[2023] IEHC 579

THE HIGH COURT
JUDICIAL REVIEW

[H.JR.2022.1022]

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

BETWEEN

CARROWNAGOWAN CONCERN GROUP, UTE RUMBERGER AND NICOLA HENLEY

APPLICANTS

AND

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

RESPONDENTS

AND

FUTURENERGY CARROWNAGOWAN DESIGNATED ACTIVITY COMPANY (BY ORDER)

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Friday the 27th day of October, 2023

1. The applicants are seeking interlocutory disclosure of licences and similar documents relating to forestry consents affecting specified lands going back to what looks at first sight like the arbitrary date of 1st June, 1970, a period of 53 years. Perhaps this was unconsciously inspired by the *Jarndyce v. Jarndyce* threshold of 54 years: see *Lehane v. Wymes* [2021] IEHC 427, [2021] 7 JIC 0206, para. 1. To untangle the applicants' perspective we will need a whistlestop tour of the evolution of European planning assessments.

2. EU law began to significantly impact on Irish planning procedures from the 1980s onwards. The deadline for implementing the birds directive 79/407/EEC fell on 7th April, 1981, and for the EIA directive 85/337/EEC on 3rd July, 1988.

3. The applicants seek *certiorari* of decisions going back to 1st June, 1988 relating to specified forestry activities, although it is not altogether clear why that particular date was chosen either.

4. The deadline for implementation of the habitats directive 92/43/EEC fell on 10th June, 1994.

5. From the establishment of the forestry consent system in 2001, up to 2006, where advertisement of applications was necessary this was done in a local newspaper.

6. Since December, 2006, notices of application for afforestation licences and grants have been available online. Applications for forest roads have been online since 2011.

7. On 16th May, 2017, transposition of directive 2014/52 amending the 2011/92 EIA directive fell due, and EIA reports since then are available on the Government's central portal.

8. Since June, 2017, notices of application for felling licences have been available online.

9. On 30th November, 2020, Coillte lodged an application for permission (File Reference ABP-308799-20) to construct a windfarm and associated works in the townlands of Ballydonaghan, Caherhurley, Coumnagun, Carrownagowan, lnchalughoge, Killokennedy, Kilbane, Coolready and Drummod, County Clare. The area is located north west of Killaloe, near the village of Bodyke (for more on that village see *Minogue v. Clare County Council* [2021] IECA 98, [2021] 3 JIC 2902).

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

11. The EIAR includes the following:

> "7.3.4, The type and nature of the upland habitats, in the site and wider locality, has been significantly modified by plantation forestry and this accounts for the occurrence of (specialist) species including redpoll, crossbill and siskin. Hen harrier and merlin may benefit from temporal availability of breeding sites and foraging habitat in conifer plantation, but for these and for other species extensive open moorland is essential habitat.
>
> While conifer plantation may have created new bird habitats for species such as hen harrier, there are more serious implications in terms of the extent of upland moorland lost to natural upland species using these habitat types, such as red grouse, and hen harrier. Moreover, forest habitat and to some extent agriculture may encourage predator numbers to an unbalanced level, particularly fox, pine marten, hooded crow and raven, affecting vulnerable ground-residing species such as hen harrier and red grouse (Thompson et al. 1988)."

12. The citation is to Thompson, Des & Stroud, David & Pienkowski, Mike, "Afforestation and upland birds: consequences for population ecology", in *Ecological change in the uplands* (1988), Nature Conservancy Council/British Ecological Society Symposium, 237-259. I note in passing that this paper is available online at:

https://www.researchgate.net/publication/292972362_Afforestation_and_upland_birds_consequences_for_population_ecology_In_Ecological_change_in_the_uplands. It concludes that at least 34 out of 71 upland species of British birds are at risk from afforestation.

13. The NIS concludes (p. 57) that the site is unlikely to be of inherent value for the SPA population of Hen Harrier. It notes that Hen Harrier are associated with ground nesting and heather/ moorland areas, but in recent decades have been associated with young pre-thicket conifers on a first or particularly second rotation (citing Mark W. Wilson, Sandra Irwin, David W. Norriss, Stephen F. Newton, Kevin Collins, Thomas C. Kelly & John O'Halloran "The importance of pre-thicket conifer plantations for nesting Hen Harriers Circus cyaneus in Ireland", *Ibis* (2009), 151, 332–343).

14. I can pause to note in passing (without drawing any conclusions from it) that the full paper cited is available online at:
https://www.ucc.ie/en/media/research/planforbio/pdfs/Wilsonetal2009.pdf, and while in no way definitive does include the comment at p. 342 that:

> "In Ireland, however, pre-thicket second rotation plantation forest is not only the most commonly used nesting habitat, but is positively correlated with changes in breeding Hen Harrier numbers over time. Coupled with the lack of evidence for any negative impact of post-closure forest cover on Hen Harrier distribution within these areas, this gives some reason to be optimistic about the long-term effects of afforestation on this species, at least in Ireland."

15. Forestry was identified as a high pressure impact on Mount Aughty Mountains SPA (p. 66) An examination of other wind farms including Derrybrien indicated that Hen Harrier were not significantly adversely effected. In this regard the NIS cites "Madden & Porter (2007)", but there is no Madden & Porter study referenced in the bibliography. This paper is however cited in the bibliography subsequently contained in the response to the request for further information (Item 1 p. 28). The paper is Madden, B. & Porter, B., "Do wind turbines displace Hen Harriers Circus cyaneus from foraging habitat? Preliminary results of a case study at the Derrybrien wind farm, County Galway", *Irish Birds* (2007) 8: 231-236.

16. Whilst Coillte was the applicant for planning permission, all development rights in respect of Carrownagowan Wind Farm were transferred from Coillte to FEC, although the development lands have not yet transferred. FEC's onshore wind development rights in respect of the relevant Coillte lands are held pursuant to an exclusive option for lease, which option allows for entry into a long-term lease prior to commencement of the construction of Carrownagowan Wind Farm.

17. The second applicant made a submission on 12th January, 2021 and the first named applicant made a submission received on 3rd February, 2021. While Hen Harrier are mentioned briefly, it is hard to see much emphasis in that on either the remedial obligation generally or what specific measures are required to assist the Hen Harrier in dealing with effects, if any, of afforestation.

18. The Development Applications Unit (DAU) of the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media made a submission raising issues about impacts on Hen Harrier. The fifth point in that document states:

> "The cumulative impact assessment needs to consider all pressures operating on the surrounding environment and protected sites. Most specifically, analysis of proposed forestry planting and felling licence applications in the area must be assessed."

19. On foot of that submission the board requested further information from the developer.

20. The developer submitted such further information on 23rd December, 2021. This included a Hen Harrier management plan which involved the improvement of nearby specified areas (Habitat improvement lands A-G) in order to provide suitable lands for hen harrier foraging/ roosting. Site A was initially afforested around 1992 (p. 10 of hen harrier management plan). The response noted that nesting at forest edges was associated with an increased risk of predation (p. 7 citing NPWS 2015) so the improved lands would mitigate that problem. NPWS 2015 is cited in the response to Item 1 bibliography as being NPWS, 2015, *Hen Harrier Conservation and the Forestry Sector in Ireland*, 31/03/2015, Version 3.2.

21. The developer's response to the need to assess forestry licence applications was that "[b]aseline conditions at the site will not be significantly altered". It stated that Coillte's forestry management plan for the area was reviewed, and private forest activity was estimated based on aerial surveys. It provided figures which suggested that parcels likely to be felled and re-planted in 2040-45 would be 626 ha, and in 2050-58 would be 124ha. It concluded that foraging and nesting habitat would remain relatively stable for the period of the project (2025-55). The meaning of all this wasn't immediately self-evident in that it wasn't obvious how this conclusion follows from a table that indicates significant variation and that does not address 2025-2040.

22. That section concluded (p. 10) with the comment that forestry licences were subject where appropriate to EIA and AA. That is more a statement of legal theory rather than a reassurance as to implementation in practice and is probably cold comfort to these applicants.

23. This further information was advertised, and the second and third applicants made submissions on 14th and 16th February, 2022 respectively. Again these are rather light on the remedial obligation and the Hen Harrier specifically albeit that there is some reference to Annex I species.

24. The inspector prepared a Report dated 31st August, 2022. The section on EIA includes the following:

> "7.32 In response to concerns raised by the Department of Culture, Heritage, and the Gaeltacht, the applicant has submitted an up-to-date breeding bird survey which investigates concerns raised in relation to breeding Hen Harrier on proposed improvement lands. I note that no breeding pairs have been recorded during this survey. Impacts to Hen Harrier are examined in detail within both Section 7 of the EIAR which specifically examines effects to Ornithology and the Appropriate Assessment section of this report hereunder.
> 7.33 I am satisfied, based on the information submitted with the file and discussed within the Appropriate Assessment section below, that the applicant has adequately demonstrated beyond reasonable scientific doubt that the proposed development would not adversely affect the integrity of these SPAs and SAC in view of these sites Conservation Objectives.
> 7.34 Potential impacts on biodiversity associated with the proposed development include loss of habitat and disturbance or displacement of species. It is important to note at this juncture that impacts effecting the hydrological regime of the area are examined in section 8 of the EIAR and an assessment of the impacts on relevant habitat will be assessed in further detail under this heading below.
> 7.35 The assessment of impacts is supported by an ecological assessment, a desk top study was carried out and field surveys were completed between July 2018 and November 2019 to provide comprehensive overview of the baseline ecology in the study area. Relevant sections of the study area were re-surveyed in January, and April 2020 and as mentioned above additional breeding bird surveys were carried out in 2021. Detailed targeted surveys were carried out for bats, habitats, mammals, invasive species and invertebrates owing to the features and locations of potential ecological significance."

25. The report includes a section headed "Ornithology" as follows:

> "7.78 Section 7 of the EIAR submitted examines the potential for impacts to arise in relation to Ornithology. It is important to state at the outset that a number of concerns were raised within both the submissions from prescribed bodies and third parties in relation to the presence of breeding Hen Harrier in the locality and the potential for the proposed development to displace these species within a 1 km radius of the development. I note at the outset that the proposed development site is located in a Non-Designated Regional Zone for Hen Harrier and is c. 8km south of the Slieve Aughty Mountains SPA which is designated for Hen Harrier and Merlin. 7.79 The DAU in their submission raised a number of concerns in relation to the displacement of breeding Hen Harrier within 1km of the proposed wind development and the viability of habitat enhancement areas. Concerns in relation to collision risks were also raised, as was the extent of the cumulative assessment which is recommended to cover a 20km radius.
> 7.80 In order to establish the potential for impacts to arise in relation to birds it was necessary to establish the baseline conditions of the site and surrounds. A desktop survey was undertaken, documents and mapping are referenced in Section 7 of the EIAR. The development site was viewed within the bird sensitivity spatial tool and is largely within an area identified as a 'Low Sensitivity Zone'. Moderate sensitivity zones are located towards the eastern part of the site and there are no highest sensitivity zones within the site. It is important to note that this tool is merely an indicator of sensitivity and is not relied on to any significance within the assessment.
> 7.81 I note from Section 7.3.2.5 of the EIAR that breeding pairs of Hen Harrier declined within the Slieve Aughty Mountains SPA between 2005 and 2015 but interestingly increased within the same period within the Slievefelim to Silvermines Mountains SPA which [is] located c. 16.7km to the southeast of the development. It is inferred by the applicant that forestry, which is the main threat to Hen Harrier, is the cause of the decline within the Slieve Aughty Mountains and that birds are relocating to a more favourable habitat in the Slievefelim to Silvermines Mountains SPA.
> 7.82 Winter and Breeding Bird surveys were carried out between 2016 and 2020 with summer 2020 surveys solely focused on hen harrier. Bird surveys also included wetland sites within 10km of the development site, the survey area extended to 10km as greenland white-fronted geese was identified as a potential target species within the wider surroundings of the project mainly and Lough O'Grady. It is of note that the study area referred to within section 7 of the EIAR extends to an area 500 metres out from the proposed development boundary.

Hen Harrier Base Line conditions

7.83 With regard to hen harrier I note that surveys in 2016/2017 recorded 124 Hen Harriers flights and of these it is stated that 53 were at potential collision height (PCH). In 2018/19 there was a total of 69 hen harrier observations and of these 20 were at PCH. A targeted hen harrier breeding survey was also undertaken between the months of May, June, July and August 2020 to determine the distribution and use of the site and general area by birds.

Breeding sites

7.84 One nest was recorded within the development site in 2017 which ultimately failed. No other nests were recorded over the three years of surveys within the development site. The location of this nest was c. 400 metres from the nearest turbine.

7.85 In 2018 a nest was recorded outside of the development boundary circa 600 metres from the nearest proposed turbine. It is of note that this nest failed.

7.86 In 2020 three failed nests were recorded outside of the development boundary with the nearest being 500 metres from the closest turbine.

7.87 Over the 3 year survey period other breeding sites were recorded outside of the development boundary within a 2-5km distance from the development site. I note that only one nest recorded was successful in 2019.

