THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 390
[2020 No. 557 JR]

BETWEEN

PETER SWEETMAN

APPLICANT

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

BORD NA MÓNA POWERGEN LIMITED

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Wednesday the 16th day of June, 2021

1. The applicant challenges the legality of the grant of planning permission for a windfarm on a large site in County Longford, part of an overall bogland area of 1,908 hectares which is approximately 11 km by 5 km east to west. If constructed to the maximum dimension allowed by the permission, the turbines would be the joint tallest structures in Ireland, standing at 185 metres (higher than the Gherkin Tower in London, for comparison) and would equal the largest turbines for which permission has already been given (the largest actually constructed are 176 metres high). Even that record may be smashed in due course as other developers have plans for larger turbines to be erected at sea. The turbines are to be accompanied by a 110 Kv electrical substation and grid connection.

2. An additional superlative that was noted by counsel for the applicant is that the site includes extensive rail networks which are part of what he says is the biggest private railway in Europe. The railway is owned by the developer's parent entity, Bord Na Móna. The developer quantified the extent of the rail network as 570 km of permanent rail and 140 km of temporary rail across the State as a whole, although it isn't clear how much of that is on this particular site.

3. The site consists of three bog areas collectively known as Mountdillon Peat Production Bog Group, Lanesborough, County Longford. It predominantly consists of areas of drained bog land which has been the subject of industrial peat production (see para. 11 of affidavit of Gabriel Toolan). No application for substitute consent was made for the peat extraction on the site (para. 13). The evidence suggests that draining of the bogs commenced in the 1940s, but the court has been told that Bord Na Móna stopped all peat harvesting in 2019 and now says that such activity has been permanently stopped across the State. While Bord Na Móna says that the vast majority of peat removal was "lawful" in terms of domestic law, it is equally clear that much was contrary to European law due to the absence of compliance with the environmental impact assessment (EIA) directives 85/337/EEC and 2011/92/EU as amended by directive 2014/52/EU and the habitats directive 92/43/EEC, which requires appropriate assessment (AA).

4. On 9th May, 2000, a related company, Bord Na Móna Energy (not the notice party here) obtained a licence (number 0504) from the Environmental Protection Agency under s.

83(1) of the Environmental Protection Agency Act 1992 which purported to allow for the extraction of peat on the site, subject to fourteen conditions. Condition number 10 required an agreed bog rehabilitation plan to be submitted to the agency for agreement within eighteen months of the grant of the licence and which would have to be reviewed every two years. No such plan was ever agreed by the agency. The licence was last reviewed on 26th September, 2012 despite the fact that the legislation envisages significantly more regular reviews. The failure to carry out a review (or make any other decision) doesn't in itself preclude a challenge (see *SPUC v. Grogan* [1989] I.R. 753, *J.N.E. v. Minister for Justice and Equality* [2017] IEHC 96 at para. 10) but that challenge would have to take the form of mandamus or declaratory relief rather than *certiorari*.

5. The National Peatlands Strategy was published in 2015, and noted the changed understanding towards the exploitation of Irish bogs and the awareness of the need to protect these unique wetland habitats as well as to cherish them in a way that contributed to addressing the climate emergency.

6. The planning application for the development here was lodged directly with the board under the strategic infrastructure provisions of s. 37A of the Planning and Development Act 2000 on 31st January, 2019. As regards use of pre-existing infrastructure, the application states inter alia that "[s]urface water run-off from roads, crane pads and hardstanding areas to be collected by interceptor drainage network and dispersed across the cutaway peatlands to be assimilated into the existing drainage system within the boundary of the proposed development."

7. The notice party prepared a Natura Impact Statement (NIS) including assessing potential effects on European sites, particularly Lough Ree Special Protection Area (SPA) (004064), Lough Ree Special Area of Conservation (SAC) (000440), Ballykenny-Fisherstown Bog SPA (004101) and River Shannon Callows SAC (000216) having regard to the sites' conservation objectives.

8. The Government's Climate Action Plan was published in June 2019 and recognised the need to develop and manage peatland as a carbon sink through the management restoration and rehabilitation of peatlands as set out in the National Peatlands Strategy 2015 to 2025.

9. An oral hearing was held commencing on 12th June, 2019. A first inspector's report was prepared in respect of the present application on 6th September, 2019 which recommended refusal of permission. It noted that the elected members of Longford County Council unanimously opposed the development. The reasoned conclusion identified two matters which the inspector considered could not be mitigated. The first was the impact on the landscape setting of Corlea Trackway Visitor Centre. The second was the impact of the development on climate due to the ongoing pumping of the peatland site, which would interfere with the extent to which the peatland would act as a carbon sink.

10. In September 2019, Simons J. gave judgment in *Friends of the Irish Environment Ltd. v. Minister for Communications* [2019] IEHC 646, [2019] 9 JIC 2002 (Unreported, High Court, 20th September, 2019), declaring invalid statutory instruments which classified peat extraction as exempted development and subjected such extraction to licencing by the Environment Protection Agency. This gave rise to a cessation of peat harvesting by Bord na Móna across the State that was at first temporary and, as noted above, later made permanent.

