[2024] IEHC 610

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2023.0000949]

IN THE MATTER OF SECTIONS 21B AND 3 OF THE FORESHORE ACT 1933, AS AMENDED AND IN THE MATTER OF SECTION 50B OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN

IVAN TOOLE AND GOLDEN VENTURE FISHING LIMITED

APPLICANTS

AND

THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE

RESPONDENT

AND

CODLING WIND PARK LIMITED AND THE MARITIME AREA REGULATORY AUTHORITY (BY ORDER)

NOTICE PARTIES

(II)

JUDGMENT of Humphreys J. delivered on Friday the 1st day of November 2024

1. The decision under challenge is a foreshore licence authorising temporary environmental surveying – not permanent development – in the service of a proposed offshore wind farm. The permission application states that "[w]ith the potential to generate enough locally produced renewable electricity to power the equivalent of up to 1.2 million homes annually, Codling Wind Park will support the delivery of Ireland's Climate Action Plan targets. It will also help reduce Ireland's reliance on imported fossil fuel-based energy and significantly improve energy security". The Marine Licence Vetting Committee (**MLVC**) report on the application notes relevant Government policy including that (a) "[t]he published Programme for Government had committed to achieving 5GW capacity in offshore wind by 2030 off Ireland's Eastern and Southern coasts", (b) the National Marine Planning Framework states that "[p]roposals that assist the State in meeting the Government's offshore renewable energy targets, including the target of achieving 5GW of capacity in offshore wind by 2030 and proposals that maximise the long-term shift from use of fossil fuels to renewable electricity energy, in line with decarbonisation targets, should be supported" and (c) the Climate Action Plan "recommits Ireland to the ambition to install 5GW of offshore wind capacity in our maritime area by 2030, and introduces a new objective, that by the same year, up to 80% of our electricity will be sourced from renewables" and states that "[i]n addition to increasing our renewable energy share, these targets will support our carbon emission reduction commitments, meet anticipated increases in domestic electricity demand and increase our security of electricity supply". The applicants did not make any submission to the decision-maker during the public consultation process, but launched their complaints for the first time in the present judicial review. The primary question here is whether the applicants have discharged the burden of proof to demonstrate that the licence is invalid.

Previous relevant caselaw

2. While there is no specific previous litigation between the existing parties, there are a number of pieces of related litigation to which reference can usefully be made at this point. The notice party helpfully prepared details of related and relevant cases as follows, and I will draw on their wording, which was not objected to.

3. First of all, in relation to general recent law on foreshore licences, the following are noteworthy:

(i) *Uí Mhuirnín v. Minister for Housing, Planning and Local Governmen*t [2019] IEHC 824, [2019] 12 JIC 0503 (Unreported, High Court, 5th December 2019): This concerned a challenge to the grant of a foreshore lease under the Foreshore Act 1933 for an energy wind wave and tidal test facility in Co. Galway. Quinn J. granted *certiorari* on the basis that the Minister for Housing, Local Government and Heritage (**the Minister**, hereafter, unless another Minister is intended) had regard to mitigation measures in carrying out the screening for Appropriate Assessment (**AA**) under art. 6(3) of the Council Directive (EU) 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (**the habitats directive**).

(ii) *Casey v. Minister for Housing, Planning and Local Government* [2020] IEHC 227, [2020] 5 JIC 2002 (Unreported, High Court, Murphy J., 20th May 2020): This concerned a challenge to a decision to approve a baseline study and monitoring programme, stipulated as a condition of a foreshore licence for the mechanical

harvesting of kelp in Bantry Bay granted to Bioatlantis Aquamarine Ltd in 2014. It emerged during the hearing that the Minister had not complied with the public notice and publication requirements imposed by ss. 21A and 21B of the 1933 Act in respect of the original licence, which was held to mean that the original licensing process was incomplete and ineffective (pending belated publication).

(iii) *Casey v. Minister for Housing, Planning and Local Government* [2021] IESC 42, [2021] 7 JIC 1606 (Unreported, Supreme Court, Baker J., 16th July 2021): This was an appeal from the decision of Murphy J., discussed above. The Supreme Court held that the High Court had erred in making the decision on a ground not pleaded, and in incorrectly holding that the Foreshore Act 1933 provided for a free standing procedure to challenge a foreshore licence, separate and distinct from O. 84 RSC. The Supreme Court held that the High Court was correct in finding that the provisions of s. 21A applied to the making of all decisions to grant a foreshore licence, and not only those applications where an environmental impact assessment (**EIA**) report was submitted (as argued by the State). It was held, however, that the absence of publication does not result in the invalidity of the foreshore licence. The purpose of s. 21A is to notify interested persons of the making of a licence and to inform them of the right to make a challenge and by what means. Thus, the failure to publish might have an impact on the time within which a challenge to the validity of the licence could be brought by way of judicial review proceedings, but it did not go to the validity of the licence.

(iv) *Coastal Concern Alliance v. Minister for Housing, Local Government and Heritage* [2024] IEHC 139, [2024] 3 JIC 2102 (Unreported, High Court, Simons J., 21st March 2024): Those proceedings concerned a challenge to the decision of the Minister to grant a foreshore licence to RWE Renewables Ireland Ltd (**RWE**) to carry out marine surveys. The applicant challenged the licence on various grounds, including alleged failures to comply with the requirements of the habitats directive and inadequate EIA under directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (**the EIA directive**). The applicant did not seek a stay and RWE proceeded to carry out marine surveys under the licence. The State argued that the proceedings were moot in circumstances where the notice party indicated in correspondence that the activities authorised by the foreshore licence have been carried out and completed. Simons J. held that the challenge was not moot, as in the event that the applicant was to establish at the substantive hearing that the foreshore licence had been granted in breach of either the habitats directive or the EIA directive, the High Court would be obliged to take all measures necessary, within the sphere of its competence, to remedy the failure to carry out the requisite assessments. He considered that this obligation persists even where the works have already been completed. The applicant sought to argue that a declaration could be made in the judicial review proceedings, over and above the general remedies in relation to remedial assessment and remediation works, which denied the developer the benefit of the survey data obtained pursuant to the impugned licence. The survey data was intended for use as part of an application for development consent for the wind farm array. Simons J. described this as a novel proposition and noted that it had not been pleaded. He granted the applicant liberty to apply to amend the statement of grounds to include this relief.

(v) *Coastal Concern Alliance v. Minister for Housing, Local Government and Heritage* [2024] IEHC 524, [2024] 9 JIC 0204 (Unreported, High Court, 2nd September 2024): Simons J. determined that the granting of the foreshore licence was invalid due to the improper amalgamation of legal tests for stage one screening and stage two AA under the habitats directive. He made an order of *certiorari*. Simons J. refused the applicant's request to amend the statement of grounds to include a claim against the developer regarding the validity of survey data, concluding that this represented a significant enlargement of the original case and could cause prejudice. Notwithstanding this refusal, Simons J. went on to consider the merits of the point raised and concluded that it was without merit for two reasons. First, it purports to make the habitats directive directly applicable against a private developer. This is contrary to the orthodoxy that—in the absence of national implementing legislation—a directive, as opposed to a regulation, cannot be enforced by a member state against an individual. Second, an *ad hoc* punishment or penalty of the type which the applicant sought to impose on the developer would not advance the purposes of

the habitats directive. Simons J. made an order remitting the matter to the Minister to reconsider the application for the foreshore licence.

4. The applicants brought previous proceedings in relation to a different foreshore licence, which I will refer to as *Toole I* (this case being *Toole II*). In those proceedings, the applicants challenged the grant of a five-year foreshore licence by the Minister to RWE on 13th January 2023, pursuant to which it was permitted to undertake geotechnical and geophysical site investigations and ecological, wind, wave and current monitoring to provide further data to refine wind farm design, cable routing, landfall design and associated installation methodologies for the proposed Dublin Array offshore wind farm off the coast of counties Dublin and Wicklow:

(i) In *Toole v. Minister for Housing, Local Government and Heritage and Others I (No. 1)* [2023] IEHC 263, [2023] 5 JIC 2205 (Unreported, High Court, 22nd May 2023), I granted an interim stay on the foreshore licence impugned in the proceedings.

(ii) In *Toole v. Minister for Housing, Local Government and Heritage I (No. 2)* [2023] IEHC 317, [2023] 6 JIC 1603 (Unreported, High Court, 16th June 2023), I continued the stay on an interlocutory basis.

(iii) In *Toole v. Minister for Housing, Local Government and Heritage I (No. 3)* [2023] IEHC 378, [2023] 7 JIC 0302 (Unreported, High Court, 3rd July 2023), I dismissed the case save as to two points, refused the application to dismiss those or to reduce them to declaratory issues only, and invited further submissions.

(iv) In *Toole v. Minister for Housing, Local Government and Heritage I (No. 4)* [2023] IEHC 403, [2023] 7 JIC 1301 (Unreported, High Court, 13th July 2023), one of the two remaining points was addressed by making an order of *mandamus* regarding the amendment of the licence. The other point regarding inadequate AA was dealt with by deciding in principle to make a reference to the CJEU.

(v) In *Toole v. Minister for Housing, Local Government and Heritage I (No. 5)* [2023] IEHC 590, [2023] 10 JIC 2705 (Unreported, High Court, 27th October 2023), I set out the reasons for the request for the expedited procedure before the CJEU.

(vi) In *Toole v. Minister for Housing, Local Government and Heritage I (No. 6)* [2023] IEHC 592, [2023] 10 JIC 3102 (Unreported, High Court, 31st October 2023), I continued the stay pending the referral to the CJEU, decided that the relief of *certiorari* would remain live pending the reference, and granted *mandamus* against the Minister requiring him to correct the condition in the licence. On 20th November 2023, I joined MARA as a notice party.

(vii) In *Toole v. Minister for Housing, Local Government and Heritage I (No. 7)* [2023] IEHC 716, [2023] 12 JIC 2106 (Unreported, High Court, 21st December 2023), I made the order for reference to the CJEU, while also recording that MARA had been added into the proceedings as a second respondent and the order of *mandamus* had been corrected to be addressed to it.

5. Finally in terms of proceedings concerning licences granted to Codling Wind Park Ltd (**Codling**), the following proceedings warrant mention:

(i) Behan v. Minister for Housing, Local Government and Heritage 2021 394 JR: In those proceedings, the applicant challenged a licence issued by Minister to Codling on 28th January 2021 pursuant to s. 3 of the 1933 Act for the purpose of carrying out marine site investigation works off the coasts of Wicklow and Dublin in the vicinity of Codling Bank (Application No. 138007045) (**first licence**). The applicant did not apply for a stay and Codling proceeded to carry out marine surveys under the licence. On 5th March 2024, the High Court noted the undertaking to the court from the notice party that it would not carry out any further surveys pursuant to the terms of the first licence and that it would surrender the licence. The proceedings were struck out with an order setting out certain terms regarding costs.

(ii) Copeland v. Minister for Housing, Local Government and Heritage 2023 946 JR: In those proceedings, the applicants challenge the decision of the Minister to grant the second licence to Codling. Those proceedings are ongoing.

(iii) Featherstone v. Minister for Housing, Local Government and Heritage 2023 944 JR likewise challenges the second licence. The Copeland and Featherstone proceedings are listed for hearing together on 8th and 9th April 2025. Pleadings have been exchanged in the Copeland proceedings only, in circumstances where the grounds pleaded in both cases are the same, save that there is one additional ground in Copeland. By order dated 27th November 2023, the court ordered that the pleadings in Copeland are to serve as the pleadings for both. In relation to these proceedings, the checklist states as follows: "The Licence is also the subject of a challenge in Ivan Toole, Golden Venture Fishing Limited v Minister for Housing, Local Government and Heritage (2023/949 JR) (the 'Toole Proceedings'). The Toole Proceedings are fixed

for hearing on 8 October 2024. The Respondents and First Notice Party are not seeking a joint hearing in circumstances where the within proceedings will not be ready on time, and different issues with the Licence are raised in each set of proceedings (in particular having regard to the applicants' legal submissions delivered in the Toole proceedings)".

Geographical context

6. The site investigation works relate to a proposed offshore wind farm in the Irish Sea, in an area called Codling Bank, approximately 13 to 22 kilometres off the County Wicklow coast. The licence authorises temporary environmental survey work over a very wide area (556 km^2) that already sees very significant maritime activity.

7. According to the application, Codling Wind Park (**CWP**) has been under development since 1999 and represents one of the largest energy infrastructure projects in Ireland this decade. It is approximately 13-22 kilometres off the County Wicklow coast, between Greystones and Wicklow Town. Codling is a 50/50 joint venture between Fred Olsen Seawind and EDF Renewables and was established to develop CWP. It doesn't seem to be disputed that both companies are leading developers, owners and operators of renewable energy assets, with many years of global experience in the renewable energy and offshore wind sector.

Legal and climate context

8. I can now turn to the contexts of environmental law and more broadly of the climate emergency. It will be illuminating to draw on both operative law (Irish and EU material) and matters of an international and comparative, and thus persuasive, nature, as well as to refer to the extraordinarily rapid deterioration of the atmospheric environment that has taken place in parallel with the increasing complexity of environmental law. Holland J. previously assayed a survey of this area in *Coyne v. An Bord Pleanála* [2023] IEHC 412, [2023] 7 JIC 2104 (Unreported, High Court, 21st July 2023) referring to a range of legal and policy documents including international and comparative material and I also draw on his analysis here. Matters are moving at such a pace that even such a recent survey requires updating. While I wouldn't generally aspire to magisterial overviews, some kind of sketch of these matters is necessary in some judgment, and it might as well be this one given the notice party's interest in that, the lack of objection, and the professed environmental concerns of the applicants. For good measure, a number of the legal and policy milestones are already set out in the *Toole I* judgments, making the present matter a particularly appropriate vehicle for an update and overview. Since the national, European, international and comparative materials cross-over and refer to each other, it makes sense to set these out chronologically rather than in a strictly segregated manner or by jurisdiction. Insofar as policy documents are concerned, most if not virtually all of these have been cited in caselaw already, both national and international, including a comprehensive catalogue in *Verein Klimaseniorinnen Schweiz and Others v Switzerland* (ECtHR, 9 April 2024, App. no. 53600/20).

9. The central mechanic of the greenhouse effect is that each net additional unit of greenhouse gases (**GHG**), of which the most significant is carbon dioxide (**CO_2**), in the atmosphere contributes to global warming, and the effect is cumulative. It is not the case that there is some safe limit or timeframe up to which all will be well – every increase in atmospheric GHG amplifies climate change. Furthermore, reaching peak emissions, which is supposed to be happening around now, merely means that the *level of annual increase* in emissions is not itself increasing. But the cumulative level of emissions – which is what counts – will continues to increase for decades, and even when it stops increasing (**net zero**), we will be left at whatever concentration of GHG as exists at that point, which will be vastly in excess of pre-industrial levels. Indeed the effects of climate change will continue long after global temperature reaches its peak, which is still a long way off. And actually reducing GHG concentrations and temperatures from there to pre-industrial levels, if that were to be the ultimate goal, would require colossal measures of a kind that do not seem to be currently at hand. According to the Royal Society, even with no further GHG emissions as and from now (a completely counterfactual scenario), global temperatures would remain elevated for a thousand years (https://royalsociety.org/news-resources/projects/climate-change-evidence-causes/question-20/). The actual and potential effects of global warming are well documented – drought, heatwaves, wildfires, extreme rainfall and weather events, ocean acidification, other massive biodiversity and habitat loss, melting of sea ice and permafrost, rising sea levels and changes in ocean currents with potentially catastrophic effects, potential tipping points if as yet uncertain planetary boundaries are, or already have been, crossed, again with the potential for catastrophic results, and the effects of the foregoing on the human population including in terms of food security, vulnerability of housing to floods and sea rises, and other issues of physical safety.

