[2025] IEHC 42

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2023.0001391]

IN THE MATTER OF SECTIONS 50 AND 50A OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN
100 METER TALL GROUP AND PATRICK KEOGH AND PATRICK GOREY AND JOHN CURRAN
APPLICANTS

AND
AN BORD PLEANÁLA
RESPONDENT

AND
SEAMUS MADDEN
NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Friday the 31st day of January 2025

1. The developer enjoys permission for a wind turbine to serve a factory. The turbine was constructed 36 metres out of its permitted position, so, following, among other things, an environmental impact assessment (**EIA**) preliminary determination which ruled out the need for EIA screening, the developer obtained retention permission for that modest adjustment. The main ground of challenge is the implausible-sounding proposition that the grant of retention permission was precluded by the very fact of there having been an EIA preliminary examination. The issue here is whether on this or any other ground the applicants have pleaded and then demonstrated any specific illegality warranting *certiorari*.

Geographical context

2. The development here is about 2 km north of Limerick City. It involves a revised site boundary and revised position of a single 800kW wind turbine, 73 metres to hub height at Gortatogher, Parteen, County Clare. To the south and west is the Lower River Shannon SAC (site code 002165). Some distance to the west is the River Shannon and River Fergus Estuaries SPA (site code 004077). Some distance to the east is the Slievefelim to Silvermines Mountains SPA (site code 004165). To the north and west is the Lough Derg (Shannon) SPA (004058).

Facts

3. The original permission was granted in 2010 (P10/453).

4. The permission was extended in 2015 by the council (P15/812) to 2021.

5. The contested turbine was constructed in 2021, but not in the correct location.

6. On 23rd March 2022, the notice party made a retention application to Clare County Council (**the council**) for the proposed development.

7. The development was revised by the further public notice received by the council on 2nd September 2022.

8. The council issued a notification of decision on 23rd September 2022, granting retention subject to conditions.

9. On 20th October 2022, the first named applicant appealed the decision to the respondent. On 20th October 2022, the second and third named applicants also appealed the decision to the respondent.

10. The respondent appointed an inspector who carried out a site inspection on 9th May 2023.

11. The inspector furnished a report on 25 May 2023, recommending that permission be granted for the proposed development subject to ten conditions.

12. By direction on 6th October 2023, the respondent directed that permission for the proposed development be granted.

13. By order signed in or around 12th October 2023, the respondent granted permission for the development subject to 10 conditions (https://www.pleanala.ie/en-ie/case/314887).

14. In January 2024, the notice party began operating and testing the wind turbine.

15. Since June 2024, the wind turbine has been fully operational.

Procedural history

16. On 5th December 2023, the proceedings were opened for the purposes of stopping time.

17. On 16th December 2023, s. 34(12) of the 2000 Act (which relates to conditions for retention permission) was substituted by the Planning and Development, Maritime and Valuation (Amendment) Act 2022 (29/2022), s. 12(b), S.I. No. 645 of 2023, subject to transitional provision in s. 41(8).

18. On 18th December 2023, the proceedings were transferred to this List.

19. On 22nd January 2024, Farrell J. granted the applicants leave to apply for judicial review.

20. On 8th February 2024, the proceedings were returnable to the List.

21. The parties agreed directions on consent and revised directions on consent.
22. On 21st June 2024, the notice party applied for a hearing date. The proceedings were fixed for hearing date for 14th January 2025.
23. On 14th October 2024, the proceedings were mentioned and further revised directions were ordered. The proceedings remained fixed for hearing date for 14th January 2025.
24. On 15th October 2024, the board filed/served its statement of opposition and verifying affidavit.
25. On 23rd October 2024, the notice party served its statement of opposition and verifying affidavit.
26. On 1st November 2024, the applicants delivered a further affidavit.
27. On 15th November 2024, the board served a replying affidavit.
28. On 5th December 2024, the applicants delivered their written submissions and their draft input for the statement of case.
29. On 16th December 2024, the applicants provided a further draft of statement of case.
30. On 16th December 2024, revised directions were agreed between the parties and a callover 'for mention' listing of 13th January 2025 was assigned.
31. On 19th December 2024, the board delivered its written submissions and draft input for the statement of case.
32. On 19th December 2024, the notice party delivered a further affidavit.
33. On 23rd December 2024, the notice party delivered its written submissions.
34. The matter was then heard on 14th and 15th January 2025. At the conclusion of the hearing, the applicants asked for the indulgence of making a further oral submission on foot of the decision in *Eco Advocacy v. An Bord Pleanála* [2025] IEHC 15 (Unreported, High Court, 15th January 2025). The matter was listed for that purpose on 20th January 2025 but could not proceed on that date and was adjourned to 27th January 2025.
35. On the latter date, when the matter was called and without much in the way of advance notice, the applicants asked for permission to reopen the evidence and file further ecological evidence, and secondly made submissions arising from the decision in *Eco Advocacy*. Following discussion with the parties, the position adopted at that point was that I would reserve judgment on both points. If I were to allow further evidence I would give judgment on that alone and adjourn the balance of the case, and if not I would decide the substance. Judgment was therefore reserved on that basis on that date.

Relief sought

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

> "1. An Order of Certiorari, by way of application for judicial review, quashing the decision of the Respondent, dated 12 October 2023 (Ref: ABP- 314887-22) granting retention permission for a revised site boundary and revised position of a single 800kW wind turbine, 73 metres to hub height as granted under P10/453 and P15/812, all at Gortatogher, Parteen, County Clare, as revised by the planning authority on 02 September 2022.
> 2. Such declarations of the legal rights and/or legal position of the Applicants and/or persons similarly situated and/or of the legal duties and/or legal position of the Respondent and/or Notice Party as the court considers appropriate.
> 3. A stay on the operation of the planning permission being challenged pending the determination of the proceedings and/or further order of this Honourable Court.
> 4. If necessary, an order for the discovery of documentation which is or has been in the power, possession, or procurement of other parties hereto and which is relevant to any issue in these proceedings.
> 5. Liberty to file further Affidavits.
> 6. Such further or other order as this Honourable Court shall deem fit.
> 7. A Declaration that the within proceedings are covered by the protective costs provisions of s.50B of the Planning and Development Act 2000 (as amended), and/or sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011 (as amended), and/or the Legal Services Regulation Act 2015 and/or Order 99 RSC.
> 8. The costs of these proceedings."

Grounds of challenge

37. The core grounds of challenge are as follows:

> "DOMESTIC GROUNDS
> 1. The Respondent's decision is invalid and/or ultra vires and erred in law in failing to have regard to the Wind Energy Development Guidelines, June 2006 and the draft Wind Energy Guidelines 2019 ('the Guidelines') contrary to section 28(1) of the Planning and Development Act 2000 (as amended) ('the 2000 Act') and/or to give adequate reasons for not following the Guidelines.

2. The Respondent erred in law, acted ultra vires, and/or took into account irrelevant considerations and/or misunderstood and/or overlooked relevant material and/or acted irrationally that (i) the proposed development will not give rise to adverse effect on noise sensitive receptors; and (ii) the proposed development will not give rise to adverse effects on residential amenity as a consequence of shadow flicker.

3. The impugned decision is invalid in that it has failed to address public observations and/or failed to give adequate reasons for not accepting submissions in arriving at its decision.

4. The Respondent erred in law, acted ultra vires, and/or took into account irrelevant considerations and/or misunderstood and/or overlooked relevant material and/or acted irrationally in granting permission without first receiving a detailed Radar Impact Assessment as sought by the Irish Aviation Authority before determining the application due to the proximity of the development to Woodcock Hill Radar station.

EUROPEAN GROUNDS

5. The impugned decision was made ultra vires, in error of law and is invalid as it was made in breach of section 34(12) of the Planning and Development Act 2000 (as amended) and/or Article 4 and/or Annex II, Annex IIA and/or Annex III of the EIA Directive. In particular, Clare County Council did not have jurisdiction to determine and to grant the application to retain the unauthorised development because the Notice Party was required to make an application for substitute consent directly to the Respondent in respect of the unauthorised development in accordance with Part XA of the Planning and Development Act 2000 (as amended).

6. The Respondent's decision is invalid and/or ultra vires and/or erred in law in failing to carry out a screening determination as to whether an environmental impact assessment was required in accordance with Part X of the Planning and Development Act 2000 (as amended) and/or Part 4, Part 10, Schedule 5 and/or Schedule 7 and/or Schedule 7A of the Planning and Development Regulations 2001 as amended and/or Article 4 and/or Annex II and/or Annex IIA and/or Annex III of the EIA Directive.

7. The Respondent failed to have any or any proper regard to the issue of project splitting.

8. The impugned decision was made ultra vires, in error of law and is invalid as it was made in breach of Article 6(5) of the EIA Directive because the Noise Assessment Reports and Shadow Flicker Reports were not made electronically accessible to the public by Clare County Council on Clare County Council's website.

9. The Respondent's decision is invalid and/or ultra vires in that it contravenes Article 6(3) of the Habitats Directive (Council Directive 92/43/EC) and Part XAB of the Planning and Development Act 2000 (as amended) in circumstances where, in purporting to carry the Screening for Appropriate Assessment:

a. The Respondent failed to conduct an appropriate assessment without lacunae, and which failed to contain complete, precise, and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effect of the proposed development on the Lower River Shannon SAC (site code 002165), River Shannon and River Fergus Estuaries SPA (site code 004077), Slievefelim to Silvermines Mountains SPA (site code 004165) and Lough Derg (Shannon) SPA (004058);

b. the Respondent failed to consider the connectivity between the Site and the Lower River Shannon SAC (site code 002165) via surface water discharge, in combination effects with water discharges from the factory/other development;

c. the Respondent failed to consider the likelihood of significant cumulative effects of the relocation of the permitted turbine with the existing factory, connection to the grid/existing factory and the Limerick Northern Distributor Road, construction details and the management of surface water;

d. failed to consider the submissions made by the Applicants and/or to the submissions made by the observers to the within application all of which raise issues of significant and reasonable scientific doubt about the effects of the proposed development on the neighbouring European Sites and

e. The Respondent permitted the installation of facilities at condition 5 of the Order and left over details to be agreed with the planning authority contrary to Case C- 461/17, Holohan & Ors. v An Bord Pleanála."

Pleadings – some general legal principles

38. Some relevant legal principles concerning pleading requirements which have been rehearsed in previous caselaw include the following:

(i) Scattergun pleadings are open to being viewed as "a witch's brew designed to spread maximum confusion and to permit any argument to be made at the hearing that

ingenuity can suggest": *Hellfire Massy Residents Association v. An Bord Pleanála* [2022] IESC 38 (Unreported, Supreme Court, 24th October 2022), *per* O'Donnell C.J. at para. 22.

(ii) Applicants are confined to their pleadings: *A.P. v. Director of Public Prosecutions* [2011] IESC 2, [2011] 1 I.R. 729, [2011] 2 I.L.R.M. 100, [2011] 1 JIC 2501 (Murray C.J., Denham J.); *Khashaba v. Medical Council* [2016] IESC 10, [2016] 3 JIC 0701, 2016 WJSC-SC 12280 *per* O'Malley J. at para. 56; *Casey v. Minister for Housing, Planning and Local Government & Ors.* [2021] IESC 42, [2021] 7 JIC 1606 (Unreported, Supreme Court, Baker J., 16th July 2021) at §§29 and 31; *Concerned Residents of Treascon and Clondoolusk v. An Bord Pleanála & Ors*. [2024] IESC 28, [2024] 7 JIC 0402 (Unreported, Supreme Court, 4th July 2024) *per* Murray J at paras. 39 *et seq.*

(iii) Pleading requirements in judicial review are "stringent", allowing "little room for manoeuvre": *People Over Wind & Another v. An Bord Pleanála & Ors (No. 1)* [2015] IEHC 271, [2015] 5 JIC 0106 (Unreported, High Court, Haughton J., 1st May 2015).

(iv) While the court has jurisdiction to grant unpleaded reliefs it can do so only within the contours of the case as defined by the pleaded grounds: *Treascon* para. 42 *per* Murray J. Therefore a court can't grant relief if there is no supporting ground for it.

(v) "It shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2)(a) an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground": Order 84 r. 20(3) RSC.

(vi) It is particularly important, in the case of an allegation of a failure properly to transpose an obligation under EU law, that the requirements of O. 84, r. 20(3) be observed: *Sweetman v. An Bord Pleanála* [2020] IEHC 39, [2020] 1 JIC 3104 (Sweetman XV) (Unreported, High Court, 31st January 2020), *per* McDonald J. at para. 103 (cited with approval by Murray J. in *Treascon*); *Rushe v. An Bord Pleanála* [2020] IEHC 122, [2020] 3 JIC 0502 (Unreported, High Court, 5th March 2020) *per* Barniville J.; attempts to launch for example non-transposition claims not set out on the pleadings are impermissible: *Alen-Buckley v. An Bord Pleanála* [2017] IEHC 311, [2017] 5 JIC 1211 (Unreported, High Court, Costello J., 12th May 2017).

(vii) "If on the Grounds pleaded there is genuine 'doubt, ambiguity or confusion' an Applicant in Judicial Review cannot have the benefit of it", *per* Holland J. in *Ballyboden Tidy Towns Group v. An Bord Pleanála, The Minister for Housing, Local Government and Heritage, Ireland and the Attorney General* [2022] IEHC 7, [2022] 1 JIC 1001 (Unreported, High Court, 10th January 2022) at para. 308.

(viii) The rules of pleading are well-established, clear and mandatory, and are of particular importance in a context of special complexity such as technical EU-heavy areas of planning law; while exact specification of every jot and tittle of a case is an impossible standard, an applicant can only be permitted to advance at a hearing a point that is acceptably clear from the express terms of the statement of grounds, subject to the grant of any order allowing an amendment: *Reid v. An Bord Pleanála (No. 7)* [2024] IEHC 27, [2024] 1 JIC 2401 (Unreported, High Court, 24th January 2024).

(ix) A court only decides points that are not academic, and that are properly pleaded and actually in dispute between the parties, and even then only when it is necessary and appropriate to do so: *Friends of the Irish Environment v. Government of Ireland* [2023] IEHC 562, [2023] 10 JIC 1904 (Unreported, High Court, 19th October 2023) at §117.

39. These principles are relevant here because the applicants' oral submissions ranged somewhat beyond the pleaded points. I will endeavour to bring matters back to basics by going through the grounds on a point-by-point basis where appropriate.

40. Separately from that, the applicants' grounds fall far short of the requirement to set out sufficient particulars. There is rarely any clear route-map between the alleged complaint and the proposed relief *via* a detailed specification of facts and matters relied on. Relief ought not properly be granted on such a basis.

41. One really central problem for the applicants' pleadings here is the persistent non-compliance with O. 84 r. 20(3) RSC:

> "(3) It shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2)(a) an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars

> where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground."

42. Applicants need to set out the facts and matters relied on in appropriate detail – in many if not most instances that hasn't been done here.

43. Thus it is an insufficient basis for relief for an applicant to plead, say, that the board failed to dispel scientific doubt in the appropriate assessment (**AA**). That leaves things at large compelling the court and the opposing parties to trawl through potentially thousands of pages of material to find whether exactly the alleged doubt is. What the applicants need to do is specify the route-map from the problem to the relief claimed by indicating the facts and matters relied on as O. 84 requires.

44. So a plea in general terms that doubt has not been dispelled and there is no valid AA for the purposes of specified sections of the 2000 Act or the council directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (**habitats directive**), without specifying how or why such doubt arises, is impermissible and relief can't be granted on foot of it.

45. By contrast, a plea that the decision is invalid because, contrary to identified domestic or EU law, the decision-maker failed to provide reasons sufficient to dispel the scientific doubt that arise in relation to matter X, by reason of specific submission or information Y, *would* meet minimum pleading standards. Unfortunately there were very few pleas of that nature here.

46. Insofar as the applicants tried to justify their inadequate pleadings by arguing that they can't be required to anticipate a defence, that isn't an answer to this specific problem. The applicants didn't need to await the defence in order to be in a position to set out the details of the board's alleged failures and the route-map from the alleged error to the relief. Insofar as the applicants seize on particular words in the pleadings such as reference to the Hen Harrier, that doesn't allow the applicants to make any and every argument that may occur to them about Hen Harrier. That's the "witches' brew" method – not that I have anything against witches, very much the reverse. Just that their techniques are not transferrable to O. 84 RSC.

The argument for a further adjournment and further evidence

47. The argument for adjourning the case to allow the applicants to put in an affidavit at this late stage is unsustainable.

48. Firstly, the case has been heard. Pleadings closed long ago, and provision was made for timelines for affidavits, long past, by way of court directions in case-managed proceedings with a commercial dimension.