11. In November 2019, the developer responded to a request for further information that was issued on foot of the first inspector's report, a procedure that is permitted in the strategic infrastructure context under s. 37F(1)(a) of the 2000 Act. The following features of the response are worth of note at this point.

12. The response says at p. 2 that the extent of the permanent footprint of the proposed windfarm project is 51.8 hectares of the overall application site area of 1908 hectares and refers to "the proposed use by the windfarm project of the existing drainage network within the overall site area."

13. At p. 3 of the response it states that the "project will utilise the existing main drains and settlement ponds and does not require the use of the site/field drains".

14. At p. 9 the response says that "[t]he proposed Rehabilitation Plans (Appendix A) are site specific and propose the most up to date and proven measures to rehabilitate the cutover and cutaway bog at Derryadd Wind Farm".

15. At p. 14 the response states that a buffer zone of 25 metres was applied to the full extent of the windfarm infrastructure, increasing the area of potential impact to 194.4 hectares.

16. The draft rehabilitation plan states at p. 4 that "[w]ater pumps are located within the site … [p]umping will continue during the decommissioning and rehabilitation period, and during the construction and operation of the wind farm … [t]he objective of hydrological management during the wind farm operation will [be] to manage water levels across the site to keep the cutaway wet (soggy conditions) and protect wind farm infrastructure, so that excessive surface water across the site is reduced."

17. The affidavit of John F. Creedon for the developer states at para. 32 that "[t]he general rehabilitation strategy is for the re-wetting of the cutaway bogs" involving "the blocking of former peat production field drains" and at para. 33 that "[w]here the proposed windfarm interacts with the existing main drains, it is proposed that the existing drains are either culverted or diverted to maintain the existing infrastructure. This is proposed as part of the planning application. As such the design of the windfarm development allows for the maintenance of the required key drainage infrastructure that facilitates the maintenance of the water level and rewetting of the site. Pumping that is carried out during the operation of the windfarm and as part of the rehabilitation plan will focus on the removal of excess surface water while maintaining water levels close to the surface of the cutaway."

18. On 9th December, 2019, the board decided to advertise the additional information under s. 37F(2) of the 2000 Act.

19. The further information and submissions in response to the advertisement were considered by a second inspector in a report dated 5th March, 2020. That report referred to the judgment in the *Friends of the Irish Environmen*t case and stated that on foot of that, Bord Na Móna had ceased all peat harvesting activities. Notwithstanding this, the inspector was satisfied that the draft rehabilitation plan provided a useful indication as to how the bog could be rehabilitated. She considered that in the light of the further information, the board had sufficient information to enable it to continue with its deliberations.

20. On 12th June, 2020, the board decided to grant permission for the development. The decision notes at p. 10 that the development did not require ongoing pumping of the entire site for the duration of the construction and operational phases.

21. Condition 1 of the permission states that "[t]he development shall be carried out and completed in accordance with the plans and particulars lodged with the application, as amended by details submitted by the applicant to the oral hearing held from the 12th day of June, 2019 to the 14th day of June, 2019, and the applicant's further information submission received by the Board on the 18th day of November, 2019, except as may otherwise be required in order to comply with the following conditions …".

22. One aspect of the challenge is the extent to which the development will make use of landforms created by the removal of peat bogs without EIA or AA. It seems to be clear and accepted that some of the landforms on which the wind farm will be erected or that will be used during the construction and operational phases were created by removal of peat bogs without EIA or AA. While this may have been lawful in domestic terms, it was broadly speaking contrary to EU law.

23. Another aspect is the extent to which the development will make use of infrastructure created without EIA or AA where such would have been required by EU law. A further affidavit of John F. Creedon was sworn on this issue filed on 4th March, 2021, which clarifies the position as follows. This takes the implementation of the EIA directive as being 1988 and takes 1995 as the closest date to that for implementation of the habitats directive for which information is available (the transposition deadline was 1994). I need not consider infrastructure used for bog rehabilitation because it is not part of the current project. The position is as follows:

    (i). all main drains were pre-EIA directive 85/337/EEC;

    (ii). 7 pump sites were pre-EIA directive 85/337/EEC

    (iii). 6 pump sites are from a date unknown, but post-habitats directive 92/43/EEC (and therefore also post-EIA directive) (3rd affidavit, para. 27);

(iv). 6 silt ponds were constructed post-EIA directive 85/337/EEC and pre-habitats directive 92/43/EEC;

(v). 2 silt ponds are of unknown date, but are post-habitats directive 92/43/EEC (and therefore post-EIA directive) (3rd affidavit, para. 28); and

(vi). all discharge points are pre-EIA directive 85/337/EEC.

24. Therefore, in summary, even assuming one accepts the developer's information in its totality, 6 pump sites and 2 silt ponds to be used in the present project were constructed after the deadline for transposition of both the EIA directive and the habitats directive, and another 6 silt ponds to be used in the present project were constructed after the deadline for transposition of the EIA directive.

