[2024] IEHC 549

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2022.0001022]

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

BETWEEN

CARROWNAGOWAN CONCERN GROUP, UTE RUMBERGER AND NICOLA HENLEY

APPLICANTS

AND

AN BORD PLEANÁLA, COILLTE CUIDEACHTA GHNÍOMHAÍOCHTA AINMNITHE, THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE, THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE, IRELAND, THE ATTORNEY GENERAL AND CLARE COUNTY COUNCIL

RESPONDENTS

AND

FUTURENERGY CARROWNAGOWAN DESIGNATED ACTIVITY COMPANY (BY ORDER)

NOTICE PARTY

(No. 3)

JUDGMENT of Humphreys J. delivered on Monday the 23rd day of September 2024

1. Primary legislation in the planning area presupposes that one instance of judicial examination of the legality of decisions is normally sufficient, subject to the ever-present possibility of the Supreme Court's oversight role. But whichever appeal court we are talking about, in a context where statutory policy leans towards finality, the necessity for an appeal requires more than merely a dispute about the application of established law to particular facts – a process that is blandly called "error correction" in the appellate jurisprudence. The desirability of an appeal in such a context normally involves a *demonstration* rather than an assertion of uncertainty about what the law is in the first place. So what's required is not *mere* uncertainty – something any moderately clever lawyer can conjure up at will from thin air in any situation out of smoke, mirrors, flash-bangs and distraction – but *demonstrable* uncertainty. That has two essential preconditions. Firstly, a tangible basis on grounds going well beyond the mere fact that the losing party disputes the outcome – there must be either contrary jurisprudence or other material, or a compelling inherent logic. Secondly and perhaps most importantly, the indispensable prior evidential foundations for the point as something that properly arises on the facts, and within properly pleaded grounds, must be laid. Appeal mechanisms are not an assembly line for interesting academic points in the abstract. Are these criteria, which in essence underlie the statutory provisions for grant of leave to appeal, satisfied here?

Judgment history

2. In *Carrownagowan Concern Group & Ors v. An Bord Pleanála & Ors (No. 1)* [2023] IEHC 579, [2023] 10 JIC 2704 (Unreported, High Court, 27th October 2023) I made an order striking out part of the applicant's case and discharging leave in part.

3. That has been appealed to the Court of Appeal (no leave to appeal was required in such a situation, although that legislative inconsistency is in parliamentary cross-hairs at time of writing), and judgment is awaited.

4. In *Carrownagowan Concern Group & Ors v. An Bord Pleanála & Ors (No. 2)* [2024] IEHC 300 (Unreported, High Court, 20th May 2024), I dismissed the balance of the applicant's case.

5. The applicants now seek leave to appeal.

Geographical context

6. The development at issue is a proposed windfarm and associated works in the townlands of Ballydonaghan, Caherhurley, Coumnagun, Carrownagowan, lnchalughoge, Killokennedy, Kilbane, Coolready, and Drummod, County Clare. The area is located northwest of Killaloe, near the village of Bodyke.

7. As stated in the AA screening document, the area of the proposed wind farm is located within forested lands on the northern slopes of Slieve Bernagh mountain, approximately 4 km northeast of the village of Broadford, 7 km north-west of Killaloe, and 2.5 km south of the village of Bodyke at its closest point. Lough Derg lies approximately 4 km to the east of the proposed development area.

Facts

8. On 30th November 2020, Coillte lodged an application for permission (File Reference ABP-308799-20) to construct the development.

9. The application included a Natura Impact Statement for the purposes of the habitats directive, and an EIA report for the purpose of directive 2011/92.

10. Whilst Coillte was the applicant for planning permission, all development rights in respect of Carrownagowan Wind Farm were transferred from Coillte to FuturEnergy, although the development lands had not transferred as of the substantive hearing. FuturEnergy's onshore wind development rights in respect of the relevant Coillte lands are held pursuant to an exclusive option for lease, which option allows for entry into a long-term lease prior to commencement of the construction of Carrownagowan Wind Farm.
11. On 27th November 2020, the developer published notice of the making of the application. The papers were available for public inspection from 7th December 2020 for a period of seven weeks.
12. The second named applicant made a submission on 12th January 2021, and the first named applicant made a submission received on 3rd February 2021.
13. The Development Applications Unit (DAU) of the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media also made a submission.
14. On 3rd February 2021, the deadline for submissions expired.
15. In early 2021, on foot of the DAU submission, the board requested further information from the developer.
16. On 8th July 2021, the developer submitted further information.
17. The developer submitted a second tranche of further information on 23rd December 2021.
18. This further information was advertised, and notified to those who had made submissions in January 2022, and the second and third named applicants made submissions on 14th and 16th February 2022 respectively.
19. The third named applicant made a submission in which she reiterated the points she had made in a first, rejected, submission.
20. The inspector prepared a report dated 31st August 2022.
21. The board adopted a decision on 29th September 2022 granting permission. The board order agreed with the inspector that at screening there was the possibility of significant effects on Slieve Bernagh Bog SAC (002312) and Slieve Aughty Mountains SPA (004168), and that on appropriate assessment such effects could be ruled out. The inspector's conclusion as to the effects being acceptable following EIA was also agreed with.

Procedural history

22. The procedural history is set out in the No. 2 judgment. Following that judgment, the applicant lodged submissions seeking leave to appeal, dated 26th June 2024 but for some reason not delivered to the court until 10th July 2024. The board's submissions are dated 15th July 2024. The notice party delivered submissions dated 29th July 2024.
23. The leave to appeal issue was listed for hearing on 11th September 2024, and judgment was reserved at the conclusion of the hearing on that date. New leading counsel appeared for the applicants and introduced a number of fresh and imaginative arguments not particularly recognisable in that form in the written submissions on leave to appeal, let alone in the substantive pleaded and argued case. That isn't criticism of course – at a human level one can understand the desire to mutate the case if the original pleaded case isn't getting anywhere - but at the same time it's only stating the obvious to say that such a procedure isn't a valid basis for the grant of leave to appeal. In general terms, the points of law that should arise on appeal are ones that were properly pleaded and actually argued at the substantive trial. Otherwise, unfairly to the respondent to the appeal, an appellate court becomes a court of first instance in relation to new points being raised for the first time.

Law in relation to leave to appeal

24. The law in relation to leave to appeal is well settled and no particular disagreement between the parties arose, making it unnecessary to recite the law at length here. The jurisdiction to grant leave to appeal arises from s. 50A(7) of the Planning and Development Act 2000: see *inter alia*, *Arklow Holidays Ltd v. An Bord Pleanála* [2006] IEHC 102, [2007] 1 I.L.R.M. 125 (Clarke J.); *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250, [2006] 7 JIC 1302 (Unreported, High Court, MacMenamin J., 13th July 2006); *Save Cork City Community Association CLG v. An Bord Pleanála & Ors. (No. 2)* [2021] IEHC 700, [2021] 11 JIC 1602 (Unreported, High Court, 16th November 2021); *Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála* [2022] IEHC 231, [2022] 4 JIC 2601 (Unreported, High Court, Barniville J., 26th April 2022); *Killegland Estates Limited v. Meath County Council (No. 2)* [2022] IEHC 683 (Unreported, High Court, 9th December 2022); *Monkstown Road Residents Association & Ors v. An Bord Pleanála & Ors* [2023] IEHC 9, [2023] 1 JIC 1907 (Unreported, Holland J., 19th January 2023); *Concerned Residents of Treascon (No. 2)* [2023] IEHC 112, [2023] 3 JIC 1006 (Unreported, High Court, 10th March 2023); *Maguire T/A Frank Pratt & Sons & Ors v. Meath County Council & Ors; Phoenix Rock Enterprises Limited T/A Frank Pratt & Sons Limited v. An Bord Pleanála & Ors (No. 2)* [2023] IEHC 209, [2023] 3 JIC 1307 (Unreported, High Court, Hyland J., 13th March 2023).