Roost Sites

7.88 Hen harrier was observed on five occasions during hen harrier roost surveys over the winter periods of 2016/17 and 2017/18. Two of these observations were made during the same survey on the 23rd March 2017. One was of a male travelling over an area of forestry, while the other observation was of a female, recorded as likely going into roost in an area of heather to the west of the site boundary. The remaining three observations were confined to February and March 2018. There was no evidence of roosting hen harrier between October 2018 and March 2019. A hen harrier roost survey completed during the winter 2019/20 did not identify hen harrier roosting within the study area.

7.89 The results outlined above would indicate that the study area was not used by hen harrier in significant numbers during the winter survey periods.

Habitat loss

7.90 Hen harriers are ground nesting birds that breed in moorland, young conifer plantations and other upland habitats. It is stated that Pre-thicket conifer plantation (first and second rotation) may be used by breeding hen harriers and foraging harriers appear to avoid forest stands less than 3 years and greater than 15 years of age.

7.91 In total c.684ha of forestry (of various rotations) occurs within the red line site boundary of the project. Of this, 167.76ha (24.52% within the site boundary) will be available for nesting hen harrier and 289.95ha (42.39%) will be available for foraging hen harrier. The construction phase of the project will require the loss of c.67.66ha of forestry, of which 18.18ha would be potentially available for nesting hen harrier, and 31.87 would be available for foraging hen harrier (this is inclusive of nesting habitat) in this period. In response to the DAU's concerns the applicant has confirmed that a total of 31.87ha of suitable habitat will be lost. It is stated that 149.58ha of suitable hen harrier nesting habitat will remain within the development site, in addition to 258.08ha of suitable foraging habitat.

7.92 2,627ha of additional Coillte forestry within 5km of the development has the potential to provide 379ha of nesting habitat and 638ha of foraging habitat. It is also proposed to provide 6 enhancement areas within the surrounding area which will provide a total of 106ha of additional suitable habitat. Enhancement lands will be examined in detail below.

7.93 I note from the information submitted that the most suitable traditional habitats for breeding and foraging hen harrier will not be developed. It is stated that turbine T1 will require loss of 0.9ha of cutover bog, and T8 will require the loss of 0.31ha of wet grassland However, it is considered that this habitat loss is not significant, given the availability of often more suitable, and traditional hen harrier habitat adjacent, and extending away from the site, including the bogland protected within the Slieve Bernagh SAC extending away from the site.

7.94 Any loss of currently suitable forestry habitat owing to the project will not be significantly above that which would occur and does occur as a result of the forestry operations at the project site. It is therefore considered the magnitude of the habitat loss described will result in a Long-term, Slight Negative effect on hen harrier."

26. Having dealt with effects of the turbines themselves and other matters, the report went on as follows:

"7.106 With regard to cumulative impacts, I note the DAU raised concerns in relation to the cumulative impact assessment and the consideration of all pressures operating in the surrounding environment and protected sites. Particular reference is made to forestry planting and felling licence applications. In response to these concerns the applicant states

that forestry will continue and will create temporal and spatial changes in hen harrier use as is commonplace in commercial forestry operations.
7.107 It is noted at the outset that a forest management plan was not available for private forestry in the area but a review of aerial photography demonstrated what areas of forestry would likely be felled and replanted between 2025-2058. The details of Coillte's forestry plan were reviewed in the context of cumulative impacts. Overall analysis of forestry operations suggests that the potential suitable foraging and nesting habitat available for nesting and foraging hen harrier remains relatively stable over the lifetime of the wind farm (2025-2055), with no significant reduction, and will remain available for the population of hen harrier using the area.
7.108 Cumulative impacts assessment also includes windfarms within 20km of the proposed development site, which are referred to both within section 4.1.6 of the further information response and within section 7.7.2 of the EIAR. It is also stated that Section 7.7.2 of the EIAR also refers to cumulative impacts arising from windfarms within 30km of the proposed development. It is concluded that the project and other wind farms in the region are separated by vast areas of agricultural grassland, and the River Shannon and built areas. Due to the separation distance of over 20km it is unlikely that the project and other wind farms in the region will result in cumulative habitat loss impacts on the hen harrier population of the Slieve Bernagh to Keeper Hill Area, or other avian KERs identified. In relation to the grid connection and delivery route all works will be within the public road and where vegetation clearance is required it will be undertaken within outside of the breeding season.
7.109 Thus, having regard to the foregoing and given the nature of the development site and the separation distance from the proposed development to the nearest recorded successful nest I am satisfied that the applicant has demonstrated that the proposed development will not displace or negatively impact hen harrier utilising the surrounding area."

27. The report then considered the putting in place of enhancement lands and concluded:
"7.122 Based on the foregoing and the information submitted within the further information response, I am satisfied that the applicant has adequately addressed the concerns of the DAU in relation to the proposed enhancement areas and I am further satisfied that the proposed development and loss of 31.87ha of potentially suitable hen harrier habitat is adequately addressed by way of the proposed 106ha of enhancement lands which will, as mentioned above improve connectivity with the SAC and reduce edge effects at these locations, providing an overall improvement of breeding and foraging conditions within the general area for hen harrier."

28. The section of the report dealing with AA addresses impacts on the Hen Harrier thus:
"8.82 The Slieve Aughty Mountains are a stronghold for Hen Harrier and support the second largest concentration in the country. A survey in 2005 recorded 27 pairs, which represents over 12% of the all-Ireland population.
8.83 The site also supports a breeding population of Merlin. The population size is not well known but is likely to exceed five pairs. Red Grouse is found on many of the unplanted areas of bog and heath – this is a species that has declined in Ireland and is now Redlisted.
8.84 The Slieve Aughty Mountains SPA is of ornithological significance, as it provides excellent nesting and foraging habitat for nationally important breeding populations of Hen Harrier and Merlin, two species that are listed on Annex I of the E.U. Birds Directive.
8.85 The potential for impacts to arise in relation to this SPA relate to ex-situ effects in relation to roosting or breeding Hen Harrier. Hen harriers are ground nesting birds that breed in moorland, young conifer plantations and other upland habitats. It is stated that Pre-thicket conifer plantation (first and second rotation) may be used by breeding hen harriers and foraging harriers appear to avoid forest stands less than 3 years and greater than 15 years of age. The felling of suitable habitat has the potential to give rise to displacement effects to this species in conjunction with constriction activities which may result in further displacement of these birds from the site and surrounding area as a result of noise and disturbance."

29. In-combination effects were considered in connection with forestry:
"8.87 In combination effects are examined within section 4.3 of the NIS submitted. The proposed works were considered in combination with impacts arising from forestry, habitat alteration and fragmentation, peat harvesting and other development and windfarms in the area.
8.89 In-combination effects have also been considered in the context of climate change and the potential for climate change to impact erosion and therefore water quality within rivers.
8.90 The NIS submitted for the proposed project concludes, having considered the aforementioned activities and development that subject to mitigation measures relating to

the protection of water quality and noise and vibration, no significant incombination effects are identified with the proposed development."

30. All of this culminates in a section on the Hen Harrier in an AA context:

"8.111 The project is outside the 2km core foraging range of the Slieve Aughty Mountains SPA population of Hen harrier. The development site is within the maximum foraging range (10km) of the Slieve Aughty Mountain SPA population of Hen harrier. It is possible that the SPA population of Hen harrier occasionally loaf or commute towards the development site. However, SNH (2016) guidance states that the maximum foraging range should only be a consideration in impact assessment in 'exceptional circumstances'. There is an abundance of suitable habitat available inside the boundary of the Slieve Aughty Mountains SPA.

8.112 Notwithstanding the degree of afforestation within the SPA (c.one half), and the use of pre-thicket forestry, the availability of these traditionally suitable habitats inside the SPA together with the wider availability of similar habitats between the SPA and the development site, indicates that the development site is unlikely to be of inherent value to the SPA population of Hen harriers.

8.113 The design of the project was driven by a process of mitigation by avoidance as well as a principle of using existing infrastructure to the maximum possible extent. Construction of the project will be phased which will concentrate activity within the development site to certain areas at a time, leaving other areas relatively less disturbed. The most valuable foraging and breeding habitats for upland birds have been excluded from the developable area and will be outside the areas of construction works. Connectivity within the development site and between the development site and the SPA will therefore be maintained during the construction phase.

8.114 A study at the Derrybrien wind farm in County Galway found that Hen harriers continued to hunt over the area following construction of the wind farm, often passing within 10-50m of turbines (Madden & Porter 2007). The distance between each turbine in the proposed Carrownagowan Wind Farm will be at least 500m.

8.115 A Collison Risk Model (CRM) was undertaken for the project. The collision risk for the local Hen harrier population has been calculated at a rate of 0.056 collisions per year, or 1.65 birds over the 30 year lifetime of the wind farm. This corresponds to a 2% increase in the background mortality rate of the local population and a 0.1% increase in the background mortality rate of the national population. Therefore the magnitude of the collision effect is considered Low.

8.116 While located within the 10km maximum foraging range, no exceptional circumstance has been identified to indicate that the development site is an ecologically valuable resource for the SPA population of Hen harrier. It is considered that there are no ecological processes or pathways by which the project may significantly impact the SPAs resident population of Hen harrier. Hen harriers frequently recorded within the study area during recent breeding seasons are part of the Slieve Bernagh to Keeper Hill Regional population. The number of breeding pairs recorded during surveys is consistent with NPWS data for this Regional Area. It is also proposed to carry out a pre construction survey to identify roosts and to monitor the area for hen harrier during the course of works. In the event that hen harrier are present within the zone of influence works will cease. No works will be carried out within 500 metres of hen harrier roosts or breeding sites."

31. The board adopted a decision on 29th September, 2022 granting permission. The board order agreed with the inspector that at screening there was the possibility of significant effects on Slieve Bernagh Bog SAC (002312) and Slieve Aughty Mountains SPA (004168), and that on appropriate assessment such effects could be ruled out. The inspector's conclusion as to the effects being acceptable following EIA was also agreed with.

32. I can finally note under this heading that forestry consents and associated documents such as EIA reports, for decisions since September, 2021 are available on a Forestry Licence Viewer (FLV) on the Minister's website.

Procedural history

33. The proceedings challenging the decision and including a variety of other reliefs were instituted on 23rd November, 2022 when papers were filed and the matter was opened before the court. Liberty was given to amend the statement of grounds.

34. On 12th December, 2022 a further order was made allowing another amendment to the statement of grounds.

35. Further liberty to amend was given on 30th January, 2023, although oddly this is not referenced in the heading to the current amended statement of grounds. On 13th February, 2023 the time to comply with that order was extended, and the current statement of grounds references that order rather than the order giving liberty to amend.

36. On the same date the court dealt with a motion from the applicant seeking further information on a pre-leave basis. Paragraph 1 of the motion was adjourned generally. The extension of time for the amended statement was granted under paragraph 2. Costs were reserved by consent.

37. Once the papers were in order to the necessary minimum extent, leave was granted on 20th February, 2023. The curial part of that order reads:

> "IT IS ORDERED that
>
> 1. The Applicant do have leave to apply by way of application for judicial review for the Reliefs set forth in paragraph D 1 to 29 of the said amended Statement in the form hereafter on the grounds set out in paragraph E therein without prejudice to any point that the Respondents and Notice Party could have made
> 2. The Applicant shall serve the papers in these proceedings electronically on the Respondents and the Notice Party in the case of State Respondents service being effected on the Chief State Solicitor's Office and issue and serve on the Respondents and the Notice Party within 7 days of the date of the perfection hereof an originating Notice of Motion herein said Motion returnable for the Commercial Planning and SID List on Monday the 6th day of March 2023
> 3. Parties are requested and encouraged to agree to accept service of papers by email and to co-ordinate with each other to ensure that appropriate email addresses are exchanged
> 4. The Court's default Directions Schedule will apply unless the parties agree otherwise before the return date and notify the List Registrar default Directions being specified in 2(8) of High Court PD 107
> 5. A party shall not recover the costs of any pleading affidavit exhibit or submission delivered in breach of a time limit set out in an agreed or ordered direction unless the court otherwise orders when making the final order as to costs
> 6. The Respondents and Notice Party are to indicate in writing in advance of the return date whether they accept that the present proceedings are covered by the costs protection provisions of section 50B of the Planning and Development Act 2000 as amended and/or otherwise. And the Court Doth Certify for two Counsel in respect of the within application for the purposes of legal costs adjudication Liberty to apply."

38. The reference to two counsel was not part of the spoken order and was in fact surplusage and while it is a usual formula it did not apply here so can be deleted at this stage under the slip rule.

39. The notable thing for present purposes is that the order did not grant an extension of time in the absence of a request for that.

40. On 6th March, 2023, Future Energy was added as a notice party and the matter was adjourned to 24th April, 2023 to allow motions to be brought.

41. Separately, I can note that on 6th March, 2023, the applicants sought information on past consents under the legislation implementing the AIE directive. Correspondence was then issued seeking a narrowing of the requests on 14th March, and 5th April, 2023. The applicants declined to do that. These requests were refused by the Minister on 19th April, 2023 and by Coillte on 4th May, 2023. The applicants didn't seek internal review of that let alone make an appeal to the Commissioner for Environmental Information. The claim that this couldn't have been done in time for use in the proceedings seems of dubious merit as the proceedings will continue for some months to come.

