[2024] IEHC 570

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2024.0000128]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50, 50A, AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000 AND IN THE MATTER OF AN APPLICATION BETWEEN

JOHN JOE KENNEDY (BY ORDER) AND THE WIND TURBINE ACTION GROUP SOUTH ROSCOMMON

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

ENERGIA RENEWABLES ROI LIMITED, IRELAND AND THE ATTORNEY GENERAL (BY ORDER)

NOTICE PARTIES

JUDGMENT of Humphreys J. delivered on Monday the 7th day of October 2024

1. The first named notice party's permission for a wind farm development under the strategic infrastructure development (**SID**) procedure is challenged in these proceedings. The applicants primarily complain that particulars of the development were inadequate, that the board's conduct of appropriate assessment (**AA**) and environmental impact assessment (**EIA**) was defective, and that the board failed to give proper notice of additional information supplied by the developer. The primary question underlying the assessment of this challenge is whether the applicants have surmounted the onus of proof to successfully impugn the actions of the board.

Judgment history

2. In the leading case of *Kelly v. An Bord Pleanála & Ors* [2014] IEHC 400, [2014] 7 JIC 2503 (Unreported, High Court, Finlay Geoghegan J., 25th July 2014), permission for wind turbines on or near this site were quashed on the grounds of inadequate AA. On remittal to the board, permission was refused.

Geographical context

3. The turbines would be situated in two clusters, in the townlands of Turrock, Cronin, Gortaphuill, Glenrevagh, Tullyneeny, Bredagh, Cuilleenirwan, Cuilleenoolagh, Curry, Milltown, Tobermacloughlin, Skeavally, Boleyduff, Clooncaltry, Feacle, Cam, Tawnagh, Cornageeha, Pollalaher, Brideswell, Knocknanool, Ballymullavill, Rooskagh, Bellanamullia, Cloonakille, Monksland and Commeen, Co. Roscommon.

4. As stated in application documentation prepared by MKO on behalf of the developer,

> "The Proposed Development will be located approximately 1.5 kilometres northeast and southeast of the village of Dysart, and approximately 11 kilometres northwest/west of the town of Athlone, Co. Roscommon.
>
> ... The Proposed Development covers an area of approximately 588 hectares, in total, and it is divided by the R363 into two wind turbine clusters. ...
>
> The land uses and types within the Proposed Development site are almost entirely agricultural grasslands used for grazing and pasture farming, with some small areas of scrub. The Proposed Development site includes areas of the public road corridor and existing built development also. Other land types within the surrounding area consist of small areas of non-commercial forestry, scrub, peatcutting, quarrying and low-density residential areas in nearby villages. There are a number of small lakes, turloughs and seasonal lakes are located within proximity of the site, which drain into the River Suck, a tributary of the River Shannon, approximately 3km west of the Proposed Development site.
>
> The operational Skrine Wind Farm is the closest existing wind farm development, located approximately 8.5km to the north of the proposed Seven Hills Wind farm (northern section) and comprising of only two turbines.
>
> The nearest existing grid infrastructure is a 110 kV substation located in the townland of Monksland in Athlone, County Roscommon, approximately 11km to the east/southeast of the southern cluster. Other existing grid infrastructure in the area includes an existing 110kV overhead line, located approximately 6.5km north of the northern cluster, which runs from the substation at Monksland to the town of Roscommon to the north of the site."

Facts

5. In **2013**, permission was granted to Galetech Energy Developments Ltd. for both a Phase 1 14-turbine and a Phase 2 19-turbine development at the site. The locations of Phase 1 and Phase

2 broadly correspond to the locations of the Northern Cluster and Southern Cluster respectively of the proposed development. In **2014**, these permissions were quashed and remitted in *Kelly* on the basis of an inadequate AA.

6. The matters were reconsidered by the board (ABP Ref. PL20.244346 (Phase 1) and PL20.244347 (Phase 2)). The board engaged a consultant hydrogeologist/hydrologist to advise on the likely impacts of the proposed development from the hydrogeology/hydrology perspectives, having regard to all aspects of the proposed developments including access tracks, foundations and turbines. The board also engaged an ornithological consultant.

7. An oral hearing was held in **June 2016**. The associated inspectors' reports relied on the expert reports prepared by the consultants and recommended refusal.

8. In **February 2017**, the board refused permission on AA grounds.

9. The first named notice party opened consultations with the board in respect of the development in **March 2020**.

10. On **1st July 2021**, the board gave notice of its decision that the application constituted SID and gave notice that that the pre-application consultation procedure was closed.

11. On **7th June 2022**, the first named notice party formally applied for this permission.

12. In **July 2022**, the second named applicant made a submission.

13. On **25th January 2023**, the board notified the first named notice party that it had decided that an oral hearing was not necessary, and that it had sufficient information to determine the matter, and requested that the first named notice party provide replies to the third party observations.

14. The first named notice party replied by way of a submission on **31st March 2023** which consisted of a set of revised plans/drawings, a substantive document that included, *inter alia*, replies to third party observations, and four appendices that included three updated bird surveys. The submission noted that an observation of the Department's Development Application Unit (**DAU**) referred to bird data that was not considered in the EIAR.

15. On **13th June 2023**, the board made a request for further information (**RFI**) in particular in respect of the DAU bird data.

16. On **7th July 2023**, the first named notice party replied to the request with a second tranche of information.

17. On **19th July 2023**, the board directed the first named notice party to advertise the additional significant information as received in both March and July.

18. On **1st August 2023**, the first named notice party gave public notice of the receipt of additional information by the board by advertisement in the *Irish Times* (the cover letter to the board says the *Irish Examiner*, but that is an error) and *Roscommon Herald*. There was also a site notice. By letter of the same date, the first named notice party gave notice of the consultation to Roscommon County Council. The letter attached only the July RFI reply and did not attach the full March submission despite this being the subject of the additional information advertisement.

19. On **3rd September 2023**, the second named applicant made a submission in respect of the consultation.

20. On **29th September 2023**, the inspector prepared her report.

21. The board's direction is dated **20th November 2023**.

22. The board's order is dated **23rd November 2023**. The order, bearing reference ABP-313750-22, grants planning permission under s. 37G of the Planning and Development Act 2000 to the first named notice party for a proposed strategic infrastructure development comprising, *inter alia*, a windfarm consisting of 17 turbines (with an overall ground to blade tip height of 180 metres, a rotor diameter of 162 metres and hub height of 99 metres), associated foundations, hard-standing areas, related site works and ancillary development.

Procedural history

23. The matter was opened on 26th January 2024 by the original first named applicant Ms Aoife Butler in person under the clock-stopping procedures then applicable.

24. On 19th February 2024, I was informed that Ms Butler might be withdrawing. Issues had arisen between her and the second named applicant regarding *inter alia* the expenses of the application. It appeared that Ms Butler had been charged €3,690 (inclusive of VAT) by WP Toolan Solicitors, which she paid, for assistance with the application, but this assistance did not include the preparation of a statement of grounds. Ms Butler informed me that she had been furnished with a statement of grounds in another case with the suggestion that she could adjust it for use here, which she did. Apparently there had been a number of meetings with counsel giving rise to the charge but, in the end, it didn't become necessary for me to look into the matter further.

25. Solicitors for the second named applicant were on record by 26th February 2024, and sought time for an amended statement of grounds.

26. The amended statement of grounds eventually delivered weighs in at an implausible 24,507 words, longer than Kafka's *Metamorphosis* (1915, Kurt Wolff Verlag, Leipzig) but with perhaps a

similar disorienting effect. Within the statement, an equally comprehensive approach was applied to the selection of core grounds, with the applicants generating 17 such grounds, together with around 100 sub-grounds that occupied the bulk of the 72 pages of the statement. Commendably, some these grounds were rationalised as the process moved forward.

27. On 11th March 2024, I substituted the present first named applicant on the basis that Ms Butler's expenses in the amount quantified by her would be discharged by the second named applicant. Leave was granted on the basis of the amended statement of grounds without prejudice to any point the opposing parties could have made.

28. The substantive motion was returnable for 15th April 2024. The matter was then assigned a date in the April 2024 list to fix dates. Issues concerning costs protection had not been entirely resolved but there was liberty to apply on such matters.

29. The board's opposition was delivered on 18th June 2024. The State's opposition was delivered on 20th June 2024, and the first named notice party's opposition on 28th June 2024.

30. The applicants brought a motion for discovery/particulars on 23rd July 2024.

31. The applicants filed submissions on 26th July 2024, together with an affidavit of Ms Rose Burke.

32. The first named notice party wrote on 29th July 2024 objecting to the new affidavit, and objected to the application for discovery and particulars. The board took a similar stance.

33. The case was listed for mention on 31st July 2024 before Holland J. While there was initially some difference of recollection of what happened on that date, we fortunately have a transcript of that remote hearing, the relevant part of which is as follows:

> "[COUNSEL FOR THE FIRST NAMED NOTICE PARTY]: Judge, there is just one issue, my Friend [Counsel For The Applicants] filed an affidavit last week, it is an extraordinar[il]y long affidavit and it quite clearly will need a reply, which I don't think was said by any of the opposing parties. It is quite clearly inadmissible, it is ex post facto and it is not a response to anything which has been said. It does strike us and an attempt, an inadmissible attempt by the Applicant to ...[loss of connection]... their proceedings at this very late stage. It is clearly inadmissible. I am very happy for that issue to be dealt with at the hearing of the action. I heard the exchange between the Court and the parties in relation to a similar issue. A ...[loss of connection]... was to be brought. I don't think we have time to do that. We have three legal weeks between now and the hearing of the action. I am looking for the motion to be admitted de bene esse with everybody reserving
> ...[loss of connections]... as to admissibility to the hearing of the action.
> MR. JUSTICE HOLLAND: [To Counsel For the first named notice party] I don't know if your signal is poor but your picture is poor and your audio is breaking up. As I understand your position is that you are reserving to trial your objection to the admissibility of the affidavit just filed, is that correct?
> [COUNSEL FOR THE FIRST NAMED NOTICE PARTY]: Correct.
> MR. JUSTICE HOLLAND: Okay. You have said your piece and I don't think I need make any order or direction in that regard. Anything else?
> [COUNSEL FOR THE APPLICANTS]: Judge, just to say the Applicant reserves their position to object. We have to take instructions on to whether we think it is appropriate to have the matter dealt with, the admissibility of the affidavit to be dealt with at hearing. I don't have instructions either way on that at this stage. We might reserve our position.
> MR. JUSTICE HOLLAND: You can ventilate that on 9th September with Mr. Justice Humphreys if you wish but I am simply noting the parties' positions, that is all that I am doing.
> MR. HUGHES: Likewise, Judge, our position is the same as the Notice Party but I don't need to articulate that today, Judge, thank you.
> MR. JUSTICE HOLLAND: That is grand. Anybody else?
> [COUNSEL FOR THE STATE]: Judge, I appear for the State Respondents, the Court will have noticed that there is a discovery application in and the Court has given a hearing date for that for an hour on 9th. The State Respondents are not the subject of any application for relief, however the issue raised in the application is one that has wider importance beyond just this particular case and the State may wish to make short oral submissions in relation to that matter. Indeed insofar as their written submissions have been scheduled we may well put in written submissions in answer to the Applicants position as well.
> MR. JUSTICE HOLLAND: Okay. Again I am not going to give directions, I will just note that position."

34. So there was no question of it being envisaged, still less directed, that the opposing parties would bring a motion to strike out the affidavit.

35. The board delivered its submissions on 6th September 2024.

36. The State respondents delivered their submissions on 9th September 2024.

37. The first named notice party delivered its submissions on 10th September 2024.

38. The matter was listed for hearing commencing on 18th September 2024. At the outset of the hearing a number of preliminary issues arose.

39. As regards the applicants' **motion for particulars** and discovery dated 23rd July 2024, following discussion of the matter when the motion was first listed, the board provided information by letter dated 17th September 2024 regarding the board's expertise on a voluntary basis and not on foot of an order. The applicants said that the information effectively superseded the motion and asked for no order on the motion with liberty to apply in relation to costs against the board. That order was made, with no order as to costs of the motion for or against any other party.

40. As regards the applicants' **amended pleadings**, these were objected to. As is normal in the List, any amendments made to pleadings are generally without prejudice to any later objection. Such an objection has been made. The statement of case summarises things:

> "36. The Notice Party objects to those grounds that were added by the Applicants in the period between the filing of the original Statement of Grounds on 26 January 2024 and the date upon which leave to apply for judicial review was granted on 11 March 2024. It is inappropriate for the Applicants to use the period of time granted to the Applicants for 'house-keeping' to seek to introduce additional grounds that did not form part of the proceedings as instituted.
>
> 37. The Applicants submit that they did not introduce additional grounds. Instead, the Applicants simply added or inserted law into the grounds already contained or raised in a pleading that was drafted by a lay litigant. That is permissible and benefits the Court and the parties by defining the issues more clearly. The Notice Party has not identified with sufficient precision what grounds or pleas are the subject of the objection."

41. The parties effectively agreed that the applicants could address the amended grounds *de bene esse*. If any of the grounds are otherwise made out, we can return to the question of whether the ground was properly introduced by amendment.

42. As regards the applicants' **late affidavit of Ms Burke**, the opposing parties all objected to this on various grounds, and I deal with this further below.

43. As regards **netting down the issues**, the applicants withdrew grounds 16 and 17 by letter of 17th September 2024. At the outset of the hearing on 18th September 2024, the implications of this were teased out and since the applicants had no subsisting grounds against the State it followed that the related relief also fell, so the State were changed from being respondents to notice parties by order, there being no continuing remedy sought against them. The applicants later clarified that core ground 3 was being withdrawn in consequence.

44. On 19th September 2023, the applicants confirmed withdrawal of core ground 3 and also withdrew core grounds 4, 7, 9 and 13. They also sought (and were granted without objection) liberty to correct an erroneous statement in the final paragraph of Ms Burke's affidavit (where a paragraph about being joined as an applicant was inadvertently copied and pasted from an earlier affidavit of the first named applicant). At the conclusion of the hearing on that date, judgment was reserved.

45. Following that, on 23rd September 2024, the original first named applicant wrote to the solicitors for the board (copied to the court) as follows:

> "It is my understanding that you have queried whether I withdrew my affidavit filed in January 2024.
>
> To confirm, I did withdraw my affidavit and counsel for the applicant was aware of this withdrawal and requested an extension of time to prepare a new affidavit.
>
> I also did not and do not give consent for Mr. Kennedy (or Ms. Burke) to rely on my affidavit.
>
> If you have any further questions relating to me please pose them to me directly.
>
> Thank you,
>
> Aoife Butler"

46. However this is something of a misunderstanding. First of all, an affidavit cannot be unilaterally withdrawn. A party can indicate that they are not relying on it, or can seek leave to correct it, or apply for an order striking it out, but that isn't the same thing. Anyway the point made in the recent email wasn't the thrust of Ms Butler's position back when she appeared before the court, at which stage her main concern was to withdraw from the case altogether if not have it struck out, rather than do anything more procedurally specific. Insofar as the original first named applicant's affidavit was also filed on behalf of the second named applicant, it remains relevant, and that applicant doesn't need the deponent's consent to rely on it. So I don't see the original first named applicant's email as changing anything adverse to the current applicants.

Relief sought

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

> "1. An Order of Certiorari quashing the Decision of the Respondent An Bord Pleanála to grant, subject to certain specified conditions, a 10-year Planning Permission to run from

November 23, 2023 and a 30-year operational period to run from the date of the first commissioning of the wind farm for the development of a 17 Turbine wind farm and related works in the townlands of Turrock, Cronin, Gortaphuill, Glenrevagh, Tullyneeny, Bredagh, Cuilleenirwan, Cuilleenoolagh, Curry, Milltown, Tobermacloughlin, Skeavally, Boleyduff, Clooncaltry, Feacle, Cam, Tawnagh, Cornageeha, Pollalaher, Brideswell, Knocknanool, Ballymullavill, Rooskagh, Bellanamullia, Cloonakille, Monksland and Commeen, Co. Roscommon, which Application Planning Register Reference Nos. ABP-313750 and ABP-313750-22 made under Section 37(E) of the Planning and Development Act 2000 (as amended) was determined on the 23rd day of November 2023 ('the Decision').