25. Leave in the present proceedings was granted by McDonald J. on 10th September, 2020, the primary relief sought being *certiorari* of the planning permission. Declaratory relief as to one aspect of transposition is also sought as well as other reliefs.

Domestic law complaints

26. I will begin by addressing the complaints relating to domestic law. For clarity and at the risk of making this point repeatedly in judgments, the main purpose of separating domestic from EU law issues is to ensure that if recourse is ever had to Luxembourg, it is only in a case where the point is "necessary" for the determination of the proceedings (art. 267 TFEU). In one sense the separation is artificial because all domestic law has to be read in the light of EU law, but for the purposes of such a modularisation exercise, as here, the postulated assumption is that EU law doesn't add anything to the domestic law provision. Obviously that assumption will be revisited if the domestic law points (as considered on that assumption) fail, but it is an absolutely necessary assumption for discursive and presentational purposes, because modularisation couldn't coherently function without that kind of approach.

Complaint that the board is not entitled to rely on an unfinalised peat rehabilitation scheme

27. Core ground 2 complains that the board was not entitled to rely on a draft unfinalised peat rehabilitation scheme which was never agreed to by the Environmental Protection Agency. That, however, is not in itself an error. It is not in principle impermissible for an administrative decision-maker to apply a condition to a permission that the applicant will comply with steps carried out in a document that describes itself as a draft.

Complaint that the draft plan was erroneously treated as finalised

28. It is clear from the second inspector's report that she understood that the draft plan was merely a draft. While some of the language of the board's decision (referred to in the board's own jargon as an "order", a form of terminology that may or may not be the most simple and transparent – why not "decision"?) could be construed as treating it as final, it is more appropriate to construe administrative decisions in a way that makes sense and renders them valid rather than invalid. Thus, I construe the impugned decision as not

being predicated on any fatal error of fact given that it is open to the interpretation that it should be read in the sense intended by the inspector.

Complaint of failure to record the basis of disagreement with the inspector

29. Core ground 15 alleges that the board failed to record the basis of its disagreement with the inspector and was in breach of s. 34(10) of the 2000 Act. However, the relevant part of the board's order *does* set out reasons for that decision including the acceptance of certain aspects of the first inspector's report - the reliance on certain provisions of the EIA report and consideration of the further information received after the inspector's report. This constitutes adequate reasoning in the circumstances.

Complaint regarding ownership of the site

30. While core ground 18 complains that the ownership of the site had not been demonstrated, I was informed that this was not being pursued.

Failure to consider obligations under Article 40.3 of the Constitution

31. Core ground 16 alleges that Article 40.3 of the Constitution was not properly considered. That has not been made out. The board (or any decision-maker) is not obliged to expressly refer to constitutional provisions merely because they are relied on by objectors (or other parties to the administrative process), as long as any points are considered in substance. The board considered the substance of the issue of human health as part of the overall consideration of environmental effects.

Complaint that the decision was contrary to reason and common sense

32. Core ground 17 alleges that the decision was irrational. That has not been established in any sense that does not arise more specifically under one of the other headings.

Complaint of having regard to irrelevant considerations or failure to have regard to relevant considerations

33. Core ground 18 alleges that the board had regard to irrelevancies or failed to have regard to relevant matters. But again, that has not been established in any respect that does not arise under any other heading more specifically.

Complaint of inadequate detail in respect of design

34. Core ground 6 states as follows: "[t]he First Respondent erred in law in accepting an Application without an appropriate level of detail in respect of design contrary to Article 4 of 2011/92/EU as amended inter alia by 2014/52EU and the Planning & Development Regulations 2001 as amended. Further particulars are set out in the Statement of Grounds."

35. Ground 25 states as follows: "[t]he Plans and Particulars lodged and in particular the detail in respect of the Turbine which is one of if not the largest series of structures ever to be constructed in the Jurisdiction has no detail in terms of their design relative to their particular siting. When one compares the level of detail that one requires to produce in a conventional Planning Application for even the most modest extension which is required to show existing ground levels, method of construction, all the surrounding features and each specifically related to the structure the subject matter of the Application here is completely inadequate. The Plans and Particulars lodged show virtually no detail and no

site specific detail and given the scale and extent of the Development and the likely consequences and impacts it will be impossible on the basis of these Plans to formulate any definitive findings in respect of their impacts."

36. Ground 26 views the matter from an EU law perspective, but I can park that for the moment as I am considering the matter under domestic law under this heading, that is in terms of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001).

37. Condition 8 provides *inter alia* as follows: "[t]he following design requirements will be complied with: (a) the wind turbines will have a maximum tip height of 185 metres. Final details of the turbine design, hub height, tip height and blade length complying with the maximum limit and within the range set out in the application documentation, along with details of colouring shall be submitted to and agreed in writing with the planning authority prior to commencement of development."

