THE HIGH COURT
PLANNING AND ENVIRONMENT

2023/96 MCA

IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN:

DONEGAL COUNTY COUNCIL

Applicant

AND

PLANREE LIMITED
and
MID-CORK ELECTRICAL LIMITED

Respondents

JUDGMENT OF MR JUSTICE DAVID HOLLAND DELIVERED 10 APRIL 2024.

Contents

INTRODUCTION

1. The Applicant ("Donegal CC") as planning authority seeks injunctions pursuant to Section 160 of the Planning and Development Act 2000 ("s.160" and "PDA 2000") restraining the Respondents ("Planree" and "Mid-Cork Electrical") from further development of a 90mw[1] 19-turbine windfarm (the "Windfarm" and "Meenbog Windfarm") on a site of 990 hectares at the Barnesmore Gap, in the townlands of Meenbog, Croaghonagh and Cashelnavean, County Donegal[2] ("the Site") which entire Windfarm, Donegal CC asserts, is by reason of numerous material deviations (the "Material Deviations") from the applicable planning permission, unauthorised development within the meaning of the PDA 2000.

2. Planree's Meenbog Windfarm has been in gestation since at least 2013.[3] Mid-Cork Electrical is its contractor for the construction of the Windfarm. They are associated entities – I am unaware of the details

[1] The 2018 SID Permission was for a 50mw+ windfarm. Planree's application for leave to seek Substitute Consent describes it as a 90mw windfarm. I presume the increase derives from the Board's subsequent authorisation of larger turbines.
[2] The Site lies ≈12km north of Donegal Town and 9km south of Ballybofey, in south County Donegal. It abuts the Northern Ireland border with County Tyrone, along its eastern boundary.
[3] Affidavit of Brian Keville, Environmental Director of MKO, sworn 29 January 2024.

but Michael Murnane is a director of both and is a deponent for both. Save where necessary, I will refer to them collectively sub nom "Planree".

3. Planree has an SID Planning Permission[4] ("the SID Permission") dated 25 June 2018 for the Windfarm. It was amended in June 2019 by decision of the Board under s.146B PDA 2000, essentially allowing bigger turbines/longer rotor blades. By the SID Permission, the Windfarm is to be constructed within 10 years of 25 June 2018 and may operate for 25 years from its first commissioning. Due to the nature of Windfarm, the particular environmental sensitivity of the Site and their proximity to Natura 2000 sites, including an adjoining SAC,[5] the decision to grant the SID Permission was informed by both EIA[6] and AA.[7] Condition 1 to the Permission is in the usual form requiring completion of the project in accordance with the plans and particulars lodged. Condition 7 required full implementation of all construction methods and environmental mitigation measures, including operation monitoring requirements, as set out in the EIAR[8] and the CEMP.[9]

4. Planree says, variously, that about "90%" and "95%" of the groundworks are complete.[10] I lay little store in such percentages as mathematical assertions but accept that the Windfarm is at a very advanced stage of construction. Views differ as to whether the outstanding groundworks[11] are minor or significant. Thereafter, the main remaining element of the works is the installation of the turbines and rotors – which are in storage in nearby Killybegs.

THE DISPUTE – ESSENTIALS

5. Donegal CC asserts, in essence, that:

- By reason of the Material Deviations, the entire Windfarm is unauthorised development as one not in conformity with the SID Permission.
- As matters stand, as a matter of planning law, and pending any regularisation of that unauthorised status, the Windfarm can no longer be completed in conformity with the SID Permission.
- As a matter of environmental law, it is concerned as to the environmental effects of building out and operation of the Windfarm – given the Material Deviations have not been subjected to EIA Screening and AA.
- Accordingly, to permit the building out and operation of the Windfarm would be to undermine the integrity of the planning and environmental law systems and allow Planree to profit from its wrong in

[4] Strategic Infrastructure Development – permission pursuant to s.37G PDA 2000 – Board Pleanála Order ABP-300460-17.
[5] Special Area of Conservation within the meaning of the Habitats Directive – Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.
[6] Environmental Impact Assessment within the meaning of the EIA Directive – Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment as amended by: Directive 2014/52/EU.
[7] Appropriate Assessment within the meaning of the Habitats Directive.
[8] Environmental Impact Assessment Report within the meaning of the EIA Directive.
[9] Construction and Environmental Management Plan.
[10] Details of works done and outstanding are set out in §4 of Planree's Planning report by MKO dated 8 July 2022 which accompanies its application dated 8 July 2022 for leave to apply for substitute consent. They include the wind farm access roads, electricity substation, turbine hardstands, turbine bases, peat repositories and borrow pit areas.
[11] Described at §2.4 of the MKO s.160 Report 24 May 2023 – Exhibit BK1 to Brian Keville's affidavit sworn 25 May 2023.

effecting the Material Deviations.

- It seeks, by this s.160 motion, to restrain all further works until, at least, the outcome of the Substitute Consent[12] process.

6. Planree's essential position is that it:

- Accepts that there are numerous deviations from the applicable planning permission.
- Now accepts that they are material deviations which constitute unauthorised development – not least as the Board has determined that they require EIA Screening and AA.
- Will make a Substitute Consent application to the Board to regularise the status of those deviations. That may take some years given backlogs in the Board in processing such applications.
- Should be allowed to build out the remaining, authorised, elements of the Windfarm and operate it pending the Board's decision on Substitute Consent.

7. Planree's position is argued, in essence, on the following bases:

- The Material Deviations are unauthorised development but do not render the entire Windfarm unauthorised.
- The Windfarm can now be built out in conformity with the Planning Permission as all remaining works conform to the relevant SID Permission.[13]
- Accordingly, there is no jurisdiction to injunct the completion and operation of the Windfarm.
  - This a "curate's egg" argument: that the Windfarm is authorised "in parts" and that I can injunct only the unauthorised parts.
- Alternatively, and even if the entire Windfarm is unauthorised development, I should exercise my discretion against an injunction.

8. The parties dispute whether to build out the remaining elements of the Windfarm would represent significant environmental risk unassessed in EIA Screening and AA.

9. As I have said, Planree now agrees that it has materially deviated from the scope of development permitted by the SID Permission. It has obtained leave to seek Substitute Consent for those Material Deviations and will make the Substitute Consent application presently.[14] However, it fears delay of perhaps years in the Board's deciding that application and financial losses in that interim. The crux of the case, in reality, is that it wants, meanwhile, to build out and operate its Windfarm, whereas Donegal CC seeks, by this s.160 motion, to restrain all further works until, at least, the outcome of the Substitute Consent process.

10. In consequence, the precise identification of the unauthorised works is disputed – not as to whether the Material Deviations are unauthorised (it is agreed that they are) – but as to whether they, as it were,

[12] Within the meaning of Part XA PDA 2000. Retention planning permission may not be granted for development of a kind which requires EIA and/or AA. The substitute consent procedure provides an exceptional means of retrospectively regularising unauthorised development of such a kind.
[13] See below.
[14] It has given an undertaking to the Court in that regard.

infect the planning status of the remainder of Windfarm on the basis that the development permitted must be considered as a whole. This is a question on which authority is surprisingly sparse.

11. The foregoing may oversimplify a complex dispute but indicates the main battlelines.

THE SITE AND ITS ENVIRONMENTAL SENSITIVITY

12. The Site is in an upland rural area characterised by a mix of mountains, blanket bog, forestry and agricultural fields. The Site itself is mainly in coniferous forestry on upland blanket bog. It includes the hills of Barnsmore (451m), Croaghanagh (433m), Cross Hill (350m) and Carrickaduff Hill (329m) and parts of five valleys, each drained as follows:[15]

- The first valley is drained by Mary Breen's Burn, on to the Mourne Beg River, the River Derg, and the Mourne River which flows into the River Finn SAC and the River Foyle and Tributaries SAC (NI[16]).
- The second valley is drained by the Bunadaowen River, several tributaries, and a network of small forest drains. The Bunadaowen River also joins the Mourne Beg which, as stated above, ultimately flows into the River Finn SAC and the River Foyle and Tributaries SAC (NI).
- The third valley is drained by the Shruhangarve Stream and a tributary. The Shuhangarve also joins the Mourne Beg which, as stated above, ultimately flows into the River Finn SAC and the River Foyle and Tributaries SAC (NI).
- The fourth valley is drained by the Glendergan River and its tributaries, which flows into the River Derg and the River Foyle and Tributaries SAC (NI).
- The fifth valley, the Barnesmore Gap, carries a tributary the Lowerymore River onto the Lough Eske and Ardnamona Wood SAC.

13. The Site is upstream of and drains into the SACs identified above. The SACs identified by the Board's Inspector[17] as relevant are as follows:

Natura 2000 Site[18]	**Relationship to the Site**
Croaghonagh Bog SAC 000129	Partly within the Site[19]

[15] See Map exhibited at Exhibit MMcD4 Tab 11.
[16] Northern Ireland.
[17] Pettigo Plateau Nature Reserve SPA (IR004099) was also screened in for AA in the Permission process but has not been identified as relevant in the leave to seek substitute consent to which I refer below.
[18] List taken from Inspector's report 17/8/23 §4.2.
[19]The AA in the Inspector's Report underlying the SID Permission records: "This SAC is located to the immediate N of the windfarm site boundary, it has been designated for its importance for Blanket Bog and a short (c.500m) section of the access road runs parallel to the SAC site boundary. …… Although there is potential for some minor damage to a sliver of the Blanket Bog habitat where it interfaces with the access track, it was noted during my site inspection that this section was not in good condition and that any damage to the bog would soon begin regenerate once the works are complete. The N section of the site is connected to the SAC via on-site drainage ditches and watercourses and there is potential for indirect effects on water quality during the construction and operational phases. However, the EIAR construction phase mitigation measures would ensure that any fine sediments released during the excavation and construction works, or any contaminants resulting from accidental spills or accidents, would not reach the SAC."

Natura 2000 Site[18]	**Relationship to the Site**
River Finn SAC 002301	≈1.1 km north-east of the Site (However MKO[20] records[21] this SAC as the closest to the Site – running along its south-eastern boundary and forming the border between Donegal and Tyrone.)
Lough Eske and Ardnamona Wood SAC 000163	≈5km south-west of the Site
River Foyle & Tributaries SAC (UK Ref. UK0030320)	Encroaches on the southern corner of the Site

14. As I have noted, the Site is largely blanket bog. In certain circumstances – especially on hillsides – water-laden peat can "slip" or flow much like a liquid. Works such as those permitted inevitably require excavation of large amounts of peat and require care in so doing to avoid peat slippages. Also, the excavated peat must be deposited somewhere. Typically, it is deposited in on-Site "peat cells" identified in the SID Permission and the EIA and AA which inform it. Such peat cells must be carefully engineered for stability. Accordingly, in 2017/2018, the SID Planning Application, EIAR, Inspector's report, EIA, AA and SID Permission all considered and addressed the stability of the peat on-Site, the risk of peat slippage due to construction of the Windfarm, the location of peat cells, the possible environmental effects thereof, including on European Sites and the mitigation of such risks.

15. The 2018 Inspector's report[22] recorded that,

> *"The proposed windfarm project would comprise extensive excavation works associated with the construction of the turbines, borrow pits,[23] met mast, substation and access tracks within an afforested upland peat environment."*

In this respect, the Inspector's report considered Planree's EIAR, Peat Stability Assessment Report, Peat and Spoil Management Plan, and CEMP – inter alia to the effect that there was "*no evidence of bog slides or peat instability within the site*". The works were to give rise to 247,075m^3 of excavated peat. It and other spoils would be permanently placed in identified borrow pits and peat cells below ground level with no risk of instability or runoff. It was recognised that unregulated peat excavation and movement works had the potential to affect peat hydrology and drainage patterns in the area and cause peat instability and slippage, with resultant serious adverse environmental impacts, including pollution, by suspended solids, sediments and other pollutants, of watercourses flowing into the European Sites. But the proffered Peat Stability Assessment Report, CEMP and Peat and Spoil Management Plan were considered by the Board to be reassuring as to mitigation of those risks, such that the works would not give rise to peat instability or landslide risk. The Board's conclusion in EIA was that the environmental effects of the project would be acceptable – including that peat instability or slides were not anticipated as resulting from the works and

[20] McCarthy Keville O'Sullivan Limited (t/a MKO), Planning & Environmental Consultants to Planree.
[21] MKO s.160 Report 24 May 2023 – see below.
[22] 9.5 Peat stability.
[23] The Inspector in the application for leave to seek substitute consent (see below) explained: "The borrow pits are effectively quarries, that have been excavated for use of material as part of the approved wind farm development."

that the proposed Blanket Bog/Wet Heath habitat replacement project was an appropriate mitigation measure for the priority Annex 1 habitat[24] on Site, given that habitat was not within a European Site. In AA, the Board concluded that the proposed development would not adversely affect the integrity of European Sites in view of those sites' conservation objectives. While it does not imply, per se, that the EIA and AA were flawed, in fact and as matters turned out, those expectations were not realised.

PEAT SLIDES & AFTERMATH

16. Construction began in November 2019. On 12 November 2020, a major peat slide occurred in an area in which a digger was being used to lay timbers and brash for a permitted floating road[25] to Turbine 7. A 20m long section of road failed under the recently-loaded area as the loading from the construction had increased the applied stress through the full depth of the underlying peat over the full width of the road. This localised failure then spread.[26] Fehily Timoney[27] for Planree in a report[28] submitted to the EPA[29] estimated that about 86,240m^3 of peat slid – of which about 65,740m^3 left the "scar areas" and entered the Shruhangarve Stream[30] via which it flowed into the Mourne Beg River[31] and on to nearby European Sites, including in Northern Ireland, causing significant environmental damage.

17. Planree say that the November 2020 slide had been preceded by 2 "minor" slides in June 2020. However, their consultants, Fehily Timoney,[32] identified a total of 8 instances of "peat failure" on Site, including the November 2020 slide. In fairness, the numerical discrepancy is largely a matter of categorisation but citing a total of 3 rather than 8 slides does tend to convey a different impression.

- Fehily Timoney recorded 3 peat failures in June 2020 near a borrow pit between Turbines 5 and 6. They were arguably part of essentially the same incident. They were clearly due to the manner in which works were done. The manner of casting aside excavated peat caused excessive loading, resulting in failure of the underlying peat.[33] The total volume of peat involved was 40,000m^3.[34] One of the slides extended downslope by 260m and another by 750m and, to contain it, Planree constructed a rock berm upslope of Turbine 8. Fehily Timoney considered that these slides were contained within the Site and were now stable.
- Fehily Timoney recorded 1 peat failure at Turbine 12 – also due to the manner of casting aside excavated peat. About 10,500m^3 of peat failed over a 30m wide area and extended 200m downslope. Fehily Timoney considered that this slide was contained within the Site and is now stable.[35]

[24] Active blanket bog is a priority natural habitat type of Community interest listed in Annex I of the Habitats Directive as in danger of disappearance and for the conservation of which the EU has particular responsibility – see also Article 1(c)&(d) of the Habitats Directive.
[25] As I understand, a floating road is a road not laid on bedrock or similarly solid base. Various materials are introduced into the peat to strengthen it and the road is laid on the resulting surface. Those materials typically include such as tree trunks and branches (brash) and geogrid/geotextile. See EIAR 2017 – Exhibit MMcD1 Tab 4.
[26] Described at §3.1 of the MKO s.160 Report 24 May 2023 – Exhibit BK1 to Brian Keville's affidavit sworn 25 May 2023.
[27] Engineers.
[28] Peat Stability Assessment August 2021.
[29] Environmental Protection Agency.
[30] Fehily Timoney Peat Stability Assessment, August 2021, Figure 9: Extent of peat failure of 12 November 2020, Figure 10: Aerial image of upper and lower scars.
[31] Fehily Timoney Peat Stability Assessment, August 2021, §8.2.3, Description of Failure p39.
[32] Fehily Timoney Peat Stability Assessment, August 2021, Figure 2, §7.3. & Table 12: Summary of likely causes peat failures on site during construction.
[33] Fehily Timoney Peat Stability Assessment, August 2021 §7.3.1.
[34] Fehily Timoney Peat Stability Assessment, August 2021 3,000m^3 + 11,000m^3 + 27,000m^3.
[35] Fehily Timoney Peat Stability Assessment, August 2021 §7.3.2 & Figure 6: Peat Failure at T12. & §7.3.5.

- Fehily Timoney recorded 3 others as minor instabilities – peat movements of a few metres. One took the form of concentric tension cracks in about a 30m radius around the plinth of Turbine 5. Again, these were identified as likely to have occurred due to the manner in which works were done. Inappropriate support to the plinth excavation caused peat to move in towards the excavation. This was stabilised by infilling the excavation to make the plinth.[36] I mention this instability as Donegal CC identifies it as allegedly illustrating risk of allowing the erection of Turbine 5.

18. Fehily Timoney considered the causes, sequence and mechanism of the November 2020 peat failure as multifactorial but as including Planree's works.[37] It was clarified at trial that the parties are agreed:

- that Planree's works caused or at least contributed to the occurrence of, the November 2020 slide.
- that those works were in conformity with the SID Permission. Nor is there evidence that the November 2020 slide was caused by negligence by Planree.
- that the November 2020 slide was not caused, or contributed to by the Material Deviations which are the subject of these proceedings.

19. In this light, one can only regard as puzzling, unhelpful and entirely unrealistic Planree's submission in writing (as late as in the Statement of Case submitted only days before the trial) that *"It is simply not true that the peat slide was caused as a result of the works conducted by the Respondents in carrying out the development. There is precisely no evidence to support that contention."* and "*There is .. no evidence that the peat slide occurred as a result of the Respondent's actions".* Planree's own experts, Fehily Timoney and MKO[38], had long since made the contrary quite clear.

20. There is no evidence that any the peat slides occurred during works not permitted by the SID permission. However, Fehily Timoney does, in each case, identify as causative the manner of conduct of those permitted works – primarily, and specifically in the case of the November 2020 slide, by the manner of casting aside excavated peat, causing "excessive loading" of the peat onto which it was cast. To put the multiple slides in context of the recognition of risk and the need for care in performing works, I think it proper to note that Appendix 4.2 of the 2017 EIAR was a Peat & Spoil Management Plan which explicitly stated[39] that:

> *"Inappropriate side-casting of material, notably as arisings from excavations, is considered one of the main peat stability risks during the construction phase of the wind farm. Control of general loading of the peat surface, such as placement of arisings, can greatly reduce the risk of peat instability."*
>
> *"This methodology includes procedures that are to be included in the construction to minimise any adverse impact on peat stability. The methodology is not intended to*

[36] Fehily Timoney Peat Stability Assessment, August 2021 §7.3.3 & Figure 7: Peat Failure at T5.
[37] Fehily Timoney Peat Stability Assessment, August 2021 §8.5 Sequence and Mechanism of Peat Failure. Also described at §3.2 of the MKO s.160 Report 24 May 2023 – Exhibit BK1 to Brian Keville's affidavit sworn 25 May 2023.
[38] Whose s.160 Report summarised Fehily Timoney's views.
[39] §7.

cover all aspects of construction such as drainage and environmental considerations.
(1) All excavated peat and spoil shall be permanently placed in the 3 no. borrow pits or appropriately placed alongside excavated access roads …"

21. That said, it is fair to observe that the Peat & Spoil Management Plan refers to reducing, not eliminating, such risks. I do not draw any inference adverse to Planree as to the manner of its conduct of those works as none was argued. However, on the assumption that the manner of conduct of those works was entirely proper, the facts demonstrate repeated occurrence of peat slides on Site despite due care being taken by Planree – and this on a Site of which it was found in EIA and AA that no such events were anticipated. Planree's experts now, and again, give similar assurances as to Site stability at present. It is not for me to doubt those assurances but the history emphasises, if emphasis were needed, the necessity of their careful scrutiny in EIA Screening and AA.

22. The November 2020 slide had significant environmental consequences. As to their description, Donegal CC is correctly critical of the "MKO s.160 Report"[40] for Planree, written explicitly for the purposes of these proceedings – that is, to inform the court. It explicitly purports to report, inter alia, on the "*Peat Slide and Restoration Works*"[41] and "*Adverse impacts of peat slide*".[42] It asserts, as is not disputed, that the works under way at the time in the area where the peat slide occurred, were permitted works and it essentially repeats the Fehily Timoney description[43] of the causes, sequence and mechanism of the November 2020 peat slide as multifactorial but including Planree's works. However, the MKO report notably fails to usefully describe the environmental damage caused by the November 2020 slide or the residual position after its remediation. It states that:

"With the exception of the peat slide in November 2020, no significant cases of sedimentation of streams were observed during the construction phase and there was no significant effect on the water quality of the streams within the site or downstream of the site. …… if any element of the wind farm development (excluding the peat slide), …..had given rise to indirect environmental effects on downstream watercourses or water-dependent habitats or species, … any such effects would have become apparent …."[44]

23. The exclusions in these passages (of the effects of the November 2020 peat slide) can reasonably be read as implying, or at least allowing, that the November 2020 peat slide had caused significant sedimentation of streams and effects on downstream watercourses or water-dependent habitats or species. That possibility is confirmed, if only in very general and uninformative terms, by MKO's observation that "*The peat slide did have an adverse impact on the environment, downstream of the slide area*."[45] However, the

[40] MKO Report – Entitled "Project Report Meenbog Wind Farm, and matters arising as a result of notice of motion for relief under Section 160 of the Planning and Development Act." And dated 24 May 2024. §2.2 – Exhibit BK1 to Brian Keville's affidavit sworn 25 May 2023. It is referred to in affidavits as the "Project Report" but I will refer to it as the "MKO s.160 Report" as reflecting its status as a report to the Court in the proceedings.
[40] 9.5 Peat stability.
[41] MKO s.160 Report 24 May 2023 §3.
[42] MKO s.160 report 24 May 2023 §5.6.
[43] Peat Stability Assessment report by Fehily Timoney & Company (FTC) dated August 2021 submitted to the EPA.
[44] MKO s.160 report 24 May 2023 §5.3.
[45] MKO s.160 report 24 May 2023 §5.6.

report does not describe those adverse impacts – contenting itself with asserting that they were not due to deviations from the SID Planning Permission. Despite that, undoubtably correct, assertion, it was unrealistic to assume that the nature and degree of the adverse impacts of the November 2020 peat slide would not be canvassed in these proceedings or at least form part of the context relevant in the proceedings – not least when the relevant content of the MKO report was a response to an affidavit asserting the possibility of such impacts and that such impacts were to, or in the vicinity of, European Sites. As I observed at trial, the failure to describe those impacts in any useful way is regrettable.[46] That said, I do not think much of consequence ultimately turns on the omission.

24. All works on Site ceased after the November 2020 peat slide. An environmental liability investigation[47] ensued – led by the EPA, in conjunction with Donegal CC and the Loughs Agency.[48] In June 2022, Planree and Mid-Cork Electrical pleaded guilty in the District Court to offences relating to the pollution of the Shruhangarve & Mourne Beg streams by the November 2020 peat slide. Planree effected a considerable remediation programme under the supervision of the EPA and Donegal CC.

25. The Fehily Timoney Peat Stability Assessment of August 2021[49] considered peat stability over the Site generally, not just in the area of the November 2020 slide. It concluded[50] that, subject to specified mitigation measures, *"the construction of the wind farm can be completed safely without further peat instability"*.

26. Ultimately, Donegal CC by letter dated 11 July 2022 and the EPA by letter dated 28 September 2021[51] agreed that Planree had acceptably remediated the November 2020 Peat Slide and its environmental effects, inter alia, in light of the Fehily Timoney Peat Stability Assessment of August 2021. The EPA considered it "*important that the mitigation measures proposed are implemented <u>for the remaining works to be completed at the site</u>*."[52] – thereby implying its satisfaction that the remaining works could be completed. Donegal CC's letter lists aspects of the remediation works with which it is satisfied, commends those works as "*very well-designed and executed*" and specifically notes that *"the monitoring data obtained for the Shruhangarve and Mournebeg has been satisfactory."* Had there been residual adverse effects of the November 2020 Peat Slide of consequence after remediation, this would have been the letter in which to record it. But no such record is made.

27. I reject Donegal CC's suggestion that such residual effects are implied by an EPA report on a Shruhangarve water quality survey of September 2022.[53] It records that,

[46] Day 3 10:04 et seq.
[47] Pursuant to the European Communities (Environmental Liability) Regulations 2008, (SI 547 of 2008), which effects the Environmental Liability Directive (2004/35/EC).
[48] The Loughs Agency is an agency of the Foyle, Carlingford and Irish Lights Commission. It is a cross-border body under the 1998 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (better known as the "Good Friday Agreement"). A cross-border Multi-Agency Working Group also included representatives from Northern Ireland Water, the Rivers Agency, Northern Ireland Environment Agency, National Parks and Wildlife Service, and Derry City and Strabane District Council.
[49] Supplemented by a Peat Stability Quantitative Assessment dated August 2021 by Ionic Consulting.
[50] §11.
[51] Both letters are in Exhibit MM1.
[52] Emphasis added.
[53] Exhibit 2RA1.

- the river had been impacted by the November 2020 peat slide but had been improving ever since.
- the September 2022 survey suggested a decline in water quality again – "*indicating poor ecological condition with suspected toxic pollution*".

There is no suggestion in this EPA report, or ground for inference, that this decline was due to the November 2020 Slide (from which the Shruhangarve had, prior to September 2022, made appreciable recovery) or was otherwise due to Planree's works.

28. An updated site stability assessment[54] by AFRY[55] for Planree in October 2023 asserts that the Site and its peat are stable and Brian Keville of MKO is of the same view.[56]

29. Accordingly, I have formed the view that the residual effects of the November 2020 Peat Slide should not concern me in these proceedings and that the peat on-Site is, at least currently, stable. In that light, the failure to describe properly the effects of the November 2020 Peat Slide recedes in immediate importance in these proceedings – though those effects seem likely to provide useful information in any EIA or AA process as it relates to the Site and works thereon.

THE DEVIATIONS

30. For present purposes, a main significance of the November 2020 Peat Slide is that, incidentally but unsurprisingly, it prompted a more general planning enforcement investigation by Donegal CC of the Windfarm works. Inter alia, Planree were required to identify, by both as built-drawings and written statement, all deviations from the SID Permission – from the works as thereby permitted. Expert reports by consultants for both Planree and Donegal CC ensued – as did dispute as to the identification of deviations, their materiality, whether the Windfarm works as done constituted unauthorised development, whether Substitute Consent was required to regularise their status and as to the presence or absence of environmental risk.

31. Donegal CC retained SLR Consulting to review the ecological risks associated with the deviations. Notably, the resultant "SLR Deviations Report"[57] identified some deviations as of "higher" and "medium" ecological risk which, as they had not been included in the project description in the SID Permission process, had not been considered in EIA and AA prior to the grant of that permission. SLR considered – and still do[58] – that the effects of and risks posed by the Material Deviations include suspended solid pollution during construction, peat instability post-construction, loss of features used by protected species, loss of habitat and compromising the ability to restore peat bog habitats.

[54] Exhibit MM4 to the affidavit of Michael Murnane sworn 18 January 2024.
[55] AFRY Ireland Ltd – formerly Ionic Consulting.
[56] Affidavit sworn 26 January 2024.
[57] SLR Consulting Ecological Assessment of Planning Deviations, 18 March 2022 – exhibit RA1 to the Affirmation of Richard Arnold of 10 February 2023.
[58] Affirmation of Richard Arnold of 8 June 2023.

