



[2024] IEHC 603

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2024.0000049]

IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT
ACT 2000

BETWEEN

NAGLE VIEW TURBINE AWARE GROUP

APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENT

AND
COOM GREEN ENERGY PARK LIMITED

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Friday the 1st day of November 2024

1. In *Balz v. An Bord Pleanála* [2019] IESC 90, [2020] 1 I.L.R.M. 367, [2019] 12 JIC 1202, the Supreme Court *per* O'Donnell J. considered the Wind Energy Development Guidelines 2006, said that "[t]he statutory obligation imposed on the planning authorities and the Board is to 'have regard' to such guidelines." (para. 4), noted that the inspectors report that "runs to 96 pages" (a quarter of what we have in the present case) was "a comprehensive and impressive document" (para. 16), noted that the case "does not appear to raise any issue of law of general importance, but rather is a dispute – evidently heated – as to how the facts should be characterised", or even what the facts were (para. 40), and concluded crucially that "the appellants have adduced sufficient evidence to lead to the inference that the Inspector considered that he could not entertain submissions directed to whether the guidelines were adequate or fit for purpose or not, and accordingly that he discounted the submissions, and treated them as irrelevant, and that that approach was adopted and approved by the Board" (para. 47). Given *inter alia* changing science and the possible relevance of updated standards, it followed that by failing to consider submissions that the guidelines were out of date, the inspector "had excluded from his decision-making relevant considerations" (para. 53). This was so even that "[i]t must be doubtful that if, having considered all the materials and submissions made on behalf of the appellants, a decision-maker would have been likely to accept them, and certainly the more extreme version put forward. There was something of a scattergun approach about the submissions and the voluminous material landed on the Inspector" and that "it would not have been unreasonable to continue to give weight to the existing guidelines, and to be slow to depart radically from them" (para. 56). Flushed with enthusiasm about this authority, the applicant now tries to re-run that case, and expects big box-office success with the blockbuster sequel – *Balz II: The Groundhog Rises*. But the script-writers have overlooked the inconvenient fact that the board in this case did everything the Supreme Court asked in *Balz* and more. The question now is whether the board should be knocked back yet again, despite all of those efforts.

Geographical context

2. As noted in the inspector's report, the proposed development is located to the south of the Nagle Mountains in North County Cork within the townlands of Glashaboy North, Coom (Hudson), Tooreen South, Killeagh, Coom (Fitzgerald), Knuttery, Mullenaboree, Knockacullata, Knoppoge, Carrig, Glannasack, Knockdoorty, Lackendarragh North, Glashaboy South, Toorgarrif, Castleblagh, Ballyhooly South and Grange West. The proposal is within two clusters. The northernmost turbine cluster is situated on the upper southern slopes of Knocknaskagh Mountain in the eastern extents of the Nagle range, which is a distinctive upland ridgeline with the Nagle Mountains reaching a height of approximately 420 m above ordnance datum (AOD). The other cluster is located south of the Nagle range on the more plateaued hilltop of Bottlehill. The proposal is located approximately 12 km south east of Mallow, 10 km south-west of Fermoy and approximately 5 km south west of Ballyhooly. The nearest settlements are Glenville, which is 4 km to the southeast. The N20 is situated just under 4 km to the west of the site at its nearest point, with the N72 national secondary route to the north running in a general east-west direction just under 5 km from the nearest turbine at its nearest point. The N73 national secondary route diverges from the N72 northeast of Mallow and is situated just under 10 km from the site at its closest point. The area within which this development is proposed is predominantly agricultural lands and forestry covering an area of approximately 443 ha primarily comprising commercial forestry with small areas of agricultural pasture lands with elevations within the site ranging from 190 m to 390 m above sea level. The slopes of the southern portion of the proposed development site (Bottlehill) comprises typical elevations of between 270 m to 290 m AOD. The central portion of the site (Mullenaboree) also comprises elevated lands generally lower than those at the south with typical elevations of between 220 m to 260 m AOD.

The northern portion of the proposed development (Knockdoorty) comprises elevated lands sloping steeply to the south. A ridge feature at the extreme northern boundary of the proposed development has an east-west axis and maximum elevations of between 424 m and 428 m AOD.

Facts

- 3.** An application was made on the 24th December 2018 for pre-application consultations to the board.
 - 4.** The board determined on 1st November 2019 that the proposed development falls within the scope of s. 37A(2)(a), (b) and (c) of the Planning and Development Act 2000 and served a notice under s. 37B(4)(a) that the proposed development is strategic infrastructure development within the meaning of the Act and that a planning application should be made directly to the board.
 - 5.** The EIA Report (**EIAR**) is dated November 2020. The EIAR includes a section (7.2.3) on operational noise and amplitude modification (**AM**), particularly what is known as other amplitude modification (**OAM**), and which concludes:
 "At present there is no method for predicting OAM at any particular location before turbines begin operation due to the general features of a site or the known attributes of a particular turbine. It is therefore proposed to undertake measurements once the site is operational to determine if OAM is occurring. In the unlikely event of OAM being present and following establishment of the likely cause, this can be addressed by turbine manufacturers as and when it occurs."
 - 6.** The formal application was submitted on the 11th December 2020 for planning permission in respect of the proposed development. The development comprises the construction of a wind farm and associated infrastructure of up to 22 wind turbines with a maximum tip height of 169 metres and a maximum rotor diameter of 138 metres and ancillary works including hardstanding areas.
 - 7.** The applicant made a lengthy observation to the board on the 22nd February 2021. This submission had elements of the "scattergun" approach referred to by O'Donnell J., containing objections on a whole range of issues and running, including appendices, to 731 pages.
 - 8.** On 28th September 2021, a request for further information was issued by the board.
 - 9.** A response to the further information request was submitted by the notice party on 30th March 2022.
 - 10.** The board appointed an inspector who prepared a report. The inspector visited the site on 22nd and 23rd July 2021 and 6th December 2022.
 - 11.** The inspector completed her report on the 9th January 2023.
 - 12.** The submissions on file and inspector's report were considered by the board at a meeting on the 19th October 2023.
 - 13.** The board order was signed on the 9th November 2023. The permission granted by the board (ABP-308885-20) to the notice party under s. 37G of the 2000 Act is for, *inter alia*, a windfarm consisting of 22 turbines with a maximum tip height of 169 m (tip height range from 165 m to 169 m) and a maximum rotor diameter of 138 m (rotor diameter range from 132 m to 138 m), with a hub height range of 96 m to 103 m and related site works and ancillary development.
- ### **Procedural history**
- 14.** The application for leave to apply for judicial review was opened and adjourned on 15th January 2024.
 - 15.** Leave to apply for judicial review was heard and granted on 29th January 2024 and liberty was given to amend the statement of grounds.
 - 16.** An amended statement of grounds was filed on 2nd February 2024.
 - 17.** A statement of opposition was filed on behalf of the board on 26th April 2024.
 - 18.** A hearing date of 22nd October 2024 for two days was set on 29th April 2024.
 - 19.** A statement of opposition was filed on behalf of the notice party on 9th May 2024.
 - 20.** A replying affidavit was served on behalf of the notice party on 7th July 2024.
 - 21.** A replying affidavit of Mr Dick Bowdler was filed on 13th August 2024.
 - 22.** Prior to the hearing the parties were consulted as to whether the matter could be dealt with in one long calendar day rather than across two days. This was agreed. The matter was then heard for 5.5 hours in one calendar day on 22nd October 2024 when judgment was reserved subject to agreement that the parties could, in sequence, add short written comments drawing attention to relevant exhibits. This was not meant to be further written legal submissions and so was a simple two-step procedure with the applicant having three days to provide its list of relevant exhibits and comment as to why they were relevant with the opposing parties to then do likewise (two working days later).
 - 23.** On 25th October 2024, the applicant sent in some written comments. The opposing parties had until 30th October 2024 to reply, and the notice party and board provided comments on that date. The purpose of the exchange of comments was to compensate for any lack of time to open

every relevant exhibit, not to start a further round of legal submission and rejoinder. So I have read all comments in that light.

Relief sought

24. The reliefs sought in the amended statement of grounds are as follows:

"1. An order of certiorari quashing the Respondent's ('the Board') Order dated 9th November 2023 granting planning permission subject to conditions for the development of a wind farm and associated works within the townlands of Glashaboy North, Coom (Hudson), Tooreen South, Killeagh, Coom (Fitzgerald), Knuttery, Mullenaboree, Knockacullata, Knoppoge, Carrig, Glannasack, Knockdoorty, Lackendarragh North, Glashaboy South, Toorgarrif, Castleblagh, Ballyhooly South and Grange West, County Cork under Ref. No. ABP-308885-20.

2. Such declaration(s) of the legal rights and/or legal position of the Applicant and/or persons similarly situated and/or of the legal duties and/or legal position of the respondent(s) as the Court considers appropriate.

3. A stay on works being carried out pursuant to the impugned decision pending the resolution of these proceedings.

4. A Declaration that Section 50B of the Planning and Development Act 2000 ('the 2000 Act') as amended, and/or Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011 and/or that the interpretative obligation set out in Case C-470/16 North East Pylon Pressure Campaign Limited v. An Bord Pleanála whereby in proceedings where the application of national environmental law is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention apply to these proceedings.

5. An extension of time, if necessary, to seek the reliefs in these proceedings.

6. Further or other orders

7. Costs."

Grounds of challenge

25. The core grounds of challenge are as follows:

"1. The decision to grant planning permission by order dated 9th November 2023 ('the impugned decision') (ABP-308885-20) is invalid as the Board erred in law by excluding from its decision-making relevant considerations, specifically material relating to wind turbine noise other than the Wind Energy Development Guidelines of 2006 ('WEDG 2006') and/or did not comply with the requirements of fair procedures and natural justice, further particulars of which are set out at Part 2 below.

2. The Board failed to have any or any proper regard to the submissions made by the applicants in respect of the likely noise impacts of the proposed development. In particular the Board failed to have any or any adequate regard to the submissions made by the applicants to the effect that the WEDG 2006 were out of date and no longer represents best scientific knowledge in the field of windfarm noise. The Board does not engage at all with these submissions. This is contrary to fair procedures and natural and Constitutional justice and to the decision of the Supreme Court in Balz -v- An Bord Pleanála. This is particularly so in circumstances where, having regard to the legal position as regards nuisance, in granting planning permission and conditioning specific noise limit values, the Board are determining the level of noise considered legally acceptable (Smyth -v- RPA 2010 IEHC 290).

3. The Board has failed to have any or any adequate regard to the fact that, having regard to the decision in Smyth -v- RPA (and in particular paragraphs 34.9 to 34.11) that in setting conditions they are setting standards 'for permitted environmental effects and impacts of the construction and operation' of a major infrastructure project (para 34.9). As such they are defining what the applicant and its members can lawfully be subjected to in terms of noise impacts. The Board has not conducted any inquiry into what best practice in respect of noise in fact is in this case. The Board has not adopted any particular standard or approach to noise either in general or in the specific. It has no guidance of its own (or independent) that it applies to noise in general or to windfarms in particular. Instead it is dealt with on a case by case basis by individual inspectors (as here) and no defined or consistent approach can be discerned. In the instant case, this appears to have resulted in the Inspector applying the standards contained under the 2006 WEDG. These standards are out of date and no longer represent best practice in the context of windfarm noise. Given the legal consequences from the setting of such limits and the effect same has on the property rights of individuals including the members of the applicant herein this unacceptable and contrary to the Constitutional rights of the applicant and its members. European Legal Grounds

4. The impugned decision is invalid as the Board failed to consider adequately or at all the environmental effects of the proposed development on the environment in terms of noise impacts for the purposes of section 171A and 172 of the Planning and Development Act 2000 and/or had no objective information before it to support a conclusion of no significant effects on the environment for the purposes of that EIA assessment and/or contained lacuna, further particulars of which are contained at Part 2 below."

