

THE HIGH COURT
JUDICIAL REVIEW

2019 No. 20 J.R.

IN THE MATTER OF SECTION 50A(7) OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN

HEATHER HILL MANAGEMENT COMPANY CLG
GABRIEL MCGOLDRICK

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

BURKEWAY HOMES LTD

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 5 December 2019

INTRODUCTION

1. By judgment delivered on 21 June 2019, *Heather Hill Management Company v. An Bord Pleanála* [2019] IEHC 450 (*"the principal judgment"*), this court held that a decision of An Bord Pleanála to grant planning permission for a "strategic housing development" was invalid. This second, supplementary judgment is delivered in respect of an application for leave to appeal to the Court of Appeal. The within proceedings are subject to the special statutory judicial review procedure provided for under Sections 50 and 50A of the Planning and Development Act 2000 (*"the PDA 2000"*). One of the features of the procedure is that there is no automatic right of appeal to the Court of Appeal; rather, it is necessary for a putative appellant to obtain leave to appeal from the High Court.
2. An Bord Pleanála has identified three points of law in respect of which it seeks leave to appeal (*"the draft points of law"*). The parties have exchanged written legal submissions on these points and the application for leave to appeal was heard on 13 September 2019.
3. The applicant for planning permission, Burkeway Homes Ltd (hereinafter *"the Developer"*) had indicated earlier that it did not intend to participate in the application for leave to appeal.

LEGAL TEST GOVERNING LEAVE TO APPEAL

4. Sub-sections 50A(7) and (8) of the PDA 2000 provide as follows.
 - (7) The determination of the Court of an application for section 50 leave or of an application for judicial review on foot of such leave shall be final and no appeal shall lie from the decision of the Court to [the Court of Appeal] in either case save with leave of the Court which leave shall only be granted where the Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to [the Court of Appeal].
 - (8) Subsection (7) shall not apply to a determination of the Court in so far as it involves a question as to the validity of any law having regard to the provisions of the Constitution.

5. The sub-sections had originally referred to “the Supreme Court”, but by virtue of Section 75 of the Court of Appeal Act 2014, this is now to be read as a reference to “the Court of Appeal”.
6. It should be noted that the form of the certified point of law operates to define the Court of Appeal’s jurisdiction on the appeal. See Section 50A(11) of the PDA 2000, as follows.
 - (11) On an appeal from a determination of the Court in respect of an application referred to in subsection (10), [the Court of Appeal] shall—
 - (a) have jurisdiction to determine only the point of law certified by the Court under subsection (7) (and to make only such order in the proceedings as follows from such determination), and
 - (b) in determining the appeal, act as expeditiously as possible consistent with the administration of justice.
7. The leading judgment on the interpretation of the statutory criteria governing leave to appeal remains that of the High Court (MacMenamin J.) in *Glancre Teoranta v. An Bord Pleanála (No. 2)* [2006] IEHC 250 (“*Glancre*”). The judgment sets out ten principles or considerations as follows.
 - “1. The requirement goes substantially further than that a point of law emerges in or from the case. It must be one of exceptional importance being a clear and significant additional requirement.
 2. The jurisdiction to certify such a case must be exercised sparingly.
 3. The law in question stands in a state of uncertainty. It is for the common good that such law be clarified so as to enable the courts to administer that law not only in the instant, but in future such cases.
 4. Where leave is refused in an application for judicial review i.e. in circumstances where substantial grounds have not been established a question may arise as to whether, logically, the same material can constitute a point of law of exceptional public importance such as to justify certification for an appeal to the Supreme Court (*Kenny*).
 5. The point of law must arise out of the decision of the High Court and not from discussion or consideration of a point of law during the hearing.
 6. The requirements regarding ‘exceptional public importance’ and ‘desirable in the public interest’ are cumulative requirements which although they may overlap, to some extent require separate consideration by the court (*Raiu*).
 7. The appropriate test is not simply whether the point of law transcends the individual facts of the case since such an interpretation would not take into account the use of the word ‘exceptional’.

