[2023] IEHC 378

THE HIGH COURT
JUDICIAL REVIEW

[2023 No. 407 JR]

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

BETWEEN

IVAN TOOLE
AND
GOLDEN VENTURE FISHING LIMITED

APPLICANTS

AND
THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE

RESPONDENT

AND
RWE RENEWABLES IRELAND LIMITED AND THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE

NOTICE PARTIES

(No. 3)

JUDGMENT of Humphreys J. delivered on the 3rd day of July, 2023

Judgment history

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

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

3. I am now dealing with the main module of the substantive challenge (later potential modules to look forward to include issues regarding Luxembourg and the stay revisited).

Facts

4. On 26th May, 2010, Dalkey Island Special Protection Area (SPA) was designated by the European Communities (Conservation of Wild Birds (Dalkey Islands Special Protection Area 004172)) Regulations 2010 (S.I. No. 238 of 2010). The qualifying interests were:

Sterna dougallii (Roseate Tern) [A192];
Sterna hirundo (Common Tern) [A193]; and
Sterna paradisaea (Arctic Tern) [A194].

5. On the same date, the Lambay Island SPA was established by the European Communities (Conservation of Wild Birds (Lambay Island Special Protection Area 004069)) Regulations 2010 (S.I. No. 242 of 2010). The qualifying interests were:

Reefs [1170];
Vegetated sea cliffs of the Atlantic and Baltic coasts [1230];
Halichoerus grypus (Grey Seal) [1364]; and
Phoca vitulina (Harbour Seal) [1365].

6. On 8th March, 2019, the Rockabill to Dalkey Island Special Area of Conservation (SAC) was defined by the European Union Habitats (Rockabill to Dalkey Island Special Area Of Conservation 003000) Regulations 2019 (S.I. No. 94 of 2019). This specified the qualifying interests as:

Reefs [1170]; and
Phocoena phocoena (Harbour Porpoise) [1351].

7. On 22nd October, 2019, the South Dublin Bay SAC was established by the European Union Habitats (South Dublin Bay Special Area of Conservation 000210) Regulations 2019 (S.I. No. 525 of 2019). The qualifying interests were:

Mudflats and sandflats not covered by seawater at low tide [1140];
Annual vegetation of drift lines [1210];
Salicornia and other annuals colonising mud and sand [1310]; and
Embryonic shifting dunes [2110].

8. On 25th January, 2021, a previous licence was granted in favour of the first named notice party (reference FS 007029) with effect from December, 2020, and on foot of that the first named notice party carried out what is referred to in the papers as a "2020 site investigation campaign", although that appears to have happened in 2021.

9. The licence now under challenge was sought under s. 3 of the Foreshore Act 1933 on 1st October, 2021, to undertake geotechnical and geophysical site investigations and ecological, wind, wave and current monitoring to provide further data to refine wind farm design, cable routing,

landfall design and associated installation methodologies for the proposed Dublin Array offshore wind farm off the coast of counties Dublin and Wicklow.

10. We perhaps should pause here to clarify the distinction between geotechnical and geophysical investigations (see society of Underwater Technology Guidance):

(i) Geotechnical investigations tend to be conducted over a wider area and use intrusive techniques to investigate the seabed, involving the taking of physical samples or in situ testing.

(ii) Geophysical investigations use remote sensing techniques, to achieve various objectives including, for example, the characterisation of the seabed, shallow soils and geology, and to identify any man-made or naturally occurring hazards or objects on the seabed, involving the use of various acoustic, magnetic, electrical or optical based instruments and systems.

11. The geotechnical and geophysical surveying proposed by RWE are set out in the Investigative Foreshore Licence Application, tab 4, page 39, page 4 and 5 of exhibit IT1.

(i) Geotechnical:
   (a) Geotechnical boreholes;
   (b) Deep push seafloor Cone Penetration Tests (CPT); and
   (c) Vibrocores.

(ii) Geophysical:
   (a) Refraction surveys;
   (b) 2D UHR & geophysical survey including Bathymetric Survey, Side Scan Sonar, Shallow Reflection Seismic (Sub-bottom Profiling) and Marine Magnetometer; and
   (c) Geophysical survey including Bathymaetric Survey, Side Scan Sonar, Shallow Reflection Seismic (Sub-bottom Profiling) and Marine Magnetometry.

12. The application was accompanied by supporting documentation including a Natura Impact Statement and an Appropriate Assessment screening report which were annexes to a Supporting Information Report.

13. Two public consultation exercises took place in this matter.

14. The first consultation took place on foot of the application for the licence. That was advertised on 17th November, 2021 and took place from 18th November to 17th December, 2021. A copy of the application, relevant documents, maps and drawings were available for inspection at specified locations.

15. Some 17 submissions were made during the public consultation process as well as 8 submissions by prescribed bodies. Neither applicant made a submission at this stage.

16. The developer gave a response on 11th February, 2022 following the submissions from prescribed bodies.

17. It then submitted a more extensive 86-page response on the public submissions on 22nd March, 2022.

18. In May 2022, an independent environmental consultant (IEC), Hartley Anderson Ltd, prepared an appropriate assessment (AA) screening report to inform the Minister.

19. The Minister was also informed by an Environment Screening Stage Report prepared by the Department's Marine Advisor dated 20th June, 2022 which accepted that likely significant effects could not be discounted.

20. The Minister then published an AA Screening Determination on 20th June, 2022.

21. On foot of this, the Minister carried out a second public consultation exercise, which took place under reg. 42 of the European Communities (Birds and Natural Habitats Regulations) 2011 (S.I. No. 477 of 2011) from 30th June to 29th July, 2022 in respect of the AA Screening.

22. The first named applicant made a short submission on 30th June, 2022 as follows:

> "I'm a fisherman working in this area, I've 3 vessels and 7 lads working here for 20 plus years, there's been no consultation with fishermen as to where theses wind farms will be placed , it's been a bully boy attitude that the[y']re going to be built so get onboard, There's been more lies told to Europe by our government on the status of kish, bray and codling banks than you could make up, this has been brought to the attention of European Commission by many groups including fishermen, I'm part of an existing industry operating in this area and I won[']t be moving from this area for Rwe/codling or any other windfarm company's (ESB)."

23. The second named applicant did not make any submission during the consultation.

24. There were further observations by certain prescribed bodies (Foreshore Marine Advisors, Commissioners of Irish Lights and Inland Fisheries Ireland) and a response to those submissions was submitted by the developer on 10th August, 2022.

25. There were 19 public submissions made at this juncture and the developer prepared responses, which were submitted to the Department on 16th August, 2022 and on 30th August, 2022.
26. A further report was prepared by Arup and Hartley Anderson in September 2022 and the Department's Marine Advisor also prepared a report with an attached AA Conclusions Statement.
27. The Marine Licence Vetting Committee (MLVC) reported in November 2022 and concluded that, with site specific conditions and taking account of the totality of the documentation on file and subject to compliance with specific conditions, the proposed works would not adversely affect fishing, navigation or the environment and were in the public interest, and that the proposed site investigation activities, individually or in combination with other plans or projects, will not adversely affect the integrity of European sites outlined in the report in view of the sites' conservation objectives.
28. A submission was made to the Minister accordingly, entitled Submission HLG 00537-22: Appropriate Assessment Determination on Foreshore Application FS007188 RWE Renewables Ireland Ltd., Site Investigations for the proposed Dublin Array offshore wind farm, which was approved by Minister of State Burke on 23rd November, 2022.
29. The impugned five-year foreshore licence itself was executed by licence agreement on 13th January, 2023.
30. Notice of the licence was published in *Iris Oifigiúil* on 27th January, 2023 pursuant to s. 21A of the 1933 Act. The first named notice party then proceeded to notify interested parties that borehole drilling would commence in April, 2023.
31. On 20th April, 2023, the applicants gave notice of an intention to bring proceedings and to seek a "stay or similar relief". The first named applicant received a notice that, weather permitting, the array borehole element of the survey was intended to commence on 23rd April, 2023.

Procedural history

32. On 26th April, 2023, proceedings issued and were mentioned to Holland J. Strictly speaking, the proceedings were out of time on the basis of time running from the date of the decision, but given that one can reasonably assume that the applicants were not made aware of the decision until its publication in *Iris Oifigiúil*, they should be entitled to the full period of three months in this instance running from the date of that notification, particularly having regard to the EU law elements of the case (see caselaw discussed in *Marshall v. ESB* [2023] IEHC 73, [2023] 2 JIC 1705 (Unreported, High Court, 17th February, 2023)) and in the end there wasn't any contest on that point.
33. On 28th April, 2023, the applicants emailed the Minister of State enclosing a motion to admit the proceedings to the Commercial Planning and Environmental List pursuant to Practice Direction HC119, although, as previously emphasised, it would have been preferable if the CSSO had been served on behalf of the Minister. On the same date, the motion was served on the solicitors for the first named notice party.
34. At the initial mention date, the matter was adjourned to 8th May, 2023, which was the next sitting Monday list in the Commercial Planning and Environmental List.
35. On 12th May, 2023 an order was made allowing an amendment to pleadings, and an amended statement of grounds was filed dated 17th June, 2023.
36. On 12th May, 2023 I granted leave to seek judicial review and extended time for this purpose, and allowed an amendment. I indicated that there would be an interim stay with reasons to follow. As noted above, on 22nd May, 2023 I set out the reason for the interim stay in the No. 1 judgment, and on 16th June, 2023 I continued that on an interlocutory basis in the No. 2 judgment.
37. The substantive notice of motion seeking relief by way of judicial review was made returnable for 19th June, 2023, but expedited directions were given in the meantime for the opposing parties to confirm costs protection by 26th May, 2023 and file opposition by 2nd June, 2023, for the applicants to file replying affidavits by 9th June, 2023 and submissions by 12th June, 2023, and for the respondents to submit the opposing submissions by 16th June, 2023 with a call-over listing on 19th June, 2023.
38. The matter was listed for hearing for three days commencing on 21st June, 2023. On that date, without objection I made a formal order striking out the Minister of State (previously the second named respondent), on the basis that he was not an appropriate party since the Minister is the legal entity and is responsible in litigation terms for acts of the Minister of State.
39. On 22nd June, 2023, I made an order listing the costs of the interlocutory injunction for hearing on 3rd July, 2023 and giving the State liberty to put in a further affidavit setting out material regarding the Codling licence application on the basis of that being purely a factual narrative and without prejudice to the argument that it is legally irrelevant to these proceedings.
40. On 23rd June, 2023 there were a series of procedural rulings which are more fully set out below, including liberty to the State to put in an affidavit exhibiting a schedule setting out agreed details of the other projects proximate to the current project (with the parties' respective positions

where this is not agreed), and liberty to the applicants to put in an affidavit exhibiting material about the relationship of the project to the Arklow wind farm, on a *de bene esse* basis.

41. On 26th June, 2023, the applicants sought to put in a last-minute affidavit about the Arklow wind project, exhibiting additional information including that the Arklow wind farm was 25.3 km from the development area of the previous RWE application. I allowed this affidavit without prejudice to the opposing parties' pleading objections and the objection that the point had already been answered on affidavit.

42. The matter was listed again on 27th June, 2023 to deal with a draft schedule of other relevant projects in the Irish Sea which the parties disagreed about. That resulted in a direction to include the parties' respective positions if there is no agreement, to make certain changes to the table by adding all projects referred to in the papers plus their application number and types, plus liberty to the State to prepare a draft affidavit exhibiting the table and certain documents related to the North Irish Sea Array II licence (the URL having already been introduced in evidence) to be agreed between the parties, that the parties will attempt to agree or at least exchange definitions of the technical terms referred to and the matter be listed on 28th June, 2023 to finalise.

43. On 28th June, 2023, the court was informed that the terms of the additional affidavit were basically agreed subject to the addition of two further documents to be exhibited as sought by the applicants, which were not objected to. The table of projects was also discussed with some editing changes to be made to clarify what was agreed and what the respective positions were. Judgment was then reserved.

Relief sought

44. The relief sought in the amended statement of grounds is as follows:

> "1. An Order of certiorari by way of application for judicial review quashing the Foreshore Licence ('the Licence') granted by the First and/or Second Named Respondent to the First Named Notice Party in respect of the carrying out site investigations, off the coast of Counties Dublin and Wicklow (Ref. No. FS007188) dated 13 January 2023 and published in Iris Oifigiúil on 27 January 2023 .
>
> 2. Such declaration(s) as to the legal rights and/or legal position of the Applicants and (if and insofar as legally permissible and appropriate) persons similarly situated and/or of the legal duties and/or legal position of the Board as the court considers appropriate.
>
> 3. An Interim order and/or stay pursuant to Order 84 Rule 20(8)(a) and/or (b) of the Rules of the Superior Court, 1986 (as amended) or otherwise staying the effect of the Foreshore Licence impugned herein, its implementation, or any reliance on it pending the determination of these proceedings.
>
> 4. A declaration that protective cost provisions of 50B of the Planning and Development 2000 Act and/or section 3 of the Environment (Miscellaneous Provisions) Act 2011, and/or Order 99 and/ or section 169 of Legal Services Regulation Act 2015, as interpreted in light of Article 9 of the Aarhus Convention, apply to these proceedings.
>
> 5. Such further or other order.
>
> 6. Liberty to Apply.
>
> 7. An Order in respect of the costs of these proceedings."

45. As noted above, the stay has already been addressed. It was agreed that a protective costs approach will apply so relief 4 is not an issue either at this stage.

Grounds of challenge

46. The pleaded domestic law grounds, to which I have added a summarising heading, begin as follows:

> "1. [**Lack of information/ breach of fair procedures**] The application for the Licence does not provide sufficiently precise or definitive information concerning the placement or erection of any articles, things, structures, or works in or on the foreshore and, in particular, the location of such articles, things, structures, or works and/or the nature and extent of such structures as may be erected at intertidal locations (which are to be prepared in consultation with an ecologist on foot of Condition 31.12) to allow proper consideration of the application and informed public participation, as a consequence of which the Licence is invalid. Further, or in the alternative, the First and/or Second Named Respondent ("the Minister") acted in breach of fair procedures in determining the application without such information or without requesting further information from the First Named Notice Party ("RWE") to enable the Minister, the statutory prescribed bodies and the concerned members of the public to consider the said information and the geophysical and environmental (which would appear also to include archaeological) data collected during the site survey campaign in connection with foreshore licence FS 007029 and/or such other data as was available prior to the granting of the Licence and to facilitate public participation in accordance with the requirements of Article 9 of the Aarhus Convention in that regard. Further particulars of which are set out in Part 2 below."

47. It can be noted that this is in part a European law ground insofar as it references Aarhus, so I will also consider this ground under the EU law heading as required below. The pleaded domestic law grounds continue:

> "2. [**Unlawful delegation**] The Minister acted ultra vires and/or unlawfully delegated his powers to regulate the proposed site investigation by requiring the appointment of an ecologist for the purposes of (i) supervising all access to the Poolbeg intertidal area by track machines pursuant to condition 31.10 of the Licence; and (ii) ensuring disturbance is minimised and the integrity of the relevant European sites is maintained on foot of condition 31.12 of the Licence, in circumstances where the criteria or parameters or obligations on which the ecologist discharge these responsibilities were not adequately defined under the terms or conditions of the Licence, as a consequence of which the said Licence is invalid. Furthermore, the said ecologist would not be answerable to the Minister or any other independent body as, in the absence of express wording to the contrary, the condition allows for the ecologist to be appointed by the licensee or other person implementing the Licence. Further particulars of which are set out in Part 2 below.
>
> 3. [**Reasons/ matters considered**] The Licence is invalid in that the Minister failed to have any (or any adequate) regard to relevant considerations in determining that it was in the public interest that a licence should be granted to RWE and/or the Minister failed to provide any (or any adequate) reasons for determining that it was in the public interest that a licence should be granted to RWE. Further or in the alternative, in so far as the Minister took into account the public interest he failed to take any or any adequate account of the legitimate public interest in, and EU and international obligations regarding, the protection of the marine environment. In this later regard, reliance will be placed on Core Grounds 5-10 and the particulars relating thereto in addition to the particulars relating to Core Ground 3. Further particulars of which are set out in Part 2 below."