32. The s.160 Notice of Motion lists the deviations from the SID Planning Permission upon which it relies. It is now agreed that the deviations in respect of which s.160 relief is sought are material in planning terms such as to represent unauthorised development. Of note, some of the Material Deviations consist of works outside the "red line boundary"[59] of the Site. It is fair to say that Planree's explanations of why it deviated from the SID Planning Permission are, for the most part, very general. Generally, additional peat cells were said to have been required to accommodate more excavated peat than the volumes estimated pre-construction – though I have not been directed to an explanation of why the estimated volumes proved so greatly underestimated in the 2017 planning application. I list below the Material Deviations listed in the Notice of Motion.[60]

TABLE – LIST OF DEVIATIONS

Deviation per Notice of Motion[61]	**SLR Ecological Risk Designation**[62]	**Planree's Explanation**[63]	**Substitute Consent?**[64]	**Note/Comment**
Donegal CC considered items (1) to (9) to be material both in planning and environmental terms.				
(1) The realignment and relocation from that permitted of an access road to Turbine 10.[65]	Medium	Realignment followed more favourable ground and natural topography. Turning Head not constructed.	Yes - #3	The road was moved a maximum of 15m east over a length of 200m.
(2) The development and use of a borrow pit south of Turbine 12, including by blasting rock. The permitted size of the borrow pit was ≈0.2 hectares. As built it is ≈2 ha.[66]	Higher	An existing forestry borrow pit was expanded to win stone on site before gaining access to the designated borrow pits. Area already partially	Yes - #4	The reference to 0.2 hectares was in fact to a pre-existing borrow pit. There was no permission for its use as either a borrow pit/quarry or as a peat cell.[67] Planree blasted/

[59] The requirement that a planning application include a location map "marked so as to identify clearly: (i) the land or structure to which the application relates and the boundaries thereof in red" is imposed by Article 22 PDR 2001. (Planning And Development Regulations 2001 – 2023).
[60] I have edited the text of the list for clarity. References to "Turbines" are to their permitted locations as they have not yet been installed.
[61] Deviation numbers in the footnotes below refer to the numbering of deviations in the "Unauthorised Developments / As Constructed Deviation Matrix" ("Deviations Matrix") prepared by Martin McDermott of Donegal CC – Tab 41 Exhibit MMcD5 to his Affidavit sworn 29 March 2023.
[62] SLR Consulting Ecological Assessment of Planning Deviations, March 2022.
[63] As recorded in the Deviations Matrix and in Planree's application for Leave to Seek Substitute consent
[64] Was the item included by Planree in its list of 25 deviations for which it obtained leave to seek substitute consent.
[65] Deviation 4 – §39(a) Affidavit of Martin McDermott sworn 29th March, 2023.
[66] Deviation 5 – §39(b) Affidavit of Martin McDermott sworn 29th March, 2023. See as built Layout Sheet 7 exhibit MMcD5 Tab 19.
[67] Compare 2017 EIS Figure 4.1 and 2017 Site Layout Plan 3 (Exhibit MMcD1 Tab 4) with "Plot 2a" in the map attached to the Notice of Motion. As recorded above, the 2017 Peat & Spoil Management Plan had stated that "All excavated peat and spoil shall be permanently placed in the 3 no. borrow pits or appropriately placed alongside excavated access roads …" Figure 6 of that Plan identified those 3 borrow pits.

Deviation per Notice of Motion[61]	**SLR Ecological Risk Designation**[62]	**Planree's Explanation**[63]	**Substitute Consent?**[64]	**Note/Comment**
		reinstated with peat storage. It is intended to place further peat here to further reinstate this area.		excavated the existing 0.2 ha to a total of 2 ha and used rock thereby gained in the works. It backfilled the excavation as a peat cell with a 2m high retaining wall. Donegal CC can't precisely calculate the total volume of peat in the cell but roughly calculate it at up to 360,000m^2. That is likely an overestimate but it is clear that a very large volume of peat was deposited and is to be deposited It is not apparent to me that one "reinstates" a quarry by making it a peat cell or that doing so justifies unauthorised quarrying
(3) The movement of the access road to Turbine 8 from the route permitted.[68]	Medium	The road was amended to approach the southern side of Turbine 8 and align with the Peat Containment berm placed	Yes - #7	This berm was a response to the peat slides of June 2020.[69] Why the berm necessitated realignment of the access road is not apparent. The road has been

[68] Deviation 7(b) – §39(c) Affidavit of Martin McDermott sworn 29 March 2023.
[69] See above.

Deviation per Notice of Motion[61]	**SLR Ecological Risk Designation**[62]	**Planree's Explanation**[63]	**Substitute Consent?**[64]	**Note/Comment**
		south of T8 as a safety measure.		moved a maximum of 25m south over length of 250m.
(4) The realignment from that permitted of the floating access road at Turbine 4.[70]	Medium	Slightly amended to provide a more effective alignment for delivery vehicles.	Yes - #10	The road has been moved about 10m over length of 100m.
(5) Enlargement from that permitted of a borrow pit south of Turbine 15.[71]	Medium	None beyond stating what was done.	Yes - #11	
(6) Peat storage cells, totalling ≈2ha, at Turbine 15.[72]	Higher	None beyond stating what was done to accommodate more excavated peat than the volumes estimated preconstruction.	Yes - #17 & #18	These cells were not permitted. Again, Donegal CC can't calculate the total volume of peat in these cells but it is clear that they contain a large volume of peat.
(7) Peat storage cells at Turbine 17.[73]				
(8) The enlargement from that permitted of a layby storage compound for containers and welfare services southwest of Turbine 10.[74]	Medium	None beyond stating what was done and that the site office and welfare facilities will be removed on completion of construction.	Yes - #19	
(9) The realignment	Medium	None beyond	No	

[70] Deviation 10 – §39(d) Affidavit of Martin McDermott sworn 29 March 2023.
[71] Deviation 11 – §39(e) Affidavit of Martin McDermott sworn 29th March 2023.
[72] Deviation 18 – §39(f) Affidavit of Martin McDermott sworn 29th March 2023.
[73] Deviation 19 – §39(g) Affidavit of Martin McDermott sworn 29th March 2023.
[74] Deviation 25 – §39(h) Affidavit of Martin McDermott sworn 29th March 2023.

Deviation per Notice of Motion[61]	**SLR Ecological Risk Designation**[62]	**Planree's Explanation**[63]	**Substitute Consent?**[64]	**Note/Comment**
from that permitted of a road to Turbine 16 and the revised hard standing base for Turbine 16.[75]		stating what was done.		
(10) The following material deviations:	Donegal CC considered the deviations listed in Item 10 to be material only in planning and not in environmental terms. They represent breaches of Condition 1 of the SID Permission.			
(i) A revised access road to Turbine 12 – located adjacent to permitted access road, at the location of a previous bog slide in June 2020.[76]		The natural topography required a slight realignment. The road was moved west, and downslope about 30m. This avoided excessive cut at this location.	Yes - #5	Why these items were not included in the scheme submitted for EIA in 2017 is not explained.
(ii) Access road to Turbine 1 - revised from the permitted alignment ≈10m to the northeast for a length of ≈60m.[77]		Slightly amended to provide more effective alignment for delivery vehicles.	Yes - #8	
(iii) Access road to Turbine 2 - revised ≈10m to the northeast of the permitted alignment for a length of ≈60m.[78]			Yes - #9	
(iv) Hardstanding area at Turbine 15 rotated 90^0 from that permitted.[79]		The natural topography and rotating the hardstand allowed direct access to T15 off the main spine road – avoiding the need	Yes - #12	

[75] Deviation 36 – §39(i) Affidavit of Martin McDermott sworn 29th March 2023.
[76] Deviation 6 – §41(i) Affidavit of Martin McDermott sworn 29 March 2023.
[77] Deviation 8 – §41(ii) Affidavit of Martin McDermott sworn 29 March 2023.
[78] Deviation 9 – §41(iii) Affidavit of Martin McDermott sworn 29 March 2023.
[79] Deviation 12 – §41(iv) Affidavit of Martin McDermott sworn 29 March 2023.

Deviation per Notice of Motion[61]	**SLR Ecological Risk Designation**[62]	**Planree's Explanation**[63]	**Substitute Consent?**[64]	**Note/Comment**
		for the permitted road to T15.		
(v) Realigned access road to Turbine 17 in lieu of permitted alignment.[80]		The road was built along a pre-existing road/firebreak. The difference of alignment was minor.	Yes - #13	
(vi) Upgrade of 220m of existing forestry track near Turbine 13.[81]		Obviated the need for a section of new permitted road	Yes - #14	
(vii) Turning head near Turbine 14 moved from permitted layout.[82]		To suit natural topography.	Yes - #16	
(viii) Access road to Turbine 19 realigned from that permitted.[83]		Slight widening and curve realignment to increase horizontal bend radius for turbine blade delivery.	Yes - #21	
(ix) Access road to Turbine 9 – built on existing forest track to east of permitted alignment.[84]		SLR considered this a slight relocation. Planree said it was a minor difference of alignment.	Yes - #22	The Inspector, in reporting to the Board on Planree's application for leave to seek Substitute Consent[85] said that this deviation was in response to a peat slide and done After engagement with Donegal CC and

[80] Deviation 13 – §41(v) Affidavit of Martin McDermott sworn 29 March 2023.
[81] Deviation 14 – §41(vi) Affidavit of Martin McDermott sworn 29 March 2023.
[82] Deviation 17 – §41(vii) Affidavit of Martin McDermott sworn 29 March 2023.
[83] Deviation 28 – §41(viii) Affidavit of Martin McDermott sworn 29 March 2023.
[84] Deviation 29 – §41(ix) Affidavit of Martin McDermott sworn 29 March 2023.
[85] Inspector's Report 20/10/23 p14 & 17.

Deviation per Notice of Motion[61]	**SLR Ecological Risk Designation**[62]	**Planree's Explanation**[63]	**Substitute Consent?**[64]	**Note/Comment**
				the EPA.[86]
Items (11) to (13) relate to development outside the "red line" delimiting the Site.				
(11) A section of new access road off the N15 (60m long x 5m wide) and associated accommodation site/development works – substantially outside the Site.[87]	Higher	Minimal works were required to construct a bypass in lieu of upgrading the existing hairpin bend access road. This provides a safer and more sensible approach to the Site by eliminating a sharp, blind bend in the main entrance road to the Site. The existing hairpin bend was unsafe as it did not provide adequate line of sight for vehicles using the road. This was a safety concern that only came to light when prior to construction and after it was established that the as-built route was feasible from a	Yes - #1	The description of the deviation in the Notice of Motion is misleading – I accept unintentionally. This section of road is just inside the main Site entrance and is part of the main access road into the Site. The SID Permission envisaged the maintenance of an existing hairpin bend around a small depression/valley. The road was laid straight across the depression to eliminate the bend. In fact, the road itself, as laid, is inside the "red line" delimiting the Site. What is outside the "red line" is made ground or embankment supporting the road laterally as it crosses the depression. This was to assist delivery of turbine elements

[86] He makes a similar remark as to works in the region of the access route to Turbine 7 but these works are not listed in the Notice of Motion. Presumably these were the remediation works at the site of the November 2020 peat slide to which Donegal CC and the EPA had agreed.
[87] Deviation 1 – §§47-50 Affidavit of Martin McDermott sworn 29 March 2023. See also "Plot 2a" marked on Site Location Map – Exhibit MMcD4 Tab 14.

Deviation per Notice of Motion[61]	**SLR Ecological Risk Designation**[62]	**Planree's Explanation**[63]	**Substitute Consent?**[64]	**Note/Comment**
		geotechnical perspective with the benefit of site investigations. The as-built alignment would have required a reduced construction footprint compared to the permitted.		by large lorries. It is difficult to understand Planree's explanation. The hairpin bend is perfectly obvious on any map in the papers before me and must have been just as obvious to engineers surveying the site for the 2017 planning application. Yet we are told the safety issue "only came to light when prior to construction and after it was established that the as-built route was feasible." On that view, the safety issue was identified <u>after and did not prompt</u> the investigation of the alternative route.
(12) Two peat cells, a borrow pit, retaining walls, and associated accommodation site/development works – all southeast of the substation and substantially outside the Site.[88]	Higher	None beyond stating what was done to accommodate more excavated peat than the volumes estimated preconstruction.	Yes - #2	Donegal CC and SLR state that • This is c. 0.7km south of Croaghonagh Bog SAC and upslope of the adjoining Mary Breen's Burn

[88] Deviation 3 – §§51 - 54 Affidavit of Martin McDermott sworn 29March 2023. See also "Plot 2b" marked on Site Location Map – Exhibit MMcD4 Tab 14.

Deviation per Notice of Motion[61]	SLR Ecological Risk Designation[62]	Planree's Explanation[63]	Substitute Consent?[64]	Note/Comment
				River. • mitigation is unknown; • the impact, including flood risk, and impacts on part of the Lough Eske and Ardnamona Wood SAC, were not assessed
(13) A borrow pit and peat cells near Turbine 18, and associated accommodation/site development works – substantially outside the Site.[89]	Higher	None beyond stating what was done to accommodate more excavated peat than the volumes estimated preconstruction.	Yes - #15	There was no permission for a borrow pit or peat cell here.[90] SLR asserts this has no silt curtains or settlement lagoon. Donegal CC asserts a risk of peat cell wall failure or over-topping with wet peat and reaching the Bunadaowen River. Planree disputes these criticisms.

33. Donegal CC is concerned that recommencement of works would present the following concerns:[91]

- About 10,000 tonnes of stone is required to cap the roads with up to 300mm of cover (as advised by Planree's Michael Murnane during site inspections. The MKO s.160 Report[92] records that about 17km of

[89] §§55 - 58 Affidavit of Martin McDermott sworn 29 March 2023 & his affidavit sworn 6 June 2023 §62. See also "Plot 2c" marked on Site Location Map – Exhibit MMcD4 Tab 14.
[90] Compare 2017 EIS Figure 4.1 and 2017 Site Layout Plan 3 (Exhibit MMcD1 Tab 4) with "Plot 2c" in the map attached to the Notice of Motion. As recorded above, the 2017 Peat & Spoil Management Plan had stated that "All excavated peat and spoil shall be permanently placed in the 3 no. borrow pits or appropriately placed alongside excavated access roads …" Figure 6 of that Plan identified those 3 borrow pits.
[91] §91 Affidavit of Martin McDermott sworn 29 March 2023.
[92] MKO s.160 Report 24 May 2023 P5 – Exhibit BK1 to Brian Keville's affidavit sworn 25 May 2023. It is recorded that 21km of new and upgraded roads had been completed and the permitted wind farm access roads are substantially complete with the exception of the further widening of the existing road to T18. Clearly this largely excludes capping as Table 2.2 Summary of civil works to be completed records "Approx. 80% of roads to be capped". 21 x 80% = 17km.

road remains to be capped.)

- Recommenced works from September 2022 to November 2022[93] had included rock breaking:
  - at Turbine 16 to enable construction of its base.
  - in the borrow pit beside Turbines 13 and 16 – directly downslope from the origin of the November 2020 peat slide and upslope of large unauthorised surface peat cells near Turbine 15.
  - the rock from which was used to create the remaining hardstanding areas/access pads for turbines and provide additional stone material for road widening/capping, etc.
- Planree had advised Donegal CC[94] that it intended to deliver, install and commission 8 to 10 turbines within 6 weeks.
- Storage of peat dug out from September to November 2022 had left no capacity to store peat.
- The borrow pit near Turbine 13[95] was still being used to make peat storage space; (While SLR were not concerned by this "*additional excavated borrow pit and peat storage cell*", Planree included it as Deviation 25 in its Substitute Consent application.[96])
- The Turbine 8 base remained to be dug out and 2.5km of the road to Turbine 18 remained to be widened – but where the excavated material would be deposited is unknown absent unused permitted peat storage capacity.

THE RED LINE ISSUE

34. As I have said, Donegal CC alleged that some of the Material Deviations included development outside the "red line" – the planning application site boundary – required by regulation to identify the Site. Others were said by SLR to be outside the "consented footprint". I understand that description to allege development within the red line but outside the footprint of actual development permitted. While, in fairness to Planree, the allegation was not disputed, it caused some confusion – if only on my part – in part due to the nature of windfarm development. On the ground, as it were, it consists primarily of access roads to individual turbine sites, those turbine sites and the turbines on each. In plan, this presents as something like a tree (the main access road) and branch (the roads off the main access to each turbine) layout or a web layout, in which the part of the overall site actually developed may be quite small.

35. From the Site layout maps which formed part of the 2017 planning application and on which the SID permission is based, it is clear that the red line hugs, as it were, the main access road, from the public road to the west, into the Site and the hugs the substation about halfway along that road. However, from where the main access road splits in two to allow access via further "branches" to the turbine sites, the red line no longer hugs the development footprint. Rather, it encircles the entire and general area in which that footprint is situate. As a result, it is clear that the actual development footprint represents only a small part of the total Site area. So Planree's emphasis on the size of the Site as rendering deviations from the SID Permission understandable[97] is, at least in some degree, misplaced – though I accept Planree is

[93] See further below.
[94] At site inspections on 28 October 2022 and 25 November 2022.
[95] Variously described as Borrow Pit B and Borrow Pit 3
[96] Deviations Matrix, Tab 41, Exhibit MMcD5 to the Affidavit of Martin McDermott sworn 29 March 2023.
[97] To use a neutral word.

environmentally responsible, as it were, for the entire Site and my decision does not turn on my view that its emphasis is misplaced.

36. For present purposes however, I confirm that I am satisfied that Donegal CC is correct in its specific assertions of development outside the "red line" – the planning application site boundary.[98]

SUBSTITUTE CONSENT APPLICATION FOR DEVIATIONS & APPROVAL OF REMEDIATION OF PEAT SLIDE

37. In July 2022, Planree sought leave to seek Substitute Consent,[99] not for the entire Windfarm development as-built to that time, but for a single "subject development", consisting of "*25 no. deviations from the permitted development*".[100] The accompanying MKO Planning Report[101] dated 8 July 2022 asserted that

- there was no unauthorised development.
- the application was "*made at the request of DCC but without prejudice to Planree's belief that substitute consent is not required*", *"and in order to adhere to DCC's expressed preference."*
- the 25 deviations were unconnected to the peat slide of November 2020.
- "*The works associated with the Meenbog wind farm, which are the subject of this application for leave to apply for substitute consent, are described as follows*:

  Alterations to the permitted Meenbog wind farm development, including:
  > Alteration to alignment of permitted internal wind farm roads, road junctions, turning heads and or turbine hardstands;
  > Additional peat storage areas;

[98] See, for example, the Ionic "As Built Layout Overview" Map MNBG d024.1.0 dated 15/12/20202 attached to the Notice of Motion and the MKO "Explanatory Map" 220623 – 99 dated 21.03.2024 which, though not exhibited, was before me by agreement.
[99] The leave application was required by s.177C (2)(b) – since repealed.
[100] Exhibit BK2 – MKO to An Bord Pleanála 8 July 2022.The 25 deviations for which leave to seek substitute consent was sought were as follows:
1.Alteration of internal road alignment in area of N15 access junction.
2.Additional peat storage cell in area southeast of substation
3.Alteration to alignment of the T10 access road.
4.Additional borrow pit south-west of T12 (also associated additional peat storage space) in place of permitted borrow pit in alternative location.
5.Alteration to alignment of the T12 access road.
6.Construction of peat containment berm near T8.
7.Alteration to alignment of the T8 access road.
8.Alteration to alignment of the T1 access road.
9.Alteration to alignment of the T2 access road.
10.Alteration to alignment of the T4 access road.
11.Expansion of borrow pit BP2 south of T15.
12.Alteration to hardstand and access road for T15.
13.Alteration to alignment of the T17 access road.
14.Alteration to alignment of the T13 access road.
15.Provision of enlarged peat cell north-west of T18.
16.Alteration to alignment of turning head at T14.
17.Additional peat cell north near T15.
18.Additional peat cell near T17.
19.Provision of layby with welfare facilities south of T10.
20.Provision of layby north-east of T15.
21.Alteration to alignment of the T19 access road.
22.Alteration to alignment of the T9 access road.
23.Alteration to alignment of the T7 access road including additional storage.
24.Provision of roadside berms and settlement ponds adjacent to road corridor
25.Repositioned borrow pit and peat storage cell at T13.
[101] Exhibit BK2.

> Extension or repositioning of previously permitted borrow pit;
> Additional borrow pit in place of previously permitted borrow pit at alternative location;
> Peat containment berm;
> All ancillary works associated with the above, including environmental mitigations measures and water quality (drainage design) protection measures."[102]

38. That MKO Planning Report also recorded as follows.[103] (I have supplemented its account somewhat on foot of information appended to that Report.)

- That Donegal CC had engaged SLR in 2021 to review the ecological risks associated with the deviations.

- There was some difference between Donegal CC and Planree as to the identification of and number of deviations – though this seems to have been at least in large part due to sub-division of deviations for purpose of identification/analysis. It is not apparent to me that there is real disagreement in this regard significant for present purposes. It suffices to note that SLR reported 47 deviations to Donegal CC and the Notice of Motion lists 21. The real disagreements, at that time though since resolved, were not as to the identification of the deviations but as to their materiality.

- It appended SLR's Deviations Report which included an AA Screening report to the effect that about 1/3 of the deviations posed medium or higher ecological risk, with half of those (i.e. 1/6) posing a higher ecological risk. So SLR considered that '*likely significant effects'* on European Sites could not be excluded and AA was required.

- Donegal CC wrote accordingly to Planree on 27 April 2022[104] citing SLR's Deviations Report and NPWS's[105] agreement with it. Donegal CC opined that the only "*route to regularisation*" available to Planree was via Substitute Consent. However, DCC did not direct Planree to apply for leave to seek Substitute Consent.

- Planree seeks leave to apply for Substitute Consent for 25 of the 47 deviations considered by SLR. The other 22 do not require substitute consent.

39. Donegal CC made a submission, dated 15 August 2022,[106] on that leave application. It objected that Planree had sought leave as to only 25 deviations and, in particular, had omitted 6 of those SLR had identified as medium or high ecological risk. It asserted that these too required regularisation via Substitute Consent. However at trial, Donegal CC did not pursue this particular criticism.

[102] MKO Planning Report 8 July 2022 §5.
[103] §5.1.
[104] Appended to the MKO Planning Report dated 8 July 2022.
[105] NPWS is the National Parks and Wildlife Service of the Department of Housing, Local Government and Heritage and manages and advises the Minister on the State's nature conservation responsibilities, including the designation and protection of European Sites.
[106] Exhibit BK3.

40. Once Planree got confirmation from the EPA[107] and Donegal CC[108] that its remediation works, as they related to the November 2020 Peat Slide and its effects, were satisfactory, and on legal advice, Planree took the view that it could properly recommence development works – which it did in September 2022. It ceased works again late November 2022 on receipt of Enforcement Notices[109] issued by Donegal CC requiring, inter alia, cessation of works. In essence, these Notices invoked the deviations as a matter distinct from the peat slide. Planree has not recommenced works since. On judicial review, the Enforcement Notices were quashed by consent on 27 February 2023 – at which time, it seems, Donegal CC intimated the present s.160 proceedings. Planree has understandably taken the view since then that remobilisation of the Site was not prudent.

S.160 MOTION, S.160 & THE CONCEPT OF UNAUTHORISED DEVELOPMENT

41. These proceedings started by originating notice of motion dated 3 March 2023. An amended notice of motion issued on 19 May 2023. I have identified above the 21 Material Deviations listed in the amended notice of motion. Planree urges that Donegal CC has not sought orders to prevent the carrying out of any future or additional unauthorised development.[110] To reject that argument I need only note that the amended notice of motion seeks orders under s.160(1) PDA 2000 as follows:

- requiring Planree to cease and restraining Planree from continuing its "unauthorised development" on the Site. It asserts that the development is unauthorised by reason of the listed Material Deviations.
- directing Planree to do or not to do, or to cease to do, anything that the Court considers necessary.
- Interim and/or interlocutory relief – including of the kind described above.
- such further or other order as the Court shall deem fit.
- liberty to apply if Planree gets substitute consent.

42. There was the usual exchange of affidavits. Donegal CC filed affidavits of Martin Mc Dermott, Executive Planner and affirmations of Richard Arnold, ecological consultant of SLR Consulting. Planree filed affidavits of Michael Murnane and of Brian Keville, environmental scientist and the environmental director of MKO. It is fair to say that the affidavits preceding the Board's decision of 13 October 2023[111] to grant leave to seek Substitute Consent were considerably taken up by disputes as to the materiality of the Deviations – a dispute settled for practical purposes by the Board's decision to grant leave. At trial, the materiality of the Deviations was agreed – though significant disputes as to environmental risk remain. Those disputes are pointed to the extent that Mr Arnold, for Donegal CC, consider the MKO position to be non-evidence based and to consist primarily of a series of assertions and hypotheses.[112] Mr Keville replies in kind as to the bases of Mr Arnold's opinions.[113]

[107] In fact, earlier – by EPA letter dated 28 September 2021.
[108] By letter dated 11 July 2022.
[109] Pursuant to s.154 PDA 2000.
[110] Planree's written submissions §9.
[111] See below.
[112] Affirmation of Richard Arnold 8 June 2023 – see generally.
[113] Affidavit of Brian Keville 19 June 2023 – see generally.

43. As relevant s.160 PDA 2000 reads as follows:

> *"160.—(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:*
>
> *(a) that the unauthorised development is not carried out or continued;*
>
> *(b) in so far as is practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;*
>
> *(c) that any development is carried out in conformity with —*
> *(i) in the case of a permission granted under this Act, the permission pertaining to that development or any condition to which the permission is subject, or ……..*
>
> *(2) In making an order under subsection (1), where appropriate, the Court may order the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or other feature.*
>
> *(3) (a) An application to the High Court or the Circuit Court for an order under this section shall be by motion and the Court when considering the matter may make such interim or interlocutory order (if any) as it considers appropriate. ….."*

44. It will be seen from s.160 that unauthorised development past, present or foreseen, is a precondition to an injunction and that an injunction may only be granted to ensure that unauthorised development is not carried out or continued, that any development is carried out in conformity planning permission and to effect restoration of the land. In the very particular circumstances in which Planree wants to continue development, and on the arguments made, it becomes necessary to discern whether to do so would continue unauthorised development or whether, as Planree says, such continued development is authorised.

UNAUTHORISED DEVELOPMENT – CONCEPT & SIGNIFICANCE

45. The concept of "unauthorised development" is not a negative one that a mere regulatory requirement is lacking. Nor is it a matter of not having crossed some t's or dotted some i's. It is a positive matter. To be clear: it is a matter of the rule of law to say that unauthorised development is forbidden by law. That prohibition is not overridden by developers'[114] perceptions of pragmatism, inconvenience, industry norms or expense – or even environmental benefit. Its premise is that the acceptability of development,

[114] For the avoidance of doubt, I use the word "developer" and cognates here in their broadest sense – encompassing all who would develop land and not particular to commercial developers. Nor do I suggest that any particular subgroup of those who would develop land is more or less prone to unauthorised development.

including environmental benefit, is decided not by developers or landowners but before development occurs and strategically by national and local government, and in particular instances by planning authorities,[115] in the public interest and with due regard to the private rights and interests of all concerned, including the developer. **S.32(1) PDA 2000** states that permission shall be required in respect of any development of land, not being exempted development. **S.32(2) PDA 2000** states that *"A person shall not carry out any development in respect of which permission is required except under and in accordance with a permission .."*[116] If, which it does not, **S.32(2)** left any doubt outstanding in this regard, it is dispelled by **S.151 PDA 2000**, which is quite plain: *"Any person who has carried out or is carrying out unauthorised development shall be guilty of an offence."* Indeed, by **s.156 PDA** it is an indictable offence punishable by a fine of up to €12,697,380.78 and/or 2 years' imprisonment and is continuing offence after such conviction such that further prosecution may ensue. Of course, I can take judicial notice that prosecutions are relatively rare and penalties of that order even rarer. A very proper discretion and proportionality attends decisions whether to prosecute for unauthorised development. Very properly, smaller hammers (such as s.160) are provided by statute and are typically used, at least initially, to crack the nuts of unauthorised development. And statute also provides for remediation of unauthorised development via retention permissions and Substitute Consent. But sight should not be lost of the legal fact that a planning permission is a permission to do something which, but for that permission, is a criminal offence. See, more pithily in this regard, McKechnie J in **Murray**.[117]

46. S.2 PDA 2000 defines "unauthorised development", in relation to land, as "*the carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use;"* As relevant, it defines *"unauthorised works"* as

> *"any works … other than … (b) development which is the subject of a permission …. and which is carried out in compliance with that permission or any condition to which that permission is subject;".*

So, the default position is that all development is unauthorised. Development is authorised only if exempted from the need for permission or permitted by a permission. In my view there is no discernible difference in meaning between the words "*in compliance with"* in the definition of unauthorised works in s.2 and the words *"in conformity with"* in s.160(1)(c). A development not carried out in conformity with an applicable permission is unauthorised development and illegal.

