# THE HIGH COURT
## COMMERCIAL

**[2023] IEHC 89**

**Record No. 2019/ 98 JR**

**BETWEEN**

**PETER SWEETMAN**

**APPLICANT**

**AND**

**AN BORD PLEANÁLA**

**RESPONDENT**

**AND**

**IRELAND AND THE ATTORNEY GENERAL**

**SECOND AND THIRD RESPONDENTS**

**AND BY ORDER**

**BALLYCUMBER WIND FARM LIMITED**

**NOTICE PARTY**

**Judgment of Mr. Justice Quinn delivered the 17th day of February 2023**

**1.** The applicant seeks an order of certiorari quashing an order made by the first named respondent on the 18th day of December 2018 pursuant to s. 5 of the Planning and Development Act 2000, as amended, which declared that the construction of a grid connection between a wind farm development located at Ballycumber, Tinahely, Co. Wicklow and an ESB substation at Kilmagig, Avoca, Co. Wicklow was exempted development.

**2.** The principal ground of the application is that the declaration is in breach of Directive 2011/92/EU on the Assessment of the Effects of Certain Public and Private Projects on the

Environment, as amended by Directive 2014/52/EU, together referred to as the "Consolidated Environmental Impact Assessment (EIA) Directive" or "the Directive", and contrary to the jurisprudence of the Court of Justice of the European Union and judgments of this court interpreting the Directive and its transposition in the State.

**3.** In making the declaration the respondent performed a screening exercise and determined that the grid connection works did not require an environmental impact assessment (EIA). The applicant claims that because the grid connection works were not assessed as part of the EIA of the windfarm itself when it was assessed and granted planning permission by the Board in 2013 (following an appeal from a decision of Wicklow County Council), the screening and the s. 5 declaration of exemption constituted impermissible "project splitting".

**4.** The first respondent and the notice party submit that the screening exercise undertaken by the first respondent examined the cumulative effect of the grid connection and existing or permitted development in the vicinity, including the Ballycumber wind farm itself, to determine whether the grid connection works were likely to have significant environmental effects. Its conclusion was that an EIA was not required for the grid connection by reason of its specific characteristics and location and the absence of any likely significant environmental impacts, whether viewed alone or cumulatively with the Ballycumber wind farm.

**5.** The notice party supports the first respondent and says that the determination of the first respondent does not amount to impermissible "project splitting". It submits that the conclusion of the Board that the grid connection works would not be likely to have significant impacts on the environment over and above those already considered and assessed in the EIA of the wind farm itself is compliant with the Directive which does not preclude the completion of an assessment of the entirety of the project in that manner.

**6.** The notice party submits also that these proceedings are an impermissible collateral attack on a previous s. 5 declaration made by Wicklow County Council in respect of the same grid connection works on 17 April 2015 ("the 2015 Declaration)". It says that in reliance on the original planning permission for the wind farm granted on 13 August 2013, and the 2015 Declaration, it commenced works on both, the wind farm and the grid connection, which have been energised. Before these proceedings commenced it expended in excess of €30 million on those works. It submits that the question referred to and decided by the Board was identical to that referred to and decided on by Wicklow County Council on 17 April 2015, and there has been no change in facts or circumstances.

**7.** The second and third named respondents support the submission of the notice party that these proceedings are a collateral challenge. They go further and say that the first respondent ought to have dismissed the referral pursuant to its powers under s. 138 of the Act of 2000.

**8.** The applicant also seeks a declaration that s. 5 as amended is contrary to the Constitution, European Law, and the Aarhus Convention. In particular he says that the absence of provision for public participation in s. 5 requests and referrals violates the public participation provisions of the Directive.

**9.** The second and third respondents oppose the challenge to the validity of s. 5, and submit that as it is not a procedure for the grant of development consent, the absence of provisions regarding public participation in such referrals does not violate the Directive or any other provisions of community law.

**The Ballycumber Wind Farm**

**10.** On 13 August 2013, the Board issued a decision to grant permission for construction of the wind farm. The decision was made following an appeal by Gerard and Lena Dunne of

Ballycumber, Tinahely, Arklow, Co. Wicklow and others against a decision of Wicklow County Council made on 15 March 2013 to grant permission.

**11.** The wind farm stands at a location described as Ballycumber North and Ballycumber South, Tinahely, Co. Wicklow. As described in the Board's decision, the windfarm consists of the following: -

- 6 turbines with a hub height of 80 to 85 metres and a maximum blade tip height of up to 131 metres;
- A borrow pit;
- Anemometry mast;
- An upgrade to existing site tracks and access roads;
- New site tracks and hard standing areas;
- Electrical control building and compound;
- Underground cabling and site works.

**The grid connection**

**12.** The grid connection is between the Ballycumber Wind Farm and an existing ESB substation located 23.4km away at Kilmagig, Avoca, Co. Wicklow.

**13.** The grid connection line runs in an underground duct within the following areas: -

- 2,566m within agricultural fields and conifer forestry;
- 2,182m within private trackway;
- 16,755m within public road;
- 1,388m within footpaths.
- 536m of "directional drilling" at 8 locations;

**Chronology**

**14.** The decision of the Board of 13 August 2013 to grant planning permission for the windfarm records that the Board considered an environmental impact statement submitted

with the application and concluded that it was adequate in identifying and describing the direct and indirect effects of the proposed development. The Board completed an environmental impact assessment and agreed with the Inspector in her assessment and conclusion on the acceptability of the mitigation measures proposed and residual effects.

**15.** Condition 9(c) of the decision provides that: -

"This permission does not include the works of cabling and connection to the Electricity Grid".

**16.** On 1 April 2015, the notice party submitted to Wicklow County Council a question pursuant to s. 5 of the Act as to whether or not the construction of a grid connection between the wind farm and the ESB Kilmagig substation is or is not exempted development.

**17.** On 17 April 2015, Wicklow County Council issued a declaration in accordance with s. 5 that the construction of the grid connection is development but is exempted development within the meaning of the Act.

**18.** The notice party's submission accompanying the referral pursuant to s. 5 to Wicklow County Council was made on its behalf by Messrs Jennings and O'Donovan, consulting engineers, in a letter dated 30 March 2015. Accompanying that submission were the following: -

- Development drawings;
- Appropriate Assessment Screening Report;
- Ecology Report;
- Archaeological Assessment;
- Consent letters from affected third party landowners;
- Construction method statement;
- ESB Networks specification for the installation of ducts and structures for underground 38KV power cables and communication cables;

- Consultation with National Parks and Wildlife Service and drawing showing a trench cable along the Ballyarthur Forestry road;
- Consultation with Inland Fisheries Ireland and drawing showing a bridge crossing detail at Woodenbridge.

**19.** Between September 2016 and April 2017, the notice party negotiated finance arrangements with Ulster Bank DAC to finance the construction of the wind farm. On 13 April 2017 the notice party entered into finance agreements, borrowing in excess of €30 million from Ulster Bank. At that time it also entered into a series of contracts for the development of the wind farm.

**20.** It is said, and not contradicted, that by 30 April 2017 the notice party had disbursed or committed "almost all of its cash reserves". It says that its assets and its means of repayment of the borrowings from Ulster Bank consisted almost exclusively of its rights under the construction contracts, property in the wind farm site and ultimately the constructed wind farm. It says that the value of those assets and extent of its means of repayment are dependent on its ability to continue to export electricity through the grid connection which in turn depends on its exempted development status as determined in the 2015 Declaration.

**21.** On 24 April 2017, construction of the windfarm commenced. It was substantially completed at the end of January 2019.

**22.** On 17 May 2017, construction works commenced on the grid connection. These were substantially completed in late December 2018.

**23.** On 15 May 2017, Mr. Gerard Dunne, who was one of the appellants from the original Wicklow County Council decision to grant planning permission for the wind farm, made a request to Wicklow County Council for a declaration pursuant to s. 5 of the Act of 2000 on the question as to whether grid connection from the wind farm to the substation at Kilmagig is development and if so whether it is or is not exempted development.

**24.** On 25 May 2017, the notice party received a letter from Wicklow County Council informing it that the Council had received a complaint arising from the commencement of the grid connection works. The Council confirmed to the notice party that the grid connection works had already been declared exempt pursuant to s. 5 and accordingly that no enforcement action would be taken arising from the complaint.

**25.** No determination was issued by Wicklow County Council on foot of Mr. Dunne's s. 5 referral.

**26.** On 22 June 2017, Mr. Dunne referred the question to the Board. It made a determination on 18 December 2018 that the grid connection works were exempted development. That is the determination the subject of these proceedings.

**Other proceedings**

**27.** On 6 September 2017, Timothy Healy applied for and was granted leave to commence judicial review proceedings to quash the 2015 Declaration. This application was made before Humphreys J. at a sitting of the court where there was also listed an application by the notice party for injunctions against parties (a Mr. Moore O'Farrell and others including Mr. Healy) to restrain interference with the grid connections works. That application was adjourned.

**28.** On 9 October 2017, McGovern J. made an order consolidating three proceedings, being the judicial review proceedings of Mr. Healy, a plenary action commenced by Mr. Healy against the notice party and the notice party's proceedings against Mr. More O'Farrell and others (including Timothy Healy).

**29.** Ultimately, those proceedings were settled, and orders were made by consent by Haughton J. on 5 December 2017. The consent order of 5 December 2017 included an order restraining the defendants and all other persons having notice of the making of the order from

impeding, obstructing, hindering or interfering with the grid connection works and included also a declaration: -

> *"That the named defendants, their servants or agents, be restrained from disputing the legal status of the grid connection works or disputing the planning status thereof (including but not by way of limitation disputing in any way the validity of the s. 5 declaration)".*

**30.** On 21 December 2017 those proceedings were struck out.

**31.** Mr. Dunne does not appear to have been a party to those proceedings. Nor was the applicant.

**32.** The notice party's solicitor has sworn an affidavit in which he stated that the applicant was present in court on 6 September 2017 when the notice party's injunction application concerning the grid works was listed, and when the court granted leave to Mr. Healy to commence his judicial review proceedings in respect of the 2015 Declaration. That important fact is not contested.

