2023 IEHC 173

THE HIGH COURT
JUDICIAL REVIEW
COMMERCIAL PLANNING AND STRATEGIC INFRASTRUCTURE DEVELOPMENT

Record No: 2022/424 JR

Between:

ANN MARSHALL, RODERICK RYAN AND PETER WALSH (AS EXECUTORS OF THE ESTATE OF FRANK DUNNE DECEASED),
ANN MARSHALL
AND HAMWOOD STUD UNLIMITED COMPANY

Applicants

AND

ELECTRICITY SUPPLY BOARD,
IRELAND AND THE ATTORNEY GENERAL

Respondents

AND

EIRGRID PLC

Notice Party

Contents

JUDGMENT OF MR JUSTICE DAVID HOLLAND DELIVERED 18th APRIL 2023

INTRODUCTION

1. This is my judgment in the Applicants' motion for discovery against the 1st Respondent ("ESB") and the Notice Party ("EirGrid").

2. The Applicants (collectively, "Hamwood") own and operate Hamwood Stud at Dunboyne, County Meath where they train and breed racehorses and farm pedigree Shorthorns. Since in or

about 1985, part of the Maynooth-Woodland 200kV electricity transmission line ("the Line"), owned by the ESB, has traversed Hamwood Stud, supported by 6 steel towers on Hamwood Stud. I infer that the ESB obtained a Wayleave for the Line at that time, in reliance on which the Wayleave Notices next described were served.

3. On 25 February 2022, pursuant to S.53 of the Electricity Act 1927, the ESB served on Hamwood Wayleave Notices of intention to perform works to the Line. The works were described in schedules to the Notices and summarised in the covering letter.[1] The latter describes the works as "*Uprating and refurbishment*" of the Line.

4. Hamwood says that the works threaten Hamwood Stud in both its operations and its commercial reputation. It exhibits an expert veterinary report to the effect that *"the proposed works could have a very significant negative impact on these premises and they could threaten the very viability of the enterprise"*. It proposes that the cables be undergrounded on peripheral routes instead.[2] In these proceedings, Hamwood seek to quash the Wayleave Notices on various grounds, for which they have been granted leave to seek judicial review. Only some of those grounds are relevant to the present discovery motion.

5. The regulation and resultant organisational structure of the electricity industry in Ireland is considerably shaped by the "unbundling"[3], progressively since the mid-1990's, of the historic monopoly of the Electricity Supply Board ("ESB") in the generation, transmission[4], distribution[5], and sale of electricity. This unbundling is required by successive EU Directives[6] since 1996 "*concerning common rules for the internal market in electricity*" in the cause of introducing competition in the generation and sale of electricity in, as applicable to Ireland, a single all-island electricity market. Very broadly, Ireland has sought to achieve that objective while maintaining the ESB Group in a variety of "ring-fenced"[7] roles - essentially as owner of large parts of the system and a major player in the industry. The result is a bewildering plethora of interlocking roles and functions, legal entities

1 As follows:
uprating the 3 conductor wires with similar size conductor together & replacement of the insulators (where required) & the fittings.
replacement of the existing earth/shield wire with similar sized earth/shield wire.
fitting of fibre wrap to the replaced earth/shield wire.
painting existing steel masts/towers.
replacement of some steel members and bolts (where required) of existing masts.
repair of concrete shear caps at 5 of the 6 existing masts at ground level.
Temporary guard/spar poles and temporary stay wires may be required to be erected on your lands to facilitate the works.
The Notice clarifies that
The conductor wires will be uprated from 600 mm2 ASCR to 568 mm2 HTLS.
The fibre wrap will consist of an optic cable/electronic communications networks cable.
2 EirGrid & ESB have exhibited an expert report discounting risk by Electric fields, Magnetic Fields and Noise. Essentially, they say that the line uprate will not change existing levels and they will remain under relevant limits. As to noise, they also record that as a continuous operation of these lines means that they are not typically a source of any transient noise that would produce a startle response.
3 Apparently a verb. It means separation.
4 The transmission system carries power from Generation to the distribution system.
5 The distribution system carries power from the transmission system to the ultimate user of the electricity.
6 Directive 2003/54, the 2009 Directive, and Directive 2019/994.
7 I use the term "ring fence" and cognate terms to describe an effective and practical separation of entities and not to denote any particular legal form of ring fencing.

and business units,[8] contractual arrangements, ring-fences and acronyms.[9] Individual entities may have multiple roles. Entities are awarded licences by the Commission for Regulation of Utilities[10] ("CRU") to allow them perform those roles.

6. This case, however, is concerned primarily with the transmission system, of which the Line forms part. In particular, the transmission system has:

- A licensed Owner – ESB – the "Transmission Asset Owner" ("TAO").
  - An internal ESB unit – "ESB Networks" - to perform the ESB's TAO Functions.
- A Manager – ESB Networks DAC – the Transmission Asset Manager ("TAM") - to manage ESB Networks' performance of ESB's TAO Functions. ESB Networks DAC is a wholly-owned subsidiary of ESB.
- A licensed Operator – EirGrid plc – the "Transmission System Operator" ("TSO"). Eirgrid is a State-owned plc with no connection to the ESB other than that they are both State-owned.

7. The role division described above derives in the first instance from the obligations of Directive 96/92 EC[11] which sought to unbundle ESB's historic monopoly by requiring the establishment of independent roles of TAO and TSO. This was implemented by the Electricity Regulation Act 1999 and the 2000 Regulations[12] by which, inter alia, the ESB was licensed as TAO in June 2001 and EirGrid was established and licensed as TSO. By the 2000 Regulations ESB as TAO and EirGrid as TSO were required to, and they did in 2006, make a Transmission Infrastructure Agreement (TIA) – arranging and governing as between them their respective roles and interactions, as TAO and TSO and as they related to the transmission system. That 2006 TIA subsists unchanged and the ESB's TAO licence subsists unchanged since an amendment in 2007.

8. As relevant here, the ESB, as TAO, is responsible for the maintenance of the transmission system.[13] EirGrid as TSO, is responsible for the operation of the transmission system as well as its maintenance and development. It identifies and decides on the transmission development works to be done from time to time and publishes periodic Transmission Development Plans ("TDP") accordingly. The TIA governs the process in some detail but essentially EirGrid requires ESB to perform those works to EirGrid's specification and at ESB's expense. ESB performs those works by its internal "Engineering and Major Projects" business unit.

8 i.e. business units internal to legal entities and having no distinct legal personality.
9 The various entities and their roles are very helpfully described in Electricity Supply Board v. Killross Properties Ltd [2016] IECA 210 and [2018] 3 IR 690 Supreme Court. See also COMMISSION DECISION of 12.4.201 pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC – Ireland – Eirgrid / ESB - Brussels, 12.4.2013 C(2013) 2169 final.
10 Or its predecessors, the Commission for Electricity Regulation and the Commission for Energy Regulation.
11 Concerning common rules for the internal market in electricity.
12 SI 445 of 2000 - European Communities (Internal Market in Electricity) Regulations, 2000.
13 Regulation 19, European Communities (Internal Market in Electricity) Regulations 2000.

