

Unapproved – no redactions required



THE COURT OF APPEAL

CIVIL

Neutral Citation No: [2022] IECA 126

RECORD NOS 2020/55 & 2020/56

BETWEEN

NORTH WESTMEATH TURBINE ACTION GROUP and

NORTH WESTMEATH TURBINE ACTION GROUP

COMPANY LIMITED BY GUARANTEE

Appellants

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

Respondents

AND

WESTMEATH COUNTY COUNCIL, COOLE WINDFARM LIMITED.

GREENWIRE LIMITED/GREENWIRE WINDFARMS LIMITED

Notice Parties

JUDGMENT of Mr Justice Maurice Collins delivered on 1 June 2022

BACKGROUND

1. The essential background to the two appeals before the Court is set out in the judgment that I gave (Noonan and Binchy JJ agreeing) dismissing applications brought by Ireland and the Attorney General (“*the State Respondents*”) to strike out the appeals on the basis that they had been brought without the leave of the High Court: [2020] IECA 355. However, certain aspects require more detailed narration here.
2. The Applicants/Appellants (“*NWTAG*”) have challenged a decision of An Bord Pleanála (“*ABP*”) of 26 March 2019 which granted (subject to a number of conditions) planning permission for the construction of a windfarm consisting of up to 13 wind turbines with a tip height of up to 175 metres, together with associated works, in the townland of Coole and adjacent townlands in Co Westmeath (“*the Decision*”). The development site consists of 440 hectares of peatland. Planning permission had previously been refused by Westmeath County Council but that decision was successfully appealed by the Second Notice Party (“*the Developer*”).
3. The permission sought and granted relates only to the erection of the turbines and associated works. However, as the turbines require a grid connection, the environmental impact assessment report (EIAR) submitted by the Developer also addressed the environmental impacts of the proposed grid connection to the National Grid at

Mullingar, approximately 25 kms away.¹ The EIRA identified mitigation measures relating to the overall development i.e. not limited to the turbine site and including the proposed grid connection. A Natura Impact Statement was also submitted by the Developer which, it appears, also assessed the overall development including the proposed grid connection. ABP proceeded to assess the environmental impacts of the proposed development, including the cumulative impacts of the windfarm and grid connection (the adequacy of that assessment is a significant issue in the proceedings but is not relevant to the resolution of these appeals).

4. Condition 4 of the Decision provides as follows:

“The mitigation measures and monitoring commitments identified in the Environmental Impact Assessment Report, and other plans and particulars, including the Natura impact statement, submitted with the planning application shall be implemented in full by the developer, except as may otherwise be required in order to comply with the following conditions.

Prior to the commencement of development, the developer shall submit to, and agree in writing with, the planning authority, a schedule of these mitigation measures and monitoring commitments, and details of a time schedule for implementation measures and associated monitoring”

¹ Wind farm developments present particular difficulties concerning the extent of the development requiring environmental impact assessment: see the discussion in Browne, *Simons on Planning Law* (3rd ed; 2021) at para 14-330 and following.

Condition 5 should also be noticed. It provides that, prior to the commencement of the development, a detailed environmental management plan for the construction and operational stages is to be submitted to and agreed in writing with the planning authority “*generally in accordance with the proposals set out in the [EIAR].*”

5. In May 2019 NWTAG commenced judicial proceedings seeking *certiorari* of the Decision, as well as declarations to the effect that ABP failed to carry out an Environmental Impact Assessment (EIA) in accordance with Directive 2014/55/EU² and that the proposed development had not been considered and assessed in accordance with the requirements of Directive 92/43/EEC.³ In addition to ABP, Ireland and the Attorney General were named as respondents.

6. NWTAG’s Statement of Grounds set out no fewer than 44 separate grounds in support of those claimed reliefs. *Inter alia*, it was said that Condition 4 was *ultra vires* and bad in law, on a number of different bases, including that it purported to affect third party land outside the control of the Developer, in respect of which no consent had been obtained from the relevant landowners. On that basis, it was said that the condition was, on its face, *ultra vires* ABP. It was also said that the Condition 4 was impermissible on the basis that section 34(4) of the Planning and Development Act 2000 (as amended)

²Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (“*the EIA Directive*”).

³ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (“*the Habitats Directive*”)

(the “PDA”)⁴ expressly protects third party lands from any burden of the kind enshrined in the condition and on its face (so it was said) Condition 4 was “*fundamentally inconsistent*” with section 34(4) and *ultra vires*, invalid and void (Statement of Grounds, para E28). Further issue was taken with the enforceability of the required mitigation measures and the consequences of their alleged unenforceability for the lawfulness of the environmental impact assessment and/or appropriate assessment that ABP was required to carry out in paras E35, E36 and E38.

7. Para E42 asserts that the provisions of Directive 2014/52/EU have not been properly transposed “*in circumstances where there is no provision whereby mitigation measures can be lawfully imposed on lands other than those provided for under Section 34(4) and where the Scheme of the Planning Act appears to contemplate a provision whereby part of a Scheme can be the subject matter of an application for planning permission and can require the imposition of conditions mitigating the adverse impacts of the development where no jurisdiction on the part of the competent authority to impose such conditions exists*”. In those circumstances, it was said, Ireland has failed to transpose the EIA Directive “*as there is no appropriate or effective mechanism*

⁴ Section 34(1) PDA provides that where an application for planning permission is made to a planning authority, “*the authority may decide to grant the permission subject to or without conditions*”. Section 34(4) then provides that “[*c*]onditions under subsection (1) may, without prejudice to the generality of that subsection, include all or any of” the conditions which are then set out at (a) – (q). Subsection 4(a) refers to “*conditions for regulating the development or use of any land which adjoins, abuts or is adjacent to the land to be developed and which is under the control of the applicant*” if the imposition of such conditions appears expedient for the purposes of the permitted development or where such conditions appear appropriate for the purposes of conserving a public amenity on the adjacent lands. These provisions also apply to ABP: section 37(1)(b) PDA. The conferral of power to impose conditions for the purposes of conserving a public amenity seems to have been a legislative response to the decision of the Supreme Court in *Ashbourne Holdings Ltd v An Bord Pleanála* [2003] 2 IR 114.

provided in the Scheme of the Act within which mitigation measures can adequately be imposed or enforced” in the circumstances of this case.

