THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 643 J.R.]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 50 AND 50A OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

PÓL Ó GRÍANNA, GERALDINE UÍ DHUINNÍN, AOIFE NÍ DHUINNÍN, CLIODHNA NÍ DHUINNÍN, BERNADETTE COTTER, TIM O'CONNELL, CAOIMHGHÍN Ó BUACHALLA, PÁDRAIG D. KELLEHER, ALAN KING, XAK AROO, SIMON SWALE AND ELIZABETH TWOMEY

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CORK COUNTY COUNCIL AND FRAMORE LIMITED

NOTICE PARTIES

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 18th day of January, 2017.

1. These judicial review proceedings are issued pursuant to s. 50 of the Planning and Development Act 2000 (as amended) ("the Act of 2000"). The applicants seek to quash the decision of the respondent ("the board") made on 15th June, 2016, granting the second named notice party ("Framore") planning permission (Ref. No. PL04 245082) for a development comprising a wind farm consisting of six turbines, a substation including one control building and associated internal equipment and other ancillary works including road access and underground cables in the town lands of Derragh, Rathgaskig, Lack Beg, Ballingeary, Co. Cork, as amended by a revised public notice received by the board on 5th November, 2015. The revised notice consisted of the relocation of one of the turbines (T1) at a distance of 50m to the south of its previous position location with consequent minor alterations to the internal access track and associated underground cable and also the provision of approximately 11.5km of 38kV underground cabling and associated underground communication cables between the proposed on-site 38kV substation and the national electricity grid at the permitted Coomataggart 110kV substation at Grousemount, Kilgarvan, Co. Kerry ("the permission").

Background

2. In previous proceedings bearing record number [2014 No. 19 J.R.] the applicants challenged the decision of the board on 14th November, 2013, (Ref. No. PL04 242223) to grant permission to Framore for a similar development at the same site ("the first permission").

3. In a judgment dated the 12th November, 2014, [2014] IEHC 632 ("the substantive judgment") Peart J. held that the connection of the wind farm to the national grid was an integral part of the overall development of which the construction of the turbines is the first part. He concluded that the board had failed to carry out an Environmental Impact Assessment (E.I.A.) in accordance with s. 172 of the Act of 2000 in that no cumulative assessment of the proposed development and the necessary connection to the national grid was carried out. He quashed the decision of the board granting the first permission and remitted the matter to the board with a direction that it reconsider the application and reach a decision in accordance with the findings of the court.

4. On 24th July, 2015, the board issued a notice pursuant to s. 132 of the Act of 2000 ("the s. 132 notice") requesting that Framore furnish certain information in order to enable it to determine the appeal. The notice required that Framore submit a revised Environmental Impact Statement ("E.I.S.") to incorporate sufficient information so to enable the board to conduct an E.I.A. in accordance with the requirements of Directive 2011/92/EU ("the E.I.A. Directive ") in relation to the overall proposal including the grid connection.

5. The s. 132 notice also required that the revised E.I.S. should take into account any changes in circumstances and in the receiving environment since the submission of the original planning permission and original E.I.S. in May 2012 (including the provisions of the new Cork County Development Plan) and the submission of a revised Directive 92/43/EEC ("Habitats Directive") Appropriate Assessment ("A.A.") Screening Report, and if necessary, a revised Natura Impact Statement ("N.I.S.") in respect of the overall proposal including the grid connection.

6. In response to the s. 132 notice, Framore, on 18th September, 2015, submitted a letter to the board which included a revised E.I.S., and A.A. Screening Report and a N.I.S.. The letter indicated a number of changes proposed to be made to the wind farm project including the following:-

> (a) relocation of turbine T1, a distance of 50m to the south, with consequential minor alternations to the internal access track and underground cabling; and,
>
> (b) a consequential change to the red line boundary of the site to accommodate the relocation of the turbine.

Issues

7. In this judicial review, the following issues arise for consideration:-

> (i) Whether the board failed to carry out an E.I.A. in respect of the grid connection works and the wind turbine development by reason of the fact that the grid connection works did not form part of the proposed development in respect of which the application for planning permission was made.