9. Unbundling has been an iterative process. By Article 9[14] of Directive 2009/72/EC[15], 3 models of organisational structures were permitted by way of advancing the unbundling process. But Ireland chose the 4th – a derogation under Article 9(9) which allowed for approval of existing arrangements if they guaranteed more effective independence of the TSO than would reorganisation under Article 9. That required, in the first instance, a provisional decision of the SEM Committee[16] and in the second instance a decision of the EU Commission[17] (the "Commission Decision") approving the pre-existing arrangements between ESB as TAO and EirGrid as TSO ("the Existing Arrangements"). These decisions were made in 2013 – (the "2013 Decisions"). The 2013 Decisions are not impugned in these proceedings. Issues arise in the proceedings as to whether, to what extent, with what effect in law, by when and of whom, the 2013 Decisions required changes to be made to the Existing Arrangements. Some of those changes, it is alleged, related to improvement of the ring-fencing of various ESB Group activities.

10. It is also relevant to note that the ESB, trading via its "Electric Ireland" business unit, is licensed to sell electricity to electricity consumers.[18] Further, some large electricity consumers, such as Intel, are supplied electricity directly from the transmission system rather than from the distribution system. Such customers ("TSO Demand Customer"[19]) have a contractual relationship, as to that connection to the transmission system, with EirGrid as TSO – a contract separate to those customers' contractual relations with their electricity suppliers, who may or may not include Electric Ireland.

11. The ESB says that, as required by regulation and in fact, its Electric Ireland sales unit on the one hand, and ESB qua TAO, its ESB Networks Unit, ESB Networks DAC and, I infer, the ESB Engineering and Major Projects Unit on the other hand, are strictly separated by ring fences and know nothing of each others' businesses. They do not share information and maintain, as between them, confidentiality of confidential and commercially sensitive information. Further, ESB says that ESB qua TSO and, I infer, its ESB Networks Unit, ESB Networks DAC and, the ESB Engineering and Major Projects Unit, is unaware of the identity of the suppliers of electricity (such as, potentially, Electric Ireland) to EirGrid's TSO Customers, such as Intel. These assertions are not specifically contradicted on affidavit.

12. However, Hamwood generally asserts that these ring-fencing arrangements are incomplete by reason of the failure to fully implement improvements to the Existing Arrangements required by the 2013 Decisions. These observations are relevant to Hamwood's allegation that the Line uprating project and an associated Substation project are part of an illegally anti-competitive abuse of ESB's

14 Unbundling of transmission systems and transmission system operators.
15 concerning common rules for the internal market in electricity.
16 Single Electricity Market Committee. This is a statutory committee comprised of representatives of the Commission for Regulation of Utilities (formerly the Commission for Energy Regulation) and the Northern Ireland Utilities Regulator and an independent chair.
17 COMMISSION DECISION of 12.4.201 pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC – Ireland – Eirgrid / ESB - Brussels, 12.4.2013 C(2013) 2169 final.
18 It appears that ESB Independent Energy Limited and ESB Independent Energy (NI) Limited are also involved in that trading activity. But it has not been suggested to me that that is relevant for present purposes.
19 Not a term of art. A term generated for purposes of this judgment. The other customers of the Transmission system are generators.

and Eirgrid's dominant positions by way of and in furtherance of anticompetitive agreement to facilitate increased electricity sales by Electric Ireland to Intel. Essentially, Hamwood says the purpose of the Line uprating is to increase the potential supply of electricity to Intel to benefit Electric Ireland as a vendor to Intel.

13. The ESB says these complaints are baseless and that the grounds do not plead breach of these confidentiality requirements. ESB also says that even had information passed in breach of these requirements it would be irrelevant as it is EirGrid, entirely separate from ESB, not ESB, which decides what transmission system development works are to be done. In that regard, it says in effect, ESB merely does what EirGrid tells it to do.[20]

14. As has been seen, two Transmission System development projects are relevant to the case:

- The Line Project – CP869.[21]
- The Substation Project – CP1029. [22]

15. The Substation Project is identified as a newly adopted project in the EirGrid Transmission Development Plan 2020-2029 published in 2021 and the full project name[23] includes the words "*Demand customer connection*". The Introduction to an exhibited EirGrid "*Final Committed Project Parameters*"[24] of 26 November 2019 as to the Substation Project records that *"The driver of this project is a Connection Agreement Modification Request from Intel, an existing demand customer"* to "*provide the customer with an increase of Maximum Import Capacity"* ("MIC").[25] The Introduction makes explicit the linkage of the Substation Project to the Line Project: *"To meet the full MIC requirement of* (redacted) *MVA the Maynooth-Woodland 220 kV OHL[26] will require upgrading …"* In the exhibited version of this Parameters document, the intended quantum of the increased MIC is redacted. The "Project Description" in that document states, "*Intel Limited (the "Customer") seeks a permanent 220 kV connection to facilitate a demand site load of* (redacted) *MVA*" and that the new substation will "*loop into the existing Maynooth – Woodland 220 kV Circuit"*. Planning permission for the Substation was granted on 21 November 2019 and included permission for the loop to the Line and for ducting to *"the Customer's*" transformers. In context, this reference to the customer can only have been to Intel. So the identity of the customer must have been apparent, or at very least deducible, from the public documents in the planning application.

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20 The process is in part apparent from exhibited EirGrid Final Committed Project Parameters 220 kV Station Project (CP1029). It describes the Station Project and states "Unless otherwise indicated herein or separately agreed between TAO and TSO, The Infrastructure Agreement shall be implemented to ensure that the development of the project agreement for the above committed project is reached. It is envisaged under the Infrastructure Agreement that the TSO will issue a committed project parameter (CPP) to the TAO. The TAO will develop a project implementation plan (PIP) from this CPP and submit to the TSO for approval. Once the CPP is finalised and the PIP is determined or agreed to be satisfactory, then the Project Agreement shall be prepared and executed." Similar text appears in the exhibited Line Uprate Committed Project Parameters.

21 Project number assigned by EirGrid.

22 Project number assigned by EirGrid.

23 "Kellystown 220 kV New Station and loop-in to Maynooth – Woodland 220 kV circuit – Demand customer connection".

24 Final Committed Project Parameters CP1029 220 kV Station Project (CP1029).

25 I infer that MIC is a measure of the maximum quantity of electricity which the transmission system can supply to a TSO Demand Customer in a given period of time.

26 Overhead Line.

16. The Introduction to an exhibited EirGrid "Committed Project Parameters"[27] of 27 May 2020 as to the Line Project records that:

- Intel Ireland Ltd. (the "Customer") applied to modify its existing Connection Agreement with EirGrid Group on 3 August 2018.
- That "customer connection has now brought forward the need to uprate the Maynooth Woodland 220 kV line".
- Intel signed a new Connection Agreement on 19 June 2019. It anticipated delivery of the Maynooth – Woodland 220 kV line uprate by late 2022.
- The need to increase network capacity between Maynooth and Woodland 220 kV busbars involves an uprate of the existing circuit.
- So the refurbishment project scope changed to a line uprate that will include any refurbishment.

17. Accordingly it is clear, and ESB and EirGrid do not deny, that a considerable driver[28] of the pair of projects is to enable, at Intel's request, an increase in the capacity of the transmission system to transmit electricity to Intel.