48. Core ground 4 was not pursued. It provided as follows:

> "4. [**Fair procedures – lack of publication**] The Licence is invalid in so far as it was made in breach of fair procedures in that relevant information furnished by the licensee in relation to the Foreshore application was not made available to the public and/or prescribed bodies and meetings were held, while the application was still pending determination, between RWE and the Minister or his servants or agents or advisers from which the public were excluded. Further particulars are set out in Part 2 below."

49. Turning to EU law grounds we must begin by returning to the EU law element of core ground 1 (noting that the reference to Article 9 is a misprint for Article 6):

> "1. [**Aarhus public participation**] … the First and/or Second Named Respondent ('the Minister') acted in breach of fair procedures in determining the application without such information or without requesting further information from the First Named Notice Party ('RWE') to enable the Minister, the statutory prescribed bodies and the concerned members of the public to consider the said information and the geophysical and environmental (which would appear also to include archaeological) data collected during the site survey campaign in connection with foreshore licence FS 007029 and/or such other data as was available prior to the granting of the Licence and to facilitate public participation in accordance with the requirements of Article 9 of the Aarhus Convention in that regard. Further particulars of which are set out in Part 2 below."

50. The other EU-related grounds, to which I have added a summarising heading, are as follows:

> "5. [**Absence of information for AA purposes**] The Minister has failed to comply with his legal obligations under Article 6(3) of the Habitats Directive and Regulation 42 of the Habitats Regulations which it transposes, in relation to both screening for Appropriate Assessment and Second Stage AA by determining the application in the absence of the best scientific knowledge available and, in particular, in the absence of (i) the information relating to the project referred to in Core Ground 1, above, namely, precise and/or definitive information concerning the placement or erection of any articles, things, structures, or works in or on the foreshore and, in particular, the location of such articles, things, structures, or works and/or the nature and extent of such structures as may be erected at intertidal locations (which are to be prepared in consultation with an ecologist on foot of Condition 31.12, and (ii) the geophysical and environmental (including archaeological) data collected during the site survey campaign in relation to foreshore licence FS 007029 (referred to under Condition 31.9) and/or such other data as was available prior to the granting of the Licence. Further particulars are set out in Part 2 below.
>
> 6. [**Screening out Dalkey Island SPA**] The Licence is invalid in that the Minister has failed to comply with his legal obligations under Article 6(3) of the Habitats Directive and Regulation 42 of the Habitats Regulations which it transposes, in relation to screening for Appropriate Assessment by not providing any or any adequate reasons for 'screening out'

relevant European Sites (including their QIs) which were within the zone of influence of the proposed development ('the screened out European Sites') and by failing to take into account relevant considerations and/or best scientific knowledge in concluding that the project, individually or in-combination with other plans or projects, is not likely to have a significant effect on the screened out European Sites . The Minister further failed to comply with his said obligations in relation to AA screening for the reasons referred to, and in particular, the lacunae identified below under the next Core Ground and the relevant particulars thereof. Further, while the Minister made a determination that AA was required in respect of the proposed development, he made no determination that an AA was not required in respect of the 'screened out' European Sites. Further particulars of which are set out in Part 2 below.

7. [**Lacunae in AA**] The Licence is invalid in that the Minister has failed to comply with his legal obligations under Article 6(3) of the Habitats Directive and Regulation 42 of the Habitats Regulations which it transposes, in respect of Stage 2 Appropriate Assessment in that the AA which the Minister purported to carry out did not contain complete, precise and/or definitive findings and conclusions such as would enable the Minister to conclude beyond a reasonable scientific doubt that the proposed development, considered on its own or in combination with other plans or projects, would not adversely affect the integrity of any European Site. The information provided to the Minister contained a significant number of lacunae or gaps in information relating to the effects on European Sites and their Qualifying Interests. Further, or in the alternative, the Minister did not provide any or any adequate reasons for the said conclusion of no adverse impact. Further particulars of which are set out in Part 2 below.

8. [**Lack of specificity of mitigation**] The Licence is invalid in that Article 6(3) of the Habitats Directive, being a provision that is transposed by Regulation 42 of the Habitats Regulations, in that the mitigation measures which were proposed by RWE, and were subsequently conditioned by the Minister on foot of condition 31.7 and condition 31.25 of the Licence, and conditions 31.8, 31.9 31.10, 3.12, 31.13, 31.14, 31.15, 31.16 and 31.23 were not described in sufficient detail to enable their effectiveness to be determined as a result of which the residual impacts of the proposed development on the environment and, in particular, on the integrity of European sites and/or the relevant qualifying interests or species of conservation interest associated with such sites could not be determined, as a consequence of which the conclusion of the Stage two appropriate assessment was defective, which in turn renders the Minister's decision invalid. Further particulars of which are set out in Part 2 below.

9. [**Inadequacy of conditions regarding ecologist**] The conclusion of the Minister in his Notice of Determination that "the proposed development on the foreshore would not adversely affect the integrity of any European Site", in respect of which he had regard to "the consent conditions" is flawed as Conditions 31.10 and 31.12 of the Foreshore Licence are based on the appointment by the licensee of an ecologist, inter alia, to prevent damage to Qualifying Interests of European Sites, to ensure disturbance to SCIs is minimised and the integrity of European Sites is maintained. Furthermore, the manner in which the ecologist is to perform his or her role under the said conditions is not determined by the terms or conditions of the Foreshore Licence, nor is the ecologist independent in the performance of that role and the discharge of the responsibilities assigned to him or her on foot of the said conditions. The provision for the appointment of the said ecologist does not meet with the requirement for a high standard of environmental protection under EU law in the context of European Sites in particular, breaches the requirements of the precautionary principle, and is inconsistent with the Minister's obligations in relation to AA, as a consequence of which the said conditions and the Licence are invalid. Further particulars are set out in Part 2 below.

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

Decision algorithm for the case

51. The applicants' request for a reference to Luxembourg on the issue regarding in-combination effects, together with the volume and nature of doctrines relied on by way of defence, has rendered this case a somewhat more involved one than usual and accordingly it was appropriate to discuss

with the parties the sequence in which the various points would be addressed. This resulted in a gratifying degree of agreement on the following decision algorithm:

(i) The first issue is whether the case could be disposed of on the basis of domestic law, or on the basis of any EU law point apart from the in-combination effects issue that the court considered it could address without a reference.

(ii) If the court is then required to turn to the in-combination effects issue (reference to which includes potentially any other EU law point that the court was potentially minded to refer), it would then consider the opposing parties' defences on that issue insofar as those defences would result in a complete dismissal of the ground. If the matter is so dismissed then the court would skip the next two steps and proceed to the stay issue. If the court was minded to so dismiss but the process of doing so itself raised a referable EU law question, the court could consider whether to hold off on dismissal and proceed to the next step.

(iii) If the in-combination ground had to be considered and was not to be completely dismissed, the court would then consider the opposing parties' submission that the ground should be viewed as a basis for declaratory relief only and not *certiorari*. If the court was minded to dismiss the *certiorari* claim only but the process of doing so itself raised a referable EU law question, the court could consider whether to hold off on such dismissal and proceed to the next step.

(iv) On the basis that some relief is live at this point, then irrespective of the nature of such relief, the next step would be to either decide the in-combination ground or to refer any appropriate question to Luxembourg.

(v) The following step would be to reconsider the question of continuing, varying by reference to specified activities (and if so, temporarily staying the variation of) or discharging (and if so, temporarily staying the discharge of) the stay in the light of the foregoing and in the light of any possible appeals by any party.

(vi) The court would deal with the costs if the matter was final at that point, or if not with any costs issues that were appropriate to be dealt with at that stage including costs of the interlocutory stay if still in dispute at that point.

(vii) Finally the court would deal with any stays on execution of costs, if that were to be an issue.

52. In order to manage matters from there, a number of procedural questions were addressed with the parties as follows:

(i) Whether the parties would find the proposed sequence in which the court would decide the issues to be acceptable. This produced the already referred-to agreement on the sequence above.

(ii) If so (or subject to any amendment), how far should the court go in the judgment on foot of the present hearing, in other words, the court will at least deal with step (i) but should it also deal with any subsequent steps and if so which? The applicants wanted the court to deal just with step (i), the notice party wanted the court to also deal with steps (ii) and (iii), and the State wanted to also address step (iv) and wanted the stay addressed before the end of the legal year. Following discussion, the developer's suggestion was agreed as was the proposal to address the stay in July, 2023.

(iii) Assuming that at least some of these steps will be left over after this judgment, when will these be dealt with and, in particular, would the parties find it acceptable to address any of these at the end of the Monday lists? The notice party and State were agreeable to Mondays with 10th July, 2023 being suggested. The applicants wanted a full weekday although, following discussion, this wasn't pressed. Ultimately, this led to a rather full timetable for the subsequent 5 Mondays as set out in the order in the final section of this judgment.

(iv) In the light of the foregoing, would the parties be agreeable to postponing the costs of the interlocutory hearing to a later point per the attached rather than deal with it on 3rd July, 2023, but retaining 3rd July, 2023 as a target date for a decision on this phase and possibly for further hearing of subsequent steps? This was agreed.

(v) If so, should the interlocutory stay order be perfected at this point or would that complicate matters procedurally such that it would be preferable to give the opposing parties liberty to seek such perfection at a time convenient to them, if necessary in advance of the determination of costs? The applicants were neutral and the notice party was happy with liberty to seek perfection of the order. The State robustly submitted: "The Respondents do not perceive any particular complication. It is desirable that the interlocutory stay order be perfected as soon as possible, including in advance of a hearing on step (v)". As requested therefore,

I directed on 23rd June, 2023 that the order granting an interlocutory stay can be perfected on the basis that the costs would be adjourned to be dealt with by a separate order on a date to be fixed in due course.

(vi) Should the foregoing approach to perfection of orders also apply to the sequence of orders to be made if the court approaches the matter on a step-by-step basis? Parties gave similar responses to those to the previous question. So I would propose to give parties whatever perfected orders they want as matters progress.

Step (i) in decision algorithm – core grounds 1 to 9

53. The first stage therefore is to decide the grounds other than the question of in-combination effects to ascertain whether any of these are determinative. Before doing so, there are some general issues related to the onus of proof that need to be addressed.

Onus of proof, admissibility of new evidence and effect of lack of cross-examination

54. There was broad agreement that the onus of proof was on the applicants (although that only applies up to the point when an applicant demonstrates a flaw – the onus as to showing that the flaw wouldn't have made any difference is separate and is addressed later in the judgment). The applicants agreed that they were not entitled to challenge the decision otherwise than by reference to flaws on the face of the material or matters that were before the decision-maker at the relevant time, or by reference to exceptions in *Reid v. An Bord Pleanála (No. 1)* [2021] IEHC 230, [2021] 4 JIC 1204 (Unreported, High Court, 12th April, 2021).

55. The State submitted, and I broadly agree, that if what is alleged to be a lacuna is a matter of pure reason and logic, then the court can identify that, but if the issue is one of expert evidence, the court can't determine that without it being established evidentially that a reasonable expert body would have seen scientific doubt on the face of the materials.

56. It follows however that, in general, where new scientific evidence is presented to the court for the first time in circumstances not covered by one of the recognised exceptions, as discussed in *Reid No. 1*, then such evidence is either inadmissible or of no decisive weight. That unfortunately impacts on much of the applicant's new material. Such a procedural rule is equivalent as between domestic and European law, and does not infringe the principle of effectiveness.

57. Equally significantly, insofar as such new information is admissible (for example to show that the material was flawed on its face), a significant feature of the case is that the applicants' expert evidence has been roundly contested by the opposing parties on affidavit. No application has been made for cross-examination. The court cannot then find for the applicants on any such contested issue (*RAS Medical Ltd. v. Royal College of Surgeons in Ireland* [2019] IESC 4, [2019] 1 I.R. 63, [2019] 2 I.L.R.M. 273, [2019] 2 JIC 0501) save in limited circumstances which don't apply here. One such limited circumstance might be where one affidavit explains all matters comprehensively and the other includes bare assertions or bare denials leaving massive and self-evident gaps. A court is not precluded from relying on flaws on the face of an affidavit merely because its deponent is not cross-examined.

58. For example, merely offering an opinion based on nothing in particular doesn't automatically create a conflict warranting cross-examination if there is an affidavit from the other side that is clearly framed as directly admissible factual evidence or an expert view based on factual material.

59. As pointed out in *Doorly v. Corrigan* [2022] IECA 6, [2022] 1 JIC 2104 (Unreported, Court of Appeal, 21st January, 2022) at para. 137, while conflict between equally inherently credible averments, with no cross-examination, is normally resolved against the party carrying the onus of proof, a court is not always obliged to regard all averments as being equally credible, or to disregard internal or evident problems with them (see by analogy the manner in which the Supreme Court considered it was entitled to prefer an affidavit over even oral evidence in *Koulibaly v. Minister for Justice, Equality and Law Reform* [2004] IESC 50, [2004] 7 JIC 2906 (Unreported, Supreme Court, Denham J. (Geoghegan and McCracken JJ. concurring), 29th July, 2004)). Among the matters to which regard might be had included the failure to explain patently relevant questions that are clearly within that party's responsibility.

60. Furthermore, a conflict that can only be resolved by cross-examination has to be a conflict between two affidavits of equal evidential weight. A court can prefer an affidavit based on direct evidence with one based on hearsay evidence without cross-examination – indeed broadly speaking cross-examination is definitionally pointless in the latter case because the deponent will say in effect "well, that's what I was told": see *In re Dunne* [2021] IEHC 291, [2021] 5 JIC 0501 (Unreported, High Court, 5th May, 2021) para. 70.

61. But this isn't a case where the opposing parties' affidavits are flawed on their face such as to invoke this principle.

62. The problem for the applicants is that it is relatively straightforward to ask for an order for cross-examination in judicial review. A court would be obliged in the interests of justice to grant such an order in a judicial review matter if certain conditions are met as follows:

(i) the order for cross-examination is applied for by the party carrying the burden of proof;
(ii) the circumstances are such that a potentially determinative factual issue properly arises in the judicial review that is a matter for the court and not the decision-maker;
(iii) issue has been properly joined on that question by conflicting factual affidavits;
(iv) the conflicting affidavits are both admissible and are of comparable evidentiary status (hence a court can, without cross-examination, prefer a non-hearsay affidavit to a hearsay affidavit even if the issue is interlocutory and the latter is technically admissible – and indeed normally cross-examination of a hearsay affidavit is definitionally fairly pointless to begin with);
(v) the conflicting affidavits are comparably relevant to the issue (hence a court can, without cross-examination, prefer an affidavit that addresses all aspects of an issue to one that fails to deal relevantly with significant aspects that are clearly within the knowledge of the deponent);
(vi) the affidavit of the party seeking cross-examination is not so flawed on its face as to be capable of rejection even without cross-examination; and
(vii) there is no more convenient way of resolving the issue (such as by determining some other issue or issues that might be determinative such that cross-examination might be unnecessary, and postponing cross-examination until then).