42. The matter was then heard commencing on 17th October, 2023. At the hearing it emerged that some pages of the response to Item 1 of the request for further information had not been exhibited formally so the developers agreed to file a short affidavit by 20th October, 2023 to exhibit the full document.

Issues now before the court

43. The hearing involved an embarrassment of matters to be decided, which I can summarise as follows and which include but are by no means limited to the formal notices of motion:

(i) a motion to strike out the proceedings to a specified extent brought by the developers;
(ii) a motion to strike out the proceedings as against the State;
(iii) a motion for discovery from the applicants;
(iv) a preliminary request to amend the discovery motion;
(v) an issue about whether the applicants should be allowed to file a further affidavit;
(vi) a preliminary issue as to the applicability and extent of any remedial obligation as referred to in sub-ground 10.19A;
(vii) a preliminary point about the preliminary issue was whether that issue could properly be decided at this stage; and

(viii) consequential issues arising from the decision on the foregoing, in regard to the format of the proceedings and the continuing role of certain parties.

44. We turn now to the pleadings, which are of crucial importance. The developers made the overall point that the applicants' case had the flavour of an academic symposium, and I'm afraid there is a great deal of validity to that. The developers correctly point out that the parameters of the case are fixed by the pleadings. A great deal of the oral submission sought to press hard at those boundaries. The single most striking thing was that the whole centre-piece of the hearing was the EU law remedial obligation. But that only gets a single, almost passing, reference in a single sub-ground – not even a core ground – of the third amended statement of grounds. But what really propels this case into the sphere of the academic symposium is the fact that the applicants' emphasis throughout was on the granular detail of the EU law obligation, at the expense of getting to grips with whether it properly arose here at all. This conflates two applicants' fallacies (and to avoid misunderstandings, there are plenty of respondents' fallacies out there also) – firstly, the misconception that Europe in general (and latterly, the judgement of 4 December 2018, *The Minister for Justice and Equality and The Commissioner of An Garda Siochana v. Workplace Relations Commission*, C-278/17, ECLI:EU:2018:979 in particular) is always available to descend like a *Deus ex machina*, as the developers put it, and secondly the belief that elaborate legal superstructures rather than facts are of most interest to judges and will be more likely to determine the outcome of cases.

45. On the first point, the erroneous view that Europe and *WRC* solve all problems for applicants has been addressed elsewhere.

46. And on the second point, as regards an excessive focus on abstract law, like the plaintiff who is strong on quantum but light on liability, the applicants spent very little time in either written or oral submissions in dealing with the factual matrix which supposedly provided the premise on which the whole tottering edifice of European argument was erected. But in the present case the facts were crucial. Indeed that is normally the default position in litigation generally. There is very little exaggeration in the aphorism offered by the late Edmund King QC in his post on Essex Court Chambers website, "How to lose a case": "Every single case is only ever won on the facts, even the ones that supposedly aren't": https://essexcourt.com/publication/how-to-lose-a-case/. Perhaps this is something to reflect on for those drafting submissions going forward – in an ideal world, maybe the word count in terms of the fact:law ratio might be at least 1:2 if not 1:1.

Relief sought – substantive proceedings

47. What seems to be a local record-breaking 29 reliefs are set out in the third amended statement of grounds as follows:

> "D, Remedies
>
> Preliminary Remedies
>
> 1. Directions requiring the First Respondent, the Board, pursuant to S146 of the Planning and Development Act 2000 as amended, to put on its website within such time as the Court may specify, all material relating to Board Decision file reference ABP-308799-20, dated 29 September 2022, relating to a proposed windfarm development at Carrownagowan, County Clare.
>
> 2. Directions permitting the Applicants to file an amended Statement of Grounds containing such further particulars and further grounds as it may consider appropriate, subject to leave of the Court in relation thereto, within the period of 8 weeks following the placing on the Board's website in accordance with relief Dl above, of all material relating to Board Decision file reference ABP-308799-20, dated 29 September 2022, relating to a proposed windfarm development at Carrownagowan, County Clare.
>
> 3. Directions permitting the First Named Applicant to consider the further information submitted by the Developer between June 2021 and December 2021 relating to Board file reference ABP-308799-20, and granting liberty to the First Named Applicant to file an Affidavit outlining such submission as it would have made had it been aware of the determination of the Board that the said further information was significant and that it was appropriate to allow the making of submissions in relation thereto, as provided for pursuant to S37E(3)(a).
>
> 4. Directions of the type outlined at paragraph 81 of the decision in *Reid v Bord Pleanala*, [2021] IEHC 362 requiring the Board to file an Affidavit providing, in respect of Board Decision file reference ABP-308799-20, dated 29 September 2022, relating to a proposed windfarm development at Carrownagowan, County Clare, details of the expertise applied by the Board in respect of the issues raised, including but not limited to the expertise applied by it to independently, demonstrably and impartially, deploy sufficient expertise, detailed scrutiny and a high standard of investigation, and showing it had the resources with which to do so, per paragraph §243 of the judgment of this Court in the case of *Environmental Trust Ireland v Bord Pleanala*, [2022] IEHC 540.

5. Such mandatory order or injunction to the like effect as the Court may consider appropriate.

6. Discovery

Substantive Remedies

7. An Order of Certiorari pursuant to Order 84 of the Rules of the Superior Courts 1986 as amended and Section 50 of the Planning and Development Act 2000 as amended quashing the decision of the First Respondent, An Bord Pleanala (the Board), dated 29 September 2022, file reference ABP-308799-20, and there described as: Proposed Development: The proposed development is for a ten-year permission that will constitute the provision af [sic] the fa/lawing [sic]:

a) nineteen (19) number wind turbines (blade tip height up ta [sic] 169 metres);
b) nineteen (19) number wind turbine foundations and associated hardstand areas,
c) one (1) number permanent metearalagical [sic] mast (100 metre height) and associated foundation and hardstand area,
d) one (1) number substation (110 kilovolts) including associated ancillary buildings (electrical building including contra/ [sic], switchgear and metering rooms and the operational building including welfare facilities, workshop and office), security fencing and all associated works,
e) upgraded site entrance,
f) new and upgraded internal site service roads (8.4 kilometres of existing tracks to be upgraded and 11.4 kilometres of new service roads to be constructed),
g) provision of an onsite visitor cabin and parking,
h) underground electrical collection and SCADA system linking each turbine to the proposed on-site substation,
i) construction of new roadways and localised widening along the turbine delivery route,
j) two (2) number temporary construction site compounds
k) three (3) number burrow pits to be used as a source of stone material during construction,
l) three (3) number peat and spoil deposition areas (at burrow pit locations),
m) associated surface water management systems,
n) tree felling for windfarm infrastructure, and
o) all associated site development works.

All in the town/ands [sic] of Ballydonaghan, Caherhurley, Coumnagun, Carrawnagowan, Inchalughoge, Killokennedy, Kilbane, Coo/ready [sic] and Drumnod, County Clare.

8. Such declaration(s) of the legal rights and/or 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 Respondents as the court considers appropriate.

9. A stay pursuant to Order 84 Rule 20(8)(b) of the Rules of the Superior Courts on the operation of the above Board Decision of 29 September 2022, file reference ABP-308799-20, pending conclusion of the present proceedings.

Forestry Consent Remedies

10. Directions of the type outlined at paragraph 81 of the decision in *Reid v Bord Pleanala,* [2021] IEHC 362 requiring the Developer to file an Affidavit providing details of all licences, permissions or other consents granted relating to projects for afforestation, felling or reafforestation of any lands in the townlands of Ballydonaghan, Caherhurley, Coumnagun, Carrownagowan, Inchalughoge, Killokennedy, Kilbane, Coolready and Drummod, County Clare, from 1 June 1970 to date, the dates of such licences, of all forestry related works carried out on those lands during that period (in particular the fire break between the Slieve Bernagh SAC and the afforested area) and of all environmental impact assessments and appropriate assessments carried out in relation to such licences, permissions or consents, and all screening determinations relating to whether such assessments were required, and to provide copies of all documents so identified.

11. Discovery

12. An Order of Certiorari pursuant to Order 84 of the Rules of the Superior Courts 1986 as amended and/ or Section 50 of the Planning and Development Act 2000 as amended quashing all and/ or any decisions taken between 1 June 1988 and the present by the Minister for Agriculture Food and the Marine or any other competent authority, authorising the carrying out of any afforestation, felling and/ or reafforestation project, and all forestry related works (in particular the fire break between the Slieve Bernagh SAC and the afforested area), in the townlands of Ballydonaghan, Caherhurley, Coumnagun, Carrownagowan, Inchalughoge, Killokennedy, Kilbane, Coolready and Drummed, County Clare.

13. An Order pursuant to Section 50(8) of the Planning and Development Act 2000 as amended, or pursuant to Order 84 Rule 21(3) of the Rules of the Superior Courts 1986 as amended, extending time for the bringing of any application referred to in the preceding paragraph.

14. A Declaration for the purposes of S177B of the 2000 Act in relation to all and/ or any such decisions taken between 1 June 1988 and the present by the Minister for Agriculture Food and the Marine or any other competent authority, authorising the carrying out of any afforestation, felling and/ or reafforestation project in the townlands of Ballydonaghan, Caherhurley, Coumnagun, Carrownagowan, lnchalughoge, Killokennedy, Kilbane, Coolready and Drummed, County Clare, to the effect that such decisions relate to a development or project in the administrative area of Clare County Council for which authorisation was granted by the Minister for Agriculture Food and the Marine or such other competent authority as may appear to have issued such authorisation, or by the planning authority or the Board, and for which - (a) an environmental impact assessment, (b) a determination in relation to whether an environmental impact assessment is required, or (c) an appropriate assessment, was or is required, that such consent was in breach of law, invalid or otherwise defective in a material respect because of - (i) any matter contained in or omitted from the application for consent including omission of an environmental impact assessment report (or environmental impact statement) or a Natura impact statement or both that report and that statement, as the case may be, or inadequacy of an environmental impact assessment report or a Natura impact statement or both that report and that statement], as the case may be, or (ii) any error of fact or law or procedural error.

15. A mandatory order or injunction requiring the Council, pursuant to the Order in the preceding paragraph, to serve the notice specified in S177B of the Planning and Development Act 2000 as amended in respect of all and / or any decisions taken between 1 June 1988 and the present by the Minister for Agriculture Food and the Marine or any other competent authority, authorising the carrying out of any afforestation, felling and/ or reafforestation project in the townlands of Ballydonaghan, Caherhurley, Coumnagun, Carrownagowan, lnchalughoge, Killokennedy, Kilbane, Coolready and Drummod, County Clare, and any other forestry related works (in particular the fire break between the Slieve Bernagh SAC and the afforested area).

16. A Declaration pursuant to Order 84 Rule 18(2) of the Rules of the Superior Courts as amended to the effect that, in authorising the carrying out afforestation, felling and / or reafforestation projects in the townlands of Ballydonaghan, Caherhurley, Coumnagun, Carrownagowan, lnchalughoge, Killokennedy, Kilbane, Coolready and Drummod, County Clare, and any other forestry related works (in particular the fire break between the Slieve Bernagh SAC and the afforested area), the Minister and / or the State has failed to consider and determine whether the carrying out of such projects or works was compatible with the preservation of a species listed in Annex I to the Birds Directives (79/409 and 2009/147), namely hen harrier (Circus Cynaeus), and compatible with maintaining the population of that species at a level which corresponds to ecological, scientific and cultural requirements, or whether the authorisation of such projects or works was compatible with the requirement to take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for hen harrier, for the purposes of Articles 2 and 3 of those Directives.

17. A mandatory order or injunction pursuant to Order 84 Rule 18(2) of the Rules of the Superior Courts 1986 as amended, S160 of the 2000 Act, A6(2) of the Habitats Directive, A9(3) and (4) of the Aarhus Convention, A47 of the Charter, and A4(3) and A19(1) TEU, and/ or some or all of those provisions, requiring the Developer to assess, identify and remediate the negative environmental impacts identified in the Hen Harrier Programme included with its Responses to Requests for Further Information between June and December 2021 (in which the Developer identified such effects in the context of proposals to carry out works to provide compensatory habitat for hen harrier disturbed by the existing forestry project on the site.)

18. Such mandatory order or injunction to the like effect as the Court may consider appropriate.

Non-Transposition Remedies

19. A declaration that the State failed, in the period between I June 1988 and 2010 correctly to implement Al, A2, A3, A4, AS, A6, A8 and/ or A9 of Directive 85/337 on environmental impact assessment as amended and A6 of Directive 92/43 on habitats, and that S177B of the Planning and Development Act 2000 as amended should be interpreted as applying retrospectively to any consent to afforestation, felling and/ or reafforestation project in the townlands of Ballydonaghan, Caherhurley, Coumnagun, Carrownagowan,

Inchalughoge, Killokennedy, Kilbane, Coolready and Drummod, County Clare between 1 June 1988 and the present.

20. Such declaration(s) of the legal rights and/or 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 Respondents as the court considers appropriate.