8. Paragraph E44 of the Statement of Grounds is in similar terms, save that it asserts a failure to transpose the Habitats Directive on the same basis i.e. the absence from the Irish planning scheme of any provision enabling the effective imposition of mitigation measures on lands outside the control of the applicant for planning permission.
9. Leave to apply for judicial review on the grounds set out in section E of the Statement of Grounds was granted by the High Court (Noonan J) on 27 May 2019 and the proceedings were subsequently admitted to the Commercial List. Noonan J was clearly satisfied – albeit on the basis of an *ex parte* application only - that the grounds set out in section E, including the grounds at E41-E42, amounted to “*substantial grounds*” for contending that the Decision was invalid or ought to be quashed.
10. In August 2019, the State Respondents brought an application to dismiss/strike-out the proceedings against it pursuant to Order 19, Rules 27 and/or 28 RSC and/or the inherent jurisdiction of the Court, asserting that the proceedings disclosed no reasonable cause of action as against them and/or were frivolous and vexatious and/or were doomed to fail.⁵

⁵ No point appears to have been taken as to the form of the application brought by the State. Nevertheless, it is difficult to see how the jurisdiction to strike out a pleading given by Order 19, Rule 28 RSC could arise here given that the definition of “*pleading*” in Order 125, Rule 1 RSC does not include a statement of grounds or originating notice of motion. Indeed, that very point was made by the State by way of arguing that Order 28 RSC (amendment of pleadings) was of no relevance to the amendment application here. Similarly, Order 19, Rule 27 – which

11. The basis for the application was set out in an affidavit sworn by Barry Ryan, a solicitor from the Chief State Solicitor’s Office, sworn on 13 August 2019. Mr Ryan observed that of the 45 paragraphs in the Statement of Grounds, only five (E26 and E41-E44) could be construed as touching on the State Respondents “*insofar as they raised issues concerning the transposition of the EIA and Habitats Directive.*” According to Mr Ryan, those pleas were “*vague and so unclearly expressed as not to be in accordance with Order 84 Rule 20(2)*” RSC. However, the main complaint made by Mr Ryan, and the principal basis on which the strike-out application was advanced, was the fact that the Statement of Grounds failed to seek any reliefs against the State Respondents. Mr Ryan referred to previous correspondence in which these points had been raised with the solicitors for NWTAG and they had been invited to release the State from the proceedings. Mr Ryan also observed that the grounds raised in relation to the State depended on the meaning of particular conditions of the planning permission and suggested that the State “*had been named in reserve as a backup to other grounds relevant*” to ABP. That, Mr Ryan suggested, was “*not a proper way to proceed, in particular in circumstances where no declaratory relief or otherwise can be granted*” against the State.

empowers the High Court to strike out or order the amendment of “*any matter in any indorsement or pleading*” would appear to have no application to the proceedings here. As for the *Barry v Buckley* jurisdiction, in *Alen-Buckley v An Bord Pleanála* [2017] IEHC 311 the High Court (Costello J) held that such jurisdiction was exercisable in respect of judicial review proceedings, rejecting the applicant’s argument that the appropriate procedure was to bring an application to set aside the leave, relying on the jurisdiction recognised in *Adam v Minister for Justice, Equality and Law Reform* [2001] 3 IR 53. No challenge was made to that holding in *Alen-Buckley*. In any event, there would appear to be no material difference between the *Barry v Buckley* threshold test and the threshold test articulated in *Adam*.

12. There is no dispute that the Statement of Grounds did not seek any relief against the State Respondents. However, those respondents clearly had an interest in the transposition issues raised in the Statement of Grounds and arguably (at least) they were “*directly affected*” by the proceedings for the purposes of Order 84, Rule 22(2). As the High Court (MacMenamin J) observed in *Usk and District Residents Association Ltd v An Bord Pleanála* [2009] IEHC 346, [2010] 4 IR 113, by “*virtue of Article 10 EC [now Article 4(3) TEU] and Article 249 EC [now Article 288 TFEU], the State is the entity ultimately responsible for any failure in the transposition of any European Directive*” (at para 140). Therefore a finding by the High Court that the EIA Directive and/or the Habitats Directive had not been properly transposed could have potentially significant consequences for the State, both in terms of exposing it to the risk of enforcement action by the European Commission and also by reason of potential exposure to claims for *Francovich* damages.
13. Order 84, Rule 22(2) requires service of judicial review proceedings on all persons “*directly affected*” by such proceedings. In practice, such persons are generally named as notice parties. Rule 22(2) was considered by the Supreme Court in *BUPA Ireland Ltd. v. Health Insurance Authority (No. 1)* [2006] 1 IR 201. The facts there were different in that VHI were seeking to be joined as a notice party against the opposition of the applicant but that does not dilute the principle which the Court (per Kearns J) extracted from the authorities, namely that “*where a party has a ‘vital interest in the outcome of the matter’ or is ‘vitaly interested in the outcome of the proceedings’ or would be ‘very clearly affected by the result’ of the proceedings, it is appropriate for*

that party to be a notice party in the proceedings” (at para 26). Arguably (at least), the State were potentially affected by the proceedings here to a sufficient degree to trigger the application of Order 84, Rule 22(2).

14. That being so, in the event that the State Respondents had not been named as parties, the judge hearing the application for leave would have had to consider whether to direct that they should be put on notice of the proceedings. If the State Respondents had not been put on notice, they might well have had a legitimate basis for complaint. Furthermore, if the State was not put on notice of the proceedings, ABP and/or the Developer could have objected to NWTAG pursuing its transposition grounds on the basis that the State was the *legitimus contradictor* in respect of those grounds and that it would be inappropriate to adjudicate on them in its absence.⁶

15. Of course, the State Respondents were named as respondents, rather than as notice parties (or simply being served with the proceedings). In circumstances where the only decision impugned in the proceedings was that made by ABP, and where no relief was sought against them, the State Respondents ought not to have been named as respondents. Even so, they were at all times free to decide whether or not they wished to be heard on the transposition issues. If they did, they could have asked the High Court to direct that such issues would be addressed last and only if strictly necessary.

⁶ In fact, in its Statement of Opposition, ABP expressly pleads that the alleged failures in transposition in paras E41-E44 of the Statement of Grounds “*are for the State Respondents to address*” (ABP Statement of Opposition, para 73). While “*for completeness*” it denied that there were any “*transposition errors*”, the Developer similarly pleaded that this was a matter for the State (Developer’s Statement of Opposition, para 128).

They could also have sought to have their status altered from respondents to notice parties.

16. In such circumstances, one might be forgiven for wondering why, from a pragmatic perspective, the State Respondents considered it appropriate to bring the application that they did. In any event, that application obviously prompted NWTAG to apply to amend the Statement of Grounds by the addition of two further declarations, in the following terms:

“A Declaration that Council Directive 92/43/EU has not been properly transposed by the Second Named Respondent in circumstances where there is no provision in the Planning and Development Act 2000 (as amended) whereby mitigation measures can be lawfully imposed on lands other than those provided for under section 34(4) of the Planning and Development Act.”

and

“A Declaration that the provisions of Council Directive 2014/52/EU have not been properly transposed in circumstances where there is no provision whereby mitigation measures can be lawfully imposed on lands other than those provided for under section 34(4) of the Planning and Development Act.”

The terms of these declarations mirrored what was pleaded in paras E44 and E42 of the Statement of Grounds respectively. No declaratory relief directed to any issue of public

participation was sought. Significantly, NWTAG did not seek any amendment of the grounds set out in section E of the Statement of Grounds.

17. The application to amend was grounded on an affidavit sworn by Gabriel Toolan, the solicitor acting for NWTAG, on 9 October 2019. He explained the basis for his clients' complaints regarding the transposition of the EIA Directive and the Habitats Directive and observed that these issues had been raised in the Statement of Grounds in the paragraphs referred to above. According to Mr Toolan:

“The jurisdiction of An Bórd Pleanála to impose mitigation measures is limited in Section 34(4) of the Planning and Development Act only to those lands which form of the subject matter of the Application and to lands which immediately adjoin or are adjacent to these lands and which are under the control of the Applicants and therefore, in effect, the only conditions that can be imposed, including those which deal with the mitigation measures required for the purposes of the [EIA] Directive and for the purposes of the appropriate assessment, are those lands on the lands immediately adjoining the site but do not, and can not be such, as to give jurisdiction to the Bórd to impose conditions in respect of the works across the grid connection route; which conditions relate to lands over 20 kilometres from the lands over which the Applicant has any interest has any interest or control.”