MATERIALITY & UBIQUITY OF DEVIATIONS

47. Planree's position is essentially summarised in its following assertion:

> *"Although there is a dispute as to the extent and materiality of the deviations on the site, the Respondent accepts that there is unauthorised development on the site, as is uniformly the case for projects of this scale. The Respondent is seeking to complete its 95% completed and fully authorised*

[115] Including the Board.
[116] Emphases added.
[117] Meath County Council v Murray [2018] 1 IR 189.

windfarm and to address the unauthorised development in the context of building out the site.

All of the evidence … is that the site is stable and that there are no significant environmental effects from the unauthorised development. The Respondent is perfectly happy to consent to an Order directing the cessation of unauthorised development and an Order directing the removal or remediation (as appropriate) of the unauthorised development in phasing to be agreed and under (as required) the supervision of the Council or the Honourable Court."[118]

48. By his first affidavit[119] Michael Murnane, director of Planree and Mid-Cork Electrical, cited MKO[120] for his averment that he was *"advised that the deviations from the planning permission granted in this case as alleged are not material."* He recorded that MKO had advised that:

"The deviations from the permitted development are mostly minor in scale, occur in similar habitats and locations to the previously assessed and permitted plans, do not change the nature or scale of the development originally permitted, and in addition do not materially alter the environmental impacts associated with it.
Such deviations are not considered to represent a material departure from the terms of the consented project. "

49. Mr Murnane also asserted[121] that

"…. in developments of this scale it is inevitable that deviations will occur ….. It is not feasible to conduct very detailed ground surveys on the entirety of a site of this size. Therefore, when construction works commence, minor alterations to the development are normally required so as to respond to the ground conditions encountered.

…. these deviations generally arise as a result of circumstances which present on the site and in the sub-surface once personnel and equipment are on the site and construction commences. I say that this is an entirely normal and acceptable manner of approaching construction of this scale and complexity that is universally applied. I say that frequently non-material deviations are needed to avoid unnecessary environmental damage or because there is a safer, less intrusive and more effective way of achieving the completed development. Deviations are not implemented to cut corners or save costs, instead deviations are undertaken after careful engineering and environmental considerations are applied to issues that present on site and are implemented only where strictly necessary."

50. Mr Keville of MKO for Planree avers that:

[118] Statement of Case §30.
[119] Sworn 26 May 2023.
[120] Brian Keville's affidavit sworn 25 May 2023 & MKO s.160 report 24 May 2023 – Exhibit BK1 thereto.
[121] Affidavit sworn 29 May 2023.

> *"…… it is neither practical nor environmentally advisable to ignore the ground conditions encountered on a large-scale construction site and carry on with a development to the letter of a planning permission. Planning applications and the assessments made in respect of same can only provide a certain level of detailed information on ground conditions, and as further information comes available prior to and once on-site once construction commences, engineering and construction plans must be adjusted accordingly. Invariably, there are ground conditions encountered which require changes to construction practices, sequencing or management, and some deviations are an inevitable and universal practice for works on projects of this size, scale and complexity."*[122]

Planree submitted in writing[123] that, by the foregoing, Mr Keville had stated that "*deviations are ubiquitous and inevitable and that it is neither possible nor environmentally prudent to ignore on-site conditions and rigorously stick to the letter of a grant of planning permission*."

51. These assertions by Mr Murnane and Mr Keville are practical and in accordance with law and with the flexibility proper to planning permissions – but, and vitally, only as predicated on the deviations in question being "*minor*" and "*non-material deviations*". It should be said that those averments were made before the Board's grant of leave to seek Substitute Consent and so were made while both deponents were still disputing the materiality of the deviations. Mr Murnane and Mr Keville do not, and could not in accordance with law, seek to excuse on pragmatic grounds material deviations from planning permissions or, in particular, deviations material as requiring EIA or AA. Such a proposition, as it would in effect enable developers to ignore planning permissions in material respects, and as was said in another context, "*would be incredibly destructive of planning law*."[124] The protestation that one cannot be bound by the "letter" of a planning permission sets up a straw man. No-one says one is so bound. Everyone accepts that there is flexibility. Minor deviations are permitted. But developers are bound by law to material compliance with planning permissions. To be plain, one cannot excuse material deviations by relying on the pragmatic flexibility of planning permissions.

52. The introduction to MKO's s.160 Report interestingly states: "*<u>Planree</u> is of the view that the deviations or alterations were not material and did not give rise to any additional environmental impact either individually or cumulatively/in combination with existing works*."[125] In a s.160 application there is a fundamental difference between the legal significance of the of view of a developer (a non-expert and not entitled to put its opinion in evidence) and that of its planning consultant (an expert and entitled to put its opinion in evidence) as to these crucial matters. Donegal CC repeatedly agitated the complaint that MKO, rather than expressing its own opinion, expresses Planree's.[126] There is merit in that complaint and that MKO created a basis for it is regrettable. All that said and perhaps taking an indulgent view, it is on balance apparent from the rest of MKO's s.160 – including its conclusion – that MKO holds the same views as Planree. In any event, Mr Keville later confirmed, and I accept, that MKO's s.160 Report does reflect his

[122] Affidavit of Brian Keville 19 June 2023.
[123] Updated statement of case 14/3/24 Appendix 1, §11, & written submissions §39.
[124] Bailey v Kilvinane Windfarm [2016] IECA 92.
[125] Emphasis added.
[126] Affidavit of Martin McDermott sworn 6 June 2023. Affirmation of Richard Arnold made 8 June 2023.

expert view.[127]

53. While it was prudently "walked back" at trial, Planree audaciously submitted in writing (as late as in the Statement of Case submitted only days before the trial) that, "*there is unauthorised development on the site, as is uniformly the case for projects of this scale"* and that such unauthorised development *"is typical for projects of this scale."*[128] This clearly suggests that in large projects unauthorised development – illegality – is endemic, routine, to be expected and is not a matter for concern. I cannot say if that surprising submission is correct as to fact. In fairness to them, it goes beyond the averments of Mr Murnane and Mr Keville, which were confined to minor deviations. But I unhesitatingly assert that to any extent it is correct as to fact it is unacceptable in law. It is all the more unacceptable as to development unauthorised for want of necessary EIA, EIA screening or AA. And it bears recollection that satisfaction of the exceptionality requirement of Substitute Consent *"is no easy achievement"* and cannot be *"in any way standard, typical or routine*".[129]

54. I have earlier sought to elucidate the importance and legal significance of the concept of "unauthorised development" as forbidden by law and as a criminal offence. I hasten to disavow any suggestion that prosecution or penalty of the order cited above is likely in this case or deserved. That is not my decision to make and, as I have said, such events are rare. A very proper discretion and proportionality attends decisions whether to prosecute for unauthorised development. Nor do I ignore the view of the relevant regulators that Planree dealt very properly with the November 2020 Peat Slide and its consequences. My purpose, rather, is to explain my unhesitating rejection of any proposition that "*unauthorised development … is uniformly the case for projects of this scale"* represents an acceptable position. I note in passing that in **Luxor**,[130] cited by Planree, the court predictably rejected the proposition that an "*industry norm*" – in that case as to phasing of development – could trump the legal obligations imposed by planning conditions.

55. **Browne**,[131] considering planning injunctions, cites **O'Connell**[132] and **Cliftonhall**[133] to the effect that the nature of the breach of a planning permission may be relevant to the question whether there has, in fact, been any unauthorised development at all, as planning permissions are to be interpreted to allow for a tolerance of "slight" or "immaterial" deviations. That is so as the practical reality is that buildings can sometimes not be built precisely as the plans indicate. He cites **St Margaret's 2017**[134] for the proposition that a breach of planning permission may be significant at two levels. First, it may be sufficiently immaterial or trivial as not to amount to unauthorised development. Second, even if there has been unauthorised development, the trivial or immaterial nature of any breach may be such that it is not appropriate as a matter of discretion to grant s.160 relief. "*However, the measure of tolerance allowed is in respect of immaterial deviations*." – **Forest Fencing**.[135]

[127] Affidavit of Brian Keville sworn 19 June 2023 §17 et seq.
[128] Updated Statement of Case 14 March 2024 §§29 & 46 – emphases added.
[129] See below and McQuaid & Ballysax Quarries cases §85 & §91. Citing Barrett J, An Taisce v An Bord Pleanála (McQuaid Quarries) [2018] IEHC 315.
[130] Luxor Investments Ltd v Wave Point [2018] IEHC 775.
[131] Simons on Planning Law, 3rd Edition §11-536 et seq.
[132] O'Connell v Dungarvan Energy Ltd., Unreported, High Court, Finnegan J., 27 February 2001.
[133] County Council v Cliftonhall, Unreported, High Court, Finnegan J., 6 April 2001.
[134] St Margaret's Concerned Residents Group and Others v Dublin Airport Authority plc [2017] IEHC 694.
[135] Wicklow County Council v Forest Fencing [2007] IEHC 242 §40. See also Krikke v Barranafaddock Sustainability Electricity Ltd [2019] IEHC 825.

56. I do not suggest that Planree's site investigation and the information provided by Planree which informed the Board's EIA in 2018 was inadequate: there is no evidence before me to that effect and the EIA is long-since immune from challenge. However it is the developer, not the environment, which bears the risk in that regard if material deviation from the resultant planning permission is considered necessary.

57. For the foregoing reasons and also given the necessity that EIA and AA precede development,[136] it is important to say that Planree's submission, though "walked back" that "*unauthorised development … is uniformly the case for projects of this scale"* is fundamentally misconceived. Equally misconceived is the submission that allowance for such "*unauthorised development"* is necessary on a pragmatic basis. So too is the vaguely articulated suggestion that there is some sort of a get out for "*unauthorised development"* in the case of large-scale projects (itself an inherently vague and elastic concept) as opposed, presumably, to smaller scale projects. While any such proposition is problematic, it seems especially so of any project which has been subjected to a process – AA – which, as a matter of the jurisdiction of the competent authority (here, the Board), permits development consent only for projects of which it has been determined, prior to development consent being given and as a matter of certainty beyond reasonable scientific doubt in the light of the best scientific knowledge in the field, that it will not adversely affect the integrity of any European Site.[137]

58. Lest the contrary be thought, I should say that the law does take a pragmatic approach. Where development occurs under the cloak of a permission, all of the development as built must stay within the scope of that permission. But that scope does allow for flexibility and the practical considerations and unpredictability of construction work. Deviations from the precise terms – the "letter" – of the permission can fall within that flexibility. But to allow unlimited deviations within that flexibility would undermine the concept of authorised development and, as a matter of the rule of law, the integrity of the planning code. So, unless the law requiring prior development consent, EIA and AA for the project actually built is to be undermined, there must be a criterion for allowing that flexibility while limiting the degree of pragmatic deviation from the terms of the planning permission. Materiality is that criterion – materiality that is, in planning and environmental terms. Materiality of deviation is the divisor between the authorised and legal on the one hand and the unauthorised and illegal on the other. Immaterial deviation is authorised development precisely because it comes within the flexibility of the planning permission. Material deviation renders the development unauthorised precisely because it does not come within that flexibility. In **Krikke**[138] Simons J cited the "*characteristic clarity*", of Fennelly J. in **Kenny**[139] in identifying *"some simple matters of common sense … concerning planning permissions":*

> *"There will inevitably be small departures from some or even many of the plans and drawings in every development. There can be discrepancies between and within plans,*

[136] See further below.
[137] Case C-127/02, Waddenzee, Judgment of 7 September 2004 and many cases since, including Sweetman (Case C-258/11) Eu:C:2013:220; Kelly v An Bord Pleanála (2014) IEHC 400, Balz v An Bord Pleanála [2016] IEHC 134 and An Taisce v An Bord Pleanála & Kilkenny Cheese, [2022] IESC 8, [2022] 1 ILRM 281.
[138] Krikke v Barranafaddock Sustainability Electricity Ltd [2019] IEHC 825.
[139] Kenny v Dublin City Council & Trinity College Dublin [2009] IESC 19.

> *drawings, specifications and measurements; there can be ambiguities and gaps. It seems improbable that any development is ever carried into effect in exact and literal compliance with the terms of the plans and drawings lodged. If there are material departures from the terms of a permission, there are enforcement procedures."*

Here we see the divisor: immaterial deviations are authorised development; material deviations are unauthorised development and subject to enforcement procedures such as under s.160.

59. This analysis seems to me consistent with the view of pragmatism taken as to the imposition of "Boland Conditions", leaving detail to be agreed between the developer and the planning authority, having regard to *"the desirability of leaving to a developer who is hoping to engage in a complex enterprise a certain limited degree of flexibility having regard to the nature of the enterprise".*[140] The words "*a certain limited degree"* are notable – as is their inclusion in wording expressly referable to a "complex enterprise". In similar vein, in **Borg Developments**[141] as to the scope of a Boland condition, O'Neill J said: *"Needless to say in order to keep faith with the planning permission generally and the scheme in respect of which it was given, such degree of change would have to be of a very limited and technical nature and not such as to excite significant public interest and/or objection."* If such limited and technical matters require agreement with planning authorities such that conditions are imposed to that effect, a fortiori a developer's scope for making changes unilaterally in reliance on the flexibility of a permission can be no greater.

60. In fairness, Planree's recent acceptance[142] that its position that the Deviations were minor and not material became untenable at latest once the Board – an authority competent in EIA and AA – determined in granting leave to seek Substitute Consent[143] that the deviations "for" which Planree had sought leave had not been considered in the EIA and AA which preceded the 2018 SID Permission and that EIA screening and AA thereof are required. In my view, as unauthorised development is a statutory precondition of such leave[144] – the Board's granting leave rendered inevitable Planree's concession that at least the 25 deviations identified in its leave application are Material Deviations.

IDENTIFICATION OF THE UNAUTHORISED DEVELOPMENT – ANAYSIS & DECISION

THE ISSUE

61. The premise of this issue is that, jurisdictionally, s.160 permits restraint of the works required to complete the Windfarm only if those works are unauthorised development.

62. Donegal CC asserts that:

[140] Boland v An Bord Pleanála [1996] 3 I.R. 435.
[141] O'Connor v Dublin Corporation & Borg Developments, Unreported, High Court, O'Neill J, 3 October 2000.
[142] Planree's written submissions §15.
[143] See below.
[144] See further below.

- the Windfarm comprises a single development the entire of which Planree rendered unauthorised by the multiple deviations they now acknowledge as material. It cites **Horne v Freeney**.[145]

- completion of the Windfarm while the Material Deviations remain unauthorised would constitute unauthorised works and/or would result in an unauthorised development in the form of a Windfarm not in compliance/conformity with the SID Permission within the meaning of unauthorised development and unauthorised works in s.2 PDA 2000 and/or s.160(1)(c) PDA 2000.

- the permitted Windfarm was subjected to EIA and AA and comprises a single project for EIA and AA purposes. The as-built Windfarm was not subjected to EIA and AA as, by reason of the Material Deviations from the SID Permission, it is, considered as a whole, a materially different project to that for which EIA and AA were done and, as to AA, on the outcome of which, as a matter of scientific certainty, the jurisdiction to grant development consent was conditional.

63. Planree says that:

- There is one development – the Windfarm. It is authorised but contains unauthorised elements – the Material Deviations. The remaining works remain authorised as, considered discretely, they continue to comply with the SID Permission.

- There is no authority that, because a development effected pursuant to a planning permission contains material deviations, the entire development as so effected is unauthorised development.[146] "*There is no basis in law for suggesting that works carried out in pursuance of a valid permission could be rendered unauthorised by other works elsewhere on a development site*."[147] *"There is no intention to carry out, or prospect of, any future unauthorised development …"*[148]

- The view that a single material deviation renders unauthorised the entire development across 1,000 hectares,[149] is unsupported by authority and would make the planning system unworkable. The only plausible interpretation is that the works carried out in compliance with the planning permission on the Windfarm are development and not unauthorised development.
    - As I have said, the foregoing is the "curate's egg" argument: that the Windfarm is authorised "in parts", that I can injunct only the unauthorised parts and that the works remaining to complete the Windfarm are authorised by the SID Permission.

- Donegal CC has not suggested that construction of the balance of the Windfarm will lead to further unauthorised development.*[150]*
    - That is simply incorrect – it is precisely what Donegal CC has suggested.

[145] [1983] ILRM 426; 1982 WJSC-HC 2157, [1982] 7 JIC 0702.
[146] Planree's written submissions §82.
[147] Planree's written submissions §48.
[148] Planree's written submissions §77.
[149] In fact somewhat less but nothing turns on it.
[150] Planree's written submissions §85.

- Alternatively, the Material Deviations are each individual unauthorised developments that fall outside the ambit of the authorised development.
    - The Substitute Consent process has, it seems been initiated on a similar premise of identifying the Material Deviations, though collectively rather than individually, as development separate from the rest of the Windfarm: that "*The 25 no. alterations which make up the Subject Development for which substitute consent is being sought and which are the subject of the rEIAR and rNIS ….*"[151]

- S.160 is directed to "*specific unauthorised development and does not encompass developments that incorporate unauthorised elements*."[152]

ANALYSIS

64. As a preliminary observation, I confess that I cannot see how the proposition, apparently proffered as one of principle, that s.160 is directed to "*specific unauthorised development and does not encompass developments that incorporate unauthorised elements*" flows from the terms of s.160 or provides, or even usefully contributes to, a workable approach to the identification of unauthorised development and its regulation by s.160.

65. The parties were unable to direct me to any authority directly on this point of precise identification of the unauthorised development. That may be because it is unusual to seek in a s.160 process to continue actively developing a development which includes material deviations from planning permission while awaiting the regularisation by the planning authority or the Board of the status of those deviations. Or it may be because in many such cases the issue of precise identification of the unauthorised development and whether the material deviations infect the entire development need not be resolved given the view taken as to the exercise of discretion to refuse s.160 relief – for example as disproportionate – or as to the exercise of the discretion to grant limited relief focussed on the specific problem which renders the development unauthorised. Whatever the reasons, it seems there is no authority quite on point. However there are some which at least assist.

The SID Permission

66. It seems to me that, as to identifying the development in question, the SID Permission itself, which is the inevitable source of the authority to develop, is the proper starting point. It is also clear that the "proposed development" for planning purposes is, as is required by statute and as it must be to avoid incoherence, the same as the "project" for EIA and AA purposes. As Finlay Geoghegan J said in **FitzPatrick** – "*The EIA Directive requires an EIA to be carried out of the project or proposed development for which the planning permission is sought.*" [153]

[151] MKO "Scoping Report" of 19 January 2024 Exhibit BK4, Affidavit of Brian Keville 29 January 2024.
[152] Statement of Case, Appendix 1, Respondent's response §6.
[153] Fitzpatrick v An Bord Pleanála, Galway County Council And Apple, [2019] 3 IR 617; Coyne V An Bord Pleanála & Enginenode [2023] IEHC 412.

67. Planree clearly proposed and got permission for a windfarm – one windfarm comprising all its parts. It did not get permission for multiple developments consisting discretely of those parts. That windfarm was the project subjected to EIA and AA accordingly. True, the description of the development in the Board's order does not use the word "windfarm".[154] But that is the common sense of it and the most cursory consideration of the documents confirms that that is what it is. The 2017 SID Permission application letter said: *"Please find enclosed a Planning Application for the proposed Meenbog Wind Farm……."*. The EIAR is entitled accordingly and states *"The proposed development comprises the construction of a wind farm comprising 19 wind turbines and all associated works."*[155] It repeatedly refers to *"the proposed wind farm*". Its essential characteristic and only purpose – generating capacity – is described in terms of the entire windfarm – as "*in excess of 50 MW*".[156] While it has many components, and though the permission is for "*up to*" to 19 turbines, The Windfarm was not proposed or permitted as comprising dissociated turbines. I suppose it is conceivable that the turbines could discretely end up in separate ownership and operate as separate enterprises, but that has not been argued – I suspect wisely. The permitted development is clearly to function as a single windfarm – a single enterprise producing a single output of electricity to the grid. The word "windfarm" conveys the collective consideration of its turbines – one would not call a single turbine a windfarm any more than a single cow makes a dairy farm. This analysis applies to ancillary works: the main internal road serves the turbines collectively; the peat cells can store peat indiscriminately from all over the Site. A similar observation can be made of the borrow pits, the electrical substation, control buildings with welfare facilities, associated electrical plant and equipment, security fencing, the waste water holding tank and the meteorological mast.

68. In all this, a windfarm is distinguishable from, for example, a housing estate or apartment block. While they have common areas and common services such as roads they, at least typically, are intended, designed for and/or facilitate subdivision of ownership and in any event discrete occupation of distinct dwellings. One need not invoke the Englishman and his castle to recognise dwellings as serving a social function individually particular to their respective occupants and they are constitutionally and discretely protected accordingly. A warrant to search an apartment does not authorise search of the apartment next door.

69. The dividing line between projects considered as unitary and those considered severable may not be precise or susceptible to minute logical analysis – Browne suggests that it may raise questions of fact and degree.[157] But having considered – and by no means discounting – the detail, examining the matter broadly confirms that what was considered in the planning application and in EIA and AA and permitted in the SID Permission was a single and entire Windfarm permitted as such in June 2018.

70. So, in my view, the starting point is that, as to what is built in reliance on the SID Permission and

[154] Or "wind farm".
[155] Non-Technical Summary P II.
[156] Later 90mw – see above.
[157] See below.

the EIA and AA which informed it, a single Windfarm is the "development" to be considered as to whether it is authorised or unauthorised.

Some Caselaw

71. As I have said, there seems to be no case directly on point – all can be distinguished in greater or lesser degree but some at least assist.

Save Cork City – a workable and coherent planning code

72. Planree correctly cites Woulfe J. in **Save Cork City**[158] for the important obligation to read the PDA 2000 (and I would add, the planning code generally) to produce a *"workable and coherent interpretation*". Of course, I entirely accept that proposition. However, it is a general proposition – not a view to be taken solely from the viewpoint of the developer. It must incorporate due regard for the purposes, objectives and integrity of the Planning Code and the many associated legislative regimes (in particular environmental law) and the legitimate interests of the public and all stakeholders. Indeed, at base, all planning law is, in its essence, a system of development control in the public interest while respecting private rights and interests. The developer, the competent authorities and the public all need reasonable certainty as to what the former can, and cannot, develop on foot of a permission. The aim is a *"workable and coherent"* planning code from all those points of view. As they inevitably conflict in varying degrees, compromises inevitably result – both in the express terms of the code and in its interpretation. Despite Planree's repeated invocation of its view of "pragmatism", I do not see the need for a *"workable and coherent"* as much assisting its argument.

Kilronan Windfarm – a wind farm project as a whole

73. **Kilronan Windfarm**[159] was a claim for an injunction to prohibit works to provide a grid connection for which planning permission had not been granted to a wind farm for which planning permission had been granted. Browne cites it as a case in which the environmental significance of a deviation rendered it material.[160] Baker J refused to refuse relief – for various reasons including the following:

> *"I do not accept that what has occurred is a technical or trivial breach. ….. the issue engages questions of environmental protection and the need ….. to have regard to the environmental framework of a wind farm project as a whole. Therefore, while I accept that no specific individual environmental factors have been identified …… because the grid connection must be considered as part of the overall project, and as the overall project is one of significant potential for environmental damage, a description of the breach as being trivial, minor or technical fails to reflect the broader environmental context in which this application was brought."*[161]

[158] Save Cork City v An Bord Pleanála [2022] IESC 5.
[159] Daly v Kilronan Windfarm [2017] IEHC 308. Citing also Ó Grianna v An Bord Pleanála (No. 1) [2014] IEHC 632.
[160] Simons on Planning Law, 3rd Ed'n, (Browne) §11-583.
[161] Emphases added.

Martin – a real and sensible view of what constitutes the development

74. In **Martin**,[162] Mr Martin argued that a proposed incinerator comprised two projects for EIA and development consent purposes: respectively its construction and its operation. The Supreme Court held that though development consent might consist of the decisions of multiple competent authorities, and each might complete part of the overall EIA, as to the necessity of completion of EIA before development consent in the EIA Directive *"development consent"* meant a decision which entitled the developer to proceed with the whole, and not just part, of the project. Murray CJ held that a real and sensible view was required:

> *"It seems to me wholly artificial and unreal to seek to divide the development in this case into two, as the applicant seeks to do, thus requiring two development consents. To regard it as two projects would do violence to ordinary language. It is manifestly clear that the project in this case is for a "waste installation"."*

Horne – permitted development indivisible

75. Donegal CC, understandably, cite **Horne**[163] in particular. It was an application for a planning injunction prohibiting further works in the construction of a partly-built amusement arcade. Ms Horne said Mr Freeney had departed from the applicable planning permission in that:

- The roof was built of steel, whereas permission was for a 10-inch thick concrete slab roof.
- The ground floor as built included 30 pillars separate rooms, whereas permission was for an open space for dodgem cars.
- The first floor lacked the permitted toilet and other facilities and instead comprised an open area - apparently for the use of dodgem cars.[164]

76. The question was whether development was being effected "*in conformity with permission*". Murphy J held not. He held that

> *"……. Planning Permission is indivisible: that it authorises the carrying out of the totality of the works for which approval has been granted and not some of them only. A developer cannot at his election implement a part only of the approved plans as no approval is given for the part as distinct from the whole. Accordingly I propose to grant an injunction ….. prohibiting the carrying on of further development works."*

Notably for present purposes, Murphy J gave liberty to apply to lift the injunction if retention permission was granted.

[162] Martin v ABP & Indaver [2008] 1 IR 336, [2007] 2 ILRM 401.
[163] Horne v Freeney [1982] 7 JIC 070 and [1983] ILRM 426 (Headnote only).
[164] Murphy J inferred that Mr Horne had in essence transposed the permitted ground floor use to the first floor.

77. Horne is relevant as:

- Murphy J's reference to implementation of "part only" was not in contemplation merely of the omission of part of a permitted development. On the facts of Horne, the deviations consisted in substituting in the development elements different from those permitted. In that, the case is similar to the present case.
- The works were incomplete and their completion was injuncted.

In their day, **Galligan,**[165] **Simons,**[166] and **Dodd**[167] cited **Horne** to the effect that a permission is indivisible. That was repeated as recently as in **Bonar's Quarry**.[168] **Browne** is perhaps less dogmatic[169] – but specifically by reference to **Dwyer Nolan**, to which I will come. And he distinctly considers the question of severability of a permission – to which I will also come.

Dwyer Nolan – multi-dwelling developments

78. Lest alarm be caused, for example as to the planning status of houses in partially completed housing developments, I refer to and respectfully endorse **Dwyer Nolan**. In that case Carroll J, explicitly considering her view to be consistent with Horne, and considering also the English decisions of **Lucas**[170] and **Pilkington,**[171] made clear that:

- at least some permissions are divisible to the effect that though left part-built, what has been built is authorised development.

- *"partial development is authorised development provided it can be regarded as severable".* So whether a partly-completed development is an authorised development depends on satisfaction of a proviso: that it be severable development.

- this conclusion is consistent with Horne in which it was held that "*permission to construct a new building to replace existing buildings had to be carried out in all its specifications as the permission was not divisible at the option of the owner. He was obliged to carry out all the works*[172] *or obtain a variation."*

- For example, one could not build the bottom storey of a two storey house and leave it unfinished for use as a bungalow. That could not be regarded as authorised partial development since the permission was to build a two-storey house.

[165] Irish Planning Law & Practice, 1997, p92.
[166] Planning and Development Law Second Edition, 2007, §2-67.
[167] Planning Acts 2000 – 2007 Annotated and Consolidated, 2008, §1-60.
[168] Donegal County Council v P Bonar Plant Hire Ltd [2021] IEHC 342.
[169] Simons on Planning Law, 3rd ed'n (Browne) §2-145: "Horne v Freeney would appear to suggest that in the case of works, a planning permission is indivisible in that it authorises the carrying out of the totality of the works for which the permission has been granted and not some of them only. Apparently, a developer cannot, at his election, implement a part only of the approved plans as no approval is given for the part as distinct from the whole." See also §2-206: "……. although works affecting the interior of a structure are exempted development, a planning permission is indivisible and a developer is apparently nevertheless required to adhere to the plans submitted with the planning application, …" (citing Horne v Freeney).
[170] F. Lucas and Sons Ltd v Dorking and Horley Rural District Council (1964) 2 L.G.R. 491.
[171] Pilkington v Secretary of State for the Environment [1974] 1 All ER 283, [1973] 1 WLR 1527 at 1532.
[172] i.e. all the works permitted.