63. A court can't adopt a restrictive approach to cross-examination where there is a direct conflict of admissible relevant evidence, and then find against the party who has been refused that order on the grounds that they haven't discharged the onus of proof. Each individual piece of that drama could be written to sound very reasonable, and the legal process being what it is, those individual pieces would be written at separate times and possibly by separate judges, but the two in combination would be so contradictory and unfair as to make *Catch-22* look like a CPD manual for procedural decision-making.

64. What is potentially confusing is the existence of various statements in the caselaw that cross-examination in judicial review is rare. Which of course it is, but that is ultimately an empirical or statistical observation, not an issue of principle. Generally, as a matter of fact, the issues in judicial review are about legal analysis of non-disputed facts. But again, that is dependent on the empirical position; it is not a paradigm that can simply be imposed on any given litigant on the grounds that cross-examination in administrative law should be "rare" – as if it was to be parcelled out like a jealously-guarded ration. Its rarity is merely statistical but such an order should be made in all cases where the conditions for it are met. In short, cross-examination in judicial review is rare because the various conditions for it – listed above – don't normally come together. That's the rarity. If those factors *do* come together then the order should be made – there is no further "rarity" within that limited category that would create further hoops to jump and obstacles and obstructions to be overcome.

65. The upshot is that these applicants have unfortunately engaged in the same largely doomed strategy pursued by a whole distinguished host of environmental litigants before them, namely the approach of only calling in the experts and lawyers after the decision is made. The difficulties with the approach to introducing new points that were never put before the decision-maker has been explained in many previous cases including the following highlighted by the developer:

(i) *Reid v. An Bord Pleanála (No. 1)* [2021] IEHC 230, [2021] 4 JIC 1204 (Unreported, High Court, 12th April, 2021).
(ii) *An Taisce v. An Bord Pleanála (No. 1)* [2021] IEHC 254, [2021] 4 JIC 2003 (Unreported, High Court, 20th April, 2021).
(iii) *An Taisce v. An Bord Pleanála* [2022] IESC 8, [2022] 1 I.L.R.M. 281, [2022] 2 JIC 1602.
(iv) *Environmental Trust Ireland v. An Bord Pleanála* [2022] IEHC 540, [2022] 10 JIC 0305 (Unreported, High Court, Holland J., 3rd October, 2022).
(v) *Sherwin v. An Bord Pleanála (No. 1)* [2023] IEHC 26, [2023] 1 JIC 2701 (Unreported, High Court, 27th January, 2023) (under appeal but not by the applicant – this was a point made in favour of the opposing parties).

66. Yes, in many cases the applicant has standing to make the point even without putting it to the decision-maker, and yes there are some circumstances where the point can succeed even if it wasn't made originally, but to bring the case home in such situations, an applicant can only operate within very defined categories – see *Reid No. 1*.

Domestic law preliminary issues

67. The State initially made a time objection to the proceedings but sensibly this was not pursued (State submissions para. 18).

68. The State also complain that the applicants did not make the points now being made during the public consultations on the licence and objected to the applicants' *locus standi* for any issues other than core ground 3 (State submissions para. 19).

69. The position in relation to the domestic law issues (we will return to the EU law issues) can be assessed on a ground-by-ground basis.

70. As regards core ground 1, insofar as this makes a jurisdictional complaint regarding a requirement for precise information, then it is independent of any submission from the applicants. Insofar as it adds anything to that, it can't be advanced in the absence of there having been something before the decision-maker to make that an issue. Insofar as the ground makes a fair procedures point, the applicants have an onus to show that they would have said something further during the process if further information had been provided. That is implausible given that the submission actually made did not even begin to attempt to engage with the detail of the licence. No breach of fair procedures arises. That is conceptually separate from the Aarhus dimension which I will consider under the EU law heading.

71. As regards core ground 2, this relates to a condition of the licence. In general, something that arises subsequently to and consequentially on the actual decision can properly be challenged after the event. An applicant is not normally obliged to predict such conditions as may be imposed and pre-emptively make a submission on those possible points, except where draft conditions are in effect published for discussion. However, this is such a case.

72. Condition 7.1.3 in the Supporting Information Report provides:

> "To prevent damage to saltmarsh and sand dune habitat, all access to the Poolbeg inter-tidal area by track machine will be supervised by an ecologist to ensure these sensitive areas are avoided. Machinery will be either lowered to the beach by crane from Shellybanks Road, or brought to shore by barge."

73. This corresponds to condition 31.10 of the licence.

74. Section 4.4.2 of the NIS provides:

> "4.4.6 In order to minimise disturbance of bird receptors within the intertidal areas of the Foreshore Licence area, the following mitigation measures will be implemented:
>
> - An ecologist would be employed to ensure disturbance is minimised and site integrity is maintained. If roosting birds are present on the shore during intertidal works, the nearby sample stations will be postponed until the birds depart, without provocation;
> - Drift lines in close proximity to the proposed route would contain the highest proportion of potential food source for bird species. If present, these will be avoided by machinery and personnel;
> - If for any reason access by sea to the near-shore or intertidal sample locations is not possible, any temporary access arrangements or structures that are put in place to allow machinery access to the beach area will be prepared in consultation with an ecologist and the site should be fully reinstated post works;
> - Reinstatement of the intertidal habitat will be carried out to pre-survey conditions. Spoil from boreholes will be contained and removed off site. Should the boreholes be close to the HDD cable route, the boreholes will be filled with grout to prevent weakness during drilling operations during construction."

75. This is a precursor to condition 31.12.

76. In these relatively unusual circumstances the conditions were up for discussion in the process. Not having challenged them in the process itself, the applicants can't do so now in the absence of anything flawed on the face of the conditions (which hasn't been made out), or anything otherwise before the decision-maker that would have required a different approach (which hasn't been made out either).

77. As regards core ground 3, standing is not specifically challenged by the State under this heading. In particular, insofar as reasons are concerned, any given applicant can complain about reasons if such reasons relate to something that the applicant couldn't have anticipated or something that was required to be addressed, or a matter touched on in submissions. So the reasons point can be advanced.

Domestic law issues

78. Section 3(1) of the Foreshore Act 1933 provides for the power to grant a licence of this type. This provides:

> "(1) If, in the opinion of the appropriate Minister, it is in the public interest that a licence should be granted to any person in respect of any foreshore belonging to the State authorising such person to place any material or to place or erect any articles, things, structures, or works in or on such foreshore, to remove any beach material from, or disturb any beach material in, such foreshore, to get and take any minerals in such foreshore and not more than thirty feet below the surface thereof, or to use or occupy such foreshore for any purpose, that Minister may, subject to the provisions of this Act, grant by deed under

his official seal such licence to such person for such term not exceeding ninety-nine years commencing at or before the date of such licence, as that Minister shall think proper."

79. As regards the domestic law grounds generally, the applicants' case is very light on reference to any provision of domestic law, as the developer points out (developer's submissions para. 6).

Core ground 1 – information/ fair procedures

80. As regards core ground 1, the need for information to the level of precision demanded by the applicants is not a jurisdictional requirement of the 1933 Act. This distinguishes *Balscadden Road SAA Residents Association Ltd. v. An Bord Pleanála* [2020] IEHC 586, [2020] 11 JIC 2501 (Unreported, High Court, 25th November, 2020). No breach of domestic law has been made out. As noted above, the fair procedures argument doesn't get off the ground, but no breach of fair procedures has been established in any event given the limited nature of the applicants' engagement with the process.

Core ground 2 – unlawful delegation

81. As regards core ground 2, as noted above this doesn't get off the ground on a standing basis. But in any event, the 1933 Act doesn't prohibit a condition of the type imposed. Nor could such a condition reasonably constitute unlawful delegation contrary to general administrative law principles, as it deals with matters of execution and detail. We can return to the EU law position later.

Core ground 3 – public interest

82. As regards core ground 3, as is clear from s. 3(1) of the 1933 Act above, the Minister is required to consider the public interest, and did so. The applicants complain that this consideration took inadequate account of the protection of the marine environment, but by its nature any assessment of a general concept like "public interest" must involve a degree of discretion for the decision-maker. It can't plausibly be said that the Minister failed to consider the marine environment given the extensive EIA and AA consideration. Furthermore, the absence of any particularly relevant submission from the applicants other than in relation to their own requirements is relevant. No lack of reasons or failure to consider relevant matters can be established in that context.

EU law preliminary issues

83. The *locus standi* issue looks somewhat different when viewed from a European perspective. Case C-137/14 *Commission v. Germany* (Court of Justice of the European Union, 15th October, 2015, ECLI:EU:C:2015:683) dealt with the access to justice provisions of art. 11 of directive 2011/92/EU on EIA and art. 25 of directive 2010/75/EU on industrial emissions. In particular, at paras. 75 to 77, the CJEU identifies that a domestic requirement that "pleas in law" (para. 75) to be made to the court must first be made in the administrative process is not provided for in the directives which have the objective "of ensuring broad access to justice in the area of environmental protection" (para. 77). I noted in *Reid (No. 1)* that the logic of that decision would seem to apply to any similar access to justice provision in EU environmental law, meaning that an applicant is not confined to legal grounds that were raised before the decision-maker.

84. While the State didn't expressly accept that as a general principle, they were in effect accepting something equivalent for the purposes of the case because they weren't making any standing objection in relation to the EU law points. And the developer didn't make a standing objection. So in the end there wasn't any preliminary issue to resolve as regards the EU law points.

EU law issues

85. Identifying the inflection points between the parties in relation to the EU law issue was not an absolutely straightforward exercise but I will attempt to summarise matters under each relevant heading.

86. Insofar as there were suggestions that doubt arose in relation to EU law, I should clarify one point when it is generally appropriate to consult Luxembourg. Such consultation by way of preliminary references is worth considering where there is some doubt about the position, either by reason of an inherent difficulty with the EU law argument being advanced by the party in whose favour the court might otherwise be inclined to decide the matter, or by reference to some piece of material or jurisprudence. This could include:

(i) any Irish caselaw or institutional or academic material opining on EU law which illustrates doubt or tension, or about which the referring court may have doubts by reference to other material;

(ii) any jurisprudence of the European courts or an opinion of an Advocate General;

(iii) any guidance material produced by EU institutions such as the European Commission;

(iv) any judgments or material produced by the courts or institutions of, or academic material from, the 26 other EU member states, or other jurisdictions interpreting EU law such as EFTA members or the UK.

(v) in respect of issues arising under the Aarhus convention, any opinions issued by the UNECE bodies such as the Aarhus Compliance Committee, or any decisions of UNECE member state institutions or courts, or academic material in that regard.

87. But if a party can't point to even a scrap of paper anywhere on the continent in favour of their position, then any case for a reference is going to be dependent on there being some form of inherent difficulty or doubt applying to the other side's EU law analysis. Here, with one major exception, the applicants thus far haven't come up with any of the sort of jurisprudential material to which I have referred. So it makes sense that they have so far limited the claim for a reference to that sub-issue and points related to the defence offered to it. But I am not ruling out also considering one further issue, if it involves a referrable question of EU law (very much in the to-be-determined bracket), as will become apparent below.

Core ground 1 – Aarhus and the right to information

88. The essential EU law point buried in core ground 1 is that the right to public participation under Aarhus involves an entitlement to access to data relevant to the application which exists as of the date of the application but has not been published.

89. This is reinforced by Article 6(2) of the Aarhus convention:

"2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of:

(a) The proposed activity and the application on which a decision will be taken;

(b) The nature of possible decisions or the draft decision;

(c) The public authority responsible for making the decision;

(d) The envisaged procedure, including, as and when this information can be provided:

(i) The commencement of the procedure;

(ii) The opportunities for the public to participate;

(iii) The time and venue of any envisaged public hearing;

(iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;

(v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and

(vi) An indication of what environmental information relevant to the proposed activity is available; and

(e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure."

90. So the applicants are correct that the issue of access to information should be engaged with by the competent authority as part of the public participation process. But this issue is pleaded as a fair procedures point (and applicants are to be held to their pleadings – *Rushe v. An Bord Pleanála* [2020] IEHC 122, [2020] 3 JIC 0502 (Unreported, High Court, Barniville J., 5th March, 2020); Case C-721/21 *Eco Advocacy CLG v. An Bord Pleanála* (Court of Justice of the European Union, 15th June, 2023, ECLI:EU:C:2023:477) – and there is nothing on the evidence to support such a conclusion. The applicants have not demonstrated as a matter of probability that if only more information had been published at the outset, they would have engaged with it. That is highly unlikely anyway given how the applicants approached matters. They only called in lawyers and scientific experts after the decision was made. So this point isn't going anywhere. And indeed much of the alleged lack of information was fairly patent, such as the application being based on indicative locations, but the applicants didn't do anything to complain about that at the relevant time. The fact that another observer complained about lack of information doesn't create a fair procedures issue for an applicant who never made the point and hasn't proved that they would have said or done anything specific if they had such information.

Core ground 5 – absence of information for AA purposes

91. Paragraphs 4.1.3 and 4.1.4 of the AA screening information report provide that:

"4.1.3 The indicative locations of the survey areas which form the scope of the proposed works are shown in Figure 3 to Figure 7. The final geotechnical and ecological sampling locations and buoy deployment positions will be selected after a review of the most up to date geophysical data available in advance of selection of the sampling stations. The data will be reviewed for the presence of anomalies of potential anthropological origin and potential for ecological features such as subtidal reef. Locations will be micro-sited where necessary to avoid archaeological or ecological impacts. As such, no figure is provided for the benthic sampling locations, but taking a precautionary approach it has been assumed that samples could be taken anywhere across the Foreshore Licence application area.

4.1.4 Should the review of the geophysical data identify areas of paleo archaeological interest which require further archaeological investigation the sampling locations will be micro-sited to achieve this aim."

92. Section 3.3.2 of the AA report of the independent environmental consultant states *inter alia*:

"The inter-tidal and sub-tidal geotechnical sampling locations will be selected after review of the geophysical and environmental data collected during the 2020 Site Investigation campaign. The data will be reviewed for the presence of potential ecological features such as subtidal geogenic reef. Sampling locations will then be micro-sited where necessary to avoid ecological (as well as archaeological) impacts, specifically with reference to potential subtidal geogenic reef features within the Rockabill to Dalkey SAC which may not have been previously mapped or identified.

The applicant will consult with NPWS on the results of the initial site investigation campaign and the selection of geotechnical sampling locations prior to sampling taking place."

93. Condition 31.9 of the impugned licence provides:

"The licensee shall ensure that the intertidal and subtidal geotechnical sampling locations will be selected after review of the geophysical and environmental data obtained from surveys completed under licence FS 007029 has been reviewed for the presence of potential ecological features such as Geogenic reef."

94. There are in essence two complaints in core ground 5.

95. Firstly the applicants allege that the indicative location of the sampling sites in itself fails to accord with the need for precise and definite information, by reference to best scientific knowledge, ruling out any scientific doubt as to the impact on a European site.

96. The problem with that is that the applicants haven't pointed to anything before the decision-maker to create scientific doubt in relation to the indicative sites issue. The applicants' doubts have all come into being after the event. Insofar as the applicants' expert Ms Heffernan is claiming that there is doubt on the face of the material, that is contested, and there has been no cross-examination. Hence the applicants haven't discharged the burden of proof.

97. The second complaint is that the geophysical and environmental (including archaeological) data collected during the site survey campaign in relation to foreshore licence FS 007029 was available prior to the granting of the licence but was not factored into the AA process.

98. The problem with that argument is that without material fed into the process at the time creating doubt, the absence of such further information didn't give rise to any particular doubt about impacts on the reef on the basis of the information before the decision-maker. Insofar as the claim is made that such a doubt arises on the face of the material, that is contested; and in the absence of cross-examination that point cannot be resolved in favour of the applicants.

