually quite close to it, but because it's not between that exact height area or band it's dismissed. Well, what about the rest of the year when it's foraging and when it's moving around doing what it does according to the NBWS, BirdWatch Ireland, Mr Whelan, et cetera and, indeed, their own evidence later on when they do more complete ornithological surveys? Again, it's not clear.

"The core foraging range for hen harrier during the breeding season is 2 kilometres…" -- again, they seem to be focusing on the breeding season -- "…with a maximum range of 10 kilometres…" -- again, during the breeding season -- "… In the majority of cases the core range should be used when determining whether there is connectivity between the proposal and the qualifying interests. Maximum distances should only be used in exceptional circumstances, for example, if there is suitable habitat within the proposed development site and no other suitable foraging habitat exists outside the site." What the Court will see is that, first of all, there is, it seems, suitable habitat within the site and, moreover, when the trees come to be removed for the purposes of the installation of the hen -- wind turbines, the hen harrier may recolonise the site. That is expressly expressed as a concern in a number of different locations by a number of different parties but yet it doesn't seem to feature anywhere in this analysis. And, again, the distances -- these are distances from nests. They are not distances in relation to general foraging in the winter months.

"As the proposed wind farm site does not have suitable habitat…" -- again, that must be nesting habitat -- "… the core foraging range of 2 kilometres will be used for the assessment. Hen harrier typically only travel 1 kilometre to source alternative nest sites." So, it's again expressly nest sites. So, we're sufficiently far away from the SPA or suitable habitat here, the Bord thinks, for this to be okay but the complete focus of what the Bord's inspector is doing here is on nesting. It is not on -- it doesn't seem to contemplate at all the actual problem which is the wintering birds moving across the site or being diverted from moving across the site or colliding with turbine blades.

"Given the absence of hen harrier recordings during the ornithological survey and the lack of suitable habitat at the wind farm site, in addition to the distance between the proposed wind farm and the SPA, it is considered no effects would occur by virtue of disturbance or displacement on hen harrier or the Slieve Blooms SPA." On what basis is that decided? What actually accurate basis is that decided? It is a conclusion supported by a variety of sub-conclusions and practices that don't apply here.

And then the stage 2 appropriate assessment the Court won't be surprised, doesn't deal at all with hen harrier because it has already been excluded from the further consideration by the screening exercise.

Then we have appropriate assessment: "The Bord agreed with and adopted the screening assessment and conclusion…" -- sorry, this is at page 80 of 90, Judge -- "… The Bord agreed with and adopted the screening assessment and conclusion carried out in the inspector's report that the River Barrow and River Nore SAC is the European site for which there is a likelihood of significant affects. The Bord considered the Natura Impact Statement and all other relevant submissions and

carried out an appropriate assessment of the implications for the proposal and for the River Barrow and Rive Nore SAC. In view of the science conservation objectives, the Bord considered that the information before it was adequate to allow the carrying out of an appropriate assessment. In completing the assessment, the Bord considered…" and various matters are then set out, Judge, but the Court won't see, of course, is anything relating there to the hen harrier.

Then, Judge, we have the inspector's addendum report and that can be seen at the next tab and then we have -- in dealing with the various notices, Judge, we have a reference to: "It is noted that the development description as set out on the statutory notices refers to a tip height of 185 metres. There's no reference to hub height or rotor diameter in the statutory notices to enable the Bord to determine the appeal. Please confirm the nature and extent of the development for which permission is sought," et cetera. So, there the Bord is raising an issue in relation to the lack of knowledge as to the particular turbine type and turbine blade dimension and that gives rise to a significant difficulty as well, Judge, because elsewhere in the assessment, again, you won't see this in the Bord's assessment, but elsewhere in the assessment we have a specific indication that hen harriers tend to fly at 15 to 30 odd metres. In fact, the one that was seen on the site was seen flying at 20 to 30 metres above the ground and the turbine that is indicated in the further information seems to increase the swept area and has a lower tip height which brings it, I think, to 15 metres above ground level and that reduces the headroom for the hen harrier and, of course, there's no assessment undertaken of that either.

And at 3.4 of the inspector's addendum report, at page 7, we see a -- "I am therefore satisfied that the detail submitted within the further information request do not have any impact on the appropriate assessment carried out in relation to the development and the conclusions in the appropriate assessment remain as per my original report." So, there's a significant change in rotor diameter but there's no change in the assessment even though the rotor diameter now intersects with the flight height, the cruising altitude of the hen harrier. Again, that's another lacunas.

Then we have the Bord's decision itself, Judge, and, again, the appropriate assessment doesn't mention the SPA and there is no consideration of any of the issues relating to the hen harrier. The inspector's report is simply adopted and that's that.

And then, Judge, I'll just take the Court to the first of the, I suppose, other side evidence in relation to the hen harrier and we have the Department of Culture, Heritage and the Gaeltacht submission of the 24th of March 2020 to the Director of Services of Planning in Laois County Council and that describes the proposed development and says: "On behalf of the Department of Culture, Heritage and the Gaeltacht, I refer to correspondence received in relation to the above. Outlined below are heritage related observations/recommendations of the department under the stated headings." And then under Nature Conservation, Judge, what's quite interesting is, is the very first thing that's dealt with by the department is, indeed, the hen harrier. There's, yes, a very different approach to the approach taken by the Bord who place it at pretty much Paddy last, in terms of the appropriate assessment stakes and then don't carry it forward into stage 2 for reasons unclear.

"The Department acknowledges the high quality of the environmental reports including the Natura Impact Statement and environmental impact statement report which have submitted in relation to this proposed wind farm development. However, concerns remain that the impacts to hen harrier, a bird of prey listed on annexe 1 of the birds' directive and protected under the Wildlife Act as amended, have not been adequately assessed. During winter, hen harriers gather at suitable safe communal roost sites at night from which they can radiate and hunt across the hinterland during the short winter days. The proposed development lies close to such a site. The winter roost site has been the subject of several years of targeted surveys as part of the Irish Hen Harrier Winter Survey. Up to six hen harriers have been recorded roosting communally at this site including a juvenile bird tagged in the Slieve Bloom Mountains SPA which lies within 5 kilometres of the proposed development site. This bird provides evidence of a pathway between the SPA and the nearby roost site." So, again, Judge, we have an establishment of a linkage between the SPA and the particular site in question. We can see that there is a winter roost site identified that has been the subject of several years of targeted surveys. Up to six hen harriers have been seen roosting communally at the site including that juvenile bird. Again, Judge, all of that establishes a reasonable scientific doubt in relation to the finding to the effect that they don't use or frequent the site.

"To assess whether there are processes or pathways by which the proposal may influence a site of special conservation interest bird species it is important to consider the distances that some species may travel beyond the boundary of the SPAs. In this case there is a known connection between the

Slieve Bloom Mountains SPA and the nearby winter roost site. The potential for this project to undermine the conservation objectives for hen harrier and the Slieve Bloom Mountains SPA by virtue of this pathway has not been assessed in the NIS. Assessment is required as further information and should include assessment of cumulative impacts of other proposed developments." So, again, Judge, we say this is critically important. There's a known connection, there's a nearby roost site and the potential for the project to undermine the conservation objectives has not been assessed in the NIS and that is as strong a condemnation as you can get from the department.

"Assessment is required as further information and should include assessment of cumulative impacts of other proposed developments." And, Judge, the department is not talking about a further screening assessment, the department is talking about a full assessment and is referring to a Natura Impact Statement as a full stage 2 assessment. It is not just talking about a screening. How the Bord is still at screening on this is beyond comprehension.

"The department considers that winter roost checks conducted on the 26th of October 2018, 22nd of November 2018 and the 11/12/2018 are insufficient given the size and area of the suitable winter roost habitat adjacent to this proposed wind farm development and the importance of the area to wintering hen harrier. Recently published guidance recommends that suitable vantage points which cover the entire extent of the area of interest should be used. Depending on the size of the site and area of interest more than one person may often be needed for observations. Scottish National Heritage recommend survey for a minimum of two years to allow for variation of bird use between years and advise that any hen harrier roost sites within 2 kilometres of a proposed wind farm should be identified. The department recommends that in order to complete assessments further information in relation to communal hen harrier winter roosts in the vicinity of this proposed wind farm is required." So, again, there -- need a full belt and braces on this. That's a stage 2 appropriate assessment. That's all it is. That's what it must be. They can't just be screened out and with this expression of possible affect, irrespective -- I mean, if it just stopped here that's sufficient to trigger a stage 2. Why they haven't done it is, frankly, beyond comprehension and, Judge, with the greatest of respect, if this Court endorses that approach it will set the Habitat's Directive back more than 10 years/15 years. We'll go back to the bad old days where it just wasn't done at all. It wasn't understood and wasn't done and when it was done wrong it wasn't punished and that changed gradually over the course of a decade with cases like Sweetman, with cases like Grace and Sweetman, with cases like Kelly and cases like Connolly. Almost all of them, bar the first Sweetman, were wind farm cases and most of them involved hen harriers and if this is now going to pass muster well then, Sharpston, Finlay Geoghegan, Judge Clarke in Connolly, et cetera, all of those were at nothing, the CJEU in Grace and Sweetman at nothing and, by the way, if it's incumbent on me to do something along the lines of going out and finding an expert, which I haven't been able to do, because I know some of them are afraid to go on affidavit against wind farms in this country, if that is failing in some way I say that that can't be correct, that was not a feature in any of those other wind farm cases and this document here on its own requires no further proof, it requires no further evidence. I don't need to get an ornithologist to come into a room and swear up to the possibility. I can sense the Court's discomfort or dissatisfaction with that.

JUDGE: No, I'm just wondering what would they be afraid of swearing up against wind farms.

MS MURRAY: Yes, Judge, I have to say -- I mean, as a wind farm developer I do have to oppose what Mr -- object to what Mr Collins is saying.

JUDGE: Okay.

MS MURRAY: I -- he can't just make these kind of bald statements that they're -- people are afraid to swear affidavits, Judge.

MR COLLINS: Now -- yes, I can, Judge. I've tried to get witnesses, I can't. I'm perfectly entitled to say I have tried.

JUDGE: Yes.

MR COLLINS: I have tried to get witnesses and I can't.

JUDGE: Sure. No, no, I know, I get that but just --

MR COLLINS: In fact, one of them was threatened off it, Judge.

JUDGE: I'm sorry?

MR COLLINS: Not by the developer, so if I --

MS MURRAY: Well, Judge, I'm glad Mr Collins has clarified that.

MR COLLINS: Not by the developer. No, no, no, sorry, I'm not making any -- I'm not saying anything about this particular development.

JUDGE: I think let's --

MR COLLINS: It is a feature of wind farms generally.

JUDGE: Yes.

MR COLLINS: Because, at the moment, you're either seen as being with the industry or against the industry and if you're against the industry you'll never work again for the industry. That is the perception. That is the way that it is being, I suppose, progressed, unfortunately, and it is extremely difficult to get independent ornithological witnesses to come to Court to give evidence and we have tried any number and have failed and that has been repeatedly said to us that no, they will not go in against wind farms in general and renewables in particular because of the fact that they have this particular concern.

JUDGE: Okay.

MR COLLINS: And, Judge, I say in any event what would any such expert add? And what more do we need beyond what's in this page, what's in Mr Whelan's pages, what's in the later letter from the department, what's in the letter from BirdWatch Ireland? What does a third wheel coming in to say, yes, they're all right and the Bord is wrong, do you actually add to what the Court has to undertake? And, again, in Sweetman, from paragraph 44 the Court of Justice decision, it is for the Court to decide and the Court doesn't need independent verification from some expert. I am not certain of what that expert would add and I'm not certain of what I am short of in evidential terms. If the Court has any view on that, I'd welcome knowing what it is but I see the only substantive defence that seems to be raised against me in the opposition papers and in the submissions is an accusation that I am short in some respect of proving my case but I don't know what further proof is required. Is this document not real? Does it not speak for itself? Does it not raise concerns in relation to the Habitats Directive on the hen harrier? Does it not require a mandate, a full assessment and a full appropriate assessment? Is it not properly scientifically informed? Is it not representative or indicative of the best of scientific knowledge in the field? How can our own department, charged with this particular function and role, be an outlier or a voice in the wilderness? And I have to say it's facile to say that the case isn't proved because I don't have a. n. other ornithologist to come in and say yes, I agree with the applicant. I don't see why that's required at all. It wasn't required in Connolly, it wasn't required in Kelly, it wasn't required in Grace and Sweetman. All of those cases involved hen harriers, all of them involved submissions such as this, reliance was placed on those submissions in those courtrooms and they were not sent home because of a pleading point or because they didn't prove their case by hiring an independent ornithological witness on affidavit or in Court viva voce.

Continuing with the department submission: "As hen harrier was not recorded within the study area over the 1.5 years of dedicated field surveys, this species was not listed as a key receptor in the EIAR. Intensive grassland and closed-canopy commercial forestry, which cover the majority of the proposed development site, are not favoured hen harrier habitats. However, opening up such forestry for wind farm development through keyholing, restructuring or clear felling can make areas which were previously unattractive to hen harrier suitable for foraging. This may attract birds into the wind farm site and increase the risk of collision mortality to levels above these predicted on the basis of pre-application survey. Standard methods of collision risk estimation, based on survey across closed-canopy forestry are likely to underestimate post-felling flight activity. The department advises that this issue is addressed in the NIS and EAIR as further information that suitable mitigation measures are proposed. As hen harrier are prone to persecution any further information which would allow the identification of sensitive roosting sites should be provided in a confidential annexe." Now, again, Judge, we have clear indication that there are issues arising potentially from the development that are not contemplated anywhere in either the developer's submission -- and certainly have not been dealt with at all by the Bord's inspector's analysis.

That analysis that I opened earlier, Judge, does not contain complete, precise, definitive findings capable of removing a scientific doubt, it just doesn't. It is riddled with lacunae. It only deals with insufficient or unsuitable terrain for the purposes of hen harrier nesting. That is the only concern

that seems to be dealt with by the inspector in her report. That is not sufficient and the department is here raising other real concerns that are not ever properly answered, Judge.

And then, if we turn, Judge, to the developer's own further information response, we can see, again, the hen harrier feature's prominently, Judge, and I only have 30 minutes left available to me, it could take me probably twice that to do a proper analysis on this but I'll do what I can. We have – "To address this request, six rounds of hen harrier winter roost surveys were undertaken by Betty Timoney at the Garryhinch Bog subsite and note the Garryhinch Bog consists of Garryhinch and Garrymore Bog between October 2020 and February 2021. According to submissions made by BirdWatch Ireland and Ricky Whelan, roosting hen harriers are claimed to be using the Garryhinch Bog…" -- I think that's a very interesting use of words, Judge, and it permeates the document. It's hostile, almost, to the claims that are made. It's casting doubt. It's not saying, you know, sightings have been made. We're not building on scientific observations already made, we're treating with suspicion as claims, we're not really believing them, they're not actual sightings that claims to have sight of something and that seems to me to be the wrong approach to this. At this stage I would have thought the correct approach would have been to say, right, look, maybe we'll look at this again and incorporate it into an NIS and just do the stage 2 appropriate assessment and analyse all the aspects of it because that's what's actually required and instead of that there's a kind of a resistance and I'm not really sure why that is.

"They were recorded in January 2014, January and December 2015 and January 2016 as part of work carried out by the then NPWS ranger and volunteers…" -- and, again, I don't see what's to be doubted in any of that -- "… Following an initial ground trooping assessment the Garryhinch subsite was found to be more vegetated and was assessed as most likely to provide hen harrier roost habitats whereas the Garrymore subsite is bare and was assessed as unsuitable for roosting hen harriers. Consequently, our surveys focused on the Garryhinch subsite although view sheds focusing on Garryhinch also covered part of the Garrymore subsite on the hen harrier roost report." And, again, Judge, so there are potentially suitable roost sites in this area. That's identified. Again, once you've identified that and a possible source pathway receptor in your own screening assessment well, then, you must move to do a belt and braces and stage 2. And why would you be afraid of doing that anyway, Judge? I mean, where is the downside in completing a stage 2 appropriate assessment when you had to do it anyway in relation to the other SAC? Why not just include it in your Natura Impact Statement? Why not submit it to the Bord and why not have the Bord do a proper full belt and braces assessment on it? Well, it really is -- it beggars belief that that hasn't been done. And again, it is claimed by the third party submissions, BirdWatch Ireland -- I mean, I don't think BirdWatch Ireland go round making claims all that terribly often. They record things like sightings of birds and they record where they are and so on, and, if there's uncertainty about it, that uncertainty is also recorded. The Garryhinch bog is particularly difficult to survey, in that multiple field observers need to be based at multiple vantage points to devastating hen harriers. It is claimed that the bird surveys as conducted as part of the 2019 EIAR did not detect any hen harriers because only a single surveyor was used for hen harrier winter roost surveys. To counter this critic in the 2020/2021 surveys, four surveyors were stationed at four vantage point locations chosen to provide maximum visibility of the Garryhinch subsite. The surveys were then carried out by the four surveyors simultaneously to minimise the chances that any hen harries were missed.

And then, Judge, over the page we have the 2020/2021 winter roost surveys recorded only a single hen harrier at the Garryhinch subsite across 18 hours of survey time over five months. So there is a hen harrier in the location. This bird was a ringtail that was observed travelling in an east-west direction over the south of the site at heights of 20 to 30 metres. Again that's within the range of the turbines. For 130 seconds at 15:34 on the 19th of November 2020. This bird was not observed roosting, although it's said elsewhere, Judge, if I get to that, I'm not certain with the time available, that, had it been followed, it would have led to the roost site, but it wasn't followed, so therefore the roost site just remained uncertain. The bird flew over the recolonising cutover bog, bog woodland and depositing lowland rivers at the Cottoner's Brook watercourse being lost from view.

So, Judge, again that is on observation, a positive sighting of a hen harrier in this vicinity. I mean, it's downplayed significantly, but there are only a number of surveys done, 18 hours in total is what is assigned to this, and yet in that time a hen harrier is in fact seen. So, again how it is we're moving away from stage one without a certification or an identification that a stage two is required seems to me to be very, very peculiar, Judge.

The conclusion from the hen harrier report was: "Taken together, it seems that while the Garryhinch subsite may have been used as a hen harrier winter roost between 2013 to 2016, this is no longer

the case, and if the Garryhinch subsite is still used as a winter roost by hen harrier at all, then it is infrequently and in a limited way and does not represent a full roosting area." Well, so what? Does it have to represent a full roosting area in order to qualify for a stage two appropriate assessment? Surely not. Surely all you have to do is establish the possibility of a roost site, which they're acknowledging themselves. On Sharpston's test they fail, but, for whatever reason, they're not applying the Sharpston test.

"Field surveyors advised by Bord na Móna staff that they have trouble with quad bikes and scrambling at the Garryhinch bog group." Now, this has been offered up a number of occasions, that perhaps they were frightened off, frightened off by the quad bike usage and such like on the bog -- cutaway bog elsewhere. These human activities -- there was also evidence of recent burning. "These human activities could have rendered the Garryhinch bog group as less suitable for wintering hen harries." Yes, well, one trespass case by Bord na Móna would quickly resolve that difficulty, and perhaps if that step were taken by Bord na Móna, then you may have recolonisation of the said roost sites. None of that is contemplated here. It's just they've been frightened off, they used to use it, they may have been frightened off by some intermittent human recreational activity and trespassing on state land, but that's it, they're done, they're never coming back, and we're never going to do any assessment on the possibility of them recolonising this area. I'm not sure how that sits with any of the case law on restoration to a favourable conservation status. And you seem to be quite happy that the hen harrier is no longer using this particular area because we want to develop it as a windfarm. We're not taking any steps to restore or mitigate the effects that might perhaps be driving those birds away.

"Hen harrier breed in moorland, young conifer plantations and upland habitats typically between 100 metres and 400 metres above sea level. The proposed windfarm sites range in elevation from 80 metres above sea level to 73 metres above sea level. Therefore, even if habitats were made more suitable for hen harriers, the proposed windfarm is located outside the elevational range preferred by breeding birds. The nearest hen harrier nest is located 7.4 kilometres southwest within the Slieve Bloom SPA and it is therefore much more likely than any future nest would be located within or within the immediate vicinity of the SPA." Again, Judge, we flip immediately back subtly to nesting at the other side of the year. There's no talk about how it might be that this -- any remediation or improvement of the background environmental condition might result in an increase in roost activity. Instead, we flip straight back over to the usage of the site for the purposes of nesting, which is not what is the focus of either the submissions made by the NPWS or by BirdWatch Ireland nor indeed Mr Whelan.

And then: "Given this, mitigations are not required postconstruction for hen harrier." Again we're not going to mitigate it because it's slightly outside the optimal altitude range for the hen harrier. Again no explanation as to how that works with roosting, which is the focus.

"Consequently we request that the following sections of the EIAR and AA screening and AIS are updated to reflect hen harrier survey results. This addendum has been included put on in 4.3" And I'm not going to take the Court to too much of that but further on we do find in "potential impacts to birds" to Garryhinch bog and winter roost hen harriers are dealt with, two submissions. Una Duggan, BirdWatch Ireland, and Ricky Whelan note that the Garryhinch bog site is an important roost site for hen harriers. "The assertion is based on the following rationale. Historical surveys of Garryhinch bog coordinated by Jason Monaghan, a then MWPS ranger, recorded four hen harriers arriving to a roost in January 2014, three birds in November 2014, one male recorded in 2015, three males recorded in December 2015, and one male observed in January 2016." So there's a long historical, recent historical history of use in this area and record of use of this area by hen harriers. And, for whatever reason, that doesn't seem to prompt any concern because that was five years ago or now nearly 10 years ago.

"These surveys are documented as part of an unpublished report from the 2013 national hen harrier winter roost survey. That submission asserts should have been made available following consultation with the NPWS during the screening stage. Since 2016 no formal monitoring by the NPWS has taken place. However, a third party submission, Ricky Whelan, has recorded hen harrier in the area in October 2019 with a screenshot of a submission to the Irish Birding website provided as evidence. Mr Whelan also claims," and we're back to claiming again, "he observed a ringtail on the edge of a flooded field that skirts the local road, L20972, close to the junction with R423 on the Portarlington side of the Borness bridge over the Barrow river in January 2014, with a bird trap screenshot provided as evidence." Again the 2019 record is claimed to provide proof that the species is still using Garryhinch bog, and it is also claimed that there is no significant habitat change, so

Garryhinch bog remains suitable as a roost for hen harriers. "Mr Whelan acknowledges the quality of the survey works done in the EIAR but notes in his experience four surveyors positioned four independent vantage points is necessary to effectively determine usage by hen harrier. The third party submissions claim that, while no hen harries were recorded during surveys conducted in the winter of 2018 as part of the 2019 EIAR, this does not infer that the Garryhinch bog is no longer used or does not remain an important winter roost for the species. They recommend that greater attention is given to determining whether Garryhinch bog is still used in the winter by hen harrier and it is important in the national context. They also recommend that survey approaches follow best practice guidelines and they include a review of the existing data on the use of the hen harrier at the site."

So, Judge, again we have detailed expressed concerns in relation to all of this matter. The hen harriers are established as using this particular area across 2016, 2015, and then they have been seen by Mr Whelan in 2019, although his -- they don't actually doubt it, it seems. They keep talking about it as being "claim" but they don't' actually say it's not true or it is true. They don't seem to make any analysis or determination in relation to that. And it has to be said, Judge, that it's abundantly clear that there is scientific doubt in relation to this particular proposition, and it is abundantly clear that when that occurs on the authorities that a stage two appropriate assessment must be required. I see the Court is somewhat troubled by that proposition but I'm --

JUDGE: No. No. The -- not at all by the proposition that if there's reasonable scientific doubt that has to be removed.

MR COLLINS: Yes.

JUDGE: And I think the sort of, for want of a better term, inflection point between you and the opposing parties is what an applicant has to do to be able to assert the first leg of your syllogism, which is the existence of scientific doubt. So there can be doubt on the face of the papers, and then there can be doubt that has to be established evidentially, so I think that's where the debate is.

MR COLLINS: But what is the doubt that needs to be established evidentially here? What do I actually need to prove? I mean, I'm completely puzzled by this. I'm 25 years doing it and I don't know what I have to prove yet. I really don't and I don't know how I have to do it here and didn't have to it Kelly, didn't have to it in Connolly, didn't have to do it in Sweetman 1, Sweetman 2 or any of the other Sweetmans. In fact, I never had to do it. So why do I now find myself faced with authorities that say I have to have witnesses that say things that are perfectly evident on papers?

JUDGE: Well, why don't we -- why don't we bookmark that question, and we'll come back to --

MR COLLINS: Well, Judge, if that is the only question --

JUDGE: Yes.

MR COLLINS: -- and I'm often afraid that it may be the only question, then that is what actually needs to be addressed, and we can skip all the evidence, because all I'm going to be giving the Court is more of that, because, I mean, either all of this is meaningless and I depose a witness who then comes in and says something that I would consider to be meaningless, that there is scientific doubt here, because, on one hand, we have BirdWatch Ireland, the NPWS, Mr Whelan --

JUDGE: Yes.

MR COLLINS: -- all identifying, you know, site surveys. What am I going to depose at this time of year? Having regard to the expedited procedure --

JUDGE: Yes, yes.

MR COLLINS: What sort of a winter bird survey can I undertake on my own? Do I actually have to commission that? Do I have to send ornithologists out onto the site to actually survey for weeks or months on end to see?

JUDGE: Yes.

MR COLLINS: And then do I have to have a gotcha? Do I have to have a hen harrier actually fly in and land and, you know, whatever, or perhaps a sky dance might be performed, and never seen it but perhaps it might actually be performed --

JUDGE: Yes.

MR COLLINS: -- and we can video it and bring it to the Court and say, look, this is occurring on the site.

JUDGE: I know. You're making me feel a site visit would be productive here. But, look, no, I mean, I'm open to doing this whatever way you want to do it, Mr Collins, but I -- look, I -- and I'm totally subject to correction here, but just right this second, if you were to sort of force me to say what's the possible inflection point here, I think it's that. But one option -- I'll just throw this out --

MR COLLINS: Well, then I think I'll have to apply for adjournment, Judge, and look for -- my quest for ornithological evidence continues.

JUDGE: Well, I -- no, what I was going to say, one option might be if we could -- if you want to, one option would be to pause matters here, reserve the time, let the opposing parties deal with that, and, if necessary, then we can have another go around in your reply.

MR COLLINS: I'm not quite -- in what sense? Deal with just this issue?

JUDGE: Well, you said -- you said that if that's the issue, you might as well stop talking about the evidence, so I'm just --

MR COLLINS: No, but, I mean, the evidence is meaningless if I don't have -- if the Court is saying that this is not going to be sufficient and it can't be because it's on paper, then --

JUDGE: Yes. No, I'm not saying that. I'm not saying that. I'm saying that's my interpretation of what they're saying.

MR COLLINS: It is what they're saying, yes, Judge.

JUDGE: Okay.

MR COLLINS: But that's the only defence because they know they're bang to rights on the actual material. They can't make a legal argument.

JUDGE: Yes, okay.

MR COLLINS: So I either fail on lack of evidence or pleading. Like I have done in other recent cases, it's either lack of evidence or pleading.

JUDGE: Yes.

MR COLLINS: Because there's no actual answer to the substantive point. I don't see any answer to my substantive point.

JUDGE: Look, I'm just giving you the option. That's the way I'm seeing what they're saying. Okay. Now, I'm not -- I'm not agreeing with them, Mr Collins.

MR COLLINS: No, I know that but --

JUDGE: Just so we're clear about that, but I'm -- I'm just giving you the option if you want it, that if we want to let -- I mean, maybe this is a terrible idea, but, I mean, if you want to let them reply now, you can reserve your time --

MR COLLINS: Just on the evidence point or generally?

