APPROVED NO REDACTION NEEDED

THE COURT OF APPEAL
CIVIL

Court of Appeal Record Number: 2024/120
High Court Record Number: 2023/96MCA
Neutral Citation: [2024] IECA 300

Butler J.
Meenan J.
Hyland J.

BETWEEN/

DONEGAL COUNTY COUNCIL

APPLICANT/ RESPONDENT

- AND -

PLANREE LIMITED

AND

MID-CORK ELECTRICAL LIMITED

RESPONDENTS/ APPELLANTS

JUDGMENT of Ms. Justice Butler delivered on the 18th day of December 2024

Introduction

1. This judgment concerns an appeal taken by the appellants against the decision of the High Court (Holland J. [2024] IEHC 193) granting an order under section 160 of the Planning and Development Act 2000, as amended, prohibiting the carrying out of further

development at Meenbog Wind Farm, County Donegal. The appellants are the developers of the Meenbog Wind Farm, the first appellant being, strictly speaking, the developer and the second appellant the entity responsible for the works on the ground. I will refer to them cumulatively as the appellants even though some matters concern only the first appellant. Donegal County Council ("the Council"), the applicant for relief in the High Court, is the planning authority within whose functional area the wind farm is located. In this judgment all statutory references are to the Planning and Development Act 2000, as amended, (also referred to as "the Act" or the "PDA") unless otherwise stated.

2. The particular issue that the court is asked to determine on this appeal is whether the presence of material deviations from the grant of planning permission on foot of which the development has been constructed, renders the entire development unauthorised or merely those elements of it which do not conform to the planning permission. As we shall see, in this case the answer would not have a bearing on the jurisdiction of the court to make orders restraining the continuation of the development. However, the appellants are concerned that the characterisation of the entire development as unauthorised could have an impact on the validity of an application which Planree has submitted to An Bord Pleanála seeking substitute consent in respect of the deviations only. For reasons which I will explain in due course, it does not seem to me appropriate that this court should be asked to comment on the validity of the substitute consent application, which does not form part of the section 160 appeal, and which is currently pending before the body with jurisdiction to determine both whether it is valid and whether it should be granted.

3. It will also become apparent as I describe the interactions between the parties and what occurred at the High Court hearing, that the nature and extent of the defence raised by the appellants to the Council's applications has varied over time. This, in turn, has had an effect on the way some of the evidence presented by the appellants is to be read. Most

significantly, at the time the Council first initiated enforcement action (the service of a warning letter in November 2020), through the exchange of affidavits before the High Court hearing until a point shortly before the hearing commenced, the appellants contended that the deviations from the permitted development identified by the Council were not material. Consequently, the appellants disputed the jurisdiction to make any order under section 160. Once it was conceded that the deviations were material, the focus shifted to two different issues both of which remained live on this appeal. The first, identified in the preceding paragraph, is the extent to which that portion of the development which was built in conformity with the planning permission remained authorised notwithstanding the presence of unauthorised elements in the overall development. The second is the precise basis, within the subparagraphs of section 160(1), on which the court has jurisdiction to make any order. Finally, as is the case with any injunctive relief, in the event that this court upholds the High Court decision regarding the jurisdiction to grant section 160 relief, the appellants raise issues regarding the exercise of the court's discretion as to whether such relief should actually be granted. I will return to all of these issues in due course.

4. In order to address these issues, I propose, initially to outline the circumstances in which the wind farm development came to be built and in which the material deviations that are the subject of the section 160 application came to be identified. In that context, I will look at the relevant provisions of section 160 PDA and the arguments made thereon. I will also address the related application for substitute consent, the relevant portions of Part XA PDA and of the EIA Directive and the Habitats Directive. Rather than examining the High Court judgment in isolation, I will look at the conclusions reached by Holland J. when considering each of these elements of the case. As the arguments made on the central issue, i.e. the extent to which that portion of the development constructed in accordance with the planning permission can be described as unauthorised, ranged over both section 160 and Part

XA PDA, I will address this issue having considered both of these provisions. Finally, I will consider the discretionary element of a section 160 order.

The Meenbog Wind Farm Development - Planning Permission

5. The development in issue on this appeal is a 19-turbine wind farm located in west Donegal in respect of which An Bord Pleanála granted a Strategic Infrastructure Development permission (the "SID permission") on 26th June 2018. Because the development constitutes strategic infrastructure, the application for planning permission was made directly to An Bord Pleanála. It appears from the inspector's report in respect of that application that, although the elected members of Donegal County Council recommended that planning permission be refused, the reports from the Council as the planning authority were, broadly speaking, supportive of the development. The permitted development must be carried out within 10 years of the date of the permission – i.e. by June 2028.

6. The process which led to the grant of the SID permission included the carrying out of [both] an environmental impact assessment ("EIA") and an appropriate assessment ("AA"), both of which were required under EU law. In this judgment I use the term "environmental assessment(s)" to cover both of these. An EIA was required because the project (an installation for the harnessing of wind power for energy production) fell within paragraph 3(i) of Annex II of the EIA Directive (2011/92/EU) and exceeded the threshold set in respect of such a project at national level (five turbines) at paragraph 3(i) at Schedule 5 Part 2 of the Planning and Development Regulations 2001 S.I. No. 600/2001 (the "PDR"). A screening exercise was conducted in respect of AA which concluded that the development had potential to have significant effects on five sites in the vicinity of the development site, which had been designated under the Habitats Directive 92/43/EEC and/or the Birds Directive 79/409/EEC for the protection of ecologically sensitive habitats and/or species.

Consequently, An Bord Pleanála was required to and did carry out an appropriate assessment. The fact that such assessments were required prior to the grant of development consent is a crucial factor in considering the status of a development which is not then carried out in accordance with the terms of the resulting development consent.

7. It is common case that the wind farm is located in an area of high ecological sensitivity. The development site is extensive and occupies approximately 1000 hectares in an uplands area, most of which is covered by blanket bog and commercial forestry. Although the development site itself is not designated, active blanket bogs are a priority habitat under Annex I of the Habitats Directive (reference 7110). The boundaries of the site are contiguous with two designated sites and a further three were "screened in" as part of the first stage of the AA. Of these five sites one is a bog, two are riverine and a fourth includes a lake. This is unsurprising given that bogs are wetland habitats and the potential for hydraulic links with other wetland habitats is very high. In this case, the wind farm lands are upstream of and drain into the EU sites.

8. It should also be noted that the western edge of the site lies on the border between County Donegal and County Tyrone in Northern Ireland. One of the designated sites screened in for the AA lies wholly within Northern Ireland and the development thus comprises a project capable of having transboundary effects.

9. The permitted development consists of up to 19 wind turbines of a stipulated maximum height and a range of ancillary development associated with the construction and operation of a wind farm. The turbines are each located in an area of hard standing and are spread out across the western portion of the site in two groups. For the purposes of this case the important elements of permitted ancillary development are an access road to the entire development from the public road, the upgrading of existing tracks and forestry roads and the construction of new internal roads to provide access to the areas in which each turbine is

located. The upgrading of existing roads is necessary largely to facilitate the transport of the turbines to the areas of hard standing as these comprise exceptionally heavy loads. Thereafter, until decommissioning, the internal roads will mainly be used for maintenance purposes, for which the upgrades would not be necessary. The ancillary works also include three borrow pits, i.e. areas on the site from which rock was to be extracted for use in the building works and, when excavated, were to be filled with the peat which had been removed from the areas in which the building works had taken place.

10. The SID permission was subject to twenty conditions, a number of which were specifically directed at ensuring the construction works were carried out in a manner which protects the environment and the ecological interests identified during the course of the two assessments referred to above. Of particular importance for present purposes is condition one, the relevant portion of which provides as follows: -

> "*The development shall be carried out and completed in accordance with the plans and particulars lodged with the application, except as may otherwise be required in order to comply with the following conditions …*"

The reason given for the condition, which is a fairly standard one, especially having regard to the scale of the development is "*in the interest of clarity*".