Costs protection

21. A Declaratory Order pursuant to Section 7 of the Environment (Miscellaneous Provisions) Act 2011 as amended, Order 99 of the Rules of the Superior Courts as amended, the inherent jurisdiction of the Court, Article 47 of the Charter on Fundamental Rights of the European Union, Articles 4(3) and 19(1) of the Treaty on European Union, and/ or Article 9 of the Convention on Access to Information, Public Participation In Decision-Making and Access to Justice In Environmental Matters done at Aarhus, Denmark, on 25 June 1998 (the Aarhus Convention), confirming that Section SOB of the Planning and Development Act 2000 as amended and/ or Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011 apply to the Grounds set out at Part E hereof.

Further Orders

22. Liberty to file further Affidavits containing further particulars or expert evidence in support of the grounds already advanced.

23. Liberty to amend grounds on foot of expert advice if and when received.

24. Liberty to amend grounds on foot of any material added to the website of the Board following commencement of the present proceedings.

25. Liberty to amend grounds on foot of any material obtained by the Applicants in relation to the authorisations granted for the planting of forestry in the townlands of Ballydonaghan, Caherhurley, Coumnagun, Carrownagowan, Inchalughoge, Killokennedy, Kilbane, Coolready and Drummod, County Clare.

26. An order referring a question or questions of law for determination by the Court of Justice of the European Union.

27. Further or other relief.

28. Discovery

29. Costs"

Grounds of challenge – substantive proceedings

48. The core grounds as set out in the third amended statement of grounds are as follows:

"E1. Core Grounds

National Law Grounds

1. The Board failed to put all the documents relating to the matter the subject of the Decision on its website contrary to S146(5) and (7)(a) of the 2000 Act.

2. The Board failed to make a prior determination to the effect that the Proposed Development would constitute strategic infrastructure for the purposes of S37A and Schedule 7 of the 2000 Act, and failed to make a direction as to the plans, particulars or other information which the Board will require for the purposes of consideration of an application, as required by A210(2)(a) of the 2001 Regulations.

2A. The Impugned Decision is invalid because the Board failed to comply with S37E(3)(c) of the 2000 Act and / or A213(1)(h) of the 2001 Regulations in that the Applicant failed to notify Tipperary County Council and Limerick City and County Council of the application for permission, both of which are local authorities from whose functional areas the Proposed Development would be visible and which are therefore required. Additionally or in the alternative the Board failed to obtain any evidence of that notification, and / or failed to satisfy itself as to the making of that notification.

EU Law Grounds

3. The Impugned Decision is invalid because the Board failed to ensure it had sufficient expertise to examine the EIAR in order to ensure its completeness and quality and to carry out an assessment that would be as complete as possible, contrary to S172(1H) of the 2000 Act, and A6 of the EIA Directive and to carry out an assessment that would be as complete as possible (~~5~~S171A, 5S172, A3(6)), and failed to give adequate reasons to establish that it had access to such expertise (~~5~~S71A, ~~5~~S172, A8a).

4. In the alternative the Decision If the Impugned Decision is not invalid for the reasons set out in the preceding Ground, it must nonetheless be set aside because the State has failed to create an effective procedure of review, in breach of Article 9(4) of the Aarhus Convention, All of the EIA Directive, A47 of the Charter, Article 19(1) of the TEU, and/ or some or all of those provisions and a Decision that fails to comply with the EIA Directive but that cannot be effectively reviewed is necessarily either invalid or incapable of having any effect.

5. The Impugned Decision is invalid because the Impugned Decision is invalid because it fails to incorporate environmental conditions into the decision, and fails to incorporate a description of measures intended to avoid, prevent, reduce or offset effects contrary to S37H(2A), S172(1H), and S172(11) of the 2000 Act read in light of A8a of the EIA Directive; or those subsections constitute an inadequate transposition of A8a.

6. In the alternative the Decision If the Impugned Decision is not invalid for the reasons set out in the preceding Ground, it must nonetheless be set aside because the State has failed to adequately transpose A8a(1) of the EIA Directive contrary to A4(3) and 19(1) TEU and a Decision adopted pursuant to provisions of an Act that fail to give effect to a Directive, where the Board does not apply the interpretative obligation, and / or, where appropriate, the set aside obligation, in order to correctly apply A8a of the EIA Directive, is invalid, void and of no legal effect.

7. The Impugned Decision is invalid because the Board failed to investigate and analyse the information submitted by the Developer, and/ or to carry out as complete an assessment as possible, and therefore its EIA failed to meet the definition of an EIA in S171A when interpreted in accordance with Articles 1, 2 and 3 of the EIA Directive.

8. In the alternative, the State failed adequately to implement the requirement that an EIA must involve as complete an assessment as possible and thereby failed to give full effect to A1(2)(g), A2(1) and A3 of the EIA Directive as required pursuant to A4(3) and A19(1) TEU, and to A288 TFEU which provides that a Directive is binding as to the result to be achieved and a Decision adopted pursuant to provisions of an Act that fail to give effect to a Directive, where the Board does not apply the interpretative obligation, and / or, where appropriate, the set aside obligation, to correct the defect, is invalid, void and of no legal effect.

9. The impugned Decision is invalid because the Board failed to carry out a proper screening for appropriate assessment of the Application and further information submitted by the Developer for the purposes of S177S of the 2000 Act read in light of A6(3) of the Habitats Directive.

10. The Impugned Decision is invalid because the Board failed to carry out as complete an assessment as possible in that it failed to assess the cumulative effects of the Proposed Development together with the effects of the existing forestry developments on the site, and failed to have regard to the EIA and Appropriate Assessment(s), if any, carried out in respect of those forestry developments and in so doing contravened A2, 3 and 4 of the EIA Directive, and A6 of the Habitats Directive; the Developer erred in law by carrying out projects for which prior EIA and Appropriate Assessment was required without those assessments being carried out and in so doing contravened A5 of the EIA Directive, A6 of the Habitats Directive, and A4(3) and A19(1) of the Treaty on European Union; and the State erred in law in granting the underlying forestry consents for the application contrary to A2, 3 and 4 of the EIA Directive, A6 of the Habitats Directive, and A2 and A3 of the 1979 and 2009 Birds Directives, and substitute consent is required for the purposes of S177B of the 2000 Act."

Relief sought – motions

49. The relief sought by Coillte and the notice party in their motion is as follows:

"1. An Order pursuant to the inherent jurisdiction of this Honorable Court setting aside leave to apply by way of an application for judicial review in these proceedings granted by Order of Mr Justice Humphreys made on 20 February 2023 and perfected on 27 February 2023, in so far as leave was granted in respect of the "Forestry Consent Remedies", namely reliefs 10 to 18 set out in Section D of the Third Amended Statement of Grounds filed on 16 February 2023, on the grounds set out at Core Ground 10 and §E2.10 to §E2.10.21.

2. An Order pursuant to Order 19, rules 27 and/or 28 of the Rules of the Superior Courts and/or the inherent jurisdiction of his Honourable Court striking out the Applicants' pleadings and/or dismissing the Applicants' claim in so far as it relates to the "Forestry Consent Remedies", namely reliefs 10 to 18, sought in Section D of the Third Amended Statement of Grounds filed on 16 February 2023, on the grounds set out at Core Ground 10 and §E2.10 to §E2.10.21.

3. Further or other Order.

4. An Order for the costs of this application, pursuant to section 50B(3) of the Planning and Development Act 2000."

50. The relief sought by the State respondents in their motion is as follows:

"1. An Order setting aside the Order of this Honourable Court (Humphreys J.) made on 20 February 2023 insofar as that Order grants the Applicants leave to apply for judicial review as against the State Respondents;

2. In the alternative, an Order dismissing the proceedings as against the State Respondents pursuant to Order 19, rules 27 and/or 28 of the Rules of the Superior Courts

and/or the inherent jurisdiction of the Court as being out of time and/or failing to disclose a cause of action and/or being frivolous and/or vexatious and/or bound to fail;

3. Further or other order.

4. Costs."

51. The relief sought by the applicants in their motion is as follows:

"1. An order pursuant to Order 31 of the Rules of the Superior Courts directing the Second Respondent, Coillte CGA, to make discovery on oath of the documents which are or have been in its possession, power or procurement relating to the precise categories of documents set out in Part 1 of the First Schedule hereto, discovery of which is necessary for the reasons set out in Part 2 of that Schedule.

2. An order pursuant to Order 31 of the Rules of the Superior Courts directing the Fourth

Respondent, the Minister for Agriculture, Food and the Marine, to make discovery on oath of the documents which are or have been in his possession, power or procurement relating to the precise categories of documents set out in Part 1 of the Second Schedule hereto, discovery of which is necessary for the reasons set out in Part 2 of that Schedule.

3. Directions of the sort referred to at paragraph 81 of the decision in *Reid v Bord Pleanala,* [2021] IEHC 362 requiring the Second Respondent, Coillte, to file an Affidavit providing details of all licences, permissions or other consents granted relating to projects for afforestation, felling or reafforestation of any lands in the townlands of Ballydonaghan, Caherhurley, Coumnagun, Carrownagowan, lnchalughoge, Killokennedy, Kilbane, Coolready and Drummod, County Clare, from 1 June 1970 to date, the dates of such licences, of all forestry related works carried out on those lands during that period (in particular the fire break between the Slieve Bemagh SAC and the afforested area) and of all environmental impact assessments and appropriate assessments carried out in relation to such licences, permissions or consents, and all screening determinations relating to whether such assessments were required, and all consideration given to the impact of such forestry works on the conservation of wild birds, and to provide copies of all documents so identified.

4. Further or other order.

5. Costs."

Whether the preliminary issue regarding the remedial obligation can be determined at this stage

52. The applicants in written submissions suggested that the preliminary issue regarding the nature and extent of any remedial obligation could not be determined at a preliminary stage and would depend on discovery. That somewhat misunderstands the nature of what is involved here. The issue is whether the applicants' complaints about the remedial obligation even get off the ground, having regard among other things to their failure to make this point to the board or the Minister prior to brining proceedings. That issue of principle doesn't depend on discovery so can be decided now.

Assessment requirements for forestry

53. Before getting into the alleged remedial obligation due to allegedly defective assessment for the forestry activities here, we need to consider the gradually tightening requirements applicable to that process. I can endeavour to summarise these in the following table:

Period	EU law	Irish law
7/4/81-2/7/88	Birds directive 79/409 art. 4(4) requires efforts to avoid pollution and deterioration of habitats outside SPAs – there was a dispute about whether this involves some degree of assessment and whether this is directly effective	Not transposed
3/7/88 – 18/12/99	Directive 85/337, Annex II included initial afforestation and deforestation for the purposes of conversion to another type of land use – not obviously directly effective due to Annex II status	Not transposed. Agriculture was exempted development under the Local Government (Planning and Development) Act 1963.
19/12/89-30/9/96	As above Habitats directive 92/43 imposed additional	EIA required for initial afforestation over 200 ha - European Communities (Environmental Impact

	requirements for AA as of 10/6/94	Assessment) Regulations 1989 (349/1989). Normal planning permission applied to developments over that threshold (reg. 6).
1/10/96-20/9/99	As above	EIA required for initial afforestation over 70 ha - 101/1996, European Communities (Environmental Impact Assessment) (Amendment) Regulations, 1996 26/2/97 habitats directive transposed by S.I. No. 84 of 1997
21/9/99-9/12/01	As above plus CJEU finding in Case C-392/96 that Irish law is in breach of the directive by reason of being based on fixed thresholds and failing to address cumulative impacts	As above
10/12/01-20/9/11	Per 85/337 above Directive replaced by directive 2011/92 but with similar provision	Forestry consent system introduced by European Communities (Environmental Impact Assessment) (Amendment) Regulations, 2001, 538/2001. Applications for initial afforestation required a licence from the Minister for the Marine and Natural Resources and requires an EIS if over 50 ha (regs. 4 and 15) or if directed by the Minister (reg. 21). The 2001 regulations were replaced by S.I. No. 558/2010 - European Communities (Forest Consent and Assessment) Regulations 2010 and ultimately the Forestry Regulations 2017 no. 91 of 2017
21/9/11-date	As above	As above plus under art. 27(4)(b) of S.I. No. 477/2011 - European Communities (Birds and Natural Habitats) Regulations 2011, art. 4(4) of the birds directive was transposed.

54. Whether art. 4(4) of the birds directive requires an assessment was in dispute. The applicants said it did, and the State respondents said:

> "Article 4(4) does not require prior assessment of projects, and the obligation arising is aspirational, rather than requiring a particular result. It is not accepted that a remedial obligation could arise under that Article. (submissions on preliminary issue para. 98)."

55. In its judgment of 13 December 2007, *Commission v. Ireland*, C-418/04, ECLI:EU:C:2007:780, the CJEU held that there had been a failure to transpose and give effect to art. 4(4) of the birds directive. While the decision was mainly based on lack of factual implementation, there was some reference to the lack of a legislative framework, for example para. 187:

"Lastly, with regard to the Wildlife Act, it is clear that the only provision of that act relevant in this context and referred to by Ireland during the proceedings is section 11(1). However, that provision is not sufficiently specific to be regarded as guaranteeing the transposition of the second sentence of Article 4(4) of the Birds Directive."