49. Secondly, even if it was otherwise appropriate, derailing the hearing would be unfair to the opposing parties. Especially where the applicants have near complete costs protection, the prejudice to the developer in terms of delay could not be compensated for in costs. That has to make the court somewhat hesitant to agree to procedures proposed by costs-protected applicants that add to the costs incurred by other parties – whether the procedures be adjournments, derailing other steps, an excessively permissive approach to leave to appeal, or indeed demands for lengthier hearings than those sought by parties who are at risk of costs orders. There is no such thing as a free lunch – near-total costs protection has to come with some form of procedural price-tag, and in general it is that applicants must cut their cloth somewhat rather than having free rein to impose costs on others without consequence.

50. Thirdly, the application is simply taking advantage of the happenstance of another judgment. Allowing the parties to come back on *Eco Advocacy* was, as the board says, "a concession of generosity" because *Eco Advocacy* didn't decide anything new under this heading. It reflected the previous jurisprudence which is referenced later in this judgment. Thus it should not be used opportunistically to try to derail the orderly processing of the case after the hearing proper is over.

51. Fourthly, the board also points out that the application for further evidence does not comply with O. 84 r. 23(2) and (3) RSC as discussed at para. 31-241 of *Delany and McGrath on Civil Procedure*, 5th Ed., 2023:

> "(2) The Court may, on the hearing of the motion or summons, … may allow further affidavits to be used if they deal with new matters arising out of an affidavit of any other party to the application.
>
> (3) Where the applicant or respondent intends to apply for leave … to use further affidavits he shall give notice of his intention … to every other party."

52. Here the proposed new affidavit doesn't arise out of new matters in an affidavit of another party, and nor was notice given – the applicants only launched the proposal to have a further affidavit on the morning of the final top-up listing which was given as a concession after the main hearing.

53. For any of these reasons, and certainly for all in combination, as the board submits, this is "a completely inappropriate application".

Domestic law issues

Core ground 1 - guidelines

54. Core ground 1 is:

"1. The Respondent's decision is invalid and/or ultra vires and erred in law in failing to have regard to the Wind Energy Development Guidelines, June 2006 and the draft Wind Energy Guidelines 2019 ('the Guidelines') contrary to section 28(1) of the Planning and Development Act 2000 (as amended) ('the 2000 Act') and/or to give adequate reasons for not following the Guidelines."

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

"Ground 1-Wind Guidelines

Applicants' position

The Applicants allege that the Board's decision is invalid and/or ultra vires and erred in law in failing to have regard to the Wind Energy Development Guidelines, June 2006 and the draft Wind Energy Guidelines 2019 ('the Guidelines') contrary to section 28(1) of the Planning and Development Act 2000 (as amended) ('PDA') and/or to give adequate reasons for not following the Guidelines. The Applicants submit that Board has erred in law, acted ultra vires, and/or acted irrationally in concluding that the mandatory minimum setback of 500 metres under the Guidelines did not apply where there was no basis before the Board to conclude that the energy generated from the wind turbine would be 'primarily for onsite usage.'

Board's position

The Board's Decision is not invalid as alleged at Core Ground 1. The alleged failure of consideration did not actually happen, and the reasons complaint is misconceived (as the Board's Decision complies with the relevant legal principles on reasons), is not properly particularised, and is based on a misinterpretation of the Board's Decision and a misconception as to the legal status of the draft Wind Energy Guidelines 2019 (being draft Guidelines that were lawfully considered by the Board and were correctly understood by the Board to be a draft in its Decision). The aforesaid draft 2019 Guidelines are a draft (and were correctly understood by the Board to be a draft in its Decision) that did not have legal force or effect and were not binding on the Board under Irish law and same were not applied by the Board or its Inspector in the manner the Applicants contend. The Applicants complaints at Core Ground 1 by reference to the draft 2019 Guidelines are based on the incorrect premise that same were binding on the Board and/or apply in a manner which they do not. As regards the Wind Energy Development Guidelines 2006, the assertion in Core Ground 1 that the Board failed to have regard to same or failed to give reasons for not following same is baseless and denied and is not properly particularised and in any event without substance as in fact the Board had regard to the said 2006 Guidelines as it was entitled to (see e.g., §2.3, §5.1, §7.14.4, §7.15.2, §7.15.3, §7.15.4, and §7.15.12 of the Inspector's Report where the said 2006 Guidelines are expressly considered). Further, there was sufficient information in the subject application and in the previous application under P10/453 for the Board to conclude that the turbine was being connected to the Notice Party's factory and not to the national grid. No 'uncertainty' arises as alleged by way of mere assertion at Core Ground 1 or at all.

Notice Party's position

In so far as the Applicants claim that the Board failed to have regard to the Wind Energy Development Guidelines, June 2006, contrary to Section 28(1) of the 2000 Act and/or that the Board failed to give adequate reasons for not following the said 2006 Guidelines, no particulars of such plea in relation to the 2006 Guidelines have been provided, contrary to the requirements of Order 84, Rule 20(3), RSC. What is described by the Applicants as a 'mandatory minimum setback of 500 metres' is not mandatory in any sense as this statement is contained in draft 2019 Wind Energy Guidelines and does not form part of any specific planning policy requirement (SPPR), for the purposes of Section 28. Further, the Applicants claim that there was no evidence before the Board that the energy generated from the proposed wind turbine would be 'primarily for onsite usage' such as would otherwise provide a basis for the exercise of as discretion under the draft 2019 Guidelines in relation to the application of the said setback. In that regard, the Notice Party will rely upon the terms and conditions of the application in respect of the permission under challenge in addition to the application and permission under Reg. Ref. P10/453 and P15/812 as establishing that the wind energy generated by the single turbine is for onsite usage only"

56. This ground is unfounded on the facts.

57. As regards the alleged **failure of consideration**, the board had regard to the Wind Energy Development Guidelines 2006 (WEDG) – §2.3, §5.1, §7.14.4, §7.15.2, §7.15.3, §7.15.4, and §7.15.12 of the inspector's report (which was adopted generally). The draft 2019 guidelines were also considered – as a draft – § 5.1 and §7.8.4.

58. As regards the alleged **lack of reasons** for not following the guidelines, those enjoy a have-regard-to status only so there is no enhanced obligation to give reasons for not following them, even assuming for the sake of argument that some departure could be established.

59. As regards any alternative suggestion that **the board shouldn't have looked at the draft 2019 guidelines**, these were referred to by the applicants in their submission so regard to them can't be a basis for judicial review.

60. As regards the claim in the sub-grounds that **the way in which regard was had to the guidelines was unlawful**, this contradicts the ground itself which alleges lack of regard. In any event the complaint of defective regard hasn't been made out evidentially.

61. Insofar as the applicants claim lack of regard to the "mandatory minimum setback of 500 metres" there is no such mandatory provision. The draft is just a draft and the 2006 guidelines have only a have-regard-to status.

62. In particular as regards the alleged **inadequate information regarding connectivity** of the project, the board had material (see §7.16.2 of inspector's report, which cites the AA material (see §2.2.3 of the Appropriate Assessment Screening Report prepared by MKO) to the effect that "underground cabling, connecting the wind turbine to the factory building, was laid within the electrical ducting in the verge of the access road", which she held was consistent with condition 4 of the original permission, PA ref. 10/453) setting out the connectivity of the Parteen Wind Turbine Development to the Limerick Blow Moulding facility rather than the national grid, and imposed a condition (condition 8) to that effect. The claim of inadequate information is assertion and has not been made out.

63. What makes it obvious that there is no question of connection to the grid is that the original permission dealt with the connection being to the factory only, and there is no change to that in the retention application.

64. As the notice party points out, the original permission under reg. ref. P10/453 was required to be implemented in accordance with condition 1, which provided as follows:

> "1. The development shall be carried out in accordance with plans and particulars received by the Planning Authority on 28th May, 2010 and further information received on 18th November, 2010 except where altered or amended by conditions in this permission.
> Reason: To define the scope of permission in the interest of orderly development."

65. The information received by the council on 18th November 2010 in response to its further information request included the following response at Part 3 that "Limerick Blow Moulding will use all the electricity produced."

66. Further, as the notice party points out, condition 4 of the original permission reg. ref. P10/453 required the cables to be laid underground.

67. So the alleged connection to the grid is pure fiction. There is no impermissible uncertainty as to what the connection involves.

Core ground 2 – noise and shadow flicker

68. Core ground 2 is:

> "2. The Respondent erred in law, acted ultra vires, and/or took into account irrelevant considerations and/or misunderstood and/or overlooked relevant material and/or acted irrationally that (i) the proposed development will not give rise to adverse effect on noise sensitive receptors; and (ii) the proposed development will not give rise to adverse effects on residential amenity as a consequence of shadow flicker."

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

> "Ground 2-Noise and Shadow Flicker
> Applicants' position
> The Applicants submit that the Board erred in law, acted ultra vires, and/or took into account irrelevant considerations and/or misunderstood and/or overlooked relevant material and/or acted irrationally in finding that (i) the proposed development will not give rise to adverse effect on noise sensitive receptors; and (ii) the proposed development will not give rise to adverse effects on residential amenity as a consequence of shadow flicker. The Applicants submit that the Board failed to address the Applicants' submissions as to noise and shadow flicker.
> Board's position
> The Board's Decision is not invalid as alleged at Core Ground 2. This ground of challenge amounts to merits-based disagreement framed in legal language regarding the Inspector's conclusions in relation to potential adverse effects on noise sensitive receptors and in relation to potential impacts on residential amenity as a consequence of shadow flicker. That is not a basis for certiorari of the Board's Decision or any other relief. the conclusions reached by the Inspector in relation to relation to potential adverse effects on noise sensitive receptors (at e.g., §7.14.7 of the Inspector's Report) and in relation to potential impacts on residential amenity as a consequence of shadow flicker (at e.g., §7.15.12 of the Inspector's Report),

were open to the Inspector and the Board based on the evidence and materials that were before the Board. There was adequate material before the Board in this regard in relation to noise and shadow flicker (see e.g. (i) the Noise Assessment Report that was submitted to the Council by the Notice Party in response to the Council's request for Further Information; (ii) the Shadow Flicker Assessment Report that was submitted to the Council by the Notice Party in response to the Council's request for Further Information; (iii) the Council's 'Planning Application Report 2' dated 23 September 2022 , and (iv) the Council's submission to the Board in response to the third-party appeals). The assertion that the Board misunderstood and/or overlooked relevant material is baseless and incorrect. The submissions made regarding the alleged inadequacy of the Notice Party's Noise Assessment Report were expressly considered by the Inspector (see e.g., §3.4.1 and §7.14.1 of the Inspector's Report) as were the submissions made regarding the alleged inadequacy of the Notice Party's Shadow Flicker Report (see e.g., §3.4.1 and §7.15.1 of the Inspector's Report).

Further, the Board Direction expressly records (at page 1) that the submissions on this file and the Inspector's Report were considered at a Board meeting held on 6 October 2023 and that the Board decided to grant permission generally in accordance with the Inspector's recommendation, for stated reasons and considerations and subject to conditions. The onus of proving otherwise rests upon the Applicants, and no evidence has been adduced to contradict the content of Board Direction in this regard. The Applicants have manifestly failed to discharge the burden of proving otherwise by evidence. In addition, consistent with the Board having had regard to the submissions made concerning noise and shadow flicker, it is to be noted that, in granting permission, the Board attached Condition 3 (which expressly addresses shadow flicker in the interest of residential amenity) and Condition 4 in relation to noise levels during operation of the development (expressly in the interest of the amenity of noise sensitive receptors).

Notice Party's position

The pleas made under Core Ground 2 are not particularised adequately or at all, in so far as the following matters are not identified: (a) the alleged error or errors of law; (b) the alleged irrelevant considerations; and (b) the manner in which the Board is alleged to have misunderstood certain material; and (c) the relevant material which the Board is alleged to have 'overlooked'. The Notice Party otherwise agrees generally with the position adopted by the Board above, in particular in relation to the fact that the submissions made regarding the alleged inadequacy of the Notice Party's Noise Assessment Report and Shadow Flicker Report were in fact engaged with and expressly considered by the Inspector. Moreover, the assessment of the adequacy of information in relation to environmental impacts is a matter for the expert judgment of the Board, reviewable only on irrationality/ O'Keeffe grounds."

70. Insofar as the allegation is of **lack of consideration** in relation to noise, that isn't correct on the facts - see *e.g*. para. 7.14 and 7.15 of the inspector's report. The board had before it materials dealing with such matters including the noise assessment report, the shadow flicker assessment report, the council's planning report and the council's submission to the board. Conditions 3 and 4 reflect that consideration.

71. Insofar as the allegation is consideration of **irrelevant matters**, such matters haven't been pleaded precisely, or otherwise identified, still less established.

72. Insofar as the allegation is failure to take into account **relevant matters**, that requires to be established evidentially which hasn't been done, and such failure to take matters into account can't be conflated with lack of narrative discussion.

73. Thus this ground is an impermissible merits-based disagreement with the decision: see *e.g*., *Jones & Anor v. South Dublin County Council* [2024] IEHC 301, [2024] 7 JIC 1102 (Unreported, High Court, 11th July 2024) at §138, §184; *Duffy v. An Bord Pleanála* [2024] IEHC 558 (Unreported, High Court, Holland J., 27th September 2024) at §18.

Core ground 3 - reasons

74. Core ground 3 is:

"3. The impugned decision is invalid in that it has failed to address public observations and/or failed to give adequate reasons for not accepting submissions in arriving at its decision."

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

"Ground 3-Adequacy of reasons

Applicants' position

The Applicants submit that the Board failed to adequate reasons in addressing the public submissions, inter alia, as to :

a. noise
b. shadow flicker

c. the jurisdiction of the Board to hear the retention application pursuant to section 34(12) PDA
d. the need for a Radar Impact Assessment
e. The requirement of an environmental impact assessment/appropriate assessment

Board's position

The Board's Decision is not invalid as alleged at Core Ground 3. This ground of challenge is based on an erroneous premise as the Board did not fail to address public submissions or to give adequate reasons for not accepting submissions as incorrectly alleged. In relation to reasons, the rule comes down to a requirement to give the main reasons for the main issues. The Board has provided the main reasons for the main issues in this regard. The pleaded assertion that the Inspector addressed submissions as to the adequacy of the Notice Party's Noise Assessment Report and Shadow Flicker Report in a 'superficial' way is simply wrong. The pleaded assertion that the Board failed to give adequate reasons for not accepting submissions that the Council did not have jurisdiction to hear the application pursuant to s.34(12) of the 2000 Act and that a detailed Radar Impact Assessment was required is without substance. The Inspector accurately summarised the submissions made in relation to these matters. As regards the issues raised in relation to both s.34(12) of the 2000 Act and the absence of a Radar Impact Assessment, the complete context to the Board's Decision inform its reasoning.

As regards s.34(12), it is clear that the Inspector in recommending that retention permission be granted subject to conditions, and the Board in granting retention permission subject to conditions, were each satisfied that they were not precluded from doing so. It is also clear from the Council's submission to the Board in response to the third-party appeals that it did not accept that it was precluded from granting retention permission by reason of s.34(12) of the 2000 Act. It is also clear from that document that the Council did not concur with the submission made alleging non-assessment of material changes between the permitted and as constructed wind turbine. It is also clear that as regards EIA, both the planning authority and the Board concluded that the need for EIA could be excluded at preliminary examination stage and that an EIA screening determination was not required in relation to the development and that an Appropriate Assessment (AA) was not required in relation to the development. As regards the relevant version of s.34(12), the fundamental flaw in the Applicants argument is that the development concerned in this case does not come within the scope or embrace of same – in this case it was determined by both the planning authority and the Board that an EIA screening determination was not required and that an Appropriate Assessment was not required. Therefore, the prohibition under s.34(12) of the 2000 Act did not bite as regards the development at issue and the submissions made to the contrary as part of the appeal process and the grounds of challenge that re-agitate those submissions are incorrect.

As regards the absence of a Radar Impact Assessment, this issue was clearly and expressly addressed at section 7.17 of the Inspector's Report, with conditions 5 and 6 attached to the Board's grant of permission being 'the proposed conditions' referred to at §7.17.3 of the Inspector's Report that the Inspector considered were sufficient such that no adverse effects on aviation are likely to arise as a consequence of the development notwithstanding the absence of submission of a detailed Radar Impact Assessment as requested by IAA in their second observation (to the Council at first instance). The approach of the Inspector and the Board in addressing the issue was not unlawful and notably was consistent with the approach taken by the planning authority at first instance in relation to the issue. as referred to by the Inspector at §7.17.2, the potential for effect on the Woodcock Hill Radar was considered in the original application for the wind turbine under P10/453, with 'the IAA satisfied that if built to the proposed plans no adverse effects would arise on radar installation at Woodcock Hill,' which is approximately 7.5 km away from the location of the turbine. It was reasonable for the Inspector (and the Board), to conclude that having regard to the modest change in location, relative to the location of said Radar installation, that no adverse effects on aviation were likely to arise because of the development. Further, the Applicants have not pleaded nor identified any obligation upon the Board that compels it to insist on submission of a Radar Impact Assessment, nor have they identified any breach of any obligations arising from the Board not acceding to the request made in IAA's submission (see e.g., §3.3.1, Inspector's Report) that a Radar Impact Assessment was required.