18. Mr Toolan referred to the position taken by ABP on the transposition issues and suggested that the relevant grounds in the Statement of Grounds were directed to and

were properly to be dealt with by the State. He went on to say that “*to ensure that these matters are dealt with as part of a single unitary hearing where all these issues can be resolved*” NWTAG had brought an application to insert “*formal reliefs*” against the State reflecting the existing grounds in the Statement of Grounds. Mr Toolan stated that, in the event that the transposition issues could not be raised in the proceedings, NWTAG would be required to bring separate plenary proceedings seeking the same declarations and that would, he said, “*lead to an unnecessary duplication of Proceedings and an inefficient use of valuable Court time*”.

19. The two motions came on for hearing before the High Court (Twomey J) over 2 days in November 2019. By then, the State Respondents had filed a Statement of Opposition which, after making a preliminary objection to the effect that the proceedings against them ought to be dismissed because of the failure to seek any relief against them, went on to address the substance of the grounds relating to the transposition of the EIA and Habitat Directives, albeit also complaining that those grounds lacked clarity.
20. The Judge gave judgment on the two motions on 19 December 2019. He first addressed what he referred to as “*the strike-out application*”, on the basis that it was the first in time. As regards that application, the Judge referred extensively to the decision of the High Court (Costello J) in *Alen-Buckley v An Bord Pleanála* [2017] IEHC 311. In *Alen-Buckley* the High Court had acceded to an application to strike out judicial review proceedings against the State Respondents in circumstances similar to the circumstances of the application in these proceedings – though in the absence of an application to amend - and Twomey J concluded that the same approach was

appropriate in this case.

21. The Judge rejected the argument that *Alen-Buckley* should be distinguished on the basis that no application to amend had been made in *Alen-Buckley* whereas such an amendment application had been brought by the NWTAG here. The reasoning of the Judge on this point is somewhat difficult to follow. He considered that it was “*self-evident that if the pleadings are now amended to include relief against the State parties, there would then be a cause of action against the State parties.*” (Judgment, para 38). However, he considered that the filing of the motion to amend “*does not, and cannot, impact on the strength of the standalone argument contained in the motion for strike out, that where pleadings disclose no relief as against the State parties, they are bound to fail*” (Judgment, at para 44). In coming to that conclusion, the Judge voiced concern that to permit the amendment would circumvent strict time sensitive rules and would allow NWTAG to bring a judicial review challenge against the State Respondents some 142 days after the time for doing so had expired. He also criticised the absence of any explanation for the failure to seek reliefs against the State Respondents in the Statement of Grounds. The Judge suggested that the failure to do so may not have been an oversight but did not identify what might have the reason for any deliberate omission of such reliefs.
22. The Judge then went on to address the amendment motion, although noting that his earlier analysis had effectively disposed of it. Again, he emphasised the time-limits involved and the public policy underpinning them and also stressed (as he had done earlier in his Judgment) the failure of NWTAG to explain their failure to seek any relief

against the State Respondents. He rejected its argument that permitting the amendment was not akin to permitting an entirely new case to be advanced against the State, given that the grounds for seeking those reliefs were already in the Statement of Grounds. The Judge concluded that even if the application to amend “*was to be considered in isolation*”, no sufficient justification to permit the amendment had been offered.

23. The Judge expressed his conclusions as follows:

“52. In summary, this Court will grant the motion of the State parties .. for an Order striking out the proceedings against them as bound to fail. It follows therefore that this Court refuses the application of the Action Group ... to amend the Statement of Grounds.”

24. Separate orders were drawn up in respect of each of the motions. The precise order made on the State Respondent’s motion was an order “*that the proceedings herein against the second and third defendants be struck out on the basis that they are bound to fail*”. Effectively, the State Respondents were left out from the proceedings. Otherwise, the proceedings were unaffected. In particular, the High Court did not strike out any of the grounds in the Statement of Grounds. All of those grounds – including the grounds at E26 and E41- 44 - remained in the proceedings.

25. NWTAG appealed both orders. The State Respondents then applied to this Court to strike out the appeals, asserting that NWTAG were not entitled to appeal without first obtaining leave from the High Court pursuant to section 50A(7) PDA. For the reasons

set out in the judgment that I gave on those applications, this Court dismissed the applications and ruled that NWTAG was entitled to have its appeals heard and determined in the ordinary way.

26. Consequent on the orders made by the High Court, the judicial review proceedings proceeded against ABP and the Developer only. Those proceedings were subsequently heard by the High Court (Quinn J) over a number of days. Judgment was reserved and has not yet been delivered. The State Respondents did not participate in that hearing. As I shall explain, the fact that NWTAG's challenge to the Decision has been heard is, in my opinion, a significant factor in the ultimate resolution of the appeals before the Court.

ARGUMENTS ON APPEAL

27. On appeal, NWTAG argued that the High Court erred in not addressing its amendment application first. While its position was that, even without the amendments sought, the proceedings should not in any event be struck out as against the State, if the amendments were permitted (as NWTAG contended they ought to have been) it clearly followed that the State's application could not succeed. As regards the refusal of the amendment application, NWTAG submitted that the Judge had wrongly regarded the application as amounting to an attempt to make an entirely new case against the State. That was not the position, it was said, given that the State had been named as a party from the commencement of the proceedings and where it was on notice of the transposition issues. NWTAG emphasised that the amendment application did not involve the addition of any new grounds for seeking judicial review; it merely involved the addition of formal reliefs against the State Respondents reflecting grounds already pleaded, which would not result in any prejudice to them.
28. NWTAG relied on *Keegan v Garda Síochána Ombudsman* [2012] IESC 29, [2012] 2 IR 570, *Copymoore Limited v Commissioners of Public Works in Ireland* [2014] IESC 63, [2014] 2 IR 786 and *BW v Refugee Appeals Tribunal (No 1)* [2015] IEHC 725 in support of its contention that the Judge had erred in his analysis of the amendment application and his conclusion that the amendment should be refused.
29. Even in the absence of the amendments, NWTAG submitted that the Judge erred to acceding to the strike-out application. The Statement of Grounds included grounds that

were clearly directed to the State Respondents and it had not been suggested by them that those grounds were bound to fail. That was sufficient to disclose a good cause of action against the State Respondents, even in the absence of any formal relief being claimed against it. If those grounds were made at the substantive hearing, Order 84, Rule 19 gave the Court power to grant appropriate relief.⁷ The decision of Costello J in the High Court in *Alen-Buckley* was distinguishable on the basis (it was said) that in *Alen-Buckley* the court had concluded that the applicant's statement of grounds did not identify what Ireland was alleged to have done wrong (*Alen-Buckley*, at para 12). That was not the case here, it was submitted, in that NWTAG's Statement of Grounds clearly identified the failures of transposition alleged against the State.