DISCOVERY IN JUDICIAL REVIEW

18. The parties are agreed that discovery in judicial review is granted or refused on the same principles as those on which it is decided in plenary actions. The ESB and EirGrid draw attention to authorities to the effect that discovery in judicial review *"ought to be the exception rather than the rule"*,[29] and that "*that the necessity for discovery will be more difficult to establish than in plenary proceedings"*. It is important to point out that, once one accepts that the same principles apply as in plenary actions, statements such as those just cited must properly be understood as descriptive and predictive – not prescriptive or normative. There is no greater reluctance in principle to grant discovery in judicial review than in plenary actions. Laffoy J put it well when she said, as a matter of description not prescription, that *"the same principles apply to discovery in judicial review proceedings as apply generally in civil proceedings, although, primarily by reason of the nature of the process, the relief afforded and the issues which arise in judicial review proceedings, the practical application of the principles may result in discovery being less frequently ordered in judicial review proceedings than in other proceedings"*.[30] It is not that, as a general normative proposition discovery in judicial review should be granted less frequently: it is that in practice it is granted less frequently.

19. In practice, discovery in judicial review is granted less often than in plenary actions because discovery in plenary actions is most commonly granted as relevant to facts in dispute, the resolution

27 Committed Project Parameters Maynooth - Woodland 220 kV Line Uprate (CP0869).
28 Though they say not the only.
29 Sheehy v. Ireland (Unreported, High Court, Kelly J, 30 July 2002).
30 Fitzwilton Limited v. Mahon [2006] IEHC 48.

of which dispute bears on the result of the action. Such disputes as to fact are far less common in judicial review – which very often proceeds on agreed facts or turns on issues of law to which the resolution of any disputed facts is of little or no relevance.

20. The position as to the exercise in judicial review proceedings of the discretion as to discovery has been usefully introduced in **Hogan, Morgan & Daly**:[31]

> *"While the ordinary discovery rules apply in judicial review, there are nevertheless special factors which have operated to limit the scope of discovery in judicial review matters.*
>
> - *First, the facts are generally not the subject of controversy in judicial review matters.*
> - *Secondly, as judicial review is normally concerned with procedure rather than substance, this inevitably will narrow the range of documents which are relevant. Indeed, 'discovery will not normally be regarded as necessary if the judicial review application is based on procedural impropriety as ordinarily that can be established without the benefit of discovery.'*
> - *Thirdly, discovery will generally be refused where the applicant has made out no positive case on a particular ground, but where discovery is simply sought 'in the hope of turning up something out of which he could fashion a possible challenge.' Here again if the challenge is based on irrationality or unreasonableness grounds, discovery will 'not normally be necessary because if the decision is clearly wrong it is not necessary to ascertain how it was arrived at.'*
>
> *The result of these factors is that discovery in judicial review applications is thus generally confined to cases where information is improperly withheld or where there is a relevant and material conflict of fact on the affidavits."*

21. The first principles are that discovery is a discretionary order and is a matter of fairness of procedure.[32] While the discretion is broad, it is nonetheless to be exercised in accordance with established principles.

22. These principles applicable to discovery in judicial review are stated in various cases[33] from which, I believe, the principles can be synthesised as follows:

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31 Administrative Law in Ireland, 5th ed. §18-18. I have reformatted for clarity.

32 Ambiorix Ltd v Minister for the Environment (No. 1) [1992] 2 IR 77.

33 The cases cited and cases in turn cited therein, include Compagnie Financière du Pacifique v Peruvian Guano Company (1882) 11 QBD 55, R v Secretary of State for Health ex p London Borough Council (Unreported, Court of Appeal 29 July 1994); Aquatechnologie v N.S.A.I. Unreported Supreme Court 10/07/2000, [2001] 7 I.C.L.M.D. 101; KA v Minister for Justice [2003] 2 IR 93; Carlow Kilkenny Radio Ltd v Broadcasting Commission of Ireland [2003] 3 IR 528; Ryanair plc v. Aer Rianta cpt [2003] 4 IR 264; Fitzwilton Limited v. Mahon [2006] IEHC 48; Hartside Ltd v. Heineken Ireland Ltd [2010] IEHC 3; Evans v University College Cork [2010] IEHC 420; MacAodháin v. Ireland and the Attorney General [2012] 1 I.R. 430; McEvoy v Garda Síochána Ombudsman Commission [2015] IEHC 203; BAM v NTMA [2015] IECA 246; Kerins v McGuinness, [2015] IECA 267; O'Brien v. Red Flag Consulting Ltd [2017] IECA 258, Murphy v The Revenue Commissioners [2020] IECA 36. As many of these cases repeat the relevant principles, the footnote references to cases as authority for particular principles generally, but inexhaustively, refer to one or two cases only. See also Chubb European Group SE [Formerly Ace European] v. Perrigo Company Plc [2022] IEHC 444 and cases cited therein.

(1) The overall and crucial question is one of justice – whether the application cannot be fairly resolved without discovery? Generally, discovery is for the very specific purpose of enhancing the prospects of justice being done in the case in a timely and cost-effective way.

(2) Discovery should only be granted where the applicant seeking it establishes that it is relevant and necessary for the fair disposal of the issues in the case. It is undesirable to attempt any precise definition of the practice in this regard but, broadly, discovery will be regarded as necessary if a party raises a factual issue of sufficient substance to lead the court to conclude that it may, or will, be unable to try the issue fairly to all parties, without discovery of documents bearing on the issue.[34]

(3) The same tests of relevance and necessity apply as do in other proceedings.[35]

(4) But primarily by reason of the nature of the process, the relief afforded and the issues which arise in judicial review proceedings, "the practical application of the principles may result in discovery being less frequently ordered in judicial review proceedings than in other proceedings".[36]

(5) Judicial review is not concerned with the correctness of a decision but with the way in which the decision was reached. Therefore, the categories of documents likely to be considered relevant and necessary to be discovered will in practice be much more confined than if the litigation related to the merits of the impugned decision.

(6) Relevance and necessity are determined from the issues arising on the pleadings. As to identification of those issues, and speaking as to the issue of loss but in terms applicable to any issue, Clarke CJ put it pithily in **Hartside**[37], "Loss is an issue because it is pleaded and denied." [38]

(7) Relevance and necessity are determined in respect of the grounds that arise on the judicial review application rather than the substantive issue which was before the decision maker. They are also determined on the state of the evidence in the judicial review.[39]

(8) Relevance is considered in the sense indicated in **Peruvian Guano**. In that case it was held that a document is relevant "which, it is reasonable to suppose, contains information which may, not which must, either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary". However, in **Murphy** the bar has been raised somewhat from that

34 R v Secretary of State for Health ex p London Borough Council (Unreported, Court of Appeal 29 July 1994, cited in, inter alia, Carlow Kilkenny Radio Ltd v Broadcasting Commission of Ireland [2003] 3 IR 528 & Evans v University College Cork Neutral Citation: [2010] IEHC 420.
35 Fitzwilton Limited v. Mahon [2006] IEHC 48; Kerins v McGuinness, [2015] IECA 267.
36 Fitzwilton Limited v. Mahon [2006] IEHC 48; Kerins v McGuinness, [2015] IECA 267. Emphases added.
37 Hartside Ltd v Heineken Ireland [2010] IEHC 3.
38 Emphasis added.
39 Fitzwilton Limited v. Mahon [2006] IEHC 48; MacAodháin v. Ireland and the Attorney General [2012] 1 I.R. 430.

indicated by the phrase "reasonable to suppose" to a requirement that the documents be relevant as a matter of probability.[40] Discovery will not be granted to allow a party to find out whether a document may be relevant.