~~A Declaration that the Respondent An Bord Pleanála failed to consider and assess the proposed wind farm in accordance with the requirements of the Habitats Directive (Council Directive 92/43/EEC).~~

~~A Declaration that the Respondent An Bord Pleanála failed to consider and assess the proposed wind farm in accordance with the requirements of the Birds Directive (Council Directive 2009/147/EC).~~

~~A Declaration that the Respondent An Bord Pleanála failed to consider and assess the proposed wind farm in accordance with the requirements of the EIA Directive (Council Directive 2014/52/EU).~~

~~A Declaration that the Respondent An Bord Pleanála was required to carry out an Appropriate Assessment in respect of the proposed wind farm pursuant to the Habitats Directive (Council Directive 92/43 EEC) and did not comply with its obligations under that Directive.~~

~~A Declaration that the Respondent An Bord Pleanála is obliged under the terms of the Habitats Directive (Council Directive 92/43 EEC) to consider, in addition to the proposed wind farm, such other plans and projects as may be relevant, and in that regard failed.~~

~~A Declaration that Section 50 of the Planning and Development Act 2000 (as amended) applies to the above-entitled proceedings.~~

~~A Declaration that the Second Named Respondent failed to transpose the requirements of Council Directive 92/43 EEC in failing to provide for a procedure in respect of the protection of Karst landscapes so as to protect the Habitats Directive Annex I habitats, and Annex II and Annex IV species that reside and thrive in Karst environments.~~

2. Such Declaration(s) of the legal rights and/or the legal position of the Applicant and (if and insofar as legally permissible and appropriate) persons similarly situated and/or of the legal duties and/or legal position of the Respondent as this Honourable Court considers appropriate.

3. A Declaration that the Second Named Respondent failed to transpose and/or comply with the requirements of Council Directive 92/43 EEC and/or Article 3(1) and 4(1) the SEA Directive 2001/42/EC in not updating and/or withdrawing the Wind Energy Guidelines, 2006 by failing to provide updated policies and procedures and/or where the 2006 Guidelines were not subject to an SEA ~~to address the increasing size of wind turbines so as to protect the Habitats Directive Annex I habitats, and Annex II and Annex IV species that reside in or in proximity to, and/or move through locations that may be subject to wind turbines and/or acted in breach of Art~~ .

4. If necessary, stay on the implementation of Planning Application Reference Nos. ABP-313750 and 313750-22 pending the determination of the above-entitled proceedings.

~~A stay on the Notice Party conducting any work to comply with the Order and Direction issued by An Bord Pleanála in Planning Application Reference Nos. ABP-313750 and 313750-22.~~

~~A stay on the Notice Party conducting any work relating to subject matter of Planning Application Reference Nos. ABP-313750 and 313750-22.~~

~~A stay on the Notice Party conducting any work within 10 kilometres of the townlands that are the subject of Planning Application Reference Nos. ABP-313750 and 313750-22.~~

~~An Order quashing Planning Application Reference Nos. ABP-313750 and 313750-22 and declaring that in the interest of justice and fairness and so as to give appropriate effect to the Habitats Directive, the Birds Directive, and the EIA Directive, the Karst Landscape in South Roscommon and the townlands that are the subject of Planning Application Reference Nos. ABP-313750 and 313750-22 be designated an area 'Not Favoured' for wind turbines, in accordance with steps Roscommon County Council had already taken and then reversed without explanation.~~

~~Such interim and/or interlocutory relief as this Honourable Court may deem appropriate.~~

~~Such further and other relief as this Honourable Court may deem appropriate.~~

5. A protective costs order pursuant to the Aarhus Convention and Section 50, including Section 50B, of the Planning and Development Act 2000 and/or s.3 of the Environment

(Miscellaneous Provisions) Act 2011 (as amended) and/or the Aarhus Convention interpretative obligation in EU law, or otherwise.

6. An Order providing for the cost of these proceedings and related ancillary costs."

Grounds of challenge as amended *de bene esse*

48. The core grounds of challenge (all introduced by amendment *de bene esse*) are as follows:

"(i) Domestic Law Grounds

1. The impugned decision of the Board is invalid and/or unlawful as the planning application failed to properly particularise and/or provide the requisite information and/or plans and particulars in relation to the development and breached Art. 22(2)(b), (d) & (g), 23(1), 210 & 214(1) of the Planning and Development Regulations 2001 (as amended) ('the 2001 Regulations') as:

(i) The Application fails to include necessary measurements for key structures that are the subject of the Application.

(ii) The Application fails to include accurate bespoke drawings for key structures that are the subject of the Application.

(iii) The Application fails to describe in sufficient detail the proposed connectivity from the wind farm to the national grid.

(iv) The Application fails to establish ownership of or rights to all necessary lands for the proposed connectivity from the wind farm to the national grid.

2. The impugned decision of the Board is invalid as the Applicants were denied the opportunity to address and/or make submissions on an approximately 400-page Notice Party submission to the Board in March 2023 and the Board therefore acted in breach of s.37F(2) & 131 of the PDA 2000 and/or Article 218(1)(b) of the PD Regulation 20001 as amended and/or acted in breach of fair procedures and/or natural and constitutional justice.

3. The impugned decision of the Board is invalid as the Inspector and the Board improperly relies on outdated guidelines ('the Wind Energy Guidelines, 2006') and/or draft guidelines ('the Draft Wind Energy Guidelines 2019') which was ultra vires and/or not a relevant consideration under and/or in breach of section 37N, 143 and/or section 28(2) of the Planning and Development Act 200 as amended.

European Law Grounds

4. The impugned decision of the Board is invalid as the Application and/or Decision is invalid because it relies heavily on mitigation measures and the EIAR and/or NIS failed to provide sufficient information to properly assess the environmental impacts of the development and/to remove all reasonable scientific doubt and/or to support sufficiently precise findings in relation to the adverse effects of the development on relevant SACs and was made in breach of s. 172(1) of the PDA 2000 and/or Art. 1(2)(g)(ii), 2, 4 and 8a (1)of the EIA Directive as amended and/or s. 177V of the PDA 2000 and/or Art 6(3) of the Habitats Directive.

5. The impugned decision of the Board is invalid as the site investigation was inadequate and therefore the Appropriate Assessment was not proper and/or was carried out in breach of s.177V of the PDA 2000 and Art 6(3) of the Habitats Directive and/or an EIA was not validly carried out in breach of Article 2 and 4(5) of EIA and s.172(1) of the PDA 2000 and there was a failure to give adequate reasons in breach of section 37H(2)(a), 171A(a)(iv) of the PDA 2000 and Article 1(2)(g)(iv) and 8a(1) of the EIA Directive.

6. The impugned decision of the Board is invalid as the because the drainage is not sufficiently described or investigated in the application and/or information before the Board and accordingly the Appropriate Assessment was not proper and/or was carried out in breach of s.177V of the PDA 2000 and Art 6(3) of the Habitats Directive and/or an EIA was not validly carried out in breach of s.172(1) of the PDA 2000 and Art 2 & 4 of the EIA Directive and there was a failure to give adequate reasons in breach of section 37H(2)(a), 171A(a)(iv) of the PDA 2000 and Article 1(2)(g)(iv) and 8a(1) of the EIA Directive

7. The impugned decision of the Board is invalid because the investigation regarding grasslands was insufficient and accordingly the Appropriate Assessment was improper and/or was carried out in breach of s.177V of the PDA 2000 and Art 6(3) of the Habitats Directive and/or an EIA was not validly carried out in breach of s.172(1) of the PDA 2000 and Art 2 & 4 of the EIA Directive and there was a failure to give adequate reasons in breach of section 37H(2)(a), 171A(a)(iv) of the PDA 2000 and Article 1(2)(g)(iv) and 8a(1) of the EIA Directive

8. The impugned decision of the Board is invalid as the Board and the Inspector takes an inconsistent approach in evaluating visual impact and provides no reasoned conclusions and accordingly the EIA was not validly carried out in breach of s.172(1) of the PDA 2000 and Art 2 & 4 of the EIA Directive and and [*sic*] there was a failure to give adequate reasons

in breach of section 37H(2)(a), 171A(a)(iv) of the PDA 2000 and Article 1(2)(g)(iv) and 8a(1) of the EIA Directive

9. The impugned decision of the Board is invalid as the Board failed to consider relevant and nearby SACs and accordingly the Appropriate Assessment ~~does not comply with the Habitats Directive~~ was carried out in breach of s.177V of the PDA 2000 and Art 6(3) of the Habitats Directive and/or an EIA was not validly carried out in breach of s.172(1) of the PDA 2000 and Art 2 & 4 of the EIA Directive and there was a failure to give adequate reasons in breach of section 37H(2)(a), 171A(a)(iv) of the PDA 2000 and Article 1(2)(g)(iv) and 8a(1) of the EIA Directive

10. The impugned decision of the Board is invalid as the Board abdicated its independent statutory role and accordingly the Appropriate Assessment was carried out in breach of s.177V of the PDA 2000 and Art 6(3) of the Habitats Directive and/or an EIA was not validly carried out in breach of s.172(1) of the PDA 2000 and Art 2 & 4 of the EIA Directive and there was a failure to give adequate reasons in breach of section 37H(2)(a), 171A(a)(iv) of the PDA 2000 and Article 1(2)(g)(iv) and 8a(1) of the EIA Directive

11. The impugned decision of the Board is invalid as Inspector and the Board acted inconsistently with regard to turbines creating the same issue within the site without explanation or reason and accordingly the Appropriate Assessment was carried out in breach of s.177V of the PDA 2000 and Art 6(3) of the Habitats Directive and/or an EIA was not validly carried out in breach of s.172(1) of the PDA 2000 and Art 2 & 4 of the EIA Directive and there was a failure to give adequate reasons in breach of section 37H(2)(a), 171A(a)(iv) of the PDA 2000 and Article 1(2)(g)(iv) and 8a(1) of the EIA Directive

12. The impugned decision of the Board is invalid as the Inspector and Board lacks the expertise/best scientific knowledge in the field to be able to appropriately assess the Application and the adverse impacts and accordingly the Appropriate Assessment was carried out in breach of s.177V of the PDA 2000 and Art 6(3) of the Habitats Directive and/or an EIA was not validly carried out in breach of s.172(1) of the PDA 2000 (and without prejudice s.172(1H) thereof) and Art 2, 4 & 5(3)(b) of the EIA Directive and the Inspector/Board failed to give any or any adequate reasons.

13. The impugned decision of the Board is invalid as the Inspector did not understand her duties and accordingly the Appropriate Assessment was carried out in breach of s.177V of the PDA 2000 and Art 6(3) of the Habitats Directive.

14. The impugned decision of the Board is invalid as the Appropriate Assessment did not comply with Art 6(3) & 12 of the Habitats Directive ~~or the High Court decisions delivered in this country~~ by failing to include sufficiently precise findings and by failing to remove all scientific doubt by failing to consider or properly consider observations that raised scientific doubt.

15. The impugned decision of the Board is invalid as the Applicants were wrongly denied the opportunity to address an approximately 400-page Notice Party submission to An Bord Pleanála in March 2023 and accordingly the Appropriate Assessment was carried out in breach of s.177V of the PDA 2000 and Art 6(3) of the Habitats Directive and/or an EIA was not validly carried out in breach of s.172(1) of the PDA 2000 and Art 2, 4 & 5(3)(b) of the EIA Directive and the Board acted in breach of s.37F & 131 of the PDA 2000 and/or Article 218(1)(b) of the Planning Regulations 2001 and/or acted in breach of fair procedures and/or natural and constitutional justice.

16. The impugned decision of the Board is invalid as Inspector and the Board improperly relies on outdated guidelines ('the Wind Energy Guidelines, 2006') in breach of sections 37G(2) and 37H(2)(bc) of the PDA Act 2000 and/or Article 8a(6) of the EIA Directive as amended and/or draft guidelines ('the Draft Wind Energy Guidelines 2019') which is ultra vires and where neither were subjected to an SEA pursuant to Article 3 and 4 of Directive 2001/42/EC and were not updated notwithstanding changes in technology and relevant scientific knowledge in respect of the effect of wind turbines on Annex I habitats, and Annex II and Annex IV species that reside in or in proximity to, and/or move through locations that may be subject to wind turbines and accordingly the Appropriate Assessment was carried out in breach of s.177V of the PDA 2000 and Art 6(3) of the Habitats Directive and/or an EIA was not validly carried out in breach of s.172(1) of the PDA 2000 and Art 2, 4, 8(6) of the EIA Directive and/or the Inspector/Board acted in breach of fair procedures and/or failed to give any or any adequate reasons and/or took into account irrelevant factor.

(iii) Validity Grounds

17. The Second Respondent failed to transpose and/or comply with the requirements of Article 3(1) and 4(1) of Directive 2001/42/EC in failing to provide updated policies and procedures and/or by failing to update and/or withdraw the Wind Energy Guidelines, 2006, to address the failure to carry out an SEA in relation thereto pursuant to and/or the

increasing size of wind turbines and/or changes in technology and relevant scientific knowledge in respect of the effect of wind turbines so as to protect the Habitats Directive Annex I habitats, and Annex II and Annex IV species that reside in or in proximity to, and/or move through locations that may be subject to wind turbines."

Contested affidavit

49. The contested affidavit of Ms Burke was delivered in tandem with the applicants' legal submissions on 26th July 2024.

50. The board's objection was:

(i) the entire affidavit was inadmissible due to the deponent's non-independent-expert status;
(ii) if not disallowed *in toto*, it should be disallowed insofar as it deposed to matters the deponent had no personal knowledge of and thus that were hearsay;
(iii) the directions only allowed for a reply so any averments going beyond reply should be disallowed;
(iv) insofar as the affidavit involved comment and argument it was inadmissible; and
(v) insofar as it included matters not put before the board that should have been put before the board it was impermissible.

51. The first named notice party's objection was similar:

(i) the deponent was not an expert and so her opinion is not admissible;
(ii) points related to the original planning documentation should have been put before the decision-maker;
(iii) points related to documents following the applicants' submissions to the board could have been made in the applicant's statement of grounds and grounding affidavit;
(iv) the affidavit goes beyond the pleadings; and
(v) the scale and length of the affidavit at a late stage creates prejudice.

52. The applicants' main points seemed to include that:

(i) the opposing parties could have brought a motion to strike out the affidavit but did not do so;
(ii) while Ms Burke was perhaps not independent that didn't mean that she wasn't an expert; and
(iii) in any event the objections didn't warrant exclusion of the affidavit *in toto*.

53. I would address the objection as follows.

54. Firstly, a motion to strike out an affidavit is not necessary. Inadmissible evidence doesn't become admissible merely because a motion is not brought. Also in the present case, Holland J. effectively left this to the trial in any event when the matter was first mentioned, which is equivalent to saying that a motion is not required.

55. As regards Ms Burke's expertise I don't question that she has expertise. That isn't the issue though – the issue is whether she technically qualifies as an expert witness in the sense used in the caselaw, such as to make her opinion evidence admissible.

56. Expert opinion by an expert witness is only admissible if there is sufficient independence on the part of the deponent: see O'Donnell J. in *Emerald Meats Limited v. The Minister for Agriculture, Ireland & The Attorney General* [2012] IESC 48, [2012] 7 JIC 3001 (Unreported, Supreme Court, 30th July 2012), at para. 28, and summary of the law in *Environmental Trust Ireland v. An Bord Pleanála* [2022] IEHC 540, [2022] 10 JIC 0305 (Unreported, High Court, Holland J., 3rd October 2022) and caselaw referred to. That doesn't arise here given that Ms Burke clearly is involved in opposing the development.

57. Insofar as the affidavit includes comment or submission, this isn't admissible in any event. And insofar as it purports to state facts about matters of which the deponent doesn't have direct knowledge, such as whether the applicants were prejudiced, that is hearsay and inadmissible. Insofar as the affidavit includes matters that are not properly matters of reply to the opposing parties' affidavits, it was filed without leave of the court and thus is impermissible.

58. As regards the objection, familiar from much previous caselaw, that particular matters should have been put to the decision-maker rather than being raised in court for the first time, in one sense it doesn't matter whether one says that such evidence is inadmissible as irrelevant, or is merely insufficient and doesn't get an applicant anywhere. Normally the latter is sufficient but if absolutely pressed on it I think the former is technically the more correct position. Thus it isn't relevant (and thus isn't admissible) for a deponent to simply give their view that in effect the application does not remove all scientific risk to European sites or was not prepared with best scientific knowledge. The issue needs to be primarily looked at through the lens of what was before the decision-maker or what steps a reasonable expert in that position would have taken – thus a deponent can say that a reasonable expert in the decision-maker's position would have seen such a risk or view on the materials that were actually before her. On that criterion, and even allowing for

defined exceptions – specifically, matters that can be demonstrated to be the subject of an autonomous obligation of consideration – much of Ms Burke's affidavit is inadmissible in any event.