Notice Party's position

The Notice Party agrees generally with the position adopted by the Board above. The Inspector and the Board did engage with the public observations in an adequate manner, and gave adequate reasons for not accepting submissions in relation to noise and Shadow Flicker impacts, and imposed conditions Nos. 3 and 4 to mitigate against the potential for

such impacts. Furthermore, the Board would only have been prevented under section 34(12) from assuming jurisdiction under s. 34 if it determined that the matter needed an EIAR or an AA or needed to be screened for EIA. Arising out of the determinations made by the Board in this regard, the Board's reasons for assuming jurisdiction to determine the application were obvious."

76. The standard is to give the main reasons for the main issues (*per e.g*. *O'Donnell & Ors v. An Bord Pleanála & Ors* [2023] IEHC 381 (Unreported, High Court, 5th July 2023), §§45-57). The board did that – applicants are not entitled to micro sub-reasons or reasons for the reasons. Reasons can include by way of acceptance of a developer's material: *Ratheniska Timahoe and Spink (RTS) Substation Action Group & Anor v. An Bord Pleanála & Anor* [2015] IEHC 18, 2015 WJSC-HC 24479, [2015] 1 JIC 1402 (Unreported, High Court, Haughton J., 14th January 2015) at §92-§93; *Aherne & Ors v. An Bord Pleanála & Ors* [2015] IEHC 606, 2015 WJSC-HC 1744, [2015] 10 JIC 0605 (Unreported, High Court, Noonan J., 6th October 2015) at §23, [2016] IEHC 536, 2016 WJSC-HC 796, [2016] 10 JIC 0303 (Unreported, High Court, Noonan J., 3rd October 2016) at §7; *Balscadden Road SAA Residents Association Ltd v. An Bord Pleanála* [2020] IEHC 586, [2020] 11 JIC 2501 (Unreported, High Court, 25th November 2020) at §25; *Carrownagowan Concern Group & Ors v. An Bord Pleanála & Ors* [2024] IEHC 300 (Unreported, High Court, 20th May 2024) at §156; *Nagle View Turbine Aware Group v. An Bord Pleanála* [2024] IEHC 603 (Unreported, High Court, 1st November 2024) at §98.

77. That standard was complied with generally but it is worth mentioning a couple of matters specifically:

(i) The complaint of a lack of reasons for not holding that the board lacked jurisdiction under s. 34(12) of the 2000 Act falls into the category of legal argument rather than matters a body is under a duty to give reasons about. An otherwise valid decision doesn't become invalid because the body fails to give reasons for rejecting an incorrect legal submission. If on the other hand the legal submission was correct then that's a jurisdictional point on the merits (which I address below in this case) on which a given applicant will succeed. If the point lacks merit, an applicant can't win by the backdoor on the grounds of lack of reasons for rejecting a bad point.

(ii) The alleged lack of reasons regarding the absence of radar impact assessment falls flat. The board gave a reason for not requiring that and dealt with aviation issues at para. 7.17 of the inspector's report and by way of conditions 5 and 6.

Core ground 4 – radar impact assessment

78. Core ground 4 is:

"4. The Respondent erred in law, acted ultra vires, and/or took into account irrelevant considerations and/or misunderstood and/or overlooked relevant material and/or acted irrationally in granting permission without first receiving a detailed Radar Impact Assessment as sought by the Irish Aviation Authority before determining the application due to the proximity of the development to Woodcock Hill Radar station."

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

"Ground 4- Radar Impact Assessment

Applicants' position

The Applicants submit that the Board erred in law, acted ultra vires, and/or took into account irrelevant considerations and/or misunderstood and/or overlooked relevant material and/or acted irrationally in granting permission without first receiving a detailed Radar Impact Assessment as sought by the Irish Aviation Authority before determining the application due to the proximity of the development to Woodcock Hill Radar station.

On 26 May 2022, the Irish Aviation Authority sent a further observation stating: 'It is the observation of the Surveillance Domain that a detailed Radar Impact Assessment is required due to its proximity to Woodcock Hill Radar.' No detailed Radar Impact Assessment was submitted by the Notice Party in support of his retention application to Clare County Council or the Board. In these circumstances, the Applicants claim that the Board failed to give adequate reasons why a detailed Radar Impacted Assessment was not required.

Board's position

The Board's Decision is not invalid as alleged at Core Ground 4. The pleaded case at Core Ground 4 comprises non-expert mere assertion (which is not a basis for relief by way of judicial review) and discloses no route-map from the complaint made to the relief claimed. As set out above in response to Core Ground 3, as regards the absence of a Radar Impact Assessment, this issue was clearly and expressly addressed at section 7.17 of the Inspector's Report, with conditions 5 and 6 attached to the Board's grant of permission being 'the proposed conditions' referred to at §7.17.3 of the Inspector's Report that the Inspector considered were sufficient such that no adverse effects on aviation are likely to arise as a consequence of the development notwithstanding the absence of submission of a detailed

Radar Impact Assessment as requested by IAA in their second observation (to the Council at first instance). The approach of the Inspector and the Board in addressing the issue was not unlawful (the Applicants' pleaded case has not particularised how or in what manner it is unlawful) and was consistent with the approach taken by the planning authority at first instance in relation to the issue as aforesaid. The Applicants have not discharged the onus of establishing that the Board's Decision is vitiated by an error of law or irrationality or that the Board misunderstood or overlooked relevant material as alleged at Core Ground 4 or at all.

Notice Party's position

The Applicants have, contrary to the requirements of Order 84, Rule 20(3), RSC failed to identify (i) the irrelevant considerations that the Board is alleged to have taken into account; (ii) what material the Board is alleged to have misunderstood; and (iii) what relevant material the Board is alleged to have overlooked. Moreover, the potential effect on the radar station was considered in the original application for the wind turbine under Reg. Ref. P10/453 and that the IAA was satisfied that if it was built in accordance with the proposed plans and that no adverse effects would arise. The Inspector was entitled to exercise her judgment in concluding that in circumstances where the revised location was only 36 metres to the north-east of the original location, but with no change in height or turbine type, that it was unlikely that this would have an adverse effect on the radar approximately 7.5 km to the west of the site. It was reasonable for the Inspector and, by extension, the Board, to conclude that having regard to the modest change in location relative to the location of the radar station at Woodcock Hill, no adverse effects on aviation were likely to arise as a consequence of the development."

80. This point is based on a false premise. The fact that a given consultee, in this case the Irish Aviation Authority (**IAA**), wants something, doesn't mean that a public body acts unlawfully in not providing that something. The public body has jurisdiction to disagree with consultees and did so lawfully here. The board provided alternative conditions for dealing with aviation issues as noted above.

81. Indeed as the notice party points out, the context is that the radar installation at Woodcock Hill is some distance away from the project – about 7.5 km away from the location of the turbine.

82. Secondly, a radar impact assessment was submitted to the council at the time of the original permission application in response to item 1 of the FI request. That assessment concluded that the wind turbine at its original location would have no adverse impact on the radar installation.

83. Thirdly, the IAA did not refer to the radar impact assessment which was furnished in the context of the previous application granted under P10/453, nor did it identify any reason as to why it did not do so. In that context the inspector's point makes much sense where she said that the radar issue had been addressed in the original permission. That context makes it implausible that there is some fundamental legal error here.

EU law issues

84. The EU law issues relate to defective or unlawful EIA and AA and related issues. It would be appropriate to start with some general points about such assessments.

Inadequacy of assessments – some general legal principles

85. Some relevant legal principles regarding inadequacy of assessments which have been rehearsed in previous caselaw include the following (although I need to note that the applicants here took issue with some of this, as explained below):

(i) 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: *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; judgment of 7 November 2018, *Holohan v An Bord Pleanál*a, C-461/17, ECLI:EU:C:2018:883 at para. 44; 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, and 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.

(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, 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: *Kennedy v. An Bord Pleanála* [2024] IEHC 570 (Unreported, High Court, 7th October 2024) at §105; *Carrownagowan Concern Group v. An Bord Pleanála* [2024] IEHC 300 (Unreported, High Court, 20th May 2024) at §191(v); *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; 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 5 – EIA/AA screening

86. Core ground 5 is:

"5. The impugned decision was made ultra vires, in error of law and is invalid as it was made in breach of section 34(12) of the Planning and Development Act 2000 (as amended) and/or Article 4 and/or Annex II, Annex IIA and/or Annex III of the EIA Directive. In particular, Clare County Council did not have jurisdiction to determine and to grant the application to retain the unauthorised development because the Notice Party was required to make an application for substitute consent directly to the Respondent in respect of the

unauthorised development in accordance with Part XA of the Planning and Development Act 2000 (as amended)."

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

"Ground 5- Section 34(12) PDA

Applicants' position

The Applicants submit that the impugned decision was made ultra vires, in error of law and is invalid as it was made breach of section 34(12) PDA. The Applicants submit that Clare County Council did not have jurisdiction to hear the retention application pursuant to section 34(12) PDA and accordingly the Board acted ultra vires in granting permission on appeal in circumstances where an EIA screening determination and/or Appropriate Assessment was required.

Board's position

The Board's Decision is not invalid as alleged at Core Ground 5. The Applicants case by reference to s.34(12) is based on an erroneous premise. As set out in response to Core Ground 3, the development concerned in this case does not come within the scope or embrace of any of the three matters in s.34(12) – in this case it was determined by both the planning authority and the Board that an EIA screening determination was not required and that an Appropriate Assessment (AA) was not required. Therefore, the prohibition under s.34(12) of the 2000 Act did not bite as regards the development at issue and the submissions made to the contrary as part of the appeal process and the grounds of challenge herein that re-agitate those submissions are incorrect. Further, insofar as the Applicants in their pleaded case contend that an EIA screening and AA were required to be carried out, that is not accepted nor is it correct. The relevant pleas in substance comprise merits-based disagreement with the Preliminary Examination and AA screening conclusions reached by the Board. That is not a basis for judicial review of the Board's Decision.

Notice Party's position

The Notice Party agrees generally with the position adopted by the Board above. The Board would only have been prevented under section 34(12) from assuming jurisdiction under s. 34 if it determined that the matter needed an EIA or an AA or needed to be screened for EIA. Having determined that none of these requirements applied, the Board was correct in assuming jurisdiction to determine the application. In so far as the Applicants claim that the EIA screening was flawed because the turbine should have been assessed with the existing factory, connection to the grid, the Limerick Northern Distributor Road, 'construction details' and the 'management of surface water', the Applicants have failed to discharge the burden of proof of showing that the Board failed to take into account these matters. Specifically, in relation to the Limerick Northern Distributor Road, the Applicants provide no particulars of any likely significant effects on the environment arising from this road, which could act in-combination with the permitted wind turbine."

88. The version of s. 34(12) that was in force as of the date of the decision was as inserted by the Planning and Development (Amendment) Act 2010, s. 23 (with effect from 23 March 2011 - SI 132 of 2011):

"(12) A planning authority shall refuse to consider an application to retain unauthorised development of land where the authority decides that if an application for permission had been made in respect of the development concerned before it was commenced the application would have required that one or more than one of the following was carried out—

(a) an environmental impact assessment,

(b) a determination as to whether an environmental impact assessment is required, or

(c) an appropriate assessment."

89. The current version as inserted in 2023 as noted above is:

"(12) A planning authority shall refuse to consider an application to retain unauthorised development of land where it decides that either or both of the following was required or is required in respect of the development:

(a) an environmental impact assessment;

(b) an appropriate assessment."

90. The applicants contend that the current version reflects EU law as in force as of the date of the decision.

91. While the applicants plead that there was an obligation to apply for substitute consent, in oral submissions it refined that to say that s. 177E was the only mechanism to regularise matters (*i.e.*, the developer isn't obliged to apply but the development is unauthorised without a successful application).

92. However the premise of the argument is that s. 34(12) reflecting EU law precludes the grant of retention permission.

93. The rationale for the 2010 amendment is giving effect to the CJEU's judgment of 3 July 2008, *Commission v Ireland,* Case C-215/06, ECLI:EU:C:2008:380 (see *Mount Juliet Estates Residents Group v. Kilkenny County Council* [2020] IEHC 128, [2020] 3 JIC 1001 (Unreported, High Court, Simons J., 10th March 2020) at §35-40).

94. The CJEU held as follows (emphasis added):

"Findings of the Court

49 Member States must implement Directive 85/337 as amended in a manner which fully corresponds to its requirements, having regard to its fundamental objective which, as is clear from Article 2(1), is that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location should be made subject to a requirement for development consent and an assessment with regard to their effects (see, to that effect, Case C-287/98 Linster [2004] ECR I-723, paragraph 52, and Case C-486/04 Commission v Italy [2006] ECR I-11025, paragraph 36).

50 Further, development consent, under Article 1(2) of Directive 85/337 as amended, is the decision of the competent authority or authorities which entitles the developer to proceed with the project.

51 Given that this wording regarding the acquisition of entitlement is entirely unambiguous, Article 2(1) of that directive must necessarily be understood as meaning that, unless the applicant has applied for and obtained the required development consent and has first carried out the environmental impact assessment when it is required, he cannot commence the works relating to the project in question, if the requirements of the directive are not to be disregarded.

52 That analysis is valid for all projects within the scope of Directive 85/337 as amended, whether they fall under Annex I and must therefore systematically be subject to an assessment pursuant to Articles 2(1) and 4(1), or whether they fall under Annex II and, as such, and in accordance with Article 4(2), are subject to an impact assessment only if, in the light of thresholds or criteria set by the Member State and/or on the basis of a case-by-case examination, they are likely to have significant effects on the environment.

53 A literal analysis of that kind of Article 2(1) is moreover consonant with the objective pursued by Directive 85/337 as amended, set out in particular in recital 5 of the preamble to Directive 97/11, according to which 'projects for which an assessment is required should be subject to a requirement for development consent [and] the assessment should be carried out before such consent is granted'.

54 As the Irish legislation stands, it is undisputed that environmental impact assessments and planning permissions must, as a general rule, be respectively carried out and obtained, when required, prior to the execution of works. Failure to comply with those obligations constitutes under Irish law a contravention of the planning rules.

55 However, it is also undisputed that the Irish legislation establishes retention permission and equates its effects to those of the ordinary planning permission which precedes the carrying out of works and development. The former can be granted even though the project to which it relates and for which an environmental impact assessment is required pursuant to Articles 2 and 4 of Directive 85/337 as amended has been executed.

56 In addition, the grant of such a retention permission, use of which Ireland recognises to be common in planning matters lacking any exceptional circumstances, has the result, under Irish law, that the obligations imposed by Directive 85/337 as amended are considered to have in fact been satisfied.

57 While Community law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of Community law, such a possibility should be subject to the conditions that it does not offer the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception.

58 A system of regularisation, such as that in force in Ireland, may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfy the criteria of Article 2(1) of Directive 85/337 as amended, and consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment. The first recital of the preamble to Directive 85/337 however states that it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects.

59 Lastly, Ireland cannot usefully rely on Wells. Paragraphs 64 and 65 of that judgment point out that, under the principle of cooperation in good faith laid down in Article 10 EC, Member States are required to nullify the unlawful consequences of a breach of Community

law. **The competent authorities are therefore obliged to take the measures necessary to remedy failure to carry out an environmental impact assessment, for example the revocation or suspension of a consent already granted in order to carry out such an assessment**, subject to the limits resulting from the procedural autonomy of the Member States.

60 This **cannot be taken to mean that a remedial environmental impact assessment**, undertaken to remedy the failure to carry out an assessment as provided for and arranged by Directive 85/337 as amended, since the project has already been carried out, **is equivalent to an environmental impact assessment preceding issue of the development consent**, as required by and governed by that directive.

61 It follows from the foregoing that, **by giving to retention permission, which can be issued even where no exceptional circumstances are proved, the same effects as those attached to a planning permission** preceding the carrying out of works and development, when, pursuant to Articles 2(1) and 4(1) and (2) of Directive 85/337 as amended, projects for which an environmental impact assessment is required must be identified and then – before the grant of development consent and, therefore, necessarily before they are carried out – must be subject to an application for development consent and to such an assessment, **Ireland has failed to comply with the requirements of that directive**.