56. The judgment of 21 September 1999, *Commission v. Ireland*, C-392/96, ECLI:EU:C:2012:834, calls for some brief comment. In that case the Commission impugned the 70 ha threshold for afforestation projects.

57. At para. 22 the CJEU notes the Commission's argument that:

"The second factor is that the legislation fails to take account of the cumulative effect of projects. A number of separate projects, which individually do not exceed the threshold set and therefore do not require an impact assessment may, taken together, have significant environmental effects."

58. At para. 30 the court noted:

"The Commission acknowledges that S.I. No 101 of 1996 is an improvement on the previous legislation inasmuch as it has lowered the threshold from 200 ha to 70 ha. Nevertheless, the protection remains inadequate because the whole of a proposed NHA could, in theory, be afforested without an impact assessment being required if the afforestation were carried out by different developers who all kept within the threshold of 70 ha over three years. The Irish legislation fails to take sufficient account of the cumulative effect of projects."

59. Ominously for the State, the court found at para. 60 that:

"In order to prove that the transposition of a directive is insufficient or inadequate, it is not necessary to establish the actual effects of the legislation transposing it into national law: it is the wording of the legislation itself which harbours the insufficiencies or defects of transposition."

60. The critical findings are as follows:

"64. As far as the objection to thresholds is concerned, although the second subparagraph of Article 4(2) of the Directive confers on Member States a measure of discretion to specify certain types of projects which are to be subject to an assessment or to establish the criteria or thresholds applicable, the limits of that discretion lie in the obligation set out in Article 2(1) that projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment (Kraaijeveld, cited above, paragraph 50).

65. Thus, a Member State which established criteria or thresholds taking account only of the size of projects, without also taking their nature and location into consideration, would exceed the limits of its discretion under Articles 2(1) and 4(2)of the Directive.

66. Even a small-scale project can have significant effects on the environment if it is in a location where the environmental factors set out in Article 3 of the Directive, such as fauna and flora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration.

67. Similarly, a project is likely to have significant effects where, by reason of its nature, there is a risk that it will cause a substantial or irreversible change in those environmental factors, irrespective of its size.

68. In order to demonstrate that Ireland has failed to fulfil its obligations in this regard, the Commission has put forward several convincing examples of projects which, whilst considered solely in relation to their size, may none the less have significant effects on the environment by reason of their nature or location.

69. The most significant example is afforestation because, when carried out in areas of active blanket bog, it entails, by its nature and location, the destruction of the bog ecosystem and the irreversible loss of biotopes that are original, rare and of great scientific interest. In itself, it may also cause the acidification or eutrophication of waters.

70. It was however necessary, and possible, to take account of factors such as the nature or location of projects, for example by setting a number of thresholds corresponding to varying project sizes and applicable by reference to the nature or location of the project.

71. Ireland's explanation that other environmental protection legislation, such as the Habitats Regulations, made it unnecessary to assess afforestation, land reclamation or peat extraction projects carried out in environmentally sensitive locations must be dismissed. Nothing in the Directive excludes from its scope regions or areas which are protected under other Community provisions from other aspects.

72. It follows that, by setting, for the classes of projects covered by points 1(d) and 2(a)of Annex II to the Directive, thresholds which take account only of the size of projects, to the exclusion of their nature and location, Ireland has exceeded the limits of its discretion under Articles 2(1) and 4(2) of the Directive.

73. As regards the cumulative effect of projects, it is to be remembered that the criteria and/or thresholds mentioned in Article 4(2) are designed to facilitate the examination of the

actual characteristics exhibited by a given project in order to determine whether it is subject to the requirement to carry out an assessment, and not to exempt in advance from that obligation certain whole classes of projects listed in Annex II which may be envisaged on the territory of a Member State (Commission v Belgium, cited above, paragraph 42, Kraaijeveld, cited above, paragraph 51, and Case C-301/95 Commission v Germany [1998] ECR I-6135, paragraph 45).

74. The question whether, in laying down such criteria and/or thresholds, a Member State goes beyond the limits of its discretion cannot be determined in relation to the characteristics of a single project, but depends on an overall assessment of the characteristics of projects of that nature which could be envisaged in the Member State concerned (Kraaijeveld, paragraph 52).

75. So, a Member State which established criteria and/or thresholds at a level such that, in practice, all projects of a certain type would be exempted in advance from the requirement of an impact assessment would exceed the limits of its discretion under Articles 2(1) and 4(2) of the Directive unless all the projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment (see, to that effect, Kraaijeveld, paragraph 53).

76. That would be the case where a Member State merely set a criterion of project size and did not also ensure that the objective of the legislation would not be circumvented by the splitting of projects. Not taking account of the cumulative effect of projects means in practice that all projects of a certain type may escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the Directive.

77. In order to demonstrate that Ireland has failed to fulfil its obligations in this regard, the Commission has also provided various examples of the effects of the Irish legislation as drafted.

78. Ireland has not denied that no project for the extraction of peat, covered by point 2(a) of Annex II to the Directive, has been the subject of an impact
assessment, although small-scale peat extraction has been mechanised, industrialised and considerably intensified, resulting in the unremitting loss of areas of bog of nature conservation importance.

79. As regards initial afforestation, covered by point 1(d) of Annex II to the Directive, such projects, encouraged by the grant of aid, may be implemented in proximity to one another without any impact assessment at all being carried out, if they are conducted by different developers who all keep within the threshold of 70 ha over three years.

80. The Commission has also cited the example of land reclamation projects, covered by point 1(d) of Annex II to the Directive, whose cumulative effect is not taken into account by the Irish legislation. Nor has it been disputed that much land clearance has taken place in the Burren without a single impact assessment being carried out, although it is an area of unquestionable interest. Limestone pavement, which is characteristic of the area, has been destroyed, as have vegetation and archaeological remains, giving way to pasture. Considered together, those interventions were likely to have significant environmental effects.

81. As regards sheep farming in particular, the Commission has proved that, again encouraged by the grant of aid, this has grown in an unrestrained fashion, which is a development which may have adverse environmental consequences. However, it has not demonstrated that sheep farming as practised in Ireland constitutes a project within the meaning of Article 1(2) of the Directive.

82. It follows from all of the foregoing that, by setting thresholds for the classes of projects covered by points 1(d) and 2(a) of Annex II to the Directive without also ensuring that the objective of the legislation will not be circumvented by the splitting of projects, Ireland has exceeded the limits of its discretion under Articles 2(1) and 4(2) of the Directive.

83. Consequently, the objection relating to infringement of Article 4(2) of the Directive in respect of the classes of projects covered by points 1(d) and 2(a) of Annex II to the Directive is well founded."

Reliefs and grounds challenged

61. The developers challenge reliefs 10-18. The State challenge some albeit not all of those, as well as relief 19.

62. So I will proceed on the basis that reliefs 1-9 and 20-29 are unchallenged in the present applications. That is of course without prejudice to the obvious fact that they can be challenged at the substantive hearing.

63. The State challenges core grounds 4, 6 and 8 (not specified in their motion but see written legal submissions at para. 7) and the developers and the State both challenge core ground 10.

Reliefs 10 and 11 - interlocutory or unnecessary reliefs

64. With very limited exceptions like a claim for an extension of time, only substantive reliefs need to be claimed in a statement of grounds, not interlocutory reliefs. Reliefs 10 and 11 claim such interlocutory reliefs and are therefore unnecessary. They simply confuse an already complex picture. I would propose to strike those out but that doesn't prevent the applicants from making any appropriate interlocutory application (including the matters covered by these reliefs) by motion or other appropriate application; and indeed they are doing so.

Reliefs 12 and 16 – certiorari of forestry licences – are these claims in time?

65. I would propose to consider the opposing parties' points firstly on the basis of whether they are in time, and if not whether time should be extended. If both questions are answered no then the leave order should be set aside. That is because an extension of time for an out-of-time case is a prerequisite for leave.

66. As regards the viability of the applicants' points that are within time, I would prefer to consider those not on the basis of discharging the leave order but rather on the basis of the issue of whether the applicant's case, taken at its height, can succeed, such that if not it should be struck out pursuant to the court's inherent jurisdiction rather than any specific rule of court. If an action can't succeed, what's the point in letting it go further, or quibbling about which precise jurisdiction the order to that effect should invoke?

67. On the time issue, it is obvious that reliefs 12 (*certiorari* of consents from 1988-2022) and 16 (declarations regarding consents from 1988-2010) are out of time. That is beyond argument, with the possible theoretical exception of consents covered by relief 12 granted in the 3 months prior to the issue of the proceedings. However there is no basis to say that there are any such consents, and this relief should not be allowed on such a purely speculative basis. The applicants made no efforts to establish whether there were any such consents anyway so it becomes speculation upon speculation.

Relief 13 - Whether an extension of time should be granted

68. Relief 13 seeks an extension of time. But there is no basis to extend time in relation to reliefs 12 and 16. The applicants have not established that they were unaware of the possibility of forestry works and would have remained unaware even exercising a reasonable degree of diligence in the circumstances. Awareness of such works would have put them on notice of the likelihood of the existence of consents. They didn't take any steps to inform themselves on that, and it is notable that the grounds make no reference to the AIE directive or implementing legislation.

69. Basically the notice party is correct that "[o]nce the Applicants knew that forestry activities had been carried out on the lands, the existence of consents for forestry activities on the lands, where required, became a probability rather than a mere possibility ... As such, the Applicants knew or ought to have known of the existence of consents for Coillte's forestry activities for several years prior to the institution of the within proceedings" (para. 39). "Notwithstanding the Applicants' awareness of the historic forestry activities for several years prior to the within proceedings, no explanation is offered as to why the Applicants did not seek to challenge any forestry consents, assert that Coillte "erred in law" by carrying out historic forestry activities, or even seek to obtain details of such forestry activities or consents, prior to the institution of these proceedings." (para. 40). This is what distinguishes the case from *Marshall v. Kildare County Council* [2023] IEHC 73. In Marshall, the challengers knew only that the developers were preparing and intending to carry out works. That implied the possibility of a consent having already been obtained but not a probability. Time only began to run when that possibility hardened into a probability by the provision of further information. But if the works actually begin, we are in probability territory. That's the situation here.

70. Yes it's true that the applicants didn't have all information at the outset. But the notice party flattens this argument very effectively: "The Applicants knew or ought to have been aware of the carrying out of historic forestry activities for several years. The Applicants did not attempt—let alone attempt "diligently"—to obtain any further information or relevant documents since that time" (para. 43).

71. The applicants didn't attempt to acquaint themselves with the web search facilities for relevant forestry consents, and only engaged with that after the links were provided by the State in these proceedings. That isn't consistent with acting diligently to follow up information that is publicly available.

72. To repeat points made elsewhere, the problem with the applicants' argument is the commercial context of the time limit for planning cases: *Kelly v. Leitrim County Council* [2005] IEHC 11, [2005] 2 I.R. 404, [2005] 1 JIC 2704, (Clarke J.), *Shell E & P Ireland Ltd v. McGrath* [2013] IESC 1, [2013] 1 I.R. 247, [2013] 1 JIC 2201 (Clarke J.) at §7.11, *Drumquin Construction (Barefield) Ltd. v. Clare C.C.* [2017] IEHC 818, [2017] 12 JIC 1908 (Coffey J.). This is a broad principle that applies in other commercial contexts: *Arthropharm (Europe) Ltd v The Health Products Regulatory Authority* [2022] IECA 109 (Murray J.). This is a context where there is prejudice to private law

actors, not a purely human rights or public law context: *O'Riordan v. An Bord Pleanála* [2021] IEHC 1, [2021] 1 JIC 2102.

73. The inevitable conclusion is that the leave order for reliefs 12 and 16 should be discharged.

Reliefs 14 and 15 - Claim under s. 177B

74. Reliefs 14 and 15 claim reliefs under s. 177B. As noted above that is totally misconceived because on the facts the section doesn't apply due to the lack of consents previously issued by the planning authority or the board. This is bound to fail and must be struck out. The applicants positively asserted in oral argument that there weren't any previous such consents. That being so, the jurisdictional requirement for the section isn't met.

Relief 17 - Claim for injunction to require developers to address information provided to the board

75. Relief 17 seeks an imaginative injunction compelling the developers to address matters arising from further information provided by them in the planning process.

76. In oral submissions the developers said compellingly that "it's the decision we have to comply with, we will do that" and that a misconceived claim in relation to orders requiring a developer to comply with material introduced in the planning process is "put in there to complicate and confuse". One has to have a lot of sympathy for that complaint.

77. Ultimately the problem for the applicants is that any materials in the consent process are superseded by the actual consent granted. That is the operative instrument which can be enforced, not subsidiary information introduced during the process. The information can and normally does become binding as a condition, but only as viewed through the lens of compliance with the decision, not under some separate free-standing duty.