59. In general terms it is not the function of the court to trawl through the wreckage of a substantially inadmissible affidavit to fillet scraps of remaining material and identify fragments that could have constituted acceptable averments. That is a time-consuming, indeed time-wasting, exercise, which should not be visited on the court and the opposing parties. It's on the party concerned, in this case the applicants, to confine their evidence to admissible matters. It's one thing to strike out discrete, net, clearly-identifiable elements of inadmissibility. But once the inadmissible matters become permeating or overwhelming, the only fair thing to do taking into account the rights of the other parties is to strike the affidavit out altogether. The oral submissions of the first named notice party in particular highlighted the great forensic difficulty of how to deal in practical terms with having potential fragments of this affidavit imposed on them piece-meal and mid-hearing. Insofar as the affidavit merely recites the chronology, as submitted on behalf of the applicants, it is effectively otiose as there is little or nothing identifiable that qualifies as uncontested fact that isn't already before the court otherwise. In all the circumstances, striking out the affidavit in full is the only appropriate course, on the grounds that it exceeded the liberty to reply afforded by the directions, and was in any event substantially inadmissible, and on the grounds that any fragments of possibly admissible material are insufficiently identifiable in a ready manner and that allowing severance of such matters at this stage would give rise to injustice to the opposing parties.

Assessing the grounds

60. While the applicants suggested considering the issues on a theme-by-theme basis, this runs too much of a risk of departing from what is actually pleaded, either by addition or subtraction. Thus I think the best – indeed only – way to satisfactorily deal with the matter is on a ground-by-ground basis.

61. The core grounds are therefore dealt with below in sequence, obviously apart from those withdrawn (3, 4, 7, 9, 13, 16 and 17), and apart from core ground 2 which is so closely related to core ground 15 as to be best dealt with under that heading.

Domestic law issues

Core ground 1 – lack of particulars

62. Core ground 1 is:

> "1. The impugned decision of the Board is invalid and/or unlawful as the planning application failed to properly particularise and/or provide the requisite information and/or plans and particulars in relation to the development and breached Art. 22(2)(b), (d) & (g), 23(1), 210 & 214(1) of the Planning and Development Regulations 2001 (as amended) ('the 2001 Regulations') as:
>
> (i) The Application fails to include necessary measurements for key structures that are the subject of the Application.
>
> (ii) The Application fails to include accurate bespoke drawings for key structures that are the subject of the Application.
>
> (iii) The Application fails to describe in sufficient detail the proposed connectivity from the wind farm to the national grid.
>
> (iv) The Application fails to establish ownership of or rights to all necessary lands for the proposed connectivity from the wind farm to the national grid."

63. Sub-paragraph (iv) was withdrawn – the statement of case notes:

> "38. The Applicants withdraw the landowner consent issue raised in Ground 1 (iv)."

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

> "Core Ground 1:
>
> (a) APPLICANT'S SUMMARY OF CORE GROUND 1
>
> 1. The Applicants' submissions address 'Inadequate Drawings/Particulars' at issue 6.
>
> 2. This issue is raised at:
>
> a. Ground 1 §§ 1-6
>
> b. Ground 6 §§ 40 & 41
>
> c. Ground 14 § 73
>
> d. Ground 15 §§ 110-115
>
> 3. The Applicants allege that the drawings and plans submitted were inadequate and failed to properly set out the nature and extent of the development with the result that it was not possible to assess certain likely effects of the development. Key measurements that were not provided include the depth of turbine foundation/formation level and road & hardstanding excavations depths. The foundation depth is approx. 3.0m , but is it is unclear whether it is 3.0m below the lowest point of the existing ground or the highest point or something in between and so the foundation level is undefined. It was not possible to assess or verify inter alia spoil quantities in the result.

4. This ground is linked to the public participation issue (Core Ground 15). After the consultation period had expired the Notice Party provided revised drawings as part of a submission of 31 March 2023. The revised plans addressed some of the deficiencies identified in submissions in respect of the original drawings (e.g. in relation to spoil storage areas). The submission further provided, inter alia, minimum figures for the depth of hardstanding excavation areas. The Applicant was not afforded an opportunity to comment on the same. The failure to provide adequate measurements in drawings interfered with an assessment of the effects of the development and an adequate ex post provision could not (and did not) remedy the breach/effect on participation.

(b) BOARD RESPONSE TO CORE GROUND 1

5. The Board's Decision is not invalid as alleged at Core Ground 1. There has been no breach of Articles 22(2)(b), (d) & (g), 23(1), 210 & 214(1) of the 2001 Regulations as alleged by the Applicants or at all. The Applicants' complaint in that regard is not properly particularised contrary to the requirements of Order 84 rule 20(3) of the Rules of the Superior Courts, with the Applicants failing to particularise adequately or at all how or in what manner those provisions and Articles have been allegedly breached (it is denied that same have been breached). The complaints made in Core Ground 1 were not made in submissions to the Board by the Applicants and cannot now be raised in judicial review proceedings. This ground of challenge presumes its own incorrect suppositions and is premised on impermissible merits-based submissions, incorrect interpretation of certain of the planning application documents submitted by the Notice Party (namely certain drawings submitted by the Notice Party as part of the application) and on mis-reading the Board's Decision and the Inspector's Report in a way that renders it invalid rather than valid. Contrary to the Applicants' assertions, there was sufficient information before the Board in relation to the turbines, the site, and the grid connection. The reference to foundational depths is also a purely merits-based complaint.

6. Core Ground 15 is denied and responded to below. The Applicants' subjective characterisation of the process before the Board is not accurate nor accepted. The Applicants' legal submissions and assertions in this Statement of Case do not constitute an evidential foundation for the propositions they advance. The Applicants were not deprived of making a submission on the March 2023 Notice Party response document as alleged or at all. The Applicants' complaint in that regard is based on an erroneous premise.

(b) NOTICE PARTY RESPONSE TO CORE GROUND 1

7. The planning application submitted to the Board was accompanied by two sets of detailed drawings which set out, in very considerable details, the structures and layout of the proposed development including foundations, turbines, the Grid Connection and the meteorological mast. The allegation about an alleged lack of landowner consent was not raised before the Board, is not particularised and is unstateable by reference inter alia to Article 22(2)(g)(ii) of the Planning and Development Regulations 2001."

65. The applicants' complaint as developed or expanded in oral submissions was that

(i) the application wasn't adequately particularised on day one;

(ii) if, which is denied, an inadequately particularised application can be particularised during the process, that doesn't extend to what is alleged to be a wholesale reconstruction of the application as carried out here; and

(iii) in any event even with additional information the application is still in adequately particularised.

66. But there is simply no route map set out on the pleadings between the alleged acts of the board, through precise legal provisions, to the claimed relief of *certiorari*. The board is correct to plead that "[t]he Applicants' complaint in that regard is not properly particularised contrary to the requirements of Order 84 rule 20(3) of the Rules of the Superior Courts, with the Applicants failing to particularise adequately or at all how or in what manner those provisions and Articles have been allegedly breached".

67. The applicants haven't pleaded any provision that specifically precludes a refinement of the information provided, and similarly as to the second issue they have not identified provisions in the Act or regulations that prohibit adjustment to the (in fact limited) extent effected here. The first named notice party's evidence is that the primary change of dimension was error correction, not a size increase in what had been intended, and that hasn't been effectively displaced.

68. As far as whether the ultimate particularisation of the permission application was inadequate is concerned, the applicants haven't evidentially demonstrated this, especially given the very significant level of particularising detail provided. Nor have the applicants demonstrated any legal infirmity in the first named notice party having identified and corrected an error in the base diameter prior to the EIA and appropriate assessment process.

69. It is not the law that there are scare terms which in and of themselves doom any application to invalidity – whether that be approximate, indicative, maximum, typical, or the like. Such terms do of course imply flexibility, but flexibility is not in itself prohibited. What is problematic is flexibility that is so wide that it creates the possibility of a real planning issue. Any limited possible uncertainty in the particulars of the development is massively less than the very considerable uncertainty in the *Sweetman XVII* case (*Sweetman v. An Bord Pleanála* [2021] IEHC 390 (Unreported, High Court, 16th June 2021)). The leave to appeal judgment in that case (*Sweetman v. An Bord Pleanála (No. 2)* [2021] IEHC 662, [2021] 10 JIC 2601 (Unreported, High Court, 26th October 2021)) expressly recognised the ongoing relevance of the general concept of limited flexibility that doesn't create a genuine planning issue. Here any flexibility is vanishingly limited:

(i) In the original Environmental Impact Assessment Report of June 2022, chapter 4 of the EIAR, the locational specific co-ordinates are given for all turbines. Table 4-1 sets out "Table 4-1 Proposed Wind Turbine Locations and Elevations".

(ii) Section 4.3.1.3 Turbine Type notes that:

> "Wind turbines use the energy from the wind to generate electricity. A wind turbine, as shown in Plate 4-1 below, consists of four main components:
> Foundation unit
> Tower
> Nacelle (turbine housing)
> Rotor"

(iii) Page 412 states:

> "The proposed wind turbines will have a tip height of 180 metres, a rotor diameter of 162m and a hub height of 99m. The exact make and model of the turbine will be dictated by a competitive tender process, but it will not exceed a tip height of 180 metres. Modern wind turbines from the main turbine manufacturers have evolved to share a common appearance and other major characteristics, with only minor cosmetic differences differentiating one from another. The wind turbines that will be installed on the site will be conventional three-blade turbines, that will be geared to ensure the rotors of all turbines rotate in the same direction at all times. The turbines will be grey matte in colour."

(iv) Insofar as there is also reference to the height not exceeding 180 metres, in the context of the prior positive statement that it would be 180 metres, the latter statement should be read as meaning it will be in the region of that height but not over it.

(v) In diagrams immediately after that text, it is stated that the base diameter of the turbines would be 29,000 millimetres, or 29 metres (top of p. 414).

(vi) Reinforcing that, section 4.3.1.4 states:

> "The horizontal and vertical extent of the turbine's foundation is shown above in Figure 4-5.
> The proposed turbine foundations measures 29m in diameter."

(vii) In the March 2023 information, it was noted that contrary to the correct figures in the EIAR, the turbine layout drawings had erroneously identified a 15,000 mm base diameter, and that these drawings had been amended as "REV A", and changed to 29,000 mm.

(viii) The wind measurement mast is referred to as having a *maximum* height of 100 m, but the drawings submitted are consistent with it being *actually* built to 100 m.

70. In all of the circumstances, no illegality has been demonstrated.

EU law issues

Core ground 5 – defective EIA/AA – site investigation

71. Core ground 5 is:

> "5. The impugned decision of the Board is invalid as the site investigation was inadequate and therefore the Appropriate Assessment was not proper and/or was carried out in breach of s.177V of the PDA 2000 and Art 6(3) of the Habitats Directive and/or an EIA was not validly carried out in breach of Article 2 and 4(5) of EIA and s.172(1) of the PDA 2000 and there was a failure to give adequate reasons in breach of section 37H(2)(a), 171A(a)(iv) of the PDA 2000 and Article 1(2)(g)(iv) and 8a(1) of the EIA Directive."

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

> "Core Ground 5:
> (a) APPLICANT'S SUMMARY OF CORE GROUND 5
> 20. The Applicants' submissions address 'Inadequate assessment of Karst - Karst Features' at issue 2 (ii) and 'Inadequate investigation and assessment of subterranean Karst' at issue 2(iii)."

21. These two issues are directly raised at:
    a. Core Ground 4 §§ 12 & 13
    b. Core Ground 5 §§ 15 – 28
    c. Core Ground 6 §§ 32 - 38
    d. Core Ground 10 §§ 52 - 54
    e. Core Ground 12 §§ 58 – 60 & 63
    f. Core Ground 13 §§ 68 & 69

22. The Applicant asserts that the Inspector /Board wrongly or unlawfully reached the conclusion the site investigations were 'robust'. The Inspector failed to consider, address or respond to concerns about the site investigations raised in third party submissions. The Notice Party is incorrect that the matters were not raised in submissions. The Board did not consider or reply to the DAU submission that 'further research' was necessary for Karst features, that it was aware of several dolines that are present in higher ground in the vicinity of the proposed turbines that are not present on the Karst feature map, that bat surveys were inadequate and that 'further investigative works' on caves be undertaken, in particular caves known by the DAU and, further, failed to reply to the GIS submission of potential damage to karst features such as swallow holes, enclosed depressions and that there may be further underlying caves and caverns that were not detected in the surveys and risks of collapse of sinkholes and/or to the Applicants' submission in respect of features at a cave near T5 and the Inspector wrongfully relied or misinterpreted the implications of a walk over survey by HES.

23. The Board's Inspector in his report at pg. 90/91 stated:

'The consultant hydrogeologist who advised the Board on the previous windfarm described the underlying bedrock as extensively karstified (i.e. weathered or fissured)… On the other hand, the applicant has described the underlying limestone bedrock as not been highly karstified in both the previous and current windfarm applications. However, unlike the previous cases, the applicant's contention has been supported by an extensive range of site surveys and investigations to support the current application. The site investigations provide a very detailed, localised, and spatially specific description of the topography, sub-soil overburden, bedrock conditions and groundwater levels and flow patterns with the site, which I consider to be thorough and robust following my review of them'.

24. The Applicant asserts that the application did not contain a very detailed, localised, and spatially specific description of the topography supporting a contention that the underlying bedrock is not highly karstified. While more investigations were completed in particular boreholes, the same was subject to clear and express qualifications by the parties who conducted such investigations and, moreover, the results of the same largely confirmed the prior assessment but were not assessed or were misinterpreted by the Inspector/Board. In addition, the information submitted in the EIAR is not consistent with the actual raw data, presented in the actual investigation results set out in the Appendices to the EIAR. The inspector and the Board simply accepted the interpretation present in the EIAR and did not consider the actual underlying data on which it was based in arriving at conclusions.

(b) BOARD RESPONSE TO CORE GROUND 5

25. The Board's Decision is not invalid as alleged at Core Ground 5. There has been no breach of sections 37H(2)(a), 171A(a)(iv), 172(1), 177V of the 2000 Act or of Articles 1(2)(g)(iv), 2,4(5) and 8a(1) of the EIA Directive and Article 6(3) of the Habitats Directive as alleged by the Applicants or at all. The Applicants complaint in that regard is not properly particularised contrary to the requirements of Order 84 rule 20(3) of the Rules of the Superior Courts, with the Applicants failing to particularise adequately or at all how or in what manner those provisions and Articles have been allegedly breached (it is denied that same have been breached). It is denied that the site investigation was inadequate as alleged by the Applicants or at all. In this connection, Core Ground 5 is based on an erroneous premise. This ground of challenge presumes its own incorrect suppositions and is premised on impermissible merits-based submissions, incorrect interpretation of certain of the planning application documents submitted by the Notice Party (namely parts of Chapters 8 and Appendix 4-3 of the EIAR) and on mis-reading the Board's Decision and the Inspector's Report in a way that renders it invalid rather than valid. It is, for example, noted that, in the context of EIA, at §7.7.5 (page 81) of the Inspector's Report, the Inspector stated that she was 'satisfied that the results of the various site investigations and assessments are robust. Although the excavations would have a permanent direct impact on land, soils and geology, on balance, the impacts on the environment would not be adverse, subject to the stringent implementation of EIAR mitigation measures (incl. on-going site inspections & monitoring) and the recommended conditions which seek to protect the character and integrity of geological features in the area.' At page 93 of her Report the Inspector referred

to the 'extensive range of location specific site investigations and test results, as referenced above in the Groundwater section'. At pages 90 to 91, in the context of EIA, the Inspector stated, inter alia, 'The site investigations provide a very detailed, localised, and spatially specific description of the topography, sub-soil overburden, bedrock conditions and groundwater levels and flow patterns with the site, which I consider to be thorough and robust following my review of them.' The Inspector was entitled to conclude as aforesaid based on the materials that were before the Board and was entitled to accept the content and analysis contained in the documentation submitted by the Notice Party. The Inspector clearly considered the submissions made by the Geological Survey Ireland (GSI) (see e.g., §4.2.2, §4.4.3 and pages 75, 78, 79, 80, 87, 90, 91, 93 of the Inspector's Report). The previous planning applications were also properly considered by the Inspector as evident from the clear text of the Inspector's Report correctly interpreted (see e.g. pages 7, 8, 46, 56, 65, 77, 87, 90, 91, 102 and 120 of the Inspector's Report).

26. The non-expert assertions of the Applicants (who are litigants in this action and are not independent) are not a basis for and do not establish any inadequacy in the EIA or AA carried out by the Board nor any adequacy in the EIAR or the NIS or any other supporting documentation submitted to the Board by the Notice Party in the planning application process. Consideration of the adequacy of information submitted for EIA and AA purposes is primarily a matter for the discretion of the Board. The Board is entitled to curial deference to its view of the adequacy of the information before it and, as to such adequacy, is reviewable only for irrationality. There was material before the Board capable of supporting its view of the adequacy of the information before it. The Applicants have not advanced or adverted to anything that impugns the rationality of the Board's conclusions for EIA or AA purposes by reference to the material before the Board.