National and European policy context

26. The report *inter alia* notes national policy as follows:

"5.1.1. Project Ireland - National Planning Framework 2040

The National Policy Position establishes the fundamental national objective of achieving a transition to a competitive, low carbon, climate resilient and environmentally sustainable economy by 2050. This will be achieved by harnessing both the considerable on-shore and off-shore potential from energy sources such as wind, wave and solar.

Of particular relevance is National Strategic Outcome NSO8 which seeks a Transition to a low carbon and climate resilient economy. It is stated that 'the National Climate Policy Position establishes the national objective of achieving transition to a competitive, low carbon, climate-resilient and environmentally sustainable economy by 2050. This objective will shape investment choices over the coming decades in line with the National Mitigation Plan and the National Adaptation Framework. New energy systems and transmission grids will be necessary for a more distributed, renewables focused energy generation system, harnessing both the considerable on-shore and off-shore potential from energy sources such as wind, wave and solar and connecting the richest sources of that energy to the major sources of demand'.

One of the objectives in respect of Green Energy is to 'deliver 40% of our electricity needs from renewable sources by 2020 with a strategic aim to increase renewable deployment in line with EU targets and national policy objectives out to 2030 and beyond. It is expected that this increase in renewable deployment will lead to a greater diversity of renewable technologies in the mix'.

National Policy Objective (NPO) 55 seeks to 'promote renewable energy use and generation at appropriate locations within the built and natural environment to meet national objectives towards achieving a low carbon economy by 2050'.

5.1.2. Project Ireland 2040 – National Development Plan 2018-2027

The key role of the NDP is to set out the public capital investment to achieve the National Strategic Outcomes as set out within the National Planning Framework. A number of key energy initiatives, proposed to diversify energy resources and assist in the transition towards a decarbonised society are set out with the NDP further emphasises National Strategic Outcome 8: Transition to Sustainable Energy by stating that: 'Ireland's energy system requires a radical transformation in order to achieve its 2030 and 2050 energy and climate objectives. This means that how we generate energy and how we use it, has to fundamentally change. This change is already underway with the increasing share of renewables in our energy mix and the progress we are making on energy efficiency. Investment in renewable energy sources, ongoing capacity renewal, and future technology affords Ireland the opportunity to comprehensively decarbonise our energy generation. By 2030, peat and coal will no longer have a role in electricity generation in Ireland. The use of peat will be progressively eliminated by 2030 by converting peat power plants to more sustainable low-carbon technologies.'

To achieve a Low-Carbon, Climate Resilient Society, the Plan outlines a New Renewable Electricity Support Scheme to support up to 4,500 megawatts of additional renewable electricity by 2030.

5.1.3. Ireland's Transition to a Low Carbon Energy Future 2015-2030

This document is a complete energy policy update, which sets out a framework to guide policy up to 2030. Its objective is to guide a transition, which sets out a vision for transforming Ireland's fossil fuel-based energy sector into a clean, low carbon system. It states that under Directive 2009/28/EC the government is legally obliged to ensure that by 2020, at least 16% of all energy consumed in the state is from renewable sources, with a sub-target of 40% in the electricity generation sector. It notes that onshore wind will continue to make a significant contribution but that the next phase of Ireland's energy transition will see the deployment of additional technologies as solar, offshore wind and ocean technologies mature and become more cost-effective.

5.1.4. Climate Action Plan 2023

The Climate Action Plan (CAP) 2023 was adopted in December 2022 and follows a number of predecessors which arose following the declaration of a climate and biodiversity emergency by the Irish Government. The Plan seeks to identify how Ireland will achieve its

2030 targets for carbon emissions by sector and through a series of actions. The overarching requirement in the Climate Action Plan as they relate to electricity require transformational policies, measures and actions, and societal change to increase the deployment of renewable energy generation, strengthen the grid, and meet the demand for flexibility in response to the challenge.

The Plan seeks to reduce the State's greenhouse gas emissions by 51% by 2030. One of the most important measures increasing the proportion of renewable electricity to up to 80% by 2030, including a target of 9 GW from onshore wind, 8 GW from solar and at least 5 Gigawatts of offshore wind energy by 2030.

5.1.5. Wind Energy Development Guidelines 2006

The following sections of the Guidelines are of particular relevance:

- Section 5.6 discusses noise impacts, which should be assessed by reference to the nature and character of noise sensitive locations i.e. any occupied house, hostel, health building or place of worship and may include areas of particular scenic quality or special recreational importance. In general noise is unlikely to be a significant problem where the distance from the nearest noise sensitive property is more than 500m.
- Section 5.12 notes that careful site selection, design and planning and good use of relevant software can help to reduce the possibility of shadow flicker in the first instance. It is recommended in that shadow flicker at neighbouring offices and dwellings within 500m should not exceed 30 hours per year or 30 minutes per day. The potential for shadow flicker is very low at distances greater than 10 rotor diameters from a turbine.
- Chapter 6 relates to aesthetic considerations in siting and design. Regard should be had to profile, numbers, spacing and visual impact and the landscape character. Account should be taken of inter-visibility of sites and the cumulative impact of developments.
- 5.1.6. Draft Wind Energy Development Guidelines 2019

Chapter 5 – considering an application for wind energy development. A planning authority may consider some if not all of the following matters:

- Environmental assessments (EIA, AA etc.)
- Community engagement and participation aspects of the proposal
- Grid Connection details
- Geology and ground conditions, including peat stability; and management plans to deal with any potential material impact. Reference should be made to the National Landslide Susceptibility Map to confirm ground conditions are suitable stable for project;
- Site drainage and hydrological effects, such as water supply and quality and watercourse crossings; Site drainage considerations for access roads/tracks, separate in addition to the impact of the actual turbines management plans to deal with any potential material impact on watercourses; the hydrological table; flood risk including mitigation measures;
- Landscape and visual impact assessment, including the size, scale and layout and the degree to which the wind energy project is visible over certain areas and in certain views;
- Visual impact of ancillary development, such as grid connection and access roads;
- Potential impact of the project on natural heritage, to include direct and indirect effects on protected sites or species, on habitats of ecological sensitivity and biodiversity value and where necessary, management plans to deal with the satisfactory co-existence of the wind energy development and the particular species/habitat identified;
- Potential impact of the project on the built heritage including archaeological and architectural heritage;
- It is recommended that consideration of carbon emissions balance is demonstrated when the development of wind energy developments requires peat extraction.
- Local environmental impacts including noise, shadow flicker, electromagnetic interference, etc.;
- Adequacy of local access road network to facilitate construction of the project and transportation of large machinery and turbine parts to site, including a traffic management plan;
- Information on any cumulative effects due to other projects, including effects on natural heritage and visual effects;
- Information on the location of quarries to be used or borrow pits proposed during the construction phase and associated remedial works thereafter;
- Disposal or elimination of waste/surplus material from construction/site clearance, particularly significant for peatland sites; and
- Decommissioning considerations.

Notable changes within the draft guidelines relate to community engagement, noise and separation distance.

Noise

- Section 5.7.4 - The 'preferred draft approach', proposes noise restriction limits consistent with World Health Organisation Guidelines, proposing a relative rated noise limit of 5dB(A) above existing background noise within the range of 35 to 43dB(A), with 43dB(A) being the maximum noise limit permitted, day or night. The noise limits will apply to outdoor locations at any residential or noise sensitive properties.

Shadow Flicker

- Section 5.8.1 - The relevant planning authority or An Bord Pleanála should require that the applicant shall provide evidence as part of the planning application that shadow flicker control mechanisms will be in place for the operational duration of the wind energy development project.

Community Investment

- Section 5.10 - The Code of Practice for Wind Energy Development in Ireland Guidelines for Community Engagement issued by the Department of Communications, Climate Action and Environment (December 2016) sets out to ensure that wind energy development in Ireland is undertaken in observance with the best industry practices, and with the full engagement of communities around the country.

Visual Impact

- Section 6.4- Siting of Wind energy projects.

Set back

- Section 6.18.1 Appropriate Setback Distance to apply - The potential for visual disturbance can be considered as dependent on the scale of the proposed turbine and the associated distance. Thus, a setback which is the function of size of the turbine should be key to setting the appropriate setback. Taking account of the various factors outlined above, a setback distance for visual amenity purposes of 4 times the tip height should apply between a wind turbine and the nearest point of the curtilage of any residential property in the vicinity of the proposed development, subject to a mandatory minimum setback of 500 metres.
- Policy SPPR 2 – Set back.
- Section 6.18.2 Exceptions to the mandatory minimum setbacks - An exception may be provided for a lower setback requirement from existing or permitted dwellings or other sensitive properties to new turbines where the owner(s) and occupier(s) of the relevant property or properties are agreeable to same but the noise requirements of these Guidelines must be capable of being complied with in all cases"

- 27.** The inspector also identified national and European legislation and policy as follows:
"9.1.3. Policy Context and Guidance (see section 5 above) which includes reference to the following:

EU Directives and Policies

- EU Renewable Energy Directive 2009/28/EC
- European 2020 Strategy for Growth
- 2030 Climate and Energy Framework
- Energy Roadmap 2050
- Recast Renewable Energy Directive (RED2)
- European Green Deal

National Policy

- Climate Action and Low Carbon Development Act 2015
- Project Ireland 2040: The National Planning Framework
- Project Ireland 2040: National Development Plan 2018-2027
- Climate Action Plan 2019
- Climate Action and Low Carbon Development (Amendment) Bill 2020
- Department of Environment Heritage and Local Government Planning Guidelines for Wind Energy (June 2006)
- Draft Revised Wind Energy Guidelines (Published for Consultation on 12th December 2019)
- National Landscape Strategy for Ireland 2015-2015 (DAHG)
- Code of Practice for Wind Energy Development in Ireland Guidelines for Community Engagement issued by the Department of Communications, Climate Action and Environment (December 2016)"

- 28.** The inspector applied this *inter alia* as follows (emphasis added):

"14.2.2. Need for Proposed Development

This matter is addressed in some detail in the documentation received and it is not intended to repeat same. The proposed windfarm would be compatible with European and National climate change and renewable energy policies as summarised in section 5 above. It would contribute to the achievement of European and National renewable energy targets, and in

particular the objectives of the Climate Action Plan (2023) which seeks to reduce the State's greenhouse gas emissions by 51% by 2030 and increase the proportion of renewable electricity to up to 80% by 2030, including a target of 9 GW from onshore wind. Providing the physical infrastructure, in this instance onshore wind turbines, to facilitate the achievements of this measure is critical thereby providing a demonstrable need for the proposed development.