38. The applicant complains that this leaves core elements of the design of the project to the post-consent stage. This is clear from the nature of the application made. Indeed there seem to be three elements to the complaint made by the applicant:

    (i). the application does not give precise details of the design of structures but only "typical" arrangements;

    (ii). the application also fails to specify dimensions for the structures, only maximum dimensions;

    (iii). the application does not specify the exact location of all of the structures and foundations.

39. In particular, the turbine heights and blade lengths are expressed in terms of *maxima*, not the actual proposed dimensions. That is equivalent to applying for planning permission for a house on the basis that it could be anything from a one-storey bungalow to a ten-storey mansion, and contending that proper details have been furnished as long as a maximum dimension is provided.

40. The EIAR says that the make and model of the turbine will be "dictated by a competitive tender process", so that "the proposed turbine will be detailed by the turbine manufacturer on award of the contract" (para. 2.4.1.2.). The turbines will be "the typical three bladed, horizontal axis type" with general specifications of a "maximum height envelope of 185m", and that "within this maximum turbine-sized envelope, various configurations of hub height, rotor diameter and ground to blade tip height may be used."

41. The reply on behalf of the applicant on day 3 of the hearing (p. 91 (Word version)) included the submission that: "the application failed to provide any finished design as to the 24 turbines. [At] paragraph 2.4.1.2 in tab 6 of the Egan booklet 1, it stated that: 'The proposed turbines will be detailed by the turbine manufacturer and the exact make and model will be determined following a tender.' There are no drawings of the structures that are proposed to be erected. There are indicative drawings of a generic wind turbine

or an indicative drawing of a generic wind turbine, but what is made abundantly clear in the EIAR is that all that is specified that the application is for is for an envelope of up to 185 metres blade tip height, three bladed horizontal access type. It is made clear that no possible configuration of hub height, rota diameter, ground blade height is being ruled out. We are told that new turbine models may become available when it comes to tendering. Then you will see at paragraph 2.4.1.5 the foundation design will be dictated by the turbine manufacturer; at paragraph 2.4.1.6, the size, arrangement and positions of the hard stands will be dictated by the turbine supplier."

42. As the point seemed to me to have been developed in the oral submissions (and in particular the reply, which in fairness was dealing with points made during the hearing) to an extent that went somewhat beyond what was in the applicant's original written submissions, I allowed a further round of written submissions post-hearing to ensure that everyone had an opportunity to deal with the issue.

43. There is nonetheless some common ground. Going back to the three headings of complaint above:

(i). The board expressly accepts that "typical" details of aspects of the development are given rather than precise details. For example at para. 36 of the board's replying submissions, it is stated in relation to turbine foundations that: "[t]he bases for same are describe as typically being 24m in diameter with detailed foundation *design* dictated by local ground conditions."

(ii). More generally, it is also effectively agreed that the application was for a "design envelope" rather than for a construction of specified dimensions. The board's submissions at para. 27 say that "[t]he [planning] drawing clearly shows how the 185m is arrived at and clearly shows that what is being sought is a permission for a tower up to 120m and a maximum blade tip of 185m".

(iii). As regards the variability of locations, the road layout is specified in the application (drawing 10325-2023), although it seems to be implied in the EIAR that there may be some variation before determination of the final position. The maximum footprints of the location of hardstands are specified (drawing 10325-2021 suggests the hardstands will be within the specified footprint). Section 2.4.1.6 of the EIAR says that the hardstands shown on the layout drawings are "indicative of the sizes required, but the extent of the required areas at each turbine location may be optimised on-site depending on the topography, position of the site access road, the proposed turbine position and the turbine supplier's requirements. Preliminary design shown represents a worst case based on typical designs. The EIAR utilises this worst case when determining the quality, significance, extent and duration of potential impacts." The "extent ... may be optimised" seems to be another way of saying the precise location will be determined, although that seems to be within the overall footprints specified.

Is the applicant's complaint adequately pleaded?

44. Predictably, complaint is made that the point now advanced is inadequately pleaded. The key plea is, as noted above: "[t]he First Respondent erred in law in accepting an Application without an appropriate level of detail in respect of design contrary to ... the Planning & Development Regulations 2001 as amended. Further particulars are set out in the Statement of Grounds." The notice party, quite reasonably, points out at para. 5 of replying submissions that "[a]lthough it is stated that "further particulars are set out in the Statement of Grounds", no particulars of breach of the 2001 Regulations can be found anywhere therein."

45. As emphasised in *Waltham Abbey Residents Association v. An Bord Pleanála* [2021] IEHC 312, [2021] 5 JIC 1002 (Unreported, High Court, 10th May, 2021) and *Eco Advocacy CLG v. An Bord Pleanála* [2021] IEHC 265 (Unreported, High Court, 27th May, 2021), the cry of "particularise that" can echo indefinitely. That process has to stop when the point being made is acceptably clear. While the applicant's statement of grounds would definitely have been improved by specific reference to the particular provisions of the 2001 regulations concerned, the necessary implication from the pleadings is that reference is intended to the provisions concerning the detail required in the application for permission.