**The Dunne referral**

**33.** As the appellant to the original grant of planning permission for the windfarm Mr. Dunne was on notice from the time when that decision to grant was made by the Board on 13 August 2013 that the permission did not extend to grid connection works (Condition 9(c)) and accordingly that those works would in due course require a permission, unless declared exempt. In respect of the 2015 Declaration, he took no action. On 15 May 2017, after construction works on the windfarm commenced, he made his request to Wicklow County Council. On 22 June 2017, one month after the commencement of the grid connection works, he made his referral to the respondent.

**34.** On 29 June 2017, the Board invited the notice party to make submissions on the Dunne referral and these were made by the notice party on 25 July 2017.

**35.** The notice party submitted that the Board should exercise its power under s. 138 of the Act to dismiss the referral having regard to the fact that the question referred had already been determined by the 2015 Declaration. Without prejudice to that submission, it addressed the substantive question of the referral.

**36.** The notice party submitted that EIA screening and environmental reports which it had procured in July 2016 relative to the grid connection works showed that: -

> *"…. the works would not have a significant effect on the environment, either alone or cumulatively with the wind farm project and other existing and permitted projects".*

**37.** It further submitted that the reports confirm that there was no reason to anticipate that the grid connection works: -

> *"either alone or in combination with other plans or projects, would have significant negative environmental impacts and that the conclusions of the Ballycumber Wind Farm EIS would not change as a result of the grid connection works".*

**38.** The wind farm itself had been the subject of a full EIA, by the Board, as recorded in its decision of 13 August 2013.

**39.** Attachments to the submission included the following: -

- A Grid Connection EIA Screening Report, dated July 2016;
- An Environmental Report dated July 2016;
- An Appropriate Assessment Screening Report dated January 2015 (No question of appropriate assessment or of the Habitats Directive is pursued in this case);

**<u>Report of the Inspector</u>**

**40.** On 11 January 2018 the Board's Inspector, Kevin Moore, issued his report.

**41.** The Inspector performed a screening for environmental impact assessment. His conclusion in that screening was as follows: -

*"Where the Board has previously determined that the mitigation measures proposed and residual effects from the Ballycumber wind farm development itself are acceptable, and where it has been determined that the grid connection would not likely have any significant environmental impacts or significant cumulative impacts with the wind farm development, then it is reasonable to conclude that the overall project is not likely to have any significant impacts on the environment".*

**42.** The Inspector went on to consider case law referred to in Mr. Dunne's referral namely O'Grianna v. An Bord Pleanala which is discussed in more detail later, and concluded as follows: -

*"Having regard to the above current legal position, I submit to the Board that, notwithstanding my screening for EIA, I am constrained in a manner which requires me to conclude that it appears that grid connections for windfarms that are subject to environmental impact assessment cannot be exempted as a matter of principle. While the proposed development of the wind turbines associated with Ballycumber wind farm was subject to EIA, the grid connection, as part of the overall project, was not. Based upon the recent High Court findings, it appears that the grid connection requires to be subject to EIA, notwithstanding my conclusions drawn in the screening for EIA".*

**43.** He recommended that the Board conclude that: -

*"The grid connection forms part of an overall project for which environmental impact assessment is required and for which EIA of that grid connection was not carried out as part of the assessment of that project"* . . . and;

*"the said underground cable comes within the scope of s. 4(4) of the Planning and Development Act 2000 as amended. In this regard, the Board acknowledges that the*

*above reference to High Court judgments represents the current legal position applicable to grid connections for wind farm developments".*

He therefore recommended that the Board declare the grid connection works to be development "and not exempted development".

**The Board's order**

**44.** On 18 December 2018, the Board issued its order overruling the Inspector and declaring the grid connection and associated works to be exempted development. That is the order the subject of these proceedings.

**45.** The Board concluded as follows: -

(a) That the grid connection works constituted development;

(b) That the grid connection works being carried out by an electricity undertaking and having regard to their nature, would come within the scope of Class 26 of Part 1 of the second Schedule to the Planning and Development Regulations 2001 as amended; and

*(c) "It is considered that the underground electricity connection and associated works, while forming part of the wind farm project of the Ballycumber wind farm would not be likely to have significant impacts on the environment over and above those already considered and assessed as part of the environmental impact assessment for that wind farm, and in combination with the wind farm, and that therefore an environmental impact assessment for the connection and associated works would not be required. Accordingly, the provisions of s. 4(4) of the Planning and Development Act 2000 as amended do not apply in this instance, and the development is exempted development".* (emphasis added)

**46.** The Board's direction records that in deciding not to accept the recommendation of the Inspector, the Board had full regard to the judgment of the High Court in the case of Daly

v. Kilronan and "accepts that the proposed grid connection is a part of the overall project that includes the Ballycumber wind farm". The Board concluded that the circumstances in this case are different to those in Daly v. Kilronan as follows: -

> *"The Board noted the detailed screening for environmental impact assessment carried out by the Inspector on pp. 22 – 29 of his report and concurred with his conclusions that the proposed grid connection would not be likely to have any significant environmental impacts or significant cumulative impacts with the wind farm development (for which environmental impact assessment had already been carried out by the Board previously under planning permission register reference number 13/8043 – An Bord Pleanala reference number PL 27.241827). Accordingly, the Board considers that in this particular instance, and in the light of the Inspector's screening assessment, which the Board adopts, the proposed grid connection and associated works would not be likely to have significant effects on the environment over and above those already considered and assessed as part of the environmental impact assessment for the wind farm and that therefore the circumstances in this case are different to those to which the High Court case relates. Therefore, it is the considered view of the Board that the provisions of s. 4(4) of the Planning and Development Act 2000 as amended, do not apply in this instance, and accordingly that the grid connection and associated works are exempted development".*

**47.** In December 2018 the grid connection works were completed and in January 2019 the wind farm works were completed.

**48.** On 25 February 2019 the Applicant made this application. This was his first recorded intervention in the matter, notwithstanding his attendance in the courtroom on 6 September 2017 when the Healy judicial review of the 2015 Declaration and the injunction proceedings arising from the commencement of the grid connection works were before the court.

**49.** On 21 March 2019 the grid connection was energised.

**Summary**

**50.** I have concluded that this application should be dismissed for the following reasons: -

(i) These proceedings are an impermissible collateral challenge to the 2015 Declaration.

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

(iii) The Board should have exercised its discretion pursuant to s. 138 of the Act to dismiss the Dunne referral.

(iv) S. 5 of the Act of 2000 does not contravene the provisions of the Directive.

**51.** These conclusions are sufficient to dispose of the application. In deference to extensive submissions made regarding the substance of the Board's order, and at the request of the parties and lest I have fallen into error in the conclusions above, I have considered also the question of whether, in reaching its conclusion on the Dunne referral, the Board engaged in impermissible project splitting in contravention of case law of the European Community and national case law. My view is that the decision was an exercise in impermissible project splitting and the Board fell into error in its interpretation of the case law of this court. I give my reasons later in this judgment.

**52.** In this judgment I consider the following;

(a) The Directive (paragraphs 53 et seq.)

(b) The Act of 2000 (paragraphs 61 et seq.)

(c) The objection of impermissible collateral challenge (paragraphs 83 et seq.)

(d) Project splitting (paragraph 135 et seq.)

(e) Compliance of Section 5 with the Directive (para. 190 et seq.)

## DIRECTIVE 2011/92/EU OF 13 DECEMBER 2011 ON THE ASSESSMENT OF THE EFFECTS OF CERTAIN PUBLIC AND PRIVATE PROJECTS ON THE ENVIRONMENT

**53.** Article 1 provides that the Directive "shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment".

**54.** Article 1.2 (c) defines "development consent' as a "decision of the competent authority or authorities which entitles the developer to proceed with the project";

**55.** Article 2.1 provides as follows: -

> *"Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects".*

***56.*** Article 4 identifies, by reference to Annexes 1 and 2, projects which are subject to mandatory EIA and those which Member States may determine should be subject to EIA.

**57.** In determining which projects within Annex 2 require EIA, selection criteria are identified in Annex 3, and they include in s. 1, the following characteristics : -

> *"(a) the size of the project;*
>
> *(b) the cumulation with other projects".*

**58.** Articles 5 and onwards govern the regimes which Member States are required to apply in relation to projects which, being likely to have significant effects on the environment, are required to be made subject to an environmental impact assessment. They stipulate information to be provided by applicants for development consent, procedures regarding statutory consultation and regarding public consultation and information.

**59.** Article 11 requires Member States to ensure the availably of review procedures to challenge the substantive or procedural legality of "decisions, acts or omissions subject to the public participation provisions".

**Directive 2014/52/EU ("the amending Directive")**

**60.** Recital 29 provides as follows: -

> *"When determining whether significant effects on the environment are likely to be caused by a project, the competent authorities should identify the most relevant criteria to be considered and should take into account information that could be available following other assessments required by Union legislation in order to apply the screening procedure effectively and transparently. In this regard, it is appropriate to specify the content of the screening determination, in particular where no environmental impact assessment is required. Moreover, taking into account unsolicited comments that might have been received from other sources, such as members of the public or public authorities, even though no formal consultation is required at the screening stage, constitutes good administrative practice".* (emphasis added).

**PLANNING AND DEVELOPMENT ACT 2000**

**61.** Section 4 describes the categories of development which are exempt from the requirement to obtain development consent, and subsection (2)(a) permits the relevant Minister to make regulations providing for classes of exempt development.

**62.** Under the Planning and Development Regulations 2001 – 2019, as updated on 12 November 2019, the Minister stipulated an exempt Class 26 pursuant to s. 4(2)(a) as follows:

> *"The carrying out by any undertaker authorised to provide an electricity service of development consisting of the laying underground of mains, pipes cables or other apparatus for the purposes of the undertaking".*

**63.** Section 4(4) provides that notwithstanding any other provisions of that section or any regulations made under subs. 2, "Development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required". This requires screening for EIA and AA before any declaration of exemption can be made.