JUDGE: Well, generally on everything to date, I guess, and then you can --

MR COLLINS: Well, Judge, I have a lot more that I think I just need to address before the Court -- because I'm not going to come back and deal with it in reply. It wouldn't be fair to my friends if I was to do --

JUDGE: No, that's okay. I'm just giving you the option, but you carry on then.

MR COLLINS: No, I will, Judge, but I am very concerned at this, I must say, because it seems to be a feature that's coming up in a lot of cases now, and it is -- I don't see the basis for it in the first instance. Normally, if this happened, the judgment has already been delivered, but I cannot see how it is that in a case such as this, with the evidence at this height on these papers, scientific commentary from the NPWS unanswered, scientific commentary and observations from BirdWatch Ireland unanswered, commentary from Mr Whelan unanswered, and appropriate assessment screening that doesn't engage at all with any of that evidence, that leaves a gaping hole in its

analysis, those are things that can only be exposed by a lawyer doing advocacy in a courtroom. They cannot be exposed by a witness in the witness box. I cannot depose an ornithological witness to comment on the analysis undertaken by the inspector. That would be inappropriate. I cannot depose an ornithological witness to comment on the evidence that is given generally in the case. That would be inappropriate. So the only thing I can do is introduce new ornithological evidence. Now, if I deposed an ornithological witness who is just going to talk about the matters -- the papers that are here, then we will be told that's for the Court decide. The Court can form the same view of the papers as any ornithological witness can.

JUDGE: Well, whatever you do will be --

MR COLLINS: So the only thing, Judge --

JUDGE: Yes. Whatever you do --

MR COLLINS: Just please hear me out on this -- is that my ornithological witness will come in with some positive evidence about the presence of a hen harrier. I do not need to prove the presence of a hen harrier. That is clearly not something that is required of me. What I have to establish is that there's a lacuna in the assessment, and the lacunas here are manifold and astonishingly apparent and obvious.

JUDGE: Yes, okay.

MR COLLINS: The inspector just simply hasn't engaged with any of these issues at all. There's no evidence that the Board has either.

JUDGE: Okay. Well, look, I mean, the best thing to do is you just continue with your submission as you see is appropriate, okay.

MR COLLINS: Yes, Judge. Well, perhaps, and I only have 10 minutes left anyway. And, Judge, I'm sorry, but this doesn't have a future. This is not the way we're going to be presenting these cases going forward. It doesn't work. It can't work and it won't work. I'm sorry, that is just a fact, and it is a fact that -- it's just a fact that's going to have to be accepted. I cannot possibly do what I need to do in this room in the time that's available. It's not doable. It just isn't. And I'm sure eventually other applicants will be brave enough to come into this Court to say that too because that is what is happening, Judge, and I know I've been probably the first to be put through this procedure, and this is the second, I think, time, that we've down this or close to that in the Mago class already.

JUDGE: Yes.

MR COLLINS: And --

JUDGE: Like, Mr Collins, I'm not against bravery, okay, and I, you know, admire it at one level, okay.

MR COLLINS: But you don't advocate suicide.

JUDGE: No. Can I go back to my earlier point? I want you to be happy, okay. So --

MR COLLINS: I'm not.

JUDGE: No, I get that, but, look, work with me rather than against me.

MR COLLINS: Well, Judge, I've 10 minutes left. I still -- I haven't even -- I haven't even go through the first book. Why do have these books? Look, look behind you. I mean, have a look behind you.

JUDGE: Well --

MR COLLINS: I mean, like, what do we have? We have 45 minutes is all that people have to deal with this us.

JUDGE: But, look, make all your best points, okay, and we --

MR COLLINS: I can't even do that.

JUDGE: We'll see if we can do something for you in the time. But just do your best for the time being.

MR COLLINS: There's no point, as I said, adding on bits, and particular at this stage the preparation is over. I spent the last two days trying to work out how I can do this in an hour and a half, and I've wasted vastly more than the hour and a half in that endeavour and realised it's impossible. And I'm afraid this is going to be -- any applicant that comes into this position, any counsel that finds himself in the position that I find myself in that doesn't speak out about it is a coward, and I'll say that. And I do ask my colleagues to finally fess up and say what they're saying outside inside because this procedure doesn't work. It's prejudicial.

In any event, the next document that I was going to take the Court through, Judge, is the second letter of the department of the 1st of April 2021. Now, this, Judge, again is to the director of services in the planning department, and again we have the references to the correspondence, the 15th of March 2021, received in connection with the above, and then the heritage related observations are made, and major conservation is again the first one of those, and in sequence again, unsurprisingly, the hen harrier features with prominence. It says the Garryhinch -- sorry, "a key point in its submission which was not included in the further information request was the need to assess the potential for this project to undermine the conservation objectives for the hen harrier in the Slieve Bloom Mountains SPA by virtue of the known connection between this SPA and the Garryhinch hen harrier winter roost site. The Garryhinch winter roost site has been the subject of several years of targeted surveys as part of the Irish hen harrier winter survey. Up to six hen harriers have been recorded roosting commonly at this site, including a juvenile bird tagged in the Slieve Bloom Mountains SPA, which lies 8 kilometres from the proposed development site. This bird provides evidence of a pathway between the SPA and the nearby roost site." Then the roost dates are set out. "As pointed in the NPWS's original submission, Scottish Natural Heritage recommend survey for a minimum of two years to allow for variation of bird use between years." Now, again, Judge, that is a freestanding basic observation. Scottish Natural Heritage, which represents what the NPWS is saying is the best scientific evidence in the field or scientific approach in the field, and that requires two years, and the reason for that is that frequently for the reasons outlined earlier, where you have -- a roost site is deserted because a quad bike goes by, because people are walking their dogs, whatever it happens to be, the hen harries vacate of a given year a particular roost site. They even do it for a number of years, but if you want to be certain that it's a roost site and that it isn't going to recolonise and be reused, you need to do at least two-year survey.

Now, again I do not need an ornithological witness to come in and say that. That is apparent on the paper that's written by the NPWS. That speaks for itself. I don't need any additional evidence to confirm that.

"The NPWS considers that winter roost checks conducted on the 26th of October 2018, the 22nd of November 2018 and the 11th of December 2018 were inadequate, given the size of the area suitable winter roost habitat adjacent to this proposed windfarm development, and should not be counted as part of the two years of surveying recommended. Therefore only five months of adequate surveying has taken …" -- so we only have five months of actual adequate surveying done instead of the two years that Natural Heritage recommend or require.

Again, Judge, that's a lacuna. It's a problem. I don't need any evidence to support that. If the Court find that that doesn't -- isn't freestanding and can't be relied upon in a case such as this as establishing a doubt about this assessment, well, then, as I said earlier, Kelly, Connolly, Sweetman 1 and Sweetman 2, et cetera, were all wrongly decided because all of them relied on letters identical to this one, and none of them identified an evidential difficulty or paucity arising from that approach.

"The further information points to the fact that the 2020/2021 winter roost surveys recorded only a single hen harrier at the Garryhinch bog subsite across 18 hours of survey time over five months as evidence of its insignificance. It is noted that guidance on which the survey was based specifies that watches at roosts should be carried out at least once a month from October to March on the first day of the month or as close to the first as possible. The NPWS notes that any potential hen harrier usage as a roost site in most of October 2020 and March 2021 was missed due to the timing of the survey. O'Donoghue (2021) found that over a third of known roost sites were occupied less than 50% of watches and points out that this is an important consideration for surveys and investigations to inform planning and land use change decisions. Satellite tracking data has shown that individual hen harriers may use different roots in different years, perhaps dependent on site specific circumstances or other factors yet to be confirmed. Scottish Natural Heritage advise that roost sites within 2 kilometres of proposed windfarm development should be identified. The known roost site at Garryhinch bog has not been identified." Another lacuna. "The single hen harrier sighted was lost from view before it could have potentially been followed back to the roost site. The bird appears

to have been lost from site within advantage point two view shed during daylight hours at 15:34 when dusk was 17:07 at this date.

"Guidance on which the 2020/2021 survey was based states that roosts could be located by observing hen harriers in the late afternoon and watching them back to the roost. This guidance goes on to say that to count the birds a roost should be watched from a suitable vantage point from late afternoon until dusk hours before sunset to half an hour after sunset or until it becomes too dark to see. Satellite tracking data has shown that individual hen harriers may return to the same roost sites on multiannual basis and therefore location of the roots site is important to survey design. It is also important in terms of assessing the impacts of disturbance and damage sighted in the further information response. The conclusion from the hen harrier report, appendix 4.2, was 'taken together, it seems likely that while the Garryhinch subsite may have been used as a hen harrier winter roost between 2013 and 2016, this is no longer the case, and if the Garryhinch subsite is still used as a winter roost by the hen harrier at all, then it is infrequently and in a limited way and does not represent a core roosting area.' Given the inadequacy of the surveying pointed out above, the NPWS is of the opinion that this conclusion and any subsequent categorisation of the importance of the winter roost site for hen harrier is not supported by best scientific evidence. The NPWS remains concerned that the impacts of the proposed project on the conservation objectives of the Slieve Bloom Mountains SPA have not been adequately addressed."

I mean, these are extraordinary statements from the department. It is rare for the department to come in with criticisms of surveying, and it is very rare for them to come in and put in this level of critique and criticism. It's fundamental. We have our own best expression of scientific knowledge, our own authority, the department, is saying that the surveying is inadequate, and, given that inadequacy, the NPWS, the National Parks and Wildlife Service, are expressing their opinion that the conclusion and any subsequent categorisation of the importance of the winter roost for the hen harriers is not supported by best scientific evidence. I mean, they have worded that so that this Court can read their expert analysis of the surveying that was done in this instance. It's just not good enough. It doesn't pass muster, and, as result, the SPA has not been adequately assessed, and, as a result, Judge, under paragraph 44 of Sweetman, this Court must quash that decision.

Then, Judge, there's just a few other -- excuse me -- documents that are of significance that I just want to take the Court to.

JUDGE: Sure.

MR COLLINS: Unfortunately, I'm going to have to pass over, and I think --

JUDGE: Well, I don't mind giving you a bit of extra time if within reason.

MR COLLINS: Well, to be honest, Judge, do you know what? I'll leave my friends at it.

JUDGE: Okay. All right. Thanks very much.

MR COLLINS: I mean, it's pointless, to be frank.

JUDGE: Well.

MR COLLINS: I mean, you can't -- you just can't. I'm sitting down with any amount that I can do, that I can't do and I can't say, and if that's not enough to show up the difficulty that's here, well, then I don't think my floundering for another seven minutes or whatever I'm entitled to on the clock there is going to achieve anything.

MR FOLEY: May it please the Court. And I'll deal just -- there are some points I need to deal with in terms of the webpage, the documentation later. It's obviously of some importance to the Board how the Board has to organise its files and so on, so I'll deal with that at the end and I want to reserve some time for that.

I just want to start, Judge, just again my approach is going to be very much by reference to location sources and paragraph numbers, but simply in terms of the super -- super-arching structure to Advocate General Sharpston -- remember, the Irish authority has set a test of mere capacity or probability, I'd ask the Court to look at Mr Justice Barniville's analysis in Eoin Kelly which is in the book of authorities, I think it's tab 8, from paragraph 38 and onwards where he specifically treats of

that. I'll return to that in a moment but it's not simply a test of mere capacity or mere possibility and, as I say, Mr Justice Barniville's treated of that in detail.

Judge, I want to deal with the habitats point across several points but if I can just try and set the scene of what I want to talk about, the risk that everybody is concerned with here is obviously the risk of hen harrier mortality arising by collision with turbines or part of the turbine apparatus. The Court might have seen at the end of my written submissions -- I took the step of annexing a colour photograph of the site so that you --

JUDGE: Yes, I saw that, yes.

MR FOLEY: Yes. So, just in terms of the technology, we're talking about the geography, the turbine site has to the immediate north of it a site outlined in red which is referred to as the Garryhinch Bog Group. That in turn is divided into two areas. Closer to the turbine site hatched in purple is the Garrymore subsite and then, further to the north-east, is the Garryhinch subsite and it had been suggested, prior to the application document, and Mr Collins has opened this, by, in particular -- well, there had been local anecdotal evidence you see in the papers, that hen harriers roosted in the north-east of the site, being understood later by the NPWS as a reference, to the Garryhinch subsite, that hatched in green to the north-east of the turbine site, and the point, in very basic terms, is the applicant, Eco Advocacy, says hen harriers are going to get to that place by flying through the turbines.

JUDGE: They're --

MR FOLEY: That's the point.

JUDGE: Sorry, how much time are you going to take, by the way?

MR FOLEY: Sixty minutes. Twelve, Judge, I'll finish at 12.

JUDGE: Okay.

MR FOLEY: Unless I get bogged down and Ms Murray is gracious to give me five more minutes but that's the plan, to stick to the time.

JUDGE: Sure. I hope you're reliant -- if your interventions are made as well.

MR COLLINS: Of course, Judge.

MR FOLEY: And I didn't -- the only pleading points that arise are ones that have arisen as the matters have developed in Court so I'll get to them as they arise.

JUDGE: Mm-hmm.

MR FOLEY: Just, Judge -- and in terms of -- and obviously there's an argument made, which I say is defeated by the papers that the Bord wasn't cognisant of a change in the clearance between ground and turbine and, of course, the Court will have seen that the Collision Risk Model which was drafted in December 2009 has always, at all times, used a clearance of 15 metres. So, on this particular issue, birds flying under the blades, it's never actually been any different than the clearance was 15 metres, and you'll see that across the written submissions, so it just doesn't get off the ground, the point, so to speak, because it's always been the case that the clearance that's been used is 15 metres and you see that in section 4 of the Collision Risk Model being upheld. It's -- I think it's appendix 12.7 --

MR COLLINS: I wonder if Mr Foley could direct us to where the Bord considered any of this.

MR FOLEY: Yes, well -- so, Judge, in the context, I just want to talk about an -- process really as it is. It is important to note that the NPWS made observations but the applicant hasn't made any observations in this case whatsoever about the hen harrier at all.

MR COLLINS: If there's a point been made in that regard I would be referred to the pleadings.

JUDGE: Well, I'm sorry?

MR COLLINS: Where that is set out in the pleadings, my own -- my friend's pleadings.

MR FOLEY: And the Eco Advocacy, Judge, haven't made a point with regards to the hen harriers whatsoever in this case at all and, in fact, what's particularly interesting is despite there being a

refusal at the planning authority stage, Eco Advocacy themselves brought an appeal against the refusal saying, in summary, you didn't refuse for enough reasons and yet, despite taking that step, they don't actually raise the question of the hen harrier at all in that appeal they brought against the refusal. So, I'm just referring to the Carrownagowan judgment when the Court says that it's a legitimate observation to make.

MR COLLINS: Judge, again, this is not pleaded. How am I going to deal with this in the very short reply that I have and Mr Foley -- I know respondents don't know this because nobody ever calls them on it but Order 84, Rule 22, sub-rule 5 puts the same obligation on my friends as Order 84 Rule 22(5) places on me. My friend is very fond of the latter, not the former.

MR FOLEY: Yes, all right. So, anyway, Judge, that's --

MR COLLINS: But I say that's not an answer, Judge, and I don't have time to deal with this kind of footwork now, that new grounds of opposition is going to be raised and Carrownagowan's going to be relied on in that context.

JUDGE: To -- before -- sorry, I didn't hear your last comment, the -- your friend is fond of something, I didn't hear that.

MR COLLINS: Fond of -- he's fond of one of the rules but not the other.

JUDGE: Oh, yes, yes.

MR COLLINS: You find any authority anywhere where the Bord has been prevented from mounting a line of authority because they haven't pleaded it but you'll find an abundance of authority on the plaintiffs.

JUDGE: Okay.

MR FOLEY: So, Judge, the approach I want to look at then for the purpose of the case is it's based on an aggregation of two points. We know that the appropriate assessment screening report compiled by the developer specifically screened out the Slieve Bloom SPA and did it with overt reference to the hen harrier. We know there were -- response to the request for further information looked at that afresh and asked that the RFI be read in conjunction with inter alia the AAS -- the AA screening report and nothing there changes the screening conclusion. In fact, it's amplified, I say, when we get to it.

So, when the inspector and the Bord come to look at this it's viewed together and you can see how, and we'll go through all of this, that the AA screening report reaches a conclusion that there won't be a sufficient effect on the hen harrier to screen in AA, the NPWS asks questions and then the developer comes back with inter alia the RFI in appendix 4.2 to that and says we're sure, and, in fact what they say is -- is that it is speculative, page 20, in appendix 4.2, that hen harrier will fly through the site and that they can say that negative effects on the hen harrier of the SPA are excluded, page 21 of appendix 4.2.

So, the developer's position is that they have done enough and reasoned out enough for those conclusions originally stated to be restated and reaffirmed and, Judge, in terms of the point do I need to bring evidence and so on, it is -- there's no need to bring evidence to make a legal point but what I want to deal with here is five points or five themes on the evidence that explain why, in the face of all this, if the applicant still wants to make even the pleaded points, not just the points Mr Collins is now making on his feet for the first time, the differences between nests and roosting, but you actually do need to go a little bit further than they have done here and it's particularly the point that Mr Collins, in paragraph of his grounding affidavit, actually swears that Eco Advocacy have an ornithological expertise but we'll get to that when I bring all this together.

So, Judge, if I could just -- I want to develop five points and the first point really is about collision itself, that notwithstanding him talking about where hen harriers are or what's been seen, the issue is about a hen harrier flying through the development site with the turbines being a risk and what's critically important, Judge, is is that in appendix 4.2 at page 19 the developer specifically cites scientific literature to the view that there is a 98% avoidance rate to be used for the hen harrier and, in fact, that it has been reported and written, citing Pearse-Higgins from 2009, that hen harriers operate at 250 to 500 metre avoidance distance and that's significant turbine avoidance from this particular species. So, that's put up by the developer and, notwithstanding the fact that the NPWS have a chance to opine on appendix 4.2, there's no response to that at all. So, if we're just talking first of all about -- whatever we say about where we see hen harriers the question is will they, to

the requisite standard, I'm just not repeating the AA standard every time I say it for speed, go through the turbine site? We're starting from the proposition that that issue itself is substandard by evidence that says hen harriers will avoid turbines by 250 to 500 metres and the developer in this case has specifically spaced the turbines out by 500 metres each.

And at page 20, Judge, of appendix 4.2, and I'll just read this, I hope the Court can get it in due course, they deal with this in terms and say: "The assertion that hen harriers from the SPA will fly through the proposed turbines en route to the Garryhinch subsite is speculative. Given that no hen harriers have been recorded within the proposed Derrinacartha Wind Farm site over two years before its surveys, it strongly suggests this is not the case on the basis of scientific data gathered. We also believe that the assertion that hen harriers will fly through the proposed turbines is likely to be incorrect for a number of additional reasons: first, the birds can easily enter the Garryhinch subsite from the north-west of the Garrymore subsite avoiding the turbines altogether which seems likely given the documented 250 to 500 metre avoidance distance from hen harriers flying near operational wind turbines in the scientific literature citing Pearse-Higgins et al 2009. Second, if the birds will indeed follow the rivers Barrow or Owenass out of the SPA they may well enter the Garryhinch subsite from the north-west or north-east, again avoiding the turbines altogether. Third, the turbines are located at least 500 metres from each other providing sufficient space for hen harriers to pass between turbines," and no one, not the NPS, not anyone, rebuts any of this.

So, really the amount of activity that we're going to be talking about has to be read entirely in the context of the specific risk as we've discussion in terms of collision in light of the specific science about this particular species, none of which is rebutted, and again, despite Eco Advocacy saying we are ornithological experts no one has said anything about this literature that's referenced to being a bit of a -- being wrong. So, this is what the developer is putting up and it's in the context of this specific science that we will now deal with the amount of hen harriers that we see both on the site, which is a zero, we all know this, and then in the vicinity of the site which we'll get to.

JUDGE: Yes. I mean, to -- if I can use Mr Collins's phrase of looking at it at a high level would it be an over-simplification to say that the issue is one that -- the main issue really is whether the way the Bord dealt with it post the final NPWS observation was that just to create scientific data and repeat whether that's been demonstrated?

MR FOLEY: Probably but that's a function of what I say and I just want to say that one point is Mr Collins has presented a table in the inspector's report is from the developer's material, it's not -- it's nowhere else so the developer never said --

MR COLLINS: Sorry, I didn't present it on that basis, Judge.

MR FOLEY: The developer never said, ever, prior to the NPWS observations and its second round of information in the RFI that hen harriers may go through the site, never said that. That only comes up after the NPWS raised their observations. So, I'll get to this when I get to it, Judge, I'll get to the inspector's report but the inspector quite clearly is cognisant of this as an issue and of course there's criticism of the language being used but I will develop that -- is that it's quite clearly the case, in my respectful submission, that when you look at that table the inspector is actually identifying the issue, that issue having been raised by the NPWS, and then reaches her conclusion, I think, in paragraph 7.46 or 7.40, by effectively restating the language of the AA screening report which, of course, the developer has reaffirmed, and, of course, that's the relevant language -- the AA screening report has the language necessary for screening, the developer then has stood over that with the further information and it says, in particular, three things: there's no hen harrier habitat on the site, notwithstanding what's been said in Court today, there isn't, secondly, that it's far away from the SPA, I think 4.7 is used there and, third, there's no hen harrier sitings at the site which is the issue.

So, Mr Collins says -- one of the expressions, that's incorrect, not it remains the case that when we're talking about collision risk for turbines there's been no sighting of the hen harrier at the site at all, and I'll get to this in a moment, and the only sighting of a hen harrier is, I'll show the Court in a minute, to the north-east and in an area, Judge, and this is completely overlooked, that was already covered by vantage points in the first sets of survey. So, none of that gave cause to the developer to change their position and none of that raised an --

MR COLLINS: Judge, I really have to object to this. There's no evidence whatsoever of the Bord having considered any of these matters. My friend is now advocating on behalf of the developer, not the Bord. The Bord needs to address and stand over its own decision and what Mr Foley really needs to show this Court is where the assessment that he is now giving the Court is actually

undertaken by his client because it was nowhere undertaken by his client and Mr Foley can't come into Court and give this evidence because that's what it is, it is evidence.

MR FOLEY: So, Judge, I'll get that. I'll show you the inspector's report and then it's for the Court, I suppose, to actually see if I'm right, that that table doesn't come from anywhere except the inspector and that's quite important because it shows what the inspector was recognising as the issues.

Judge -- secondly, Judge -- my second point then, Judge, if I just look at the -- this point that Mr Collins is raising, it actually wasn't relied on in the case at all by the applicant but the NPWS in their first submission of the 20th of March had suggested that there may be an issue if one deforests and fells in the area of the turbines so therefore you should look at that again in terms of your suggestion that hen harriers won't come into the site.

Now, again, as I said, it didn't feature in the case so far but it's featured today and, Judge, I just ask the Court to look again at appendix 4.2 to the response for further information, in particular page 21 and 22, section 4.5, which dealt in terms with that saying that the elevation of the site was such that if there is deforestation and felling it simply won't attract the hen harrier in and there's no engagement with that. So, that is what it is. That's the developer's response, it's capable of being accepted, Eco Advocacy doesn't engage with that, the NPWS doesn't say you're wrong on that so that point being made is responded to and closed off.

And then, Judge, in relation to my third point, when one looks at the development site itself at no point during the original or the additional surveys has any hen harrier been seen in the stie, flying through, engaged in the breeding behaviour of the sky dancing that we're talking about or have any roosts been found on the site. No one else says anything to the contrary and it's important, Judge, when the Court looks at the vantage point descriptions in appendix 12.4 of the AAR, they all take in the turbines on the site. So, despite all this effort being done, no hen harrier is seen behaving, flying or roosting or foraging in the area of the turbines and you can see, Judge, again, the corollary to that or the -- not -- the flip side is is when you look at the vantage points you'll actually see that a huge host of AB fauna are seen in the area. So, when the Court has time, the Court can look at those vantage points and see these multiple -- if there's -- they're not -- but I think it's at page 1238 in the core book, the Court can see all these multiple lines of other birds flying. Now, Mr Collins suggests my submissions are pejorative by saying the Courts were concerned with birds but maybe that's my language, trying to be quick in things, but the point is that --

MR COLLINS: It's nothing to do with that.

MR FOLEY: The point is is that having looked -- this isn't the case that people aren't examining and closely looking for the presence of a particular species, they're all over the place and the hen harrier isn't seen. The site isn't suitable habitat for the hen harrier. That's been said in the papers. Nowhere has that been taken issue with at all by Eco Advocacy in any of their papers and it can't arise now.

And the flight which is observed, Judge -- and can I ask the Court if the Court can have reference to this, if one looks at figure 3.1 in the RFI the flight that is observed on the 19th of November 2020, page 14 of appendix 4.2, it's not in the turbine site. You can see the forward -- is noted as seen in its flight line within the Garrymore Group -- Bog Group but flying from the Garrymore Bog order of the Garrymore subsite, across the Garryhinch subsite and then its lost.

I just want to point out, again just while I'm in passing, no one said you would have seen where the bird roosted if you followed on the flight. What the NPWS said is you could potentially have seen where a bird roosted if you could continue on seeing it and we'll get to this, this question of the presence of a roost on this area in a moment.

But, Judge, the point I just want to make in this case, and it's an interesting and an important point, is I'd asked the Court to look, when it has the time, at the vantage points that were in the EIAR in the first place because these documents, Judge, in appendix 12.4, show the vantage points that were being used to look at AB fauna in the first place, and certainly in my reading of it, when the Court looks at it the Court will see that certainly vantage point 1, 2, 5 and 6, as originally used, all include all or part of that flight trajectory of the hen harrier seen in November 2020. So, it just is an important point in terms of the argument and no one knows what they're doing here, that whereas a hen harrier was seen in flight along that line on that day, this was not because the developer was now looking in some new place for the first time, the developer was definitely doing an increased

survey effort using more people but it's actually in areas that had already been covered by vantage points.

And, then, Judge, I suppose my third issue then is having looked at the question of collision risk, what's found in respect of the site itself, in respect of the wider area no roosts were found in the original surveys and the hinterland survey was extended to 10 kilometres and no roosts were found. There was no hen harrier seen in any breeding behaviour and the only thing seen is that single flight that I've just referred to.

And when the Court looks at appendix 4.2, Judge, you'll see that it's not quite the dismissive document that Mr Collins presents is as. In fact, actually, the developer does engage with the fact that there's a recognised contrast between what the developer is seeing and the records that have come to its attention via submissions and observations including those that saw hen harriers present in 2013 -- 15 -- 14/15 and 2015/16, this is at page 16, Judge.

So, the developer is aware of this. I sense that the developer -- the developer's experts, I think it's Fehily Timoney, and they point out, again, it's page 16 of appendix of appendix 4.2, that no official reporting had been done since 2016, and that is a key point, notwithstanding the way the NPWS language is -- it is set out in the department's -- when you actually go and click the link it's where they tell you where the roost is. It's actually a click to the guidance and you'll see this. There hasn't -- notwithstanding the language no one has actually pointed out where this roost is and the developer has looked at -- can't find it.

But they say, the developer, that there's been no official reporting done since 2016 and they report that if there had been no change in the habitats then logically you'd expect to see similar numbers to before but they just haven't and they specifically --

MR COLLINS: Judge, I really have to object to this. My friend is -- and I think he may have forgotten his role here, he's representing An Bord Pleanála. All he is doing is going through the developer's information and saying there's all of this here, there's all of that there. He's not engaging with what he's supposed to engage with which is the decision of the Bord and where the Bord has dealt with any of this and where we find complete, precise, definitive findings, such as my friend is now giving evidence in relation of, actually in the Bord's decision. It is not open to my friend to come into this courtroom and seek to defend somebody else's development project in circumstances where he has not identified where in his own decision any of what he is now saying was actually decided or considered even by the Bord at all. He can't do it like this.