46. If the application had been a common or garden appeal from a planning authority, the relevant provisions would have been arts. 22, 22A and 23, which deal respectively with "content of planning applications generally" (art. 22), "specified additional information to be submitted with application" (art. 22A), and "requirements for particulars to accompany an application under article 22" (art. 23). As this is strategic infrastructure development (SID), the relevant provision is art. 214 of the 2001 regulations. Articles 22 to 23 don't apply directly, although they are relevant indirectly *via* the application form under art. 214 (to which I will return).

47. Despite the absence of reference to art. 214 in the applicant's papers, I think it follows from what is expressly pleaded, by necessary implication, that breach of that provision is what is intended to be relied on because that is the relevant provision dealing with details in an application. That is acceptably clear, and indeed replying submissions have addressed art. 214, so even acknowledging that the pleadings were sub-optimal, I would reject the pleading objection here to that extent. The one reservation I had had about that was that art. 214 wasn't referred to in the applicant's original written submissions either, but when the final replying submissions were delivered, the applicant argued that if his other arguments didn't succeed he was relying on that provision. Just in time perhaps. It goes without saying that it would have been better to have said this in the pleadings from the outset, but failure to do so hasn't in fact caused any injustice to the other parties despite their strenuous complaints to the contrary. The broad point was always in the case, even if the precise detail had to be thrashed out right to the end. Anyone who has ever been personally immersed as an advocate in an immensely hard-fought case might feel a murmur of recognition for that phenomenon and may, despite themselves, see the relatability of scrambling to clarify and refine a point once the real cutting edge of the case begins to take shape. No desk-bound analysis with the perfect

vision of hindsight can capture the dynamic of the advocate's struggle to keep their case upright as the tectonic plates shift in the course of the proceedings. That isn't any form of blanket endorsement of slovenliness with pleadings of course, if for no other reason than that there are equally advocates on the other side who then have to address the point thus refined. All that needs to be said is that the ultimate clarification of the point in the applicant's final submissions wasn't unjust or unfair *here*.

Should the applicant's pleadings be read narrowly?

48. The board's submission argued for an extremely narrow reading of the applicant's pleadings, such that "the only point actually pleaded by reference to the [2001 regulations] is a contention that a rule exists that the structures above and below ground must be shown and this did not occur." I don't see it as appropriate to read core ground 6 in such a very narrow manner. Furthermore, the board contended that, as regards ground 26, "[t]his plea is crafted exclusively in the language of European law assessments". That may be so, but core ground 6 insofar as it refers to the 2001 regulations is not so limited.

49. I don't accept the implicit point that if a general claim is made with particulars provided in later paragraphs, and the particulars don't flesh out all aspects, then the non-fleshed-out aspects fall away. That is to read pleadings in the narrowest possible sense and of course massively incentivises prolixity. The key criterion is, needless to say, justice, which includes the concept of giving acceptable notice of the point being made. Here the point is acceptably clear – there were inadequate details of the design contrary to the 2001 regulations. Admittedly, it took the applicant a long time to identify which particular provision of the 2001 regulations was the relevant one, and perhaps also what exact details weren't specified, but that hasn't in fact caused any injustice to the other parties or inhibited them from endeavouring to counter the point.

Does the application fall short of adequate detail as alleged at core ground 6?

50. Given my conclusion that the point is adequately pleaded, I now turn to the merits of that point. Does the application fall short of the required detail, for domestic law purposes, as alleged in core ground 6?

51. Article 214(1) of the 2001 regulations includes the following requirements: "[s]ubject to sub-article (2), when making an application for strategic infrastructure development, the applicant shall send to the Board – (a) 10 copies of the plans and particulars of the proposed development (including any plans, particulars or other information indicated by the Board under article 210(2) and of the EIAR and, where the application is accompanied by an NIS, of the NIS ...".

52. While the concept of "plans and particulars" isn't defined by the regulation, it must mean something specific – in particular something specifically measured and capable of being drawn on a plan. That can't include a widely variable design envelope. Otherwise one wouldn't be talking about a plan, still less particulars.

53. The board replies that having regard to condition 8, "these specific design details must be agreed within the range set out in the application documentation submitted by the notice

party developer as well as the scope of the EIA and appropriate assessment ("AA") carried out by the Board. In other words, the developer is not at large to deviate from the 'design envelope' which is permitted by the Board in its permission." That's as may be, but of course that isn't the point – the question is not whether the developer is at large, but whether the application included the required plans and particulars.

54. The board also contends that everything was assessed on a worst case basis and that this is sufficient. Unfortunately, I don't consider the "worst-case scenario" defence as really being an answer. It amounts to saying that, to take one of the matters at issue, the blades are going to be of some length, totally unspecified apart from a maximum. Does that amount to providing "plans and particulars" of the development? I think not. Specifying particulars of the works for which permission is sought is the statutory obligation – not to seek permission for a project that is open-ended at one end of the scale and which could be anything up to a maximum specified. The statutory nature of the required plans and particulars means this can't be converted into an unreasonableness challenge as the board predictably contended.