**64.** Environmental impact assessment means a prescribed form of assessment as mandated by Directive 2011/92/EU, as amended, and by s. 172 of the Act.

**65.** The term "appropriate assessment" is defined by reference to the requirements of the Habitats Directive 92/43/EEC.

**Section 5**

**66.** Section 5 governs referrals for declarations as to whether works are development or exempted development and is of central importance in this case: -

> *"5.—(1) If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.*
>
> *(2) (a) . .. . a planning authority shall issue the declaration on the question that has arisen and the main reasons and considerations on which its decision is based to the person who made the request under subsection (1), and, where appropriate, the owner and occupier of the land in question, within 4 weeks of the receipt of the request.*
>
> . . .

*(3) (a) Where a declaration is issued under this section, any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration.*

*(b) Without prejudice to subsection (2), in the event that no declaration is issued by the planning authority, any person who made a request under subsection (1) may, on payment to the Board of such fee as may be prescribed, refer the question for decision to the Board within 4 weeks of the date that a declaration was due to be issued under subsection (2).*

*(4) Notwithstanding subsection (1), a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board.*

*(5) The details of any declaration issued by a planning authority or of a decision by the Board on a referral under this section shall be entered in the register (which s. 7 requires every planning authority to keep).*

**67.** Subsection 6 obliges the Board to keep a record of decisions made by it on every referral and to make it available for purchase and inspection.

**68.** Section 5(7A) obliges the planning authority or the Board to specify in every declaration or decision, in respect of a development specified in Part 2 of Schedule 5 to the Planning and Development Regulations 2001, whether the development or proposed development identified in a request or referral "would be likely to have significant effects on the environment by virtue, at the least, of the nature, size or location of such development and require an environmental impact assessment". Developments specified in Part 2 of Schedule 5 to the Regulations include any wind farm having more than five turbines.

**69.** Section 7 requires planning authorities to keep a public register of all decisions and other information, including any declarations made by the authority or the Board on referrals made under s. 5.

**70.** Subsection (7B) imposes obligations on the planning authorities and the Board to place on their websites for a period of at least eight weeks particulars of any question referred under s. 5, information received and any reports, and a copy of the declaration or decision on such a referral.

**Judicial review**

**71.** Section 50(2) of the Act provides that a person shall not question the validity of any decision made or other act done by a planning authority or the Board, otherwise than by way of an application for judicial review pursuant to O. 84 of the Rules of the Superior Courts.

**72.** Subsection 6 provides that, subject to subs. 8 which concerns extension of time, an application for leave to apply for judicial review shall be made within a period of 8 weeks beginning from the date of the decision or other relevant act.

**73.** Section 50(8) permits the court to extend the period within which to bring an application for judicial review if the court is satisfied

(a) that there is good and sufficient reason for doing so and

(b) that the circumstances which resulted in the failure to make the application within the period of 8 weeks were outside the control of the applicant.

**Dismissal of appeals or referrals**

**74.** Section 138 provides that the Board shall have an: -

*"absolute discretion to dismiss an appeal or referral*

*(a) where, having considered the grounds of appeal or referral, the Board is of the opinion that the appeal or referral—*

*(i) is vexatious, frivolous or without substance or foundation, or*

*(ii) is made with the sole intention of delaying the development or the intention of securing the payment of money, gifts, consideration or other inducement by any person,*

*or*

*(b) where, the Board is satisfied that, in the particular circumstances, the appeal or referral should not be further considered by it having regard to—*

*(i) the nature of the appeal (including any question which in the Board's opinion is raised by the appeal or referral), or*

*(ii) any previous permission which in its opinion is relevant".*

(emphasis added)

**75.** I emphasise the word "permission" s. 138 (1) (b) (ii) because a declaration pursuant to s. 5 is not a permission. There is therefore nothing express within s. 138 which would ground the exercise of that discretion on the existence of a prior s. 5 referral and declaration. It is nonetheless stated to be an "absolute discretion".

**Environmental Impact Assessment**

**76.** Section 172 of the Act transposes the requirements of the Directive concerning the performance of an environmental impact assessment in respect of an application for development consent in certain cases.

**77.** Section 172 (1) identifies the categories of development in respect of which an EIA is mandatory. Such developments are those referred to in Part 1 of Schedule 5 to the Planning and Development Regulations 2001, and certain projects described in Part 2 of Schedule 5 which includes at para. 3 (j) wind farms with more than 5 turbines.

**78.** Section 172 (1) (b) provides that certain classes of development which are not subject to mandatory EIA in accordance with s. 172 (1) (a) are subject to EIA where it is concluded

by the relevant planning authority or by the Board that the proposed development "is likely to have a significant effect on the environment".

**79.** Schedule 7 to the Planning and Development Regulations 2001 identifies the criteria for determining whether development listed in Part 2 of Schedule 5 should be subject to environmental impact assessment. It identifies criteria under the headings of "Characteristics of proposed development", "Location of proposed development", "Types and characteristics of potential impacts".

**80.** Under the heading "Characteristics of proposed development" there is included the following: -

> "(b) cumulation with other existing development and/or development the subject of a consent for proposed development for the purpose of s. 172(1A) (b) of the Act and/or development the subject of any development consent for the purposes of the Environmental Impact Assessment Directive by or any other enactment".

**81.** Clearly the Board's Inspector had regard to these provisions in performing his screening for EIA.

**82.** Section 172 then contains detailed provisions as to the obligations of a planning authority or the Board as the case may be in relation to the conduct, where required, of environmental impact assessments, including information concerning the category of report and other information required and provisions governing the consideration of submissions.

## IMPERMISSIBLE COLLATERAL CHALLENGE

**83.** The first question to be determined is whether this application is in substance a challenge not, as it appears in its terms, to the declaration made by the Board on 18 December 2018 but to the 2015 Declaration, and if so whether such a challenge is permissible.

**84.** It is instructive to refer to the precise wording of the relevant declarations and referral. The 2015 Declaration was in the following terms: -

> *"That construction of a 38KV underground electrical connection between the consented Ballycumber wind farm (APB ref PL 27.241827/WCC PL. ref. 13/8043) and ESB Kilmagig existing substation located at Kilmagig, Avoca, is development but is exempted development within the meaning of the Planning and Development Acts 2000 (as amended)".*

**85.** Mr. Dunne's request to Wicklow County Council made on 15 May 2017 is in the following terms: -

> *"Is construction of a 38KV underground electrical connection between Ballycumber Wind Farm and ESB Kilmagig existing substation located at Kilmagig Avoca is* [sic] *exempted development or development".*

**86.** On 17 May 2017 Wicklow County Council acknowledged Mr. Dunne's request stating: -

> *"I am to advise that this is presently receiving consideration and a decision is due on this application on the 9th of June 2917".*

**87.** No decision was issued by Wicklow County Council, and the exhibited file of Wicklow County Council includes a letter on 12 July 2017 to the Board forwarding the file relating to the question which states to the Board that no declaration was issued on the request "….as a declaration had issued previously in related File 16/15", being the file concerning the notice party's original request. Clearly Wicklow County Council considered Mr. Dunne's request to relate to the same question.

**88.** Mr. Dunne's referral made to the Board on 22 June 2017 was made by a letter signed by him on 22 June 2017 and co – signed by "Fred Roache" (agent). In this letter he refers to the request made by him on 15 May 2017 to Wicklow County Council, in respect of which

Wicklow County Council had not issued any decision other than its acknowledgment of 17 May 2017. He frames the question as follows: -

> *"Whether or not the project consisting of a 38KV underground electrical connection, and associated works, from a substation to be located within the permitted Ballycumber Wind Farm site (WCC PRR 13/8043 and ABP PL 27.241827) and the existing ESB substation at Kilmagig, Avoca, Co. Wicklow is development and if it is development, whether or not it is exempt development".*

**89.** Notably, Mr. Dunne's letter then refers to the project having been "fully depicted and described in the maps and documents located on the file X16/15 in the Planning Department of Wicklow County Council" being the file on which the 2015 Declaration was made by Wicklow County Council. He was clearly aware that his referral related to the same works.

**90.** The referral letter runs to 4 pages and contains Mr. Dunne's submissions on the referral. Although he refers to case law concerning the conduct of environmental impact assessments on grid connections separately from windfarms, namely O'Grianna & Ors v. An Board Pleanala [2014] 19 JR, he does not describe any change in the facts or in the form of the project or the receiving environment.

**91.** The decision of the Board made on 18 December 2018 is in the following terms: -

> *"Now therefore An Bord Pleanala, in exercise of the powers conferred on it by s. 5 (3) (b) of the 2000 Act, hereby decides that a 38KV underground electrical connection, and associated works, between a substation to be located within the permitted Ballycumber wind farm site and the existing Electricity Supply Board's substation at Kilmagig, Avoca, Co. Wicklow, is development and is exempted development".*

**92.** Whilst there are minimal differences in the wording of the 2015 Declaration and the terms of the Dunne referral, it is clear that in substance the question put was the same. (See

Goonery v. Meath County Council [1999] IEHC 15). Nor was any distinction identified by reference to the status of works, which is understandable because the Dunne request to Wicklow County Council was made on 15 May 2017, being two days before the commencement of the grid connection works.

**93.** The applicant suggests that there has been a change in the facts and circumstances between the time of the 2015 Declaration and the 2018 declaration, namely as follows: -

(a) That by the time the Board made its decision on 18 December 2018 the grid connection works the subject of the referral were complete or almost complete and that the wind farm works themselves were almost complete.

(b) That the evolving case law of this court had clarified the approach which should be taken to the assessment of grid connections to the effect that assessment of a grid connection works separately from those of the wind farm itself amounts to impermissible project splitting.