30. In response, the State Respondents supported the Judge's reasoning and conclusions. While they accepted that, in general, where a court was faced with an application to strike out and an application to amend it ought to address the issue of amendment first, here it was said that the Judge was entitled to proceed as he did given the "*reactive nature*" of the amendment application. In any event, they submitted, the amendment application had been properly considered and the Judge was entitled to conclude that the amendment should not be permitted. That was a discretionary decision to which this Court should give great weight, as per the judgment of Irvine J in this Court in *Collins v Minister for Justice, Equality and Law Reform* [2015] IECA 27 (at para 79). The

⁷ Order 84, Rule 19 provides as follows: "*On an application for judicial review any relief mentioned in rule 18(1) or (2) may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of or relates to or is connected with the same matter and in any event the Court may grant any relief mentioned in rules 18(1) or (2) which it considers appropriate notwithstanding that it has not been specifically claimed.*" Rule 18(2) refers to declaratory relief.

Judge was entitled to give decisive weight to the statutory context and the policy underpinning the time-limits in section 50 PDA and was also entitled to attach significance to the absence of any proper explanation by NWTAG for its failure to seek relief against the State in the first place and for its delay in bringing the application to amend. The application to amend was, they submitted, tantamount to making a new case and the authorities on extending time under section 50 were relevant. As they did before the High Court, the State Respondents emphasised that of the 44 grounds set out in the Statement of Grounds, only 4 related to them and criticised the vagueness and lack of clarity in those grounds, going so far as to suggest that those paragraphs were “*effectively incomprehensible*” and “*largely unintelligible*”. No specific provisions of the EIA Directive or the Habitats Directive had been identified. Insofar as it could be made out that the NWTAG was making a claim of failure to transpose those directives, it was “*questionable*” whether that issue was appropriately raised in judicial review proceedings at all, with reference being made to *Cosgrave v An Bord Pleanála* [2004] 2 IR 435 as authority for the proposition that issues of transposition ought to be pursued by plenary proceeding rather than by judicial review.

31. In the course of the hearing, the Court was referred to a number of provisions of the EIA Directive, including Article 8a (inserted by Directive 2014/52/EU). Article 8a(1)(b) requires that every decision to grant development consent shall incorporate “*any environmental conditions attached to the decision, a description of any features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment as well as, where appropriate, monitoring measures.*” Article 8a(4) then provides that “*Member States shall ensure*

that the features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment are implemented by the developer, and shall determine the procedures regarding the monitoring of significant adverse effects on the environment.” The Court was not referred to any provision of the Habitats Directive equivalent to Article 8a of the EIA Directive. According to NWTAG, the State has failed to transpose the provisions of Article 8a because the PDA does not empower planning authorities or ABP to impose enforceable conditions relating to the overall “*project*” in the circumstances presented here i.e. where an integral part of the overall project – the grid connection – is not part of the application for permission and is to be carried out on lands not in the control of the applicant for permission.

DISCUSSION

Preliminary

32. Before addressing these arguments, it is important to note that circumstances have altered significantly in the period since the Judgment and Orders of the High Court. NWTAG's case against ABP (and the Developer) has been heard by the High Court (Quinn J) and its decision is awaited. That decision will determine the validity of ABP's Decision, subject only to the possibility of an appeal to this Court pursuant to Section 50A PDA and/or an appeal to the Supreme Court pursuant to Article 34.5 of the Constitution.

33. NWTAG has had the opportunity to advance its arguments to the effect that the Decision of ABP is bad in law and ought to be quashed, including on the grounds referred above to the effect that Condition 4 is *ultra vires* the powers of ABP because, notwithstanding the requirements of the EIA and Habitats Directives, the PDA, and in particular section 34 PDA, does not confer any power on planning authorities or ABP to impose such a condition applying to land beyond the development site and outside the control of the developer. Mr Bland SC (for NWTAG) confirmed that these grounds were indeed advanced before Quinn J in the High Court. Those grounds of challenge were opposed by ABP and the Developer. While the Court is unaware of the precise parameters of the arguments before Quinn J, it seems likely that issues arose as to the meaning and effect of Condition 4 (an issue flagged in para 60 of ABP's Statement of Opposition) and as to effect of Article 8a of the EIA Directive (including, potentially,

whether it has direct effect as a matter of EU law).

34. This Court does not, of course, know how the High Court will ultimately decide the challenge to the Decision. The challenge may fail in its entirety. That outcome would necessarily appear to involve the High Court upholding the validity of Condition 4 and rejecting the contention that such a condition went beyond what is authorised by Section 34 PDA. As Mr Bland accepted in argument, a finding that, as a matter of Irish law, Section 34 authorised the imposition of Condition 4 would be the end of his transposition point (at least as regards the issue of the imposition of mitigation measures, which is the only issue addressed in the additional declarations sought to be added by way of amendment).
35. On the other hand, NWTAG's challenge to the Decision may succeed. The Court may be persuaded that Condition 4 goes beyond what is permitted by section 34 PDA. That might indeed suggest that the transposition point was well made. However, the High Court could reject that ground but uphold the challenge to the Decision on another of the grounds advanced (such as the "*design envelope*" ground upheld by the High Court (Humphreys J) in *Sweetman v An Bord Pleanála* [2021] IEHC 390)⁸ or it may be that,

⁸ At the commencement of the oral hearing, Mr Bland explained that the challenge to ABP's Decision involved 10 separate grounds. One of those grounds was to the effect that insufficient particulars of the design of the proposed development had been provided by the Developer. In that context, Counsel explained that in *Sweetman v An Bord Pleanála* [2021] IEHC 390, the High Court (Humphreys J) had upheld a similar ground of challenge to a windfarm development. While ABP had sought and been given leave to appeal that decision to this Court, it had subsequently decided not to pursue that appeal and, we were told, the developer in that case had decided not

if satisfied that the Decision ought to be quashed on some other ground, the court would consider it unnecessary to reach this particular ground of challenge at all. Either way, however, the Decision would, in this scenario, be quashed and NWTAG's fundamental objective in bringing the proceedings would be achieved.

36. Mr Bland accepted that this was so. He explained to the Court that, even if the amendment had been allowed by the High Court, NWTAG would have suggested a modular trial of the judicial review proceedings, with the claim for declaratory relief against the State being left over until after the determination of the challenge to ABP's Decision. That is not, of course, how matters appear to have been presented to the High Court. It will be recalled that in his affidavit grounding the motion to amend, Mr Toolan explained that the motion was brought to ensure that all matters would be dealt with as part of a "*single unitary hearing*". In any event, such a hearing is now impossible. Mr Bland accepted that, in the event that his client was permitted to amend, its claim for declaratory relief against the State Respondents would have to be the subject of a separate stand-alone hearing. He also accepted that, even if his client succeeded in obtaining declaratory relief against the State, that would not affect the validity of ABP's Decision and would not lead to that Decision being set aside in the event that *certiorari* of the Decision had been previously refused.

to seek leave to appeal. The Court was told that the decision in *Sweetman* (which post-dated the substantive hearing of these proceedings in the High Court) had been provided to Quinn J and that NWTAG's position was that if the High Court followed that decision it would follow that the Decision should be quashed. That position may be disputed by ABP and/or the Developer and I express no view on it.

