AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE2023:000035
[2024] IESC 28

O'Donnell CJ
Woulfe J.
Murray J.
Collins J.
Donnelly J.

IN THE MATTER OF SECTION 50 OF THE

PLANNING AND DEVELOPMENT ACT, 2000, AS AMENDED

BETWEEN/

CONCERNED RESIDENTS OF TREASCON AND CLONDOOLUSK

APPELLANTS

- AND -

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

- AND -

ELGIN ENERGY SERVICES LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Brian Murray delivered this 4th day of July 2024

Background

1. In these proceedings, Concerned Residents of Treascon and Clondoolusk, ("*the Appellant*") sought to challenge the legality of a decision of An Bord Pleanála ("*ABP*") of 4 October 2021. The effect of that decision ("*the ABP Decision")* was to grant Elgin Energy Services Limited ("*the Developer*") planning permission (subject to conditions) to construct and operate a photovoltaic solar farm on a site of approximately 90 hectares in Co. Offaly (*"the Proposed Development*"). The ABP decision was made following an appeal brought by the Appellant from the decision of the planning authority, Offaly County Council, to grant permission for the Proposed Development (again, subject to conditions). That decision was made on 5 May 2021.

2. The Appellant's challenge was rejected by Humphreys J. ([2022] IEHC 700). Thereafter Humphreys J. refused the Appellant's application for leave to appeal that decision to the Court of Appeal ([2023] IEHC 112). This Court granted leave to appeal by Determination of 15 May 2023 ([2023] IESCDET 59).

3. The issues in respect of which leave to appeal to this Court was granted, as further clarified in the course of case management, are set out below. The substantive issues the subject of the appeal all relate to the proper interpretation and application of Directive 2011/92/EU (as amended by Directive 2014/52/EU) ("*the EIA Directive*") and of those provisions of Irish law which give domestic effect to the EIA Directive – particularly the Planning and Development Regulations, 2001 (SI 600/2001) (as amended) ("*the 2001*

Regulations") and the European Communities (Environmental Impact Assessment) (Agriculture) Regulations 2011 (SI 456/2011) (as amended) ("*the 2011 Regulations*"). However, ABP, the Developer and Ireland and the Attorney General (to whose interests in the matter I will come shortly, and to all of whom I will on occasion refer collectively as "*the Respondents"*) have vigorously contended that these issues were not pleaded by the Appellant and comprise grounds on which leave to seek judicial review was never given. They also contend that some of these grounds are premature.

The statutory setting

4. The legal context in which these issues arise is involved. Article 2(1) of the EIA Directive requires Member States to adopt all necessary measures to ensure that, before "*development consent*" is given, "*projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects.*" Those projects are defined in Article 4 of the Directive, read in conjunction with Annexes I and II thereto. Article 4(1) provides that projects listed in Annex I "*shall*" be made subject to an assessment in accordance with Articles 5 – 10. Article 4(2) provides that, for projects listed in Annex II, Member States shall determine whether the project shall be made subject to such an assessment. In making that determination, a Member State may rely on a case-by-case examination, apply thresholds or criteria fixed by the Member State, or apply both procedures. But in every case, even where an Annex II project is below these thresholds or outside those criteria, Member

States must ensure that it is subject to environmental assessment if it is likely to have significant effects on the environment: Case C-72/95, *Kraaijeveld* §50; Case C-2/07, *Abraham* §37; C-75/08, *Mellor* §50; C-427/07, *Commission v. Ireland* §41.

5. The EIA Directive is given effect in Irish law largely (though not exclusively) through the provisions of Part X of the Planning and Development Act, 2000 (as amended) ("*the PDA*") and Part 10 of the 2001 Regulations. Section 176 of the PDA provides that the Minister shall, for the purpose of giving effect to the Directive, make regulations identifying developments which may have a significant effect on the environment and specifying the manner in which the likelihood that such developments would have significant effects on the environment is to be decided. In turn, Article 93 of the 2001 Regulations provides that the "*prescribed*" classes of development for the purpose of section 176 are set out in Schedule 5. Schedule 5, Parts 1 and 2 largely correspond with Annex I and Annex II of the EIA Directive.

6. Sections 176A-176C PDA provide for screening for EIA in relation to development within Schedule 5 and further provision is made in Part 10 of the 2001 Regulations for the screening and, where appropriate, full assessment of "*sub-threshold development*". This is specified in Article 92 of those Regulations as "*development of a type set out in Schedule 5 which does not exceed a quantity, area or other limit specified in that Schedule in respect of the relevant class of development."*

7. Solar farms are not listed in Annex I or Annex II of the Directive nor is reference made to them in Part 1 or 2 of Schedule 5 to the 2001 Regulations. The High Court has found that solar farms are not a category of project that requires EIA: *Sweetman v. An Bord Pleanála* [2020] IEHC 39 ("*Sweetman*"); *Kavanagh v. An Bord Pleanála* [2020] IEHC 259 ("*Kavanagh*").

8. Annex II of the Directive includes, at paragraph 1(a), "*[p]rojects for the restructuring of rural land holdings*". Such projects therefore require assessment as to whether they are likely to have a significant effect on the environment and, if so, they must be subject to EIA.

9. Until 2011, projects of this kind were included in Schedule 5, Part 2, 1(a) of the 2001 Regulations (subject to the area to be restructured being greater than 100 hectares) and therefore constituted a "*prescribed class*" of development for the purposes of section 176 PDA. In broad terms, that meant that development which comprised or included the restructuring of rural land holdings exceeding the threshold, or which was otherwise likely to have a significant impact on the environment, was subject to EIA as part of the planning process and any necessary screening and/or assessment was undertaken as part of that process by the planning authority and/or ABP.

10. However, the 2001 Regulations were amended in 2011 and *"restructuring of rural land holdings*" was deleted from Schedule 5, Part 2.[1] At the same time, the 2011 Regulations were made by the Minister for Agriculture, Fisheries and Food (now the Minister for Agriculture, Food and the Marine) ("*the Minister*"), under which the Minister was given the function of screening and, where appropriate, carrying out an EIA on certain "*activities*", including the restructuring of rural land holdings.

11. As amended in 2017 (by SI 407/2017), the 2011 Regulations provide that anyone wishing to undertake an "*activity*" must submit an application to the Minister for a screening decision: Regulation 7(1).[2] Where the Minister determines that the proposed activity is likely to have a significant effect on the environment, that activity cannot proceed without Ministerial consent: Regulation 8(2). Ministerial consent must also be sought if the proposed activity exceeds the thresholds set out in Schedule 1, Part B of the 2011 Regulations.[3] In either scenario, the application for consent must be accompanied by an environmental impact statement ("*EIS*") in accordance with Regulation 10:

---

[1] Regulation 19(a) of the Planning and Development (Amendment) (No. 2) Regulations 2011 (SI 454/2011).

[2] Regulation 7(1) in its original form required an application for screening to be made where the area of land or length of field boundary involved exceeded the thresholds set out in Schedule 1, Part A or where the activity "*may*" have a significant environmental effect. Schedule 1, Part A sets out various thresholds for screening restructuring of rural land holdings, including where the length of field boundary to be removed exceeds 500 metres. That threshold would be exceeded here but it appears from the amended Regulation 7 that the obligation to submit an application to the Minister for a screening decision in relation to a proposed activity is no longer subject to any such threshold (though, having regard to Regulation 3(2), that is not free from doubt). Here, in any event, it is now accepted by the Developer that it is obliged to apply for a screening decision.