**94.** In his grounding affidavit, sworn 13 February 2019, the applicant says that he believes that the assessment by the Board of the referral has been carried out in the abstract and "fails to have any or any proper regard for the fact that the development has already been carried out or substantially carried out". He continues "In the first instance the grid connection works have had a significant effect on the environment. The laying of this cable involved the digging of a trench 1.2 metres deep along a length of over 23 kilometres across and adjacent to highly sensitive environmental locations. Accordingly, it requires EIA".

**95.** The statement by the applicant that the grid connection works "have had a significant effect on the environment" is a bald statement for which no supporting evidence is provided.

**96.** Neither Mr. Dunne in his referral, or the applicant in this application, made any substantive or meaningful description of any change in the receiving environment which

ought to have been taken into account in the Dunne referral. The focus of the question is entirely on the grid connection works themselves.

**97.** I am not persuaded that the fact that the grid connection works had been progressing between the time when Mr. Dunne made his referral and the time when the Board made its decision on 18 December 2018 is such as would alter the substance of the question which was put to and decided by the Board.

**98.** As regards the evolving case law, when Mr. Dunne made his referral on 22 June 2017 he cited the judgment of Peart J. in O'Grianna, but not the then very recent decision of Baker J. in Daly v. Kilronan which had been issued on 11 May 2017.

**99.** The submission that evolving case law presented a change of "fact and circumstances" for the Board to consider amounts to a proposition that any decision of an empowered body, whether it be a planning authority, the Board or for that matter a court of law, can be revisited as to the same facts long after the time for appealing has expired by reference to case law decided after it has become final. Clearly this cannot be done in a fashion which would affect the outcome of previously decided cases.

**100.** If a new challenge to the same case were to be permitted every time a new judgment touching on the same question was delivered and a new section 5 question were put, by whatever party, this would create interminable and open – ended uncertainty for parties affected.

**101.** If there has truly been a different question put or a change in the facts or circumstances such as the receiving environment, a subsequent s. 5 referral or question would be permissible (see Cleary Compost and Shredding Limited v. An Bord Pleanala [2017] IEHC 458). This is not such a case.

**Finality of decisions in relation to planning matters.**

**102.** In KSK Enterprises Limited v. An Bord Pleanala [1994] 2 IR 128, Finlay C.J. considered the importance of time limits in challenges to decisions of planning authorities and put it thus: -

> *" . . . it is clear that the intention of the legislature was greatly to confine the opportunity of persons to impugn by way of judicial review decisions made by the planning authorities and in particular one must assume that it was intended that a person who has obtained a planning permission should at a very short interval after the date of such decision in the absence of a judicial review be entirely legally protected against subsequent challenge to the decision that was made and therefore presumably left in a position to act with safety upon the basis of that decision".*

**103.** In Michael Cronin (Readymix Limited) v. An Bord Pleanala [2017] 2 IR 658, O'Malley J. for the Supreme Court considered the purpose and status of s. 5 of the s. 5 procedure. She concluded: -

> *"It follows that the primary role in determining whether a development is exempted or not is given to (depending on the circumstances) either the planning authority or the Board. A decision by one of those bodies is an authoritative ruling on the issue, subject to the potential for judicial review".*

**104.** The doctrine was restated by the Supreme Court in Sweetman v. An Bord Pleanala [2018] 2 IR 250 ("Sweetman Houston") where Clarke C.J. said: -

> *"The rationale behind the collateral attack jurisprudence is clear. A party who has the benefit of an administrative decision which is not challenged within any legally mandated timeframe should not be exposed to the risk of having the validity of that decision subsequently challenged in later proceedings which seek to quash the validity of a subsequent decision on the basis that the earlier decision was invalid.*

*Like consideration would apply to a State decision maker who has rejected an application or other similar decisions.*

*The requirements of legal certainty make clear that a person who has the benefit of a decision which is not challenged within whatever time limit may be appropriate is entitled to act on the assurance that the decision concerned is now immune from challenge subject to very limited exceptions such as fraud and the like".*

**105.** The application of this doctrine in the context of successive s. 5 referrals was considered by Heslin J. in Narconon Trust v. An Bord Pleanala & Ors. [2020] IEHC 25.

**Narconon**

**106.** In Narconon, a declaration of exemption pursuant to s. 5 was issued by Meath County Council in respect of a change of permitted use from nursing home to residential drug rehabilitation facility. The declaration was issued on 29 September 2016.

**107.** On 16 February 2018, two further s. 5 applications were made to the Council in respect of the change of use, this time by different parties. The Council referred the matter to the Board pursuant to s. 5 (4) of the Act, noting that the Council had itself already issued a determination in the matter.

**108.** On 19 November 2018, the Board issued an order declaring that the change of use in that case was development and not exempted development.

**109.** The court was satisfied in that case that there had been no evidence of any change in planning facts or circumstances between the Council's decision of 29 September 2016 and the submission by the notice parties of their s. 5 applications on 16 February 2018 or of any change in planning facts or circumstances between any of those dates and 19 November 2018 when the Board made its orders.

**110.** Heslin J. considered that in making the applications in 2018 the notice parties were simply hoping to persuade the Council to give a different answer, despite the fact that the

relevant facts and circumstances had not changed from when the Council had made its original decision in 2016.

**111.** Heslin J. concluded that the notice parties, which had sought declarations pursuant to s. 5 in 2018 were in reality seeking to question the validity of the council's 2016 decision to which they objected and which they regarded as incorrect.

**112.** The applicant in that case had spent approximately €9 million on works at the facility the subject of the reference in reliance on the 2016 declaration. Heslin J. continued: -

> *"Such expenditure does not, of itself, entitle the Applicant to the relief sought. It does, however, bring into sharp focus the damage to individual rights which might arise if the court was to permit a challenge to the Council's 2016 decision other than in accordance with the method which the Oireachtas has mandated pursuant to section 50(2) of the 2000 Act and I consider the reliance placed by the Applicant on the 2016 Declaration and the very significant sums of money expended by the Applicant on the facility at Ballivor to be relevant in the context of the exercise by the court of what is a discretionary jurisdiction.*
>
> *In my view, the court is obliged to guard against situations whereby a party seeks to avoid complying with legislative obligations as regards the proper means of challenging a planning decision. If, in light of the particular facts of this case, the court was to permit a challenge to the 2016 s. 5 Declaration via the route of questions, identical in substance, raised in 2018, despite no change in planning facts or circumstances since 2016, it would set at naught the requirements of s. 50 (2). It also seems to me that it would wholly undermine the concept of legal certainty and result in a patent unfairness if, despite having the benefit of a decision which was neither reviewed nor challenged in accordance with the mandatory route, including time limits, laid down by statute, a party could question the validity of the original*

*decision, which they regarded as wrong, by asking the self-same question at some later point, ignoring the mandated route for a challenge to that decision, and in the context of unchanged facts, have that question answered differently".*

**113.** Heslin J. quoted from the dictum of the Chief Justice in Sweetman v. An Bord Pleanala [2018] IESC 1, which I have quoted earlier, and concluded: -

*"In light of the facts in the present case, the Second and Third Notice Parties were, in reality, seeking to question the validity of the Council's 2016 decision, to which they explicitly objected, which they regarded as incorrect and which they sought to change, and were seeking to do so two years after it had issued, on the basis of no new or changed planning facts or circumstances, whilst ignoring the procedure and time limits mandated by statute in s. 50 of the 2000 Act. In my view, to permit this would be to allow a breach of explicit statutory provisions, would be offensive to the concept of legal certainty and would result in an injustice".*

**114.** Heslin J. considered submissions which were made concerning the absence of any bar within s. 5 to an authority or the Board entertaining a second or subsequent referral in circumstances where a planning authority has previously issued a declaration under the section.

**115.** Heslin J. concluded that the Board had power, although was not obliged, to dismiss the referral pursuant to the provisions of s. 138 of the Act in these circumstances. Nonetheless he was satisfied that the Board did not have power to make decisions in respect of an attempt by the notice parties to question in 2018 the validity of the council's decision made in 2016, and which itself had not been the subject either of an appeal or judicial review.

**116.** The decision of Heslin J. was upheld by the Court of Appeal which found that once it had become apparent that the question referred was the same or substantially the same and in respect of the same land and that there was no evidence of any change in the planning facts or

circumstances the Board ought to have concluded that the referral in 2018 amounted to an impermissible attack on the 2016 Declaration which was prohibited by s. 50 (2).

**Application of collateral challenge principles to this case**

**117.** In his grounding affidavit sworn 13 February 2019, the applicant states at para. 10 that the 2015 Declaration was not advertised and there was no participation in respect of the declaration. He says that: -

> *"A local resident, Mr. Gerard Dunne, affected by the Declaration was concerned in respect of same and sought a second declaration from the council in respect of the development".*

**118.** The applicant does not say when Mr. Dunne "became concerned". Nor does he mention the fact that Mr. Dunne was the unsuccessful appellant from the original decision of Wicklow County Council to grant planning permission for the wind farm on 15 March 2013. Mr. Dunne was a person interested in the wind farm development from as early as 2013 and was aware of the fact that the conditions of the original grant of permission for the wind farm noted that the permission did not extend to grid connection works and therefore that this was a matter which would fall for consideration in due course.

**119.** Whilst the applicant correctly refers to the fact that the 2015 Declaration was not advertised and there was no public participation, he makes no reference to the fact that the existence of the declaration would have been known to any party who inspected the planning register maintained by the authority pursuant to s. 7 of the Act. That is not to say that the applicant was under any obligation to inspect the register. But he pursues this challenge by reference to Mr. Dunne's referral, and Mr. Dunne, who had exhibited an interest in this development from as early as 2013, had every reason to inspect the register. No information is provided as to whether Mr. Dunne ever inspected the register, despite knowing that the

matter of grid connection works would in due course arise for a decision, whether on an application for planning permission or on a section 5 referral.