(9) Unless the discovery request is based on speculation,[41] the case made by the applicant for discovery should be taken at its height and assumed true, rather than accepting the case made by the party from whom discovery is sought – even if the latter seems the more credible.[42]

(10) The scope of discovery must accommodate itself to the parameters of the case as pleaded rather than the other way around.[43] An applicant is not entitled to discovery based on speculation or mere assertion – "bare unsubstantiated assertion".[44] The overall problem in this regard is one of balancing potentially countervailing factors. On one hand, the court must facilitate a party who may have a legitimate claim but may require access to information available only to its opponent in order to fully plead and ultimately substantiate that claim. On the other hand, the court must prevent a party from obtaining, by making a mere allegation, wide access to its opponent's documents, including what may well include highly confidential documents. In balancing procedural justice, the court may require a party whose application is based on a mere assertion to satisfy a threshold criterion of establishing a factual basis for the claim.[45] A general trawl of a party's documents – "fishing" is not permitted. The court will consider the possibility of speculation or fishing even though leave to seek judicial review has been granted on the ground to which the documents are allegedly relevant and will in that regard consider the particularity, or lack of it, of the grounds pleaded.[46]

(11) Absent material suggesting that the averments in the respondent's affidavits are untrue, an applicant may not go behind such affidavits by seeking discovery merely to undermine or test those averments.[47]

(12) Once relevance of documents to issues in the case is established it will follow in most cases that their discovery is necessary for the fair disposal of those issues.[48] The close relationship of relevance and necessity is such that the cases vary in considering similar circumstances through the prisms of relevance in some cases and necessity in others, but with generally the same results.

40 Murphy v The Revenue Commissioners [2020] IECA 36. The subtleties of this heightening of the bar were considered in Chubb v Perrigo but do not seem to require attention in this case.
41 See below.
42 Murphy v The Revenue Commissioners [2020] IECA 36 citing BAM v NTMA [2015] IECA 246.
43 Evans v University College Cork Neutral Citation: [2010] IEHC 420.
44 R v Secretary of State for Health ex p London Borough Council (Unreported, Court of Appeal 29 July 1994, cited in, inter alia, Carlow Kilkenny Radio Ltd v Broadcasting Commission of Ireland [2003] 3 IR 528 & Evans v University College Cork Neutral Citation: [2010] IEHC 420; also Aquatechnologie v N.S.A.I. Unreported Supreme Court 10/07/2000, [2001] 7 I.C.L.M.D. 101.
45 O'Brien v. Red Flag Consulting Ltd [2017] IECA 258 & Hartside Ltd v. Heineken Ireland Ltd.
46 Evans v University College Cork Neutral Citation: [2010] IEHC 420.
47 Murphy v The Revenue Commissioners [2020] IECA 36 citing BAM v NTMA [2015] IECA 246.
48 Murphy v The Revenue Commissioners [2020] IECA 36 citing BAM v NTMA [2015] IECA 246.

(13) Discovery may be necessary where there is a clear factual dispute on the affidavits which must be resolved in order to adjudicate properly or fairly on the application or where there is prima facie evidence that a document that ought to have been considered before a decision was made was not considered or that a document which ought not to have been seen before a decision was made, was considered.[49]

(14) Discovery will not normally be necessary if the judicial review application is based on impropriety which may be established without discovery.[50]

(15) Discovery will not normally be necessary if the judicial review application is based on irrationality, as, if the decision is clearly wrong, it is not necessary to ascertain how it was reached. [51]

(16) As to necessity, there must be some proportionality between the volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at trial. "Discovery could become oppressive and the court should not allow it to be used as a "tactic in war between parties." [52]

(17) Generally, the court should not concern itself with issues of admissibility when determining whether or not to order discovery. Admissibility is for the trial judge.[53] However, noting that relevance is essential to admissibility, this principle is not a basis for discovery of irrelevant documents on the basis that their admissibility is for the trial judge.

DISCOVERY IN THIS CASE

CATEGORY 1: (sought from ESB only)

All documentation detailing the ESB's compliance with the European Commission's Qualified Approval dated the 12 April 2013, to include but not limited to all documentation setting out the measures adopted by the ESB to ensure that it is compliant with Article 9[54] of Directive 2009/72/EC[55] (the 2009 Directive) and/or Article 43[56] of Directive 2019/944/EC[57] (the 2019 Directive).

49 Carlow Kilkenny Radio Ltd v Broadcasting Commission of Ireland [2003] 3 IR 528.
50 Carlow Kilkenny Radio Ltd v Broadcasting Commission of Ireland [2003] 3 IR 528.
51 Carlow Kilkenny Radio Ltd v Broadcasting Commission of Ireland [2003] 3 IR 528.
52 Murphy v The Revenue Commissioners [2020] IECA 36 citing BAM v NTMA [2015] IECA 246.
53 Murphy v The Revenue Commissioners [2020] IECA 36 citing BAM v NTMA [2015] IECA 246.
54 Unbundling of transmission systems and transmission system operators.
55 Concerning common rules for the internal market in electricity.
56 Ownership unbundling of transmission systems and transmission system operators.
57 On common rules for the internal market for electricity.

23. Essentially, Hamwood plead that the 2013 Decisions required various additional steps to be taken by way of amendment of the Existing Arrangements and that ESB has failed to take those steps such that it is in breach of obligations pursuant to those decisions. In particular, ESB's TAO licence not been amended to accord with the 2013 Decisions. Such breaches, Hamwood says, serve to invalidate the impugned Wayleave Notices and entitle Hamwood to certiorari accordingly.

24. It became clear in argument that Hamwood, on their own case, in reality require discovery only of documents relevant to the ESB's compliance with the 2013 Decisions as the operative documents giving effect to Directive obligations (leaving aside questions of direct effect and that the Directive was addressed to Member States and not to ESB and EirGrid). It is clear from the text of the Commission's Decision that such discovery would necessarily encompass documents relevant to the SEMC's Qualified Approval dated the 12 February 2013[58], of which, in essence, the Commission's Decision was an approval. They cannot be understood separately. Hamwood correctly accepted that it did not need discovery as to compliance more generally with the 2009 and 2019 Directives.

25. The ESB deny that they have breached any relevant obligations under the 2013 Decisions – asserting that the Commission Decision is addressed to the CRU and not to it. But that is in dispute and cannot yet be decided. Meanwhile, I must take Hamwood's case in this regard at its height and I am satisfied that Hamwood has a stateable case both that the Commission Decision was conditional on the making within a reasonable time of certain changes to the Existing Arrangements and that it imposed obligations on the ESB to carry at least some of those changes into effect.

26. Hamwood relies on Article 9.1 of the 2009 Directive[59] as providing context in which to consider what is a "reasonable time" as envisaged in the Commission Decision. Article 9.1 states that *"Member States shall ensure the unbundling happens as from 3rd March 2012".* While not necessarily dispositive of that issue (a question for the trial), it seems to me that Hamwood's reliance on Article 9.1 in this regard is stateable.

27. At this point, it is necessary to return to the 2013 Decisions made pursuant to Articles 9.9, 9.10 and 10 of the 2009 Directive. ESB applied to the SEMC for the Existing Arrangements in Ireland to be certified, by way of derogation from Article 9.1 and in accordance with Article 9.9 and for the designation[60] of Eirgrid as TSO. The resultant SEMC Qualified Approval concluded[61] that derogation was justified as the Existing Arrangements have provided more effective independence of the TSO than would any of the 3 Article 9 models *"and with the improvements proposed, would clearly guarantee this into the future."* It decided to grant the Application *"subject to the implementation of the proposed improvements and to the decision of the Commission under Article 9(10) of the*

58 Single Electricity Market – TSO Certification under Article 10 of Directive 2009/72/EC - Application in respect of EirGrid - Preliminary Decision Qualified Approval of Application - February, 2013.
59 It also cites Article 49 as to transposition deadlines.
60 In reality the re-designation.
61 §331.