37. All of this raises significant issues as to what purpose would be served by allowing the amendment of the proceedings at this stage and whether it would be appropriate to permit NWTAG to pursue what is now effectively a free-standing claim against the State in judicial proceedings which have as their focus the validity of ABP's Decision (which has already been the subject of a hearing) or whether NWTAG should be left to pursue any such claim by way of plenary proceedings against the State.
38. It should be said that these issues were not addressed to any significant extent in the written submissions of the parties and the parties appear to have taken by surprise when the Court raised them at the oral hearing. It will be necessary to come back to these issues later in this judgment, after considering the arguments advanced on the appeals,

The Sequence of the Motions

39. In my view, the Judge clearly erred in addressing the strike out motion first. As he himself observed (at para 38 of the Judgment) it was "*self-evident that if the pleadings are now amended to include relief against the State parties, there would then be a cause of action against the State parties.*" That being so, the Judge ought to have addressed the amendment application first. As Clarke J stated in *Moffitt v Agricultural Credit Corporation plc* [2008] 1 ILRM 416, it is "*well-settled that, even if the proceedings as currently drafted might have no chance of success, the proceedings ought not to be dismissed if, by an appropriate amendment, the proceedings could be recast in a fashion which would give rise to a prospect of success*" (at para 3.20). That principle

can be traced back to the judgment of McCarthy J in *Sun Fat Chan v Osseous Ltd* [1992] 1 IR 425 (which was cited by Clarke J in *Moffitt*) and has been affirmed in many subsequent decisions, including by the Supreme Court in *Lawlor v Ross* [2001] IESC 110 (also cited in *Moffitt*).

40. While those were all plenary actions, the same approach is appropriate where (as here) an application is made to dismiss judicial review proceedings *in limine*, whether pursuant to Order 19, Rules 27 and/or 28 RSC or in reliance on the *Barry v Buckley* jurisdiction. No doubt the threshold for obtaining leave to amend is higher in judicial review proceedings – particularly where statutory time limits such as those provided for in section 50(7) PDA apply – but the fundamental principle is still the same: proceedings should not be dismissed if they admit of an amendment having the effect of disclosing a sustainable claim. That is a critical safeguard in the operation of the jurisdiction to strike out proceedings *in limine*.

41. In *Fulham v Chadwicks Limited* [2021] IECA 72, Haughton J (with whose judgment Ní Raifeartaigh J and I agreed) considered that the case-law suggested that the claimant or his/her lawyers will usually be required to intimate an intention to amend, and at least the general nature of the amendment suggested, in response to the motion to dismiss. However, the earlier decision of this Court in *VK v MW* [2018] IECA 290 suggests that there may be circumstances where the possibility of a saving amendment ought to be raised by the court itself (per Finlay Geoghegan J, at paras 35-36). No issue of that kind arises here, however, given that a formal application to amend was before the High Court for determination at the same time as the State Respondents' strike-out

application.

42. That the amendment application should have been addressed first is particularly so given that, as the Judge expressly accepted, if the amendment was allowed there would clearly be a cause of action against the State. That was not, as the Judge appears to have thought, a reason for deferring consideration of the amendment application. On the contrary, it indicated clearly that the justice of the case required consideration of the amendment application first.

Amendment

43. I also respectfully differ from the Judge's analysis of the amendment application and with the conclusions reached by him.
44. While it is, of course, entirely appropriate that applications to amend judicial review proceedings – and particularly proceedings governed by a special statutory regime such as that provided for in sections 50 and 50A PDA – should be carefully scrutinised, such proceedings are, in principle, open to amendment pursuant to Order 84, Rule 23(2) RSC. While Rule 23(2) makes no express reference to amending the relief claimed (as opposed to the grounds on which relief is sought) the State Respondents accept – correctly, in my view – that the court has power in an appropriate case to permit the amendment of the relief, including by the addition of further relief. Ultimately, the touchstone for determining whether to permit an amendment under Rule 23(2) RSC – as it is under Order 28 RSC – is the interests of justice: *Keegan v Garda Síochána*

Ombudsman Commission [2012] 2 IR 570, per Fennelly J (O’ Donnell and McKechnie JJ agreeing), at para 21. Protecting the constitutional right of access to the court is an important consideration in this context: *Keegan*, at para 29. The assessment of whether the interests of justice weigh in favour of amendment or not will depend on the particular facts and circumstances: *Keegan* at para 23. Ultimately, the Court in *Keegan* allowed the amendment, even though the additional grounds “*raised an entirely new ground in law*” and, to that extent, substantially enlarged the original grounds (para 38). A factor favouring the amendment was that, if not permitted, the appellant would be “*deprived of a serious argument.*”

45. In his judgment in *Keegan*, Fennelly J surveyed the authorities and noted (at para 36) that the “*cases show that the courts are reluctant to admit new grounds which amount to advancing an entirely new cause of action, as in *Ní Eilí v Environmental Protection Agency* [1997] 2 ILRM 458, or a challenge to a different decision, as in *Muresan v Minister for Justice, Equality, and Law Reform* [2004] 2 ILRM 364.*”⁹ Here, the Judge considered that the amendment sought by NWTAG would, if permitted, amount to advancing an entirely new cause of action. I regret that I do not agree. The cases referred to by Fennelly J are, I believe, instructive in this context.

46. The primary ground on which the application to amend was refused by the High Court (Kelly J) in *Ní Eilí* was that section 85(8) of the Environmental Agency Act 1992 provided for an absolute time-limit that was not capable of extension in any

⁹ The decision reported at [2004] 2 ILRM 364 is a decision of Peart J relating to naturalisation/citizenship. The decision of Finlay Geoghegan J referred to by Fennelly J is an unreported decision of 8 October 2003.

circumstance. Thus, the court concluded, it had no discretion to permit the amendment of the proceedings given that the amendment application had been brought outside the statutory two month limit. The court proceeded to consider whether, if it had discretion, the amendment sought should be permitted. The proceedings involved a challenge to a licensing decision of the EPA on various public law grounds which are recited in the High Court's judgment. The other parties to the proceedings were the EPA (as respondent) and the grantee of the impugned licence (as notice party). The amendment would have involved the addition of a claim that certain provisions of the 1992 Act were unconstitutional. The amendment, if permitted, would have resulted in the joinder of a new party or parties (Ireland and the Attorney General) and the addition of entirely new grounds (none of the existing grounds went to the constitutionality of the 1992 Act). As Kelly J observed, the "*expansion sought is a major one and really involves an entirely new and different relief to that already contended for. It is in effect a new cause of action*" and, if permitted, it "*would inevitably involve the joinder of an additional party, namely, the Attorney General*" (at 466)

47. That is not the position presented to the High Court here. The amendment application here did not involve the joinder of any additional party nor did it involve the addition of any additional grounds. It sought merely to amend the Statement of Grounds to add declaratory relief against the State that was based on the existing grounds pleaded in the Statement of Grounds, grounds which the State Respondents had been on notice of from the commencement of the proceedings within the time-period stipulated by section 50(6) PDA. Such amendment would not, on any view, "*result in any significant enlargement of the applicant's case*" (*Keegan*, at para 21, citing *Ó Siodhacháin v*

Ireland (Unreported, Supreme Court, 12 February 2002). It would not, in fact, enlarge NWTAG's case at all, involving an essentially formal or technical amendment to the Statement of Grounds.