(ii) Whether the board acted ultra vires in granting permission for 1km of cable forming part of the grid connection in relation to the adjacent Cleanrath wind farm without carrying out an E.I.A. in respect of the Cleanrath wind farm together with grid connection.

(iii) Whether, in making the decision to grant the permission, the board acted ultra vires in granting planning permission for an application which was substantially different from that remitted to the board pursuant to the remittal order of Peart J..

(iv) Whether the board failed to carry out an A.A. prior to making the decision to grant permission as required by s. 177V of the Act of 2000, as interpreted in accordance with the obligations imposed by the Habitats Directive.

8. Article 2.1 of the E.I.A. Directive states:-

> "Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia,* of their nature, size or location are made subject to a requirement for a development consent and an assessment with regard to their effects. Those projects are defined in Article 4."

9. An overriding objective of the Directive is to ensure the protection of the environment and the quality of life; see, the E.I.A. Directive recital (4).

10. The applicants argue that, in carrying out an E.I.A., the board is obliged to have regard to mitigation measures to avoid, reduce and, if possible, remedy significant adverse effects of the project that is the subject of an E.I.A.. They contend that the developer is obliged to furnish information in relation to mitigation measures pursuant to art. 94 and also schedule 6 para. 1(b) of the Planning and Development Regulations 2001 (as amended) ("the Regulations of 2001"). In order to ensure that these mitigation measures are implemented and are binding upon the developer, the applicants argue that it is necessary that compliance with the mitigation measures as set out in the E.I.S. is conditioned upon the granting of planning permission. As the grid connection works did not form part of the proposed development which is the subject matter of the application, the applicants say that the board did not have any power and did not in fact impose a condition requiring the implementation of mitigation measures relating to the grid connection works. They argue that similarly the board had no power to refuse permission in relation to the grid connection works because they did not form part of the proposed development. Furthermore, the board did not have power to regulate the grid connection works or to modify the route or the manner in which those works were to be carried out and that, therefore, the board did not have power to carry out an E.I.A. in relation to the grid connection works.

11. The applicants also contend that where an E.I.A. is to be carried out there must be full public consultation with regard to the likely significant effects on the environment of that project and that for such a consultation to be meaningful it must be capable of influencing the outcome of the development consent procedures.

12. They say that the connection to the national grid did not form part of the proposed development and, in those circumstances, it was not possible for the board to conduct an E.I.A. (including accumulative assessment of the proposed development and the connection to the national grid) in accordance with the requirements of the E.I.A. Directive, despite the fact that this is what was ordered by Peart J. in the remittal following the substantive judgment.

13. It is alleged that Framore's response to the s. 132 notice went entirely beyond its scope and purported to alter the terms of the planning application that had been remitted to the board for its reconsideration. The board had no power to receive these proposals and even if the changes to the application had some merit they must be effected in a procedurally correct manner by the exercise by the board of its powers under art. 73 of the Regulations of 2001 to seek or receive revised plans of modifications. The board did not invoke its powers under art. 73. The applicants rely on the decision of O'Leary J. in *Illium Properties Limited v. Dublin City Council* (Unreported, High Court, O'Leary J., 15th October, 2004) where the learned judge said, at para. 11:-

> "Variation can only be done by agreement or by condition (and in these circumstances to a limited extent only in view of the public interest in planning applications) or by re-application."

14. In the circumstances, the applicants claim that the decision to grant the permission was in breach of s. 34(1) of the Act of 2000, as applied by s. 37(1)(b) thereof in circumstances where the requirements of the Regulations of 2001 had not been complied with. Section 37(1)(b) of the Act of 2000 provides that "the board shall determine the application as if it had been made to the board in the first instance".

15. The board and Framore both made extensive submissions to the court. The following is a summary of the submissions made by Framore and the board.

16. In the substantive judgment of the High Court in *Ó Gríanna v. An Bord Pleanála (No. 1)* [2014] IEHC 632 Peart J. stated, at para. 27:-

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

17. In a judgment dated the 16th April, 2015, [2015] IEHC 248 ("the remittal judgment") Peart J. stated, at para. 1:-

> "In this case the court has determined that the construction of the wind turbines themselves and the connection to the national grid is a single project, and not two separate projects, and that before granting planning consent for the former, it was necessary that the cumulative effects of the combined or single project ought to have been carried out. In circumstances where that has not happened, I concluded that the decision should be quashed."