11. It is relevant to some of the appellants' arguments regarding discretion, to note that in dealing with the grant of permission the Board's decision expressly records that it had regard, *inter alia*, to the national targets for renewable energy contribution of 40% gross electricity consumption by 2020. In its EIA conclusions, the Board identified the positive environmental impacts the operational phase of the wind farm would have through the generation of renewable energy. In its conclusions regarding proper planning and sustainable development, the Board stated that "*implementation of the project was in compliance with the national strategic objectives and policies in delivering Ireland's targets for maximising*

Ireland's renewable energy resources and would support Ireland's transition to a low carbon economy".

The Construction of the Development - Peat Failures

12. Prior to construction works commencing on site, the appellants requested an alteration of the SID permission from An Bord Pleanála under section 146B of the PDA. That section permits the alteration of the planning permission for an SID development provided the alteration would not constitute a material alteration of the terms of the development. In this case, the alteration permitted an increase in the length of the turbine blades provided the overall height of the turbines did not increase from the originally permitted height (i.e. the hub height would have to reduce in order to accommodate longer blades within that overall limit). Nothing turns on this save that the Council have queried why the appellants felt it was appropriate to seek an alteration regarding this aspect of the development when other elements were also changed without any similar request being made in respect of them.

13. Construction works commenced in November 2019. It seems that from a relatively early stage, problems emerged due to the instability of the peat covering the site. Notwithstanding the soil stability analysis which had been presented as part of the EIA and AA and the requirement that the construction works comply with the construction and environmental management plan appended to the EIA (a condition of the SID permission), a number of peat slides occurred within the first twelve months on site. A report prepared on behalf of the appellants, identified seven such incidents, four at two locations which were classified as "*peat failure*" and three incidents of minor instability at three different locations. The report (by Fehily Timoney) ascribes these failures to the casting of undrained

excavated peat onto *in-situ* peat which was unable to bear the load. It appears that none of these incidents were reported to the Council nor to any other agency.

14. Work continued on the site until 12th November 2020 when a major peat slide occurred. This took place at an area at the very east of the site at which works were being carried out on a floating road to turbine 7. The volume of peat which failed is estimated at 86,240 meters cubed of which approx. 65,740 meters cubed left the area in which it was located and travelled three kilometres along the Shruhangarve Stream into the Mourne Beg River in Northern Ireland and nearby EU sites. Entry of peat into water is itself a polluting event as the suspended solids from the peat have the potential to harm aquatic life and species.

15. Not all of the peat which moved reached the river as some accumulated along the run-out trail. Nonetheless, the incident was potentially significant and caused environmental damage. Unlike the earlier peat failures which Fehily Timoney ascribed exclusively to construction methods, the report advances a number of different potential contributory causes for the major peat slide, only one of which involves construction methods. These included an unforeseen zone of weak peat, the topography of the site at the location of the failure and the rainfall intensity and pattern preceding it.

16. The appellants place significant reliance on the fact that the works being carried out at turbine 7 at the time of the peat slide were authorised by the SID permission and did not involve any deviation therefrom. This seems to be correct and, as a result, Holland J. expressly concluded that the residual effects of the November 2020 peat slide should not concern him (para. 29 of the judgment). Whilst I accept that this is so as regards to the section 160 application, it is nonetheless apparent that any further environmental assessment of the development will have to take account of the historic fact that the carrying out the works required for the development caused peat failure. Not only does this mean that the receiving

environment has now changed, it is also unavoidable that regard will have to be had to the fact the original environmental assessments carried out in respect of the SID permission did not identify the areas of underlying weakness in the peat. Therefore, as Holland J. observes (at para. 21 of his judgment) careful scrutiny will be required in any further EIA or AA.

17. Following the November 2020 peat slide, works on the site ceased. A cross-border environmental investigation led by the EPA and a multi-agency working group including a number of Northern Ireland bodies, were established. Parallel to these steps, a criminal investigation and prosecution took place resulting in the conviction of the appellants before the District Court on foot of guilty pleas in June 2022. In fairness to the appellants, they carried out the remediation works required by the EPA and the Council by the summer of 2021. The appellant relies on the fact that the EPA confirmed that it was satisfied with the works which had been carried out and the stability of the site as a result of the remedial works. Following completion of these works, the EPA accepted that the site was sufficiently stable for the construction of the wind farm to be completed.

Enforcement Action

18. Prior to the November 2020 peat slide, the Council was unaware that the construction of the wind farm was not taking place in full conformity with the SID permission. In the immediate aftermath of the peat slide, the Council served a warning letter under section 152 of the Act on 23rd November 2020. No further action was taken, in part because the Council was waiting on the outcome of various investigations which were taking place and because, in any event, work on the site had stalled following the peat slide. The Council engaged external consultants (SLR Consultants) to assist in its investigations. SLR produced a report in February 2022 which identified various deviations from the SID permission and assessed their significance from a planning and ecological perspective.

19. I do not propose to go through each of the deviations in this judgment and the following is intended as a broad overview. A useful and detailed table listing the deviations, the level of environmental risk (if any) posed by them, the appellants' explanations for them and the trials judge's comments is to be found at para. 32 of the High Court judgment.

20. The SLR Deviations Report identifies 45 separate deviations from the SID permission in the as-constructed development. Sixteen of these are identified as posing medium or higher ecological risks which were not considered during the EIA and AA process prior to the grant of permission. In the Council's view, 21 of the deviations are material in planning terms and these form the basis of the section 160 application. It might be noted that the appellants have submitted an application for substitute consent regarding 25 material deviations. The additional ones, over the 21 cited in these proceedings, comprise remedial works done at the direction of the EPA and the Council after the peat slide. The balance of the deviations in the SLR report are characterised as non-material and need not concern us further.

21. Of the 21 deviations listed in the notice of motion, 11 are categorised as having potential ecological significance and as being material in planning terms, whereas the other 9 are regarded as material in purely planning terms. One deviation relates to the access road to the entire site, another 10 relate to the internal access roads to individual turbines. Two deviations concern alterations to the hard standing area of turbines and one the enlargement of a permitted storage compound. Three deviations relate to borrow pits and at least five to peat storage cells. The figure to the latter is inexact because it appears that some of the unauthorised borrow pits are also being used for peat storage. Two of the deviations fall outside the red line planning boundary shown on the applicants' planning application documents, i.e. they are not within the site for which planning permission was granted.

22. Whilst a number of the deviations involve alteration of permitted elements of the development (e.g. movement of roads, enlargement of borrow pits etc), others involve development which was not indicated on the planning application at all. The most significant of these is identified as deviation number five. It consists of the expansion of an existing 0.2-hectare forestry borrow pit south of turbine 12. Although three separate borrow pits are identified in the planning documentation, this was not one of them. It has been expanded tenfold and now covers two hectares. In addition to extracting stone from this location, the appellants used the excavated area as a peat cell for the storage of an unknown but presumably large quantity of extracted peat. Mr. McDermott's affidavit on behalf of the Council describes the excavated borrow pit as having been filled with peat to a depth of 20 meters and that it is held on the downside slope with a 2-meter-high retaining wall constructed from rock. It is apparent from an explanatory map of the as-built development that this borrow pit/peat cell is now the single largest element of the development on the site. Two other areas used as peat cells (one on the access road and the other near turbine 18) are substantially outside the red line planning boundary. Four of the peat cells (at turbines 12, 15, 17 and 18) do not have any planning permission.

23. The appellants and the Council disagreed regarding the significance of the deviations identified in the SLR Deviations Report. The Council took the view that substitute consent was necessary to authorise the deviations as the project had originally required both an EIA and an AA. The appellants disagreed primarily on the basis that they did not regard the deviations as material. This dispute is echoed in the affidavits filed in response to the section 160 application, at which time the appellants were still maintaining that the deviations were not material. In particular, Brian Keville, an environmental scientist and director of a consultancy (MKO) engaged by the appellants, averred that "*once on-site [once] construction commences, engineering and construction plans must be adjusted accordingly.*

Invariably, there are ground conditions encountered which require changes to construction practices, sequencing or management, and some deviations are an inevitable and universal practice for works on projects of this size, scale and complexity." In fairness to Mr. Keville, this averment was made in circumstances where the appellants were asserting that the deviations were not material, a position which they no longer hold. However, since abandoning that position the appellants, in their notice of appeal and written submissions to this court, maintained the position that the deviations which occurred "*arose out of site conditions and were an environmentally prudent response to same*" (para 13) and that "*the evidence established that the degree of material deviation has to be understood and assessed by reference to the size, scope and complexity of the development*" (para 14).