Core ground 6 – screening out Dalkey Island SPA

99. In the context of Dalkey Island SPA, the potential impacts on Arctic Tern are screened out in the AA screening information report (which was endorsed in the screening document prepared by the independent environmental consultant and adopted by the Minister) for the following reasons:

"No impact on the QI [qualifying interests] of this SPA is foreseen due to the limited nature of the works in terms of both spatial and temporal extent. All geophysical and geotechnical operations will be a minimum of 0.9 km from the SPA boundary in an area that has existing regular levels of vessel traffic.

Any disturbance impacts or effects upon supporting habitats for QI species that result from the proposed works would be negligible; therefore no potential for LSE [Likely significant effects] are predicted."

100. The applicants complain that this creates lacunae and that the analysis is incomplete and defective. However again we have the problem that the decision has to be judged on the basis of the material before the decision-maker, and such doubts didn't arise on the basis of what the Minister had at that point. Insofar as it is said that the material is flawed on its face, that can't be resolved in favour of the applicants absent cross-examination.

Core ground 7 - lacunae

101. In Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij, Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA* (Court of Justice of the European Union, 7th September, 2004, ECLI:EU:C:2004:482, see paras. 52-54, 59), the CJEU said of AA that:

"Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those (conservation) objectives must be identified in the light of the best scientific knowledge in the field."

102. The complaint made at para. 94 of the applicants' submissions is that:

"The information provided to the Minister to enable him to carry out a Stage 2 Appropriate Assessment including that furnished in the reports of RWE, the IEC and the Minister's

advisers contained a number of significant lacunae or gaps, inter alia, in respect of (i) the absence of the survey information obtained on foot of under licence FS007029 (in addition to the lack of precise information relating to the actual location of geophysical sampling points); (ii) mapping relative to Natura 2000 sites; (iii) the Project description; (iv) waste materials; (v) duration of drilling; (vi) the assessment of noise; (vii) pollution, (viii) reinstatement of sub-tidal boreholes; and (ix) ecological surveys."

103. The applicants complain about various matters including (to give just one example of many) the impacts on other European sites including Lambay Island SAC.

104. But all of this is *esprit d'escalier* stuff. The problems arise as with previous grounds.

105. The applicants didn't make any of these points and didn't make any hugely detailed attempt to specify precisely how, when and where the points were raised by other observers. It is certainly best practice to plead specifically how the point was one that arose out of an identified document or matter, or should otherwise have been considered in the process as a result of identified factors, and if an applicant doesn't do that, she runs the risk of the complaint being viewed as artificial and manufactured unless the requirement to address the point is clear to the court from other material.

106. But leaving aside any counsel of perfection regarding drafting, and assuming in favour of the applicants that they can heave this point upright based on submissions by other people, those submissions were answered by RWE. The point then becomes one of whether a reasonable expert body would have seen the analysis as flawed. Any such claim has to be established evidentially. That hasn't been done for the reasons explained.

Core ground 8 – mitigation measures

107. In respect of Core ground 8, the Applicants submit that:

"[T]he Licence is invalid in that the mitigation measures which were proposed by RWE, and were subsequently conditioned by the Minister on foot of condition 31.7 and condition 31.25 of the Licence, and conditions 31.8, 31.9 31.10, 3.12, 31.13, 31.14, 31.15, 31.16 and 31.23 were not described in sufficient detail to enable their effectiveness to be determined as a result of which the residual impacts of the proposed development on the environment and, in particular, on the integrity of European sites and/or the relevant qualifying interests or species of conservation interest associated with such sites could not be determined, as a consequence of which the conclusion of the Stage two appropriate assessment was defective, which in turn renders the Minister's decision invalid."

108. Again the same problems arise. The decision is primarily to be judged by reference to what was before the Minister at the relevant time. An applicant can go beyond that to argue that the approach was flawed on its face, but that has to be established evidentially and, given the conflict, that hasn't been done in the absence of cross-examination.

Core ground 9 – adequacy of conditions regarding ecologist

109. Case C-461/17 *Holohan v. An Bord Pleanála* (Court of Justice of the European Union, 7th November, 2018, ECLI:EU:C:2018:883) allows points of detail to be left for the post-consent process, but only if the competent authority can be certain that there will be no adverse effects:

"Article 6(3) of Directive 92/43 must be interpreted as meaning that the competent authority is permitted to grant to a plan or project consent which leaves the developer free to determine subsequently certain parameters relating to the construction phase, such as the location of the construction compound and haul routes, only if that authority is certain that the development consent granted establishes conditions that are strict enough to guarantee that those parameters will not adversely affect the integrity of the site."

110. Core Ground 9 complains about the conditions leaving certain matters to the proposed ecologist, relying on the precautionary principle as a general principle of EU law (Article 191(2) TFEU) and art. 6(3) of the habitats directive.

111. Condition 31.10 provides:

"The licensee shall ensure that to prevent damage to salt marsh and mud flats and sand flats not covered by sea water at low tide qualifying interests (South Dublin SAC), all access to the Poolbeg intertidal area by track machine will be supervised by an ecologist to ensure these sensitive areas are avoided."

112. Condition 31.12 states:

"An ecologist is to be employed to ensure disturbance is minimised and site integrity is maintained. If roosting birds are present on the shore during intertidal works and operations, the nearby sample stations will be postponed until the birds depart, without provocation …."

113. The applicants say in essence that "the RWE-appointed ecologist (i.e. an employee or contractor) will lack independence and impartiality, and is not subject to any oversight whatsoever".

114. But a much more appropriate and logical interpretation, in line with the natural meaning of the condition (which is not particularly ambiguous or permissive on its face) is to say that the objectives to be achieved are clearly set out in the conditions and the ecologist's function is to execute those, not to add a layer of discretion to allow those objectives to be undermined.

Step (ii) – arguments for dismissal *in limine* of core ground 10

115. As core grounds 1 to 9 fail, and as no question appropriate for reference to the CJEU has been identified that would need to be answered before such an order, I can dismiss those grounds and then turn to core ground 10. In accordance with the decision algorithm, this brings us to step (ii) which is to consider the opposing parties' arguments which would result in the dismissal of that ground. In that context, it is important to tease out the various sub-issues within the ground, dispose of any that can immediately be rejected and then outline the various defences to the other grounds and my assessment of whether these give rise to a valid basis to dismiss the points.

116. Core Ground 10 concerns the issue of cumulative and in-combination effects. There is quite a lot packed into that ground and it is possible to discern the following main sub-issues either pleaded or touched on in affidavits, written submissions or otherwise referred to at the hearing, which need to be addressed separately:

(a) General qualitative criticisms regarding the assessment;
(b) Failure to consider plans as opposed to projects;
(c) Failure to consider other activities not requiring consent;
(d) Failure to consider consented developments;
(e) Failure to consider pending projects;
(f) Inadequacy of the condition imposed to prevent in-combination effects; and
(g) Inadequacy in specification of the projects being considered.

Sub-issue A – qualitative criticisms

117. The qualitative criticisms are unfounded having regard to the lack of material before the decision-maker that would have made these an issue, and having regard to the lack of cross-examination, as well as the evaluative nature of the decision-making process concerned. That is an equivalent and effective rule of domestic procedure and doesn't raise any problematic issue of EU law: similar to the pleading rules considered in *Case C-721/21, Eco Advocacy CLG*.

Sub-issue B – failure to refer to plans as opposed to projects

118. Insofar as plans are concerned, these are not referenced in the Minister's decision, but this is an abstract complaint because it hasn't been shown that there was any plan to which regard should have been had. That doesn't raise any problematic issue of EU law, which itself acknowledges such a principle: see by analogy Case C-72/12 *Gemeinde Altrip v. Land Rheinland-Pfalz* (Court of Justice of the European Union (Second Chamber), 7th November, 2013, ECLI:EU:C:2013:712). That isn't any kind of wide discretion – it is a conclusion that in the absence of any relevant plan, there was no meaningful non-compliance with the habitats directive because the item that wasn't referred to wasn't relevant.

Sub-issue C – failure to consider other activities apart from licensed works

119. The applicants' expert Ms Heffernan complains in her first affidavit (para. 85) that other activities which cause ongoing disturbance, such as boats, fishing, jet skis, dog walkers and day trippers to Lambay Island and Dalkey Island are not addressed for the purpose of in-combination effects. But given the conflict of expert views on the issue of scientific doubt, the applicants would have had to demonstrate, by cross-examination, how that created doubt on the face of the materials, based on having first identified how that arose from what was before the decision-maker, as seen by a reasonable expert. They haven't done that.

Other projects allegedly not considered – context

120. Before getting into the various categories of project that were allegedly not considered, we need to identify a list of the projets that are possibly relevant to the matter at hand.

121. Classifying these projects is by no means an easy task but there seem to be three categories of projects – those consented prior to the application, those consented during the application process, and those pending as of the date of the licence. We can then sub-divide these into projects considered for in-combination effects purposes and those not so considered, leaving us with 6 categories overall:

Whether considered	**Consented before licence application (<1.10.21)**	**Consented during the application process (1.10.21-13.1.23)**	**Pending as of the licence (13.1.23)**
Considered in the AA process	Codling Wind Park Ltd. (Codling I) FS007045), lodged 24th April, 2020, granted 8th February, 2021 (addressed in developer's AA screening p. 111, NIS	Dublin Port Maintenance Dredging (FS007132), licence granted dated 28th July, 2022 (addressed in NIS p. 67 and Hartley Anderson report p. 129).	Celtix Connect Ltd installation and maintenance of the fibre-optic Havhingsten Telecommunications Cable (FS006915); the cable landing site is at

	p. 69, and Hartley Anderson report p. 129). Ringsend Waste Water treatment facilities upgrade (application by Irish Water) (addressed in developer's AA screening p. 111, NIS p. 68, Hartley Anderson report p. 129), permission granted in 2019 (An Bord Pleanála case reference: PA29S.301798). There was apparently no foreshore aspect to this. Statkraft North Irish Sea Array (NISA I) Site Investigations (FS007031), applied for 17th December, 2019, granted 14th December, 2021 (the developer's AA screening p. 111, NIS p. 69 and Hartley Anderson report p. 129 refers to the North Irish Sea Array without specifically indicating the Foreshore Licence number in each case but on balance this relates to NISA I). Innogy – Site Investigation – Dublin Array at Kish and Bray Banks (FS007029), lodged 26th September, 2019, determination published 28th January, 2021. This was the developer's previous site investigation licence dated 25th January, 2021, to commence retrospectively on 9th December, 2020 for 5 years, so was in force as of the present licence. It was considered impliedly by being referred to in		Loughshinny, Fingal, Co. Dublin. (considered in developer's AA screening document, p. 110, NIS table 7, p. 67, Hartley Anderson report p. 129) (consultation closed February, 2020, pending at time of NIS). Dublin Port Capital Dredging Project (appears to be FS007164 although referred to at one point in the papers as FS007132) (addressed in developer's AA screening p. 110, Hartley Anderson report) (a number of applications said to have been made, appears to have been submitted 23rd June, 2021 and remains pending). Irish Water Greater Dublin Bay drainage application in April 2020 to enable the construction of a 5.935 km outfall pipeline (addressed in developer's AA screening p. 111, NIS p. 68 and Hartley Anderson report p. 129). This consisted of both a planning application made on 20th June, 2018 (An Bord Pleanála case reference: PA06F.312131) and a foreshore licence sought on 7th May, 2020 (FS006843). Both are still pending. The planning aspect was decided by the board on 11th November, 2019 but quashed by the High Court and remitted (*Joyce-Kemper v. An Bord Pleanála (No. 2)* [2020] IEHC 601,

	the IEC stage 2 report at p. 93.		[2020] 11 JIC 2402 (Unreported, High Court, Allen J., 24th November, 2020) by order of 16th July, 2021. The references to the project on the papers did not distinguish between the planning and foreshore aspects or indicate the application numbers.
Not considered		Sure Partners Arklow Bank Wind Park Phase 2 Site Investigations (FS007339), lodged 15th April, 2021, decision to grant published on 27th May, 2022 (prior to the time of the licence). This was referenced in the s. 19 public consultation submission 4 and the AA consultation, submissions 4 and 18. Statkraft North Irish Sea Array (NISA II) Site Investigations for Export Cable Route (FS007358), application 31st March, 2021, granted 12th September, 2022 (the developer's AA screening p. 111, NIS p. 69 and Hartley Anderson report p. 129 refers to the North Irish Sea Array without specifically indicating the Foreshore Licence number in each case but these references on balance relate to NISA I – there was some suggestion that an ambiguous or erroneous wording in Ms Heffernan's affidavit amounted to an acceptance that it was considered but it would be inappropriate to place significance on that if in fact it appears that it wasn't). It is notable that the IEC	Codling Wind Park Ltd. Site Investigations for proposed Offshore Wind Farm, off Counties Wicklow and Dublin (Codling II) (Ref. FS007546), lodged 13th June, 2022, licence granted dated 12th May, 2023 (was pending at the time of the licence) (there are general references in submission to Codling Bank without indicating which application is concerned – submissions 4, 12 and 16). ESB Wind Development Limited Site Investigations at Sea Stacks Offshore Wind off Dublin and Wicklow (FS007134), lodged 23rd November, 2020, remains pending. This was referred to in AA public consultation (submissions 4, 9, 12) and RWE response to submissions 12 and 18. This project is apparently currently paused. Réalt na Mara Offshore Wind Farm Ltd, site investigations off the coasts of Wicklow and Dublin (Ref. FS007330), lodged 24th March 2021, remained pending. Referred to in AA public consultation

		AA report for the NISA II project assessed the potential in-combination effects between NISA II and the impugned licence here, but not vice versa.	submission 4 and 9. This project is apparently currently paused.

Sub-issue D – failure to consider development consent that had already been granted

122. There was a claim of failure to address a number of already-consented projects (Arklow and NISA II – the applicants didn't particularly advance any submission on the Innogy licence although in fact this can be treated as having actually been considered).

123. The problem for the applicant in relation to already-consented projects is that there was no acceptably clear reference to such projects in the grounds.

124. Sub-ground 93 provides:

> "According to the EU Commission's Guidance on Article 6(3) of the Habitats Directive (2021), the obligation to take into account cumulative impacts in the context of AA extends to other plans or projects that have been already completed, approved but uncompleted, or proposed (i.e. for which an application for approval or consent has been submitted[)]. The Minister did not have any information before him in relation to proposed projects for which an application for approval or consent has been submitted, nor did the Minister himself consider whether any such proposed projects would be capable of having in-combination effects, as a consequence of which his consideration of cumulative impacts was invalid."

125. This consists of three points. The first is to refer to the European Commission guidance, which is merely a statement of legal context. The second point is that the Minister did not have sufficient information in relation to developments at the proposal stage. The third point is that this was not validly considered. Points two and three are claims of substantive illegality, by reference to projects applied for but not consented. There is no reference to consented projects.

126. The fact that the relevant core ground is in wider terms (core ground 10 refers to "the cumulative impacts arising from other plans or projects with the potential of having in-combination effects with the activities permitted by the Licence") isn't a sufficient answer given the incredible factual complexity of the matter. The "particulars" are limited to projects at the proposal stage. In no sense is it acceptably clear from the pleadings that the applicants are seeking to introduce a whole separate category of consents not referenced in these particulars.

127. The number of potential other projects and the highly technical nature of the factual situation and the need for expert evidence on each of these is such that there is no way that it would be fair to the opposing parties to allow the applicant to go beyond the very specific point made in sub-ground 93 to launch some further dimension never made clear in the wording of the core ground. Order 84 r. 20(3) RSC applies here.