8. Normal statutory rules of construction apply which mean *inter alia* that 'exceptional' must be given its normal meaning.
 9. 'Uncertainty' cannot be 'imputed' to the law by an applicant simply by raising a question as to the point of law. Rather the authorities appear to indicate that the uncertainty must arise over and above this, for example in the daily operation of the law in question.
 10. Some affirmative public benefit from an appeal must be identified. This would suggest a requirement that a point to be certified be such that it is likely to resolve other cases."
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8. As discussed presently, almost all of these considerations are "in play" in this case. The parties are in disagreement on the following issues (i) whether the draft points of law actually arise from the principal judgment; (ii) whether there is any uncertainty in the law; (iii) whether the draft points of law transcend the facts of the case; and (iv) whether the second limb of the statutory test is met, namely whether an appeal to the Court of Appeal is desirable in the public interest.
 9. There have been a number of legal developments since the delivery of the landmark judgment in *Glancre* in July 2006 as follows.
 10. The first development is the establishment of the Court of Appeal and the reordering of the Supreme Court's jurisdiction. This has implications for the High Court in the discharge of its certifying role under Section 50A(7) of the PDA 2000. Moreover, the case law of the Supreme Court in relation to the exercise of its constitutional jurisdiction to grant leave to appeal may provide some guidance, by analogy, for the High Court in the exercise of its own statutory jurisdiction. I will elaborate on this first development under the next heading below.
 11. The second development is the introduction, under the Planning and Development (Amendment) Act 2010, of special rules in relation to the legal costs of certain types of environmental litigation. These rules are set out at Section 50B of the amended PDA 2000, and give effect to *inter alia* the requirements of the Environmental Impact Assessment Directive (2011/92/EU) ("*the EIA Directive*"). Member States are obliged to provide a "review procedure" which is "fair, equitable, timely and not prohibitively expensive". An issue arises as to whether it would be consistent with these requirements to allow an appeal in circumstances where the appeal is moot. Even if An Bord Pleanála were to succeed in the putative appeal, the decision to grant planning permission would nevertheless be invalid by reference to other (unchallenged) findings in the principal judgment. I will return to this point at paragraph 56 below when discussing the second limb of the statutory test, namely whether it is desirable in the public interest that an appeal should be taken.

NEW APPELLATE ARCHITECTURE UNDER THE CONSTITUTION

12. Following on from the establishment of the Court of Appeal in October 2014, an appeal from a decision of the High Court in respect of a challenge to a planning permission might, in principle, be brought before either the Court of Appeal or the Supreme Court.
13. The gateway to the Supreme Court differs in four significant respects from that which controls access to the Court of Appeal. First, access to the Supreme Court is controlled by the Supreme Court itself; the High Court has no function in this regard and cannot grant leave to appeal. Secondly, the criteria for leave to appeal are different for the two appellate courts. In one respect, the criteria for leave to appeal to the Supreme Court are less onerous: it is enough that the decision of the High Court involves a “matter” of “general public importance”, which is a lesser standard than a “point of law” of “exceptional public importance” under Section 50A(7) of the PDA 2000. In another respect, however, the criteria are more onerous: there is an additional requirement to satisfy the Supreme Court that there are exceptional circumstances warranting a direct appeal to it. Thirdly, the application to the Supreme Court is a paper-based application, i.e. the Supreme Court usually determines the matter on the basis of the written notices filed by the parties, and there is not normally an oral hearing. Fourthly, it seems that access to the Supreme Court cannot be limited by legislation whereas there can be legislative exceptions to the Court of Appeal’s jurisdiction (save in cases which involve questions as to the constitutional validity of any law).
14. The Supreme Court in *Grace v. An Bord Pleanála* [2017] IESC 10 stated that it would be appropriate for High Court judges, in considering whether to grant a certificate of leave to appeal, to at least have regard to the new constitutional architecture. More specifically, the High Court should have regard to the fact that an appeal to the Supreme Court under the leapfrog provisions of Article 34.5.4° is open but also to the fact that an appeal to the Court of Appeal should remain the more normal route for appeals from the High Court.
15. Notwithstanding the differences between the constitutional test and the statutory test governing access to the two appellate courts, the Supreme Court’s case law on the determination of an application for leave to appeal provides valuable guidance to the High Court. In particular, the distinction drawn between (i) the *interpretation* of, and (ii) the *application* of, legal principles can usefully be applied by analogy. The case law of the Supreme Court indicates that it will not normally be enough for a putative appellant to complain that the High Court did not properly apply *established legal principles* to the particular facts of the case; rather it seems that the basis of any appeal must be that the very legal principles relied upon by the High Court judge were incorrect.
16. This distinction has been explained as follows by the Supreme Court in *B.S. v. Director of Public Prosecutions* [2017] IESCDT 134.