24. I might pause at this point to make two observations. Firstly, no matter how prudent a developer might regard its own actions, it is fundamental to our planning system that the decision as to what is permissible is not made by the developer. Rather, it is made by the appropriate decision maker. More importantly, in cases which involve sensitive environmental or ecological considerations, that decision will only be made after a full environmental assessment in which a range of parties, including members of the public, have the opportunity to comment on and contest what the developer has submitted as environmentally appropriate. To allow a developer to ignore the outcome of that process and revert to what it regards as prudent has the potential to seriously undermine the integrity of the planning system.

25. Secondly, once the appellants accepted that the deviations were material, it is difficult to understand how the degree of materiality remained relevant. A material deviation is something which is not within the scope of an existing planning permission and, thus, requires a separate or additional grant of planning permission. The Council accepts that the implementation of a planning permission requires some flexibility and not all deviations

from the plans and particulars on which the permission is based will be material. In this case, the Council accepted that over half of the deviations identified by SLR were not material and those do not form part of this application. Clearly, the size, scope and complexity of a development will be a factor in determining, in the first instance, whether a deviation is material or not. Other factors will include the location of a development and its environmental sensitivity, which may render a deviation material, which might not be so regarded in a similarly sized development located elsewhere.

Substitute Consent

26. Because of the difference of opinion between the appellants and the Council as to whether the deviations were material, the appellants were initially reluctant to accept that a grant of substitute consent would be necessary to regularise the development. I will look at the legislative provisions concerning substitute consent in more detail later in this judgment. At this stage, it is sufficient to understand that a grant of retention permission under section 32(1)(b) of the PDA to retain development which is unauthorised is not available where the development in question requires either an EIA or an AA. This is because EU law requires that such assessment be carried out before development consent is granted to ensure that consent will only be granted where the proposed development is environmentally sustainable and any such consent will be appropriately conditioned in light of environmental concerns. It is axiomatic that development requiring environmental assessment should not be carried out prior to the granting of development consent.

27. Consequently, this required the introduction of a separate system of retrospective development consent which may be granted only in exceptional circumstances and after the carrying out of a remedial EIA and/or a remedial AA as the case may be. Needless to say, it

is significantly more difficult to obtain substitute consent than it is to obtain retention permission.

28. At the material time, an application for substitute consent could only be made if An Bord Pleanála granted leave to make such an application. The appellants made an application for leave to apply for substitute consent on 8th July 2022 on a "without prejudice" basis because they were still disputing the materiality of the deviations and consequently the need to make any such application. This was framed as an application "*for alterations to the granted planning permission…of the Meenbog Wind Farm…*" and looks for substitute consent in respect of 25 deviations from the permitted development. These include the 21 deviations listed in the notice of motion grounding the section 160 application and additional deviations which occurred in the carrying out of emergency works directed by the Council and the EPA in response to the peat slide.

29. The Board granted leave to apply for substitute consent on 13th October 2023 and, after requesting an extension of time, the applicant submitted an application for substitute consent on 2nd April 2024. It emerged in the course of argument the appellants' principal concern at this stage is that the High Court judgment suggests, because of the material deviations, that the entire wind farm development is now unauthorised and, consequently that the entire wind farm development should be the subject of the substitute consent application, not just the material deviations. Because of this, on 17th July 2024 the appellants formally requested the Board not to make a determination on the substitute consent application, presumably until this court has delivered judgment.

30. The appellants were of the view that if the entire wind farm development is unauthorised then the application for substitute consent currently before the Board will not suffice to remediate the SID permission and a further, and more extensive, application would be required. Although the works required to complete the *in-situ* development are likely to

take six to nine months, the time required to prepare a new application for substitute consent, and for that application to be decided, is far longer. The appellants have a concern as to whether this process could be completed, and the works carried out before the planning permission expires in 2028.

Section 160 Proceedings

31. As previously noted, the Council issued the appellants with a warning letter on 23rd November 2020. A criminal prosecution was concluded in June 2022. In September 2022 the appellants indicated that they intended to recommence works on the wind farm to carry out the balance of the works permitted by the SID permission. In response to this, on 16th November 2022 the Council issued two enforcement notices under section 154 of the PDA, as a result of which works ceased on site. These notices were challenged by way of judicial review and subsequently quashed by consent on 27th February 2023. Very shortly thereafter, these section 160 proceedings were issued on 3rd April 2023.

32. The appellants took issue with the way in which the notice of motion was originally drafted in that it looked for an order under section 160(1)(a) requiring them "*to cease and/or refrain from carrying out all and/or any development*" at the Meenbog Wind Farm. On 19th May 2023, an amended notice of motion was issued pursuant to an order made in the SID directions list. This looks for relief under section 160(1) requiring the appellants "*to cease an unauthorised development and/or to restrain … from any continuation of an unauthorised development*" at the same location. The notice of motion specifies that the development "*comprises unauthorised development notwithstanding the grant of planning permission … by reason of significant unauthorised development and deviations carried out [by the appellants] from the said planning permission and conditions relating thereto …*". The 21 deviations are specified in an appendix to the notice of motion.

33. Changes to a notice of motion made before the High Court hearing are rarely relevant by the time the case comes before this court on appeal. In this case they are relevant, not as a pleading issue, but because they neatly incapsulate the position the appellants ultimately adopted before the High Court. It appears that the appellants ceased contesting the materiality of the deviations following the grant of leave to apply for substitute consent, presumably because that position was difficult to maintain in circumstances whereby in granting leave, the Board acknowledged that the deviations in respect of which the leave was sought required an EIA or an AA, or both. Logically, a deviation which itself requires such an assessment can hardly be said to be immaterial.

34. By the time the application was heard by the High Court, the appellants' position had crystallised as follows. The material deviations constitute unauthorised development, but the balance of the development was carried out in compliance with the SID permission and remained authorised. Orders under section 160 can only be made in respect of the unauthorised parts of the development and not in respect of the development as a whole. Specifically, an order under section 160(1)(a) requiring that works not be carried out or continued can only be made in respect of the unauthorised portion of the development. Consequently, the appellants should be permitted to complete the outstanding works on the permitted development as this remains authorised. In any event, the court should exercise its discretion to permit the appellants to complete the development in light of the significance of the deviations relative to the size, scale and the complexity of the development; economic considerations including a threat to the appellants' solvency which could result in an inability to complete the development; and policy considerations arising from the fact that the development, when operative, will generate renewable energy and contribute to the reduction of Ireland's carbon emissions.

35. This position crystallised further towards the end of the High Court hearing when the appellants put a proposal to the court that they should be allowed to partially complete the development by the installation of 11 of the 19 turbines, with the installation of the remaining turbines to await a grant of substitute consent. It was submitted that an order could be made under section 160(1)(c) to facilitate this by requiring the development to be carried out in conformity with the planning permission. This proposal was advanced on the basis that, for the most part, the 11 turbines did not "*interact*" with the material deviations for which substitute consent was required.

36. In my view, the contention that the installation of 11 turbines could be completed without interacting with the material deviations is misconceived. Two examples will illustrate the inherent fallacy. Firstly, the development site is accessed from the public road by a road which runs initially south-east, before turning north-east towards the area in which the turbines are located. This was an existing access road which was to be upgraded along its existing line as part of the SID permission. Close to the entrance to the site, the access road turns sharply in a configuration described as a "hairpin bend". Instead of upgrading this portion of the access road, the appellants built a new stretch of road across the mouth of the hairpin bend, thereby obviating the need to make that difficult turn. The appellants believe that this is a better solution, and that may well be so, but it is not something permitted by the SID permission.