While it is noted that many of the submissions reference their agreement in principle in respect of merits of renewable energy, there is resistance to the location of such a proposal within the locality for the range of reasons outlined in the summary of submissions received above. In order to address Climate Change, I would suggest that other elements of our environment and the context within which the environment is perceived must also change. This includes in particular the visual context of an area which cannot be expected to remain unchanged in perpetuity but particularly within the context of a climate emergency."

Domestic law issues

Core ground 1 – lack of consideration

29. Core ground 1 is:

"1. The decision to grant planning permission by order dated 9th November 2023 ('the impugned decision') (ABP-308885-20) is invalid as the Board erred in law by excluding from its decision-making relevant considerations, specifically material relating to wind turbine noise other than the Wind Energy Development Guidelines of 2006 ('WEDG 2006') and/or did not comply with the requirements of fair procedures and natural justice, further particulars of which are set out at Part 2 below."

30. The parties' positions as recorded in the statement of case (covering core grounds 1 to 3 collectively) are summarised as follows:

"Applicant: In making its decision the Board erred in law by failing to consider in its decision-making relevant considerations, specifically material relating to wind turbine noise other than the Wind Energy Development Guidelines of 2006. In failing to engage with the submissions made by the applicant in respect of likely noise impacts the Board acted contrary to fair procedures and natural and Constitutional justice and to the decision of the Supreme Court in *Balz v An Bord Pleanála*. The Board has failed to have any or any adequate regard to the fact that, having regard to the decision in *Smyth v- RPA* (and in particular paragraphs 34.9 to 34.11) that in setting conditions they are setting standards 'for permitted environmental effects and impacts of the construction and operation' of a major infrastructure project (para 34.9). The Board has not conducted any enquiry as to what would constitute best practice but rather has relied entirely on the out of date 2006 standard. This is to ignore the comment of O'Donnell J. (as he then was) in *Balz* at p.49: 'it is inevitable that, particularly where guidelines deal with matters of technology or science, the knowledge in that field may develop, or that the experience of application of the existing guidelines to particular circumstances produced greater knowledge and insight'.

Board: The Board's Decision is not invalid as alleged at Core Grounds 1 to 3 or at all. It is manifestly incorrect for the Applicant to assert that the Board made its Decision by having regard to the Wind Energy Development Guidelines of 2006 (the 'WEDG 2006') only. It is, for example, perfectly clear from the Inspector's Report that the Board did in fact consider materials relating to wind turbine noise other than the WEDG 2006. In this connection, the Inspector expressly considered other methodologies for assessing noise impact, in particular the Draft Revised Wind Energy Development Guidelines (December 2019) (the 'Draft WEDG 2019'), the World Health Organization 'Environmental Noise Guidelines for the European Region' (2018), and British Standard BS 4142: 2014 – Methods for rating and assessing industrial and commercial sound, as well as other guidance on wind development noise including the Institute of Acoustics (IOA) 'A Good Practice Guide to the Application of ETSU R 97 for the Assessment and Rating of Wind Turbine Noise', prior to concluding that the noise limits in the WEDG 2006 should be applied to the proposed development. The Applicant's assertions as regards the Board's treatment of its submissions are also clearly inaccurate. On any objective interpretation, the submissions made on behalf of the Applicant, including submissions based on materials other than the WEDG 2006, were clearly considered by the Board and its Inspector. The Applicant has failed to overcome or displace the evidential onus that the Board did not have regard to the Applicant's submissions/observations or to a part of same, including regarding alternative methodologies for the assessment of the noise impact of the proposed development.

The Applicant's reliance on *Smyth v. RPA* [2010] IEHC 290 and on *Balz v. An Bord Pleanála* [2019] IESC 90, [2020] 1 ILRM 367 is misplaced. It is denied that the Board acted in a manner contrary to fair procedures and natural and constitutional justice and/or contrary to

the decision in Balz as alleged by the Applicant or at all. The Board's Decision was not made in breach of obligations outlined by the Supreme Court in Balz or any legal principle outlined in Smyth. Insofar as the Applicant's complaint as against the Board's Decision in substance involves a challenge to the WEDG 2006, those statutory guidelines enjoy a presumption of validity, same are not challenged in these proceedings, and it is not open to the Applicant to challenge the validity of the Board's Decision by way of collateral challenge to the WEDG 2006. The Board was obliged to have regard to the WEDG 2006 in accordance with, *inter alia*, s.28 of the 2000 Act and expressly had regard to same (see e.g., page 3 of the Board Order), with the weight to be attached to same being a matter for the Board as decision-maker, subject to review for irrationality/unreasonableness. In this connection, the Applicant has not discharged the onus of establishing that the Board's Decision is vitiated by irrationality/unreasonableness. Further, it was not unreasonable for the Board to continue to give weight to the WEDG 2006 as the existing, operative guidelines issued under s.28 of the 2000 Act. It is not a matter for the Board to determine whether the WEDG 2006 should be updated and in what respect. That is a policy-making function. In addition, the Inspector did expressly consider other methodologies for assessing noise impact as aforesaid. Insofar as the Applicant advances a merits-based challenge to the Board's Decision by reference, *inter alia*, to the WEDG 2006, same does not constitute grounds for *certiorari* of the Board's Decision or any other relief.

Notice Party: The Board did not fail to consider material relating to wind turbine noise other than the Wind Energy Development Guidelines 2006 ('WEDG 2006'), or to engage with the submissions made by the Applicant in respect of likely noise impacts. The Applicant's bare assertion to the contrary is made without any engagement with the Board's decision or the documentation before the Board and is manifestly incorrect. The Board did not act contrary to fair procedures or natural justice and the Applicant's claim is premised on an interpretation of the decision in *Balz v An Bord Pleanála* [2020] 1 ILRM 367 ('Balz') that is unequivocally incorrect. The argument now advanced by the Applicant in relation to nuisance, even if the Applicant had correctly interpreted the decision in *Smyth v. Railway Procurement Agency* [2010] IEHC 290 ('Smyth'), is manifestly unstateable. Moreover, the Applicant's interpretation of *Smyth* as advanced in its submission was recently confirmed as being incorrect in *Webster & Rollo v. Meenacloghspar (Wind) Limited* [2024] IEHC 136. The Board did not rely entirely on WEDG 2006 when making its decision, but rather considered all relevant materials before it with respect to noise impacts prior to reaching a decision, which decision was clearly open to it having regard to that material. In doing so, the Board acted in a manner entirely consistent with the decision of the Supreme Court in *Balz*."

31. An initial problem which I need to note here is that the applicant's actual proposition was quite slippery to get hold of. Obviously, an applicant is, in principle, confined to the pleaded case at all levels of the system.

32. Let's look in detail at the pleadings under the heading of core grounds 1 to 3:

"Part 2 - Particulars of Legal Grounds

Domestic Law Grounds

CORE GROUNDS 1 - 3:

1. By way of further particulars of the claim the Board's Inspector had regard in her report to the WEDG 2006 in assessing the noise impacts of the proposed wind farm development and her report was adopted by the Board. These Guidelines are based on research carried out for the UK Department of Trade and Industry in the mid 1990s and published by the Energy Technology Support Unit ('ETSU'). In short, the scientific base of the advisory material to which the Board had regard in making its decision as to the likely significant noise impacts of the proposed development is now over a quarter of a century old."

33. That makes the obvious chronological point that the ETSU 1997 guidelines, in isolation, were out of date, but not a legal reason why that leads to *certiorari*.

34. The grounds continue:

"2. In this regard, the Inspector stated as follows:

'Reference is made to the modelling undertaken against the 2019 Draft Guidelines and the 'failure' of 17 of the 18 properties to meet the guidelines. I would agree with the applicant that the proposal has been appropriately assessed against the limits applied in the 2006 Guidelines which remain in force. There is concern expressed that the assessment in the EIAR is against the 2006 Guidelines with the assessment in the 2019 Guidelines included in an Appendix which an observer believes is contrary to the Directive. I would not agree. The appendix is referenced in a number of locations in Chapter 7 and is quite clear. Rather than confuse by including it in the main Chapter it is available for review within a clear context.

Again, I would outline that the 2006 Guidelines are the relevant section 28 guidelines that the Board must have regard to in coming to their decision.”

- 35.** That is just a statement of legal context, not a ground for relief. The grounds continue:
 “3. It is the Applicant’s case that the WEDG 2006 are seriously outdated and while the Board may have had to have regard to them it was not bound by them. However, the Board’s inspector appears to have formed the view that the Guidelines remain in force. The Guidelines have no force as such as the Board has no obligation to follow same. Moreover, the field of windfarm noise has greatly evolved since 2006. As was observed by O’Donnell J. (as he then was) in *Balz and Heubach v An Bord Pleanala* [2019] IESC 90 at p.49: ‘..it is inevitable that, particularly where guidelines deal with matters of technology or science, the knowledge in that field may develop, or that the experience of application of the existing guidelines to particular circumstances produced greater knowledge and insight’.”
- 36.** This mix of points, bordering on word salad, seems to advance three propositions: (a) the guidelines were outdated (a point already made) (b) the board isn’t bound by the 2006 guidelines (again there’s no statement of why this leads to *certiorari*) and (c) the inspector’s view that the guidelines were in force was incorrect.
- 37.** The grounds continue:
 “4. The learned judge then asked rhetorically ‘What is to occur then?’ and gave his own view in the matter at p.50 as follows: ‘...it is absolutely open to a party...to put before...the Board information, material and submissions suggesting that the decision-maker should depart from the guidelines to a greater or lesser extent’.”
- 38.** That is just a statement of legal context, not a ground for relief. The grounds continue:
 “5. The learned judge continued at p.51: ‘A decision-maker must engage with such a submission, and if there is evidence that that there is a consensus that the guidelines are no longer widely accepted within the relevant expert community, then that should lead to a reduced reliance on the guidelines as, in themselves, sufficient to ground a decision on any aspect of an application’.”
- 39.** That is also just a statement of legal context, not a ground for relief. The grounds continue:
 “6. As O’Donnell J. noted at p.52: ‘Here, the relevant guidelines were more than a decade old, and the relevant portion was based on the ETSU document which was more than 20 years old. The guidelines were given in an area where knowledge was advancing considerably’.”
- 40.** That is yet again just a statement of legal context, not a ground for relief. The grounds continue:
 “7. The Board failed to consider the submissions of the Applicant with regard to more up to date thinking on the impact of noise from wind turbines including, but not limited to, the Draft Wind Energy Guidelines published by the Government in 2019 (‘DWEG 2019’). By failing in this manner the Inspector, and the Board, erred in law ‘and meant unavoidably that [they] had excluded from [their] decision-making relevant considerations’ as was concluded by O’Donnell J. in *Balz* at p.53.”
- 41.** This at least pleads a recognisable point which is failure to consider the applicant’s submission. The words “but not limited to” clearly fall foul of the requirement under O. 84 RSC to plead with precision.
- 42.** The grounds continue:
 “8. Moreover, the applicant pointed out that even applying the WEDG, the development showed significant exceedances of the levels recommended therein. The Board’s inspector failed to properly or at all to engage with the applicant’s submissions. Similarly, the applicant submitted a report by an expert, Mr. Bowdler which received scant regard by the Inspector. The applicant submitted that it was clear from this evidence and the evidence of the objectors that members of the applicant would be subjected to significant noise levels in their properties. These noise levels would be such as would constitute a nuisance and would exceed the thresholds set out in other guidance.”
- 43.** Again multiple points seem to be being made here: (a) failure to engage with submissions or giving scant regard to them (b) creation of a nuisance.
- 44.** The grounds continue:
 “9. The Board had no or no adequate regard for these submissions, instead, the Board’s inspector states as follows:
 I would also note that Mr Bowdler, in his observation proposes a number of alternative assessment methods. Firstly, the alternative assessment by absolute level proposed with reference to the WHO Guidelines 2018 is reviewed by the applicant and I consider that their response to same is robust. Effectively the metrics in the WHO Guidelines (Lden) are different to those in the 2006 Guidelines and ETSU-R-97 with the Lden an annual weighted sound pressure level which the applicant notes is rarely used for wind farm noise assessment

due to practical difficulties. I would also refer the Board to the fact that the Institute of Acoustics has not made any changes to the good practice guidance set out in the IOA GPG to incorporate the 2018 WHO guidelines. The second alternative is assessment by relative level, BS 4142:2014 which is used to assess the impact of industrial and commercial noise on residential receptors and compares a Rating Noise level (the predicted or measured level plus any corrections to account for noise character) against the background sound levels. The applicant responds to the use of this method by referring to the issues raised about this method in the ETSU document and I consider that the rebuttal clearly outlines why this methodology is not necessary in the current context. While I note that Mr. William McSweeney in particular outlines why this standard can be applied and disagrees with a number of the responses provided by the applicant I consider that the applicant has provided a satisfactory response to the issues raised. I would conclude by stating that it is not the role of the Board to dictate the methodology used by the applicant but rather to assess the information provided."