62 Consequently, the first two pleas in law are well founded."

95. At the risk of over-summarisation, the message of *Commission v Ireland* is that if EU assessment obligations are breached, there must be rectification of that, which normally means revocation of a consent. It could in exceptional circumstances involve fresh assessments but that would need to bear in mind that *post hoc* assessments are not to be equated with advance assessments.

96. This has been further clarified by the judgment of 26 July 2017, *Comune di Corridonia and Others v Provincia di Macerata and Provincia di Macerata Settore 10 – Ambiente,* Joined Cases C-196/16 and C-197/16, ECLI:EU:C:2017:589:

"Consideration of the question referred

28 In these two cases, the referring court asks, in essence, whether Article 191 TFEU and Article 2 of Directive 2011/92, in circumstances such as those in the main proceedings, mean that the failure to carry out an environmental impact assessment of a plant project required pursuant to Directive 85/337 cannot be regularised, following the annulment of consent granted in respect of that plant, by such an assessment being carried out after that plant has been built and has entered into operation.

29 As a preliminary point, it is necessary to note that Article 191 TFEU, paragraph 2 of which fixes general objectives in environmental matters (see, to that effect, judgment of 4 March 2015, Fipa Group and Others, C-534/13, EU:C:2015:140, paragraph 39 and the case-law cited), is irrelevant for the purposes of answering the questions posed.

30 Moreover, the question posed by the referring court rests on the premiss that the two plants at issue in the main proceedings ought to have been the subject of a prior assessment of their impact on the environment, by virtue of Article 2(1) of Directive 85/337, which is a matter for that court to assess.

31 Finally, as regards the question of whether, in order to answer the question posed, it is appropriate to take into account Directive 85/337, in force when VBIO1 and VBIO2 submitted the first applications for consent, or Directive 2011/92, in force when they submitted the second applications, following the annulment of the first consents granted to them, it is sufficient to note that the provisions of those two directives which are or could be relevant in the present case, and Article 2(1) of those directives in particular, are, in any event, essentially identical.

32 As to whether it is possible to regularise a posteriori the failure to carry out an environmental impact assessment of a project as required under Directive 85/337, in circumstances such as those at issue in the main proceedings, it should be remembered that Article 2(1) of that directive provides that projects that may have a significant impact on the environment, within the meaning of Article 4 of that directive, read in conjunction with Annex I or II to that directive, must be subject to that assessment before consent is granted (judgment of 7 January 2004, Wells, C-201/02, EU:C:2004:12, paragraph 42).

33 As the Court has also emphasised, the prior nature of such an assessment is justified by the fact it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects (judgment of 3 July 2008, Commission v Ireland, C-215/06, EU:C:2008:380, paragraph 58).

34 However, neither Directive 85/337 nor Directive 2011/92 contains provisions relating to the consequences of a breach of that obligation to carry out a prior assessment.

35 Under the principle of cooperation in good faith laid down in Article 4 TEU, Member States are nevertheless required to nullify the unlawful consequences of that breach of EU law. The competent national authorities are therefore under an obligation to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out an environmental impact assessment, for example by revoking or suspending consent already granted in order to carry out such an assessment (see, to that effect, judgments of 7 January 2004, Wells, C-201/02, EU:C:2004:12, paragraphs 64 and 65; of 3 July 2008, Commission v Ireland, C-215/06, EU:C:2008:380, paragraph 59; and of 28 February 2012, Inter-Environnement Wallonie and Terre wallonne, C-41/11, EU:C:2012:103, paragraphs 42, 43 and 46).

36 The Member State concerned is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment (judgment of 7 January 2004, Wells, C-201/02, EU:C:2004:12, paragraph 66).

37 The Court has, however, held that EU law does not preclude national rules which, in certain cases, permit the regularisation of operations or measures which are unlawful in the light of EU law (judgments of 3 July 2008, Commission v Ireland, C-215/06, EU:C:2008:380, paragraph 57; of 15 January 2013, Križan and Others, C-416/10, EU:C:2013:8, paragraph 87; and of 17 November 2016, Stadt Wiener Neustadt, C-348/15, EU:C:2016:882, paragraph 36).

38 The Court has made it clear that such a possible regularisation would have to be subject to the condition that it does not offer the persons concerned the opportunity to circumvent the rules of EU law or to dispense with their application, and that it should remain the exception (judgments of 3 July 2008, Commission v Ireland, C-215/06, EU:C:2008:380, paragraph 57; of 15 January 2013, Križan and Others, C-416/10, EU:C:2013:8, paragraph 87; and of 17 November 2016, Stadt WienerNeustadt, C-348/15, EU:C:2016:882, paragraph 36).

39 Consequently, the Court has held that legislation which attaches the same effects to regularisation permission, which can be issued even where no exceptional circumstances are proved, as those attached to prior planning consent fails to have regard for the requirements of Directive 85/337 (see, to that effect, judgments of 3 July 2008, Commission v Ireland, C-215/06, EU:C:2008:380, paragraph 61, and of 17 November 2016, Stadt Wiener Neustadt, C-348/15, EU:C:2016:882, paragraph 37).

40 The same is also true of a legislative measure which could allow, without even requiring a later assessment and even where there are no specific exceptional circumstances, a project which ought to have been subject to an environmental impact assessment, by virtue of Article 2(1) of Directive 85/337, to be deemed to have been subject to such an assessment, even if such a measure were applicable only to projects in respect of which consent was no longer subject to a possibility of being directly challenged before the courts because of the expiry of the time limit for bringing proceedings laid down in national legislation (see, to that effect, judgment of 17 November 2016, Stadt Wiener Neustadt, C-348/15, EU:C:2016:882, paragraphs 38 and 43).

41 Furthermore, an assessment carried out after a plant has been constructed and has entered into operation cannot be confined to its future impact on the environment, but must also take into account its environmental impact from the time of its completion.

42 It is for the referring court to assess whether the legislation at issue in the main proceedings satisfies those requirements. It is, however, appropriate to mention to the referring court that the facts that the undertakings concerned took the necessary steps to arrange for, if need be, an assessment of the environmental impact of their projects to be carried out, that the refusal of the competent authorities to accede to those requests was based on national rules, the incompatibility of which with EU law was only subsequently established by a ruling of the Corte costituzionale (Constitutional Court), and that the activities of the plants concerned were suspended appear rather to indicate that the regularisations carried out were not permitted under national law in conditions similar to those in the case leading to the judgment of 3 July 2008, Commission v Ireland (C-215/06, EU:C:2008:380, paragraph 61), and did not attempt to circumvent rules of EU law.

43 In the light of all of the foregoing considerations, the answer to the question posed is that, in the event of failure to carry out an environmental impact assessment required under Directive 85/337, EU law, on the one hand, requires Member States to nullify the unlawful consequences of that failure and, on the other hand, does not preclude regularisation through the conducting of an impact assessment, after the plant concerned has been constructed and has entered into operation, on condition that:

– national rules allowing for that regularisation do not provide the parties concerned with an opportunity to circumvent the rules of EU law or to dispense with applying them, and

– an assessment carried out for regularisation purposes is not conducted solely in respect of the plant's future environmental impact, but must also take into account its environmental impact from the time of its completion."

97. The domestic transposition is consistent with that. Domestic law offers two routes to "rectify" irregularities in the context of permission – retention permission or substitute consent. These fit together in the sense that s. 34(12) precludes retention if there is a breach of EU law assessment requirements, so the only route is s. 177E. But in that context, s. 177K(1A)(a) only allows substitute consent in "exceptional circumstances".

98. The premise of the applicants' argument under core ground 5 is that the board was precluded from granting permission by reason of s. 34(12).

99. That is based on the applicants' argument "in circumstances where an EIA screening determination and/or Appropriate Assessment was required" (submissions para. 17).

100. The premise of that prior argument is that "given the nature of the development, a screening was required" (submissions para. 22).

101. How is that proposition established? The applicants' reliance on *Hayes v. An Bord Pleanála* [2018] IEHC 338, [2019] 2 I.R. 645 (Ní Raifeartaigh J.) doesn't get them very far because that was a case where it was not disputed that EIA was required. Here that is in dispute.

102. Insofar as it is argued that s. 34(12) precluded permission as a result of the very carrying out of a preliminary examination, that claim is unfounded for reasons discussed later in this judgment. Such an examination is not to be equated to a screening determination.

103. EIA screening is dealt with at section 5.5 of the inspector's report. AA is dealt with at section 8.0.

104. The EIA screening decision is:

"EIA Screening

5.5.1. Schedule 5 of the Planning and Development Act 2001 (as amended) sets out the classes of development which require environmental impact assessment. These include in Class 3 of Part 2, installation for harnessing wind power for energy production with more than 5 turbines having a total output greater than 5 megawatts. The proposed development comprises a single turbine with a total output of 800kW. As such it is a sub-threshold development and does not as a matter of course require EIA.

5.5.2. The development is proposed on agricultural land, with a modest footprint, and is removed from sites of environmental sensitivity and impacts are unlikely to be significant in terms of magnitude or spatial extent. Effects on population and European sites can be dealt with in the planning assessment and appropriate assessment sections of this report respectively, including any potential for cumulative effects with existing and proposed development.

5.5.3. Having regard to the foregoing, notably the nature the proposed development which comprises the modest relocation of a permitted wind turbine, there is no real likelihood of significant environmental effects and the need for EIA can therefore be excluded at preliminary examination and a screening determination is not required."

105. The AA screening identifies the relevant European sites:

"European Sites.

8.8 The proposed development site is not located within or immediately adjacent to any site designated as a European site comprising a Special Area of Conservation (SAC) or a Special Protection Area (SPA). The boundary of the nearest European site is c.500mm to the south west of the appeal site. It comprises the Lower River Inspector's Report Page 39 of 49 ABP-314887-22 Shannon SAC (site code 002165). The appeal site lies within the River Shannon Sub-catchment and the site is likely to drain towards the River. This European site is therefore within the zone of influence of the development. The appeal site is substantially more removed from other SACs and has no direct connections to them (see Table 3-1 AA Screening Report).

8.9 The nearest SPA to the site is the River Shannon and River Fergus Estuaries SPA (site code 004077) which lies c.4km to the south/south west of the site. Qualifying interests of the site include various waterbirds (see below), with the potential for effects on these species if they utilise the appeal site or move across it to access the SPA. Approximately 14km to the east of the site is Slievefelim to Silvermines Mountains SPA (004165). It's qualifying interest is Hen Harrier. Approximately 18km to the north east of the site is Lough Derg (Shannon) SPA, with QIs including mobile bird species. There is potential for effects on the QIs of these two sites also if birds utilise the appeal site or move across it."

106. The determination is:

"Screening Determination

8.27.1. Having carried out Screening for Appropriate Assessment of the project in accordance with Section 177U of the PDA 2000 (as amended), it has been concluded that the project individually or in combination with other plans or projects would not be likely to give rise to significant effects on European sites including Lower River Shannon SAC, River Shannon and River Fergus Estuaries SPA or Slievefelim to Silvermines Mountains SPA or any other European site, in view of the sites Conservation Objectives, and Appropriate Assessment (and submission of a NIS) is not therefore required.

8.27.2. This determination is based on the relatively minor nature of the development (relocation of turbine), distance from European sites, limited connectivity and lack of impact mechanisms that could significantly effect a European site."

107. In oral submissions the applicants went through the inspector's report line by line and pointed to things that allegedly could be clearer or that were unspecified. The problem though is that this is an argument that proves too much - such an exercise is always possible.

108. Dealing with the core ground requires us to look at the sub-grounds on an individual basis. It's the pleadings that count, not any exotic mutations of that that an applicant may think of later or that may be launched on a witches' brew basis in the oral submissions.

109. Sub-ground 31 provides:

"31. Section 34(12) of the of the Planning and Development Act 2000 (as amended) provides that:

'A planning authority shall refuse to consider an application to retain unauthorised development of land where the authority decides that if an application for permission had been made in respect of the development concerned before it was commenced the application would have required that one or more than one of the following was carried out—

(a) an environmental impact assessment,

(b) a determination as to whether an environmental impact assessment is required, or

(c) an appropriate assessment.'"

110. That is just a statement of legal context and not a ground.

111. Sub-ground 32 provides:

"32. Clare County Council did not have jurisdiction to hear the retention application pursuant to section 34(12) of the Planning and Development Act (as Amended) 2000 because the application to retain authorised development required:

a. a determination as to whether an environmental impact was required in accordance with Part X of the Planning and Development Act 2000 (as amended) and/or Article 4 and/or Annex II and/or Annex IIA and/or Annex III of the EIA Directive; and

b. an appropriate assessment was required in accordance with Article 6(3) of the Habitats Directive (Council Directive 92/43/EC) and Part XAB of the Planning and Development Act 2000 (as amended)."

112. That is just an assertion that a determination or an AA was required. It doesn't provide a reason to conclude that such was required. So on its own it isn't a basis for relief.

113. Sub-ground 33 provides:

"33. Clare County Council and the Board erred in law and/or acted ultra vires in concluding that neither a screening determination as to an environmental impact assessment nor an appropriate assessment was required. The failure to apply for planning permission prior to the commencement of development had the consequence that the Notice Party avoided a screening determination as required by Article 4 of the EIA Directive and an appropriate assessment as required by Article 6(3) of the Habitats Directive. The Applicants place reliance on the judgment in Case C-215/06, Commission v Ireland and Mount Juliet Estates Residents Group v Kilkenny County Council [2020] IEHC 128 in this regard. The Notice Party was required to make an application for substitute consent directly to the Board in respect of the unauthorised development in accordance with Part XA of the Planning and Development Act 2000 (as amended)."

114. Again that doesn't get us very far. It asserts rather than demonstrates or provides a reasoned basis for saying that the conclusion of no determination or assessment was unlawful. It isn't a properly particularised plea in any sense.

115. Sub-ground 34 provides:

"34. The Clare County Council and the Board failed to consider that a screening determination was required by Article 4 of the EIA Directive and an appropriate assessment was required by Article 6(3) of the Habitats Directive because the turbine should have been assessed with the existing factory, connection to the grid/existing factory and the Limerick Northern Distributor Road, construction details and the management of surface water."

116. This is at least a stateable ground. It argues that (a) the turbine was not assessed with the factory, grid connection, road, construction details and surface water management and (b) that

failure rendered unlawful the conclusions on the lack of need for a screening determination or AA. The problem with this argument is that it hasn't been made out on the facts. To show that the board didn't consider matters before it requires evidence which is lacking. To show that any failure of consideration, if established, would give rise to a failure to appreciate significant environmental effects or effects on European sites requires evidence, which is also lacking.

117. Furthermore this ground doesn't engage with the inspector's report. For example para. 7.14.2 provides (emphasis added):

> "In response to the request for further information, the applicant submitted a Noise Assessment. It is based on assessment of predicted effects, as the turbine was not operational at the time. Background noise monitoring includes noise arising in the wider environment of the site, including existing factory noise. This approach is reasonable as **the existing background noise provides the actual context for the development and allows for the assessment of likely cumulative effects.** Further, at the time of site inspection, noise was evident from the factory in the immediate area of the site e.g. in car park, at public road at entrance. This was typically a low hum, which was not evident at any distance from the site."

118. This *does* consider cumulative effects with the factory, contrary to what is pleaded at sub-ground 34.

119. Sub-ground 35 provides:

> "35. Moreover, Clare County Council and the Board failed to address the Applicants' objections and/or failed to give adequate reasons for not accepting that Clare County Council did not have jurisdiction to consider the retention application."

120. That is repetitive of core ground 3 which is addressed above.

121. So none of the pleaded grounds under this heading are a basis for *certiorari*.

Core ground 6 – EIA preliminary examination

122. Core ground 6 is:

> "6. The Respondent's decision is invalid and/or ultra vires and/or erred in law in failing to carry out a screening determination as to whether an environmental impact assessment was required in accordance with Part X of the Planning and Development Act 2000 (as amended) and/or Part 4, Part 10, Schedule 5 and/or Schedule 7 and/or Schedule 7A of the Planning and Development Regulations 2001 as amended and/or Article 4 and/or Annex II and/or Annex IIA and/or Annex III of the EIA Directive."