[3] Schedule 1, Part B refers to activity involving the removal of field boundary exceeding 4 kms in length, "*re-contouring (within farm-holding)"* of an area in excess of 5 ha and/or the restructuring of land (by the removal of field boundaries) above 50 ha in area. The Appellant here claims that the Proposed Development here would involve re-contouring of an area in excess of 5 ha and that the area of land to be restructured here by the removal of hedgerows exceeds 50 ha and is thus subject to mandatory EIA (Submission, §3). That is not agreed, however.

Regulation 9(2)(e)(i). The Minister must then carry out an EIA of the application before making a decision on it: Regulation 13 (as amended by SI 142/2013). The Minister may grant consent, refuse consent or attach such conditions to a consent as he or she considers necessary: Regulation 13(7).

12. When making a screening decision under Regulation 8, the Minister must consider the characteristics of the activity having regard (*inter alia)* to "*the cumulation with other activities"*: Schedule 2(1)(b). Where the submission of an EIS is required, it must consider *"the cumulation of effects with other existing and approved projects or activities"*: Schedule 3.5(e) (as substituted by SI 407/2017).

13. The Proposed Development the subject of these proceedings would involve the removal of 770 meters of hedgerow to the north of the development site while a further three sections of hedgerow (total length 140 meters) will be removed and relocated ("*set back*") by 3 metres.[4] That is not in dispute. Nor is it – now – in dispute that, before commencing the Proposed Development, the Developer must, at a minimum, apply to the Minister for a screening decision in respect of that element of the development (as already noted, the Appellant says that Ministerial consent, and an EIA, is required but that does not appear to be agreed).

[4] Planning and Environmental Considerations Report ("*PECR*") submitted by the Developer, at para 4.4.3.1.

14. Subsequent to the ABP Decision, the Planning and Development (Amendment) (No. 2) Regulations 2023 (SI 383/2023) were made. Regulation 4 of those Regulations inserts into Schedule 5, Part 2 of the 2001 Regulations a new paragraph in the following terms:

> *"(a) Projects for the restructuring of rural land holdings, undertaken as part of a wider proposed development, and not as an agricultural activity that must comply with the European Communities (Environmental Impact Assessment) (Agriculture) Regulations 2011, where the length of field boundary to be removed is above 4 kilometres, or where re-contouring is above 5 hectares, or where the area of lands to be restructured by removal of field boundaries is above 50 hectares."*

15. Projects within (a) are prescribed projects for the purposes of s. 176 PDA. SI 383/2023 does not repeal or amend the 2011 Regulations (though a separate review of those Regulations has been announced) and it seems that they continue to govern projects for the restructuring of rural land holdings when undertaken as an agricultural activity. But where – as here – the proposed restructuring is part of a *"wider proposed development*", it will fall to be considered within the planning process and any necessary screening for EIA and/or EIA assessment will once again be the responsibility of the planning authority and/or ABP. In any event, all of the parties agree that SI 383/2023 has no direct bearing on any of the issues in this appeal given that they postdate the application for planning permission and the ABP Decision.

The application for planning permission

16. While the Developer maintained that the Proposed Development was not such as to require EIA screening or assessment, it did submit an Environmental Impact Assessment Screening Report with its application for planning permission and the Planning and Environmental Considerations Report which it also submitted was in its structure and detail comparable to an Environmental Impact Assessment Report ("*EIAR*"). A Natura Impact Statement was also submitted. The Screening Report assessed the Proposed Development against various projects listed in Schedule 5 to the 2001 Regulations (but did not refer to the 2011 Regulations) and concluded that it was not a project which required environmental assessment. However, the Report went on to carry out a screening exercise which led to the further conclusion that there was no real likelihood of significant effects on the environment arising from the Proposed Development in any event.[5]

17. The Appellant objected to the application. It complained that the "*Environmental Impact Study"* was inadequate in a number of respects (relating to the impact on ecology and fauna) but the objection did not specifically refer to the removal of the hedgerows (visual impacts on the landscape were mentioned). No suggestion appears to have been made that the planning authority was obliged to carry out an EIA of that aspect of the Proposed

[5] Screening Report, Page 12.

Development. The planning authority took the view that the Proposed Development did not come within Schedule 5 and, furthermore, that it was not a "*sub-threshold development"* and therefore an EIAR was not required.

18. On appeal, the ABP Inspector took the same view. She was also satisfied that no component part of the development was a development class for which an EIAR or screening for an EIAR was required (Report, §7.2.2). Neither the ABP Order nor the ABP Direction contain any reference to EIA.

19. The ABP Decision grants planning permission for the Proposed Development, including the proposed removal and/or relocation of certain of the internal hedgerows, subject to the conditions set out in the Order. One of those conditions – condition 7(a) – requires the retention of "*existing field boundaries"* but the parties appear to be *ad idem* that this condition is not referrable to, and does not prohibit, the removal/relocation of the hedgerows. However, a grant of planning permission does not, of itself, entitle a person to carry out any development: PDA, s. 34(13).

The proceedings

20. The Appellant then sought judicial review of the ABP Decision. In addition to *certiorari* of the Decision, it sought various declaratory reliefs. Two of these were as follows:

"(iii) A Declaration that the Second and Third Respondents failed to properly transpose Annex II, paragraph 1(a) of the Directive 2011/92/EU as amended by Directive 2014/52/EU ('the EIA Directive') into Irish law governing development consents, being the class project "Projects for the restructuring of rural land holdings.

(iv) A Declaration that Art. 109(2) of the Planning and Development Regulations, 2001, as amended, is incompatible with the State's obligations under Articles 4(2) to 4(6) of Directive 2011/92/EU as amended by Directive 2014/52/EU."

21. The Appellant relied on a wide range of grounds and arguments for the purpose of impugning the validity of the ABP Decision. Most of these have no relevance to this appeal. As regards the issue of whether the Proposed Development should have been subject to screening and/or EIA assessment because it included or involved a "*project for the restructuring of a rural land holding*", the Appellant contended as follows:

- The ABP Decision was invalid because ABP failed to make a screening determination for an EIA for a "*project for the restructuring of a rural land holding"* (Statement of Grounds, E5).
- If ABP claimed to have conducted an EIA screening for that project, it had failed to record its consideration and determination and, moreover,

it seemed to lack jurisdiction to do so having regard to the 2011 Regulations (E6).

- The ABP Decision was invalid because of the State's failure to properly transpose Annex II, paragraph 1(a) of the Directive into Irish planning law (E19).
- Further particulars of these pleas are set out in Part 2 of the Statement of Grounds. One of the arguments made there is that there was a gap in the transposition of the Annex II, paragraph 1(a) project class. According to the Appellant, the thresholds set for EIA were to be found in the 2011 Regulations and the competent authority for making an EIA screening determination was the Minister. However, those thresholds were not prescribed for the purposes of the planning regime and while the combined effect of s. 176(3) PDA and SI 349/1989 (as amended by SI 93/1999) was (so it was said) to prescribe a threshold for such projects for the purposes of the PDA (projects where the area to be restructured would be greater than 100 hectares), the thresholds relating to field boundary removal (removal of hedgerows) had not been incorporated into the planning regime (E40).

22. ABP, the State and the Notice Party all opposed the application for judicial review. ABP *inter alia* denied that the 2011 Regulations (which, it said, applied only to on-farm activities) had any application to the Proposed Development or that it involved a project for the restructuring of rural land holdings (ABP Statement of Opposition, paras. 52-54). However, it also pleaded that, insofar as the Proposed Development involved an *"activity"* within the scope of the

2011 Regulations, the ABP Decision did not authorise such an activity (reference being made in this context to s. 34(13) PDA) and the Developer would have to comply with the procedures set down in the 2011 Regulations (para. 65).