- 45.** This repeats the failure-to-have-regard complaint. The grounds continue:
 "10. This is an entirely unsatisfactory and incorrect approach to this critical issue. Firstly, it is not oriented at the correct issue, namely the prescription of an appropriate noise level at individual sensitive receptors. The first question must be what is the appropriate standard of noise to be applied in this instance? This question is not asked nor is it answered. The decision proceeds on the basis that the Guideline levels are the appropriate standard. This is not correct. These standards are out of date and are currently being revised. They cannot simply be applied in this manner."
- 46.** A claim that the decision is "entirely unsatisfactory" isn't a legally cognisable ground of judicial review. The point being made here seems to be that the board asked the wrong question, namely whether the 2006 guidelines were complied with rather than what is the appropriate standard of noise.
- 47.** The grounds continue:
 "11. Secondly, the Inspector appears to be of the view that it is not the role of the Board to dictate the methodology used by the applicant but rather to assess the information provided. This is entirely incorrect. It is clear from the decision in Smyth that is precisely the role of ABP. In fact, given the number of windfarms consented by ABP over the last two decades, it is astonishing that the Board has not itself fixed on a clear, coherent methodology including applying appropriate limits in particular situations. However, no such methodology exists and noise limits vary from decision to decision. In the instant case, no consideration has been given to what site specific levels or, as is clear from the above paragraph, what the relevant methodology ought be. This is contrary to national and EU law."
- 48.** It is hard to categorise this plea – although one can say with certitude that the bald statement that "[t]his is contrary to national and EU law" doesn't even attempt to comply with the standards of pleading required by Order 84 and is utterly impermissible. It is about as far from minimum basic standards of pleading as one can get.
- 49.** The error pleaded seems to be that the inspector was wrong in law in saying that the board's role was assessment of the material rather than dictation of the methodology. The lack of a coherent methodology "over the last two decades" is not a basis to quash an individual consent.
- 50.** The grounds continue:
 "12. It is also clearly in breach of the obligations outlined by the Supreme Court in Balz. It is clear from the above paragraphs that the obligation on the Board is to have regard to the Guidelines but then go and do its own assessment (including for EIA) of the implications on neighbouring properties. Under Smyth the Board must determine in accordance with best scientific practice, the level of noise that would be considered acceptable by a normal, reasonable person, i.e. the level at which noise becomes an actionable nuisance. The Board has failed to conduct this inquiry and has instead simply applied the Guidelines. As per Balz above, this is not what is required."
- 51.** The complaint here is impliedly that the board failed to do its own assessment of noise implications generally, and in particular to the nuisance standard. This seems to repeat points already made.
- 52.** The grounds continue:
 "13. Instead, as is set out by Judge O'Donnell in para. 51 above, with the advance of time and science, there should be a reduced reliance on the Guidelines and new standards and methodologies ought be developed and applied. Indeed, in the Balz case itself, the Board fixed on a lower noise limit than that specified in the Guidelines. Even so, the decision was quashed on the basis that the Board did not properly consider a similar submission to that made herein. In the instant case, a more comprehensive submission has received in

less attention and, an out of date (now nearly two decades old) limit from the Guidelines has been imposed.”

- 53.** This again seems to repeat points already made about the need for up-to-date standard-setting.
- 54.** The grounds continue:
 “14. Thirdly, the information available remains uncertain. The exact turbine type remains unknown and the precise noise impacts arising cannot be predicted. This is particularly true in the context of amplitude modulation. This has now been accepted as a significant noise impact, however, no attempt to deal with this by means of penalty or otherwise has been made. Again, this is a significant failure and significant lacuna in the context of EIA. Moreover, the noise condition leaves significant matters in this regard to be left over until post consent agreement with the planning authority.”
- 55.** The plea here seems to be: (a) lack of a penalty scheme and (b) a lacuna in assessment
- 56.** The grounds continue:
 “15. The impugned decision imparts significant property rights to the Notice Party. The noise conditions of the decision are based on a flawed application of outdated technical advice. Nevertheless if compliance with those conditions by the Notice Party can be demonstrated it in effect provides an immunity to enforcement proceedings and also against common law suit for nuisance by the Applicant.”
- 57.** This seems to be a repetition of the nuisance argument.
- 58.** The grounds continue:
 “16. This much can be deduced from the comments of Charleton J. in *Lanigan & Ors v Barry & Ors* [2008] IEHC 29 at p.22 quoted by Laffoy J. in *Smyth v Rail Procurement Authority* [2010] IEHC 290 at p.20: ‘...where planning consent is given after due process for a development, including a change of use, the issue as to what is a nuisance will be determined according to the character of that neighbourhood as authorised by relevant planning permissions and as declared by the development plan.’”
- 59.** That is merely legal context, albeit not very complete legal context since it doesn’t refer to the Supreme Court decision in *Lanigan*.
- 60.** The grounds continue:
 “17. The existence of this effective immunity from a potential future common law tort of nuisance on the part of the Applicant is an intolerable infringement of the Applicant’s constitutional rights under Art.s 40.3 and 43 of Bunreacht na hEireann.”
- 61.** This doesn’t add a whole lot to the nuisance argument albeit that it at least pleads a specific provision of a legally operative instrument of positive law – for the first time in the sub-grounds.
- 62.** We can turn now to an analysis of these points insofar as they arise.
- 63.** First of all some terminological clarifications. The Energy Technology Support Unit (**ETSU**) was a UK quango under the Department of Trade and Industry at the material time, which produced a large number of reports on various technical aspects of the energy industry. One of those reports was a report of a Working Group on Noise from Wind Turbines entitled *The Assessment & Rating of Noise from Wind Farms* ETSU-R-97 (September 1996) https://assets.publishing.service.gov.uk/media/5a798b42ed915d07d35b655a/ETSU_Full_copy_Searchable.pdf
- 64.** The Institute of Acoustics (**IOA**) (<https://www.ioa.org.uk/>) describes itself as “the UK’s Professional body for those working in Acoustics, Noise, Sound and Vibration”. The IOA has produced a good practice guide in this area dated 2013: <https://www.ioa.org.uk/sites/default/files/IOA%20Good%20Practice%20Guide%20on%20Wind%20Turbine%20Noise%20-%20May%202013.pdf>.
- 65.** Another 2013 document of relevance is a study, Sabine Von Hunerbein et al., “Wind Turbine Amplitude Modulation: Research to Improve Understanding as to its Cause & Effect Work Package B(2): Development of an AM Dose-Response Relationship”, December 2013, a book chapter in Matthew Cand ed., *Wind Turbine Amplitude Modulation: Research to Improve Understanding as to its Cause & Effect* (pp. 140-265) (<http://www.renewableuk.com/en/publications/index.cfm/wind-turbine-amplitude-modulation>).
- 66.** The World Health Organization (**WHO**) adopted Environmental noise guidelines for the European Region in 2018: <https://www.who.int/europe/publications/i/item/9789289053563>. It doesn’t add much to the AM debate – one inconclusive paragraph in a 181-page document (at p. 85):
 “The noise emitted from wind turbines has other characteristics, including the repetitive nature of the sound of the rotating blades and atmospheric influence leading to a variability of amplitude modulation, which can be a source of above average annoyance (Schäffer et al., 2016 [Beat Schäffer *et al.*, “Short-term annoyance reactions to stationary and time-varying wind turbine and road traffic noise: a laboratory study” (2016) 139(5) J Acoust Soc

Am. 2949]). This differentiates it from noise from other sources and has not always been properly characterized. Standard methods of measuring sound, most commonly including A-weighting, may not capture the low-frequency sound and amplitude modulation characteristic of wind turbine noise (Council of Canadian Academies, 2015 [Expert Panel on Wind Turbine Noise and Human Health, *Understanding the evidence: wind turbine noise* (Council of Canadian Academies 2015) <https://cca-reports.ca/wp-content/uploads/2018/10/windturbineoisefullreporten.pdf>])."

67. More recently, consultants **WSP** prepared a Report for HM government: a review of noise guidance for onshore wind turbines recommending updates to the ETSU-R-97 standard, including in relation to AM (<https://www.wsp.com/en-gb/insights/wind-turbine-noise-report>). This seems to have been originally dated October 2022 although one can infer from Mr Singleton's first affidavit that (contrary to the written addendum by way of applicant's submission on 25th October 2024) it does not appear to have been published until February 2023 at the earliest (*i.e.*, after the inspector's report). It doesn't make any difference when it was published though because it wasn't brought to the board's attention at the time or because it isn't in principle inconsistent with the board's decision or for both reasons.

68. TNEI group (**TNEI**) (<https://www.tneigroup.com/about/>) are expert consultants in the energy sector who were engaged by the notice party to assist with the application for permission.

69. The applicant's submission did contain some references to noise, which they summarise as follows:

- (i) reference is made to "Noise" at p. 500 *et seq.* of the version in the Book of Exhibits;
- (ii) reference is made to the relevance of the 2006 guidelines at p. 501;
- (iii) the respondent was requested to impose a condition relating to AM rather than leaving the matter of potential future mitigation "should it arise" to the turbine manufacturers (pp. 515-517);
- (iv) it was noted that the EIA directive would require some assessment to be made of the significant environmental effects of AM;
- (v) in his report Mr Bowdler (p. 721, *recte* 728) stated (according to the applicant's characterisation) that no account has been taken in the EIAR of "noise character", including AM (but even without taking into account the replying comments of the opposing parties, it's clear on the face of the material that this is not a correct reading of Mr Bowdler's report since the cited passage refers to the report itself not the EIAR, which obviously does deal to some extent with noise character in ch. 7, and the applicant quotes passages that can be characterised to that effect); and
- (vi) at p. 747 Mr Bowdler presents a "Note on Amplitude Modulation" in which he observes "it is now recognised that the possibility of AM is significant in any modern wind farm".