Directive." Those "*improvements*" are identified[62] under the heading "*Additional Measures Proposed by the SEM Committee*" which reads that "*with the improvements proposed in this section*" the existing arrangements would guarantee TSO independence into the future. It is clearly arguable by Hamwood that this SEMC decision, which was explicitly "Qualified", was qualified by reference to its being conditional on the "*improvements proposed*". I cannot resolve that argument now.

28. There follows in the SEMC decision[63] a list of the improvements in question, which address, inter alia, a "*key concern*" as to the working relationship between ESB Networks and EirGrid and the need to deepen the existing separation between ESB Networks and ESB. It also lists improvements under the headings "*Financing*"[64] and "*Ring-Fencing*".[65] Hamwood has specifically pleaded these improvements as not having been carried into effect.

29. The Commission decision is lengthy. A full account of it is neither possible nor necessary here. The entire is a useful description of relevant entities and the Existing Arrangements (as they were in 2013). The Commission decision essentially consists of two parts. The recitals run to §93. One may argue whether and to what degree they reflect obligations beyond mere recital, or at least represent the legal basis of the decision, and I cannot decide that issue now. There are two curial articles. While I do not purport to set out all relevant elements, inter alia the Commission decision records[66] in the recitals that:

- "In Ireland, the functions of transmission system operation are currently shared between the Electricity Supply Board (hereafter "ESB"), the owner of the transmission assets and a vertically integrated undertaking (VIU), and Eirgrid plc (hereafter, "Eirgrid"), an independent company legally responsible for carrying out the functions of transmission system operator except for ownership and maintenance of the transmission system."[67]
- "Eirgrid is independent of ESB, with the relationship between the two companies confined to their common public ownership."[68]
- "CER proposes that this system[69] be clarified and enhanced in certain respects to further improve the independence of system operation in Ireland."[70]
- "Eirgrid is responsible for planning investments for the Irish transmission system and ensuring that system security and quality of service standards are met. ESB is responsible for actually effecting the plans developed by Eirgrid and is under a legal obligation to do so. In summary, the Irish Arrangements have the effect of putting Eirgrid in charge of most functions of transmission system operation in Ireland. Eirgrid is responsible for the day to day operation of the Irish transmission system. ESB has a limited role regarding connections, effectively confined to carrying out the actual necessary work but does not interact with system users.

62§315 et seq.
63 §316 et seq.
64 §319 et seq.
65 §326 et seq.
66 §86 et seq.
67 §2.
68 §10.
69 i.e. the existing arrangements.
70 §13.

Eirgrid plans the Irish system with ESB responsible only for financing and carrying out the necessary developments."[71]

- As to ring-fencing[72]
  - "ESB Networks business unit and ESB Networks Limited do not share any facilities (including physical premises) or IT systems with the other ESB entities."
  - "With regard to other resources required to carry out transmission related activities, hitherto, there has been some sharing of services, including IT and Human Resources services, between ESB networks Limited, the ESB Networks business unit, and the wider ESB group. However, CER proposes to use its powers to phase this out and ensure that ESB Networks procures its own services."
- "Independence in terms of assets, equipment, staff and identity are central to the ringfencing needed to ensure full independence of transmission activities. One of the important provisions in the Third Package is to ensure that in each of the three standard unbundling models, all transmission related activities, including asset ownership, be carried out within legally separate bodies."[73]
- "The potential for independence in financing of the transmission function is a key element of ensuring independence in transmission system operation. ……. CER proposes to make explicit rules relating to the financial viability of the transmission asset owner licensee …. ."[74]
- "The importance of ensuring that all aspects of transmission system operation, including the maintenance and construction activities carried out by ESB, are carried out by suitably separated legal entities can be seen in various Commission Opinions. This concern applies not only to the ownership of transmission assets in the present case, but also to the employees carrying out maintenance and similar works who should be employed by a legally separated networks entity."[75]
- As to ESB Networks Limited "CER proposes to use its existing powers to increase this such that independent members at all times comprise a majority of board membership."[76]
- Generally the Commission strongly supports CER Proposals to limit interactions between ESB staff and ESB Networks staff.[77]
- The arrangements for preservation of confidentiality as between ESB and ESB Networks is noted - as is CER's intention "to use its existing powers to ensure that existing or remaining shared services between ESB and ESB Networks are phased out."[78]
- "ESB Networks is responsible for drawing up a compliance programme to specify how it will implement business separation and non-discrimination obligations." and "Both ESB Networks Limited and ESB …. are required by licence to appoint a compliance officer who is responsible, inter alia, for ensuring compliance …"[79] CER will make those appointments subject to their approval.

71 §§34 - 36.
72 §44.
73 §46.
74 §47 & 48.
75 §49.
76 §50.
77 §55 et seq.
78 §58 et seq.
79 §64 et seq.

- "ESB is not entitled to refuse access to the system[80] and must provide all necessary information to Eirgrid to allow it to assess applications for new connection."[81]
- "The Commission recognises that almost all tasks of transmission system operation rest with Eirgrid and that it was specifically established in order to ensure maximum independence in carrying out those tasks."[82]
- "The key difference between the arrangements applying in Ireland and the independent transmission operator model is the role of ESB in the functions of the transmission system operator alongside the role of Eirgrid." [83]
- "Eirgrid brings a level of independence and responsibility to transmission system operation in Ireland which would not be present in the independent transmission operator model." [84]
- "The ringfencing rules applying to ESB networks are strict …" The Commission "welcomes the intention of CER to use its powers to enhance the financial independence and ring-fencing provisions applicable to the transmission asset owner." [85]
- It considers "the regulatory rules applying to ESB Networks business unit … to be effective .." but "splitting the transmission function between ESB Networks (the business unit) and ESB Networks limited (the legal entity) could serve to undermine the effectiveness of the Irish arrangements, by blurring the lines between transmission activities and generation and supply activities. This could be addressed by situating all of the roles of ESB as transmission asset owner within a single legally distinct entity which employed all staff in transmission related activities and owned the transmission assets." [86]
- "On the basis of the above, the Commission considers that, if effectively implemented, the Irish arrangements which share the tasks of transmission system operation between Eirgrid and ESB can deliver more effective independence than the independent transmission operator model. The changes necessary to ensure that the Irish arrangements are effectively implemented in the future can and should be made within a reasonable period of time, taking account of the possible need for legislative change and the current difficult situation as regards financing pertaining in Ireland."[87]
- "CER should monitor and assess whether the necessary steps are being taken to ensure these changes are implemented in a reasonable period of time." [88]

30. Article 1 of the curial part of the Commission Decision approves certification of EirGrid as TSO and continues:

> *"To ensure that the arrangements in place are implemented effectively CER shall monitor and assess that within a reasonable period of time:*
>
> *– Eirgrid in its organisation fully meets the requirements of Article 9(1) and Article 9(6) of*

80 i.e. the transmission system.
81 §77.
82 §80.
83 §86.
84 §88.
85 §90.
86 §91.
87 §92.
88 §93.