**120.** The applicant says in para. 15 that Mr. Dunne made his referral having regard inter alia to "the fact that the time for judicial review in respect of same had passed when it was discovered". This is the clearest acknowledgment that the Dunne referral was an attempt to circumvent the time limitations associated with a challenge to the 2015 Declaration, whether by way of referral to the Board or by way of judicial review.

**121.** The applicant says also in his grounding affidavit, referring to the 2015 Declaration: - "I had no awareness of the existence of any Section 5 referral or Declaration at this time". He does not say what "time" he is referring to. He provides no information as to when he first became aware of the 2015 Declaration. It is not denied by him that he was in court on 6 September 2017 when the Healy judicial review was instituted, arising from the 2015 referral. Therefore, it is clear that the applicant was aware from 6 September 2017 at the very latest, of the existence of the 2015 Declaration, and that grid connection works were in progress.

**122.** The applicant offers no information or explanation of what he did between 6 September 2017 and 20 February 2019 when this application was commenced, other than to await the outcome of the Dunne referral. Therefore, despite having become aware on 6 September 2017 of the existence of the 2015 Declaration his first act in the matter was to commence this application in February 2019.

**123.** One of the applicant's complaints, dealt with elsewhere in this judgment, is what he describes as uncertainty associated with time limits for challenge of s. 5 Declarations. Because the Healy judicial review was settled, no detail is before this Court as to the basis upon which it was settled. The exhibited transcript of the hearing before Humphreys J. on 6 September 2017 records that an issue as to time had been raised. He granted leave to bring

judicial review and extended time without prejudice to whatever view the judge hearing the substantive matter would take on time. I should not speculate as to the detail of the settlement, but I must infer that an objection that the proceedings were out of time was a factor which informed the settlement. But insofar as the applicant now complains that he had no facility or opportunity to challenge the 2015 Declaration, the only information which this court has is that from the moment he became aware of its existence no steps were taken by him to challenge it. He knew that Mr. Healy was facing an objection regarding time and that Humphreys J. had on 6 September 2017 extended time "without prejudice". Equipped with that knowledge he elected instead to stand by while the Dunne referral on an identical question progressed and moved in this Court only when the Board issued its final determination more than a year later on the Dunne referral.

**124.** The above description assumes that the applicant was aware in 2017 of the making of and the progress of the Dunne referral. If he was not so aware, his inaction over the period September 2017 to February 2019 is even more inexplicable.

**125.** The evidence of the Notice Party is that it relied on the validity of the 2015 Declaration in assuming significant financial liabilities. On 13 April 2017, it borrowed in excess of €30 million from Ulster Bank Ireland DAC for the purpose of financing the construction of the wind farm. Between September 2016 and April 2017. The contracts for the development of the wind farm were executed and the evidence of the Notice Party is that by 30 April 2017 it had disbursed or committed almost all of its cash reserves such that its assets and means of repayment of the bank debt consist of its rights under the construction contracts, property in the wind farm site and the constructed wind farm.

**126.** The only lawful method by which the 2015 Declaration could have been challenged was by an appeal to the Board or a judicial review commenced within eight weeks or such extended time as may have been granted. No application was ever made by the applicant or

by Mr. Dunne for an extension of that time. Instead, this application is made, on its face to quash the Board's 2018 Declaration, but in substance to challenge the 2015 Declaration.

**127.** The Healy proceedings were disposed of by a strike out of the challenge to the 2015 Declaration. If this Court were to accede to this application, the effect would be to undermine that Declaration. It is clear also from the averments made by the applicant quoted above that the Dunne referral was made expressly to circumvent the time limit for judicial review which applied to the 2015 Declaration.

**128.** To permit such an outcome would run contrary to all of the jurisprudence on impermissible collateral challenges and the jurisprudence regarding the finality of decisions made under the Act in the absence of valid and timely appeals or judicial reviews as the case may be.

**129.** The question which this Court has to consider is whether in all those circumstances the applicant is entitled to use the occasion of the 2018 Declaration, to advance a complaint in respect of the substance of the 2015 Declaration.

**130.** It was opportunistic on the part of the applicant to pursue this application 17 months after he became aware of the 2015 Declaration, particularly when he became aware in December 2017 that judicial review proceedings by Mr. Healy and others had themselves been resolved and been struck out. The question of whether the grid connection works were exempted development had been determined by the 2015 Declaration. The applicant, after he became aware of the existence of the 2015 Declaration, simply waited for another party, in this case Mr. Dunne, to act and only after Mr. Dunne's referral came to final determination in December 2018 did he take the step of commencing these proceedings.

**131.** These proceedings are an impermissible collateral challenge to the 2015 Declaration, and I would dismiss this application on that ground alone.

**Section 138**

**132.** The State respondents go a step further and submit that the Board erred in failing to exercise its discretion pursuant to s. 138 of the Act.

**133.** The first respondent objected to this submission being made by the State respondents on the grounds that this amounted to a challenge to its decision process for which prior leave of the court had not been sought or granted as required by s.50 of the Act and Order 84 of the Rules of the Superior Courts. Whilst there is some force in that particular objection it does not seem to me to be necessary to rule on it having regard to the fundamentals of my finding that these proceedings and the Dunne referral itself were each an impermissible collateral challenge to the 2015 Declaration.

**134.** The power to dismiss a referral pursuant to s.138 is expressly stated in the section to be an "absolute discretion." Therefore I have a measure of sympathy for the Board in its decision to consider and determine the Dunne referral in circumstances where submissions to it included not only references to O'Grianna, but other case law on the subject including the then recently decided Daly v. Kilronan, and Cleary Compost v. An Bord Pleanala, albeit that these cases were cited by the notice party without prejudice to its objection that the referral was an impermissible collateral attack. However, it is plain from the judgment of Heslin J. in Narconon, as upheld by the Court of Appeal, that this is precisely the circumstance in which the Board ought to have exercised its discretion pursuant to s. 138 to dismiss the referral.

## PROJECT SPLITTING

**135.** As required by s. 172 of the Act and para. 3 (j) of the Second Part of Schedule 5 to the Planning and Development Regulations 2001, in considering the application for planning permission for the wind farm in 2013 the Board completed an environmental impact assessment. It agreed with the assessment undertaken by the Inspector of the likely significant effects of the proposed development and agreed with her conclusions on the acceptability of the mitigation measures proposed and residual effects on the environment.

**136.** The EIA performed in relation to the windfarm did not include the grid connection works. Condition 9(C) of the Board's decision noted that the permission did not extend to the works of cabling and connecting to the electricity grid. The question is whether in these circumstances it was permissible on the Dunne s.5 referral to screen the grid connection works for EIA and declare them exempt.

**137.** The Inspector concluded as follows: -

> *"Where the Board has previously determined that the mitigation measures proposed and residual effects from the Ballycumber wind farm development itself are acceptable, and where it has been determined that the grid connection would not likely have any significant environmental impacts or significant cumulative impacts with the wind farm development, then it is reasonable to conclude that the overall project is not likely to have any significant impacts on the environment".*
>
> (emphasis added)

**138.** A question of whether the "overall project" was likely or not to have any significant effects on the environment does not arise on this application, which concerns the Board's decision on the grid connection only. Having more than five turbines, the windfarm required EIA by reason of the mandatory provisions of s. 172 and Schedule 5 to the Regulations.

**139.** The inspector then considered the case law, namely O'Grianna v. An Bord Pleanala and Daly v. Kilronan Wind Farm Limited, and continued: -

> *"Having regard to the above current legal position, I submit to the Board that, notwithstanding my screening for EIA, I am constrained in a manner which requires me to conclude that it appears that grid connections for windfarms that are subject to environmental impact assessment cannot be exempted as a matter of principle. While the proposed development of the wind turbines associated with Ballycumber wind farm was subject to EIA, the grid connection, as part of the overall project, was not.*

*Based upon the recent High Court findings, it appears that the grid connection requires to be subject to EIA, notwithstanding my conclusions drawn in the screening for EIA."*

**140.** In its decision of 18 December 2018, the Board adopted the screening analysis performed by the inspector but disagreed with his conclusion as regards the law. It recited: -

*"It is considered that the underground electricity connection and associated works, while forming part of the wind farm project of the Ballycumber wind farm would not be likely to have significant impacts on the environment over and above those already considered and assessed as part of the environmental impact assessment for that wind farm, and in combination with the wind farm, and that therefore an environmental impact assessment for the connection and associated works would not be required. Accordingly, the provisions of s. 4(4) of the Planning and Development Act 2000 as amended do not apply in this instance, and the development is exempted development".*

**141.** The Board continued: -

*"in deciding not to accept the recommendation of the inspector that the development would not constitute exempted development, the Board had full regard to the judgment of the High Court in the case of Daly v. Kilronan Wind Farm Limited and by order, Derrysallagh Wind Farm Limited [2017] IEHC 308, and accepts that the proposed grid connection is a part of the overall project that includes the Ballycumber wind farm. However, the Board also notes that paras. 61 and 62 of the judgment, wherein it was stated that: -*

*"The carrying out of an environmental impact assessment is a function of the planning authority and one which is not yet been engaged".*

*And,*

*"The matter of whether an environmental impact assessment is required is a matter for the Board".*

*In this context, the Board noted the detailed screening for environmental impact assessment carried out by the inspector on pp. 22 – 29 of his report and concurred with his conclusions that the proposed grid connection would not be likely to have any significant environmental impacts or significant cumulative impacts with the wind farm developments (for which environmental impact assessment had already been carried out by the Board previously under planning permission register reference 13/8043 - ABP reference PL 27.241827). Accordingly, the Board considers that in this particular instance, and in the light of the inspector's screening assessment, which the Board adopts, the proposed grid connection and associated works would not be likely to have significant impacts on the environment over and above those already considered and assessed as part of the environmental impact assessment for the wind farm, and that therefore the circumstances in this case are different to those to which the High Court case relates. Therefore, it is the considered view of the Board that the provisions of s. 4(4) of the Planning and Development Act 2000, as amended, do not apply in this instance and accordingly that the grid connection and associated works are exempted development".*

**142.** The applicant contends that the Board erred in its consideration of the case law and ought to have followed the conclusion reached by the Inspector.