JUDGE: Well, regarding -- but I think the best way to deal with this sort of issue is just to continue de bene esse and then have the objection made in reply, I think, because it probably -- I think it --

MR COLLINS: Well, I don't have any short reply, Judge. I have 10 minutes or 15 minutes or whatever it is, I can't go through each of these items while my friend is now -- he is taking you through the developer's documentation. He's doing the developer's job for the developer. That's inappropriate for an advocate for An Bord Pleanála. The Bord is here to defend its own decision on its own basis, not on the basis that there's a welter of information there, an ocean of information that you could, you know, dive into and find your answer.

MR FOLEY: So, Judge, the point is the developer says all this at page 16 of appendix 4.2 because they make the point specifically that whereas it's picked up in the applicant's papers there has been a hen harrier population decline the reverse is the case for Slieve Bloom because the SPA here has had a 62.5% increase in breeding pairs and the point the developer makes here, which I'll be getting to when I come to the Bord's papers, is that they're highly aware that people have said hen harriers are present in the past therefore they should be seen more and especially they should be seen more if the breeding population in Slieve Bloom is beating the national problem and they observe, and they reason out why they don't, because they say they've been told that there are difficulties on the lands with people using quads, scramblers and fires and they say that can amount to an explanation as to why there's a difference in sighting. Indeed, they say at page 17, their surveys say there's not even a resident or a regularly occurring population of hen harriers within the Garryhinch subsite. That's what they say.

So, then, the last point, Judge, here, I don't want to make in relation to the four blades, just to give the Court the references, this is my fourth point just in relation to context, the Collision Risk Model is tab 12 to the core book, it's appendix 12.7, and section 4 of that, Judge, you can plainly see that the -- I'll call it the sweep clearance was used at 15 metres for the purpose of assessing Collision

Risk Models with the birds. So, notwithstanding that the Bord issued an RFI, clearly in response to taking into account jurisprudence of this Court asking the developer effectively to specify out what they're doing is -- Derryadd, I suppose, sweeping An Bord Pleanála, the Bord issued that RFI, I think on the 30th of January 2023, the developer replies on the 31st of January 2023, there's an addendum inspector's report which accepts that nothing has changed and with this particular issue, this is entirely correct because the developer has always used a 15 metre clearance for sweep on the CRM, the -- using this model and when I get to the webpage Mr Collins has replied said well, this is why we've got a problem here because none of this is on the website and of course it is -- I can't explain why they couldn't then or can't find it now but it's there and it's fact.

So, overall, Judge, when I come down to the question of lacuna and the inspectorate report. In short, the developer has started out by saying in the AA screening report that significant effect is excluded for the hen harrier in connection with Slieve Bloom SPA because, dealing with the collision issue, there's no hen harrier habitat suitable on the site, it's quite far, in their terms, from the Slieve Bloom SPA and they said there won't be a risk. So, no hen harriers were sighted on the site and that's what you're dealing with.

The NPWS, which I'll come to now, and I -- this is a structure I'm dealing with, I'm not trying to exclude anything, saying well, you've missed a few things, they go off and they do their RFI, including more surveys, generate appendix 4.2 and their response to the request for further information and they come back and they weigh a five year old conclusion saying the negative effect on the SPA is excluded because they say -- and this is why I opened on collision risk, in terms, they say the collision risk has to be dealt with as follows: hen harriers will avoid the turbines, there is science behind that, they say, not rebutted by anybody including the NPWS, they say there's another three reasons why they'll avoid the site and then the context of all that is that, not to take a James Bond movie, but the quantum of sightings, Judge, that's involved here has to be relevant to the overall question as to whether the Bord can be criticised for accepting, as the developer said, that notwithstanding that hen harriers may go through the site, the overall risk is not significant to require an AA screening and, Judge, that is an important point because if one looks at the -- excuse me -- with regard to all the NPWS observations and when the Court looks at them both in the first and the second one, in particular the second report, they seem to be driven by the energy consistently saying you have to identify the roost, surveys aren't good enough unless you identify the roost and the developer is saying well, we know you did your data up to 2016 and you saw hen harriers in the area which you viewed on an -- no one can point to the area, no one is telling them where it is, unspecified route, well we've gone out and looked, we've done all this and we can't see a roost. So, it's not good enough -- with the greatest of respect, and it doesn't create a gap or a lacuna for the NPWS just to come back and say find a roost.

JUDGE: Yes.

MR FOLEY: And that -- you definitely get that theme of the second report from the NPWS.

JUDGE: Right. Okay. Well, look, I mean, again, my understanding of the point you're making here, and you correct me if I'm wrong, is that the -- we know the NPWS weren't happy.

MR FOLEY: Yes.

JUDGE: Mr Collins says that in itself raised the scientific doubt about there. You, on the other hand, are saying that the developer's response was capable of being accepted by the Bord as dispelling doubt and that if an applicant wants to displace that I have to conclude evidentially.

MR FOLEY: Absolutely and it's a function of the --

JUDGE: And that's -- sorry, yes --

MR FOLEY: I'm sorry, Judge, go on.

JUDGE: No, you go on.

MR FOLEY: It's a function of the quality of the information and a function of the issues. So, in another case we might be talking about something different altogether where there's a question about particulate leak into a stream where the fresh water farmed mussel is and there's particular evidence about quantities and populations and so on, this is an issue where the issue is collision. That is --

MR COLLINS: No, that's not the case, Judge. I mean, this is the danger with my friend giving evidence. He doesn't -- he is not qualified. He's just not qualified. He shouldn't be doing this. We should be backdropping about the decision of the Bord, not all the information the developer gave. We know -- we've all seen the three banker's boxes of information. My friend needs to defend his decision which we have heard nothing about.

MR FOLEY: And I'll get to it if I could just get there.

MR COLLINS: You're -- you only have another 20 minutes or so.

JUDGE: Well --

MR FOLEY: I think I can add seven more for reasons --

JUDGE: Very good. Well, look, I don't know whether anybody will be prepared to allow me just to appeal to -- for perhaps just to -- a more smooth kind of processing of things and, look, I mean I appreciate every other -- views and, you know, but there will be reply and I'll consider any other steps that I can take to make sure that people are, if not completely happy, which may be impossible, at least less unhappy than they might otherwise be. So, I think the points have been well made at this stage so I think, Mr Foley, just continue de bene esse, I think.

MR FOLEY: Thank you, of course, Judge, and --

JUDGE: Yes.

MR FOLEY: Yes, Judge, so that is the point but can I just ask the Court -- I just really want to ask the Court to look at section 7.4.2 of the inspector's report. So, if we just consider the stages and the timing at this point, the application has been put in obviously, the NPWS has made observations, the RFI followed, effectively, when it comes to hen harriers as a result of that, the developer has given its response, the NPWS has made further submissions, the council has refused for other reasons and then there is an appeal brought by the developer to the Bord and an appeal brought by Eco Advocacy to the Bord if -- but they want it refused for more reasons. So, at this point what's on the docket, so to speak, about the hen harrier is not just the AA screening report, what clearly is on the docket is not just saying that there's no hen harrier on the site but what's on the docket is the issued at the start by Ricky Whelan and considered throughout the process before the planning authority that hen harriers may go through the site. So, when the Court looks at 7.4.2 and sees the inspector compiling this table where it says: "I consider the following European sites in terms of initial screening for the current phase two on the basis of likely significant effects." The inspector -- so this doesn't come from any other source other than the inspector, Judge, and that's a fact. Table one, when it comes to the Slieve Bloom SPA in terms of hen harrier, Circus cyaneus, says commuting hen harrier may pass over the site. And then considered further in screening says, yes, commuting foraging hen harrier may utilise the site. Now that only comes from, with the greatest respect, the inspector recognising the issue had arisen. And it's patently clear that the inspector knows this because, as you can imagine, in the report the Court will see that the inspector does, of course, record at section 3.21 on page seven that the FI was sought on the hen harrier with regard to the NPWS observations. Section 3.4 records third party observations recording the hen harrier. And the inspector then -- so this argument that this is autonomous as if nothing has happened -- the inspector recognises this as a point and the inspector then at 7.43 agrees: "I consider the applicant's approach in this respect to be reasonable." So, again, we're supposed to read these and I understand, you know, someone could say there could be more text, there could be more citation. But, with the greatest respect, I think it's, to use Mr Justice Holland's language in Monkstown, it's tolerably clear that the inspector has recognised the issue and is saying there is no significant effect here because the AA screening which said there won't be one is, obviously, ratified and confirmed by the further information that comes in. And the criticism that has been attached is that the inspector hasn't done a further disposition of saying the NPWS said the following and the developer replied, reaffirming its original position.

So the point isn't -- there may have been an attempt to argue -- the point isn't that the board or the inspector has to engage in a point by point dispellation -- if that is a word -- of removal of doubt. We went to the Court of Justice for that, Judge, in Eco Advocacy and the Court said: "It follows that although where a competent authority decides to authorise such a project without requiring appropriate assessment…" -- I'm sorry, this is at paragraph 42 of the Eco Advocacy -- "with the meaning of that provision, EU law does not require that body to respond in the statement of reasons for such a decision, one by one, to all the points of law and fact raised by the interested parties during the administrative procedure. The said authority must, nevertheless, state to the requisite

standard the reasons why it was able, prior to the granting of such authorisation, to achieve certainty, notwithstanding any opinions to the contrary and any reasonable doubts expressed therein and that there was no reasonable scientific doubt as to the possibility that that project would significantly affect that site." And, Judge, when you combine the inspector's report and the board decision I say it does that. It clearly identifies the issue of not just the presence or the question of hen harriers in the vicinity, but the actual issue raised by the observers of flight through, collision and mortality, and accept that the AA screening report's language governs the situation. In other words, that that is the correct analysis, the correct approach, that there will not be a significant effect on the SPA, having regard to its conservation interests. And that itself, again, I say, is completely confirmed by the developer's engagement with the NPWS and appendix 4.2 that comes back.

And, as I said, the only real matter that remains outstanding which one could argue when we haven't come back on the NPWS point is that the NPWS just say you have to find the roost. But that doesn't -- you don't need to treat of that because it's clearly not the case that when it comes to habitats, in terms of this point, you can just say you have to keep going until you find something. The developer has reasoned out why, despite having looked over a 10 kilometre range, it can't find a hen harrier roost in the area. And it has reasoned out why observations that have led to a view that a roost was there, ending in 2016, might no longer be both sides.

MR COLLINS: Sorry, Judge, could my friend direct me to where that is in the inspector's report for any consideration of these issues? No?

MR FOLEY: I'll reply to the Court, Judge, you know.

JUDGE: Yes, again, I think the de bene esse approach is the best for the time being.

MR COLLINS: But, Judge, my friend is giving evidence on the decision that's nowhere apparent. He can't do that and I don't have time. Normally I might take an hour or two to reply and I stand with a note and I go through each individual claim which Mr Foley has said. That doesn't accord with what this requisite standard is. I can't do that in 15 minutes which is all I'd get. So I think I'm entitled to ask Mr Foley now to identify where the board actually decides these matters that he's giving evidence about.

JUDGE: Okay. Well, entitled is a kind of a strong term. My reading of it is that it's implicit in the board decision that the developer's responses were accepted. Am I wrong?

MR FOLEY: No. That's what I'm saying, Judge.

JUDGE: Yes.

MR FOLEY: And it is also implicit, in particular -- I think it is really important that table where the inspector identifies this particular issue over and above how the developer identified it in the first round of papers. And, of course, this is under the heading of appropriate assessment. So could the Court say, as happens in every one of these cases, would we be here or wouldn't it be better if there was a separate level of text saying A, B or C and the answer is of course. But that, historically, isn't a reason to quash decisions of An Bord Pleanála. Rather you have to stand back and ask the Court to remember it's own judgments here instead of what's really being decided here. The issue is and -- sorry -- more to the point, is an issue in the case, not an issue that agitates anyone appealing to the board at all.

But the issue in the case, of course, is whether or not the hen harriers are going to be significantly affected -- or the SPA is going to be significantly affected, having regard to its conservation interests, those being the hen harrier. And they're looking at the extent to which hen harriers will collide with turbines and that is the risk I've looked at already. So the inspector looks at that and all that affirms the AA screening report. And, Judge, when you actually look at the language of how the RFI is actually drafted, I'm asking you to go back and read all this with the AA screening report, NIS and EIAR. Like, it has been put forward as, you know, this might be as well be day one, so to speak, you know. If you bundle it all back up in time this is the case the developer is making. So the case the developer is making is as set out in the AA screening report for the following reasons. I respectfully say it's open to the inspector to deal with the matters the way that she did at paragraph 7.46 and it's open to the board to say we accept that screening conclusion. And when I say that, Judge, because when one has regard to Eco Advocacy, we know I don't need to do a point by point dispellation of treatment.

I say in terms of the issue here, whether or not the only issue -- it's only what's said in Court now -- the only issue in terms of affect of the hen harriers that has any traction is the question of collision. Bringing hen harriers into the area once the tree fell has been disposed of is not an issue. The only issue then that needs to be considered is collision. They tell us about collision relevance and they say, despite all this effort, we have seen one flight and it's not in the turbines and there was no roost to be found and here's we think why. And the criticism then is, well, you have to go further. And so the board can say we think we have achieved scientific certainty here. We can say we don't think there's a likely significant effect on the European site. We can accept the inspector's assessment and the inspector's assessment says no hen harrier recorded at the site. That's correct. Mr Collins says that's wrong but it's not; it's correct. He says there's no suitable foraging habitat at the site. That's correct. You know when you look at appendix 4.2 and, particularly, the Gary Moore sub-site is completely run-down and not suitable at all and the site itself isn't. In fact, actually the Department accepted that in their own submissions. They accepted that the site isn't suitable for the hen harrier. They raised the issue about what happens when you change the site and that was all dealt with. So the inspector concludes: "Given the absence of hen harrier recordings and the lack of suitable habitat at the proposed wind farm site and, in addition, the distance between the proposed wind farm and SPA, it's considered no effects would occur by virtue of disturbance." And considers that approach to be reasonable. Respectfully, it is. And you have to read that then in the context of the evidence that's before the inspector which the inspectors clearly had regard to because you couldn't create the table otherwise and she said she has had regard to. And the board's conclusion then is that its view is that they can exclude the Slieve Bloom SPA from AA on the basis of the inspector's screening report, having regard to all the information that it said it read.

JUDGE: Sorry -- just one point.

MR FOLEY: Of course.

JUDGE: I just wonder should we make -- should we have our kind of mid-morning break at this point.

MR FOLEY: Sure. I'm doing quick, Judge, and it won't cause me a problem. So I'm doing quite well.

JUDGE: Okay. Well, I just want to let people out to decompress for a minute.

MR FOLEY: Sure.

JUDGE: Is that okay?

MR FOLEY: Yes, absolutely.

JUDGE: So let's take our usual sort of 10 minute break at this point.

MR FOLEY: Sure.

JUDGE: All right. Thanks very much.

Adjournment

REGISTRAR: 2024/290JR, Eco Advocacy CLG v. An Bord Pleanála.

MR FOLEY: May it please the Court. I think the Court has the lines of battle.

JUDGE: I have the essentials. I mean do we want to allow a bit of time for a few things on my mind at this stage?

MR FOLEY: Sure, of course.

JUDGE: I don't want to waste too much time on the issue of the time allocation but when did we fix the hearing date?

NO NAME: I don't know, Judge.

JUDGE: The list of fixed dates.

MR COLLINS: It was in July, Judge, I think.

JUDGE: Was it the 24th of June I think?

MR COLLINS: Or maybe June, yes. It could have been earlier, yes.

JUDGE: Yes. From recollection now -- I'm open to correction -- I don't think the opposing parties were objecting to an expedited hearing at that point.

MR FOLEY: No. I did but I don't know if anyone else did.

JUDGE: Yes, that's okay. I mean, all these are welcome, obviously, but I just want to just be clear my recollection is correct on what happened. I mean -- and maybe this is one more for Ms Murray -- but Mr Collins's point is that we use the most expeditious procedure available rather than create a new one. But in a sense the Order 84 allows a judicial review to be heard on the basis of the papers allowing an oral hearing. So, in one sense --

MR FOLEY: No, that is -- sorry -- as the point has been made, the point is we're in a sort of poration-esque proportionality that you have to find. You can look at the system and see what's the least tolerable way to do it and the Court is right, not -- but it's correct legally.

JUDGE: Yes.

MR FOLEY: Now there might be issues about, you know, the ubiquity of that but it's correct as the matter goes.

JUDGE: Sure. I mean the logic of that would be that it's indulgence contrary to European law to have an oral hearing at all but, I mean, obviously, in a given case one listens to the parties and their view.

MR FOLEY: Look, I think, yes, to a degree but, no, to any relevant sense. You can't use -- there's always an element of flexion in any -- what I mean by poration is that that's a classic type of proportionality argument, that if you have to do something in the most expeditious possible way you must do it in the way that's most expeditious which, of course, is that no one turns up and the Court reads the papers.

MR COLLINS: There's no reason to presume that that's any quicker than running the case. I mean the Court has to go do all the work itself and that's going to be a problem, Judge.

MR FOLEY: It's not a reasonable point. I'm just saying, Judge, I think the Court is correct on that point and I do think by the contrary though is that there isn't -- like, the Court is allowed say I don't have to do it that way and is allowed then do what we're doing today and is allowed do, in addition, I think the longer hearings and so on.

JUDGE: But it depends on -- I think there's an element of getting to grips with this and I suppose we, you know -- one can see all kinds of scenarios where this could come up in terms of are we doing the most expeditious procedure. I'll give you another example which is that normally if a case is decided one way or the other, subject to leave to appeal, the Court holds off in perfecting the order to give the would be appellant the opportunity to put in submissions. But the most expeditious procedure would be to perfect the order immediately and start the clock so that the would be appellant would be compelled to move within a period of time.

MR FOLEY: Oh, well, that's a separate issue. Like, you can find -- and, you know, to a degree, I agree with that across the board but, you know, I do have to be aware of the fact that I do tend to represent respondents. So you'd probably want to hear more representative view than that one. Yes, I have time to run from the judgment, you know.

JUDGE: Yes, I could facetiously say that, lamentably, respondents occasionally try and appeal as well you know. It would be --

MR FOLEY: I know. I take your point but I'm just saying --

JUDGE: -- your point --

MR FOLEY: -- that you can find deflection and expedition all over the place.

JUDGE: Yes.

MR FOLEY: So I don't think -- I know it's not an issue for this case but I don't think further protraction is necessarily the answer. There's other ways in which expedition can be found across.

JUDGE: Yes, but I'm just saying to follow the logic of it --

MR FOLEY: Yes.

JUDGE: -- suggests, you know, that's something to be considered.

MR FOLEY: Yes, or just go back to -- someone said it to you the other day. It was Denning in -- with the intoxication case. The absolute logic of human affairs is a most uncertain guide.

JUDGE: Yes.

MR FOLEY: An absolute poration application of proportionality is incorrect in law.

JUDGE: Can I ask you about something else which isn't --

MR FOLEY: Sure.

JUDGE: -- really specific to the expedited procedure but just more generally. If you go back a while a certain number of -- the society that there were kind of recurrent authorities.

MR FOLEY: Yes.

JUDGE: And the Court had the book of authorities.

MR FOLEY: Yes, and that actually started -- that, first and foremost, started I remember in sort of the motion lists. It was to stop coming in with six or seven principles on discovery. Look, I just happen to be aware from other things. I don't know how it is.

JUDGE: Yes.

MR FOLEY: But there's the bench books, you know. So the logic was that there would be something similar. There'd be a bench book on discovery but we don't know about it instead and there's the 10 authorities. So every single case list would go under that tab seven and we didn't have to keep printing and bringing them in and that was -- I don't remember it happened, put it that way.

JUDGE: Yes, I know, but I'm just wondering -- just supposing for the sake of argument and follow the logic there. And it's 12 o'clock now, so we'll have to give Mr Collins additional time to if we over run and the opposing side goes over. But supposing, for the sake of argument, one were to say well, there are X number of principles/cases that come up repetitively, in the list, you know should I have a list of should I put up a list of authorities and points and that people can be on notice of that.

MR FOLEY: There are two elements to that, one is the authorities themselves, which I don't know if I'm speaking out of turn, but from my perspective, yes absolutely that would be the case. If it was known that the Court always has regard to a folder, in which these authorities are and they are labelled this way, that would be great, provided it operates across the planning and environment list. I don't want to say any more than that but provided that it applied to all the courts. Whether the Court can, in the absence of potential argument, synthesise principles that aren't existing in the case law you know, but there are ones. So for example, we also -- when it comes to that. So at that level of you do not set out this again.

JUDGE: I get the point about synthesising principles but I am not saying, I'm not under -- case X on the issue of what the Respondent has to do in case Y on the issue of what an Applicant has to do about assessment or something. You know, without saying what the principle is but just identifying the topic or the point.

MR FOLEY: Yes, it comes to, it just it reminds me of those kind of, Law and order here, it's in the Supreme Court, where I could just say -- says -- Johnson says and there is not opening, we all know. But I think that yes, I can see the absolute benefit of that. But the question though is aside for looking more expeditious, does it actually save time? Because in the hearing, and Mr Collins is like he's drawing attention to what is Sharpstone, but he knows I know the context, he's not telling me what the case is about correctly. So I am not responding by reading Eoin Kelly, despite the fact I asked the Court about such. I don't know what time it would say, it would certainly cut down submissions, in terms of their text volume but

JUDGE: Well, yes I mean ultimately I think it is clearly about saving time but also it is putting parties on notice of

MR FOLEY: Excuse me, sorry. I am just saying that avoids that, yes, yes.

JUDGE: I mean now admittedly it could cause delay in pipeline cases and supposing for example, for the sake of argument, say in two weeks time, I were to take up that idea and put a list on the website, we should not assign to Mr Collins and indeed yourselves here and come back and give me a submission, if you see anything of this that warrants further comment or something. You know, the one thing the list is already there when people are doing that, as such.

MR FOLEY: Yes, I understand that but you know we are leaving aside the time to do the case, that's

JUDGE: Yes.

MR FOLEY: We have done our job and I suppose, you know we took cognisance of what we are doing, when it came to the written submissions. I understand what the Applicant. The Applicant did like a detailed reply, you know. So, we there is an issue about the time. With the greatest benefit, asking the Court.

JUDGE: We have talked the time and there are all kinds of angles to that. They are all very well-rehearsed and so forth but I mean separate from that?

MR FOLEY: No, I mean first of all, I don't think it's helpful after a procedure to do it. And I don't think with the greatest respect, I am foreseeing it. If the Court was to do it next week, I don't think it would be the greatest of assistance then to come back to this and say, can we see anything if there's anything arising in the cases. We should all know already.

JUDGE: Even in the written submission?

MR FOLEY: May it please the Court. I am not going to say, if the Court needs assistance in that respect so be it. These are cases we should know and most likely do know already. Like, to the credit of the counsel in this case or to credit junior counsel, this is a small book of authorities.

JUDGE: Yes.

MR FOLEY: Because we know what the principles are and we have chosen the authorities to synthesise, I'm open to the Court, whatever the Court feels is appropriate.

JUDGE: There is an option, I suppose, I hear you're point about across the list and that's you see, this is one of the reasons why it's worth interrogating people, because then they come up with good responses.

MR FOLEY: It's for the Court. But the Court will recall, certainly in the planning sphere in NEPPC, after I think oral hearing, the Court circulated a list of authorities. And the Court might recall, I don't have I don't know what to say about the times in the UK in a planning case and obviously, the Court had view of what was relevant to it. It didn't necessarily focus the minds on the issues that the Court saw is relevant.

JUDGE: Yes, there is obviously a line or something that the issue was. Yes, I guess you live and learn, I suppose.

MR FOLEY: Well, it's a belated criticism, seven years on, Judge.

JUDGE: That's okay.

MR FOLEY: I'm just saying it's it's possible, it can be done.

JUDGE: Yes.

MR FOLEY: But just for the context of this case, I would have thought the lines are drawn.

JUDGE: Yes, not enthusiastic.

MR FOLEY: Sorry, I'm never enthusiastic about more work.

JUDGE: I know.

MR FOLEY: I think that's what

JUDGE: Well, especially at the end of the case is that's even more of a downer. But look, can we just look at it as a possibility and no more than that.

MR FOLEY: Absolutely, 15 years.

JUDGE: So, the now I know Mr Collins didn't make oral submissions on Ground 1, and you may be thusly in an awkward in replying to it. But was there an official in terms of what was published?

MR FOLEY: No.

JUDGE: No. Can I ask, just I have nearly one line to say on that, on all of these issues across the board, which is if it's not in the affidavit, it's not a fact. And it hasn't been put in affidavit that there is any actual specific thing now found, which was omitted. The cases are made is that the titling was difficult to follow, which in their own terms violated fair procedures, is the key ground and they argue that as a matter of law, there was an obligation to publish what they call the amended EIAR. And there wasn't an amended EIAR.

MR COLLINS: Sorry, Judge, again, Ms Healy confirmed, I know it's not something I addressed in my oral submissions but the EIAR was amended.

MR FOLEY: No, it wasn't. This is

JUDGE: Well, is it technically the further information, you're talking about?

MR FOLEY: Yes, and I feel like I am bashing my head against the wall on that point, time after time.

JUDGE: Yes, he sets it out as amended.

MR FOLEY: Sorry, Judge, as a physical process, okay, you've got an EIA, which is a document, I can fold it up. And you've the FI, which is a separate document and it says, these are the things we want to change in EIAR. No one has physically amended the EIAR and the Applicant's case continuously pleads as if there is a physical artefact out there, a separate amended EIAR. So there isn't an amended EIAR, that didn't happen. MR FOLEY: Yes. So it just doesn't exist, there is no sometimes you see it. Here's the original EIAR. Here's a separate one. The FI is a separate document and the Court has our submissions on how you can get that and how that is made available on the Court website.

JUDGE: Okay, so am I understanding correctly no. So that wasn't on Pleanála.ie; right?

MR FOLEY: The further information, Judge.

JUDGE: The EIFA, yes, yes.

MR FOLEY: We say on, Judge. The domain from which you access it too is the Planning Authority.

JUDGE: There is a link.

MR FOLEY: Yes.

JUDGE: There was a link on Pleanála to the Council's website at which point you could download the FI, but with a misleading or odd file name; is that it?

MR FOLEY: No, no, not at all; sorry.

JUDGE: Okay. What is wrong there? They are first, if we just let's separate the two issues: okay. The misleading final names were said and were correctly, as the Applicant points out, the file names used on the board website for the files hosted by the board on its website which was the EIAR; okay?

JUDGE: So?

MR FOLEY: So there were no misleading file names.

JUDGE: For the FI; is it.

MR FOLEY: Yes.

JUDGE: Okay.

MR FOLEY: But of course when you the technology of it so there when you look at the PA website, you click the link, there is it always happens before the Planning Authority, the further

information was done there. So the Bord Pleanála website has a link, you click, there is other further information and at that point in time, you could do all of that and then went you went down, the importance of the screen grab is when you went down to the sales, this was an EIA procedure and here's the EIAR, when you click that, the file titles were, as I put in the Statement of Grounds at 10112, so you can still download them and see what they were. But that's the fact so those I won't say Judge, they are not misleading file names. They don't mislead you. They are just no comprehensive, they don't tell you, what the document was. There is a difference.

JUDGE: Now, which document are we talking about now; is it the EIAR or the Screening Report or the NIS or all three of them?

MR FOLEY: I can't remember Judge, offhand because the only cases, as far as I can remember is the EIAR. So the documents that the board posted, under the section, this document and this case and subject to EIA procedure. They were all titled in a you might just call it a hex decimal way. You know, there were numbers and letters. So none of those documents disclosed their content.

MR COLLINS: And 67 of those, Judge.

MR FOLEY: Yes.

MR COLLINS: Good luck trying to make any sense of that.