18. That was the problem which was to be addressed by the board when the matter was remitted back to it. It was required to ensure that the cumulative impacts of the proposed wind farm development and the connection to the national grid were assessed before granting permission for the proposed wind farm development.

19. Framore relies on extracts from Stephen Tromans, *Environmental Impact Assessment* (2nd edn., Bloomsbury Professional 2012) in

which the author analyses the speech of Lord Hoffman in *Berkeley v. Secretary of State for the Environment* [2001] 2 A.C. 603. The author states at para. 2.9:-

> "Though Lord Hoffman does not spell it out, this approach to construing the Directive is heavily influenced by E.U. law principles. It recognises the importance of a purposive approach in the context of relatively open-textured E.U. drafting. It stresses the importance of ensuring effectiveness of the Directive, a principle which itself finds its origins in interpretative techniques of the E.C.J.. It is a principle which finds clear expression in a number of the E.C.J. cases on E.I.A. discussed later in this chapter. At the same time it must be noted that the purposive approach is not a licence for indiscriminate use of the Directive to strike down consents where there has in reality been substantial compliance with its requirements and this, of course, turns on being able to identify with precision what those requirements are. The balance between ensuring effectiveness and avoiding an over-zealous response to cases of minor non-compliance is one which has troubled the courts on various occasions…"

20. Having considered two decisions of the High Court of England and Wales in *R. v. Rochdale M.B.C., ex parte Tew* [2000] Env. L.R. 1 and *R. v. Rochdale M.B.C., ex parte Milne* [2001] Env. L.R. 406, and having quoted from a passage of the judgment of Sullivan J. in the latter case, Tromans states, at para. 2.15:-

> "This passage is useful in emphasising that the principle of effectiveness is not a mandate for construing the Directive in the most onerous manner possible. The objectives of the Directive are to preserve and protect the quality of the environment, but not in absolute terms. The protection is procedural in nature and does not extend to all projects. Its objectives involve striking a balance between the requirements of EU law and such discretion as is allowed to Member States in this respect."

21. The author refers to the opinion of Advocate General Sharpston in the joined cases of *Antoine Boxus and Ors. v. Région wallonne* C-128/09, C-129/09, C-130/09, C-131/09, C-134/09 and 135/09 where she stated, at para. 79:-

> "The E.I.A. Directive is not about formalism. It is concerned with providing effective E.I.As for all major projects; and, in its amended form, with ensuring adequate public participation in the decision making process."

22. Framore and the board both contend that the applicants are inviting the court to construe the E.I.A. Directive in the most onerous manner and are engaged in legal formalism in circumstances where the competent authority has now conducted an effective E.I.A. for this wind farm project in compliance with the E.I.A. Directive and the remittal judgment of Peart J..

23. In giving its decision on the remitted application, the board attached a number of conditions. Condition no. 2 states:-

> "This permission shall not be construed as any form of consent for the proposed grid connection, which shall be the subject of a separate planning application, unless it is exempted development at the time of construction. Any other grid connection, other than that indicated in the revised Environmental Impact Statement and Natura Impact Statement submitted to An Bord Pleanála on 21st day of September, 2015, shall be the subject of a separate planning application, which shall be accompanied by an Environmental Impact Statement and Appropriate Assessment Screening/Natura Impact Statement (as appropriate)."