25. A couple of points within the caselaw are of particular note. The fact that a point is "novel" is not determinative as to whether a point is suitable for the granting of a certificate: *Callaghan v. An Bord Pleanála* [2015] IEHC 493, 2015 WJSC-HC 4417, [2015] 7 JIC 2405 (Costello J.).

26. And as Hyland J. observed in *Maguire T/A Frank Pratt & Sons (No. 2)* [2023] IEHC 209 [2023] 3 JIC 1307 (Unreported, High Court, 13th March 2023) at §27: "[c]learly the mere fact that an applicant for leave disagrees with a conclusion in the judgment cannot be relied upon to characterise the state of the law as being uncertain".

27. The board's complaint is pertinent to all of the proposed questions:

> "the Board does not accept that any of the four points posed by the Applicants are of such systemic importance as to need appellate clarification. Rather, the four points posed are a clear example and manifestation of the intending appellant having lost in the High Court on the basis of the application of clear and well-established principles to the facts of the case, and then positing their unsuccessful view of the law (itself advanced on factual assertions that the Applicants failed to evidentially establish) as indicating uncertainty in the law's application."

Proposed question 1 – harmless error

28. The applicants' first proposed question of exceptional public importance is as follows:

> "Ground 7, Habitats - Where the Court finds that there is an error in relation to appropriate assessment, is it open to it to refuse certiorari on the basis of an averment by the developer that the Board would have come to the same conclusion on a different basis had it identified that error?"

29. Before dealing with the merits of this it is necessary to draw attention to the fact that the applicants' submissions contain the following at para. 16:

> "16. The Court relied in coming to this conclusion on the judgment in C-72/12 Altrip, a case which had not been cited or discussed in submission."

30. This submission is unfortunate. The judgment of 7 November 2013, *Gemeinde Altrip and Others v Land Rheinland-Pfalz*, C-72/12, ECLI:EU:C:2013:712 was in play at all material times. Firstly it is referenced at para. 63 of the board's statement of opposition:

> "63. Without prejudice to the foregoing pleas, and in the context of the Court's discretion to refuse relief, if the Court were to determine that there is an inconsistency and/or an error as between the AA Screening Report (§7.7, internal page 22) and the EIAR (Table 8-15 and para. 8.6.1.9) and a corresponding inconsistency and/or error in the Inspector's Report in relation to there being a hydrological connection between the application site and the Lough Derg, the Board pleads that, taking the Board's Decision, Inspector's Report and supporting material as a whole, same is in the category of harmless error, by analogy with Case C-72/12 Altrip. Further in this regard, the Appropriate Assessment as a whole is adequate to remove all scientific doubt notwithstanding any such error, particularly having regard to the lack of conflicting material before the Board, and any such error is not sufficiently central to the actual inflection point of the Inspector's analysis for AA purposes. Accordingly, the Board's Decision should not be quashed on this ground."

31. The board's written submissions for the hearing that led to the No. 2 judgment contain the following:

> "59. Without prejudice to the foregoing, and in the context of the Court's discretion to refuse relief, if the Court were to determine that there is an inconsistency and/or an error as between the AA Screening Report (§7.7, internal page 22) and the EIAR (Table 8-15 and para. 8.6.1.9) and a corresponding inconsistency and/or error in the Inspector's Report in relation to there being a hydrological connection between the application site and the Lough Derg, in taking the Board's Decision, Inspector's Report and supporting material as a whole, same is in the category of harmless error. Relevant and applicable by analogy, given the particular facts and evidence in this case, is Concerned Residents of Treascon and Clon[d]oolusk v. An Bord Pleanála [2022] IEHC 700 at §80:
>
> 'Taking the board decision, inspector's report and supporting material as a whole it seems to me that the error in respect of the location of the white-clawed crayfish falls into the category of harmless error, by analogy with Case C-72/12 Gemeinde Altrip v. Land Rheinland-Pfalz, Court of Justice of the European Union (Second Chamber), 7th November, 2013, ECLI:EU:C:2013:422. The Appropriate Assessment as a whole is adequate to remove all scientific doubt notwithstanding the error concerned, particularly having regard to the lack of conflicting material before the board, and so, with a certain amount of misgiving, I do not think that the applicant has made out a basis for certiorari here. To put it another way, the error is not sufficiently central to the actual inflection point of the inspector's analysis.'
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> 60. Accordingly, the Board's Decision should not be quashed on this ground."

32. Furthermore, *Altrip* is cited in the *Treascon* case (at para. 80) which was referred to in submissions and thus before the court at the hearing. Indeed the applicants now agree that if a judgment is before the court, cases mentioned in such a judgment are by definition also before the court to that extent.

33. Even if *Altrip* had not been mentioned at the hearing, the procedure in the List (which is particularly important because of the time limits for hearings) is that all of the written materials are before the court (and therefore can be relied on in a judgment) and don't need to be opened. This is reflected in the relevant practice direction - HC126 para. 119. Thus a party can't complain that something in another party's papers that it hasn't refuted was relied on.

34. However, it gets worse, because *Altrip was* expressly referred to not just in written but in oral submissions, and not once but twice by counsel for the board at the hearing (Day 2 pp. 33 and 37).

35. Even if counterfactually *Altrip* hadn't been referenced at the hearing, the complaint would be contrived because the concept of harmless error was stressed on at least six occasions by counsel for the board and notice party (Day 1 p. 115, Day 2 pp. 26, 30, 33, 37 and 96) the context being an alleged error in application of EU law. Harmless error was also put up front in the board's contribution to the statement of case at para. 45 in advance of the hearing. Complaining about alleged non-reference in submissions to the leading EU law case on harmless error would be like complaining that reference to *East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] IR 317, 104 ILTR 81 appeared in a judgment about constitutional fair procedures. Trial participants, perhaps especially if represented, can be expected to be aware of the leading cases.

36. Turning then to the merits of the question, the parties' positions as summarised in the statement of case are as follows:

> "GROUND 7, HABITATS
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> Applicant Position
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> The question whether it is open to a Court which has found an error in the appropriate assessment, to nonetheless refuse certiorari on the basis of an averment by the developer (not the Board), that the Board would have come to the same conclusion on a different basis had it identified that error, is a question of exceptional public importance because it involves the Court substituting its view on the merits for that of the Board, and reverses a decision of the Supreme Court (Talbot), to the effect that the Court cannot do so, on the basis of a principle purportedly established in a Court of Justice case (Altrip) to the effect that an error can be overlooked if it would have made no difference to the outcome. Altrip does not establish such a principle in respect of substantive errors such as the error found in this case. If this is indeed the case, it is desirable in the public interest that the position be confirmed at appellate level.
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> Board Response
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> Point (i) is based on a false premise and does not reflect a correct understanding of the decision of the High Court and is therefore not appropriate for certification and does not meet the threshold for same under s.50A(7). The High Court did not refuse certiorari in the manner the Applicants subjectively assert in the point as framed. The High Court did not substitute its views on the merits for that of the Board - see e.g., §181-§184 and §191(v) and (vi) of the Court's judgment which demonstrate the baseless nature of the Applicants' assertion in this regard. The High Court did not reverse the decision of the Supreme Court in Talbot [2009] 1 I.R. 375 - the Applicants' misplaced reliance and misinterpretation of Talbot and misinterpretation of this Court's judgment is not a basis for certification and the argument now being made by the Applicants by reference to Talbot is the same point that the Court recently rejected in Save Roscam [2024] IEHC 335 at §178. No novel interpretation or incorrect application of Case-72/12 Altrip has occurred in the manner the Applicants erroneously assert. The High Court's approach to the issue by reference to Case-72/12 Altrip is consistent with other relevant case law (e.g., Concerned Residents of Treascon and Clon[d]oolusk [2020] IEHC 700 at §80; Toole v. Minister for Housing (No. 6) [2023] IEHC 592 at §39; Reid v. An Bord Pleanála (No.2) [2021] IEHC 362 at §53; R (Champion) v. North Norfolk District Council [2015] UKSC 52, [2015] 1 WLR 3710 at §54-§59; and Regina (Hudson) v. Windsor and Maidenhead Royal Borough Council [2021] 1 W.L.R. 5588 at §77-§78). No uncertainty in the law arises such as to warrant certification of this point. The s.50A(7) case law is clear in that "uncertainty" should not be equated with the applicant for the certificate having lost its case and then positing its unsuccessful view of the law as indicating uncertainty in the law's application – yet that is precisely what the Applicants are doing as regards point (i). Further, point (i) would be inappropriate to certify given the Court's finding (see e.g. §191) that the Applicants did not evidentially establish any inadequacy in the AA that the Board carried out (relevant by analogy, see Liscannor Stone Limited [2021] IEHC 258 at §12; Save Roscam [2024] IEHC 335 at §181). Point (i)

comprises an impermissible attempt by the Applicants to reargue points already decided upon by the High Court in its substantive judgment, which is not appropriate (Rushe [2020] IEHC 429 at §32).