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

> "Ground 6- Section 34(12) PDA
>
> Applicants' position
>
> The Board concluded that the proposed development was sub-threshold within the meaning of Schedule 5 of the Planning and Development Regulations 2001 (as amened) and excluded the need for EIA screening determination at the preliminary examination stage. The Applicants submit that the Board erred in law and/or acted ultra vires in concluding that a screening determination was not required having regard to the nature, size or location of the development. The Applicants state that the Board's decision is invalid because (i) it did not consider the impact the development would have on the adjoining European Sites; (ii) it failed to consider the impact the cumulative impact of the wind turbine with the existing plastics factory, connection to the grid/existing factory and the Limerick Northern Distributor Road, construction details and the management of surface water; and (iii) it did not have regard to the issues of noise, shadow flicker and nuisance.
>
> Board's position
>
> The Board's Decision is not invalid as alleged at Core Ground 6. Insofar as it concerns the Board (in circumstances where several pleas are directed at the Council - who are not a party to the proceedings - and in no way go to the validity of the Board's Decision), the pleaded assertions at Core Ground 6 in substance comprise merits-based disagreement with the Preliminary Examination conclusion reached by the Board. That is not a basis for judicial review of the Board's Decision. The Preliminary Examination that was carried out in this case is objectively supportable. The Board's conclusion on Preliminary Examination was open to it based on the materials before it – the Applicants have failed to demonstrate that there was no material before the Board that would support its decision in that respect and have further failed to establish that the decision is so irrational that no reasonable authority or decision-maker in the Board's position would have made such a determination. The non-expert assertions of the Applicants do not establish any legal flaws in the conclusions of the Board and its Inspector that an EIA screening determination was not required (a conclusion that the planning authority also reached).
>
> Notice Party's position

> There is some overlap between the Applicants' pleas under Core Ground 5 and Core Ground 6, in particular in relation to the alleged failure of the ... Board ... to take into account certain other developments, including the existing factory and the Limerick Northern Distributor Road and the Notice Party's position is the same under this Core Ground. In so far as the Applicants claim that the Board erred in failing to conclude that an EIA screening determination was required, rather than a Preliminary Examination, having regard to the issues of noise, shadow flicker and nuisance, it has to be borne in mind that the Board was dealing with an application for revisions in relation to a previously permitted development under Reg. Ref. P10/453. Having regard to what the Board referred to in its 'Reasons and Considerations' as a 'modest relocation' of the permitted wind turbine and its conclusion as to the 'absence of significant visual and environmental effects associated with its relocation', the Board was entitled to conclude, inter alia, that the development proposed to be retained 'would not seriously injure the visual amenity, residential amenity or landscape character of the area'."

124. Article 103(1) of the Planning and Development Regulations 2001 (substituted by article 67(a) of S.I. No. 296 of 2018 European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018) provides:

> "(a) Where a planning application for subthreshold development is not accompanied by an EIAR, the planning authority shall carry out a preliminary examination of, at the least, the nature, size or location of the development.
>
> (b) Where the planning authority concludes, based on such preliminary examination, that—
>
> (i) there is no real likelihood of significant effects on the environment arising from the proposed development, it shall conclude that an EIA is not required,
>
> (ii) there is significant and realistic doubt in regard to the likelihood of significant effects on the environment arising from the proposed development, it shall, by notice in writing served on the applicant, require the applicant to submit to the authority the information specified in Schedule 7A for the purposes of a screening determination unless the applicant has already provided such information, or
>
> (iii) there is a real likelihood of significant effects on the environment arising from the proposed development, it shall—
>
> (I) conclude that the development would be likely to have such effects, and
>
> (II) by notice in writing served on the applicant, require the applicant to submit to the authority an EIAR and to comply with the requirements of article 105."

125. Article 109(2) (substituted by article 69(b) of S.I. No. 296 of 2018 European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018) is the relevant section to the board's decision here. Unfortunately the applicants didn't plead art. 109, but the board rather generously doesn't take any point on that. Sub-article (2) provides:

> "(2) (a) Where an appeal relating to a planning application for subthreshold development is not accompanied by an EIAR, the Board shall carry a preliminary examination of, at the least, the nature, size or location of the development.
>
> (b) Where the Board concludes, based on such preliminary examination, that—
>
> (i) there is no real likelihood of significant effects on the environment arising from the proposed development, it shall conclude that an EIA is not required,
>
> (ii) there is significant and realistic doubt in regard to the likelihood of significant effects on the environment arising from the proposed development, it shall, by notice in writing served on the applicant, require the applicant to submit to the Board the information specified in Schedule 7A for the purposes of a screening determination unless the applicant has already provided such information, or
>
> (iii) there is a real likelihood of significant effects on the environment arising from the proposed development, it shall—
>
> (I) conclude that the development would be likely to have such effects, and
>
> (II) by notice in writing served on the applicant, require the applicant to submit to the Board an EIAR and to comply with the requirements of article 112."

126. It is agreed by the board that this was a sub-threshold development so that art. 109(2) applied.

127. The preliminary examination procedure is consistent with EU law. Article 4(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**) as amended in 2014 provides:

> "3. Where a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken

> into account. **Member States may set thresholds or criteria to determine when projects need not undergo either the determination under paragraphs 4 and 5 or an environmental impact assessment**, and/or thresholds or criteria to determine when projects shall in any case be made subject to an environmental impact assessment **without undergoing a determination set out under paragraphs 4 and 5**."

128. The word "determine" means determine whether to have EIA screening, which is what enables a procedure such as preliminary examination. The word "determination" means EIA screening under art. 4(4) and (5). Yes that's not going to win any drafting awards but the two words and the two concepts are clearly distinct.

129. The applicants' basic point was that "determination" in the Irish legislation meant any determination (including a decision as to whether the "determination" in art. 4(4) of the directive applied) – and so implicitly postulates that the word "determination" has a different meaning in the directive and in the Irish legislation to transpose it.

130. That is an inappropriate approach to interpretation of transposing legislation. Given that the directive uses the word "determination" (*e.g.* – art. 4(4) "Where Member States decide to require a determination for projects listed in Annex II, …"), such a word in national law should be given the same meaning. To interpret national law otherwise would potentially create conflict with EU law in many situations.

131. A wider interpretation would create an absurdity in any event, which would mean that vast amounts of sub-threshold development would be excluded from retention permission even though EIA would never get off the ground (for example, a retention application for a single structure or item, sub-threshold, in any situation where a much larger development falls within Annex II). The applicants seem to be enthusiastic in their agreement that there would be such absurdity and speculatively suggest that that is why the legislation was amended. But another option – a preferable option – is to interpret the law that avoids such absurdity in the first place.

132. The fact that the relevant version of s. 34(12) was put in place prior to the preliminary examination procedure doesn't change the fact that the two need to be read together. As s. 10 of the Interpretation Act 2005 states under the marginal note of "Enactment always speaking":

> "An enactment continues to have effect and may be applied from time to time as occasion requires."

133. That includes continuing effect after related enactments have been amended.

134. The applicants rely on *Shadowmill Ltd v. An Bord Pleanála* [2023] IEHC 157, [2023] 3 JIC 3106 (Unreported, High Court, 31st March 2023) *per* Holland J. at §55: "Ultimately, the standard for concluding that EIA is required or not required is necessarily the same in Preliminary Examination as in EIA Screening – i.e. 'that there is no real likelihood of significant effects on the environment arising from the proposed development'". The applicants state at para. 30 of their submissions: "Accordingly, in effect, a preliminary examination and a screening determination are the same thing." That isn't a correct representation of what is stated in *Shadowmill*, a statement in which the word "ultimately" is doing a fair amount of work.

135. The critical point is that *Shadowmill* does not either purport to bring about, or have the effect of, totally assimilating preliminary examination into screening determinations. The distinction in EU and domestic legislation between the two remains. They are procedurally distinct even if the test is ultimately comparable. So when s. 34(12) of the 2000 Act refers to the need for a screening determination, that doesn't include a project where EIA is ruled out at preliminary examination stage. *Shadowmill* doesn't purport to say to the contrary. Indeed the contrary view (which, as I say, Holland J. doesn't espouse) would be clearly wrong – the statutory language is clear, avoids absurdity, and fulfils the requirement to interpret transposing legislation in the light of EU law.

136. The applicants engage in the common litigant's fallacy of construing a judgment as if it were a statute, or even as a tablet handed down on Mount Sinai, and try to read *Shadowmill* as some kind of comprehensive user's manual or encyclopaedia on the meaning of preliminary examination - even though that judgment dealt with a separate issue - certainly not the issue in this case. Most if not all of the extracts relied on by the applicants from that judgment are *obiter* anyway and are a helpful attempt to give some general comments about the preliminary examination procedure. Attempts at general overviews have pros and cons. The pro is to bring together, for reference, some relevant material as of the date of the attempt. That is often very useful and we all are in the debt of those with the fortitude for such compilations. The con is that that becomes out of date as soon as the next case comes along, but that more fundamentally such an exercise may, depending on how one reads it, stray into *obiter* musing about issues that have not been argued. While any judgment may have this feature, the grand synthesis possibly has a slightly greater chance of using phrasing that can be construed as addressing hypothetical situations that would, on argument, require different phrasing. *Obiter* statements come in hard and soft varieties. The hard *obiter* statement is one that relates to a concrete issue in a concrete case that was argued but where the decision doesn't in the end turn on it, so the court's comments are at least informed by real debate.

The soft *obiter* statement is one that doesn't draw on detailed, or perhaps any, *inter partes* argument at all, and must be received at a certain discount accordingly. Argued law is tough law, as Megarry J. said (*Cordell v. Second Clanfield Properties Ltd* [1969] 2 Ch 9, 16-17), and that needs to be priced in when a court makes comments about, or uses terminology that potentially envisages, things that haven't been argued. Shoehorning the distinct issue in this case into the general language of the different context of *Shadowmill* – legitimately and understandably general language in the sense that that case didn't require the court to draw a distinction between preliminary examination decisions and determinations, or to consider the use of terms in the directive – isn't how the common law method works or could ever work.

137. The critical point is that s. 34(12) is compatible with the preliminary examination albeit that it was enacted in its current form (2011) prior to that procedure (2018). If a valid preliminary examination is conducted that decides that matters go no further, then s. 34(12) doesn't arise and isn't an obstacle to retention permission. That isn't a complicated issue of statutory interpretation and it isn't a close call – the legislation on its plain meaning is clear and there is nothing in its purpose or context that contradicts such a clear interpretation. A different interpretation would create absurdity. Nor is a different interpretation required to comply with EU law – on the contrary that interpretation is harmonious with EU law. This isn't a complex issue.

138. This isn't a serious point. On the contrary the applicants' approach is to launch a highly artificial and unreal interpretation of domestic law in order to unhook it from its EU law foundations and unleash procedural chaos as a result. Indeed they almost revel in the absurdity thereby created and boast that this very absurdity explains later amendment of the law. But there are simpler explanations and simpler interpretations.

139. To illustrate the lack of substance of this point we need to look at the pleaded sub-grounds.

140. Sub-ground 36 provides:

> "36. Clare County Council and the Board purported to consider whether a screening determination as to whether an environmental impact assessment was required. Clare County Council and the Board concluded that the proposed development was sub-threshold within the meaning of Schedule 5 of the Planning and Development Act 2001 (as amened) and excluded the need for EIA screening determination at the preliminary examination stage. The Inspector's Report records at para. 5.5.1-5.5.3 of her Report:
>
> '5.5.1. Schedule 5 of the Planning and Development Act 2001 (as amended) sets out the classes of development which require environmental impact assessment. These include in Class 3 of Part 2, installation for harnessing wind power for energy production with more than 5 turbines having a total output greater than 5 megawatts.
>
> The proposed development comprises a single turbine with a total output of 800kW. As such it is a sub-threshold development and does not as a matter of course require EIA.
>
> 5.5.2. The development is proposed on agricultural land, with a modest footprint, and is removed from sites of environmental sensitivity and impacts are unlikely to be significant in terms of magnitude or spatial extent. Effects on population and European sites can be dealt with in the planning assessment and appropriate assessment sections of this report respectively, including any potential for cumulative effects with existing and proposed development.
>
> 5.5.3. Having regard to the foregoing, notably the nature the proposed development which comprises the modest relocation of a permitted wind turbine, there is no real likelihood of significant environmental effects and the need for EIA can therefore be excluded at preliminary examination and a screening determination is not required.'"

141. That is a statement of factual context, not a ground as such.

142. Sub-ground 37 provides:

> "37. Article 103(1)(a) and (b)(i) of the Planning Regulations Act 2001 provides:
>
> 'Where a planning application for sub-threshold development is not accompanied by an EIAR, the planning authority shall carry out a preliminary examination of, at the least, the nature, size or location of the development.
>
> (b) Where the planning authority concludes, based on such preliminary examination, that—
>
> i. there is no real likelihood of significant effects on the environment arising from the proposed development, it shall conclude that an EIA is not required,'"

143. That is just legal context.

144. Sub-ground 38 provides:

> "38. Clare County Council and the Board erred in law and/or acted ultra vires in concluding that a screening determination was not required having regard to the nature, size or location of the development."

145. That is just sheer assertion. It is certainly not a properly pleaded ground because it fails to specify why the decision was invalid.

146. Sub-ground 39 provides:

"39. Clare County Council and the Board failed to conclude that a screening determination was required because the retention application for turbine was required to be assessed with the existing factory, connection to the grid/existing factory and the Limerick Northern Distributor Road, construction details and the management of surface water."

147. That pointlessly repeats sub-ground 34.

148. Sub-ground 40 provides:

"40. In this respect, Clare County Council and the Board failed to carry out a screening determination in accordance with Paragraph 1(1)(b) and Paragraph 1(3)(g) of Schedule 7 of the Planning and Development Regulations 2001 as amended and/or Article 4(5)(b) of the EIA Directive and/or Annex III of the EIA Directive in considering 'the cumulation of the impact with the impact of other existing and/or approved projects'."

149. Again that is just another way of making the point in sub-ground 34.

150. Sub-ground 41 provides:

"41. Clare County Council and the Board failed to conclude that a screening determination was required having regard to the issues of noise, shadow flicker and nuisance. Clare County Council and the Board also Board failed to carry out a screening determination in accordance with Paragraph 3 of Schedule 7 of the Planning and Development Regulations 2001 as amended and/or Article 4(5)(b) and Annex III of the EIA Directive in considering the type and characteristics of the potential impact of the development, including the noise, shadow flicker and nuisance associated with the proposed development."

151. That is a merits-based disagreement with the decision of the board. To elevate that complaint to a basis for *certiorari*, an applicant would have to demonstrate a flaw on the face of the material or produce expert evidence to show that the board's approach was flawed.

152. Sub-ground 42 provides:

"42. Clare County Council and the Board erred in law and/or acted ultra vires in concluding that a screening determination was not required contrary to Part X of the Planning and Development Act 2000 (as amended) and/or Part 4, Part 10, Schedule 5 and/or Schedule 7 and/or Schedule 7A of the Planning and Development Regulations 2001 as amended and/or Article 4 and/or Annex IIA and/or Annex III of the EIA Directive."

153. That doesn't seem to be making any point that isn't made elsewhere. Certainly that doesn't constitute a properly pleaded ground because it provides no basis for the asserted conclusion.

154. So core ground 6 as pleaded hasn't been made out.

Core ground 7 – EIA project-splitting

155. Core ground 7 is:

"7. The Respondent failed to have any or any proper regard to the issue of project splitting."

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

"Ground 7-Project-splitting

Applicants' position

The Applicants state that the proposed development constitutes project splitting contrary to Article 4 of the EIA Directive. The Applicants submit that in adopting the Inspector's report, that the Board erred in law/acted ultra vires and/or acted irrationally in deciding that a screening determination was not required under Article 4 of the EIA Directive (i) in the absence of any details on file regarding the location of cabling or connectivity to the factory; and (ii) in circumstances where there was no application before the Board to connect the turbine to the factory and/or the national grid.

Board's position

The Board's Decision is not invalid as alleged at Core Ground 7. This ground of challenge is misconceived in fact and law and based on an erroneous premise. The Board did not fail to have any or any proper regard to the issue of project splitting as alleged. No breach of Article 4 of the EIA Directive has occurred. The concept of projecting splitting is understood to typically involve splitting a project that requires EIA into smaller components to avoid the requirement to carry out EIA altogether. That is not what occurred here at all and there is no evidence of project splitting, the ground of challenge is based only on mere assertion by the Applicants. The retention permission was subject to Preliminary Examination for EIA. There is no attempt and no evidence of any attempt to avoid any EIA obligations, noting the relevant planning history and Preliminary Examination carried out in this case. On a valid and correct interpretation of the Inspector's Report, it is clear and obvious that the Inspector was fully aware that the Preliminary Examination was being carried out in relation to a single wind turbine that was connected by cable to the factory for which it was supplying electrical power.

Notice Party's position

The Applicants' reliance on the decision in O'Grianna .v. An Bord Pleanala [2014] IEHC 632, is misplaced, in circumstances where that case concerned the failure to carry out an EIA in respect of a connection to the national grid in circumstances where no details of the location of the connection were given and in circumstances where the windfarm itself was subject to a requirement for mandatory EIA. The submissions under Core Ground 1 above relating to the energy generated being used for onsite use for the factory premises (and not for the national grid) are relied upon again under this Core Ground."