10. In such a context, it's only human to regard any given policy or action however large as a mere drop in the ocean, but that argument fails the test of Kant's Categorical Imperative. An immense number of drops in the ocean is all there is. It's also only human to regard the whole thing as a massive prisoners' dilemma with the world at the mercy of a few bad actors. That's not a

concern without substance but nor is it without possible solutions (we can note in passing that the United Nations Environment Programme (**UNEP**) itself has recommended "[f]urther investigation into the merits" of a proposal to give the International Criminal Court jurisdiction in relation to the crime of ecocide: https://www.un.org/en/ga/sixth/75/universal_jurisdiction/unep_e.pdf).

11. *Toole I (No. 5)* cites the Sixth Intergovernmental Panel on Climate Change (**IPCC**) assessment report (https://www.ipcc.ch/assessment-report/ar6/) (at para. 9). The summary for policymakers (https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf) includes the following:

> "A.1 Human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850-1900 in 2011-2020. Global greenhouse gas emissions have continued to increase, with unequal historical and ongoing contributions arising from unsustainable energy use, land use and land-use change, lifestyles and patterns of consumption and production across regions, between and within countries, and among individuals (*high confidence*). ...
>
> A.2 Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred. Human-caused climate change is already affecting many weather and climate extremes in every region across the globe. This has led to widespread adverse impacts and related losses and damages to nature and people (high confidence). Vulnerable communities who have historically contributed the least to current climate change are disproportionately affected (*high confidence*). ...
>
> A.3 Adaptation planning and implementation has progressed across all sectors and regions, with documented benefits and varying effectiveness. Despite progress, adaptation gaps exist, and will continue to grow at current rates of implementation. Hard and soft limits to adaptation have been reached in some ecosystems and regions. Maladaptation is happening in some sectors and regions. Current global financial flows for adaptation are insufficient for, and constrain implementation of, adaptation options, especially in developing countries (*high confidence*). ...
>
> A.4 Policies and laws addressing mitigation have consistently expanded since AR5. Global GHG emissions in 2030 implied by nationally determined contributions (NDCs) announced by October 2021 make it likely that warming will exceed 1.5°C during the 21st century and make it harder to limit warming below 2°C. There are gaps between projected emissions from implemented policies and those from NDCs and finance flows fall short of the levels needed to meet climate goals across all sectors and regions. (*high confidence*) ...
>
> B.1 Continued greenhouse gas emissions will lead to increasing global warming, with the best estimate of reaching 1.5°C in the near term in considered scenarios and modelled pathways. Every increment of global warming will intensify multiple and concurrent hazards (*high confidence*). Deep, rapid, and sustained reductions in greenhouse gas emissions would lead to a discernible slowdown in global warming within around two decades, and also to discernible changes in atmospheric composition within a few years (*high confidence*). ...
>
> B.2 For any given future warming level, many climate-related risks are higher than assessed in AR5, and projected long-term impacts are up to multiple times higher than currently observed (*high confidence*). Risks and projected adverse impacts and related losses and damages from climate change escalate with every increment of global warming (*very high confidence*). Climatic and non-climatic risks will increasingly interact, creating compound and cascading risks that are more complex and difficult to manage (*high confidence*). ...
>
> B.3 Some future changes are unavoidable and/or irreversible but can be limited by deep, rapid, and sustained global greenhouse gas emissions reduction. The likelihood of abrupt and/or irreversible changes increases with higher global warming levels. Similarly, the probability of low-likelihood outcomes associated with potentially very large adverse impacts increases with higher global warming levels. (*high confidence*) ...
>
> B.5 Limiting human-caused global warming requires net zero CO2 emissions. Cumulative carbon emissions until the time of reaching net zero CO2 emissions and the level of greenhouse gas emission reductions this decade largely determine whether warming can be limited to 1.5°C or 2°C (*high confidence*). Projected CO2 emissions from existing fossil fuel infrastructure without additional abatement would exceed the remaining carbon budget for 1.5°C (50%) (*high confidence*)....
>
> B.6 All global modelled pathways that limit warming to 1.5°C (>50%) with no or limited overshoot, and those that limit warming to 2°C (>67%), involve rapid and deep and, in most cases, immediate greenhouse gas emissions reductions in all sectors this decade. Global net zero CO2 emissions are reached for these pathway categories, in the early 2050s and around the early 2070s, respectively. (*high confidence*) ...
>
> B.7 If warming exceeds a specified level such as 1.5°C, it could gradually be reduced again by achieving and sustaining net negative global CO2 emissions. This would require

additional deployment of carbon dioxide removal, compared to pathways without overshoot, leading to greater feasibility and sustainability concerns. Overshoot entails adverse impacts, some irreversible, and additional risks for human and natural systems, all growing with the magnitude and duration of overshoot. (*high confidence*) ...

Urgency of Near-Term Integrated Climate Action

C.1 Climate change is a threat to human well-being and planetary health (*very high confidence*). There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (*very high confidence*). Climate resilient development integrates adaptation and mitigation to advance sustainable development for all, and is enabled by increased international cooperation including improved access to adequate financial resources, particularly for vulnerable regions, sectors and groups, and inclusive governance and coordinated policies (*high confidence*). The choices and actions implemented in this decade will have impacts now and for thousands of years (*high confidence*). ...

C.2 Deep, rapid, and sustained mitigation and accelerated implementation of adaptation actions in this decade would reduce projected losses and damages for humans and ecosystems (*very high confidence*), and deliver many co-benefits, especially for air quality and health (*high confidence*). Delayed mitigation and adaptation action would lock in high-emissions infrastructure, raise risks of stranded assets and cost-escalation, reduce feasibility, and increase losses and damages (*high confidence*). Near-term actions involve high up-front investments and potentially disruptive changes that can be lessened by a range of enabling policies (*high confidence*). ...

C.6 Effective climate action is enabled by political commitment, well-aligned multilevel governance, institutional frameworks, laws, policies and strategies and enhanced access to finance and technology. Clear goals, coordination across multiple policy domains, and inclusive governance processes facilitate effective climate action. Regulatory and economic instruments can support deep emissions reductions and climate resilience if scaled up and applied widely. Climate resilient development benefits from drawing on diverse knowledge. (*high confidence*) ..."

12. Atmospheric CO_2 levels are a matter of record from public domain material (here I draw on https://www.statista.com/statistics/1091926/atmospheric-concentration-of-co2-historic/) and, as referenced below, set out the average CO_2 level in the atmosphere as a fraction of molecules of dry air in parts per million (**ppm**) in the year or decade concerned. Caselaw includes such references, for example the Hague District Court in the *Vereniging Milieudefensie v. Royal Dutch Shell plc* ECLI:NL:RBDHA:2021:5339 case cited the then current GHG levels in ppm (para. 2.3.4, although the figure given there without a source is an understatement).

1970s (325.68 to 336.84 ppm)

13. According to the United Nations (**UN**), "[t]he 1972 United Nations Conference on the Human Environment in Stockholm was the first world conference to make the environment a major issue". (https://www.un.org/en/conferences/environment/stockholm1972). Its report (https://documents.un.org/doc/undoc/gen/nl7/300/05/pdf/nl730005.pdf) tentatively touched on climate risks in recommendation 70.

14. Forty-five years ago, on 19th September 1979, modern European environmental law began, with the Bern convention on the Conservation of European Wildlife and Natural Habitats being opened for signature (https://www.coe.int/en/web/bern-convention). The convention was to be implemented in the EU by the habitats directive in due course.

1980s (338.76 to 353.20 ppm)

15. The first EIA directive, Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, was adopted in June 1985 (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31985L0337).

16. In 1987, the Single European Act (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11986U/TXT) introduced a new Environment Title (Title VII), which provided the first legal basis for a common environment policy. Its aims are to preserve the quality of the environment, protect human health and ensure rational use of natural resources.

17. In November 1988, the World Meteorological Organization (WMO) and UNEP set up the IPCC.

18. In September 1989, the UN General Assembly adopted Resolution 43/53 on the protection of global climate for present and future generations (https://unfccc.int/resource/docs/1989/un/eng/a44484.pdf), stating climate change to be a "common concern of mankind" which required that "timely action should be taken to address climate change within a global framework".

1990s (354.45 to 368.54 ppm)

19. In February 1992, the Treaty on European Union signed at Maastricht (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11992M/TXT) amended the Treaty of Rome to insert Title XVI on the environment.

20. In May 1992, the UN Framework Convention on Climate Change (**UNFCCC**) (https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf) was adopted in New York with the objective of stabilising GHG concentrations in the atmosphere.

21. Also in May 1992, the habitats directive, Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01992L0043-20130701), requiring *inter alia* appropriate assessment of plans and projects with significant effects on European sites, was adopted.

22. In December 1993, the Council approved the UNFCCC on behalf of the EU (then the EC) by Decision No. 94/69/EC of the Council of 15 December 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change (https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:31994D0069).

23. The Kyoto protocol to the UNFCCC (https://unfccc.int/resource/docs/convkp/kpeng.pdf), adopted in December 1997, required parties to take on specific commitments to implement the climate goals of the parent treaty.

24. In June 1998, the Aarhus Convention was adopted (https://unece.org/environment-policy/public-participation/aarhus-convention/text).

25. In May 1999, the environmental provisions of the Treaty of Rome were enhanced by the Treaty of Amsterdam (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A11997D%2FTXT), *inter alia* mandating the integration of environmental protection into all EU sectoral policies so as to promote sustainable development. The relevant provisions of the Treaty of Rome as amended now provide (https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF):

> "Article 11
> Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development. …
> Article 191
> 1. Union policy on the environment shall contribute to pursuit of the following objectives:
> – preserving, protecting and improving the quality of the environment,
> – protecting human health,
> – prudent and rational utilisation of natural resources,
> – promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.
> 2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.
> In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.
> 3. In preparing its policy on the environment, the Union shall take account of:
> – available scientific and technical data,
> – environmental conditions in the various regions of the Union,
> – the potential benefits and costs of action or lack of action,
> – the economic and social development of the Union as a whole and the balanced development of its regions. ..."

2000s (369.71 to 387.64 ppm)

26. In October 2000, the Charter of Fundamental Rights of the European Union was adopted (https://www.europarl.europa.eu/charter/pdf/text_en.pdf). This includes:

> "Article 37
> Environmental protection
> A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."

27. In August 2000, the Planning and Development Act 2000 was enacted (https://revisedacts.lawreform.ie/eli/2000/act/30/revised/en/html).

28. In June 2001, the SEA directive, Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, was adopted (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0042).

29. In December 2007, the Treaty on European Union made climate change and sustainable development a priority (https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF):

> "Article 3 § 3
> The Union ... shall work for the sustainable development of Europe ... aiming at ... a high level of protection and improvement of the quality of the environment ..."

30. In October 2003, Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC was adopted (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003L0087) which limited certain activities causing emissions without a permit within an allocation scheme.

31. In June 2006, the Wind Energy Development Guidelines 2006 were adopted (https://www.opr.ie/wp-content/uploads/2019/08/2006-Wind-Energy-Development-1.pdf).

32. In September 2006, Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies was adopted implementing Aarhus for internal EU (then EC) institutions (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006R1367).

33. In April 2009, Decision No. 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their GHG emissions to meet the Community's GHG emission reduction commitments up to 2020 was adopted (https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:140:0136:0148:EN:PDF). It provides that each member state should limit its GHG emission according to a percentage set for that member state.

34. On the same date, Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC was adopted, *inter alia* setting mandatory national overall targets for the use of energy from renewable sources (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0028).

2010s (390.10 to 411.65 ppm)

35. In September 2011, the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) transposed the habitats directive generally in relation to any statutory project affecting European sites (see in particular reg. 42) (https://www.irishstatutebook.ie/eli/2011/si/477).

36. In December 2011, the updated EIA directive, Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment was adopted (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0092).

37. In March 2013, the Commission published *Guidance on integrating climate change and biodiversity into environmental impact assessment* (https://op.europa.eu/en/publication-detail/-/publication/3ed0e578-7f24-4073-81c9-f279c6d4b3cf/language-en) (discussed by Holland J in *Coyne*).

38. In February 2014, the Offshore Renewable Energy Development Plan was published (https://www.gov.ie/en/publication/e13f49-offshore-renewable-energy-development-plan/).

39. In April 2014, the EIA directive was amended with Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0052).

40. In November 2014, the European Union (Environmental Impact Assessment and Appropriate Assessment) (Foreshore) Regulations 2014 (S.I. No. 544 of 2014) made specific amendments to the 1933 Act in relation to AA (https://www.irishstatutebook.ie/eli/2014/si/544/made/en/print).

41. On 4th April 2015, in *Leghari v. Federation of Pakistan* (2015) W.P. No. 25501/201 (https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2015/20150404_2015-W.P.-No.-25501201_decision.pdf), the Lahore High Court found "the delay and lethargy of the State in implementing the Framework [for Implementation of Climate Change Policy (2014-2030)]" and made sweeping mandatory orders in that regard to give effect to constitutional rights.

42. On 10th December 2015, the Climate Action and Low Carbon Development Act 2015 was enacted. Section 3 provides as follows: (https://revisedacts.lawreform.ie/eli/2015/act/46/revised/en/html):

> "National climate objective

3. (1) The State shall, so as to reduce the extent of further global warming, pursue and achieve, by no later than the end of the year 2050, the transition to a climate resilient, biodiversity rich, environmentally sustainable and climate neutral economy (in this Act referred to as the 'national climate objective').
(2) For the purpose of enabling the State to pursue and achieve the national climate objective, the Minister shall make and submit to the Government for approval—
(a) carbon budgets in accordance with sections 6B and 6D,
(b) a sectoral emissions ceiling in accordance with section 6C,
(c) a climate action plan in accordance with section 4,
(d) a national long term climate action strategy in accordance with section 4, and
(e) a national adaptation framework in accordance with section 5.
(3) The Minister and the Government shall carry out their respective functions under sections 4, 5, 6, 6A, 6B, 6C and 6D in a manner—
(a) that is consistent with the ultimate objective specified in Article 2 of the United Nations Framework Convention on Climate Change done at New York on 9 May 1992, and:
(i) any mitigation or adaptation commitments entered into by the European Union in response or otherwise in relation to that objective;
(ii) the steps specified in Articles 2 and 4(1) of the Agreement done at Paris on 12 December 2015 to achieve that objective, and
(b) which takes account of the most recent national greenhouse gas emissions inventory and projection of future greenhouse gas emissions, prepared by the Agency.
(4) The Minister shall consult with the Advisory Council for the purpose of the performance, by him or her, of his or her functions under sections 4, 5 and 6.
(5) The Government may consult with the Advisory Council for the purpose of the performance by them of their functions under sections 4 to 6D."