(c) NOTICE PARTY RESPONSE TO CORE GROUND

27. The Notice Party provided, and the Board considered, very significant information (including 318 hours of sitework, 152 no. site investigation points; and 114 no. laboratory tests accompanied by 80 no. geophysical surveys) in relation to the geological composition of the site sufficient to allow the completion of lawful EIA and AA assessments. None of this information was contradicted by the Applicants and the Applicants, respectfully, have misunderstood the chronology of the request for Further Information. The Board was clearly concerned to protect the karst landscape and directed that T9, T10 and T11 should be omitted."

73. The alleged inadequacy or impropriety of the site investigation (which on the evidence was very extensive) has to be established evidentially by a challenger through the primary frame of reference of what was before the board at the time, together with what can be evidentially demonstrated as something the board was obligated to consider autonomously. That hasn't been successfully achieved. The applicants' non-expert views do not discharge this burden.

Core ground 6 – defective EIA/AA – drainage

74. Core ground 6 is:

"6. The impugned decision of the Board is invalid as the because the drainage is not sufficiently described or investigated in the application and/or information before the Board and accordingly the Appropriate Assessment was not proper and/or was carried out in breach of s.177V of the PDA 2000 and Art 6(3) of the Habitats Directive and/or an EIA was not validly carried out in breach of s.172(1) of the PDA 2000 and Art 2 & 4 of the EIA Directive and there was a failure to give adequate reasons in breach of section 37H(2)(a), 171A(a)(iv) of the PDA 2000 and Article 1(2)(g)(iv) and 8a(1) of the EIA Directive"

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

"Core Ground 6:

(a) APPLICANT'S SUMMARY OF CORE GROUND 6

28. The Applicants' submission address 'Inadequate Assessment, impact and investigation of water including groundwater and turloughs' as issue 3.

29. This issue is raised at:

a. Core Ground 6 at §§ 29 – 42
b. Core Ground 10 at § 50
c. Core Ground 11 at § 57
d. Core Ground 12 at §§ 62-64
e. Core Ground 14 at §§ 81 -83

30. The Applicants assert that the Board failed to properly assess the hydrological impacts of the development. The Inspector failed to address adequately the hydrological connectivity between the site and proximate turloughs. In the Prior Refusal, the Board's independent expert identified certain matters or tests that would need to be addressed or carried out before adverse impacts could be ruled out with sufficient certainty. The Notice

Party failed to carry out the same and the Board failed to identify that failure. There was for example no adequate data on seasonal water level monitoring in groundwater, turloughs and wells.

31. Further Condition 6, which relates to protection of impact on groundwater, refers to the 'winter water table', which metric is entirely uncertain. The said levels are not specified and are in any event variable.

(b) BOARD RESPONSE TO CORE GROUND 6

32. The Board's Decision is not invalid as alleged at Core Ground 6. There has been no breach of sections 37H(2)(a), 171A(a)(iv), 172(1), 177V of the 2000 Act or of Articles 1(2)(g)(iv), 2,4 and 8a(1) of the EIA Directive and Article 6(3) of the Habitats Directive as alleged by the Applicants or at all. The Applicants' complaint in that regard is not properly particularised contrary to the requirements of Order 84 rule 20(3) of the Rules of the Superior Courts, with the Applicants failing to particularise adequately or at all how or in what manner those provisions and Articles have been allegedly breached (it is denied that same have been breached). Core Ground 6 is based on an erroneous premise, as contrary to what the Applicants allege, the drainage is sufficiently described and/or investigated in the application and/or information before the Board. Core Ground 6 presumes its own incorrect suppositions and is premised on impermissible merits-based submissions, incorrect interpretation of certain of the planning application documents submitted by the Notice Party (namely parts of Chapters 4 and 8 and Appendix 4-3 of the EIAR) and on mis-reading the Board's Decision and the Inspector's Report in a way that renders it invalid rather than valid.

33. In the context of EIA and AA, potential impacts in relation to groundwater, drainage, and karst/karst landscape features were properly considered and assessed by the Inspector. (In relation to groundwater see e.g., pages 73,74,75, 76, 77, 83, 84, 85, 86, 87-97, 103, 104, 124-125 and 141 of the Inspector's Report. In relation to drainage see e.g., pages 30, 32, 43, 73, 74-77, 83-88, 93-96, 98, 106, 116, 123-125, 141, 152, 167, and 170 of the Inspector's Report. In relation to karst landscape features see e.g., pages 18, 19-21, 23, 25 -31, 43, 45, 47, 48, 51, 73, 74-82, 85-91, 93, 103, 104, 106-108, 109-110, 124, 132 and 152 of the Inspector's Report). The relevant conclusions reached by the Inspector and Board in relation to potential impacts on groundwater, drainage, and karst landscape features were valid and were open to the Board and the Inspector based on the materials that were before the Board (see e.g., Chapter 4 at §4.6, Chapter 9, Chapter 17, Table17-1, Appendix 4-2, Appendix 4-3, Appendix 4-4, Appendix 4-6, Appendix 6-5, Appendix 9-4, and Appendix 9-5 of the EIAR; §3.4.1, §6.1, §6.2.2., §6.2.3, §6.2.2, Table 6-14, §7.1., Table 7-1, §7.3, Table 7-3, §7.4, Table 7-4, Table 7-5, Table 7-6, Table 7-7, Table 7-8, §8.3, §8.4, and 9 of the NIS and Appendix 1(AA Screening Report), Appendix 2 (Construction Environment Management Plan), Appendix 4 to the NIS (Drainage Management Plan and Site Drainage Drawings); §2.2.2.1, Table 2-1, Table 2-2, and section 4.3 of the Planning Report; and the March 2023 Notice Party response to observations document). It is also a condition of the Board Order that the conditions in the Drainage Management Plan must be adhered to. The non-expert assertions of the Applicants (who are litigants in this action and are not independent) are not a basis for and do not establish any inadequacy in the EIA or AA carried out by the Board nor any adequacy in the EIAR or the NIS or any other supporting documentation submitted to the Board by the Notice Party in the planning application process. Consideration of the adequacy of information submitted for EIA and AA purposes is primarily a matter for the discretion of the Board. There was material before the Board capable of supporting its view of the adequacy of the information before it.

(c) NOTICE PARTY RESPONSE TO CORE GROUND 6

34. The Inspector concluded that she was satisfied that there would be no significant environmental consequences as a result of the proposed works or changes to the groundwater levels, groundwater flow paths or recharge rates of the surrounding turlough network. This was a conclusion which the Inspector was clearly entitled to reach on the basis of the materials before the Board.

35. Furthermore, the Applicants have misunderstood the design and construction approach for the internal trackways, drainage and roads and the purported grounds are advanced on the basis of those misunderstandings bear no relation to the proposed development or the decision actually made by the Board."

76. An applicant who wishes to dislodge a decision-maker's view of the merits, of no impact on ground-water, for example, has to discharge the onus of proof to establish infirmity in the approach evidentially – and, as before, to do that through the primary frame of reference of what was before the board at the time, together with what can be evidentially demonstrated as something the board was obligated to consider autonomously. The applicants haven't succeeded in doing that.

Core ground 8 – defective EIA – visual impacts

77. Core ground 8 is:

"8. The impugned decision of the Board is invalid as the Board and the Inspector takes an inconsistent approach in evaluating visual impact and provides no reasoned conclusions and accordingly the EIA was not validly carried out in breach of s.172(1) of the PDA 2000 and Art 2 & 4 of the EIA Directive and and [*sic*] there was a failure to give adequate reasons in breach of section 37H(2)(a), 171A(a)(iv) of the PDA 2000 and Article 1(2)(g)(iv) and 8a(1) of the EIA Directive"

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

"Core Ground 8:

(a) APPLICANT'S SUMMARY OF CORE GROUND 8

40. The Applicants' submissions address 'Karst Landscape and Character' at issue 2(i).

41. This issue is directly raised at:

a. Core Ground 6 § 39
b. Core Ground 8 §§ 45 & 46
c. Core Ground 11 §§ 55 - 57
d. Core Ground 12 §§ 58 - 60

42. The site is partially located within the Killeglan Karst Landscape, a Geological Site of National Importance. The Inspector recommended that 5 turbines (T8, T9, T10, T11 & T12) in the Southern Cluster that were located within, or close to the Mid-Section of the landscape be omitted given their visual impact but went on to say 'if the Board did not concur with this assessment' that 3 turbines were recommended to be omitted. The Board decided to omit only the later 3 turbines in Condition 4 (T9, T10 and T12) but gave no reasons as to why it 'did not concur'.

43. Further, the Inspector considered that the NE section of the Killeglan Karst Landscape had been 'modified by agriculture practices in recent years' and concluded that 3 turbines (T13, T14 and T16) would not adversely affect the landscape. The Inspector gave no reason as to why it preferred the developer explanation for justifying retaining 3 turbines (T13, T14 and T16) based on recent agricultural practice and rejected the GIS submissions which made no distinction between turbine located within the Killeglan Karst Landscape. The Killeglan Karst Landscape designation is not based simply on visual considerations. The GIS submission further addressed the impact on the Castlesampson Esker and the Inspector failed to give reasons for rejecting the same and, further, the recommended condition (15 in Order) does not have the effect that is intended in the report.

(b) BOARD RESPONSE TO CORE GROUND 8

44. The Board's Decision is not invalid as alleged at Core Ground 8. There has been no breach of sections 37H(2)(a), 171A(a)(iv) and 172(1) the 2000 Act or of Articles 1(2)(g)(iv), 2,4 and 8a(1) of the EIA Directive as alleged by the Applicants or at all. The Applicants complaint in that regard is not properly particularised contrary to the requirements of Order 84 rule 20(3) of the Rules of the Superior Courts, with the Applicants failing to particularise adequately or at all how or in what manner those provisions and Articles have been allegedly breached (it is denied that same have been breached). Core Ground 8 is based on an erroneous premise in that the Board and its Inspector did not take an inconsistent approach in evaluating visual impact (no actual inconsistency is identified or established by the Applicants and the Applicants' merits-based, non-expert assertions are incorrect and not a basis for certiorari of the Board's Decision or any other relief) and a reasoned conclusion for EIA purposes relating to visual impacts was in fact provided (see e.g., pages 142 and 177 of the Inspector's Report, and page 6 of the Board Order where, in the context of EIA, the Board expressly states that 'Landscape and visual impacts would arise during the operational phase from the insertion of the turbines and met mast into a rural setting, the location and siting of which would assist in assimilating the works into the landscape').

45. Core Ground 8 presumes its own incorrect suppositions and is premised on impermissible merits-based submissions and on mis-reading the Board's Decision and the Inspector's Report in a way that renders it invalid rather than valid. The non-expert assertions of the Applicants in advancing Core Ground 8 are not a basis for and do not establish any invalidity or deficiency in the EIA that the Board carried out. The Inspector's Report records that the Inspector conducted 4 site visits. As part of her site inspections, the Inspector visited multiple locations at varying distances from the proposed development. (Pg 46 of 187). The assessment of visual impact, and specifically which turbines should be omitted, was a matter for the Inspector to determine and such determination was lawfully carried out. In relation to the giving of reasons, the rule comes down to a requirement to give 'the main reasons for the main issues' and that was complied with by the Board in its Decision. The Applicants' pleas alleging to the contrary are denied and are based on an incorrect interpretation of the Board's Decision.

(C) NOTICE PARTY RESPONSE TO CORE GROUND 8

46. The Inspector, on the basis of four days of site visits and very comprehensive LVIAs concluded and was clearly entitled to conclude that there would be no significant impacts on the environment once the three identified turbines had been removed in order to protect geological heritage and landscape. The Board agreed and the Applicants have identified nothing unlawful in the approach adopted."

79. The allegation of inconsistency arises primarily from the fact that the inspector recommended omitting a number of turbines. But that was on a reasoned basis: the inspector considered *inter alia* that the receiving environment in the area of "the Mid-Section of the Killeglan Karst Landscape, which is located in the SW section of the S[outh] Cluster" differed from the receiving environment in other area and, accordingly, recommended the omission of three turbines entirely located within the mid-section of the Killeglan karst landscape (T9, T10 & T12), "in order to protect the unique geological heritage and landscape character of this area". There is nothing to the applicants' complaint under this heading. They are not entitled to micro-sub-reasons or reasons for the reasons.

Core ground 10 – defective EIA/AA – abdication

80. Core ground 10 is:

"10. The impugned decision of the Board is invalid as the Board abdicated its independent statutory role and accordingly the Appropriate Assessment was carried out in breach of s.177V of the PDA 2000 and Art 6(3) of the Habitats Directive and/or an EIA was not validly carried out in breach of s.172(1) of the PDA 2000 and Art 2 & 4 of the EIA Directive and there was a failure to give adequate reasons in breach of section 37H(2)(a), 171A(a)(iv) of the PDA 2000 and Article 1(2)(g)(iv) and 8a(1) of the EIA Directive"

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

"Core Ground 10:

(A) APPLICANT SUMMARY OF CORE GROUND 10

51. The Applicants address this Ground at Core Ground 5, 6 & 12.

(b) BOARD RESPONSE TO CORE GROUND 10

52. The Board's Decision is not invalid as alleged at Core Ground 10. There has been no breach of sections 37H(2)(a), 171A(a)(iv), 172(1), 177V of the 2000 Act or of Articles 1(2)(g)(iv), 2,4 and 8a(1) of the EIA Directive and Article 6(3) of the Habitats Directive as alleged by the Applicants or at all. The Applicants' complaint in that regard is not properly particularised contrary to the requirements of Order 84 rule 20(3) of the Rules of the Superior Courts, with the Applicants failing to particularise adequately or at all how or in what manner those provisions and Articles have been allegedly breached (it is denied that same have been breached). Core Ground 10 is based on an erroneous premise in that the Board did not abdicate its statutory role as alleged by the Applicants or at all. This ground of challenge presumes its own incorrect suppositions and is premised on impermissible merits-based submissions, incorrect interpretation of certain of the planning application documents submitted by the Notice Party (namely Chapter 8 of the EIAR) and on mis-reading the Board's Decision and the Inspector's Report in a way that renders it invalid rather than valid.

53. The fallacy that underpins Core Ground 10 is the proposition that acceptance of a developer's material is a breach of the duty to independently decide. But such acceptance does not in itself constitute a failure to assess the application. The Applicants merely assert (e.g. at §50bi and §51 at E(Part 2)) that the Notice Party developer's material was accepted without consideration by the Board. The Applicants have failed to establish that point by evidence and the ground is without substance and reveals no valid complaint. The non-expert assertions of the Applicants in advancing Core Ground 10 are not a basis for and do not establish any invalidity or deficiency in the EIA and AA that the Board carried out, and the Board's Decision complies with the relevant legal principles on reasons.

c) NOTICE PARTY RESPONSE TO CORE GROUND 10

54. The Board was entitled to rely upon the information contained in the application documentation when carrying out the required assessments under the EIA and Habitats Directive. The Inspector's reasoning is ascertainable and capable of being readily determined deriving from her report and from the documents and the context of the decision. The Board and its Inspector discharged the duty to give reasons for the Board's decision and the evidential basis for the Inspector's conclusion was clearly set out in the materials submitted by the Notice Party and no evidence to the contrary was offered on behalf of the Applicants.

55. In relation to the issue of spoil the Notice Party did address and identify the depth of the foundations in Drawing 21337-MWP-ZZ-00-DR-C-0104 and, therefore, was in a position to identify the volume of spoil to be removed. In the circumstances, the Applicants

assertions in relation to the Board's consideration in relation to spoil at §51 have no factual basis and are denied. The Applicants purported reliance on the ACRES scheme is unsubstantiated and completely irrelevant – in any event the Inspector correctly concluded that the proposed development would in fact lead to a net bio-diversity gain arising from the proposed development, as a result of, inter alia, the creation of species rich grassland."

82. The gist of this complaint is that the board was excessively deferential in accepting the developer's material. But that in itself isn't abdication. The applicants have come nowhere near overcoming the onus of proof and evidentially establishing an abdication of the board's role. Agreeing with a participant in the process is not abdication. There is no lack of reasons under this heading.