Notice Party Response

The High Court correctly applied Case-72/12 Altrip, in that not every procedural defect will necessarily have consequences which can possibly affect the purport of a decision. The Applicants submissions, at §17, seek to construe the Court's judgment such that Altrip establishes a general principle that applicants cannot succeed substantively unless they dislodge the Developer's averments that an error is harmless and that this would run contrary to the decision in Talbot [2009] 1 I.R. 375.

The Applicants argued, by way of mere assertion, that there was inadequacy in the AA screening carried out by the Board. Concerned Residents of Treascon and Clon[d]oolusk [2020] IEHC 700 confirms that harmless error may not give rise to certiorari, where the adequacy of the AA would not be affected.

Sliabh Luachra [2019] IEHC 888, and Heather Hill [2022] IEHC 146 confirm that decisions in the AA context should not be made on a purely hypothetical approach to risk founded on supposition not verified by evidence.

The High Court observed, at §181 of the judgment, that the expert affidavit evidence in this case averred to the immateriality of the error to the substance of the AA findings. The Applicant did not contest this evidence, nor did they provide evidence for the mere assertion that the AA was defective.

The decision in Talbot relates to separate issues, and in any event, the Applicant's point in this regard has already been decided by this Court in Save Roscam [2024] IEHC 335. There is no uncertainty in the law such as would make it desirable that the conflict be resolved by a higher court."

37. Unfortunately, the issue as framed by the applicants is highly tendentious. The court did not "refuse certiorari on the basis of an averment by the developer that the Board would have come to the same conclusion on a different basis had it identified that error". As the board correctly submits:

> "... the point is based on a false premise. The point of law must reflect a correct understanding of the decision of the High Court (Monkstown Road Residents Association [2023] IEHC 9 at §9(d)). Point (i) does not. The Court did not refuse certiorari in the manner the Applicants subjectively assert in the point as framed."

38. The concept that *certiorari* is a discretionary remedy is within the scope of national procedural autonomy and satisfies the tests of equivalence and effectiveness, provided that relief isn't refused in a case where relief is necessary to remedy the effects of a breach of EU law. But by definition, if there are no effects caused by the breach of EU law, then the court isn't prohibited by the principle of effectiveness or any other principle from dismissing the proceedings. That is fact-specific and doesn't raise any question of law in relation to which there is uncertainty.

39. The applicants' reliance on *Talbot v. Kildare County Council* [2008] IESC 46, [2009] 1 I.R. 375 (Fennelly J.), §29, is misplaced and that case was also fact-specific. The Supreme Court's language there about not presuming how a decision-maker would have decided matters is in a factual context where the court clearly thought that the outcome was not a foregone conclusion. That is a fact-specific determination, not some sort of *ex cathedra* principle that every error must be regarded as potentially making a difference. It is obvious that many errors make no difference. Browne (*Simons on Planning Law*, §12-913) reinforces that by analysing *Talbot* in terms that the non-quashed reason did overlap with the quashed reason. That emphasises the highly fact-dependent nature of any evaluation of harmless error. The mantra that "merits are for the decision-maker" doesn't prohibit the court from making an evidential evaluation that any given error would not have impacted on such merits. Otherwise, we would be in a technical objector's paradise, where every point becomes a "gotcha" point, and developers must suffer the massively disproportionate impact of *certiorari* irrespective of whether the complaint has any practical reality or not. If law were to go down that cul-de-sac it would fetishise doctrine over any kind of holistic view of the rights of other participants in the process. The applicants seem to be unconsciously striving to prove Mr Bumble's view of the law to be correct.

40. The CJEU saw this coming and said that a position corresponding to the applicant's stance here is "unarguable". At §49 of the judgment in *Altrip*, that court held as follows:

> "Nevertheless, it is unarguable that not every procedural defect will necessarily have consequences that can possibly affect the purport of such a decision and it cannot, therefore, be considered to impair the rights of the party pleading it."

41. The CJEU expressly envisaged that the *Altrip* process would involve evidence from the developer in review proceedings:

> "53. Therefore, the new requirements thus arising under article 10a of that Directive mean that impairment of a right cannot be excluded unless, in the light of the condition of causality, the court of law or body covered by that article is in a position to take the view, without in any way making the burden of proof fall on the applicant, but by relying, where appropriate, on the evidence provided by the developer or the competent authorities and, more generally, on the case-file documents submitted to that court or body, that the contested decision would not have been different without the procedural defect invoked by that applicant.
> 54. In the making of that assessment, it is for the court of law or body concerned to take into account, inter alia, the seriousness of the defect invoked and to ascertain, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making in accordance with the objectives of Directive 85/337."

42. The UK Supreme Court in *R. (Champion) v. North Norfolk District Council and another* [2015] UKSC 52, [2015] 1 W.L.R. 3710 (Lord Carnwath) relied on this in holding that the court can rely on a developer's affidavit in this regard:

> "58. Allowing for the differences in the issues raised by the national law in that case (including the issue of burden of proof), I find nothing in this passage inconsistent with the approach of this court in *Walton* [[2012] UKSC 44]. It leaves it open to the court to take the view, by relying 'on the evidence provided by the developer or the competent authorities and, more generally, on the case-file documents submitted to that court' that the contested decision 'would not have been different without the procedural defect invoked by that applicant'. In making that assessment it should take account of 'the seriousness of the defect invoked' and the extent to which it has deprived the public concerned of the guarantees designed to allow access to information and participation in decision-making in accordance with the objectives of the EIA Directive."

43. It's hard to improve on the opposing submissions at the main hearing but I will confine myself for now to endorsing the following from the notice party (Day 2 p. 96):

> "So what's proposed in this area is not significantly different in any meaningful way from what is already being undertaken as part of the baseline conditions. And yes, it's true to say that it would've been better to refer to the main section of the development site or the area where the major infrastructure is being proposed and undoubtedly there is a slip in that regard, but nonetheless, the fundamental point and it's the point the Court has made is that what Mr. Hayes says is that there is simply no conceivable basis upon which there could be any effect upon this European site, because there is going to be no effect on water quality. And without an effect on water quality, there simply can't be an effect on the qualifying interests.
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> ... There is no evidence put up against this, none whatsoever. And in those circumstances, in my respectful submission, the Court really hasn't got much alternative but to hold that this is in the category of harmless error, because the evidential foundation for a different conclusion simply hasn't been laid. And I'm not saying that in any disrespectful since, it's simply because the Court acts on the basis of the evidence before it. And in this regard, as in all the other situations, Judge, it's not good enough simply to be asking questions, [counsel for the applicants] has to provide some kind of answer. He hasn't done that. And respectfully, under those circumstances, the Court can be absolutely satisfied that there will be no effect whatsoever upon any European site. That's evident from the evidence before you.
>
> In those circumstances, it would be grossly unjust to my client, Judge, if this were to lead to this project being quashed and certiorari should not, therefore, be [granted.] [I]t [is] a discretionary remedy, Judge. We deal with the discretion in our written submissions at some length, I won't go over that, but we obviously continue to rely on those submissions in that regard. But for all those reasons, we do respectfully urge upon the Court that the Court should not countenance a grant of certiorari with regard to this ground."