43. The Paris Agreement (https://unfccc.int/sites/default/files/english_paris_agreement.pdf) was adopted by 196 Parties at the UN Climate Change Conference (COP21) in Paris, France, on 12th December 2015. It entered into force on 4th November 2016 and replaced the Kyoto protocol. Its overarching goal is to hold "the increase in the global average temperature to well below 2°C above pre-industrial levels" and pursue efforts "to limit the temperature increase to 1.5°C above pre-industrial levels".

44. Also in December 2015, a white paper, *Ireland's Transition to a Low Carbon Energy Future 2015-2030* (https://www.gov.ie/pdf/?file=https://assets.gov.ie/77389/e5aa9f25-da81-43eb-804d-57309615681e.pdf#page=null) was published, setting out an objective to guide a transition, which sets out a vision for transforming Ireland's fossil fuel-based energy sector into a clean, low carbon system. It states that under directive 2009/28/EC the government is legally obliged to ensure that by 2020, at least 16% of all energy consumed in the state is from renewable sources, with a sub-target of 40% in the electricity generation sector.

45. On 8th March 2017, in *Earthlife Africa Johannesburg v. Minister of Environmental Affairs and Others* (65662/16) [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP) (https://www.saflii.org/za/cases/ZAGPPHC/2017/58.html), the North Gauteng High Court quashed a planning approval for a coal-fired power station in the Limpopo Province on the basis that without a full assessment of the climate change impact of the project, there was no rational basis for the decision-maker to endorse the assertions of limited impact set out in the environmental impact report.

46. The National Mitigation Plan (https://www.gov.ie/en/publication/48d4e-national-mitigation-plan/) was published in 2017 – later to be quashed by the Supreme Court in *Friends of the Irish Environment v. Government of Ireland* [2020] IESC 49, [2021] 3 I.R. 1, [2020] 2 I.L.R.M. 233, [2020] 7 JIC 3107.

47. In January 2018, the National Adaptation Framework was published (https://www.gov.ie/en/publication/fbe331-national-adaptation-framework/) to set out measures to adapt to climate change.

48. In February 2018, the National Planning Framework (**NPF**) was adopted (https://cdn.npf.ie/wp-content/uploads/Project-Ireland-2040-NPF.pdf) – currently under challenge before the CJEU: see *Friends of the Irish Environment v. Government of Ireland* [2022] IESC 42, [2022] 11 JIC 0903 (Unreported, Supreme Court, Baker J., 9th November 2022). The NPF reiterates the fundamental national objective of achieving a transition to a competitive, low carbon, climate resilient and environmentally sustainable economy by 2050, including by use of renewable energy.

49. In March 2018, in its Resolution 37/8, A/HRC/RES/37/8 (https://documents.un.org/doc/undoc/gen/g18/099/17/pdf/g1809917.pdf), the UN Human Rights Council noted "that more than 100 States have recognized some form of a right to a healthy environment in, inter alia, international agreements, their constitutions, legislation or policies".

50. In May 2018, Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual GHG emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 was adopted, *inter alia* providing that each member state will, by 2030, limit its GHG emissions at least by the percentage set for that member state (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R0842).

51. In December 2018, Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action (the Governance Regulation) was adopted to implement the Paris Agreement commitments (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1999).

52. On 8th February 2019, in *Gloucester Resources Limited v. Minister for Planning* [2019] NSWLEC 7 (https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2019/20190208_2019-NSWLEC-7-234-LEGRA-257_decision.pdf), the New South Wales Land and Environment Court *per* Preston C.J. ordered refusal of permission for a coal mine on the grounds *inter alia* that it was not a "sustainable" development in the light of the climate emergency. As "sustainable development" is a critical statutory metwand to be applied by the board, such an approach is not without interest from an Irish point of view.

53. In June 2019, the Climate Action Plan 2019 was published (https://www.gov.ie/en/publication/ccb2e0-the-climate-action-plan-2019/). Holland J. commented on this in *Coyne* at para. 75 that "it is unclear to me why, having mapped in the 2015 Climate Act an intended policy structure to address climate change, the Government appears to have based its strategy (though not entirely) on a non-statutory plan", and at para. 76 that "[i]t is impossible not to be struck by the paucity of reference in the Climate Action Plan 2019 to the Climate Act 2015.".

54. On 26th June 2019, in *Lamu v. National Environmental Management Authority* [2019] eKLR, NET 196 OF 2016 (https://kenyalaw.org/caselaw/cases/view/176697/), the National Environmental Tribunal of Kenya quashed a permit for a coal-powered energy plant on grounds of inadequate environmental assessment of climate effects, including failure to consider domestic climate legislation enacted during the planning process and a lack of public participation on the assessment material. Generic conditions for the permission and failure to include conditions suggested by the assessment that was carried out also seem to have been a consideration.

55. On 11th December 2019, the European Commission presented the European Green Deal (https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6691) with a package of proposed measures to address the climate emergency.

56. On 20th December 2019, in *State of the Netherlands v. Stichting Urgenda* (ECLI:NL:HR:2019:2007) (https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf), the Hoge Raad (Supreme Court) of the Netherlands upheld an order directing the Dutch State to reduce GHG by the end of 2020 by at least 25% compared to 1990.

2020 (414.21 ppm)

57. On 31st July 2020, dealing with a challenge to the National Mitigation Plan 2017, the Supreme Court decided in *Friends of the Irish Environment v. Government of Ireland* [2020] IESC 49 *per* Clarke C.J. that:

> "9.2 ... A compliant plan is not a five-year plan but rather a plan covering the full period remaining to 2050. While the detail of what is intended to happen in later years may understandably be less complete, a compliant plan must be sufficiently specific as to policy over the whole period to 2050.
>
> 9.3 For the reasons also set out in this judgment, I have concluded that the Plan falls well short of the level of specificity required to provide that transparency and to comply with the provisions of the 2015 Act. On that basis, I propose that the Plan be quashed."

58. In a judgment of 22nd December 2020, *Nature and Youth Norway and Greenpeace Nordic v. the Ministry of Petroleum and Energy*, HR-2020-2472-P (case no. 20-051052SIV-HRET) (https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2020-2472-p.pdf), the Supreme Court of Norway dismissed a challenge to oil and gas production permits in the south Barents Sea South and the southeast Barents Sea). The Supreme Court concluded that the decision in question to award the licences violated neither art. 2 nor art. 8 of the ECHR – that was of course prior to the European Court of Human Right's (Grand Chamber)'s judgment in *Klimaseniorinnen*. Nor did it find a violation of Article 112 of the Constitution. The case is currently pending before the ECtHR (*Greenpeace Nordic and Others v. Norway*, application no. 34068/21 – the ECtHR has requested comments on various matters including *locus standi* and exhaustion of remedies – (https://hudoc.echr.coe.int/fre#{%22sort%22:[%22kpdate%20Descending%22],%22itemid%22:[%22001-214943%22]}).

2021 (416.41 ppm)

59. In March 2021, in *Neubauer and Others v. Federal Republic of Germany*, Order of the First Senate of 24 March 2021, 1 BvR 2656/18 DE:BVerfG:2021:rs20210324.1bvr265618 (https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html), the German Federal Constitutional Court dealt with a challenge to the Federal Climate Change Act of 12 December 2019 (Bundes-Klimaschutzgesetz) and against the State's failure to take adequate measures to reduce GHG emissions. The court held that the provisions of the Federal Climate Change Act were incompatible with fundamental rights in so far as they lacked sufficient specifications for further emission reductions from 2031 onwards and otherwise dismissed the action. The court decided that the rights to health and physical integrity involved a duty on the State to take climate action.

60. On 26th May 2021, in *Vereniging Milieudefensie v. Royal Dutch Shell plc* ECLI:NL:RBDHA:2021:5339 (https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBDHA:2021:5339), the Rechtbank Den Haag (Hague District Court) ordered Royal Dutch Shell "to limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels".

61. The basis of the claim was essentially in tort (para. 3.2):

> "RDS has an obligation, ensuing from the unwritten standard of care pursuant to Book 6 Section 162 Dutch Civil Code to contribute to the prevention of dangerous climate change through the corporate policy it determines for the Shell group. For the interpretation of the unwritten standard of care, use can be made of the so-called *Kelderluik* criteria, human rights, specifically the right to life and the right to respect for private and family life, as well as soft law endorsed by RDS, such as the UN Guiding Principles on Business and Human Rights, the UN Global Compact and the OECD Guidelines for Multinational Enterprises. RDS has the obligation to ensure that the CO2 emissions attributable to the Shell group (Scope 1 through to 3) will have been reduced at end 2030, relative to 2019 levels, principally by 45% in absolute terms, or net 45% (using the IPCC SR15 report and the IEA's Net Zero emissions by 2050 scenario as a basis), in the alternative by 35% (using the IEA's Below 2 Degree Scenario as a basis), and further in the alternative by 25% (using the IEA's Sustainable Development Scenario as a basis), through the corporate policy of the Shell group. RDS violates this obligation or is at risk of violating this obligation with a hazardous and disastrous corporate policy for the Shell group, which in no way is consistent with the global climate target to prevent a dangerous climate change for the protection of mankind, the human environment and nature."

62. In June 2021, the National Marine Planning Framework (**NMPF**) was published, stating *inter alia* that climate change is a central consideration throughout the NMPF (at p. 18):

> "Climate disruption is already having diverse and wide-ranging impacts on Ireland's environment, society, economic and natural resources. It is causing significant adverse impacts on our oceans. The atmosphere and oceans have warmed, the amounts of snow and ice have diminished, and sea levels have risen. Rising sea levels threaten habitable land and particularly coastal infrastructure, as well as having an impact upon protected habitats and species. In vulnerable parts of the world, extreme weather events, including more frequent and intense storms and rainfall are affecting our land, coastline and seas. Furthermore, water quality is at risk, and changes are being observed in the distribution and time of lifecycle events of plant and animal species on land and in the oceans. The impacts of climate change will play a part in shaping land-sea interactions into the future."

63. The NMPF sets out the planning framework within which the State's offshore renewable energy (**ORE**) targets will be realised, in conjunction with the new development management process for individual ORE projects. Climate action is also embedded as a theme throughout the plan through the application of a number of overarching marine planning policies (OMPPs), specifically aimed at ensuring that marine regulators and decision makers must take account of climate action when considering any proposal for marine use or activity.

64. Also in June 2021, as discussed in *Toole I (No. 5)*, the net zero commitment was reflected in Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No. 401/2009 and (EU) 2018/1999 (**the European Climate Law**) (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R1119). This provides a binding objective of climate neutrality in the Union by 2050 in pursuit of the long-term temperature goal set out in art. 2(1)(a) of the Paris Agreement and provides a framework for progressing the global adaptation goal established in art. 7 of the Paris Agreement. Article 4 of the European Climate Law provides for intermediate union climate target. Article 4(1) provides that:

> "In order to reach the climate-neutrality objective set out in Article 2(1), the binding Union 2030 climate target shall be a domestic reduction of net greenhouse gas emissions (emissions after deduction of removals) by at least 55 % compared to 1990 levels by 2030."

65. In July 2021, the Climate Action and Low Carbon Development (Amendment) Act 2021 (https://www.irishstatutebook.ie/eli/2021/act/32/enacted/en/print) was enacted, confirming the commitment to reduce national GHG emissions by 51% by 2030 relative to 2018 levels and achieving net zero emissions by 2050.

66. October 2021 was a busy month for environment and climate-related legal developments, with at least five notable steps taken.

67. On 4th October 2021, the National Development Plan was launched (https://www.gov.ie/en/press-release/7ac57-government-launches-the-renewed-national-development-plan-2021-2030/) (currently under challenge). National Strategic Outcome 8 states that:

> "Ireland's energy system requires a radical transformation in order to achieve its 2030 and 2050 energy and climate objectives. This means that how we generate energy and how we use it, has to fundamentally change. This change is already underway with the increasing share of renewables in our energy mix and the progress we are making on energy efficiency. Investment in renewable energy sources, ongoing capacity renewal, and future technology affords Ireland the opportunity to comprehensively decarbonise our energy generation. By 2030, peat and coal will no longer have a role in electricity generation in Ireland. The use of peat will be progressively eliminated by 2030 by converting peat power plants to more sustainable low-carbon technologies."

68. On 6th October 2021, the EU's internal Aarhus rules were enhanced by Regulation (EU) 2021/1767 of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32021R1767). This followed findings by the Aarhus Convention Compliance Committee on foot of a communication by ClientEarth and others (Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union, adopted by the Compliance Committee on 17 March 2017, ECE/MP.PP/C.1/2017/7, https://unece.org/fileadmin/DAM/env/pp/compliance/CC-57/ece.mp.pp.c.1.2017.7_for_web.pdf).

69. On 8th October 2021, in Resolution 48/13, the UN Human Rights Council formally recognised the right to a clean, healthy and sustainable environment as a human right (https://documents.un.org/doc/undoc/gen/g21/289/50/pdf/g2128950.pdf), stating that it:

> "1. Recognizes the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights;
>
> 2. Notes that the right to a clean, healthy and sustainable environment is related to other rights and existing international law;
>
> 3. Affirms that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law"

70. On 14th October 2021, in the matter of an application by *Oxfam France, Notre Affaire à tous, Fondation pour la Nature et l'Homme et Greenpeace France*, the Paris Administrative Tribunal made a mandatory order to achieve GHG targets (https://paris.tribunal-administratif.fr/decisions-de-justice/dernieres-decisions/l-affaire-du-siecle-l-etat-devra-reparer-le-prejudice-ecologique-dont-il-est-responsable):

> « Par un jugement du 14 octobre 2021, le tribunal administratif de Paris a, pour la première fois, enjoint à l'Etat de réparer les conséquences de sa carence en matière de lutte contre le changement climatique. A cette fin, le tribunal a ordonné que le dépassement du plafond des émissions de gaz à effet de serre fixé par premier budget carbone (2015-2018) soit compensé au 31 décembre 2022, au plus tard. »

71. At the UNFCCC Conference of the Parties (COP26) in Glasgow, which took place between 31st October and 13th November 2021, the Glasgow Climate Pact (https://unfccc.int/sites/default/files/resource/cma2021_10_add1_adv.pdf) was adopted, which provides, *inter alia*, that the Conference:

> "3. Expresses alarm and utmost concern that human activities have caused around 1.1° C of warming to date, that impacts are already being felt in every region and that carbon budgets consistent with achieving the Paris Agreement temperature goal are now small and being rapidly depleted"

72. On 4th November 2021, the Climate Action Plan 2021 was published (https://www.gov.ie/en/publication/6223e-climate-action-plan-2021/). Holland J. commented in *Coyne* at para. 80 that "The stated intention of the Climate Action Plan 2019 was quarterly

monitoring and delivery reports and annual publication of a progress report, and that the Plan would be updated annually, first in 2020. It does not seem that it was."