“It obviously follows from what has just been set out that it can rarely be the case that the application of well established principles to the particular facts of the relevant proceedings can give rise to an issue of general public importance. It must, of course, be recognised that general principles operate at a range of levels. There may be matters at the highest level of generality which can be described as the

fundamental principles applying to the area of law in question. Below that there may well be established jurisprudence on the proper approach of a Court to the application of such general principles in particular types of circumstances which are likely to occur on a regular basis. The mere fact that, at a high level of generality, it may be said that the general principles are well established does not, in and of itself, mean that the way in which such principles may be properly applied in different types of circumstances may not itself potentially give rise to an issue which would meet the constitutional threshold.

However, having said that, the more the questions which might arise on appeal approach the end of the spectrum where they include the application of any principles which might be described as having any general application to the facts of an individual case, the less it will be possible to say that any issue of general public importance arises. There will, necessarily, be a question of degree or judgment required in forming an assessment in that regard in respect of any particular application for leave to appeal. However, the overall approach to leave is clear. Unless it can be said that the case has the potential to influence true matters of principle rather than the application of those matters of principle to the specific facts of the case in question then the constitutional threshold will not be met.”

17. An example of this approach being applied to a planning case is provided by *Buckley v. An Bord Pleanála* [2018] IESCDT 45. The Supreme Court refused leave to appeal in circumstances where the judgment of the High Court had merely entailed the application of well-established principles of planning law to the facts of the case.

AN BORD PLEANÁLA’S DRAFT POINTS OF LAW

18. It is proposed to address each of An Bord Pleanála’s three draft points of law in turn under separate headings.

(1). *Is the breach of that part of a Development Plan included on foot of a statutory obligation contained in section 10(2A) of the Planning and Development Act, 2000 as amended a material contravention of the Development Plan?*

19. This draft point of law does not arise out of the “decision” of the High Court, i.e. the principal judgment. The question posed seeks to imply that the High Court’s finding that the proposed residential development would involve a material contravention of the Galway County Development Plan 2015 – 2021 had been based on some “bright line” rule to the effect that any breach of the “core strategy” of a development plan is automatically a material contravention. This is not how the issue was dealt with in the principal judgment. As explained below, the issue of whether or not the proposed residential development would involve a material contravention had been addressed at a granular level, and involved a careful consideration of the detail of the development plan.
20. Before turning to that explanation, it may assist the reader in better understanding the issues were I to pause briefly, and to clarify what is meant by the reference to Section 10(2A) of the PDA 2000. As a result of amendments introduced primarily under the

Planning and Development (Amendment) Act 2010, a local planning authority must now include a “core strategy” which shows that the development objectives in the development plan are consistent, as far as practicable, with national and regional development objectives. The matters to be included in the “core strategy” are elaborated upon under Section 10(2A). Relevantly, the “core strategy” for a county council, such as Galway, must include a “settlement strategy” which indicates *inter alia* projected population growth of cities and towns in the hierarchy. A “town” for this purpose is a settlement with a population of more than 1,500 persons.

21. As An Bord Pleanála itself notes, at §5 of its written legal submissions, “the statutory provision speaks in terms of detailing ‘projected growth’ rather than requiring a planning authority to set or fix objectives for growth”.
22. As it happens, the Galway County Development Plan went further than strictly required by statute, and the town of Bearna had been “assigned” a “population growth target” of 420 persons by 2012, with a land allocation of 12.12 hectares provided to accommodate new residential development over the plan period. See paragraph [45] of the principal judgment.
23. The issue before the High Court was whether the proposed residential development—which would have exceeded the allocated number of residential units (130) by 50 per cent and the allocated population target by almost 25 per cent—represented a material contravention of the development plan. An Bord Pleanála had conceded at the hearing that the exceedance of the population growth target represented a contravention of the development plan. The dispute between the parties centred on the narrow question of whether it represented a *material* contravention.
24. This issue was resolved in the principal judgment by the application of well-established principles governing the interpretation of a development plan. There had been no significant dispute between the parties as to the applicable legal principles. Each of the parties relied, in particular, upon *Tennyson v. Dun Laoghaire Corporation* [1991] 2 I.R. 527, and *Tesco Stores Ltd. v. Dundee City Council* [2012] UKSC 13. This latter judgment has been cited with approval by the High Court (McGovern J.) in *Navan Co-ownership v. An Bord Pleanála* [2016] IEHC 181.
25. As appears from paragraphs [44] to [60] thereof, the principal judgment sets out the relevant provisions of the development plan, and attempts to interpret same as they would be understood by a reasonably intelligent person, having no particular expertise in law or town planning. This is the legal test set out in *Tennyson v. Dun Laoghaire Corporation* [1991] 2 I.R. 527.
26. The principal judgment draws attention to the fact that in the Bearna Plan (which had been introduced by way of a variation to the development plan a mere eight days prior to the making of the planning application), it is expressly stated that Bearna has been “assigned” a population growth target of 420 persons by 2021. Reference is also made to