- the legislature could not have intended that the purchaser of a house in a partially completed scheme should be left vulnerable, if the entire scheme was not completed, to enforcement procedures which might deprive them of their houses and of the money which they would have invested in those houses, whether or not they built them themselves.

- failure to complete a housing scheme does not mean that the partial development which has taken place is unauthorised.

Horne & Dwyer Nolan, taken together

79. Horne & Dwyer Nolan taken together, as Carroll J in the latter case was content they should be, seem to me to be authority that:

- The default is that permitted developments are indivisible – such that partly-completed development and non-conforming development (which is to say, by material as opposed to immaterial deviations from planning permission) renders the entire unauthorised.

- The completion of a partly-completed and non-conforming development may be restrained by s.160 injunction.

- Nonetheless and by way of exception to that default position, some types of development, including and notably multiple-dwelling developments (no doubt they do not exhaust the list), are regarded as severable such that unauthorised elements of the development (whether by commission or omission) do not render unauthorised those elements of the development which, considered discretely, have been built in conformity with planning permission.

Ironborn – severance by law as opposed to self-severance.

80. In **Ironborn**[173] Mulcahy J recently noted legislative change after Horne was decided[174] such that he distinguished severance of a planning permission by operation of law (its expiry when the development is as yet part-finished)[175] from *"……. the legal effect of a developer deciding not to complete a development in accordance with the terms of the permission by omitting elements, or incorporating new or different elements, i.e. seeking to 'self-sever' certain elements of the permission …".* Here we are concerned with the latter – the developer's decisions – not the former, and Mulcahy J did not cast doubt on **Horne** in that regard.

[173] Ironborn Real Estate Limited v Dun Laoghaire-Rathdown County Council [2023] IEHC 477.
[174] S.2 of the Local Government (Planning and Development) Act, 1982 provided that a permission ceases to have effect after its expiry but without prejudice to the validity of anything done pursuant thereto prior to its expiry. See now s.40 PDA 2000.
[175] Citing Dwyer Nolan Developments Ltd v Dublin County Council [1986] IR 130.

Browne – whether a permission is severable?[176]

81. Browne considers the relevant caselaw. Inter alia, he:

- cites **Moore**[177] to the effect that a planning permission must generally be completed in its entirety except where any particular permitted element of the development[178] is severable from the rest.

- says severance may depend on the wording of the permission and whether it was subject to EIA or AA. In my view, all three considerations tend against severability in the present case.

- cites **Lucas** as English law that permission need not be implemented in its entirety unless a condition of it so requires. **Hillside Parks**,[179] to which I will come, is to the same effect. But Browne contrasts Irish law in that regard, as stated in **Horne**, to the effect that "*a planning permission is indivisible in that it authorises the carrying out of the totality of the works for which the permission has been granted and not some of them only. In other words, a developer cannot, at his election, implement a part only of the approved plans as no approval is given for the part as distinct from the whole."*

- interprets the "net effect" of Dwyer Nolan as "not inconsistent" with Horne – to the effect that the development should be completed. In this he echoes the view of Carroll J in Dwyer Nolan that her view was consistent with that taken in Horne.

- suggests that, at least generally, where a specific condition provides that the development is to be implemented in accordance with the plans and particulars, it is not open to the developer to deviate from what was lodged. Similarly, where the application was subject to EIA or AA, it is arguable that the permission must be implemented in full.

- cautiously suggests that the position is *"somewhat less certain where the permission is clearly and unambiguously severable and where the divisible components are not functionally interdependent. In that case, it is possible that it is a question of fact and degree."*

Hillside Parks

82. Caution is required in considering English cases given their appreciably different statutory context. Hillside Parks is mostly a case about inconsistent multi-dwelling permissions – which is not the issue here. The UKSC held that a multi-dwelling permission was not to be construed, absent clear express provision, as separately permitting multiple independent acts of development. Rather it was to be construed as authorising a single scheme which could not be disaggregated in that way as *"planning permission for a multi-unit development is applied for and is granted for that development as an integrated whole."*[180] And it

[176] Simons on Planning Law, 3rd ed'n (Browne) §5.08 et seq.
[177] Moore v Minister for Arts, Heritage and the Gaeltacht [2016] IEHC 150 §455 in which Barrett J considered the cases on severability. The decision was later overturned ([2018] 3 IR 265) but not in this regard.
[178] The text reads "any particular development" but I think the added words conform to Browne's meaning.
[179] Hillside Parks Ltd v Snowdonia National Park Authority [2022] 1 WLR 5077.
[180] §50.

held that *"from a spatial point of view, a planning permission to develop a plot of land is not severable into separate permissions applicable to discrete parts of the site.*" As indicated above, Browne suggests that Horne differs from Lucas – and so necessarily also from Hillside Park in this respect[181] – as to whether a developer must finish a development. But, if by a different reasoning though expressing the same view as to legislative intent,[182] Hillside Park arrives at the same conclusion as Dwyer Nolan. That is that where a multi-dwelling planning permission authorised a single scheme, failure or inability to complete the whole scheme did not make development already carried out pursuant to that permission unlawful.

83. In my view, paraphrasing Hillside Parks and nonetheless reiterating the caution required in deriving principles from English cases, planning permission for the Windfarm was applied for and was granted for it as an integrated whole – all the more so as it was subjected to EIA and AA as an integrated whole.

84. The UKSC held in Hillside Park that "a planning permission is not to be construed as authorising further development if at any stage compliance with the permission becomes physically impossible." It cited **Pilkington**[183] – on which its decision was based – for that proposition and for the view that the decision in Pilkington did not depend on the fact that building the second bungalow on the site in that case would be a breach of a planning condition, pursuant to which the earlier bungalow was built, that it be the only dwelling on the site. What mattered was whether it was physically possible to carry out the development authorised by the terms of the unimplemented permission. I confess, with appreciable diffidence, that I am not clear that that was quite the point Lord Widgery was making in **Pilkington** – which seems to have related to the law as to terms of an enforcement notice. I say this as Planree stressed that it remained physically possible to build out the Windfarm by works, considered discretely, permitted by the SID Permission. For my part, I would delete the word "physically" and say that "a planning permission is not to be construed as authorising further development if at any stage compliance with the permission becomes impossible."

85. The UKSC noted, and Donegal CC emphasises, that the Snowdonia National Park Authority had not argued,

> *"…. that the continuing authority of a planning permission is dependent on exact compliance with the permission such that any departure from the permitted scheme, however minor, has the result that no further development is authorised unless and until exact compliance is achieved or the permission is varied. ……. The ordinary presumption must be that a departure will have this effect only if it is material in the context of the scheme as a whole: … What is or is not material is plainly a matter of fact and degree."*[184]

[181] Lucas was in another aspect disapproved in Hillside Park.
[182] "… It would create intolerable uncertainty and potential unfairness, not least for parties who purchased completed units. … where, for example, the developer ran out of money or simply decided to stop construction work but it remained physically possible to complete the development. Parliament cannot have intended accrued property rights to be made vulnerable to enforcement action taken under the Planning Acts in such circumstances, …"
[183] Pilkington v Secretary of State for the Environment [1974] 1 All ER 283, [1973] 1 WLR 1527 at 1532.
[184] Emphases added. As indicated, I have omitted text for purposes of exposition of the point at issue. The omitted text reads "That would be an unduly rigid and unrealistic approach to adopt and, for that reason, would generally be an unreasonable construction to put on the document recording the grant of planning permission—all the more so where the permission is for a large multi-unit development."

86. The logic of this passage is that where a departure is material in the context of the permitted scheme as a whole, it will have the effect that no further development is authorised unless and until compliance is achieved or the permission is varied.

Cases and an example cited by Planree

87. Planree cites a number of cases as, it says, supportive of its proposition that an unauthorised element of a development does not render the entire unauthorised. It cites:

- **Centz**[185] – in which, Planree says, Simons J restrained the retail sale of certain goods and ordered removal of certain unauthorised signage rather than the demolition of the three separate retail premises at issue[186] or the cessation of all activities therein.

    - This case is irrelevant. The entirely unsurprising purpose of Simons J was to return one of the buildings to its permitted use as a retail warehouse[187] and to stop the unauthorised sale therein of convenience goods,[188] clothing and footwear. As to the other two premises, all retail use was prohibited as unauthorised. As to all three premises there is no suggestion that demolition was in any way in issue or was conceivably proportionate to a contravention consisting of unauthorised use. The case is simply an example of the granting of s.160 relief proportionate to the circumstances. It sheds no light on the identification of the unauthorised development in the present case.

- **Kenny**[189] – Planree cites the rejection of Mr Kenny's contention that a compliance submission and a resulting compliance order *"constituted a material variation and was, therefore, unauthorised development".* Planree observes that there was no suggestion that the material variation of a boiler room rendered the entire 300-bedroom development unauthorised.

    - This case is also irrelevant. First, a case not argued by Mr Kenny is a case not decided. Second, the case had a complex background. The s.160 motion was dismissed on Trinity's application as an abuse of process and as bound to fail where an earlier judicial review[190] had already determined that there was no unauthorised development as any deviations were very minor and the court declined to "*become involved in such microscopic examination of matters of detail*."[191] Indeed, it is from that 2009 decision in judicial review that I have cited the excerpt from the judgment of Fennelly J above as to the flexibility in planning permissions.

[185] Waterford County Council v Centz Retail [2020] IEHC 634.
[186] In Waterford city, Dungarvan and Tramore respectively.
[187] The term "retail warehouse" is defined in Annex 1, Glossary, Retail Planning Guidelines 2012 as "A large single-level store specialising in the sale of bulky household goods such as carpets, furniture and electrical goods, and bulky DIY items, catering mainly for car-borne customers."
[188] The term "Convenience Goods" is defined in Annex 1, Glossary, Retail Planning Guidelines 2012 as: food; beverages; tobacco and non-durable household goods.
[189] Kenny v Trinity College Dublin [2020] IESC 54, §53.
[190] Kenny v Dublin City Council & Trinity College Dublin [2009] IESC 19.
[191] Kenny v Trinity College Dublin [2020] IESC 54, §18.

- **Cantwell**[192] – Planree cites this as a case of complaint as to subsurface excavation works to facilitate services to 61 houses in which there was no suggestion that the entire 61 houses had thereby become unauthorised.

    - Roderick Murphy J was dealing with a s.160 complaint as to laying an allegedly unauthorised storm water sewer in the public roads between the housing development and an outfall to a stream some distance away. As at trial the sewer had been laid, the s.160 application was limited to restricting its use. Murphy J dismissed the application as it was clear to him that the development was executed in conformity with the relevant planning permission, the works were not unauthorised and the use of the sewers was not unauthorised.[193] So no question of precisely identifying an unauthorised development arose. And again, a case not argued by Cantwell is a case not decided. The case does not assist Planree.

- **Warrenford**[194] **–** Planree cites this case on the same basis as that on which it cites Cantwell. As to its facts, it resembles Centz – at issue was the use of 3 units in a retail warehouse park in Waterford for the sale of goods defined as comparison goods. The Board had declared it a material change of use and had declared internal works to amalgamate the units to be directly related to the change of use and, for that specific reason, not exempted development.[195] Finlay Geoghegan J emphasised the public interest in securing compliance with the planning code – including the Development Plan Retail Strategy – and any Planning Permission and the conduct of the parties as nearly always relevant matters to be taken into account. By the time judgment was given, the main dispute was whether there should be an order to reinstate the 3 units by reversing their amalgamation – which the landlord opposed. The court declined to so order as, on agreed cesser of the unauthorised use, the amalgamations would be (or perhaps be the factual equivalent of[196]) exempted development in any letting for a use compliant with the applicable planning permission and costly reinstatement would be disproportionate and punitive.

    - Again, this case does not buttress Planree's case. The question was not one of precisely identifying the unauthorised development or of prohibiting completion of development in light of such identification. It was simply one of identifying an order proportionate to the need to bring the use of the units into conformity with the permission. Ordering demolition would have been even more disproportionate than ordering de-amalgamation and neither would have achieved any sensible end. The Court's purpose was clearly, and entirely unsurprisingly, to bring the use of the units into conformity with the permission.

- **Krikke**[197] **–** Planree cites this as a case in which some only of the wind turbines were identified as unauthorised as not in conformity with the planning permission, in which the High Court's orders

[192] Cantwell v McCarthy [2005] IEHC 351.
[193] Certain aspects of the decision in Cantwell have been doubted – see Quinn v An Bord Pleanála [2022] IEHC 699. But that does not seem to affect any view I might take of the argument for which Planree cites it.
[194] Warrenford Properties v TJX Ireland [2010] IEHC 310.
[195] MacMenamin J refused to quash the Board's declaration - [2010] IEHC 13.
[196] The judgment is not entirely clear but nothing turns on that.
[197] Krikke v Barranafaddock Sustainability Electricity Ltd [2020] IESC 42 §§ 1- 3 are cited.

related only to those turbines and in which it was never suggested that the entire wind farm therefore constituted unauthorised development.

- For similar reasons, this case does not assist Planree. The orders sufficed (ignoring the specific issues which brought the case to the Supreme Court) to bring the entire windfarm into conformity with the planning permission and so nothing turned, as so often it does not turn, on the precise identification of the unauthorised development as being merely and discretely the non-compliant turbines or the windfarm considered generally.

- Planree suggests, by way of example, that if Donegal CC is correct that, by reason of the many Material Deviations, the entire Windfarm is unauthorised, then by that logic, a dormer window larger than that permitted in a house absurdly renders the entire house unauthorised development such that the court could direct its demolition.

  - This postulate does not assist Planree. First, the question would arise whether the deviation was material. If not, there would be no unauthorised development. That is the primary means of avoiding absurdity. Second, and if the deviation was material and assuming it rendered the entire house unauthorised development, the question which would arise in any reality of which I can conceive would be of a proportionate s.160 order to bring the house into conformity with the applicable planning permission. Not merely is an order that the house be demolished not a logical consequence of the unauthorised status of the house in such an instance, it is an extremely unlikely order. A smaller window, rather than demolition of the entire house will ensue.

Are the Material Deviations severable from the Windfarm?

88. To paraphrase Murray CJ in Martin, it seems to me wholly artificial and unreal to seek to divide the development in this case into two, as Planree seeks to do, consisting of the Material Deviations of the one part and the rest of the Windfarm works on the others, with a view to deeming the former unauthorised and the latter authorised development. The same may be said with even more force of Planree's alternative argument that each Material Deviation is a discrete development severable from the Windfarm. It is clear from the briefest consideration of the substance of the Material Deviations – as to access roads, peat cells, borrow pits and the like that all, without exception, have no purpose or sensible existence other than as ancillary to and hence as part of the overall development of the Windfarm. The Windfarm is their raison d'etre and they are not sensibly severable from it.

89. Having excluded severance, the Windfarm is not composed of numerous developments, some authorised, some unauthorised. There is only one "development" – the Windfarm. However else a deviation from planning permission may be categorised, it must fall into one of two categories – material and immaterial. Immaterial means "does not matter" in planning terms. Material means "does matter" in planning terms. If the deviations are material, the entire development is unauthorised as development not in conformity with the planning permission. That is what "material" means. There is no sub-division of

material deviations into sub-types some of which render the entire development unauthorised and some of which do not. Planree has identified no principle on which such a subdivision might be effected. Nor has it cited authority for the proposition - I do not see that its citation of **Luxor**[198] assists it in this regard. Nor has it identified any limiting factor whereby such a proposition could be restrained from undermining the legal requirement for permission, and for EIA and AA where required, before development is effected. And, as I have said, the whole point of distinguishing material from immaterial deviations is to provide the necessary divisor of the authorised from the unauthorised.

In my view Planree's inevitable concession that the deviations which it admits are material is decisive that its Windfarm as built is unauthorised development. Materiality of the deviations would compel that conclusion in any case but it is all the more inevitable given the Board's statutory finding that the deviations are such as to require EIA and AA.

90. On that view, the unauthorised development at issue in this case consists of the Windfarm considered as a whole.

In What Would Completion of the Windfarm result?

91. By way of further testing this conclusion, I think it useful and illustrative to consider what the planning status of the Windfarm would be between its completion as Planree advocates and any grant of Substitute Consent or, which amounts to the same thing in my view, after any refusal of Substitute Consent. In both cases what is left is a windfarm in non-conformity with the SID Permission by reason of 25 Material Deviations from the SID Permission. That is not to suggest that the removal or demolition of the entire Windfarm would be necessarily inevitable. Any decision in that regard would have to await enforcement proceedings of one sort or another. It might be, for example, that some form of remediation works could bring the Windfarm into conformity. I should not rule out that possibility even if Substitute Consent had been refused – though, in that event, s.160 relief might be pre-empted, in whole or in part, by the Board's ordering remedial works under s.177L PDA 2000.

92. For present purposes, I think I need only say that it seems to me clear that in either instance the Windfarm, taken as a whole, would constitute an unauthorised development. Of that analysis, any course I might take now permissive of further works of completion of the Windfarm would be permissive of the completion of an unauthorised development and so inconsistent not merely with a proper approach to environmental risk but also with proper vindication of the integrity of the systems of planning and environmental law.[199]

[198] Luxor Investments Ltd v. Wave Point Ltd [2018] IEHC 775
[199] Tesco Ireland v Stateline Transport [2024] IECA 46.

DECISION – IDENTIFICATION OF UNAUTHORISED DEVELOPMENT

93. For all of the foregoing reasons, I prefer the analysis of Donegal CC, to that of Planree. I hold that the unauthorised development at issue in these proceedings consists, by reason of the Material Deviations, of the entire Windfarm and not, discretely considered, of each or all of the Material Deviations. On that basis I hold that I have jurisdiction, if I think it proper, to restrain Planree's further development of the Windfarm – at least pending regularisation of its present planning status.

ALTERNATIVE DECISION – INTERPRETATION OF S.160

94. If I am wrong in my view that the entire Windfarm is at present unauthorised, I would in any event hold that I have jurisdiction pursuant to s.160 to restrain Planree's further development of the Windfarm – at least pending regularisation of the planning status of the Material Deviations. The presence of unauthorised development is a necessary and jurisdictional precondition to the making of such an order. There is no doubt that the Material Deviations, even on Planree's view, comprise unauthorised development. In that sense the jurisdictional precondition is undoubtedly satisfied – although Planree say it is a jurisdiction limited to orders relating to the Material Deviations themselves.

95. However, once that jurisdictional precondition – the presence of unauthorised development – is satisfied, s.160 empowers the High Court to require any person to do or not to do, or to cease to do, anything that the Court considers necessary to ensure that any development is carried out in conformity with the permission pertaining to that development or any condition to which the permission is subject. In my view, even if the unauthorised development is identified as being limited to the Material Deviations, the proposal to complete the Windfarm is to complete a development of which, as matters stand, those Material Deviations – being unauthorised development – will form part once the Windfarm is completed.

96. Even on that view, the unauthorised development is intrinsically part of the Windfarm the completion of which will produce an unauthorised Windfarm not in conformity with the SID Permission – even if by works, considered discretely – permitted by the SID Permission. I cannot see that interpretation of s.160, which jurisdictionally prohibited the Court from making an order restraining the completion of such an unauthorised windfarm, is consistent with a purposive interpretation of the s.160 as designed to ensure conformity of development with applicable planning permissions or is required by the literal text of s.160. Indeed, in my view the words "any development" and are consistent with the broad jurisdiction which Baker J identified **Shillelagh Quarries**[200] – indeed identified in **Luxor**[201] as "extremely wide" – to do "*anything that the Court considers necessary*" to secure planning compliance in the context of the identified unauthorised development.

[200] McCoy v Shillelagh Quarries Ltd [2015] IEHC 838.
[201] Luxor Investments Ltd v Wave Point Ltd [2018] IEHC 775.

EIA & AA – TIMING, REMEDIAL EIA & AA & SUBSTITUTE CONSENT

97. Having decided that, on either of the foregoing views, I have jurisdiction to restrain the completion of the Windfarm, I turn to the question whether, in the exercise of my discretion, I should do so. First, however, it is necessary to place the law as to the exercise of that discretion and the question of the application of that laws in the present case, in the context of the law as to EIA, AA and Substitute Consent.

98. It is a matter of the rule of law to say that unauthorised development is forbidden by law and that, save for specific exceptions, prior authorisation of development is required by law. Retention planning permission is available to regularise genuine error in compliance and is not an alternative to be envisaged in advance, much less to be planned for, when embarking on development. It is a matter of the rule of law to say that "retention culture" if it exists in practice – in the sense of, develop and "*we'll sort it out afterwards*" – has no place in Irish law or in the development practices it regulates. That is not to impugn the motives or mindset of Planree in developing the Site or to suggest what matters planning authorities may consider in deciding retention applications. It is, rather, to place Irish law in the context of the analysis of EU law which follows.

EU LAW

99. One may I think, start with the insistence of EU Law that EIA be "comprehensive". In **Namur-Est**,[202] Kokott AG said: *"The starting point is the objective of a comprehensive assessment of all environmental effects"* in EIA. The CJEU in **Case C-50/09**[203] cited the requirement in EIA of "*as complete an assessment as possible*". Essentially the same requirement in AA is expressed in terms of the necessity for certainty of absence of adverse effect on European sites. Generally, it seems logical and clear that compliance with this obligation prior to the granting of development consent requires that the project has, in EIA and AA, been described accurately and completely in all material respects. I emphasise the word "material" as immaterial deviations are irrelevant. But put simply, it is the project that has been subjected to EIA and AA and received development consent which is the project which must be built. The EIA and AA and development consent do not authorise the building of a materially different project.

100. It is a matter also of European Law to say that any "retention culture" has no place in the law as to developments requiring EIA and AA. That EIA and AA must precede development consent and that development consent must precede development are fundamental tenets of EU law on EIA and AA. As was said as to windfarm development in the first **Derrybrien Windfarm** decision of the CJEU ("**Derrybrien #1**")[204]

> *"… unless the applicant has applied for and obtained the required development consent and has*

[202] Case C-463/20 Namur-Est Environnement ASBL v Région Wallonne, Opinion of Kokott AG 21/10/21, §§41, 57, 60, 72.
[203] Case C-50/09 Commission v Ireland, judgment of 3 March 2011. Cited in this regard in Balz -v- An Bord Pleanála [2016] IEHC 134.
[204] Case C-215/06 Commission v Ireland, judgment of July 3, 2008, [2009] Env L.R. D3. §§51-61 – citing in particular Articles 2(1), 4(1) and 4(2) and Recital 1 of the 1985 EIA Directive and Recital 5 of the 2011 amending Directive according to which "projects for which an assessment is required should be subject to a requirement for development consent [and] the assessment should be carried out before such consent is granted".

first carried out the environmental impact assessment when it is required, he cannot commence the works …"

The CJEU in substance accepted the Commission's submission[205] that Ireland's retention permission system, in allowing EIA of projects after their execution, undermined the "*principal objective*" of the EIA Directive that environmental effects be taken into account, via EIA, at the earliest possible stage in all planning and decision-making processes and so undermined the effectiveness of the EIA Directive. So, projects requiring EIA "*must be identified and then – before the grant of development consent and, therefore, necessarily before they are carried out – must be subject to an application for development consent and to*" EIA.

101. The Irish Substitute Consent process[206] was introduced in response to **Derrybrien #1 –** the logic of which was further explained in the second Derrybrien Windfarm decision of the CJEU ("**Derrybrien #2**").[207] The CJEU found the retention planning permission system, as applied to EIA projects, incompatible with EU law as to EIA. Those decisions flowed from the underlying logic of the EIA Directive, which is the prevention of environmental damage, in preference to its remediation.[208] EU environmental policy is based on the precautionary and preventive principles.[209] That logic results in the "*fundamental*" objective set in Article 2(1) of the EIA Directive, to ensure that projects likely to have significant effects on the environment are subjected to EIA before development consent is given and before development is effected – see also **Inter Environnement Wallonie**[210] and **Stadt Wiener Neustadt**.[211] The issue of timing is, if anything, even more imperative and fundamental in AA as Article 6(3) of the Habitats Directive prescribes, as to possible effects of projects on European Sites, that *"the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned."* That EIA and AA must pre-date the works was recognised by the Supreme Court in the **McQuaid & Ballysax Quarries** cases[212] – "*Otherwise, the requirements of the EIA Directive are being ignored*."

102. If those requirements of the EIA Directive are breached as to a project which *" … is under way or has already been completed"* then remedial EIA is necessary and *"Where national law allows, the competent national authorities are required to suspend or set aside the consent already granted, so as to enable it to be regularised or a new consent to be granted that meets the requirements of the directive*." – **Derrybrien #2**[213] and **Aalter & Nevele Wind Turbines**.[214] The obligation to remedy such breach "*applies to*

[205] §41 of the judgment.
[206] Part XA PDA 2000 – s.177A et seq.
[207] C-261/18 European Commission v Ireland, judgment of 12 November 2019.
[208] C-215/06 European Commission v Ireland, judgment of 3 July 2008 §58 & C-261/18 European Commission v Ireland, opinion of Pitruzzella AG of 13 June 2019 §31, C-261/18 European Commission v Ireland, judgment of 12 November 2019 §72 & 73, citing judgment of 7 January 2004, Wells v Secretary of State for Transport, Local Government and the Regions, C-201/02, EU:C:2004:12, §42 and judgments of 3 July 2008, Commission v Ireland, C-215/06, EU:C:2008:380, §58, and of 26 July 2017, Comune di Corridonia and Others, C-196/16 and C-197/16, EU:C:2017:589, §33.
[209] Environmental assessments of plans, programmes and projects. Rulings of the Court of Justice of the European Union (2020), EU Commission, p92 citing Case C-332/04 Commission v Spain.
[210] Case C-411/17 Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des Ministres, Opinion of Kokott AG delivered on 29 November 2018 §58 citing Judgments of 18 October 2011, Boxus and Others (C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:667, §41), and of 17 November 2016, Stadt Wiener Neustadt (C-348/15, EU:C:2016:882, §29).
[211] C-348/15, Stadt Wiener Neustadt v Niederösterreichische Landesregierung, Judgment of 17 November 2016, [2016] All ER (D) 120 (Nov).
[212] An Taisce v An Bord Pleanála, McQuaid Quarries & Browne, [2020] IESC 39, [2021] 1 IR 119 §75.
[213] C-261/18 European Commission v Ireland, opinion of Pitruzzella AG of 13 June 2019 §36, Judgment of the CJEU of 12 November 2019 §75 . See also Coastal Concern v Minister for Housing [2024] IEHC 139 – though it does not make new law in this regard.
[214] Case C-24/19, Judgment of the Grand Chamber, 25 June 2020 §83.

every organ of the Member State concerned" "*within the sphere of its competence*".[215] And "*subject to the limits laid down by the principle of procedural autonomy of the Member States*",[216] that obligation may require "*revoking or suspending consent already granted, in order to carry out such an assessment*".[217] Clearly, an injunction pending decision of a Substitute Consent application would, on the facts of this case, not merely be within the jurisdictional scope of the domestic law power provided by s.160, but be consistent with that contemplation of suspensive effect. The State must also, under the principle of sincere cooperation laid down in Art. 403 TEU,[218] "*nullify the unlawful consequences caused by a failure to implement or properly implement or utilise the EIA Directive*."[219]

103. Importantly, the option of retrospectively regularising a breach by remedial EIA and/or AA of a project already built or part-built, is permissible only exceptionally[220] and must encompass its environmental impact prior to the date of remedial assessment as well as into the future. The option may not encourage or incentivise developers to bypass the EIA Directive.[221] Indeed, that they be positively dissuaded from doing so is intentionally a key objective of the EIA Directive.[222] The exceptionality requirement which is "*an essential requirement of EU law*",[223] "*heavily circumscribes*"[224] the possibility of remedial EIA or AA. It is grounded in the views, taken by the CJEU that,

- provision for remedial EIA must not offer developers the opportunity to circumvent the rules of EU law or to dispense with their application, and
- were remedial EIA of projects after their execution not exceptional, it "*may have the effect of encouraging developers to forgo <u>ascertaining whether</u> intended projects satisfied the criteria of art.2(1) and consequently not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment*."