73. In December 2021, the Maritime Area Planning Act 2021 (**2021 Act**) was enacted (https://revisedacts.lawreform.ie/eli/2021/act/50/revised/en/html), under which most functions relating to foreshore licences were transferred from the Minister to the Maritime Area Regulatory Authority (**MARA**).

2022 (418.53 ppm)

74. The Russian Federation's criminal war of aggression against Ukraine became full-scale on 24th February 2022. In response, the European Commission proposed a range of initiatives including the REPowerEU policy (https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/repowereu-affordable-secure-and-sustainable-energy-europe_en) to phase out Russian fossil fuel imports.

75. On 6th April 2022, Decision (EU) 2022/591 on a General Union Environment Action Programme to 2030 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022D0591) was adopted setting out a general action programme in the field of the environment (the 8th EAP) for the period up to 31st December 2030.

76. As cited in *Toole I (No. 5)*, Recommendation (EU) 2022/822 of 18 May 2022 on speeding up permit-granting procedures for renewable energy projects and facilitating Power Purchase Agreements (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022H0822) states that (Recital 1):

> "Renewable energy is at the heart of the clean energy transition necessary to achieve the objectives of the European Green Deal, make energy affordable and decrease the Union's dependence on fossil fuels and energy imports".

77. Recital 3 states that:

> "The energy sector is responsible for over 75 % of the total greenhouse gas emissions in the Union. Speeding up the production of energy from the development and deployment of renewable energy installations is therefore vital for the Union to reach its 2030 renewable energy target and for contributing to reaching the 2030 Union target of at least 55 % GHG emission reductions in accordance with Regulation (EU) 2021/1119 of the European Parliament and of the Council".

78. On 7th July 2022, the UN Human Rights Council adopted Resolution 50/9 on human rights and climate change (https://documents.un.org/doc/undoc/gen/g22/406/80/pdf/g2240680.pdf).

79. On 21st July 2022, the UN Human Rights Committee adopted a decision in *Daniel Billy and others v. Australia (Torres Strait Islanders Petition)* CCPR/C/135/D/3624/2019 (https://climatecasechart.com/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change/#:~:text=Human%20Rights%20Committee%20found%20that,private%20life%2C%20family%20and%20home) to the effect that failure by Australia to combat climate change was a breach of the International Covenant on Civil and Political Rights.

80. In December 2022, the Climate Action Plan 2023 (https://www.gov.ie/en/publication/7bd8c-climate-action-plan-2023/) was published (under challenge in Friends of the Irish Environment v. Minister for the Environment 2023 627 JR). It seeks to increase the proportion of renewable electricity to up to 80% by 2030, including a target of 9 GW from onshore wind, 8 GW from solar and at least 5 GW of offshore wind energy by 2030.

81. Recital 1 of Council Regulation (EU) 2022/2577 of 22 December, 2022 laying down a framework to accelerate the deployment of renewable energy (OJ L 335, 29.12.2022, p. 36–44, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R2577) provides that "[a] fast deployment of renewable energy sources can help to mitigate the effects of the current energy crisis", by forming a defence against Russia's war of aggression against Ukraine and the unprecedented reduction of natural gas supplies. To this end, Recital 3 provides that:

> "… the Union needs to take further immediate and temporary action to accelerate the deployment of renewable energy sources, in particular by means of targeted measures which are capable of accelerating the pace of deployment of renewables in the Union in the short term."

2023 (421.08 ppm)

82. In March 2023, a policy statement *Accelerating Ireland's Offshore Energy Programme: Policy Statement on the Framework for Phase Two Offshore Wind* was published (https://www.gov.ie/en/publication/f3bb6-policy-statement-on-the-framework-for-phase-two-offshore-wind/).

83. On 28th April 2023, the Government approved a long term climate strategy (https://www.gov.ie/en/publication/e4e81-long-term-strategy-on-greenhouse-gas-emissions-reductions/) and submitted it in May 2023 to the European Commission under Regulation

2018/1999. Proceedings are ongoing to quash this instrument and seek mandatory relief (Friends of the Irish Environment v. Minister for the Environment, Climate and Communications, 2023 No. 65 JR).

84. In its 53rd session concluding on 14th July 2023, the UN Human Rights council adopted Resolution 53/6 on human rights and climate change (https://documents.un.org/doc/undoc/gen/g23/148/70/pdf/g2314870.pdf).

85. The MARA establishment day was 17th July 2023.

86. On 14th August 2023, the First Judicial District Court of Montana held that a provision of state law preventing the consideration of GHG emissions when determining individual development consents was unconstitutional (by reference to the right to a clean and healthful environment in the state constitution): *Held v. Montana* CDV-2020-307 (https://www.courthousenews.com/wp-content/uploads/2023/08/held-v-montana-order.pdf). That decision is under appeal.

87. On 8th September 2023, the synthesis report on the technical dialogue of the first global stocktake under the Paris Agreement (FCCC/SB/2023/9, in preparation for the UNFCCC Conference of the Parties (COP28) in Dubai, held between 30th November and 12th December 2023) (https://unfccc.int/documents/631600), made key findings including:

> "1. Key finding 1: since its adoption, the Paris Agreement has driven near-universal climate action by setting goals and sending signals to the world regarding the urgency of responding to the climate crisis. While action is proceeding, much more is needed now on all fronts. ...
> 3. Key finding 2: to strengthen the global response to the threat of climate change in the context of sustainable development and efforts to eradicate poverty, governments need to support systems transformations that mainstream climate resilience and low GHG emissions development. Credible, accountable and transparent actions by non-Party stakeholders are needed to strengthen efforts for systems transformations. ...
> 6. Key finding 3: systems transformations open up many opportunities, but rapid change can be disruptive. A focus on inclusion and equity can increase ambition in climate action and support. ...
> 9. Key finding 4: global emissions are not in line with modelled global mitigation pathways consistent with the temperature goal of the Paris Agreement, and there is a rapidly narrowing window to raise ambition and implement existing commitments in order to limit warming to 1.5 °C above pre-industrial levels. ...
> 13. Key finding 5: much more ambition in action and support is needed in implementing domestic mitigation measures and setting more ambitious targets in NDCs to realize existing and emerging opportunities across contexts, in order to reduce global GHG emissions by 43 per cent by 2030 and further by 60 per cent by 2035 compared with 2019 levels and reach net zero CO2 emissions by 2050 globally. ...
> 17. Key finding 6: achieving net zero CO2 and GHG emissions requires systems transformations across all sectors and contexts, including scaling up renewable energy while phasing out all unabated fossil fuels, ending deforestation, reducing non-CO2 emissions and implementing both supply- and demand-side measures."

88. In October 2023, the Commission presented the European Wind Power Action Plan (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023DC0669&qid=1702455143415) which included *inter alia* measures to speed up permitting processes and review the European regulatory regime to "send a strong signal to the industry and Member States about the need to urgently accelerate deployment of wind and other renewable energy sources".

89. On 20th November 2023, Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023L2413) was adopted, revising the renewable energy directive 2018/2001 with a transposition date of 1st July 2024 for initial measures including expedition in administrative and judicial decision making. The directive includes a presumption of overriding public interest for projects that affect European sites in ways not capable of mitigation. The requirement that recourse to judicial procedures (what the directive calls "appeals", but this must be considered as an autonomous concept of a wide nature that includes national procedures such as judicial review) should be given the most expeditious process available in national law. Practice Direction HC126 has endeavoured to implement that, but other elements require primary legislation. For example, it is hard to see three instances of judicial decision as compatible with this now binding EU law requirement, since more expeditious appeal procedures exist in domestic law.

90. On 30th November 2023, the Brussels Court of Appeal in the case of *VZW Klimaatzaak v. the Kingdom of Belgium and Others* (https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20231130_2660_judgment-2.pdf), confirmed a finding of breaches of the

domestic law and arts. 2 and 8 of the Convention by the Belgian national and regional government defendants, save the Walloon Region. The court in effect held that the judiciary would not be infringing the principle of the separation of powers provided that they did not take the place of the authorities in choosing the *means* to remedy the breaches found. On that basis the court ordered the defendants to reduce GHG emissions by at least 55% compared to 1990 levels by 2030.

2024 (average CO_2 to be determined)

91. Climate-related legal developments continue apace. In January 2024, the Oslo District Court in *Föreningen Greenpeace Norden Natur og Ungdom v. Staten v/Energidepartementeta* judgment of 18.01.2024 i Oslo tingrett, Saksnr.: 23-099330TVI-TOSL/05 (https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2024/20240118_Application-no.-23-099330TVI-TOSL05_judgment.pdf) held that EIA of extraction licences in the oil and gas fields of Breidablikk, Yggdrasil, and Tyrving in the North Sea was required to cover the environmental effects of combustion outside Norway of extracted fossil fuel. The injunction on extraction was vacated on appeal, but the Borgarting Court of Appeal by decision dated 19th August 2024 referred the substantive questions to the EFTA Court: E-18/24 *The Norwegian State v. Greenpeace Nordic, Nature and Youth Norway* (https://eftacourt.int/cases/e-18-24/).

92. On 5th March 2024, the final progress report on the Climate Action Plan 2023 was published (https://www.gov.ie/en/press-release/f0d8c-final-climate-action-plan-2023-progress-report-shows-65-implementation-of-actions-last-year), the Government concluding *inter alia* that:

> "2023 was a key year for the climate globally with multiple sets of data confirming record-breaking weather and warnings about the imminent breach of the Paris Agreement's 1.5-degree target in the run up to COP28. While climate action in Ireland saw significant achievements in renewable energy, active travel, and funding, delivery rates of committed actions for the year were not equal to the actions set out in the Climate Action Plan. This creates challenges for legally binding EU and national emissions reduction targets, with the Q4 report calling for uncompleted CAP23 actions to be urgently delivered and challenges to climate action implementation to be dealt with."

93. In April 2024, the ECtHR gave judgment in *Verein Klimaseniorinnen Schweiz and Others v Switzerland* (9 April 2024, App. no. 53600/20) (https://hudoc.echr.coe.int/eng#{%22appno%22:[%2253600/20%22],%22itemid%22:[%22001-233206%22]}). The judgment contains a wide overview of developments in climate law and litigation and I have drawn on their wording for present purposes. The court found a violation of art. 8 of the ECHR which encompasses a right to effective protection from the serious adverse effects of climate change. There was a breach of the positive obligations thereby imposed in terms of establishing a relevant domestic regulatory framework relating to budgeting for and limiting emissions. In addition, the failure by the domestic courts to accept the applicants' standing to litigate was a breach of art. 6.1 of the ECHR. In the latter respect, reliance was placed on the Aarhus Convention and related guidance, *The Aarhus Convention: An Implementation Guide,* Second Edition, 2014 (https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf), and the *Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters*, 2015 (https://www.un-ilibrary.org/content/books/9789210574082).

94. Also in April 2024, the revised industrial emissions directive was adopted: Directive (EU) 2024/1785 of the European Parliament and of the Council of 24 April 2024 amending Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control) and Council Directive 1999/31/EC on the landfill of waste (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AL_202401785).

95. On 13th May 2024, the latest Climate Change Advisory Council annual review was published (https://www.climatecouncil.ie/councilpublications/annualreviewandreport/CCAC-AR-2024-SfA-final.pdf), including the following recommendations for the energy sector:

> "The Government urgently needs to implement the planning reform required to accelerate the installation of sufficient wind and solar power to achieve the annual average increase of 1.6 gigawatts of onshore renewable electricity that is needed to meet national targets. New high-voltage grid infrastructure is also urgently needed to match Ireland's grid capacity with its renewable energy ambitions.
>
> - It is critical that the use of coal to generate electricity is stopped by 2025 and that the use of oil is phased out as soon as possible.
> - The Government should ensure pricing incentives for data centres and other large energy users to shift electricity usage to times of low carbon emissions and to give the public access to data on their energy efficiency and sustainability performance.
> - The Government urgently needs to adopt the plan for the roll-out of offshore wind power off the south coast to avoid further delays in offshore wind generation.

- The Government should publish a long-term strategy with timelines for the delivery of a reliable and zero-carbon electricity system well in advance of 2050 and ensure that publicly owned energy companies take full account of the Climate Act in setting their own objectives.
- Planning processes must ensure that new energy infrastructure is developed to withstand future projected climate impacts. Operators must act now to reduce known flood risks to critical infrastructure and take account of protecting and, where possible, enhancing biodiversity in new infrastructure developments. Government and operators need to enhance resilience to power outages and work closely with all communities to identify and develop the technologies required."

96. On 14th May 2024, the Foreshore (Transfer of Departmental Administration and Ministerial Functions) Order 2024 (S.I. No. 236 of 2024) (https://www.irishstatutebook.ie/eli/2024/si/236/made/en/print) came into operation. This transfers the foreshore functions of the Minister for Housing, Local Government and Heritage to the Minister for the Environment, Climate and Communications. That would appear to have a direct relevance to the reliefs sought in the proceedings. Article 4 provides:

> "4. Where, immediately before the commencement of this Order, any legal proceedings are pending to which the Minister for Housing, Local Government and Heritage is a party and the proceedings have reference to functions transferred by this Order to the Minister for the Environment, Climate and Communications, the name of the Minister for Housing, Local Government and Heritage shall, in so far as the proceedings relate to any function transferred by this Order, be substituted in the proceedings for that of the Minister for the Environment, Climate and Communications or added in the proceedings, as may be appropriate, and the proceedings shall not abate by reason of such substitution."

97. On 21st May 2024, the Climate Action Plan 2024 was published (https://www.gov.ie/en/publication/79659-climate-action-plan-2024/) – currently under challenge in Community Law and Mediation v. Minister for the Environment 2024 1053 JR.

98. On the same day, the International Tribunal on the Law of the Sea gave its decision in *Request For an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf), holding *inter alia* that (para. 243):

> "Under article 194, paragraph 1, of the Convention, States Parties to the Convention [on the Law of the Sea] have the specific obligations to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions and to endeavour to harmonize their policies in this connection. Such measures should be determined objectively, taking into account, *inter alia*, the best available science and relevant international rules and standards contained in climate change treaties such as the UNFCCC and the Paris Agreement, in particular the global temperature goal of limiting the temperature increase to 1.5°C above pre-industrial levels and the timeline for emission pathways to achieve that goal. The scope and content of necessary measures may vary in accordance with the means available to States Parties and their capabilities. The necessary measures include, in particular, those to reduce GHG emissions."

99. In June 2024, Regulation (EU) 2024/1991 of the European Parliament and of the Council of 24 June 2024 on nature restoration and amending Regulation (EU) 2022/869 was adopted (**the nature restoration law**) (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32024R1991).

100. On 26th June 2024, the Government published an updated long term strategy on greenhouse gases emissions reduction (https://www.gov.ie/en/press-release/c814e-minister-ryan-announces-long-term-strategy-on-greenhouse-gas-emissions-reductions/) for the purpose of submitting it to the Commission under Regulation 2018/1999. At time of writing an application to amend the Friends of the Irish Environment v. Minister for Environment proceedings to include a challenge to this instrument is pending.