JUDGE: Okay. So that is so the Applicant's point there is that doesn't constitute it doesn't an effective form of publication.

MR FOLEY: Making available, yes.

MR COLLINS: And it's not that effective at all, Judge. You just can't find anything on it, it's impenetrable.

JUDGE: How many of those documents were there?

MR COLLINS: 67.

MR FOLEY: And then, Judge, on the EIAR, Appendix 4.3 records the following insertions are to be made in EIAR and they are then set out in red and blue on page 1 of 23, to the Appendix 4.3.

JUDGE: Okay, now just for the sake of argument; okay. I mean, if the if it comes down to the file names, amounts to, in effect, publication, I suppose there's an issue about certiorari, verses declaratory relief; is there?

MR FOLEY: Yes, there's an issue. But, Judge, what I would say is of course, the principles in that have been dealt with already, in the Court's case law. It happened after the decision. Nothing has been deposed to by the Applicant or anyone else, in terms of prejudice and the only issue that arose is that lately in the written submissions, that came in reply, so not even in the case or in the submissions made, in the reply submission, by the Applicant, they claim there is a cases for Certiorari for three reasons, they actually take issues with the changes to the Board's website because the Board, after the proceedings issued, changed those titles to effective titles and they say there is a delay between the proceedings of those changes by definition. They say the list bears no resemblance to the time that went before, but of course that's the point that is changed from the Hexi decimals to plain English. And they say again, no amendments to the EIAR. And I don't know how many times I can say this, there is not physically amended EIAR.

JUDGE: Yes.

MR FOLEY: Second, they contend and this is in their replying submissions of said case, they say the model is missing because it's not, you know, it's just not there. But I would have an affidavit replying to that because they didn't save it in an affidavit. But the Court can click on it and you can see the Statement of Claims, where we dealt that it's there. So the argument that there is continually missing documentation in the face of these proceedings is wrong.

And then third they say, the amended parts of the EIAR include mitigation measures, so it's hard to interpret condition 4, which of course, isn't a completed point at all. But even if it was it, it says, "The Developers should ensure that all construction measures, environmental measures, set out in the EIAR and associates are implemented in full."

We all know the associated documentation is further information. Their complaint seems to have been that they thought necessarily had to lead to a physically further amended EIAR. So respectfully Judge, I say, at paragraph 105, at Carrowagowan is on point here. There is only so much I can say that the titles are the way they are. And if you can get the documentation, you could but is that an effective way to make documentation available, I am in the Court's hands. You know, there's a human element to this, Judge; do you understand. But it doesn't go in any way to any crisis caused to the Applicant. They didn't oppose to any. And in fact, Judge, the case was it went to fair procedures, like that's the pleaded ground, they went to fair procedures.

JUDGE: Yes.

MR FOLEY: And they pleaded their case, having got all of the information and having sought to amend their case and haven't really deposed to anything arising from the information they now have. That causes a problem that they didn't see in the first place.

JUDGE: Yes, yes.

MR FOLEY: No third-party interest could be relied on. And the Court has all these submissions and all the other cases that apply.

JUDGE: Yes, yes.

MR FOLEY: It doesn't go to Certiorari.

JUDGE: Yes, yes. Okay.

MR FOLEY: Okay. But it's obviously unfortunate that the list of file names were in the way I've quoted the Statement of Opposition. You know 08346 and so on.

JUDGE: Hmm mm.

MR FOLEY: I say, Judge. My written submissions were made available but I am in Court's hands as to whether or not there is a further Statutory gloss that to make something available, it must be effective as well.

JUDGE: Yes, sure; okay.

MR FOLEY: And I take the Court's point.

JUDGE: Well, look the last point is and Mr Collins seems to be complaining about Pleadings on this.

Both you and Ms Murray did plead discretion, in the statement of opposition, but I wasn't totally clear on what basis. So I don't know whether that is still an issue or I know you said that the Applicant didn't make any submission, if I heard you earlier but I am not totally clear on what the ground of discretion would be, if hypothetically, let's say hypothetically the assessment was defective in some way? What would be the ground of discretion; what would warrant it?

COUNSEL FOR THE DEFENCE: The ground of discretion Judge, would be in this particular case, having regard to the evidence that if the Court takes the view that it is correct to say as the Developer did that the evidence put forward prior to this particular case, in risk and all of this that objectively speaking, it is reasonably correct to say that a likely significant effect on the European effect could and was capable of being excluded on all that.

JUDGE: I mean, there has been discussion on other cases about this kind of scenario and certainly in the An Taisce and the Minister for Housing case, the correct name of I can't remember now who the Respondent was but the government anyway. The State's argument was that the appropriate Order, if there was a defective on the assessment was to direct additional assessments and not to quash the decision. That is the An Taisce case. But that is still under discussion obviously. But whether that whether to classify that is a matter of discretion or is something else.

MR FOLEY: Sorry, but I don't know what that difference that makes, like you know, if you're saying more assessments have to be done, it has to go back to the Board to do them. If you quash it, you're going to quash it at a point in time, in which the Board has to carry out the assessment the Court said was lacking. It just seems to be the State want to avoid Certiorari in that case. Presumably, the Applicant's costs to get that point. I know personally, there must be a reason for that but

JUDGE: I think the cost the cost would go without saying if there any kind of

MR FOLEY: Yes, that's why I just I don't know that case, but Judge can I say the discretion point here, it just arises straight forward here is that sometimes there are cases where respectfully the point is for example, there should have been an AA here but on the basis of the evidence that we've gone through, is the Court able to take the view, look, nothing different could've occurred here, having regard to the evidence that was before the decision maker. And that is an analysis of the Court, certainly in the UK, under very particular and I accept Rules of Court regime is allowed and in fact mandated when it comes to EIA, we've addressed the Court on this before. So it is a matter when the Court takes

JUDGE: Is the discretion for the lack of evidence that there is a real problem here?

MR FOLEY: It is

MR COLLINS: It is not made out anywhere in the Pleadings. That is a new point and if the Court is going to be in any way influenced to take that on Board, then I will have significant input.

JUDGE: Okay, well let's leave it there and go over to Ms Murray now.

MR FOLEY: Thank you, Judge.

JUDGE: That's fine.

MS MURRAY: Sorry, Judge, if I could just be pick up with some of the questions that the Court had for Mr Foley that might be the best place to start.

JUDGE: Yes, of course.

MS MURRAY: If that's acceptable to the Court?

JUDGE: Yes, well, it's a general rule in the list that a question to one party is a question to all parties.

MS MURRAY: Yes, but I was going to start with them as opposed to finish with them, Judge, if that's acceptable to the court.

JUDGE: Of course.

MS MURRAY: Just in relation to the question in relation the Court mentioned about the expedited hearing. I can just clarify that it was my client who sought the expedited hearing, Judge. Obviously, it was in June, as the Court referred to and that was after the practice direction would have come in, insofar as I can recall, Judge in relation to the default procedure whereby there were certain types of the cases that the Court had identified where the default the expedited procedure would apply as a default and they are the renewable energy cases. And the Court refers to the renewable energy directives. So it was on that basis that an expedited hearing was sought. Although in reality, you probably wouldn't have needed to have actually formally sought it where the position was that the default, it would have automatically applied, Judge. Also, this is a case I suppose, Judge that they are, the way the practice direction is set up, as the Court knows, the Applicant is given an opportunity to put in, supplemental submissions after the it had sight of the board and the notice party, if the notice party is participating. So the Applicant has the opportunity to come back and that was obviously availed of in this particular case. And indeed I think the Statement of Case was also updated after the replying submissions should I say, came in from the Applicant. So that is all provided for in the actual practice direction and that process was availed of, in this particular case, Judge.

In relation the Court had a question for Mr Foley in relation to the Core Ground 1, which is the a breach of section 146 subsection 7, Judge and as Mr Foley said, that's a requirement that arises after the decision has been made and requires that in the cases where an EIA was carried out, documents relating to the matter have to be posted to the board's website, three days after the decision and have to be kept there in perpetuity, when it's an EIS case. Now the Court has obviously grappled with section 146 in Reid, in the Reid case, Judge and the Court, at paragraph 132 of that judgement sets out in what circumstances the certiorari should flow or a declaration should flow, depending on a breach of procedure that arises post decision. So it actually doesn't go to the decision itself. It's something which occurs post decision. And the Court I say, Judge in both Reid and also in Grafton is clear that where the error where and I'm not accepting obviously, Mr Foley doesn't accept that there has been a breach because the link to the board's website directs you to the Council website, which has the further information. But if the Court considers that that wasn't adequate, then in circumstances where this is a post decision issue, there has been no prejudice to

the Applicant, they haven't pointed to any prejudice in the actual pleadings. No third party has been prejudiced, Judge. But this is a case where a declaration is sufficient and it's not one which would warrant an order of certiorari quashing the decision.

Now just in terms of the nature the declaration, the Court asked Mr Collins initially that there was a preliminarily objection or maybe a pleading objection in relation to public participation, in the context of a relief 1A. The Court might recall that was one of the first engages that it had with Mr Collins at the beginning.

JUDGE: Yes.

MS MURRAY: And that is obviously an issue that we have said that the relief number 1A, which is the a declaration that there has been a breach of a contravention of public participation rights, under EU law because of a failure to make available an amended EIAR. So that's the relief that is sought in paragraph 1A. And I suppose our issue with that is that there are no specific grounds which raise any public participation rights. They are not expressly pleaded. Now I take the Court's point that section 1467 was amended, in light of the 2018 Regulations, which hark back then to the EIA directive and public participation.

JUDGE: Yes, he can make the point indirectly.

MS MURRAY: Yes, Judge and I suppose, Judge, I am not making a huge pleading objection about it. And in fairness, a declaration of either sorts will do Mr Collins, whether it be a declaration that the Board have breached section 146(7) or if the Court wants to frame it in a way that there has been a breach of public participation rights. It's still a declaration that the board hasn't complied with the requirements, under 146. I don't think it gets them any further or avails them any further, the actual wording of the declaration.

JUDGE: It doesn't get them anymore cause, than they will getting if they get the Section if they get the 146 declaration.

MS MURRAY: Exactly, Judge. And it just again, it's just a statement as to the position, if I want to just put it like that. It also doesn't tip it over into an Order of certiorari and indeed that's evident from the actual relief that's sought. It's a declaration that Mr Collins is seeking at paragraph 1A, not an Order of Certiorari because of an alleged breach of public participation rights. So it really just goes to the wording of the declaration as I say Judge, if the Court is minded or concludes that, what the Board has done with this situation is not fully in compliance with section 1467 of the Act, then I say firstly a declaration is the obvious remedy and the wording is really whether you put in public participation, I don't think it really takes the matter any further, Judge. And Judge, I suppose, just while I'm on this ground. An EIA or an NIS was submitted with the Planning Application and they are little books, as Mr Foley says, which you can hold in your hand and shake about. The further information is a standalone document, it wasn't there wasn't an entirely new amended EIA or amended NIS submitted, as can be the case in some situations where you get the entire EIAR and the entire NIS reproduced. And instead, it's quite evident and it's evident, I am just going to direct the Court, it's page 195, of the core book, which was the introductory section to the further information and it explains to the reader how it is to be read. And it says that amendments or alterations to the EIAR and the NIS are in red. So the way in which the further information works and the Court will have seen this because I am sure the Court has looked at it. It takes each of the questions that the Council have asked. It responds to it. If it's then felt that an alteration or it required the EIA or NIS, you then have that section of the EIAR/NIS, which is copied in black font and then any edition is put in, in red. So not all sections of the EIAR or NIS, required on foot of the request of further information to be looked at again or to be altered or to be amended.

And just for the Court's own information, in the context of the bird issue and the hen harrier issue, you'll find the, I suppose, the amendments to the EIAR at pages 334 to 342 of the core book and the amendments the NIS are at 342 to 355 of the core book. But again, they are not every section, it is only specific sections, which were relevant to the hen harrier or the issues raised that are high out of there in red, and they are either completely new red text or it's red text inserted and imposed in the original text of the EIAR/NIS, Judge.

And then just the last point before I go into my just a couple of points which I want to make to the Court, with the issue of discretion. And the Court said, we have pleaded in the Statement of Grounds, in the exercise of the Court's discretion, it should refuse relief. And the Court asks well, on what basis would it be exercising that discretion, if there had been if the Screening had not been properly carried out, Judge and again, this is an issue which the Court grappled with itself, in

Reid number 7. And Judge, if I can just direct that to the Court. So that is the at tab 17 of the book.

JUDGE: What page?

MS MURRAY: It's 2024 IEHC 27, Judge. So this was a judgement of January of this year, Judge. And as I said it's Intel number 7. And the issue is dealt with, I suppose in the context of Core Ground 5, which the Court takes up at paragraph 64 of the judgment and the Court sets out what Core Ground 5A is. And really, the Applicant's complaint here is that, and I suppose just so I can just be clear what the issue in the case was, it says neither the Board's Order nor its direction contains an appropriate assessment or screening for same or findings and conclusions. Case C721/21 Eco Advocacy, paragraph 43, "The competent authority, which states the requisite stand or the reasons why it was abled prior to the granting of such authorisation, to achieve certainty, notwithstanding any opinions to the contrary, and any reasonable doubts expressed therein that there was no reasonable scientific doubt, as to the possibility that that project would significantly effect that site." And in that Screening exercise, deprived the decision maker of jurisdiction to grant development consent. So Judge, that's the issue in the case, which is an issue here. That's an invalid screening exercise, deprives the decision maker of jurisdiction. The Court then sets out the judgement of Eco Advocacy, at paragraph 65. And sets out the conclusions of the Inspector at 66. But it's paragraph 71, that I wanted to sorry, it's not it's

JUDGE: 74.

MS MURRAY: Exactly, Judge. It's 74. And the Court says, "Even if I'm wrong in relation to all of the foregoing."

JUDGE: I made the same point that Mr Foley made here about them not having raised the issue.

MS MURRAY: Yes, Judge. But I will first of all, before we even get there Judge, at paragraph 74, on page 15. The Court says, even if I'm wrong in relation to all of the foregoing, Intel's submission that it is blameless, in relation to form of recording of the reasons is compelling in the circumstances, an order of Certiorari would be disproportionate here. So it's this issue of blameless. So I think and again, I am not going to go over the ground that Mr Foley has gone over. But this is a situation Judge, where my client prepared an EIAR and a screening an appropriate assessment screening. The Court will see and I think Mr Collins made various criticisms of the further information and the use of the word, "claim," claim this and claim that. But if the Court goes back to the beginning, in the EIAR. And the Court will see this in the NIS and the Screening Report at page 491, of the core book. We set out that we engaged in consultations with Bird Watch, Ireland, DAU and IFI, the Inland Fisheries Ireland, before we commenced the preparation of the documents, and it was BirdWatch Ireland which said we needed to do a collision risk model, so that's done. The Court will then see in the screen report the different types of survey that were carried out, and on page 496 there's a section entitled "hen harrier winter roost checks", and that says: "Due to anecdotal evidence from a local birdwatcher that a hen harrier was observed on several occasions on the cutaway bog immediately northeast of the proposed windfarm site the hen harrier roost checks were undertaken in this area. Fixed point watches are undertaken at dusk to target potential roosting hen harriers. The survey comprised three visits undertaken at regular intervals monthly between October and December. All observations were recorded on field maps." So this isn't a case where we're not engaging with the issues that are there at the very outset. We've consulted BirdWatch Ireland, we've consulted DAU, we've taken on board the fact that there are ornithologists in the area who have said there have been sightings. So, based on that, we then go out and do this level of survey in detail.

The DAU, as a prescribed body, made a submission. It's been opened in detail by Mr Collins. That submission asked the council to look for further information. That's what the council did. The council asked us for further information, and, to be clear, Judge, they asked us to address two matters in the request for further information, which the Court will see. The first thing they asked us to do was to address the particular submission made by the DAU, but then they also asked us to address all the other issues raised by third party objectors, and that brings in Mr Ricky Whelan, who was the ornithologist who sighted the bird in 2019, and it also then brings in the submission made by BirdWatch Ireland, which we address in detail in the RFI, Judge. There's also then additional surveys carried out at four vantage points with four surveyors, which is again answering the concerns raised by Mr Whelan and also BirdWatch Ireland as to the number of surveyors. And we also then carry out a roost survey, not only within 2 kilometres, which is the width -- which is the stated area, but we actually go further. We go to 10 kilometres, and those surveys don't identify a roost.

So, Judge, if there is an error, and again I don't accept that there's an error, I would say that my client falls within this -- the issue here in paragraph 74 of Reid, where it's blameless. It has done everything. It has done everything from the start that was necessary to be done. It has replied to the further information sought by the council, and it has put all the evidence before the council, and again just, I suppose, for the Board's own -- I'm sure the Board knows this, but the council didn't ultimately refuse on any issue in relation to screening for AA. The council refused it because of an issue in relation to bats. There was no AA reason for refusal, and indeed the council didn't do an appropriate assessment because of -- it refused on the basis of bats. But the council were obviously notified of the appeals, Judge, and Eco Advocacy took an appeal, my client took an appeal, and I think it's Mountmellick Wind Action Group, I think is, that's the proper title, also took an appeal, but the Board -- but the planning authority responded to those the appeals. As the Court knows, the planning authority is -- you know, it's circulated with the appeals and has an opportunity to respond, and the planning authority in their response said that they had nothing -- they were satisfied with the reasons that they had used for refusal, that they didn't need to expand on those reasons any further, so they never raised any further issues that they opined on should be reasons for a refusal, Judge.

And so in that context, if the Court is with Mr Collins, then I will be saying that my client is blameless and I will be relying on paragraph 74 and then 75 of the Reid (number seven) judgment, where the Court takes it up at paragraph 75 where it says: "In the circumstances here any defect under this heading, if I am wrong in saying that there is no such defect, would be purely formalistic and thus would more properly be addressed by an order other than certiorari. It is highly relevant for the purposes of such a discretionary exercise that the applicant's appeal to the board didn't make any specific points about appropriate assessment beyond bland generalities about alleged major impacts, unspecified, on European sites and breaches, unspecified, of all EU directives and many other EU directives. Quite a feat, but in this context a comment more in the high spirits of Buzz Lightyear rather than the logic of Georg Cantor or Kurt Gödel. Much of the applicant's overheated word salad of generalities was of no relevance to planning issues at all. That wouldn't necessarily have put him in a strong starting position if the Court's discretion was being called on to frame a more proportionate order had that arisen."

Now, the Court is looking quizzically at me, which I'm always rather worried about.

JUDGE: No, no, not quizzically at all at this moment.

MS MURRAY: But obviously in this particular case, Judge --

JUDGE: I'm just wondering how far you're going to press that analogy to this case. That's all.

MS MURRAY: Well, Judge --

JUDGE: Hopefully not very far, but I take the general point that they didn't make the point.

MS MURRAY: Yes, they didn't make the point.

JUDGE: Yes.

MS MURRAY: They didn't make the point. And Mr Collins --

MR COLLINS: But, Judge, again this isn't pleaded.

MS MURRAY: Well, sorry, Judge, we have pleaded on the exercise of the Court's discretion that the relief should not be granted.

MR COLLINS: Sorry, Judge. Now, no, that's just an absolutely absurd. If the Court goes with that, we'll just give up. There is no particular of those pleas, and I'd like the Court to consider the findings the Court has recently made, for example, in Mago in relation to pleadings and myriad other cases where it is required that specifics of a plea are made out. Nowhere in either set of opposition papers is any reference made to this.

MS MURRAY: Judge, just Mr Collins had also --

MR COLLINS: And I don't have time once again to deal with it in reply.

MS MURRAY: Mr Collins also made issue in relation to the ability of objectors to secure ornithological experts, and, in fairness, Mr Collins didn't say that there was an issue in relation to my case or my developer warning of --

MR COLLINS: No, that wasn't intended at all, Judge.

MS MURRAY: Yes, and -- but obviously, Judge, there is no evidence affidavit to say that they tried to get any or that they didn't try to get any --

MR COLLINS: Again this is not the issue, Judge.

MS MURRAY: But, sorry, Judge, this is on his own pleadings, Judge.

MR COLLINS: This is not -- sorry, this is not pleaded.

MS MURRAY: Well, sorry, this is a point that you made on your feet. This was a point that Mr Collins made on his feet, Judge, so I'm entitled to come back at it.

MR COLLINS: In reply to your submissions. You're not.

MS MURRAY: Sorry, Judge, I'm entitled to come back on this and all I want --

JUDGE: I don't think -- again --

MR COLLINS: Ms Murray needs to plead this, Judge, and then I would have dealt with properly in my opening. It's not pleaded, I didn't deal with it properly in my opening.

MS MURRAY: Sorry, Judge, Mr Collins stood up and made assertions about the windfarm community in general that you couldn't get an ornithological expert, they were almost running scared of putting their name to an affidavit. Now, if he's going to make that suggestion on his feet, that's a very serious allegation to make, and that needs to be backed up. And all I can say, Judge --

MR COLLINS: I think --

MS MURRAY: No, no, by your client saying we attempted to contact X, Y and Z or we did contact X, Y and Z, we couldn't get them for X, Y and Z's reasons. But --

MR COLLINS: Well, Judge, I say I --

MS MURRAY: Mr Gallagher in his -- sorry, if I can just -- I appreciate that Mr Collins is very frustrated about the length of time, but that doesn't mean he has the right to interrupt council.

JUDGE: Well, I -- yes, just on that note, again I think the best -- the best thing to do is, if people are willing to consider this, is just deal with it de bene esse, and then at the reply can come back on it.

MR COLLINS: Well, under normal circumstances, I would say absolutely, yes, Judge, but we're in this --

JUDGE: Yes.

MR COLLINS: -- truncated procedure, where I'm going to have -- presumably in seven minutes I get to feet for a further 15. I can't deal with all these issues and --

MS MURRAY: Well, sorry, Judge --

MR COLLINS: -- I certainly can't deal with issues that weren't pleaded, so I'm stopping them before they arise. I'm saying, no, you can't say that, it isn't pleaded, and the respondents, for once, need to be held to the same standard as the applicants.

MS MURRAY: Well, Judge, perhaps Mr Collins could stop interrupting my last seven minutes, so I can actually finish, and I'd really appreciate that. All I'm going to ask the Court is if the Court could look, when the Court has time, at paragraph nine of Mr Cummins's second affidavit where he refers to the expertise of Eco Advocacy in ornithology, his affidavit is based on his own knowledge and experience, he has been a birdwatcher "since my childhood", other experience birders in the organisation. "We could not have anticipated that the Board's decision would fail to reflect the experts of the National Parks and Wildlife Service who identified the flaws in the Board's hen harrier assessment as it did or that the Board would fail to have any proper regard to the submissions of the experts in BirdWatch Ireland or the expertise of Ricky Whelan, a very experienced ornithologist." And this is really what the case all boils down to, Judge.

The case boils down to a submission by the DAU to the effect that in its view the surveys aren't adequate and that there's a reasonable doubt, so that's on one side, along with the ornithologists

and BirdWatch Ireland. On the other side you have survey work undertaken initially, supplemented then because of a request for further information which came from the first submission or arose out of the first submission made by the DAU. The Court will be aware that -- and again the CJEU in Eco Advocacy, and this is at paragraph 37, stated that "the competent authority has to state the requisite standard of reasons why it was able to achieve certainty, notwithstanding opinions to the contrary and any reasonable doubt expressed therein that there was no reasonable scientific doubt." So Eco Advocacy envisages a situation where you have conflicting evidence and that's taken up by Judge Holland in ETI, and that's at tab 12 of the judgment, and I'd refer the Court in particular to paragraph 264 of that judgment where he says that "the fact that an expert sees a reasonable scientific doubt isn't determinative that an appropriate assessment is required", and he goes on to say, Judge, that the determination as to whether there's a reasonable doubt is the task of the decisionmaker, not of the competing experts.

So this is a situation where you have the DAU saying we're not satisfied with the information that's been put up, but you cannot say that there isn't information, that all the information is there. The Board then, as the competent authority and the decisionmaker, assess that, and Mr Foley opened the inspector's report where she carried out that assessment, and she screened out the Slieve Bloom SPA for three reasons. One is the absence of recording of the hen harrier, and that is factually right. No hen harriers were recorded on the site. One was recorded flying north of the site, and Mr Foley has shown you the photograph there with the -- sorry, the aerial image with the flightline superimposed on that, and in that regard I do think it's useful for the Court, when it has the opportunity, to go back to page 185 of the core book, which shows a map of the site. Again -- sorry, it's an aerial photograph with the turbine superimposed on it, but you can see the locations of the turbines relative to the two bogs, the Garryhinch bog and the Garrymore bog, where they're located to them, and the flightpath of that one hen harrier is very clearly outside the range of the turbines.

JUDGE: When you said three reasons, what do you mean?

MS MURRAY: Sorry, one was the absence of recordings of hen harriers; two was the lack of suitable habitat at the proposed site, which again that's accepted by the DAU in the first submission, that the actual windfarm site itself doesn't have suitable habitat for the hen harrier; and then the third reason is the distance between the proposed site and the Slieve Bloom Mountains SPA, and Mr Collins, when he opened the inspector's report, referred to it's a 4.8, 4.7 kilometre distance, and again the Court will see that on the map on page 185 of the core book, where the SPA is located to the -- to the southeast -- sorry, southwest of the site, but you'll see the SPA is in shaded yellow hatch, Judge, located to the southwest of the site.

And Mr Collins -- sorry, Mr Foley, when he took the Court through the further information and the hen harrier study, referred again to the rebuttal of the submissions made by Mr Whelan as to the likelihood that the birds would have to fly over the turbine site, and Mr Foley opened to the Court the reasons there being that the birds, if they were following the rivers, they'll actually fly to the south and to the north of the site, that there was the -- the distance, also the 500 metres separation distance between each of the turbines, the collision risk factor that the Scottish National Heritage themselves apply to the birds, which is a 98% avoidance risk, and that on those factors they said that there wasn't a collision risk.

And again this issue in relation to the -- Mr Collins said, oh, the collision risk model was done on the basis of a different type of turbine with a different height and that the hub height was a hundred metres as opposed 106. It's very clear, Judge, that the collision risk model was done on the basis of the parameters of the turbines as ultimately clarified in the response to further information, and that's evident from the collision risk model which sets out on page 368 the actual turbine details used, which was a hub height of a hundred metres, and that's then confirmed in item 2.4 of the response to further information, which is on page 199 of the core book, Judge, where that's -- and that's the response to Laois County Council those figures were clarified, and the response actually states that those particular diameters form the assessment for bat and bird flight activity assessments throughout the EIAR.

And the evidence that was before the Board was that surveys -- the area had been subject to surveys between 2013 and 2016. Birds were recorded there. 2019, Mr Whelan says --

JUDGE: Can I just pause you just for second. How we are doing on time?

MS MURRAY: I'd say I only have about two minutes left.

JUDGE: Well, we'll accommodate Mr Collins obviously, but I'm not -- I'm not -- I'm not ruling out additional time today, if that's going to help anybody. Anyway, do your two minutes, and we'll --

MS MURRAY: Well, I suppose, I suppose, Judge, I mean, certainly I prepared on the basis that I would only have 30 to 35 minutes --

JUDGE: All right. Well --

MS MURRAY: -- so I'm trying to stick to --

JUDGE: Stick to that, okay.

MS MURRAY: -- my allotted time.

JUDGE: Okay. Off you go.

MS MURRAY: I'm sorry, I was just on the -- the surveys that had been completed, Judge, and, as I said, the -- the study that was referred to by the NPWS was from 2013 to 2016, but since 2016 there was one bird recorded in 2019 by Ricky Whelan. No birds were recorded during the surveys carried out for the screening in the first stage, and then only one was identified, and again that's not over the turbines but out of the site, and the -- the conclusion or the -- that's reached in the hen harrier report, which is part of the further information, is that, having spoken to the Bord na Móna operatives, that there has been disturbance of the area and that this might have damaged the roost, and again that's something that was a legitimate matter to include in the report. It's backed up in the evidence in that there have been no recordings of them. If they were there, as the report says, one would expect to be finding figures like there had been in 2013 to 2016, but that's not the case on the evidence there before -- that was from the surveys, Judge.