Core ground 11 – defective EIA/AA – inconsistency

83. Core ground 11 is:

"11. The impugned decision of the Board is invalid as Inspector and the Board acted inconsistently with regard to turbines creating the same issue within the site without explanation or reason and accordingly the Appropriate Assessment was carried out in breach of s.177V of the PDA 2000 and Art 6(3) of the Habitats Directive and/or an EIA was not validly carried out in breach of s.172(1) of the PDA 2000 and Art 2 & 4 of the EIA Directive and there was a failure to give adequate reasons in breach of section 37H(2)(a), 171A(a)(iv) of the PDA 2000 and Article 1(2)(g)(iv) and 8a(1) of the EIA Directive"

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

"Core Ground 11:

(a) APPLICANT SUMMARY OF CORE GROUND 11

56. The Applicants address this ground at Core Ground 8.

(b) BOARD RESPONSE TO CORE GROUND 11

57. The Board's Decision is not invalid at alleged at Core Ground 11. There has been no breach of sections 37H(2)(a), 171A(a)(iv), 172(1), 177V of the 2000 Act or of Articles 1(2)(g)(iv), 2,4 and 8a(1) of the EIA Directive and Article 6(3) of the Habitats Directive as alleged by the Applicants or at all. The Applicants' complaint in that regard is not properly particularised contrary to the requirements of Order 84 rule 20(3) of the Rules of the Superior Courts, with the Applicants failing to particularise adequately or at all how or in what manner those provisions and Articles have been allegedly breached (it is denied that same have been breached). Core Ground 11 is based on an erroneous premise in that the Board and its Inspector did not act inconsistently in the manner the Applicants allege. Core Ground 11 presumes its own incorrect suppositions and is premised on impermissible merits-based submissions and on mis-reading the Board's Decision and the Inspector's Report in a way that renders it invalid rather than valid. Further, the Board's Decision complied with the relevant legal principles on reasons, the Applicants assertion to the contrary is based on a misinterpretation of the Board's Decision.

58. As regards the omission of the three turbines (T9, T10 and T12) which would be located within the Killeglan Karst Landscape in the Southern Turbine Cluster, the Applicants quote selectively from the Inspector's Report in their pleaded case. On a correct interpretation of page 48 of the Inspector's Report, it is clear that the Board's Decision is in fact consistent with the alternative recommendation by the Inspector for the removal of the three turbines T9, T10 and T12, in relation to which the Inspector provided a clear rationale, namely 'in order to protect the unique geological heritage and landscape character of this area'. Contrary to the Applicants' incorrect assertions, what is also clear from the relevant passage from the Inspector's Report is that in relation to turbines T13, T14 & T16, the Inspector concurred with the Notice Party 'that the area within the NE-Section of the Killeglan Karst Landscape, which is located in the middle of the S Cluster, has been noticeably altered by land reclamation and boulder removal' and therefore the Inspector was 'satisfied that the 3 x turbines located within or close to this section of the Karst Landscape would not have an adverse visual impact on its character or integrity.' Further, the Applicants are incorrect in contending that the Board and its Inspector failed to provide reasons for the omission of the three turbines T9, T10 and T12. The Inspector, inter alia, recommended (at internal page 178) that three wind turbines (T9, T10 and T12) which would be located within the Killeglan Karst Landscape in the Southern Turbine Cluster, be omitted from the permitted development by way of condition, for the stated reason 'To protect the visual integrity and geological heritage of the area.' Consistent with the foregoing, by way of condition no. 4 attached to the Board's Decision, three wind turbines (T9, T10 and T12), were omitted from the permitted development by the Board, for the same stated reason 'To protect the visual integrity and geological heritage of the area.' It is also clear from the wording of Condition 4 (which must be read in context of the Inspector's Report and the evidence that was before the Board) that the Board was aware of the sensitivity of the Killeglan Karst Landscape.

(c) NOTICE PARTY RESPONSE TO CORE GROUND 11

59. The reasons for the Inspector's recommendation for the omission of turbines is clearly set out in her report. The Inspector noted that Turbines T8, T9, T10, T11 & T12 in the Southern Cluster would be located within, on the periphery, or close to the Mid-Section of the Killeglan Karst Landscape (p. 48). However, the Inspector did not recommend the exclusion of all five of those turbines but rather specifically recommended the omission of the 3 no. turbines that were 'entirely located within the Mid-Section of the Killeglan Karst Landscape (T9, T10 & T12)', which recommendation was accepted by the Board and omission of turbines is required by Condition 4 of the Board Order. The Inspector clearly evaluated the degree of visual impact from the proposed development and exercised her expert judgement in relation to the visual impact of the proposed turbines, which conclusion can only be impugned on grounds of irrationality, which have not been made out in these proceedings."

85. The ground is tendentious. The applicants assert that the differing sites of turbines were "creating the same issue" but the board disagreed, and the inspector provided a rationale for potentially differing approaches to differing areas based on the level of impacts on such landscapes by farming and other practices. The points made above under core ground 8 apply here.

Core ground 12 – defective EIA/AA – expertise

86. Core ground 12 is:

"12. The impugned decision of the Board is invalid as the Inspector and Board lacks the expertise/best scientific knowledge in the field to be able to appropriately assess the Application and the adverse impacts and accordingly the Appropriate Assessment was carried out in breach of s.177V of the PDA 2000 and Art 6(3) of the Habitats Directive and/or an EIA was not validly carried out in breach of s.172(1) of the PDA 2000 (and without prejudice s.172(1H) thereof) and Art 2, 4 & 5(3)(b) of the EIA Directive and the Inspector/Board failed to give any or any adequate reasons."

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

"Core Ground 12:

(a) APPLICANTS SUMMARY OF CORE GROUND 12

60. The Applicants' submissions address 'Lack of expertise of the Board' as issue 7. The Applicants allege that the Inspector/Board had insufficient expertise to carry out a fair/lawful/proper assessment and that it was required to have or have recourse to expertise in geology, geophysics, hydrology, Karst Landscapes and ornithology.

61. This issue is directly raised at:

a. Core Ground 5 §§17 – 28
b. Core Ground 6 §38
c. Core ground 10 §§ 50 - 54
d. Core ground 12 §§ 59-65
e. Core ground 14 §§ 73 & 80-96

62. The Applicants have brought an associated discovery/particulars application wherein they seek evidence and/or information as to the expertise of the Inspector/Board. The Applicants' ability to state the case is prejudiced by the fact that this application has yet to be determined.

63. Without prejudice, the Applicants rely on, inter alia, the peculiarly complex and specialised nature of the issues that arise in this application, the prior decision by the Board to hire external experts (a hydrogeologist and ornithologist) in relation to the prior application, the Inspector's conclusion on the expertise which went into the EIAR, and the general failure to interrogate the EIAR and/or to consider the primary data including the failure to appreciate the import of the Apex Geophysics Report, the failure to appreciate the significance of the failure to provide the IGSL interpretative report and further the resultant impact and/or failures of assessment identified at inter alia §§26, 27 & 31.

B) BOARD RESPONSE TO CORE GROUND 12

64. The Board's Decision is not invalid as alleged at Core Ground 12. It is denied that the Board decision is invalid as the Inspector and Board lacks the expertise/best scientific knowledge in the field to be able to appropriately assess the Application as alleged by the Applicants or at all. There is no evidence to support this ad hominem complaint and, in the contrary, it is not evidenced by the content of the Inspector's Report. Core Ground 12 has no merit or substance. The reasons for the Board's Decision complied with the relevant legal principles on reasons and can be found not only in the Board Order, but also in the Board Direction, the report of its Inspector and in other documents referred to expressly or by necessary implication in that Report and in the Decision, as well as in other information provided to the Board. Insofar as the Applicants contend to the contrary, such contention is incorrect and is denied. Further, the AA and the EIA that the Board completed in respect

of the proposed development were carried out in accordance with the requirements applicable to that assessment. [T]he Inspector (§8.2, Inspector's Report), having reviewed the NIS submitted by the Notice Party, was satisfied that same 'provides adequate information in respect of the baseline conditions, does clearly identify the potential impacts, and does use best scientific information and knowledge'. The Board Order (page 4) expressly records that the Board considered 'that the information before it was sufficient to undertake a complete assessment of all aspects of the proposed development in relation to the [European] sites' Conservation Objectives using the best available scientific knowledge in the field.' The non-expert assertions of the Applicants (litigants in this action who are not independent) are not a basis for and do not establish any lack of expertise or on the part of the Inspector or the Board for AA or EIA purposes or otherwise.

65. This ground of challenge presumes its own incorrect suppositions and is premised on impermissible merits-based submissions and on mis-reading the Board's Decision in a way that renders it invalid rather than valid. The Applicants' argument amounts to an assertion that the Board in judicial review has to prove its own expertise (or that of its Inspector) or demonstrate in the proceedings that it has conducted a proper assessment, which is totally misconceived. The Board is not required to prove it has sufficient expertise to conduct the EIA or the AA that it carried out merely because the Applicants contend by way of non-expert assertion and without any evidence that the Board lacks sufficient expertise. The Applicants have pointed to nothing that in any sense raises any issue at all with the expertise of the members of the Board or the Inspector that determined the subject application. Article 5(3) of the EIA Directive and s.172(1H) of the 2000 Act requires that the Board as a designated 'competent authority' for the purposes of the EIA Directive shall ensure that it has, or has access as necessary to, sufficient expertise to examine the EIAR submitted by the applicant for permission/developer (the Notice Party in this case). The purpose of such expertise is to check the structure and logic of the EIAR, as well as the overall quality of data used, judgements and conclusions presented. Pursuant to the 2000 Act, the Board is the competent authority for the purposes of examining the adequacy of the EIAR and carrying out an EIA and is assisted in this regard by its Inspectors and is deemed to have the necessary expertise. There is no requirement that the Board must show or demonstrate such expertise. There is no requirement or independent or free-standing duty on the Board to give reasons establishing that it had access to any given level of expertise for EIA purposes. In the present case there is no evidence that Inspector or Board members involved in the impugned Board Decision lacked such expertise, there is only mere assertion in that regard from the Applicants and their solicitor who assume their own suppositions. There is no established fact or proven factual circumstance external to the subject matter of the Board's Decision that serves to raise any issue whatsoever as to the expertise of the Inspector or the Board members involved.

66. The Applicants have identified no basis to impugn the expertise the Board or its Inspector to consider and determine the planning application, or carry out the required environmental assessments, in relation to the proposed development. In the absence of any evidence to support their assertions, the Applicants cannot purport to impugn the expertise of the Board and its Inspector. Specifically, Condition No. 6 does not impose an 'unachievable engineering task'. Rather, it is clear that this planning condition was imposed by the Board in order to ensure the protection of the quantity and quality of water in the area, including groundwater, public water supplies and turloughs and is entirely consistent with the approach adopted by the Notice Party in relation to the protection of water resources in the vicinity of the proposed development, which included locating the turbines so as to avoid the necessity for excavations into bedrock and or the water table.

d) State Respondents' Response to CORE GROUND 12.

67. The State Respondents support the objection of the Board to this ground of challenge. In that regard the State Respondents note that the Applicants have not (a) identified a factor external to the decision making process that would tend to suggest that the Inspector did not hold the requisite expertise to report on the planning application at issue (b) provided any detailed expert evidence to support the allegations that the four matters pleaded in CORE GROUND 12 were errors that reveal a lack of expertise on the part of the Inspector."

88. Article 5(3) of the EIA directive provides:

"3. In order to ensure the completeness and quality of the environmental impact assessment report:

(a) the developer shall ensure that the environmental impact assessment report is prepared by competent experts;

(b) the competent authority shall ensure that it has, or has access as necessary to, sufficient expertise to examine the environmental impact assessment report; and
(c) where necessary, the competent authority shall seek from the developer supplementary information, in accordance with Annex IV, which is directly relevant to reaching the reasoned conclusion on the significant effects of the project on the environment."

89. Recital 33 to the 2014 EIA directive states:

"(33) Experts involved in the preparation of environmental impact assessment reports should be qualified and competent. Sufficient expertise, in the relevant field of the project concerned, is required for the purpose of its examination by the competent authorities in order to ensure that the information provided by the developer is complete and of a high level of quality."

90. In European Commission: Directorate-General for Environment, McGuinn, J., Lukacova, Z., McNeill, A. and Lantieri, A., *Environmental impact assessment of projects – Guidance on the preparation of the environmental impact assessment report (Directive 2011/92/EU as amended by 2014/52/EU),* Publications Office, 2017, (https://op.europa.eu/en/publication-detail/-/publication/2b399830-cb4b-11e7-a5d5-01aa75ed71a1), the Commission states at pp. 69-70:

"Competent Authorities can have expertise in-house or can access this expertise through external channels. In some Member States, where EIAs have been carried out for decades, those reviewing EIA Reports, in particular those within the Competent Authorities, have years of experience and they can, thus, be considered to be experts. In some cases, EU Cohesion Policy funds, including technical assistance available from the European Reconstruction Development Fund or training activities under the European Social Fund, may be available to support training for both authorities and for other stakeholders. Where expertise is not available in-house, research institutes and professional bodies may be asked to undertake reviews. In some Member States, a review body may be available to undertake the review ...

Finding sufficient expertise (Competent Authorities)

Competent Authorities can take various approaches to ensuring that they have access to the expertise necessary to examine EIA Reports, where this is not available in-house. If individual experts are contracted on a case-by-case basis, many of the approaches adopted by Developers in the past, detailed above, can also be used to find competent experts to carry out a review of the EIA Report on behalf of the Competent Authority. Another possible option is for Member States to set up a dedicated independent review body, a body which is always available to provide insight into the evaluation of EIA Reports.

Under Article 5(3)(c), the Competent Authority can request any supplementary information that it requires from the Developer before reaching its decision, as long as the information is directly relevant to reaching the Reasoned Conclusion. Competent Authorities need to ensure that the additional information that they request can be clearly linked to the decision-making process, and is not merely precautionary in nature.

Several Member States ensure that all authorities have access to sufficient expertise to review EIA Reports through the establishment of institutions to serve this purpose. These vary in composition, size, as well as their links to authorities.

In some Member States these can be considered to be independent: in the Netherlands, a Commission is appointed by the minister whose exclusive role is to maintain a pool of approximately 300 experts who are then responsible for providing opinions on EIAs. In France, the review body is made up of nine evaluation specialists, stemming from the Ministry of the Environment directly, as well as six external qualified experts.

Other Member States opted for mechanisms closer to that of an inter-institutional platform (which may include members of the civil society). For instance, in Cyprus, ten members comprise the EIA Committee, including representatives of different ministries, the chamber of engineers, the federation of environmental organisations, and two qualified experts."

91. The board accepts that there is a read-across in terms of the same standard of expertise for AA as well as EIA.

92. The problem for the applicants is that a complaint of lack of expertise or best scientific knowledge has to be made out evidentially. The applicants have not done this. It's not something the court can just infer from the lack of express qualifications about karst landscape or some other micro-aspect of environmental science. There could be tens of thousands of sub-fields which could be said to arise in any given application, and could not have been the intention of the European legislature to create a cottage industry for applicants by requiring expertise at this level of sub-detail in the absence of discharging an onus that the board has failed to take some step or understand some point that an expert would have taken or understood. The repeated complaint of lack of reasons adds nothing – it is for an applicant to demonstrate a lack of expertise on the part of a

decision-maker, not for the latter to prove her own competence to an applicant's satisfaction (an impossible standard).

93. In addition, as the Commission points out, experience as opposed to mere qualifications can qualify someone as an expert. That is only common sense anyway, especially in a changing field such as environmental assessment. If there is a spectrum of disciplines from the more static, say Euclidian geometry, Gregorian chant or Latin grammar for the sake of argument, up to the most dynamic, say generative artificial intelligence, the field of planning and the environment has got to be in the more dynamic half of the curve. That's not to suggest that apparently static fields don't actually evolve – they do – and nor is it to denigrate more gently moving disciplines at all or traditionalists in any context – indeed there's much to be said for comfort zones. But what one learns in formal qualifications in a dynamic area is going to be out of date in practice fairly quickly, so going by qualifications alone isn't going to get us very far.

94. The applicants are correct about two points however.

95. The first point is insofar as they argued that the board has a "positive obligation" to satisfy themselves that they have the correct expertise, and indeed that whatever expertise the board has, it has to be sufficient to evaluate the material before it. I would accept that insofar as it relates to the decision-making process because that follows from the directive. In that context it is only one of a lot of positive obligations imposed on the board by both domestic and EU law. But what doesn't follow is that a positive obligation *in the administrative process* translates into a positive obligation *in the forensic context* merely because somebody challenges a decision. On the contrary, the onus of proof in judicial review is on an applicant to prove otherwise. There's a mountain of authority on the onus of proof (see recently for example discussion in *Sherwin v. An Bord Pleanála* [2023] IEHC 26, [2023] 1 JIC 2701 (Unreported, High Court, 27th January 2023) at para. 85 and authorities cited, particularly *per* Denham J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701, [2011] 2 I.L.R.M. 157 at 743).