the provisions of the plan which are intended to ensure that the quantum of zoned land that is available for development remains within the allocation under the core strategy.

27. The principal judgment also refers to the fact that the proposed development would, in and of itself, exceed the assigned population growth target, and refers to the existence of *other* planning permissions which allow for significant residential development in the area.
28. The court's finding that the proposed development would represent a material contravention was, therefore, based on (i) the specific wording of the relevant provisions of the development plan; (ii) the scale of the proposed development; and (iii) the existence of other planning permissions. The finding is specific to the facts of the case, and does not entail reliance upon any "bright line" rule of statutory interpretation to the effect that any breach of the "core strategy" of a development plan is automatically a material contravention.
29. As appears from the wording of Section 10(2A), a "core strategy" must address a large number of matters. The principal judgment is not authority for any proposition that breach of any of these would, automatically, lead to a finding of material contravention. At the risk of belabouring the point, the finding in the principal judgment was fact-specific, and informed, in particular, by the scale of the proposed residential development and the extent by which the assigned population target would have been exceeded.
30. It should also be reiterated that Section 10(2A) does not refer to the assignment of a population growth target. Whereas there is an obligation to state the projected population growth of towns, i.e. settlements with a population of more than 1,500, there is no express statutory obligation to "assign" a "target population growth". Rather, these concepts had been introduced to the Galway County Development Plan in order to address a concern in relation to over zoning in the area of the plan.
31. Finally, not only does the draft point of law not arise out of the principal judgment, it is incapable of being given a definitive answer in any event. This is because it is presented at a level of abstraction. The only sensible response which could be given to the question posed would be to say that the answer is entirely dependent on the specific wording of the individual development plan under consideration. The question does not admit of an answer which could be characterised as a general principle transcending the facts of any individual case.

(2). *Does Objective CCF 6 of the Galway County Development Plan import a mandatory requirement to carry out a Justification Test as contained in the Planning System and Flood Risk Management Guidelines for Planning Authorities?*

32. This draft point of law is self-evidently specific to the facts of the present case, and, in particular, is confined to the wording of the Galway County Development Plan. As such, the draft point of law does not fulfil the requirement, per *Glancreé*, of transcending the facts of the case. It should be recalled that the High Court in *Glancreé* had refused leave to appeal in that case precisely because the findings of the court had been referable

exclusively to the specific content of the Connaught Waste Management Plan and had no wider relevance.

33. Moreover, as explained presently, even if this aspect of the principal judgment were to be overturned on appeal, it would not affect the outcome of the judicial review proceedings in that the planning permission would be invalid on the separate ground that the justification test was required in any event under the guidelines.
34. In order to assist the reader in understanding the draft point of law, it is necessary to explain briefly (i) the circumstances in which this objective came to be included in the development plan, and (ii) what is meant by a "justification test".
35. As appears from paragraphs [94] to [100] of the principal judgment, the inclusion of this objective arose in circumstances where the elected members of the local authority had sought to designate certain lands in what is now the application site. The executive of the local authority had recommended that these lands be designated as "open space".
36. This tension between the elected members and the executive is reflected in the terms of the development plan and the Strategic Flood Risk Assessment ("*SFRA*"). More specifically, the relevant lands are in the anomalous position of being zoned for development purposes, yet at the same time subject to Objective CCF 6 which refers to inappropriate development on flood zones, and expressly states that any development proposals should be considered with caution. This anomalous status is further emphasised by the SFRA for the Bearna Plan which had concluded that the zoning is *contrary* to the flood risk management guidelines.
37. The concept of a "justification test" is introduced under the flood risk management guidelines. The concept is explained in detail at paragraphs [77] to [81] of the principal judgment. For present purposes, the concept might be summarised by saying that where a planning authority is considering proposals for new development in areas at a high or moderate risk of flooding that include types of development that are vulnerable to flooding (such as, relevantly, residential development), then the development proposals must be subject to an appropriate flood risk assessment.
38. The principal judgment contains two distinct findings in respect of the application of the "justification test" to the lands as follows. First, Objective CCF 6 had been interpreted as making the carrying out of a "justification test" mandatory in the case of development proposals in respect of the relevant lands. This finding had been reached by interpreting the development plan in accordance with the well-established principles of interpretation referred to under the previous heading above. Secondly, aside entirely from the provisions of Objective CCF 6, the principal judgment had found that the carrying out of a "justification test" would have been required under the flood risk management guidelines in any event.
39. An Bord Pleanála seeks to challenge only the first of these two findings. The Board has, mistakenly, sought to elevate what is a fact-specific finding, which is firmly rooted in the