70. The inspector's report notes 396 submissions having been made. These were stated to have been considered, so in the absence of proof to the contrary, the claim of lack of consideration is a misunderstanding. This ground illustrates the classic applicant's confusion between lack of express narrative discussion and lack of consideration. The statement that submissions were considered has not been evidentially displaced: *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418, [2002] 1 I.L.R.M. 401.

71. The applicant argued that by analogy with *Balz*, the board failed to allow the applicant to advance arguments that the 2006 guidelines were out of date and failed to engage with those submissions. But that isn't compatible with the facts here.

72. The inspector acknowledged submissions that the 2006 guidelines were out of date, summarising the relevant submissions at p. 44:

"7.1.5. Wind Energy Guidelines

- Wind Energy Guidelines out of date and not fit for purpose and reflect different turbine height
- Proposal premature pending updated version of Guidelines and request no more wind farms are approved until Guidelines are released
- Draft 2019 guidelines do not go far enough to address set back distance with 750m not going far enough.
- Best international practice such as 10 times height rule should be followed
- Wind energy guidelines state details of feasible options for grid connection should be provided."

73. The inspector expressly deals with the issue of best practice, in section 14.2.3.1 (emphasis added):

"Guidelines and National and Regional Policy

There is a positive presumption in favour of renewable energy development at National, Regional and Local policy levels. At national level, the proposed development complies with national planning policy as set out in the National Planning Framework Plan,

2018-2040 which recognises the need to move toward a low carbon and climate resilient society with a sustainable renewable energy supply.

The 2006 Wind Energy Development Guidelines (and 2019 Draft Guidelines) advise that a reasonable balance must be achieved between meeting national policy on renewable energy and the proper planning and sustainable development of an area.

The Guidelines also state that projects should not adversely affect any European sites, have an adverse impact on birds, give rise to peat instability or adversely affect drainage patterns, cultural heritage, sensitive landscapes, the local road network or residential amenity. These matters will be addressed specifically, where relevant, in the relevant sections of this assessment and the EIA and AA below.

In terms of the consideration that the current Guidelines are not fit for purpose, while it is acknowledged that the Guidelines date from 2006, draft Guidelines dated 2019 have been prepared and consenting authorities await the finalisation of same by the Department which according to the CAP 2023 (Table 12.6) is expected to be redrafted in 2023 and published in 2024. Until that time, the existing guidelines remain in force but with the applicant in this instance opting to apply key elements of the draft guidelines in terms of the proposed development – such as the minimum set back of 4 times the tip height and zero-shadow flicker. I consider that this is appropriate and seeks to apply best practice to the consideration of the proposed development.

At regional level, the policies reiterate those at National Level in the main and I note it is outlined that the RSES recognises and supports the many opportunities for wind as a major source of renewable energy and contends that Wind Energy technology has an important role in delivering value and clean electricity for Ireland.”

74. When the inspector speaks of a presumption in favour of renewable energy, we have to understand that in the context in which that is stated, which is the sense that national, European and international law and policy require a significant increase in provision of such energy (with a view to replacing rather than just adding to the combustion of fossil fuels – obviously there’s no point in climate terms unless the latter condition is satisfied). That isn’t quite what a lawyer means by a presumption (*i.e.*, that the application will be granted unless there is sufficient reason to the contrary), but the term is being used informally here. It is being argued in other proceedings that there is in fact a legal presumption, or something equivalent, in favour of renewable energy by virtue of climate legislation, but that isn’t what the inspector means in this passage. We can cross that bridge when we get to it in those other cases. But insofar as, to use a sociological phrase, the inspector is making a bid for a permission structure to facilitate the grant of consents for renewable energy, I would broadly endorse that as an insightful approach as long as we understand the implicit qualification that contrary arguments require consideration in any given case.

75. The applicant semantically seizes on the term “in force”. But that phrase isn’t being used in its most mandatory sense (an operative legal instrument that has current binding effects). It means currently applicable. That sense of “in force” is legitimate as long as we understand it to mean merely operative rather than mandatorily operative. Even legislation can be in force but not actually include mandatory provisions (it can be purely enabling or declaratory for example). The term doesn’t mean that the guidelines are mandatory, and the context indicates that the inspector didn’t mean that either. The report should be read in a sense that makes it coherent and sensible rather than the opposite.

76. When presented with draft guidelines, there are various possible reactions:

- (i) to disregard them altogether notwithstanding submissions relying on them in some relevant way – that was the problem in *Balz*;
- (ii) to have regard to them as part of the evolving factual or scientific context or in illuminating what amounts to best practice – that is in principle lawful; or
- (iii) to have regard to them as if they were government policy or something approaching that – that was akin to the problematic issue in *Shannon LNG v. An Bord Pleanála* [2024] IEHC 555 (Unreported, High Court, 30th September 2024).

77. So there is no question here of a *Balz*-type problem. The 2019 draft guidelines are considered insofar as they are represented as best practice. That is lawful. The alleged failure of consideration did not actually happen.

78. The inspector went on to address the applicant’s issues expressly at 14.5.2:

“The TNEI experts state, in reference to amplitude modulation, that in recent times the acoustics community has sought to make a distinction between the AM discussed within ETSU-R-97, which is expected at most wind farms and as such may be considered as ‘Normal Amplitude Modulation’ (NAM), compared to the unusual AM that has sometimes been heard at some wind farms, hereinafter referred to as ‘Other Amplitude Modulation’ (OAM). In terms of requests for a planning condition to address AM, it is stated that at present there is no method available to predict AM and it is not possible to predict what impact the inclusion

of an AM condition would have on the operation of the wind farm. The recommendation to impose a planning condition and the associated penalty scheme is at odds with the advice from the IOA A Good Practice Guide to The Application Of Etsu-R-97 For The Assessment And Rating Of Wind Turbine Noise (GPG), which currently states (paragraph 7.2.10) that 'the evidence in relation to "Excess" or "Other" Amplitude Modulation (AM) is still developing. At the time of writing, current practice is not to assign a planning condition to deal with AM.' I consider that this matter has been satisfactorily addressed.

Reference is made to the modelling undertaken against the 2019 Draft Guidelines and the 'failure' of 17 of the 18 properties to meet the guidelines. I would agree with the applicant that the proposal has been appropriately assessed against the limits applied in the 2006 Guidelines which remain in force. There is concern expressed that the assessment in the EIAR is against the 2006 Guidelines with the assessment in the 2019 Guidelines included in an Appendix which an observer believes is contrary to the Directive. I would not agree. The appendix is referenced in a number of locations in Chapter 7 and is quite clear. Rather than confuse by including it in the main Chapter it is available for review within a clear context. Again, I would outline that the 2006 Guidelines are the relevant section 28 guidelines that the Board must have regard to in coming to their decision.

In terms of specific matters raised by Mr Dick Bowdler in his submission the applicant has provided a detailed response noting that the details of wind shields are included in Appendix 7.1 of the EIAR, the co-ordinates of the LiDAR is provided which it is considered to be in an appropriate location. References to the applicability of elements of the 2006 Guidelines and I consider that the applicants defense of the lower fixed limit proposed, in the context of the Guidelines, is rationale and supported by the Guidelines currently in force.

I would also note that Mr Bowdler, in his observation proposes a number of alternative assessment methods. Firstly, the alternative assessment by absolute level proposed with reference to the WHO Guidelines 2018 is reviewed by the applicant and I consider that their response to same is robust. Effectively the metrics in the WHO Guidelines (Lden) are different to those in the 2006 Guidelines and ETSU-R-97 with the Lden an annual weighted sound pressure level which the applicant notes is rarely used for wind farm noise assessment due to practical difficulties. I would also refer the Board to the fact that the Institute of Acoustics has not made any changes to the good practice guidance set out in the IOA GPG to incorporate the 2018 WHO guidelines. The second alternative is assessment by relative level, BS 4142:2014 which is used to assess the impact of industrial and commercial noise on residential receptors and compares a Rating Noise level (the predicted or measured level plus any corrections to account for noise character) against the background sound levels. The applicant responds to the use of this method by referring to the issues raised about this method in the ETSU document and I consider that the rebuttal clearly outlines why this methodology is not necessary in the current context. While I note that Mr. William McSweeney in particular outlines why this standard can be applied and disagrees with a number of the responses provided by the applicant I consider that the applicant has provided a satisfactory response to the issues raised. I would conclude by stating that it is not the role of the Board to dictate the methodology used by the applicant but rather to assess the information provided."

79. The reference to the IOA report para. 7.2.10 is a typo, and should be 7.2.1. Furthermore the phrase "at time of writing" seems to mean 2013, as the applicant submitted, not 2022, as it is within the quotation.

80. In section 15.6.2.1 the inspector discusses the EIAR and further information by reference to the existing environment and clarifies that she is going well beyond the 2006 guidelines:

"In terms of methodology it is clarified that 'The Assessment and Rating of Noise from Wind Farm' (1996) published by the Department of Trade & Industry (UK) Energy Technology Support Unit (ETSU) and Institute of Acoustics' A Good Practice Guide to the Application of ETSU-R-97 for the Assessment and Rating of Wind Turbine Noise, (May 2013) (IoA GPG) has been used to supplement the guidance contained within the 'Wind Energy Development Guidelines' and 'Draft Revised Wind Energy Development Guidelines' publication as necessary. Table 7.2 provides the impact significance criteria applied in the assessment."

81. What one can see more generally in the 393-page inspector's report is the staggering range and variety of issues and objections raised in the huge number of submissions made. A vast amount of material to be dealt with creates a context whereby reasons, which of necessity involve summarisation, simply can't be indefinitely extensive. Can it seriously be said that a judicial review applicant is entitled to pluck out any one of the sub-issues numbering in the hundreds, call it the central issue, and demand *certiorari* on the basis that the reasoning could have been more developed? That isn't a workable procedure. Of course one has to look at whether there is a reason, but the law has to be workable in terms of how detailed that reason needs to be. The fact that the

applicant made a 700+ page submission covering a huge range of issues doesn't particularly help this argument. As regards reasons, the rule comes down to a requirement to give "the main reasons for the main issues" (*Connelly v. An Bord Pleanála* [2018] IESC 31, [2018] 2 I.L.R.M. 453, [2021] 2 I.R. 752, [2018] 7 JIC 1701; *Balscadden Road SAA Residents Association Limited v. An Bord Pleanála* [2020] IEHC 586, [2020] 11 JIC 2501 (Unreported, High Court, 25th November 2020), §39; *O'Donnell v. An Bord Pleanála* [2023] IEHC 381, [2023] 11 JIC 0102 (Unreported, High Court, 1st November 2023), §§45-57; *Save Roscam Peninsula CLG v. An Bord Pleanála (No.6)* [2024] IEHC 335 (Unreported, High Court, 7th June 2024), §87). This was complied with here.