101. As noted above, 1st July 2024 was the transposition date for the expeditious administrative and judicial procedural requirements relating to renewable energy that had been introduced by directive 2023/2413.

102. Also in July 2024, an updated National Adaptation Framework was published (https://www.gov.ie/en/publication/fbe331-national-adaptation-framework/).

103. The nature restoration law entered into force on 18th August 2024

104. On 4th October 2024, the CJEU gave judgment in relation to the SEA issues referred by the Supreme Court: judgment of 4 October 2024, *Friends of the Irish Environment CLG v Government of Ireland and Others*, C-727/22, ECLI:EU:C:2024:825 (https://curia.europa.eu/juris/document/document.jsf?text=&docid=290692&pageIndex=0&docla

ng=en&mode=lst&dir=&occ=first&part=1&cid=7671064), a judgment which appears to have the consequence that the SEA-related complaints against the NPF and NDP are unfounded.

105. To bring matters up to date for now, two weeks ago on 17th October 2024, the Planning and Development Act 2024 was enacted (https://data.oireachtas.ie/ie/oireachtas/act/2023/34/eng/enacted/a3424.pdf).

106. Further matters remain pending, most notably hearings or decisions as follows:

(i) the International Court of Justice, in a request for an advisory opinion on climate change from the General Assembly (https://www.icj-cij.org/case/187) – the EU and some individual member states have made written observations, but not Ireland;

(ii) the Inter-American Court of Human Rights, in an application by Colombia and Chile (https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf); and

(iii) the various ongoing aspects of cases referred to above including *Greenpeace Nordic* in the ECtHR*, Held v. Montana* in the Montanan Supreme Court, *The Norwegian State v. Greenpeace Nordic* in the EFTA court, and of course the ongoing Irish cases.

Facts

107. Prior to 2020, there were many developer-led site investigation foreshore licence applications pending for assessment. The Government decided to move to a plan-led approach, which involved pausing a number of projects. This policy decision was communicated by the Department of Housing, Local Government and Heritage to the Irish Wind Energy Association by email dated 9th October 2020.

108. As noted above the first licence was issued to the developer on 28th January 2021 to carry out site investigation works. This was implemented notwithstanding a challenge in which no stay was sought.

109. On 19th May 2022, Codling applied to the Minister for a second foreshore licence for a period of seven years under s. 3 of the Foreshore Act 1933, as amended to undertake site investigations for the proposed CWP Project, off counties Wicklow and Dublin. Codling sought to obtain the licence for the purpose of carrying out metocean surveys, geophysical and unexploded ordnance (UXO) surveys, geotechnical campaign, fish & shellfish surveys, benthic & intertidal surveys, marine mammal passive acoustic monitoring (PAM) surveys, and archaeological surveys.

110. The application made by Codling was accompanied by a number of documents, including:

(i) A non-statutory environmental report dated 18th May 2022.

(ii) AA screening documentation dated 18th May 2022.

(iii) A Natura Impact Statement (**NIS**) dated 18th May 2022. The notice party included relevant pending projects in the in-combination assessment in the NIS.

(iv) An Annex IV risk assessment dated 18th May 2022.

111. A screening for AA report dated 27th September 2022 was prepared by the Marine Advisor (Environment) of the Department of Housing, Local Government and Heritage, and a marine adviser environment screening stage report dated 28th September 2022 was also completed. These assessments led to a submission to the Minister indicating that a Stage 2 AA was required, and the Minister of State duly signed a screening determination for AA on 6th October 2022.

112. It was thus necessary under reg. 42(13) of the 2011 Regulations to carry out a public consultation. Section 19 of the 1933 Act also provides for a (non-mandatory) public consultation.

113. On 27th October 2022, the Minister issued a public notice under s. 19 of the Foreshore Act 1933 and reg. 42(6) of the European Communities (Birds and Natural Habitats) Regulations 2011, inviting submissions in respect of the application by Codling. This notice was advertised in a number of news publications. The public consultation period commenced on 27th October 2022, and the deadline for submissions in respect of the application expired on 27th November 2022. In total, eight submissions were made by members of the public in respect of the application. The applicants did not make a submission.

114. Thirteen prescribed bodies made submissions in respect of the application. Codling prepared a document entitled "Responses to Public and Prescribed Body Submissions" outlining its responses to the submissions made.

115. On 24th February 2023, an AA report was prepared by a marine ecologist of the Department.

116. An environmental assessment and determination report was prepared by the Department's marine advisor on 24th February 2023.

117. In accordance with the policy document *Accelerating Ireland's Offshore Energy Programme - Policy Statement on the Framework for Phase Two Offshore Wind* (March 2023), the assessment and determination of existing applications for foreshore licences relating to prospective ORE site investigation activity (aside from Phase 1 projects) was paused until designated maritime area plans (DMAPs) have been designated for ORE in accordance with the 2021 Act.

118. A submission was prepared by the Department entitled "Submission HLG 00133-23: Appropriate Assessment Determination on Foreshore Application FS007546 Codling Wind Park

Limited for a Licence for Site Investigations for proposed Offshore Wind Farm, off Counties Wicklow and Dublin" and is marked as "Seen and Approved by Minister O'Donnell 5/4/2023".

119. The Minister signed an AA conclusion statement on 5th April 2023.

120. On 12th April 2023, the MLVC prepared a report on the licence application.

121. A submission was prepared by the Department entitled "Submission HLG 00179-23: FS007546 Codling Wind Park Ltd. Site Investigations for proposed Offshore Wind Farm, off Counties Wicklow and Dublin" and is marked as "Seen and Approved by Minister O'Donnell 19 April 2023".

122. On 12th May 2023, a five-year foreshore licence was executed between the Minister and Codling subject to 44 conditions, which are set out in the second schedule of the agreement.

123. A formal communication of the decision to move to a plan-led approach was made by the Foreshore Unit dated 18th May 2023.

124. On 19th May 2023, a notice of determination of the application pursuant to s. 21A of the Foreshore Act 1993 was published in *Iris Oifigiúil*. This notice was subsequently advertised in four news publications on 24th and 25th May 2023.

Procedural history

125. On 16th August 2023 (in a context where MARA had taken over the relevant functions from the Minister the previous month), the proceedings were issued, not naming MARA as either a respondent or notice party.

126. On 17th August 2023, during the Long Vacation, an application was made to stop time before Sanfey J., and the matter was adjourned into the List.

127. On 23rd August 2023, the applicants issued a motion seeking entry into the List.

128. On 2nd October 2023, the applicants were granted leave and were granted an extension of time insofar as one was required. The proceedings were also entered into the List on that date and the applicants were granted liberty to issue an originating notice of motion. Finally, a stay was granted on the foreshore licence pending further order with the consent of Codling.

129. On 9th October 2023, the applicants issued an originating notice of motion, and on 16th October 2023, default directions were made in respect of the proceedings.

130. On 28th November 2023, the Minister filed his opposition papers.

131. On 12th December 2023, Codling served its opposition papers.

132. On 23rd January 2024, the applicants filed a replying affidavit.

133. On 7th February 2024, the Minister and Codling served further replying affidavits.

134. On 14th March 2024, the applicants filed a further replying affidavit, sworn 8th March 2024, the unsworn affidavit having been served on 25th February 2024.

135. On 22nd February 2024, the Minister issued a notice of motion seeking to join MARA to the proceedings. Both the applicants and Codling were neutral regarding that application.

136. On 8th April 2024, MARA was joined to these proceedings as a notice party on the basis of the undertaking provided to the court that it will be bound by the outcome of the hearing in respect of any issue relating to the requirement for an amendment of the licence.

137. The hearing was listed for two days commencing on 10th October 2024. Core grounds 1 and 2 had been withdrawn in the applicants' submission. The hearing concluded on 11th October 2024 when judgment was reserved.

Relief sought

138. The reliefs sought are as follows:

> "1. An Order of certiorari by way of application for judicial review quashing the Foreshore Licence granted by the Respondent to the Notice Party in respect of Site Investigations for proposed Offshore Wind Farm, off Counties Wicklow and Dublin (Ref. No. FS007546) dated 12 May 2023 ('the Foreshore Licence') and published in Iris Oifigiúil on 19 May 2023.
>
> 2. Insofar as it is necessary, an Order granting an extension of time for the making of the within application for leave to apply for judicial review.
>
> 3. A declaration that all survey data obtained under the Foreshore Licence is unlawful.
>
> 4. An Order of Mandamus directing the Respondent to terminate the Foreshore Licence on the basis that condition 31.29 thereof has been breached by the Notice Party.
>
> 5. Insofar as it may be necessary, an Order that a preliminary reference is made to the CJEU pursuant to Article 267 TFEU in respect of whether Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ('the Habitats Directive') requires that mitigation measures contain details of (i) the person or body in charge of implementation and/or (ii) the methods for checking implementation of such measures.
>
> 6. Such declaration(s) as to the legal rights and/or legal position of the Applicants and (if and insofar as legally permissible and appropriate) persons similarly situated and/or of the legal duties and/or legal position of the Respondent as the court considers appropriate.
>
> 7. An Interim order and/or stay, prior to the granting of leave, pursuant to Order 84 Rule 26(1) of the Rules of the Superior Court, 1986 (as amended) and/or pursuant to the

inherent jurisdiction of this Honourable Court or otherwise staying the effect of the Foreshore Licence, its implementation, or any reliance on it pending the determination of these proceedings.

8. An Interim order and/or Interlocutory order and/or stay pursuant to Order 84 Rule 20(8)(a) and/or (b), and/or pursuant to the inherent jurisdiction of this Honourable Court or otherwise staying the effect of the Foreshore Licence impugned in the within proceedings, its implementation, or any reliance on it pending the determination of these proceedings.

9. A declaration that protective cost provisions of 50B of the Planning and Development 2000 Act and/or section 3 of the Environment (Miscellaneous Provisions) Act 2011, and/or Order 99 and/ or section 169 of Legal Services Regulation Act 2015, as interpreted in light of Article 9 of the Aarhus Convention, apply to these proceedings.

10. Such further or other order.

11. Liberty to Apply.

12. An Order in respect of the costs of these proceedings."

Grounds of challenge

139. The core grounds of challenge are as follows:

"(1) Domestic Law Grounds

1. The Foreshore Licence is invalid in that no Delegation of Ministerial Functions Order or other manner of lawful delegation of powers and/or obligations and/or functions was made authorising the Minister of State at the Department of Housing, Local Government and Heritage and/or the Minister of State for Local Government and Planning to carry out the Minister for Housing, Local Government and Heritage's functions in respect of Regulation 42 of the European Communities (Birds and Natural Habitats) Regulations 2011 ('the Habitats Regulations'). Further particulars are set out in Part 2 below.

2. The Foreshore Licence is invalid in that the Minister failed to comply with section 13A of the Foreshore Act 1933, as amended in that no lawful preliminary examination in respect of Environmental Impact Assessment ('EIA') or screening in respect of EIA and/or EIA was carried out by the Minister. Further particulars are set out in Part 2 below.

3. The Minister has failed to terminate the Foreshore Licence following breach of Condition 31.29 of the Foreshore Licence by Codling despite his duty to do so and despite requests from the Applicants. Further particulars are set out in Part 2 below.

(2) EU Law Grounds

4. The Foreshore Licence is invalid in that it is in breach of Article 6(3) of the Habitats Directive, being a provision that is transposed by Regulation 42 of the Habitats Regulations, in that the mitigation measures which are required under Appropriate Assessment were not made conditions of the Foreshore Licence. Further particulars are set out in Part 2 below.

5. The Foreshore Licence is invalid in that it is in breach of Article 6(3) of the Habitats Directive, being a provision that is transposed by Regulation 42 of the Habitats Regulations, in that (i) insofar as purported mitigation measures were set out in the AA such measures do not meet the requirements of Article 6(3) of the Habitats Directive and (ii) insofar as purported mitigation measures were set out as conditions to the Foreshore Licence such measures do not meet the requirements of Article 6(3) of the Habitats Directive. Further particulars are set out in Part 2 below.

6. The Licence is invalid as the Minister failed to comply with his legal obligations under Article 6(3) of the Habitats Directive being a provision that is transposed by Regulation 42 of the Habitats Regulations, by granting the Licence without considering, adequately or at all, the cumulative impacts arising from other plans or projects with the potential of having in-combination effects with the activities permitted by the Foreshore Licence, as a consequence of which the conclusions reached by the Minister in relation to AA Screening and Second Stage AA were not justifiable beyond a reasonable scientific doubt. Further particulars are set out in Part 2 below."

Domestic law issues

Core ground 3 – alleged breach of licence

140. Core ground 3 is:

"3. The Minister has failed to terminate the Foreshore Licence following breach of Condition 31.29 of the Foreshore Licence by Codling despite his duty to do so and despite requests from the Applicants. Further particulars are set out in Part 2 below."

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

"Core Ground 3 – Breach of the Foreshore Licence

Applicant - This ground is linked to the relief of mandamus sought. It is the Applicants' position that Codling has breached condition 31.29 of the Foreshore Licence by carrying out geotechnical surveys prior to geophysical surveys and that the Licence ought to be

terminated. The Applicants have requested that the Minister exercise his powers to terminate the Licence, and he has refused to do.

Minister – Even if there has been a breach of a Licence condition (which is not admitted, and for which no, or no adequate, evidence had been adduced), the appropriate body to investigate and take remedial action in respect of any such breach is the MARA following its establishment on 17 July 2023. Accordingly, this Ground fails *in limine* in circumstances where it has been incorrectly pleaded against the Minister.

Codling – This is not a ground which goes to the validity of the Licence, or the decision to issue the Licence, relating as it does to alleged events following the grant of the Licence. The Notice Party adopts and relies on the Minister's pleas, as summarised above."

142. The alleged breach is set out on the pleadings as follows:

"20. Without prejudice to the other grounds of challenge pleaded herein, Codling has breached condition 31.29 of the Foreshore Licence, and consequently, the Minister is required to terminate the Foreshore Licence.

21. Condition 31.29 of the Foreshore Licence provides:

'31.29 The proposed geophysical surveys shall be carried out in advance of any geotechnical works and in advance of any deployment of metocean monitoring equipment, to ensure all potential impacts to the underwater cultural heritage are avoided.'

22. Said condition arises from a recommendation made by the Underwater Archaeology Unit ('UAU') of the National Monuments Service, Department of Housing, Local Government and Heritage, dated 24 November 2022. In Codling's response to the recommendation, set out at page 40 of its document entitled 'Responses to Public and Prescribed Body Submissions' it states 'CWP accepts the above recommendation'.

23. Said condition also arises from a recommendation made by the Marine Licence Vetting Committee ('MLVC') on 12 April 2023 in respect of Site Specific Condition No.29. That recommendation follows from section 4.0 of that Report, where the MLVC stated in respect of submissions made in respect of the public consultation:

'Reference is made to the large number of wrecks located in the general area which is the subject of this site investigation application. In particular there are a number ships that were sunk during WW1. The preservation of these wreck sites is recognised. This application has been the subject of comment by the underwater archelogy unit of the Dept. and their recommendations will form part of any conditions which may be attached to this licence, if approved. It should be noted that the survey work may yet yield further more detailed knowledge as to the status of known wrecks and possibly unknown wrecks.'