The -- and then the only other matter, I suppose, that I don't think Mr Foley -- and he can correct me if I'm wrong -- while Mr Foley did open the inspector's report, obviously there was an addendum report as well prepared by the inspector, Judge, and that arose in circumstances where the -- the Board itself had sought further information in relation to the dimensions of the turbines and the number of the turbines, and that was submitted by the -- by the developer, and then an addendum report was prepared by the inspector, and the addendum report concluded that the further information didn't have any impact on the appropriate assessment and that the conclusions remained the same. So there -- again, looking at any information that had been put in, the inspector considered that there wasn't a need to revisit or to review the appropriate assessment, Judge.

So, Judge, unless the Court has any further questions.

JUDGE: Okay. We can leave it there. Thanks very much, Ms Murray.

MS MURRAY: Thank you, Judge.

JUDGE: Okay, Mr Collins.

MR COLLINS: Yes, Judge. Again, Judge, to reiterate that, I'm afraid that, in fact it's actually got worse in the last hour in relation -- because the Court has raised itself other issues which I didn't deal with in my opening. I don't really know where I am now geographically in terms of reply because I had to focus my submission on one issue because I couldn't in the time allowed raise any more than that properly, and I didn't deal with the availability of a file and so on, and I don't intend in reply to do what I didn't do in my opening, but it does significantly hamper my ability to run these cases or run this case on behalf of my client in these sort of strictures. I'm sorry, but that just is a fact, and the sort of reply that I have here is simply wholly inadequate, won't possibly enable me to fix that glaring difficulty that presents. And I'm sorry about that, but the procedure is as it has evolved to be. It has been practiced as such for generations, and, unless there's a wholesale reform of it, it can't be done like this. It simply can't. I'm saying that utterly objectively and just looking from where I am and trying to understand how I can do this properly. I don't think it is possible to this properly. You would have to completely redesign an entire system and restructure our entire approach to this, and everything would have to be loaded into the paperwork in a way that just isn't thus far and can't be. And, honestly, to be talking about process in cases and so on is missing the point.

And a big issue as well that's going to arise, Judge, and I know it doesn't particularly arise in the context of this Court, but I think it's going to lead to a delay in judgments. I think you will find there are very few judges that will actually be able to approach the expedited hearing in the manner that

this Court does. You're going to have judges that are less familiar with the issues, less familiar with the law, less familiar and have to do a lot of research, and if you take out all argument and the ability of the counsel to answer questions and guide judges through a morass of papers like we have here, you're going to take away the capacity for judges to their job to effectively administer justice. And it's important not only that justice is done but that it's seen to be done, and expediting and squeezing everything into these truncated periods of time, I'm sorry, does not achieve either of those aims. And I am just observing that I cannot do a job for my client in these circumstances.

JUDGE: Well, okay, well, Mr Collins, I go back to what I said originally. I gave virtual -- you know, we're probably not going to completely agree about this, okay.

MR COLLINS: No. But, I mean, this course is good, Judge, and I think the Court engaged in as nearly as long -- well, certainly twice as long as I had in reply on the expedited process with Mr Foley earlier on, and it's hard not to notice that in case where everything is condensed, that the Court spent a good nearly half hour dealing with just that particular issue.

MR FOLEY: It was 11 minutes.

MR COLLINS: And that's not a -- that not a criticism.

MR FOLEY: I was watching my own time. It was 11 minutes.

MR COLLINS: It was certainly a lot longer than that.

JUDGE: Well, again, not to --

MR COLLINS: And the transcript of the DAR will show it.

JUDGE: Okay. Just not to get too sidetracked, we mightn't -- we mightn't completely agree about this, but I do want you to be happy insofar as I can to, okay, bearing in mind that the -- bearing in mind that, A, the practice direction did assign this category of case as a default matters for the expedited procedure, and, B, the notice party supported that specifically. So, look --

MR COLLINS: Well, of course the notice party would support that, Judge, because it's really the applicant that suffers, and I'm going to say this as well because most of the time it's the applicant that has to take the Court through all of the papers. The applicant always has the biggest challenge in these cases. The respondents usually come in and talk for half an hour to an hour, maybe a notice party might talk for 35, 40 minutes. When you're preparing to do replies, it's a lot easier than preparing to actually open a case. The opening traditionally is where all of the heavy lifting is done, and applicants do that. And when the case is foreshortened, as it has been, most of that time comes out of the applicant's time, and respondents actually do a job that's not terribly dissimilar to what they normally do in these cases. Frequently you will see a notice party doing 45 minutes to an hour in reply in a three-day case. This is a three-hour case, and they do the same thing that they normally do.

JUDGE: Okay.

MR COLLINS: What has really happened here is that my client hasn't had an opportunity to properly present its case. It is prejudiced as a result of that.

JUDGE: Okay. Okay. Well, I -- I don't necessarily agree with that, Mr Collins. I mean, obviously it's a matter of concern to me that everybody would get a reasonable opportunity to make their points, and the way I'm looking at it is that you -- you have your initial -- you have your pleadings obviously, you've got your statement of grounds, you've got your initial submission, you've got a special replying submission in the expedited procedure, and you got an hour and 45 minutes. So I'm -- you know, I wouldn't be usually minded just as of right now to say that that isn't a reasonable opportunity. But, look, you know, if there's something specific I can do for you now, I'm open to it.

MR COLLINS: Well, Judge, I'm marking it --

JUDGE: Yes.

MR COLLINS: -- because of the fact that my client, and I'm representing my client --

JUDGE: Yes.

MR COLLINS: -- is prejudiced in the presentation of his case by the imposition of these strictures, which are just not -- not meetable, shall we say, in the way that the Bar normally works or the Corut normally works, Judge.

JUDGE: Mm. Anyway, look, can I just go back to my question, which is this. Is there something specific I can do for you to assist at this point? Do you want --

MR COLLINS: Like I said earlier, a full opening over two or three -- you know, a day and a half like I would normally have for a case such as this. There's no difference between this and the case that the Court has listed for hearing elsewhere in this building and which is running for three or four days, and the case next week and the week after. None of those cases are any different to this case, so why aren't they all being done in a foreshortened period of time? That just to me seems to be a peculiar riddle that nobody can answer. There's nothing to this process that distinguishes it from its normal hearing times, so how's it taking three to four normally to run these cases and now it's taking three hours.

JUDGE: Well --

MR COLLINS: I mean, I ask that rhetorically but I ask that.

JUDGE: Well, okay, if it's rhetorical, then can I just go back to my question, which is can I do anything for you specifically. I can think --

MR COLLINS: Well, Judge --

JUDGE: I can think of two options, right. One is we -- you can have more time for the reply. The second option is we think about a written submission in the relatively near future by way of reply.

MR COLLINS: Judge, we're all flogged to death, doing written submissions, and the whole purpose of advocacy is we need to come into rooms to tease things out, answer questions, engage. That doesn't happen on paper. That's the difference between doing it in an inquisitorial fashion, as they do abroad, and doing it in an adversarial fashion, as we do here.

JUDGE: Okay, well, you just carry on then.

MR COLLINS: Well, may it please the Court, Judge. I'll do the rest that I can. Unfortunately I don't think it's possible unless, as I said, I can start again opening the case, taking the Court through all of the information that's here, but my friends can't reply to that. Their replies are already done, so, as I said, geographically I'm a little lost as to what the solution would be. But what I am surprised at, Judge, is to hear, as I said earlier, that, not only has the decision making gone back 10 or 15 years, but I think the actual defence of this case, particularly by An Bord Pleanála, has gone back 20. Developers do what they do. They're in the business of developing infrastructure or renewable energy schemes or whatever it happens to be that they're in the business of doing, and they just get on and do that, but it's the Board that's the decisionmaker. It's the Board that actually has to record its decision on this issue, and the Board doesn't do that. We know from Connolly that that has to be express, it has to be -- and it has to contain from Kelly complete, precise, definitive findings capable of removing all scientific doubt. There are no complete, precise, definitive findings capable of removing any scientific doubt here. Mr Foley cannot replace an actual assessment conducted by his actual client with his own pointing to myriad evidence that exists before the Court, mostly, it has to be said, if not exclusively, in the form of the developers' own documentation. The answer cannot be found in that documentation because in every case a developer has produced a large amount of information on the environment, and in almost every case the developer has also concluded that the proposed development will not adversely affect the environment; otherwise they wouldn't be proposing it and certainly wouldn't be advocating on environmental terms for a grant of planning permission in respect of it. That's the Board's job. It's the Board that needs to do the assessment, and in this case the Board has failed utterly to do the assessment, and it's absolutely clear just from Mr Foley's submission that that is so because Mr Foley can't point to anywhere in the Board's decision or the inspector's report where, for example, the NPWS concerns are engaged with. They're simply not engaged with. Apart from a reference to their existence at the top of the report in the section on screening for appropriate assessment, the NPWS isn't even mentioned, Judge. In fact, nothing is mentioned in this particular paragraph, and it is the only paragraph, and Mr Foley hasn't been able to direct the Court to any other paragraph. And in that paragraph you won't find a reference to the bogs. You won't find a reference other than in the tables to the commuting of hen harriers across the bog. You won't find a reference to the NPWS. You won't find a reference to BirdWatch Ireland. You won't a reference to Mr Whelan. You won't find a reference even to roosting. You find no reference to any of these things. All of it is conspicuously absent.

The entire debate that rages between the NPWS and the developer in this case is just simply not -- ignored or missed I'm not sure which, by the inspector. If the inspector is aware of these submissions and this conflict existing, well, then the inspector's ignoring it. If the inspector's not aware of it, well, then we have a lacuna by means of omission. And, either way, Judge, it is not engaged with.

The requirement in Kelly is to have complete, precise, definitive findings capable of removing all scientific doubt. There are no such findings and no reasonable scientific doubt is removed. The NPWS has expressed scientific doubt in terms. While I didn't get the chance before in my opening to take the Court to the BirdWatch Ireland submission, it is in similar terms. Similarly, Mr Whelan has also stated in identical terms that the surveying is inadequate, and they have identified other issues in their submissions that are not engaged with by the Board, such as the fact that the clear fell, et cetera, might be more attractive to the hen harrier into the future. That is not engaged with by the inspector.

And Mr Foley points to answers in the developers' documentation. That's not sufficient. Mr Foley needs to be able to point to the decision in its own determination, and that omission or that failure fundamentally undermines what the Board has done here, and it has fundamentally undermined it in exactly the way that Connolly says you can't, in exactly the way that Kelly says you can't, in exactly the way Advocate General Sharpston says you can't. There's no way around any of those findings or those rulings in this case by simply pointing to other information that might have been considered, particularly in circumstances where the NPWS has criticised that very information and has raised a legitimate scientific doubt about that very information. And, as I said, it cannot be a requirement on me to separately and discretely -- to either discretely or distinctly depose a ornithological expert to give any evidence on that, and I don't hear from my friends what exactly that ornithologist would say. I don't know what I'm missing. Whart part of this have I not proven? By exhibiting the NPWS criticism of the further information received, and the fact that it clearly states that there is a scientific doubt in respect of the survey material that was presented, I have discharged the onus of proof on me to say that this development has not dispelled all reasonable scientific doubt because it hasn't. And there is no analysis of that in the inspector's report.

If you look at the inspector's report, Judge, as I did before lunch or before -- it feels like lunchtime at this stage, Judge, before we had a coffee break at midmorning, you will see that there's only reference to breeding habitat. There's no reference to foraging. There's no reference to roosting. There's no reference even to the commuting that the inspector herself identified as being a danger. None of those issues are resolved. They are simply not engaged with. As I said already, how can the NPWS make these two criticisms, one actually prompting a further information request from the council, and the Board's inspector not actually engage with that at all. That just simply is not satisfactory. And then the Board's own decision subsequently is completely and utterly silent on that point.

In those circumstances, Judge, it's impossible to understand how it is that Mr Foley can say that his for or six points, like, for example, the great 98% avoidance rate. Where is that? Mr Foley's own client makes no reference to the 98% avoidance rate, and from just first principles that's true of every windfarm, so why are we concerned at all about windfarms? Sure, the hen harrier will be grand. They avoid 98%. How does that work in this context? How is that an answer to anything that has been raised? Why is that even being offered up? To give the Court reassurance there's nothing to see here because, although I can't bring a case on the merits, Mr Foley and Ms Murray want to defend the case on its merits, and they want to say that there's nothing to see here, you've nothing to fear, there's a 98% avoidance rate, 500 metre space in between the turbines, it will all be grand. All of this is known and universally applied in windfarm development, Judge, and the NPWS is aware of it. Mr Whelan, I'm sure, is aware of it. BirdWatch Ireland are aware of it. The studies that my friend relates to that support all of this are all entirely generic, and this could be said in the context of every windfarm development. So how, Judge, is it answer in this context and in particular how is it an answer to the concerns that are expressed by the NPWS, BirdWatch Ireland and Mr Whelan? And if it is answer, and Mr Foley is correct, why isn't it recorded in the inspector's report as being the answer? How is this Court to undertake the judicial review that's mandated under Sweetman without seeing the actual assessment? Where is the assessment? And if the assessment is what is on page 35 of the inspector's report, and it seems to be, well, where is this contained in that assessment? And if it is not contained in that assessment why is Mr Foley on his feet advocating that this is an answer or part of an answer when it is nowhere apparent in his own client's decision-making that this was even adverted to?

And it's the same in relation to whether or not the hen harrier has been seen over the site. I don't need to depose a witness to say the hen harrier has been seen over the site. I do not need to establish harm to the hen harrier. That is not the purpose of the hearing that I am engaged with. It is not what is required under paragraph 40 of the Sweetman decision, where this Court has to make a determination as to whether or not there are complete, precise, definitive findings capable of removing all scientific doubt because that separately is the obligation that this Court has to discharge. And there's no getting around that, as I've said, by merely identifying facts that can be found elsewhere in the documentation.

Similarly, my friend talks about reasonable certainty that the hen harrier is going to be unaffected. Where is that made out? Where is that said? In fact, there's reasonable doubt expressed by the NPWS, and that's nowhere engaged with. That simply cannot pass muster.

Similarly, Judge, with discretion, my friends offer up a bald plea of discretion, not particularised at all say that's the answer to everything, Judge. You have a discretion. Even if you think that they haven't done it right, and the Court couldn't think anything else, you must or can sidestep a certiorari by requesting further information or whatever needs to be done, effectively making this Court the decisionmaker that Mr Foley's client was to be, and that is totally inappropriate and unacceptable. And, as Ms Murray points out in a separate context, the reason for that is abundantly clear in Kelly, and that is that it goes to jurisdiction. The ability to grant planning permission is contingent on these assessments being undertaken properly, and if it goes to jurisdiction, with the greatest of respect, in this context I say it can't be overlooked in the context of discretion. There isn't any way that this could be fixed. The decision of the Board simply has to be quashed as it had no jurisdiction to grant it because it didn't undertake the proper assessments.

Then, Judge, in terms of any evidence that might be given that might exercise that discretion one way or the other, again I don't see how or why or what I would need to put an affidavit. And if the Court is going to say that the case is not proofed in any way, and the Court is minded to go with that argument, I would ask the Court to give clarity in its judgment as to what that proof might actually involve because I'm 25 years doing it. I have been in some of the top cases on this issue over the years and I don't see any lack of proof in this case. Now, if I can't see it, I would welcome the clarity that this Court might bring in its judgment that would tell us exactly what it is that applicants need to do. We're entitled to know that as practical information in relation to the bringing of a judicial review of this nature. We should all know exactly what the proof is that is required. It was not required in Kelly, it was not required in Connoly, it was not required in Sweetman for independent experts to be deposed to to give independence evidence that there's something fundamentally wrong with the decision. This is not a swearing match of that nature, Judge. I am saying that the paragraphs that are set out 7.4, 7.43 and 7.44, which seem to comprise the appropriate assessment in the context of this particular issue, do not meet the requisite legal standard. That is what I say at core ground two. They don't. I don't need to depose anybody to do that.

And insofar as it seems everybody seems to have got entirely the wrong end of the stick about my inability to get witnesses, it's not because they're threatened off it by developers, and it's certainly not because they're threatened off it by this developer. The difficulty is, Judge, is that most people in ornithology and ecology, et cetera, and certainly those that are engaged in it professionally don't particularly want to be going up against renewable energy developments because they're seen generally by both that category of person and the world in general as being of benefit ultimately to the environment and to climate. And it is difficult because of that to get people to swear up in a way they would have no difficulty swearing up to a quarry, for example, or no difficulty swearing up to an incinerator or some other type of development which would be perhaps less attractive in environmental terms. But hat has been expressed, and insofar as there's any evidence it's my own evidence because that was expressed to me directly in that context, that people are reluctant to come to court and give evidence in relation to these matters because of the fact that there are other downstream potential consequences arising from that.

And that is something that is an issue, Judge. We simply couldn't get anybody to be deposed in this case, and, I have to say, Judge, I still don't know what I'd be deposing them to say anyway because I really don't understand where this evidential deficit is, and I really hope I'm not reading a judgment in two weeks time that says I failed in some way and haven't been given an opportunity to address that because this is supposed to be a procedure that's fair, equitable, timely, not prohibitively expensive and so on. My friends have not identified any missing evidence. They haven't said what

it is that I should be saying on affidavit. They haven't identified where the battlelines even are evidentially. I don't see anything that's relied on by them that isn't dealt with comfortably in the NPWS's response or comment on the further information.

And that's what's critical to it, that last sentence that I opened to you earlier, that says there's reasonable scientific doubt remaining. I rely on that statement. I rely on that as requiring a full appropriate assessment stage two and I can see no way how I'm not right on that, and I do not need anybody else on affidavit in this or any other case to tell me that the NPWS is right, the NPWS speaks for itself. It is the authority charged with this. If it doesn't represent reasonable scientific opinion, well, then we've a much bigger problem, and I don't think this Court could find either, A, it's not admissible; B, it's no in evidence either by admissibility or otherwise; and I certainly don't think the Court would find that it's wrong. And I certainly don't think the Court need to find that somebody needs to come on and say, yes, that's -- that's right. I don't see what that adds to what the NPWS has already said.

And, Judge, at the end of our authorities you'll see what was recently produced in relation to the hen harrier, the 2024 effectively strategy on the protection of the hen harrier. That identifies the hen harrier population is in shocking decline. Despite all of the comments that have been made in relation to this particular area in the Slieve Blooms, there are significant doubts about the sustainability of that population expressed in that document.

MS MURRAY: Sorry, Judge, I hate to interrupt Mr Collins when he's mid flow, but this is new.

MR COLLINS: It's not new, Judge, it's in the authorities.

MS MURRAY: Sorry, it might be in the authorities, but this is a reply, Judge.

MR COLLINS: And it's also in tab three.

MS MURRAY: He didn't refer to this.

MR COLLINS: It's in tab -- and you see now, Judge, you see, this is a reply.

MS MURRAY: Yes, but -- sorry.

MR COLLINS: There you go. Now you have the problem. Ms Murray is correct. This is a reply.

MS MURRAY: It is a reply, Judge.

MR COLLINS: But I can't go there in my opening because I don't have the time.

MS MURRAY: Sorry. But, sorry, Judge, this is a reply.

JUDGE: Okay.

MR COLLINS: That is the very point, Judge, right there in the shell of a nut. I can't go there in reply because I didn't go there in my opening. Now, if I'm going to be foreshortened in the manner that I have been foreshortened, and my opening is controlled, and my reply is equally controlled, how am I not prejudiced?

JUDGE: Well, as I -- as I said -- as I said previously, I'm happy to be flexible within reason, so --

MR COLLINS: But, Judge, you can't offer me that now at the end of my case when I'm dealing with a reply, as Ms Murray says. I mean, I can't then at 1 o'clock start opening my case fulsomely. If I had extra time, I needed to know last week so that I could structure my argument to deal with that. And, Judge, I really don't want to be locking horns with the Court about this issue, but --

JUDGE: Okay. Great. Well --

MR COLLINS: -- I mean, it's a real problem. It's a real problem. And it's not going to go away.

JUDGE: Look -- look, you can take it as read I don't want to be arguing either, and I also want to hear what you've got to say, and I want you to be happy, and I want all parties to be happy if we can do. Having said that, you know, we've got to balance a number of factors. This is the lie of the land as worked out in the practice direction. Well, look, I'm open to other ways of doing things, but my sort of thinking at this point is this. I'm just thinking through the ramifications of -- of having a kind of a well of sort of frequently referred to authorities that, you know, may be relevant, not just in this case, but in a range of cases, and I just want to think about if I do that, I just want to think

about how that impacts upon a case that is kind of in progress, such as this one at this point. So, in other words, if theoretically -- I'm not saying I'm going to do this, but just theoretically, if there was some published list of sort of cases and points that people should just sort of take notice of for all purposes, should there be a facility for a case that's in progress to come back and for people to say, well, we actually want to add something for whatever reason. So it's just an idea, to be clear. Bear with me on this. The idea maybe would be, not reserve judgment at this point, but if I just put this in for mention on -- maybe on Monday, and I will make my mind up insofar as I can do before then as to what I'm going to do about that. And if there is a list, if there is some list published, then if people want an opportunity to say something further, well, even if that's just in writing, I will do that.

MR COLLINS: Judge, I don't really understand what the Court --

MS MURRAY: Judge, we're actually ad idem. I don't understand. I don't --

MR COLLINS: That doesn't happen very often.

MS MURRAY: It hasn't happened ever. I'm not sure I understand what the Court is proposing for this particular case, is that the Court will have a list of cases, say, just for example, the Sweetman case, the Holohan case, that may be pertinent to appropriate assessment or screening cases and how they're applied but --

JUDGE: Just generally. It's not going to be comprehensive by any stretch of the imagination, but it would be a start.

MS MURRAY: But, Judge, our written submissions -- sorry, I'm just thinking about practically in this particular case. Our written submissions address them. Mr Collins in his submissions sets out Advocate General Sharpston, sets out the Sweetman, same as Mr -- yes, Mr Foley has a whole section in his submissions in relation to the principles.

MR COLLINS: And they're almost the same, Judge.

MS MURRAY: We also have them.

MR COLLINS: The respondents have the same 10 authorities, and the applicants have the same 10 as well, and when we change sides we just flip them over --

MS MURRAY: And so, in fairness, Judge, I don't think there's any necessary dispute about what the relevant cases are. I suppose it's the application in this particular case where Mr Collins is saying there's a reasonable scientific doubt, and we're saying the decisionmaker has to balance where there's competing evidence, Judge, but -- so I'm not a hundred per cent sure what the Court is proposing and whether then the Court's proposing either further written submissions if Mr Collins wants to take up that opportunity.

JUDGE: Well, I'm not -- okay, all I'm proposing is just not to reserve judgment and just give me a few days to think about it and put it into Monday. And the -- the -- what one possibility might be some kind of a publication of a list of sort of -- well, we might even call a first draft of a list of sort of generally relevant cases, but if did that, you could all say, well, we've addressed all of those. In fact, we suggested them, and -- yes, that's a problem.

MS MURRAY: But I suppose, Judge, again -- and I'm -- I don't want to lock heads with the Court at this either, Judge.

JUDGE: Yes.

MS MURRAY: But I say if the Court doesn't reserve judgment at this stage --

JUDGE: Yes.

MS MURRAY: -- in theory, how long is that process -- that process could go on for some time, and this is an expedited hearing, Judge, because of the nature of the development in issue.

JUDGE: Sure.

MS MURRAY: And so --

JUDGE: Well, you heard Mr Collins say flatteringly, but of course that's advocacy, isn't it, that he didn't want to read in the --

MR COLLINS: No, no, that's real, Judge, and if the Court is --

JUDGE: He didn't -- he didn't want to read in the judgment in two weeks time, so that's the applicant's time estimate of how long the judgment's going to take. Look, I -- okay, look, don't agree with me then if you don't want to, but just let me think about this for a few days, and I'll tell you on Monday if I'm going to reserve judgment or --

MR FOLEY: Judge, can I just say just to report -- I don't want to be difficult on all this. My own view, for what's it's sort of worth, is we're done, and, subject to the Court, but the case has been made, the response has been done, the written legal submissions are in, and what it does sound like to me is that there just might be more written submissions. And so be it, but, you know --

JUDGE: Yes, written submissions.

MR FOLEY: But then there's more submissions, and then there's more, well, you didn't plead this or you didn't plead that. Like, cases have to finish, you know, so already here today, Mr Collins has said I didn't plead something, I'll say he has pleaded no difference between foraging or roosting and so on.

JUDGE: Yes.

MR FOLEY: So then the list of cases will come out and say, well, on that authority foraging and roosting aren't the same thing, but I'll come back and say he didn't plead that, and then we're asking then why did we come here to join this issue. And I just make -- this is a really practical point, is that when we go back to the old days where you had a four-day case, habitats might have been in there with lots of other points, and habitats might have gotten three and a half hours anyway, and, like, I understand the case made against me, and I assume Mr Collins understands the case I'm making against him, and within this paradigm there's been a lot of talking about the actual time, and still the bones of the case are before the Court.

MR COLLINS: They're not, Judge. Sorry, like, look, most of the time, respondents -- respondents get to their feet and they complain about the pleadings, they complain about the failure to participate and whatever, and they do a bit of look at all the welter of information that's before the Board, and then they go off into the distance, and they can do that in any time that you prescribe. They really can. I mean, normally I'm sitting at the end or often I'm sitting at the end where Ms Murray is, and as a notice party you get left with whatever is left after the Board is finished doing what they're doing. This is the end that does the heavy lifting. This is the end that has to present the case. This is the end that has to prove the case. This is the end that has an onus to discharge, and this is the side that is prejudiced by this truncation, okay, so I'm not surprised to hear Mr Foley say that this case has run. It has run. It has run because I ran it on one single point, one paragraph in this. I haven't had a chance to take this Court through all of the evidence that Mr Foley has addressed, and I'm not going to get that chance. I didn't even get a chance to open the BirdWatch Ireland report. I didn't get a chance to open the Whelan report or any of those submissions that were put in. I just didn't get a chance to do it. And that's just even on a high level of what I intended to do today, Judge. I got through less than half of the exhibits that I had hoped to open, and if I was running this case properly I would have opened twice as many exhibits again, but that's just the way this process runs.

JUDGE: All right.

MR COLLINS: And this Court may not want necessarily, and the Court has said this in Mago, to hear advocacy and it feels that not what most informs a court's decision and the Court was perfectly candid and frank about that, but --

JUDGE: Well --

MR COLLINS: -- other courts are very much informed by that.

JUDGE: Don't get me wrong, Mr Collins. I enjoy listening to you and all counsel, and by no means -- I'm by no means discounting oral submissions and oral advocacy. All I'm saying is that, I suppose, number one, the written advocacy in the submissions is a lot more crucial in certain respects. The -- and the points made generally have an inherent logic, and you can -- you know, you can only make so much out of a silk purse, out of a point I didn't physically get, for example, in a particular case, or vice versa indeed. So what I'm saying is, you know, I know where advocacy is important, I enjoy listening to it, and present company very much included, but I'm just saying one shouldn't be unrealistic about the extent to which one can persuade a court that white is black or vice versa. You know, the points have an inherent logic. Now, you'd say, well, the Court has already been

subtly persuaded by the pleadings and the written submissions, that's all valid, but my -- my point is not that oral submissions are irrelevant; it's just that their relevance is not all encompassing for the reasons I mention.

Okay, look, I appreciate none of you seem to be enthusiastic about this, but I think the Court has to get a vote as well --

MR FOLEY: Maybe the important one, Judge, maybe.