82. Insofar as it is suggested that the board slavishly adhered to the 2006 guidelines rather than merely had regard to them, that abstract proposition simply isn't compatible with the actual decision, which did have regard to the guidelines but also to the arguments for a more demanding standard. So the caselaw on the relatively light burden of the obligation to "have regard" just isn't relevant and doesn't get the applicant anywhere (including *Glencar Explorations plc v. Mayo County Council* [2001] IESC 64, [2002] 1 I.L.R.M. 481, [2002] 1 I.R. 84; *McEvoy and Smith v. Meath County Council* [2003] IEHC 31, [2003] 1 I.L.R.M. 431, [2003] 1 I.R. 208; *Salmon Watch Ireland & Ors v. The Aquaculture Licences Appeals Board & Ors* [2024] IEHC 421 (Unreported, High Court, Holland J., 12th July 2024) at para. 1373; *Delaney v. Personal Injuries Assessment Board* [2024] IESC 10, [2024] 1 I.L.R.M. 189, [2024] 4 JIC 0906 at para. 114).

83. Specifically in addition to WEDG 2006, I agree with the opposing parties that it is relevant that the inspector referred to:

- (i) the draft WEDG 2019;
- (ii) WHO "Environmental Noise Guidelines for the European Region" (2018) (WHO 2018);
- (iii) British Standard BS 4142: 2014 – Methods for rating and assessing industrial and commercial sound (BS 4142:2014); and
- (iv) other guidance on wind development noise including the IOA "A Good Practice Guide to the Application of ETSU R 97 for the Assessment and Rating of Wind Turbine Noise" (IOA GPG 2013),

84. The applicant also submits that:

"19. The Board must also take cognisance of views of members of the public who make representations in determining what the ordinary person whose requirements are objectively reasonable would expect in terms of noise control. This requirement is clear from the judgment of Laffoy J. in *Smyth v Railway Procurement Agency* [[2001] IEHC 290] (see p.34.2)."

85. Insofar as the objection is that submissions that the 2006 guidelines were outdated as to noise was not considered is concerned, any concerns about the guidelines being out of date is something the board dealt with by considering both the guidelines and other subsequent material. Insofar as the objection is that points regarding AM were disregarded, that is not factually based. Sure, there were individual pieces of science both before and after the inspector's report that the applicant relies on, making particular reference to the WSP report and the December 2013 study, but an applicant has to do more than complain that such matters weren't referred to or followed.

86. Insofar as Mr Bowdler's affidavit at §19 suggests that no evaluation of AM "of any sort" was undertaken by the board, this is a misunderstanding which is clear on the face of the materials, particularly the inspector's report and the EIAR and further information insofar as that is endorsed by the inspector. For the avoidance of doubt, issue has been joined on it *via* the affidavit of Jim Singleton, acoustics consultant, of TNEI, sworn on 11th July 2023 in response to Mr Bowdler's affidavit sworn on 2nd July 2024. The documentation is clear on its face but if I am wrong about that and there is an evidential conflict, the absence of cross-examination means that the applicant can't succeed under this heading: *RAS Medical Ltd v. The Royal College of Surgeons in Ireland* [2019] IESC 4, [2019] 2 I.L.R.M. 273, [2019] 1 I.R. 63. What Mr Singleton says is:

"5. As already outlined in my Affidavit filed on 30 April 2024, TNEI were engaged by Fehily Timoney to provide additional expert noise assessment with respect to issues raised in the public consultation process in respect of inter alia AM. In addition, TNEI were asked to comment on the report by Richard Bowdler (the 'Bowdler Report') and the 'Note on Amplitude Modulation' by Richard Bowdler (the 'Note on Amplitude Modulation') included as part of the response from Nagle View Turbine Aware Group (the 'Applicant').

6. The Note on Amplitude Modulation stated inter alia that penalty schemes for AM have been devised in the UK and proposed in the 2019 Draft Revised Wind Energy Development Guidelines. The Affidavit of Richard Bowdler expands on that statement and exhibits a number of documents not referenced in the Bowdler Report or the Note on Amplitude Modulation.

7. I confirm that the matters raised in the Affidavit of Richard Bowdler with respect to the development of penalty schemes for AM in the UK were addressed in detail in TNEI's

response to the public consultation process with respect to AM (at Issue 2 of Section 5.3 of Appendix 2 to the RFI response submitted to the Board). A true copy of the RFI response and Appendix 2 thereto are produced at Exhibit BH1 to the Replying Affidavit of Brian Harrington.

8. Amongst other things, that response addressed the research of Renewable UK in 2013 on AM, and the WSP/Parsons Brinckerhoff Report dated August 2016, as referenced in the Affidavit of Richard Bowdler. That response noted that the recommendation to impose a planning condition and the associated penalty scheme is at odds with the advice stated in the Institute of Acoustics [IOA] 'A Good Practice Guide to the Application of ETSU R 97 for the Assessment and Rating of Wind Turbine Noise' ('IOA GPG 2013').

9. I confirm that I have reviewed the Board's Inspector's Report with respect to the development consent under challenge in these proceedings and, as appears therefrom, the Inspector expressly considered, and ultimately did not accede to, the contention made by the Applicant that an AM condition should be imposed, at section 14.5.2 of her report.

10. In these circumstances and, in particular, from reading the documentation which was submitted to, and produced by, the Board, the assertion made at paragraph 19 of the Affidavit of Richard Bowdler – that no evaluation of AM of any sort was undertaken by An Bord Pleanála – is manifestly incorrect. Rather, as is evident from the documentation maintained on the Board's file, detailed information with respect to the development of assessment methods and planning conditions for AM was submitted to, and appropriately considered by, the Board.

11. In these circumstances, I confirm that, in my expert view, there was no 'serious omission' by the Board with respect to its consideration of AM, whether in the manner asserted at paragraph 19 of the Affidavit of Richard Bowdler, or at all."

87. The applicant, who bears the onus of proof, hasn't displaced any of these propositions.

88. If the suggestion is now that the 2019 draft guidelines should have been operated, that is unsustainable in law given their status as a draft, and for good measure the applicant's own expert Mr Bowdler seems to have issues with such an approach: see the consultation response document jointly authored by Mr Jim Singleton and Mr James Mackay of TNEI, Mr Bowdler and others, including contributors to ETSU-R-97, the IOA Good Practice Guide and the IOA Amplitude Modulation Working Group.

89. The basic problem with core ground 1 is that the board did not fail to "take cognisance of views of members of the public who make representations". The board did take cognisance of submissions, but wasn't obliged to accept them. The complaint in effect that submissions were not agreed with is a merits complaint which is not a ground of judicial review, being a process confined to legality rather than correctness (apart from the intersection with grounds such as unreasonableness or irrationality): *C'OC v. An Bord Pleanála* [2021] IEHC 70 (Unreported, High Court, 10th February 2021) at §20; *Coyne v. An Bord Pleanála* [2023] IEHC 412 (Unreported, High Court, Holland J., 21st July 2023) at §8 and §414; *Fernleigh Residents Association & Anor v. An Bord Pleanála & Others* [2023] IEHC 525 (Unreported, High Court, Holland J., 27th September 2023) at §303; *per Farrell J. in Grafton Group plc v. An Bord Pleanála* [2023] IEHC 725 (Unreported, High Court, 22nd December 2023) at §166; *Jones v. South Dublin County Council* [2024] IEHC 301 (Unreported, High Court, 11th July 2024) at 138; and *per Holland J. in Duffy v. An Bord Pleanála* [2024] IEHC 558 (Unreported, High Court, 27th September 2024) at §18.

90. Again, where the decision says that matters were considered, an applicant has to prove that submissions and issues were not properly considered, which the applicants here haven't succeeded in doing: again the judgment of Hardiman J. in *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418, [2002] 1 I.L.R.M. 401 is relevant.

91. Insofar as the applicant's complaints eventually zeroed in on the proposition that the science is developing and that the board didn't consider the latest science, that is comprehensively answered by Mr Singleton's first affidavit:

"4. I confirm that the Notice Party retained Fehily Timoney & Company, civil and environmental engineering, scientific and planning consultants to review and respond to the issues raised with respect to noise in the public consultation process on the planning application for the wind farm development, the subject of these proceedings (the 'Proposed Development'). Fehily Timoney in turn engaged TNEI to provide additional expertise in relation to noise assessment advice with respect to issues raised in respect of Low Frequency Noise (LFN) & Infrasound, Amplitude Modulation (AM), health effects (of noise) and Significance of Effects (in relation to Environmental Impact Assessment). In addition, TNEI were asked to comment on the report by Mr Dick Bowdler ('the Bowdler Report'), included as part of the response from Nagle View Turbine Aware Group (the 'Applicant'). I undertook a review of those noise issues raised and the preparation of the response to those issues, as set out in Sections 4.1 (Issue 6B) and Section 5.3 (Issue 1, 2, 3 and 7) of Appendix 2 to

the RFI response. Fehily Timoney were also involved in the preparation of that response, and in particular were responsible for the section addressing the 'Use of Wind Shields' under Issue 6B in Section 4.1 of Appendix 2. A true copy of the RFI response and Appendix 2 thereto are produced at Exhibit BH1 to the Replying Affidavit of Brian Harrington.

5. I confirm that I have reviewed the Amended Statement Required to Ground an Application for Judicial Review filed on 2 February 2024 (the 'Amended Statement of Grounds') and the Statement of Opposition of the Notice Party herein, prior to the swearing hereof.

6. I am advised by the Notice Party['s] legal advisors and believe that the majority of the matters pleaded in the Amended Statement of Grounds and the Statement of Opposition of the Notice Party relate to legal issues, which will be addressed, as appropriate and in due course, by way of legal submission at the hearing of the application for judicial review.

7. In those circumstances, and to the extent necessary, I verify the facts contained in the Statement of Opposition of the Notice Party that relate to the role of TNEI. In addition, I substantiate the pleas made at paragraph 57 of the Statement of Opposition of the Notice Party.

8. As set out at paragraph 58 of the Statement of Opposition of the Notice Party, I confirm that your deponent, together with other personnel in TNEI, reviewed the submissions made in the public consultation process with respect to Amplitude Modulation ('AM'). Having done so, on behalf of the Notice Party, TNEI provided a detailed response to those issues (at Issue 2 of Section 5.3 of Appendix 2 to the RFI response submitted to the Board) which noted, amongst other things, that the recommendation to impose a planning condition and the associated penalty scheme is at odds with the advice stated in the Institute of Acoustics [IOA] 'A Good Practice Guide to the Application of ETSU R 97 for the Assessment and Rating of Wind Turbine Noise' ('IOA GPG 2013').

9. Subsequent to the submission of the RFI response by the Notice Party to the Board on 30 March 2022, a report was produced for the UK Government Department for Business, Energy & Industrial Strategy, considering the extent to which ETSU-R-97 may require updating, on 10 February 2023 ('the WSP BEIS report'). I beg to refer to a true copy of the WDP BEIS report upon which marked 'JS1' I have signed by name prior to the swearing hereof.

10. As a matter of fact, AM was considered in the WSP BEIS report, which report notes (in Section 7.1.2 on page 223) that the IOA method provides a suitable approach to measure and quantify AM (whilst noting that work is ongoing to refine the approach) but also highlights that further work is required to develop a robust mechanism for controlling AM that could be incorporated into a planning condition.

11. In relation to the potential adoption of a penalty scheme to control AM, again, as a matter of fact, the WSP BEIS report notes (at page 208) that the details of applying an AM penalty scheme are complicated and that such details will need to be carefully considered in further study.