24. This condition does not entitle Framore to use any other grid connection in the absence of a separate planning application and appropriate E.I.S. and A.A. Screening/Natura Impact Statement. The permission which was granted does not authorise the development of the grid connection between the Derragh Wind Farm Development and the Cleanrath Wind Farm Development. The applicants' consultant Mr. Peter Crossan had raised this issue in his submission to the board in November, 2015. The consultant on behalf of the board in a reply to that submission stated:-

> "The grid connection for Cleanrath Wind Farm is not proposed as part of Derragh Wind Farm Developments. As such, the assertion in this observation that '…the Cleanrath Wind Farm grid connection is now part of the project' is incorrect. As outlined in section 2.5 of the revised E.I.S., Cleanrath Wind Farm is a separate development subject to its own E.I.S. and planning application (Cork County Council, Planning Ref. No. 11/5245 and A.P.B. Planning Ref. No. PL04.240801). Indeed, the Derragh Wind Farm which forms the subject matter of the instant appeal is a distinct development which can function independently of the Cleanrath Wind Farm. Should one wind farm proceed without the other, it will be connected via underground cable to the national grid at the Coomataggart 110kV Substation, Kilgarven in Co. Kerry. As such, Derragh Wind Farm Development and Cleanrath Wind Farm are not interdependent. The appraisal presented in the revised E.I.S. considered the scenario whereby both developments proceed, in which case it is intended to combine the power generated by both developments at the on-site 38kV substation at Derragh for export to the national grid."

25. The two wind farm developments are not interdependent and the grid connection between them is not authorised by the decision of the board which is impugned in these proceedings; rather, the revised E.I.S. has appraised the potential interactions and interrelationship arising from the Derragh Wind Farm as well as potential cumulative impacts which may arise between the Derragh Wind Farm and other developments including the Cleanrath Wind Farm.

26. In *Dietacaron Limited v. An Bord Pleanála* (Unreported, High Court, Quirke J., 13th October, 2004), it was argued that the nature and extent of the revision sought by the board went beyond mere modifications and thereby radically altered the development so that a fresh application for permission was required. Quirke J. held that the decision fell to be reviewed against the standard of administrative unreasonableness and that the decision was not, in fact, unreasonable. He stated:-

> "The decision sought to be impugned in these proceedings was an administrative decision concerning planning policy. As such it can only be challenged on grounds of irrationality of the kind identified by the courts in *Keegan v. Stardust* [1986] I.R. 642 and *O'Keeffe v. An Bord Pleanála* [1992] ILRM 237 and the type of unreasonableness identified in the extract from British Telecommunications p.l.c. v. Gloucester City Council referred to above."

27. Both Framore and the board deny that the further information submitted by the former in response to the s. 132 notice altered the nature and extent of the development to the extent that it resulted in a substantially different application to that which had previously been determined by the planning authority.

28. It is contended on behalf of Framore that the powers of the board pursuant to s. 132 are sufficiently broad and general in nature as to permit the request for information contained in the notice of 24th July, 2015, and that, in view of the remittal judgment by Peart J., the board was entitled to form the view that the information requested was necessary in order for the board to properly

consider and determine the appeal as remitted to it. It is argued that *Illium Properties v. An Bord Pleanála* is not authority for the proposition for which the applicants contend as in that case the court held that the planning authority had overreached its specific powers in that it had sought information in respect of certain amendments or variations to the proposed development which were being proposed by the planning authority rather than the applicant for permission as is the case here.

Differences between Proposed and Permitted Developments
29. The applicants submit that the board acted *ultra vires* and in breach of s. 37(1)(b) of the Act of 2000 in granting permission for a development which the applicants assert was substantially different from that contained in the planning application made in May, 2012. The relevant differences are as follows:-

> (i) a new cable trench, approximately 1km in length within the Derragh Wind Farm site to facilitate a grid connection from Cleanrath Wind Farm;
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> (ii) relocation of Turbine T1 by 50m from the coordinates identified in the 2012 E.I.S. (and consequential minor alteration to the internal access track and associated underground cable and to the "red line" site boundary) to ensure that all turbines associated with the proposed development are a minimum distance of 500m from all residences;
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> (iii) increase in sub-station handling capacity to 38kV to cater for 38kV connection; and
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> (iv) maximum output from wind farm to be 20MW.

30. Framore and the board deny that the information submitted on behalf of the former constituted a material alteration to the proposed development. Framore's response to the s. 132 notice included information on the provision for the connection of Cleanrath Wind Farm into the proposed sub-station at Derragh Wind Farm. The grid connection between Cleanrath and Derragh Wind Farm Developments is not authorised by the decision of the board impugned in these proceedings.