24. Condition 31.29 provides that the geophysical surveys authorised under the Foreshore Licence must proceed the geotechnical works and metocean monitoring. The purpose of scheduling the surveys in this order is stated to ensure all potential impacts to the underwater cultural heritage are avoided.

25. Codling has failed to comply with Condition 31.29 as it has proceeded to carry out geotechnical surveys prior to geophysical surveys.

26. Marine Notice 28 of 2023 dated 13 April 2023 states that 'the Department of Transport has been advised by Codling Wind Park Ltd that geotechnical site investigations will be conducted on the Codling Wind Park project site off the coast of County Wicklow. The project works will commence on 8 May 2023 and continue through to late July 2023, subject to weather and operational constraints'. That Marine Notice was amended on 20 July 2023 to state that the works would continue through to late August 2023 rather than July 2023. Solicitors for Codling confirmed in writing on 22 June 2023 that borehole and CPT campaign commenced on 29 May 2023. In response to a request as to which Foreshore Licence Codling was relying upon in respect of Marine Notice 28 of 2023, solicitors for Codling stated that:

'As you are aware, our client has been granted two Foreshore Licences dated 28 January 2021 and 12 May 2023, both of which authorise the carrying out of the current borehole and Cone Penetration Testing (CPT) campaign. Our client relies on both of those Foreshore Licences, as necessary and appropriate.

We do not understand the relevance of your statement that our client issued a Marine Notice in relation to this campaign on 13 April 2023. A Foreshore Licence is not required to issue a Marine Notice. It is only required for the actual activity on the foreshore. In that regard, we confirm that the borehole and CPT campaign commenced on 29 May 2023.'

27. Marine Notice 50 of 2023, dated 17 July 2023 and states that the Department of Transport has been advised by Codling Wind Park Limited that 'a geophysical survey will be conducted in the shallow sub tidal area of South Dublin Bay and also around the Pigeon Park area in the River Liffey channel. The project works will commence on or around 14 August 2023 and will continue through to early September 2023, subject to weather and operational constraints'.

28. On the basis of the foregoing, Codling has breached condition 31.29 as it carried out geotechnical surveys prior to geophysical surveys, and consequently, the Minister is obliged to terminate the Foreshore Licence."

143. The pleaded breach is clearly limited to the allegation that the geophysical surveys under the second licence were not carried out before the geotechnical surveys. It does not extend to an allegation that if the notice party was entitled to rely on the geophysical surveys under the first licence, those surveys took place in a different area.

144. This ground fails for multiple reasons.

(i) Firstly, **there was no breach**. So the point does not arise. The applicants' interpretation of the licence means that Codling would be required to re-do geophysical surveys under the licence which had already been completed under a previous licence pursuant to Marine Notice No. 28. That procedure ensures that geophysical surveys occur prior to geotechnical surveys sequentially, but not necessarily under the same licence. The Underwater Archaeology Unit (**UAU**) which had requested the condition confirmed its approval in advance of the subsequent geotechnical campaign. The applicants' interpretation would as the opposing parties submit, "necessitate the carrying out of additional marine surveys which – on the applicants' case – would give rise to a wholly unnecessary risk of environmental harm". Insofar as the applicants sought belatedly to argue that the works under the first licence did not take place in the area of the second licence, that would need to have been pleaded and then evidentially supported. Neither of those things happened – on the contrary, details as to the location of works are set out on affidavit by the notice party.

(ii) Even if there was a breach, **there was no obligation to terminate the licence**. The licence merely permits, rather than requires, termination in the event of breach. That is discretionary: clause 12.1. *Mandamus* does not arise in these circumstances.

(iii) Even if there was an obligation to terminate, **any obligation did not fall on the respondents**. The Minister no longer has the function of terminating the licence by virtue of the 2021 Act s. 9(1): *Toole I (No. 7)*. The applicants are also incorrect to plead that the Minister has contractual rights – the licence is not a matter of contract but of public law, and in any event the licence is to be construed as referring to MARA. Section 43(1)(i)(i) of the 2021 Act provides that any reference in the licence to the Minister ought to be construed as being a reference to MARA. With effect from the establishment day on 17th July 2023, MARA became responsible for monitoring and enforcement of obligations under foreshore licences, including the licence. At the same time, MARA became responsible for revoking or suspending any such licences, including the licence, including under s. 3(5) of the 1933 Act. The transitional provisions apply to undecided licence applications, not to monitoring, investigation and enforcement of licences that have been granted. I agree with the State's complaint:

> "[the applicants] say that MARA 'has been joined to these proceedings and has agreed to be bound by the outcome'. That is a misleading submission. MARA has been joined as a Notice Party to the proceedings, not a Respondent, and has agreed to be bound by the outcome by reference to the reason for its joinder, namely as to whether there is any requirement for any of the conditions of the Licence to be amended. If the Applicants had wished to join it as a Respondent for the purpose of advancing a ground of judicial review against it, and seeking reliefs against it, it was incumbent on them to do so. It would be a significant breach of MARA's right to fair procedures for advantage to be taken of its joinder as a Notice Party for entirely separate reasons in order now to seek substantive relief against it. It has not put in Opposition Papers, nor made legal submissions, on the basis of its limited participation in these proceedings. Indeed, it has not even been called upon to perform its alleged function by the Applicants and given the opportunity to do so, or to refuse, as is required for a grant of mandamus to issue."

As the State eloquently submits: "An order of mandamus cannot issue to compel a public authority to perform a function which it does not have, let alone a function which it is explicitly prohibited by statute from performing".

145. I emphasise that the logical consequence of the applicants' argument here is that surveys already carried out would have to be repeated if the notice party was to be allowed to rely on the second licence. This would inevitably have given rise to adding, without adequate justification, to whatever risks to the marine environment that gave rise to concerns on the part of the Minister in

the first place. Even if that was technically required, which it isn't, I would exercise discretion against the grant of such harmful "relief". Given the pleaded and ostensible reliance by the applicants on protection of archaeological heritage, habitats and species, the notice party calls the applicants' approach "cynical". I'm afraid that that description is not unwarranted in the circumstances. The applicants struggled to explain why the logic of their approach would not have involved unnecessary disturbance to the marine environment by repetition of surveys, but that struggle was not a successful one unfortunately. The applicants' argument seemed to mutate under pressure to the position that the geophysical activities would have to be "completed" rather than "repeated", but the claim of lack of completion hasn't been pleaded, let alone evidentially established. Indeed the eleventh-hour reconfiguration of the claim as one of lack of completion is inconsistent with the logic of the pleadings that any earlier survey work under the first licence can't be relied on at all for the purposes of the second licence, a logic which was based on the flawed premise that the latter must be executed within its own four corners without regard to work already done.

EU law issues

Core ground 4 – failure to include conditions

146. Core ground 4 is:

"4. The Foreshore Licence is invalid in that it is in breach of Article 6(3) of the Habitats Directive, being a provision that is transposed by Regulation 42 of the Habitats Regulations, in that the mitigation measures which are required under Appropriate Assessment were not made conditions of the Foreshore Licence. Further particulars are set out in Part 2 below."

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

"Core Ground 4 – Mitigation Measures

Applicant - This ground relates to the fact that compliance with mitigation measures set out in the AA was not required pursuant to the conditions of the Foreshore Licence in breach of Article 6(3) of the Habitats Regulations. It is clear from the AA Determination of the Minister that the finding that '*the proposed project, either alone or in- combination with other projects, will not adversely affect the Integrity of any European Site*' was reached on the basis that mitigation measures specified in the application would be binding on the Licensee and would be conditioned for that purpose in the Foreshore Licence to ensure their binding effect.

The AA conclusion signed by the Department's Marine Advisor Environment and co-signed by the Minister of State at the Department of Housing, Local Government and Heritage dated 5 April 2023, stated that the mitigation measures identified in the AA Report would be included 'as licence conditions'. Furthermore, the Notice of Determination dated 19 May 2023, states that the Minister adopted the Screening for AA and AA prepared by the Department. However, despite these statements, the Foreshore Licence does not include all the mitigation measures set out in the AA Report prepared by a Marine Ecologist of the Department of Housing, Local Government and Heritage as conditions to the Foreshore Licence.

Minister – The mitigation measures required in the AA are contained in substance in the conditions attaching to the Licence, and there was no requirement for the Minister explicitly to require the mitigation measures in the AA Report to be carried out by way of condition. Further, the Licence conditions must be interpreted in light of the relevant documentation giving rise to them, including the AA Report. Even if the Licence does not contain all of the conditions required pursuant to the appropriate assessment (which is not admitted), the appropriate relief is an order of mandamus requiring the MARA to amend the Licence conditions more accurately to reflect the appropriate assessment mitigation measures, and not the quashing of the Licence.

Codling – The Notice Party will rely on the entirety of the materials published by the Department, together with the decision to grant the Licence. The Notice Party notes and agrees with the Minister's plea, as summarised above."

148. The context is the following from the AA report p. 33 (condition relied on in argument in bold):

"4.3.2 Annex II species

Likely significant effects from underwater noise as a result of the proposed project could not be discounted for marine mammals and migratory fish species. The sound emitted by geophysical and geotechnical survey equipment has the potential to induce the onset of Temporary Threshold Shift (TTS) and/or Permanent Threshold Shift (PTS) when the frequencies emitted by the equipment fall within species' hearing range.

The following mitigation measures will be put in place to eliminate negative effects:

- **Consultation with other Site Investigation projects to ensure no temporal overlap with geophysical, geotechnical and intertidal surveys. [what the applicants call condition A]**
- Strict adherence to the Guidance to manage the risk to marine mammals from manmade sound sources in Irish waters (DAHG, 2014) when undertaking geophysical and geotechnical surveys. Specifically, it should be noted that in absence of modelling or supporting information there should be no deviation on the distance from the source to the perimeter of the exclusion zone during start-up procedures.
- While the PAM (passive acoustic monitoring) is a useful supplement to visual monitoring it cannot be used as a substitute.
- PAM may be used in conditions of poor visibility and should be operated by a suitable qualified operator.
- A survey to determine whether or not otter holts are present will be undertaken within a 300m radius of any intertidal works. This work should be undertaken by an otter specialist.
- If otter holts or couches are located within 50m of the proposed works or a possible natal holt within 250m of the works, a licence to derogate from the Habitats Directive and disturb an otter resting or breeding place shall be obtained from NPWS before the initiation of any work."

149. And at p. 36 (again, conditions relied on in argument are in bold):

"4.3.3 In-combination effects

There are a number of projects which if they occur at the same time as this proposed project are likely to have in-combination effects. Such effects, depending on the project, are likely to include all or some of the following effects - above water noise disturbance, under water noise disturbance and visual disturbance. These projects are:

- All ORE site investigation surveys
- Dun Laoghaire Harbour Company – Routine mooring maintenance.
- Dublin Port Company - various works around Dublin port.
- PWSDZ4121/21 - Ringsend Bottle Factory - development works.

Therefore the following mitigation measure is required:

1. Prior to commencement of works dialogue between Codling Wind Park Ltd and ORE site investigation survey project managers to be undertaken to ensure the project elements that may cause in-combination effects are not carried out at the same time. [what the applicants call condition B]

2. Prior to commencement of works dialogue between Codling Wind Park Ltd and Dun Laoghaire Harbour Company, Dublin Port Company ORE and Ringsend Bottle Factory to ensure the project elements that may cause in-combination effects are not carried out at the same time. [what the applicants call condition C]"

150. The MLVC report stated:

"Article 6(3) of Directive (92/43/EEC) (as amended) (Habitats Directive)

Following a review of the proposed project, the IEC completed a Screening for Appropriate Assessment which concluded that a Stage 2 Appropriate Assessment was required as the project, individually or in combination with other plans or projects, is likely to have a significant effect on European sites.

Having considered the application and the Screening for Appropriate Assessment Report which was accepted by Marine Advisor (Environment), the Screening for Appropriate Assessment and its conclusions is agreed with and an Appropriate Assessment was required to consider the effects of the activities outlined above.

As a result of the outcome of the Screening for Appropriate Assessment, a Stage 2 Appropriate Assessment was carried out by the Department's Marine Advisors (Environment). The document included control and mitigation measures for possible underwater disturbances due to noise (adopting NPWS Guidance to Manage the Risk to Marine Mammals from Man-made Sound Sources in Irish Waters, 2014), ensuring no overlap with other site investigation activities/surveys and restrictions to time of year when certain surveys can be undertaken.

While the screening process identified possible impacts as a result of habitat loss or disturbance on the Annex I habitat Mudflats and sandflats not covered by seawater at low tide [1140] in the two Dublin Bay SACs and wetlands in the two Dublin Bay SPAs this is considered to be negligible given the hydrodynamics of this area. No mitigation measures were therefore required in that regard. Likely significant impacts as a result of geotechnical or ecological sampling on Annex I habitat Reefs [1170] in Wicklow Reef SAC could not be ruled out without mitigation.

Underwater noise was screened in for marine mammals and diving birds in the Appropriate Assessment Screening process. However given the ability of birds to quickly move away from disturbance no mitigation measures were deemed necessary for diving birds. Likely significant impacts as a result of underwater noise from geophysical surveys on Annex II species of marine mammals from thirteen SACs could not be rule [*sic*] out without mitigation. Disturbance to qualifying interests of 11 SPAs were identified in the screening process. Mitigation measures were identified for five SPAs with these in place no further mitigation was required for the three estuarine SPAs north of Dublin Bay, Baldoyle Bay SPA, Malahide Estuary SPA and Rogerstown Estuary SPA.

The remaining SPAs are well removed from the Foreshore Licence Application Site so that there will be no significant impacts on their qualifying interests. Therefore no mitigation is require[d]. Mitigation measures were identified to ensure that impacts on European sites and their qualifying interests would not occur.

Having considered the application, the submissions from the public and prescribed bodies' consultations, the Marine Advisors (Environmental) Appropriate Assessment report concluded 'Therefore with adherence to these measures and in view of best scientific knowledge and of the sites' conservation objectives, the project, individually or in combination with other plans or projects, will not adversely affect European sites.'

Article 12 of the Habitats Directive (92/43/EEC) affords strict protection to those species listed in Annex IV, wherever they occur. Therefore a risk assessment to Annex IV species from a project must take place prior to commencement of works. Such a risk assessment has been undertaken for this project under the title of Risk Assessment to Annex IV Species report. This identifies underwater noise as the primary risk to cetaceans, all species of which are considered Annex IV species. Mitigation for this is strict adherence to NPWS (2014) Guidance to Manage the Risk to Marine Mammals from Man-made Sound Sources in Irish Waters. It is considered that the environmental aspects of this proposed application have been comprehensively assessed and it concluded that subject to the proposed mitigation measures that the proposed activities are acceptable."