78. The permission requires as condition 1 that it be carried out in accordance with the plans and particulars submitted. That includes the Hen Harrier management plan and the additional information. The idea that before a project has even commenced, an applicant can get some kind of pre-emptive injunction compelling the developer to do what it is required to do anyway, without even the slightest evidence that it isn't going to do that, is simply a non-starter. That would be like granting a s. 160 injunction under the 2000 Act against a developer, upon the grant of permission, without any evidence that unauthorised development had been, was being or was going to be carried out.

Relief 18 – general mandatory relief

79. Relief 18 seeks general and unparticularised mandatory relief that appears unnecessary and I propose to strike it out on that basis. That isn't meant to limit the power to grant further and other relief if ultimately the applicants should be shown to be entitled to that.

Relief 19 – Non-transposition by virtue of alleged remedial obligation

80. Relief 19 claims non-transposition by the State of EU law obligations. This ties in to the preliminary issue as to the scope and effect of the "remedial obligation" referenced in §10.19A of the third amended statement of grounds.

81. Sub-ground 10.19A is as follows:

> "10.19A. If and insofar as Irish law, properly interpreted in accordance with the interpretative obligation, did not require the carrying out of an assessment which was required by the EIA Directive or the Habitats Directive, or the making of a determination of compliance for the purposes of A1 to A4 of the Birds Directive, the State has failed adequately to implement the requirements of those Directives, and the Impugned Decision is thereby invalid being cumulative with earlier consents that are invalid because they were adopted pursuant to a deficient legal framework, and because the Impugned Decision fails to comply with the remedial obligation in respect of those Decisions."

82. What exactly this means on the specific facts was not altogether clear. One has to have a lot of sympathy for the State's response, which was that its submission "reflects the State Respondents' best attempts to identify the case that the Applicants seek to make based on the remedial obligation. However, where there is no consistency or clarity in the Applicant's own articulation of its case, it is not possible to reply to each proposition or legal argument that has been raised by the Applicants, in any coherent or concise manner."

83. EU law has recognised a remedial obligation in the AA and EIA contexts. As yet that doesn't appear to have been established in relation to the birds directive. The State's submission throws down the gauntlet:

> 98. The Applicants allege that a remedial obligation must also arise under the second sentence of Article 4(4) of the Birds Directive, which requires Member States to "strive to avoid pollution or deterioration of habitats" outside of protected areas. However, Article 4(4) does not require prior assessment of projects, and the obligation arising is aspirational, rather than requiring a particular result. It is not accepted that a remedial obligation could arise under that Article.

84. I don't need to decide that for reasons that will become fairly clear – essentially because the applicants never called on anybody to carry out such a remedial procedure. They just presented themselves to the court where they made that complaint for the first time.

85. Going back to remediation more generally, the really critical point is that the remedial obligation goes beyond merely an ability to challenge the decision which lacked assessment, and remains relevant even though such a challenge can be precluded by national time limits: see the judgment of 17 November 2016, *Stadt Wiener Neustadt*, C-348/19, ECLI:EU:C:2016:882. There is no contradiction between that and *Krikke v. Barranafaddock Sustainable Electricity Ltd* [2020] IESC 42, [2020] 7 JIC 1702, which upholds the validity of the relevant national time limits and does not purport to collapse the remedial obligation into that one limited question.

86. What remains, even if national law precludes the late invalidation of a permission that failed to involve a valid assessment, is an obligation "to nullify the unlawful consequences of that failure": see the judgment of 26 July 2017, *Commune di Corridonia and Others*, C-196/06 and C-197/16 ECLI:EU:C:2017:589.

87. The remedial obligation covers a multitude of concepts and needs to be understood as having at least four strands which need to be considered:

(i) where a challenge is brought to a previous consent without assessment;

(ii) where a project which has been consented without a full assessment is subject to a further consent application seeking extension or amendment of the previous permission;

(iii) where the validity of the previous permission is not challenged but the State and relevant actors are not taking action to remedy, review or carry out the inadequate assessment; and

(iv) where infringement proceedings are brought by the Commission.

Strand 1 – where a defectively authorised project is challenged within time

88. Where assessment is defective in making a particular decision, an applicant can make that point by way of challenge to the decision itself, provided that the challenge is brought within time as fixed by domestic law. The remedial obligation does not have the consequence that any given decision is invalid notwithstanding domestic time limits. Normal time limits apply (see the judgment of 12 November 2019, *Commission v. Ireland [Derrybrien II]*, C-261/18, ECLI:EU:C:2019:955 Para. 95). The applicants don't satisfy those here for reasons we will examine further later.

Strand 2 – where a defectively authorised project is sought to be continued

89. The judgment of 7 January 2004*, Wells*, C-201/02, ECLI:EU:C:2004:12 referred to the remedial obligation in a context of the "resumption" of a project that wasn't adequately assessed.

90. The CJEU said in the judgment of 10 November 2022, *AquaPri*, C-278/21, ECLI:EU:C:2022:864:

> "34 As is apparent from the case-law of the Court on the term 'project', within the meaning of that provision, that concept is broader than that in Directives 85/337 and 2011/92, which refer to the existence of works or interventions involving alterations to the physical aspect of a site. That concept also encompasses other activities which, without being connected with or necessary to the management of a protected site, are likely to have a significant effect on that site (see, to that effect, judgment of 7 November 2018*, Coöperatie Mobilisation for the Environment and Others,* C-293/17 and C-294/17, EU:C:2018:882, paragraphs 61 to 68 and the case-law cited).
>
> 35 However, where an activity likely to have a significant effect on a protected site has already been authorised, at the planning stage, the continuation of that activity can be regarded as a new or separate project which must be made subject to a new assessment under the first sentence of Article 6(3) of Directive 92/43 only in the absence of continuity between the authorised activity and the continued activity, having regard in particular to the nature of those activities and to the location and conditions in which they are carried out (see, to that effect, judgments of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others*, C-293/17 and C-294/17, EU:C:2018:882, paragraph 83, and of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, paragraphs 129 to 131).
>
> 36 In the event of the continuity of such an activity, its continuation must, in fact, be regarded as forming part of a single project which has already been authorised, and which does not need to be reassessed under the first sentence of Article 6(3) of Directive 92/43 (see, to that effect, judgments of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others,* C-293/17 and C-294/17, EU:C:2018:882, paragraphs 78 and 79; of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, paragraph 128, and of 9 September 2020, *Friends of the Irish Environment*, C-254/19, EU:C:2020:680, paragraph 35).

37 In the present case, it follows from the clear and precise wording of the present question that the referring court asks the Court about the applicability of the first sentence of Article 6(3) of Directive 92/43 in a dispute concerning the continuation of the activity of an operation which has already been authorised at the planning stage, under conditions which are unchanged in relation to those in the light of which that authorisation had been granted. There does not therefore appear to be, from that point of view, a new or separate project which must be made subject to a new assessment under that provision, subject to verifications which it is for the referring court alone to carry out.

38 In the second place, it must nevertheless be observed that, since the Member States are required to comply with Article 6(3) of Directive 92/43 and, more specifically, the assessment obligation laid down in the first sentence of that provision, it cannot be accepted that a legal consequence may not be drawn from the infringement of that obligation in the event that such an infringement is found, in a final decision, by the competent national authority or court.

39 On the contrary, as the Court has stated with regard to the similar assessment obligation established by Directive 85/337, even where the authorisation of a project which has been adopted in breach of that obligation is definitive, that project cannot, however, be regarded as having been lawfully authorised with regard to that obligation, such that the Member State concerned is required, under the principle of sincere cooperation provided for in Article 4(3) TEU, to eliminate the unlawful consequences of the breach which it has committed by taking all measures necessary within the sphere of its competence to remedy it (see, to that effect, judgment of 12 November 2019, *Commission v Ireland* (Derrybrien Wind Farm), C-261/18, EU:C:2019:955, paragraphs 71, 75, 80 and 90 and the case-law cited).

40 In particular, as the Advocate General noted, in essence, in points 29 and 30 of her Opinion, where a project has been authorised following an assessment which does not comply with the requirements of the first sentence of Article 6(3) of Directive 92/43, the competent national authority must carry out a subsequent review of the effects of the implementation of that project on the site concerned, on the basis of Article 6(2) of that directive, if that review constitutes the only appropriate measure for avoiding that implementation from leading to deterioration or disturbance that could have had a significant effect on the site concerned. (see, to this effect, judgment of 14 January 2016*, Grüne Liga Sachsen and Others,* C-399/14 EU:C:2016:10, paragraph 46).

41 However, such a subsequent review, based on Article 6(2) of Directive 92/43, is not the only appropriate measure that the competent national authority may, in a situation such as that at issue in the main proceedings, be called upon to adopt.

42 In fact, as is apparent from the case-law of the Court, EU law does not preclude that authority from revoking or suspending the authorisation already granted in order to carry out a new assessment in accordance with the applicable requirements, provided that those measures take place within a reasonable period of time and that account is taken of the extent to which the person concerned may have been able to rely on the lawfulness of that authorisation, or even, in certain exceptional cases provided for by the applicable rules of national law, for the authority to regularise the situation, which must then not only comply with those requirements, but also take place under conditions which exclude any risk of circumvention or non-application of the rules of EU law (see, to that effect, judgment of 12 November 2019, *Commission v. Ireland* (Derrybrien Wind Farm), C-261/18, EU:C:2019:955, paragraphs 75 to 77 and 92 and the case-law cited).

43 Furthermore, where a Member State has provided, either in a measure of general scope, or in a measure of individual scope, that the continuation of an activity already authorised must be the subject of a new authorisation, the competent national authority is required to make that authorisation subject to a new assessment in accordance with the requirements of the first sentence of Article 6(3) of Directive 92/43, where it appears that that activity has not yet been the subject of such a compliant assessment, in which case that authority will have to draw all the factual and legal consequences which that new assessment entails in the context of the decision which it is called upon to adopt on any new authorisation to be granted."

91. In an interesting article commenting on this, "Unlawfully Authorised Projects under the Habitats Directive: Remediation at All Costs?, Comment on the CJEU Judgment of 10 November 2022 in Case C-278/21 *AquaPri",* Journal for European Environmental & Planning Law 20(1), 95-113. https://doi.org/10.1163/18760104-20010005, Online Publication Date: 21 Mar 2023 (footnotes omitted), Lolke Braaksma and Thomas Haugsted write as follows:

"3.2.2 Rectification in the Context of a Later Consent Procedure

> That an unlawful authorisation has become final does not mean, however, that the project concerned can be regarded as having been lawfully authorised under Article 6(3). The obligation on the national authorities to remedy the failure to carry out an assessment does not go away as a result of the finality of the permit. Instead, it remains a contingent liability for the national authorities. As the Court pointed out in AquaPri, this means that if a national authority gets the opportunity to rectify the failure to carry out an appropriate assessment in the context of a later consent procedure, the authority is obliged to do so. Or as the Court put it: 'where a Member State has provided, either in a measure of general scope, or in a measure of individual scope, that the continuation of an activity already authorised must be the subject of a new authorisation, the competent national authority is required to make that authorisation subject to a new assessment in accordance with the requirements of the first sentence of Article 6(3), where it appears that that activity has not yet been the subject of such a compliant assessment.
>
> This was the case in the main proceedings in AquaPri. As required by Danish legislation as well as the 2006 permit, the fish farm concerned was required to apply for a new authorisation, by the latest in 2014. Before granting this new authorisation, the Danish authorities were therefore obliged to carry out an appropriate assessment even though the mere continuation of the activity under unchanged conditions did not constitute a 'project' within the meaning of Article 6(3). As is apparent, this remediation measure is also dependent on national law which has to provide for the renewal or reconsideration of existing permits. However, it is not unthinkable that the duty to rectify a failure to carry out an assessment at a later stage might also 'awake' under other circumstances than in AquaPri. This could, for example, be the case if the operator wishes to make amendments to the existing project requiring approval."

92. Thus, if EU law assessments were not carried out properly in relation to an original permission, and the developer (or someone benefitting from a previous consent) seeks an extension of the consent, or an amendment of it, the remedial obligation may have the consequence that the body giving consent to such subsequent application is obliged to rectify the failure to conduct a correct assessment originally. If such rectification is not put in place, then a given applicant can challenge the subsequent consent on that basis. This does not extend to a retrospective challenge to the original consent.

93. It is hard to see any immediate support for the idea that this would apply to an unrelated development, and the question of whether this is a related development was hotly contested both substantively and in terms of pleadings and evidence. In the judgment of 17 March 2011*, Brussels Hoofdstedelijk Gewest,* C-275/09, ECLI:EU:C:2010:154, the CJEU held that renewal of a permission in a context where "that permit forms part of a consent procedure carried out in several stages" could involve a remedial obligation. But contrary to the State's submission here, that doctrine is not to be construed as absolutely limited to a situation where there is a single consent procedure carried out in several stages. That was just the potential fact situation in the Brussels Hoofdstedelijk Gewest case.

94. I can park that controversy because even if it is resolved in favour of the applicants, they face an insurmountable stumbling-block which is that they didn't call on the board to consider an extended form of assessment that would have identified and remediated any adverse effects on the Hen Harrier of forestry activity within the area overall since 1981. That isn't rocket science; it would have required an expert to estimate the state of forest plantation in 1981 (or possibly 1988), the state now, and that during the currency of the project, to infer from that the impacts on Hen Harrier generally or in particular associated with the relevant European site, and to offer an expert view as to what additional compensatory measures would be required.