48. In *Muresan*, the applicant had brought judicial review proceedings seeking to quash a deportation order made by the Minister for Justice under section 2 of the Immigration Act 1999, as well as an earlier decision of the Refugee Appeals Commissioner dismissing her application for asylum as manifestly unfounded. The applicant had unsuccessfully appealed that decision to the Refugee Appeals Tribunal but she did not challenge the Tribunal's decision in her original proceedings. Those proceedings were governed by section 5 of the Illegal Immigrants (Trafficking) Act 2000, which is materially equivalent to section 50 PDA. Subsequently, the applicant applied to amend the proceedings so as to challenge the decision of the Refugee Appeals Tribunal. She also sought to challenge a notification given to her under section 3(3)(b)(ii) of the Immigration Act 1999, including a decision that section 5 of the Refugee Act 1996 (*non-refoulement*) did not preclude the deportation of the applicant. The section 3(3)(b)(ii) had not been challenged previously. The grounds on which the applicant sought to impugn the decision of the Tribunal and the Ministerial notification were new, save that one of those grounds could be considered to include a ground already pleaded in respect of the Commissioner's decision.

49. Finlay Geoghegan J considered that where an applicant sought leave to amend an application for leave to apply for judicial review by adding new reliefs which either seek to challenge a different decision to that already challenged or which may amount

to a new cause of action in respect of a decision already challenged, “*the applicant is in effect making a new application albeit by way of amendment to an existing application and therefore must satisfy the Court that there is good and sufficient reason for extending the period within which the application shall be made in accordance with subs. (2)(a) of s.5 of the Act of 2000*” (at page 9). The same principle applied to an application to amend the grounds relied upon to challenge a decision in respect of which a claim of invalidity had already been made “*where the new grounds in substance amount to a new cause of action challenging the validity of the decision*” (*ibid*). Thus, where an applicant sought to amend so as to introduce “*an entirely new ground of challenge*”, section 5(2) of the 2000 Act required the court to be satisfied that there was good and sufficient reason for extending the period within which that new challenge might be made.

50. In *Sweetman v An Bord Pleanála* [2007] IEHC 153, [2008] 1 IR 277 – a section 50 case – the High Court (Clarke J) summarised the effect of *Ní Eilí* and *Muresan* as follows: “[w]here an amendment to grounds is sought which would amount to the pleading of a new case and where that amendment is sought outside the statutory time limit, then it can only be granted in circumstances where there is ‘good and sufficient’ reason for allowing the amendment outside time” (para 37). In *Sweetman*, the applicant had originally made a case that judicial review did not provide for the review of planning decisions involving environmental assessment at a non-prohibitive cost, contending that was a breach of the requirements of the EIA Directive. He then sought to advance a far broader claim, to the effect that the judicial review procedure failed to provide for the appropriate review of such decisions. Unsurprisingly, Clarke J was of the view that

the nature of the amendment was such that it effectively amounted to a new case. On examination, he concluded that the new grounds did not amount to substantial grounds and the application was refused.

51. As will be evident from the discussion above, the addition of the two declarations sought against the State Respondents could not be said to involve the pleading of a new case. Subscribing to that suggestion necessarily requires one to ignore the fact that the State Respondents were already parties to the proceedings *and* that the amendment application did not involve *any* amendment and/or addition to the existing grounds in the Statement of Grounds. I cannot therefore agree with the Judge that allowing the amendment would be “*akin to allowing the Action Group mount a judicial review challenge to the State parties with effect from the date of the Action Group’s [amendment] motion*” (Judgment, para 38, final bullet point). That, with respect, appears to me to be a wholly artificial characterisation of what was involved in the amendment application.

52. Finally, there is the Supreme Court’s decision in *Copymoore*. It involved Order 84A proceedings challenging a procurement decision. The applicant sought to amend its proceedings in two respects. The first involved the addition of a new ground to the effect that the respondent Commissioners lacked the capacity to enter into a multi-supplier framework agreement. The second amendment involved the addition of a claim for damages. The High Court refused both amendments. On appeal, the Supreme Court (per Charleton J (Murray and Laffoy JJ agreeing)) allowed the applicant’s appeal in respect of the capacity ground. It had been relied on in previous proceedings between

the parties and had also been relied on in pre-action correspondence but had been omitted through an oversight. It was a point of “*real substance*” which did not come as any surprise to the Commissioners (at para 16). In contrast, the claim for damages was “*effectively a new point*” which had never been notified to the Respondents previously and which did not “*arise in any way naturally or by implication out of the existing proceedings.*” (at para 17). No explanation had been offered as to why the point was not included in the original Statement of Grounds and it was not essential to the disposal of the aspect of the case which would be in the public interest. Accordingly that amendment was refused (*ibid*).

53. I will address the lack of explanation issue below. As regards the other considerations referred to by Charleton J, it was not the case here that NWTAG’s complaints regarding the State’s alleged failure to properly transpose the EIA Directive and/or the Habitats Directive had not been notified to the State Respondents prior to the bringing of the application to amend. The State Respondents were on notice of those complaints from before the expiry of the statutory time-period and the declaratory relief sought to be added by way of amendment arose directly and naturally out of the existing grounds in the Statement of Grounds.

54. In light of the above discussion, I am not persuaded that it was appropriate to approach the amendment application here as though it involved a late application for leave to seek judicial review and thus was subject to the extension of time provisions in section 50(8) PDA. Section 50 does not purport to impose any such general requirement. It does not in fact address the issue of amendment at all. Order 84, Rule 23(2) RSC

continues to govern the amendment of judicial proceedings brought pursuant to section 50. Order 84, Rule 23(2) does not require that every amendment application must be approached as if it involved a late application for leave. That is the appropriate approach where a substantially new case is sought to made. The amendment here did not involve the making of a substantially new case or, indeed, any new case at all.

55. The Judge also attached great significance to what he regarded as the NWTAG's failure to explain why the Statement of Grounds did not include the declarations against the State *ab initio* (Judgment, paras 41 – 42 and 51). He was also – understandably - unimpressed by the failure of NWTAG's solicitors to engage properly with the correspondence from the Chief State Solicitor and by the delay in actually bringing the application to amend. There is no doubt that *Keegan* and *Copymoore* indicate that, where a new ground is sought to be added by way of amendment, some explanation must be offered for the failure to include that ground in the original application. To the extent that such a requirement follows from Order 84, Rule 21(3)(a) RSC or equivalent statutory provisions such as section 50(8) PDA or section 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000, I have already explained why I do not consider those provisions to have any direct application here.

56. In any event, however, it appears to me that the explanation for the failure to include the declaratory relief against the State in the Statement of Grounds was clear. Counsel told the High Court that it was an oversight and Mr Bland confirmed that position on appeal. Whether the error was in the omission of declaratory relief that it was intended to claim, or in taking the view that it was unnecessary to seek declaratory relief in the

circumstances here, appears to me to matter little in this context. While the Judge appears to suggest that the omission of declaratory relief was not the result of oversight (Judgment, para 41) he did not identify what other factor might have been at play and no other reason was identified by the State Respondents in argument either. As to the point that the State Respondents did make as to the absence of any affidavit evidence explaining the omission, I do not think that, in the particular circumstances here, and in the absence of any identified basis for questioning the explanation offered by counsel, that objection has any significant force. That is not to say that, in other circumstances, affidavit evidence may not be required.