See in these regards **Derrybrien #1**[225] And **Stadt Wiener Neustadt**.[226]

104. The words "*ascertaining whether*" describe the developer's duty of active inquiry. As applied to deviations from planning permission, it identifies the developer's duty of active inquiry, when contemplating and in any event <u>before effecting a deviation</u>, whether it may be material in the sense of requiring EIA, AA or screening for either.

[215] Judgment of 7 January 2004, Wells, C-201/02, EU:C:2004:12, §64.
[216] Judgment of 7 January 2004, Wells, C-201/02, EU:C:2004:12, §65. §67 states: "The detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness)."
[217] C-261/18 European Commission v Ireland, judgment of 12 November 2019 §75 citing judgment of 7 January 2004, Wells, C-201/02, EU:C:2004:12, §64 and judgment of 26 July 2017, Comune di Corridonia and Others, C-196/16 and C-197/16, EU:C:2017:589, §35.
[218] Treaty of the European Union.
[219] McQuaid & Ballysax Quarries cases §77. C-261/18 Commission v Ireland, Judgment of 12 November 2019 §75.
[220] C-261/18 European Commission v Ireland, judgment of 12 November 2019 §76 – citing judgments of July 2008, Commission v Ireland, C-215/06, EU:C:2008:380, §61; of 17 November 2016, Stadt Wiener Neustadt, C-348/15, EU:C:2016:882, §37 & 38 and of 26 July 2017, Comune di Corridonia and Others, C-196/16 and C-197/16, EU:C:2017:589, §§37 & 38.
[221] McQuaid & Ballysax Quarries cases §91.
[222] McQuaid & Ballysax Quarries cases §94.
[223] McQuaid & Ballysax Quarries cases §82 – following a review of the EU caselaw.
[224] McQuaid & Ballysax Quarries cases §76, Comune di Corridonia v Provincia de Macerata (Joined Cases C-196/16 and C-197/16) §§35 & 43.
[225] Commission v Ireland, C-215/06, EU:C:2008:380, §58.
[226] C-348/15, Stadt Wiener Neustadt v Niederösterreichische Landesregierung, Judgment of 17 November 2016, [2016] All ER (D) 120 (Nov).

105. There is no evidence of such inquiry in this case. Though not a formal necessity, it would seem prudent on a developer's part to record such active inquiry. That is not least because satisfaction of the exceptionality requirement *"is no easy achievement"*[227] and cannot be *"in any way standard, typical or routine*".[228] And in case of error as to materiality, such a record may well assist the developer seeking Substitute Consent in demonstrating that the error was reasonable. Conversely, the absence of such a record may, depending on circumstance, contribute to a contrary finding. The Supreme Court has cited the EU cases as demonstrating "*the restrictive nature of how and when such a process may be availed of*".[229] Its dissuasive logic was very directly described in **Ardagh Glass**[230] **–** *"Easy regularisation would encourage developers to ignore the criteria of art 2(1) and the Directive"* and exceptionality required that it be made "*plain that a developer will gain no advantage by pre-emptive development and that such development will be permitted only in exceptional circumstances."*

106. The same general approach was identified by Stack J in **St Margaret's Recycling**[231] in the context of her consideration of the retention and Substitute Consent regimes: she,

- cited the unequivocal EU law obligation on the State to adopt all measures to ensure a fully compliant EIA as the basis for development consent,
- cited the EU Law requirement to deter circumvention of a requirement to submit to EIA,
- and observed that:

> *"… a strict approach is warranted in discouraging avoidance of EIA requirements through the system in place in the State for the regularisation of unauthorised development. The rationale for the strict approach, …. is to serve a deterrent purpose. ….. a lenient approach serves to encourage circumvention of the requirement to submit to screening for EIA and full EIA."*

107. While remedial EIA and/or AA must consider the past effects "*from day one*" of the development of a project already built or part-built,[232] it seems to me obvious that EU law requires that such a remedial EIA and/or AA, in considering future effects, must consider them in the context of past effects and of the receiving environment in its condition at the time of performing the remedial EIA and/or AA. That is required by the high level of environmental protection identified by Article 114 TFEU as a "*base*" of environmental protection and by Article 191 TFEU as an "aim" of EU environmental policy. Also, Recitals 32 and 33 of the EIA Directive 2014 require that the data and information on which EIA is based be complete and of high quality and Article 8(6) requires that EIA be "up to date" when development consent is granted. And the absence of scientific doubt required in AA must exist on the best reasonably available evidence and at the date of the decision – *"It is at the time of adoption of the decision authorising implementation of the project that there must be no reasonable scientific doubt remaining as to the absence of adverse effects on the*

[227] McQuaid & Ballysax Quarries cases §85. Citing Barrett J, An Taisce v An Bord Pleanála (McQuaid Quarries) [2018] IEHC 315.
[228] McQuaid & Ballysax Quarries cases §91.
[229] McQuaid & Ballysax Quarries cases §77.
[230] Ardagh Glass Ltd v Chester City Council [2009] EWHC 745 §§101 & 102, [2009] All Er (D) 111 (Apr) and [2010] EWCA Civ 172, [2011] 1 All ER 476.
[231] St. Margaret's Recycling and Transfer Centre Ltd v An Bord Pleanála [2024] IEHC 94 §95 & 96 – citing McMenamin J in Usk v An Bord Pleanála [2010] 4. I.R. 113, Simons J. in Mount Juliet Estates Residents Group v Kilkenny County Council [2020] IEHC 128, and the CJEU in Case C-215/06, Commission v Ireland.
[232] Comune di Castelbellino v Regione Marche (Case C-117/17) EU:C:2018:129 §30, McQuaid & Ballysax Quarries cases §77, Comune di Corridonia v Provincia di Macerata and Comune di Loro Piceno v Provincia di Macerata (Joined Cases C-196/16 and C-197/16) [2017], An Taisce v McTigue Quarries Ltd [2018] IESC 54 §18, Hayes v An Bord Pleanála [2018] IEHC 338.

integrity of the site in question …"[233] In the **Shannon LNG** case[234] the CJEU, considering an analogous question of AA in the context of a development consent extending the construction period for a project, considered that

- relying only on a previous AA of the project[235] can't rule out the risk that it will have significant effects on the protected site unless, inter alia, "*there are no changes in the relevant environmental and scientific data, no changes to the project and no other plans or projects that must be taken into account*" and
- the competent authority must consider whether the AA "*must relate to the entire project or part thereof, taking into account, inter alia, previous assessments that may have been carried out and changes in the relevant environmental and scientific data as well as changes to the project and the existence of other plans or projects*."

108. That identification of the receiving environment is important in this case. Whereas the 2018 EIA was sanguine as to the risk of peat slides, their repeated occurrence since then and the reports, procedures and other events which ensued seem likely to represent enlightening additional information as to the actual degree of such risk and as to the necessary requirements of greater care in peat excavation and management of excavated peat than was appreciated in 2018. And any remedial EIA will necessarily reflect those considerations. Counsel for Planree agreed with these propositions.[236] The position as to Remedial AA must be the same for similar reasons – see, for example, **O'Sullivan**[237] as to the need for up to date information and data and the best scientific evidence. Further, these requirements must apply whatever the definition of the "project" for purposes of remedial EIA and AA in substitute consent – whether by way of "intra-project" cumulative/in combination effect if the project is defined as the entire Windfarm or by "inter-project" cumulative/in combination effect if the project is defined for purposes of Substitute Consent as merely the Material Deviations from the SID Planning Permission – as to "intra-project" and "inter-project" cumulative/in combination effect in securing comprehensive EIA, see **Coyne**.[238]

IRISH LAW – SUBSTITUTE CONSENT

109. In response to Derrybrien #1, Ireland introduced Substitute Consent by way of Part XA PDA 2000. It has been authoritatively said (in my view with some restraint) that the complexity of the Substitute Consent legislation is perhaps explained by "*the myriad of circumstances and the timeframe which it has endeavoured to cover*".[239] There are three gateways to Substitute Consent. Obviously, all relate to built development which required EIA or EIA Screening or AA which were not done or were defectively done – otherwise the need for Substitute Consent does not arise. Common to all three gateways is "*a precondition to the issue of a substitute consent that there was a prior unauthorised development. The purpose of the grant of a substitute consent is to allow the development to continue as authorised development."* – **O'Brien**.[240] The first gate

[233] Case C-239/04, Commission v Portuguese Republic, judgment of 26 October 2006 §24.
[234] Case C-254/19, Friends of the Irish Environment v An Bord Pleanála and Shannon LNG, ECLI:EU:C:2020 §55 et seq.
[235] Though in that case there had not been one.
[236] Day 3 p42 – 44.
[237] O'Sullivan v An Bord Pleanála & Irish Amateur Rowing Union [2022] IEHC 117. Citing Aitoloakarnanias v Perivallontos (Case C-43/10 §§117 & 155).
[238] Coyne v An Bord Pleanála & Enginenode [2023] IEHC 412, §403.
[239] An Taisce v An Bord Pleanála (McQuaid Quarries); An Taisce v An Bord Pleanála and Sweetman v An Bord Pleanála (Ballysax Quarry) [2020] IESC 39.
[240] O'Brien v An Bord Pleanála [2017] IEHC 510 §54.

opens where the applicable planning permission was defective and exceptional circumstances exist. There was nothing wrong with the permission in this case – it is the development that is wrong. The third gate relates to quarries. The second gate, with which we are concerned, opens on proof of "exceptional circumstances".

110. Until December 2023, the architecture of Part XA permitted a Substitute Consent application only on instruction of a planning authority[241] or by leave of the Board.[242] The Board could grant leave only if it satisfied of various matters,[243] including the existence of exceptional circumstances. It was obliged to set a time limit by which the resultant Substitute Consent application was to be made – including submission of a Remedial EIAR and/or Remedial NIS.[244] But the Board was able extend the time limit.[245] Interestingly, even where leave was granted, by s.177K PDA 2000, in making its Substitute Consent decision the Board had to consider afresh whether exceptional circumstances existed.

111. To December 2023[246] and thereafter subject to transitional provision as to processes already in train, and considering, both in deciding whether to grant leave[247] and whether to grant substitute consent,[248] whether exceptional circumstances exist, the Board shall "*have regard*" to:

- (*a*) whether regularisation of the development would circumvent the purpose and objectives of the EIA Directive or the Habitats Directive;[249]
- (*b*) whether the applicant had or could reasonably have had a belief that the development was not unauthorised;
- (c) whether the ability to carry out an EIA or an AA of the development and to provide for public participation therein has been substantially impaired;
- (*d*) the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development
- (*e*) the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;
- (*f*) whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;
- (*g*) such other matters as the Board considers relevant.

112. Given the well-established lightness of the "*have regard to*" obligation and item (g) of the list above, it is clear that the Board has a wide discretion, circumscribed only by rationality and bona fides, as to identification of the matters it may consider relevant to the question whether exceptional circumstances exist. However it is equally clear that, however wide that discretion, its discretion as to the weight it may

[241] S.177B PDA 2000.
[242] S.177C & s.177D PDA 2000.
[243] S.177D(1A), (2) & (3) PDA 2000.
[244] S.177D (7) PDA 2000.
[245] S.177E (4) PDA 2000.
[246] By the Planning and Development, Maritime and Valuation (Amendment) Act 2022 (29/2022), s.40(b), S.I. No. 645 of 2023.
[247] S.177D (2) PDA 2000.
[248] S.177K (1a) PDA 2000.
[249] I have edited the wording of this list slightly for clarity.

attribute to those matters is "*heavily circumscribed*"[250] by the logic of the exceptionality and dissuasion requirements of EU Law as described above.

113. From December 2023[251] and subject to transitional provision as to processes already in train, s.177C was repealed[252] and s.177E was amended, such that leave to make a Substitute Consent application is no longer required. A developer may simply make such an application where it considers the criteria are satisfied. Inter alia, s.177K was amended to insert the same list of factors to which regard is to be had in considering whether exceptional circumstances exist.[253] We need not concern ourselves with why the leave stage was abolished – though **Slattery**[254] observes that, at least as to (*d*) and (*e*), the exceptionality questions are difficult to resolve without the kind of information that would be necessary to complete the Substitute Consent assessment.

114. Until December 2023,[255] and thereafter subject to transitional provision as to processes already in train, s.177E(2A) PDA 2000 provided that Substitute Consent applications other than those via the exceptional circumstances gateway might be made in relation to —

- (I) that part of a permitted development that had already been effected.
- (II) that part of a permitted development that had already been effected and all or part of the permitted development that had not already been effected.

From December 2023, s.177E(2A) is notably amended. It now provides that:

> *"Where an application for substitute consent is made in respect of development of land for which planning permission has been granted, that application may be made in relation to—*
> *(a) that part of the development permitted under the permission that has been carried out at the time of the application, or*
> *(b) subject to subsection (2B), that part of the development referred to in paragraph (a) and all or part of the development permitted under the permission that has not been carried out at the time of the application."*

115. No Substitute Consent process is challenged in these proceedings and it would be wrong of me to express any firm view on the scope and effect of these provisions. Suffice it to say that care is required as to identifying the scope of the development to which a Substitute Consent process relates and there may be advantage or disadvantage as between the pre-December 2023 and post-December 2023 regimes.

[250] McQuaid & Ballysax Quarries cases §76, Comune di Corridonia v Provincia de Macerata (Joined Cases C-196/16 and C-197/16) §§35 & 43.
[251] By the Planning and Development, Maritime and Valuation (Amendment) Act 2022 (29/2022), s.40(b), S.I. No. 645 of 2023.
[252] As was s.177B as to notices by planning authorities requiring Substitute Consent Applications.
[253] S. 177K(1J) PDA 2000.
[254] Simons on Planning Law, 3rd ed'n, §16-31.
[255] By the Planning and Development, Maritime and Valuation (Amendment) Act 2022 (29/2022), s.40(b), S.I. No. 645 of 2023.

Activity Cessation Orders

116. Under both the pre-December 2023 and post-December 2003 regimes and by s.177J PDA 2000, once the Board has received a Substitute Consent application it may, of its own motion direct cesser of all or part of the applicant's activity or operations at the site of the development the subject of the application if the Board is of the opinion that its continuation is likely to cause significant adverse effects on the environment or adverse effects on the integrity of a European site.[256] S.177J requires some comment:

- First, s.177J creates a statutory discretion in the Board which it may exercise of its own motion. As it is a statutory and not a common law discretion, it follows as a matter of domestic administrative law that the Board must actively consider and decide in each substitute consent application whether to exercise that discretion and if so in what terms – **Stapleton**.[257]

- Second, s.177J concerns a risk that an already existing development which has unlawfully escaped EIA and/or AA may have caused, be continuing to cause or be about to cause significant adverse effects on the environment or adverse effects on the integrity of a European site. Though s.177J imposes no time limits and an activity cessation order can be made at any time in the process, that risk which an activity cessation order is required to address necessarily implies an urgency – commensurate with the circumstances and consistent with the statutory process – in the Board's first making a decision for the purposes of s.177J.

- Third, the obligation to decide whether to exercise that discretion and, if so, in what terms appears to me to imply, at least, an entitlement in the Board to notify the applicant for Substitute Consent of any decision not to issue an activity cessation order.

117. The urgency of making a decision derives from:

- the high level of environmental protection identified by Articles 114 and 191(2) TFEU as a "*base*" and an "aim" of EU environmental law, and the associated precautionary principle of EU law.

- the preventive principle of EU environmental law identified by Article 191(2) TFEU as "a priority"- the underlying logic of the EIA and Habitats Directive being the prevention of environmental damage, in preference to its remediation.[258] That logic results in the "*fundamental*" objective of EIA and AA before development is effected.

- the exceptional nature of the jurisdiction to retrospectively authorise unauthorised development which otherwise would be subject to enforced cessation in early course.

[256] S.177J PDA 2000. The section involves the service of a draft direction to the applicant and a decision once the applicant has had opportunity to comment.
[257] Stapleton v ABP & Savona [2024] IEHC 3, §257.
[258] C-215/06 European Commission v Ireland, judgment of 3 July 2008 §58 & C-261/18 European Commission v Ireland, opinion of Pitruzzella AG of 13 June 2019 §31, C-261/18 European Commission v Ireland, judgment of 12 November 2019 §§72 & 73, citing judgment of 7 January 2004, Wells, C-201/02, EU:C:2004:12, §42 and judgments of 3 July 2008, Commission v Ireland, C-215/06, EU:C:2008:380, §58, and of 26 July 2017, Comune di Corridonia and Others, C-196/16 and C-197/16, EU:C:2017:589, §33.

- the importance of protection of habitats and species protected pursuant to the Habitats Directive – they are protected precisely because they are particularly valuable and, in the case of priority species,[259] under threat and in the case of priority habitats "*in danger of disappearance*".[260] Active Blanket Bog is a priority habitat[261] and is present on Site.[262]

- The weight of the prohibition on development imposed by Article 6(3) of the Habitats Directive – which requires proof prior to development and beyond reasonable scientific doubt of the certain absence of effect on the integrity of European Sites. This derives from the stringency of the precautionary principle as applied in Article 6(3).[263]

- The weight of the requirement of strict protection of species imposed by Articles 12 and 13 of the Habitats Directive.

118. Accordingly, I must expect that, on receipt of a Substitute Consent application as to the development at issue in this case, the Board will expeditiously decide whether to make an activity cessation order. If it does so it will be promulgated in the ordinary way. If it decides not to make such an order it will, in all likelihood, inform Planree accordingly.

119. I have considered whether s.177J is to be interpreted as implying a presumption that a developer may persist in a development requiring Substitute Consent pending a decision on a Substitute Consent application. That presumption might be said to derive from the fact that s.177J requires pro-action by the Board in making an activity cessation order. I have come to the view that there is no such presumption – that s.177J is in the nature of a belt and braces approach to enforcement of EIA and AA law. The power is given to the Board by s.177J to enable it to respond to the circumstances of the case as a supplement to the existing law as to unauthorised development – which is illegal and subject to enforcement process under planning law. To infer the posited presumption, at least as a general presumption, would be to infer statutory acquiescence in active continuation of an unauthorised development, which is a criminal offence and has, ex hypothesi, been identified as in breach of EU Law requirements as to EIA and AA. Such an inference is possible as a matter of domestic law but should not be lightly drawn. Such a general presumption would also be inconsistent with the exceptionality requirement of the Substitute Consent process as it relates to EIA and AA and with the required dissuasive effect.

120. That said, the premise of Substitute Consent is that the preservation of the development is at least a possibility and any general requirement of reversal of an unauthorised development awaiting a Substitute Consent decision would be inconsistent with that premise – at least unless the reversal was itself reversible. In **Balz**[264] the Supreme Court, considering the possibility of staying certiorari of an invalid planning permission, said that s.177J implied that,

[259] Habitats Directive Article 1(d) & Annex II.
[260] Habitats Directive Article 1(d) & Annex I.
[261] Habitats Directive Article 1(d) & Annex I #7130.
[262] 2017 NIS §3.1.2.1.
[263] Case C-127/02 – Waddenzee, Judgment of 7 September 2004 §58.
[264] Balz v ABP [2020] IESC 22, [2020] 5 JIC 050.

> *"… a determination of invalidity does not automatically mean that what was permitted under the invalidated permission should cease, or any works reversed. At a more mundane level, in applications under s. 160 of the PDA 2000, it is relatively common for courts to exercise a discretion as to whether to adjourn the proceedings themselves, or put a stay on any order for a limited period to permit the regularising of the permission if possible, or at least to permit a decision to be made on the planning merits.*

121. It seems to me that the general premise pending a Substitute Consent decision is preservation of the status quo – subject to the considerable caveat that any steps necessary to avoid significant adverse effects on the integrity of European sites pending that Substitute Consent decision must be taken and the possibility of steps necessary to avoid significant adverse effects on the environment more generally pending that Substitute Consent decision must be considered by the Board with an urgency commensurate to the circumstances. While the analysis may be different as to uses already in train, and in any event case-by-case consideration may be required, I do not see that, as to development works, s.177J creates a general presumption at planning law that their continuation pending a Substitute Consent decision is acceptable unless the Board takes steps under s.177J. It may well be therefore that the position pending a Substitute Consent decision will differ as between a wind farm already in operation when the need for Substitute Consent is seen, and a windfarm as to which the need for Substitute Consent is seen before it is complete. But I do not see unfairness, much less illegality, in any such difference. That is because the overarching circumstance is that unauthorised development has been effected which required EIA and/or AA but did not get it. Whatever about existing circumstances of works already done or use already in train, exacerbation of that legal deficit by additional such works may be considered differently to preservation of a status quo.

THE BOARD'S DECISION TO GRANT LEAVE TO SEEK SUBSTITUTE CONSENT & OPTIONS OPEN TO PLANREE

122. By decision of 13 October 2023,[265] the Board granted Planree leave to apply for Substitute Consent. Though, surprisingly and regrettably, the Board's Order and Directions don't recite its attitude to its Inspector's report, the parties agree, as do I, that its acceptance is broadly apparent.

123. The Inspector, by report dated 17 August 2023, had advised that the statutory criteria for granting leave had been satisfied and recommended that leave be granted.[266] In doing so he noted:

- that "*Leave to apply for substitute consent is sought for 25 No. deviations from the permitted development*".
- the without prejudice basis of the application and Planree's view that none of the deviations required substitute consent.

[265] ABP-314062-22.
[266] Inspector's Report §§7 & 8.

124. It is useful to state the Inspector's conclusions first. He recommended, and the Board as competent authority decided, that leave to seek Substitute Consent should be granted. In doing so, the Inspector noted that s.177D(1)(b) PDA 2000 provided, inter alia,[267] that the Board,

> *"….. shall only grant leave to apply for substitute consent where it is satisfied that an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment, was or is required in respect of the development concerned …"*

The Inspector advised that leave be granted as to the deviations in part because:

- the likelihood of significant effects on the environment could not be excluded and so EIA screening was required.[268]
- he was unable to state whether "*significant effects on the environment or adverse effects on the integrity of a European site required remediation or could be remediated"*[269] and so AA was required.[270]

In its decision, the Board recorded its satisfaction to that effect. So, the Deviations require EIA screening and AA and are material for that very reason.

125. I have no hesitation in saying that in view of those conclusions, and given the imperatives of the EIA and Habitats Directives as described above, it became impossible to argue that the Deviations which had been the subject of the application for leave to seek Substitute Consent were minor or non-material. Planree properly accepted that at trial.

126. It is fair to say that the Inspector's general view was sympathetic to Planree – he said that:

> *"Many of the deviations identified only came to light on forensic analysis undertaken by both the applicant and Planning Authority and it can be expected that similar issues would arise at other large scale development sites."*[271]

If this passage is to be read (it can be so read but perhaps it is not to be so read) as a sanguine acceptance that similar deviations, unauthorised and material as in breach of EU law requirements of EIA and AA, conducted prior to effecting development and by way of deviations from planning permission, are commonplace or tolerable, it must be clearly stated that such a view is inconsistent with law. That such deviations would be commonplace is not legally tolerable and its toleration is inconsistent with the insistence of EU law that remedial EIA and AA be exceptional. It is exceptional for the very reason that such toleration "*may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfied the criteria of art.2(1) and consequently not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment."* – **Derrybrien #1**.[272] Only non-material deviations are tolerable.

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[267] Leaving aside the criterion of exceptional circumstances.
[268] Inspector's Report §6.4.5.
[269] Inspector's Report §6.6.18.
[270] Inspector's Report §6.5.11 & 12.
[271] Inspector's Report §5.2.6.
[272] Case C-215/06 Commission v Ireland, Judgment of 3 July 2008, EU:C:2008:380, §58.

127. The Inspector noted "*from the application documents that the applicant is of the view that there is a tolerance for minor deviations from the approved planning-stage designs, in response to actual conditions encountered on the ground, and that such an approach to construction of large-scale construction projects is commonplace*."[273] MKO had said the same in its s.160 Report – though on the premise, not borne out by the Board's decision to grant leave, that the Deviations were in fact minor and non-material in planning and environmental terms.[274] In its own terms, the Inspector's is an uncontroversial observation – but only as limited to tolerance for "*minor deviations*". Though he doesn't expressly adopt Planree's view or say so, it seems to follow that the Inspector mobilised this consideration in satisfaction of the criterion that the "*applicant had or could reasonably have had a belief that the development was not unauthorised*". In other words, Planree's error was to mistake deviations as minor when in fact they were material as requiring EIA Screening and AA. I confess to being puzzled as to how, of itself and logically, the existence of a commonplace, proper and pragmatically necessary tolerance of minor deviations rendered such an error reasonable – and so reasonable as to appreciably contribute to exceptionality of circumstance. I would have thought that the reasonableness of such error (in this case, 25 such errors) of identification of deviations as minor, when in fact they were material, would have to be related to the specifics of the errors as opposed to a general and proper tolerance of minor deviations, if the exceptionality criterion is to be maintained. However, the leave decision is not impugned and these comments are obiter.

128. The Inspector noted that, in submitting that the criterion of exceptional circumstance was satisfied, Planree stated:

> *"The applicant could reasonably have had a belief that the subject deviations were not unauthorised. It is common for largescale developments such as wind farms to have a degree of built-in flexibility to allow for further refinement of construction activities in response to on-site conditions. The subject deviations are not considered to be material changes."*[275]
>
> *"The subject deviations do not result in any significant effects on the environment or adverse effects on the integrity of a European site."*[276]

However, given the Inspector's conclusion as to the need for EIA screening and AA, he cannot be read as agreeing that the Deviations were in fact or in law minor or non-material or environmentally insignificant. Nor can he properly be read as approving of a general practice that a commonplace approach to construction of large-scale construction projects may lawfully deliberately engage in material – as opposed to immaterial – deviations from planning permissions.

129. In his assessment, the Inspector advised, inter alia, that:

[273] Inspector's Report §6.6.8.
[274] MKO s.160 Report 24 May 2023 §4.2.1. – Exhibit BK1 to Brian Keville's affidavit sworn 25 May 2023.
[275] Inspector's Report §5.2.2.
[276] Inspector's Report §5.2.4.

"In accordance with the requirements of the legislation, the Board's determination in this case, whether or not to grant leave to make such an application, must be confined solely to the retention elements of the development. This application relates to 25 No. identified deviations from the approved wind farm development."

"The alterations to internal access roads and turbine access roads/hardstanding areas involved groundworks/excavation, deposition of heavy stone material and alterations to the site surface water drainage network. The alterations to the access route to T7 and hardstanding at T9 were in response to a peat slide …. These works have the potential to affect the groundwater regime on this peatland site and have the ability to affect the quality and content of surface water discharges from the site."[277]

"The borrow pits involved deep excavation and removal of materials, in a number of instances with the excavated pit reused as a peat store. I observed substantial standing water in each of the borrow pits on my visit to the site. I consider the works have the potential to affect the groundwater regime on this peatland site and have the ability to affect the quality and content of surface water discharges from the site." [278]

"….. the Planning Authority's submission on the application expresses the view that a number of the deviations pose medium or higher ecological risk. [279]

"Having regard to the above, I am of the opinion that the likelihood of significant effects on the environment cannot be excluded by the Board and that there is a requirement for a determination as to whether EIA is required .."[280]

SLR considered that that some of the deviations "pose either a `medium' or `higher' ecological risk …. The higher ecological risks relate primarily to the borrow pits and peat cells, with medium risks relating primarily to access road alterations." [281]

The subject deviation works involve excavation, deposition and construction activities of a similar degree to those involved with the wider wind farm project and include works that were a direct response to a peat slide event. I consider the works have the potential to affect the groundwater regime on this peatland site and have the ability to affect the quality and content of surface water discharges from the site. In this regard I consider the deviations have the potential to give rise to significant effects on those European sites that are hydrologically connected, similar to impacts identified as part of the NIS submitted with the parent application. In view of the above assessment, I conclude that the subject development requires Appropriate Assessment."[282]

He also stated that that he was unable to state whether "significant effects on the environment or

[277] Inspector's Report §6.4.3 p14.
[278] Inspector's Report §6.4.3 p14.
[279] Inspector's Report §6.4.4.
[280] Inspector's Report §6.4.5.
[281] Inspector's Report §6.5.10.
[282] Inspector's Report §6.5.11 & 12.