128. On that basis I think that the already consented projects fall outside the pleadings.

Sub-issue E – failure to consider pending projects

129. The State points out that the particular projects concerned are not identified in sub-ground 93, which is correct. But despite that, the relevant pending projects are relatively identifiable being the three projects pending as of the date of the licence that were within the 30 km zone of influence, as set out in the table above. That is a very net grouping, by contrast with the attempted fairly open-ended reading of core ground 10 which could potentially cover anything ever previously consented or applied for.

130. The first edition of the European Commission's document known as the "Article 6 guide", and is formally titled Managing Natura 2000 sites, The provisions of Article 6 of the 'Habitats Directive' 92/43/EEC, was published in 2000. It stated:

> "4.4.3. ... either individually or in combination with other plans or projects
>
> A series of individually modest impacts may in combination produce a significant impact. Article 6(3) tries to address this by taking into account the combination of effects from other plans or projects. It remains to be determined what other plans and projects are covered. In this regard, Article 6(3) does not explicitly define which other plans and projects are within the scope of the combination provision.
>
> It is important to note that the underlying intention of this combination provision is to take account of cumulative impacts, and these will often only occur over time. In that context, one can consider plans or projects which are completed; approved but uncompleted; or not yet proposed:

- In addition to the effects of those plans or projects which are the main subject of the assessment, it may be appropriate to consider the effects of already completed plans and projects in this 'second level' of assessment. Although already completed plans and projects are excluded from the assessment requirements of Article 6(3), it is important that some account is still taken of such plans and projects in the assessment, if they have continuing effects on the site and point to a pattern of progressive loss of site integrity.
  Such already completed plans and projects may also raise issues under Article 6(1) and (2) of Directive 92/43/EEC if their continued effects give rise to a need for remedial or countervailing conservation measures or measures to avoid habitat deterioration or species disturbance.
- Plans and projects which have been approved in the past and which have not been implemented or completed should be included in the combination provision.
- On grounds of legal certainty, it would seem appropriate to restrict the combination provision to other plans or projects which have been actually proposed. At the same time, it must be evident that, in considering a proposed plan or project, Member States do not create a presumption in favour of other as yet unproposed plans or projects in the future.

For example, if a residential development is considered not to give rise to a significant effect and is therefore approved, the approval should not create a presumption in favour of further residential developments in the future.

When determining likely significant effects, the combination of other plans or projects should also be considered to take account of cumulative impacts. It would seem appropriate to restrict the combination provision to other plans or projects which have been actually proposed."

131. The current edition of the Article 6 guide dates from 2019 (2019/C 33/01). Section 4.5.3 states as follows in similar terms:

"4.5.3. … either individually or in combination with other plans or projects

A series of individually modest impacts may, in combination, produce a significant impact. As the Court has pointed out 'the failure to take account of the cumulative effect of projects in practice leads to a situation where all projects of a certain type may escape the obligation to carry out an assessment, whereas, taken together, they are likely to have significant effects on the environment' (C-418/04, C-392/96 paragraphs 76, 82).

Article 6(3) tries to address this by taking into account the combination of effects from other plans or projects. In this regard, Article 6(3) does not explicitly define which other plans and projects are within the scope of the in-combination provision.

It is important to note that the underlying intention of this in-combination provision is to take account of cumulative impacts, and these will often only occur over time. In that context, one can consider plans or projects which are completed, approved but uncompleted, or proposed:

- In addition to the effects of those plans or projects which are the main subject of the assessment, it may be appropriate to consider the effects of already completed plans and projects in this 'second level' of assessment, including those preceding the date of transposition of the Directive or the date of designation of the site (see, for example, C-142/16, paragraphs 61 and 63). Although already completed plans and projects are themselves excluded from the assessment requirements of Article 6(3), it is still important to take them into consideration when assessing the impacts of the current plan or project in order to determine whether there are any potential cumulative effects arising from the current project in combination with other already completed plans and projects. The effects of such completed plans and projects would normally form part of the site's baseline conditions which are considered at this stage (52).
- Plans and projects which have been approved in the past but have not yet been implemented or completed should be included in the in-combination provision.
- As regards other proposed plans or projects, on grounds of legal certainty it would seem appropriate to restrict the in-combination provision to those which have been actually proposed, i.e. for which an application for approval or consent has been introduced. At the same time, it must be evident that, in considering a proposed plan or project, Member States do not create a presumption in favour of other not yet proposed plans or projects in the future.

For example, if a residential development is considered not to give rise to a significant effect and is therefore approved, the approval should not create a presumption in favour of further residential developments in the future.

In addition, it is important to note that the assessment of cumulative effects is not restricted to the assessment of similar types of plans or projects covering the same sector of activity (e.g. a series of housing projects). All types of plans or projects that could, in combination with the plan or project under consideration, have a significant effect, should be taken into account during the assessment.
Similarly, the assessment should consider the cumulative effects not just between projects or between plans but also between projects and plans (and vice versa). For example, a new project to build a major motorway through an area may on its own not adversely affect the site, but when considered in combination with an already approved housing development plan for the same area, these impacts may become significant enough to adversely affect the site. On the other hand, a plan may have no significant impact on Natura 2000 sites on its own but may be assessed differently if considered in combination with an already proposed or authorised major development project not included in that plan.
Potential cumulative impacts should be assessed using sound baseline data and not rely only on qualitative criteria. They should also be assessed as an integral part of the overall assessment and not be treated merely as an 'afterthought' at the end of the assessment process.
When determining likely significant effects, the combination with other plans and/or projects should also be considered to take account of cumulative impacts during the assessment of the plan or project in question. The in-combination provision concerns other plans or projects which have been already completed, approved but uncompleted or actually proposed."

132. The most recent Commission guidance document, dating from 2021, is entitled Assessment of plans and projects in relation to Natura 2000 sites – Methodological guidance on Article 6(3) and (4) of the Habitats Directive 92/43/EEC (2021/C 437/01) [Brussels, 28.9.2021 C(2021) 6913 final, Commission notice], and includes the following at p. 21:

"The 'in combination' screening requires the identification of other plans and projects that can have potential effects on the same Natura 2000 sites and then assessing their capacity to cause significant effects when considered together with the plan or project under assessment. If this analysis cannot reach definitive conclusions, it should at least identify any other relevant plans and projects that should be scrutinised in more detail during the appropriate assessment.
Assessing cumulative effects at the screening stage
A series of individually low-level impacts may, in combination, produce a significant impact. When determining likely significant effects, the combination with other plans and/or projects should also be considered to take account of cumulative impacts during the assessment of the plan or project.
The in-combination provision concerns other plans or projects that have been already completed, approved but uncompleted, or proposed (i.e. for which an application for approval or consent has been submitted). In addition, it is important to note that the assessment of cumulative effects is not restricted to the assessment of similar types of plans or projects covering the same sector of activity. All types of plans or projects that could, in combination with the plan or project under consideration, have a significant effect, should be included during the assessment.
Similarly, the assessment should look at the cumulative effects, not just between projects or between plans but also between projects and plans (and vice versa). For example, a new project to build a major motorway may on its own not adversely affect the site, but when considered in combination with an already approved housing development plan for the same area, the impacts may become significant enough to adversely affect the site. By contrast, a plan may have no significant impact on Natura 2000 sites on its own but may be assessed differently if considered in combination with an already proposed or authorised major development project not included in that plan.
See further details in the Article 6 Guide – section 4.5.3."

133. The guidance continues at p. 22:

"Table 2 outlines the key steps for assessing cumulative effects on a Natura 2000 site.

Table 2: Cumulative impact assessment

Steps in the assessment	Activity to be completed
…	…
Identify all projects/plans that could act in combination	Identify all possible sources of effects from the plan or project under consideration, together with other sources in the existing

	environment and other possible effects from other proposed projects or plans; timing and phasing of projects or plans.

134. At pp. 44-45 the guide discusses this further including by reference to multiple wind farms as an example:

"c) Assessing cumulative effects with other plans and projects

Cumulative impacts can result from the successive, incremental, and/or combined effects of a development (plan, project) when added to other existing, planned, and/or reasonably anticipated developments (see also section 3.1.4, table 2 on the key steps for assessing cumulative effects on a Natura 2000 site). Examples of cumulative impacts include:

- increased pollutant concentrations (particularly in water and soil), beyond levels compatible with the ecological requirements of the habitat or species protected in the site;
- reduction of water flow in a watershed due to multiple withdrawals, below the level which is compatible with the ecological requirements of the habitat or species protected in the site;
- interference with migratory routes or wildlife movement;
- increased pressure on habitats and species in an ecosystem from different developments.

Cumulative impacts encompass a broad spectrum of impacts on different geographical scales and timeframes. In some cases, cumulative impacts occur because a series of projects of the same type are being developed. Prime examples are:

- when several hydroelectric projects are constructed or planned on the same river or within the same watershed;
- when multiple oil and gas projects or mineral extraction projects are developed in close proximity; or
- when a number of wind farms are constructed or planned within the same flyway or region.

In other cases, cumulative impacts occur due to the combined effects of different types of projects in the same area, such as the development of a mineral extraction site, access roads, transmission lines, and other adjacent land uses. In some situations, different components of the same development are implemented and assessed separately, meaning that the cumulative impacts from these components should also be subject to a cumulative impact assessment.

Other plans or projects that could, in combination with the plan or project under investigation, have a significant effect on a site must be taken into account during the appropriate assessment. For example, a proposed road will pass some distance from a Natura 2000 site and the disturbance it will generate (e.g. noise) will not significantly affect bird species protected in the site. However, if there are other existing or proposed projects or plans (e.g. a road on the other side of the Natura 2000 site), then the total noise levels from all these projects combined may cause a significant level of disturbance for those bird species (noise levels above what it compatible with the ecological requirements of the species).

To note also that cumulative impacts could occur where impacted areas interact. An example of this would be where a proposed project is likely to reduce water levels in a Natura 2000 site. Although that resource reduction in itself may not be significant, if existing fertiliser and pesticide residues reach the site from a nearby intensive farming area, the lower water levels may mean higher concentrations of pollutants when runoff occurs, to an extent that the combined effect becomes significant, i.e. concentrations of pollutants beyond the levels which are compatible with the ecological requirements of the habitat or species protected in the site.

'In-combination' effects should already have been investigated at the screening stage (Section 3.2), and any other plans and projects that can act in combination should have been identified. The assessment at the screening stage may have been simplified, but, at the appropriate assessment stage, the identified impacts of other projects or plans that can act in combination with the plan or project being assessed should be properly evaluated. This requires quantifying and/or qualifying the magnitude of these other impacts and identifying the affected features of the Natura 2000 sites.

As stated in section 3.1.4, the in-combination provision concerns other plans or projects that have been already completed, approved but not yet completed, or submitted for consent.

> In addition to the effects of the plans or projects that are the main subject of the assessment, it may be appropriate to consider the effects of already completed plans and projects, including those preceding the date of transposition of the directive or the date of designation of the site. The effects of such completed plans and projects would typically form part of the site's baseline conditions which are considered at this stage. Plans and projects that have been approved in the past but have not yet been implemented or completed should also be included in the in-combination provision. As regards other proposed plans or projects, in the interest of legal certainty it would be appropriate to restrict the in-combination provision to plans that have been actually proposed, i.e. for which an application for approval or consent has been submitted. At the same time, it must be evident that, when assessing a proposed plan or project, Member States do not create a presumption in favour of other not yet proposed plans or projects in the future.
>
> See further details in the Article 6 Guide – section 4.5.3
>
> The geographical scope to use when looking at cumulative effects will depend on the type of plan or project and the habitats and species significantly present on the site. It could be, for instance, within a certain radius, on a catchment area basis, or along a bird migration route. It should however cover the entire geographic area in which all plan or project activities and their cumulative effects are likely to have implications on the conservation objectives of the Natura 2000 sites in question."

135. Hence the guidance envisages that pending applications should be considered in the in-combination assessment rather than just consented projects and plans, and has expressly provided to this effect for over 20 years now.

136. The State argues by analogy that there is no obligation to take into account non-consented projects in an EIA context – see EIA directive annex IV para. 5(e) which applies only to existing or approved projects. But the habitats directive has always involved a higher standard of certainty.

137. Ms Heffernan points out in evidence (see third affidavit, para. 103) that this approach is reflected in the State's own guidance document, Appropriate Assessment of Plans and Projects in Ireland, Guidance for Planning Authorities, published by the Department of Environment, Heritage and Local Government in December, 2009 (revised 2010), and currently the responsibility of the NPWS at pp. 33-34:

> "As the underlying intention of the in-combination provision is to take account of cumulative effects, and as these effects often only occur over time, plans or projects that are completed, approved but uncompleted, or proposed (but not yet approved) should be considered in this context (EC, 2002)."

138. While the applicants haven't expressly pleaded the divergence from national guidance as a specific ground of challenge, it is nonetheless a striking feature of the case. The State's attempt to explain away the contradiction between its own published guidance and its stance to the contrary in the present case is unconvincing and I will come back to that as a contextual matter potentially relevant to the issue of discretion.

139. The issue of in-combination effects with other pending projects arose not only from other submissions, such as the reference to cumulative effects by the Marine Institute, Inland Fisheries Ireland, the Irish Whale and Dolphin Group (submission 3), Coastal Concern Alliance (submission 17) and submissions 8, 11, 15, but more importantly from the material before the decision-maker itself, so the applicant not only gets out of the starting blocks on a *Commission v. Germany* basis but there is also factual material before the decision-maker by reference to which the complaint can be advanced.

140. At the broad level I would not quibble with the point made in *In re Newry Chamber of Commerce and Trade* [2015] NIQB 65 by Treacy J. at para. 64 that the decision-maker's views on the assessment of in-combination effects "are matters of expert judgment which cannot legitimately be condemned as unreasonable. Furthermore, this is not a matter for an impermissible merits debate before this court". However that presupposes a lawful assessment and consideration of the projects by reference to which the in-combination effects consideration is to take place.

141. Likewise, in *Rushe* v. An Bord Pleanála at paras. 212-220, Barniville J. upheld the *merits* of an in-combination effects analysis, but again that was not a case where there was an issue as to the *process* of consideration and in particular whether the decision-maker had factored in the correct projects to consider. Such a question is at best from the opposing parties' viewpoint a mixed question of fact and law, and at worst a pure question of law.

142. Here what makes it an issue of law is that the State adopted a position in principle limiting the matters to which regard would be had. As noted above, the State very firmly and clearly submitted that there is no obligation to consider in-combination effects in respect of projects that were only at the application stage, that is prior to the grant of permission.

143. We will deal with the defences to this point below.

Sub-issue F – inadequacy of condition

144. The second sentence of sub-ground 91 provides as follows:

"Neither the mitigation measures proposed by RWE, nor the conditions imposed by the Minister are effective in dealing with issues of spatial and temporal overlap in terms of similar licensed activities."

145. While sub-optimally, the ground isn't particularly specific about which conditions it is talking about or why they aren't effective, it is acceptably clear as to what the similar licensed activities are (as listed above) and therefore as to what the condition is. Its ineffectiveness is a matter apparent on its face so I don't think that the applicants' submissions on this issue impermissibly expand their case.

146. A certain amount of material acknowledging the possibility of in-combination effects through temporal overlap is directly contained in the development application. The NIS includes the following at para. 4.3.10 regarding the North Irish Sea Array (NISA):

"The NISA site investigation works were screened into the in combination assessment for consideration of the harbour porpoise QI of the Rockabill to Dalkey SAC. The NIS for NISA Foreshore Licence application submitted by Statkraft Ltd concluded no LSE for geotechnical, metocean and benthic surveys occur[r]ing within the site boundary. Further the effects are very localised (immediate footprint of the equipment or in the case of drilling within 100 m of the drilling equipment). Given that the application has yet to be determined and details on the exact timing of the intended works are unknown, there is a potential for temporal overlap of the NISA geophysical survey with the surveys for Dublin Array."