151. Matters concluded thus in the MLVC report:

"Significant appropriate consideration has been given to environmental matters by the Departments Marine Advisor Environmental which is reflected in this report. The supporting environmental reports form part of this assessment. It is considered that subject to the appropriate conditions that there will not be adverse environmental consequences arising from this application.

In the interests of co-ordinating the appropriate, efficient and timely site surveying work being carried out by a number of parties, in the general area, it is considered both prudent and reasonable that that the timing of these proposed activities be co-ordinated to avoid the carrying out of similar activities at the same time in the same area. It is recommended that this should form part of the conditions attached.

The development of off shore wind developments is an important element of Government energy policy which has been further enunciated in the recently published energy security framework. It is both necessary and appropriate that surveying work be undertaken so as to site future proposed wind arrays in locations that is geotechnical safe. This application is such an activity and is considered to be necessary and appropriate.

It is concluded that taking account of the totality of the documentation on file and subject to compliance with the specific conditions set out below, the proposed works would will [*sic*] not adversely affect Fishing, Navigation or the Environment and is in the Public Interest.

Therefore, the MLVC recommend that the Minster issues a Foreshore Licence for the proposed geotechnical site investigation activities as set out in the application, subject to the conditions set out below.

The MLVC also recommends that the Minister:

1) makes a finding that that the proposed site investigation activities, individually or incombination with other plans or projects, will not adversely affect the integrity of European sites outlined in the report in view of the said sites' conservation objectives, and

2) adopts the findings of the risk assessment to Annex IV species that has been carried out."

152. In effect, the MLVC report attempted a summarisation of the AA report for the purpose of preparing the legal decision, but in effect it was over-summarisation, when judged against the very strict standard of EU law of removal of scientific doubt. Summarisation has its place if what we are talking about is *exposition* of an operative document, but the context here is that the decision itself *is* the operative document, and must meet the EU law standard.

153. The basic problem is that while many of the conditions recommended in the AA report were included, and while the MLVC report didn't indicate any intention to differ from that, three identified conditions (what the applicants call A, B and C) were not included.

154. The relevant conditions actually imposed were:

> "31.9 Operators will be required to make reasonable endeavours to liaise with other licence holders engaged in surveys, so that there is no temporal overlap between other vessel based surveys in areas which are common to this licence area and have been licensed by the Foreshore Unit for geophysical surveys.
>
> 31.10 The Licensee shall ensure that the mitigation measures as set out in submitted Natura Impact Statement subject to compliance with other relevant conditions as set out below."

155. *Sliabh Luachra Wind Awareness Group v. An Bord Pleanála* [2019] IEHC 888, [2019] 12 JIC 2017 (Unreported, High Court, McDonald J., 20th December 2019), paras. 101-107 was about a different situation where the complaint was in respect of a vague condition, but the court considered that the vagueness could not be read literally because it had to be viewed in the context of the objectives of the assessment process including the EIS and NIS. This is not about the validity of a vague condition – conditions 31.9 and 31.10 are not challenged here. Rather the issue here is the omission of specific conditions that were recommended in the AA analysis – an omission that occurred without reasoning.

156. Condition 31.9 is not prescriptive and does not reflect the sort of mitigating conditions that were recommended in the AA process.

157. Condition 31.10 only reflects the measures set out in the NIS, not the AA report. Had it referred to the latter that would have incorporated the necessary conditions by reference.

158. Overall the basic point is that EU law requires the removal of any reasonable scientific doubt as to effects on European sites. While some of the issues relating to possible disturbance were focused on cultural heritage, specifically shipwrecks from the World War II period, concerns about underwater noise related principally to marine life.

159. Where the AA process considered that certain conditions were required, but these conditions were not included in the final decision except in a more permissive format, without reasoned explanation, the wording of the final decision calls into question compliance with the EU law test of removal of reasonable doubt, as reflected in decisions such as the judgment of 7 September 2004, *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij*, C-127/02, ECLI:EU:C:2004:482 (Grand Chamber) and the judgment of 11 April 2013, *Peter Sweetman and Others v An Bord Pleanála*, C-258/11, ECLI:EU:C:2013:220.

160. Interestingly, an analogous logic was also applied by the Kenyan National Environmental Tribunal in the *Lamu* case to which I have referred above, something that does nothing to dispel the conclusion I had independently arrived at. That judgment could almost have been written with the present case in mind:

> "143. The 1st Respondent in issuing the ... licence for the project, imposed conditions for the approval. These are attached to the licence. The conditions attached are in generalized terms and do not appear to make mention of the matters identified by the [developer] in its mitigation proposals. Accordingly, [one] is unable to say with certainty whether there was a proper evaluation undertaken by the 1st Respondent in issuing the licence.
>
> 144. The conditions imposed ought to have been more comprehensive and bind the [developer] to its commitments as spelt out in [the environmental assessment] report. To this extent, the conditions set are inadequate and display a casual approach by the 1st Respondent to an otherwise serious and important project."

161. When I say *almost*, there is one major difference with the present case, which is that in *Lamu*, the necessary conditions were nowhere to be seen, whereas here, the "proper evaluation" *did* happen and the conditions were prepared and ready for the Department to press play, but the implementation didn't follow. Hence the need to consider a different remedy.

162. In addition to viewing the problem as one of failure to ensure certainty in EU law terms, one can also say that in purely domestic administrative law terms there is a gap in reasoning in failing to incorporate wording that was deemed appropriate in the reasoned document underlying the decision, without anything explaining the omission of that wording.

163. We then turn to the question of remedies. *Certiorari* would be clearly disproportionate. Apart from anything else, it hasn't been established that the Minister formed any intention to impose a lesser standard of certainty than that required by EU law. The essential problem was not an intent to depart from the actual substance of the AA analysis but rather a failure to adopt the required protections as set out in the AA analysis as being express conditions. There was no explanation or reason given for that failure, presumably because it was a shortcoming in execution and drafting rather than a failure of fundamental thought and principle. For some reason it was thought desirable to redraft the AA analysis in a truncated fashion – hopefully a procedure that won't be regarded as a precedent. An order of *mandamus* against MARA is a more proportional and appropriate remedy by comparison with the nuclear option of *certiorari*. Clause 8.2 of the licence provides that it can be amended by the licensor (now, MARA having regard to s. 43(1)(i)(i) of the 2021 Act (which provides

that references to the Minister in the licence must now be read as references to MARA), and having regard to the definition of "Licensor" in the licence, clause 1.24) and *mandamus* to like effect was the approach adopted in *Toole I (No. 4)*, paras. 15-21, citing *Pembroke Road Association v. An Bord Pleanála* [2021] IEHC 545, [2021] 7 JIC 2912 (Unreported, High Court, Owens J., 29th July 2021).

Core ground 5 – inadequate mitigation

164. Core ground 5 is:

> "5. The Foreshore Licence is invalid in that it is in breach of Article 6(3) of the Habitats Directive, being a provision that is transposed by Regulation 42 of the Habitats Regulations, in that (i) insofar as purported mitigation measures were set out in the AA such measures do not meet the requirements of Article 6(3) of the Habitats Directive and (ii) insofar as purported mitigation measures were set out as conditions to the Foreshore Licence such measures do not meet the requirements of Article 6(3) of the Habitats Directive. Further particulars are set out in Part 2 below."

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

> "Core Ground 5 – Mitigation Measures
>
> Applicant - This ground is without prejudice to ground 4 and relates to a breach of Article 6(3) of the Habitats Directive on the basis that (i) insofar as purported mitigation measures were set out in the AA, and / or (ii) insofar as purported mitigation measures were set out as conditions to the Foreshore Licence, such measures do not meet the requirements of Article 6(3) on the basis that such conditions do not identify either the person/body in charge of implementation or the methods for checking the implementation of the measures.
>
> Minister – The conditions in the Licence, which must be interpreted in light of the documents giving rise to them, meet the requirements of Article 6(3). Insofar as the Applicants complain about the precise wording of particular conditions, that amounts to no more than a merits challenge, which is doubly illegitimate in circumstances where the Applicants do not have standing having failed to make any submissions at all during the public consultation process. The Licence itself contains multiple ongoing powers of supervision that ensure that the Minister (and now the MARA) can monitor Codling's compliance with them.
>
> Codling – The NIS submitted by the Notice Party with the application objectively concluded, following an examination, analysis and evaluation of the relevant information, including in particular the nature of the predicted impacts from the Proposed Activities and the implementation of specific mitigation measures where appropriate, that the Proposed Activities will not pose a risk of adversely affecting (either directly or indirectly) the integrity of any Natura 2000 site either alone or in combination with other plans or projects, and there is no reasonable scientific doubt in relation to this conclusion. The NIS identifies all necessary mitigation measures, including temporal and spatial restrictions, to ensure that no changes from the indicative locations and timings will cause an adverse effect on the integrity of any Natura 2000 site. Detailed mitigation measures are set out in respect of each of: (i) marine ornithology, (ii) marine mammals, (iii) Annex I habitats, (iv) Annex II diadromous Fish, and (v) other Annex II species.
>
> As stated by the Minister above, MARA is responsible, in accordance with the MAP Act, for ensuring compliance with and enforcement of foreshore licences. The Notice Party notes and agrees with the Minister's plea, as summarised above. The Notice Party notes and agrees with the Minister's plea, as summarised above."

166. It needs to be noted at the outset that, while included in the statement of case, the applicants in argument dropped the complaint that the licence didn't identify the person responsible for mitigation. The State called that criticism "ludicrous" and said that it was "absolutely obvious" that the licensee was responsible – indeed the licence pretty much says that. Those seem to be fair criticisms.

167. There is a separate side-issue which we can address at the outset, which is the error in Condition 31.10:

> "The Licensee shall ensure that the mitigation measures as set out in the submitted Natura Impact Statement subject to compliance with other relevant conditions set out below."

168. This doesn't make grammatical sense. The applicants contend that this condition is invalid on the basis that it does not provide any obligation on the notice party to do anything. There is an obvious typographical error in this condition, in that it omits the phrase "are complied with". We will return to how this can be corrected.

169. Turning then to the question of whether the mitigation conditions were adequate, the State's argument was essentially:

(i) **It is contended that there is no general requirement to set out details** of how the implementation of mitigating conditions in a development consent is to be checked. If that was the only issue, one might have to place weight on the Commission's views ("Assessment of plans and projects in relation to Natura 2000

sites – Methodological guidance on Article 6(3) and (4) of the Habitats Directive 92/43/EEC 2021/C 437/01"), which appear to strike a different note to that argued by the State. But the case doesn't need to be decided on this basis. So I don't need to decide on the correctness in EU law of the State's position here in legal submissions that:

> "61. As a general proposition, the Minister accepts that insofar as a mitigation measure is deemed necessary for a project to comply with Article 6(3) of the Habitats Directive, it ought to be clear who is responsible for carrying out that mitigation measure. If no entity is responsible for implementing a measure, it cannot be assumed that it will be implemented so as to remove scientific doubt about avoiding an adverse impact on a European Site.
>
> 62. It is not accepted, however, that it is also necessary for the method for checking implementation of the measure(s) to be specified. This does not follow from the text of Article 6(3), or a contextual or teleological interpretation of same. It is sufficient that a legally binding mitigation measure is imposed on a defined body or entity, and it is not necessary (in order for the measure to be a valid mitigation measure) that the method for checking implementation be also specified."

(ii) Even assuming that there is such an obligation, **it can be satisfied by procedures set out in legislation** rather than in an individual consent, a condition that is satisfied here. I agree with that and indeed that suffices to dispose of this ground.

(iii) If the checking procedures in relation to implementation of conditions has to be set out in a consent itself, the nature of the conditions here was such that **adequate details were set out** in a context where the primary prism through which this is to be judged is the material before the decision-maker and where an applicant bears, and has failed to discharge, the onus of proof to show that the lack of further detail created a risk to the integrity of European sites.

170. The applicants say that there is a lack of sufficient detail of mitigation, but the problem with that plausible-sounding argument when set in a fact-specific, case-specific context, is that it is entirely theoretical – working on a kind of *a priori* basis that all mitigation measures must be set out in fine detail in terms of how they are to be implemented and monitored, otherwise *certiorari*. But EU law or any form of pragmatic adjudication recoils from such doctrinaire absolutism. The onus of proof remains on an applicant in judicial review (a rule that has been repeatedly held to comply with the principles of equivalence and effectiveness), and an applicant has to show that lack of additional granular detail in mitigation provisions is likely to give rise to a risk of significant effects on European sites. That has to be demonstrated evidentially.

171. Returning to the preliminary objection, the lack of any submission from the applicants is important. The applicants can't in general impugn the scientific assessment in the decision by reference to issues not before the decision-maker, barring proof that a reasonable expert decision-maker would have seen the material as flawed on its face (*Lancefort Ltd. v. An Bord Pleanála (No. 2)* [1998] IESC 14, [1999] 2 I.R. 270, [1998] 2 I.L.R.M. 401, *Reid v An Bord Pleanála (No. 1)* [2021] IEHC 230, [2021] 4 JIC 1204 (Unreported, High Court, 12th April 2021), para. 15). The applicants haven't surmounted the burden in this regard. The judgment of 15 October 2015, *European Commission v Federal Republic of Germany*, C-137/14, ECLI:EU:C:2015:683 allows the applicants to bring the challenge but it doesn't have the effect that they can re-programme the evidence before the decision-maker or assert the existence of scientific doubt without laying fact-specific foundations for that. Courts internationally have wrestled with the manner in which science and law interact, particularly in the climate space (see for an interesting discussion Dr Katalin Sulyok, *Science and Judicial Reasoning: The Legitimacy of International Environmental Adjudication* (Cambridge, CUP, 2021)) but here the problem is not that complex. An applicant has to do more to discharge the burden of proof than these applicants have done here – which wouldn't be difficult since these applicants have done so little.

172. In broad terms I endorse the State's defence that with regard to the methods for checking the implementation of the measures, this is provided for by the 2021 Act, which confers extensive statutory powers on MARA to monitor compliance with the conditions attached to maritime area consents (MACs) and licences. These powers include the enforcement powers provided for in Part 6 of the 2021 Act (headed "Enforcement" and consisting of ss. 134 to 166A, containing regulatory, civil and criminal enforcement provisions). In addition, as submitted, the licence itself provides for ongoing supervision, monitoring, and enforcement (clauses 6.1, 7.1, 8.1, 8.3, 9.2, 9.3, 10, 12 and 21).

173. Finally, any specific complaint about the vagueness of condition 31.9 is superseded by the need for that to be amended as set out above under core ground 4.

174. It can also be noted here that the applicants contend, albeit that this isn't pleaded, that the Minister has adopted a more rigorous approach in keeping with the Commission guidance in other cases. As a general rule it's probably for the best to minimise any real or apparent differences in approach between domestic practice and recommended European guidance, if only for the pragmatic reason of avoiding giving the impression that there are unresolved points of interpretation of EU law that need closer attention from the courts (which is basically what happened in *Toole I*).