55. As the applicant, with some merit, submits: "[a] "worst-case" analysis is also hopelessly subjective. What is the worst case scenario for one person at one location may not be considered as such by another person at another location. The design that impacts "worst" in terms of visual impact may not be the design that impacts "worst" on noise, shadow flicker, aesthetics and so on. The application must be submitted with plans and particulars of the design of the development proposed for permission and must be assessed by the planning authority on that basis only, and without reference to what the developer suggests may be the "worst" of the design options that it wants to be free to decide upon if it receives permission. Multiple choice design options decided after the event by the developer cuts out the public (and the planning authority) from the design decision-making process." That highlights a point that is supported by the English caselaw on which the board purports to rely: the "worst case" isn't enough – even if a range is permissible, one also has to look at the particular alternative discretions thereby afforded.

56. More generally, the "worst case" defence confuses assessment with particulars of the project applied for. Even if in some sense one could properly assess a project based on a dynamic range of dimensions, that isn't what arts. 22 and 23 of the 2001 regulations envisage. The regulations require "plans" and "particulars", meaning reasonably (although not necessarily absolutely) precise particulars. I say not necessarily absolutely precise particulars in that Fennelly J. in *Kenny v. Provost, Fellows & Scholars of the University of Dublin, Trinity College* [2009] IESC 19 at paras. 18 to 20 acknowledged that in practical terms there may be modest variation between the plans submitted and the structures constructed. Thus we have the concept, created by the courts for the purposes of s. 160 of the 2000 Act, of the "material" deviation from the permission, which implies a core of materiality and a periphery of detail; dovetailing with the doctrine permitting points of detail and limited flexibilities to be provided in conditions, and with the doctrine (were we to venture into EU law) that permits "parameters relating to the construction

phase" to be determined later (Case C-461/17 *Holohan v. An Bord Pleanála*). In *Boland v. An Bord Pleanála* [1996] 3 IR 435, Hamilton C.J. said at 466-467:

> "In imposing a condition that a matter be left to be agreed between the developer and the planning authority, the Board is entitled to have regard to:
>
> (a) the desirability of leaving to a developer who is hoping to engage in a complex enterprise a certain limited degree of flexibility having regard to the nature of the enterprise;
>
> (b) the desirability of leaving technical matters or matters of detail to be agreed between the developer and the planning authority, particularly when such matters or such details are within the responsibility of the planning authority and may require re-design in the light of the practical experience;
>
> (c) the impracticability of imposing detailed conditions having regard to the nature of the development;
>
> (d) the functions and responsibilities of the planning authority;
>
> (e) whether the matters essentially are concerned with off-site problems and do not affect the subject lands;
>
> (f) whether the enforcement of such conditions require monitoring or supervision."

But there is a fundamental difference in principle between, for example, providing a reasonably modest margin of appreciation (Hamilton C.J.'s "certain limited degree of flexibility") around details of design, dimensions or location-to-the-millimetre, such that it can be said, as it was in effect in *Boland*, that no real planning issue is thereby created by reference to which someone could reasonably object, and a situation where as here no specific dimensions are provided other than a maximum, and no specific designs are provided other than what is typical. A scale that is open at one end is not a scale that has a "certain limited degree of flexibility".

57. The view that the dimensions of rotor blades, for example, once that goes beyond a modest variation, is a material element of what must be specified in the application is consistent with the jurisprudence on the analogous issue of unauthorised development in the context of material deviations from permissions. In *Bailey v. Kilvinane Wind Farm Ltd*. [2016] IECA 92, [2016] 3 JIC 1602 (Unreported, Court of Appeal, Hogan J. (Finlay Geoghegan and Irvine JJ. concurring), 16th March, 2016), the Court of Appeal held at paragraph 87 that an increase in rotor diameter of 23 metres was a material deviation. Simons J. applied that decision in *Krikke v. Barranafaddock Sustainability Electricity Limited* [2019] IEHC 825, [2019] 12 JIC 0601 (Unreported, High Court, Simons J., 6th December, 2019).

58. The board places major reliance on the decision of Haughton J. in *Alen-Buckley v. An Bord Pleanála* [2017] IEHC 541, [2017] 9 JIC 2602 (Unreported, High Court, 26th September,

2017). There the learned judge said (at para. 40) that: "I also accept that there is no requirement under the 2000 Act or the Planning Regulations to state in the site notice the blade length and rotor diameter. The most important physical feature is the overall height of the proposed structure. This was correctly stated, and would have alerted members of the public to the nature of the proposed development. Beyond this the details of the planning application, including the drawings showing a sample turbine with a height of 126.6 metres made up of rotor blade length of 45 metres and with a hub height of 81.6 metres could be inspected on line or at the local planning authority offices. Further there was no evidence whatsoever to suggest that the applicants or any members of the public were under any misapprehension as to the overall height of the turbines or the maximum height of the component parts." However, self-evidently, that addresses a different submission, namely that the *site notice* must specify certain dimensions. There is no reference to art. 214 of the 2001 regulations.