95. Speaking of rocket scientists, the applicants' response to the problem of their own failure to make the point is effectively that of Werner von Braun, as scripted by Tom Lehrer, when confronted with the destruction caused by his V-2 rockets: "That's not my Department". The applicants here push the whole thing onto the board and call it an "autonomous obligation". *An autonomous obligation*? To sort through hundreds of consents over the 53 years identified by the applicants in their motion and analyse the existence and extent of any assessments in each – with no route-map, no parameters, no articulated concerns that would guide such an exercise? Law – even European law one is tempted to facetiously add for the benefit of the applicants – must be workable, and this preposterous procedure is so obviously unworkable that, to conclude the analogy, it simply self-destructs on the launch-pad.

Strand 3 – where relevant actors are failing to remedy the defective assessment within domestic law

96. The remedial obligation means that any effects of any breach of EU law should be rectified. That presupposes it being established that there has been such a breach, that there are effects of that breach, and that specified action is required to rectify those effects.

97. It also normally implies under this heading that such remedial action is possible under domestic law, albeit the judgment of 14 January 2016, *Grüne Liga Sachsen*, C-399/14, ECLI:EU:C:2016:10 suggests there may be directly effective obligations in relation to AA.

98. The CJEU said in The judgment of 7 January 2004*, Wells*, C-201/02, ECLI:EU:C:2004:12 :

> "... it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered."

99. Post-hoc assessment may also be an option, on clear conditions that respect EU law: the judgment of 26 July 2017, *Commune di Corridonia and Others*, C-196/06 and C-197/16 ECLI:EU:C:2017:589.

100. And in a habitats context, such subsequent assessment may be mandatory if it is the only means of enforcing EU law: see the trenchant findings of the CJEU in *Grüne Liga Sachsen* that an AA-deficient project "must be the subject of a subsequent review, by the competent authorities, of its implications for that site if that review constitutes the only appropriate step for avoiding that the implementation of the plan or project referred to results in deterioration or disturbance that could be significant in view of the objectives of that directive".

101. The State's attempt to "distinguish" this case into obscurity, on the grounds that it "was concerned with the operation of the remedial obligation in a particular circumstance – where a site was designated after the grant of consent", is the classic lawyer's manoeuvre of latching on a fact that is irrelevant or peripheral to the actual logic of an unhelpful decision, and calling that the *ratio*. The methodology of that bogus procedure is to invite any given judge to "seize on almost any factual difference between this previous case and the case before him in order to arrive at a different decision": Glanville Williams in *Learning the Law*, 11th ed. (London, Sweet & Maxwell, 1982) p. 77, cited in *Doorly v. Corrigan* [2022] IECA 6.

102. Exceptionally, the domestic competent authority can regularise the permission, but this would involve an assessment in that context and compliance with EU law: the judgment of 10 November 2022, *AquaPri*, C-278/21, ECLI:EU:C:2022:864 para 42.

103. Thus a decision-maker may be under an obligation to review or revoke the decision within their competence (para. 90), or to impose a requirement for an assessment after the event (see para. 79, citing judgment of 17 November 2016, *Stadt Wiener Neustadt*, C-348/15, EU:C:2016:882, paragraph 38), including in the exceptional context of regularisation, but doing nothing isn't an option unless one of the other strands of remedy apply.

104. Can this be operationalised in judicial review at the suit of a private applicant? In principle, yes, albeit that the State wanted to reserve the position to argue more vigorously against such a procedure in a case where it properly arises.

105. On that premise, a litigant could in principle seek to call on the relevant consenting authority to exercise any powers within its competence as to review, revocation or after-the-event assessment, but such a request would be required to be evidentially sustainable, the onus being on the applicant to show a defect in the original assessment that had an environmental effect that required remediation. Recourse to court would only arise in the event of an unlawful failure to exercise such powers.

106. An applicant can't short-circuit the process by coming straight to court seeking exotic declarations and reliefs. Firstly they need to put their request to exercise specified statutory powers before the appropriate statutory decision-makers together with sufficient information to enable that point to be made, and call on the decision-makers to exercise any relevant powers. Only if that is unlawfully rejected could the applicants come to court seeking declaratory relief or mandatory orders requiring those powers to be exercised.

107. On that analysis, the claim regarding the remedial obligation fails for multiple reasons:

(i) the applicants didn't make any such request to the relevant consenting authority prior to litigating;

(ii) the claim against the council under s. 177B of the 2000 Act is misconceived because the council or board hasn't been the relevant consenting authority for afforestation since 2001 and didn't in fact grant any permissions relevant to this in the period prior to that, so can't exercise powers under that section; and

(iii) the applicants haven't come anywhere near even attempting to back up their point with expert or other evidence or even particularising it to any acceptable extent.

108. The applicants have a number of lame excuses in reply.

109. Firstly they say they didn't call on the council or Minister to do anything prior to bring the proceedings because they were under time pressure to get the proceedings out within the time limit applying to the *certiorari* claim. That is all well and good but all it means is that the mandamus-

type reliefs should have been properly set up and brought by separate proceedings. The actions could have been be heard together to avoid excessive buck-passing between opposing parties.

110. Their second excuse predictably was that they don't have the information that would enable them to put forward such a request.

111. In principle, by analogy with *Norwich Pharmacal Co. & Others v Customs and Excise Commissioners* [1974] A.C. 133, [1973] 3 W.L.R. 164, [1973] 2 All E.R. 943, an applicant who intends to bring proceedings but lacks the information to do so can seek a pre-action order from the court for the disclosure of any necessary information by a potential defendant. That needs to be focused and specific if circumstances permit, even bearing in mind that only a certain amount of specifics may be possible given the nature of such circumstances. Given the blunderbuss nature of the applicants' request, not much focus was engaged in as regards the present request. Nor am I particularly convinced that it is appropriate for the applicants to seek AIE and then simply abandon that process at the first hurdle and call on the court to solve the problem. Yes it can be a slog to work one's way through the AIE system but it could turn out to be the best way to resolve matters and in any event is the primary statutory mechanism to resolve matters. But in this instance I'm not refusing the demand for vast amounts of information because the applicants abandoned the AIE process, or because theoretically they could try again with a less ambitious list of demands. I'm refusing it under this heading because it doesn't seem to be necessary, at least in terms of how matters stand at the moment.

112. This could be a classic example of refusing to see the wood because one is too busy complaining about the difficulty of counting trees. You don't need detailed, millimetre-by-millimetre 3D models of every tree, or the life history of every twig or sapling, in order to make a map of a forest. The exercise of estimating forest loss or growth since 1981 or whatever date the applicants think is legally significant may be able to be done by an expert even without access to the consents or assessments, because the growth of afforested areas over time and the existence or otherwise of compensatory measures is something that could potentially be ascertained from other material or visible on the ground. If the available material doesn't facilitate that exercise, than any request for information would be extremely specific and limited. If the compensatory measures are inadequate then whatever assessments took place by definition (and subject to counter-argument in due course) could be represented as being inadequate. That follows logically even without current access to the individual consents and assessments.

113. Insofar as the applicants claim that they don't know exactly when each element of the afforestation took place, a complaint hindered by a lack of public domain material and not helped by an objection to hearsay evidence that has been taken by the opposing parties, their ultimate point doesn't depend on knowing all of that granular detail.

114. And while the applicants don't have all information, they had at all times quite a bit of information from which highly focused questions could be asked. They knew that no planning permissions were granted, so it follows by necessary implication that there were no assessments in relation to forestry works prior to December, 2001 when planning permission ceased to apply. Why not just ask for details of the areas afforested as of that date as compared with in 1981? And they also know, unless I am misreading things, that there aren't any EIA reports for forestry works in the area on the central portal, which presumptively suggests that such assessments don't exist in relation to forestry consents from 2017 to date. So perhaps there are 16 years in the middle where there might have been assessments, or maybe not, but either way the applicants are not totally in the dark about all of this and could have extrapolated a lot about the adequacy of assessments to date.

115. More fundamentally, in the absence of a proper complaint being made to the Minister, the whole thing is premature in forensic terms so we don't even get to the hearsay issue (although if we did get to it, Ordnance survey maps would appear *prima facie* to be an exception to that). Insofar as the applicants will end up, after reasonable inquiries, needing more information as to the extent of afforestation in 1981 or 1988 or some other very specific date, the applicants are falling victims to their own inflated demands for information which led to the AIE request being dismissed as manifestly unreasonable. A short and focused request might well be replied to more constructively.

116. The developers characterise the complaint here as Kafkaesque - they (or the Minister or both) are accused of getting something wrong, unspecified, at some point in time in the past, unspecified, and are required to disclose a vast amount of material so that the applicants can then decide whether and if so to what extent to provide particulars of the alleged wrong.

117. The applicants are strong on complaint but light on taking the lead to advance the complaint. The really crucial thing is that they failed, prior to instituting the proceedings, to properly call on the relevant decision-maker, in the scenario under discussion, the Minister for Agriculture, Food and the Marine, to exercise relevant powers within that Minister's competence, failed to specify what powers exactly should be exercised and under what statutory jurisdiction or under what directly effective EU law provision, and failed to present the decision-maker with a plausible factual basis for such a

demand. One does not simply walk into Mordor – or into the High Court. Before litigating one has to set the case up properly. If mandatory orders are going to be sought, then generally speaking, and assuming that rectification is a reasonable prospect, one should call on a proposed respondent to rectify the alleged problem, having first supplied enough information to enable her to do so. The approach of charging into the Central Office to file ones pleadings without laying that groundwork is an example of the more general applicant's fallacy that doing any of the hard work is always on somebody else. It feels like that is normally put on the court itself, but if that becomes untenable in any given case, it's on the opposing parties, or someone else.

118. All that said, if the applicants want to pursue the Hen Harrier remediation issue (and the State rather unsympathetically implied that Hen Harrier were really a flag of convenience, of major interest only insofar as they helped challenge the windfarm project), there isn't anything stopping the applicants at some future point from putting together a properly structured request to the Minister, based on expert evidence, at which stage the matter could be debated more thoroughly depending on the reply to that. It mightn't even be inconceivable that such a forensic debate could include a more relevantly pleaded and factually grounded transposition complaint about whether the statutory framework is sufficient. Of course, if they do that, the applicants will still have to face all of the other objections that have been launched or intimated against such a process, but at least they won't fall foul of the threshold problem of never having properly made the point in the first place. But none of those hypotheticals would affect the validity of the impugned planning permission.

Strand 4 – where infringement proceedings are brought

119. As the Derrybrien proceedings indicate, time limits are not a problem that prevents enforcement proceedings. But that doesn't assist an applicant in domestic judicial review.

The complaint that Irish law constitutes defective transposition

120. The opposing parties complain that the pleaded non-transposition claim is very vague – for example it doesn't outline which Irish law we are talking about and is lacking in legal and evidential specificity.

121. We need to look at what is actually pleaded very specifically. When we do so, what immediately emerges is a massive contrast between the pleadings, which only make one lonely and solitary passing reference to the remedial obligation, and the written and oral submissions which made it the whole pivot of the applicants' case. But the fragile fragment of language in the pleadings just isn't sufficient to bear the weight now being placed on it.

122. The first clause of sub-ground 10.19A is "if and insofar as Irish law, properly interpreted in accordance with the interpretative obligation, did not require the carrying out of an assessment which was required by the EIA Directive or the Habitats Directive, or the making of a determination of compliance for the purposes of A1 to A4 of the Birds Directive ..."

123. While no particular time periods are specified in the ground, that is a valid presupposition up to 2001, in the sense that the fact that initial afforestation was exempted development up to 1989 meant that there was no assessment under relevant directives, and the CJEU has already found in effect that there was inadequate transposition at least up to the 2001 regime. If the clause is intended to cover consents post-2001, it isn't particularly plausible because the applicants haven't come up with anything to show how the transposing legislation does not (prospectively) require any assessments that are necessitated by EU law.

124. Insofar as the applicants in oral submissions made the point that there is no retrospective legislative provision to enable past developments to be revisited if either a required planning permission wasn't ever applied for (as may have been the situation here, they say, between 1981 and 2001) or where the consent was granted by someone other than the council or board (and hence where s. 177B of the 2000 Act doesn't apply, as was the situation here from 2001 onwards), this complaint of a lack of transposition due to the failure to enact retrospective legislation simply isn't pleaded. Such a complex and involved argument can't be magicked up at the hearing. It needs to be thought through and expressly set out in the statement of grounds. That point, while interesting, doesn't properly arise.

125. The next clause is "... the State has failed adequately to implement the requirements of those Directives ...".

126. That conclusion follows if the presupposition is accepted, but no declaration is called for in relation to purely historical matters, some of which have already been addressed by the CJEU. That would be an academic exercise, and a declaration should not be granted on an academic point.

127. Things would be different if there was any plea of lack of legislative provision in that respect that should be capable of being be invoked at this point, but there is no such plea, merely the bald statement that the State has failed adequately to implement the directives.