147. The Hartley Anderson Report includes the following at para. 3.5:

"Codling Bank site investigation works: a foreshore licence for these site investigation works was determined in February 2021, and while a schedule for the works is not available there is the potential for spatial/temporal overlap. The proposed Codling Bank site investigations at the Poolbeg landfall overlap with South Dublin Bay and River Tolka Estuary SPA and Rockabill to Dalkey Island SAC. The potential for incombination effects will be considered for the qualifying interests of these sites in the Applicant's NIS. The specific features and sources of effect to be considered incombination were not indicated.

Greater Dublin Drainage Project: the applicant notes that there is the potential for temporal overlap between the construction of a marine diffuser related to the Greater Dublin Drainage Project, due to commence Q2 2022 with works lasting three years. While LSE is not identified for any particular site in-combination with the survey activities, the applicant notes that the diffuser construction will be considered further in its NIS.

...

North Irish Sea Array (NISA) site investigation works: there is no spatial overlap between the proposed NISA surveys and that of the Applicant, however, there is the potential for temporal overlap. In-combination effects are discounted for the NISA geotechnical, metocean and benthic surveys due to the localised nature of the effects. Due to the potential overlap with mobile qualifying interests of Rockabill to Dalkey Island SAC (harbour porpoise) and Lambay Island SAC (harbour seal, grey seal) in relation to underwater noise from geophysical surveys, the in-combination effects with the NISA survey in relation to these sites will be considered in the Applicant's NIS."

148. The Hartley Anderson Report continues at section 3.4:

"Irish Water Greater Dublin Bay drainage

The Irish Water construction of a pipeline to the north of Dublin Bay, including a section of the Baldoyle Estuary, will involve excavation of a trench 5m deep, installation of the pipeline and backfilling with previously excavated material, together with the installation of two piled structures. Whilst there is no spatial overlap, the applicant identified the potential for temporal overlap with the proposed site investigations at Dublin Array.

...

North Irish Sea Array site investigation works

The applicant noted the potential for temporal overlap of the NISA geophysical survey with the surveys for Dublin Array. The NIS for NISA Foreshore Licence application submitted by Statkraft Ltd concluded no LSE for geotechnical, metocean and benthic surveys occurring within the site boundary. The site investigation works at NISA will be undertaken over 20 km from the survey activities at Dublin Array, and any underwater noise generated would attenuate rapidly to within background levels, with no adverse effects predicted. Given the localised nature of any effects from survey activities and that both projects were committed to mitigation in line with the DAHG guidance (see Section 3.3.1), the applicant concluded that no adverse effects upon site integrity as a result of the proposed works in-combination with NISA would occur.

...

In-combination underwater noise effects: The proposed site investigations and those other wind farm site investigations identified above (Codling, NISA) could theoretically happen at the same time. The risk of injury to harbour porpoise qualifying interests from these surveys is considered to be very low and only within the immediate vicinity of the survey vessel or operation. Given the localised nature of any effects from survey activities and that all projects have committed to mitigation in line with the DAHG guidance, there will be no adverse incombination effects on the integrity of the site. Further, the licensee shall liaise with the Department and use their best endeavours to liaise with the holders of Foreshore licences for other surveys and site investigations to be undertaken in the vicinity of the Foreshore licence area specified in this application."

149. Conclusion 7 in the Marine Adviser's Environmental Assessment and Determinations Report is as follows:

"The licensee shall liaise with the Department and use their best endeavours to liaise with the holders of Foreshore licences for other surveys and site investigations to be undertaken in the vicinity of the Foreshore licence area specified in this application."

150. The MLVC Report introduces a new proposed requirement, namely to co-ordinate with other licence holders. The report states in section 9.0:

"Given the existence of other licences in this general area, it is considered prudent in the interests of mitigating the possible cumulative environmental effects that the applicant be required, in the event of a licence being granted, to coordinate with other licence holders that overlap with the survey area as submitted to ensure that no temporal overlap between two or more projects occurs. It is considered that this requirement shall form part of the notification condition."

151. However, for whatever reason (possibly mistake – the State hasn't really explained this), the proposed conditions at section 10.0 don't include such a new condition but only the general wording previously proposed by Hartley Anderson, stating at proposed condition 14:

"The licensee shall liaise with the Department and use their best endeavours to liaise with the holders of Foreshore licences for other surveys and site investigations to be undertaken in the vicinity of the Foreshore licence area specified in this application."

152. Submission HLG 00537-22: Appropriate Assessment Determination on Foreshore Application FS007188 RWE Renewables Ireland Ltd., Site Investigations for the proposed Dublin Array offshore wind farm, approved by Minister of State Burke on 23rd November, 2022, includes the following, reflective of the MLVC report:

"Significant appropriate consideration has been given to environmental matters by Independent Environmental Consultants which is reflected in this report. The supporting environmental reports formed part of this assessment. Given the existence of other licences in this general area, it is considered prudent in the interests of mitigating the possible cumulative environmental effects that the applicant be required, in the event of a licence being granted, to coordinate with other licence holders that overlap with the survey area as submitted to ensure that no temporal overlap between two or more projects occurs. It is considered that this requirement shall form part of the notification condition."

153. But again the submission repeats the contradiction of the MVLC, namely to narratively propose a "notification condition" that "the applicant be required, in the event of a licence being granted, to coordinate with other licence holders that overlap with the survey area as submitted to ensure that no temporal overlap between two or more projects occurs", but to include as a proposed condition only the earlier, weaker, wording that does not in terms achieve this.

154. Condition 31.13 of the licence ultimately granted provides:

"The Licensee shall liaise with the Department of Housing, Local Government and Heritage and use their best endeavours to liaise with the holders of Foreshore Licences for other surveys and site investigations to be undertaken in the vicinity of the Foreshore Licensed Area the subject matter of this Licence."

155. The State's submission was that the condition should be read as intended to give effect to the more imperative wording that the MLVC introduced and that was accepted by the Minister in approving the submission. It is also submitted that the Minister can ensure all this happens anyway through other powers.

156. Paragraph 6.1 of the licence:

"The Licensee shall not commence any works associated with the Operations in the Licensed Area, without the prior written consent of the Licensor."

157. Paragraph 6.3 and 31.2 of the Second Schedule of the licence requires 14 days' notice to the Minister of proposed works under the licence. The Minister interprets this as involving 14 days' notice of beginning any item of works involving the departure of a specific vessel.

158. Paragraph 9.2(10) provides that the licensee shall:

"... not, without the prior written consent of the Licensor, carry out any works, activities or operations which, in the reasonable opinion of the Licensor, are injurious to or interfere unreasonably with fishing, navigation, adjacent lands and/or Foreshore, approved scientific research or the public interest".

159. Paragraph 9.3 provides that:

"Without prejudice to any other remedy under this Licence, at Law or Environmental Law, if the Licensor is of the view that the Licensee is in breach of any obligation pursuant to clause 9.2, the Licensor may, by notice in writing, require that the Licensee rectify such breach within such reasonable time period as is specified by the Licensor."

160. Paragraph 81 of the State's written submission obscures this issue by saying that "cumulative impacts were considered by the MLVC, and a mitigation measure proposed, which was adopted as a condition of the Licence". That inaccuracy is the very problem. The condition narratively proposed by the MLVC was not adopted as a condition of the licence, which instead took the form of the formula pre-dating the MLVC report.

161. The applicants called the ultimate condition "woolly language", and one has to agree with that. There isn't anything unlawful in itself about a condition of a permission being woolly, all other things being equal; what makes it potentially unlawful here is the context which requires removal of all scientific doubt about impacts on European sites together with the contradictory situation that the MLVC added much stronger language about the need for an imperative condition but didn't follow through to actually propose the condition that was so needed, in lieu of the very loose wording of the condition they inherited. The fact that theoretically the Minister might be able to come at the problem some other way (even making the contestable assumption that the rosy scenarios promised in legal submissions are invariably carried through in their totality in practice) doesn't in itself do a lot to meet the MLVC's statements that co-ordination should be ensured or the habitats directive requirement of removing all scientific doubt. This isn't a case where a Minister is given a general power and it is to be assumed that it will be exercised lawfully. Rather it is one where there is a complex situation involving multiple public and private law actors, where the directive requires certainty, where the Minister's official reasoning, supporting the MLVC, supports the need for that, and where the specific measure that was expressly agreed to as being required to ensure such certainty wasn't in fact adopted.

162. The opposing parties predictably complain that the applicants haven't shown in granular detail how all of this will impact, how specific impacts on qualifying interests of European sites will be adversely affected by hypothetical in-combination effects and so on. But surprising as it may seem, an applicant can't do all the work. Once an applicant manages to overcome the onus of proof to demonstrate infirmity in the decision-making process, it is up to the opposing parties to show that such an infirmity couldn't have made any difference (see *H.A. v. Minister for Justice* [2022] IECA 166, [2022] 7 JIC 2201 (Unreported, Court of Appeal, 22nd July, 2022) at para. 48). They certainly haven't done that thus far in relation to such apparent infirmities as the applicants have identified.

163. The State's position is not enhanced by the evidence that the alleged plenary powers of the Minister have not been used in a manner so as to obviate any temporal overlaps. In her third affidavit, Ms Heffernan deals with the alleged in adequacy of the condition as follows:

"96. ... RWE commenced works on foot of the Licence on or about 25 April 2023, and Marine Notices 16 of 2023 and 24 of 2023 indicated that works would commence in April and run until late May 2023. Mr Toole has previously referred to Marine Notice 28 of 2023 (which is exhibited at '4IT4' to Mr Toole's Fourth Affidavit) and which was issued on 13 April 2023 (the day before the Department emailed to state that there had been compliance with condition 31.13) related to the Codling Wind Park –Geotechnical Site Investigations. That Marine Notice indicated that:

> 'The Department of Transport has been advised by Codling Wind Park Ltd that geotechnical site investigations will be conducted on the Codling Wind Park project site off the coast of County Wicklow. The project works will commence on 8 May 2023 and continue through to late July 2023, subject to weather and operational constraints.
>
> 2. Location of Planned Operations
>
> The Codling Wind Park is a project on the Codling bank approximately 13km off the east coast of Ireland. The geotechnical investigation (incl. boreholes and cone penetration tests) is intended to take place at 15 different locations within the project work site.'

97. Given that the above Marine Notice refers to a start date of 8 May 2023, the Codling investigations had the potential to overlap with investigations being carried out by RWE. As the start date is prior to the second licence having been granted to Codling Wind Park, it

would appear to have been issued on foot of Codling's 2021 Licence, which was not considered by RWE or the Minister.

98. For the reasons set out above, conditions 31.13 is demonstrated to be ineffective in dealing with the potential for in combination effects arising from the spatial and temporal overlap of the effects of similar licensed activities.

99. I have dealt further with the views expressed by the MLVC in relation to the necessity for the imposition of a condition on the Licence which would 'ensure that no temporal overlap between two or more projects occurs' in the section of my Affidavit below, which provides a response to the Affidavit of Colin Ryan. No such condition was, in fact, imposed which would be effective to ensure this objective."

164. I am not sure that there has been a completely convincing answer to this point so far, although I bear in mind that the directions did not provide for a reply to this affidavit, so there may be some wriggle room left for the opposing parties to clarify their position in the next module.

Sub-issue G – inadequate specification of the projects being considered

165. Some points were made in oral submissions about a failure by the developer or State to identify the foreshore licence and planning application numbers in the course of the process which could have caused confusion if there were multiple applications. This claim of either no reference or inadequate or incomplete reference applied to the following projects:

(i) Celtix Connect;
(ii) Dublin Port Company maintenance dredge campaign;
(iii) Ringsend Waste Water; and
(iv) Irish Water Greater Dublin Bay drainage.

166. In addition, a specific point is made in respect of the NISA matters in that it is said that it is unclear which NISA project was considered.

167. The problem with this argument is that it arose from the materials that were available when the proceedings were commenced, and could have been raised by the applicants in the statement of grounds (even if they didn't have to correct the developer's homework by raising it in the process). Not having done that, I don't think that that point properly arises.

The argument that the in-combination points should be dismissed

168. So what remains live at this point is the argument that the treatment of in-combination effects was defective because either the Minister wrongly exclude pending projects or because the condition fails on its face to adequately address such effects or contradicts the reasoning regarding the need for an imperative condition that was accepted by the Minister.

169. We now turn to whether these points should be dismissed outright. The developer's submission helpfully lists out 8 factors which it suggests should be considered as a matter of discretion, and another 8 headings were raised by the opposing parties in submissions, making 16 objections in total. I can add a 17th point which is whether the criticisms should be considered cumulatively or in combination, even if they are not up to snuff individually:

(i) It is said that the Commission guidance is only guidance and expresses itself as subject to the CJEU. That is of course true but that doesn't make it of no value or relevance. If the only issue was non-compliance with non-binding guidance then the State might have a point, but that is a mischaracterisation. The obligation comes from the habitats directive rather than the guidance, and the issue is whether the European Commission's interpretation of the directive correctly reflects the obligations of the directive. Maybe it does, maybe as the State contends it doesn't, but any uncertainty about that makes the case for the reference sought by the applicants, not for dismissing the proceedings.

(ii) The argument is made that the applicants have to plead a connection between the matter not considered and an impact on a European site. That sounds plausible but one has to bear in mind that the applicants are making a process objection rather than a merits objection under this heading. The issue is that the decision-maker unlawfully failed to take into account certain matters by adopting an incorrect view of the law. That is a common or garden administrative law complaint. If it is upheld, the responding parties would have some onus to show that that couldn't make any difference (*H.A. v. Minister for Justice* at para. 48), unless that was obvious, which it certainly isn't. So I don't think an applicant has to anticipate any possible defence. Core ground 10 and sub-grounds 91 and 93 are adequate in this regard, even if, like all pleadings with the benefit of hindsight, they could have been more detailed. The standard is acceptable clarity, not perfection.

(iii) It is then said that even if the applicants don't have to plead this in detail, they have to demonstrate evidentially that any demonstrated potential error could have caused impacts on a European site. This assumes that the onus of proof on the applicant doesn't even slightly shift once they get to the point of demonstrating error. That

isn't the case but that is doubly so where the exercise is about removing all scientific doubt under the habitats directive.

(iv) It is then argued that these issues will all be matters for the Minister, who is the same decision-maker as here, when deciding on the pending applications, so there isn't any real problem. So the question of whether project A and project B have effects in combination could have been addressed when project A is being consented, but if that isn't done, then exactly the same exercise can be carried out later when project B is being consented *by the same decision-maker*. Hence there's nothing to see here. That superficially sounds not only extremely plausible but rock-solid to a mathematical level of certainty. Forgivably I hope, I was initially somewhat taken in by that argument, but when one looks in detail at the European Commission guidance on cumulative and in-combination effects one sees that it is a much more dynamic and complex problem. Mathematically and logically the argument regarding two projects makes sense, but we are not talking about two projects. In-combination effect analysis involves an overall look at how any specific project will impact in combination with all relevant projects already completed, all relevant projects consented but not completed as of the date of the consent, and if the European Commission and the departmental guidance on the NPWS website is to be believed, all relevant projects that have been applied for as of that date but not consented. That is a technical exercise specific to the particular development consent concerned. So the question is *not* whether project A and project B will have in-combination effects, but whether project A, project B, and projects C to M will have in-combination effects. If the decision-maker postpones that to the stage of consenting project B, she will then find that the question is quite different, namely perhaps whether project A, project B, and projects K to Z have in-combination effects, and the opportunity to conduct the specific exercise that should have been conducted in relation to project A will now be utterly irrecoverable. There are so many fluctuating variables in this type of analysis that the Minister is not going to be able to unscramble the egg. Some projects that should have been considered as relevant to project A may not arise at all for project B, not only due to factual changes in the nature and stages of the projects but because of possibly different zones of influence which define which projects are relevant based on their geographical location.