**O'Grianna v. An Bord Pleanala & Ors [2014] IEHC 632**

**143.** This case concerned a challenge to a grant of planning permission for a wind farm, where the application for the wind farm, as in this case, included no information concerning the intended grid connection works.

**144.** Information concerning the grid connection works could not be submitted with the application for planning permission as the proposed route was not yet known.

**145.** Condition 4 of the Board's decision contained a provision, similar to Condition 9 (c) in this case, to the effect that the permission did not include grid connection works and should not be construed as any form of consent or agreement to a connection to the national grid.

**146.** The applicants in that case submitted that the Board had failed to carry out an EIA of the overall project of which they said the construction of the wind turbines was only the first stage, the grid connection works being a necessary second phase. It was submitted that the cumulative effect on the environment of the entire development should have been the subject of the Board's EIA. Therefore, an impermissible "project splitting" had occurred, thereby invalidating the decision – making process. The applicant submitted that the connection to the national grid is a fundamental part of the overall development because without such connection, the wind farm cannot operate, and therefore the two stages should be considered as a single project and be assessed on such a cumulative basis.

**147.** In that case the Board accepted that "project splitting" must be avoided to ensure that the objectives of the EIA directive were not frustrated. However, it submitted that the wind farm development and the later grid connection to that development do not constitute one project but are separate projects in respect of which their respective environmental impacts may be assessed at the relevant time. It submitted that <u>when</u> (emphasis added) the separate project in relation to the grid connection became the subject of a consent application, the cumulative effects of that development would be assessed, including by reference to its cumulative effect with the wind farm itself. It submitted that in that way, even if the entire project were considered to be a single project the effects of both elements will be assessed.

**148.** Peart J. concluded that the wind farm and its grid connection was one project. He held that before granting planning consent for the wind farm it was necessary that the assessment of the cumulative effects of the combined or single project ought to have been carried out. He quashed the decision to grant planning permission for the wind farm and remitted the matter to the Board.

**149.** Peart J. said the following: -

> *"27. I am satisfied that the second phase of the development in the present case, namely the connection to the national grid, is an integral part of the overall development of which the construction of the turbines is the first part. . . . The wind turbine development on its own serves no function if it cannot be connected to the national grid. In that way, the connection to the national grid is fundamental to the entire project, and in principle at least the cumulative effect of both must be assessed in order to comply with the Directive".*

Peart J. continued: -

> *"32 . . . I have already concluded that in reality the wind farm and its connection in due course to the national grid is one project, neither being independent of the other as was the case on R (Littlewood) v. Bassetlaw District Council for example. The Board's submissions are very much predicated on the contrary argument, and on the fact as submitted also by Framore that at this point in time there have been no proposals formulated by ESB Networks for the design and route of the connection to the national grid. That argument does not, it seems to me, justify treating phase 1 as a stand-alone project when in truth it is not. Rather, it points to a prematurity in the seeking of permission for the construction of the wind farm ahead of the detailed proposals for its connection to the national grid from ESB Networks."*

*"I appreciate that Framore have indicated that it simply is not possessed of the necessary information in this regard and could not include it in its EIS. But that does not mean that given more time and further contact with ESB Networks it could not be achieved so that it could be included in an EIS which addressed the impact of the environment of the total project "at the earliest stage". It may mean that the developer must wait longer before submitting its application for planning permission. But it seems to me likely at least that even if a phase 1 permission is granted with a condition such as Condition 4 contained therein, no sensible developer would complete phase 1 of the development without having been granted permission for the connection to the national grid, or without having been assured that the connection phase is exempted development. In that way, it is difficult to see any real prejudice to the developer by having to wait until the necessary proposals are finalised by ESB Networks so that an EIS for the entire project can be completed and submitted, and so that a cumulative assessment of the likely impact on the environment can be carried out in order to comply with both the letter and spirit of the Directive".*

**150.** In a number of places within the passage above, Peart J. referred to the possibility of a decision being made as to whether any cumulative assessment is required at all, and the possibility a developer receiving an assurance that the connection phase is exempted development. However, it is clear from a reading of the entire of the judgment that in these references, Peart J. was referring to the necessity to perform an assessment, being an EIA, and not merely a screening for EIA, of the entire project.

**151.** The attention of Peart J. was drawn to the practical and commercial difficulties which flow from the deferred or later availability of details of a grid connection, and yet he concluded that the expediencies of assessing the environmental impacts of the construction of

a windfarm before the grid connection details were available were not of themselves a reason to justify project splitting.

**152.** When the matter came back before Peart J. the Board submitted that this was an appropriate case for the court to remit the matter to it, so that it could carry out an EIA in a manner which reflected the findings and conclusions of the court. That application was opposed by the applicants. The court concluded that it was an appropriate case in which to remit the matter to the Board.

**153.** In his remittal judgment delivered 16 April 2015 [2015] IEHC 248, Peart J. noted that the Board was ". . . satisfied that if the matter is now remitted to the Board, an EIA can be carried out by the Board which will meet the requirements of a cumulative assessment in line with the findings of the court".

**154.** The Board had noted that insofar as the original EIS already submitted did not contain the necessary information for an EIA in respect of the connection to the national grid, the Board could exercise its power to request a further EIS and, in that regard, notice would be duly published, so that a fully compliant EIA could be undertaken, the Board then having been equipped with the required further information.

**155.** Peart J. observed that if the applicants in that case were not satisfied that the new EIA had been carried out in accordance with law, they would be entitled to again seek leave to challenge it as they had originally done. He noted: -

> *". . . it stands to reason that this Court should take very seriously a submission by the Board itself that it will be in a position to carry out a fresh EIA in the light of the Court's judgment".*

**156.** These observations are important in that they show that it was not intended by the court that anything less than a full EIA would be undertaken in respect of the entire of the project namely the wind farm and the grid connection.

**O'Grianna 2 – McGovern J. – [2017] IEHC 7**

**157.** Following the remittal to An Bord Pleanala, a challenge was brought to the result of the Board's further decision to grant permission for the wind farm including ancillary works. The challenge on this occasion concerned the manner in which the Board had carried out its EIA in respect of the grid connection works and the wind farm itself. McGovern J. rejected this challenge and considered a number of questions concerning the general manner of interpreting the EIA Directive.

***158.*** McGovern J. noted that the applicants had not raised any point on the substantive EIA carried out and had not purported to allege any deficiency in the EIA. He referred to judgments of the Supreme Court in O'Connor v. Environmental Protection Agency [2002] 1 IR 530 and Martyn v. An Bord Pleanala [2008] 1 IR 336, which *"suggest that an EIA can be carried out at a stage wherein the partial consent for part of an overall project has been given."*

**159.** A number of points arise from this judgment.

**160.** Firstly, before the Board on the remittal was a full EIA of the entire project, including the cumulative effects of the grid connection.

**161.** Secondly, the Board did not grant permission for the grid connection works. It simply noted that the EIA as revised and submitted took account of the cumulative effects of the wind farm and the proposed grid connection works.

**162.** Thirdly, McGovern J. noted that the Directive and the Irish legislation envisage a situation where there may be different stages of the consent procedure.

**163.** None of these references dilute the fundamental principle identified by Peart J. effect that an EIA of only part of the entire project is not a compliant EIA.

**Daly v. Kilronan Wind Farm Limited & Ors. [2017] IEHC 308**

**164.** This was an application pursuant to s. 160 of the Act for orders restraining the carrying out of grid connection works. The planning permission for the wind farm, again as in this case, and as in O'Grianna, stated that it was not to be construed as any form of consent or agreement to a grid connection. The respondents relied on a s. 5 declaration by Leitrim County Council to the effect that the grid connection works were exempted development.

**165.** Baker J. concluded that the s. 5 declaration issued by Leitrim County Council was erroneous as a matter of law because the Council had considered the question of exemption without a proper consideration of the effect of the decision of Peart J. in O'Grianna. In the quotations below I have underlined certain phrases on which the respondents and Notice Party rely : -

> *"44. It is argued by the applicant that as a result of the decision of Peart J. in O'Grianna & Ors. v. An Bord Pleanála, a developer of a wind farm project is not safe to apply for planning permission for the construction of the turbines and the works associated with the turbines without agreeing a grid connection with ESB Networks, and that the only permissible way in which a planning application can be made is by application for the whole project to include the grid works. I am not convinced that the matter can be stated in such broad terms, as there may be a number of ways in which an assessment of the entire project can be dealt with by a planning authority. (emphasis added)*
>
> *In the present case, however, the planning permission issued two years before the grid connection was agreed and no EIA has been carried out, of either the grid connection itself, or of the whole project to include the turbines, associated works and grid connection works.*
>
> *45. In the light of the decision of Peart J. in O'Grianna & Ors. v. An Bord Pleanála, the grid works must be regarded as an integral part of the project as a whole and the*

*assessment of the grid works is to be made in the context of the entire project, as must the assessment of the application for the turbines and works associated with them. That is not to say that a separate EIA will always be required with regard to the grid works and I adopt the dicta of Haughton J. in his judgment in Sweetman v. An Bord Pleanála & Ors. in that regard.* (emphasis added)

*46. However, as the grid works are part of an overall project, and an EIA is required for the overall project, an environmental assessment must be carried out of the entire project, and, therefore, no part of the project, and ipso facto no individual part treated as a standalone element, can be exempt from planning. This emerges from the European jurisprudence to which I now turn".*

**166.** In para. 48 of her judgment, Baker J. stated as follows: -

*"Whether a particular development divided into a series of projects or sub-projects can be regarded as impermissible project splitting depends on the facts….."*

Applying that question to the windfarm and grid connection she held : -

"*that on account of the fact that the grid works cannot be lawfully separated from the project as a whole, that to treat the grid works as exempt fails to give effect to this principle".*