44. To state the obvious, the court didn't refuse relief in the substantive judgment purely on the basis of an averment by the developer. The critical point is at para. 182:

> "The applicants have not challenged Mr Hayes' affidavit in any way whether by replying affidavit, cross-examination or otherwise and so can't be said to have evidentially dislodged the averments to the effect that any error is harmless and that there is a near-zero prospect of any effect, let alone significant effect, on European sites."

45. A court's findings of fact generally come about as a result of a combination of the evidence put forward by the parties including evidence as to what was before the decision-maker, together with an analysis of that evidence by the court and the extent to which that evidence is contested and, in the event of a contest, a weighing and adjudication of that contest. It isn't the averment by

the developer in itself that gives rise to a finding of near-zero impact. Here, it is in particular the combination of that averment with the applicants' failure to challenge it.

46. That is a standard procedure. It is in line with established rules on the necessity to challenge evidence as set down by the Supreme Court: *RAS Medical Ltd v. The Royal College of Surgeons in Ireland* [2019] IESC 4, [2019] 2 I.L.R.M. 273, [2019] 1 I.R. 63, [2019] 2 JIC 0501 (Clarke C.J.). It doesn't raise an issue of law as purportedly identified in the question or indeed any new issue of law whatever.

47. It is in line with other cases where applicants failed due to a lack of an evidential contest regarding alleged inadequacies. There is no conflict in jurisprudence.

48. The question doesn't purport to refer to any provision of EU law. But if and insofar as it is an EU law point, it is *acte clair* against the applicant for the reasons I have referred to.

49. The applicants now introduce a new point as to whether the court can refuse *certiorari* on the basis of harmless error by reference specifically to a developer's affidavit at all rather than a particular type of averment by the developer. The applicants' basic position in oral submissions is now not to question the doctrine of harmless error as such but to argue that the factual material by reference to which the error was deemed harmless should have been the subject of a decision by the administrative decision-maker, and to raise the bogeyman that introducing evidence on the topic in judicial review proceedings somehow breaches the principles of public participation. (Of course nothing so undignified as a specific provision of EU law is demonstrably involved in that postulation.) The applicants go on to say that "the parameters to that have not been fully developed in Ireland". If that's the standard, then there is no standard because there isn't a doctrine in the books where one can say that the parameters have been fully developed. There isn't anything so solid that a lawyer can't conjure up a plausible-sounding question that isn't answered in the textbooks. And let's not forget the misdirecting words "in Ireland" in that submission. *Altrip* is a European doctrine, not an Irish one – and the CJEU have given all of the clarification that is required for present purposes by finding in effect that developer's evidence in a judicial examination of a decision may allow the court to find that the error is harmless.

50. The appeal process in this context is not there to expand and develop doctrines for the sake of it (an obviously endless process and a poor use of limited judicial resources), but to identify pleaded legal issues in relation to which demonstrable legal uncertainty arises that is causing difficulty in practice. In an ideal world, appeals on law would be confined to areas where the appeal can reduce the net amount of uncertainty, rather than involve the creation of new uncertainty and legal entropy in areas that are working perfectly well and where there is neither doubt in practice nor demand for new doubt.

51. More fundamentally perhaps, this new point wasn't pleaded so can't be raised now. After five versions and four orders allowing amendments, the only reference to public participation in the fourth amended statement of grounds is in relief regarding costs protection (para. 9), and in the glossary to the statement. The appeal process is not a green light for an impermissible reprogramming of the pleaded case: *Concerned Residents of Treascon* [2024] IESC 28, [2024] 7 JIC 0402 (Unreported, Supreme Court, 4th July 2024) *per* Murray J. But even if one were to ignore all that, and come to the merits of the argument that public participation is offended by taking into account the developer's unchallenged affidavit in the present case, that is, as submitted by the board, "legal nonsense". The geographic facts of the situation were before the decision-maker, and the public participation process allowed the applicants to say anything they liked about it. Public participation wasn't compromised by regard being had by the court to the developer's assessment on affidavit of the material before the board. In any event, a procedure that is expressly envisaged by the CJEU can hardly simultaneously be a breach of EU law.

52. Ultimately there isn't anything revolutionary or even controversial about the proposition that decisions shouldn't be quashed over errors that make no difference, particularly in a context where the evidence to that effect was unchallenged. That is compatible with:

(i) European jurisprudence (Judgment of 7 November 2013, *Gemeinde Altrip and Others v Land Rheinland-Pfalz*, C-72/12, ECLI:EU:C:2013:712);

(ii) domestic jurisprudence (e.g., *Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanála* [2019] IEHC 888, [2019] 12 JIC 2017 (Unreported, High Court, McDonald J., 20th December 2019); *Reid v. An Bord Pleanála (No. 2)* [2021] IEHC 362, [2021] 10 JIC 0606 (Unreported, High Court, 6th October 2021) at §53; *Concerned Residents of Treascon and Clondoolusk v. An Bord Pleanála* [2022] IEHC 700, [2022] 12 JIC 1609 (Unreported, High Court, 16th December 2022) at §80; *Toole v. Minister for Housing (No. 6)* [2023] IEHC 592, [2023] 10 JIC 3102 (Unreported, High Court, 31st October 2023) at §39; *Heather Hill Management Company CLG v. An Bord Pleanála* [2022] IEHC 146, [2022] 3 JIC 1603 (Unreported, High Court, Holland J., 16th March 2022) at §257 et seq. and §326(d) and (e)); and

(iii) British jurisprudence (*R. (Champion) v. North Norfolk District Council* [2015] UKSC 52, [2015] 1 W.L.R. 3710 (Lord Carnwath) at §§54-59; *R. (Hudson) v. Windsor and Maidenhead Royal Borough Council* [2021] EWCA Civ 592, [2021] 1 W.L.R. 5588 (Coulson L.J.) at §§77-78).

53. Where's the uncertainty? As the board points out:

"The s.50A(7) case law is clear in that 'uncertainty' should not be equated with the applicant for the certificate having lost its case and then positing its unsuccessful view of the law as indicating uncertainty in the law's application."

Proposed question 2 – alleged requirement to set out material *in extenso*

54. The applicants' proposed second question of exceptional public importance is:

"Grounds 4 and 6, Peat slides - Where a decision-maker recites the developer's materials and then relies on them in coming to a conclusion, and tacitly accepts them, without discussion, can such tacit acceptance amount to an examination, analysis and evaluation, that identifies, describes and assesses, in an appropriate manner the direct and indirect significant effects of the proposed development on the environment, for the purposes of S171A PDA and A3 of the EIA Directive, or does the requirement to give reasons mean that the examination, analysis and evaluation must be set out by the decision maker?"

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

"GROUNDS 4 AND 6, PEAT SLIDES

Applicant Position

The question whether tacit acceptance, without discussion, of an EIAR can amount to an EIA as defined in S171A PDA and A3 of the EIA Directive, or whether the Board must explicitly set out and explain its examination, analysis and evaluation, is a question of exceptional public importance because, if the former is the position, the reasons requirement is so minimal as to eliminate the requirement to explain why the developer's submissions are preferred over those of the public, contrary to the decisions in Connelly, Balz, Redmond, Jennings and Stapleton. It is a question which transcends all EIA cases and has implications for reasoning requirements generally. A certificate is desirable in the public interest to resolve the diverging jurisprudence, and to ensure that the Board applies the law correctly and cannot set the limits of its own jurisdiction.