> *adverse effects on the integrity of a European site required remediation or could be remediated.*[283]

130. Planree intimated its intention to expeditiously make the Substitute Consent application for which it has leave, including the necessary Remedial EIAR and Remedial NIS.[284] It further asserts[285] that,

- the information to hand in preparing the Remedial EIAR and Remedial NIS discloses no adverse environmental effects to date due to the Deviations. It is difficult to attribute weight to these assertions. More importantly, it is for the Board in the Substitute Consent process to weigh them.
- it furnished a scoping report with a view to the Remedial EIAR and Remedial NIS to Donegal CC in January 2024 and by reply of 25 January 2024 Donegal CC expressed itself "*satisfied with the approach*" of that Scoping Report.

131. In truth that MKO "Scoping Report" of 19 January 2024[286] is better described by the phrase in which it is more accurately entitled: "*Informal Environmental Scoping Request*" with a view to the rEIAR[287] to be submitted in the Substitute Consent application. It issued to 35 listed consultees and said that MKO, as to a proposed rEIAR, "*would welcome any comments that you might have in relation to the Subject Development, including baseline data, survey techniques or potential impacts that should be considered".* While there is nothing wrong with it, it is in quite general terms – it does not, for example, state MKO's preliminary list of "*potential impacts that should be considered*". Though it refers to the intention to prepare an rNIS[288] it does not seek similar comment – though that may not have deterred recipients. However it's most salient feature – correct given the terms of the request for, and grant of, leave to seek Substitute Consent – is that it lists;

> *"The 25 no. alterations which make up the Subject Development for which substitute consent is being sought and which are the subject of the rEIAR and rNIS …."*

132. In other words, as I have said above, leave to seek Substitute Consent was sought and granted not for the as-built Windfarm and the remaining parts of it yet to be built, but for a single "subject development", consisting of the 25 Deviations. Donegal CC consider that Substitute Consent should be sought for the entire Windfarm, including the outstanding works, all of which has been rendered unauthorised and which, it says, constitutes the *"development concerned"* within the meaning of s.177K(1) PDA 2000. There was discussion at trial as to which approach is correct.

133. However, as the leave granted has not been challenged, I must presume it valid and Planree may make its application accordingly. It may be that, if it wished, Planree could, and might in the long run be wiser, to abandon that process and simply make a new Substitute Consent application under the regime in place since December 2023. It is not for me to advise Planree in these regards or predict the outcome of any

[283] Inspector's Report §6.6.18.
[284] Affidavit of Brian Keville 29 January 2024.
[285] Affidavit of Brian Keville 29 January 2024.
[286] Exhibit BK4, Affidavit of Brian Keville 29 January 2024.
[287] Remedial Environmental Impact Report.
[288] Remedial Natura Impact Statement.

course it may take. For now it is clear that Planree can make at least some Substitute Consent application. It has undertaken to the Court to do so expeditiously. As a revised application would take further time, the duration of which cannot be precisely predicted and notwithstanding any resultant difficulties of enforceability, I accepted an undertaking in the somewhat vague terms of "expedition" and on the basis that Donegal CC has liberty to apply to me to revise my decision in the event a difficulty as to such expedition arises.

134. In part, the original and amended versions of s.177E(2A) PDA 2000[289] may bear on the question which is the correct approach. It is of course the law that the "project" to be subjected to EIA and AA is that for which development consent is sought and so the developer is, as it were, in the driving seat as to the identification of that project – **Fitzpatrick**[290] – subject to considerations such as those which arose in **O Grianna**.[291] However, that view of the law is premised on the circumscription by the resultant development consent of the scope and extent of a development yet to be effected. Different considerations may arise where a development is already effected and, in seeking Substitute Consent, the applicant seeks to retrospectively carve elements out of that development for the purpose of identifying them as a "development" for which Substitute Consent is sought. In that context, it may be that the comments, set out above, of Murray CJ in **Martin**[292] as to what is "*artificial and unreal*" may have some application. On the other hand, it might be that Annex II §13 of the EIA Directive allowing the identification, prospectively as opposed to retrospectively, as projects of changes or extensions to projects already authorised, executed or in the process of being executed, is relevant in substitute consent. In any event,, as will be appreciated, these comments are obiter and tendered with some diffidence as the present case did not require a detailed consideration of this aspect of the complexities of the law as to Substitute Consent.

135. The net position seems to me to be that I should now proceed on the footing that:

- Planree will expeditiously make a Substitute Consent application – indeed it may have done so since trial.
- Thereafter, and with an expedition appropriate to the circumstances, the Board will decide whether to make an activity cessation order under s.177J PDA 2000.
- In its submission on the Substitute Consent application, Donegal CC may make submissions as to the possibility of an activity cessation order under s.177J PDA 2000.[293]

[289] Supra.
[290] Fitzpatrick v An Bord Pleanála, Galway County Council and Apple, [2019] 3 IR 617.
[291] O Grianna v An Bord Pleanála [2014] IEHC 632.
[292] Martin v ABP & Indaver [2008] 1 IR 336, [2007] 2 ILRM 401.
[293] The parties were agreed in this regard - Day 3 p75.

SCOPE OF S.160 & DISCRETIONARY FACTORS

INTRODUCTION

136. From the voluminous caselaw[294] the following principles as to the exercise of the jurisdiction created by s.160 are apparent:

(a) In at least two senses, the "starting point" is unauthorised development.
- First, it is a jurisdictional precondition to an injunction. I have considered this issue above.
- Second, it creates a prima facie entitlement to s.160 relief subject only to the question of discretion.[295]

It has been said that "*The core focus of s.160 is on whether or not there is an unauthorised development*".[296]

(b) If the prima facie entitlement to s.160 relief is established, the discretion to refuse it will be sparingly and rarely exercised.[297] Its exercise in refusal of relief requires "*exceptional circumstances*".[298]

(c) In considering whether to refuse to make an order under s.160 or whether to limit the scope of such an order, even temporarily pending a retention or Substitute Consent application, it must be borne in mind that,
- it is not the function of the High Court to act as a planning authority and to licence the temporary unauthorised use of lands.
- In the case of development requiring EIA and/or AA or screening for either, to allow the development to continue, even temporarily, in the absence of a concluded assessment which would legally enable it to be permitted, could itself be a breach of European law.[299]

(d) If relief is to be granted, the court has an "extremely wide" power to order anything that the Court considers necessary and specifies in the order to ensure the achievement of the aims listed in s.160.

POSSIBLE ORDERS

137. Possible orders seem to me to include the following:

- Refuse all relief.

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[294] Including, but not limited to, Morris v Garvey [1983] IR 319, Leen v Aer Rianta [2003] 4 IR 394, Wicklow County Council v Forest Fencing [2007] IEHC 242, McCoy v Shillelagh Quarries Limited [2015] IEHC 838, Bailey v Kilvinane Windfarm [2016] IECA 92, Luxor Investments Ltd [2018] IEHC 775, Meath County Council v Murray [2018] 1 IR 189, An Taisce v McTigue Quarries Ltd. [2018] IESC 54; [2019] 1 ILRM 118, Ferry v Caulderbanks [2021] IEHC 97; [2021] 2 JIC 0507, Ferry v Caulderbanks [2021] IECA 345; [2022] 2 I.C.L.M.D. 65, Kelly Dunne v Guessford Limited [2022] IECA 223, Doorly v Corrigan [2022] IECA 6, Tesco Ireland Limited v Stateline Transport Limited [2024] IECA 46.
[295] Bailey v Kilvinane Windfarm [2016] IECA 92, §90.
[296] An Taisce v McTigue Quarries [2018] IESC 54.
[297] Cork County Council v Slattery Precast Concrete [2008] IEHC 291 §12.1, McCoy v Shillelagh Quarries [2015] IEHC 838, §66.
[298] Meath County Council v Murray [2018] 1 IR 189 §86 et seq, citing Morris v Garvey [1983] IR 319. Also, Wicklow County Council v Forest Fencing [2007] IEHC 242, [2008] 1 ILRM 357 and An Taisce v McTigue Quarries Ltd [2018] IESC 54.
[299] Tesco Ireland v Stateline Transport [2024] IECA 46.

- Order cesser of all development on Site simpliciter and permanently.
  - This was not seriously pursued.

- Order cesser of all development on Site giving all parties liberty to apply to vary or vacate that order.
  - Though any such order would not be so confined, the possibility of liberty to apply to vary or vacate would, in reality, be in contemplation of developments in the envisaged Substitute Consent process.

- Order cesser of only specified development on Site – giving all parties liberty to apply to vary or vacate that order.
  - During the trial Planree made in some detail, and Donegal CC rejected, an offer to submit to such an order.

- Order remediation of the Material Deviations.
  - Donegal CC did not seek remediation at this point, though reserving the right to return to court for it.
  - Planree advocated such an order as an alternative allowing it to get on with the works generally. It is fair to say that, this option fell away at trial, largely for the reasons identified in Stateline – the difficulty of the court's defining, and assessing the effects of such works as compared to the Board's expert capacity in those regards.

ONUS OF PROOF

138. Browne[300] cites, inter alia, **Sweetman v Shell**[301] for the proposition that the applicant for s.160 relief – here Donegal CC – bears the onus of proof both of unauthorised development and that the court should exercise its discretion to make a s.160 order. But, while the authority is correctly cited, it appears to me that the proposition that the onus of proof as to the exercise of discretion is on the applicant for relief, is inconsistent with the many decisions to the effect that:

- proof of unauthorised development generates a prima facie entitlement to s.160 relief.
- the discretion to refuse it requires exceptional circumstances and is sparingly and rarely exercised.
- the "*defaulter is seeking the indulgence of the court*" as to what consequences he should face.[302]
- the weight of the public interests at stake (see below, both in domestic planning law and EU environmental law) are such that, once unauthorised development is proven, the proper focus of inquiry is not on why a s.160 order should be made but on why it should not be made.[303]

139. Though arguably obiter,[304] the following appears in the judgment of the Court of Appeal in

[300] Simons on Planning Law 3rd Ed'n §11-32 et seq.
[301] [2006] IEHC 85. Also Amphitheatre Ltd v HSS Developments [2009] IEHC 464 §28.
[302] Meath County Council v Murray [2018] 1 IR 189 §91.
[303] Meath County Council v Murray [2018] 1 IR 189 §124.
[304] Costello J said: "I would not entertain any appeal against the exercise by the trial judge of his discretion." But, as is not unusual, she did in fact consider the issue and concluded: "Even if the issue of the exercise of his discretion were properly part of the appeal, I would not interfere with his order."

Guessford:[305]

> *"As is clear from Morris, once unauthorised development has been established it would require exceptional circumstances before the court would refrain from making an order under the section. The onus rests on the offending party to establish those circumstances to the satisfaction of the court and the appellant failed in this regard. That being so, it was not appropriate not to grant relief."*

In **Morris**[306] Henchy J had said,

> *"It would require exceptional circumstances (such as genuine mistake, acquiescence over a long period, the triviality or mere technicality of the infraction, gross or disproportionate hardship, or such like extenuating or excusing factors) before the court should refrain from making whatever order (including an order of attachment for contempt in default of compliance) as is 'necessary to ensure that the development is carried out in conformity with the permission'. …."*

140. In my view, on a proper understanding of the authorities, once the applicant for relief discharges the onus of proving unauthorised development, it is for the developer to convince the court that the exceptional discretion should be exercised in its favour by way of refusal of relief under s.160.

DISCRETIONARY FACTORS

General Observations

141. The discretionary factors at play may apply both to the question whether relief should be granted and the terms in which it should be granted. In practice, the analysis of these two issues will often properly be elided. However, in my view the caselaw indicates that the discretion to fashion a remedy suited to the circumstances is necessarily, and much, wider than that to refuse relief. Indeed, in some degree, the discretion to fashion a remedy will be exercised in most, if not all cases, in which s.160 relief is granted.

142. As *"the courts have tended to individualise each case and decide it accordingly, rather than to inquire as to whether the resulting circumstances fell within any of the illustrations mentioned in"* Morris v Garvey,[307] it follows that the list of discretionary factors is not closed. But in a given case, they may include the following list taken from **Meath County Council v Murray**[308] and since repeatedly applied, including by the Supreme Court in **McTigue Quarries**,[309] and recently by the Court of Appeal in **Stateline**.[310] In that case, Butler J, citing McKechnie J in Murray, considered it important to note that:

[305] Kelly Dunne v Guessford Limited [2022] IECA 223.
[306] Morris v Garvey [1983] I.R. 319.
[307] McKechnie J. in Leen v Aer Rianta [2003] 4 I.R. 394; Finlay Geoghegan J in Warrenford Properties v TJX Ireland [2010] IEHC 310.
[308] Meath County Council v Murray [2018] 1 IR 189. See also Leen v Aer Rianta [2003] 4 I.R. 394.
[309] An Taisce v McTigue Quarries Ltd [2018] IESC 54.
[310] Tesco Ireland Limited v Stateline Transport Limited [2024] IECA 46.

- The list is non-exhaustive.
- It is of *"factors to be considered rather than as a checklist of criteria which must be met in each case*".
- The discretionary factors "*are not isolated or stand-alone …but will inevitably interact with each other …"*
- *"The weight to be attributed to each factor will be determined by the circumstances of a given case …"*
- *"Some, because of their importance, may influence whether an order is or is not in fact made: others, the scope, nature or effect of that order".*

143. In similar vein, in **Leen,** McKechnie said:

> *"It would, I believe, be unhelpful, unnecessary and, in any event, probably impossible to identify what public interest considerations one must take into account in this area of the law. It seems to me that, in general, any element or feature of public interest which arises from the particular circumstances before the court are elements or features which the court can take cognisance of when exercising its discretion under s 160."* [311]

Also, as the various factors combine in informing an overall assessment it is impossible, and would be inappropriate, to analyse them entirely discretely. Nonetheless, and accepting overlap and interaction between them, the various headings set out below are useful organisationally though not determinative.

The integrity of the systems of planning and environmental law.

144. In **Forest Fencing**[312] Charleton J identified "*the duty of the court to uphold the principle of proper planning for developments under clear statutory rules*". In **Murray**, McKechnie J.

- identified the "*public interest imperative in upholding and maintaining planning control, planning regulation, orderly and sustainable development and the rule of law*."
- identified s.160 as underlain by a *"policy aspiration … of legislative compliance so that orderly development takes place in a regulated and coherent manner*" and as part of planning enforcement *"armoury … to ensure that the environmental and ecological rights/amenities of the public are preserved and enhanced and that the integrity and efficacy of planning control is maintained."*
- considered that, in the consideration of discretionary factors, that public interest "*will be ever present*" and "*most likely will stand first in the queue for consideration*."[313]
- observed that unauthorised development is a criminal offence punishable by "*imprisonment and fines on indictment up to over €12m. This is a significant expression of the high level of public concern there is in regulating orderly and sustainable development. The fact that one can apply for retention permission impacts very little, if at all, on this point …"*[314]

McKechnie J was speaking of a case of no planning permission rather than one of breach of a planning permission. While on the facts of a given case that distinction may be relevant, it does not seem to me a

[311] Leen v Aer Rianta [2003] 4 IR 394. §35.
[312] Wicklow County Council v Forest Fencing [2007] IEHC 242.
[313] See also Ferry v Caulderbanks [2021] IEHC 97, [2021] 2 JIC 0507, Doorly v Corrigan [2022] IECA 6.
[314] A factor also emphasized by Kelly J in Curley v Galway Corporation Ex Temp, 11 December 1998,[1998] Lexis Citation 6781.

distinction of principle. In either case, the development in question is unauthorised and a crime. And as I have said, a proper proportionality and discretion is brought to bear on decisions whether to prosecute. Significantly, McKechnie J framed s.160 as part of an armoury concerned, inter alia, with upholding the rule of law. Counsel for Planree described that, I think not inaccurately, as a "*moral hazard"* issue.

145. This logic as to the low weight of the prospect of retention in the exercise of the discretion applies, a fortiori, to Substitute Consent given the CJEU's insistence on its exceptionality and on dissuading breach of EIA and AA law. So, in general and ceteris paribus, s.160 relief should not be deferred pending a decision on Substitute Consent – though the discretion as to the precise relief to be granted may be affected by the prospect of such a decision and the relief may be later reviewed in light of statutory decisions in the Substitute Consent process.

146. On the facts of Murray, the public interest informed the correct approach: the proper focus of inquiry was not on why a s.160 order should be made but was on why it should not be made.[315] In other cases it has been said that there is a "*strong public interest*"[316] "*in ensuring that the planning laws are adequately enforced and the judicial failure to make mandatory orders in s.160 proceedings may dilute this effective enforcement and encourage others into thinking that they might profit from their own breaches of the planning laws"*. Such a position "*would be incredibly destructive of planning law*."[317]

147. As O'Donnell CJ said in **Krikke**:

> *"The enforcement of planning law is … of benefit to the wider community. This, if anything, has become more apparent since the implementation in Irish law of the Environmental Impact Directive …… The courts, in applying the law, must seek to find a balance between restraining unauthorised development which might be harmful to the built and natural environment and to the legitimate interests of people affected, and permitting protracted litigation to obstruct and perhaps preclude development where the breach, if one exists, may be minor and where the development is clearly permissible in principle and of benefit to the community and the wider economy."*[318]

The word "minor" here is important. And the operation of a windfarm was restrained in Krikke despite the public interest in the provision of renewable energy given the restraint would have a minimal effect in the national context.[319]

148. Though the issue in **Krikke** was as to a stay pending appeal of a s.160 order restraining the operation of a windfarm, and it must be emphasised that cases turn on their individual circumstances, O'Donnell J's judgment is illustrative in agreeing with O'Malley J that the decision of the Court of Appeal to stay the injunction,

[315] Meath County Council v Murray [2018] 1 IR 189 §124.
[316] Kerry County Council v McElligott [2021] IEHC 542, [2021] 7 JIC 3003; Doorly v Corrigan [2022] IECA 6.
[317] Bailey v Kilvinane Windfarm [2016] IECA 92.
[318] Krikke v Barranafaddock Sustainability Electricity Ltd, [2020] IESC 42, [2020] 7 JIC 1702.
[319] Krikke v Barranafaddock Sustainability Electricity Ltd, [2020] IESC 42, [2020] 7 JIC 1702.

> *"… gave too much weight to the financial loss which might be suffered by the appellant developer if the appeal were to succeed. I also agree that it follows that insufficient weight was given to the public interest in the enforcement of planning law and, in this case, the law protecting the environment, which should have significant weight .."*

149. Furthermore, **Leen**[320] is authority that the "*very integrity*" of the planning code demands equality of enforcement – there is "*every reason*" why that should be so. While the court must take into account the individual circumstances of each case and apply the law accordingly, respect for planning law cannot be insisted upon from some and not others; otherwise, disrepute would follow and the entire regime would suffer.

150. The integrity of the EIA and AA processes fall within this category of strong public interest. Browne[321] cites **Shillelagh Quarries**[322] and **Kilronan Windfarm**[323] as suggesting that the inherent discretion in s.160 proceedings is more curtailed if there has been or continues to be a breach of EU law – the respect for which is in the public interest, as is the public interest in preserving public amenity. The imperative of ensuring compliance with EU law – the requirements of the EIA and the Habitats Directives – limits the court's discretion to refuse relief as significantly curtailed to sparing use. In such circumstances to allow unauthorised development to continue would fail to respect the integrity of the environmental legislation. The judgment of Baker J. in **Shillelagh Quarries**[324] is instructive. The context was, inter alia, one of compliance with the EIA and Habitats Directives. She considered that the discretion to refuse s.160 relief,

> *"….. must be exercised sparingly, that the imperative of Community law must be respected in the exercise of discretion, and that the court should have as its starting point the fact that a development is unauthorised and that it may not by the exercise of its discretion "tacitly accept" the breach …"*[325]

Baker J. considered that "*the public interest in the observance of environmental legislation and of determinations made by the competent authorities is a weighty imperative that guides me*." – though she said so in a context in which, on oral evidence, "*the likelihood further damage to the environment has been shown*".[326] The judgment of Baker J is, however notable, also in that substantive environmental concerns were not her only concern. She said:

> *"83. It is not merely the matter of the protection of the landscape, and the role of the court in determining whether a landscape is exposed to an environmental hazard, but the exercise, having regard to the statutory provisions, seems to me to be one where my discretion is limited and ought to be sparingly used, as any other approach would involve a failure of the court to recognise the*

[320] Leen v Aer Rianta [2003] 4 IR 394 §37
[321] Simons on Planning Law, 3rd ed'n, (Browne) §11-29,. §11–575 & 576.
[322] McCoy v Shillelagh Quarries Ltd [2015] IEHC 838.
[323] Daly v Kilronan Windfarm [2017] IEHC 308.
[324] McCoy v Shillelagh Quarries Limited [2015] IEHC 838.
[325] §66. Citing Cork County Council v Slattery Precast Concrete Ltd. [2008] IEHC 291.
[326] §74.

statutory imperative, and a failure of the court to recognise the decision of the Oireachtas to determine that the operation of this quarry is unlawful.

84. I consider myself constrained further by the requirements of European Community law, and especially the EIA Directive and the Habitats Directive as each of these mandates that an Environmental Impact Statement is required in respect of the operation of this quarry.

85. Accordingly, were I to refuse injunctive relief or grant injunctive relief with respect to some of only of the operation, I consider that my decision would be one which could be characterised as a failure to respect the integrity of the environmental legislation, and allow the development to continue when it is unauthorised under Irish and when Irish law arises as a result of the obligations of Ireland and Community law."

151. As to the integrity of the system of EU environmental law, I refer again and generally to the Derrybrien caselaw considered above.

152. In **Krikke**[327] Simons J, in granting a s.160 injunction, said that the discretion to "*forgive*" a material breach of EIA law is more limited. He cited Article 10a of the EIA Directive as to the necessity of effective, proportionate and dissuasive penalties for infringements of EIA Law and said, "*There has been a breach of EU law, and this court is obliged to ensure that there is an effective and dissuasive remedy for same."* To be clear, s.160 injunctions are not punitive. But I agree with Simons J that, as a matter of the strong public interest in the integrity of the planning, EIA and AA processes, they are expected not merely to be effective to restrain development non-complaint with EIA and AA law and planning law but also to be dissuasive of such development. Indeed such dissuasion is part of the method whereby the integrity of planning and environmental law is protected. While the decision of the High Court in Krikke was later overturned, it does not seem to me that the basis on which it was overturned impugned the analysis of Simons J in this regard. The same may be said for his observation that

"It would not, however, be appropriate to allow the operation of the wind turbines to continue uninterrupted pending the outcome of an application for leave to apply for substitute consent. This is similar to the approach which had been adopted by the Court of Appeal in Bailey v. Kilvinane Wind Farm. There has been a breach of EU law, and this court is obliged to ensure that there is an effective and dissuasive remedy for same."

153. In a comment applicable to this case, in which the Board has identified the need for EIA screening (leaving aside its identification of the need for AA), and as to the integrity of the systems, Simons J in Krikke also cited the requirement of the EIA Directive that any "change" or "extension" to a permitted project which is likely to have a significant adverse effect must be subject to further EIA. He considered it necessary, therefore, to carry out a form of screening exercise to determine whether a change or extension is likely to have a significant adverse effect before a decision to authorise a change or extension can lawfully be made.

[327] Krikke v Barranafaddock Sustainability Electricity Ltd [2019] IEHC 825 – overturned on other grounds [2023] 1 ILRM 81.

He said:

> *"Whereas it may well be the position that the outcome of a screening exercise in relation to the change in the scale and dimensions of the turbines would be that no EIA is required, this does not obviate the legal requirement to carry out such a screening exercise."*[328]

154. Without undermining the existence of the discretion, it can be said that in **McTigue**,[329] and despite the significant consequences for McTigue, a similar view of the integrity of the planning code clearly underlay the view that in response to a *"notable breach of the planning and development code"*, an order under s.160 must follow as "*only the granting of a s.160 order would be in keeping with the obligation of the courts as a judicial organ of the State to give effect to the national law*."

155. In **Balz**[330] the Supreme Court observed that,

> *"…. windfarms are very substantial developments normally in remote and scenic areas, which will moreover stay in place for a very long time. The very public policy that encourages development of alternative energy – and, moreover, provides financial incentives to do so – also requires that the interests of members of the public and those entitled to participate in the decision-making process are respected, and that the process is conducted in accordance with the law. Substantial enterprises should be expected to respect the adjudications of the courts."*

While that passage was concerned with respect for the planning process and adjudications of the courts, the rationale also requires respect for the outcome of the planning process. Substantial enterprises are expected to respect the planning permissions pursuant to which they develop windfarms.

Other Factors

156. Here I will list the other factors identified in the cases and make a few minor comments. I will return to them in analysing the circumstances of the present case.

(ii) The nature of the breach: ranging from minor, technical, and inconsequential up to material, significant and gross.

(iii) *The conduct of the infringer: his attitude to planning control and his engagement or lack thereof with that process*.

- Acting in good faith, whilst important, will not necessarily excuse the infringer from a s.160 order.[331]
- Acting mala fides may presumptively subject him to such an order. (Mala fides is not alleged in this case.)

[328] Simons J §158 et seq.
[329] An Taisce v McTigue Quarries Ltd [2018] IESC 54 87, [2019] 1 ILRM 118.
[330] Balz v ABP [2020] IESC 22, [2020] 5 JIC 050.
[331] An Taisce v McTigue Quarries Ltd [2018] IESC 54, [2019] 1 ILRM 118. Krikke v Barranafaddock Sustainability Electricity Ltd [2019] IEHC 825.

(iv) *The reason for the infringement: this may range from general mistake, through to indifference, and up to culpable disregard.*

(v) *The attitude of the planning authority.*

- This factor is important, but will not necessarily be decisive. I consider it further below.

(vii) The public interest in such as:

• Employment for those beyond the individual transgressors. (This is not a major element in the present case).

• The importance of the underlying structure/activity, for example, infrastructural facilities or services. Planree invokes the public interest in renewable energy generation. I consider that issue further below.

(viii) The conduct and, if appropriate, personal circumstances of the applicant;

- In the sense of blameworthiness this is not very weighty in this case – though I do below indicate courses which Planree ought to have taken.

(ix) The issue of delay, even within the statutory period, and of acquiescence;

- This is not relevant in this case.

(x) The personal circumstances of the respondent

- Planree assert the prospect of financial losses – including complete loss of its considerable investment in the Windfarm. I consider this further below.

The presence/absence of a likelihood of adverse environmental effect.

157. This heading does not appear in the "Murray list", but it is a relevant factor. In this case, the risk of environmental effects if the windfarm is built out and operated before the substitute consent decision is made is disputed. I return to it below.

158. However, the pervasiveness in planning and environmental law of environmental considerations, to whatever extent they can be distinguished from planning considerations, is such that in considering s.160 applications as to projects requiring EIA and AA, sight can be lost of considerations other than the prospect of environmental effects. Such prospects of environmental effects can compel the grant of s.160 relief, but their absence, while it may be ameliorative, is not per se a defence to a s.160 application. See my reference below to **Krikke**,[332] under the heading of proportionality.

159. In **Daly v Kilronan Wind Farm**[333] the continuation of unauthorised grid connection works to a wind

[332] Krikke v Barranafaddock Sustainability Electricity Ltd [2020] IESC 42, [2020] 7 JIC 1702.
[333] Daly v Kilronan Windfarm Ltd [2017] IEHC 308 (High Court, Baker J, 11 May 2017).

farm was injuncted. Though the grid connection works themselves posed no particular environmental threat, the breach was not trivial, minor or technical as, as those works were part of the windfarm project. It was necessary

> *"… to have regard to the environmental framework of a wind farm project as a whole. Therefore, while I accept that no specific individual environmental factors have been identified by the expert witness who gave evidence on affidavit on behalf of the applicant, because the grid connection must be considered as part of the overall project, and as the overall project is one of significant potential for environmental damage, a description of the breach as being trivial, minor or technical fails to reflect the broader environmental context in which this application was brought. The assessment of the environmental impact is a matter for the planning authority."*[334]

Proportionality & the Precautionary Principle

160. I will consider the relevance of the precautionary principle later in this judgment. Proportionality was considered in Murray but as to the particular issue of interference with constitutional rights in the context of a question of ordering demolition of a dwelling. It played the same role in **McDonagh**.[335] Proportionality does not appear as a distinct entry in the "Murray list" of factors but it is relevant – as to both whether and in what terms a s.160 order should be made. Indeed, one might say that proportionality pervades the "Murray list". For example:

- in **Krikke**,[336] where a substitute consent application was pending, O'Donnell J considered that a permanent restraint on the operation of the development would be disproportionate *"to the fact that permission had been granted for a windfarm development, and there was little clear-cut evidence that the development in operation was any more intrusive or offensive than the development for which permission had been granted".* Yet, despite the absence of such evidence, the Supreme Court explicitly would not have stayed the High Court Order which had prohibited windfarm operation pro tem pending regularisation of the planning status of the windfarm.[337]

- Disproportionality was described obiter as a proper basis for refusal of s.160 relief in **Grimes**[338] and was a basis of such refusal in **Smyth**.[339]

- Proportionality played an appreciable part in the analysis of a s.160 issue by Birmingham J in **DAA v JD Motorline**[340] and in resulting orders nuanced to allow application by the developer to regularise unauthorised development.

