THE HIGH COURT
COMMERCIAL

[2023] IEHC 330

Record No. 2019 98 JR

BETWEEN

PETER SWEETMAN

APPLICANT

-AND-

AN BORD PLEANÁLA

AND

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND BY ORDER

BALLYCUMBER WIND FARM LIMITED

NOTICE PARTY

Judgment of Mr. Justice Quinn delivered the 16th day of June 2023

1. The applicant has applied for leave to appeal from the decision of this Court to refuse his application for an order quashing a decision of the first named respondent, An Bord Pleanala, made on 18 December 2018 pursuant to section 5 of the Planning Development Act 2000, which determined that the construction of a grid connection servicing a windfarm

development located at Ballycumber, Tinahely, Co. Wicklow, was exempted development. The applicant had sought and been refused also a declaration that the Board's determination was in breach of Directive 2011/92 EU on the assessment of the effects of certain public and private projects on the environment as amended by Directive 2014 / 52 EU ("the EIA Directive") and the jurisprudence of the European Court of Justice, and a declaration that s. 5 of the Act is contrary to the Constitution, European law and the Aarhus Convention.

2. Section 50 A (7) of the Act of 2000, provides that no appeal shall lie against such a decision of this court without leave of the court, and that leave shall only be granted where the court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken.

3. I have concluded that this case does not meet the criteria for this Court to issue such a certificate, having regard to the principles established in the case law of the Court concerning subs. 7.

4. The facts are described in detail in the Principal Judgment delivered on 17th February 2023 [2022 IEHC 89]. It is not always necessary on an application for leave to appeal to repeat the detail of the original proceedings. Nonetheless, it is appropriate in this case to summarise a number of the critical features of the case which inform my decision to refuse a certificate.

Chronology

5. On 13 March 2013 Wicklow County Council decided to grant permission for construction of the Ballycumber windfarm. This was appealed by local residents Gerard and Lena Dunne.

6. On 13 August 2013 the Board decided to grant the permission.

7. On 17 April 2015, Wicklow County Council issued a declaration in accordance with s. 5 of the Act that the construction of a grid connection between the windfarm and an ESB substation at Kilmagig, Avoca, Co. Wicklow, is development but is exempted development.

8. Following these decisions and in reliance thereon, the notice party negotiated the required investment for the construction of the windfarm and the grid connection.

9. On 24 April 2017, works commenced on the construction of the windfarm, and on 14 May 2017, works commenced on the construction of the grid connection.

10. The windfarm was substantially completed at the end of January 2019. The grid connection was substantially completed in December 2018.

11. The grid connection was energised on 21 March 2019.

12. On 15 May 2017, Mr. Dunne made an application to Wicklow County Council pursuant to s. 5 of the Act for a declaration as to whether the grid connection in this case was development, and if so, whether it was exempted development. Wicklow County Council issued no determination on foot of that request and on 22 June 2017 Mr. Dunne referred the question to the Board.

13. On 11 January 2018, the Board's inspector Mr. Kevin Moore, issued his report.

14. The Inspector concluded that in circumstances where the Board had previously determined that mitigation measures proposed and residual effects from the Ballycumber windfarm development were acceptable and where it had been determined that the grid connection would not likely have any significant environmental effects or significant cumulative effects with the windfarm development, it was reasonable to conclude that the overall project was not likely to have any significant impacts on the environment.

15. The Inspector then considered recently decided case law, notably the judgment of the High Court in the case of O'Grianna v. An Bord Pleanala & Ors. [2014] IEHC 632, in which Peart J. held that the grid connection formed part of the overall windfarm project for which

environmental impact assessment was required and that where no EIA of the grid connection had been performed the EIA Directive had not been complied with. The Inspector concluded that the authorities, notably O'Grianna, precluded consideration of the grid connection in isolation from the overall windfarm project, which requires EIA, and therefore that it could not be declared exempt.

16. On 18 December 2018 the Board issued an order overruling the Inspector and declaring the grid connection and associated works to be exempted development.