23. In its Statement of Opposition, the State denied that SI 349/1989 and/or SI 93/1999 had any application. According to the State, where a Proposed Development involves an "*activity*" within the scope of the 2011 Regulations (and, the State said, such activity was not limited to "*on farm activity*"), planning permission on its own could not be said to constitute development consent within the meaning of EU law. Where the activity met the threshold so as to require Ministerial consent under the 2011 Regulations, such consent also constitutes development consent. The ABP Decision was not open to criticism on the basis that it had not assessed for such an activity as it was not required to do so – that was the responsibility of the Minister under the 2011 Regulations. The Minister said that Ireland's development consent regime was consistent with the EIA Directive because the 2011 Regulations provided for the assessment of Annex II, paragraph 1(a) projects (State's Statement of Opposition, paras. 13-16).

24. The Notice Party also contended that the 2011 Regulations had no application because the Regulations apply only to on-farm activities (Statement of Opposition, para. 74) and, thus, that the removal of the hedgerows was not "*rural land restructuring"* within the meaning of paragraph 1(a) of Annex II.

The Notice Party denies that the Proposed Development was a project within/under Annex I or II of the EIA Directive.

The decision of the High Court

25. The High Court (Humphreys J.) rejected all of the grounds advanced by the Appellant. The reasons are set out in its judgment of 16 December 2022. Humphreys J. divided the issues into two categories: those dealing with "*domestic law points*" and those dealing with "*EU law points*". Additionally, Humphreys J. subdivided those EU law issues into (i) issues relating to the EIA Directive; and (ii) other EU law issues. Only those EU law points relating to the EIA Directive are pertinent to this appeal. Within this category, Humphreys J. identified four issues raised in the core grounds of the Appellant (Judgment No. 1, §32). Two are relevant here.

26. The first of those issues was whether the ABP Decision was in breach of the EIA Directive by reason of the alleged failure of ABP to screen for a "*project for the restructuring of a rural land holding*" and, if necessary, to carry out an EIA on the Proposed Development or the part of it that involved such restructuring (§§35-36). Humphreys J. did not accept that ABP had been guilty of any such failure. He accepted that the proposed removal of 770m of hedgerow (and removal and relocation of another 140m) did involve rural land restructuring, which, in his view, was not limited to agricultural projects (§§39-41). Rejecting the contention advanced by the Notice Party, he said that the

"*[r]emoval of such hedgerows for the purposes of a change of use from agricultural land to a wind farm clearly changes the land use concerned"*.

27. However, what Humphreys J. viewed as critical was that ABP did not have "*statutory EIA jurisdiction in relation to this particular planning application even if other elements of the wider project would require EIA*" as solar farms were not, in and of themselves, projects requiring EIA. Any interpretation of planning legislation that would impose an obligation on ABP (as opposed to the State) to conduct an EIA in relation to rural land structuring would be *contra legem* (§§42-43). And, as I have noted earlier, ABP's EIA jurisdiction in relation to rural land restructuring had been expressly excluded and was not contained in the current list relevant to ABP's functions, Schedule 5 of the 2001 Regulations.

28. The second issue related to the proper transposition of Annex II, paragraph 1(a) of the EIA Directive. "*Fascinating broader questions*" had been raised in argument relating to a situation in which more than one competent authority is involved in giving consent for a project (what the Judge referred to as "*dual consent*") and how those authorities should interact, particularly as regards complex development, so as to ensure adequate consideration of the effects of the project as a whole (referred to by the Judge as "*in-combination effects*"). Humphreys J. identified two arguments as having been raised in this regard – each of which is relevant to this appeal as it has unfolded.

29. First, it had been contended in submissions that the State had failed to transpose the EIA Directive correctly by allowing one competent authority (here ABP) to grant permission for one element of a broader project prior to an EIA being carried out on the project as a whole, in circumstances where other elements of the project *do* require an EIA.

30. Second, it had been said that there had been a failure of transposition by the State in not clarifying how the interactions between different competent authorities should work especially in a complex situation. In this regard, Humphreys J. explained the context as follows:

> "*The national legislation in fact compels the developer to make separate planning applications because the substation is strategic infrastructure which requires direct application to the board, the solar farm requires application to the planning authority in the first instance, and consent for the hedgerow removal would ostensibly require at least a screening application to the Minister for Agriculture, Food and the Marine."*

31. However, in the Judge's view, these issues had not been pleaded (§§45-46): "*important as these questions are, there are no such pleas here and no claim for declaratory relief in relation to non-transposition in these respects*" (at §45). He continued "*[n]ot only was there no plea in relation to dual consent or in-combination effects but there was no plea in relation to sequencing where multiple consenting authorities have jurisdiction"* (§46). The Judge continued:

"*It seems to me that under those circumstances the interesting points made by the applicant, which essentially amount to a systemic challenge and a claim of failure of transposition generally, do not arise. The applicant has pleaded expressly that the board has failed to carry out EIA but the fatal difficulty with that plea is simply that by the legislation governing an application of this type, the board is not required to carry out EIA; and nor does EU law require the centralisation of EIA functions in relation to a project into a single authority, let alone into the regular planning process. That is in no way to endorse the domestic legislation – merely to conclude that the particular plea made in the limited form it is made cannot succeed."*

(Trial Judge's emphasis).

32. The judge stressed that the transposition challenge advanced against the State was "*very narrow*". He said:

"*There is no transposition challenge in relation to the 456/2011 regulations or issues relating to project-splitting such as the interaction between the strategic infrastructure procedure and ordinary planning, and nor is there a transposition challenge in relation to the key matter regarding the possibility of part of the project being consented before an overall EIA is carried out by someone other than the board …".*

33. Instead, the "*transposition challenge"* boiled down to a complaint that the EIA Directive in relation to rural land restructuring had not been implemented *"into Irish planning law"*, that is in a manner that gave the board some jurisdiction over it. Humphreys J. concluded that this ran up against a problem: EU law does not, he said, "*require the centralisation of EIA functions in relation to a project into a single authority, let alone into the regular planning process"*. The "*fallacy*" of the Appellant's position was that there is no obligation to transpose EIA into the planning legislative regime but only into the overall legislative regime. The transposition claim was therefore "*misconceived*" (§55).

34. The Judge noted that the Appellant was not left without a remedy because it could return to Court in the event that the Notice Party failed to make an application to the Minister for consent under the 2011 Regulations or failed to acknowledge an obligation to do so prior to removing any hedgerows (§47).

35. On 10 March 2023, Humphreys J. gave a further judgment ([2023] IEHC 112). This addressed claims by the Appellant for three reliefs. The first was a declaration in the following terms (the judgment of Humphreys J. records that in the course of oral submissions counsel for the Appellant asked the Court to make an order of *certiorari* on the same basis):

> "*A Declaration that the development consent given for, and the execution of, solar farm developments and associated works at Treascon and Clondoolusk, Portarlington, Co. Offaly involving land restructuring in excess of 50 hectares and field boundary removal in excess of 500*

metres must be preceded by an assessment with regard to their environmental effects …".

36. Second, leave to appeal to the Court of Appeal was sought as was, third, a reference to the CJEU. Humphreys J rejected each of these applications. He further recorded that the Notice Party had confirmed it would make an application to the Minister for Agriculture under the 2011 Regulations for an EIA screening decision in relation to the removal of hedgerow within the project (Judgment (No 2), §§1, 25).