[334] See also, Simons on Planning Law, 3rd ed'n, (Browne) §11-538.
[335] Clare County Council v McDonagh [2022] IESC 2 ([2022] 1 ILRM 353).
[336] Krikke v Barranafaddock Sustainability Electricity Ltd [2020] IESC 42, [2020] 7 JIC 1702.
[337] In light of changed circumstances and for complex reasons not here relevant, the Supreme Court, despite that view, continued the stay imposed by the Court of Appeal.
[338] Grimes v Punchestown Developments Ltd. [2002] 1 ILRM 409
[339] Smyth v Dan Morrissey (Ireland) Ltd [2012] IEHC 14.
[340] Dublin Airport Authority v Mulvihill & J.D. Motorline [2013] IEHC 510.

THE EXPERT EVIDENCE

161. As was said in **RAS Medical**,[341] the starting point is that the onus to raise the status of evidence lies on the party who wishes to assert that it is inadmissible or admissible only for limited purposes. In this case no objection was taken to the expert evidence adduced by either side. Nor was I asked to exclude or ignore any. Nor was there cross-examination in the case. Indeed, having got liberty to cross-examine, both parties decided against it – largely, it seems, because the materiality of the deviations was no longer in dispute. Yet the parties differed as to the prospect of environmental damage if s.160 relief was refused.

162. As this is an application for final, not interlocutory orders, and in light of **Ferry**[342] I should add that no objection was taken to my having regard to exhibited expert reports by experts who had not themselves sworn affidavits or, for that matter, to exhibited Inspector's reports. S.160 proceedings are adversarial proceedings on the civil side.[343] The necessity of objection to exhibits as hearsay evidence to their exclusion is evident in **RAS Medical**.[344]

163. I make it clear that I cast no aspersions on any of the witnesses or the authors of the expert reports. Brian Keville, deponent for MKO and Ionic/Afry in their exhibited report of May 2025 very properly acknowledged their primary duties to the court rather than their client, Planree. I have referred already to the exhibited Fehily Timoney report of 2021.[345] I do not question the sincerity of those acknowledgments or the integrity of those reports. I also appreciate the value of the intimate knowledge and experience of the project which those experts provide. However, I think some comment appropriate.

164. It is notable that MKO have been continuously involved in this project since 2013. As project managers, they prepared the original planning application, EIAR (including ecological surveys, NIS, and CEMP. The EIAR, as to Peat Instability and Failure[346] stated "*The risk rating for each infrastructure element at the Propose[347] Development is designated trivial and tolerable following some mitigation/control measures being implemented.*" The CEMP included details of drainage, peat and overburden management and waste management and a section on Peat Stability Management which asserted that the peat stability assessment indicates an insignificant risk of peat failure and advised as to management of the risks. Once works started in November 2019, MKO provided an environmental monitoring and ECoW[348] service to the project. After the November 2020 peat slide, MKO prepared and coordinated action plans, environmental monitoring and supervised construction/remediation required in response to the peat slide. It understandably asserts "*an intimate and detailed knowledge of the Meenbog site and the wind farm development*".

[341] RAS Medical v The Royal College of Surgeons in Ireland, [2019] 1 IR 63 §§ 70, 92, 113, 114.
[342] Ferry v Caulderbanks [2021] IECA 345, [2021] 12 JIC 2105.
[343] In referring to the civil side my purpose is to say nothing of criminal proceedings.
[344] RAS Medical v The Royal College of Surgeons in Ireland, [2019] 1 IR 63.
[345] No affidavit by Fehily Timoney was tendered in evidence.
[346] §8.5.2.4.
[347] Sic.
[348] Environmental Clerk of Works

165. Fehily Timoney[349] prepared the 2017 Peat Stability Assessment and Peat & Spoil Management Plan which informed the planning application and EIAR. It also prepared the 2021 Peat Stability Assessment after the November 2020 Peat Slide. Ionic/Afry swore no affidavit but in its exhibited s.160 report, very properly disclosed the following:

- It is hugely committed to the windfarm industry – offering "Owner's Engineer Services" directly in the delivery of projects through the pre-construction and construction phases. It has completed over 120 onshore wind projects in Ireland since 2004 comprising over 1000 individual wind turbines and so claims to be the leading provider of these services in Ireland.
- It has been involved in this project since 2019 in the following capacities:
  - Civil Design Sub-Consultant – including the design of existing and new roads, concrete foundations, crane hardstandings, and the certification of turbine foundation formation levels.
  - Peat Storage and Stability – Assessment and Design.
  - Drainage and Culverts Design.
  - The statutory safety role of Project Supervisor Design Process.
  - Site Engineer – Testing and Monitoring.
  - Project Management role – assisting in delivering all technical aspects of the project – other general project management tasks as may be required.
  - Management of the Civil Works Contract with Mid-Cork Electrical – including review of proposed designs, dealing with commercial and programme issues, and monitoring all key stages of the works.
  - Pre-Construction Phase – Site Investigations – AFRY assessed the work of others in this regard but also repeatedly walked the site before the design of each section of the works with a particular focus on higher risk areas. It decided on and bespoke additional peat stability testing. It prepared Design Risk Assessments for each individual element of work, including of Peat Management and, after the November 2020 Peat Slide, a Peat Slide Stabilisation Design Risk Assessment.
- Its role as designer is to assess the specific hazards and risks associated with the specific type of works to be designed and to establish and assess the data required to allow the associated design of the works to be appropriate for the location in question and to mitigate those risks to the level that is reasonably practicable. Inter alia, this involved deciding if risks, including civil engineering risks, needed mitigation. Typical actions would involve getting additional ground investigation to confirm designs, minimising excavations and using additional materials such as geogrids. Designs would incorporate such mitigation.
- MKO's CEMP and Fehily Timoney's Peat Stability Assessment were main relevant inputs to AFRY's pre-construction assessment of the Site.

166. AFRY's opinion[350] is that:

> *"To date the project has been delivered in a very professional manner by a client with a strong track record of successful project delivery and a team of contractors and consultants who are amongst the most competent and experienced in their respective fields. The peat slide of November 2020 was an unfortunate event which was caused by reasons outlined by the experts in this field and is not a reflection of the approach taken by the construction team or the standard of the works on site. In fact, the expeditious and very professional response to that event is a testament to the quality of*

[349] Sub nom AGEC Engineering Consultants.
[350] Report May 2023.

the team on site. Each main element of the works is well advanced and in our professional opinion, there is a robust plan in place to safely and successfully complete the works to the required standard of safety and quality, within the parameters of the existing planning permission and with a low level of risk of any further adverse event."

167. While AFRY's opinion is undoubtedly well-informed and may well be an opinion with which an independent expert would agree, it is an opinion on the performance of a team of which Afry itself was an important member. It is important to say that none of the foregoing implies fault or error or lack of competence on Afry's part – nor was that suggested. It is no reflection on Afry's integrity or sincerity in its effort to assist the court to say that one is left, nonetheless, with a certain unease that in legal proceedings an expert defending the works which caused or contributed to each peat slide is an expert who, at least in appreciable degree, designed and supervised them, including the Material Deviations. To appreciable degree, the back Afry is explicitly patting in its conclusion is its own. Similar observations can be made as to MKO and Fehily Timoney – again emphasising that no aspersion is cast on their expertise, performance or integrity, or, indeed, their appreciation of their duties to the court. And, as with Afry, not merely did they disclose their involvement on the project – it was the explicit basis of their evidence. They are also the experts tendered by Planree to assert that it is environmentally safe to do further works whereas Donegal CC, and its expert, are unconvinced that their completion is safe pending completion of the substitute consent process.

168. While expert evidence may be excluded for conflict of interest, that will not necessarily be the case – **Toth**[351] and **Factortame**.[352] Nor is the issue of admissibility of expert evidence decided as to conflict of interest on the objective bias test applicable to decisionmakers – for reasons including that the rigid application of such a test would pose insurmountable problems in litigation – **Factortame** and ***O'Leary***.[353] While, as has been observed, the ideal must bend somewhat to the practical,[354] it remains notable that no expert tendered by Planree was independent of the Windfarm project or of the aspects of the project which resulted in these proceedings.

169. As stated, Donegal CC made no application to exclude the expert evidence adduced for Planree, nor did it argue a conflict of interest point, nor did it argue that the evidence of the experts tendered by Planree should be discounted as to weight by reference to any conflict, nor were those experts cross-examined. However, as was said in **Toth**, "…. *it is for the court and not the parties to decide whether a conflict of interest is material or not. The court may take a different view from that of the parties as to whether an expert has a conflict of interest which might lead the court to reject the independence of his opinion…*"[355] That said, in light of the view I take as to the resolution of this motion, I do not consider that I need to resolve any issues of difference between the respective experts whose conflicting affidavits and affirmations are before me – Mr McCormack and Mr Arnold for Donegal CC and Mr Keville for Planree. Indeed, the considerations I have canvassed above as to the expert evidence and the absence of argument on them propel me to the view that

[351] Toth v Jarman [2006] EWCA Civ 1028, [2006] 4 All ER 1276.
[352] R (Factortame) v Secretary of State for Transport, Environment and the Regions, [2002] EWCA Civ 932, [2003] QB 381, [2002] 4 All ER 97, [2002] 3 WLR 1104.
[353] O'Leary v Mercy University Hospital [2019] 2 IR 478.
[354] University College Cork v ESB [2015] IEHC 598 §1186.
[355] Toth v Jarman [2006] EWCA Civ 1028, [2006] 4 All ER 1276 §112.

I should not do so. It seems to me that any such resolution is best left to the expert body most competent to resolve such disputes – the Board.

170. Notably however, the EPA investigated the November 2020 peat slippage, approved the remediation works and later peat stability assessments and in effect authorised resumption of the works. ARUP Consulting Engineers advised the EPA on the geotechnical and peat stability aspects of the investigations.[356] Accordingly and for the purposes of this judgment and without in any way trammelling the judgment of the Board to be exercised in due course, I think I should approach the matter on the basis that, as to specifically geotechnical and peat stability risks, the intended works do not pose concerning risk. However, this does not get Planree very far given the more general finding of the Board as expert competent authority that the Material Deviations require EIA Screening and AA in a Substitute Consent application.

171. As was said in **RAS Medical**,[357] it is incumbent on the party who bears the onus of proof of establishing contested matters in its favour to use appropriate procedural measures to ensure that the potentially conflicting evidence is challenged. So, as between the respective experts, I cannot prefer Planree's evidence as to environmental risk to that adduced for Donegal CC. And, as I have found, unauthorised development having been established, Planree bears the onus of demonstrating that the discretion to refuse relief should be exercised in its favour as to the completion of the Windfarm in advance of a decision by the Board in the Substitute Consent application. Insofar as the dispute as to the environmental risks of works proceeding is concerned, I hold that it has not discharged that onus.

DISCRETION – ANALYSIS & DECISION

REMEDIATION ORDER

172. While I have power under s.160 to make a remediation order – including for removal of the Windfarm and restoration of the site to its prior condition – I consider that I should do so only if there is no better alternative means of bringing the Site into compliance with planning and environmental law. I take that view for the following reasons:

(a) Donegal CC did not seek such an order at this point – though it reserved the right to do so after the Board has made its decision as to Substitute Consent.

(b) Such an order would be disproportionate and unfair to Planree – not least as it has, ultimately, permission to build and operate a windfarm at this location. The principle of such development is established in its favour. It has invested great time, effort and large sums of money in a project in which there is an appreciable public interest (even if the weight of that public interest does not require refusal of s.160 relief[358]). Planree should be allowed an opportunity to regularise its position – and the

[356] MKO s.160 Report 24 May 2023 §3.3 – Exhibit BK1 to Brian Keville's affidavit sworn 25 May 2023.
[357] RAS Medical v The Royal College of Surgeons in Ireland, [2019] 1 IR 63 §92.
[358] See below.

Board has determined, in the exercise of its jurisdiction in Substitute Consent, that it should be allowed that opportunity.

(c) This is clearly a highly delicate Site environmentally. There must be an appreciable risk that remediation works, unless very carefully and expertly scoped and supervised, could do as much, or even more, harm than good. I respectfully agree with the observation in **Tesco v Stateline**[359] wherein the Court of Appeal noted, in a s.160 context, its "*wide power*" and stated:

> *"[L]arge parts of the planning code derive from EU law requirements which the State has implemented by imposing obligations on planning authorities and others to carry out environmental assessments as an integral part of the process leading to the making of a planning decision. Those assessments must be based on stipulated information to be provided by a developer and, crucially, must include an opportunity for the public to participate and to make submissions on the proposed development before any decision is reached. A court exercising jurisdiction under s.160 is simply not in a position to carry out such an assessment or even to safely carry out a screening assessment in order to be satisfied that a full assessment is not required. Apart from lacking the necessary expertise, the essential element of public participation cannot be readily accommodated in litigation inter partes …"*

173. Further, I note that the Board in the Substitute Consent process will, as an expert competent authority, perform any necessary EIA Screening, EIA and/or AA and on completion of that process and informed by it, have power to impose conditions on any Substitute Consent or, on refusing Substitute Consent have power under s.177L PDA 2000 to impose measures remedial of the Material Deviations. That seems to be an obviously preferable route to environmental remediation to remediation by s.160 order where, as here, the choice between them presents.

174. On occasions, the Court is obliged to go down the s.160 route as to site remediation and it may yet prove necessary in the present case. But it is often fraught with difficulties such as those evident, for example, in **Brownfield –** the Whitestown Dump saga **–** to which the trojan efforts of Humphreys J have been devoted over many years and in which the 10th judgment was recently delivered.[360] Though I do not suggest that the materiality of the deviations in this case are of the same order as in that case, the general point is that the courts are ill-suited to manage complex remediation projects. If they must, they will, but it is generally preferable, if the option presents (as it does here), that the regularisation of the planning and environmental status of a Site be addressed by the statutory and expert body empowered to that end via, in this case, the Substitute Consent procedure.

175. In circumstances in which a Substitute Consent procedure is firmly in prospect and may either obviate the need for remediation or direct it, I am not, at least for now, prepared to make a remediation order.

[359] Tesco Ireland Limited v Stateline Transport Limited [2024] IECA 46.
[360] Brownfield Restoration Ireland Ltd v Wicklow County Council [2023] IEHC 712.

WHAT IS AT STAKE?

176. Given my views as to remediation of the Site, what is in essence at stake at this point in these proceedings is what is to happen pending the determination of the Substitute Consent application. I do not purport to assume, much less decide, what the outcome of that application may be and what is implications may be for the planning status of the Windfarm. The question now is whether Planree may finish out the Windfarm and operate it pending the determination of the Substitute Consent application or any earlier decision of the Board in that process in favour of continuation of the works.

THE SUBSTITUTE CONSENT APPLICATION

177. I am not moved by Planree's having made its application for leave to seek substitute consent on a "without prejudice" basis "*in order to adhere to DCC's expressed preference."* Nor, in my view sensibly, did Planree really argue the point. DCC's letter of 27 April 2022 did not express a "preference" as if between available options. Correctly or not, it expressed the clear view that Substitute Consent was the only means of regularising the planning status of the Windfarm. Planree's application for leave to seek Substitute Consent may or may not have prevented Planree from arguing that its deviations from planning permission were immaterial. But, as I observed earlier, such a position became untenable once the Board in granting leave, determined that EIA and AA of the Deviations were required and so Planree no longer contests that the alleged deviations are Material Deviations from the SID permission.[361] Indeed, by the Board's doing so, much of the premise of Planree's affidavits and reports in these proceedings – that the Deviations were minor and immaterial and could be taken as involving no significant environmental effects – was undermined.

178. As noted earlier, the application for leave to seek Substitute Consent was made, not for the entire development as-built, but "for" the 25 deviations listed by Planree. While, colloquially, this is sensible enough, it may be arguable that this approach did not, at least in terms, accord with the legal position. There is no challenge in these proceedings to the validity of the leave to seek Substitute Consent granted by the Board. Its validity may not be impugned in these proceedings. Nonetheless, the Board will wish to proceed in accordance with law in the Substitute Consent process.

[361] Planree's written submissions §15.

DISCRETIONARY CONSIDERATIONS

The Nature of the Breaches

179. The breaches here are by way of deviation from a project subjected to EIA and AA on a site of considerable environmental vulnerability – indeed, as events demonstrated, greater vulnerability than the EIA and AA had recognised (though that is not, per se, a criticism of the EIA and AA). Though not itself in a European site, the Site is comprised in large part of blanket bog which, at least in part, is active and so is a priority habitat.[362] Even the inactive bog is still a valuable habitat identified as such in Annex I of the Habitats Directive. The Site is cheek by jowl with a number of European sites with which it is closely hydrologically connected. Indeed, one need say little more than that the Board has decided that the Deviations are material because they require EIA Screening and AA. Exacerbating this aspect of the matter is the sheer number of Material Breaches. While, on the spectrum of severity of planning and environmental law breaches, they are not at the most severe end, all this puts them clearly on the wrong side of the mid-line.

Planree's Conduct

180. This factor bears reciting in full: "*The conduct of the infringer: his attitude to planning control and his engagement or lack thereof with that process*".

181. Planree did not submit that the Material Deviations in this case were accidental or inadvertent as to the commission of the works involved. Nor could it have. Not least, in a project costing €100m with access to and supervision by highly competent professional advisors, including engineers and surveyors, and absent direct evidence of accident or inadvertence, it cannot be inferred that development outside the "red line" of the permitted Site was inadvertent. The observation of McKechnie J in **Leen** applies: *"It would, I believe, be unthinkable that the company did not have available to it experts in every discipline relevant to the issues in this case. It must have consulted both lawyers and planners …"* Nor can it be inferred that the expansion of a pre-existing borrow pit to 2 hectares – 10 times its prior size – and its use as a peat cell was inadvertent. There was simply no permission for such works.[363] The truth no doubt lies in Planree's submission that these and the others were examples of the "*unauthorised developments*" described in its written submissions as "*typical*" of and "*uniformly the case for projects of this scale".* I do not infer mala fides or contumacious disobedience of planning law. It may be that, despite the resources available to Planree and despite its attitude that unauthorised development is routine, its appreciation of the materiality of the deviations came late. But, short of that, the submission necessarily implies that the deviations were deliberate. And, as the authorities make clear, acting in good faith is not, per se, a defence to an application for a s.160 order. For example, Planree cannot make Barranafaddock's claim in Krikke to having actively engaged with the planning authority as to its desire to make material changes.

[362] 2017 NIS §3.1.2.1.

[363] Compare Site Layout Plan 3 (Exhibit MMcD1 Tab 4) and the "Plot 1" in the map attached to the Notice of Motion.

182. Mr McDermott for the Council[364] raised fair questions, which he says the affidavits of Mr Keville and Mr Murnane had not addressed, to the effect that the MKO s.160 Report is lacking as to:

- The point at which the requirement for deviations from the permitted development arose.
- Whether MKO was given advance notice of the said deviations as part of its environmental monitoring regime and ECoW service for the project.
- The point at which MKO learnt of the deviations/unauthorised works.
- Any consideration given to securing prior consent from An Bord Pleanála for the deviations/ unauthorised works.
- Whether MKO advised against the deviations/unauthorised works.

183. No evidence of consequence is adduced by or for Planree as to the advice it received or its decision-making processes in and about deciding to effect the Deviations. If only as to the developments outside the red line and the unauthorised excavation of 2-hectare borrow pit and its use as a peat cell, it is difficult to imagine that on such an expertly supervised site there was no pause for thought before proceeding and no record made of those thoughts. We are not told what those thoughts and decisions were save as recounted above in the table of deviations. This observation is thrown into some relief by the observation in the MKO s.160 Report[365] that:

> *"There is established precedent in the context of the S.146B process for sometimes significant deviations within strategic wind farm development projects to be considered as non-material."*

Given MKO volunteered this observation, it provokes some comment:

- First, there is no evidence that Planree or its advisors considered or advised or decided, as to a process asserted to relate to non-material deviations, whether the very many deviations in this case should be validated via the s.146B[366] process.

- Second, it is difficult to know, as a matter of language, what sense to make of the suggestion that "significant" deviations can be simultaneously "non-material".

- Third, it is notable that s.146B allows:
  - the Board to determine, and the developer to ascertain, if a deviation is material.
  - at least the possibility of public participation.
  - consideration of EIA and Habitats law in making that determination.

184. If anything, MKO's observation as to s.146B is exacerbating rather than ameliorating. Planree failed, for no explained reason, to avail of the very statutory facility made available to meet its need to alter the terms of the strategic infrastructure development on which it was embarked – which facility was made available by statute to provide it with certainty as to the validity of such alterations. McKechnie J made an analogous comment of the respondent in **Leen**: *"If it was dissatisfied with either condition or felt that it could*

[364] Affidavit sworn 6 June 2023 §25 & 54.
[365] MKO s.160 Report 24 May 2023 §4.2.1. – Exhibit BK1 to Brian Keville's affidavit sworn 25 May 2023.
[366] Inserted (31.01.2007) by Planning and Development (Strategic Infrastructure) Act 2006 (27/2006), s.30, S.I. No. 684 of 2006.

not meet the requirements thereof, then it should have appealed to An Bord Pleanála or sought a new planning permission or otherwise should have taken steps to avoid its resulting non-compliance." If, as I suspect, delay in the Board is a problem and part of the explanation, while I have some sympathy for Planree, the Court must, nonetheless, uphold the integrity of the planning and environmental law system.

185. In that light and in my view, that material (as opposed to immaterial) deviations from the SID Permission were effected, as Planree asserts, for practical or pragmatic reasons or for better environmental protection is not weighty. It is the competent authority in EIA and AA, not the developer, who, having consulted the public and other consultees, decides what is environmentally desirable or acceptable.

186. As Simons J said in **Krikke**[367] *"The case law indicates that the rationale for allowing some flexibility in planning permissions is to address unexpected contingencies during the course of the carrying out of the development."* As to "*unexpected contingencies*" Planree's bland submission that the breaches were a "*prudent reaction to actual on-site sub-surface conditions rather than undertaken in ease or for the convenience of the Respondent*" is unconvincing. The evidence does not much improve on that bland assertion. As the table of deviations shows, many deviations were not explained in any real way. Certainly, straightening the hairpin bend (the presence of which was always plain to see – even before the 2017 SID planning application – and by no stretch could it be described as an unexpected contingency) was for Planree's convenience in easing access to the Site by larger loads. If that is explained, as I think it is, by the need to deliver larger rotors on foot of the s.146B decision of June 2019, the straightening of the hairpin could have prudently been included in the application for that decision or by way of an amending planning permission application at that time – a point made by Donegal CC.[368] And as for "*prudent reaction*" as explaining other Material Deviations, it seems to me that prudence properly should have taken the form of s.146B applications. Indeed that is what Mr Arnold affirms.[369] The submissions that the Material Deviations represented better environmental decisions than those permitted ignores, as I have said, that where they involve material deviation from the planning permission it is for the competent authority, not the developer unilaterally, to decide what are better environmental decisions.

187. While I do not find contumacious disregard for planning laws and am conscious of the approbation of the EPA and Donegal CC of the manner in which Planree remediated the November 2020 peat spill and also of its co-operation with the Council's investigation of the Deviations, I do not see this factor as, in any appreciable degree, assisting Planree in persuading me to exercise my discretion in its favour. Indeed, that approbation and co-operation are, perhaps a little illogically, a factor in my not expressing a more critical view of Planree's conduct prior to the November 2020 Peat Slide.

[367] Krikke v Barranafaddock Sustainability Electricity Ltd [2019] IEHC 825.
[368] Affidavit of Martin McDermott sworn 6 June 2023 §23 & 47.
[369] Affirmation of Richard Arnold 8 June 2023 §8.4.

Public Interest – Integrity of the Systems of Planning And Environmental Law.

188. I consider the integrity issue after my consideration of the nature of the breaches and Planree's conduct because my views in those regards feed into my view on integrity of the system. As Butler J said in **Stateline**: *"… the factors to be considered by a court in exercising its discretion under s.160 are not isolated or stand-alone factors but will inevitably interact with each other …"*

189. I have already set out above the law as I understand it in this regard and have already to some degree sought to apply it to the circumstance of this case. I repeat that this consideration is generally, and I consider in this case, "*first in the queue*" of considerations affecting the exercise of the discretion and proceeds from both domestic and European law – including as to the importance of dissuasive effect and the enforcement of planning and environmental law.

190. In Krikke, Simons J held that the principal factor weighing in favour of the grant of relief was that the project was "*subject to the EIA Directive. The EIA Directive obliges a Member State to provide effective, proportionate and dissuasive penalties for breaches of national legislation. The importance of ensuring compliance with the EIA Directive has very recently been emphasised by the judgment of the CJEU in Case C-261/18, Commission v. Ireland (Derrybrien).*" That weight is increased in this case by the Board's identification of the need also for AA.

191. In my view, the issue of the integrity of the planning and environmental law systems weighs heaviest in this case of all the factors in play and does so in favour of the grant of s.160 relief. It is particularly important that, in large infrastructure projects in environmentally sensitive locations, the commitments made by and imposed on developers in planning, EIA and AA processes are kept. Prominent amongst those commitments is that, allowing for proper flexibility as to minor deviations, the development shall, as the conditions of a planning permission all but invariably require and as Condition 1 did in this case, and as is in any event required by the very logic of a permission, be carried out and completed in accordance with the plans and particulars lodged with the application (save as varied by planning condition) and with the environmental commitments deriving from EIA and AA. That is important not least as, in appreciable degree, the system operates on trust that developer will abide by those commitments. The planning authority and the public cannot maintain a constant invigilating presence on site. For example and notably, the many Material Deviations in this case appear to have come to the Council's attention only by reason of the unhappy coincidence of the November 2020 Peat Slide which prompted the Council to a more general investigation of the project.

192. As stated earlier, substantial enterprises are expected to respect the planning permissions pursuant to which they develop windfarms. Though I note the Board's view that the errors were reasonable, I confess the view that the fact that a Substitute Consent application is required as to no less than 25 Material Deviations is inherently unimpressive. In discussing at trial with counsel for Planree the issue of the integrity of the process, the following exchange occurred:

- Judge The problem with all of that is you haven't respected the integrity of the process.

- Counsel I accept that, Judge. And we're sorry about that. But we are exactly where we are. And we can't –
- Judge I know but "we are where we are" is the kind of reasoning that actually doesn't respect the integrity of the process. In other words, the Court is presented with a fait accompli.

I remain of that view.[370]

193. In similar vein, in discussing at trial[371] with counsel for Planree the issue of the integrity of the process, it was observed that the hairpin bend was "straightened" by way of Material Deviation, including by way of some development outside the red line, to facilitate the delivery of larger turbines to the Site than had been envisaged in the SID permission – which larger turbines had been later permitted pursuant to s.146A PDA 2000. Unless a s.160 order is made, all turbine deliveries will use this straightened and unauthorised route and it seems that the hairpin might prevent such deliveries. It remains to be seen whether the straightened and unauthorised route will receive Substitute Consent. I must assume that either grant or refusal is possible. If I refuse a s.160 order and the larger turbines are delivered before any decision by the Board, and in due course Substitute Consent is refused for that straightened and unauthorised route, Planree will have had a very considerable benefit from unauthorised development – indeed, the very benefit for which the Material Deviation in question was intended. I provisionally expressed the view at trial, which I now affirm, that such an outcome would not be respectful of the integrity of the planning process. Counsel for Planree did not disagree.