37. Installation of the turbines requires the transportation of the turbine parts along the access road to reach the individual turbine bases. The reason the existing roads had to be upgraded and new roads built is that the turbine parts comprise exceptionally heavy loads which the existing forestry roads could not bear. The subsequent maintenance of the turbines would not require roads of that quality or specification. Therefore, the erection of any turbine entails the use of an unauthorised development, i.e. a road constructed in breach of the SID

permission, in order to access to turbine base. An order facilitating the erection of 11 turbines would effectively give the appellants the benefit of the unauthorised access road for the only real purpose it is intended to serve, before An Bord Pleanála has a chance to decide whether substitute consent should be granted in respect of it.

38. The second example is deviation number five, the two-hectare borrow pit/peat cell near turbine 12. Whilst it might be true to say that the erection of 11 turbines would not interact with this prospectively, it cannot be said with any real certainty that it has not interacted with it already. Clearly, a lot of rock was extracted from this borrow pit. We do not know where it was brought on site, or which roads, or turbine bases it was used to construct. Similarly, we don't know from where the peat now stored in that borrow pit was excavated. The appellants are not in a position to state categorically that the peat did not come from the turbine bases or related access roads of any of the 11 turbines they wish to erect immediately.

39. In my view, the contention that the material deviations do not interact with the 11 turbines it is now sought to erect is simply incorrect. In any event, Holland J. did not agree to making a limited order which would have facilitated such works. He took the view that the receiving environment, i.e. the development site, had been altered by both the peat slide and the carrying out of the material deviations and thus no longer reflected the site which has been analysed in the environmental assessments conducted at the time the SID permission was granted and that this may have a bearing on the carrying out of the remaining works. I agree with this analysis.

40. The foregoing description of the development, the material deviations and the events leading to this application give some idea of the issues with which the court is now concerned. I now propose to look at section 160 and the relevant portions of Part XA (substitute consent) and to address the arguments made specifically in relation to those

sections, before looking at the central issue on the appeal, namely whether the presence of the material deviations renders the entire development unauthorised.

Section 160 PDA

41. Section 160 allows for the grant of a statutory injunction in relation to unauthorised development. For present purposes we are concerned only with section 160(1) which creates the jurisdiction to grant the statutory injunction. In so far as relevant it provides: -

> "*Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court … may, on the application of a planning authority or any other person … by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:*
>
> *(a) that the unauthorised development is not carried out or continued;*
>
> *(b) in so far as is practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;*
>
> *(c) that any development is carried out in conformity with –*
>
> *(i) in the case of a planning permission granted under this Act, the permission pertaining to that development or any condition to which the permission is subject …*".

42. There is no dispute that, in principle, the High Court has jurisdiction to make an injunction in this case nor that the Council has complied with the time limits and requirements set out in other subsections of section 160. Instead, the appellants contend that the High Court did not have jurisdiction to make the order it made – namely one restraining the appellants from carrying out any further development on the wind farm pending further order. The appellants argue that the types of orders that can be made under section 160(1)

are exhaustively identified in subparagraphs (a) to (c). Consequently, what the appellants describe as a "stop order" requiring cessation of works can only be made under subparagraph (a). Under the terms of subparagraph (a), such an order can only be made in respect of unauthorised development. Therefore, the appellants argue that the High Court did not have jurisdiction to make an order which effectively restrained them from carrying out works under the SID permission to complete the authorised portion of the development. The Court only had jurisdiction to injunct the unauthorised parts of the development on which work had ceased before the injunction application was brought. Further, notwithstanding the presence of unauthorised development on the site, the appellants argue that the High Court has jurisdiction under subparagraph (c) to make an order permitting the completion of the development in accordance with the SID permission.

43. Holland J. did not agree with this interpretation. This was largely because of his conclusion that the entire development was unauthorised due to the presence of the material deviations (an issue to which I shall return). However, lest his decision on that point was incorrect, he also considered whether the appellants' interpretation of section 160 was correct. He concluded that whilst the presence of unauthorised development was a precondition to the court exercising jurisdiction under section 160, once that precondition was satisfied, the court had a broad jurisdiction to make a range of orders requiring any person to do or not to do, or to cease to do anything the court considered necessary to ensure the development was carried out in conformity with the planning permission to which it is subject. He regarded the reference in this section to "*any development*" as conferring a broad jurisdiction to do anything the court considered necessary to secure planning compliance in the context of the identified unauthorised development (see paras. 94-96 inclusive of the judgment).

44. I think that this analysis is generally correct. In addition, I think that the appellants' interpretation, which characterises subparagraphs (a) to (c) as identifying the types of order that can be made under section 160(1) and the circumstances in which each can be made, is incorrect. As Holland J. said, section 160(1) creates a broad jurisdiction to make orders with a view to ensuring that certain objectives are achieved. Those objectives are identified in subparagraphs (a) to (c) and include ensuring that unauthorised development is not carried out and that development is carried out in conformity with any planning permission relating to it. The appellants have confused the purposes for which the power to make orders under section 160 has been conferred with the types of orders that can be made. In my view they have done this in a way which artificially and unnecessarily restricts the otherwise broad jurisdiction conferred by this section. The court has power under section 160(1) to make an order requiring any person to do, or not to do, or to cease to do anything, the court considers necessary to achieve the objectives in subparagraphs (a) to (c). Even if the appellants are correct in their argument that the presence of unauthorised development within a permitted development does not render the entire development unauthorised, the court still has jurisdiction under section 160 to make an order affecting the authorised development, including an order requiring it to cease, if that is necessary to ensure that the unauthorised development is not continued, or that the development is carried out in conformity with an existing grant of planning permission. In this regard I also accept as correct the argument made on behalf of the Council, that even if the appellants' characterisation of section 160(1) was correct, it would not necessarily follow that each of subparagraphs (a), (b) and (c) were necessarily disjunctive and that they could not overlap in appropriate circumstances.

45. Obviously, this element of the analysis is unnecessary if Holland J. is correct in concluding that the entire development is unauthorised. Even on the appellants'

interpretation of section 160(1), if the entire development is unauthorised, then orders can be made in respect of it under any of the subparagraphs.

Part XA of the PDA/ Substitute Consent

46. The history of Part XA of the PDA is well known and need only be summarised briefly here. In *Commission v. Ireland* Case C-215/06 (*Derrybrien I*), the CJEU held that the availability of retention permission under section 32(1)(b) and section 34(12) in respect of development which required an EIA was inconsistent with EU law. This was because the EIA Directive requires the carrying out of an assessment of the likely effects of such projects before development consent is granted and certainly before any works on the project are carried out.

47. Whilst the judgment acknowledged that EU law could not preclude applicable national rules from allowing the regularisation of matters which are unlawful in light of EU law, this should be exceptional and, crucially, should not provide developers with the opportunity of circumventing EU rules. The judgment also identified the possibility of a "*remedial environmental impact assessment, undertaken to remedy the failure to carry out an assessment as provided for*" in the EIA Directive but noted that this is not the equivalent to an EIA carried out under the Directive before development consent is granted.

48. The jurisprudence of the CJEU has remained consistent on this point and, in a similar vein, on the requirement that an AA under the Habitats Directive be carried out before a Member State agrees to a project with the potential to have a significant effect on any EU site. Indeed, the jurisprudence has since gone further in identifying that the principle of sincere cooperation under Article 4(3) of the TEU requires Members States to remedy the failure to carry out an EIA. In paragraphs 35-37 of Cases C-196/16 and C-197/16, *Comune di Corridonia* the CJEU stated: -

"*35. Under the principle of cooperation in good faith laid down in Article 4 TEU, Member States are nevertheless required to nullify the unlawful consequences of that breach of EU law. The competent national authorities are therefore under an obligation to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out an environmental impact assessment, for example by revoking or suspending consent already granted in order to carry out such an assessment …*

36. The Member State concerned is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment …

37. The Court has, however, held that EU law does not preclude national rules which, in certain cases, permit the regularisation of operations or measures which are unlawful in the light of EU law …

38. The Court has made it clear that such a possible regularisation would have to be subject to the condition that it does not offer the persons concerned the opportunity to circumvent the rules of EU law or to dispense with their application, and that it should remain the exception …

39. Consequently, the Court has held that legislation which attaches the same effects to regularisation permission, which can be issued even where no exceptional circumstances are proved, as those attached to prior planning consent fails to have regard for the requirements of Directive 85/337."