37. By Order of the High Court made on 14 March 2023 (and perfected on 15 March 2023), the proceedings were dismissed, and both an application for a reference to the CJEU and leave to appeal the Judgment of the High Court were refused. It is to be noted, in particular, that in rejecting the application for declaratory relief, Humphreys J. characterised the applicant's submissions as presenting an "*impermissible recalibration of the pleaded case"*. He attached particular significance to the fact that no supporting grounds had been pleaded and that the Minister was not a party to the case: "*flexibility regarding the court's entitlement to grant reliefs not specifically claimed has to be within the contours of the case as defined by the grounds*" (§ 4). He continued in a similar vein when considering the application for leave to appeal (§10):

"*The applicant inevitably seeks to retro-fit the points now made into its original case having had sight of the No. 1 judgment. But that square-peg-insertion procedure wrenches the issues from their original context,*

which was the alleged failure by the board to carry out EIA under the planning code in relation to the application made to it, and the State's alleged failure to implement the EIA obligation in the planning code"

(Trial Judge's emphasis)

The issues

38. Following the grant of leave to appeal to this Court, the parties engaged in the case management process for the purpose of identifying the questions arising for determination. They agreed on five issues. Four of these were substantive, and (as amended by the case management judge and re-ordered by me for the purposes of this judgment) were as follows:

1. "*Where the carrying out of a proposed solar farm development – itself not a project falling under Annex I or II of the EIA Directive – involves the restructuring of rural landholdings – which is a project included under Annex II, paragraph 1(a) – what is the scope of the assessment required to be undertaken by the Directive?*

    a. *Specifically, does the Directive require the assessment of the environmental impact of the entirety of the proposed development or does it require only that the environmental impact of that part of the proposed development comprising the restructuring of rural landholdings be assessed (though*

that impact is to be assessed cumulatively with the impact of the remainder of the project)?

2. *In the event that, on its proper construction, the EIA Directive requires the assessment of the entirety of the proposed development, do the 2011 Regulations enable the Minister for Agriculture to carry out such an assessment in compliance with the EIA Directive in circumstances where planning permission for the development (including that part of it coming within Annex II paragraph 1(a)) has already been granted in the absence of any environmental impact assessment?*

3. *Whether the EIA Directive has been properly transposed in the State in circumstances where:*

    a. *The Minister is responsible under the 2011 Regulations for screening for and/or conducting an EIA in respect of an 'activity for the restructuring of rural land holdings' and is limited to the powers granted in those Regulations and as may be lawfully implied or arise (whether through implication or otherwise) by virtue of European law and otherwise has no role in deciding whether development including or involving such an activity should be permitted or the conditions to be attached to such developments.*

b. *Where consent for a solar farm, which involves the restructuring of rural landholdings, requires (as one element of its authorisation) an application for planning permission under the Planning and Development Act 2000 (as amended) and where such permissions can, as a matter of Irish law, be granted without any prior environmental impact assessment of the development.*

4. *Whether the Board's decision to grant planning permission to the Notice Party should be quashed by reason of any of the matters set out here [ ] relating to transposition, scope, and/or effect of the EIA Directive.*"

The pleading issue

39. There is, however, a preliminary question that arises. It defined the fifth issue agreed between the parties, and arose from the clear – and obviously strongly held – view of the Trial Judge that the questions underlying these issues, had not been sufficiently pleaded to enable these questions to be addressed at all. That matter (and a related question as to prematurity) was framed by the parties by reference to the agreed substantive issues as follows:

"*Whether the Appellant's pleadings are sufficient to permit them to advance the issues set out at 1-4 above and/or whether any or all of*

those issues are premature in light of the view that no application to the Minister has yet been made or determined".

40. In the course of its notice of appeal, the Appellant posited that the High Court had erred in finding that the Appellant had failed to plead its case correctly. It said that "*the matters identified by the Court in its judgment as being interesting points of law but which fell outside of the pleadings were matters that arose in the course of debate in the High Court"*. It said that "*the process"* under SI 456/2011 was "*not engaged"* and that it "*did not bring and could not have been expected to have brought a challenge to a hypothetical process in those circumstances."* In its original written submissions to this Court, what it had to say about the pleading issue was terse. It believed, it asserted, that "*these matters were sufficiently pleaded and are in accordance with Order 84 Rule 20(3)"*. It said that it "*cannot be expected to see around every corner and anticipate what might be said by the respondents and plead against each eventuality"*. To put it in that position, it said, would be contrary to Article 11 of the EIA Directive and the Aarhus Convention.

41. It is convenient to address each of the first four issues by reference to the pleadings *seriatim*. The governing principles can hardly be in doubt. The Statement of Grounds required to initiate an application for leave to seek judicial review must identify the relief sought, and the "*particular grounds upon which each such relief is sought*" (O. 84 R. 20(2)(ii)). It is not sufficient for these purposes to give as a ground "*an assertion in general terms of the ground concerned*", but must "*state precisely each such ground*" (O. 84 R. 20(3)). A

Statement of Grounds may be amended both at the time of the leave application (O. 84 R. 20(4)) or thereafter (O. 84 R. 23(2)), but absent such an amendment the Rules are emphatic in their stipulation that "*no grounds shall be relied upon or any relief sought at the hearing except the grounds and relief set out in the statement"* (O. 84 R. 23(1)). It is because of these provisions that it has been stressed that judicial review is a procedure in which "*leave must be sought in relation to specific reliefs aimed at specific decisions, on specific grounds"* (*Khashaba v. Medical Council* [2016] IESC 10 (per O'Malley J. at para. 56).

42. It is thus to be expected that both the importance of the manner in which a claim is pleaded, and the strictness with which that requirement will be enforced, has been consistently stated and restated (*Casey v. Minister for Housing, Planning and Local Government* [2021] IESC 42 at paras. 29-32 per Baker J.). Whatever flexibility may be demanded by the interests of justice in a particular case, it is axiomatic – and indeed the Trial Judge rightly framed the matter in these terms – that the power of the Court to grant reliefs that are not specifically claimed is conditioned by and must (at least unless the affected parties agree otherwise) be exercised within the contours of the case as defined by the pleaded grounds. This is *a fortiori* the case in the context of a claim of a failure to transpose an obligation of EU law, a significant allegation which it is particularly important should be presented in compliance with O. 84 R. 20(3) (*Sweetman* at para. 103 per McDonald J.).

43. The Appellant was in error in suggesting that it was an answer to these basic features of proceedings by way of judicial review to propose that matters that were not pleaded could, notwithstanding that default, be relied upon to ground relief because they "*arose in the course of debate in the High Court"*. It was also wrong in saying that in some sense the pleading objection raised against it dissolved because the notice party had said it was not obliged to make an application under SI 456/2011 and that this excused it from bringing "*a challenge to a hypothetical process"*. The parties are expected to identify the alleged legal frailties in a challenged decision before they seek leave for judicial review and, where they have not done so in some respect and the justice of the case so requires, the Court may in certain circumstances enable the pleadings to be amended (the Appellant has never applied to either amend its pleadings, or to seek permission to argue new points on appeal). The purpose of proceedings by way of judicial review is thus to enable a party who has identified a legal error in a decision of, or process undertaken by, a public body to challenge the legality of that decision on the basis thus identified. The grant of leave is the extension of a permission to pursue that ground of challenge, not the opening of an investigation into whether the decision or process is unlawful on any grounds that might subsequently present themselves in the course of the ultimate hearing of the matter.