Directive 2009/72/EC such that the public body which exercises control over it does not exercise rights in or have control over undertakings performing the activities of generation or supply,

– Eirgrid has the right to develop and own transmission assets where ESB is in delay or default of its obligations under the infrastructure agreement, and

– The licence to act as transmission asset owner has been transferred to ESB Networks limited or another legally separate entity in the ESB group which owns the transmission assets and employs all ESB staff involved in transmission related activities."

31. Article 2 of the curial part of the Commission Decision states that it is addressed to the CRU.[89]

32. ESB and EirGrid also observe that the Commission's Decision is addressed to the CRU and not to them such that no obligations thereunder are enforceable against it. Nonetheless, it is clearly arguable by Hamwood that the combination of the 2013 Decisions imposed obligations as to improvements to the Existing Arrangements. For example, one may ask whose acts should the CRU monitor and assess as to *"whether the necessary steps are being taken to ensure these changes are implemented in a reasonable period of time"* in respect of a compliance, as to "*necessary steps*" with a decision made in 2013? I cannot resolve those arguments now. It suffices to observe that Hamwood has leave to make them and to argue also that:

- the ESB and EirGrid are in breach of those obligations.
- those breaches justify certiorari of the Wayleave Notices. Hamwood says, and I accept, that given leave has been granted I should not consider, much less determine this latter question for purposes of deciding the discovery motion.

33. ESB and EirGrid say they have no documents relevant to these matters and that all relevant documents are either held by the CRU or are in the public domain. I do not accept that as an argument against discovery. It would be surprising if ESB did not have internal documents relevant to the question of whether, when and in what substance they, or for that matter the CRU, had carried into effect or would carry into effect the improvements envisaged in the 2013 Decisions. These matters can only have been of the most intense interest to the ESB, and it is difficult to infer that ESB paid those issues no attention and generated no documents in doing so. Though in no way exhaustive of that observation, I note that the Commission envisaged that "ESB Networks is responsible for drawing up a compliance programme to specify how it will implement business separation and non-discrimination obligations." And it is not readily apparent that the compliance officers envisaged by the Commission will have generated no relevant documents in the performance of their duties. None of this is to find that ESB has documents within the category but its assertion that they don't is not an answer to a requirement that they make discovery on oath to

89 Sub nom Commission for Energy Regulation.

that effect. That assertion on oath in an affidavit responding to a motion for discovery (while I do not criticise it) is not the same thing as a similar assertion made on oath by way of affidavit of discovery following the formal and complete search required by an order for discovery. Indeed, the premise of the affidavit responding to a motion for discovery is that such a search has not yet been made as it has not been ordered and the order is resisted.

34. The question of discovery under this heading turns in large part on whether there is a dispute of fact on the question whether and to what extent the changes to the Existing Arrangements contemplated by the 2013 Decisions have been made. The Affidavit grounding the discovery application asserts that:

> *"The ESB does not say one way or the other whether the conditions or "additional requirements" as set out in the 2013 Decision have been complied with. Though by implication it appears that some if not all have not been complied with. However, until the ESB clarifies the extent to which the 2013 Decision have been complied the Applicants have the burden of establishing that those conditions or "additional requirements" have not been complied with, as this is a foundational part of the reliefs being sought at D(vii), D(viii) and D(ix) of the Statement of Grounds."*

35. The foregoing seems a fair characterisation of the ESB's evidential position – though its Statement of Opposition somewhat incidentally denies non-compliance with the Commission decision[90] while primarily denying that the decision is addressed to the ESB. During the hearing the ESB offered to make, and I indicated that I would accept that offer and direct it to make, an affidavit addressing that question whether there has been compliance with the Commission Decision. I outlined at the hearing my intention as to the scope of that affidavit and that I would adjourn the question of discovery under Category 1 pending provision of the affidavit.

36. I therefore direct that the ESB file an affidavit stating whether and if so to what extent and how, the following Improvements/measures have been implemented: those envisaged in:

- Chapter 7 of the SEMC Decision of February 2013.
- Art 1 of the Commission Decision.
- The recitals of the Commission Decision.

37. As intimated at the hearing, I further direct that the ESB will state in that affidavit its position as to the question whether the "*reasonable period of time*" envisaged in Article 1 of the Commission decision 2013 has expired.

90 §65 in part states:"……. If, which is denied, there was any non-compliance with the decision of the European Commission ……".

ESB will also be at liberty to describe in that affidavit the nature, extent, legal basis of and legal form of all and any ring-fencing arrangements the existence of which it considers relevant to the question of discovery of Category 1.

That affidavit will, of course, be sworn without prejudice to the ESB's position that any obligations imposed by the 2013 Agreements are not imposed on the ESB.

CATEGORY 2: (sought from ESB & EirGrid)

All documentation relating to respective roles of the ESB and EirGrid pursuant to Clause 7.6 of the Transmission Interface[91] Agreement dated the 16 March 2006 (TIA).

38. Hamwood accepts that ESB was the correct party to issue the impugned Wayleave Notices. It impugns them on the ground that engagement and negotiation with Hamwood prior to the service of the Wayleave Notices was conducted by ESB in breach of §7.6 of the TIA in that such engagement and negotiation should have been conducted by EirGrid. It cites e-mail traffic in 2010 and 2011 as to doubt and difference as between ESB and Eirgrid as to their respective powers under S.53 of the 1927 Act, the 2000 Regulations and the TIA. It pleads that *"In breach of the TIA and Conditions 2(1) and 21(1) of the TAO licence, the ESB has interposed itself in the discussions that should have taken place between the Applicants and EirGrid. The ESB acted ultra vires in conducting the discussions with the Applicants. Accordingly, the Wayleave Notices issued on foot of these discussions are ultra vires the ESB powers under the TIA and unlawful."*

39. Given the facts of this case, Hamwood agree that this category can be focussed by adding the words "*as they relate to engagement and negotiations with recipients of wayleave notices*".

40. Six issues seem to me to potentially arise in this regard:

a. Who, of ESB and EirGrid, engaged and negotiated with Hamwood.

b. That the Wayleave Notices were served and as to the nature and substance of the intended works.

c. Whether the Wayleave Notice, the works and any resultant compensation entitlements fall within §7.6 of the TIA.

d. The interpretation of §7.6 as it determines the respective roles of the ESB and EirGrid in respect of the activities which fall within §7.6.

91 "interface" is a misnomer, but nothing turns on that.

e. Whether, the actions of the ESB and EirGrid, as they relate to engagement and negotiations with Hamwood, breached §7.6.

f. Whether, assuming the answer to question e. is "yes", that answer invalidates the Wayleave Notice served on Hamwood.

41. As far as I can see, the only factual issues in the foregoing list (and the only factual issues identified in argument before me) are the questions,

- who, of ESB and EirGrid, engaged and negotiated with Hamwood,
- whether wayleave notices were served and
- as to the nature and substance of the intended works.