49. More recently in Case C-411/17 *Inter-Environnement Wallonie v. Counseil des Ministres,* the CJEU has confirmed that the duty of sincere cooperation and the principles identified in *Comune di Corridonia* also apply to national courts: -

"*171. That obligation is also incumbent on national courts before which an action against a national measure including such a consent has been brought. The detailed*

procedural rules applicable to such actions are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (the principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (the principle of effectiveness)…

172. Consequently, courts before which actions are brought in that regard must adopt, on the basis of their national law, measures to suspend or annul the project adopted in breach of the obligation to carry out an environmental assessment…".

50. This is the jurisprudential context in which Part XA was introduced in 2010, along with a parallel amendment to section 34(12) which precludes planning authorities from considering applications for retention permission where an EIA or an AA is required. The provisions of Part XA are of bewildering complexity although they have been simplified somewhat by changes in the legislation since the appellants submitted their application for substitute consent. Fortunately, for present proposes it is not necessary to consider the procedure through which an application for substitute consent is made nor the criteria to be applied when determining it. It is only necessary to look at the circumstances where the need to make such an application arises. Note that in the discussion which follows, I use "environmental assessment" as an umbrella term to include either or both an EIA or an AA.

51. It is important to appreciate at the outset that substitute consent does not simply replicate retention permission with an added element of remedial environmental assessment. This is because the circumstances in which an application for substitute consent may be required are broader than those which trigger the need for retention permission which is required only where development is unauthorised.

52. Under Part XA as originally framed, an application for substitute consent could be made in four discrete sets of circumstances. The first, under section 261A, required an application to be made on the direction of a planning authority but applied only to quarries and is not relevant here. The second under section 177B was when a planning authority directed a developer or landowner to make an application in respect of a permitted development where a court had quashed the grant of planning permission. At the relevant time, the third and fourth possibilities allowed a developer/landowner to make an application to the Board under section 177C for leave to apply for substitute consent as a precondition to making such an application. An application for leave could be made under section 177C(2)(a) where a planning permission was invalid for reasons similar to those which applied under section 177B, but it was not necessary that a court had quashed the permission. Under section 177C(2)(b) an application could be made on the basis that exceptional circumstances existed "*such that it may be appropriate to permit the regularisation of the development by permitting an application for substitute consent*". The appellants' application for leave to apply for substitute consent was made under section 177C(2)(b) which is unsurprising as all of the other headings presume the existence of a planning permission, albeit a defective one, in respect of the development for which substitute consent is sought.

53. In deciding whether to grant leave to apply for substitute consent, under section 177D An Bord Pleanála had to be satisfied that the criteria under the relevant subsection of section 177C were met. In particular, it had to consider, by reference to criteria similar to those which apply to decisions as to whether an environmental assessment was required in normal course, whether an environmental assessment was required in respect of the development. In considering whether exceptional circumstances existed, the Board had to have regard to a number of criteria including whether regularisation of the development would circumvent

the objectives of the Directives, whether the developer could have reasonably believed the development was not unauthorised (section 177D(2)(b)), whether the ability to carry out an environmental assessment was substantially impaired, whether the environmental effects could be remediated and whether the applicant had complied with the previous planning permissions or previously carried out unauthorised development (section 177D(2)(f)). If leave to apply for substitute consent was granted, the developer then made the application under section 177E.

54. Since the date of the appellants' application, sections 177B, 177C and 177D have been repealed as of 16th December 2023 by the Planning and Development, Maritime and Valuation (Amendment) Act 2022. The preliminary procedure under which either a planning authority directed a developer or the Board granted leave to the developer to make an application for substitute consent has been abolished. Applications are now made directly by the landowner or developer to An Bord Pleanála under section 177E.

55. The application for substitute consent is still made under section 177E but that subsection has been substantially amended to take account of the fact that there is no longer a preliminary procedure determining the need for an application. Now the Board's jurisdiction to consider the application for substitute consent is dependent on making an initial determination that the development, the subject of the application, required an environmental assessment. One positive change is that it is no longer necessary to make an application for substitute consent where a screening exercise to determine whether an EIA was required should have been but was not carried out. This is entirely logical as it makes little sense to require a developer to undergo a substitute consent process because of a failure (presumably on the part of the planning authority) to carry out a screening process where the result of that process, if carried out, would have been a decision that an EIA was not necessary.

56. However, under section 177E(1D) and (1E) where a remedial EIAR or a remedial NIS is submitted with an application for substitute consent, An Bord Pleanála is deemed to be satisfied that an environmental assessment is required and should consider the application accordingly.

57. I have outlined the circumstances in which an application for substitute consent could be made prior to December 2023 to illustrate the difference between these circumstances and those relating to an application for retention planning permission for unauthorised development. Crucially, an application based on either section 177B or section 177C(2)(a) required the existence of a planning permission, the validity of which was in question because of the failure to carry out an environmental assessment before the permission was granted or because of the inadequacy of the materials on which the assessment was based made the resulting assessment unreliable. In circumstances where no judicial review challenge to such permission was instituted within the eight-week period under section 50(6), the developer was likely to have proceeded with the development in the reasonable belief that the planning permission was valid. In those circumstances, the development to which the application for substitute consent related was not unauthorised. There was, or had been until it had been quashed, a planning permission in existence which authorised it.

58. In many instances the failure to carry out the requisite environmental assessment would have resulted from decisions made by the planning authority, especially screening decisions which erroneously concluded that such assessment was not required or, historically, circumstances in which the planning authority failed to meaningfully engage with the requirements at all. In those cases, while some criticism can be levelled at a developer for not being sufficiently proactive in complying with their obligations, in reality the default was largely that of the planning authority. Thus, substitute consent might be required in respect of a permitted development in respect of which the developer had

complied with all of its legal obligations and with the decisions of the planning authority in respect of those obligations. The appellants' argument assumed that the failure to carry out an environmental assessment automatically rendered a development unauthorised. In my view, this is not always correct as a matter of domestic law.

59. In contrast, retention permission will be required where a developer has carried out unauthorised development (the meaning of which is considered in more detail below) in the absence of or in breach of the terms of a planning permission. In the case of retention permission, there will always have been default on the part of the developer or its predecessor-in-title.

60. The significance of all of this is that the requirement for substitute consent is not premised on the existence of unauthorised development, although in many cases development in respect of which environmental assessment was required but not carried out may well also be unauthorised. Instead, it is premised on the existence of a development which should have been but was not subjected to an environmental assessment before it was carried out. That may be because the development is unauthorised because it does not have planning permission, but it may equally be permitted development in respect of which a procedural error was made in the consent process as a result of which an environmental assessment which should have been carried out was not carried out.

61. Although the provisions of section 177C(2)(b) which acknowledge that there may be other cases in which "*exceptional circumstances*" justify an application for and grant of substitute consent, the sub-paragraph itself does not expressly link exceptional circumstances to the presence of unauthorised development. The possibility of such link was evident from the list of matters to which the Board had to have regard in deciding whether exceptional circumstances existed. In looking at these matters in section 177D(2), I noted subparagraphs (b) and (f), both of which expressly refer to unauthorised development.

However, they do so in a manner which does not make the need for substitute consent coextensive with the presence of unauthorised development. Subparagraph (b) looks at the motive of a developer and whether what is, in fact, unauthorised development could reasonably have been assumed to be authorised. Subparagraph (f) is more tenuous as it looks at the conduct of a developer in the sense of previous compliance or noncompliance with planning permissions and the carrying out of previous unauthorised development. Such unauthorised development is not necessarily referable only to the development in respect of which substitute consent is sought. It seems to allow the Board to have regard more generally to the developer's past conduct.