17. During 2017, after commencement of the works, a number of legal proceedings were commenced relating to the grid connection.

18. Two separate plenary actions including injunction applications were issued. The Notice Party issued a plenary action, including an application for an injunction against persons who it alleged were interfering with the grid connection works once they commenced. Similarly, an action was issued by a Mr. Timothy Healy against the Notice Party arising from the works themselves. Thirdly, Mr. Healy applied for and was granted leave to commence judicial review proceedings to quash the 2015 Declaration.

19. These proceedings were all consolidated by an order of McGovern J. on 9 October 2017. Ultimately, they were settled and by a consent order made in December 2017 the proceedings were struck out.

20. Mr. Dunne was not a party to any of these proceedings. Nor has he challenged the Board's decision of 18 December 2018 made on his referral.

21. The applicant was not a party to any of the referrals or the proceedings referred to above. He was present in court on 6 September 2017 when the Healy judicial review proceedings and the injunction proceedings were mentioned before the court. He therefore had knowledge from that date at the latest of the windfarm, of the ongoing grid connection

works and of the 2015 Declaration in respect of the grid connection. On 25 February 2019, he commenced these proceedings.

22. In the judgment delivered by this Court on 17 February 2013, I held as follows: -

(i) That these proceedings were an impermissible collateral challenge to the 2015 Declaration.

(ii) That the Dunne referral was an impermissible collateral challenge to the 2015 Declaration.

(iii) That the Board ought to have exercised its discretion pursuant to s. 138 of the Act to dismiss the Dunne referral for this reason.

(iv) That s. 5 does not contravene the provisions of the Directive.

23. The conclusions above were sufficient to dispose of the application. However, in deference to the extensive submissions made regarding the substance of the Board's order, and, importantly, at the request of the parties, and lest I would have fallen into error in the conclusions made above, I considered and stated my conclusion that the decision of the Board was an exercise in impermissible project splitting and that the Board had fallen into error in its interpretation of the case law of this Court on that subject.

24. Having found that the proceedings were an impermissible collateral challenge to the 2015 Declaration and were a clear attempt to circumvent the statutory framework and time limits for review of that declaration, I continued in para. 220 as follows: -

"A logical extension of these findings is that it is not the absence of procedures for public notification in the s. 5 referral process which has deprived the applicant of a remedy, but his own conduct in standing by from September 2017 to February 2019 to await the outcome of the Dunne referral, while the construction works continued and opportunistically initiating these proceedings on the 'back' of the board's determination".

25. I held that the notice party was entitled to rely on the 2015 Declaration and the original consent to the windfarm development in constructing the wind farm and grid connection, and I refused the reliefs sought.

26. Following the delivery of this Court's judgment, the applicant requested that, notwithstanding the findings summarised above, the court should issue a declaration in the terms sought in the originating notice of motion to the effect that the board's s. 5 declaration of 18 December 2018 was in breach of the EIA Directive and the jurisprudence of the European Court of Justice.

27. In a judgment delivered ex tempore on 30 March 2023, I refused to make any such declaration and said the following: -

> *"No authority has been cited to me which requires, even as a matter of recognising the primacy of EU law, that this Court should disregard its own findings that the proceedings were an impermissible collateral challenge and an opportunistic attempt to circumvent the time limit and then reverse, which it has been asked to do, to reverse its decision to refuse relief.*
>
> *"The applicant has been found to be engaged in opportunistic proceedings. On their face, a timely challenge to the 2018 declaration, in substance a collateral challenge which would undermine the finality and certainty of the 2015 declaration and it seems to me that that of itself warrants refusing a declaration".*

<u>This application</u>

28. Section 50 A (7) of the Act provides as follows: -

> *"The determination of the Court of an application for s. 50 leave or of an application for judicial review on foot of such leave, shall be final and no appeal shall lie from the decision of the court to the Supreme Court* (now the Court of Appeal) *in either case save with leave of the Court which leave shall only be granted where the court*

certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court (now Court of Appeal)".