59. Heavy reliance is also placed on *Ó Gríanna v. An Bord Pleanála* [2017] IEHC 7, [2017] 1 JIC 1801 (Unreported, High Court, McGovern J., 18th January, 2017), where there is a passing reference at para. 33 to the turbine design being "typical", but that was in the context of making a different point as set out at para. 29, namely an unwarranted discrepancy between the application made and permission granted. The concept of the typical structure wasn't challenged there and nor is there any reference to art. 214 of the 2001 regulations.

60. Reliance is also placed on the fact that design envelope permissions have been granted in other situations *e.g*. *Carroll v. An Bord Pleanála* [2016] IEHC 90, [2016] 2 JIC 1102 (Unreported, High Court, Fullam J., 11th February, 2016); but if the challenges made previously don't raise this specific point in this specific context, then they are self-evidently not determinative. *Craig v. An Bord Pleanála* [2013] IEHC 402, [2013] 8 JIC 2602 (Unreported, High Court, Hedigan J., 26th August, 2013), is relied on by the notice party, but that was viewing the point as an EIA point only: see para. 37.

61. Beating back all of the overgrowth of detail, pleading objection and legal irrelevancy here, at the heart of the case is a clear question as to whether planning law envisages the outer contours what the board calls the "well-known" concept of the "Rochdale envelope" (namely an application for development consent that is of variable dimensions up to a specified maximum), although how well-known that really is may be up for debate because, according to justis.com, that phrase is only making its debut in the Irish caselaw in the current sentence of the current judgment.

62. Holgate J. discussed the concept recently in *Raymond Stephen Pearce v. Secretary of State for Business Energy and Industrial Strategy* [2021] EWHC 326 (Admin), noting at para. 25 an express National Policy Statement for England relevant to the application: NPS EN-1 (Overarching National Policy Statement for Energy).

63. Para. 4.2.7 of NPS EN-1 says that "[i]n some instances it may not be possible at the time of the application for development consent for all aspects of the proposal to have been settled in precise detail. Where this is the case, the applicant should explain in its

application which elements of the proposal have yet to be finalised, and the reasons why this is the case."

64. Paragraph 4.2.8 goes on to say that "[w]here some details are still be to be finalised, the ES [Environmental Statement] should set out, to the best of the applicant's knowledge, what the maximum extent of the proposed development may be in terms of site and plant specifications, and assess on that basis, the effects which the project could have to ensure that the impacts of the project as it may be constructed have been properly assessed."

65. At para. 30, Holgate J. commented that "[p]aragraph 4.2.8 of EN-1 accords with well-known principles set out in *R v Rochdale Metropolitan Borough Council ex parte Milne* [2001] Env. L.R. 406. In the present case NVL [Norfolk Vanguard Ltd.]'s application proposals for the Vanguard infrastructure at Necton were presented as a 'Rochdale envelope'. That is, because certain design details remained to be determined subsequently, the DCO [development consent order] application defined the parameters within which the buildings would be constructed, and the ES assessed the environmental effects of the proposals by reference to those parameters and any flexibility they involved. The DCO granted by the Defendant authorised the "Works" within those parameters ...".

66. Two points are notable. Firstly, the concept of the design envelope has, in English law, a written basis in national guidelines, albeit guidelines that build on caselaw. There is no such written basis in this jurisdiction, either in statute or in guidelines. And secondly, it is not simply a question of assessing a project by reference to a "worst case scenario" alone but "by reference to those parameters and any flexibility they involv[e]". That involves considering the range of situations that could arise within the flexibility so provided, not just the top end of the scale.

67. This clearly leaves open a degree of room for debate on the application of the Rochdale envelope, as appears from *RSPB v. Scottish Ministers* [2017] CSIH 31, para. 26, where an objection on that basis was noted.

68. However, what is most striking about the decision in *R v. Rochdale Metropolitan Borough Council ex parte Milne* [2001] Env. L.R. 406 (Sullivan J.) is that it doesn't deal with this point at all in terms of the statutory framework in English law regarding the validity of an application. The point is only addressed in terms of EIA and the corresponding domestic law on assessments. The original submission made in that case, as noted at para. 10 of the judgment, was confined to the regulations implementing the EIA directive. The discussion of the point was in the context of "the purpose of the directive" (para. 63). Another important contextual point is that *Rochdale* dealt with an application for *outline* permission only regarding an industrial estate, as well as two full permission applications for roads (see paras. 3 to 5). In that context, the discussion of the project evolving over time has a very different flavour to the present case. The particular development there, an industrial park, could only take final shape as different businesses moved in and occupied the various units. That is miles removed from the present case. Thus, the court

concluded at para. 93 that "integrating environmental assessment into the domestic procedure for seeking outline planning permission, which acknowledges this need for flexibility for some kinds of building projects, is not contrary to the objectives of the Directives". Indeed the court went on to say that "[t]his does not give developers and excuse to provide inadequate descriptions of their projects" (para. 95). Guidelines that reference this principle do so in the context of EIA rather than engaging with the requirements of permission applications: see e.g., EPA "Draft Guidelines on the Information to be Contained in Environmental Impact Assessment Reports" (2017) at pp. 41-42, European Commission Guidance on the Preparation of the Environmental Impact Assessment Report (2017) para. 3.34.