Board Response

Point (ii) is based on a false premise and does not reflect a correct understanding of the decision of the High Court and is therefore not appropriate for certification and does not meet the threshold for same under s.50A(7). It also comprises an impermissible attempt by the Applicants to reargue points already decided upon by the High Court in its substantive judgment, which is not appropriate (Rushe [2020] IEHC 429 at §32). There is no contradiction between the High Court's judgment and the judgment in Stapleton [2024] IEHC 3 at §213 or the Supreme Court judgments in Balz and Connelly. The suggestion by the Applicants that there is, is baseless and contrived and advanced to impute uncertainty in the law where none exists. The point of law posed by the Applicants simply ignores the point made by the Court (at §154 of the judgment) in relation to core grounds 4 and 6 that 'there are a number of fundamental misconceptions in the applicants' submissions under this heading – so much so that it borders on a crash-course in applicants' fallacies generally' as well as other parts of the judgment (e.g. §161, §162, §164 (in full) and §165) that undermine the interpretation of the Court's judgment that the Applicants purport to advance as the foundation for point (ii). The Applicants certificate submissions extend their misplaced reliance on fundamental misconceptions and applicant fallacies to their interpretation of the Court's judgment. As the Court stated at §157 'It cannot simply be asserted that the developer's material was accepted without consideration. That has to be proved – by evidence - which hasn't been done.' The Applicants interpretation and characterisation of the Court's judgment is patently inaccurate. There is no basis for the Applicants speculative and hyperbolic assertion that it is a question which transcends all EIA cases and has implications for reasoning requirements generally. Such an evidence-free submission cannot be a basis for the certification of questions of law to an appeal court (McCaffrey and Sons Ltd v. An Bord Pleanála [2024] IEHC 476 at §3.7; see also Phoenix Rock Enterprises v. An Bord Pleanála & Ors [2023] IESCDET 97 (Dunne, Baker and Donnelly JJ., 20th July, 2023) at §22 and §30; and more generally Hellfire Massy [2023] IEHC 591 at §43). Point (ii) is based on a version of events which has been rejected, as a matter of fact, by this Court. It is not possible to accept that a matter of law, as identified on misstated facts, can truly arise (McCaffrey [2024] IEHC 476 at §2.3).

Notice Party Response

At §160 of the judgment, the Court notes the requirement that the decision-maker carry out an examination, analysis and evaluation of an EIAR such that it may be established that it

is of sufficient quality that it may be accepted in line with section 171A of the 2000 Act and Article 3(1) of the Directive. At §164, the Court notes further that where the decision-maker recites the materials and then appears to rely on them in coming to a conclusion, that amounts a tacit acceptance of the relevant materials.

The question is an impermissible attempt to reargue points already decided upon by the High Court in its substantive judgment, contrary to the decision in Rushe [2020] IEHC 429.

There is no conflict between the authority in Stapleton [2024] IEHC 3 and the judgment in this case: expert scientific evidence will usually be needed to support the allegation of a flaw in the EIAR, which would allow the matter to be addressed by cross-examination. No such effort was made by the Applicants in this case."

56. The first point to be noted is that, as submitted by the notice party in the leave to appeal hearing, the point now made does not form part of the grounds. Core grounds 4 (in relevant part) and 6 are:

> "4. The Impugned Decision is invalid because the Board failed ... to carry out an assessment that would be as complete as possible (S171A, S172, A3(6)), ... 6. The Impugned Decision is invalid because the Board failed to investigate and analyse the information submitted by the Developer, and/ or to carry out as complete an assessment as possible, and therefore its EIA failed to meet the definition of an EIA in S171A when interpreted in accordance with Articles 1, 2 and 3 of the EIA Directive."

57. Those are substantive points, not complaints as to what is recited in the decision. The sub-grounds don't appear to contain the complaint now made either. So it can't arise.

58. For the avoidance of doubt, in any event, this point is abstract and fails to acknowledge the express findings of the inspector. The inspector says at para. 8.66:

> "I have considered additional European sites as listed above, as well as those considered within the applicants NIS, and consider that the applicant's approach is reasonable. Based on my examination of the NIS report and supporting information submitted, the scale of the development, its likely effects by way of the potential to contaminate or create disturbance to qualifying interests of the Slieve Aughty Mountains SPA (004168) and Slieve Bernagh Bog SAC (002312) by way of water pollution and sedimentation and noise disturbance and vibration during construction, I would conclude that a Stage 2 Appropriate Assessment is required for these Natura 2000 sites. It is important to note that mitigation measures have not been considered in the Appropriate Assessment Screening."

59. The applicants complain that the detail is in the NIS for example, and that saying that the NIS is "reasonable" isn't enough, the inspector must recite it all verbatim. But what is the basis for this alleged legal principle?

60. Tediously, the applicants phrase this as a reasons complaint, despite the Supreme Court laying down the law on reasons in *Connelly v. An Bord Pleanála* [2018] IESC 31, [2018] 2 I.L.R.M. 453 (Clarke C.J.). No further clarification is necessary – I have applied that here and found that reasons are discernible. Indeed, analogously to Hogan J.'s view in *Killegland Estates Limited v. Meath County Council* [2023] IESC 39, [2023] 12 JIC 2109 (Unreported, Supreme Court, 21st December 2023), nobody could be in doubt as to what they were.

61. The applicants then make an utterly contrived point that "[t]he approach taken in the Judgment differs from the approach of Holland J in *Stapleton* [*v. An Bord Pleanála* [2024] IEHC 3, [2024] 2 JIC 1305 (Unreported, High Court, Holland J., 13th February 2024)], §213" and indeed is "irreconcilable" with *Stapleton* (para. 34 of submissions). This is straight from the Appellant's Playbook 101 - asserting a conflict of jurisprudence is virtually required practice for would-be appellants, in order to enable thundering rhetoric along the lines that "an appeal is necessary to reconcile conflicting High Court decisions".

62. But the whole thing is threadbare. There is no conflict in High Court jurisprudence – indeed the jurisprudence is remarkably consistent. Given that reasons seem to come up as a boilerplate objection in nearly every case, there are dozens of judgments about reasons, and it would be unthinkable for each judgment to phrase things in exactly the same way. The basic position is clear – the centre of gravity of the jurisprudence is that there is an obligation to give the main reasons on the main issues. Different cases will apply that to different facts. The complaint is in reality fact-specific. Perhaps the unstated collective applicants' policy is not to take no for an answer and to keep seeking leave to appeal on reasons in case after case until further notice.

63. The applicants have made no attempt to reconcile the cases or even properly explain why they can't be reconciled. Anything they don't like the sound of is condemned as wrong and irreconcilable with other cases. Luckily for everyone else, that isn't how the common law method works.

64. As it happens, after independently coming to the foregoing conclusion, it has come to my attention that Barr J. has recently adopted an analogous approach in an analogous procedural conflict, refusing leave to appeal on the basis of an allegation that there was conflict between High

Court judgments (on the face of things, it looks like it may have been an alleged conflict between the same judgments – this is how urban myths get off the ground, through repetition). In *Graymount House Action Group & Ors v. An Bord Pleanála & Ors* [2024] IEHC 542 (Unreported, High Court, 13th September 2024), Barr J. put the matter thus:

> 28. In relation to the second question, the applicants want to argue that the adequacy of reasons mandated, is subject to some legal uncertainty, due to an alleged conflict of approaches between Humphreys J and Holland J as to the level of reasons required in planning decisions.
>
> 29. The court does not accept that there is uncertainty in the law in relation to the obligation to give reasons. That has been long established in the caselaw: see Meadows v Minister for Justice, Equality and Law Reform [2010] 2 IR 701, Balz v An Bord Pleanála [2020] 1 ILRM 367, Connelly v an Bord Pleanála [2018] IESC 36 and Christian v Dublin City Council [2012] 2 IR 506.
>
> 30. The law in this area was exhaustively analysed by Humphreys J in O'Donnell v ABP [2023] IEHC 381, wherein, having considered a large number of authorities, he came to the conclusion that the obligation was to provide the main reasons on the main issues. That approach has been adopted in numerous subsequent decisions of the High Court. This Court accepted that statement of the law in reaching its decision in the substantive judgment.
>
> 31. There will always be differences of emphasis, or phraseology, between one judge and another. That does not give arise to a true conflict, or divergence, as to the applicable law, on which it is desirable in the public interest that the point be resolved by way of an appeal.