Analysis of the pleadings

44. At the most general level, it appears to me that the argument advanced by the Respondents and Notice Party in respect of the pleadings is well placed. Insofar

as any aspect of EIA relevant here was concerned, the Appellant's pleaded case was that ABP had breached the 2001 Regulations in two broad respects. The first was directed to the failure of ABP to make a screening decision. In the Statement of Grounds an assertion to that effect was followed by a plea that if ABP had made such a screening decision it lacked jurisdiction to do so as the Minister has the function of screening under the 2011 Regulations. The Board did not conduct a screening, and made that clear. The function of screening was vested in the Minister under the 2011 Regulations. Once it was evident that the Board had not conducted a screening determination, this point evaporated. It was not pursued before this Court.

45. Second, it was also said that the ABP decision was invalid because the State Respondents had failed to properly transpose the EIA Directive. However, this transposition case was made on a single ground, namely that the Directive should have been transposed "*into Irish planning law"* rather than by creating a separate consent procedure.

46. There were – as evident from my earlier summary of the decision of Humphreys J. – other points raised at various stages in the process. The Appellant had pleaded that ABP had jurisdiction pursuant to s. 176(3), but the trial Judge's finding that this involved a misconstruction of the provision has not been appealed. The Appellant also said that the amendments to the class for restructuring rural landholdings in the 2011 Regulations had not been validly made under domestic planning law.

47. Critically, however, at no point was it contended that transposition was ineffective because the Minister rather than ABP would conduct an EIA screening or an EIA in relation to the rural landholding restructuring. No point was taken that the Irish system involved two or more consents or that the timing of the applications may involve a screening for EIA after an earlier consent. All of these arguments would have required the joinder of the Minister.

48. As ABP stresses, the Minister was not a party to the proceedings, no attempt was made to join him, no relief declaratory or otherwise was sought in respect of the 2011 Regulations, the Appellant did not plead any grounds of challenge to ABP's decision on the basis of limitations or restrictions arising from same on the operation of the 2011 Regulations and/or the Minister's EIA jurisdiction, the Appellant did not plead any grounds of challenge relating to the sequencing of an application for planning permission and a subsequent application for Ministerial consent under the 2011 Regulations, and the Appellant did not plead any grounds of challenge to the 2011 Regulations – including any EIA transposition grounds. The Notice Party, I think, puts the matter well in its submissions: while the Appellant's case as pleaded with regard to the 2011 Regulations was in the context of ABP's actions, it now seeks to impugn the Regulations themselves.

49. Having received the Appellant's written submissions, and having regard to the fact that those submissions had not addressed in any detailed way the pleading issue that had been clearly identified by the Respondents during the application for leave to appeal to this Court, the Court requested that the Appellant identify

"*with particularity"* where it said that each of those issues was raised in the Statement of Grounds. As to issue 1, the response focussed on Core Grounds E5, E13 and E14 as particularised further (respectively) in sub-grounds E25/E26, sub-ground E35 and sub-ground E36. None of them present a formulation that approaches the basic point which it is now sought to make – that where a development involves the restructuring of rural landholdings, the Directive requires the assessment of the environmental impact of the entirety of the proposed development. This case, simply, was not pleaded. The case that was made in these various paragraphs of the Statement of Grounds – that *ABP* should have conducted an assessment of the entire project – necessarily collapsed once it was found that ABP had no such statutory jurisdiction, and that any construction of the legislation that sought to impose this jurisdiction on the Board, was *contra legem*.

50. As to issue 2, it was contended by the Appellant that this question "*arises primarily from legal argument before the Court below and paragraphs 39 to 48 of the judgment of the High Court"*. It said that it "*did not seek to challenge any determination that might be made under the 2011 Regulations"*. The Developer, the Appellant says, had no intention of making any application under the Regulations and ABP made its decision on the application for permission on the basis that the Proposed Development did not require an EIA and/or any other consents. Accordingly, the Appellant says, an application to the Minister was not likely to arise and could not have given rise to any challenge by means of judicial review.

51. Instead, it says, the Appellant challenged the lack of EIA in the development consent that had been granted by ABP. It says that "*it identified the gap in the transposing legislation in the statement of grounds at paragraph 40"*. In response to this plea, it is said, the State Respondent (alone) sought to rely on the Ministerial consent as filling the gap identified by the Appellant. It says that this was so in circumstances where the Developer was maintaining no intention of applying for any such consent and therefore no such application would be made and there was no mechanism by which the Developer could be forced to make such an application. Equally, there was no mechanism by which the development of the lands could be constrained as planning permission had been granted.

52. The Court below, the Appellant says, found that the removal of hedgerows amounted to "*rural land restructuring"* within the scope of paragraph 1(a) of Annex II of the EIA Directive and the 2011 regulations (paras. 39 to 41); and that the Board is not required to carry out an EIA (para. 46); that any interpretation of the legislation in the light of EU law that would impose an obligation on the Board as opposed to the State to conduct an EIA is not available (para. 43); that the Appellant is not entirely without a remedy because it can always return to Court in the event that the Developer fails to make an application to the Minister for consent or fails to acknowledge an obligation to do so prior to removing any hedgerows (para. 47); and that the Appellant must call on the Developer formally to acknowledge a liability not to remove such hedgerows prior to at least a screening decision under the 2011 regulations (para. 47). None of this addressed the absence of a pleaded case.

53. The Appellant similarly did not identify where the issue 3(a) was pleaded. The point was said "*to arise from the High Court judgment"*. As to issue 3(b), it pointed to Core Ground E19, and sub-grounds E27 and E40. Neither of these in any way communicate the contention which it is sought to make here. None suggest that the Minister could not carry out the required assessment in circumstances where planning permission for the development had already been granted without a prior EIA. It is, once again, difficult to accept that it was intended to advance this argument in an action to which the Minister had not been joined.

The consequence of the pleading deficiencies

54. When granting leave to appeal, the Court observed that there were sharp differences between the parties as to the extent to which the issues for which leave was granted properly arose from the Appellant's pleaded case. The Court said that it was not in a position to resolve those issues at that stage. It observed that the Appellant's case clearly did raise the fundamental issues of whether Irish law is compatible with the EIA Directive and whether Irish law ensures that development, such as that in issue, are subject to screening and assessment in accordance with the requirements of the Directive. Decisions to grant leave to appeal are usually made without the benefit of a full set of pleadings. Nothing in the Determination, or otherwise, either suggested or should be understood as suggesting that once a point was of sufficient importance to merit the grant of leave, the fact that the point had not been pleaded ceases to be of relevance. On

the contrary, it is clear from the Determination that the pleading issue remained a live one.

55. It follows from what I have said earlier that the Respondents were, in those circumstances, entitled to have the appeal against them dismissed and entitled to insist on the Appellant being held to its pleaded claim. That this should happen is proper for a number of reasons – by determining these issues on the merits now, the Court does so without the benefit of relevant findings by the trial Court and contrary to its own jurisprudence around hearing arguments on issues for the first time. At a systemic level, it is wrong that the impression should be given that parties are free before this Court to raise and obtain a determination on issues that have not been duly pleaded because, inevitably, that will be said to suggest that parties are free in all Courts to depart from their pleadings. As is clear from what I have said earlier, parties are not so free.