69. If I am wrong that art. 214 of the 2001 regulations in its own terms precludes an application of this type, I turn to the application form provided by the board (which has statutory power to specify the required information under art. 210) to be completed by SID developers, which states at p. 13:

> "General Guidance Note:
>
> > The range and format of material required to be compiled / submitted with any application in respect of a proposed strategic infrastructure development shall generally accord with the requirements for a planning application as set out in the Planning and Development Regulations, 2001 to 2018 and those Regulations should therefore be consulted prior to submission of any application."

This necessarily incorporates (to the standard of "genera[l] accord") the more specific terms of arts 22 to 23. In particular, art. 22(4)(a) as so applied requires:

> "such plans (including a site or layout plan and drawings of floor plans, elevations and sections which comply with the requirements of article 23), and such other particulars, as are necessary to describe the works to which the application relates."

Such details (even qualified by general accord) can't be said to have been provided by the sort of significantly variable design that was furnished here.

70. Ultimately, this point isn't that complicated. The 2001 regulations require plans and particulars. That isn't compatible with a widely-variable-design application where the designs, dimensions or locations of structures are not specified in the application itself, either by reference to precise terms or to a reasonably limited range that could not in itself raise any reasonable planning objection. Applying that to the present case, design and dimensions are couched in terms of what is typical, what is maximum, and what is worst case (although assuming the application can be read as limiting the locations of the turbines to a reasonably concise footprint albeit not to a to-the-millimetre positioning, I would not see the location aspect as massively problematic). Even the English doctrine of the Rochdale envelope is not a blanket acceptable of variable applications, and the facts in *Rochdale* are a world away from the facts here. And importantly, planning law is an order of magnitude more complex now that it was a professional lifetime ago when

Rochdale was decided in 2001. This is a much less auspicious time for courts to be creating significant new procedures for flexibilities and options to be read into planning legislation.

71. If the constitutional provisions on electoral procedure are, as O'Higgins C.J. said in *Re Electoral (Amendment) Bill*, 1983 [1984] I.R. 268 at 274, a "total code" for the holding of general elections, then, to borrow that language, the far more complex web of statutes and regulations on planning applications are in their own way a similar total code for the processes of seeking development consent. For the court to now endorse "design envelope" applications (beyond the existingly-recognised "certain limited degree of flexibility") would amount to an impermissible modification of those enactments. One reason above all is obvious – it can't be said with absolute confidence that wide "design envelope" applications generally are so completely and obviously desirable that they must have been intended and that any deficit in what is spelled out in the regulations simply must be filled in by the courts. The greater the variability in what is permitted in an application, the less definite information is there for other interested parties availing of public participation, and the greater the range in terms of what the built outcome on the ground would look like. That involves policy trade-offs and technical issues; winners and losers as well as all that comes with that, such as the arguments for terms, conditions and limitations on the extent of any design envelope procedure.

72. As a technical matter, maybe it mightn't be that unfeasible for the 2001 regulations to provide for widely variable design envelope applications if thought necessary, with such limitations and conditions as are thought desirable bearing in mind policy, engineering and economic considerations as well as the interests of parties other than the developer. But given the many legal issues such an exercise would raise, especially in the light of the significantly increased complexity of planning law in recent years, contributed to by the greatly evolved nature of European law in this area since the 2014 directive, and the importance of public participation, particularly in the European context, to construct such a procedure out of whole cloth would be a hazardous if not quixotic venture for a court to embark on, particularly at this stage of the evolution of planning law. Such a project would be courageously adventurous even if the court had jurisdiction to tackle it, which it doesn't, given my conclusion on the meaning of the regulations as they stand. The fact that the legislation might not expressly say that an application made in breach of the 2001 regulations is invalid in the SID context is not decisive. Breach of a requirement in an enactment is a fairly conventional basis for *certiorari*, and breaks no new ground here. Accepting the implicit suggestion to treat such a requirement as directory rather than mandatory would unacceptably undermine the whole purpose of the legislation regarding particulars of the application, and would severely compromise the public participation process by failing to respect the need for a reasonably precise set of plans and particulars with all the ramifications that has for third party objectors and for other interested parties into the future once the works are carried out.

EU law points

73. For clarity, while EIA and AA are the applicant's next line of attack, I am confining the discussion for present purposes to the wording of the 2001 regulations on the assumption that EU law doesn't add anything beyond what is provided for by the regulations on their own terms. If I hadn't taken the view that the 2001 regulations don't envisage the kind of wide design envelope applications at issue here, then the EIA and AA points would have fallen for consideration. So for present purposes we don't need to get into the extent of the scope for "parameters relating to the construction phase", as set out in Case C-461/17 *Holohan v. An Bord Pleanála* (Court of Justice of the European Union, 7th November, 2018, ECLI:EU:C:2018:883).

Order

74. Accordingly, there will be an order of *certiorari* of the impugned board decision.