96. The applicants, understandably, ask "how do I disprove that?" Actually that isn't at all impossible. I appreciate it's hard to answer that without being accused of advising an applicant's proofs, but let's just take it as a hypothetical. Let's assume that sufficient expertise involves an awareness of the relevant scientific standards required to evaluate the factual issues. If an applicant has a qualified witness who says that a board with sufficient expertise in subject X would have been aware that the national or international scientific standard would be to take investigative or analytical step Y or to have a particular specified piece of expertise Z, then an applicant can call on the board to ask if they were aware of or implemented Y or Z, and if the reply is not so, then the applicant can put its expert up on affidavit to say that the board's expertise was therefore insufficient. Maybe that will be contested in which case one might have to get into cross-examination. But these applicants didn't do any of that. Such a procedure is valid and necessary because otherwise there would not be a facility for scrutiny of actually unqualified decision-makers, which could lead to all sorts of issues. But in that context the question would not be whether the hypothetical applicant's expert was more qualified than the decision-maker. It would be the question of fact as to whether the applicant had shown that the baseline threshold of sufficient expertise had not been met.

97. Also, a lack of sufficient expertise isn't to be confused with merely getting something wrong. A qualified person can be found to be incorrect, especially in grey areas where there is an evaluative judgement or no clearly established answer. That's just the nature of human existence in general and decision-making in particular. Indeed there are many areas of life where there are no "wrong" answers, just different answers – matters of art, culture, taste, style and creative expression come to mind (a point made by writers through the ages, of whom three examples may suffice: Michel de Montaigne, who made it a central pillar of his *Essais* (1580), Horatius Montanus, who made a legal aphorism of it in 1628, and Harry Chapin, who based a poignant 1978 folk song on the concept). Relatedly, getting something wrong isn't to be equated with bias, for example. Nonetheless, it's important to recognise that the expertise of the board is a jurisdictional fact, not a substantive judgment on the merits. So if in that event the opposing parties might suggest that the board's assertion of their own expertise has to be dislodged on an unreasonableness standard rather than only on a balance of probabilities basis, that is implausible. Such a demanding test might raise issues of whether enforcement of EU law would become excessively difficult and conflates the issues of whether a person *has* or whether she *thinks she has* expertise, by analogy with Lord Atkin (diss.) in *Liversidge v. Anderson* [1941] UKHL 1, [1942] AC 206.

98. The fact that the applicants raised the board's alleged lack of expertise in their submission to the board doesn't mean that they don't have the onus of proof in this case. The fact that the board didn't bring in an external expert or experts on hydrology or ornithology or anything else this time even though they did in a previous application on this site doesn't have that implication either.

99. The applicants on the pleaded case also seem to make the point that the decision is so flawed that it has the necessary implication that the board lacked expertise. While there is a basic distinction between lacking expertise and getting things wrong, just as there is between bias and

merely erring, the two are not as absolutely watertight as the State appeared to be contending. At the extremes there is a rough justice to the applicant's argument, much as one might, for example, infer from hearing someone make a comment that misunderstands or confuses legal fundamentals that the speaker probably doesn't have a great deal of legal expertise. But ultimately the argument under this sub-heading doesn't get the applicants very far, as the State correctly submitted. If the decision is actually flawed they will win under that heading. It doesn't particularly matter if the error is so bad that they also win consequentially under the heading of inferred lack of expertise. Conversely, if there is no other error in the decision the complaint doesn't arise under this aspect of the expertise argument.

100. The second point on which I agree with the applicants is insofar as they made the point that the determination of expertise should be made on a case-by-case basis rather than on an overall basis. That is a valid point but it isn't a pleaded complaint. The complaint is that the board didn't have the expertise, not that it didn't lawfully satisfy itself on a case-specific basis as to its expertise in relation to the particular environmental report (which is in fairness what art. 5(3) of the directive does in effect say). The board's essential reply seemed to be that by not calling in external experts the board was implicitly satisfied as to its own expertise in the given case. That isn't totally implausible as an answer but had the issue been expressly raised on the pleadings the defence could have been developed evidentially rather than just by implication. That's not to say that implication would have necessarily been insufficient – we can leave that debate to a case where the point properly arises.

101. Ultimately the problem for the applicants is that the rule that an applicant in judicial review bears the onus of proof complies with EU law in that it satisfies the principle of equivalence as between national and EU obligations, and it also satisfies the principle of effectiveness in that it doesn't make the enforcement of EU law either impossible or excessively difficult.

102. The board also makes the point, I think validly, that not only is there no positive evidence of insufficient expertise now, but there wasn't much of an attempt to show that as of the date on which the proceedings were launched. The applicants didn't specify the board members' identities in the original pleadings which made it implausible for them to complain about the board's qualifications at that point. Accordingly they call the complaint "speculative", and I am afraid that looks like a fair comment in the circumstances.

Core ground 14 – defective EIA/AA – removal of doubt

103. Core ground 14 is:

> "14. The impugned decision of the Board is invalid as the Appropriate Assessment did not comply with Art 6(3) & 12 of the Habitats Directive ~~or the High Court decisions delivered in this country~~ by failing to include sufficiently precise findings and by failing to remove all scientific doubt by failing to consider or properly consider observations that raised scientific doubt."

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

> "Core Ground 14:
>
> a) APPLICANTS SUMMARY OF CORE GROUND 14
>
> 73. The Applicants' submissions address "Inadequate Assessment of connectivity between sites" as issue 4.
>
> 74. This issue is directly raised at:
>
> a. Core Ground 9 §§ 45 - 47
>
> b. Core Ground 14 §§ 80 - 95.
>
> 75. The Board failed to assess properly or adequately the broader connectivity effects of the development in relation to inter alia ex situ feeding sites and/or failed to give adequate reasons for a conclusion that there would be no adverse impacts. The Board inadequately assessed the impact of the development on species in ex-situ locations, i.e. species that use lands outside of designated areas. Species or habitats that are intrinsically linked to and support the qualifying interests (Qls) or special conservation interests (SCIs) of a European site (SAC/SPA) but that occur outside of that specific European site must also be assessed for potential impacts from a proposed development. The submissions of the DAU and the Council addressed connectivity between the development and, inter alia, potential ex-situ impacts to Whooper Swans, the same being a qualifying interest of the River Suck Callows SPA. The board failed to assess or give reasons for a conclusion of no impact in relation to the same.
>
> 76. The Applicants' submissions address 'Inadequate assessment on fauna, flora including birds as issue 5'.
>
> 77. This issue is directly raised at:
>
> a. Core Ground 7 §§ 43 & 44
>
> b. Core Ground 14 §§ 79 -98 & 105.

78. The inspector concluded for the purpose of EIA at pg. 114 that the proposed development '… would not have any significant, adverse, long term residual impacts on any sensitive sites, habitats, flora or fauna in the area, subject to full implementation of EIAR mitigation measures, any recommended conditions and adherence to best guidance' This conclusion is not supported by the evidence and/or the inspector and the Board failed to give adequate reasons to explain such conclusion and/or did not take into account a relevant consideration.

79. The proposed development involves the permanent loss of sensitive land namely Karst landscape and also involves the loss of 2.7ha of Annex 1 priority grassland habitat. The Board failed to give adequate reasons for a conclusion that the same was not a significant long term negative impact and the Board failed to consider the DAU submission to the effect that the replacement plan would 'decades or more' to become equally valuable.

80. The Board further failed to consider the impact that the loss of grassland would have on botanical species such as orchid and also the Marsh Fritillery Butterfly. The development involves hedgerow removal, and the Board further failed to assess the impact of the same on yellowhammer. The Board further failed to assess adequately the impact of the development on bats. The foregoing issues were raised in the DAU submission.

(b) BOARD RESPONSE TO CORE GROUND 14

81. The Board's Decision is not invalid as alleged at Core Ground 14. The premises of the Applicants' complaints at Core Ground 14 are not accepted. In that connection, the Board disputes the interpretation and legal significance of the Board's Decision and the documents and materials that were before the Board as pleaded by the Applicants, in circumstances where such documents are open to being interpreted a way that makes sense and is valid rather than invalid. The Board's Decision complied with the relevant legal principles on reasons and the AA and EIA that the Board completed in respect of the proposed development was carried out in accordance with the requirements applicable to that assessment. As regards AA (which Core Ground 14 purports to relate to) the Board's conclusions for AA purposes were open to it on the basis of the materials that were before it. As regards AA, the Applicants have not demonstrated that the evidence and materials that were before the Board were so flawed on their face that a reasonable expert would have objected to them. The legal burden of demonstrating the invalidity of the Board's Decision, including as regards grounds of challenge regarding AA, rests with the Applicants and has not been met here. There is no evidence to support a contention that the proposed development risks impacting bats in a manner that would breach Article 12 of the Habitats Directive. Core Ground 14 and the related pleas at §71 to §108 involve a merits-based disagreement (advanced on the basis of non-expert assertion and supposition) with the result of the AA in the context of judicial review, which is not permissible nor a basis for certiorari of the Board's Decision or any other relief. The Board relies on the relevant pleas in its Statement of Opposition in response and opposition to Core Ground 14.

(c) NOTICE PARTY RESPONSE TO CORE GROUND 14

82. Core Ground 14 is simultaneously unparticularised and prolix, replete with extensive quotations from irrelevant documents and inappropriate legal submissions. Whilst Core Ground 14 is pleaded as an Article 6(3)/Appropriate Assessment challenge, almost none of the issues raised by the Applicants are in any way relevant to any European site or any conservation objectives or Qualifying Interests [QIs] of such sites. It is not possible in a Statement of Case to respond to the broad disparity of issues lobbed indiscriminately by the Applicants into Core Ground 14. Without prejudice to that contention, the NIS and supporting documentation was based on the best scientific knowledge in the filed in circumstances where that documentation was prepared by relevant experts (including in relation to ornithology, fauna and flora). The Board and the Inspector's conclusions as to the adequacy of the NIS and supporting documentation, including as to the use of best scientific information and knowledge is a matter within the expertise of the Board and reviewable by the courts on the ground of irrationality alone."

105. Failure to remove doubt (on any of the bases referred to, including for example in-combination effects) has to be established evidentially – and, as before, through the primary frame of reference of what was before the board at the time, together with what can be evidentially demonstrated as something the board was obligated to consider autonomously. The applicants haven't achieved this. They carry the onus of proof in that regard which they haven't discharged on this or any of the other merits-based issues.

Core grounds 2 and 15 – making available of additional information

106. Core ground 2 is:

"2. The impugned decision of the Board is invalid as the Applicants were denied the opportunity to address and/or make submissions on an approximately 400-page Notice

Party submission to the Board in March 2023 and the Board therefore acted in breach of s.37F(2) & 131 of the PDA 2000 and/or Article 218(1)(b) of the PD Regulation 20001 as amended and/or acted in breach of fair procedures and/or natural and constitutional justice."

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

"Core Ground 2:

(a) APPLICANT'S SUMMARY OF CORE GROUND 2

8. See Core Ground 15

(b) BOARD RESPONSE TO CORE GROUND 2

9. The Board's Decision is not invalid as alleged at Core Ground 2. No particulars are provided in relation to this ground at §10 at E(Part 2) of the Amended Statement of Grounds. Insofar as pleas relating to Core Ground 2 are advanced at §§109 - 114 at E(Part 2) of the Amended Statement of Grounds in relation to Core Ground 15, the Board relies on its pleas made in opposition and response to Core Ground 15 by way of opposition and response to Core Ground 2 also.

(c) NOTICE PARTY RESPONSE TO CORE GROUND 2

10. This Core Ground is devoid of substance and there is nothing for the Notice Party to dispute."

108. Core ground 15 is:

"15. The impugned decision of the Board is invalid as the Applicants were wrongly denied the opportunity to address an approximately 400-page Notice Party submission to An Bord Pleanála in March 2023 and accordingly the Appropriate Assessment was carried out in breach of s.177V of the PDA 2000 and Art 6(3) of the Habitats Directive and/or an EIA was not validly carried out in breach of s.172(1) of the PDA 2000 and Art 2, 4 & 5(3)(b) of the EIA Directive and the Board acted in breach of s.37F & 131 of the PDA 2000 and/or Article 218(1)(b) of the Planning Regulations 2001 and/or acted in breach of fair procedures and/or natural and constitutional justice."

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

"Core Ground 15:

(a) APPLICANTS SUMMARY OF CORE GROUND 15

83. The Applicants' submissions address the issue of 'Failure to invite submissions on further information/revised plan/fair procedures' as issue 1. This issue is directly raised at Core Ground 15.

84. This issue / ground is involved and cannot easily be reduced to a short explanation save at a high of abstraction. Put simply, the Applicant asserts that the Board failed to consult or adequately consult on a post consultation submission/further information that it received from the Notice Party – 'the 31 March 2023 Submission'.

85. After the consultation procedure concluded the Board decided that an oral hearing was not necessary, that it had sufficient information to determine the case, and it invited the Notice Party to reply to third party observations. The notice party replied by providing a document, 'the 30 March 2023 Submission'. The same comprised of a set of revised plans/drawings, a substantive document that included, inter alia, replies to third party observations, and four appendices thereto that included three updated birds' surveys. The submission noted that it contained significant additional information (the scope of which is likely contested). It further noted that the DAU observation referred to birds' data that was not considered in the EIAR, that the DAU would not provide the same save, to put the matter neutrally, in the context of a request for further information by the Board, and that it could not reply to the said observation without the said data. The submission suggested that the Board facilitate the provision of the said DAU data (and a submission/reply by the Notice Party thereto), and thereafter make a request for all the relevant further information with a view to carrying out a single consultation. The Board thereafter made a request for further information that related solely to the DAU data and a reply thereto. The Notice Party obtained the said data and submitted a reply to the same to the Board ('the July 2023 FI Reply'). The Board then directed publication.

86. There is, inter alia, an issue as to the scope of consultation that the Board was required to direct, the scope of consultation that the Board in fact directed, the scope of consultation that was actually carried out by the Notice Party, and an issue as to whether the Notice Party complied with relevant statutory obligations including an obligation to place the documents the subject of the consultation on the planning authority's file. Whether or not intended by the Board, the public consultation and documents made available to facilitate such consultation by the developer, only related to the DAU data (July 2023 data) and not to the full 30 March submission/revised plans. The public notice does not refer to the same and the documents made available at all required locations did not extend to the 30 March information. The developer may have misinterpreted the Board's direction but as a matter

of fact insofar as it was intended by the Board to extend to the 30 March information, this is [*sic*] did not happen and the Board failed to ensure compliance. This is indicative of the fact that no submissions were in fact made on the 30 March information only on the July 2023 data.

(b) BOARD RESPONSE TO CORE GROUND 15

87. The Board's Decision is not invalid as alleged at Core Ground 15. There has been no breach of sections 37F(2), 131, 172(1), 177V of the 2000 Act or Article 218(1)(b) of the 2001 Regulations, or of Article 6(3) of the Habitats Directive or Articles 2,4 and 5(3)(b) of the EIA Directive, and no breach of fair procedures or natural and constitutional justice, as alleged by the Applicants or at all. The uncontroverted fact (as pleaded and verified in the Notice Party's Opposition papers: §148 of the their Statement of Opposition and §9 of the verifying affidavit of Robert Scott, Chartered Engineer and Head of Development and the Senior Manager in Energia Renewables ROI Limited) is that the March 2023 Response to Observations document, and the July 2023 RFI Response, were both made available on the Notice Party's project website for a period including 1st August 2023 to 5th September 2023. It was also clearly stated in the public notices that submissions or observations on the significant additional information could be made to the Board on or before 5 p.m. on 5th September 2024. The Applicants were not deprived of making a submission on the March 2023 Notice Party response document as alleged or at all. The Applicants' subjective characterisation of the process before the Board is not accurate nor accepted, and their legal submissions and their above assertions in this Statement of Case do not constitute an evidential foundation for the propositions they advance in same.

88. Contrary to the incorrect premise of Core Ground 15 and Core Ground 2 at all material times it was open to the Applicants to make submissions on the aforesaid March 2023 Notice Party response document in the 5-week period commencing on 1st August 2023 and ending at 5.30pm on 5th September 2023. In circumstances where further submissions were made during that period, including by the second named Applicant, it is denied that there was any breach of the Board's statutory obligations. The fact that the Applicants did not avail of that opportunity to make further or other submissions does not mean that they were unlawfully deprived from doing so, it simply means they didn't do so. The factual response raised by the Board and Notice Party in response to this issue has not been controverted by the Applicants (who bear the burden of proof). Insofar as there is a dispute as to fact on this issue, absent cross-examination, it falls to be determined against the Applicants as the party on whom the onus of proof lay to establish the contested fact.

(c) NOTICE PARTY RESPONSE TO CORE GROUND 15

89. On 31 March 2023, the Notice Party submitted its response to the submissions received on the application, as requested by the Board. The Board did not invite further submissions on the Notice Party's response. It was considered that the information submitted in the Notice Party's response to submission documentation did not give rise to any material changes to the proposed development and that the EIAR and NIS conclusions were not materially altered. Such a conclusion was open to the Inspector on the basis of the materials before the Board, having regard to the expertise of the Board and its Inspector in the exercise of their respective judgement.