There is clearly no dispute as to service of the wayleave notices and none is intimated as to the nature and substance of the intended works. Importantly, the factual question who, of ESB and EirGrid, engaged and negotiated with Hamwood is not in dispute. Hamwood allege that such engagement and negotiation was conducted by ESB. They plead that *"In the Applicants' case, all discussions were conducted by the ESB, insofar as there were any meaningful discussions. The Applicants have had no discussions with EirGrid."*

42. ESB and Eirgrid agree. Specifically ESB's Opposition paper pleads:

> *"18. It is denied that ESB has not properly engaged with the Applicants. ESB engaged with the First and Second Named Applicants extensively and on an ongoing basis since March 2020 to explain ESB' s requirements for access to the Lands to carry out the works, the nature of the works to be carried out on the Lands and to address certain misconstrued allegations that were made against ESB.*
>
> *19. During this engagement ESB, inter alia, assured the First and Second Named Applicants that in carrying out these works ESB staff and its contractors would act with reasonable care and would endeavour to work closely with the Applicants to minimise any impact on and/or any disruptions to their operations. ESB advised the First and Second Named Applicants …."* (There follows a description of arrangements for compensation and for repair of and/or compensation for any damage caused.)

43. Hamwood accepts that there is no factual dispute in this respect.[92] Accordingly, it seems to me that there is no factual issue which would support discovery under this category.

44. The remaining issues listed above are issues of law – specifically, of interpretation of the TIA - and of application of law to the agreed facts of the case. Ordinarily, such issues would not justify discovery. Specifically, any documents postdating the TIA of 2006, reflective of the carrying into

92 Counsel for Hamwood said: "We do accept that ESB has said, yes, we are the party that engaged. That is not the factual dispute."

effect of §7.6, would ordinarily relate to the subjective understanding of the ESB and EirGrid of §7.6 and not to its objective interpretation.[93] Notably, the affidavit grounding the discovery application states that Hamwood "*only seeks to capture those documents relating to the parties' understanding of their respective roles rather than documents relating to the operation of those roles."* The behaviour of the ESB and EirGrid subsequent to the making of the TIA, insofar as it may shed light on the understanding of those respective parties of their obligations pursuant to the TIA, is irrelevant. Their subjective conduct and beliefs after it was made, indeed their beliefs seven before it was made, as to what the TIA means, are ordinarily irrelevant to its interpretation – **Chubb v Perrigo**[94] - and none of the exceptions to that principle were argued to me.

45. Further, such documents could not of themselves form part of any factual matrix in which the TIA of 2006 is to be interpreted. Any such factual matrix could consist only of "*facts and circumstances known or assumed by the parties at the time that the document was executed*" - **Knockacummer Wind Farm**.[95] It was not suggested that any such factual matrix was relevant to such interpretation or that any such documents postdating the TIA were likely, as a probability, to contain records of any such factual matrix. No such factual matrix has been pleaded. Incidentally, I accept that it is likely that the TIA will be interpreted in light, in part, of the 2000 Regulation which prompted it. But that does not seem to me to affect the issue of discovery.

46. It seems to me that ESB's reliance by analogy on the following passage from **Kerins**[96] is well-conceived:

> *"26. The issue in dispute to be decided is whether or not the PAC did have jurisdiction to inquire into the payments made by the Rehab Group and, in particular, to examine the applicant in relation to her salary and the payments made to her. This question will, however, fall objectively to be determined by reference to the Standing Orders and the Controller and Auditor General Reports upon which reliance is placed. There are no relevant factual issues in dispute. For those reasons the Court is of the view that none of the documents referred to in paras. (i), (ii), (iv) or (v) are either relevant or necessary to the issues to be determined by the court on the jurisdiction or competence of the PAC to conduct the inquiry in relation to payments by the Rehab Group."*

93 As to the necessity that interpretation be objective see Chubb European Group SE [Formerly Ace European] v. Perrigo Company Plc [2022] IEHC 444 and cases cited therein.
94 Chubb European Group SE [Formerly Ace European] v. Perrigo Company Plc [2022] IEHC 444 §149 citing the decision of the Supreme Court in Re Wogan's (Drogheda) Ltd [1993] 1 I.R. 157 and also citing Hyper Trust Ltd v FBD Insurance PLC [2021] IEHC 78 (High Court (General), McDonald J, 5 February 2021)Coachhouse Catering Ltd v Frost Insurances Ltd et al [2022] IEHC 306 (High Court (General), McDonald J, 24 May 2022) a.k.a. "Coachhouse v Sava".
95 See Knockacummer Wind Farm Ltd v. Cremins 2016 IECA 205 for various statements of this principle, citing May L.J. in Plumb Brothers v. Dolmac (Agriculture) Ltd. [1984] 271 E.G.L.R. 373 1 at p. 2, alluded to by Murphy J. in the Supreme Court in Igote Ltd. v. Badsey Ltd. [2001] IESC 65. Citing also O'Donnell J. in The Law Society of Ireland v. The Motor Insurers Bureau of Ireland [2017] IESC 31, noting the decision of Lord Hoffman in Investors Compensation Scheme Ltd. v. West Bromwich Building Society (No. 1) [1998] 1 W.L.R. 896. And citing Clarke J. in Moorview Developments Limited & Ors. v. First Active Plc & Ors. [2010] IEHC 275 in turn citing Lord Hoffman in Chartbrook Limited v. Persimmon Homes Limited [2009] 1 A.C. 1101. See also Chubb v Perrigo supra.
96 Kerins v McGuinness, [2015] IECA 267.

47. Accordingly, it appears that the interpretation of §7.6 of the TIA does not depend upon any factual evidence and it is not apparent that any documents which might be discovered could affect that interpretation. In this respect, the request for discovery seems to me entirely speculative and a fishing expedition.

48. Accordingly I refuse discovery in respect of Category 2.

CATEGORY 3 & 4: (sought from ESB & EirGrid)

3. All documentation identifying or referring to the purpose of the Line Project and the Substation Project, to include but not limited to documentation relating to the increase in the provision of electricity to Intel.

4. If not already covered by Category 3, all documentation relating to the sales of electricity to Intel and the anticipated increases in sales once the Line Project and the Substation project was completed.

49. Hamwood seeks to justify Categories 3 and 4 by reference to the Ground alleging breach of competition law. It is relevant to set out in full Hamwood's pleadings on this issue:

63. *"The ESB and EirGrid are undertakings within the meaning of ss.4 and 5 of the 2002 Act and Articles 101 and 102 of the TFEU.*

64. *The ESB and EirGrid are each statutory monopolists, being, respectively, the TAO and TSO. Accordingly, they each hold a dominant position in relation to the ownership of the electricity transmission system and the operation of the electricity transmission system in the State, within the meaning of s.5 of the 2002 Act and/or Article 102 of the TFEU.*

65. *The anticompetitive agreements and/or conduct constituting an abuse of a dominant position arises, in short, by permitting the ESB to facilitate the Intended Works under its purported statutory powers further to s.53 in circumstances where the works are to facilitate a development to increase both the level of electricity that will be available to Intel and the volume of sales of such electricity that the ESB Group, as compared to other competitors of the ESB Group, will be able to make to Intel.*

66. *Each of these agreements and/or conduct has the object and/or effect of restricting competition in the markets in the supply and sale of electricity in the State and/or the EU, resulting in harm to consumers.*

67. *Such agreements and/or conduct, that, further, are facilitated by State measures within the meaning of Article 106(1) and/or (2) TFEU, are prohibited and void."*

50. The foregoing is the full extent of the particulars given by Hamwood of their very serious allegation of anti-competitive illegality – criminal behaviour – against ESB and EirGrid. Hamwood's grounding affidavits do not elaborate. In particular, there are no particulars and no evidence of the allegation of a purpose to *"… increase … sales of such electricity that the ESB Group, as compared to other competitors of the ESB Group, will be able to make to Intel."* My invitation to counsel for Hamwood to elaborate was not taken up.[97] While an issue as to the completeness of ring-fencing arises in the case as it relates to compliance with the 2013 Decisions, the ESB's assertion on affidavit that Electric Ireland (the ESB's electricity sales business unit) is ring-fenced from the remainder of the ESB is not contradicted on affidavit.