(v) The Minister goes on to argue that as a matter of fact, in the Codling licence decision-making process, there was a subsequent analysis of the in-combination effects at the time of the grant of that licence. But I think the previous problem applies. The in-combination exercise is by its very nature specific to the situation as of the particular date of a particular development consent by reference to the particular geographical location of the specific consented project, the defined zone of influence related to that, and the particular projects thereby defined as relevant to it specifically and the nature of such projects as they appear at that time.

(vi) The opposing parties say that the problem is in any event dealt with by the condition. But even if we didn't have the problems with the condition as set out above, that is a post hoc exercise, not the specific in-combination analysis that is required as of the grant of development consent. The same problems apply.

(vii) The opposing parties argue that the complaint is largely hypothetical because two of the pending projects have been paused by Government decision communicated by letter dated 18th May, 2023 (after the licence was granted). However that does not apply to the Codling II project. Nor does it answer the problem that pausing the projects as a matter of fact does not dilute the legal obligation to consider the possible in-combination effects as a matter of European law.

(viii) The next point was that any infirmity should be dealt with by declaration and we will turn to that in the next section.

(ix) We now come to the argument that the proceedings should be dismissed as a matter of discretion. The first complaint is that "the Applicants did not make a submission on RWE's licence application at Stage One Screening stage". That is true but European law gives them a right to bring the present proceedings (or at least that hasn't been challenged here) and it would undermine that right to dismiss the proceedings because they didn't do something EU law doesn't require them to do.

(x) The next complaint is that "whilst Mr. Toole did make a submission in June 2022 on the Stage Two AA, he did not raise any of the issues now pleaded in the Amended Statement of Grounds". Again that is true but the same response applies.

(xi) The developer then says that "the issues raised in pre-litigation correspondence by the Applicants' solicitors related to the Applicants' commercial fishing interests and a purported lack of consultation in respect of the impacts of the site investigations on his fishing operations". Again that's as may be but the previous point applies. Given the EU law right to litigate the issue without first raising it with the opposing parties, it would undermine that to dismiss the proceedings on such a basis.

(xii) The developer then says "RWE sought to engage with those concerns both in the context of the licensing process and directly with Mr. Toole". That is an understandable complaint but again the same problem arises.

(xiii) The developer submits: "[s]ince the enactment of the Climate Action and Low Carbon Development (Amendment) Act 2021, any failure to reduce emissions within the initial or second five year carbon budget period will require deeper emission reductions in the next budget period, to ensure that emissions are reduced by 51% by 2030 over 2018 levels. For the first time, the 2021 Act has made Ministers and other relevant bodies legally responsible and accountable for inaction or delay in implementing the sectoral measures and actions specified in the Act, including specific actions under the latest Climate Action Plan 2023 ('CAP 23') , and these provisions strongly lean against an Order granting certiorari, in particular". The problem with that is that as discussed in the *No. 2* judgment, the need for measures to address the climate emergency can't have the effect of undermining environmental law. This argument, totally relatable as it is, is just another incarnation of the immortal insight of Jonathan Swift that "Laws are like Cobwebs which may catch small flies, but let Wasps and Hornets break through" ("A Tritical Essay upon the Faculties of the Mind", in *Miscellanies in prose and verse* (London, 1711) p. 257). The logic is that it might be just about tolerable for the courts to occasionally quash modest development consents, but it is taking things too far to accept that in respect of major projects contributing to important objectives. One can understand the all-too-human logic of that position but it isn't jurisprudentially valid. The legal correctness of the procedural issue involved in the decision-making process doesn't depend on the size or importance of the project concerned, so it would be illogical and more importantly unequal to treat this project differently from another project where similar issues might arise. Treating like cases alike and ensuring that the law makes sense overall as a unified whole is a core component of justice as seen by philosophers from Aristotle to Kant to Dworkin. That is not to say that the consequences of decisions are irrelevant – they aren't at all irrelevant. But the primary metwand by which consequences are to be assessed is their impact on the system rather than on any particular party who might not want to be on the losing side of a particular case. And here, there are absolutely no adverse consequences to the system if the points being made by the applicants are ultimately upheld. All that would mean is that the Minister would have to follow the Commission guidance, and that ministerial decisions should not be contradictory by including imperative language regarding conditions but highly permissive actual conditions. A fundamental problem not just with this but with most of the other similar points made against the applicants is that such points would be given short shrift as a basis to dismiss a more pedestrian case *in limine*. There shouldn't be a different rule book just because this project is particularly important to the State and the developer.

(xiv) The developer goes on to submit that "in that regard, the Dublin Array project competed successfully in Ireland's first offshore renewable energy support scheme (ORESS 1), securing an offer capacity of 824MW, and subject to obtaining the required consents, once operational it will deliver 16% of Ireland's CAP 23 commitment (underpinned by the Climate Act) to deliver 5GW of new offshore generating capacity by 2030 (as, indeed, was recognised in the judgment on the interim stay application, at §44)". Again the same points apply unfortunately.

(xv) The next complaint is that "the continued stay has had and is continuing to have significant programmatic delays on the Dublin Array project and RWE, which will have commercial, financial and practical implications as well as a reputational impact on the developing offshore wind sector in Ireland, where offshore wind is critical to meeting Ireland's legally binding emission reduction obligations". It will be no consolation whatsoever to say that this is all totally understandable but we are beyond the question of an interlocutory stay at this point – the applicants have made quite a bit of headway in demonstrating that the points concerned are substantial ones. Nor do I totally buy the concept of reputational damage because the logic of the EU law right to an effective remedy is that any project anywhere in the Union

can be challenged by anyone where the relevant directives so provide. Ireland isn't uniquely permissive in this respect. Although it possibly doesn't help that the 1933 Act doesn't have some of the procedural safeguards in the interests of expedition that either exist or are proposed for planning law.

(xvi) The final discretionary factor is that "the Applicants delayed in instituting these proceedings, as well as bringing the application for an interim stay, which delays have caused and will continue to cause serious prejudice to RWE". I have previously addressed this alleged and fairly limited delay in the *No. 1* and *No. 2* judgments. European law allows the full limitation period to bring the action, which can't be cut back by vague and uncertain requirements of speed within that: see Case C-456/08 *Commission v. Ireland* (Court of Justice of the European Union, 28th January, 2010, ECLI:EU:C:2010:46). In addition, the limitation period should not run from prior to when the applicant could have found out about the decision: see Case C-406/08 *Uniplex (UK) Ltd v. NHS Business Services Authority* (Court of Justice of the European Union, 28th January, 2010, ECLI:EU:C:2010:45), C-280/18 *Flausch v. Ypourgos Perivallontos kai Energeias* (Court of Justice of the European Union, 7th November, 2019, ECLI:EU:C:2019:928). It would undermine that to dismiss the proceedings on the basis of the applicants having exercised such rights.

(xvii) Finally, I can consider the foregoing points cumulatively and in combination, but this doesn't lead to a different conclusion I'm afraid.

170. This broad approach is consistent with (although of course not an exact analogy with) what Donnelly J. said for the Court of Appeal in *H.A. v. Minister for Justice* at para. 48, rejecting the idea that *certiorari* should have been refused because the underlying administrative claim was without substance:

> "The Minister's argument that the trial judge incorrectly granted an order of certiorari on the grounds that to do so was futile as the remitted reconsideration of the respondent's case was in effect bound to fail and thus would confer no benefit upon her must be rejected. The onus was on the Minister to establish that it was very clear that the respondent had no case and that the trial judge had wrongly exercised his discretion to grant the relief and she has failed to discharge that onus. The respondent's case has reached the level of arguability that is required before a court should decline the invitation to refuse to grant certiorari on the ground that the subsequent remittal would be a futile exercise. The Minister has not succeeded in establishing that it would be an unjust result to grant the order of certiorari in the present case."

171. This judgment is important in that it clearly recognises that once the applicant establishes a flaw "the onus is on the Minister" (or other decision-maker) to show that that would have made no difference.

172. Similarly here, we have to ask – can one confidently say that the licence decision, including conditions, would have been exactly the same had the Minister addressed the issues in the way that the applicants contend is legally correct? Clearly not. Maybe it would have been, but maybe not. Certainly the State hasn't shown that. It would be inconsistent and illogical to refuse relief in such circumstances (assuming that we get to the point of a formal finding that the applicants' complaints amount to legal flaws).

173. This is where the caselaw relied on by the notice party is manifestly distinguishable. In *Concerned Residents of Treascon and Clondoolusk v. An Bord Pleanála* [2022] IEHC 700, [2022] 12 JIC 1609 (Unreported, High Court, 16th December, 2022) (under appeal), the error was a harmless one because it wouldn't have made any difference. That is not the situation here.

174. So the application to dismiss the whole proceedings *in limine* is refused at this stage, but given what has happened in this case to date, it would feel wildly optimistic, if not positively reckless, to preclude any further twists and turns that might make that something that could be revisited if it could be demonstrated that anything significantly new arises or that anything major has changed.

Does any proposed dismissal raise a referrable EU law question?

175. As I am not proposing to dismiss the proceedings based on the foregoing 17 factors or any of them, the question of whether any proposed dismissal raises a referrable EU law question doesn't arise.

176. If it had arisen, the applicants' submission on the issue was:

> "If the Court finds that the AA screening or AA carried out by the Minister was invalid and/or did not comply with the requirements of Article 6(3) of the Habitats Directive, it is submitted that the Court does not have a discretion to refuse relief having regard to the need to give effect to the State's obligations under the Directive: see, for example, Berkeley v Secretary of State for the Environment [2001] 2 AC 603, at 616, per Lord Hoffmann."

177. In that case, Lord Hoffmann said as follows:

"I said in Reg. v. North Yorkshire County Council, Ex parte Brown [2000] 1 A.C. 397, 404; [1999] 2 W.L.R. 452, 458, that the purpose of the Directive was 'to ensure that planning decisions which may affect the environment are made on the basis of full information.' This was a concise statement, adequate in its context, but which needs for present purposes to be filled out. The Directive requires not merely that the planning authority should have the necessary information, but that it should have been obtained by means of a particular procedure, namely that of an EIA. And an essential element in this procedure is that what the Regulations call the 'environmental statement' by the developer should have been "made available to the public" and that the public should have been 'given the opportunity to express an opinion' in accordance with article 6.2 of the Directive. As Advocate-General Elmer said in Commission of the European Communities v. Federal Republic of Germany (Case C-431/92) [1995] E.C.R. I-2189, 2208-2209, para. 35 -

> 'It must be emphasised that the provisions of the Directive are essentially of a procedural nature. By the inclusion of information on the environment in the consent procedure it is ensured that the environmental impact of the project shall be included in the public debate and that the decision as to whether consent is to be given shall be adopted on an appropriate basis.'

The directly enforceable right of the citizen which is accorded by the Directive is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues. In a later case (Aannemersbedrijf P.K. Kraaijeveld BV v. Gedeputeerde Staten van Zuid-Holland (Case C-72/95) [1996] E.C.R. I-5403, 5427, para. 70), Advocate-General Elmer made this point again:

> 'Where a Member State's implementation of the Directive is such that projects which are likely to have significant effects on the environment are not made the subject of an environmental impact assessment, the citizen is prevented from exercising his right to be heard.'

Perhaps the best statement of this aspect of an EIA is to be found in the U.K. government publication 'Environmental Assessment: A Guide to the Procedures' (HMSO 1989) at p.4:

> 'The general public's interest in a major project is often expressed as concern about the possibility of unknown or unforeseen effects. By providing a full analysis of the project's effects, an environmental statement can help to allay fears created by lack of information. At the same time it can help to inform the public on the substantive issues which the local planning authority will have to consider in reaching a decision. It is a requirement of the Regulations that the environmental statement must include a description of the project and its likely effects together with a summary in non-technical language. One of the aims of a good environmental statement should be to enable readers to understand for themselves how its conclusions have been reached, and to form their own judgments on the significance of the environmental issues raised by the project.'

A court is therefore not entitled retrospectively to dispense with the requirement of an EIA on the ground that the outcome would have been the same or that the local planning authority or Secretary of State had all the information necessary to enable them to reach a proper decision on the environmental issues.

Although section 288(5)(b), in providing that the court 'may' quash an ultra vires planning decision, clearly confers a discretion upon the court, I doubt whether, consistently with its obligations under European law, the court may exercise that discretion to uphold a planning permission which has been granted contrary to the provisions of the Directive. To do so would seem to conflict with the duty of the court under article 10 (ex article 5) of the EC Treaty to ensure fulfilment of the United Kingdom's obligations under the Treaty. In classifying a failure to conduct a requisite EIA for the purposes of section 288 as not merely non-compliance with a relevant requirement but as rendering the grant of permission ultra vires, the legislature was intending to confine any discretion within the narrowest possible bounds. It is exceptional even in domestic law for a court to exercise its discretion not to quash a decision which has been found to be ultra vires: see Glidewell L.J. in Bolton Metropolitan Borough Council v. Secretary of State for the Environment (1990) 61 P. & C.R. 343, 353. Mr. Elvin was in my opinion right to concede that nothing less than substantial compliance with the Directive could enable the planning permission in this case to be upheld."

178. While this possibly pulls in a slightly different direction from Case C-72/12 *Gemeinde Altrip*, it is not in direct conflict with *Altrip*.

179. One might be allowed to note that not referring this issue is not absolutely straightforward. Purely as a procedural observation, and not viewing it as either good or bad, one can see a possible scenario where, for example, I might definitively reject the *in limine* defences and might then refer the substantive issue to Luxembourg, the opposing parties might then appeal the order refusing to dismiss the case *in limine*, and might then persuade an appellate court to allow that appeal without referring the applicants' question about discretion which I have just outlined. The reference of the substantive issue would become moot and I would withdraw it in such circumstances. Luxembourg would then be off the pitch so the applicants would be left high and dry with no European remedy for their EU law complaint. The realist answer to that is "so be it", unless the applicants can come up with some legal or academic authority to suggest that a national court can refer a question premised on domestic law being uncertain and postulating that the trial court's own, non-definitive, interpretation of domestic law might be wrong (or refer a question as to whether it was entitled to refer such a conditional question). I am not currently conscious of such authority and nor does such a procedure appear to be free from drawbacks, but am open to being enlightened on that. One's basic position has to be that appeal courts know best, that any misfortunes the parties suffer elsewhere are not matters for me, and that parties have constitutional rights of appeal which they know how to use, and they normally need neither encouragement nor discouragement in that regard.

Step (iii) - the argument that the in-combination points should be relevant to *certiorari* only

180. We then move to step (iii) which is whether there is a case for saying that any flaws should result in declaratory relief only. I have reconsidered points (i) to (xvii) above insofar as they are relevant to this issue but broadly the analysis is on the same lines.