language and structure of the Galway County Development Plan, to an issue of legal principle. The Board appears to suggest that the judgment has established some principle governing the interaction between statutory guidelines and development plans in general. With respect, the judgment contains no such finding.

40. The first finding identified above is confined to the interpretation of a specific provision of a specific development plan, which provision had been inserted in the very unusual circumstances whereby the elected members had purported to zone lands within a flood risk zone for development. This finding is fact-specific and does not transcend the circumstances of the case.
41. The second finding, namely that the carrying out of a “justification test” would have been required under the flood risk management guidelines in any event, has not been challenged by An Bord Pleanála. The consequence of this is twofold. First, it undermines entirely the argument that the principal judgment, by allegedly misinterpreting the development plan, had brought about a situation whereby the flood risk management guidelines were being applied excessively. The core of the Board’s argument is that, but for the erroneous interpretation of the development plan, the carrying out of a “justification test” would not have been required. This argument collapses in circumstances where there is an unchallenged finding that the carrying out of a “justification test” is triggered under the guidelines themselves.
42. Secondly, any appeal in respect of the first finding would be wholly academic. Even if the Board succeeded in its appeal, the outcome of the judicial review proceedings would be the same. The decision to grant planning permission would be invalid by reason of the failure to carry out a “justification test” as required under the flood risk management guidelines.
43. Finally, even if the draft point of law did arise from the principal judgment—which it does not for the reasons set out above—there is no uncertainty as to the relationship between statutory guidelines and a development plan. The relationship has been clearly stated in the judgment of the High Court (Baker J.) in *Brophy v. An Bord Pleanála* [2015] IEHC 433, and there is no suggestion made by An Bord Pleanála that this judgment is incorrect.

(3). Is it permissible to make a reference to best practice measures, whose stated purpose is not to avoid or reduce an identified harmful effect on a European Site, as an additional assurance but not the determinative factor in reaching an AA screening determination?

44. The third of the draft points of law concerns the carrying out of screening determinations for the purposes of the EU Habitats Directive (Directive 92/43/EEC). It is apparent from An Bord Pleanála’s written legal submissions that the Board’s complaint is not so much that the legal principles are misstated in the principal judgment, but rather that the High Court erred in the *application* of those principles to the circumstances of the case.