JUDGE: What I'm going to do is just I'm not going to reserve judgment. I'm going to just take it away, think about it, and tell you on Monday if I'm either reserving judgment or doing something else, and I do note the anxieties about the something else, if there is something else not being too time consuming, and I note Mr Foley's suggestion that it's going to be -- if there is something else, it could be written submissions and maybe in a relatively short period like seven days or something. And also nobody has to come back with anything. If people say, you know, you have the basics or, I suppose, Mr Collins's position. But, look, the basics are there anyway on the pleadings. That's where the case is to be won or lost, so if you'll humour me and --

MR COLLINS: No absolutely, Judge. We'll be dictated to by the Court.

JUDGE: Well, no, no, no, I try not to do that if possible. I'm just going to ask for indulgence.

MR COLLINS: May it please the Court.

JUDGE: Let me take it away, and we'll list it for mention on Monday, and I'll tell you what I'm doing then. Is that all right?

MR COLLINS: May it please you, Judge.

JUDGE: Okay. Thanks, everybody.

Court adjourned

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Annex VIII – DAR of 25 November 2024

Bill No: H.MCA.2024.0000280

THE HIGH COURT

BEFORE THE HONOURABLE MR JUSTICE HUMPHREYS

_____

25 November 2024

_____

ECO ADVOCACY CLG

v.

AN BORD PLEANÁLA

_____

Counsel for the Applicant: Mr Collins, SC

Ms Heavey, BL

Counsel for the Respondent: Mr Foley, SC

Mr S Hughes, BL

Counsel for Notice Party: Ms Murray, SC

Ms E O'Callaghan, BL

ECO Advocacy CLG v. An Bord Pleanála

25 November 2024

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REGISTRAR: 2024/2900 ECO Advocacy COD and An Bord Pleanála.

MR COLLINS: Yes, Judge, the court will recall, the Court has not quite reserved its decision yet.

JUDGE: I called you back.

MR COLLINS: May it please the Court.

JUDGE: Now why did I call you back? So I have have we got Ms Murray here.

MS MURRAY: Yes, Judge, I'm here for the developer and I think Mr

JUDGE: Okay, great. So I have a draft on the stocks nearly ready to go of a list of cases that may come up in different situations on the recurring basis. So I may publish that at some stage and if I do, that may be this week. So that is so I know none of you are keen on that interfering with the fact that you have already made your submissions here. So I look at it with a view to saying is there anything on this that is really critical to this case that I should mention. So I would love to say there was nothing and we can just reserve judgment. But I just wanted to review it. And so there were two cases that there were two cases that did occur to me as being potentially of significance. So one is Casey and the Minister for Housing, which is where Murphy J, in the High Court, had essentially said that failure to publish a decision which was the this is your Core Ground 1 now we are talking about.

MR COLLINS: Mm hmm.

MR COLLINS: Failure to publish a -- or a licence meant that the process was incomplete and the licence, I suppose, she didn't quite say but it was effectively invalid because she wasn't even prepared to deal with the challenge to an amendment of the licence. Whereas Baker J in the Supreme Court said that failure to publish the decision didn't render it invalid. So that seems potentially relevant to Core Ground 1.

The second case was Donnelly J and Ballyboden and the issue of a right of a Notice Party to defend proceedings. Where the point made was that the I think it was Donnelly J, wasn't it? The point was that the point was that the Court itself had a role in terms of granting relief even if it wasn't opposed. So that potentially has a relevance in terms of the discretion argument, on the basis that even if there is an infirmity with the Respondents pleading about discretion, ultimately the grant of relief is something the Court has to be satisfied about. So on that logic, the Court could if it thought that there was some discretionary reason not to grant relief, it could do that. So that is Donnelly J, in February of this year in Ballyboden. So those were the only two cases that occurred to me from the list that might be of major significance. That's why I called you back, so I could check the list and tell you if there was any case law that I should mention to you.

So essentially, what I'm wondering is and really I will let you decide really essentially, should I refer judgment now, or do you want to engage in some other procedure?

MR COLLINS: Well, Judge, certainly I want to engage on the issues the Court has just raised there a moment ago and I still have, as I've indicated before, my difficulty is that I felt I didn't have enough time in opening and I certainly didn't have enough time in reply. And I still want to deal with that issue, also Judge.

JUDGE: Well

MR COLLINS: Just 15 minutes in reply, Judge, in a case of that magnitude just is simply -- it's just never going to be enough.

JUDGE: Well, look there are aspects of this we may have to agree to differ on, obviously Mr Collins, okay. But you can take it as read that I want you to be happy insofar as I can do that and there is obviously a lot of other dimensions to the scarcity of time that are outside of my control. What I was going to propose is if you want to come back, either on things that you felt you didn't have time to open in your opening, things you didn't have time to open in your reply or in the two cases that I've just mentioned, or in the other case, of if you want to wait for the full list of cases to be published during the week, if it is published midweek, which I'm hoping but I can't guarantee anything. I'm open to you coming back on that but just given the sheer scarcity of time in this business, it's probably more going to be having to be in writing, rather than orally. Although, I wouldn't completely rule out a short time on Monday, towards the end of the term but in principle it would be, it would have to be heavy on the writing. And I'll be --

MR COLLINS: Judge, I will take the opportunity for a written submission. But I would like an oral submission as well. The Court knows my views on this.

JUDGE: Well, I do. And I am look it's not that I'm

MR COLLINS: Judge, I think I've had longer just now than I did in my entire reply. That's the reality.

JUDGE: Please, Mr Collins. No debating points. I'm not wholly unsympathetic to you that in a sense that in an ideal world, I would give everyone more time; okay? But there are factors beyond my control. There are 240 live cases in the list. We discussed all this and I don't really want to debate it.

MR COLLINS: I understand all those difficulties, Judge, but I don't see how, with the greatest of respect, they are cured by giving people really short periods of time, leaving them unhappy as they are and then us having to come back perhaps on multiple occasions afterwards to tidy up loose ends.

JUDGE: Okay. Well, look come here. I don't want to debate it. I don't want to argue with you or anybody on it. What I do want to do though is to help you and assist you and try and make you less happy than you otherwise would be, even if I can't make you completely happy.

MR COLLINS: May it please the Court.

JUDGE: So give me a suggestion that I can work with.

MR COLLINS: I will take the Court's written submission possibility, if that's available.

JUDGE: Okay.

MR COLLINS: And then we can built that into some sort of reply is going to be required presumably from the board as well and -- or is that intended, I don't know. But I assume Mr Hughes…?

JUDGE: No I was open to that. Do you want to give me a concrete suggestion, how long would you like?

MR COLLINS: Well, I think I need about two weeks, just to take from what the Court has said and of the Court is publishing a list during this week, I would like to see that and have an opportunity to consider it. So perhaps if I had until Friday week. And then if my friends a further week and then if we had, as the Court suggests, maybe a Monday at the end of the list, I would be grateful.

MR COLLINS: Okay, well let me go can I go around the table then and see what other people think.

MR COLLINS: May it please the Court.

JUDGE: Okay, Mr Hughes?

MR HUGHES: I would suggest the written submissions, what is being suggested so long as we might have to chance to see those.

JUDGE: Hold on, I am just having a difficulty hearing you towards the back of the Court, can you bend one of those microphones towards you there a little, make life a bit easier.

MR HUGHES: Sorry, Judge. Yes, Judge, if written submissions are what is being suggested, I don't have a difficulty with that, save that we would be replying to what Mr Collins put in. I understand obviously there needs to be expedition in the matter. So I appreciate they might have to be truncated directions, in that regard. So long as we go after Mr Collins written submissions I don’t have any difficulty with that.

JUDGE: Two plus one isn’t inherently implausible; is it?

MR HUGHES: I don't think so in circumstances where a list is being published in the middle of this week so I suppose I wouldn’t factor that time into the computation.

JUDGE: Yes, now, that's the intention, it's not a guarantee or anything like that, you know. Okay, all right thanks. Okay, Ms Murray, this is all unwelcome news from your point of view, I'm sure, but work with me, rather than against me.

MS MURRAY: I am going to work with you, Judge. I from if Mr Collins is going to put in written submissions by Friday week, then I think a week thereafter for us to reply should be adequate, Judge. I would be asking however that those submissions from Mr Collins be limited to the two cases that the Court has identified and I think the Court also said that you would give him an opportunity to refer to matters that he did not deal with in opening. But again Mr Collins had his hearing. So any written submissions should not be able to be just free ranging all over the place. They need to be confined either to the cases that the Court has raised or cases in the list but they can't be a complete re opening and re hearing of the case. The case has been heard, Judge. And I think if the Court is to facilitate Mr Collins and anything else, it should be simply by way of written submissions, Judge, with an opportunity to reply to both the board and the notice party. This is a case that was covered by the expedited hearing, Judge and it was applied for and it was granted. And Mr Collins spent a good deal of his time on the Tuesday just arguing with the Court about that and I say that that time could've been better spent, Judge, than opposed to actually arguing

MR COLLINS: Judge

MS MURRAY: Sorry, Mr Collins and so in those circumstances, Judge, Mr Collins has been given the leeway by this Court to put in submissions and I would be urging the Court that that is all that Mr Collins gets is an opportunity to put in written submissions in respect of the cases and both the Board and myself get an opportunity to reply. But in an expedited case there has to be an ending and the whole purpose of the expedited procedure is that these cases can get on quickly, Judge, and be dealt with quickly.

JUDGE: Well, Ms Murray.

MR COLLINS: Judge

JUDGE: Ms Murray, look no, I totally hear you; okay. I suppose my where I am coming from is two things. One is one is that there just are an unusually large number of moving parts and the fact that this exercise, the draft list of cases under contemplation means that it just feels more appropriate to it would be one thing if, you know, judgment was given and then the list happened next week. But given that it's happening mid stream it feels more appropriate to allow the Applicant an opportunity to engage with that. You know, especially as there do seem to be cases that are potentially of relevance.

MS MURRAY: Yes, and the Court has identified two cases and I think we had this discussion at the hearing. The main point in the case, relates to a screening for AA and the test.

JUDGE: Yes.

MS MURRAY: And I don't think there's any dispute between the parties, as to the relevant cases and indeed I think the relevant cases were all mentioned by all parties in the submissions. The issue is the application of that test to the facts of the case. Now, I take it the Court has identified two new cases that from recollection weren't addressed by anybody --

JUDGE: Yes.

MS MURRAY: -- and I've no difficulty with that. But you know, this is a very restricted case.

JUDGE: Yes.

MS MURRAY: The issue in the case is quite narrow and therefore, you know, the submissions need to be narrowly focused as well, Judge.

JUDGE: Sure. I get that. Sorry, the other two points I want to make here that I am by no means disagreeing with you about the need for people to work within the time allocations. And I'll just be thinking about that between now and whenever judgment is given. And you know, that may be something I may try to have to clarify in the judgment. But the other thing is just the way things are happening for me at the moment, there is -- you know, in an ideal world, you get your judgment two to three weeks after the hearing. And as far as I'm concerned, I just we aren't quite in an ideal world at the moment and I think, I don't actually think you're going to be getting a judgment, collectively, any later -- if I give the Applicant a chance to come back, than you would be if I didn't give a further submission because I'm just not going to be in a position to take this up

MS MURRAY: When the Court said submission, is the Court talking about a written submission or oral submission?

JUDGE: Well, I mean I well, the oral submission would be having to be fairly brief, you know, the end of a list on a Monday, kind of 15 to 20 minutes each, that would be the absolute height of it, I think.

MS MURRAY: But in respect of the new submissions as opposed to a free flowing, going back over the entire case, Judge.

JUDGE: Well, it will have to be very focused or if it's not focused, the time will just run out. That's basically it. I know you don't like it and I know you don't want it but then there it is.

MS MURRAY: Well, Judge, it does seem the Applicant is being given a huge amount of leeway.

JUDGE: And in the particular circumstances of the way in which the hearing ran out. Obviously I'm in the Court's hands and we'll work with the Court in relation to this. But I would…

JUDGE: Yes, if it wasn't if this list wasn't in contemplation I would have just referred judgment last week. That's the kind of --

MS MURRAY: I understand.

JUDGE: -- inciting factor.

MS MURRAY: Yes.

JUDGE: Now, that the Applicant is coming back with a submission anyway, they might as well put in anything they want to say.

MS MURRAY: Anything they want to say, Judge.

JUDGE: Anything they want to say, yes, I know. I know.

MS MURRAY: But that does seem like a second bite completely of the cherry, not limited to just the cases that the Court has in contemplation.

JUDGE: I know, I know. Submission judgement, I agree with you, but look that's what they are asking for and yes.

MS MURRAY: I appreciate that that is what they are asking for but they had the opportunity to run their case.

JUDGE: Mm hmm.

MS MURRAY: And all that the Court has pointed at that's new is this list that we haven't seen.

JUDGE: Yes.

MS MURRAY: And the Court has identified two cases that it has in its mind and I would urge the Court that if the Applicant is going to be given a further opportunity that it is restricted to the cases either that the Court is referring to or the cases that were in the list that perhaps the Applicant thinks maybe of some relevance. But it can't be just a free-flowing, I'll chuck in whatever I want, written submission, Judge.

MR COLLINS: I am really starting to take exception to this.

JUDGE: No, please

MR COLLINS: Ms Murray is now basically saying we are going to go wild here.

JUDGE: No, please. Just

MR COLLINS: But I was not given the opportunity orally or an paper, and I want that opportunity and I am entitled to it.

JUDGE: Mr Collins, please, please.

MS MURRAY: I'm not getting into a screaming match with Mr Collins here and I didn't interrupt him and he should have the courtesy not to interrupt me either.

JUDGE: Yes. I know, I know. All right. Look, I get your point. The only consolation, I can offer you, Ms Murray, I know replying to this is going to be a pain and you'll say he could've done it all

earlier and all that kind of stuff. I get all of that. The only consolation I can offer you is that I don't think the net result is going to be that the judgment will be delivered whatever way it goes, that it would be delivered at a later date than it otherwise would have been, for the simple reason I've got too much on my plate at the moment. And I just can't envisage doing it in next three weeks anyway, even if we didn't have this problem. So if that's a consolation, I hope it is.

MS MURRAY: In fairness, this court is probably one of the fastest Courts to give judgment in any event, Judge. You know, the judgments are delivered so quickly so I don't really think a couple of weeks here or there is going to bother me. But I am more bothered about the process, Judge. But I've said my piece.

JUDGE: You can keep saying that the first bit anyway.

MS MURRAY: Yes, Judge, and I'll now let Mr Collins reply, if he wants to reply.

MR HUGHES: Judge, before that I just want to clarify, is the length of the submissions, the practice directions seems to envisage 5000 words limit for a reply to an expedited procedure and in certain other instances it does seem that 5000 words might be an appropriate limit in relation to this particular exercise.

JUDGE: Okay, all right. Okay, Mr Collins, can you humour me now on this, okay? First of all, can I just take you as disagreeing with your friends on all things that warrant disagreement and can we just cut to the chase? I am minded to let you say whatever you want to say.

MR COLLINS: May it please the Court.

JUDGE: Do you have any views about a word limit?

MR COLLINS: I think it should be unlimited, Judge. I don't think I will be exceeding a 5000-word limit but in the event that it becomes necessary, I don't see Judge, I just don't see how it is that we get limited at all. I was very limited in my opening. I was given a hundred minutes in total. I was only able to reserve 15 minutes of those myself in reply. There just simply isn't enough time, in a case of this magnitude, to deal with all of the issues properly in that sort of foreshortened period. I raised that at the time of the trial. I'm raising it again now.

JUDGE: Okay.

MR COLLINS: For Ms Murray to say I am going wildly off piste, I am still confined in my pleadings. I'm confined to the case I wish to bring. And I'm entitled to make the case that I wish to make. And if I can't make it orally in court, I should be able to make it on paper after if that is what is required.

JUDGE: Okay. Well, look I okay look, I will go back to my point here. We are back to the inherent nature of the thing that not everyone can be happy about everything and -- there comes a time. But I will give you what you want. I won't impose a limit; you can raise anything you want. Just bear in mind, the list of cases may not come out towards the latter half of the week, so you may have to mobilize yourself with a shorter time period. But I will give you the two weeks to finishing on Friday. I will give the opposing parties one week.

MR HUGHES: Sorry, Judge -- sorry for interrupting, just in terms of unlimited. I don't know if a week would be feasible for us, in terms of the time.

JUDGE: Well, hang on, the Applicant then time would expire on the 6th of December. Then realistically the only possible hearing day then really would be the 16th of -- the end of the list on the 16th. But given the amount of latitude and the no word limit and the fact you can say anything you want, we need to have a fairly tight time limit on the oral submissions.

MR COLLINS: I understand that, Judge.

JUDGE: So can we -- make a view down for an hour. Can you live with could you live with half an hour on this and 15 minutes each.

MR COLLINS: That would be had 45 minutes, I think, Judge. 15 minutes for each of the three parties is 45 minutes.

JUGE: No, 15 minutes on both sides. They'll have to divide it up between.

MR COLLINS: That's a matter for themselves. Certainly I can do 15 minutes, Judge.

MS MURRAY: So Mr Collins will get half an hour?

JUDGE: No, no -- 15 minutes for the Applicant and 15 minutes for the opposing parties collectively.

MS MURRAY: And that would be on the 16th, Judge?

JUDGE: That would be on Monday 16th at the end of the list, yes.

MR COLLINS: So 15 minutes, 7 and a half and 7 and a half?

JUDGE: Yes, exactly.

MS MURRAY: So be it.

MR COLLINS: We can bring in our little chess clocks, Judge, and we can do it perhaps in turns.

JUDGE: Very topical, Mr Collins. And we need to celebrate that sport of Monarchs.

MR COLLINS: I take that back, Judge.

JUDGE: You can bring the chess clocks. Okay then, when are we going to have the -- when are we going -- maybe they can have until the middle of the following week or -- let's see.

MS MURRAY: But, Judge, we were supposed to have until the 6th of December to --

JUDGE: No, it will have to be one week, sadly. Okay? Yes, yes, sorry about that. Okay, so opposing submissions by the 13th then. All right.

Case adjourned

Certified to be a complete and correct transcript of the record of the proceedings herein*:

Office Manager

Epiq Europe Limited (Ireland)

(*The absence of a dedicated logger in court to provide a detailed log may result in speaker names being omitted or unconfirmed.)

Annex IX – applicant's further replying submissions of 6 December 2024

THE HIGH COURT
JUDICIAL REVIEW
Record Number 2024/ 290 JR
Between:
ECO ADVOCACY CLG
Applicant
-and-
AN BORD PLEANÁLA
Respondent
-and-
STATKRAFT IRELAND LIMITED
Notice Party

FURTHER REPLYING LEGAL SUBMISSIONS ON BEHALF OF THE APPLICANT

"At the current rate of decline, population extinction could be expected within 25 years and there could be fewer than 50 breeding pairs of hen harrier remaining within the next 10 years."

(Government of Ireland publication, Irish Wildlife Manual 147, "The 2022 National Survey of breeding Hen Harrier in Ireland", Tab 3 Grounding Affidavit, internal page 20).

1. In February 2024, the Government published the 2022 National Survey of breeding Hen Harrier in Ireland, Irish Wildlife Manual 147 ('IWM 147'). The publication of this report, although incorporating the results of earlier surveys, postdates the impugned decision and was exhibited by the Applicant for the sole purpose of assisting the High Court in interpreting the significance of the conservation objectives for this SPA, and the measures therein, for delivering the objectives of the Birds Directive and Habitats Directive. (See paragraph 9 of the Grounding Affidavit). This publication (commissioned by the NPWS) gives added validity to the sense of alarm in the two submissions made by the NPWS to the impugned process, the letter of 24 March 2020 exhibited at Tab 10 of the Grounding Affidavit, and the letter of 1 April 2021 exhibited at Tab 13 of the Grounding Affidavit.

2. It is respectfully submitted that the status of the hen harrier, as reported in IWM 147, is also relevant to the work of this Court in determining if the Board had proper regard to the submissions of the Minister for Culture, Heritage and the Gaeltacht, prepared by ornithological experts in the NPWS, and by extension when determining whether the Board's appropriate assessment was lawfully carried out. It is also relevant to the exercise of any discretion. It is submitted by the Applicants that the NPWS, with its knowledge of the confidential locations of nesting and roosting sites and first-hand reports of the "increasing number of hen harrier collision strikes reported since the last survey" (internal page 38 of IWM 147, Tab 3 Grounding Affidavit), is best placed to advise its own Ministers, and through them the Planning Authority and Board, about the likely effects of proposed wind farm developments on the conservation objectives of the hen harrier.

3. Article 12 of the EU Birds Directive 2009/147 EC requires that Ireland prepares periodic reports on the implementation of the Directive. In part fulfilment of this obligation, Ireland undertakes a national survey of the hen harrier, typically every five years, including at the six Special Protection Areas (SPAs) designated for the conservation of the species:

- Slieve Bloom Mountains SPA
- Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA
- Mullaghanish to Musheramore Mountains SPA
- Slievefelim to Silvermines Mountains SPA
- Slieve Beagh SPA
- Slieve Aughty Mountains SPA

4. The 2022 survey, Irish Wildlife Manual 147 ('IWM 147'), is the wakeup call of a repeating alarm clock. The recent sharp decline in the hen harrier population nationally is sobering. The report concludes that the species, having recovered in the past from a previous decline, is now facing extinction in Ireland within the next 25 years.

5. As IWM 147 explains (at internal pages 1 and 2), historically in Ireland, there was a rapid retraction in the distribution of the hen harrier in Ireland between 1875 and 1900 due to the destruction of breeding habitat. By the turn of the 20th Century, breeding was confirmed only in south-west Munster and the mountains of Connaught. In the early 20th century, with the growth in game shooting and game preservation, associated raptor persecution resulted in a significantly diminished hen harrier population in Ireland and Britain.

6. The tide turned in the second half of the 20th Century with the advent of protective legislation (s19, s.22(6) and Part I of the Fourth Schedule of the Wildlife Act, 1976), a reduction in game-keeping activities and the planting of young forest plantations in the uplands (Forestry Act, 1946) resulting in the recolonisation of the hen harrier to previously vacated areas. Between 1950 and 1970, population recovery of hen harriers in Britain also likely aided recovery in Ireland.

7. The species is again in steep decline to the extent that it is now facing extinction in Ireland. As observed at page 14 of IWM 147, many of the known historical regional populations now appear functionally extinct for breeding purposes including Castlecomer, Blackstairs, Kilkenny; Curlew Mountains; Inishowen Peninsula; Kildare; Longford-Roscommon; Ox Mountains; west Cork; Wexford and Wicklow Mountains (although some do contain wintering hen harrier). In 2022, there was confirmation that some regional populations held no breeding pairs (Longford – Roscommon, Nagles Mountains) and have not done so for the last number of national surveys. No known breeding hen harrier has been recorded for the past 10 to 20 or so years in Castlecomer, Blackstairs, Kilkenny; Curlew Mountains; Inishowen; Kildare; the north-west; Ox Mountains; and Wicklow Mountains.

8. The 2022 survey reported in IWM 147 notes at page 27: "Declines appear to have accelerated since all previous surveys, from 18% for the period 2005 to 2010; 10% for the period 2010 to 2015 to 38% for the latest comparison of 2015 to 2022. The rate of decline in the SPAs has more than tripled within these past seven years despite extensive management supports via the Department of Agriculture, Food and the Marine (or DAFM's) Green, Low-Carbon, Agri-Environment Scheme (GLAS) and the Hen Harrier locally led results-based programme (HHP)"

and concludes:

"Notwithstanding agricultural programmes, the other sectoral pressures such as recreation, wind energy developments, and forestry within the SPAs and nationally may also exacerbate such sudden declines as all these factors are likely operating cumulatively on the hen harrier." [underlining added]

9. As observed at page 23 of IWM 147, The Nagles (Co. Cork) population has been lost, a region that formerly held up to 11 pairs of hen harrier. Surveyors report that harrier winter roosts there have declined to zero occupancy in the last three to four years and that both proposed and consented wind energy developments in the region may further reduce suitability of habitat for hen harrier. The known population of hen harrier in Co. Leitrim and Co. Cavan had increased from all surveys until 2015, to a maximum of 15 breeding hen harrier territories. However, by 2022, a decline of 27% from this peak has been observed. Six of the eight pairs identified in 2022 were around Cuilcagh Mountain. The remaining two pairs were recorded in Northern Ireland, on the Fermanagh side of the mountain. A wide range of pressures and threats for hen harrier in the Cavan/ Leitrim region was identified in IWM 147 including wind energy development. As observed at page 24, the Slieve Aughties region (Co. Galway and Co. Clare), which is larger than the Slieve Aughty Mountains SPA, has had its population decline by around two thirds since 2015 and now holds fewer than six pairs of breeding hen harrier. The extent of declines here since previous surveys is severe, with an 82% decline when compared to the peak population recorded in 2005 (27 breeding pairs). The extent of losses of breeding hen harrier in the region are said by the NPWS to be widespread and substantial in the national context. The range of pressures and threats recorded by surveyors include wind energy developments and associated utility and service lines. As observed on page 25, the Stack's, Glanarudderies, Knockanefune, Mullaghareirks, north of Abbeyfeale region (which includes the Stacks complex SPA) historically has held the largest proportion of the national population. This region's population has declined by around 10% since the previous national survey in 2015, and by 38% since the population peaked in 1998-2000 (45 pairs) and 2005 (45 pairs). Again, the threat of both extant and prospective wind energy development sites in the region is identified.

10. The Slieve Blooms SPA has 'bucked the trend' for 2022 with an increase of just one additional breeding pair in 2022 (9 no.) than in 2005 (8 no.) but had fewer pairs in 2022 than in 1998/2000 (11 no.). The report notes at page 28: "All of the Slieve Bloom breeding pairs were located within heather habitats and none in afforested habitats. Surveyors reported that the adjacent coniferous forest plantations are a source of potential predation risk (see also Sheridan et al., 2020) and that

extensive and invasive self-seeded conifers are compromising the remaining available heather moorland and other supporting habitats, preferred by the hen harrier."

11. The evidence, therefore, as reported in IWM 147, is that the hen harrier's preferred heather habitat within the Slieve Blooms SPA is declining. This gives affirmation to the concerns for the hen harriers on Garryhinch Bog, immediately adjacent to the proposed windfarm development, expressed in the NPWS submissions (Tab 10 and 13 of the Grounding Affidavit) and in the submissions of Birdwatch Ireland (Tab 6 of the Grounding Affidavit) and ornithologist Ricky Whelan (Tab 7 of the Grounding Affidavit), and an explanation for the alarm expressed by all of these experts.

12. The submission of 23 March 2020 prepared by the experts in Birdwatch Ireland (Tab 6 Grounding Affidavit) states:

> "Although monitoring at the site has not been conducted formally since 2016, a hen harrier was recorded in this area in October 2019 (per comm – Ricky Whelan), which indicates that the site is still being used by Hen Harrier during the winter. Hen Harrier can alternate use of roost sites throughout the winter and while we accept that targeted surveys (3 surveys in the winter of 2018) were conducted to record the presence of Hen Harrier, the fact that Hen Harrier were not recorded does not infer that the site is no longer used or does not remain an important winter roost for the species. We also refer to the methodology previously employed to detect Hen Harrier at this site (by the [NPWS] Hen Harrier Winter Roost Survey), which routinely involved four surveyors positioned at four independent vantage points, which gives the extent and characteristics of the site, is necessary to effectively determine use of Hen Harrier. In the survey methodology documented in the NIS report it is not possible to determine how many observers and vantage points were used during each survey, and this level of detail is necessary in evaluating the robustness of the survey. In general we recommend that further attention is given to determining whether the site is still being used by Hen Harrier during the winter, and its importance in the national context, and we recommend that the survey approach follows best practice guidelines and includes a review of existing data on the use of Hen Harrier at the site."