29. The applicant has requested this Court to certify three points of law pursuant to the section as follows: -

(A) Is the Board's jurisdiction to entertain a s. 5 application from a member of the public, where the subject matter has previously been addressed by the relevant local authority on an earlier s. 5 application made by the developer, affected by the fact that the previous s. 5 declaration treated development which requires EIA as exempted development?

(B) Where the Board did entertain the second s. 5 application, is a member of the public's ability to challenge the Board's decision affected by the fact that the previous s. 5 declaration treated development which requires EIA, as exempted development?

(C) Where the Board did in fact entertain the second s. 5 application, is the Board's decision to entertain the application valid unless quashed by application for judicial review under s. 50 of the Act?

30. The provisions of s. 50 A (7) have been considered in extensive case law of this Court which was opened to me on the leave application. In particular, reference was made to CHASE v. An Bord Pleanala [2022] IEHC 231 (Barniville J), Krikke v. Barranafaddock Sustainable Electricity Limited [2022] IESC 41, (Woulfe J. and Hogan J), and Monkstown Road Residents Association v. An Bord Pleanala [2023] IEHC 9, (Holland J).

31. It is unnecessary for me to recite extensively all of the statements analysing the relevant principles, but I have considered each of these judgments carefully. The key points which are relevant to this case may be summarised as follows: -

(1) The starting point is that the intention of the Oireachtas is that decisions of the High Court on planning related judicial review should be final and conclusive.

(2) The jurisdiction to certify a case and grant leave to appeal must be used sparingly.

(3) The requirements of the subsection are cumulative. This means that it must be shown firstly that the decision of the court involves a point of law of exceptional public importance and secondly that it is desirable in the public interest that an appeal should be taken.

(4) The law on the question to be certified must be shown to be in a state of uncertainty. It is not sufficient for a party to assert this by simply raising a point of law. It must be demonstrated that there is an ongoing uncertainty in relation to the point.

(5) The question posited must arise out of the decision of the High Court. It is not sufficient that the question will simply have arisen out of discussions or submissions which do not go to the *ratio decidendi* of the case or which concern a point which was not decided by the court.

(6) The point raised must be determinative of the proceedings. This test is failed if the question posited is one which, if answered differently by the appeal court, would leave the result of the case unchanged.

(7) The question of law must be formulated with precision and in a manner which demonstrates how it would resolve the issue between the parties. No matter how interesting or informative an appeal court judgment may be on a question, it must arise directly on the facts and have the potential to change the result of the case.

(8) The normal rule of statutory interpretation applies, and the point must be shown to be "of exceptional" public importance. This is a high hurdle.

(9) The requirement of public interest means that the question must transcend the facts of the case such that it is likely to resolve other cases.

(10) The application for leave must not be used to simply re – argue points of merit already decided by the court.

(11) If the intending appellant has lost the case on the basis of an application of clearly established principles it will be very difficult to show that the test has been met.

Questions A and B

32. A central finding which determined the outcome of this case and underpinned the decision to refuse relief was the finding that the question referred by Mr. Dunne and decided by the Board was the same question which had been asked by the Notice Party of Wicklow County Council in 2015 and that there had been no change in fact or circumstances. In finding that these proceedings were an impermissible collateral challenge, this Court applied a long line of authority from Goonery v. Meath County Council [1999] IEHC 15 through to Narconon Trust v. An Bord Pleanala (2020 IEHC 25 and 2021 IECA 307). I found that this was a clear case where a grant of relief would run contrary to all of the requirements of finality of decisions in planning matters and the important policy precluding collateral challenges made in an attempt to circumvent the time limits established by the Act. This was clearly the application of well established principles to the facts of this case.

33. This Court found that the applicant was aware of the 2015 Declaration at the very latest on 6 September 2017. He was also aware at that time that disputes had arisen regarding the conduct of the works and of a pending judicial review of the 2015 Declaration, albeit one facing objections as to time. Nonetheless, he elected to take no step whatsoever and simply awaited the outcome of the Dunne referral more than a year later.