**167.** Having considered case law of the ECJ Baker J. continued: -

*"54. As a matter of European law, the assessment of whether the grid connection works can be treated as exempted development is one that must be considered in the context of a reading that best achieves the aims and objectives of the EIA Directive. I consider that on account of the fact that the grid works cannot be lawfully separated from the project as a whole, that to treat the grid works as exempt fails to give effect to this principle".*

**168.** Baker J., in further considering the judgment of Peart J., said the following: -

*"57. The decision in O'Grianna & Ors. v. An Bord Pleanála does not mean that Peart J. was of the view that planning permission was required for the grid connection merely on account of the fact that it was part of a larger project. However, his judgment, it seems to me, carries a necessary implication that because the grid connection is part of the larger project, and if one identified part of that project requires an EIA, the grid connection works cannot be considered to be exempt development, as they are part of a larger development which requires an EIA.*

*58. As the grid works are part of a development that does require an EIA, the local authority must carry out an environmental assessment in the context of the project as a whole of which the grid connection forms part.*

*59. In interpreting the provisions of the PDA which permit an exemption in certain circumstances, a court should not come to a conclusion which has the effect that a project can be impermissibly split, albeit that taken alone part of the project could readily be seen as coming within the exemption. The general principle must be that the project must be considered as a whole, and therefore any argument that an exemption can exist is one that cannot be determined without reference to that first principle.*

*60. Arising from the judgment of Peart J. in O'Grianna & Ors. v. An Bord Pleanála, and the European case law, and because the interpretation of the exemptions in the PDA must be given one that is supported by the European context, I do not consider that my decision rests on whether the respondents are correct, that the net import of the Appropriate Assessment Screening Report and the EIA Screening and Environmental Report submitted which show no likely environment impact.*

*61. The planning authority has not carried out an EIA and the Screening and Environmental Reports prepared by Fehily Timoney Associates on behalf of the first*

*respondent, while they might have supported the consideration by Leitrim County Council which led to its determination under s. 5 and are to be regarded as evidence of a likely environmental impact, they are not a finding of such. <u>The carrying out of an EIA is the function of the planning authority</u> and one which has not yet been engaged.*

*62. I am not satisfied that the grid works can be characterised as exempt, and <u>the matter of whether an EIA is required is a matter for the Board.</u> This is the approach taken by Peart J. when the matter returned before him, and he delivered a second judgment, [2015] IEHC 248, by which he rejected the argument that the breach could not be cured by remittal to the Board, and did remit in order that the Board could proceed in whatever way it considered proper having regard to his conclusion.".*

**169.** In 'Daly', the report recites that the applications to the Council for declarations of exemption pursuant to s. 5 in relation to the grid connection works were accompanied by an Appropriate Assessment Screening Report and an EIA Screening and Environmental Report. The judgment records that these reports concluded that the proposed grid connection works did not fall into the class of development contained in Parts 1 or 2 of Schedule 5 to the Regulations and therefore that no requirement for an EIA existed.

**170.** Baker J. noted that screening and environmental reports prepared may have supported the consideration by the Council which led to the determination under s. 5 that the grid connection works were to be regarded as evidence of a likely environmental impact, but they were not a finding as such. She noted that *"the carrying out of the EIA is a function of the authority, and one which has not yet been engaged.*"

**171.** This is a finding by Baker J., if such were needed, that a screening report was not an EIA. Therefore, no EIA had been performed in respect of the grid connection works. Because the windfarm and the grid connection works were part of one overall project an EIA is

required for the project and must be carried out in respect of the entire and therefore not part of the project.

**172.** In Daly, the report of the senior planner with Leitrim County Council, had considered the impact of the decision of Peart J. in O'Grianna and had expressed the view that the authority did not need to: -

> *". . . slavishly adhere to an individual High Court case without giving due consideration to the facts in question, having regard to the fact that the parent permission has not been challenged or revoked and to the legislation which is in place at the time of decision making".*

**173.** Baker J. was referred to a decision in a different case in Wexford, and another decision in a case in Co. Kilkenny, where a view had been taken by the Board that development of a grid connection was capable of being treated as exempt from the requirement of planning permission, if the parent planning permission for the construction of the wind turbines and related works had been granted before the O'Grianna judgment. Baker J. concluded that this did not represent the law. She continued: -

> *". . . the decision of Peart J. in O'Grianna is applicable to planning applications where the issue of project splitting is relevant, notwithstanding that there exists an unassailable permission for the primary development, because an application for judicial review or an appeal would be out of time".*

**174.** The respondents quote the statement by Baker J. in her paragraph 44 to the effect that there may be a number of ways in which an assessment of the entire project can be dealt with by the authority, and the statement in her paragraph 45 to the effect that "that is not to say that a separate EIA will always be required with regard to the grid works". Neither of these statements are a qualification of the principle so clearly stated by Baker J., in her paragraphs 46, 54, 57, 58 and 59 that where an EIA is required for the overall project, no part of the

project can be exempt from planning. Quite clearly, there may be successive consent applications each requiring EIA, but the EIA, and not merely a screening for EIA, must assess the entire of the intended project and the cumulative effects of different stages of the project. In such a case it is still one project and not two. Nothing in the judgment of Baker J. suggests that it is compliant with the O'Grianna principle, as restated by Baker J. in her judgment, to perform an EIA firstly of the wind farm project on its own, and later to perform only a screening of the grid connection works.

**175.** The respondents submit that contrary to her own description of the law, the analysis by Baker J. is not supported by reference to the European cases quoted.

**176.** The doctrine of project splitting, which entails the avoidance of EIA by subdividing a project into different phases each of which may not on its own require EIA, is well established in the jurisprudence of the Community courts. Among those cited to the court were C-508/03 Commission v. United Kingdom; Case C-227/01 Commission v. Spain; Case C-392/96 Bond Naturschutz; Case C-142/07 Ecologistas; and C-201/02 Wells. No European cases concerning the particular question of windfarm and their grid connections were cited to this court. The judgments of Peart J. and Baker J. on this particular subject could not be clearer, and one needs to look no further to find the application in Ireland of the doctrine of project splitting to this specific question.

**O'Grianna/ Daly**

**177.** Taken together, the following conclusions can be drawn from the judgments in these two cases: -

(a) Construction of a wind farm and its grid connection works is one project, neither being feasible or serving any purpose without the other.

(b) Where environmental impact assessment of a wind farm project is required, as is the case for a windfarm having more than five turbines, that EIA must comprise

an assessment of the entire project (windfarm and grid connection) and not part thereof.

(c) Separate phases of a project may be subject to separate consent applications or s. 5 referrals, but an EIA which does not assess the entire project does not comply with the Directive. Screening for EIA of any part of the project does not meet his requirement.

(d) Since the gridworks cannot be lawfully separated from the project as a whole, when the windfarm comprises more than five turbines and therefore requires a mandatory EIA, to treat the grid works as exempt is contrary to the aims and objectives of the Directive.

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

**178.** Since it has been said that every case must be examined on its own facts, these conclusions may appear rigid. However, they are the conclusions drawn from O'Grianna and Daly. These decisions are directly on point and have not been shown to be made per incuriam.

**Application to this case**

**179.** The fact that the screening undertaken by the Board in this case and extensively described in the report of its inspector, refers to cumulative effects with the effects of the wind farm project itself as identified in the EIA for the wind farm, does not take from the fact that the exercise performed by the inspector and the Board was a screening exercise and not an EIA itself as O'Grianna requires.

**180.** In its decision of 18 December 2018, the Board referred to paras. 61 and 62 of the judgment of Baker J. quoted earlier and in particular to the phrase "the carrying out of an environmental impact assessment is a function of the planning authority and one which has not yet been engaged", and the phrase "the matter of whether an environmental impact assessment is required is a matter for the Board".

**181.** In noting that the carrying out of an EIA is the function of the authority which has not yet been engaged, Baker J. was observing that no EIA had been performed by the authority in that case. The very words used in the phrase quoted "the carrying out of an EIA is the function of the planning authority" illustrate that Baker J. was referring to the performance of an EIA itself, and not a screening for EIA.

**182.** In para. 62, Baker J. said "the matter of whether an EIA is required is a matter for the Board". The respondents and Notice Party invite this court to take these words out of context in the face of the very clear statements by Baker J. throughout the judgment and quoted earlier to the effect that no individual part of the project can be treated as exempt from planning where an EAI is required for the overall project.

**183.** I was also referred to a number of observations in the judgments of Peart J., McGovern J. and Baker J. to the effect that it will not always be necessary for a unitary application to be made in respect of each separate phase of a development and that each case must be considered on its own facts. It is correct to say that there are different ways and different sequences and stages in which development consent can be granted or even for referrals pursuant to s. 5 to be considered each leading to a consent or a declaration for separate stages of a project. But on the O'Grianna/ Daly analysis an EIA which does not assess the environmental impact of the entire project clearly offends the rule against project splitting.

**Environmental prejudice**

**184.** The respondents submit that the applicant ignores the reality that the environmental reports and information before the Board and the inspector were comprehensive and were carefully considered by the inspector. There is some substance in this submission. In reality, the screening by the inspector addressed many of the matters which would be required in the context of environmental impact assessment, and this was done having regard to the cumulative effects of the turbines and the grid connection. However, that exercise was a screening exercise only and not an assessment in the form required by the Directive and the Act.

**185.** The respondent submits also that the applicant's approach is unduly formalistic and prefers substance over form. That submission ignores the fact that were an EIA to be performed it, unlike screening for EIA, would engage the public consultation and participation requirements of the Directive. The combined effect of the judgments in O'Grianna and Daly is so clear on this point that I must conclude that the Inspector was correct in his analysis and the Board erred in its decision to overrule him.

**186.** Finally, it was submitted that the grid connection works could be characterised as no more than an extension of the wind farm project already authorised and as such are subject to the provisions of Part 2, para. 13 A of Schedule 5 to the Regulations which do not require EIA as they are "sub – threshold".