65. If I may say so, Barr J.'s statement at para. 31 puts the matter rather better than my own previously-prepared wording as set out above, but it is precisely the same point. There will *always* be differences of emphasis or phraseology between one judge and another. If the existence of such differences is the test for jurisprudential conflict and uncertainty then there is no test. There can be no body of law either – just a series of atomised individual cases jockeying against each other in a perpetual war of all against all.

66. As the board correctly submits here:

> "... there is no contradiction between the Court's judgment and the judgment in Stapleton [2024] IEHC 3 at §213 or the Supreme Court judgments in Balz and Connelly. The suggestion that there is (§§29-34 of the Applicant's submissions) is contrived and advanced to impute uncertainty in the law where none exists."

67. Indeed, the sense of *Connelly v. An Bord Pleanála* [2018] IESC 31, [2018] 2 I.L.R.M. 453, [2021] 2 I.R. 752, [2018] 7 JIC 1701 is completely contrary to the proposition underlying the applicants' proposed question of exceptional public importance. Clarke C.J. said at p. 794 para. 14.2:

> "the Decision and any other materials which are either expressly referred to in it or can be taken by necessary implication to form part of the reasoning, provide adequate information to enable any interested party to assess whether an appropriate EIA has been carried out. I would also reverse the judgment of the High Court in relation to those issues."

68. He specifically said at p. 778 that:

> "it is not necessary that all of the reasons must be found in the decision itself or in other documents expressly referred to in the decision. The reasons may be found anywhere, provided that it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contended actually formed part of the reasoning."

69. So, reasons don't have to be set out *in extenso* in a decision. They can be found in other documents where that arises as a matter of express provision or implication.

70. Ultimately the complaint is also totally academic and abstract. The applicants' submission makes no attempt to show how the generalised complaint that the board should have set out reasoning *in extenso* (which is the basis of the question) means that "a broad, uninformative assertion that matters were considered, without more, prevents the Court exercising its supervisory function, and enables the Board, in effect, to set the limits of its own jurisdiction". For the avoidance of doubt, the court hasn't been prevented from exercising its supervisory function. Rather, applicants have lain doggo and then complained that the board and the court haven't done all the work. They simply haven't established anything specific arising from the board's general acceptance of the NIS that could have given rise to a lack of reasons or clarity or would otherwise have been unlawful. Inactivity followed by creative academic verbiage doesn't cut it.

71. Insofar as the question is a point about reasons under the EIA directive rather than in domestic law, this is *acte clair* against the applicants. There is nothing to suggest that the EU law reasons requirement is more extensive than the domestic law requirement, but more fundamentally, in this case *there are reasons*, which are referred to by way of accepting the NIS. There is no prospect whatsoever that the CJEU would hold there to be a pointless obligation as a matter of EU law to recite the content at length.

72. In any event, on the facts, the whole complaint is abstract. There is no evidence that the board failed to identify anything specific the identification of which was properly called for on the basis of the actual material before it. There is no evidence that the applicants were in any way disadvantaged by the wording of the decision.

Proposed question 3 – incorporation of reasons into the decision

73. The applicants' third proposed point of law of exceptional public importance is:

"Ground 5, Incorporation - (§144-145) Does the requirement to 'incorporate' reasons into an EIA decision under A8a of the EIA Directive allow incorporation by reference, and are Applicants precluded from arguing that a legal failure arises based on the wording of a legal provision (in this instance A8a of the EIA Directive) simply because there is no prior authority for the proposition, or is it open to them to advance an interpretation of a provision where that provision has never previously been judicially interpreted?"

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

"GROUND 5, INCORPORATION

Applicant Position

The question whether the requirement to 'incorporate' reasons into an EIA decision under A8a of the EIA Directive allows incorporation 'by reference', and whether Applicants are precluded from arguing that a legal error arises based simply on the wording of a legal provision that has not previously been interpreted, is a question of law of exceptional public importance because (1) 'incorporation by reference' is an extension of 'incorporation', not the ordinary and natural meaning of the word, and because (2) a legal provision must be capable of being interpreted for the first time based on its wording, when it has not previously been interpreted by a court judgment – which the present judgment would preclude. This is a question which has ramifications for the adequacy of EIA across the entire EU. It is desirable in the public interest that an appeal should be taken to establish this point, since the Court's judgment would preclude a certificate being granted on a novel point, contrary to the decision in Callaghan.

Board Response

Point (iii) is not appropriate for certification and does meet the threshold for same. Point (iii) merely re-agitates the Applicants incorrect interpretation of Article 8a of the EIA Directive (which was unequivocally rejected by the Court) and is advanced without any supporting legal authority and based only on the words used. Point (iii) comprises an impermissible attempt by the Applicants to reargue points already decided upon by the High Court in its substantive judgment, which is not appropriate (Rushe [2020] IEHC 429 at §32). There is also no uncertainty in the law about whether the requirement to 'incorporate' reasons into an EIA decision under Article 8a of the EIA Directive allows incorporation by reference – it does. Further, the Applicants omit to refer to §146 of the Court's judgment where the Court stated that 'Even if counterfactually the board did have to set everything out in extenso, the applicants aren't disadvantaged because what the board is saying in this particular case is clear from the material. The point is simply without merit on any analysis.' The Applicants weren't 'precluded' from arguing anything as point (iii) incorrectly asserts – their arguments were expressly considered but were 'simply without merit'. Nothing of public importance, still less 'exceptional' public importance arises in relation to this point. There is no basis for the Applicants speculative and hyperbolic assertion that it is a question which has ramifications for the adequacy of EIA across the entire EU. Such an evidence-free submission cannot be a basis for the certification of questions of law to an appeal court (McCaffrey and Sons Ltd v. An Bord Pleanála [2024] IEHC 476 at §3.7).

Notice Party Response

Once again, this question seeks to re-try the same issue as was litigated at the hearing, contrary to the decision in Rushe [2020] IEHC 429.

The 'novel' nature of the point does not, of itself, make the point sufficiently important to meet the threshold prescribed by s.50A(7).

Moreover, in Monkstown Road [2023] IEHC 9, the Holland J held that the that the point of law in question should be determinative of the issue. At §146 of the High Court's judgment in this case, it was made clear that the opposite is in fact the case here: 'Even if counterfactually the board did have to set everything out in extenso, the applicants aren't disadvantaged because what the board is saying in this particular case is clear from the material. The point is simply without merit on any analysis.'

Since the point could not, on any analysis, determine the case, it is not a suitable point to advance in the context of a certification application."

75. This is just a re-heated version of the previous technical "gotcha" point that the board has to recite everything *in extenso*. This is *acte clair* – in a European system that is purposive to its fingertips, there is no realistic possibility that the CJEU would hold there to be such a pointless

obligation. That conclusion is consistent with the applicants' failure to find any supporting authority from Europe or from the law of the 27 member states or indeed from a former member state. There is no basis for leave to appeal, and no doubt arises.

76. As with both previous questions, on the facts, the whole complaint is abstract. The applicants' repetitions and reformulations unfortunately necessitate a response in kind – there is no evidence that the board failed to identify anything specific the identification of which was properly called for on the basis of the actual material before it.

77. The final pitiful cry that the applicants are condemned "simply" because there is no authority for their proposition, and that it is being viewed as not "open to them" to make a new point, is contrived and tendentious. The applicants' point is not being viewed as implausible "simply" because there is no authority for it. But the lack of authority is relevant to whether doubt arises and whether the point is *acte clair* against them. Yes of course, the law can evolve, and new points can arise without authority if they have an inherent logic. This is not such a point.