34. The applicant was also aware that the ordinary time limit of eight weeks for judicial review of the 2015 Declaration had passed. Even giving the applicant the benefit of assuming he was not aware of the 2015 Declaration before 6 September 2017 (a fact not known or verified in these proceedings), it would still have been challenging for him to persuade a court that the conditions for extending the time limit for such a challenge were met (Section 50(8)). However, no such attempt was made by him and instead he stood by and awaited the outcome of the Dunne referral and moved this application in February 2019, 17 months later and 3 years and 10 months after the date of the First Declaration. It was in these circumstances that I found that these proceedings were an opportunistic application brought to circumvent the time limit for commencing a review.

35. It would have been open to this court to simply dismiss the proceedings as an impermissible collateral challenge, without deciding the substantive question of whether the Board had erred in making the declaration of exemption in December 2018. I was persuaded by the parties to examine and decide on the substantive challenge to that determination and I concluded that in fact the Board had erred in deciding that the grid connection did not require EIA. That finding was based on an application of the very clear judgments of Peart J. in O'Grianna v. An Bord Pleanala and of Baker J. in Daly v Kilronan Wind Farm Limited [2017] IEHC 308. The law regarding impermissible project splitting in this context is summarised at para. 177 where I stated as follows: -

> *"Taken together, the following conclusions can be drawn from the judgments in these two cases (namely O'Grianna and Daly):* -
>
> *(a) Construction of a windfarm and its grid connection works is one project, neither being feasible or serving any purpose without the other.*

(b) Where environmental impact assessment of a wind farm project is required, as is the case for a windfarm having more than five turbines, that EIA must comprise an assessment of the entire project (windfarm and grid connection) and not part thereof.

(c) Separate phases of a project may be subject to separate consent applications or s. 5 referrals, but an EIA which does not assess the entire project does not comply with the Directive. Screening for EIA of any part of the project does not meet his requirement. (d) Since the gridworks cannot be lawfully separated from the project as a whole, when the windfarm comprises more than five turbines and therefore requires a mandatory EIA, to treat the grid works as exempt is contrary to the aims and objectives of the Directive.

(e) No matter what level of detail is contained in screening and environmental reports submitted in support of a s. 5 referral relating to grid connection works, in such a case the screening required for the purpose of s. 4(4) is still only screening and not a compliant EIA".

36. The applicant does not suggest that this statement of principle contains any error.

37. Applying those established principles to the facts of this case at para. 189, I concluded the following: -

"(a) The wind farm and grid connection are one project.

(b) The windfarm EIA did not assess the cumulative effects of a proposed grid connection. This was understandable since the details of its route and other details were not available for inclusion in the EIS submitted. But the result is that the grid connection works were omitted from that EIA.

(c) In concluding that the grid connection works, only screened for EIA, were exempt, the Board engaged in project splitting contrary to the established principles prohibiting such approach.

(d) The Board erred in overruling the inspector in its interpretation of the established case law on the subject".

38. In para. 223, I concluded my judgment as follows: -

"My finding that the Board erred in declaring the grid connection works exempt because of the doctrine of impermissible project splitting may be said to apply with equal force to the 2015 Declaration. But the applicant has made this case by reference to the Board decision of 2018 and the manner in which the Board made that decision. Further, a central conclusion in my decision is that by December 2017, at the latest (and arguably much earlier) the notice party had become entitled to rely on the 2015 Declaration and the 2013 permission and it would be unjust to permit these proceedings to undermine that certainty".

39. No party to this application has suggested that there is any lack of clarity or uncertainty as to how to apply the "project splitting" jurisprudence to the assessment of grid connections for windfarms. Importantly, at the hearing of the applicant's unsuccessful request that I make a declaration on foot of my findings in relation to this subject, the Board indicated that it accepts the conclusions reached by this Court. The court now finds itself in a position where the questions formulated by the applicant which recite that the "previous s. 5 declaration treated development which requires EIA as exempted development" rely on the conclusion expressed by me in relation to impermissible project splitting, but on which I had refused to make a declaration for the reasons stated on 30 March 2023. A proper application of the established doctrine of impermissible collateral challenge to the facts of this case is not altered by the finding of the court that the Board erred in law in overruling the Inspector.