31. In a letter dated the 17th September, 2015, it was proposed that turbine T1 would be relocated by 50m to the south in circumstances where (i) the s. 132 notice served by the board required Framore to furnish additional information which took into account "any changes in circumstances and in the receiving environment" since the submission of the planning application and original E.I.S.; (ii) the first inspector's report (dated 8th October, 2013) recommended that turbine T1 should be relocated by 50m (so as to mitigate against potential noise impacts) and this recommendation was followed by the board in its decision to attach condition no. 5 to the First Permission; and (iii) the Health Service Executive (H.S.E.) had noted in August, 2015, that "[d]welling reference H1 is 445m from turbine 1 (T1). There may be a noise issue here when the Turbine is up and running". The relocation of turbine T1 and consequential minor alteration to the internal access track and associated underground cable and to the "red line" site boundary were advertised in newspaper notices and Framore and the board argue that this is not a material change in planning terms and does not alter the nature and character of the development.

32. Taking further account of changes in circumstances since the preparation of the 2012 E.I.S. such as the grid connection from the (then permitted) Cleanrath Wind Farm Development as rated at 38kV, Framore clearly stated in its letter of proposal of 17th September, 2015, (and in several sections of the revised 2015 E.I.S.) that the proposed on site sub-station would operate a voltage of up to 38kV.

33. It was expressly stated in vol. 2 of the 2012 E.I.S. that the turbine make and model would be subject to competitive tender and while the drawings accompanying the planning application showed a "typical turbine", no capacity was specified. Although the applicants submitted that the original application stated the total output of the turbines was 13.8MW, this was not in fact the case.

34. The s. 132 notice issued by the board required the developer to submit information taking into account any changes in circumstances and changes in the receiving environment since the submission of the original E.I.S. in June, 2012. It seems to me that that is precisely what Framore did. The board was entitled to request the submission of further information taking into account any of these changes and the applicants were given an opportunity to make submissions in relation to these matters which were clearly identified in the revised E.I.S. and accompanying documentation. The applicants, through Mr. Crosan, made observations on 2nd November, 2015, on these matters including a submission that there was a "significant material change to the planning application". The submission of Mr. Crosan was expressly referenced in the inspector's report. Framore and the board submit that the powers of the board pursuant to s. 132 are sufficiently broad and general in nature to allow them request the information contained in the notice of 24th July, 2015, and that the matter had been remitted to the board by order of Peart J. for that very purpose. Framore contends that the information submitted pursuant to the s. 132 notice was appropriate and lawful and that the power of the board to seek and receive revised plans and modifications pursuant to art. 73 of the Regulations of 2001 is a power which is additional, incidental, consequential and/or supplemental to its power under primary legislation and that art. 73 does not constrain the board in the exercise of its powers under s. 132 of the Act of 2000. I accept that submission.

35. There is no basis for the applicant's submission that the public, including the applicants, were not given adequate notice of the changes to the development as originally proposed. Not only were the applicants given notice but they actually made submissions on these changes.

Appropriate Assessment
36. It is contended by the applicants that the board has failed to complete an Appropriate Assessment and/or that it has not conducted an Appropriate Assessment with complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed development on European sites and, in particular, the effect of other wind farm projects and sources of drainage run-off on the Gearagh Candidate special areas of conservation [cSAC].

37. The decision of the board set out the basis on which it carried out an Appropriate Assessment and the matters taken by it into consideration. The board in giving its decision, agreed with the inspector's conclusion that an Appropriate Assessment was required. It considered the information before it, including the Natura impact statement submitted by the applicant on 21st September 2015 together with the submissions made by the parties to the appeal, and was satisfied that these were appropriate and adequate to allow for the carrying out of an Appropriate Assessment. In carrying out this assessment the board considered the nature of the proposed development, the mitigation measures proposed as a part of the development, the conservation polices applicable to the area and the distances between the proposed site and three European sites mentioned in the decision and other European sites and the contents of the inspector's report. The board concurred with the inspector's analysis in relation to these matters and adopted his conclusions and stated "the board concluded, beyond reasonable scientific doubt, that the proposed development (including the proposed grid connection), either individually or in combination with other plans and projects, will not adversely affect the integrity of these European sites, in view of those sites', conservation objectives, or of any other European sites".