90. The Board is not obliged to provide an opportunity for further submissions on a response to submissions and observations on a planning application. The Applicants have failed to demonstrate any particular prejudice arising from the alleged deprivation of an opportunity to make additional submissions in response to the Notice Party's response to the previous submissions and observations. The First Applicant did not make any submission on observation on the planning application, in his own name or on his own behalf, when he did have the opportunity to do so. Moreover, the Applicants have not identified any additional submissions which they would have made, or identified the manner in which such additional submissions may have altered the assessments carried out by the Board."

110. Section 37F(1) and (2) provide:

"37F.—(1) Before determining any application for permission under section 37E the Board may, at its absolute discretion and at any time—

(a) require the applicant for permission to submit further information, including a revised environmental impact statement,

(b) indicate that it is considering granting permission, subject to the applicant for permission submitting revised particulars, plans or drawings in relation to the development,

(c) request further submissions or observations from the applicant for permission, any person who made submissions or observations, or any other person who may,

in the opinion of the Board, have information which is relevant to the determination of the application,

(d) without prejudice to subsections (2) and (3), make any information relating to the application available for inspection, notify any person or the public that the information is so available and, if it considers appropriate, invite further submissions or observations to be made to it within such period as it may specify, or

(e) hold meetings with the applicant for permission or any other person—

(i) where it appears to the Board to be expedient for the purpose of determining the application, or

(ii) where it appears to the Board to be necessary or expedient for the purpose of resolving any issue with the applicant for permission or any disagreement between the applicant and any other party, including resolving any issue or disagreement in advance of an oral hearing.

(2) Where an applicant submits a revised environmental impact statement to the Board in accordance with subsection (1)(a) or otherwise submits further information or revised particulars, plans or drawings in accordance with subsection (1), which, in the opinion of the Board, contain significant additional information on the effect of the proposed development on the environment to that already submitted, the Board shall—

(a) make the information, particulars, plans or drawings, as appropriate, available for inspection,

(b) give notice that the information, particulars, plans or drawings are so available, and

(c) invite further submissions or observations to be made to it within such period as it may specify."

111. As noted above, on 25th January 2023, the board requested that the first named notice party provide replies to the third party observations.

112. The first named notice party replied by way of a submission of 31st March 2023.

113. On 13th June 2023, the board wrote to the developer:

"MKO
Planning & Environmental Consultants Tuam Road
Galway
Co. Galway H91 VW84
Date: 13 June 2023
Re: Wind Farm Development and all associated works.
Cuilleenoolagh and other townlands, Co. Roscommon
Dear Sir/ Madam,

I have been asked by An Bord Pleanala to refer further to the above mentioned proposed development which is before the Board for consideration.

Please be advised that the Board, in accordance with section 37(F)(1) of the Planning and Development Act, 2000, as amended, hereby requires you to furnish the following further information in relation to the effects on the environment of the proposed development:

1. The Applicant shall liaise with the Department of Housing, Local Government and Heritage, Development Application Unit (DAU) in relation to acquiring copies of the additional data held by it in relation to Greenland white-fronted goose, Whooper swan and Black-headed gull, as referred to in the submission received by the Board from the DAU on 2nd August 2022.

Any resultant changes to the EIAR or NIS analysis and conclusions shall be clearly set out in the response to this request

The further information referred to above should be received by the Board within 4 weeks from the date of this notice (i.e. no later than 5.30 p.m. on the 10th July, 2023).

In this regard, please submit 2 hard copies and one electronic copy of the above information.

Please note that following its examination of any information lodged in response to this request for additional information, the Board will then decide whether or not to invoke its powers under section 37(F)(2) of the Planning and Development Act, 2000, as amended, requiring you to publish notice of the furnishing of any additional information and to allow for inspection or purchase of same and the making of further written submissions in relation to same to the Board.

If you have any queries in relation to the matter please contact the undersigned officer of the Board. Please quote the above mentioned An Bord Pleanala reference number in any correspondence or telephone contact with the Board.

Yours faithfully,"

114. The request for further information was copied to interested parties including the second named applicant:

"Wind Turbine Action Group South Roscommon c/o John Joe Kennedy
[address]
Co. Roscommon
Date: 13 June 2023
Re: Wind Farm Development and all associated works.
Cuilleenoolagh and other townlands, Co. Roscommon
Dear Sir/ Madam,
I have been asked by An Bord Pleanala to refer to the above-mentioned case.
Please find enclosed a copy of a further information request issued by the Board, which is being forwarded to you for information purposes only.
If you have any queries in relation to the matter please contact the undersigned officer of the Board.
Please quote the above-mentioned An Bord Pleanala reference number in any correspondence or telephone contact with the Board."

115. Following receipt of the second tranche of further information, the board then wrote to the first named notice party on 19th July 2023 asking the first named notice party to give notice of the information:

"Date: 19 July 2023
Re: Windfarm development and all associated works.
Cuilleenoolagh and other townlands, Co. Roscommon.
Dear Sir / Madam,
I refer to the additional information received by the Board in relation to the likely effects on the environment of the above-mentioned proposed development. Please be advised that the Board considers that this additional information contains significant additional data in relation to the effects on the environment of the proposed development and it therefore requires you in accordance with subsection 2(b) of 37F of the Planning and Development Act 2000, as amended, to:
(a) publish in one or more newspapers circulating in the area in which the proposed development would take place a notice stating that significant additional information in relation to the said effects has been furnished to the Board, that the additional information will be available, for inspection or for purchase (upon payment of a specified fee not exceeding the reasonable cost of making a copy), at a specified place and at specified times during a specified period, and that submissions or observations in relation to the additional information may be made in writing to the Board before a specified date, and update the stand-alone website stating that the additional information can be downloaded, and
(b) send notice of the furnishing to the Board of significant additional information and a copy of the additional information, to the planning authority and to the prescribed bodies stating that submissions or observations in relation to the additional information may be made in writing to the Board before a specified date.
In respect of (a) above the notices should be published in the same newspapers in which notices of the original application was advertised and the additional information should be made available for inspection or purchase at the same locations at which the original application documentation was available. In respect of the time limits for the making of submissions or observations in relation to the additional information to the Board under (a) and (b) above please indicate the specified time limit for the receipt of submissions to be not later than 5 weeks from the date of the newspaper notice. You should submit the relevant newspaper notices and a copy of any notices issued under (b) above to
the Board as soon as same are available.
Your response to this letter should be received not later than 5.30 p.m. on the 16th August 2023.
If you have any queries in the meantime, please contact the undersigned officer of the Board or email …@pleanala.ie quoting the above mentioned An Bord Pleanala reference number in any correspondence with the Board.
Yours faithfully,"

116. Simultaneously the board wrote *inter alia* to the second named applicant informing them that this letter had been issued:

"Wind Turbine Action Group South Roscommon c/o John Joe Kennedy
[address]
Co. Roscommon
Date: 19 July 2023
Re: Windfarm development and all associated works.
Cuilleenoolagh and other townlands, Co. Roscommon.
Dear Sir/ Madam,

I refer to the above-mentioned proposed development.
Please be advised that the Board has received specified additional information from the applicant with regard to this case.
Enclosed for you information is a copy of the letter issued to the applicant by the Board in accordance with the provisions of section 37(F) of the Planning and Development Act 2000, as amended. This letter requires the applicant to publish notice of the further information and to make same available for inspection and/or purchase. It also requires that such notices will enable written submissions in relation to the further information be made to the Board before a date to be specified in the notice.
If you have any queries in the meantime, please contact the undersigned officer of the Board or email ...@pleanala.ie quoting the above mentioned An Bord Pleanala reference number in any correspondence with the Board.
Yours faithfully,"

117. While phrased in terms of a "require[ment]", the opposing parties accept that s. 37F(2)(b) doesn't given the power to the board to require the first named notice party to do anything. So legally this purported requirement should be viewed as equivalent to a request, and the opposing parties didn't object to that characterisation.

118. The upshot is the board did not, as s. 37F(2) states, itself give notice of additional information. Rather the board asked the developer to publicise the material.

119. The notice published by the first named notice party in the *Roscommon Herald* is representative of the public notice given on 1st August 2023 through other means also:

"PLANNING AND DEVELOPMENT ACTS 2000 TO 2022
THE SUBMISSION OF SIGNIFICANT ADDITIONAL INFORMATION IN RELATION TO A DIRECT PLANNING APPLICATION TO AN BORD PLEANÁLA IN RESPECT OF A STRATEGIC INFRASTRUCTURE DEVELOPMENT UNDER REFERENCE NUMBER ABP-313750-22
Roscommon County Council
In accordance with sub-section 2(b) of 37F of the Planning and Development Act, 2000 as amended, Energia Renewables ROI Ltd, give notice of its furnishing of significant additional information to An Bord Pleanála for a ten-year planning permission for the following development in the townlands of Turrock, Cronin, Gortaphuill, Glenrevagh, Tullyneeny, Bredagh, Cuilleenirwan, Cuilleenoolagh, Curry, Milltown, Tobermacloughlin, Skeavally, Boleyduff, Clooncaltry, Feacle, Cam, Tawnagh, Cornageeha, Pollalaher, Brideswell, Knocknanool, Ballymullavill, Rooskagh, Bellanamullia, Cloonakille, Monksland and Commeen, Co. Roscommon. The development will consist of the following:
I. 20 no. wind turbines with an overall ground to blade tip height of 180 metres, a rotor diameter of 162m and a hub height of 99m, associated foundations, hardstanding areas
II. 15 no. spoil storage areas at hardstands of turbines no. 1, 2, 3, 4, 5, 6 and 7 (in the townlands of Turrock, Gortaphuill, Cronin, and Tullyneeny) and turbines no. 8, 10, 11, 13, 14, 17, 19 and 20 (in the townlands of Milltown, Cuilleenoolagh, Cloonacaltry, Feacle and Tawnagh)
III. Provision of 1 no. permanent meteorological mast with a maximum height of 100 metres for a period of 30 years from the date of commissioning of the entire wind farm
IV. Provision of 1 no. 110kV onsite substation in the townland of Cam, along with associated control buildings, MV switchgear building, associated electrical plant, associated security fencing, and equipment and wastewater holding tank
V. All underground electrical and communication cabling connecting the proposed wind turbines to the proposed onsite substation and associated control buildings and plant
VI. All works associated with the connection of the proposed wind farm to the national electricity grid via underground 110kV cabling from the site to the existing Athlone 110kV substation located in the townland of Monksland. Cabling will be placed within the public road corridor of the R362, R363 and L2047, or on private land
VII. Upgrade works to the existing 110kVAthlone substation consisting of the construction of an additional dedicated bay to facilitate connection of the cable
VIII. Provision of 2 no. new site accesses north and south from the R363 and upgrade of 1 no. junction south of the R363
IX. Provision of new access tracks/roads and upgrade of existing access tracks/roads X. 7 no. overburden storage areas
XI. 2 no. temporary construction compounds
XII. Site drainage works
XIII. Operational stage site signage
XIV. All associated site development works, apparatus and signage
This application is seeking a ten-year planning permission and 30-year operational life from the date of commissioning of the entire wind farm.

An Environmental Impact Assessment Report (EIAR) and Natura Impact Statement (NIS) have been prepared in relation to the project and accompanies this planning application.
This significant additional information, together with the original planning application documentation, EIAR and NIS, may be inspected free of charge or purchased (on payment of a specified fee not exceeding the reasonable cost of making a copy) during public opening hours for a period of 5 weeks commencing on the 1st of August 2023 at the following locations:

- The Offices of An Bord Pleanála, 64 Marlborough Street, Dublin 1, D01V902 (9:15am–5:30pm, Monday-Friday)
- The Offices of Roscommon County Council, Aras an Chonate [*sic*], Roscommon, County Roscommon, F42VR98 (9:30am–1pm; 2:00pm-4:30pm, Monday-Friday)

The documentation may also be viewed/downloaded on the following website: www.sevenhillswindfarm.ie
Submissions or observations in relation to the significant additional information may be made only to An Bord Pleanála (The Board), 64 Marlborough Street, Dublin 1 in writing or at www.pleanala.ie relating to:

(i) The implications of the proposed development for proper planning and sustainable development of the area.
(ii) The likely effects on the environment of the proposed development.
(iii) The likely significant effects of the proposed development on a European site, where applicable.

Any submissions/observations must be accompanied by a fee of €50 (except for certain prescribed bodies). There is no fee required to make a submission in relation to those parties/individuals who have already made a valid written submission to the Board regarding the application. Submissions or observations must be received by the Board no later than 5.30 p.m. on the 5th of September 2023. Submissions/observations must also include the following information:

(i) The name of the person making the submission or observation, the name of the person acting on his or her behalf, if any, and the address to which any correspondence relating to the application should be sent.
(ii) The subject matter of the submission or observation and
(iii) The reasons, considerations and arguments on which the submission or observation is based in full. (Article 217 of the Planning and Development Regulations 2001, as amended, refers)

Any submissions or observations which do not comply with the above requirements cannot be considered by the Board.
Any enquiries relating to the significant additional information should be directed to the Strategic Infrastructure Section of An Bord Pleanála (Tel: [no. provided]).
A person may question the validity of any such decision by the Board by way of an application for judicial review, under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986, as amended by S.I. No. 691 of 2011) in accordance with section 50 of the Planning and Development Act, 2000, as amended.
Practical information on the review mechanism can be accessed under the heading information on Legal Notices–Judicial Review Notice section of the Board's website (www.pleanala.ie) or on the Citizens Information Service website www.citizensinformation.ie"

120. The first named notice party wrote to the board in the following terms on 1st August 2023:
"1st August 2023
ABP-313750-22
Re: Section 37E Application to An Bord Pleanála for a Wind Farm Development & Associated Works, at Cuilleenoolagh and other townlands, County Roscommon, ABP-313750-22 - Significant Further Information.
Dear Sir/Madam,
I refer to the above-noted case and the letter from the Board requesting the Further Information lodged be advertised. I can confirm that that the Further Information has been advertised as follows:

- The Roscommon Herald, dated 1st August 2023.
- The Irish Examiner, dated 1st August 2023.

A copy of the relevant page of each of the above newspapers is enclosed with this letter. Site notices have also been erected across the site. A copy of this site notice is enclosed with this letter.
The project website – www.sevenhillswindfarm.ie – has been updated with the Further Information detail and copies of the relevant notices set out above.

I can confirm that Roscommon County Council and the Prescribed Bodies have been furnished with a copy of the Further Information and advised of how and where submissions can be made.

It is noted that the Board experiences significant delays in determination of cases before it, with no decision on Strategic Infrastructure Development (wind energy) applications undertaken since September 2022. In the context of the current climate change targets and recent Climate Action Plan Progress reporting calling for acceleration of climate action, the proposals offer a significant contribution to the Nation's renewable electricity targets, as fully detailed within the application documentation.

We reiterate the zoning of the application site for wind energy within the County Development Plan, the scale and size of the proposed development and its ability to directly contribute in excess of 100 Megawatts of renewable energy to overall contribution targets.

We request that the Board's resources be deployed for immediate attention to this application, particularly in the context of upcoming Commission for Regulation of Utilities Enduring Connection Policy application connection deadlines (ECP2.4) in November 2023 as an associated delivery mechanism

I trust the information is sufficient for your needs. Should there be anything further please do not hesitate to get in touch."

121. Insofar as this refers to the *Irish Examiner* that was an error. We will come back to that.

122. The first named notice party wrote to the council and presumably to other statutory consultees enclosing not the notice but a copy of the July 2023 information, but not the March 2023 information. That would have naturally had the effect that the statement that the additional information (insofar as it related to the March information) would be available in the council's offices wasn't correct either.

123. The first named notice party avers that the March 2023 response to observations document, and the July 2023 RFI response were both made available on the first named notice party's project website for a period including 1st August to 5th September 2023. The applicants haven't displaced that evidentially.

124. The first question is **the extent to which the complaint is pleaded**. The applicants haven't pleaded that they themselves were disadvantaged so the point ends there. The plea relates to "the public" – ground 111:

"111. The Application was made pursuant to Section 37E of the Planning and Development Act 2000 (as amended) and are required to comply with the obligations contained in Act. In March 2023 the Notice Party allegedly submitted a 400+ page package to An Bord Pleanála which, among other things included drawings that revised the size of the foundation of the turbines from 15 metres to 29 metres, an increase of over 93%, a very significant increase – an increase that could require 4 times more concrete than the original Application. The Notice Party allegedly informed An Bord Pleanála it believed the additional information was significant with regard to the Application; nonetheless, and despite Section 37F(1)(d) facilitating such, An Bord Pleanála did not make the information, particulars, plans or drawings available for inspection; did not give notice that the information, particulars, plans or drawings were available, and did not invite further submission or observations to be made. An Bord Pleanála denied the public the opportunity to comment on a very significant change to the Application, in addition to denying the public the opportunity to address for the first time other new information submitted by the Notice Party."