12. I acknowledge that the WSP BEIS report was not before the Board when it made the decision under challenge in these proceedings, in circumstances where that report post-dated the preparation by TNEI of the relevant section of the RFI response.

13. However, I confirm that the conclusion reached in the WSP BEIS report, with respect to applying an AM penalty scheme, is consistent with the position put forward by TNEI on that issue on behalf of the Notice Party, as detailed in the RFI response."

92. So as regards the WSP report, this wasn't put before the board – the inspector had already reported when it was prepared. The board didn't consider it but nobody asked them to. The applicant certainly didn't, and hasn't challenged the statute on the basis that this wasn't possible. The applicant only thought of this point later. A decision can't be quashed on that basis. But even more fundamentally, if that's possible, the WSP report isn't incompatible with the notice party's science. The applicant hasn't displaced the averment to that effect.

93. To summarise the difficulties with the many issues raised under core grounds 1 to 3:

- (i) as regards the alleged outdated nature of the 2006 guidelines, the inspector considered this together with any other material brought to her attention – it is incorrect to assert that consideration of other guidance or information did not occur;
- (ii) as regards the complaint that the board wasn't bound by the 2006 guidelines, the board didn't treat itself as so bound;
- (iii) as regards the complaint that she said that the 2006 guidelines were "in force", that wasn't an error and didn't imply mandatory force, merely operativeness – it was clear from the context that she was aware that the duty was a have-regard-to one only;
- (iv) as regards the alleged failure to consider submissions, there was no such failure;

- (v) as regard the alleged failure to “engage with” submissions or the alleged carrying out of “scant” consideration, that is a merits complaint – the weight to be given to any issue or submission is quintessentially one for the decision-maker;
- (vi) as regards the complaint that the standard of adjudication should have been whether there was a nuisance, and the related point that the board unconstitutionally gave immunity from suit in nuisance to the notice party by granting permission, that is a misconception – the grant of permission doesn’t preclude civil action, and the board isn’t required to predict the fate of hypothetical future civil actions to a degree that transcends the material before it (so the board can consider what the developer owns and doesn’t own and whether use of the former land will impact unreasonably on the latter through impacts that are actionable in trespass or nuisance, but that consideration is viewed through the prism of proper planning and development rather than a refined technical debate about tort law in a way that doesn’t have a clear answer from the material);
- (vii) as regards the complaint that the board asked the wrong question and should have determined a standard for acceptable noise, that’s a merits complaint in the sense that the board isn’t obliged to set an overarching and inflexible standard but merely assess an individual application in terms of the acceptability of its environmental impacts on various metrics including noise, and for an applicant to obtain *certiorari* that must be evidentially displaced, which the applicant hasn’t done here;
- (viii) as regards the complaint that the board didn’t dictate the notice party’s methodology but merely assessed the application made, that isn’t an error of law (and anyway no specific legal provision in that regard is pleaded);
- (ix) as regards the failure to impose a penalty scheme, the inspector had material, which she accepted, as to the inappropriateness of that, which was a lawful decision; and
- (x) as regards the alleged lacuna in assessment, that hasn’t been made out by the applicant, who bears the burden of proof – the inspector assessed the material before her.

94. The above points also apply to the remaining core grounds insofar as relevant.

95. Ultimately the central complaint of core ground 1, that the board “excluded from its consideration” relevant matters, is simply incorrect on the facts. If I can be allowed an alternative metaphor, it is an attempt to shoe-horn this case into a pre-existing *Balz*-shaped glass slipper. But on the facts, the slipper doesn’t fit, and the argument overstays its curfew, ending as stale pumpkin rather than fairy-tale happy-ever-after.

Core ground 2 – alleged disregard of submissions

96. Core ground 2 is:

“2. The Board failed to have any or any proper regard to the submissions made by the applicants in respect of the likely noise impacts of the proposed development. In particular the Board failed to have any or any adequate regard to the submissions made by the applicants to the effect that the WEDG 2006 were out of date and no longer represents best scientific knowledge in the field of windfarm noise. The Board does not engage at all with these submissions. This is contrary to fair procedures and natural and Constitutional justice and to the decision of the Supreme Court in *Balz -v- An Bord Pleanála*. This is particularly so in circumstances where, having regard to the legal position as regards nuisance, in granting planning permission and conditioning specific noise limit values, the Board are determining the level of noise considered legally acceptable (*Smyth -v- RPA 2010 IEHC 290*).”

97. The parties’ positions as recorded in the statement of case are summarised above.

98. Again here the applicants try to run this case as *Balz II* (“... failed to have any or any proper regard to the submissions ...”) but the facts say otherwise. The board did have regard to submissions. They simply preferred the developer’s submissions and stated reasons. There was no scientific consensus – as noted above the IOA report did not recommend any conditions for AM. There is no legal obligation to “engage with” submissions in the sense pleaded, which in practice involves a discursive analysis which goes well beyond the test in *Connelly v. An Bord Pleanála* [2018] IESC 31, [2018] 2 I.L.R.M. 453, [2021] 2 I.R. 752, [2018] 7 JIC 1701. The test is the main reasons on the main issues (*Balscadden Road SAA Residents Association Limited v. An Bord Pleanála* [2020] IEHC 586, [2020] 11 JIC 2501 (Unreported, High Court, 25th November 2020)) – that was satisfied.

99. *Smyth v. Railway Procurement Agency* [2010] IEHC 290 (Unreported, High Court, Laffoy J., 5th March 2010) doesn’t get the applicants anywhere. The fact that a developer has a permission to do something doesn’t preclude anyone from bringing a civil law action if that something is unlawful in private law: see *Lanigan v. Barry* [2016] IESC 46, [2016] 1 I.R. 656, 2016 WJSC-SC 12754, [2016] 7 JIC 2701 para. 6.7 *per* Clarke J.; *Webster and Rollo v. Meenacloghspar (Wind) Limited* [2024] IEHC 136 (Unreported, High Court, Egan J., 8th March 2024) (which is consistent with the

view that the fact that a permission exists, or the reasoning behind it, can only be a matter of weight rather than determinative). So the fact that the board lawfully thought that the impacts were acceptable doesn't preclude an argument about nuisance were that to arise in practice.

100. The fact that the receiving environment is changed by the permission as set out in the High Court judgment in *Lanigan & Ors v. Barry & Ors*. [2008] IEHC 29 (Unreported, High Court, Charleton J., 15th February 2008) doesn't mean that a person affected wrongfully by a development can't bring civil proceedings.

101. To avoid doubt, if it is clear from the material that the proposed development cannot be carried out without an actionable wrong taking place – for example if the only access to the development involves trespass on private lands which the developer has no rights over, or if the operational phase of the project would clearly involve a nuisance – then permission should be refused, but on the basis of viewing such problems through the lens of what amounts to proper planning and sustainable development. A project that necessarily involves illegality is not an instance of proper planning. But if, on the other hand, the operation of the project may or may not involve a civil wrong, and if the answer to that is not at all clear on the material and would involve a detailed consideration of the technicalities of tort law, or *a fortiori* would involve an examination of what the impacts eventually turn out to be, then the board can't be expected to make civil law adjudications or engage in forensic clairvoyance. It can only make an assessment of the acceptability of the likely impacts, but if the actual impacts turn out to be actionable, then that is a matter for separate proceedings. This case is an instance of the latter situation and if it turns out ultimately that there is some actionable nuisance that is a matter for the civil courts and not something that the board erred in not predicting.

Core ground 3 – lack of best practice

102. Core ground 3 is:

"3. The Board has failed to have any or any adequate regard to the fact that, having regard to the decision in *Smyth -v- RPA* (and in particular paragraphs 34.9 to 34.11) that in setting conditions they are setting standards 'for permitted environmental effects and impacts of the construction and operation' of a major infrastructure project (para 34.9). As such they are defining what the applicant and its members can lawfully be subjected to in terms of noise impacts. The Board has not conducted any inquiry into what best practice in respect of noise in fact is in this case. The Board has not adopted any particular standard or approach to noise either in general or in the specific. It has no guidance of its own (or independent) that it applies to noise in general or to windfarms in particular. Instead it is dealt with on a case by case basis by individual inspectors (as here) and no defined or consistent approach can be discerned. In the instant case, this appears to have resulted in the Inspector applying the standards contained under the 2006 WEDG. These standards are out of date and no longer represent best practice in the context of windfarm noise. Given the legal consequences from the setting of such limits and the effect same has on the property rights of individuals including the members of the applicant herein this unacceptable and contrary to the Constitutional rights of the applicant and its members."

103. The parties' positions as recorded in the statement of case are summarised above.

104. This ground misunderstands the decision-making process. The board is required (not just allowed) to have regard to relevant government policies of which the wind energy policy is one. Sure the policy may be viewed as out of date, but that is compensated for by the fact that the board's consideration doesn't end there. The board also considered any material submitted by the developer and by interested parties such as the applicant (that's the basic message of *Balz*).

105. Again this ground tries to re-run *Balz* but unsuccessfully. The *Smyth v. Railway Procurement Agency* argument is addressed above. The board did in fact consider best practice by going beyond the 2006 guidelines (in distinction from *Balz*) and in particular by considering the material from the developer and the submissions of the applicant. That is a world removed from the mechanical application of the 2006 guidelines alleged in the pleaded case.

EU law issues

Core ground 4 – inadequate EIA

106. Core ground 4 is:

"4. The impugned decision is invalid as the Board failed to consider adequately or at all the environmental effects of the proposed development on the environment in terms of noise impacts for the purposes of section 171A and 172 of the Planning and Development Act 2000 and/or had no objective information before it to support a conclusion of no significant effects on the environment for the purposes of that EIA assessment and/or contained lacuna, further particulars of which are contained at Part 2 below."

107. The parties' positions as recorded in the statement of case are summarised as follows:

"Applicant: The Board persisted in assessing the environmental effects of the proposed development on the environment in terms of noise impacts by reference to the 2006

guidelines that have already attracted criticism from the Supreme Court on the basis of their antiquity and likely redundancy due to technical and scientific progress. The Board's conclusion of no significant effect for the purposes of the EIA Directive/the assessment carried out pursuant to section 172 of the 2000 Act was wrong in law, irrational and unreasonable. It is submitted that the Board also erred in law in reaching its decision without considering or assessing the significance of amplitude modulation ('AM') of the sound generated by the wind turbines.

Board: The Board's Decision is not invalid for the reasons alleged by the Applicant at Core Ground 4 or at all. It is denied that the Board's Decision was made in a manner contrary to section 171A or section 172 of the 2000 Act as alleged by the Applicant or at all. No specific breach of either provision has been identified by the Applicant in its pleaded case. The EIA that the Board completed in respect of the proposed development was carried out in accordance with the requirements applicable to that assessment. The Board's conclusions for EIA purposes, including in relation to noise impacts, were open to it based on the materials that were before it. The Board was fully entitled to rely on the evidence and materials that were before it in the manner it did. An assessment of the adequacy of the information submitted for EIA purposes is primarily a matter for the discretion of the Board. A substantial margin of appreciation to judgements based upon scientific, technical, or predictive assessments by those with appropriate expertise is required. As set out at section 15.6.3 of the Inspector's Report, the Inspector's assessment for EIA purposes (with which the Board agreed), of the issues of noise and vibration, was based on consideration of the submission of the planning authority, the submissions of prescribed bodies, the observations received from members of the public, Chapter 7 of the EIAR, the Notice Party's response to the further information request from the Board and responses to same by prescribed bodies and observers. The Board Order also records (at pages 5 and 6) that the Board completed an EIAR of the proposed development taking account of that nature, scale, location and extent of the proposed development, the EIAR and associated documentation submitted in support of the application, the submissions received from the prescribed bodies and observers, and the Board Inspector's Report and the Board's Ecologist's Report. The Applicant's ground of challenge focuses on the regard had to the WEDG 2006 (which the Board was obliged to have regard to and did so lawfully) without reference to the full extent of the information that the Board considered as part of the EIA that it carried out.