13. The submission of 24 March 2020 by the experts of the Minister for Culture, Heritage and the Gaeltacht (the NPWS), founded on the statutory footing of art. 48 of S.I. 477/2011 (whereby the Minister for Heritage may provide advice and guidance to any public authority in relation to any question as to whether that public authority is obliged to carry out Appropriate Assessment in relation to a particular plan or project) states as follows:

> "The Department considers that winter roost checks, conducted on 26/10/2018, 22/11/2018 and 11/12/2018, are insufficient given the size of the area of suitable winter roost habitat adjacent to this proposed wind farm development and the importance of the area to wintering hen harrier. Recently published guidance (O'Donoghue, B. (2019) Irish Hen Harrier Winter Survey, Survey Guide, Hen Harrier Roost Types and Guidelines to Roost Watching ihhws.ie/IHHWS_Guide.pdf) recommends that suitable vantage points which cover the entire extent of the area of interest should be used. Depending on the size of the site and area of interest, more than one person may often be needed for observations. Scottish Natural Heritage recommend survey for a minimum of two years to allow for variation in bird use between year and advise that any hen harrier roost sites within 2km of a proposed wind farm should be identified. The Department recommends that in order to complete assessments, further information in relation to communal hen harrier winter roosts in the vicinity of this proposed wind farm sites is required."

14. It is clear that this expert opinion considered the surveying of the site to be insufficient. This is a clear lacuna in the assessment. This and the submissions of Ricky Whelan prompted a Further Information request by Laois County Council which resulted in the Developer's FI response exhibited at Tab 11A and Tab 11B of the booklet of exhibits. The survey effort for the FI response is described by the developer as follows:

> "Four experienced observers were stationed at four separate vantage points (VPs} that overlooked the Garryhinch bog subsite. All surveyors simultaneously conducted VP surveys starting three hours prior to dusk and continuing until observations were no longer feasible in the dark per IHHWS guidelines (O'Donoghue, 2019). IHHWS guidelines state that surveyors must be present at least 40 minutes before dusk, so our survey effort exceeds that required by IHHWS guidelines. Surveyors recorded all hen harrier flight lines and roosting behaviour."

15. The Developer's FI response implies that it had conducted 2 years of bird surveys (to comply with best practice) and concludes (at internal page 20 of Tab 11b of the Grounding Affidavit):

> "The assertion that hen harriers from the SPA will fly through the proposed turbines en route to the Garryhinch subsite is speculative. Given that no hen harriers have been recorded within the proposed Dernacart wind farm site over two years of bird surveys, it strongly suggests that this is not the case on the basis of the scientific data gathered. We also believe that the assertion that hen harriers will fly through the proposed turbines is likely to be incorrect for a number of additional reasons. First, the birds can easily enter the Garryhinch subsite from the northwest of Garrymore subsite, avoiding the turbines altogether, which seems likely, given the documented 250-500 m avoidance distance for hen harriers flying near operational wind turbines in the scientific literature (Pearce-Higgins, et al. 2009). Second, if the birds do indeed follow the rivers Barrow or Owenass out of the SPA, they may well enter the Garryhinch subsite from the northwest or southeast, again, avoiding the turbines altogether. Third, the turbines are located at least 500 m from each other, providing sufficient space for hen harriers to pass between turbines."

16. The Further Information response was forwarded by Laois County Council to the NPWS. By letter dated 1 April 2021, the NPWS responded ('the second NPWS submission'). The opinion of the NPWS ornithologists was that only 5 months of adequate surveying had in fact been carried out by the Developer and that any potential hen harrier usage of the roost site in most of October 2020 and March 2021 was missed due to the incorrect monthly timing of the survey. Again, this represents a significant lacuna. This is not a clash of expert opinion. Rather, it is a failure of the Board to have proper regard to the expertise of the NPWS and/or its submission that the survey effort was not the 2 years required by best practice and claimed by the Developer.

17. Because of its significance to these proceedings, and for the convenience of the Court, the second NPWS submission is reproduced here in full:

> "The National Parks and Wildlife Service (NPWS) refers to its original submission dated 26th March 2020 and included as an attachment in email. The NPWS would like to point out that a key point in its submission which was not included In the Further Information request was the need to assess the potential for this project to undermine the conservation objectives for hen harrier in the Slieve Bloom Mountains Special Protection Area (SPA), by virtue of the known connection between this SPA and the Garryhinch hen harrier winter roost site.
>
> The Garryhinch winter roost site has been the subject of several years of targeted surveys as part of the Irish Hen Harrier Winter Survey. Up to six hen harriers have been recorded roosting communally at this site, including a juvenile bird tagged in the Slieve Bloom Mountains SPA, which lies within 8 km of the proposed development site. This bird provides evidence of a pathway between the SPA and the nearby roost site.
>
> The NPWS notes that a Hen Harrier Winter Roost Survey of Garryhinch Bog took place the (sic) 2020/2021 on six dates (30/10/2020, 19/11/2020, 11/12/2020, 13/01/2021, 26/01/2021, 21/02/2021), from the end of October 2020 and until the end of February 2021, totalling 18 hours of surveying, to supplement winter roost checks, conducted on 26/ 10/ 2018, 22/11/2018 and 11/12/2018.
>
> As pointed out in the NPWS's original submission, Scottish Natural Heritage recommend survey for a minimum of two years to allow for variation in bird use between the years. The NPWS considers that winter roost checks, conducted on 26/10/2018, 22/11/2018 and 11/12/2018 were inadequate, given the size of the area of suitable winter roost habitat adjacent to this proposed wind farm development , and should not be counted as part of the two years of surveying recommended. Therefore only 5 months of adequate surveying has taken [place]. [Underlining added.]
>
> The Further Information points to the fact that 2020/2021 winter roost surveys recorded only a single hen harrier at the Garryhinch bog subsite across 18 hours of survey time over five months as evidence of its insignificance. It is noted that guidance on which the survey was based specifies that watches at roosts should be carried out at least once a month from October to March, on the first day of the month or as close to the first as possible. The NPWS notes that any potential hen harrier usage of the roost site in most of October 2020 and March 2021 was missed due to the timing of the survey. O'Donoghue (2021) found that over a third of known roosts were occupied on less than 50% of watches and points out that this is an important consideration for surveys and investigations to inform planning and land

use change decisions. Satellite tracking data has shown that individual Hen Harriers may use different roosts in different years, perhaps dependent on site specific circumstances or other factors yet to be confirmed. [underlining added]

Scottish Natural Heritage advise that roost sites within 2km of proposed wind farm development should be identified. The known roost site at Garryhinch Bog has not been identified. The single hen harrier sighted was lost from view before it could have, potentially, been followed back to a roost site. The bird appears to have been lost from sight within the vantage point 2 view shed, during daylight hours at 15:34 (dusk was 17:07 on this date) (Figure No. 3.1. Appendix 4.2, Hen Harriers). Guidance on which the 2020/2021 survey was based states that Roosts can be located by observing hen harriers in the late afternoon and watching them back to the roost. This guidance goes on to say that 'to count the birds, a roost should be watched from a suitable vantage point from late afternoon until dusk (1.5 hours before sunset to half an hour after sunset or until it becomes too dark to see; Gilbert et al,. 1998)'. Satellite tracking data has shown that individual Hen Harriers may return to the same roost sites on a multi-annual basis and therefore location of the roost site is important to survey design. It is also important in terms of assessing the impacts of disturbance and damage cited in the Further Information response. The conclusion from the hen harrier report (Appendix 4-2) was:

> "Taken together, it seems likely that while the Garryhinch subsite may have been used as a hen harrier winter roost between the 2013-2016 period, this is no longer the case and if the Garryhinch subsite is still used as a winter roost by hen harrier at all, then it is infrequently and in a limited way and does not represent a core roosting area."

Given the inadequacy of surveying pointed out above, the NPWS is of the opinion that this conclusion and any subsequent categorisation of the importance of the winter roost site for hen harrier is not supported by best scientific evidence. The NPWS remains concerned that the impacts of the proposed project, on the conservation objectives of the Slieve Bloom Mountains SPA, have not been assessed.

….

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Connor Rooney

Development Applications Unit"

18. Once again, the lacuna remains. This is the elephant in the room that no amount of pointing to the material produced by the Developer on other matters is capable of resolving. This is of particular significance as matters that this Court is being asked to decide comes at a pivotal point for the future of the hen harrier in the Slieve Blooms and in Ireland as a whole. The assessment under Art. 6(3) of the Habitats Directive involves "…a thorough and in-depth examination of the scientific soundness of that assessment [which] makes it possible to ensure that there is no reasonable scientific doubt as to the absence of adverse effects of each plan or project on the integrity of the site concerned, which it is for the national court to ascertain." Case C-293/17 *Coöperatie Mobilisation for the Environment*. [underlining added]

19. The evidence of the experts in the NPWS, while raising scientific doubt in the context of Art. 6(3) of the Habitats Directive or the experts on behalf of the developer in setting out to dispel such doubt is not a substitute for the High Court's role in the identification and implementation of the correct legal principles at issue. The absence of reasonable scientific doubt as the determinant of the Board's jurisdiction, is a matter of law. The issue for the Court to determine in relation to the expert evidence of the NPWS is whether the Board could have been satisfied that the reasonable doubt raised by the NPWS in its second submission in relation to the adequacy of the entire bird surveying effort, was removed. Such removal is a pre-requisite to a grant of permission.

20. The Applicant cannot see how the Board could have been satisfied, in circumstances where it neither commented on the information gap nor made any attempt to fill it. Paragraph 51 of the judgment of Donnelly J. in Ballyboden Tidy Towns Group v An Bord Pleanála [2024] IESC 4 states:

> 51. While an expert body may have specific expertise in an area, in matters of law the High Court, subject to appeal, is the ultimate decision-maker on the interpretation and application

> of law. It is well established that the courts could not and would not hear evidence as to the law of the State (see Declan McGrath and Emily Egan McGrath, McGrath on Evidence (3rd ed, Round Hall 2020 para 6-152). The courts will accept submissions, however, on any issues of interpretation raised before them. Although the High Court may rightly expect that the submissions on the law of an expert decision-maker in its area of expertise will be considered, measured and up to date, those submissions are not a substitute for the High Court's role in the identification and implementation of the correct legal principles at issue. In our adversarial system, the court must hear from all opposing parties and make its own decision as to the applicable law. In some cases, the true legal position may be readily discernible. Thus, the High Court may not always require much time in reaching a decision even on a contested case. That is a case-by-case adjudication by the High Court which does not amount to an automatic acceptance of an expert decision-maker's view as to the law.

21. This is not the first time that the Courts have been asked to consider decisions that concern the future of the hen harrier; but a comparison of the timelines of previous hen harrier cases with the state of the population as most recently reported in IWM 147 shows that no other court has been asked to consider impacts on the species at such a critical stage in the demise of the national breeding population.

22. The first mention of the hen harrier in the Irish courts is the judgment of Herbert J. in *McCallig v An Bord Pleanála* [2013] IEHC 60 which concerned a challenge, commenced in 2011, to a windfarm in Glenties, Co. Donegal. While the fortunes of the hen harrier in Co. Donegal were on the rise at the time that Mr Justice Herbert was considering its habitat, the report of the 2022 survey in IWM 147 reports a dramatic decline since 2015:

> "The Blue Stack Mountains, Pettigo Plateau and south Donegal population increased by 1100% between 1998-2000 to 2015. Between 2015 and 2022, this former stronghold has now declined by 42%, with a maximum of seven pairs recorded. The border area with Northern Ireland at south Donegal previously held several pairs but total numbers have declined. Furthermore, several known pairs have been reported by surveyors in 2022 to have been likely displaced by recent wind energy developments, including e.g. due to works at Meenbog (Co. Donegal) where extensive environmental damage was caused due to peat slippage."

23. The next appearance by the hen harrier in the Irish courts was in the judgment of Mr. Justice Fullam delivered the on 1 October 2015 in *Grace v Sweetman* [2015] IEHC 593. The proceedings led to the joint Supreme Court judgment of Mr. Justice Clarke and Ms. Justice O'Malley delivered on 24 February 2017 in *Grace and Sweetman v An Bord Pleanála* [2017] IESC 10, one of the small number of Irish cases to have its own Wikipedia entry. This in turn led to the ruling of the Court of Justice in Case C-164/17 *Grace & Sweetman*, which considered the 'trap' risk also raised by the NPWS experts in their first submission to the impugned process.

24. The *Grace and Sweetman* proceedings (which commenced in the High Court on 9 September 2014) concerned habitat for hen harriers in the Slieve Felim to Silvermines Special Protection Area (SPA), described more specifically by Mr Justice Fullam as a site "located in North Tipperary on the slopes of Keeper Hill in the Silver Mines Mountains". The IWM 147 notes a sharp decline in this population of hen harrier since the time of the judgment: "The Slieve Bernagh to Keeper Hill (Co. Limerick, Co. Tipperary) population has declined since 2015, by around 43%, a notable change from a recorded increase between 2010 and 2015."

25. The hen harrier appears next in the judgment of Barrett J. in *Kathleen Connolly v An Bord Pleanála* [2016] IEHC 322 which was delivered on 14 June 2016. These proceedings, which commenced on 31 July 2014, and which led to the judgment of the Supreme Court of 17 July 2018 in Connolly v An Bord Pleanála [2018] IESC 31, concerned a windfarm in Co. Clare and its impact on a population of hen harriers. The IWM 147 reports that Slieve Aughties region (Co. Galway and Co. Clare) has had its population decline by around two thirds since 2015 and now holds fewer than six pairs of breeding hen harrier, noting that the extent of declines here since previous surveys is severe, with an 82% decline when compared to the peak population recorded in 2005 (27 breeding pairs).

26. The next appearance in the High Court for the hen harrier was in the judgment of Haughton J. of 2 February 2017 in *Sweetman v An Bord Pleanála* [2017 IEHC 46] which concerned the likely impacts of the Grousemount Windfarm on the hen harriers associated with the Mullaghanish to Musheramore Mountains SPA. The IWM 147 notes the following regarding the demise of the population in the Mullaghanish to Musheramore Mountains SPA, in the time since the February 2017

judgment of Haughton J.: "Recent monitoring between 2017 and 2021 revealed a consistent population of only 1-2 pairs, a single year (2020) when the population peaked at five pairs (HHP, 2020) and a decline again in 2021 to three pairs (HHP, 2021)." Most recently, of the 2022 survey, the following stark finding is reported: "The Mullaghanish to Musheramore Mountains SPA and Slieve Beagh SPA failed to fledge any chicks during 2022".

27. The hen harrier was next considered in the judgment of Mr. Justice Denis McDonald delivered on 20 December 2019 in *Sliabh Luachra Against Ballydesmond Windfarm Committee v An Bord Pleanála* [2019] IEHC 888, where the Court considered the risk from a proposed windfarm to the conservation of hen harriers from the Stacks Mullaghareirk Mountains, West Limerick Hills and Mount Eagle Special Protection Area ("The Stacks SPA"). The IWM 147 report notes that this region's population as measured in 2022 had declined by a further 10% since the last known population at the time of the 2019 judgment, and had declined by 38% since 2005.

28. This Court, in *Carrownagowan Concern Group v An Bord Pleanála* [2023] IEHC 579, and subsequent judgments, considered the impact of a windfarm on hen harriers associated with the Slieve Aughty Mountains SPA. The facts as set out in the judgment also suggested that the Slieve Bernagh to Keeper Hill Regional population of hen harrier may be impacted by the development. The IWM 147 report records a significant decline since the statistics available in the reports before the Court in 2023, noting: "The Slieve Aughties region (Co. Galway and Co. Clare), which is larger than the Slieve Aughty Mountains SPA, has had its population decline by around two thirds since 2015 and now holds fewer than six pairs of breeding hen harrier", while the Slieve Bernagh to Keeper Hill population "has declined since 2015, by around 43%, a notable change from a recorded increase between 2010 and 2015".

29. By any measure, the hen harrier population is at a crisis point, and in a worse situation than at any point considered by the Courts in the past. It is against this backdrop that the NPWS made its submissions to the impugned process and it is in this context that this Court must establish whether Board had proper regard to those submissions and whether the appropriate assessment carried out by the Board has lacunae and if it contains complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the remaining few hen harriers of the Slieve Bloom SPA (see, to this effect, Case C-258/11 Sweetman, Case C-404/09 *Commission v Spain*, paragraph 100 and the case-law cited).

30. The Slieve Bloom SPA has been afforded national protection since 2012 in S.I. No. 184/2012 - *European Communities (Conservation of Wild Birds (Slieve Bloom Mountains Special Protection Area 004160)) Regulations 2012*. Case C-244/05, *Commission v Germany* suggests that there is an obligation on the national court to assess, for undesignated sites, whether all the measures necessary to avoid interventions which incur the risk of seriously compromising the ecological characteristics of the sites which appear on the national list transmitted to the Commission have been taken. It is difficult to see how there could be a lesser obligation for designated sites. The objective of all concerned, including the courts, should be to ensure that interventions which incur the risk of seriously compromising the ecological characteristics of a European site are avoided. With birds and other mobile species, such protections by necessity should extend to their foraging or resting/roosting areas.

31. It is apparent from paragraphs 7.43 and 7.44 of the Inspector's Report that the Inspector simply adopted the developer's screening which screened out the hen harrier:

> "Screening Determination
>
> 7.43 The Screening Report submitted screens out all Natura 2000 sites on the grounds that there is a lack of suitable habitat in the case of the Slieve Blooms SPA and that the others are removed from the development and will not be affected by disturbance with the exception of River Barrow and Nore SAC. In relation to the Slieve Blooms SPA of which Hen Harrier the single qualifying interest I note that Hen Harrier were not recorded at the site during extensive bird surveys. It is also mentioned within the EIAR that there is no suitable Hen Harrier habitat within the development site. Hen harriers are ground nesting birds that breed in moorland, young conifer plantations and other upland habitats at elevations of between 100 and 400 metres above sea level. The proposed windfarm is between 80m od to 73m od. The core foraging range for hen harrier during the breeding season is 2km, with a maximum range of 10km (SNH, 2016). In the majority cases, the core range should be used when determining whether there is connectivity between the proposal and the qualifying interests. Maximum distances should only be used in exceptional circumstances e.g. if there is suitable habitat within the proposed development site and no other suitable

> foraging habitat exists outside the site. As the proposed wind farm site does not have suitable habitat, the core foraging range of 2km will be used for the assessment. Hen Harrier typically only travel 1km to source alternative nest sites (SNH, 2016). Given the absence of hen harrier recordings during the ornithological surveys and the lack of suitable habitat at the proposed wind farm site, in addition to the distance between the proposed wind farm and the SPA, it is considered that no effects will occur by virtue of disturbance or displacement on hen harrier or the Slieve Blooms SPA.
>
> 7.44 It is for this reason that the Slieve Blooms SPA was screened out. I consider the applicants approach in this regard to be reasonable and note that the Council did not raise any concerns in this regard within the assessment of the application." [underlining added]

32. The issue of the clearance height through which the hen harrier could transit the site to reach the roost site on the Garryhinch Bog adjoining the windfarm simply was not addressed by the Inspector. Page 16 of the AA screening (Tab 5B of the grounding affidavit) refers to the "lowermost height passed through by the rotor blade tips (typically about 20 – 30 metres above ground level). The proposed turbines were subsequently changed to give a clearance of 15 metres above ground level. In an insertion to the EIAR, marked in red in the Further Information appendix exhibited at Tab 11B of the Grounding Affidavit, the Developer states: "The scientific literature shows that hen harriers are renowned for flying at low heights of 10-20m, which is usually below rotor swept heights" (Whitfield and Madders, 2006}, i.e. the revised clearance was not high enough to avoid collision between bird and turbine.

33. The Inspector's addendum report, which was commissioned by the Board specifically to address the subsequently confirmed turbine dimensions, does not mention the Appropriate Assessment *screening* or the hen harrier. It confirms that the newly confirmed turbine dimensions will not change the conclusions of the Appropriate Assessment on the River Barrow and Nore SAC. The Inspector in the addendum approached the issue from the position that the screening was in the past and that the starting point was the single European site that was screened in.

34. This is not changed in any way by the information offered by the Notice Party at paragraph 49 and 50 of its submissions because the Inspector in the first report simply adopted the developer's AA Screening of December 2019 which had clearly assumed that there was proper clearance and did not revisit the clearance issue or the hen harrier screening in the supplemental Inspector Report.

35. The other ground in these proceedings, which also affects the hen harrier, concerns the failure of the Board to publish the full amended EIAR (and NIS) on its website. The Board in oral submissions claimed that the EIAR had not in fact been amended. This is clearly not the case. In Appendix 4.3 of the Developer's FI response to the Planning Authority (exhibited about two thirds of the way into the exhibit at Tab 11B of the Grounding Affidavit), entitled 'Response to Fl Item 2.8', identifies in red type insertions to be made to the EIAR and which are preceded by the statement "The following insertions are to be made to the EIAR" and with footnote: "rows pertaining to hen harrier are shown here only and are to be inserted into the full tables". The same appendix also identifies in red type insertions to be made to the AA screening/NIS, preceded by the statement "The following insertions are to be made to the AA screening/NIS" with footnote "rows pertaining to hen harrier are shown here only and are to be inserted into the full tables". Further insertions are set out in red type in the exhibit at Tab 11A of the Grounding Affidavit which is the main document of the FI response.

36. These amended parts of the EIAR (marked in red in the further information response documents at Tab 11A and Tab 11B of the grounding affidavit) include updates to the mitigation measures in the EIAR, without which it is not clear how the Applicant (and the public into the future) is to interpret Condition 4 of the impugned decision which states:

> The developer shall ensure that all construction methods and environmental mitigation measures set out in the Environmental Impact Assessment Report and associated documentation are implemented in full, save as may be required by conditions set out below.
>
> Reason: In the interest of protection of the environment.

37. It is of significance also that Condition 4 refers to the mitigation measures that are in the 'associated documentation', which can only expect to be interpreted as the list of 'associated documents' on the Board's website. A condition of this type is only operable if s.146(7) is complied with and the associated documents that include mitigation measures are all on the Board's website.

38. This is a similar situation to the facts as described in the judgment of Mr Justice Simons in *Southpark Residents Association v An Bord Pleanála* [2019] IEHC 504. The issue in that case, the failure to publish online an updated bat report, is summarised at paragraph 56 of the judgment:

> 56. The right to effective public participation has been undermined as a result of the failure to post the report on the website. Moreover, there is a continuing consequence of this omission in circumstances where the mitigation measures have, in effect, been incorporated into the planning permission by dint of Condition No. 8. A person reading this condition, who then sought to examine the documentation on the website, would be left with the mistaken impression that the 2017 version of the mitigation measures applied. This has the potential to undermine the right of access to the courts within the eight-week time period allowed under section 50 of the PDA 2000. The fact that Article 301(3) requires the website to be available for eight weeks after the planning decision indicates that it is relevant for the purpose of access to the courts.

39. The updated mitigation measures missing from the Board's website include the following measures stated to apply to **any** of the target bird species in the EIAR (this includes the hen harrier) being amendments to s. 12.6.1.7 of the EIAR:

> "Where nests are found, works will be halted, an exclusion zone (determined by the bird species and to be agreed with the local authority) will be erected around the nest. An exclusion area of 500m shall be installed for any target species noted in this EIAR (e.g. Merlin, Kestrel, Snipe, etc). The nest will be monitored by the project ecologist/ECoW from outside the exclusion zone until it is determined that the nestlings have fledged, or the nest has failed. Only then will works be allowed to re-commence."

40. The omission of complete mitigation measures from the pre-amendment version of the EIAR on the Board's website is in the words of Humphreys J. in Reid v An Bord Pleanála [2024] IEHC 27 (Intel Judgment No. 7) *capable of at least indirectly prejudicing an applicant*. The Applicant here is an eNGO and a charity engaged in environmental protection. Any ongoing reliance it may have on local members of the public to protect the environment by 'policing' the mitigation measures on the ground, is compromised by the absence of a complete EIAR and mitigation measures on the Board's website. In that respect, the Applicant is, at least, indirectly prejudiced.

41. The Court has invited the parties to consider the implications, if any, of the judgment of the Supreme Court in *Casey v Minister for Housing, Planning and Local Government* [2021] IESC 42, delivered by Ms Justice Baker on 16 July 2021.

42. *Casey* concerned the failure of the Minister to publish, in Iris Oifigiúil, a decision to grant a foreshore licence to the notice party developer, as required by s. 21A of the Foreshore Act, 1933, as amended. The Court found that the publication was mandatory for all foreshore licences, and not restricted to those which had been the subject of EIA. The Court then went on to consider whether the failure to publish had the effect that no valid licence had issued.

43. *Casey*, at paragraph 122, makes a distinction between circumstances where (a) the grant of a licence is conditional upon prior consultation or prior notification, which must therefore be seen as a condition precedent to the coming into effect of a licence, and (b) provision to support public participation by the requirement to publish a notice after the making of a licence, with no precondition or suspensory effect.

44. The Court in *Casey* was considering s.21A of the Foreshore Licence 1933, as amended which provides that "when the appropriate Minister determines a relevant application, that Minister shall publish a notice, in Iris Oifigiúil…". The Court had already determined that this was a broad obligation within the Act, not restricted to the obligations under the EIA Directive to inform the public of a decision (Art. 9).

45. The obligation to make the EIAR available to the public occurs in two different parts of the EIA Directive for two different purposes, with the distinction between each that is identified in paragraph 122 of *Casey*.

46. Article 6(3)(b) of the EIA Directive requires the Member State to make available to the public in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed of the request for the decision, in this case the decision from the de novo appeal. This includes the EIAR, which in this case must the EIAR relevant to the decision under appeal, i.e. the EIAR with its modifications. The obligation in Article 6(3)(b) is transposed by s. 146(4)(a) of the Planning and Development Act, as amended,

which requires the Board to place on its website for inspection the EIAR submitted with an application or any such report received by the Board in the course of considering an appeal, *from as soon as may be* after receipt of such report. This is an example of the first circumstance identified by the Supreme Court in paragraph 122 of Casey where the grant of a licence is conditional upon prior consultation or prior notification.

47. On the other hand, Article 9(1) of the EIA Directive applies when a decision to grant or refuse development consent *has been taken*, and obligates the competent authority to *promptly inform the public*, in accordance with the national procedures, and shall ensure that information is available to the public about information gathered pursuant to Articles 5 to 7 (which includes the EIAR). The obligation in Article 9(1) is transposed by s. 146(5) and s.146(7) of the Planning and Development Act 2000, as amended, which provides that within 3 days following the making of a decision, where an environmental impact assessment was carried out, the documents relating to the matter be made available for inspection on the Board's website *in perpetuity beginning on the third day following the making by the Board of the decision*. This is the second circumstance identified by the Supreme Court in paragraph 122 of Casey having no precondition or suspensory effect.

48. The different publication obligations within both the Directive (Articles 6 and 9) and their transposition allow for situations where the interpretation of the EIAR is changed after the decision by the conditions attached to the decision. On the domestic transposition, the EIAR must be published on the Board's website *as soon as may be* following the initiation of the appeal, which acknowledges the scenario where an appeal is made by a member of the public not in possession of the EIAR and allows time for the Board to request the EIAR from the developer. The latest date by which the domestic transposition requires the EIAR to be published online, is the third day following the making of the decision, and it must be left online *in perpetuity* thereafter.

49. On the facts of this case, it was not until many months after the making of the decision that something approaching an intelligible EIAR was published on the Board's website, albeit an incomplete version of same, and the Board has yet to publish on its website the modifications to the EIAR and the NIS that were to be inserted by the Further Information response to the Planning Authority. On this basis, and in compliance with Casey, the Applicants invite this Court to find that the obligation to publish a complete and intelligible EIAR was a a [*sic*] condition precedent to the making of the EIA and the jurisdiction to bring into effect the planning decision.