125. They also say that "the community" should have had the opportunity to comment:

"110. The community was not notified of the request from An Bord Pleanála to the Notice Party allegedly in January 2023, indeed even today the community has not seen that letter despite searching the website of An Bord Pleanála and also visiting in-person the offices of the Roscommon County Council. The submission raises even more questions and highlights the need for concern as to adverse impacts to the townlands that are the subject of Planning Application Reference Nos. ABP-313750 and 313750-22. For example, the document purporting to be submission, available on the website www.sevenhillswindfarm.com states: a 15 m foundation would give rise to 179,095 tonnes of CO2, and 29 m foundation will only increase the CO2 by 107 tonnes, i.e., a 0.06% increase. While no foundation depth is provided in the Application, and indeed cannot be because the actual turbine has not yet been identified, assuming as an example for calculation purpose the depth of the foundation is 12 metres, then the volume of concrete foundation with 15 m diameter and 12 m height = 2120.58m3; volume of foundation with 29 metres diameter and 12 metre height (assuming no additional depth for wider foundation) = 7926.24m3. Notwithstanding the cement industry is one of the main producers of CO2, according to the Notice Party, increasing the volume of concrete at least almost 4-fold will only increase the development's CO2 by 0.06%. The Notice Party fails to explain this highly questionable lack of increase

> and the Inspector also fails to address it or provide reasoned conclusions as to why it is acceptable. The community should have had an opportunity to respond to the Notice Party's second bite at the apple."

126. There is also a general assertion (not a roadmap from breach to *certiorari*) that "prior observers" weren't consulted, but that is quite different to a claim of prejudice to the applicants themselves:

> "113. Furthermore, the Notice Party stated on page 3 of the submission that drawings revising the diameter of the foundation were being submitted in response to an observation; however, the 15-metre diameter foundation was not raised in an observation. The Notice Party also stated in the submission on page 3 that it 'considers the additional information on the effect of the Proposed Development on the environment contained in this submission to be significant and, as such, requests that the Board hold a further period of consultation in respect of same in accordance with section 37F(2) of the Planning and Development Act 2000 (as amended).' Despite this statement, An Bord Pleanála did not engage the community or even prior observers with regard to the voluminous new materials."

127. In any event insofar as the applicants were prior observers they *were* "engage[d] ... with" in general terms which were intended to apply to both sets of additional material.

128. The distinction between impact on the public and impact on the specific applicant is reinforced in numerous decisions where that difference has been pointed out and especially where non-compliance that is pleaded to affect the public rather than the named applicants has been the basis of declaratory relief rather than *certiorari*.

129. Insofar as the pleading objection is relevant here, this complaint was set out in the original statement of grounds as issued within time, in an un-numbered sub-paragraph under ground 17:

> "The Application was made pursuant to Section 37E of the Planning and Development Act 2000 (as amended) and are required to comply with the obligations contained in Act. In March 2023 the Notice Party allegedly submitted a 400+ page package to An Bord Pleanála which, among other things included drawings that revised the size of the foundation of the turbines from 15 metres to 29 metres, an increase of over 93%, a very significant increase – an increase that could require 4 times more concrete than the original Application. The Notice Party allegedly informed An Bord Pleanála it believed the additional information was significant with regard to the Application; nonetheless, and despite Section 37F(1)(d) facilitating such, An Bord Pleanála did not make the information, particulars, plans or drawings available for inspection; did not give notice that the information, particulars, plans or drawings were available, and did not invite further submission or observations to be made. An Bord Pleanála denied the public the opportunity to comment on a very significant change to the Application, in addition to denying the public the opportunity to address for the first time other new information submitted by the Notice Party."

130. So to the extent if any that the pleading objection applied to this particular ground (and I don't think in fact it did), such an objection couldn't in any event succeed because the point was in the case all along.

131. While the applicants made a brave attempt in subsequent argument to fit themselves under the heading of "the public", there is a foundational distinction between a general claim of that nature and a specific claim that one's own rights were affected. A plaintiff in a negligence action arising from a road traffic incident can't rest on a general plea that a defendant's actions caused injury to the public; she has to plead that she was injured, how exactly she was injured, and how such injury arose from the defendant's wrongs. The applicants simply haven't pleaded that they themselves were harmed by the non-compliance by the board with the wording of s. 37F(2).

132. The board cavilled with the applicant's pleaded ground on the technical basis that the content of s. 37F(2) is recited in ground 111 rather than the sub-section being expressly referred to. That is not the board's best point. It's acceptably clear that, by reciting the content of the section, the section itself is being contemplated by the applicants. Acceptable clarity is the standard, not express recital of specific statutory provisions (the same point arose, with the same conclusion, in *Eco Advocacy v. An Bord Pleanála (No. 4)* [2023] IEHC 713 (Unreported, High Court, 18th December 2023) para. 39).

133. As to **whether the non-compliance in any event precluded the applicants from making submissions**, the applicants' complaint in essence that the notice should have expressly covered both tranches of additional information and that a reasonable reader could have misunderstood the notice as referring to only the second tranche of information.

134. But the applicants were made aware of the March 2023 information because it is expressly referred to in the July 2023 information. Indeed, the submission made by the first named applicant on behalf of the second named applicant of 3rd September 2023 quoted from s. 2.1.2.1 of the July RFI response. Section 2.1.2.1 referred back to the March information, stating, *inter alia*:

> "The results of the 2021–22 surveys were submitted with the applicant's Response to Observations Received in March 2023."

135. Ms Burke attempted to comment on the applicants' alleged unawareness of the submission at para. 94 of the contested affidavit, but even if the affidavit had not been struck out *in toto*, this particular averment is hearsay in any event.

136. Six submissions were made on foot of the notice, one of which, from Transport Infrastructure Ireland (**TII**), expressly refers to the March 2023 information:

> "TII notes that the Significant Additional Information comprises a report entitled 'Response to Observations Received' [i.e., the March 2023 information] and applicants response to TII's observations on the initial application dated 6 July, 2022, as set out in Section 2.1.2 of the Report."

137. So both at the level of principle and in practice interested parties had the opportunity to comment on both sets of additional information.

138. Ultimately, while the terms of the notice are sub-optimally unspecific as to the date or nature of the additional information (a consequence of the board's failure to decide itself on the wording of the public notice, leaving all of that to the developer), they are sufficient to put a reasonably diligent person on inquiry. So even if hypothetically the applicants were disadvantaged, they were not unfairly disadvantaged.

139. We then come to the merits question as to **whether there was non-compliance with s. 37F**, or in other words, is the board lawfully allowed by s. 37F to simply pass on its statutory obligations to a private law actor by requesting them to give notice? Not only is this not what the section says, but permissively re-writing the section to allow such a transfer of functions involves a significant loss of public law accountability which is inherent in the section. For good measure, the board is in a quasi-judicial position required to act even-handedly in relation to the various stakeholders with their necessarily varying points of view. Any given developer is one interested party, so requesting such a participant in the process to carry out statutory functions of the board is capable of creating understandable apprehensions on the part of other participants, such as the applicants here – apprehensions which they were diligent to articulate in oral submissions. For the avoidance of doubt we are talking here about the optics of the situation, not actual bias.

140. While the board did ask the first named notice party to use the newspapers in which the original application was advertised, they didn't specify the wording of the notice or all of the details of publication, but left the *actual decisions* on that – not just *execution* of the board's decisions – to a private law entity. Nor did they visibly exercise a whole lot of scrutiny over the detail. As an example of that in the present case, the first named notice party inadvertently gave the board incorrect information as to which newspaper it had advertised in. There isn't any evidence that the board even noticed the contradiction between the cover letter referring to the *Irish Examiner* and the enclosure from the *Irish Times* until the substantive hearing of the present proceedings. Even if someone in the board did notice this, they didn't do anything about it. All of this illustrates that the wording, purpose and principle of s. 37F(2) are consistent to the effect that the steps set out are ones that the board needs to take itself, not to pass on to other actors.

141. Saying that s. 37F(2) means the board has to make the information available doesn't mean it has to do so on its own website, although one might say that that is probably the best way to do so. The means aren't specified in the section, so that is up to the board to some extent, but the section does envisage this being something to be done by the board itself and thus being something over which the board has control and in respect of which the board makes the decisions. The lack of control by the board over the first named notice party's endeavours is illustrated in a number of respects, outlined at para. 147 below.

142. Insofar as the board informed the second named applicant that it had issued the request to the developer, that may go to neutralising any prejudice argument but it doesn't in itself constitute compliance.

143. For all of these reasons I conclude that there was non-compliance with s. 37F as in effect pleaded in ground 111. That doesn't automatically determine the question of what relief should be granted.

144. As to **whether the non-compliance warrants *certiorari***, it would normally (absent an egregious breach of law, which hasn't been demonstrated here) be an improvident exercise of the court's power of *certiorari* to quash a decision merely because some unidentified person could potentially have been misled as to public participation requirements.

145. There's a significant difference between trying to quash something on the basis of breach of objective standards – a decision contravened a development plan or a binding ministerial instrument for example – on the one hand, and on the basis of a breach of rights on the other hand, particularly rights of participation in the process, on the other hand. Rights generally have to be asserted by the rights-holder, at least if the remedy is one with imperative effects such as *certiorari*. Merely declaratory relief in the interest of rule of law considerations is not quite so constrained. But if the

applicants want to quash the decision on the basis of a lack of compliance with public participation requirements, they have to firstly plead, and then evidentially show, that *they themselves* were unfairly disadvantaged. It would be an improvident exercise of the power of judicial review to allow a decision to be quashed on the basis of what would amount to an infringement of the rights of some other party who has not moved the court for relief.

146. On that basis I think *certiorari* would be inappropriate.

147. As regards **whether the non-compliance is one that warrants any other relief**, it seems to me that there is a clear public benefit in clarification of this issue, and formally marking it with a declaration, especially where there isn't anything about the situation here that provides sufficient comfort that the problem would be rectified going forward without being marked in some appropriate way. As noted above, I agree with the opposing parties that in the absence of prejudice it would be inappropriate to grant *certiorari* on the basis of a non-compliance that didn't affect the particular applicants. But in all the circumstances, a declaration is a proportionate and reasonable relief without any undue or indeed any particular impact at all on the first named notice party's rights, something which the first named notice party didn't disagree with. The case for a declaration isn't lessened by the existence of cases in the double figures now where the board in recent years hasn't complied with notification requirements. Maybe the fact that this issue isn't some sort of meaningless side-note is best illustrated by listing the various problems here:

(i) the board didn't itself carry out the statutory functions entrusted to it;
(ii) it purported to issue what it called a requirement under s. 37F to the first named notice party to take various steps, but the section confers no power to issue a requirement to an applicant for permission;
(iii) the published notice mis-spelled the council's address;
(iv) when the first named notice party wrote back to the board as to the steps taken, it incorrectly stated in a covering letter that notice had been published in the *Irish Examiner*;
(v) the board had asked that the notice be published in the newspapers in which the original application was advertised, so should have picked up the inconsistency between the request and the cover letter referring to the *Irish Examiner*, but didn't;
(vi) nor did the board pick up the inconsistency between the cover letter and the actual enclosure which on its face was from the *Irish Times*;
(vii) when the first named notice party wrote to consultees such as the council it only enclosed a copy of the July 2023 information, but not the March 2023 information, contrary to the wording of the letter;
(viii) the board did not appear to pick this problem up either; and
(ix) that omission would have naturally had the effect of rendering incorrect the statement in the public notices to the effect that the additional information (insofar as it related to the March information) would be available in the council's offices – even if all other "delegation" to the developer was permissible, the one thing that can't be gainsaid is that the sort of making available of information that the board has envisaged did not in fact happen due to the failure to include both sets of enclosures with the notifications to the council and others – and such a failure to implement the board's decision regarding notification can't constitute compliance with the section on any view.

148. In the circumstances, such a cascade of problems more than warrants the non-compliance being formally marked with a declaration. In terms of relating this to the pleadings, the basic problem is point no. (i), which is the overarching issue pleaded. The other problems, not specifically referred to in the pleadings, are consequences of that. So it is sufficient to focus a declaration on the issue expressly pleaded, but one can take into account the consequential irregularities as part of the overall circumstances and context in deciding whether relief should be granted in relation to the pleaded headline irregularity.

149. The **conclusion under this heading** is that:

(i) as to irregularities falling outside the pleaded grounds, no relief should be granted;
(ii) as regards irregularities within the pleaded grounds, specifically the failure by the board to carry out its statutory functions as pleaded at ground 111, while there was non-compliance with s. 37F(2), no order of *certiorari* should be granted as the error didn't on the evidence and pleadings give rise to harm to the applicants such as to warrant *certiorari*; and
(iii) however, the pleaded non-compliance does, in the circumstances, warrant being marked with declaratory relief.

150. It seems to me that the appropriate declaration is as follows:

A declaration that insofar as the first named notice party had submitted further information to the board on 31st March 2023 and 7th July 2023, the board failed to comply with its obligation under s. 37F(2) of the Planning and Development Act 2000 to:

(i) make the information available for inspection;
(ii) give notice that the information was so available; and
(iii) invite further submissions or observations to be made to it within such period as it may specify.

Contested amendments

151. In the light of the foregoing, I don't need to make any actual decision on the contested amendments to the statement of grounds because with one exception they don't succeed anyway.

152. The only exception to that is the ground which I am upholding, namely ground 111. In that regard, the complaint *was* contained in the original statement of grounds, so any pleading objection insofar as there was one (which wasn't very far) can't be regarded as valid in respect of the limited point actually being upheld.

Provisional view on costs

153. As regards my provisional view on costs, had the applicants confined themselves to the issue on which they succeeded, the case would have taken one day rather than two days, so the appropriate provisional order would be an order against the board for costs confined to the issue on which they succeeded, and in particular on the basis of a one-day hearing. The costs order can properly be between the applicants and the board alone given that the statutory obligation is the board's.

154. As regards the costs of the discovery and particulars motion, as noted above, the parties seemed to prefer liberty to apply rather than having me give a provisional view.

Summary

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

(i) the last-minute affidavit of Ms Burke on behalf of the applicants, in a context where directions permitted only a reply, is so permeated with non-replying and/or inadmissible material that it should be excluded *in toto*, because allowing the applicants to comb through it mid-hearing for admissible fragments would be unfair to the opposing parties;
(ii) in the absence of patent error on the face of the material, applicants bear the onus of proof to demonstrate, on the basis of admissible evidence within the pleaded grounds, that there was a flaw in the decision-making process, generally by reference to what was before the decision-maker or breach of an autonomous obligation;
(iii) the applicants have failed to discharge this onus generally;
(iv) in particular as regards defects in the assessments, or the alleged lack of expertise of the board, that has to be demonstrated evidentially to the appropriate standard, which has not been done here;
(v) the complaint of lack of particulars of the application is misconceived because any flexibility in the design parameters of this project was not excessive, and in any event because the change in base dimensions was an error correction, not an expansion of the application;
(vi) insofar as concerns giving notice of and making available additional information, the board failed to comply with s. 37F(2) in that rather than carry out the functions thereby imposed, it purported to require the first named notice party to deal with these statutory functions assigned to the board; and
(vii) that failure did not give rise to any duly pleaded and evidenced harm to the applicants' participation in the process, and in the circumstances the non-compliance is best marked with declaratory relief rather than *certiorari*.

Order

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

(i) there be a declaration that insofar as the first named notice party had submitted further information to the board on 31st March 2023 and 7th July 2023, the board failed to comply with its obligation under s. 37F(2) of the Planning and Development Act 2000 to:
    (a) make the information available for inspection;
    (b) give notice that the information was so available; and
    (c) invite further submissions or observations to be made to it within such period as it may specify;
(ii) the application for the remaining substantive relief sought be dismissed;
(iii) unless any party applies otherwise by written legal submission within 14 days from the date of this judgment, the foregoing order be perfected forthwith thereafter on

the basis that there be an order for costs (including the costs of written submissions and certifying for two counsel in respect of all relevant court applications not including the motion for discovery and particulars) to the applicants against the first named respondent in respect of the proceedings, limited to the costs that would have been incurred had the applicants confined their proceedings to the issue on which they prevailed, but including in particular the costs of a one-day hearing, and that any issue as to the extent of the costs that would have arisen in that circumstance be determined, in default of agreement, in the legal costs adjudication process, and that there be no order as to costs for or against any other party;

(iv) as regards the motion for discovery and particulars, the parties have liberty to provide any submissions in relation to costs within 14 days; and

(v) the matter be listed on Monday 21st October 2024 to confirm the foregoing.