57. As for any delay in bringing the application to amend, there was no suggestion that it caused any prejudice to the State Respondents. Neither were the State Respondents able to identify any prejudice that would arise in the event that the amendment was permitted. As already noted, they were on notice of NWTAG's contention that the EIA Directive and Habitats Directive had not been properly transposed in a number of respects from the commencement of the proceedings so there was no question of the State being taken by surprise. ABP and the Developer did not object to the amendment application from which it is reasonable to infer that they were not concerned that the amendment would give rise to any prejudice to them either.

58. There is one further consideration which appears to me to be of importance in this context. The Judge suggested more than once in his Judgment that to permit the amendment would be to allow the statutory scheme in section 50 PDA to be circumvented (Judgment, para 38; final bullet-point, para 43). However, the only

decision within the scope of section 50 PDA – the ABP Decision - was in fact challenged by NWTAG within the time period prescribed by that section. As I have explained, the amendment did not involve any expansion of the grounds relied on by NWTAG in its challenge to the ABP Decision. It is therefore difficult to see how permitting the amendment might be said to circumvent or undermine the statutory scheme.

59. Challenges to the manner in which the EIA and Habitats Directives have been transposed by the State are not governed by section 50 PDA, except to the extent that alleged failures of transposition may be relied on as a ground(s) for impugning a decision that does come within the scope of the section. That would appear to follow, by analogy, from the decision of the Supreme Court in *Nawaz v Minister for Justice, Equality and Law Reform* [2012] IESC 58, [2013] 1 IR 142. In *Nawaz*, the Supreme Court (per Clarke J, Fennelly, O’ Donnell, McKechnie and MacMenamin JJ agreeing) held that, whereas in the ordinary way a constitutional challenge ought to be brought by plenary action, where the purpose of such a challenge was to invalidate a decision to which section 5 of the Illegal Immigrants (Trafficking) Act 2000 (in that case an apprehended deportation order), then in substance that involved a challenge to the decision concerned and therefore the provisions of section 5 applied. That meant that, exceptionally, the constitutional challenge had to be pursued by way of judicial review proceedings.
60. Here, of course, the transposition grounds that NWTAG sought to rely on to assert the invalidity of the ABP Decision were all included in the original Statement of Grounds.

The State was on notice of those grounds from the commencement of the proceedings. Again, it is difficult to see how, in those circumstances, the amendment of the Statement of Grounds to include declaratory relief against the State, based on those original grounds, might be said to involve the circumvention or undermining of the statutory scheme.

61. As to the State Respondents' complaints that those grounds were "*effectively incomprehensible*" and "*largely unintelligible*", such exaggerated rhetoric does not really advance their position. There is no doubt that some of the grounds are prolix and in some instances are unduly repetitious. There is also force in the criticism that the grounds do not identify the specific provisions of the EIA Directive and the Habitats Directive on which NWTAG rely. Thus, there is no reference in the Statement of Grounds to Article 8a of the EIA Directive. However, the nature of the case being made by NWTAG on the transposition grounds is, in my opinion, quite clear. It is equally clear that the grounds raise issues of substance, as Mr Travers, for the State Respondents, accepted in the course of argument. In any event, the Judge did not refuse the amendment on the basis that the transposition grounds were not arguable or did not amount to "*substantial grounds*" for the purposes of section 50 PDA. The fact that only a minority of the grounds in the Statement of Grounds were directed to the State was also *nihil ad rem*. For reasons which I do not pretend to understand, that fact was heavily emphasised by the State Respondents before the High Court and again before this Court. The pertinent question was not how many grounds were directed to the State but whether those grounds were substantial (and that was not disputed) and whether they provided a basis for the relief sought against the State by way of amendment (which

was not disputed either).

62. Finally, there is the submission made by the State Respondents that, in light of the decision of the High Court (Kelly J) in *Cosgrave v An Bord Pleanála* [2004] 2 IR 435, it is “questionable” whether transposition issues can properly be pursued in judicial review proceedings at all. The Judge did not address this issue in his Judgment and, in light of the conclusion that I have ultimately reached on the amendment appeal, it is not an issue that requires to be resolved here. In any event, it is not an issue that could properly be determined in an appeal of this kind. There have been many developments in the law in this area since the decision in *Cosgrave* and the earlier decision of the High Court (Morris P) in *Lancefort Ltd v An Bord Pleanála* [1997] 2 ILRM 508 which is referred to extensively in *Cosgrave*. In Case C-201/02 *R (on the application of Wells) v Secretary of State for Transport* (which was decided shortly before the decision in *Cosgrave* but which does not appear to have been cited to the High Court) and in many subsequent judgments, the Court of Justice has clarified and strengthened the obligations of Member States to ensure compliance with the EIA and Habitats Directives and to take all necessary measures to remedy any failure to carry out the assessments required by those directives. Article 11 of the EIA Directive expressly requires Member States to ensure that members of the public have access to a review procedure “to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions” of the Directive. That appears to mandate a form of review wider in scope than that contemplated by Morris P in *Lancefort*. There have also been significant CJEU decisions regarding the direct effect of directives in this area (see the discussion in *Simons on Planning Law*, para 14-922

and following) as well as the principle of indirect effect/conforming interpretation. In addition, as Mr Travers observed in the course of the hearing, the recent decision of the CJEU (Grand Chamber) in Case C-378/17 *Minister for Justice and Equality and the Commissioner of An Garda Síochána v Workplace Relations Commission* may have significant implications for the powers and duties of ABP in this area (as indeed was noted by McKechnie J in his judgment for the Supreme Court in *An Taisce v An Bord Pleanála* [2020] IESC 39, [2021] 1 IR 119 which is referred to below).

63. In practice, it appears that transposition issues are often raised in judicial review proceedings challenging planning decisions pursuant to Section 50. A recent example is the important decision of the Supreme Court in *An Taisce v An Bord Pleanála* [2020] IESC 39, [2021] 1 IR 119. In one of the two cases the subject of that decision (the McTigue Quarries case) a decision of ABP to grant substitute consent for a quarry was challenged on the basis (*inter alia*) that the provisions of the PDA providing for the granting of substitute consent did not properly transpose the relevant provisions of the EIA Directive because they did not properly provide that such consent could only be granted in exceptional circumstances. It was also contended that the absence of any provision in the PDA allowing for public participation in the leave application stage for substitute consent involved a failure to transpose the EIA Directive. Both of those contentions succeeded in the Supreme Court.
64. By coincidence, the same volume of the Irish Reports includes another decision of the Supreme Court, *Callaghan v An Bord Pleanála* [2018] IESC 39, [2021] 1 IR 81, in which transposition issues had also been raised in a judicial review challenge to a

decision of ABP (in that case a decision to the effect that a proposed development qualified as strategic infrastructure development). *Inter alia*, it was said that the decision ought to be quashed because the Irish legislative provisions did not properly transpose the requirements of the EIA Directive relating to public participation as the public was excluded from the process leading to the designation of development as strategic infrastructure development. While that argument was rejected by the High Court (Costello J) ([2015] IEHC 357), it was considered on its merits and her judgment contains no suggestion that the applicant was not entitled to pursue his transposition arguments within the confines of section 50 judicial proceedings or that such issues could only be pursued by way of plenary action. While the Supreme Court declined to allow the applicant to raise what Clarke CJ referred to as a “*pure transposition issue*” on appeal to that court, that appears to have been because the Court took the view that it fell outside the proper scope of the leave to appeal it had granted.