Further, the issue of Amplitude Modulation (AM) was considered and assessed. The Inspector expressly considered that the matter was satisfactorily addressed. Insofar as concerns the submissions made in relation to the issue of Amplitude Modulation (AM), those submissions were expressly considered and addressed by the Inspector on the basis of preferred material (prepared by experts retained by the Notice Party) that was to the effect that it was not recommended practice to attach a condition to deal with AM to a grant of planning permission. There is nothing unlawful about that and the Applicant has failed to demonstrate or establish any unlawfulness or legal infirmity in relation to same.

Notice Party: The Applicant's claim in Core Ground 4 is based on the same incorrect factual and legal assertions as its claim in Core Grounds 1-3. Core Ground 4 should be rejected on the same basis as Core Grounds 1-3. The Board's conclusion of no significant effect for the purposes of the EIA Directive and/or section 172 of the 2000 Act was not wrong in law, irrational or unreasonable. The Applicant's assertion that the Board reached its decision without considering or assessing the significance of AM is again made without any engagement with the Board's decision or the documentation before the Board and is manifestly incorrect."

108. The sub-grounds are as follows:

"CORE GROUND 2 [*sic* – should be 4]: The impugned decision is invalid as the Board failed to consider adequately or at all the environmental effects of the proposed development on the environment in terms of noise impacts for the purposes of section 171A and 172 of the Planning and Development Act 2000 and/or had no objective information before it to support a conclusion of no significant effects on the environment for the purposes of that EIA assessment and/or contained lacuna

18. The matters referred to in paragraphs 1-17 above are also relied upon in the context of EIA and, it is not intended to rehearse same herein but, by way of further particulars of the claim the proposed development will result in significant noise impacts or, as stated by the Inspector in her report at page 220: 'Even with mitigation, the operational windfarm introduces a new noise source and therefore there will be an impact on the local environment with the study area which is likely to vary from slight to moderate depending on the location of the receptor'."

109. Apart from repeating points already made, that paragraph merely outlines context. The grounds continue:

"19. Notwithstanding these facts the Board persisted in assessing the environmental effects of the proposed development on the environment in terms of noise impacts by reference to guidelines, i.e. WEDG 2006, that have already attracted criticism from the Supreme Court on basis of their antiquity and likely redundancy due to technical and scientific progress. Given this precedent the Board's conclusion of no significant effect for the purposes of the EIA Directive/the assessment carried out pursuant to section 172 of the 2000 Act was wrong in law, irrational and unreasonable."

110. This repeats the out-of-date argument and asserts unreasonableness. We can note a first reference to a specific statutory provision. The grounds continue:

"20. Secondly, and in the alternative, it is submitted that the Board erred in law in reaching such a conclusion without considering or assessing the significance of amplitude modulation ('AM') of the sound generated by the wind turbines. AM is increasingly recognized as an important consideration in assessing the noise impacts of wind turbines and refers to a regular variation in sound level due to the rotation of the turbine blades and is described in some detail in DWEG 2019."

111. This alleges lack of consideration of AM. The grounds continue:

"21. The impugned decision imparts significant property rights to the Notice Party. The noise conditions of the decision are based on a flawed application of outdated technical advice. Nevertheless if compliance with those conditions by the Notice Party can be demonstrated it in effect provides an immunity to enforcement proceedings and also against common law suit for nuisance by the Applicant."

112. This seems repetitive of a point already made. The grounds continue:

"22. This much can deduced from the comments of Charleton J. in *Lanigan & Ors v Barry & Ors* [2008] IEHC 29 at p.22 quoted by Laffoy J. in *Smyth v Rail Procurement Authority* [2010] IEHC 290 at p.20: "...where planning consent is given after due process for a development, including a change of use, the issue as to what is a nuisance will be determined according to the character of that neighbourhood as authorised by relevant planning permissions and as declared by the development plan."

113. This is also repetition. The grounds continue:

"23. The existence of this effective immunity from a potential future common law tort of nuisance on the part of the Applicant is an intolerable infringement of the Applicant's constitutional rights under Art.s 40.3 and 43 of Bunreacht na hEireann."

114. This is also repetition.

115. The applicants make the valid point that EIA must be as complete as possible: judgment of 3 March 2011, *Commission v Ireland*, C-50/09, ECLI:EU:C:2011:109. But the onus of proof to show that the EIA was unreasonable lies on the applicant. This has not been discharged.

116. The claimed lack of consideration from failure to deal with AM and provide mitigating conditions just doesn't stack up on the facts. The inspector expressly referred to the developer's view, which was impliedly accepted, that it was not considered appropriate to include conditions dealing with AM. There isn't anything inherently unlawful about accepting a developer's science. That isn't abdication or anything else.

117. The applicant complains in submissions:

"25. Moreover, no mitigation of sound character is conditioned in condition 5. There is no mention of any monitoring of character of WTN, no assessment of same is mandated and no penalty is imposed. In fact, the condition does not mitigate in any way noise character relying on just (an aged) decibel limit similar to that contained in the WEDG. This simply does not pass muster for the purposes of EIA of this key impact."

118. That isn't a pleaded complaint. But even if it was, is a merits complaint. The issue was assessed and lawful reliance placed on the IOA material that was unsupportive of conditions in this respect. EIA does not dictate any particular result.

119. The ground is, yet again, an attempted re-run of *Balz*. But the *Balz* scenario does not arise on the facts.

120. The critical point is that scientific and factual shortcomings in EIA or indeed AA must be established evidentially by the applicant, who bears the burden of proof, a burden that hasn't been discharged here: see *Joyce-Kemper v. An Bord Pleanála* [2020] IEHC 601, [2020] 11 JIC 2402 (Unreported, High Court, Allen J., 24th November 2020) at §9; *Cork County Council v. Minister for Housing, Local Government and Heritage (No. 1)* [2021] IEHC 683, [2021] 11 JIC 0502 (Unreported, High Court, 5th November 2021) at §57; *Murphy v. An Bord Pleanála* [2024] IEHC 59, [2024] 2 JIC 0605 (Unreported, High Court, Bolger J., 6th February 2024) at §14. Mere assertion does not create scientific doubt: *Harrington v. An Bord Pleanála* [2014] IEHC 232, [2014] 5 JIC 0909 (Unreported, High Court, O'Neill J., 9th May 2024); *Coyne v. An Bord Pleanála* [2023] IEHC 412, [2023] 7 JIC

2104 (Unreported, High Court, Holland J., 21st July 2023) at §414; *Grafton Group v. An Bord Pleanála* [2023] IEHC 725, [2023] 12 JIC 2201 (Unreported, High Court, Farrell J., 22nd December 2023) at §166; *Power v. An Bord Pleanála* [2024] IEHC 108, [2024] 2 JIC 2802 (Unreported, High Court, Holland J., 28th February 2024) at §129; *Carrownagowan Concern Group v. An Bord Pleanála* [2024] IEHC 300 (Unreported, High Court, 20th May 2024) at §191(v); *Hayes & Anor. v. Environmental Protection Agency & Ors.* [2024] IECA 162, [2024] 6 JIC 2402 (Unreported, Court of Appeal, Butler J., 24th June 2024) at §106 *et seq.*

121. To summarise under core ground 4:

- (i) the out-of-date-guidelines argument fails for reasons discussed above;
- (ii) the unreasonableness argument fails because the applicant who bears the onus of proof hasn't demonstrated that evidentially;
- (iii) the lack of proper consideration, particularly of AM, argument fails because the applicant who bears the onus of proof hasn't demonstrated that evidentially – indeed it is clear on the evidence that AM was considered; and
- (iv) the nuisance argument fails for reasons discussed above.

Summary

122. Contextually I might be allowed to note in passing that the parties were unclear as to why updated wind guidelines have not been issued, and indeed why Ireland does not appear to have implemented acceleration areas which would facilitate renewable development in specified areas (reinforcing the policy support for renewable energy infrastructure referenced by the inspector). One can only note that these are matters that might warrant consideration, on the face of things and subject to any contrary view. But the absence of such provision probably does not assist in hastening the decision-making process on renewables, which in this case has involved a process going on for nearly six years. Insofar as the High Court stage is part of that, mechanisms have been introduced in Practice Direction HC126 to accelerate such decision-making in line with directive 2023/2413 (the relevant transposition date for which was 1st July 2024). The statutory nature of the practice direction means that additional legislation to transpose this aspect of the directive isn't required (although there are other issues that slow down judicial procedures where legislation would appear necessary, such as not affording the most streamlined appellate procedure to all projects covered by the directive). But parties need to advise to the court in order to fully realise the benefits of the new mechanisms. One achievement has been that the expedited procedure can be applied for from the word go, even before leave is granted, so there is no such thing as a waiting list in such cases. As I say, that's just context for present purposes.

123. In outline summary, without taking from the more specific terms of this judgment:

- (i) there is no analogy with *Balz* – on the facts the board did not dismiss anything *in limine*, did not fail to consider matters more up to date than the 2006 guidelines, did not consider itself bound by those guidelines, did not fail to consider the applicant's submissions and did not fail to consider the question of best practice;
- (ii) the weight to be placed on the applicant's submissions was quintessentially a matter for the board, which was entitled not to accept the applicant's proposal for a penalty scheme or any other of the applicant's submissions;
- (iii) a grant of permission does not create an immunity against civil action and the board isn't required to make findings on overly technical tort issues separate from the acceptability of impacts on stakeholders as seen through the prism of proper planning and development;
- (iv) the board lawfully considered the adequacy of noise impacts based on the materials before it, and did not ask the wrong question or err by not dictating the developer's methodology or by failing to adopt some overall standard for wind farm noise generally;
- (v) the claim of lack of adequate assessment of the noise issue or AM in particular for EIA purposes or any purposes has not been made out evidentially;
- (vi) the board had before it conflicting views, favoured the developer's view, and gave reasons, an approach that was within the board's zone of evaluative judgement;
- (vii) the board's assessment has not been shown to be unreasonable, and has not been shown to involve any lacuna;
- (viii) generally, judicial review is not a mechanism to review the merits of a decision save to the limited extent that issues such as irrationality or disproportionality arise (which insofar as was pleaded, hasn't been demonstrated here); and
- (ix) judicial review generally involves the onus of proof being on the applicant, an onus that is not discharged here.

Order

124. For the foregoing reasons, it is ordered that:

- (i) the proceedings be dismissed;

- (ii) unless any party applies otherwise by written legal submission within 14 days from the date of this judgment, the foregoing order be perfected forthwith thereafter on the basis of no order as to costs; and
- (iii) the matter be listed on Monday 18th November 2024 to confirm the foregoing.