56. Moreover, there is a potential unfairness if this course of action is permitted and the party seeking to limit their opponent to their pleaded case ultimately loses on the new issues: they find themselves faced with a decision against them not only on the basis of an unpleaded case, but in circumstances in which they have not enjoyed the benefit of the hearings before at least two Courts that are usually envisaged by a right of appeal. So, to be clear this Court does not generally entertain claims that have not been pleaded, and save in the most unusual of circumstances it does not decide cases that have not been argued in the Courts below.

57. However, some commonsense must be brought to bear on the situation in which the Court and the parties now find themselves in this case. For reasons I explain later, I have concluded – after full argument on the issues – that most of the substantive issues that have been raised by the Appellant before this Court lack any basis. In those circumstances there is no unfairness in proceeding to decide at least some of these issues: indeed in the course of oral submissions this is what counsel for the Developer accepted the Court should do – he wanted "*the pleading issue"* to be determined, but even if he won on that issue he was not saying that the Court should not express a view on the merits. These issues, it must be repeated, were exhaustively argued before, and interrogated in the course of the hearing by the Court.

58. Moreover, it was the Appellant who contended that the Trial Judge had erred in the manner in which he dealt with the question of pleadings, and it is the Appellant who sought a determination from this Court on the issues (so it cannot be heard to complain that they were not determined in the High Court). In those circumstances it would, in my view, be wasteful of the resources of the parties for the parties to incur legal costs in advancing arguments on these issues, and – having regard to the views I have reached on these questions – for them not to be determined. It would also represent a waste of Court resources, the members of the Court having fully considered all of the legal issues raised in the parties' two rounds of detailed submissions in advance of the appeal and having heard full legal arguments on those issues. In those circumstances, it is my intention to proceed to explain why I have concluded that the Appellant's claims on these issues are misconceived.

59. Before doing so, the following should be stressed. While the 33rd Amendment to the Constitution did not affect the firm starting point that the Court will not entertain cases that have not been pleaded and will not determine issues that have not been decided in the High Court or Court of Appeal, the effect of that Amendment is to confer on the Court a "*novel"* jurisdiction (see the comments of the Chief Justice in *Odum v. Minister for Justice* [2023] IESC 3 at para. 35). This has resulted in the remoulding of some features of the Court's discretion to entertain and decide issues that, previously, it might have declined to determine. *Odum* shows how the principles governing the hearing of moot cases has been thus affected (and see in particular the remarks of Hogan J. in *Pepper Finance v. Persons Unknown* [2023] IESC 21 at paras. 41 and 86 and *MD v. A Secondary School* [2024] IESC 11 at para. 12). In this case, the Panel granting leave to appeal was both mindful of its obligations under Article 267 TFEU having regard to the decision on Case C-561/19, *Consorzio Italian Management* and the general importance of the questions raised as to the proper transposition and operation of the EIA Directive. Having determined that for these reasons, leave to appeal should be granted and while not being in a position at that point to resolve the dispute around whether the case had been pleaded, the full appeal proceeded. As obvious from my earlier remarks, it is in that context that I have determined it would be most wasteful not to decide the issues, having been fully argued. While acknowledging that this is not entirely satisfactory, while accepting the apparent incongruity of explaining at some length why these questions were not pleaded and then proceeding to decide them (and while in no sense intending to criticise anyone involved in this appeal), I would remind

counsel intending to seek leave to appeal that they should *not* seek leave in respect of issues that were neither pleaded nor decided by the Court whose decision it is sought to appeal, just as I would remind their opponents that it is open to any respondent to seek a preliminary hearing as to whether in fact a particular ground is properly before the Court at all. To repeat, this is not to criticise any of the legal advisors involved in this appeal.

60. So, in summary, this very unusual situation is a consequence of a particular set of circumstances – the fact that the issues which the Appellant sought to agitate on appeal proved not to have been pleaded, that the parties delivered full submissions on all legal issues in the case, the fact that the hearing proceeded on that basis, the fact that these issues are going to arise at some point in relation to this Proposed Development, the fact that the Developer made it clear that it was prepared to see these issues decided notwithstanding the deficiency of pleading or detailed consideration in the Court below, and the fact that I have reached firm conclusions on these issues against the Appellant (and therefore without any prejudice to the Respondents as a consequence of the issues not being pleaded).

Issue 1: the Appellant's case

61. The Appellant says that, because the Proposed Development involves a project for the restructuring of rural land holdings within Annex II, paragraph 1(a) of the EIA Development, the entirety of the Proposed Development (including the solar farm) must be subject to EIA screening and, if appropriate, a full EIA.

ABP, the State and the Developer all say that that involves a fundamental misreading of the EIA Directive and contend that only the Annex II, paragraph 1(a) project – the restructuring of rural land holdings – is subject to screening for EIA/an EIA ***but*** that, in carrying out such screening or assessment, the Annex II, paragraph 1(a) project is not considered in isolation: the cumulative impacts of that project and the wider development, including the solar farm, must be considered.

62. The Appellant stresses the decision of the CJEU's in Case C-215/06, *Commission v. Ireland* ("*Derrybrien I*"). There the Court was concerned with a wind farm development involving Annex II projects (the extraction of peat and construction of roads). In the Appellant's submission, it was because the development involved such projects that the CJEU concluded that there was a requirement for EIA of the entire wind farm project, even though at the relevant time, wind farms were not within Annex I or II. It observes that in Case C-50/09, *Commission v. Ireland* the CJEU held that the assessment to be undertaken must be "*as complete as possible"* and that, accordingly, the approach of the Court has been expansive in terms of the assessment obligations. This cannot be achieved, the Appellant submits, if portions of developments can be assessed in isolation.

63. This, the Appellant says, flows from the Directive's "*wide scope and broad purpose*" – which it says was emphasised by the CJEU in cases such as Case C-72/95, *Kraaijeveld* and Case C-227/01, *Commission v. Spain*. The Appellant also draws attention to Recital 22 of the Directive referring, as it does, to the

need to assess the "*whole project*". It notes that Annex III makes "*the size and design of the whole project*" (underlined emphasis in Appellant's submission) a vital part of the process of determining whether or not an EIA screening should be conducted for Annex II projects. Annex IV, on the EIA Report, requires "*a description of the physical characteristics of the whole project*" (underlined emphasis in original). Thus, to split the land restructuring, which would fall under Annex II, paragraph 1(a), from the solar farm project – the "*cause and effect*" of the land restructuring, which shares an "*objective and chronological link*" with and may be "*functionally interdependent*" on the land restructuring – would (the Appellant contends) fall foul of the intentions of the Directive. The purpose of that Directive, it argues, cannot be circumvented by the splitting of the whole project into '*the solar farm'* and the '*land restructuring'* that is caused by, and the effect of, the solar farm. Where several projects taken together, may have significant effects on the environment within the meaning of Article 2(1) of the EIA Directive, their environmental impact should be assessed as a whole. In order to avoid the misuse of EU rules by splitting projects that, when taken together, are likely to have significant effects on the environment, it is necessary to take into account the cumulative effect of such projects where they have an objective and chronological link between them (citing *inter alia* Case C-2/07 *Abraham*, and Case C-227/01 *Commission v. Spain*).

64. The Appellant argues that were the "*project"* to be the subject of an EIA in this case confined to that part of the Proposed Development comprising the restructuring of rural landholdings, the EIA screening and EIA would not consider the whole project in the manner intended by the Directive. It is, the

Appellant argues, difficult to see how any such EIA could consider the evolution of the baseline environmental scenario without implementation of the restructuring when the fact of the solar farm construction has already been decided in a separate non-EIA process.

65. In a consent procedure involving several stages, the Appellant submits, the assessment must be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment. Where national law provides for a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. Citing Case C-201/02, *Wells* at paras. 49-53, the Appellant contends that it is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure.