45. This draft point of law does not fulfil the statutory criteria for leave to appeal for two reasons. First, it will not normally be enough for a putative appellant to complain that the High Court did not properly apply *established legal principles* to the particular facts of the case; rather it seems that the basis of any putative appeal must be that the very legal principles relied upon by the High Court judge were incorrect. (See, by analogy, *B.S. v. Director of Public Prosecutions* [2017] IESCDT 134 (discussed at paragraph 18 above). An Bord Pleanála expressly states at §20 of its written legal submission that it does not dispute the analysis of the legal position undertaken by the High Court at paragraphs [155] – [166] of the (principal) judgment.
46. Secondly, the draft point of law does not arise from the principal judgment. More specifically, the factual premise underlying the point of law is *contrary* to the finding actually made by the High Court. That finding was to the effect that the Board's inspector had attached importance to the "best practice measures", and had not relied solely on tidal dispersion in reaching her screening determination. See paragraphs [167] to [179] of the principal judgment.
47. The draft point of law is predicated on an entirely different factual premise, namely, that the reference in the inspector's report to "best practice measures" had been "an additional assurance but not the determinative factor". With respect, this factual premise is not only unsupported by the actual wording of the inspector's report, it is entirely contrary to the findings of fact made in the principal judgment. Any appeal under Section 50A(7) of the PDA 2000 is confined to an appeal on a "point of law". A putative appellant is not entitled to seek to reopen findings of fact made by the High Court. The Oireachtas have chosen to prioritise expedition and finality in planning litigation over perfection. An error of fact on the part of the High Court is not normally amenable to appeal. The PDA 2000 does, of course, allow for the correction on appeal of *errors of law*, at least in circumstances where the point of law is of exceptional public importance and transcends the facts of the individual case.
48. The principal judgment most certainly did not find that the "best practice measures" recommended by the Developer's ecologist were an "additional assurance but not the determinative factor" in the Board's screening determination. Had the findings of the principal judgment been as suggested in the draft point of law, then the answer to the question posed would be obvious, namely "yes". There would be no need for an appeal.
49. Finally, it should be noted that counsel for An Bord Pleanála had suggested that there is an inconsistency between the judgment of the High Court in *Kelly v. An Bord Pleanála (Aldi Stores Laytown)* [2019] IEHC 84 and the principal judgment.
50. With respect, the alleged inconsistency is illusory. There is a clear factual distinction between the two cases in that the alleged "mitigation measures" considered by the High Court (Barniville J.) in *Kelly* involved general urban drainage requirements which applied to all developments within a particular area. By contrast, the "mitigation measures" in the present case were ones which were drawn up specifically by the ecologist acting on behalf of the Developer, and were endorsed by the inspector and, ultimately, by An Bord

Pleanála. There is a clear distinction between the two cases. In one case the measures were generic; in the other, the measures were site-specific.

APPEAL NOT DESIRABLE IN PUBLIC INTEREST

51. For the reasons set out above, I have concluded that none of the three draft points of law constitute a point of law of exceptional public importance within the meaning of Section 50A(7).
52. For the sake of completeness, I should say that even if I had considered that any one of the draft points of law met this statutory requirement, leave to appeal would have been refused in any event on the basis that the second limb of the statutory test is not met. The court must consider not only whether there are points of law of exceptional public importance, but also whether an appeal would be desirable in the public interest. It seems to me that an appeal is not desirable in the present case for the following two reasons.
53. First, it would not be an efficient use of scarce judicial resources to entertain an appeal which is, in effect, a moot. Even if An Bord Pleanála were to succeed in an appeal on any of the three draft points of law, this would not affect the outcome of the judicial review proceedings. This is because the court's separate finding that there had been a failure to comply with the flood risk management guidelines in assessing the planning application would remain undisturbed, and the decision to grant planning permission would be invalid on this basis. Put shortly, the planning permission is lost in any event. It is, perhaps, telling that the Developer has chosen not to participate in the application for leave to appeal.
54. The courts are under a statutory obligation "to act as expeditiously as possible consistent with the administration of justice" in determining statutory judicial review proceedings under the PDA 2000. It would be more in keeping with the spirit of this statutory obligation to allocate scarce judicial resources to proceedings the outcome of which are not moot.
55. Secondly, it would not be in the public interest to put the Applicants to the time, trouble and expense of defending an appeal. The Applicants' interest in pursuing the judicial review proceedings in the first instance had stemmed from a concern that they would have been affected by the proposed residential development. The Applicants would not have any substantial interest in the appeal in circumstances where, as explained above, the appeal could not affect the outcome of the judicial review proceedings. Yet, if leave to appeal is granted, then the Applicants might have to defend any appeal if for no other reason than to ensure that they were not exposed to legal costs. An Bord Pleanála maintains the position that the Applicants are not entitled to the benefit of the special costs rules applicable to certain types of environmental litigation under Section 50B of the PDA 2000. (The question of the applicability of the special costs rules is the subject of a separate self-contained appeal to the Court of Appeal (Appeal 2019 No. 204)).

56. Insofar as the costs of any substantive appeal to the Court of Appeal are concerned, the Board has, to date, declined to give an undertaking to pay the Applicants' costs of an appeal. To require the Applicants to participate in an appeal, on hazard as to costs, in circumstances where the appeal is moot would appear to be contrary to the principle that the "review procedure" prescribed under Article 11 of the EIA Directive should be "fair, equitable, timely and not prohibitively expensive".

CONCLUSION AND FORM OF ORDER

57. The application for leave to appeal pursuant to Section 50A(7) of the PDA 2000 is dismissed.