Discussion
38. The process in which the court is now engaged is judicial review and not an appeal on the merits of the decision of the board. It is not the function of the court to act in the role of a planning authority. Once the matter was remitted to the board it was required to ensure that the cumulative impact of the proposed wind farm development and the connection to the national grid were assessed before granting permission for the proposed wind farm development. I agree with the views expressed by Lord Hoffman in *Berkeley v. The Secretary of State for the Environment* to the effect that the E.I.A. Directive should be given a purposive interpretation and should not be used to strike down consents where there has, in reality, been substantial compliance with its requirements, having identified with precision what those requirements are. The E.I.A. Directive attempts to achieve one of the objectives of the European Union in the sphere of the protection of the environment and the quality of life but not in absolute terms. It involves striking a balance between the requirements of E.U. law and such discretion as is allowed to Member States in this respect. I entirely agree with the opinion of Advocate General Sharpston in *Antoine Boxus and Ors. v. Région wallonne* where she stated that the E.I.A. Directive is not about formalism but is concerned with providing effective E.I.As for all major projects and with ensuring adequate public participation in the decision making process. The principle of effectiveness is not a mandate for construing the Directive in the most onerous manner possible. This involves the courts being astute to ensure the objectives of the Directive are met but not in an overly pedantic way.

39. The E.I.A. Directive and the Irish legislation envisage a situation where there may be different stages of the consent procedure. This is recognised in the judgment of Peart J. in determining that for an E.I.A. to be completed at this state of the development, it was required to assess the cumulative impacts of the grid connection and the wind farm. It is also acknowledged in condition no. 2 applied by the board. The grid connection was not authorised by a decision of the board in these proceedings.

40. The principle point raised for the applicants in the substantive High Court hearing before Peart J. related to the absence of information on the grid connection to enable a cumulative assessment to be carried out and is not impugned in these proceedings.

41. In the current application the applicants have not raised any point on the substantive E.I.A. carried out nor have they purported to allege any deficiency in the E.I.A.. The judgments of the Supreme Court in *O'Connor v. Environmental Protection Agency* [2003] 1 I.R. 530 and *Martyn v. An Bord Pleanála* [2008] 1 I.R. 336 suggest that an E.I.A. can be carried out at a stage wherein the partial consent for part of an overall project has been given.

42. The applicants in this case have not engaged with the content of the E.I.A. or shown any prejudice regarding matters they categorised as significant alterations to the application. When all is said and done the overall development is still a six turbine development with a connector and the decision impugned in this application concerns the wind farm aspect of that development.

43. So far as the Appropriate Assessment is concerned there is no evidence of any *lacunae* in the decision of the notice of the board.

44. In this application a significant part of the applicants' case is based on the assertion that, from the outset, the grid connection should have been included in a planning application. This is impermissible for two reasons: (i) it is out of time; and, (ii) it offends the rule in *Henderson v. Henderson* (1843) 3 Hare 100 because it could, and should, have been made in the substantive proceedings before Peart J..

Conclusion
45. Having considered the evidence before the court and the extensive legal submissions made by the parties I am satisfied that the applicant is not entitled to the reliefs sought in this application for the following reasons:-

> (i) the E.I.A. assessment conducted by the board was adequate and was a necessary consequence of the remittal by Peart J..
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> (ii) the Appropriate Assessment was conducted with complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effect of the proposed development on the three European sites referred to the decision of the board and in particular, the effects of other wind farms projects and sources of drainage run-off on Gearagh Candidate Special area of Conservation [cSAC];
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> (iii) the applicants have not established any grounds for relief on the basis of the s. 132 notice served by the board and the notice parties response thereto; and,
>
> (iv) the permission granted does not authorise the development of the grid connection between Cleanrath and Derragh wind farm sites.

46. In effect the board did what it was required to do pursuant to the remittal order by Peart J. and did so properly.