62. Counsel for the appellant also drew the court's attention to section 177E(2A), as it currently stands, but reflecting an earlier amendment made in 2015 by the EU (Environmental Impact Assessment and Habitats) (No. 2) Regulations 2015 (S.I. No. 320/2015). The text as it currently stands provides: -

> "*(2A) Where an application for substitute consent is made in respect of development of land for which planning permission has been granted, that application may be made in relation to -*
>
> *(a) that part of the development permitted under the permission that has been carried out at the time of the application, or*
>
> *(b) subject to subsection (2B), that part of the development referred to in paragraph (a) and all or part of the development permitted under the permission that has not been carried out at the time of the application.*"

He argued that the Council's contention that the application for substitute consent should relate to the entire development and not just the unauthorised portions of it was clearly incorrect in light of this provision as subparagraph (a) would make no sense if, in all cases, the developer had to apply for substitute consent in respect of the entire permitted

development because of the presence of some unauthorised elements in it. In my view, this is a misreading of section 177E(2A). The distinction drawn in section 177E(2A) is not between development which is permitted under a planning permission and development which is unauthorised because it is in breach of a planning permission. Rather it is a distinction between development which has already been carried out under a planning permission and development which is permitted by but has not been carried out under the permission at the time the application for substitute consent is made. As originally framed, the remedial environmental assessment to be carried out in the substitute consent process was entirely retrospective in that it related exclusively to development which was already carried out. There was no facility to link an application for prospective permission or prospective amendments to an existing permission with the application for substitute consent. Instead, the application for substitute consent had to be determined before any further application could be made. This provision now mends that situation at least in circumstances where there is a planning permission in existence in respect of the development. Section 177E(2B) reflects this in that the developer can describe the effects of that part of the development which has not been carried out at the time of the application in an EIA or NIS to be submitted in addition to the remedial EIA or NIS which must be furnished in respect of the substitute consent application.

63. The other element of Part XA discussed in the High Court judgment is section 177J. Under that provision, when An Bord Pleanála receives an application for substitute consent under section 177E it has jurisdiction to issue a draft direction in writing to the person who has made the application requiring that person "*to cease within the period specified … or are part of his or her activity or operations on or at the site of the development the subject of the application*". The exercise of this jurisdiction is dependent on the Board having formed "*the opinion that the continuation of all or part of the activity or operations is likely to cause*

significant adverse effects on the environment or adverse effects on the integrity of a European site".

64. The person on whom a draft direction is served has the opportunity to make submissions to the Board which, after considering the submissions, can issue the direction in the terms originally proposed or vary those terms or withdraw the draft direction. Failure to comply with the direction is a criminal offence.

65. It was not suggested, and in my view could not reasonably be suggested, that the existence of this jurisdiction under section 177J precluded the High Court from exercising its jurisdiction under section 160 in respect of the same development. Apart from anything else, the exercise of jurisdiction by the Board is predicated on its having received an application for substitute consent under section 177E, whereas a planning authority or other person may wish to move more expeditiously to restrain unauthorised development. The section 177J jurisdiction did not arise on the application for leave to apply for substitute consent nor on the giving of a direction to make an application for substitute consent by the planning authority when these preliminary steps were still required. More significantly, exercise of the section 177J jurisdiction requires the Board to have formed the opinion that the continuation of the activity will have significant environmental effects. This is not a requirement under section 160, under which the fact of unauthorised development alone may justify the grant of injunctive relief. Undoubtedly, the likelihood of or absence of adverse environmental effects may have a bearing on the exercise of a court's discretion under section 160, but it is not a precondition to the jurisdiction arising nor to its being exercised.

66. Holland J. addressed section 177J in the context of the appellants' invitation to him to make an order which would facilitate the continuation of the development and the erection of some of the turbines whilst the application for substitute consent was still pending before the Board. He took the view that the Board was better placed than the court to exercise an

environmental judgment as to the acceptability of continuing with the development in this manner. In the expectation that the applicants would make a similar suggestion to the Board, he framed his order in a way which grants the parties liberty to return to the court to vary or discharge his order in the event that the Board makes a direction under section 177J which would allow the development to proceed in whole or in part. Apart from the implicit assumption that the Board would as a matter of course address the possible exercise of jurisdiction under section 177J "*with appropriate celerity*" in all circumstances where an application for substitute consent is received, Holland J.'s approach to the potentially parallel jurisdiction under section 177J seems to me to be entirely appropriate.

Unauthorised Development

67. The central issue in this appeal is whether the presence of 25 material deviations within the development being carried out pursuant to the SID permission rendered the entire development unauthorised. As the argument progressed, it emerged that there was a level of artificiality attaching to it. This was because it was conceded by the appellants that even on their argument, the High Court could have made an order under section 160 with the exact same effect as the order actually made provided it was an order directed exclusively at the 25 material deviations. An order directed exclusively at prohibiting the use of the material deviations would, at a minimum, prevent access to the site along the altered access route and would preclude the continued storage of the peat extracted for the purposes of the ground works in the seven peat cells for which no other planning permission exists or which considerably exceed in size that of which was permitted. This would prevent both any further development at, and the use of, the partially completed development as effectively as the order actually made. Ultimately, the appellants' concern is now not so much the fact an order was made but with the basis upon which it was made.

68. In those circumstances, a question necessarily arose as to the purpose of the appeal. The answer seemed to be that the appellants were seeking a ruling, in principle, that the partially constructed development was not unauthorised development save in so far as it comprised the 25 material deviations, in order to safely proceed with the application for substitute consent lodged under section 177E in respect of the 25 material deviations only. A determination that the entire development was unauthorised would, it was submitted, require the appellants to make a fresh and more extensive application for substitute consent in respect of the entire wind farm. It was submitted that this was unnecessary for the purposes of conducting proper environmental assessments since, in considering the application for substitute consent for the material deviations, the Board would be required to consider the cumulative and in-combination effects of the 25 material deviations with the rest of the wind farm development so that no gap or lacuna could arise.

69. I have serious reservations about engaging with an argument around the form of the appellants' substitute consent application when that matter is not properly before the court. The application for substitute consent is currently pending before the Board – although the applicant has asked the Board not to determine it until this appeal has been dealt with. The Board is the body with jurisdiction to make a decision as to whether the application which it has received is correctly framed in light of the provisions of section 177E and of the EIA and Habitats Directives and the remedial purpose intended to be served by the substitute consent process. This determination must be made in light of what are now accepted to be breaches of European law, i.e. the carrying out of works requiring environmental assessment which, because they are material deviations from the SID permission, are not authorised by any planning permission and, thus, do not have a development consent the granting of which was preceded by the requisite assessments.

70. Whilst the appellants assert that complete assessments can be achieved by the assessment of the material deviations cumulatively and in combination with the balance of the development, it is the Board rather than the court which has the technical expertise to decide on the basis of the application documents whether this is in fact so. Further, a decision to be made by the Board regarding the acceptability of the appellants' proposals on the format and scope of the remedial environmental assessments will likely be informed by the fact that public consultation is a fundamental part of those assessments. If the court were to decide in advance of that process being undertaken that the format of the substitute consent application satisfied not just section 177E but the underlying EU law obligations, members of the public who are not represented before the court would be shut out from making submissions on a key issue pertaining to those assessments.

71. For these reasons, I do not propose to make any determination as to the status of the development the subject of the substitute consent application. It may be that a view will be taken by the parties or indeed by the Board as to what is required in the substitute consent process as a result of the findings this court makes under section 160. However, in the following passages, I am expressly not purporting to make a determination regarding the validity or otherwise of the substitute consent application currently pending before the Board. In any event, as I have pointed out in looking at Part XA, for the reasons discussed, development in respect of which an environmental assessment was required but which was not carried out is not necessarily synonymous with "*unauthorised development*" although there is of course a considerable overlap between the two concepts.