Core ground 6 – cumulative impacts

175. Core ground 6 is:

> "6. The Licence is invalid as the Minister failed to comply with his legal obligations under Article 6(3) of the Habitats Directive being a provision that is transposed by Regulation 42 of the Habitats Regulations, by granting the Licence without considering, adequately or at all, the cumulative impacts arising from other plans or projects with the potential of having in-combination effects with the activities permitted by the Foreshore Licence, as a consequence of which the conclusions reached by the Minister in relation to AA Screening and Second Stage AA were not justifiable beyond a reasonable scientific doubt. Further particulars are set out in Part 2 below."

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

> "Core Ground 6 – AA - In-Combination Assessment
>
> Applicant - This ground relates the fact that a significant number of other projects (including projects in respect of which an application has been made but not yet determined: 'pending projects') and the National Marine Planning Framework (as a 'plan') were not considered in the in-combination assessment carried out in the AA, and as such the AA contains lacunae and, therefore, is invalid. Such projects and plan were also not considered in the NIS. Under Article 6(3) a lawful AA must be carried out prior to the granting of the Foreshore Licence.
>
> Minister – The appropriate assessment carried out was lawful. All relevant projects and plans were considered for the purposes of potential in-combination effect with the Licence. The Applicants have failed to adduce any, or any adequate, evidence of the in-combination effects they allege any of the identified projects would have with the Licence. The 'pending projects' were not 'projects' at all within the meaning of the Habitats Directive, and in any event such projects were considered insofar as they were raised. The National Marine Planning Framework is incapable of having an in-combination effect with the Licence, but was, in any event, considered by the Minister in deciding to grant the Licence.
>
> Codling – The Notice Party notes and agrees with the Minister's plea, as summarised above. There was ample information before the Minister capable of supporting the conclusion that the proposed works, either individually or in combination with other plans or projects, were not likely to have a significant effect on any European Sites other than those screened in and assessed in the Screening for Appropriate Assessment and the Appropriate Assessment Report."

177. While the State did seek in written argument to advocate for a restricted category of projects to which regard needed to be had (relying *inter alia* on the judgment of 7 September 2004, *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij*, C-127/02, ECLI:EU:C:2004:482 (Grand Chamber) and opinion of Advocate General Kokott of 29 January 2004; judgment of 29 July 2019, *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministers*, C-411/17, EU:C:2019:622 (Grand Chamber); *R. (Akester) v. Department of Environment Food and Rural Affairs* [2010] EWHC 232 (Admin), [2010] ACD 44, [2010] Env LR 33), this wasn't particularly pursued in oral argument. Rather the State astutely put forward the fact-specific defence that in the AA process, regard was actually had to any pending projects which had come to the attention of the decision-maker that might have had in-combination or cumulative effects.

178. Reinforcing this, the NIS identified the type of projects with in-combination effects, doing so by category rather than individually.

179. I agree with the opposing submission that the AA report makes clear that the NIS, in its entirety, was considered. Section 1.2 states that the NIS was one of the documents submitted and s. 1.3 additionally states that regard was had to the responses to the public consultation. Section 1.4 identifies the legislative context, including the requirements under reg. 42 of the 2011 regulations. Section 2.4 identifies the possibility of temporal overlap leading to in-combination effects with other licences "for site investigation of wind farm array areas and associated cable corridors". Section 4.2 notes, in respect of in-combination effects:

> "In-combination effects may occur if the following projects are occurring simultaneously:
> ORE site investigation surveys
> Dun Laoghaire Harbour Company – Route mooring maintenance.
> Dublin Port Company – various works around Dublin port.
> PWSDZ4121/21 – Ringsend Bottle Factory – development works."

180. Nothing has been established to show that consideration of other projects by category rather than individually would on these facts cause a risk to European sites. Therefore the fact that all site investigation surveys weren't spelled out individually doesn't give rise to grounds for *certiorari*.

181. I agree with the opposing parties that the ability to point to something that may be characterised as "absent" from an AA does not mean that there is a "lacuna", rendering the AA invalid. Holland J.'s analysis in *Heather Hill Management Company CLG v. An Bord Pleanála* [2022] IEHC 146, [2022] 3 JIC 1603 (Unreported, High Court, 16th March 2022) at para. 268 is apposite:

> "An NIS is not an encyclopaedia. An [applicant challenging a consent] will almost always be able to point to some fact not recorded or alleged issue not addressed in an NIS. How is the court to discern whether such an absence (to use a neutral term) from the NIS constitutes a "lacuna" of legal significance? The absence of particular information from an NIS does not constitute a lacuna save by reference to the purpose of AA. The Applicant cannot just point to a supposed lacuna in a sense unrelated to a prospect of adverse effects on the integrity of a European Site having regard to its conservation objectives. The difference between a mere absence and a "lacuna" must turn on the question whether it is such as to raise a reasonable scientific doubt as to the absence of adverse effect on the integrity of a European site in light of its conservation objectives and of the characteristics and specific environmental conditions of the site concerned and of the likelihood of harm occurring and the extent and nature of the anticipated harm."

182. I respectfully agree. In the absence of it being evidentially established by the applicant that there are potentially negative implications for the integrity of any European site, caused by the alleged omission (in this case, the failure to consider the licence in-combination with the projects the applicants now assert should have been (more specifically) considered), a complaint that the omission renders the AA defective cannot succeed.

183. This case is not *Toole I Redux*, a case where an (ill-advised, I thought) absolutist and doctrinaire position was taken that whole categories of projects need not be considered. In this case, the developer sensibly assessed pending projects in the AA screening material and NIS documentation, and the Minister did likewise in the AA screening and AA report. The issues in the *Toole I* proceedings thus do not arise.

184. In some instances, the projects were demonstrably before the Minister, and therefore were considered by him. In others, they were not before the Minister, and he cannot be criticised for not considering something not raised with him.

185. This conclusion is consistent with *Rushe v. An Bord Pleanála* [2020] IEHC 122, [2020] 3 JIC 0502 (Unreported, High Court, Barniville J., 5th March 2020) at para. 244 that only "relevant" other projects need to be considered, and at para. 245 that projects which are not going ahead don't need to be considered (in that case, refused projects; in this case projects paused on an indefinite basis under government policy).

186. A conclusion that an applicant needs to evidentially demonstrate doubt is consistent with *In re Newry Chamber of Commerce* [2015] NIQB 65 (Unreported, Queen's Bench Division (Northern Ireland), 10th July 2015). My one reservation about that decision is that while Treacy J. viewed AA review as one of reasonableness, that isn't the correct EU law lens that needs to be applied given that the actual mission statement is removal of doubt rather than merely making a reasonable decision. By definition, if the standard is reasonableness, that involves the concept that reasonable people can disagree. A reasonable person could say there is no doubt, but if another reasonable person could say that there is doubt, then the test is not met even though the decision-maker might have come to a "reasonable" conclusion.

187. As regards the projects listed in Appendix C of the NIS, other than the 15 projects addressed in the AA Screening ("Category A"), these are not proceeding as set out in the 2022/23 policy decisions referred to above. It would be improvident to grant *certiorari* solely on the basis of a lack of consideration of such theoretical projects.

188. As regards other projects ("Categories B to D"), the applicants did not put any of these projects before the Minister for consideration. In such circumstances we start on the basis that inadequate consideration of such projects presumptively shouldn't be a basis for *certiorari*. What seals the deal against the applicants is that they haven't discharged the onus of proof to show that these projects would potentially have significant in-combination effects or cumulative effects taken with this project so as to damage the integrity of any European site.

189. Specifically as regards the previous licence for Codling, FS007045, while Codling applied for a second licence when the first licence was under challenge, there was no basis to assess the activities to be carried out under two licenses as part of the in-combination assessment if they were not in fact going to be duplicating works. There are no in-combination effects if there is no combination, and specifically no addition of matters not authorised by the licence being considered.

Other reliefs

190. In the light of the foregoing the applicants' request for more exotic reliefs going beyond *certiorari* don't arise, in particular relief 3:

> "3. A declaration that all survey data obtained under the Foreshore Licence is unlawful."

191. This is premised on there being an underlying established unlawfulness to even get off the ground, which doesn't apply. That relief isn't supported by any ground, so it can't be granted anyway. Plus it makes no sense on any interpretation. Any remedial obligation can't have the consequence that data obtained is "unlawful" in any sense that warrants a relief of this nature. The claim presupposes a kind of environmental exclusionary rule that is illogical and non-goal-congruent in policy terms, environmental terms or indeed legal terms. Again if this point had legal merit it would push us into the space of having to repeat surveys unnecessarily, with consequential environmental damage. Simons J. said as much in *Coastal Concern*. One recalls the notice party's description of the applicants' approach as "cynical". No wonder that the argument that was devoted to this relief was rather faint.

192. As regards the plea for relief 4:

> "4. An Order of Mandamus directing the Respondent to terminate the Foreshore Licence on the basis that condition 31.29 thereof has been breached by the Notice Party",

this doesn't arise because core ground 3 is without substance. We can therefore pass over, for this purpose, the technical problem that termination of the licence is a matter for MARA (the applicants' arguments to the contrary fly in the face of the clear statutory transfer of powers) and the fact that no relief is sought against MARA. The more fundamental problem is that the premise of unlawfulness on which such relief would arise has not been established.

193. Finally, in the light of the outcome of the proceedings there is no basis for a stay.

Suggested reference to the CJEU

194. Finally, we can review the foregoing to establish whether the proposed conclusions involve any properly and duly referrable point of EU law.

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

> "38. Insofar as it may be necessary, an Order that a preliminary reference is made to the CJEU pursuant to Article 267 TFEU in respect of whether Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ('the Habitats Directive') requires that mitigation measures contain details of (i) the person or body in charge of implementation and/or (ii) the methods for checking implementation of such measures.
>
> 39. Insofar as it may be necessary, an Order that a preliminary reference is made to the CJEU pursuant to Article 267 TFEU in respect of whether Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ('the Habitats Directive') has the effect that the competent authority is obliged to take into account the effects of other proposed projects (i.e. for which an application for approval or consent has been submitted but not determined) in combination with the effects of the project in respect of which development consent is sought."

196. These questions are not "necessary" for the purposes of art. 267 TFEU and therefore a reference would be inadmissible. That is not a matter of discretion. The first question doesn't arise on the facts given the nature of the mitigation conditions actually imposed and also noting that sub-point (i) was dropped in argument. The methods of checking are provided for in legislation and in the absence of it being evidentially established by the applicants that failure to give further detail gave rise to a risk to European sites, the factual premise of the question has not been made out. The second question doesn't arise on any analysis because the nature of the consideration given demonstrates that it was not artificially limited in the manner presupposed, and because of the applicants' failure to demonstrate evidentially that the absence of further consideration would have given rise to any risk to European sites.

Costs

197. In accordance with normal practice I can give a provisional view on costs. While there was in fact no strong resistance to the making of some form of substantive order, it is an understatement to say that the applicants have not been completely successful. Indeed I have already broadly endorsed the opposing parties' descriptions of some of the applicants' positions as "cynical" and "ludicrous". One has to look at how matters would have proceeded had they confined themselves to what they "won" on. Insofar as they have been successful it is on a subsidiary issue, correcting the wording of the formal decision. However, such correction is a matter for a party that the applicants didn't join as a respondent or otherwise, and didn't call upon prior to the proceedings to do anything in particular. While the opposing parties didn't stand on ceremony in arguing that all *substantive relief* should be refused in such circumstances, it seems *prima facie* inappropriate that the existing respondents, let alone the notice party, should be required to pay *costs* because mandatory relief to correct the licence is to be made against another party. In a properly constituted action, if the problem was correction of the licence, a simple letter at the cost of a postage stamp

calling on MARA to effect a correction in the light of the *Toole I* proceedings should have done the trick. If such a letter had been ignored then sure, an action for *mandamus* against MARA and costs against that entity would have been presumptively reasonable. But there never was a basis to sue the State respondents about not correcting the licence because the power to do so had already transferred prior to the date of issue of the proceedings. In such circumstances the logical consequence is that it would be unfair and inappropriate to make any order for costs. What makes the failure to correspond with, and if necessary, sue, MARA all the more difficult to understand is that these applicants were fully aware from the *Toole I* proceedings of the transfer of functions. So they have less excuse than most for wasting the time of the court and the opposing parties in making an unsustainable case against the Minister. (And yes of course I appreciate that the *certiorari* claim was defensibly brought against the Minister at the time, but as stated above, we are working on the counterfactual scenario that the applicants had confined themselves to points on which they made headway, omitting points which are being dismissed outright such as *certiorari*.) All that said, it looks like the applicants have the wrong Minister anyway, based on the April 2024 transfer of functions referred to above. So one might say that on the face of things there is no basis to order costs against the Minister for Housing either way. The provisional order that best conserves the court's energies for the time being, absent application to the contrary, is no order. All of that is of course subject to argument by any of the parties seeking a different order.

Summary

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

(i) the developer carrying out geophysical works under the previous licence rather than under this licence is not a breach of the licence;

(ii) in any case the power to revoke a licence is discretionary and is vested in MARA (which is not a respondent) rather than the relevant Minister, the issue of which licence to rely on for the geophysical surveys is a purely technical issue, and an approach that in practice compels repetition of surveys would damage the environment, so relief under that heading would be inappropriate in any event;

(iii) to comply with the EU law standard to exclude all doubt, conditions recommended in the AA assessment but dropped in the MLVC report without reasons (and wording omitted by clerical error) should have been included in the licence on normal administrative law principles and in the light of the EU law requirement to exclude doubt as to the effects on European sites, but the issue can be corrected easily by *mandamus* (indeed it could have been corrected voluntarily but MARA weren't asked and didn't offer that) and does not warrant other relief;

(iv) the claims of inadequacy of conditions to mitigate environmental harms or inadequacy of consideration of cumulative or in-combination impacts have to be made out evidentially by an applicant, who bears the burden of proof, by reference to possible damage to the integrity of European sites caused thereby, which these applicants haven't succeeded in doing; and

(v) the applicants have failed to establish the factual and legal premises of the proposal to refer the matter to the CJEU and therefore a reference is inadmissible as it is not "necessary" within art. 267 TFEU – a court consequently has no jurisdiction to refer such questions, a conclusion that is not a matter of discretion.

199. For completeness I have considered all of the matters pleaded and advanced, including the more micro-points made in the detailed sub-grounds, but none have merit above and beyond what is set out above, and generally the reasoning set out in this judgment applies to the sub-points also.

Order

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

(i) subject to any contrary argument by way of written submission within the next 14 days:

  (a) MARA be changed from a notice party to a respondent;

  (b) there be an order of *mandamus* requiring MARA to amend the licence in accordance with the judgment in respect of:

    (I) the typographical error; and

    (II) the inclusion of the three omitted conditions as set out in the judgment;

  (c) the title of the proceedings be amended to substitute the Minister for Environment, Climate and Communications for the first named respondent,

  (d) the proceedings be otherwise dismissed; and

  (e) there be no order as to costs; and

(ii) by way of order to be perfected now:

  (a) any stay be discharged and the opposing parties be released from any undertakings or agreements not to implement the impugned decision and/or

not to carry out relevant works or uses, subject to the notice party being required to comply with the proposed conditions to be inserted in the licence pending formal amendment; and

(b) the matter be listed on Monday 18th November 2024 to confirm the foregoing.