66. The Appellant emphasises also that "*the practicalities of disaggregating the development and attempting to do partial assessments of components are likely to be incredibly difficult*". If this even proves possible, the Appellant submits, the Court of Justice has insisted that "*projects that are subject to multistage consent procedures should be assessed as a whole*". To ensure effective screening of multi-stage processes, the assessment would be required "*as soon as it is possible to identify and assess all the effects which the project may have*

on the environment". In a case like this, which involves a "*principal decision*" and an "*implementing decision*", it is submitted that those effects must be "*assessed at the time of the procedure relating to the principal decision*".

Issue 1: assessment

67. I have concluded that the Appellant's contentions in this regard are misconceived. The fact that hedgerows were to be removed did not trigger the obligation to have an EIA in respect of the entire solar farm development. What is to be assessed is the whole project identified in the Appendices to the Directive, and that meant the removal of the hedgerows. Here, the following are relevant.

68. First, solar farms are not referred to in either Annex I or II. While the EIA Directive does not allow the exclusion of sub-elements of Annex I and II projects, that does not mean that a wider development must be subject to a full assessment only because one element of it falls within Annex I or II. The Annexes, and the EIA they require, deal specifically with "*sub-categories of projects*" and not any "*whole project*", regardless of the broad definition the EIA Directive gives for "*project*". It is the projects listed in Annex I or II that are, pursuant to Article 4 of the EIA, required to be subject to the assessment provided for in the Directive. In this case, this meant that what had to be assessed was the *"[p]rojects for the restructuring of rural land holdings*". An EIA arises only for EIA projects: the EIA Directive is quite clear in that respect and the Appellant is wrong to suggest that the EIA obligation extends to any

wider project. As O'Moore J. observed in the course of his judgment in *Kavanagh* (at para. 11) any other conclusion would subvert the evident intention underlying the careful definitions in the Directive. Indeed, as the Notice Party stresses in its submissions, that judgment shows that the legislative history of the EIA Directive (in the course of which a decision was made *not* to include solar farms as projects) is quite inconsistent with any such suggestion (see the judgment of O'Moore J. in *Kavanagh* at paras. 28 and 29).

69. Second, this does not mean that the EIA Directive allows the impacts of the solar farm project to be disregarded. Annex III of the EIA Directive provides for authorities to consider "*the cumulation of the impact with the impact of other existing and/or approved projects*". Thus, where Annex I or Annex II projects are part of a wider development or project, they do not fall to be assessed in isolation; rather the EIA Directive requires an assessment of the cumulative effects of the Annex I or II project *and* the wider development. The requirement for cumulative assessment means that the other works associated with the solar farm will be cumulatively assessed with the rural land restructuring. Thus it is incorrect to suggest that the rural land restructuring will be assessed separately. As the State submits, this does not mean that the overall project thereby becomes a *de facto* EIA project if any aspect of its construction involves an EIA project.

70. Third, that conclusion does not imply that it is (as the Appellant suggests in its submission) "*permissible to split an EIA project into smaller parts with the intention, or effect, of removing the application of the EIA Directive <u>from projects to which it applies</u>*" (original emphasis). While the EIA Directive

makes several references to "*the whole project*", these are properly understood as referring to the whole of the EIA project (as described in Annex I or II). Recital 22, in particular, uses the term '*whole project'* to describe the breadth of the assessment, not to expand the categories of project that are subject to the underyling obligation. The Annex II project here – the project for the restructuring of rural land holdings – will be subject to an EIA/screening and, as I have just explained, that will necessarily take into account the cumulative effect of other projects (including the solar farm). This, as the Court has made clear is a real distinction – taking into account the solar farm when carrying out an EIA of the proposed restructuring of the rural landholding is not the same as carrying out an EIA of the solar farm (*Fitzpatrick v. An Bord Pleanála* [2019] IESC 23, [2019] 3 IR 617).

71. Fourth, the Appellant's reliance on the decisions in *Derrybrien I* and Case C-261/18, *Commision v. Ireland* ("*Derrybrien II*") is misplaced. In *Derrybrien I*, the State contended that no EIA was required in respect of two phases of a windfarm project for which development consent was given at a time when such projects were not listed in Annex I or II of the EIA Directive. The CJEU found that because the development involved peat extraction and road construction (which were listed in Annex II), an EIA was required. But this was not, as the Appellant contends, because "*the extraction of peat and the construction of roads triggered the requirement for EIA of the wind project, even though at the applicable time, by itself a wind farm development did not require an EIA"*. Instead, the CJEU concluded that an EIA was necessary for the extraction and road building projects (see paras. 96-103 of the judgment). The fact that peat

and mineral extraction and road construction were '*projects'* was not stated as converting the wind farm project into one captured by Annex 1 or 2. That was made clear in *Derrybrien II* (at para. 21):

> "*… the Court held, in paragraph 103 of that judgment, that the location and size of the projects of peat and mineral extraction and road construction, and the proximity of the site to a river, constituted specific characteristics which demonstrated that* ***those projects****, which were inseparable from the installation of 46 wind turbines, were likely to have significant effects on the environment and, accordingly, had to be subject to an assessment of* ***their effects*** *on the environment."*
>
> (Emphasis added)

72. Fifth, these considerations of text and purpose are not displaced by general references in either the Directive to "*the whole project"* or in the case law to the Directive having a "*wide scope and purpose"*. The former begs rather than answers the question of what "*the project"* in issue is, and is not possible to deduce from the general language of the latter a specific obligation of the kind suggested in this regard by the Appellant. The purpose of the EIA Directive is to ensure that the projects listed in Annex I and II are subject to EIA processes. That entails ensuring that the whole EIA project is subject to EIA. Other projects, not included in either Annex I or II are accounted for by way of cumulative assessment. That approach, which has been repeatedly endorsed by the CJEU, ensures the even application of the Directive. The dichotomy offered

by the Appellant between performing an EIA on the solar farm versus the hedgerow removal "*in isolation*" is a false one – the EIA processes will account for the solar farm works by way of cumulative assessment.

73. Finally, the other decisions of the CJEU relied upon by the Appellant are not on point. Both *Kraaijeveld* and *Commission v. Spain* were concerned with whether projects fell within Annex I or II. *Wells* addressed a mineral extraction project which fell entirely within the Directive in a context in which what the CJEU condemned was a multi-stage procedure whereby the first stage – the principal decision – framed the parameters of the implementing decision: it was found that the effects of the project on the environment had to be identified and assessed at the time of the principal decision. Here, the Minister's EIA jurisdiction is not so confined by any decision made by ABP.

74. Had I considered there to be any serious issue around this question (which occupied the bulk of the submissions of each party to this Court), I would, of course, have concluded that a question should be referred to the CJEU arising therefrom. However, the correct answer to this issue here is so obvious that I cannot see that there is any scope for any reasonable doubt. The literal meaning of the language in the Directive leans heavily against the argument advanced by the Appellant (that the provisions to which it refers should be interpreted so that a solar farm development becomes a project requiring an EIA because one part of it comprises a restructuring of land development). There nothing in the context, nothing in the purpose, and nothing in the cases cited by the Appellant to even suggest otherwise. This is not a case in which there was any question of

splitting a development to avoid EIA thresholds. Any other conclusion would entail vast confusion and uncertainty. This issue is *acte clair*.