50. If it is not *acte clair* that art. 6(3)(b) of the EIA Directive (when read in conjunction with the obligation under art. 6(5) to take the necessary measures to ensure that the relevant information is electronically accessible to the public at the appropriate administrative level) requires the Member State to make available to the public at the stage of an administrative appeal, the most up to date version of the EIAR available at the start of the appeal process, the Applicant would support a preliminary reference under art. 267 of the TFEU.

51. It is of relevance also, under Irish law, that participation in an appeal process is not restricted to persons who have already made submissions to the decision making process under appeal. By s. 130 of the Planning and Development Act, 2000, as amended, *any person* other than a party to the appeal may make submissions or observations in writing to the Board in relation to an appeal. It cannot be the case therefore that the obligation to publish the the [*sic*] EIAR is a post appeal decision obligation, as it must apply equally to persons who participate in the process for the first time at the appeal stage.

52. The decision of Holland J. in *Ballyboden Tidy Towns Group v An Bord Pleanála* [2023] IEHC 722, concerning the failure to identify to the public a 110kV line wayleave by marking it in yellow on the site location maps that accompanied the planning application is also relevant. The court found at paragraph 107:

> 107. Given the specificity of the requirement that the wayleave be depicted in yellow, this case is close to the line. But in the end there is no evidence or reason to believe that any "vigilant or potentially interested" person was prejudiced by the error. The 110kV line and its wayleave were depicted, albeit inadequately, on the site location map. In my view, the interested reader of that map, curious as to whether (s)he should object to the planning application, would have readily seen that depiction of the wayleave by the three drawn lines. If the reader was unsure or unaware of what by the three drawn lines represented, s(he) would have made further inquiry to ascertain what they represented. That inquiry would – by the other planning application documents and the BOLAP – readily have revealed, including as depicted in yellow, both the 110kV line and pylons and the issue of the wayleave width. In that way, it seems to me that the Site Location map did serve the function required

> of it by Art 297 [of the Planning and Development Regulations 2001] and I therefore decline to quash the Impugned Permission on that account. If necessary, I do so as a matter of discretion.

53. The situation here, where the Board published an incomplete EIAR, in a non-sequential collection of 67 randomly labelled file names, while providing 'directions' in its written legal submissions, after proceedings had commenced, to a partial path by which it may be possible to retrieve on another website some or all of any files that the reader may have discovered to be missing, is not analogous with the Ballyboden scenario where the public had a site location map with an electricity line drawn on it and was only missing the yellow highlighting on the drawing which would have definitively identified the wayleave for the electricity line along the same line.

54. In paragraph 9 of its legal submissions, the Board acknowledges that amendments to the EIAR (within the further information submitted to Laois County Council) are not on the Board's website and then proceeds to give 'directions' to the Planning Authority website where it is said the missing amendments can be found. The Board explains that in order to access the complete EIAR, the public (presumably after opening all 67 mislabelled files, arranging them in order and divining by some unknown method that sections from or updates to the EIAR are missing) must then click on a link that says "Click here for details of the original planning case submission to Laois County Council" and on clicking that link must find and open the "View Scanned Files" section of the relevant page on the Council's website 'on which the relevant further information response is published'. The Board's directions go no further than that and no instructions are given about how to identify and find the missing documents inside the Council's website. Further, the Board does not attempt to assist the reader with regard to the notice on Planning Authority page advising that "A PDF viewer is required to view PDF files". A separate warning on its own site directly underneath the 'Click here' button warns the reader: "An Bord Pleanála is not responsible for the content of external sites".

55. The Court in Ballyboden found the site location map had <u>served the function required of it</u> by Art 267 of the regulations which required a Strategic Housing Development planning application to be accompanied by a location map marked so as to identify clearly, in yellow, any wayleaves. It served that function by clearly identifying the electricity line that the wayleave must be associated with.

56. On the facts of this case however, the Board's website did not serve the function required of it by EU law, which requires that the EIAR is electronically accessible to the public, through at least a central portal <u>or easily accessible points of access</u>, at the appropriate administrative level, or by the domestic transposition of the obligations in the EIA Directive, which requires that the EIAR is published on the Board's website, as soon as may be after the receipt of the appeal and in any event no later than three days after the making of the decision. No 'map' of the EIAR was provided to the public, equivalent to the map of the electricity line in *Ballyboden*.

57. The Court invited submissions in relation to the finding of the Supreme Court *in Ballyboden Tidy Towns Group v An Bord Pleanala* [2024] IESC 4 (Donnelly J.) in relation to the Board's role in granting relief, even in circumstances where *certiorari* is not opposed. The Applicant is not entirely sure of the significance of this case to the within proceedings. Insofar as it maybe suggested that the Court retains a discretion not to grant relief notwithstanding a finding that there is a lacuna in the AA conducted by the Board, the Applicant again points out as found in Kelly that the carrying out of a valid AA is a jurisdictional *sine qua non*. Particularly in the light of the sensitivities of the Hen Harrier outlined herein and the fact in the instant case we are dealing only with a Stage 1 AA, it is respectfully submitted that the Court cannot lawfully exercise its discretion to overlook the glaring lacunae in the within assessment. Certainly, as a matter of EU law, the exercise of a discretion in such a manner and in such stark circumstances is not *acte clair* and would require a reference to the Court of justice.

58. The Supreme Court at paragraph 72 of *Ballyboden* concluded:

> "In judicial review proceedings, the High Court is exercising its inherent powers to supervise the legality, rationality and procedural fairness of lower courts and public decision-making bodies. The grant of a judicial review remedy is the exercise of the High Court of those powers, and one cannot thus correctly speak of a "consent order". The High Court must be persuaded that it ought to exercise its power in a given situation."

59. The Applicant respectfully submits that this must be considered in the context of the Court's finding at paragraph 75 of Ballyboden that: "The approach of the High Court will depend on a case-by-case analysis of the issues before it and it may be that, in a given case, the most appropriate

way to proceed is to list the application for judicial review for full hearing. In other circumstances a preliminary hearing of the point conceded may be more appropriate."

60. Read together, these conclusions appear to mean that the High Court must be persuaded to exercise its inherent powers to grant a judicial review remedy by the arguments made to it at the hearing of the action and in legal submissions to which there has been afforded a right of reply.

Conclusion

61. For the reasons set out above and in the Applicant's earlier written submissions and pleadings, and in oral submissions, including any submissions yet to be made at any reconvened oral hearing, the Applicant asks this Honourable Court to grant the reliefs sought in the Statement of Grounds.

Oisin Collins SC

Margaret Heavey BL

9077 words

Annex X – DAR of 16 December 2024

Bill No: H.MCA.2024.0000290

THE HIGH COURT

BEFORE THE HONOURABLE MR JUSTICE HUMPHREYS

_____

16 December 2024

_____

ECO ADVOCACY CLG

v.

AN BORD PLEANÁLA

_____

Counsel for the Applicant: Mr Collins, SC

Ms Heavey, BL

Counsel for the Respondent: Mr Foley, SC

Mr S Hughes, BL

Counsel for Notice Party: Ms Murray, SC

Ms E O'Callaghan, BL

ECO Advocacy CLG v. An Bord Pleanála

16 December 2024

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MR COLLINS: It is now, I also have a clock, Judge, it's very important from that perspective. Judge, the Court will have seen --

JUDGE: And this is important.

MR COLLINS: The Court will have seen the submissions, the exchange of submissions that have been circulated amongst all the parties. The Court itself raised concerns that it wished to be addressed on particularly as I understood the Court in relation to the issue of discretion. I wasn't quite certain and our submissions express again that uncertainty as to precisely what the Court had in its mind in terms of discretion. I assume that is discretion in circumstances where the Court finds that for example either an environmental impact assessment or an appropriate assessment hasn't been properly or fully undertaken and notwithstanding that finding, the Court wonders whether it retains a discretion to nevertheless decide not to issue an order of certiorari or otherwise quash the decision. If that's the case, Judge, I think it's obviously important that I would address that first if that's the way the Court is thinking, and I can see why the Court might be thinking that because quite frankly, Judge, there is no answer whatsoever to at least the appropriate assessment point in this case.

The Court has heard a lot of detail from Mr Foley about a great many things that exist in the notice parties' environmental impact assessment report and Mr Foley has relied heavily on that information as he says supporting the decision that the Board made. Obviously, I take profound issue with that, and I say that that, the fact of that information cannot get away from the elephant that's prominently in the room, which is of course the letter from the NPWS which is heavily critical of the assessments undertaken by the respondent and/or notice party. That being so, there is identified by that body informed the NPWS, an expert body, a significant scientific lacuna which has simply not been addressed at all by either the notice party or by Mr Foley. It cannot be addressed by the material that was before the board because all of that material was considered by the NPWS, and their criticism remained after that consideration. So, the criticism is something that postdates the information that was presented, including all of the additional information that was presented, and it is unanswered, and it remains unanswered in these proceedings. So, in those circumstances, Judge, I say it would be perfectly understandable for the Court to be thinking that this is an imperfect appropriate assessment and in those circumstances the Court might be considering perhaps what flows from that and if we are in that space, Judge, I say what flows from that necessarily is an order of certiorari. It must follow, it's clear from Kelly, it's clear from Sharpston and Sweetman, and across the authorities onwards that an appropriate assessment without lacunae is a prerequisite to the jurisdiction to grant planning permission, and I say the Court cannot simply overlook that jurisdictional issue and in its discretion allow an appropriate assessment of this nature to simply -- to simply stand notwithstanding its infirmities or falsities or difficulties with lacunae that have been identified.

I know the Court identified a number of authorities in that regard but having considered those authorities, Judge, I can't see anything that would get, would resolve that particular difficulty, I cannot see how there could be an entitlement for the Court to overlook that level of lacuna in an assessment of this nature, but if I'm wrong in that and the Court is still entitled to exercise a discretion, we have set out in detail in our legal submissions why it is that the Court ought to exercise that discretion in a particular manner and in particular should exercise it against the respondents and order an order of certiorari and principal among that Judge is the fact that as is clear from all the documentation that has been exhibited in this -- in these proceedings, the hen harrier is critically endangered, the hen harrier is a species of special sensitivity and one that is declining significantly nationwide and in particular it seems that one of the things that has given rise to that particular decline nationwide is of course the fact that renewable energy projects are now being, I suppose, are targeting the habitat that has heretofore been frequented or favoured by the hen harrier, and that being so, Judge, there does seem to be a particular conflict between renewable energy, resources, and the hen harrier and that that is particularly obvious in the context of wind developments in upland, rural areas of forestry plantation and so on such as those that surround and indeed, I suppose, predominate the site itself in this particular instance, and, Judge, we say that that is a factor that has to be borne in mind and we say that in the event that the Court is minded to exercise some level of discretion, that that particular factor must favour, we say, a refusal of the exercise, a refusal of clemency or mercy and instead that the Court must move to grant an order of certiorari in this particular case, and, Judge, we say that there couldn't be a clearer more bright line example of that, and if this Court is minded to overlook that, that's something that we say must be borne in mind, the fact that we're dealing with here is a highly sensitive species, we're dealing with the highest protection available in the form of the Habitats Directive, and if that is to be overlooked in this instance, and that particular conflict isn't sufficient, it is difficult to conceive of a circumstance

in which one could envisage an order of certiorari being made. It's clear, we know, from a number of the authorities that we've seen, this Court and others, but particularly this Court producing including the matter that's next for hearing before this Court, the Nagle matter, that the Court has identified almost a presumption in favour of renewable energy and that presumption is said in the Nagle view determination to be something that is, I suppose, rebuttable, having regard to in particularly the legal principles and so on. We say that presumption doesn't in fact exist at all in law, there doesn't appear to be any clear authority for that proposition, but if that is the case, in this instance it must be rebutted by the presence of the hen harrier, by the fact that the hen harrier in the Slieve Bloom mountains is about the only recovering population of hen harrier in the country, or at least was, until relatively recently, and is now under threat again, and that this particular tension must be, must weigh heavily in the Court's mind before the Court could overlook a deficiency in an appropriate assessment, and presume that wind energy development should be favoured and/or that wind energy development should be given effectively a presumption in favour of an exercise of discretion or indeed outright refusal of relief.

There couldn't be a clearer case, Judge, on the facts, as I've said in the original submissions, Judge, that in the Kelly case, for example, the leading authority on this, you had a similar situation emerged there, but it wasn't in anything like as factually a strong and clear position as what we have here. What we have here, Judge, is a refusal to even go to a stage two assessment. This is not a case where a stage two assessment was undertaken and perhaps an Article 6.4 IROPI assessment was not undertaken. This is a case where we didn't even get out of the starting blocks in terms of appropriate assessment. There is absolutely no doubt but that this case is a case that should have moved to appropriate, a second stage two appropriate assessment, and that being so, Judge, that clarity, we say redoubles the Court's obligation to properly enforce and police --

JUDGE: That might be your time.

MR COLLINS: Judge, can I make an observation?

JUDGE: Sure.

MR COLLINS: This is just not how we should be making submissions, with me distractedly looking at the DAR waiting for that siren to go off. We are gaining nothing by foreshortening these submissions, we are gaining nothing, and this particular approach, I have to say, Judge -- I know the Court has its views in relation to it and there's a practice direction out there, but this particular approach to these matters seems to me to be perverse and unjust. I can't --

JUDGE: Okay.

MR COLLINS: -- stress it strongly enough, Judge, and I haven't had an opportunity again here today in that condensed ten minutes to speak properly and, you know, do a normal job having regard to the fact that I have here before me another 9,000 words of legal submissions. I mean, this isn't really, Judge, this isn't fair, it isn't what the Bar has developed to do, Judge, and I have to say there doesn't seem to be any real reason for it and on behalf of my client again today, Judge, I'm objecting to the manner in which this is being heard. It's just not -- it's not fair and it's not a proper right of access to the courts and I'm sorry to have to say that again, but if this happens in every case that were shut down like this by the sound of a clock, Judge, we're at nothing at the Bar.

JUDGE: Well, sure, but look, I mean, I'm not sure what I can say, I'm sorry you feel that way, but I think let's just agree to differ rather than waste time talking about it. Can I just -- as a final word on the discretion just say that when you were jumping into authorities, I mean, there is one that's sort of semi-favourable to you which is the Court of Justice decision in UH that a member state can't exercise a discretion to refuse to declare legislation to be contrary to EU law. Now the Advocate General's opinion seems to go, it's a bit more flexible and it talks about decisions as well, but at least there's that limitation on discretion, and then at the decision level in cases like Altrip and so on where again not hugely popular with applicants, but the Court of Justice does seem to accept the concept of terms there.

MR COLLINS: Yes, Judge --

JUDGE: But we can come back to it.

MR COLLINS: -- but Irish law --

JUDGE: Yes.

MR COLLINS: -- I don't know if I have a right to comment at this stage, possibly not, I don't know, Judge, but --

JUDGE: Well, briefly, please do, yes.

MR COLLINS: -- from the point of view of Irish law, Judge, in circumstances where the Kelly case is clear that it -- the Board is deprived of jurisdiction to make a decision to grant planning permission by the failure to conduct an appropriate, proper, lacunae-free appropriate assessment. It's difficult to see how the Court could in that kind of jurisdictional level could overlook that and notwithstanding decide that it would exercise its discretion, and it would need to have overwhelming evidence in its sights before it could do that, and here all the overwhelming evidence is resoundingly against that particular approach.

JUDGE: Okay, thanks very much, all right -- so now Mr Foley, seven and a half minutes.

MR FOLEY: May it please the Court, all right. Look, I'd expected Mr Collins to deal with kind of, specifically with the points arising in the submissions, but nothing specific, again that's a good submission, but it's the same submission we've heard so it hasn't developed anything we had in this additional hearing, but I don't have a point --

JUDGE: There is no obligation, okay.

MR FOLEY: Sorry.

JUDGE: There's no obligation to reply if you don't want to.

MR FOLEY: Yes, well, what I just wanted to say, Judge, our submissions do deal with it, but I just wanted to stress something the Court mentioned there. Altrip and the harmless error isn't just about the ability to use discretion to withhold relief on the basis that the Court feels it's the right thing to do in a given case. The Court will obviously when it gets to that point consider whether or not in a given case the objectives and purpose of inter alia the Habitats Directive are met in a given case, and that's the essence of the harmless error, it's not just for no sake, it's that whereas there may be something wrong in a process when you stand back and you look at it under what that process is supposed to be about, you might take the view that's it not something that warrants the quashing of permission, and I'm not saying there's anything wrong in the case at all, but simply at its height Mr Collins just keeps saying yes, the level of generality, everything's unanswerable, nothing has been answered, not engaging with any of my submissions at all, either in writing or orally, about what the NPWS actually said and how much of those complaints actually link to those separate points, but the point here is where he says there couldn't be a clearer case ever. For example, no hen harriers were spotted on the site, where despite huge effort one was seen off the site, and where the issue of science dealing with the flight through of the site has been dealt with and never ever replied to by the applicant who took no part in the proceedings whatsoever, and at page 20 of appendix 4.2 again, the developer in terms says here is the science as to why (inaudible) will not be an issue, and then that brings me on then to the replying submissions as to why we're supposed to be here. Mr Collins relies on the Irish Wildlife Manual 147. It was published after the Board order, Judge, and Cara MvGowan at paragraph 84 deals with that in terms of nothing there matters, when it comes to the Board's decision, it's information generated after the order, and there's other points made in the submissions, Judge, but the one again Mr Collins hasn't dealt with again is, I wanted to stress to the Court the issue of publication again raising non-related points at this level in this proceedings, so I hope the Court will see it. What the Court is trying to do -- Mr Collins just thinks it's fine on your third set of submissions in reply at a procedure like this to then introduce new points of publication. To actually invite the Court to find that there was an obligation to publish a complete and intelligible EIAR as a condition precedent to the, in his words, the making of the EIA. So, there's now an argument, despite their pleaded case, and perhaps now half-recognising that they've been wrong all the time talking about the amended EIAR, they're now saying that the Board should have published further information as a jurisdictional requisite to carry out an EIA, and none of that's there at all in the case whatsoever, and the Court asked them to address Casey and Ballyboden, I don't understand how the applicant gets from Casey, I just don't see it, I think paragraph 132 all the way to 133 are as clear as day in this case, but again the case you can put up to the Court to say this is some sort of outlier, this isn't really at all, this is the same the way I addressed Habitats in this Court in Concerned Residents -- didn't find its way up to the Supreme Court. The same way that I've addressed habitats in many particular cases. Here the inspector's report clearly shows that the inspector has thought about the issues and dealt with them and accepts the developer's position, and I've dealt with all that before, and the contrary to all that Mr Collins

says is the NPWS who he said must have their doubts textually expunged. We've been to Europe on that and they've said no, they don't, and when you put all the information together including --

UNKNOWN: (inaudible)

MR FOLEY: If someone could turn off the microphone it would help. On page 20 of Appendix 4.2, you'll see, Judge, that there just simply isn't an ability of an applicant to just continuously say this is all unanswerable, there is absolutely nothing to see here, and that's all the applicant has done in this additional time. There's seven and a half minutes, Judge, so I'll hand over to Ms Murray.

JUDGE: Thanks.

MS MURRAY: Good afternoon, Judge, I suppose the -- we filed some replying submissions to Mr Collins' further submissions and I would adopt those because I'm obviously not going to have time to go through them all, Judge. The first point though in relation to discretion, Mr Collins is asking the Court to rely on the 2022 National Survey of Breeding Hen Harriers when exercising its discretion, and the applicant is effectively saying, as I understand it, that because that report shows there's been a decline in hen harrier numbers on a national level, at a national level, then the Court should quash the permission and I say, Judge, that there is no evidence before the Court however to suggest that the development is going to impact the hen harrier, and Mr Foley referred to the survey undertaken by my client, Judge, and that survey information, which was done upon a request for further information which was based upon the first NPWS letter, was that one hen harrier was recorded in the surveys and that hen harrier was recorded on the Garryhinch Bog which the Court will remember is to the north of the site, and not on the application site at all, and then we go through the further information submitted by Statkraft, and that's at page 221 of the core book, goes through in detail why the hen harrier won't be affected by the development and refers to issues such as access into the site for the birds, the fact that the turbines are all located 500 metres apart which provides then sufficient space for the hen harriers to pass through the turbines. There's also reference there to the Scottish National Heritage Guidelines which refers to a 98% avoidance rate for hen harriers. So, all the information that was put forward in the response for further information shows that there will be no impact on the hen harrier in circumstances where there was only one surveyed and that wasn't even on the actual application site and it wasn't flying over the application site, Judge.

And in terms of discretion, the Court will recall that when the matter was at hearing before you, Judge, I referred to the Reid (No. 7) case, Judge, and in particular paragraph 74 there, and this idea that if the Court isn't satisfied that the Board and the Inspector engaged with the -- and is satisfied that there would be no adverse -- that there would be no significant effect or significant impact on the site, Judge. That if there has been any error then Statkraft is blameless in respect of that error and in circumstances where Statkraft had addressed the DAU submission, they had addressed it in the "further information", and it wouldn't be fair to penalise the developer if the Court considers that there was a failure on the part of the Board in terms of the assessment that was carried out. And I refer and I rely on paragraph 74 of this Court's decision in Reid in that regard, Judge. And I opened that to you previously -- open that again, Judge.

In respect of the other points raised in the further information submissions, again, I'd support Mr Foley's position here particularly in respect of Core Ground 1 which is the alleged failure of the Board to upload the further information response -- . That's clearly pleaded solely by reference to section 146, subsection 7 of the Act. Now in the further submissions filed by the applicant, that's now been changed over to a -- of a breach of section 146, subsection 5. And also, the applicant is now asking this Court to make a reference in relation to the particular point when, first of all, this is a purely domestic ground, and it's pleaded as a purely domestic ground. In the statement of case the applicant said it wasn't looking for any reference. But now in the submissions, for the first time, they're looking for a reference in respect of a ground that simply wasn't pleaded, Judge. And --

JUDGE: Sorry, which ground are you talking about there? Which ground number?

MS MURRAY: Sorry. It's Core Ground 1, Judge.

JUDGE: Oh, yes. Okay?

MS MURRAY: And if the Court looks at Core Ground 1, Core Ground 1 is pleaded specifically as a breach of section 146, subsection 7, Judge?

JUDGE: Yes… Sorry, are they looking for a reference on that?

MS MURRAY: Sorry, Judge, yes. If you go -- In their further submissions, Judge… Oh sorry, they're not looking for it in respect of 146(7), they're now looking for it in respect of section 146(5), Judge. Sorry, just trying to find the reference, Judge. It's at paragraph… Sorry, Judge. Paragraph 50, Judge. Where it says: "If it's not -- that article 6(3)(b) of the EIA Directive when read in conjunction with the obligation under article 6(5) to take the necessary measures to ensure that the relevant information is electronically accessible to the public at the appropriate administrative level requires a member state to make available to the public at the stage of an administrative appeal the most up to date version of the EIAR available at the start of the appeal process. The applicant would support a preliminary reference under article 267." Now, that's referable back to the requirements under section 146, subsection 5 of the Act, Judge, which the applicant hasn't pleaded nor has even granted leave to raise a ground in relation to that aspect, Judge. So, all of this is a new case being made in the statement of grounds relevant to section 146, subsection 5. I say it's just simply impermissible.

JUDGE: Okay.

MS MURRAY: And then the issues in… And the Court will have heard me at length the last time. But if the Court is -- that there has been a breach of section 146, subsection 7 which is the pleaded ground, Judge, then I say that the appropriate relief is a declaration. We're not into tertiary territory because a breach occurred -- the decision of the Board. And in line with the case, in line with the Court's own judgement in, again, Reid (No. 7), this is a matter which goes to declaratory relief. It certainly doesn't go an order of certiorari, Judge. Judge, I'm conscious that Mr Collins obviously has the right of reply. I probably used up my seven and a half minutes as well, Judge. Unless the Court has any questions?

JUDGE: There's always questions, but we have to strike a balance, Ms Murray. Thank you.

MS MURRAY: Thank you, Judge.

JUDGE: Okay, Mr Collins?

MR COLLINS: Judge, I don't very well know what I can do in five minutes to reply to all of that, a list of various complaints on… I really don't know, Judge, and I'm going to observe again --

JUDGE: Can I just say I'm not getting any audio there?

MR COLLINS: Can you hear me now, Judge?

JUDGE: I can indeed. Well done. Okay. Carry on there?

MR COLLINS: Yes, Judge. Sorry, I was just saying that in five minutes, Judge, that's just a period of time in which I wouldn't normally even clear my throat, much less reply to anybody, Judge. And again, I'm just going to observe that this is not how it should be. This is unfair, unjust. A man on a train had longer in case management than I have to finish this case not that long ago, Judge. And I have to say it's entirely bizarre that there's so much time available, it seems, in other parts of this list and yet we're being shoehorned in against stopwatches to make five-minute submissions that are absolutely useless, it has to be said, Judge. And I'm sorry, but this procedure cannot continue like this. It can't and it won't. And a challenge is going to have to be brought, and I will be taking instructions from my client in relation to that because I simply can't, in the five minutes that I'm given here, deal with the myriad matters that have been raised against me. The 10 minutes I had before that was actually almost a waste of time as well, Judge. This is simply not long enough or good enough and it's not how business should be done. It's not how people should be represented in courtrooms. And I'm sorry once again. I'm raising that objection.

Insofar as the matter is concerned or can be dealt with, Judge, and Mr Foley criticises me for effectively coming at it a high level like it was possible to do anything other than that in 10 minutes. The high level here, Judge, is exactly where we should be and where we should remain. The respondent and notice parties here repeatedly assert to the Court that there is no evidence of any potential harm to the hen harrier and that, they say, that they're not on the site. They cannot rely on their own inadequate survey efforts to demonstrate that the hen harrier is not on the site. The very criticism that the NPWS makes is that they were inadequate surveys conducted and that as a result of that the results, including the result on which they now rely which is that there are no hen harriers on the site, are unreliable. You simply can't place any store on that in circumstances where the surveying isn't in accordance with best scientific practice. And having regard to the light threshold as illustrated or enunciated by Judge Sharpston -- or Advocate General Sharpston -- in Sweetman, Judge, there is simply no escaping in this instance a stage 2 assessment. And if, as I

said in my very opening, this Court overlooks that, it will set the law on appropriate assessment back by over a decade.

And Judge, we say that in this instance, Judge, as the Court will see in the evidence that has been filed, there are only nine breeding pairs in the entire SPA in this instance of hen harrier. That's 18 birds across the whole of the Slieve Bloom SPA. That is a very small number. One bird was seen in the vicinity of the site, and it wasn't properly pursued to its roost. And that, first of all, indicates that a significant proportion of the Slieve Bloom hen harriers are found in the vicinity of the site. But it also indicates that the survey work was inadequate because that bird was not followed to a roost and the site of the roosting of that and possibly other hen harriers remains, unfortunately, unknown. And in those circumstances, Judge, it's difficult to see -- I mean now I'm overtime already. In the overtime that I am, Judge, it's difficult to see how the Court can escape -- or the respondent and notice party can escape -- the glaring inadequacy identified by the NPWS and generally in relation to the construction of the turbines. The Court will also recall that subsequent to the carrying out of the initial screening, the turbine type was identified and that has a different sweep to the turbine that was originally identified. And again, that matter just simply is not engaged with at all by the respondent and/or notice party. And the Board, in granting its decision, failed to identify the potential risk in increasing that swept path area to the passing hen harriers. But, Judge, I see I'm now well over time and, to be honest with you, it's impossible to construct a submission that fits into these time segments anyway. So, I'm sorry, Judge, but that's all I have to say. But I have to say I'm extremely disappointed that this is the approach that's been taken to this type of litigation.

JUDGE: Okay. Thanks very much, Mr Collins. So clearly I've -- and I'll let you know in due course. Thanks everybody. Thanks to all the lawyers involved.

MS MURRAY: Thank you, Judge.

Case adjourned

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