194. He did argue that such an effect would be disproportionate as it would stymie the development – but I have no evidence that Planree could not revert to turbines of a configuration envisaged in 2018 as capable of delivery by the hairpin route or otherwise arrange delivery of the larger turbines – though I do not doubt, at considerable cost. It must also be remembered that such a scenario is premised on the Board's refusal, presumptively for good reason, of Substitute Consent for the straightened route. And, of course, if the Board grants Substitute Consent or allows delivery in exercise of its powers under s.177J, the problem will not arise. All in all, I cannot see that the consideration identified by Planree in this regard should dissuade me from properly vindicating by my order, the integrity of the planning and environmental law codes.

195. Finally, I should say that I have considered the possibility that **Kilvinane Windfarm**[372] and **Krikke** (in the High Court) differ from this case in that, in both, operation of the windfarm was injuncted as to unauthorised longer rotors and in Kilvinane Windfarm the turbines were in the wrong place. In a sense it could be said that operation of the windfarm in those cases would have allowed the developer to reap the financial reward of directly that element of the development which was unauthorised. In the present case, the precise works remaining and intended, primarily to erect the turbines, are as permitted by the SID permission. In a sense the operation of turbines thus erected is at some remove from the substance of the Material Deviations at issue. However, I consider that too narrow a view. In my view and as I have found, the entire development is at present unauthorised – as would be the Windfarm if completed and operated. I

[370] Day 2 p201.
[371] Day 3 p73 et seq.
[372] Bailey v Kilvinane Windfarm [2016] IECA 92.

have addressed the issue of the straightened hairpin. Further, the unauthorised borrow pits and peat cells no doubt facilitated the development generally.

196. For these reasons, the public interest in integrity of the planning and environmental law system weighs heavily to the effect that the Material Deviations should be regularised – if that is the outcome of the Substitute Consent process – before Planree can be permitted to reap the benefit of them.

Public Interest - Wind Energy Projects

197. Planree also invokes the significance of onshore windfarms to the delivery of renewable energy generation and the reduction of GHG[373] emissions by fossil-fuel generation of electricity as part of Ireland's Climate Change Strategy. That significance is so well-rehearsed as not to require further detailed rehearsal here.[374] I entirely accept the general proposition that national policy strongly supports development of wind energy projects. I also accept that, in a general sense, the Windfarm has a place in that policy.

198. However, Planree's invocation of that policy as it relates to the Windfarm is entirely general. Planree says[375] that the Windfarm would be "*in the top five wind farms by generating capacity in the country, out of the 309 wind farms connected to the Irish electricity grid as of 1st March 2022*." But clearly, as a matter of maths, that does not quantify the Windfarm's contribution as a proportion of national renewable energy targets – mathematically, one could easily be in the top 5 of 300+ windfarms and yet not contribute a nationally significant proportion of generation capacity. Indeed, though it is undoubtedly an equally crude metric[376] and the number may have increased since 2017, the proposed 19-turbine Windfarm can be seen in the context of the 310 existing and permitted turbines identified by Planree in its planning application as lying within a 20km radius of the Site. The renewable energy targets are national targets but it is not necessary to count turbines nationally to put the Windfarm in the necessary perspective.

199. As Hogan J said in **Kilvinane Windfarm**[377]: *"…there is a public interest in ensuring that alternative, non-carbon based renewable energy sources are brought to the market, but this cannot give this wind farm – or, for that matter, any other wind farm – a licence to breach the planning laws."* And it bears observing that the laws as to EIA and AA – breach of which is at issue here – require comprehensive assessments which will seek to incorporate climate change considerations in wider environmental considerations. I think this is, as in **Stateline**, a case in which the public interest claimed to weigh against s.160 relief is "*by some margin below the degree of urgency and importance that would warrant, without more, overriding the public interest in the integrity of the planning system."*[378] Notably, in **Krikke**, Simons J considered that the overall impact of an

[373] GreenHouse Gas.
[374] Though no doubt somewhat out of date the general thrust can be found at §2.3 of the 2017 EIAR.
[375] Application of leave to Seek Substitute Consent 8 July 2022 §3.7
[376] Given, not least, the widely differing power outputs of turbines and I presume that the proposed Meenbog turbines will have a power output greater than many of these others.
[377] Bailey v Kilvinane Windfarm [2016] IECA 92
[378] §43.

order restraining the operation of a 12-turbine project would be minimal in the national context. The same can be said here.

200. I do not see that the undoubted public interest in wind energy, as it specifically applies to the Windfarm and as it relates to the period pending any delayed grant of Substitute Consent, weighs much at all in favour of the exercise of a discretion to be sparingly exercised and as against the demands of the integrity of the systems of planning and environmental law. While any prospect of Planree's insolvency (of which there is little evidence[379]) and the undoubted prospect of financial loss in that interim, are relevant to the issue of hardship and proportionality, they are not relevant, per se, to this public interest issue. I have no weighty evidence that the Windfarm will not, by reason of any insolvency of Planree, proceed if it gets Substitute Consent. Even if Planree became insolvent in the interim, the public interest in renewable energy generation is that the Windfarm operate – not that Planree operate it. McKechnie J made an analogous remark in refusing relief in **Leen**.[380]

201. While the observation is not essential to the view I take for the reasons I have just given, nonetheless it is helpful to put such "public interest" arguments against the grant of s.160 relief in the perspective of an observation by Butler J in **Stateline** as to an issue which arose quite centrally in that case:

> *"It may be hypothetically possible to envisage a claim of public interest of such great weight and moment that it could, of itself, justify the exercise of discretion in favour of the developer of an unauthorised development even where all other considerations weigh against that developer. In reality, the circumstances in which this could arise will necessarily be so extremely rare that it is difficult to speculate as to what they might be."*[381]

Attitude of the Planning Authority

202. As Simons J observed in **Krikke**, *"The fact that the local planning authority has been moved to take enforcement action is a factor which points in favour of granting relief."* The decision of the same judge in **Stateline** was upheld (as to a stay on a s.160 order) where he had *"had regard to the fact that the planning authority had "raised significant concerns in respect of the unauthorised development" and regarded that as a matter to which the court should afford weight."* While it may seem odd that merely the attitude of a litigant can weigh in the exercise of discretion,

- it would be illogical that the attitude of the planning authority would weigh where someone else brings s.160 proceedings but not where it does so itself and
- the planning authority acts in bringing s.160 proceedings not in pursuit of any private interest but in the

[379] See below.
[380] §39. "The consequences for the respondent as a company, if this airport should have to close as a result of a court order, are not, in my judgment, the determining issue. Any such consequences would be entirely its own fault. However, what is determinative is the devastating effect which any such closure would have on the multiplicity of bodies, entities and persons who would most definitely suffer."
[381] Tesco Ireland v Stateline Transport [2024] IECA 46 §42. Stateline argued for a lengthy stay on a s.160 order requiring cesser of use of an unauthorised shipping container storage facility on the basis that the shortage of such facilities rendered this one important to the public interest in the efficient and effective operations of Dublin Port.

public interest and, in particular, as the statutory guardian of proper planning and sustainable development in its functional area.

203. As the applicant for s.160 relief, the general attitude of Donegal CC here is obvious. More specifically,

- It is unwilling to permit windfarm developers to "*depart at will from planning permissions grounded on EIA and AA*" and takes that view "*well aware of the renewable wind energy generation potential of this windfarm project in the context of local and national renewable energy targets*".[382] In my view that position, in its own terms, cannot be legitimately criticised.
- The strength of that attitude is apparent in its refusal of the open offer of a limited order made by Planree and its pressing for a general order prohibiting further development pending a decision on the substitute consent application.[383]
- Its attitude is also informed by its detailed knowledge of and interaction with this project.

204. It is proper that I give the attitude of Donegal CC appreciable weight in favour of making a s.160 order. But as this judgment indicates, that weight is not, of itself, decisive.

Planree's Circumstances, Hardship and Consequences of the Order – Alleged Prospect of Insolvency & Lesser Financial Detriment

205. Planree says, and though it gives no details it is not disputed, that it has invested "*in excess of €100 million (approximately)*"[384] in the Windfarm project. In April 2013,[385] Planree predicted that if it were prevented indefinitely from completing the Windfarm, it "*will rapidly become insolvent, that investment lost and the future of the Wind Farm itself placed in very considerable jeopardy*." And that event, Planree says,

> *"would also entail potentially significant environmental consequences as the Planning Permission requires a robust series of ongoing monitoring, maintenance and (as required) remedial works on the site of the proposed wind farm, none of which will be carried out if the Respondents become insolvent and/or it becomes impossible to develop the permitted Wind Farm development in accordance with the Planning Permission."*

206. Planree repeats its prediction of insolvency, saying that the Substitute Consent process "*may take several years to complete*" and that if granted "*substitute consent will be granted in respect of the as built elements of the Wind Farm only. The process will not be concerned with consenting or assessing the development that is yet to be completed. This development will be carried out pursuant to the existing Planning Permission*."[386]

[382] Affidavit of Martin McDermott sworn 6 June 2023 §16.
[383] See below.
[384] Affidavit of Ml Murnane sworn 14 April 2023. The phrase does not strictly make sense but the gist is clear.
[385] Affidavit of Ml Murnane sworn 14 April 2023.
[386] Affidavit of Ml Murnane sworn 26 May 2023.

207. The assertion of a prospect of insolvency is not at all inherently incredible. Nonetheless, it is assertion only and vague at that. It is not indicated which of the Respondents is likely to go into insolvency – though the invocation of the quantum of investment in the project allows inference that it is Planree. There is no evidence of Planree's assets, indebtedness, the identity if its creditors, or of the timescale on which, or circumstances in which, its indebtedness may fall due for payment such that insolvency may ensue. I do not instance these issues as necessary proofs of a prospect of insolvency but as indications of the types of evidence which one might expect in verification of that prospect. I appreciate that to some degree detail might, from Planree's point of view, be financially counterproductive or tend to a self-fulfilling prophecy of insolvency. However something more than mere assertion is needed. It is a year since Mr Murnane predicted that Planree *"will rapidly become insolvent*" and it seems that his prediction has, fortunately, not yet been borne out – at least as to its rapidity. None of this is to suggest that Mr Murnane's fears are unrealistic. But neither are they substantiated beyond mere assertion.

208. There is some analogy here with the law as to undertakings in damages in cases of interlocutory injunctions – not least as the issue is one of prospective damage to the respondent by reason of an injunction which will in reality be affected by any grant of substitute consent. In that context, I note **Dunne**.[387] Mr Dunne sought an interlocutory injunction to prevent the council from removing from its lands, in constructing the southernmost section of the M50 ring motorway around Dublin, parts of a national monument[388] – the remains of Carrickmines Castle – in the absence, the Plaintiffs alleged, of the appropriate consent[389] of the Minister for the Environment and Local Government. The council said an injunction would disproportionately interfere, with consequent expense and prejudice, with one of the largest and most important infrastructural schemes in the history of the State – contracted at a tender price of €144,000,000. It said that weekly disruption and delay costs would accrue at €50,000 to €100,000. In granting the injunction, Hardiman J. said;

> *"These are important and weighty matters, very proper to be considered by the court in an application of this kind. But in order to be decisive in terms of the balance of convenience on this application, they must be specifically related to the relief actually sought. I do not think that the defendant's averments do this with sufficient precision. It is stated that delay in the motorway project would be expensive and, more generally, prejudicial, and there is no doubt that this is so. But there is no statement as to the precise way in which this claimed injunction and the proceedings commenced will delay the motorway. Nor has the defendant advanced any precise legal or factual basis for the losses it says will be incurred should an injunction be granted. The contract with the contractors has not been produced nor any basis of calculation or estimation suggested. The mention of the huge sum of 144,000,000 as the contract price of the South Eastern motorway is, no doubt, properly calculated to make any court hesitate on the threshold of interlocutory relief. But neither this figure nor the much smaller, still very significant, weekly figure quoted above have been related in any way to the actual scope of the proposed injunction. Specifically, there is no averment*

[387] Dunne v Dun Laoghaire Rathdown County Council [2003] 1 I.R. 567.
[388] Which status was assumed for purposes of the judgment.
[389] Under Section 14 of the National Monuments Act 1930 as amended.

> *that it would cause total stoppage of works, that there is no other work capable of being done by the contractor or that, by virtue of any clause in the contract, the level of restriction constituted by the claimed injunction will trigger any particular claim by the contractor. If any of these things were features of the case, Mr. O'Hare is certainly in a position to know it. In my view, it is not sufficient, either from the point of view of establishing a balance of convenience or attacking the undertaking, simply to mention huge sums of money without relating them either to the specific relief sought or to the specific liability for which the plaintiffs, by virtue of their undertaking, may become responsible."*

And later:

> *"The question of balance of convenience is a most important one in considering a large civil engineering project, but the purported damage and expense must, in my view, be established and not simply invoked. I have already referred to the freestanding mention of the huge sum of 144,000,000, in the affidavit of Mr. O'Hare. This sum is in no way related to the injunction claimed and Mr. O'Hare does not suggest that it is. The mere mention of an enormous sum of money as the total cost of the scheme does not in any way constitute evidence as to the balance of convenience of this particular case. No doubt there will be inconvenience rising from the grant of an injunction but the defendant has not adduced evidence from which one could rationally assess whether this will be of a trivial, or of a near catastrophic nature. If there is any question of the latter, one would expect that detailed evidence of that proposition would be available."*

209. There are, of course, real differences between this case and Dunne. The injunction sought here is not, strictly, interlocutory (though there is a similarity in that, if it is granted, the event of substitute consent may overtake it and I clearly have jurisdiction to grant liberty to apply to vary or discharge any order I may make; and in that there is some analogy between the prospect of Substitute Consent and the question of Ministerial consent in **Dunne**). Nor is the balance of convenience at issue here – though proportionality is. Nor is there any doubt but that an injunction in this case would stop the works in question. But the case does assist to the effect that proof of a weighty prospect of dire financial consequences requires more than simply the "*freestanding mention of the huge sum*" – "*The mere mention of an enormous sum of money"* – invested in the project. Indeed, for all Mr Murnane tells us, it may be that the funders, having invested such an enormous sum, will be more likely to await determination of the Substitute Consent application than to collapse the project in what may be a forlorn hope of recovery from its debris. They may be optimistic of the outcome of the Substitute Consent application and consider the cost of awaiting it unwelcome but bearable. Of course, on the other hand, there may in fact be a weighty risk of insolvency. I do not know which is the case. Hardiman J, in summary, emphasises the importance of evidence of such risks. I can only act on the evidence before me, which does not demonstrate that risk.

210. In **Balz**,[390] in which the investment in the windfarm was said to have been €75m, the Supreme Court, nonetheless noted the absence of "*satisfactory evidence*" "*or indeed any, evidence*" of the impact on the developer of being unable to operate the windfarm pending a Substitute Consent decision – of the damage

[390] Balz v ABP [2020] IESC 22, [2020] 5 JIC 050.

that the developer might suffer if it could not do so. The facts of that case were complex and materially different to the present case, but it is notable that the court was willing to stay certiorari only on receipt of an undertaking by the developer not to operate the windfarm pending the Board's decision on the application for Substitute Consent[391] – which was at least "*some time*" away.[392]

211. I should say, however that my analysis above relates to the risk of insolvency pending a decision in the Substitute Consent process. Different considerations would arise if the prospects of authorising the Windfarm evaporate for any reason. In that circumstance inference of a prospect of insolvency, or put another way, loss of much if not all of the €100m invested, would be possible. But the prospect of regularising the planning status of Windfarm would also have changed considerably.

212. As between being permitted to complete the Windfarm and start its operation prior to a decision on the Substitute Consent application on the one hand and being forced to await that decision before completing the Windfarm on the other, I entirely accept, that short of insolvency, a s.160 order will have significant economic consequences for Planree. That can be safely inferred. But in **Kilvinane Windfarm**,[393] Hogan J held that such significant economic consequences.

> *"…… cannot fundamentally cut across the right of the court to ensure that the planning laws are upheld. As Gannon J. stated in Dublin County Council v. Sellwood Quarries Ltd. [1981] I.L.R.M. 23, "An order of the nature sought would have very damaging consequences for the respondent and for those in their employment and for those to whom they are bound in contracts" Nevertheless, I cannot decline to make some form of restraining order unless some alternative course can be devised consistent with the proper implementation of the requirements of the Planning Acts on the part of both parties"….. "*

213. In **Doorley v Corrigan** Humphreys J, admittedly in a general observation, clearly considered that it would be unusual for commercial hardship to be decisive as to the exercise of discretion in a s.160 application. He said:

> *"In some cases that turn on their special facts, such as the High Court judgment in Ferry,[394] hardship in terms of loss of employment was viewed as a factor, but at the general level to place strong weight on such factors over-emphasises the impact on the polluter or environmental wrongdoer over the impact on the environment."*

[391] The judgment at §51 refers to the "decision of the Board". That could refer to the decision on the then-pending leave application as opposed to the decision on the application for substitute consent. However, I am satisfied, on reading the judgment as a whole, that the undertaking was required pending the decision on the application for substitute consent. See §§33 & 34. And the logic of the stay of certiorari was to avoid any period of unauthorized development in the entire period pending the grant of substitute consent. The court also referred (§51) to the "substantial benefit" the stay would confer on Mr Balz, whose fear was of noise nuisance. That remark is inconsistent with an undertaking not to operate the windfarm pending the leave decision which was imminent at the date of the judgment.
[392] §10.
[393] Bailey v Kilvinane Windfarm [2016] IECA 92.
[394] Ferry v Caulderbanks [2021] IECA 345, [2021] 12 JIC 2105.

214. Of course, if no s.160 order were made, Planree would continue to develop at its own risk that Substitute Consent may be refused. That is a risk it seems willing to take but the risk of allowing it to proceed is not a risk to it alone.

Do the Remaining Works Affect or Exacerbate any Environmental Risk Posed by The Deviations?

215. There is no suggestion that, if the remaining development works to finish out the Windfarm are done, the actual operation of the Windfarm thereafter – in the sense of rotors turning and electricity being generated – would represent an environmental risk unassessed in EIA and AA.

216. As stated earlier, Planree says about "90%" of the groundworks are complete.[395] The main outstanding element of the works is the installation of the turbines and rotors – which are in storage in nearby Killybegs. MKO says that:

> *"The works that remain to be completed on the permitted development site are generally minor in nature, and form part of the project that was permitted by and subject to Environmental Impact Assessment and Appropriate Assessment by An Bord Pleanála.*
>
> *All remaining works have been assessed in various peat stability and geotechnical reports that were prepared for, submitted to and relied upon by the EPA in its determination that there was no further impediment to works recommencing on site from a peat slide hazard or geotechnical perspective."*

217. Donegal disputes that the remaining works are "minor" and terms them "significant".[396] The parties dispute whether those remaining works represent an environmental risk unassessed in EIA and AA.

- Planree and its experts say no.[397] I note in particular the EPA's approval – one infers, on ARUP's advice – of its recommencing works, being satisfied of the issue of peat stability on the Site.

- The Council says yes – not least as the EIA and AA and the EPA did not consider the receiving environment created by the Deviations – into which receiving environment the remaining development works to finish out the Windfarm would be introduced. And identification and assessment of that receiving environment created by the Deviations awaits the EIA Screening (and possible EIA) and AA the need for which is the basis on which leave to seek Substitute Consent has been granted. By way of example of doubt as to incorporation of mitigation measures in the Deviations it also says that there is no evidence of any pre-construction designs or surface water/drainage mitigation measures serving the

[395] Details of works done and outstanding are set out in §4 of Planree's Planning report by MKO dated 8 July 2022 which accompanies its application dated 8 July 2022 for leave to apply for substitute consent. They include the wind farm access roads, electricity substation, turbine hardstands, turbine bases, peat repositories and borrow pit areas.
[396] Affidavit of Martin McCormack 6 June 2023 §69.
[397] E.g. MKO s.160 report 25 May 2023 §5.4.

unauthorised 2ha peat cell near Turbine 15.[398]

- Mr Keville for Planree disputes such assertions – asserting that the mitigation is present and shown on the as-built drawings.[399]

218. It seems to me fair to say that Planree's experts simply say that the remaining works are all works approved by the SID Permission and their effects have been assessed in the EIA and AA which informed that permission.[400] But they do not address the fact that by reason of the Material Deviations, and indeed, the various peat slides, the receiving environment is now not that which was understood to exist when that EIA and AA were done. Of course, it may be that those changes to the receiving environment will make no difference to the assessment of the effects of the remaining works – but that is one of the issues to be considered in EIA Screening and AA in the Substitute Consent process.

219. In any event, I am conscious that, as recorded above in **Stateline**,[401] the Court of Appeal considered that a Court, in s.160 proceedings, is not in a position to conduct EIA or AA or even screening for EIA or AA. Courts lack that expertise and can't readily accommodate public participation in EIA or AA. While I do not rule out a Court's having to do so nonetheless,[402] in my view and as to the exercise of my discretion, it is preferable that, ceteris paribus, these issues – including the disputes between the experts – be resolved by the Board.

220. That is especially so as, by s.177J, the Board has jurisdiction, in effect, to permit or prohibit, pending its decision on the Substitute Consent application, Planree's further activity on site having regard to the risk or otherwise of environmental effects, including on the integrity of European Sites and it is the state organ best placed by its expertise to make a decision in that regard. As O'Donnell CJ said in **Krikke**[403] the Board, considering exercising its s.177J jurisdiction:

> *"will normally have available to it additional information, such as a remedial environmental impact statement, which may assist it in determining whether the continued activity, or any part of it, is likely to cause significant adverse effects on the environment. On the other hand, by contrast, a judge who has concluded that the development is not being carried out in accordance with planning permission is concerned as to whether to restrain the development immediately or to give time for an application for retention or substitute consent to be processed, but has little insight as to whether that development is likely to secure retention or substitute consent."*

[398] Affidavit of Martin McCormack 6 June 2023 §57. Affirmation of Richard Arnold 8 June 2023 §7.6.
[399] Affidavit of Brian Keville 19 June 2023 §24.
[400] E.g. MKO s.160 report 25 May 2023 §5.4.
[401] Tesco Ireland Limited v Stateline Transport Limited [2024] IECA 46.
[402] See Simons J in Coastal Concern Alliance v Minister For Housing [2024] IEHC 139 as to the Court's remedial obligations in EIA and AA.
[403] Krikke v Barranafaddock Sustainability Electricity Ltd, [2020] IESC 42, [2020] 7 JIC 1702.

Proportionality & the Precautionary Principle

221. Proportionality may often not require distinct analysis as it will have been a feature of the consideration and counterweighing of the various identified factors already considered. However, it may provide a useful final "stand back" check at the end of the process. Given unauthorised development, disproportion would need to be very convincing before all relief should be refused in the exercise of a sparingly exercised discretion. Proportionality may have a greater role to play in tailoring the relief to the particular circumstances of the case. I do not consider that proportionality considerations beyond the various identified factors already considered require refusal of relief in this case. As to the form of order I consider that the liberty to apply for which I will provide is proportionate to the circumstances of the case.

222. In my view, the approach I have described, to both the expert evidence and to making a s.160 order with the possibility of review in light of events in the Substitute Consent process, is consistent also with the precautionary principle which is a foundation of the high level of environmental protection which is the aim of EU environmental law - Article 191 TFEU and **Waddenzee**[404]) and EIA and AA law in particular.[405] In **Bayer**[406] the General Court said that:

- The precautionary principle is a general principle of EU law requiring the authorities in question, in the particular context of the exercise of the powers conferred on them by the relevant rules, to take appropriate measures to prevent specific potential risks to the environment,

- That is done by giving precedence to the requirements related to the protection of those interests over economic interests.

- The protection of the environment takes precedence over economic considerations, with the result that it may justify adverse economic consequences, even those which are substantial.

- Where there is scientific uncertainty as to the existence or extent of risks to the environment, the precautionary principle allows the institutions to take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.

223. In circumstances in which,

- given the expert evidence of Donegal CC and, in particular, the Board's decision that EIA Screening and AA of the Material Deviations are required, it cannot be said that the environmental risks are not apparent – even if they are not fully apparent,

- it cannot be said that the risks postulated by Donegal CC are merely theoretical or hypothetical,

[404] Case C-127/02, Judgment of 7 September 2004 §44.
[405] Case C-236/01 Monsanto [2003] ECR I-8166, Case C-127/02 Waddenzee [2004] ECR I-7448, Sliabh Luachra Against Ballydesmond Windfarm Committee v An Bord Pleanála [2019] IEHC 888.
[406] Cases T-429/13 and T-451/13, Bayer CropScience AG, et al v European Commission - Judgment of the General Court, 17 May 2018.

- the premise of the precautionary principle is that action may be required before the reality and seriousness of environmental risks become fully apparent,

- though it may have to assess such risks in particular circumstances, the Court is not expert in the assessment of such risks,

- the reality and seriousness of the environmental risks in this case will become fully apparent, within the limits of scientific means, in the Substitute Consent process via remedial EIA Screening and Remedial AA,

- the reality and seriousness of the environmental risks in this case will become adequately apparent, within the limits of scientific means, to the expert Board in the Substitute Consent process in relatively short order to enable it to exercise its discretion under s.177J to halt or permit ongoing works,

it appears to me proportionate and in accordance with the precautionary principle to restrain further works on the Windfarm – but granting general liberty to apply to vary that order as circumstances – legal or factual – change.

A Limited Order?

224. On the last day of the trial, Planree openly invited me to make an order prohibiting it only from erecting 8 specified turbines and certain of the outstanding civil works pending decision of A Substitute Consent application which it undertook to make. That would, Planree said, result in its using only 1 of the 7 deviations SLR identified as high risk and 2 of the 8 it identified as medium risk. The Council rejected that offer – expressing the view that all development should cease pending the Substitute Consent decision. It disputed that at least some of the turbines Planree sought to erect could be erected safely from an environmental point of view.

225. While not insubstantial, and a via media can be attractive in terms of proportionality, in my view this invitation ultimately suffers from the same deficiency as that just canvassed. I am ill-equipped and the Board is best equipped – of its expertise and by s.177J – to exercise an environmental judgment on the acceptability or otherwise of allowing the erection of specific turbines having regard to their particular local circumstances. As Simons J said in Krikke, albeit in a somewhat different context: *"The case law is all in one direction, and it is to the effect that matters of planning judgment are best left to the local planning authorities and An Bord Pleanála."* It might be that in another case a court would take up a similar offer. But where, as here and from an environmental point of view, the manifestly substantively better option of deferral to the Board's judgment is reliably to hand then, ceteris paribus, I should avail of it. No doubt Planree will put that, or a similar offer, to the Board for consideration pursuant to s.177J.

THE BOARD'S EXERCISE OF ITS S.177J JURISDICTION & LIBERTY TO APPLY

226. I envisage that, with appropriate celerity, the Board will make its s.177J decision in due course. Though it may be unnecessary, I think I should say for the avoidance of doubt that the Board, in its exercise of its s.177J discretion, need be in no way affected by my present exercise of my s.160 discretion nor by any assumptions about what I of a colleague may or may not do if the matter returns to court after its s.177J decision. My purpose is to ensure that the Board, not I, decides the issues properly arising under s.177J.

227. I will grant liberty to both parties to apply after the Board has made its s.177J decision to vary or discharge the order I now make. However, I should make clear that I make no assumptions as to what the Board's decision will be or as to what order I might make thereafter. By that time, a s.177J decision will have been made in terms as yet unpredictable and the evidence before me in such an application is likely to differ appreciably from that before me now.

CONCLUSION – DISCRETION & ORDERS

228. For the reasons set out above, I will make an order pursuant to s.160 PDA 2000 prohibiting further development of the Windfarm on the Site pending further order of the court. I will give liberty to apply to vary or discharge the order. While I will not limit the circumstances in which, or purposes for which, such liberty might be exercised, it may be that such an application might be made in the aftermath of a s.177J decision in Planree's favour or of a decision granting or refusing Substitute Consent. It might, for example, be for a discharge of the order or, conversely, be for an order remediating the Site. I place no limitation on the possibility of variation of the Order. I will list the matter on 15 April 2024 for mention only with a view to making orders. I request the parties to liaise as to the form of such orders. I am provisionally of the view that, as it has succeeded, Donegal CC should have its costs.

David Holland
10/4/24