128. The next clause is "... and the Impugned Decision is thereby invalid being cumulative with earlier consents that are invalid because they were adopted pursuant to a deficient legal framework ...".

129. To anticipate the discussion below on the time issue, the problem with that is that the earlier consents aren't invalid. They weren't challenged during the specified time period and that can't be raised now – we will discuss this in more detail later. Therefore the point as phrased just doesn't arise. The ground is limited to invalidity due to being cumulative with invalid decisions, not due to being cumulative with decisions that lacked proper assessment.

130. The next point is "[the Impugned Decision is thereby invalid] ... because the Impugned Decision fails to comply with the remedial obligation in respect of those Decisions".

131. That at least is potentially viable. But it is not a transposition complaint. It is a complaint against the board in making the impugned decision for not remedying the alleged lack of previous assessment. However the board was never called on to do so. This complaint fails for the reasons set out above.

132. Matters become even more murky when one turns to the relief (no. 19), which does not in fact correspond to the relevant ground.

133. The relief firstly seeks "A declaration that the State failed, in the period between I June 1988 and 2010 correctly to implement Al, A2, A3, A4, AS, A6, A8 and/ or A9 of Directive 85/337 on environmental impact assessment as amended and A6 of Directive 92/43 on habitats ...".

134. One can pause there to say that there is no particular need for such a purely historical declaration as to the legal situation 13 years ago. Again that would be an academic exercise – that is not the purpose of declaratory relief.

135. Oddly enough given that the applicants initially complained that art. 4(4) of the birds directive has not been properly legislatively transposed, which if correct would be a continuing complaint that applies to this day and that *could* be a proper subject of a declaration, they never included this complaint in the non-transposition relief sought, which is limited to EIA and habitats. However the applicants ultimately seemed to accept that the 2011 regulations constituted due transposition.

136. The relief goes on to seek a declaration "... that S177B of the Planning and Development Act 2000 as amended should be interpreted as applying retrospectively to any consent to afforestation, felling and/ or reafforestation project in the townlands of Ballydonaghan, Caherhurley, Coumnagun, Carrownagowan, lnchalughoge, Killokennedy, Kilbane, Coolready and Drummod, County Clare between 1 June 1988 and the present." That isn't necessary because s. 177B *does* so apply, provided that such works were the subject of a permission granted by the council or board (on the facts, they weren't here). The applicants don't engage on the pleadings with the limitation of the section to particular decision-makers, so any declaration regarding non-transposition doesn't arise. That said, it wouldn't arise anyway due to the failure of the applicants to properly call on anyone to exercise any appropriate legal powers before coming to court.

Conclusion on impugned reliefs

137. Having regard to the foregoing I consider that reliefs 10-19 are either out of time, unnecessary or misconceived even taking the applicants' case at its height, so relief 13 is refused, the leave order should be discharged in the case of the out-of-time reliefs 12 and 16, and the other impugned reliefs 10, 11, 14, 15, 17-19 should be struck out.

Implications of foregoing for the pleaded grounds

138. Having addressed the viability or otherwise of the various reliefs, we now turn to whether the impugned grounds should be struck out. The grounds under challenge are core grounds 4, 6, 8 and 10 and the associated sub-grounds.

139. Any striking out of core grounds will also apply to the sub-grounds as applicable.

Core Ground 4 – alleged failure to create a review procedure

140. Ground 4, as noted above, provides:

> "4. In the alternative the Decision If the Impugned Decision is not invalid for the reasons set out in the preceding Ground, it must nonetheless be set aside because the State has failed to create an effective procedure of review, in breach of Article 9(4) of the Aarhus Convention, All of the EIA Directive, A47 of the Charter, Article 19(1) of the TEU, and/ or some or all of those provisions and a Decision that fails to comply with the EIA Directive but that cannot be effectively reviewed is necessarily either invalid or incapable of having any effect."

141. The basis of that is essentially what is stated in sub-grounds 4.2 and 4.3:

> "4.2. It must be possible to establish whether the Board had access to and used sufficient expertise in carrying out the EIA, for the purposes of AS(3) of the EIA Directive.
>
> 4.3. If that material is not available in the Decision, and not available by Order of the Court, then there is no effective remedy in respect of a failure by the Board to comply with the obligation to ensure it has access to sufficient expertise."

142. The logical problem with that, of course, is that if disclosure of the expertise available to the board is a requirement of EU law, then the court will order such disclosure. It would be illogical for the court to hold that this information is required but that rather than be disclosed, the State should

be condemned for non-transposition. There is no need to have a ground covering such an contradictory and implausible eventuality so this should be struck out.

Core Ground 6 – alleged non-transposition of art. 8a (information/ reasons)

143. Core ground 6 provides:

> "6. In the alternative the Decision If the Impugned Decision is not invalid for the reasons set out in the preceding Ground, it must nonetheless be set aside because the State has failed to adequately transpose A8a(1) of the EIA Directive contrary to A4(3) and 19(1) TEU and a Decision adopted pursuant to provisions of an Act that fail to give effect to a Directive, where the Board does not apply the interpretative obligation, and / or, where appropriate, the set aside obligation, in order to correctly apply A8a of the EIA Directive, is invalid, void and of no legal effect."

144. There are two problems with that. Firstly there is no basis whatever to suggest that any provision of the legislation (and no provision is pleaded) would prevent the board from acting in conformity with EU law. And secondly the plea of non-transposition is unacceptably general because it fails to specify which exact provision of the directive has not been transposed or to engage in any way with the granular detail of the transposing legislation.

Core Ground 8 – alleged failure to implement requirement that assessment be as complete as possible

145. Core ground 8 provides:

> "8. In the alternative, the State failed adequately to implement the requirement that an EIA must involve as complete an assessment as possible and thereby failed to give full effect to A1(2)(g), A2(1) and A3 of the EIA Directive as required pursuant to A4(3) and A19(1) TEU, and to A288 TFEU which provides that a Directive is binding as to the result to be achieved and a Decision adopted pursuant to provisions of an Act that fail to give effect to a Directive, where the Board does not apply the interpretative obligation, and / or, where appropriate, the set aside obligation, to correct the defect, is invalid, void and of no legal effect."

146. The phrase "as complete an assessment as possible" does not occur in the EIA directive but derives from caselaw, specifically the judgment of 3 March 2011, *Commission v. Ireland,* C-50/09, ECLI:EU:C:2011:109, para. 40. Transposing legislation is not normally defective merely because it does not keep up with additional glosses and comments added by European jurisprudence. Nothing has been pointed to whereby the legislation could plausibly preclude the board from properly applying the EIA directive. The transposition claim in this regard assumes incorrectly that a lack of language derived from a CJEU judgment equates to some failure by the State. That isn't the case generally and certainly isn't the case here.

Core Ground 10 – cumulative effects

147. Core ground 10 provides as follows:

> "10. The Impugned Decision is invalid because the Board failed to carry out as complete an assessment as possible in that it failed to assess the cumulative effects of the Proposed Development together with the effects of the existing forestry developments on the site, and failed to have regard to the EIA and Appropriate Assessment(s), if any, carried out in respect of those forestry developments and in so doing contravened A2, 3 and 4 of the EIA Directive, and A6 of the Habitats Directive; the Developer erred in law by carrying out projects for which prior EIA and Appropriate Assessment was required without those assessments being carried out and in so doing contravened A5 of the EIA Directive, A6 of the Habitats Directive, and A4(3) and A19(1) of the Treaty on European Union; and the State erred in law in granting the underlying forestry consents for the application contrary to A2, 3 and 4 of the EIA Directive, A6 of the Habitats Directive, and A2 and A3 of the 1979 and 2009 Birds Directives, and substitute consent is required for the purposes of S177B of the 2000 Act."

148. Insofar as this complains about failure by the board, this issue is so baroque that there couldn't workably be an autonomous obligation, so the board can't be faulted for failing to do something it was never asked to do. Examples of gaslighting the decision-maker don't get much better than this.

149. Insofar as the complaint is of error in law by the developers or the State as to the grant of historical consents, that is impermissible if it is a collateral attack on those consents, and pointless if it is not. It is academic either way in the circumstances. Even assuming for the sake of argument that "the State erred in law in granting the underlying forestry consents for the application", it does not follow that "The Impugned Decision is invalid". The applicants have missed a step namely the requirement for them to call on the board to carry out a remedial assessment. Also it is not clear what is meant by the "underlying" consents "for the application".

150. Insofar as a complaint is made that substitute consent under s. 177B is required, that section doesn't apply for reasons explained.

Conclusion on impugned grounds

151. It follows from the foregoing that insofar as core ground 10 and associated sub-grounds support the out-of-time reliefs 12 and 16, they are themselves out of time and no time extension is appropriate. The leave order in relation to ground 10 should be set aside to that extent for that reason.

152. Insofar as core grounds 4, 6, 8 and 10 (other than insofar as it relates to the out-of-time reliefs 12 and 16) and associated sub-grounds support other reliefs they are misconceived even taking the applicants' case at its height. They must therefore be struck out.

Request to amend the discovery motion

153. The applicants sought to amend the discovery motion in order to refer to the 2001 regulations rather than the 2010 regulations. However since the discovery is based on the impugned grounds which now fall away, the amendment becomes irrelevant.

Discovery/ disclosure motion

154. The applicants acknowledged that the discovery and disclosure was in support of the impugned grounds. As those grounds now fall away the discovery/ disclosure motion no longer has any basis because it is purely parasitical on those grounds, and so should be refused.

Further affidavit from applicants

155. The applicants also sought to file a further affidavits from Lorcan O'Toole and Dr Eimear Rooney. Having heard the parties I allowed the affidavits to be filed without prejudice to any argument as to their admissibility in due course, and on the basis that if such an issue is raised the applicants will have to demonstrate that the affidavits should be admitted and that this exercise will be conducted in advance of close of exchange of affidavits if so required by the opposing parties.

156. The affidavits are expert evidence as to effects on Hen Harrier and the developers anticipated a need to challenge those in advance of the hearing with a view to deciding whether to reply.

Format of proceedings

157. There was no objection to the concept that the applicants might reformat their pleadings in accordance with *Stapleton v. An Bord Pleanála* [2023] IEHC 344. The applicants should prepare a clean and tracked version of the fourth amended statement of grounds, the clean version to be the filed version and the tracked version being served for information. In addition the fourth amended statement should:

(i) delete matters that have been struck out or refused, or where the leave order has been discharged, and make any consequential rewording; and

(ii) change the heading so as to provide that the fourth amended statement is filed on foot of the present order and the third amended statement was filed under the orders of 30th January, 2023 and 13th February, 2023 rather than simply the latter.

Effect of the foregoing on parties

158. The only remaining reliefs affect the developers and the board. Therefore the State and the council can be released from further participation in the proceedings with liberty to apply if they wish to get involved for any reason.

159. Admittedly the council didn't get involved in the present hearing but that doesn't matter because the developers were entitled to dispute the relief that affected both them and the council. When that relief fell, the resulting vacuum has the logical consequence that there is no longer any basis for the council to be involved. Their presence isn't necessary and their rights are preserved either way because the liberty to apply means they can continue to be involved if they want to be.

Order

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

(i) the leave order be amended under the slip rule so as to delete the reference to certification of two counsel;

(ii) the application for an extension of time as set out in relief 13 be refused;

(iii) on foot of the motions by the opposing parties, the leave order be discharged in respect of:
   (a). reliefs 12 and 16; and
   (b). core ground 10 and associated sub-grounds insofar as they relate to those reliefs;

(iv) on foot of the motions by the opposing parties, the following be struck out:
   (a). reliefs 10, 11, 14, 15, 17-19;
   (b). core grounds 4, 6, 8 and associated sub-grounds; and
   (c). core ground 10 and associated sub-grounds (other than insofar as they relate to reliefs 12 and 16);

(v) the applicants' motion for discovery and the application to amend that application be refused;

(vi) the State respondents and the council be released from further participation in the proceedings with liberty to apply;

(vii) subject to the foregoing, the applicants are to have liberty to file a further amended statement of grounds within 2 weeks from the date of this judgment on the basis of a clean version to be the filed version and a tracked version being served for information:

(a). reformatting the pleadings in accordance with the format set out in *Stapleton v. An Bord Pleanála* [2023] IEHC 344;

(b). deleting matters that have been struck out or refused, or where the leave order has been discharged, and making any consequential rewording; and

(c). changing the heading so as to provide that the fourth amended statement is filed on foot of the present order and the third amended statement was filed under the orders of 30th January, 2023 and 13th February, 2023 rather than simply the latter;

(viii) the applicants have liberty to file further affidavits from Lorcan O'Toole and Dr Eimear Rooney without prejudice to any argument as to their admissibility in due course, and on the basis that if such an issue is raised the applicants will have to demonstrate that the affidavits should be admitted and that this exercise will be conducted in advance of close of exchange of affidavits if so required by the opposing parties;

(ix) unless the parties apply otherwise by written submission within 7 days, the foregoing order be perfected forthwith thereafter on the basis of no order as to costs; and

(x) the matter be listed for mention on a date to be notified by the List Registrar for further case-management.