Analysis of Statutory Scheme

72. The starting point for considering whether the entire development should be regarded as unauthorised because of the presence of material deviations is the text of the

PDA itself. The term "*unauthorised development*" as used in section 160 is defined in section 2 as follows:-

> "*"Unauthorised development" means, in relation to land, the carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use*;".

"*Development*" itself is defined in section 3 with the relevant portion of that definition being found in section 3(1)(a) as follows: -

> "*(1) In this Act, except where the context otherwise requires, "development" means-*
>
> *(a) the carrying out of any works in, on, over or under land, or the making of any material change in the use of any land or structures situated on land, …*".

It should be noted that the concept of "*unauthorised development*" has a relevance within the planning code beyond section 160. Under section 151 it is a criminal offence to carry out unauthorised development. The benefit of certain categories of exempted development does not apply to unauthorised development under Article 9(1)(a)(viii) and Article 10(1)(d) of the PDR 2001. The fact development is unauthorised affects its market value for compensation purposes under Schedule 2 paragraph (b)(v) of the PDA.

73. "*Unauthorised use*" is not relevant for present purposes, but "*unauthorised works*" is defined in section 2 as follows: -

> "*"unauthorised works" means any works on, in, over or under land commenced on or after 1 October 1964, being development other than -*
>
> *(a) exempted development …or*
>
> *(b) development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34, 37G, 37N or 293 of this Act, being a permission*

which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject;".

74. It is interesting to note that both the definition of unauthorised development and of unauthorised works are broad in that they refer to "*any unauthorised works*" and "*any works*" respectively. The use of "*any*" in this context does not suggest that the entirety of the development or the entirety of the works must be unauthorised in order for a development which comprises in part unauthorised works to fall within the definition of unauthorised development.

75. Three related definitions might be noted. "*Works*" is very broadly defined to include "*any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal ...*". An "*unauthorised structure*" is a structure other than one which was in existence in 1964 or one "*the construction, erection or making of which was the subject of a [planning permission]*" or which exists as a result of carrying out of exempted development. Clearly the pre-1964 element of this definition is not relevant for present purposes, and neither is the exempted development element since no development which requires an environmental assessment can now be carried out as exempted development. Thus, to be authorised, the construction of a structure must have been carried out in accordance with the planning permission. A "*structure*" is defined as "*any building, structure, excavation or other thing constructed or made on, in or under any land*" and where the context so requires includes the land in, on or under which the structure is situated. Therefore, the borrow pits – consisting of holes in the ground from which rock was extracted – are all structures, as are the peat cells even where they have been created by the filling in of such holes.

76. Further, in looking at the meaning of the terms, regard should be had to the scheme of the PDA as a whole. In terms of this scheme, section 32 which imposes a general obligation to obtain planning permission for development, is key. Under section 32(1)(a)

permission is required "*for any development of land, not being exempted development*". I have already touched on the significance of section 32(1)(b) under which retention permission is required in respect of unauthorised development and section 34(12) which prohibits a planning authority from considering an application for retention permission in respect of unauthorised development which requires environmental assessment. Under section 34, a planning authority may grant or refuse planning permission for the development of land on foot of an application made to it for that purpose and normally an appeal from the decision of the planning authority lies to An Bord Pleanála under section 37. There are exceptions to this such as SID (sections 37A to 37H inclusive) and substitute consent (Part XA), both of which are relevant to this case and where an application is made directly to An Bord Pleanála. However, the basic concepts of development and unauthorised development do not change depending on the body to which the planning application is made.

77. It was accepted by the appellants that a planning permission, when granted, relates to a unitary development or, in environmental assessment terms, a single project. This is evident from the terms of the SID permission which grants permission for a "*proposed development*". Although it comprises a number of different elements (turbines, a metrological mast, electrical substation and control buildings, grid connection cableing, the upgrade of existing roads and the provision of new roads, borrow pits, temporary construction compounds, site drainage, forestry felling and "*all associated site development and ancillary works*") it is perceived and permitted as a single development.

78. Despite this, the appellants argue that although the development is correctly treated as a unitary project for the purposes of the planning permission, the trial judge erred in treating it as such for enforcement purposes. In other words, the appellants' argument is that while the permitted development is the entire wind farm, the unauthorised development is strictly limited to the elements of the as-built development which do not conform to the

planning permission in a material way. Further, the appellants contend that the trial judge erred in starting his analysis for the purposes of section 160, by asking what was the development rather than asking what was the unauthorised development.

79. At first blush, this argument is unattractive. The definition of development and unauthorised development in sections 2 and 3 of the PDA apply to the whole of the Act generally, i.e. to the development control provisions of Part III (including sections 34 and 37) under which planning permission is granted, as well as the enforcement provisions of Part VIII. If the development comprises all of the elements of the wind farm for the purposes of the grant of SID permission, it is difficult to see why it should comprise something different or lesser when the question of enforcement arises.

80. Indeed, the Council responded to this argument by forcefully pointing out that the project in respect of which development consent was granted after the conduct of the requisite environmental assessments, was the entire wind farm as depicted on the submitted plans. Because what has been built on site does not conform to that consent in material ways, it is not the duly assessed project for which development consent was given. Consequently, the fact that an EIA was required and carried out adds to the reasons why the consented development (i.e. a unitary development under the planning permission) should not be regarded differently or broken into its constituent parts for enforcement purposes. On the Council's case, the wind farm development authorised by the planning permission has not been carried out. Instead, a different development has been constructed which is not authorised by the planning permission and consequently, that development, in its entirety, is unauthorised.

81. The appellants' response to this argument was to point to paragraph 13 of Annex II of the EIA Directive. This Annex lists the projects in respect of which a Member State may set thresholds or conduct a case-by-case analysis under Article 4(2) in order to determine

whether the project requires an EIA. Wind farms generally fall under paragraph 3(i) of Annex II of the Directive and Ireland has set a threshold of five turbines under paragraph 3(i) of Schedule 5 Part 2 of the PDR 2001. Obviously, the Meenbog Wind Farm easily exceeded that threshold. However, paragraph 13(a) of Annex II also requires that changes or extensions to projects "*already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment*" are made subject to assessment. The threshold set by Ireland in respect of such changes at paragraph 13(a) of Schedule 5 Part 2 is a change which results in the development coming within a class listed in Schedule 5 or an increase in size of 25% or an amount equal to 50% of the threshold.

82. The appellants relied on this to argue that, because paragraph 13 contemplates changes to projects in the course of construction, it follows that works legitimately carried out in accordance with the EIA Directive (i.e. pursuant to a development consent granted after an EIA was carried out) do not become illegitimate because there are subsequent changes to the project. This is clearly correct in circumstances where the subsequent changes are assessed prospectively before they are carried out. It is perhaps trite to say that the grant of a planning permission which amends or varies an existing permission or allows for the amendment of a development already built on foot of a planning permission does not de-regularise the unamended part of the resulting development. In those cases, the original project and its development consent will be amended by the subsequent development consent which, depending on its terms, will either be read with or replace the original development consent.

83. However, the difficulty here is that the original project has not been constructed in accordance with its planning permission and, thus, is not the development authorised by that permission. It has been the consistent view of the CJEU that environmental assessment must be carried out before development consent is granted and that retrospective regularisation

through remedial assessment must be truly exceptional. In those circumstances, I do not think that paragraph 13 can be interpreted in the manner suggested by the appellants. To do so would allow the possibility of exceptional retrospective regularisation, not yet granted, to be used to determine the legal status of a project which has not been completed in accordance with its development consent.

General Observations on the Case Law

84. The broader argument made by the appellants was based on an analysis of case law, all of which is considered in some detail by Holland J. in his judgment. The appellants contend that the trial judge erred in his treatment of the cases on which he relied in concluding that the entire development was unauthorised (*Horne v. Freeney* [1982] WJSC-HC 2157; *Dwyer Nolan Developments v. Dublin County Council* [1986] IR 130; *Ironborn Real Estate Ltd v. Dun Laoghaire-Rathdown County Council* [2023] IEHC 477 and *Hillside Parks v. Snowdonia National Park Authority* [2022] UKSC 30, [2022] 1 WLR 5077) and in distinguishing a series of section 160 cases relied on by the appellants which they contend illustrate that unauthorised elements in a permitted development do not render the entirety of the development unauthorised. In written submissions to this court, the appellants rely, in particular, on the judgment of the High Court in *Krikke v. Barranafaddock Sustainability Electricity Ltd* [2019] IEHC 825. This was a wind farm case which focused on the unauthorised status of the turbines with a view to addressing the extent of the unauthorised development in an otherwise permitted development.