157. Again it's the pleaded case that counts so we need to look at the sub-grounds.

158. Sub-ground 43 provides:

"43. Michael J. Duffy in his submission on behalf of the First Named Applicant to the Board stated at page 14:

'There is no application for connectivity of other necessary infrastructure to connect the turbine to the grid and/or the factory. The infrastructure is still unauthorised development and this application should not be advanced without full consideration of all the development involved.'"

159. That is just factual context.

160. Sub-ground 44 provides:

"44. In response to the issues raised in respect of connectivity, the Inspector notes at para. 7.16.2 of the Inspector's Report 'Any connectivity to other developments would be outside of the permitted development and potentially ultra vires. If the board are minded granting permission for the development I would recommend a condition that as built drawings are provided to the PA in the interest of clarity.'"

161. That is again just factual context not a legal ground.

162. Sub-ground 45 provides:

"45. The Inspector further notes at para. 8.2 of the Inspector's Report 'N.B,. There are no details on file regarding the location of cabling or connectivity to the factory.'"

163. Again that is just a statement of fact.

164. Sub-ground 46 provides:

"46. It is the Applicants' case that the Inspector and the Board, in adopting the Inspector's report, that the Board erred in law/acted ultra vires and/or acted irrationally that a screening determination was not required under Article 4 of the EIA Directive (i) in the absence of any details on file regarding the location of cabling or connectivity to the factory; and (ii) in circumstances where there was no application before the Board to connect the turbine to the factory and/or the national grid."

165. That oddly enough isn't a complaint about project-splitting notwithstanding the heading to core ground 7. It is a complaint of *ultra vires* or irrationality due to the lack of details regarding the rest of the project, or the lack of an application for permission in relation to the rest of the project. But there was provision for the detail of the connectivity to be specified. And there is no legal obligation to await an application for permission for a grid connection or local energy connection before applying for permission for another part of a project.

166. More fundamentally, this case doesn't have anything to do with project-splitting because it isn't part of the project to have a connection with the grid and no such connection is proposed. The turbine would serve the related factory on a specified basis. The "project" consists of (a) the original consent – already in existence (b) the extension of that – something that also already exists - and (c) the retention permission – with which the board was concerned here. There isn't some further and future element (d) of the "project" that has been "split" and that hasn't been considered. The applicants' pleaded concern regarding a future connection to the grid is purely fictional and speculative. The concern regarding the details of cabling connected to the new turbine don't legally constitute a concern about project splitting. That is merely detail left to conditions (conditions 1 and 8).

167. In *Ó Gríanna v. An Bord Pleanála* [2014] IEHC 632, [2014] 12 JIC 1208 (Unreported, High Court, 12th December 2014), Peart J. said:

"32. In that regard, I have already concluded that in reality the wind farm and its connection in due course to the national grid is one project, neither being independent of the other as was the case on R (Littlewood) v. Bassetlaw District Council [[2008]'s E.W.H. C. 1812] for example. The Board's submissions are very much predicated on the contrary argument, and on the fact as submitted also by Framore that at this point in time there have been no proposals formulated by ESB Networks for the design and route of the connection to the national grid. That argument does not, it seems to me, justify treating phase 1 as a stand-alone project when in truth it is not. Rather, it points to a prematurity in the seeking of permission for the construction of the wind farm ahead of the detailed proposals for its connection to the national grid from ESB Networks. I appreciate that Framore have indicated that it simply is not possessed of the necessary information in this regard and could not

include it in its EIS. But that does not mean that given more time and further contact with ESB Networks it could not be achieved so that it could be included in an EIS which addressed the impact of the environment of the total project 'at the earliest stage'. It may mean that the developer must wait longer before submitting its application for planning permission. But it seems to me likely at least that even if a phase 1 permission is granted with a condition such as Condition 4 contained therein, no sensible developer would complete phase 1 of the development without having been granted permission for the connection to the national grid, or without having been assured that the connection phase is exempted development. In that way, it is difficult to see any real prejudice to the developer by having to wait until the necessary proposals are finalised by ESB Networks so that an EIS for the entire project can be completed and submitted, and so that a cumulative assessment of the likely impact on the environment can be carried out in order to comply with both the letter and spirit of the Directive."

168. The comment that it would be premature to apply for permission on one phase of a project pending clarification of a subsequent phase was *obiter*. Demonstrably so because, when the court was asked to show the colour of its money, Peart J. in that case didn't see that "problem" as later precluding remittal of the application back to the board even in the absence of an application for permission for the rest of the project. Remittal would have been unthinkable if the application was really premature. So that wasn't meant as a particularly weighty comment and it certainly wasn't a correct one. The prematurity argument has no basis in EU law which is the foundation of the whole doctrine of project-splitting. As I say, what shows that that comment has no real substance is the fact that Peart J. himself on *Ó Grianna v. An Bord Pleanála (No. 2)* [2015] IEHC 248, 2015 WJSC-HC 22515, [2015] 4 JIC 1606 (Unreported, High Court, 16th April 2015) directed remittal notwithstanding his earlier *obiter* pronouncement about prematurity. If he had been correct that the application was premature it would have been unlawful and inappropriate to remit it for decision.

169. Where a project consists of multiple parts, and consideration is being given to applying for development consent for one of the parts, the issue is not one of prematurity – a developer can at any time apply for consent for any part of a project. The issue rather is consideration of the whole project and cumulative and in-combination effects with other projects. So if a developer applies for consent for a part of a project, that has to be considered as part of the overall project (both already consented, currently under consideration, and to be consented) and cumulatively and in combination with other projects. If elements are uncertain, that has to be taken into account – but it isn't the law that permission for a part can't proceed if other parts are yet to be determined. Insofar as there is a possible reading of *Ó Grianna* to the contrary effect, that respectfully makes little sense, has no basis in EU law, and wasn't even followed to the next logical step by the learned judge himself. The rather more recent and rather more binding decision of the Supreme Court in *Treascon* has clarified that projects can proceed by separate steps without there being a suggestion of it being held premature to apply for the first step.

170. Sub-ground 47 provides:

"47. The Applicants will rely on Ó'Grianna v An Bord Pleanála [2014] IEHC 632 that the proposed development constitutes project splitting contrary to Article 4 of the EIA Directive."

171. That is phrased in the form of giving notice of something but we can look at the substance. I have considered *Ó Grianna* above in any event.

172. Browne, *Simons on Planning Law*, 3rd Ed., 2021, states, correctly in my view:

"14-280 It is important that the full extent of a project be properly identified. If a project is identified in a restricted way, this may result in the evasion of the obligation for EIA. For example, if what is in reality only one project is artificially presented as a series of separate projects, it may be that none of these on its own will trigger an EIA. This practice is known as 'project-splitting' (sometimes also referred to as 'salami-slicing')."

173. The board here agreed that Hedigan J.'s view in *Sweetman v. An Bord Pleanála* [2016] IEHC 310, 2016 WJSC-HC 23644, [2016] 6 JIC 1003 (Unreported, High Court, 10th June 2016) to the effect that project-splitting is related to a (subjective) *intention* to split the project "for the purpose of avoiding the need to have an EIA" (para. 8.2), is not something they would rely on. Such an approach is incorrect. EU law doesn't work that way. As I say the board didn't seek to defend that position. Whether an overall project requires assessment in circumstances where it has been split in a way that means that the particular application comes in below relevant thresholds is an objective, not a subjective, situation. The effect of the project being split is not that an application for permission is invalid or that *certiorari* must be granted or other impulsive jabbing at the controls. The effect is rather that the decision-maker must undertake whatever assessment is appropriate having regard to the overall scope of the project as a whole, and consider the application at hand in that context and in an in-combination and cumulative assessment with other projects on that basis.

174. As regards cumulative and in-combination effects specifically with projects yet to be consented, there is some caselaw to the effect that those don't need to be considered (*Ratheniska*

Timahoe and Spink (RTS) Substation Action Group & Anor v. An Bord Pleanála & Anor [2015] IEHC 18, 2015 WJSC-HC 24479, [2015] 1 JIC 1402 (Unreported, High Court, Haughton J., 14th January 2015)) but that contradicts European Commission guidance. As noted in *Toole v. Minister for Housing I (No. 4)* [2023] IEHC 403, [2023] 7 JIC 1301 (Unreported, High Court, 13th July 2023) and *Toole v. Minister for Housing II* [2024] IEHC 610 (Unreported, High Court, 1st November 2024), that proposition is debatable and may ultimately require CJEU clarification if decision-makers are going to take that stance.

175. Coming back to the pleadings here, insofar as sub-ground 47 needs further analysis, it doesn't explain why the decision here constitutes unlawful project-splitting. It isn't a properly particularised plea on any view.

176. Sub-ground 48 provides:

> "48. Clare County Council and the Board were obliged, at a minimum, to consider the retention application in combination with an application for connection to the factory and/or the national grid in line with Ó'Grianna v An Bord Pleanála [2014] IEHC 632."

177. The problem there is that the application *was* considered in the light of issues such as the factory and the connection to it. Insofar as any significant issue is raised under this heading it hasn't been made out evidentially.

178. Sub-ground 49 provides:

> "49. Moreover, Clare County Council and the Board failed to have any or any proper regard to the issue of project splitting because Clare County Council and the Board erred in law and/or acted ultra vires in concluding that a screening determination was not required under Article 4 of the EIA Directive by considering the retention permission for a revised site boundary and the wind turbine in isolation without considering the in combination/cumulative effects of existing development on the site or adjoining lands."

179. This ground fails evidentially. It hasn't been shown that the project was considered in isolation in the sense pleaded.

180. Sub-ground 50 provides:

> "50. Clare County Council and the Board were obliged to conduct a screening determination under Article 4 of the EIA Directive by assessing the significant cumulative effects of the relocation of the turbine and the revised site boundary with the existing development on the site or adjoining lands, including the plastics factory, the underground cabling, the storage container, and the commercial warehouses."

181. This is highly repetitive of previous grounds and fails for similar reasons.

182. Sub-ground 51 provides:

> 51. The Inspector's Report sets out the planning history of the site and the adjoining lands at para.4.1 of her Report:
>
> 'The following planning applications are referred to by parties to the appeal. They have been made in respect of the appeal site or the adjoining lands:
>
> • PA ref. 98/2027 – Permission granted to Limerick Blow Moulding Ltd for 25,000sqft facility, replacing pre-existing plant, including septic tank, car parking and yard (referred to by appellant).
>
> • PA ref. 00/2247 - Permission granted to Limerick Blow Moulding Ltd to retain as constructed facility (under PA ref. 98-2027) (referred to by appellant).
>
> • PA ref. 01/2262 (PL03-128774) - Permission granted by the Board to Limerick Blow Moulding Ltd for extension to existing facility (referred to by appellant).
>
> • PA ref. 08/1299 (PL03.231442) – Application for permission by Seamus Mallen for new farm entrance and ancillary site works was refused by the PA and upheld by the Board (referred to by appellant). Refused on grounds of traffic safety, loss of farmland and impact on amenity (loss of hedgerows/trees).
>
> • PA ref. 10/453 – Permission granted to Seamus Madden to erect a single 800kW wind turbine, 73m high with rotor diameter of 53m, and ancillary access road. Permission granted for an operational period of 20 years from the date of commissioning (referred to by PA and appellant and on file).
>
> • PA ref. 15/812 - Permission granted to Seamus Madden to extend the appropriate period of planning permission under PA ref. 10-453 (referred to by PA and appellant and on file).
>
> • PA ref. 17/604 – Retention permission granted to Seamus Madden for agricultural storage shed (283m2) (referred to by appellant, PA and on file).
>
> • PA ref. 20/489 – Planning application for change of use of existing storage shed (850m2) for commercial warehouse storage sheds invalidated as sheds were already in commercial use (referred to by appellant).
>
> • PA ref. 20/634 – Retention permission granted for change of use of agricultural storage building and retention of 2 no. commercial warehouse buildings to be used for storage ancillary to Limerick Blow Moulding factory building (referred to by appellant, PA and on file).

• PA ref. UD21-021 – Ongoing enforcement action in respect of the wind turbine (referred to by PA). (Assume JR 2021/335 relates to this case).
• PA ref. UD17-28 – Closed (Referred to by PA and appellant).
• PA ref. UD12-79 – Closed (referred to by appellant UD17-28).
• PA ref. UD12-079 – Referred to by appellant and PA. File opened on foot of complaints of 24 hour HGV movements to and from factory site. File subsequently closed.'"

183. That is just a statement of context.

184. Sub-ground 52 provides:

"52. Clare County Council and the Board failed to have any or any proper regard to the issue of project splitting having regard to the planning history of site and the adjoining lands, including all of the development cumulatively on the site and the adjoining lands, as detailed by the Applicants in their submissions to the Board. Moreover, the impugned decision is invalid in that it has failed to address public observations and/or failed to give adequate reasons for not accepting submissions that an EIA screening determination/environmental impact assessment was required in arriving at its decision."

185. The complaint of lack of reasons falls flat. Reasons for the EIA and AA decisions are provided. As far as failure to consider project-splitting having regard to all development cumulatively on the site and adjoining lands, that is unacceptably general. The applicants haven't evidentially established that there was some specific and identified material cumulative or in-combination effect that the board didn't consider.

Core ground 8 – EIA public participation

186. Core ground 8 is:

"8. The impugned decision was made ultra vires, in error of law and is invalid as it was made in breach of Article 6(5) of the EIA Directive because the Noise Assessment Reports and Shadow Flicker Reports were not made electronically accessible to the public by Clare County Council on Clare County Council's website."

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

"Ground 8-Public Participation

Applicants' position

The Applicants submit that impugned decision was made ultra vires, in error of law and is invalid as it was made in breach of Article 6(5) of the EIA Directive because the Noise Assessment Reports and Shadow Flicker Reports were not made accessible to the public on Clare County Council's website. The Applicants claim that the information published by the local authority was not presented in the manner prescribed by Article 6(5) of the Directive which obliges the Board to make the relevant information electronically accessible to the public, through easily accessible points of access. The Applicants give evidence that project information available on Clare County Council website is not arranged coherently.

Board's position

The Board's Decision is not invalid as alleged at Core Ground 8. There is no basis for the Applicants allegation that the Board's Decision was made in breach of Article 6(5) of the EIA Directive. No allegation against the Board is directly advanced or pleaded at Core Ground 8 at all. The complaint is premised on a complaint directed at the Council (who the Applicants did not name as a party to the proceedings). The Board makes no admissions in relation to any of allegations directed as against the Council in this regard. The Board is not responsible for the Council's website, nor its content, and the Board's Decision is not invalid by reason of the Council allegedly not making certain documents electronically accessible on its website. More fundamentally, in any event, even if it was correctly pleaded (which it is not) Core Ground 8 is based on a false premise – as the relevant Reports are in fact (and, as confirmed by the Council, at all material times were in fact) available on the relevant page on the Council's website. There is no evidence or pleaded case that the Applicants were in any way prejudiced, or any way impeded in making submissions to the Board by reason of the alleged non-publication by the Council of the Reports on their website (which allegation itself is clearly mistaken and inaccurate as the two relevant Reports were and are in fact on the Council's website). On the facts of this case, there is no basis for the Applicants being granted any relief pursuant to this ground of challenge. It is also not open to the Applicants to rely on hypothetical third party public participation rights and/or rules to protect those rights to invalidate the Board's Decision. Further, there is no lack of reasons as incorrectly alleged at Core Ground 8.

Notice Party's position

The Applicants are not entitled to any relief under this Core Ground in circumstances where the Council was not joined as a Respondent in these proceedings. The Notice Party agrees with the position of the Board under this heading."

188. This is a complaint about defective publication by the council, which is not a respondent, so it doesn't get off the ground. That is a similar problem to the one in *Treascon* where there was an attempt to complain about the lack of material on the central portal maintained by the Minister, but the Minister hadn't been joined as a party. On the basis of Murray J.'s judgment in *Treascon* it would be prudent to simply stop there.

189. In oral argument the applicants relied on an alleged breach of the board's obligations (as opposed to the council's obligations), but core ground 8 and the associated sub-grounds 53 to 56 don't allege breach by the board specifically of anything, still less of any identified statutory obligation that applies to the board. As pleaded, on any reasonable view, this is a complaint about the council. Since the council isn't a party, that point can't succeed. There is no analogy to cases where a number of entities were alleged on the pleadings to be in breach of some requirement – such a scenario doesn't stop the court from granting relief in respect of such entities as are parties even if there are non-party concurrent wrongdoers. Such a procedure doesn't apply here because the pleaded complaint is identified as a default on the part of a non-party.