40. The judgment I delivered on 17 February 2023 contained analysis and a conclusion as to the substance of the Board's determination of December 2018 and not of the manner in which Wicklow County Council performed its deliberations in 2015.

41. It appears from the Wicklow County Council file which was exhibited in the proceedings that Wicklow County Council treated the development as exempt and issued a s. 5 declaration accordingly, but nowhere in the submissions made at the original hearing or the judgment of this Court delivered on 17 February 2023 was any analysis performed of the substance of that declaration.

42. For the decision I now have to make, it is important that it was not the 8-week time limit in s. 50 or the "closed process" of s. 5 complained of by the applicant which has deprived the applicant of a remedy in this case, but his own election to do nothing when he became aware of the 2015 Declaration. The applicant acknowledged in his grounding affidavit and submissions that Mr. Dunne had made his referral recognising that he was been out of "ordinary" time for challenging the 2015 Declaration.

43. The question of law posited in this application does not address at all this central set of facts on which the court's decision turned. Even if such a question were to be answered in the affirmative, thereby favouring the applicant, that would not alter the outcome based on this Court's assessment of the applicant's conduct, and its prejudicial effect on the Notice Party.

The remedial obligation

44. The applicant urged me on this application to have regard to the principle of EU law that where a court finds a breach of the Directive it is incumbent on the court to act to remedy that breach.

45. The theme of applying that principle was canvassed not only in this application but also at the original hearing and at the hearing after judgment to consider the form of the order

46. In support of this contention, the applicant refers to Case no. C 201/02, Wells v. Secretary of State for Transport, Local Government and the Regions, and Case no. 348/15, Stadt Weiner Neustadt v. Niederosterreichische Landesregierung.

47. In Wells, the court described the "remedial" principle where it stated the following: -

"64. ... it is clear from settled case-law that under the principle of cooperation in good faith laid down in Article 10 EC the Member States are required to nullify the unlawful consequences of a breach of community law. Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned.

65. Thus, it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.

67. The detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness)".

48. In Stadt Weiner, the court expanded on the autonomy of Member States in this regard when it stated as follows: -

"40. In the absence of EU rules in the field, it is for the national legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, provided that such rules are not less favourable than those governing similar national actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness).

41. The court also considers that it is compatible with EU law to lay down reasonable time limits for bringing proceedings in the interest of legal certainty, which protects both the individual and the administrative authority concerned. In particular it finds that such time limits are not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law.

42. Consequently, EU law which does not lay down any rules on the time limits for bringing proceedings against the consents issued in breach of the obligation first to assess the effects on the environment, set out in Article 2.1 of Directive 85 / 377 does not preclude in principle and subject to compliance with the principle of equivalence, the Member State concerned from setting a time limit of three years for bringing proceedings, such as that provided for in [the enactments the subject of that decision].

43. However, a national provision under which projects in respect of which consent can no longer be subject to challenge before the courts, because of the expiry of the time limit for bringing proceedings laid down in national legislation, are purely and simply deemed to be lawfully authorised as regards obligation to assess their effects on the environment, which it is for the referring court to ascertain, is not compatible with that Directive.

44. As the Advocate General noted, in essence in points 42 – 44 of her opinion, Directive 85 / 337 already precludes such a provision of that nature if only because that provision has the legal effect of relieving the competent authorities of the obligation to have regard to the fact that a project within the meaning of the Directive has been carried out without its effects on the environment having been assessed and to ensure that such an assessment is made, where works or physical interventions connected with that project require subsequent consent.

45. Furthermore, it is the court's settled case law that the Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment.

46. To that end, the competent authorities are obliged to take all general or particular measures for remedying the failure to carry out such an assessment (Wells)".