51. Notably, the affidavit grounding the discovery application states that "*If as contended by the Applicants the purpose of the Line Project and the Substation Project is to increase the electricity supplied to Intel, then both the ESB and EirGrid are using their statutory powers to increase the business of the ESB to the detriment of other suppliers of electricity …"* That, of itself and absent elaboration, is a non-sequitur. The Grounding Affidavit seeking judicial review asserts that:

- "ESB are clearly in a much better position to succeed in any bid by virtue of being the entity that is controlling the upgrade of the 2000 kv line".

- "If another supplier of electricity such as Airtricity were to bid on the upcoming renewal of Intel's electricity supply contract, ESB are clearly in a much better position to succeed in any bid that they may make by virtue of being the entity that is controlling the upgrade of the 220kv line, that line being Indispensable for the provision of the Increased supply of electricity to the Intel project that Is currency under construction."

These also seem to me be non-sequiturs – not least as Hamwood accepts via counsel that:

- Decisions as to what uprating works are to be done to the transmission system are made by Eirgrid, not the ESB.
- The physical uprating of the Line is, of itself, entirely neutral as to the question who supplies electricity through it once it is uprated.
- It is EirGrid, not ESB, that issues connection agreements to the transition system.
- All electricity suppliers have equal access to the transmission system once they have connection agreements with EirGrid.

52. The logic of Hamwood's bare allegation of anti-competitive illegality here is that it arises in every case in which ESB, at Eirgrid's instruction (which it is obliged to accept[98]) and as the only entity legally competent to do the work, uprates any transmission line – or, for that matter, a distribution line – in circumstances in which Electric Ireland may avail of the greater transmission or distribution

97 Leaving aside the issue.
98 Regulation 19 of the 2000 Regulations.

capacity thereby created to increase its sales and regardless of the fact that Electric Ireland competes with competitors to effect sales of electricity. Counsel was unable to point to any circumstance of Hamwood's case which set it apart from that general logic. Further, the logic of Hamwood's case is also that EirGrid, merely by its decision to uprate a transmission line (a decision which, in law, only EirGrid can make) and requiring ESB to effect the uprating (works which in law only ESB can do and which it must do if so required by EirGrid), is unlawfully conspiring with ESB in that anticompetitive endeavour. The logic of the case is further that, once the line has been uprated, EirGrid will, as operator in control of the transmission system and constituted independent of the ESB, unlawfully and in some entirely unspecified manner, prefer Electric Ireland to its competitors in affording access to the uprated transmission capacity of the Line. And as to competitors' access to the transmission system, the Commission has recorded that "*ESB is not entitled to refuse access to the system and must provide all necessary information to Eirgrid to allow it to assess applications for new connection."* As I say, this logic, if valid, will apply to any line uprating – not just that at issue in the present case. And, as I say, this logic is based, and based only, on the content of the pleadings set out above. No further particulars or evidence have been tendered by Hamwood in support of that allegation.

53. I bear in mind that, while the rules as to discovery in competition law cases are no different from those in other cases, it is a factor to be taken into account that anti-competitive behaviour is, of its nature, likely to be concealed and that the wrongful acts alleged against the ESB and Eirgrid (assuming the allegations true for the sake of argument only) are likely to be acts peculiarly within their own knowledge. On that assumption, Hamwood would be unlikely to have knowledge of any such acts because of the propensity of the ESB and Eirgrid to conceal them. See generally in these regards, **Framus**.[99] I must also take Hamwood's claim at its height – **Murphy**.[100] However, I also bear in mind that, despite the fact that leave has been granted on this ground, I am entitled in a discovery application to consider whether the ground is speculative or inadequately particularised – **Evans**.[101] Also, I may require a party whose application is based on a mere assertion to satisfy a threshold criterion of establishing a factual basis for the claim - **O'Brien**.[102]

54. In my view, the allegation of breach of competition law in this case is bare and unsubstantiated – a mere assertion of which no substantive particulars or evidence have been tendered. Hamwood has failed, in seeking discovery of Categories 3 and 4, to satisfy a threshold criterion of establishing a factual basis for the claim. On that ground, discovery of these categories will be refused.

55. I should add that I have considered Hamwood's submission that, as to this head of discovery, it is relevant that, as canvassed for purposes of Category 1, Hamwood alleges that ESB has failed to fully ring-fence its "Electric Ireland" sale and supply business from its TAO function and its function

99 Framus Ltd. v. CRH plc [2004] 2 I.R. 20 citing Ryanair p.l.c. v. Aer Rianta c.p.t. [2003] 4 I.R. 264.
100 Murphy v The Revenue Commissioners [2020] IECA 36 citing BAM v NTMA [2015] IECA 246.
101 Evans v University College Cork [2010] IEHC 420.
102 O'Brien v. Red Flag Consulting Ltd [2017] IECA 258 citing Hartside Ltd v. Heineken Ireland Ltd, §5.9.

in performing works on the transmission system at the direction of EirGrid, such as uprating the Line. But given EirGrid, not ESB, controls access to the Transmission System, I cannot see that this advances Hamwood's case for discovery of categories 3 and 4. In this respect I should say in particular that, leaving aside the question of abuse by ESB of an alleged dominant position, I have seen no basis for an assertion that EirGrid is engaged in an illegal anticompetitive agreement with the ESB.

56. I also refuse discovery of Category 3 on the basis that there is no relevant factual dispute but that a significant part of the purpose of the Line uprate project is to increase the capacity of the Line to transmit electricity to Intel. If nothing else, Eirgrid's own Parameter documents make that undeniable, even were the ESB and Eirgrid minded to dispute it – which they are not. While there may be a dispute whether that is the sole purpose of the Line uprate project, I do not see that anything in the outcome of the case will turns on any such dispute.

57. As to Category 4, documents relating to the sales of electricity to Intel and the anticipated increases in sales once the Line Project and the Substation Project is completed, I suspect this may be highly confidential information – confidential both to Electric Ireland and to Intel. Confidentiality confers no privilege but is relevant to the exercise of discretion whether discovery should be ordered. It may well have been arguable that the court should not allow discovery to be used as a tactic in the war between parties in this case by attempting to catch a non-party, Intel, in the crossfire. It is also arguable that, as at least potentially bearing on its confidential information in the hands of ESB and EirGrid, Intel would have been entitled to have been heard on this issue. However, as the issue was not argued and as it is not necessary to decide it, I will not decide it.

EIRGRID AS A NOTICE PARTY

58. As I have refused discovery against Eirgrid on other grounds, I need not consider the extent of any limitations on the grant of discovery against notice parties in judicial review as addressed in **CHASE**.[103]

CONCLUSION

59. For the reasons indicated above, I will adjourn the question of discovery of Category 1 pending the filing by ESB of the further affidavit proffered by it and described above. I refuse all other discovery sought. I defer any decision on costs pending the outcome of the issue as to Category 1.

103 Cork Harbour Alliance for a Safe Environment v an Bord Pleanála [2019] IEHC 85.

60. I direct the filing by ESB of its further affidavit by 5th May 2023 and adjourn this matter to 8th May 2023 for mention only.

DAVID HOLLAND
18/4/23