**187.** This submission was the first time that the grid connection works in this case have been described as an extension. The 2015 Declaration does not describe them as an extension. Nor are they described as an extension anywhere in the submissions made even by the notice party to the Board on the Dunne referral. So, this is therefore a new form of description of convenience proffered in response only to this application.

**188.** Furthermore, it is clear from the O'Grianna / Daly principles that grid connection works are a wholly integral part of the single development which is the wind farm and its grid

connections. They are a second phase of one project. Being an integrated part of the project they cannot be described as an extension of the project.

**189.** In summary on this issue I have concluded the following: -

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

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

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

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

## THE CONSTITUTION, THE AARHUS CONVENTION AND EU LAW

**190.** The applicant submits that s. 5 itself is contrary to the Constitution, the Aarhus Convention and the public participation provisions of the EIA Directive and of the Public Participation Directive 2003/35/EC.

**191.** Submissions were made by reference to the provisions of the Aarhus Convention made on 25 June 1998, being the Convention on Access to Information, Public Participation in Decision Making and Access to Justice and Environmental Matters. The Convention is not directly applicable in the legal order of the State save to the extent that it has been given effect through EU law instruments which of course have such effect. (See Conway v. Ireland [2017] 1 I.R. 53). Implementation of the Convention as far as the State is concerned, is effected through the Directives and transposition of the Directives under the Planning and Development Act 2000 as amended.

**192.** No particulars of unconstitutionality were presented and this aspect of the case was not pursued at the hearing.

**193.** The applicant pursued this element of the case on the ground that the absence of requirements for public participation in s. 5 requests and referrals deprived the applicant of the opportunity to participate in the decision making process which affects the environment and potentially property rights. He submits that because the public is not notified of the decision and/or of any right to take judicial review the public participation requirements and the right to an effective review and remedy are nullified.

**194.** The applicant submitted that uncertainty as to the conditions in which he might be granted an extension of time for judicial review also deprive him of an effective remedy. That submission is disposed of by the clear provisions of s. 50(8) which identify the circumstances and conditions in which a time extension may be granted.

**195.** The applicant says that he received no notification of the application for a declaration, either by the notice party or by Mr. Dunne, no notification of the fact of the referral to the Board, and no notification of the making of the determination and has therefore been entirely excluded from the process. He submits that the lack of facility for public participation in a s. 5 process and the failure to provide notification of the decision is contrary to law.

**196.** Before turning to s.5 itself, it is relevant to place these submissions in the context of the applicant's own position. The applicant does not say when he became aware of the determination of the Board. Clearly, he became aware of the determination in sufficient time to bring this proceeding, in so far as it is a challenge to that determination.

**197.** He says in his grounding affidavit: -

> *"Having regard to . . . the fact that the time for judicial review in respect of same [the 2015 Declaration] had passed when it was discovered, I understand that Mr. Dunne, concerned landowner, made the instant referral".*

It could not be clearer therefore from this averment that the referral by Mr. Dunne was itself an attempt to circumvent the time limits applicable to the 2015 Declaration. I have found earlier that the Board ought to have exercised its discretion to dismiss the referral on that ground.

**198.** The court does not know exactly when the applicant became aware of the 2015 Declaration. He was aware of it no later than 6 September 2017 and neither he or Mr. Dunne took any action in relation to it. Mr. Dunne confined himself to pursuing his own referral. When his referral was finally determined he took no further action.

**199.** The applicant did nothing about the 2015 Declaration having learned of it at the latest by 6 September 2017. Not only was he aware by then of the 2015 Declaration but he was also aware that the Notice Party had commenced construction of the grid connection works. This was known because the matters before the court on 6 September 2017 included injunction proceedings between the notice party and the persons it alleged were interfering with those works. Equipped with that knowledge, and on notice that Mr. Healy was facing an objection by reference to the timing of his application for judicial review, the applicant awaited the result of the Dunne referral, more than a year later, and then took the opportunity to commence these proceedings, on their face timely as regards the Board's determination.

**The Act**

**200.** Section 4 prescribes the categories of works or development which are exempt from the requirement for development consent. It provides also for the Minister to make regulations exempting certain classes of development.

**201.** Section 4(4) provides that no development shall be exempted development if an environmental impact assessment or an appropriate assessment is required.

**202.** Section 5(7A) provides that in every declaration or decision pursuant to s.5 in respect of a development or proposed development specified in Part 2 of Schedule 5 to the

Regulations a planning authority or the Board must specify whether the development would be likely to have significant effects on the environment by virtue at the least, of the nature, size or location of such development and require environmental impact assessment.

**203.** The combined effect of those subsections is that s.5 cannot be availed of to declare exempt from the requirement for a planning consent a development which, being likely to have significant effects on the environment, would require environmental impact assessment. This in turn means that, unless the works require mandatory EIA (s. 172(1) of the Act), the authority or Board is required to perform screening for EIA, and to make a determination as to whether the proposed development is likely to have significant effect on the environment. If the answer is in the positive, a full EIA will be required, and the relevant development will require a full consent application under the Act, thereby triggering all the associated publication, notification and consultation requirements mandated by the Directive.

**204.** It is not disputed that a section 5 declaration, for all its importance to landowners and others, is not a development consent.

**The Directive**

**205.** The Directive applies to projects which are likely to have significant effects on the environment (Article 1). Member States are required to adopt measures to ensure that before development consent is given to such projects they are subject to a requirement for development consent and environmental impact assessment (Article 2) (emphasis added). Thus, the obligation to perform such assessment and to follow consent procedures, which in Ireland engage publication, notification, and consultation, is triggered only by applications for consent to projects found to be likely to have significant effects on the environment.

**206.** Article 6 mandates consultation with relevant authorities and public notification early in the environmental decision making process. The matters to be so notified are listed and

include at Article 6(2)(a) the request for development consent and at (b) the fact that the project is subject to an environmental impact assessment procedure.

**207.** Article 9 provides that where a decision to grant or refuse development consent has been taken the competent authority must inform the public of such decision.

**208.** Article 11 mandates the availability of review procedures in relation to decisions, acts or omissions subject to the public participation directives.

**209.** All of these provisions concerning the conduct of environmental impact assessments, public notification, participation and consultation and the availability of review procedures apply only to projects "likely to have significant effects on the environment," (See Articles 1 and 2)

**Article 4 and screening decisions**

**210.** Article 4.1 identifies the categories of project which require mandatory EIA. Article 4.2 provides in relation to "non-mandatory" projects that member states must determine whether such projects shall be subject to assessment. Article 4.3 identifies by reference to Annex III the criteria and thresholds to be applied in determining whether a project must be subject to EIA.

**211.** Article 4.4 stipulates that member states shall ensure that the determination made by a competent authority under Article 4.2, namely whether a project shall be made subject to EIA, a screening decision, is "made available to the public". Article 4.4 does not say that such determinations must be publicly advertised or notified. Importantly, this is to be contrasted with the provisions in Article 6 onwards which mandate public notification in relation to processes by which decisions are made on applications for development consent.

**212.** The State's obligation in Article 4.4 to ensure that screening determinations are made available to the public is fulfilled by s. 7 of the Act which obliges planning authorities and the

Board to maintain on their register and websites a record of all decisions and declarations, including those made pursuant to s.5.

**213.** The proposition that screening decisions do not require public advertisement and notification is reinforced by the Recitals to the consolidated Directive and the caselaw of the ECJ.

**214.** Recital 29 of the Directive says that taking into account unsolicited comments from parties such as members of the public or public authorities "constitutes good administrative practice", but that "no formal consultation is required at the screening stage."

**215.** In Re Karoline Gruber, Case 570/13, Advocate General Kokott observed:

"EMA rightly submits that the decision on carrying out an environmental impact assessment does not require any public participation and concluded that Article 11 of the EIA Directive does not apply …"

**216.** I also accept the submissions of the State parties that although no public notification of a declaration issued under s. 5 is mandated, the process is not devoid of publicity in that ss. 5 and 7 of the Act require that details of decisions and declarations be placed on the planning register and websites of the authority. Clearly that is not the same as full advertisement or publicity. Nonetheless, two observations are relevant.

**217.** Firstly, the requirements to place records of decisions and declarations on publicly accessible registries and websites fulfils the requirements of Article 4.4.

**218.** Secondly, it is significant that Mr. Dunne appealed against the original decision of Wicklow County Council to grant permission in respect of the wind farm itself. He was therefore on notice of the result of that appeal and of Condition 9(c). He at least was on notice of that condition and had the facility to inspect the planning register in the light of that notice and his already recorded interest in the matter. Like the applicant, he was also aware

that construction works on the windfarm and the project were underway before 6 September 2017.

## CONCLUSION

**219.** I have concluded that

(a) the Dunne referral was an impermissible collateral challenge to the 2015 Declaration and the Board erred in failing to dismiss it pursuant to s. 138 of the Act,

(b) these proceedings are an impermissible collateral challenge to the 2015 Declaration and a clear attempt to circumvent the statutory framework for review of that Declaration, and

(c) Section 5 does not violate the requirements of the Directive.

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

**221.** The notice party was entitled to rely on the 2015 Declaration, and the original consent to the wind farm development itself, in constructing the wind farm and the grid connection. If there was ever any doubt about this, it ended when the Healy judicial review was disposed of in December 2017. The finality of determinations made pursuant to s. 5 and other provisions of the Act would be undermined, and it would be wholly unjust if this court were to deprive the notice party of the certainty attaching to the original consent and the 2015 Declaration.

**222.** For completeness, I have considered and accepted the submission that the Board erred in rejecting the recommendation of its Inspector, and in declining to follow the rule against 'project splitting' as applied in O'Grianna v. An Bord Pleanala and Daly v. Kilronan. But my

findings that theses proceedings are an impermissible collateral challenge to the 2015 Declaration are sufficient to dispose of the matter and I shall refuse the reliefs sought.

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