190. Perhaps I can note however that if we were ever to get to the point, it isn't clear that art. 6(5) as pleaded applies to the screening determination stage, since it is dependent on art. 5 which only applies where actual EIA is required (as stated in art. 5(1)). While that wasn't something the board tried to make an issue of here, they did remind me that a negative view on this was articulated in *Enniskerry Alliance and Enniskerry Demesne Management Company Clg v. An Bord Pleanála, Ireland and The Attorney General* [2022] IEHC 6, [2022] 1 JIC 1410 (Unreported, High Court, 14th January 2022), para. 26.

Core ground 9 – defective AA

191. Core ground 9 is:

> "9. The Respondent's decision is invalid and/or ultra vires in that it contravenes Article 6(3) of the Habitats Directive (Council Directive 92/43/EC) and Part XAB of the Planning and Development Act 2000 (as amended) in circumstances where, in purporting to carry the Screening for Appropriate Assessment:
>
> a. The Respondent failed to conduct an appropriate assessment without lacunae, and which failed to contain complete, precise, and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effect of the proposed development on the Lower River Shannon SAC (site code 002165), River Shannon and River Fergus Estuaries SPA (site code 004077), Slievefelim to Silvermines Mountains SPA (site code 004165) and Lough Derg (Shannon) SPA (004058);
>
> b. the Respondent failed to consider the connectivity between the Site and the Lower River Shannon SAC (site code 002165) via surface water discharge, in combination effects with water discharges from the factory/other development;
>
> c. the Respondent failed to consider the likelihood of significant cumulative effects of the relocation of the permitted turbine with the existing factory, connection to the grid/existing factory and the Limerick Northern Distributor Road, construction details and the management of surface water;
>
> d. failed to consider the submissions made by the Applicants and/or to the submissions made by the observers to the within application all of which raise issues of significant and reasonable scientific doubt about the effects of the proposed development on the neighbouring European Sites and
>
> e. The Respondent permitted the installation of facilities at condition 5 of the Order and left over details to be agreed with the planning authority contrary to Case C- 461/17, Holohan & Ors. v An Bord Pleanála."

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

> "Ground 9-Appropriate Assessment
>
> Applicants' position
>
> The Applicants submit that the Respondent failed to assess adequately or at all the proposed development by reference to the requirements of Article 6(3) of the Habitats Directive and Part XAB of the 2000 Act, by reason of:
>
> a. By failing to conduct an appropriate assessment without lacunae, and which failed to contain complete, precise, and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effect of the proposed development on the Lower River Shannon SAC (site code 002165), River Shannon and River Fergus Estuaries SPA (site code 004077), Slievefelim to Silvermines Mountains SPA (site code 004165) and Lough Derg (Shannon) SPA (004058);
>
> b. By failing to consider the connectivity between the Site and the Lower River Shannon SAC (site code 002165) via surface water discharge, in combination effects with water discharges from the factory/other development;

c. By failing to consider the likelihood of significant cumulative effects of the relocation of the permitted turbine with the existing factory, connection to the grid/existing factory and the Limerick Northern Distributor Road, construction details and the management of surface water;
d. By failing to consider the submissions made by the Applicants and/or to the submissions made by the observers to the within application all of which raise issues of significant and reasonable scientific doubt about the effects of the proposed development on the neighbouring European Sites and;
e. By permitting the installation of facilities at condition 5 of the Order and left over details to be agreed with the planning authority contrary to Case C- 461/17, Holohan & Ors v An Bord Pleanála.

Board's position

The Board's Decision is not invalid as alleged at Core Ground 9. This ground of challenge is based on an erroneous premise, namely a misinterpretation of the Board's Decision and the Inspector's Report and of the materials that were before the Board. The appropriate assessment (AA) screening that the Board completed in respect of the development was carried out in accordance with the requirements applicable to that assessment. The Board's conclusions for AA screening purposes were open to it based on the materials that were before it. As regards AA screening, the Applicants have not demonstrated that the evidence and materials that were before the Board were so flawed on their face that a reasonable expert would have objected to them. The non-expert assertions of the Applicants in advancing Core Ground 9 are not a basis for and do not establish any invalidity or deficiency in the AA screening that the Board carried out. The complaint at Core Ground 9 appears to be based on asking the Court to accept that reasonable scientific doubt has been created in non-scientific and non-expert assertion and/or the Applicants' Statement of Grounds and then to contend that this suffices for judicial review purposes – it does not. There is no lack of adequate reasons as alleged by the Applicants. There is no basis for the Applicants contention the Board did not consider the issues raised by the First Named Applicant in the Ecologist Report appended to its submission regarding Hen Harrier or that it failed to consider submissions made regarding effects of the proposed development on neighbouring European sites. These allegations are advanced by way of generic and not properly particularised pleas contrary to Order 84 rule 20(3) RSC and in the abstract without reference to the Inspector's Report.

It was open to the Inspector (see §8.27.1) and the Board to conclude, based on the materials before the Board (such as e.g. the Notice Party's AA Screening Report prepared by Ecological Consultants in MKO, and the Council's AA Screening Determination), that the development, individually or in combination with other plans or projects, would not be likely to give rise to significant effects on European sites including Lower River Shannon SAC, River Shannon and River Fergus Estuaries SPA or Slievefelim to Silvermines Mountains SPA or any other European site, in view of the sites Conservation Objectives, and that stage 2 AA and submission of an NIS were therefore not required. To the extent that cumulative/in combination effects arose for consideration - in an AA screening context – same were properly considered by the Board and its Inspector (see e.g., §8.11, §8.15, §8.25, §8.26 and §8.27.1 of the Inspector's Report). The attachment of Condition 5 does not alter or detract from the conclusions of the AA screening carried out by the Board at all. The Applicants have not demonstrated or evidentially established otherwise. They have pointed to nothing in terms of how or on what basis it is said that that Condition was imposed in breach of Article 6(3) of the Habitats Directive or any other provision. The Applicants advance the complaint about Condition 5 based on a mischaracterisation and/or misunderstanding of the Board's Decision, in particular as regard the nature and purpose of Condition 5. In addition, the Applicants reliance on Case C- 461/17 Holohan is misplaced given the distinguishing facts and evidence in this case.

Notice Party's position

The Applicants have failed to identify any irrelevant considerations alleged to have been taken into account and/or or the relevant material which the Board has alleged to have misunderstood or overlooked, in concluding that there would be no adverse effects on water quality to the Lower River Shannon SAC or the River Shannon and River Fergus Estuaries SPA, via surface water discharge, the Applicants have provided no particulars of their pleas in this regard, contrary to the requirements of Order 84, Rule 20(3), RSC. Similarly, in relation to in-combination or cumulative effects arising from the Limerick Northern Distributor Road, no particulars of this plea are furnished whatsoever, as to any potential for in-combination effects arising from the said road, or as to how any such effects would be capable of combining with the effects of the proposed development to give rise to cumulative

impacts on any European sites or the Conservation Objectives associated with same. The Applicants have similarly failed to discharge the onus of proof relating to the plea under Core Ground 9(b) that the Board failed to consider the cumulative effects of the existing factory, 'construction details and the management of surface water'. The Inspector found at §8.26 of her report that 'There is no substantial development in the immediate area of the site with potential for similar and/or concurrent effects on the environment'. The Applicants have provided no evidence to the contrary."

193. What the applicants take issue with in the statement of general law above is the following or at least its application here:

> "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, 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: *Kennedy v. An Bord Pleanála* [2024] IEHC 570 (Unreported, High Court, 7th October 2024) at §105; *Carrownagowan Concern Group v. An Bord Pleanála* [2024] IEHC 300 (Unreported, High Court, 20th May 2024) at §191(v); *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; 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."

194. The applicants' point seemed to be that the onus is on the board to address any doubt raised during the process. According to the applicants, the application of that concept was that the board didn't do that here.

195. In very general terms that's correct but we need to define it a bit more precisely. It's not as if we have been ignoring the onus on the decision-maker. As I said above in the first general point:

> 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.

196. What the CJEU decided in *Eco Advocacy* was that the board didn't need to dispel doubt on a point-by-point, party-by-party basis, but rather it needs to provide reasons sufficient to explain that the decision doesn't create reasonable scientific doubt as to impact on European sites.

197. While the applicants said rather vaguely that my decision in *Eco Advocacy* was *per incuriam* they didn't identify anything specific by way of an authority that the decision overlooked. In any event such is the volume of jurisprudence that it is always possible to find something not quoted in a given case, but that doesn't in itself make the given decision either *per incuriam* or wrong (see *Save Roscam Peninsula CLG & Ors v. An Bord Pleanála & Ors (No. 6)* [2024] IEHC 335 (Unreported, High Court, 7th June 2024), para. 54). Otherwise such concepts lose all meaning - all cases are *per incuriam* if the bar is set at a level that would be triggered if any peripherally relevant authority is not mentioned.

198. It follows from the CJEU decision in *Eco Advocacy* that the board doesn't have to expressly respond to any specific submission. That seems to be the piece that the applicants here don't take on board.

199. Objection is taken to the following in particular in *Eco Advocacy CLG v. An Bord Pleanála* [2025] IEHC 15 (Unreported, High Court, 15th January 2025):

> "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."

200. The applicants take the first sentence in isolation from the second. The point I was making is that a contrary opinion may create doubt, or alternatively it may not. That's something for the decision-maker to evaluate in the first instance, subject to review. Then if there is doubt, the decision-maker must address that doubt by providing reasons sufficient to dispel it, albeit not necessarily reasons directed to a particular identified submission. The adequacy of such reasons is in the first instance a matter for the decision-maker, subject to review.

201. The applicants also complain that it is extremely unclear what sort of evidence is required to deal with the doubt issue, but simultaneously looked for time to put in such an affidavit. That position strikes one as a touch contradictory.

202. As to what an applicant needs to do, that isn't too difficult and has been explained on numerous previous occasions. Leaving aside something that a court can evaluate as being a flaw on the face of the material, an expert, which could be the expert who provided information to the board (Dr Niamh Ní Bhroin of Dúlra is Dúchas Teo., here) would need to aver (i.e., by affidavit in the proceedings as opposed to expert report) that the material before the board would be seen by a reasonable expert as creating doubt that has not been dispelled, or that the board's scientific approach is flawed on its face as seen by a reasonable expert, or that the reasons given by the board would not be seen by a reasonable expert as dispelling scientific doubt. If that is countered, then we are into the *RAS Medical* space.

203. Paragraph 8.2.1 of the inspector's report states:

> "The previous Assessment of Impact on Birds 2010, quoted by the appellant (Appendix 1, 100 Metres Tall Group) identifies the possibility of birds moving between the Shannon Estuary and Lough Derg. However, it states that birds leaving the Shannon (or arriving) are likely to be flying at a significant height over urban areas and would therefore be over the height of the turbine."

204. The point made now is that the applicants in fact suggested in their expert report that the birds would be flying low and that this is not an urban area.

205. The part of the inspector's report being relied on is referring to the previous study, not to representing the applicants' position overall. So this reading is a misreading. But in any event this complaint isn't a pleaded point. Mention in an affidavit isn't sufficient: see *Eco Advocacy* para. 90 and cases cited.

206. The applicants complain that detailed pleading to identify the exact errors isn't possible or required – but it *is* required, and the caselaw on that is clear, as summarised above. The CJEU in *Eco Advocacy* found no incompatibility between domestic pleading rules and EU law.

207. Thus we need to look at the pleaded points which define the applicants' case. The applicants' submissions ranged well beyond the pleaded case, raising issues such as for example the antiquity of 2010 bird surveys, changes in national law and practice since then, designation of SPAs or specification of conservation objectives since then, lack of consideration of effects going beyond the pleadings and so forth. All of this is totally impermissible. Only pleaded matters can be advanced at a hearing. So let's turn to those.

208. Sub-ground 57 provides:

> "57. The Respondent failed to assess adequately or at all the proposed development by reference to the requirements of Article 6(3) of the Habitats Directive and Part XAB of the 2000 Act, by reason of not subjecting the screening for Appropriate Assessment to the sufficient scientific expertise required capable of dispelling all reasonable scientific doubt as to the effects of the proposed development on the site concerned as required by Case C-404/09 Commission v Spain. In this regard the Applicants will rely on Reid v An Bord Pleanála (No.2) [2021] IEHC 362."

209. A breach of the requirement of sufficient scientific expertise has to be made out evidentially. That hasn't been done.

210. Sub-ground 58 provides:

> "58. It is the Applicants' case that the Inspector and the Respondent, in adopting the Inspector's report, failed to give sufficient reasons removing all scientific doubt as to how it could be said that the proposed development would not have any impact on Lower River Shannon SAC (site code 002165), River Shannon and River Fergus Estuaries SPA (site code 004077), Slievefelim to Silvermines Mountains SPA (site code 004165) and Lough Derg (Shannon) SPA (004058) or any of the qualifying interests of those European sites."

211. This sub-ground doesn't provide any basis to contend that the reasons were inadequate. In any event insufficiency of the reasons would have to be established evidentially, normally by expert evidence. That hasn't been done.

212. Sub-ground 59 provides:

> "59. Lower River Shannon SAC (site code 002165) is situate 500m from the subject site. However, it is the Applicants' case that the Inspector and the Board, in adopting the Inspector's report, that the Board erred in law/acted ultra vires and/or acted irrationally as the Inspector's report incorrectly states at para. 8.8 that the 'boundary of the nearest European site is c.500mm to the south west of the appeal site'. There is a hydrological connection between the subject site and the Lower River Shannon SAC (site code 002165) connected by surface and ground water. The River Shannon and River Fergus Estuaries SPA (site code 004077) lies approximately 4km to the south/south west of the site"

213. The inspector states (emphasis added)

> "8.7 European Sites.
>
> 8.8 The proposed development site is not located within or immediately adjacent to any site designated as a European site comprising a Special Area of Conservation (SAC) or a Special

Protection Area (SPA). The boundary of the nearest European site is c.500mm to the south west of the appeal site. It comprises the Lower River Shannon SAC (site code 002165). The appeal site lies within the River Shannon Sub-catchment and the site **is likely to drain towards the River.** This European site is therefore within the zone of influence of the development. The appeal site is substantially more removed from other SACs and has no direct connections to them (see Table 3-1 AA Screening Report)."

214. The reference to 500 mm is a typo for 500 m. That isn't a basis for *certiorari*, any more than any of the other inevitable typographical errors in the developer's material or elsewhere in the board's material (*e.g.*, referring to turbines in the plural rather than singular): see for example judgment of 7 November 2013, *Gemeinde Altrip and Others v Land Rheinland-Pfalz*, C-72/12, ECLI:EU:C:2013:712. It would devalue judicial review as a remedy to hand out relief for such trivialities. For good measure, there is a very confusing typographical error in the applicants' pleadings regarding Dr Ní Bhroin's report as to which appendix to the submission it is in – not to mention their misspelling her name and pleading the wrong article of the 2001 regulations (103 rather than 109) – the point being that errors are rarely the exclusive province of any one party.

215. The inspector goes on (emphasis added):

"The appeal site is potentially connected by surface and ground water to the SAC. For example, drainage ditches which border the site are likely to connect to the larger water bodies in the area of the site (see EPA mapping) which discharge to the River Shannon. However, construction and operation of the relocated turbine is unlikely to have given/give rise any adverse effect on the River Shannon SAC as a consequence of its as (a) the turbine is not moved significantly closer to any surface water body, therefore with no consequential risk of construction effects on water quality and (b) surface water from the access road and hardstanding (during normal and storm events) is discharged to the drainage channel alongside the access road with percolation to ground. With distance from the River Shannon, and the likely effects of dilution, dissipation and dissolution in intervening groundwater, adverse effects on water quality in the River are highly unlikely."

216. At para. 8.24 she states:

"The risk of downstream effects on water quality in the River Shannon and River Fergus Estuaries SPA can be ruled out for the same reasons stated above in respect of effects on the Lower River Shannon SAC."

217. That implies an acknowledgment of the hydrological connection between the two sites.

218. Having regard to the foregoing, the complaint that the hydrological connection was not considered is unfounded on the facts.

219. Sub-ground 60 provides:

"60. It is the Applicants' case that the Respondent failed to have any or any proper regard to the connectivity between the Site and Lower River Shannon SAC (site code 002165) and River Shannon and River Fergus Estuaries SPA (site code 004077) via surface water discharge, in combination effects with water discharges from the factory/other development."

220. This is unfounded for similar reasons as the previous sub-ground.

221. Sub-ground 61 provides:

"61. The Inspector observes at para. 8.2 of the Inspector's Report 'A site drainage system was constructed at the site in accordance with the Drainage Management Plan in accordance with details submitted with application (Drawing no. 6311-JOD-SS-00-DR-S-1003, rev. P01.1 'Drainage Details). The drainage system was excavated and constructed in conjunction with the road and hard standing construction. [NB There are limited details on the drainage management plan e.g. location of measures indicated in drawings]'."