181. The real problem is that in a more common or garden case, where an applicant comes up with a potential flaw in the decision-making process, it would take something fairly specific by way of a legal consideration for a court to decide to grant a declaration only. Examples of where this has been considered are:

(i) *McCallig v. An Bord Pleanála and Others* [2013] IEHC 60, [2013] 1 JIC 404 (Unreported, High Court, Herbert J., 24th January, 2013) is an unusual case where the rationale for using the asserted "discretion" to grant a declaration rather than *certiorari* is not readily apparent and, respectfully, not clearly convincing. In the absence of such convincing rationale, that decision is best viewed as one on its own facts and has been more or less treated as such in later jurisprudence in that it has not led to any great outbreak of declarations in lieu of *certiorari*.

(ii) *Save Cork City Community Association CLG v. An Bord Pleanala & Ors* [2021] IEHC 509, [2021] 7 JIC 2802 (Unreported, High Court, 28th July, 2021) – where the infirmity as to public participation didn't affect the applicant. That doesn't apply by analogy where the action is essentially environmental public interest litigation and where an applicant seeks to uphold objective environmental considerations. Here, the infirmity alleged *did* affect such considerations.

(iii) *Pembroke Road Association v. An Bord Pleanála, The Minister for Housing, Local Government and Heritage* [2021] IEHC 545, [2021] 7 JIC 2912 at paras. 26 and 27. What Owens J. said was somewhat involved so I will add sub-numbering for the proposed courses of action to make the options more visible for present purposes:

> "[26] No useful purpose would be served by [(1)] setting aside the permission at this stage. The most that I would be prepared to do is [(2)][(a)] to make a declaration at some stage that condition 26 in its current form is legally ineffective and [(b)] in the meantime give the Board an opportunity to amend it by either [(i)] setting aside the part of its decision and order which relates to that condition and remitting that matter back for a further decision, or [(ii)] by adjourning these proceedings to enable the Board to correct the error by exercising its power under s.146A(1)(iii) of the 2000 Act.
>
> [27] As there is a lack of enthusiasm by the Board and Derryroe for the former option, I will adjourn these proceedings to enable the Board to cure the legal defect by exercising its power under s.146A(1)(iii) of the 2000 Act."

So when the learned judge refers in para. 27 to "the former option", this in context clearly doesn't mean what I have numbered option (1) (full *certiorari*), nor does it mean option (2)(a) (the declaration). What it means is option (2)(b)(i), namely partial *certiorari* and remittal. So it is clear that a declaration was to be granted where "no useful purpose" would have been served by *certiorari*, and where the consent decision itself was valid but there was a correctable issue with one of the conditions, and a specific statutory provision which permitted corrections. The error was then actually corrected. Those precise considerations don't apply here, although I note that para. 8.2 of the licence agreement does allow the specific conditions in the Second Schedule to the licence to be amended. I

don't know whether that is relevant but that certainly hasn't been shown at the moment. If the power of amendment was shown to be capable of dealing with this issue, I would certainly reconsider whether a declaration or some other relief (such as mandamus) or even an adjournment of the issue pending administrative amendment would be sufficient.

(iv) The approach of declining *certiorari* where amendment was possible was upheld by the Supreme Court in *Waltham Abbey v. An Bord Pleanála; Pembroke Road Association v. An Bord Pleanála* [2022] IESC 30, [2022] 2 I.L.R.M. 417, [2022] 7 JIC 0401. The developer places outsize reliance on the comments of Hogan J. at para. 53 onwards, but again the difference there is that he was dealing with a situation where there was a specific statutory procedure to correct the error in the decision. In those circumstances it was not necessary to quash the permission granted. Any analogy to the present case has yet to be established.

(v) *Clifford & Sweetman v. An Bord Pleanála (No. 3)* [2022] IEHC 474, [2022] 8 JIC 1502 (Unreported, High Court, 15th August, 2022) – where the breach of the statutory consultation procedure didn't affect the applicants. That doesn't apply by analogy here for the reasons outlined above.

182. No existing valid doctrine has as of now been demonstrated which could allow me to dismiss *certiorari* on a basis that could be rationally justified and applied to cases generally on an equal basis, consistent with philosophical notions of equal justice and a Kantian categorical imperative.

183. If I were in any doubt about whether sub-issue E in particular should be reduced to being only a declaration point, which I amn't, such doubt would be assuaged by the rule of law considerations that arise from the fact that the State's published guidance to planning authorities totally contradicts its submission to the court. That context raises significant concerns that would warrant the point being dealt with by imperatively effective, rather than merely declaratory, orders if ultimately upheld. The State's response to this problem is:

(i) It is stated that the departmental guidance was non-statutory and non-binding. But one would think they are talking about someone else's document – this is *their own* document. Whether AA is to be done in the manner set out in the guidance is a matter of law – so either their guidance is correct or it isn't. Whether it's binding or not isn't the issue.

(ii) It is stated out that the guidance is addressed to and designed for planning authorities carrying out functions under the Planning and Development Act 2000. That's as may be but there can be no suggestion that it is inappropriate to consider pending projects in other contexts because EU law doesn't provide any specially different AA rules for planning versus maritime projects.

(iii) It is argued that because of that context, the guidance doesn't contemplate temporally limited foreshore works where the Minister has an ongoing supervisory power on foot of foreshore licences. But there are a number of fatal flaws that that argument. Firstly, the *post hoc* ministerial powers are only able to address the problem of in-combination effects to a limited and inadequate extent for reasons explained. Secondly, there is no trace of this alleged qualification in either the directive, the Commission guidance or the State guidance. Thirdly the directive requires the assessment before consent, not afterwards. But fourthly and perhaps most concerningly for rule of law purposes, that exception is capable of being generalised so as to virtually eradicate the need to consider pending projects, by excluding any that are pending before the decision-maker concerned with the initial project. There is nothing magical about the marine context or the ministerial nature of the decision-maker - the logic would be just as compelling to enable planning authorities to ignore pending planning applications.

(iv) It is asserted that the guidance is outdated, aspects related to zones of influence of 15 km (p. 32) are said to be seen as out of date and it is claimed that there is now a more "nuanced" approach to zones of influence. But all of that is irrelevant. The Commission guidance, in place for 23 years in various editions, and the State guidance, in place for 14 years in two editions, have been utterly consistent and up to date on the critical point we are talking about – the need to consider pending projects for in-combination appropriate assessment. Either that consistent, long-standing and unchallenged published position at European and national level is correct, or the *ad hoc* position to the contrary making its first forensic appearance in present case is correct. Any other goals the State wants to score in its own net by way of criticism of its own ministerial guidance are all fine and dandy, but such self-criticisms don't resolve that contradiction.

(v) It is asserted that the guidance is heavily based on Commission guidance which has been superseded by subsequent Commission guidance. That's a point in favour of

the applicants – it's normally desirable to follow Commission guidance, but in any event the superseding guidance, as noted above, is to exactly the same effect on the critical point we are talking about.

184. To call these excuses makeweight and artificial would be to lend them an air of substance and gravitas that they do not warrant. All of this raises a concerning rule of law issue. It can't be acceptable for the State to assert one legal stance as its published position and an inconsistent one to meet the forensic needs of a particular case. It compounds those concerns rather than alleviates them to offer attempted explanations of the type we have just seen. On any analysis, this can't be irrelevant to discretionary questions such as *certiorari* versus declaratory relief.

Does any proposed order limiting the relief to a declaration raise a referrable EU law question?

185. Again this doesn't arise, subject to the procedural footnote referred to above.

Next stage – submission on possible reference to the CJEU

186. To set the context for the possible CJEU reference, the applicants' first proposed question for reference is as follows:

> "Whether Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ('the Habitats Directive') has the effect that the competent authority is obliged to take into account the effects of other proposed projects (i.e. for which an application for approval or consent has been submitted but not determined) in combination with the effects of the project in respect of which development consent is sought."

187. That broadly captures sub-issue E.

188. The second question is:

> "If the answer to question one is yes, does the obligation on the competent authority to consider proposed projects continue up until the date the development consent is granted."

189. This question seems to be designed to factor in the Arklow Bank project. However since I conclude that that falls outside the pleaded case then we don't seem to need this question.

190. The third question is:

> "Whether Article 6(3) of the Habitats Directive has the effect that a national Court is obliged to set aside a decision to grant a development consent where the competent authority has not taken into account the in combination effects of a proposed project for the reason that it has yet to be determined, or whether the Court has a discretion not to set aside the said decision in circumstances where the effects of the project in respect of which development consent is sought may be taken into account when the application for that other proposed project is being considered and determined [by the same competent authority] [or has been taken into account]."

191. I have dealt above with whether that is something I can actually refer given that I am not proposing to exercise such discretion against the applicants.

192. The fourth question is:

> "Whether Article 6(3) of the Habitats Directive has the effect that a national Court is obliged to set aside a decision to grant a development consent where the competent authority has not taken into account the in combination effects of another proposed project for the reason that it has yet to be determined, or whether the Court has a discretion not to set aside the said decision in circumstances where [the applicant] has not identified the conservation objectives of any Natura 2000 site which could potentially be subject to the effects of the project in respect of which consent is sought, in combination with that other project."

193. The same point applies to that.

194. The fifth question is:

> "Whether Article 6(3) of the Habitats Directive has the effect that a national Court is obliged to set aside a decision to grant a development consent where the competent authority has not taken into account the in combination effects of another proposed project for the reason that it has yet to be determined, or whether the Court has a discretion not to set aside the said decision in circumstances where [the applicant] has not adduced evidence which demonstrates that the project in respect of which consent is sought, in combination with that other project, is capable of having an effect on the conservation objectives of any Natura 2000 site."

195. Again the same issue arises.

196. To these questions one would need to add the issue of sub-issue F, as noted above. Either this can be addressed without a reference (in which case if it is addressed in favour of the applicants, we might not need to get to sub-issue E at all, or only for declaratory purpose), or it can't, in which case we need a specific wording for a proposed question, which we haven't got at the moment.

197. However all of this can be discussed further in submissions for the next module.

198. The next step is to hear further submissions from the parties on whether I should decide the outstanding issues myself or refer them to the CJEU and on what basis. I am leaving all options that have not already been specifically discounted open for that hearing, if the parties can come up with something major that is new or that I have overlooked.

Order

199. At the severe risk of over-simplification, I can endeavour, without taking from the more specific terms of the judgment, to try to summarise the current position.

(i) The applicants' core grounds 1 to 9 fail, mainly due to a failure to make the points during the administrative process or failure to cross-examine the opposing deponents which would have been a prerequisite for discharging the onus of proof to show that doubt arises on the face of the materials.

(ii) Core ground 10 sub-issues A to D fail mainly for similar reasons or because they are not pleaded or lack substance.

(iii) Core ground 10 sub-issue E should not be dismissed or limited to a declaration at this stage, and further submissions will be invited.

(iv) Core ground 10 sub-issue F on the inadequacy of the condition should not be dismissed or limited to a declaration at this stage, and further submissions will be invited, although how it could be dealt with by the court may depend on whether the power to amend the licence is capable of dealing with the point.

(v) Core ground 10 sub-issue G fails because it is not pleaded.

200. The order made on 21st June, 2023 was that the Minister of State be struck out as a respondent, which was to be without prejudice to the case against the State parties.

201. The order made on 22nd June, 2023 was as follows:

(i) the costs of the interlocutory stay be adjourned to Monday 3rd July, 2023 for a relatively brief hearing, and the order regarding the interlocutory stay will be perfected following that hearing; and

(ii) the State be permitted to file an affidavit exhibiting information regarding the Codling licence without prejudice to any argument that it was legally irrelevant.

202. The order made on 23rd June, 2023 was as follows:

(i) the State to file an affidavit exhibiting the schedule of other projects, with the parties' respective positions set out in relation to any matters on which they disagree;

(ii) liberty to the applicants to put in an affidavit exhibiting material about the relationship of the project to the Arklow wind farm, on a *de bene esse* basis;

(iii) it was noted that the decision algorithm was agreed and the judgment to be reserved on foot of the hearing to deal with steps (i) to (iii) in the decision algorithm insofar as those need to be decided, as a distinct module;

(iv) the processing of the matter to be as follows at the end of each Monday list:

(a) Monday 26th June, 2023 – decision regarding the applicants' proposed new affidavit;

(b) Monday 3rd July, 2023 – target date for decision on current module, and directions regarding submissions on the CJEU issue (if it arises) in the week to follow;

(c) Monday 10th July, 2023 – hearing on the CJEU module;

(d) Monday 17th July, 2023 – target date for decision on CJEU issue and directions regarding submissions on the stay in the week to follow;

(e) Monday 24th July, 2023 – hearing on stay module and target date for *ex tempore* announcement of the order on that module; and

(f) Remaining matters of costs and possible stay on costs to be adjourned to a date to be fixed;

(v) the order to hear the costs of the interlocutory stay on 3rd July, 2023 was varied so that that hearing will take place in due course on a date to be fixed;

(vi) the interlocutory stay order to be perfected at that point on the basis that the costs would be adjourned to be dealt with by a separate order on a date to be fixed in due course; and

(vii) a similar approach will apply going forward where any party requests a perfected order made contrary to its submissions notwithstanding that costs have not been dealt with (this was intended to be subject to any contrary application by any other party).

203. The order made on 26th June, 2023 was that I allowed the applicants to file an additional affidavit relating to the Arklow Bank project without prejudice to the opposing parties' pleading objections and the objection that the point had already been answered on affidavit.

204. The order made on 27th June, 2023 was as follows:

(i) The table of projects is to include the parties' respective positions if there is no agreement;
(ii) the parties be directed to make certain changes to the table by adding all projects referred to the papers plus their application number and types;
(iii) the State to prepare a draft affidavit exhibiting the table and certain documents related to the North Irish Sea Array II licence (the URL having already been introduced in evidence) to be agreed between the parties;
(iv) the parties would attempt to agree or at least exchange definitions of the technical terms referred to; and
(v) the matter be listed on 28th June, 2023 to finalise.

205. The order made on 28th June, 2023 was as follows:

(i) The State to have liberty to file an additional affidavit along the lines of the draft furnished to also include exhibiting the MLVC report of 26th April, 2022 and the foreshore licence granted in respect of the Arklow Bank project; and
(ii) The table of projects was to be completed on a basis directed, mainly to make clear the parties' respective positions as well as to include some particular matters the parties wanted to draw attention to, including the wording of condition 31.23 in the Arklow licence.

206. For the reasons set out in the judgment, it will now be ordered that:

(i) core grounds 1 to 9 and the associated sub-grounds be dismissed;
(ii) sub-issues A to D and G (as identified in the judgment) of core ground 10 be dismissed;
(iii) the opposing parties' application to dismiss sub-issues E and F (as identified in the judgment) *in limine* be refused at this stage;
(iv) the opposing parties' application to limit sub-issues E and F to declaratory relief be refused at this stage;
(v) the next module regarding step (iv) of the decision algorithm be listed to deal with sub-issues E and F of core ground 10 and with whether the court should decide one or both of these itself, and if so how, or refer one or both of them to the CJEU and if so on the basis of what potential relief;
(vi) the matter be listed for any further directions on Monday 3rd July, 2023;
(vii) subject to any contrary submission made forthwith, the parties have until 09:30 on Friday 7th July, 2023 for simultaneous written legal submissions on step (iv) and until 09:30 on Monday 10th July, 2023 for simultaneous mutually replying written legal submissions, and it is confirmed that step (iv) be listed for hearing on Monday 10th July, 2023; and
(viii) if the parties wish to request the opportunity for further evidential steps to be taken in connection with that hearing, such application must be made forthwith and at the latest at 09:30 on Tuesday 4th July, 2023, having first endeavoured to agree directions for such steps *inter se*.

Postscript

207. Following a further hearing, on 10th July, 2023, the table of projects set out in the original version of para. 121 of this judgment has been amended so that the Innogy licence will be treated as having been considered, for reasons that will be explained in a later judgment.