Issue 2: the Appellant's case

75. The Appellant says that an EIA of the Proposed Development cannot lawfully be conducted under the 2011 Regulations in circumstances where planning permission for the development (including that part of the development said to constitute a project coming within Annex II, paragraph 1(a) of the EIA Directive) has already been granted in the absence of any environmental assessment. The Appellant makes four points in support of this argument.

76. First, the 2011 Regulations provide only for an assessment of an *activity* – insofar as relevant to this case the *activity* of restructuring of rural landholdings, but not the whole solar farm *project.* Second, the only cumulative effect falling to be considered under the Regulations is that with other "*activities*", not other "*projects*". Thus, the Appellant argues, even if the land restructuring could be assessed independently of its cause and effect (the solar farm) there is no obligation to consider cumulative effects in a screening other than with other activities as defined in the 2011 Regulations. Third, the 2011 Regulations (Regulation 3(3)), do not apply to any activities which fall to be considered under the Planning and Development (Amendment) (No. 2) Regulations 2011. Finally, the Appellant says that "*it is not possible in this case to untangle the solar farm development from the hedgerow removal, land reprofiling, and or restructuring that is the cause and effect of the renewable energy development*."

Issue 2: assessment

77. In the course of their submissions, the Respondents variously referred to the four substantive issues as hypothetical and premature. Insofar as the pure issues of law arising in the context of issues 1 and 3 are concerned, and in circumstances in which it is intended that the Notice Party will make an application to the Minister under the 2011 Regulations, I do not believe this objection to be well-founded. However, in the context of the second issue I believe that this objection has compelling force.

78. Certainly in theory it can be said that insofar as it is contended that it is not *possible* for such an EIA to be undertaken, that argument – abstract as it may be – can be disposed of. There is no reason in law why the Minister cannot, in priniple, carry out an effective assessment under the EIA Directive. As the Notice Party puts the matter, if the "*[p]rojects for the restructuring of rural land holdings*" activity requires an EIA screening/EIA of the entire solar farm, there is nothing in the Regulations precluding the Minister from conducting such an exercise. Nor is there anything unlawful about a process whereby multiple development consents may be required: all that EU law requires is that an EIA of the project which requires an EIA be done before the relevant development consent is granted (*Martin v. An Bord Pleanála* [2007] IESC 23, [2008] 1 IR 336 ("*Martin*")). While the Minister could not in law reverse the ABP decision, his or her decision could have the effect that the Developer would be unable to carry out the Proposed Development pursuant to the Board Decision.

Conversely, if there was a decision of ABP granting planning permission for something which required Ministerial development consent *qua* "*[p]rojects for the restructuring of a rural land holding*", the Board Decision does not permit that to go ahead without that Ministerial consent. That is not a case of conflicting jurisdictions because the Developer never had the freedom under the Board's decision to do anything which required Ministerial Consent without getting it, and no options have been removed. The principle of conforming interpretation and the duty to disapply national law which conflicts with EU law is obviously relevant in this regard. There is nothing in the Regulations which presents any impediment to a compliant EIA. Insofar as the reference to "*activities*" in Schedule 2 is an error and that the reference should be to "*projects*" the Minister can (and, as a matter of EU law, must) have regard to the cumulative effect of other projects.

79. However, that theoretical argument only goes so far. In reality the question of whether it is possible for the Minister in a given case to carry out an assessment that is compliant with the EIA Directive can only be properly addressed when the Minister has actually done so and, clearly, there can be no developed factual context in which that issue can be adjudicated upon without an actual assessment being undertaken (see *Habte v. Minister for Justice and Equality and ors.* [2020] IECA 22, [2021] 3 IR 627 at para. 97). To that extent, and while noting the propositions of law to which I have referred, this issue cannot be properly addressed in a factual vacuum.

Issue 3: the Appellant's case

80. This issue is closely related to the first and second, but is specifically directed to two suggested frailties in transposition of the EIA Directive. The first is the fact that the Minister is responsible under the 2011 Regulations for screening for EIA and/or conducting an EIA but has no role in deciding whether a development involving such an activity should be permitted or the conditions to be attached thereto. The second is that the planning permission required for the solar farm development can be granted without any prior environmental impact assessment.

81. The Appellant in the course of a single paragraph in its submissions baldly asserts that there has not been proper transposition of the EIA Directive, referring in this regard to the draft Regulations that have since been made (the Planning and Development (Amendment) (No. 2) Regulations 2023 (SI 383/2023)), which the Appellant characterises as "*a belated attempt to transpose the EIA Directive in this regard*": the absence of particularity in the argument as articulated in submissions leads ABP and the Developer to dismiss the contention as not having been properly formulated.

Issue 3: assessment

82. The State engages in more detail with this issue and, insofar as it does so, I agree with its submissions. It argues that this third issue raises the question of dual consents in environmental litigation, contending that the Directive has been fully implemented here. First, the effect of a planning permission is only to

assure the applicant that, *quoad* the planning legislation, his development will be lawful (*Keane v. An Bord Pleanála* [1997] 1 IR 184). Further permission, under some other distinct statutory code – such as building bye-law approval – may be required before that development can actually proceed. "*Dual consent regimes*" are, the State says, envisaged in the EIA Directive. Here, the Minister is a competent authority, and his consent is a development consent, for the purpose of the Directive (the State goes so far as to suggest that the ABP Decision is not a development consent but, at the very least, as the State says, it is incorrect to say that the ABP Decision alone constitutes development consent). The legal regime here is closer to that considered in *Martin.* There are two distinct consent regimes operating independently, not hierarchically. The Minister is not, in respect of the performance of his or her functions under the 2011 Regulations, constrained in any way by the ABP Decision. It follows that the Minister may refuse consent, in which case the Proposed Development could not proceed, or could give consent subject to any conditions that the Minister considered were required by EU law and any such conditions would have to be complied with by the Developer, in addition to the conditions attaching to the ABP Decision. The fact, in short, that the Minister has no role in deciding whether planning permission is granted does not matter to the compatability of the system under European law.

83. This, I think, disposes of issue 3(b) pursuant to which the Appellant proposes that there is no proper transposition of the EIA Directive when consent for a solar farm, which involves the restructuring of rural landholdings, requires an application for planning permission under the Planning and Development Act

2000 and where such permission can, as a matter of Irish law, be granted without any prior EIA of the development. There is, as is I think clear from my consideration of the decision in the *Derrybrien I* case earlier, no such requirement in circumstances in which Irish law requires that the Minister consent to the solar farm before it can be developed. As with the first issue, I can see no possible basis for any other conclusion, and would not refer any aspect of this to the CJEU.

Issue 4

84. The fourth issue presents the question of whether these grounds or any of them afford a basis for invalidating the ABP decision. The Respondents and Notice Party make a strong case that even if there is an issue with transposition of the EIA Directive through the Agriculture Regulations, this does not go to the validity of ABP's decision, merely to the operability of the regime (and *see Hellfire Massy Residents Association v. An Bord Pleanala* [2022] IESC 38). Having regard to the answer I propose to issues 1 and 3, the issue does not arise in relation to those questions. In circumstances where I have found issue 2 to be premature, I do not think it necessary or appropriate to answer it.

Conclusion

85. In conclusion, therefore, this appeal should be dismissed. The substantive issues the subject of this appeal present grounds of challenge to the decision of ABP which were not pleaded. Nonetheless, and for the very particular reasons

summarised by me at para. 60 I have addressed the merits of the first and third of these issues, and have concluded that they are misconceived. The second is premature and, subject to the comments I have made in relation to some features of that issue, it is not possible to address it pending a decision by the Minister under the 2011 Regulations.