78. In any event, this point didn't disadvantage the applicants on the facts. As noted at §146 of the No. 2 judgment: "Even if counterfactually the board did have to set everything out in extenso, the applicants aren't disadvantaged because what the board is saying in this particular case is clear from the material. The point is simply without merit on any analysis." The board draws the irresistible conclusion:

> "The Applicants weren't 'precluded' from arguing anything as point (iii) incorrectly asserts – their arguments were expressly considered but were 'simply without merit'".

Proposed question 4 – alleged requirement on the board to set out its own expertise

79. The applicants' proposed question 4 is:

> "Ground 4, Expertise - Does the requirement to give reasons in A8a of the EIA Directive include a requirement to set out the expertise applied by the decision maker for the purposes of A5(3) of the EIA Directive?"

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

> "GROUND 4, EXPERTISE
>
> Applicant Position
>
> The question whether the requirement to give reasons in A8a of the EIA Directive includes a requirement to set out the expertise applied by the decision maker for the purposes of A5(3) of the EIA Directive is a question of exceptional public importance because A5(3) of the EIA Directive requires the decision maker to deploy expertise and A8a requires the giving of reasons, while Irish law also requires the giving of adequate reasons and requires experts to 'show their workings'. This is a question which goes to the heart of what an Applicant has to prove, and what the reasons have to show, in all EIA cases. It is desirable in the public interest that an appeal be taken because this is an issue that bears on all EIAs carried out.
>
> Board Response
>
> Point (iv) is not appropriate for certification and does meet the threshold for same. Point (iv) merely re-agitates the Applicants incorrect interpretation of Article 8a of the EIA Directive (which was unequivocally rejected by the Court) and is advanced without any supporting legal authority and based only on the words used. Point (iv) comprises an impermissible attempt by the Applicants to reargue points already decided upon by the High Court in its substantive judgment, which is not appropriate (Rushe [2020] IEHC 429 at §32). There is also no uncertainty in the law about whether the requirement to give reasons includes a requirement to set out the expertise applied by the decision-maker – it does not. As the Court held (at §134) 'As regards whether the board failed to give reasons demonstrating the required expertise, that is a complete misconception. It is up to an applicant to show that the expertise is lacking, not up to a decision-maker to prove that she has the expertise. There is no legal requirement as postulated by the applicants here.' There is no basis for the Applicants speculative and hyperbolic assertion that it is a question that bears on all EIAs carried out. Nothing of public importance, still less 'exceptional' public importance arises in relation to this point. As regards points (iii) and (iv), an analogy can be drawn with the Supreme Court's unequivocal rejection in Concerned Residents of Treascon and Clondoolusk v An Bord Pleanála & Ors [2024] IESC 28 of an EIA argument made by the applicant in that case (per Murray J. at §74).
>
> Notice Party Response
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> The Applicants' reliance on Clifford [2021] IEHC 459 is misplaced, as circumstantially there is no similarity between that case and the present matter. There is no requirement for the Board to set out its expertise. Rather, as the Court correctly held at §134, it is for the applicant to demonstrate any alleged lack of expertise.
>
> Once again, the fact that a point is 'novel' has been held not be determinative as to whether a point is suitable for the granting of a certificate: Callaghan [2015] IEHC 493. No issue of exceptional public importance has been demonstrated in relation to the above, or indeed to

> any of the points advanced in this case. On the other side of the argument, the Carrownagowan Wind Farm, which is the subject matter of these proceedings, is an important piece strategic infrastructure development, which, upon completion, will provide significant renewable energy in line with local, regional, national and EU policy, which seeks to promote a reduction in greenhouse gas emissions.
>
> Further, under the Climate Action and Low Carbon Development (Amendment) Act 2021 Ireland is committed to reducing its greenhouse emissions by 51% by 2030. A key target in the Government's Climate Action Plan 2023 (which has been retained in the Climate Action Plan 2024) is to increase the proportion of renewable electricity to up to 80% by 2030, with a target of 9 GW from onshore wind by 2030. Delay in the Carrownagowan Wind Farm becoming operational by reason of these proceedings has the potential to impact on the delivery of Ireland's renewable energy targets.
>
> The delivery of low carbon projects is in the public interest, which is another factor militating against the grant of a certificate in this instance."

81. But again, this is just a principle of the applicants' confection. No such obligation is set out in the directive. Once more, the applicants come up empty-handed when it comes to authority to support this. There is no meaningful prospect whatever that the CJEU would invent such a procedure in the terms envisaged by the applicants, above and beyond what the directive requires. This is also *acte clair* against the applicants. There is no basis for leave to appeal and no doubt arises.

82. In any event, this is an academic point. There is no evidence that the board lacked the necessary expertise to an extent that warrants it being condemned for failure to specify anything in that regard. In addition, the applicants failed to activate normal and available domestic procedures such as particulars, discovery, interrogatories or otherwise so as to investigate the issue of the board's expertise. In such circumstances the complaint is abstract and unnecessary.

Public interest

83. Independently of the foregoing, the public interest militates against an appeal for a number of reasons. I don't need to rest the decision on the public interest because this isn't a close call, but if I am wrong about that, I would have found that the public interest requirement is a basis for refusing leave to appeal.

84. Firstly, there are countervailing public interest considerations having regard to the nature of the project. The observations of McGovern J. in *Dunnes Stores v. An Bord Pleanála* [2015] IEHC 387, 2015 WJSC-HC 6876, [2015] 6 JIC 1805 (Unreported, High Court, 18th June 2015) at §15 and §16 are apposite:

> "[15]…there is no difficult point of law in which the views of the Court of Appeal or Supreme Court are required for the public interest. The court is also entitled to take into account the nature of the development and the issues involved in the case and the potential consequences of a significant further delay in the matter being resolved by the court.
>
> 16. Merely raising a question as to a point of law does not point to its uncertainty. The decision of this Court on the judicial review applies the legislative scheme in an unexceptional fashion and was stated to be clear and unambiguous. In those circumstances, there is no difficult point of law in which the views of the Court of Appeal or Supreme Court are required for the public interest. Indeed, in considering the public interest, the court has to take into account that there are competing public interests at stake and not simply those of the applicant."

85. On the one hand, the court has to stand to some extent neutrally aside from the priorities of other branches of government, at least where there is no legally cognisable signpost to guide the court. Policy priorities taken out of context and phrased at a high level of generality don't particularly get us very far. There is a public interest in, say, housing for example, or other infrastructure (insofar as that constitutes proper planning and sustainable development) – but there is also a public interest in protection of the environment, habitats, species and so forth. So focusing only on one side of this balance, for example by saying that there is a public interest in housing so we must favour whatever decision promotes housing, isn't a particularly credible intellectual exercise for the court in weighing the public interest – in fact it isn't a particularly credible intellectual exercise for any actor, because as the economist Thomas Sowell has repeatedly pointed out, everything is a matter of trade-offs between pros and cons. The low-hanging fruit and the free lunches have been eaten a long time ago – all realistic decisions now humanly available in the business of social governance involve some trade-offs. Airbrushing that out of the discourse is intellectually dishonest at best, dangerous demagoguery at worst.

86. On the other hand, however, many projects and renewable energy projects in particular, have an inherent urgency. As an example of what I mean by a legally cognisable signpost for the court, European law has changed in recent times to require the most expeditious procedure available in national law for litigation relating to renewable energy: art. 16(6) of directive 2018/2001 as amended by directive 2023/2413, with a transposition date of 1st July 2024. Practice Direction

HC126 with effect from 24th June 2024 endeavours to reflect that priority. The amending directive also provides in certain circumstances for a presumption in favour of such projects where impacts on European sites might otherwise preclude development. Article 16f of the 2018 directive as inserted by the 2023 directive provides:

> "Overriding public interest
>
> By 21 February 2024, until climate neutrality is achieved, Member States shall ensure that, in the permit-granting procedure, the planning, construction and operation of renewable energy plants, the connection of such plants to the grid, the related grid itself, and storage assets are presumed as being in the overriding public interest and serving public health and safety when balancing legal interests in individual cases for the purposes of Article 6(4) and Article 16(1), point (c), of Directive 92/43/EEC, Article 4(7) of Directive 2000/60/EC and Article 9(1), point (a), of Directive 2009/147/EC. Member States may, in duly justified and specific circumstances, restrict the application of this Article to certain parts of their territory, to certain types of technology or to projects with certain technical characteristics in accordance with the priorities set out in their integrated national energy and climate plans submitted pursuant to Articles 3 and 14 of Regulation (EU) 2018/1999. Member States shall inform the Commission of such restrictions, together with the reasons therefor."