222. That is context, not a ground as such.

223. Sub-ground 62 provides:

"62. It is the Applicants' case that the Board erred in law, acted ultra vires, and/or took into account irrelevant considerations and/or misunderstood and/or overlooked relevant material and/or acted irrationally in concluding that there would be no adverse effects on water quality to the Lower River Shannon SAC (site code 002165) and to the River Fergus Estuaries SPA (site code 004077) via surface water discharge in circumstances where there were limited details before the Board on the drainage management plan of the site of the proposed development."

224. The complaint that the material before the board was inadequate to support its conclusion has to be established by an applicant evidentially. That hasn't been done.

225. Sub-ground 63 provides:

"63. It is the Applicants' case that the Inspector and the Respondent, in adopting the Inspector's report, failed to give sufficient reasons removing all scientific doubt as to how it

could be said that the proposed development would not have any impact on Lower River Shannon SAC (site code 002165), River Shannon and River Fergus Estuaries SPA (site code 004077), Slievefelim to Silvermines Mountains SPA (site code 004165) and Lough Derg (Shannon) SPA (004058) or any of the qualifying interests of that European site."

226. That complaint is somewhat generic and has not been made out. The reasons have not been shown to be inadequate.

227. Sub-ground 64 provides:

"64. Qualifying interests of River Shannon and River Fergus Estuaries SPA (site code 004077) include various waterbirds (see para. 8.10 of the Inspector's Report), with the potential for effects on these species if they utilise the site or move across it to access the SPA. Approximately 14km to the east of the site is Slievefelim to Silvermines Mountains SPA (004165) with qualifying interest including the Hen Harrier. Approximately 18km to the north east of the site is Lough Derg (Shannon) SPA (004058), with qualifying including mobile bird species."

228. That is context, not a ground as such.

229. Sub-ground 65 provides:

"65. The Respondent failed to address and/or failed to give adequate reasons for not accepting that a stage 2 Appropriate Assessment was required in accordance with Part XAB of the 2000 Act because of the movement of waterbirds and the hen harrier between the River Shannon and River Fergus Estuaries SPA (site code 004077), Slievefelim to Silvermines Mountains SPA (site code 004165) and Lough Derg (Shannon) SPA (004058) or any of the qualifying interests of that European site."

230. This plea fails to set out the required facts and matters giving rise to doubt because while it asserts that there was an issue about movement of waterbirds and Hen Harrier, it doesn't specify what was before the decision-maker that gave rise to doubt about that issue. But if one were to impermissibly consider the merits, it fails for reasons discussed under the next heading. The inspector deals with movement of birds and gives reasons for that conclusion which the applicants haven't displaced evidentially.

231. Sub-ground 66 provides (adding an incorrect fada to the applicants' expert's name):

"66. The First Named Applicant submitted an Ecologist Report dated 18 October 2022 by Niamh Ní [Bhroin] Appendix 2 of its submissions to the Board which raised the issue that the Screening Report submitted by the Notice Party failed to consider the potential impact of the development on the hen harrier population due to the development's proximity to the Slievefelim to Silvermines Mountains SPA (004165) and Lough Derg (Shannon) SPA (004058). Nevertheless, the Board concluded that that there would be no adverse impacts on any European site."

232. There is no appendix 2 as a heading and the applicants effectively admitted that the reference is an error and should say "appendix 1". Dr Ní Bhroin's report comes in two parts, the first of which relates to AA generally, and the second part relates to birds. The plea in sub-ground 66 relates to birds only. Her comments on birds are as follows:

"Some points of note with respect to the Assessment of impacts on Birds, 2010.
Planning reference 10/453 Clare County Council.
Niamh Ni Bhroin BSc, PhD
18/10/2022
As part of a Request for Further Information Planning reference p10/453 Biosphere Environmental Services in November 2010 compiled a report entitled
Assessment of Impacts on Birds by proposed wind turbine at Knocknallynameath, Parteen Co Clare
1. The report suggested that the turbine would need extra visibility at night or in poor weather conditions and warning lights should be fitted.
2. That birds tend to use defined valley or river corridors to commute between areas.
3. The report identifies the possibility of birds moving between the Shannon Estuary and Lough Derg.
4. It is suggested that birds leaving Shannon or arriving would be likely to be flying at a significant height over urban areas therefore would be over the height of the turbine.
The report has not considered the Hen Harrier. To the west of Lough Derg is the Slieve Aughty Mountains SPA and to the east of Lough Derg is the Slievefelim to Silvermines Mountains SPA both of which are designated as SPA for Hen Harrier. In wintertime, BirdWatch Ireland website (https://birdwatchireiand.ie/birds/hen-harrier/) mentions that the Hen Harrier migrates to the coast and to lowland habitats. Hen Harrier populations migrating to the coast using a defined valley and river corridor would probably travel along the River Shannon to the coast. The birds are unlikely to fly high when using the river corridor as it isn't an urban area. The bird report doesn't rule out a migratory pathway

between Lough Derg and the Shannon Estuary for bird populations. The report does not consider the impact on Hen Harrier migrating to the coast where the increase in winter migratory birds would provide suitable feeding.

All Bird Surveys undertaken in close proximity to SPAs should be mindful of migratory wildfowl, both Winter and Summer species, along with native bird populations."

233. So the focus was on two identified SPAs – Slieve Aughty Mountains and Slievefelim to Silvermines Mountains. Oddly enough the applicants don't refer to the Slieve Aughty Mountains SPA in the pleadings. But the inspector does deal with the Slievefelim to Silvermines Mountains SPA expressly.

234. The inspector said as follows at 8.17:

"Lower River Shannon SAC. Habitats in the area of the appeal site comprise improved agricultural grassland, stone walls, hedgerows, tree lines, scrub, some areas of wet grassland (on the westerns side of the agricultural field) and a drainage ditch c.90m to the north of the development. From my inspection of the appeal site and agricultural land immediately surrounding it, I would infer that the site over which the relocated wind turbine and altered access road was built, was originally improved agricultural grassland, with no effects an any ex situ Annex I habitats or supporting habitat for QI species (see table in section 8.9 above)."

235. She went on:

"8.19 River Shannon and River Fergus Estuaries SPA, Slievefelim to Silvermines Mountains SPA and Lough Derg (Shannon) SPA. As stated, the relocated turbine has resulted in a slightly altered and marginally greater land take from improved agricultural grassland, within a wider habitat context, stone walls, hedgerows, tree lines, scrub, some areas of wet grassland and a drainage ditch c.90m to the north of the development. In their decision to grant permission under PA ref. 10/453 the PA concluded (1st December 2010), on the basis of information submitted with the application which included: (a) a report from the Environment section - which raised with no objections to the development, and (b) An Assessment of Impacts on Birds Report – which concluded that It is highly improbable that regular flights of wetland birds at low altitude would occur over the Parteen area'.

8.20 the PA concluded that the development would not have an adverse effect on any European site.

8.21 The previous Assessment of Impact on Birds 2010, quoted by the appellant (Appendix 1, 100 Metres Tall Group) identifies the possibility of birds moving between the Shannon Estuary and Lough Derg. However, it states that birds leaving the Shannon (or arriving) are likely to be flying at a significant height over urban areas and would therefore be over the height of the turbine.

8.22 The appellant argues that the previous assessment did not consider Hen Harrier the SCI of the Slievefelim to Silvermines Mountain SPA, with the potential for movements between the SPA across the site in winter to more coastal locations and lowland areas. In response the applicant (Appendix 2 of response to appeal) refers to states that the appeal site does not represent suitable habitat for any SPA species, including Hen Harrier, and it is therefore considered highly unlikely that any SCI species, including those that migrate seasonally along the Shannon river corridor to the south of the site would use the development site itself. No comments are made on the movement of Hen Harrier to the coast from the SPA.

8.23 Notwithstanding this, and mindful of the concerns raised by the appellants in respect of impacts on Hen Harrier, the subject development comprises the relatively modest alteration to the location of a permitted wind turbine. Previous assessments of the principle of the development concluded that no significant adverse effect would arise on the SCIs of any European site in the vicinity of the site. The subject development relocates the turbine by 36m. Within the context of the movement of birds of SCI between sites, notably between Lough Derg and the River Shannon and between Slievefelim to Silvermines Mountain SPA to the coast, it is unlikely that the minor relocation of the turbine will have any significant impact the movement of bird species of SCI, over and above the previously assessed impacts, which as stated which concluded that there would be no adverse impacts on any European site. Academic research also indicates that collision mortality for Hen Harriers at wind farms is low."

236. That cites a paper, *The interactions between Hen Harriers and wind turbines – Windharrier Final Project Report*, January 2015, by Dr Mark Wilson, Mr Darío Fernández-Bellon, Dr Sandra Irwin and Prof John O'Halloran. The paper is available on UCC's website: https://www.ucc.ie/en/media/research/planforbio/forestecology/WINDHARRIERFinalProjectReport.pdf.

237. The above meets the requirement of the CJEU in *Eco Advocacy* to provide a reason capable of dispelling doubt. If an applicant wants to displace that she has to produce evidence in the proceedings – these applicants haven't done that.

238. Overall the applicants have done more than most applicants by getting an expert report, albeit that their expert doesn't swear an affidavit here. But they don't make a whole lot of detailed use of the report on the pleadings. The wording of this ground is somewhat peculiar in this sense.

239. Literally interpreted, sub-ground 66 is just a statement of fact. But one might be minded to give the applicants the benefit of the doubt by stretching it to construe it as an allegation that the impacts on Hen Harrier as set out in Ms Ní Bhroin's report were not considered.

240. The problem there is that the actual plea is lack of consideration, not an irrational conclusion or a failure to remove doubt. Lack of consideration is an ambitious plea if the material was before the decision-maker, and certainly hasn't been made out here. It can't be equated with inadequacy of narrative discussion. Even if we impermissibly stretched the pleaded ground even further to amount to a lack of sufficient reason to dispel doubt, the board has done that and the applicants haven't displaced that evidentially (or demonstrated an error on the face of the material). That requires evidence in the proceedings *i.e.*, an expert affidavit), leaving aside evident error on the face of the material. The applicants haven't attempted the former or succeeded in pointing to the latter.

241. Sub-ground 67 provides:

> "67. The Board has failed to consider the submissions made by the Applicants and/or to the submissions made by the observers to the within application all of which raise issues of significant and reasonable scientific doubt about the effects of the proposed development on the neighbouring European Sites. The inspector's report and the decision of the Board fail to deal with these doubts as expressed and the decision to appropriate assessment fails to meet the required legal standard as set out in Sweetman Case C-258/11 and Kelly v An Bord Pleanála [2015] IEHC 400."

242. The failure to consider submissions falls flat and hasn't been established evidentially. The argument that the doubts in such submissions haven't been dealt with falls foul of the CJEU decision in *Eco Advocacy*. It is not the law that submissions should be responded to on a blow-by-blow basis. Rather sufficient reasons for the conclusion of no doubt have to be provided. The board's decision to that effect hasn't been displaced evidentially.

243. Sub-ground 68 provides:

> "68. Moreover, the Respondent failed to consider the likelihood of significant cumulative effects of the relocation of the permitted turbine with the existing factory, connection to the grid/existing factory and the Limerick Northern Distributor Road, construction details and the management of surface water."

244. That repeats points already made.

245. Sub-ground 69 provides:

> "69. Moreover, it is the Applicants case that, by setting a condition which permitted the installation of facilities to prevent interference with communications, radio, television, aviation radar or other telecommunications reception to be agreed in writing with the planning authority, the decision is contrary to Article 6(3) of the Habitats Directive."

246. The problem there is that the judgment of 7 November 2018, *Holohan v An Bord Pleanála*, C-461/17, ECLI:EU:C:2018:883 allows post-consent details to be determined subsequently. The applicants haven't shown that the condition here exceeds that provision.

247. Sub-ground 70 provides:

> "70. Condition 5(1) requires the Notice Party to comply with the following:
> 'Facilities shall be installed to minimise interference with communications, radio, television, aviation radar or other telecommunications reception in the area. Details of the facilities to be installed, which shall be at the developer's expense shall be submitted to, and agreed in writing with, the planning authority prior to commissioning and following consultation with the relevant authorities.
> The performance of facilities installed to prevent interference described above shall be subject to monitoring at the expense of the developer, to the satisfaction of the planning authority, during the period of one year from date proposed commencement of the proposed development. The nature and extent of monitoring programme shall be otherwise agreed with the planning authority.'"

248. That is context, not a ground.

249. Sub-ground 71 provides:

> "71. It should be noted in this context that no detailed Radar Impact Assessment, as requested by the Irish Aviation Authority, was submitted by the Notice Party in support of the retention application to Clare County Council or the Board."

250. That is pleaded as a statement of fact only.

251. Sub-ground 72 provides:

> "72. No assessment carried out by the Respondent in respect of the impacts of the proposed works that would be requires as part of the foregoing. The Board decision does not meet the test set out by the CJEU in Case C- 461/17, Holohan & Ors. v An Bord Pleanála and in particular the conclusion at paras.45-46, that Article 6(3) of the Habitats Directive requires the competent authority to catalogue and assess all aspects of a plan or project that might affect the conservation objectives of the protected site before granting the development consent at issue. Only those parameters as to the effects of which there is no scientific doubt that they might affect the site can be entirely left to be decided later by the developer."

252. This sub-ground postulates, implicitly, the proposition that the latitude within the condition could have affected European sites and thus that the board's implicit view otherwise was wrong. That has to be established evidentially, which hasn't been done.

253. Sub-ground 73 provides:

> "73. Although the decision of the CJEU in Case C-461/17, Holohan & Ors. v An Bord Pleanála permits some technical details to be agreed between the developer and competent authority after the development consent, this is only with the confines of an assessment process which has eliminated any scientific doubt as to the effects of the proposed development. There is no consideration of the installation of facilities to prevent interference with communications, radio, television, aviation radar or other telecommunications reception in the screening report submitted by the Notice Party. In such circumstances, the test is not met in this case."

254. This seems largely repetitive of points already made. Insofar as the point is made that there are matters for which there is no consideration, it is always possible to take any decision and point to something that wasn't considered or at least expressly discussed. That doesn't in itself prove possible effects on a European site, which an applicant has to establish evidentially. These applicants haven't done so here.

255. As regards my decision in *Eco Advocacy*, ultimately the applicants' position at the top-up hearing was:

(i) *Eco Advocacy* is not a bar to relief;
(ii) if it is, then it is wrong; and
(iii) if it is, but only on the basis of the lack of an expert affidavit, then there should be provision for that.

256. The essential answer to those points is:

(i) *Eco Advocacy* doesn't create any new problem for the applicants here that didn't exist in previous caselaw.
(ii) It is consistent with previous caselaw so it hasn't been shown to be wrong on that basis or any other basis.
(iii) There is no proper or sufficient basis to derail the proceedings for a further affidavit. To do so would be unfair to the opposing parties. In any event a further affidavit on its own won't guarantee a win for the applicants. That will inevitably be replied to, leading to the possibility of the applicants being back to square one by not discharging the onus of proof absent cross-examination – *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.

Summary

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

(i) the applicants' pleadings in numerous respects fall short of the requirements of O. 84 r. 20(3) RSC and relief cannot be granted in respect of pleas that do not comply with those requirements;
(ii) the board did not fail to have regard to either the 2006 wind energy guidelines or the 2019 draft or err in its consideration of those documents;
(iii) the applicants have not demonstrated legal error in relation to the board's consideration of noise and shadow flicker;
(iv) the board provided the main reasons on the main issues, thereby satisfying its obligation in that regard;
(v) the board's decision to impose conditions in relation to aviation rather than require a radar impact assessment has not been shown to have exceeded its jurisdiction or to have been otherwise unlawful;
(vi) the ruling out of the need for EIA screening at preliminary examination stage means that s. 34(12) of the 2000 Act is not triggered and so there is no prohibition on the grant of retention permission on EIA grounds, and accordingly there is no obligation to apply for substitute consent;

(vii) the alleged defects in EIA or AA are generally inadequately pleaded but in any event they have not been established evidentially by the applicants;

(viii) the doctrine of project-splitting does not apply on the facts, but if counterfactually it does apply, the whole project was assessed and the applicants have not demonstrated otherwise; and

(ix) the claim of inadequate publication of material by the council fails *in limine* because the council were not joined to the proceedings as a respondent.

Order

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

(i) the proceedings be dismissed;

(ii) unless any party applies otherwise by written legal submission within seven days from the date of this judgment, the foregoing order be perfected forthwith thereafter on the basis of no order as to costs; and

(iii) the matter be listed on Monday 10th February 2025 to confirm the foregoing.