65. Thus, *Lancefort* and *Cosgrave* notwithstanding, it appears that, where transposition arguments are relied on as a basis for impugning a particular planning decision, such arguments may – and, *Nawaz* suggests, must – be pursued in judicial review proceedings pursuant to section 50 PDA. Certainly, the contrary is not so clearly established that the amendment application here could properly have been refused on that basis. However, as I have said it is not necessary to express any definitive view on that issue (and it would not be appropriate to do so in any event in an amendment appeal).

66. It follows from the analysis above that, in my view, the Judge erred in refusing permission to amend. In reaching that conclusion, I do not overlook the point made by the State Respondents as to the weight to be given to the decision of the Judge. I considered the proper approach of this Court to a decision of the High Court on an amendment application (albeit one made in plenary proceedings) in my judgment (McCarthy and Ní Raifeartaigh JJ agreeing) in *Stafford v Rice* [2022] IECA 47, at paras 19-20. I expressed the view in that judgment that the High Court “*is entitled to some margin of appreciation and some material error of assessment will normally have to be demonstrated if this Court is to intervene*”. It will be evident from the discussion above that, in my view, the Judge materially erred in his assessment here.
67. However, it does not follow that this Court should now permit the amendment sought. The position now differs significantly from the position that existed when the amendment application came before the High Court. As I have already said, significant issues arise as to what purpose would be served by allowing the amendment of the proceedings at this stage and as to whether it is appropriate to permit NWTAG to pursue what is now effectively a free-standing claim against the State within the confines of these proceedings, given that its challenge to ABP’s Decision has already been heard and given NWTAG’s acceptance that, if that challenge fails, the validity of the Decision cannot be affected by the granting of declaratory relief against the State.
68. The decision of the High Court on the challenge to the ABP Decision may also have a profound impact on any claim for declaratory relief against the State. As Mr Bland accepted in argument, if NWTAG’s challenge to the validity of Condition 4 fails, then

there will be nothing left in the transposition points that underpin the declaratory relief. Conversely, if the High Court upholds the challenge to Condition 4, that might have the effect of making the declaratory relief redundant and unnecessary. There are many other possible outcomes and this Court cannot of course anticipate what the decision of the High Court will be. However, it is clear that there is a real prospect that, after the High Court has given its decision, there may be no reality to any further claim against the State.

69. Having regard to these considerations, it appears to me that the balance of justice leans against permitting the amendment sought. Should it be the case that, in light of the decision that is ultimately given by the High Court (and any decision on appeal), NWTAG considers that it has a proper basis for seeking declarations against the State in the terms sought to be pursued in these proceedings, it can bring appropriate proceedings at that point. As Mr Bland pointed out in argument, that will involve some extra expense in terms of drafting. But any such expense will be minor and re-pleading the claim will have the advantage of giving NWTAG the opportunity to articulate its case in clearer terms, taking due account of the decision and findings of the High Court in its challenge to the ABP Decision. In any event, I would not have been willing to allow the amendment appeal without at least directing NWTAG to plead more clearly the grounds that it relies on to seek declaratory relief, having regard to the observations made by the Supreme Court in *AP v DPP* [2011] IESC 2, [2011] 1 IR 729. Consideration would also have had to be given to directing that the claim against the State Respondents should proceed by plenary action, in accordance with Order 84, Rule 22 RSC.

70. The additional cost of pleading a new case was the only prejudice identified by Mr Bland in argument. In my view, it is not a material factor. The essential point is that, if NWTAG has a good basis for seeking declaratory relief against the State after the High court gives its decision, it can do so at that stage. Insofar as issues of standing may arise, precisely the same issues would arise in the event that the amendment appeal was allowed and NWTAG was permitted to pursue the declaratory relief in these proceedings.
71. In the very particular circumstances presented here, although I consider that the Judge erred in not permitting NWTAG to amend I would nonetheless not allow the appeal from that decision.

The Strike-out Appeal

72. Had this Court allowed NWTAG's amendment appeal, it would have followed that NWTAG's appeal from the High Court Order striking out the proceedings as against the State Respondents would have been allowed also.
73. NWTAG contends that, independently of any question of amendment, the Judge was wrong to strike out the proceedings against the State in any event. However, even if this Court was persuaded that that was so, that could not confer any practical benefit on NWTAG. The Court cannot turn back time. NWTAG's challenge to ABP's Decision has been heard in the absence of the State Respondents. That fact cannot be altered by

any order made by this Court. In these circumstances, there is no “*live controversy*” the resolution of which is capable of affecting the rights of the parties and the appeal is effectively a moot: *Lofinmakin v Minister for Justice, Equality and Law Reform* [2013] IESC 49, [2013] 4 IR 274. While the rule against the determination of issues arising in a moot appeal is not absolute, there is no exceptional circumstance here that might warrant a departure from the general rule. In the circumstances, it would not be appropriate to express any view on the respective submissions of the parties as to the effect of Order 84, Rule 19 RSC or the other arguments directed to this appeal.

74. Accordingly, I would dismiss the strike-out appeal on the basis that it is now moot.

CONCLUSIONS AND COSTS

75. For the reasons set about above, I am of the view that the Judge erred in refusing NWTAG's application to amend its Statement of Grounds by the addition of declaratory relief against the State Respondents.
76. However, it does not follow that NWTAG's appeal from that decision should be allowed and that it should be permitted to make that amendment at this stage. In circumstances where the High Court has heard NWTAG's challenge to the ABP Decision, I am not satisfied that the interests of justice favour allowing the Statement of Grounds to be amended so as to permit NWTAG to pursue what would be in effect a stand-alone action for declaratory relief against the State. That is particularly so when the outcome of the challenge to the ABP Decision may have a significant impact on any claim for declaratory relief.
77. NWTAG can, if appropriate, pursue a claim for declaratory relief against the State following the determination of its challenge to the ABP Decision. At that stage, the parameters of any claim will be clearer. NWTAG will not suffer any material prejudice.
78. Accordingly, I would refuse the amendment appeal.
79. The strike-out appeal is, in these circumstances, moot. No order that this Court might make on that appeal could have any practical effect or benefit given that NWTAG's challenge to the ABP Decision has now been heard. In those circumstances, an order

setting aside the order made by the High Court striking out the claim against the State Respondents would, in practical terms, be entirely devoid of purpose or concrete effect. I would therefore dismiss the strike-out appeal.

80. Although NWTAG has not succeeded in reversing the orders made by the High Court, it has prevailed on many of the issues argued. In the circumstances, my provisional view is that there should be no order for costs on either appeal. If either party wishes to contend for a different costs order, they should notify the Office within 14 days and in that event a short further hearing will be scheduled to hear argument on the issue.