49. I was urged in this application to find that an extension of these judgments means that this Court should set to one side the doctrine of impermissible collateral challenge to facilitate the application now of a remedy in respect even of the 2015 Declaration in this case. That submission was a re-agitation of submissions made in the original hearing and rejected in the Principal Judgment.

50. It is clear from the judgments of Woulfe J. and Hogan J. in Krikke that this Court cannot be expected to go so far, and in those judgments, the Supreme Court has expressly considered the application of Wells and Stadt Weiner to domestic time limits.

51. In Krikke, Woulfe J. said the following: -

". . . in my opinion the time limit rules in s. 50 governing a challenge to the validity of a planning decision based on the requirements of the EIA Directive comply with both the principle of equivalence and the principle of effectiveness, and I agree with the findings of the Court below in that regard. Such rules, including in particular the rule allowing for an extension of the eight-week period, are not less favourable than those governing similar national actions. Such rules do not render practically impossible or excessively difficult the exercise of rights conferred by EU law, considering in particular again the potential for an extension of time".

52. Woulfe J. noted that in Krikke, the appellants had never sought to apply for judicial review of the relevant compliance decision and, importantly for this case, had never tested the operation of the time limits.

53. In Krikke, Hogan J. considered the case law of the EU and noted again in that case that no extension of time for a judicial review had been brought and said the following: -

> *"And nor, for that matter, did they seek to extend time if (as might well have been the case) they were hampered in*
>
> *discovering what had actually happened by reason of a certain lack of transparency on the part of the Council's own decision making",* a reference which has direct relevance to s.5.

54. Hogan J. concluded that it could not be said that the statutory time limit in s. 50 (2) contravenes the general EU law principles of equivalence and effectiveness.

55. The applicant submitted in this case that the absence of public notification of a developer's s. 5 application, other than the entry of the final decision in the planning register, deprived him of the opportunity to participate in that process. This brings one back to my central finding that it is not the "closed process" nature of s. 5, or the existence of the time limits in s. 50 for challenge by way of judicial review which has deprived this applicant of a remedy. If he had so much as attempted to challenge the 2015 Declaration or sought a time extension, he would be in a different situation. The questions of law posited by him do not speak in any manner to that finding. The result of this case would not be altered by any finding on the first two questions posited.

<u>Question C</u>

56. The third question of law which the applicant proposes is as follows: -

> "Where the Board did in fact entertain the second s. 5 application, is the Board's decision to entertain the application valid unless quashed by application for judicial review under s. 50 PDA 2000?"

57. This formulation is made in reference to para. 53 (iii) of the Principal Judgment, where I stated: -

"The board should have exercised its discretion pursuant to s. 138 of the Act to dismiss the Dunne referral".

58. At the original hearing the Board objected to contentions by the State parties and the Notice Party that the Board erred in failing to dismiss the Dunne referral. The Board's objection was that those submissions amounted to a challenge to the validity of the Board's decision for which no leave had been sought or granted as required by s. 50 of the Act and O. 84 of the Rules of the Superior Courts.

59. I concluded that it was not necessary to rule on that objection having regard to the fundamentals of my finding that the proceedings themselves and the Dunne referral were each an impermissible collateral challenge to the 2015 Declaration.

60. Although it followed from my conclusion that the Dunne referral was an impermissible collateral challenge and that the Board erred in entertaining it, it seems to me that what has been described by the applicant on this application as a "decision to entertain the application" is not in fact a decision. If the Board made a decision to dismiss that referral pursuant to s. 138 that is a decision which would have binding legal effect and consequences for the parties, and therefore would be amenable to judicial review. But the ordinary course of receiving and considering the referral does not involve making a substantive decision susceptible to scrutiny in judicial review.