87. Such recent developments in EU law are potentially of significance in that they provide a form of answer for the hitherto problematic clash between arguments regarding the need to address the climate emergency versus the need to give effect to previously established European environmental law regardless of the nature of the project. In *Toole v. Minister for Housing* (No. 2) [2023] IEHC 317, [2023] 6 JIC 1603 (Unreported, High Court, 16th June 2023) paras. 16 to 21, I effectively came down in favour of the latter, but recent legal developments might require a reassessment of that. Such developments must adjust the public interest calculus somewhat against endless litigation and appeals in relation to renewable energy projects, without of course taking from the need to afford any consent decisions in relation to such projects at least one level of effective legal scrutiny.

88. Thus, the statutorily-supported policy in favour of expeditious and overriding provision of renewable energy can't be dismissed as irrelevant in this context. In the light of the foregoing legal developments I would endorse the thrust of the notice party's submission on this theme:

> "48 Finally, the Carrownagowan Wind Farm, which is the subject matter of these proceedings, is an important piece strategic infrastructure development, which, upon completion, will provide significant renewable energy in line with local, regional, national and EU policy, which seeks to promote a reduction in greenhouse gas emissions.
>
> 49 By way of example, as is noted on page 10 of the government policy document Investing in the Transition to a Low-Carbon and Climate-Resilient Society 2018 – 2027, Project Ireland 2040:
>
> 'The 2014 National Policy Position on Climate Action and Low-Carbon Development establishes the fundamental national objective of achieving transition to a competitive, low-carbon, climate-resilient and environmentally sustainable economy by 2050.'
>
> 50 Further, under the Climate Action and Low Carbon Development (Amendment) Act 2021 Ireland is committed to reducing its greenhouse emissions by 51% by 2030. A key target in the Government's Climate Action Plan 2023 (which has been retained in the Climate Action Plan 2024) is to increase the proportion of renewable electricity to up to 80% by 2030, with a target of 9 GW from onshore wind by 2030. Delay in the Carrownagowan Wind Farm becoming operational by reason of these proceedings has the potential to impact on the delivery of Ireland's renewable energy targets.
>
> 51 It is submitted that the development of low carbon projects such as that at issue in these proceedings is in the public interest, which is another factor militating against the grant of a certificate in this instance."

89. Turning to a second aspect of the public interest, there has already been considerable delay, and further delay would risk unfair prejudice to the notice parties. The application for permission was made here on 30th November 2020 – nearly four years ago. Permission was granted by decision on 29th September 2022 – two years ago. That latter delay – caused by this litigation – has to be a factor which pulls against allowing the case to delay the project further.

90. Thirdly, the applicants' points have had a very thorough airing already. The applicant has now had the benefit of three judgments from the High Court and has also pursued a full appeal to the Court of Appeal against the No. 1 judgment, so there is a fourth judgment on the way. In a context such as this, that is enough. Maybe more than enough. And for what it's worth, the applicants are not going away empty-handed – I have already decided that they should be afforded declaratory relief and a proportion of costs.

91. Fourthly, insofar as the applicant incorrectly claims that the judgment is causing, or is likely to cause, problems in the practical operation of the legislation, that is baseless on the facts. As the

board notes, "in a different context, but relevant by analogy", the Supreme Court in *Phoenix Rock Enterprises v. An Bord Pleanála & Ors* [2023] IESCDET 97 (Dunne, Baker and Donnelly JJ., 20th July 2023) at §22 and §30 dealt with an argument that alleged uncertainty in the law was creating alleged difficulties in practice, but rejected this on the basis that there was "no evidence before the High Court that the quarry industry was being seriously affected by the issues in the case", and that "[t]he decision in this case was fact-specific to this quarry and it must be recalled that the role of the Supreme Court on an Article 34 appeal is not to give advisory opinions but to deal with the controversy at issue between the parties once the constitutional thresholds have been met". Similar considerations apply here by analogy.

92. Finally, even if I am wrong on everything else, the fact that there was no actual evidential challenge to the fact that the error is harmless (question 1), no evidential basis for saying that the applicants were harmed by a lack of more extensive reasons (questions 2 and 3), and no evidential basis to doubt the board's expertise (question 4), removes any public interest in exploring the legal niceties further and makes this a highly inappropriate case to hold up the development further by reference to a potential appeal. As the notice party submits, "the facts are extremely poor" for allowing a proposed appeal.

Summary

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

(i) the Supreme Court has already clarified that failure to cross-examine may mean that a party carrying the onus of proof is bound by the evidence thus uncontroverted*: RAS Medical Ltd v. The Royal College of Surgeons in Ireland* [2019] IESC 4, [2019] 2 I.L.R.M. 273, [2019] 1 I.R. 63, [2019] 2 JIC 0501 (Clarke C.J.);

(ii) the Supreme Court has already clarified the standard of reasons and that there is no need to set out reasons *in extenso* in a decision: *Connelly v. An Bord Pleanála* [2018] IESC 31 [2018] 2 I.L.R.M. 453, [2021] 2 I.R. 752, [2018] 7 JIC 1701 (Clarke C.J.);

(iii) the Supreme Court has already clarified that reconfiguring a case beyond the pleaded grounds for the purpose of appeal is inappropriate: *Concerned Residents of Treascon* [2024] IESC 28, [2024] 7 JIC 0402 (Unreported, Supreme Court, 4th July 2024) *per* Murray J.;

(iv) the Supreme Court has already made the point, albeit non-precedentially and in a different but related appellate context, in *Phoenix Rock Enterprises v An Bord Pleanála & Ors* [2023] IESCDET 97 (Dunne, Baker and Donnelly JJ., 20th July 2023) at §22 and §30, that leave to appeal based on alleged uncertainty creating "alleged difficulties in practice" was not appropriate in the absence of any evidence before the High Court that the relevant industry "was being seriously affected by the issues in the case";

(v) the CJEU has already clarified that relief need not be granted for errors that do not give rise to actual effects that breach EU law, and that a court's assessment of that test can be informed by evidence from the developer: judgment of 7 November 2013, *Gemeinde Altrip and Others v Land Rheinland-Pfalz*, C-72/12, ECLI:EU:C:2013:712;

(vi) insofar as there are fragmentary points not expressly covered by express existing appellate authority, the mere absence of express authority rejecting a point doesn't have the implication that the point must be one of uncertainty and relevance that warrants leave to appeal - any left-over points are either tendentious, fall outside the pleaded and substantively argued case, do not properly arise on the facts, or are contrived points in relation to which no meaningful or demonstrable doubt arises and in relation to which no supporting material has been brought forward; and

(vii) in any event the public interest militates against allowing further appeal - there is a significant public interest, now legally enshrined in various ways, in the expeditious determination of the lawfulness of renewable energy infrastructure, and an enshrined EU law provision affording a presumed overriding public interest in the provision of such infrastructure in some circumstances where that conflicts with the habitats directive, and in any event, the facts of the present case are an extremely poor basis for a proposed appeal, given the lack of evidence on crucial points.

Order

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

(i) the application for leave to appeal be dismissed with no order as to costs; and

(ii) the foregoing order together with the order previously announced (granting a declaration but otherwise dismissing the proceedings and with an order for costs in favour of the applicants to an extent specified in the substantive judgment) be perfected forthwith.