61. In Spencer Place Development Company Limited v. Dublin City Council [2020] IECA, Costello J. considered the scope of acts or decisions which are amenable to judicial review. The learned judge observes that it is the policy of the Act that recourse to the courts should generally be a matter of last resort and she adopted the reasoning of Humphries J. in North East Pylon Pressure Campaign Limited v. An Bord Pleanala (No. 1) [2016] IEHC 300 where he observed that it would be inappropriate to permit judicial review of intermediate

steps which in truth form part of the administrative process leading later to a final and binding decision. Humphreys J. had held that: -

> *". . . the sort of decisions or acts to which s. 50 (2) refers are those amounting to ultimate substantive determinations, such as the grant or refusal of development consent, or some other similar definitive and non-reversible decision as to rights and liabilities, and not the subsidiary and intermediate steps, acts or secondary decisions that may take place on the way to that ultimate substantive determination".*

62. The step of receiving and progressing the Dunne referral was clearly such an intermediate step. In so far as the Principal Judgment recited that the Board erred in failing to dismiss the referral that was a clear reference to an administrative step which was never criticised by the applicant. No good reasons were advanced as to how a determination of the posited question could either assist the applicant in an appeal or be in the public interest.

Costs of the proceedings

63. Section 50 (B)(2) of the Act provides that in proceedings concerning the application of the EIA Directive and subject to subsections (2A), (3) and (4), each party to the proceedings shall bear its own costs.

64. Subsection (2A) provides that the costs of proceedings may be awarded to an applicant to the extent that it succeeds in obtaining relief. The applicant accepts that since the court has refused relief this subsection does not apply.

65. Section 50 B (4) provides as follows: -

> "Subsection 2 does not affect the court's entitlement to award costs in favour of a party in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so".

66. The applicant submits that because of what it describes as a "stark divergence" between the Board's decision and erroneous interpretation of the O'Grianna and Daly jurisprudence, and the findings of this Court, that the Principal Judgment has the effect of resolving a matter of exceptional public importance and that costs should be awarded to the applicant.

67. The test for awarding costs in Section 50 B (4) is different to the test for leave to appeal in S. 50 A (7) in two respects.

68. Firstly, for s.50 B (7) the requirement to show that the point is one of exceptional public importance arises in the forward looking context of warranting an exception to the rule that the High Court decision is final, where there is a public interest in having certain questions resolved by an appellate court. The context is more limited when deciding where a costs burden should fall as between the parties in a particular case.

69. The second limb of the test for s. 50 B (4) requires not that the award of costs be in the public interest, but that in the special circumstances of the case it is in the interests of justice to award costs.

70. The Board specifically requested that the court consider and determine the question of whether it had erred in its declaration that the grid connection works were exempted development, regardless of the court's finding on the objection of an impermissible collateral challenge. The Board went to great lengths in its submissions, both written and oral, to defend the approach it had taken. On this point of principle, the Board lost its case very clearly, albeit that it avoided having declaratory relief granted against it.. In circumstances where the Board took this position and, as it was entitled to do so, maintained it throughout the case, it ill behoves the Board to assert that the court was not resolving a question of important public importance. It is arguable that the question was not of "exceptional" public importance, but it seems to me that without this aspect being heard and determined, there was

a grave risk that the Board would continue to misinterpret the jurisprudence on the rule against project splitting as it applies to windfarm grid connections.

71. Having found that the applicant's proceedings were an impermissible collateral challenge to the 2015 Declaration and opportunistic, the court has limited sympathy for him in terms of the burden of costs. Nonetheless, the determination of the Board to have the substantive question resolved by the court, leading ultimately to a conclusion that the Board had erred, must be taken into account. In that particular circumstance it is appropriate to recognise that the applicant had raised a good and important point about the Board's deliberation in this case, and to award limited costs to him against the Board.

72. The case ran for seven days at hearing. At least half of the hearing time was dedicated to the analysis of the application of the EIA Directive and the question of whether the Board was correct or erred in concluding that the grid connection works amounted to exempted development, a question determined against the Board.

73. The interests of justice are best served in this case by balancing my conclusion to dismiss the application as an impermissible collateral challenge, which was the fundamental finding governing the result, against the factor that the applicant's submissions that the Board erred in its application of the EIA Directive were good and valid. Taking the overall result into account I shall award the applicant one third of his costs, to be paid by the Board.