85. Before I turn to look at the case law, it may assist to make a few general observations. Firstly, none of the cases deal directly with the point in issue here, namely whether the presence in the constructed development of material deviations from the grant of planning permission renders the entire development unauthorised. In my view, this is unsurprising.

Where a development is permitted, the planning decision maker has reached a conclusion that the development is, in principle, acceptable in terms of the proper planning and sustainable development of the area. Where an environmental assessment has been conducted, the potential impacts of the development have been anticipated and factored into the conditions to which the permission is subject. A planning authority will rarely have an interest in securing the removal in its entirety of a development which it regards as acceptable in principle. Rather, it will seek to ensure that the development is carried out in conformity with the planning permission. If, in the section 160 process, it can secure orders which ensure that the development will only proceed in conformity with the planning permission, it is unlikely to seek orders in respect of the balance of the development. Therefore, the authorised or unauthorised status of the development as a whole is rarely an issue where there is a permission pertaining to the development. It does not follow from the fact that the point is rarely if ever put in issue, that the development must necessarily be considered as authorised.

86. The appellants contended that the floodgates would be opened if a permitted development were to be treated as unauthorised because of a single deviation. It was argued that this would have serious consequences in terms of the number and scope of section 160 orders that could be made. The potential unfairness of this, for example to planning compliant unit holders in a shopping centre or industrial estate in which there was a breach of planning permission, was raised.

87. As we shall see, most of the case law in this area has arisen in the context of multi-unit developments to which special considerations may apply. This is because although a housing estate or industrial estate may be correctly perceived as a single planning unit in the hands of the developer, by design it is intended to be sold to individual occupiers, each of whose property will be treated as a separate planning unit once those sales have taken place.

The developer's responsibility is to ensure the estate is constructed in accordance with its planning permission because the planning authorities' view of the development as acceptable depended on the overall layout and design of the scheme and the provision of roads and services and green areas to benefit the estate as a whole. Once that is done, the subsequent decision of a single homeowner to extend his house is not something which impacts on the planning status of other units within the development or the estate as a whole.

88. In any event, I regard the appellants' arguments on this issue as overstated. Section 160 creates a discretionary jurisdiction. There is no reason to suppose that just because the jurisdiction exists that it will be exercised in inappropriate cases or to achieve anything other than what is necessary to ensure that the development complies with the requirements of the planning code. In exercising its discretion to make orders under section 160, a court must ensure that the order made is proportionate in the circumstances. In most of the hypothetical examples raised by the appellants it is unlikely that relief would have been sought under section 160 or, if relief were sought, that it would be directed at the entire development if that was not necessary to ensure planning compliance. However, it does not follow from the fact that a section 160 application may be directed only at part of a development – as was the case in *Krikke v. Barranafaddock* where the High Court focused on the non-conforming turbines - that the development as a whole remains authorised. Rather, if compliance can be achieved by addressing specific elements of the development, it may be and usually is, unnecessary to address the status of the development as a whole.

89. There is a further material difference between the facts in *Krikke v. Barranafaddock* and in this case. In *Krikke* the only element of the wind farm identified as being in breach of the planning permission was the dimensions of the wind turbines. Clearly the High Court judge took the view that if the issues regarding the turbines could be rectified through a substitute consent application, this would bring the entire development into conformity with

its planning permission. Here, the material deviations occur in the infrastructure constructed on site onto which the appellants now wish to bring the turbines. In essence, the appellants want to place what they characterise as the authorised development (i.e. the turbines) on site using infrastructure that is, at least in part, admittedly unauthorised and to commence the operation of turbines while the balance of the site remains unremedied pending a grant of substitute consent.

Is there a "Tipping Point"?

90. One other general issue arose during the hearing. Both sides accepted that a developer is afforded a certain measure of flexibility in implementing a planning permission, particularly a planning permission for a large or complex development such as this. Indeed, many planning permissions are framed in a manner which recognises that the granular detail of all issues that may arise in the course of their implementation cannot be identified before works begin on site. These permissions include conditions which allow the developer to agree points of detail with the planning authority as the development progresses, provided those points of detail remain within the envelope of the planning permission itself; see *Boland v. An Bord Pleanála* [1996] 3 IR 435 where the acceptability of such conditions was upheld by the Supreme Court having regard to "*the desirability of leaving to a developer who is hoping to engage in a complex enterprise a certain limited degree of flexibility having regard to the nature of the enterprise*".

91. Nonetheless, there is a limit on the amount of flexibility of which a developer can avail. Variations from the strict terms of a permission which arise in the carrying out of a development and which are not material in the context of the development overall will be treated as coming within the scope of the planning permission. Consequently, they have no effect on the authorised status of the development. On the other hand, deviations from the

terms of a planning permission which are material mean that the development is no longer being carried out in accordance with the planning permission (see Lord Denning MR in *Lever Finance v. Westminster LBC* [1971] 1 QB 222 at 230).

92. The materiality of a deviation will depend on the context in which it arises. Thus, in deciding whether a deviation is material the size, scale and nature of the development; its location including whether it is in or proximate to environmentally sensitive sites; the nature of the deviation and its potential for environmental and ecological consequences must all be considered. To use legal parlance, in each case the materiality of a deviation will be a context-specific question of fact and degree. The appellants' case boiled down to an argument that no matter what the nature of the deviation, the number of deviations or their relationship with the remainder of the development, everything in a permitted development save the material deviations remained authorised. The Council took the polar opposite view. A single material deviation means the development is no longer in conformity with its planning permission and thus is unauthorised. Each of these extreme positions has the potential to give rise to practical difficulties especially as the concept of unauthorised development is relevant outside of section 160 and must bear the same meaning throughout the entire planning code. Consequently, I canvassed with the parties whether in addition to there being a question as to the materiality of a deviation, there might also be an issue as to whether the nature, number and type of material deviations might be such that in some cases they would render the entire development unauthorised but in other cases they would not.

93. Both parties were resistant to the notion that there might be a "*tipping point*" at which a material deviation (or deviations) became so serious that the entire development became unauthorised. Both based their resistance on principle – the Council because a single material deviation means the development no longer complies with the planning permission which relates to the project as a unitary development, and the appellants because the reference to

unauthorised development in section 160 can only mean that portion of the development which does not conform to the planning permission. The appellants also argued that this would introduce an unacceptable level of uncertainty into the question of what constituted unauthorised development in circumstances where certainty is necessary, both because of the potential for enforcement and because the carrying out of unauthorised development is a criminal offence.

94. I struggle to see how assessing whether a number of deviations are sufficient to render the entire development unauthorised is different in principle to assessing whether a single deviation is material in the first place. Both start from the premise that there has been non-compliance with the planning permission and the developer is at risk regarding the consequences of that. Both require a fact-specific decision to be made on an objective basis. If anything, approaching the question of whether a material deviation or deviations render the entire development unauthorised on this basis would be in ease of a developer as it would allow a further degree of flexibility which might, in an appropriate case, save a development from being unauthorised notwithstanding the presence of material deviations.

95. As a fallback position, if the court were to treat the status of the development in light of the presence of material deviations as being subject to a further "*tipping point*" test, both parties argued that the application of such a test would favour their side of the case. The appellants actually made two arguments. The first was that there was no evidence – by which I presume is meant no expert evidence – on which a court could base such a decision. Given the volume of evidence regarding the development and the deviations that was before the court and the fact that a court is not bound to seek or act on foot of expert evidence, I found this argument unconvincing.

96. The second was that the scale of the material deviations in the context of a complex development on a 1000-hectare site was such that they did not reach any relevant "*tipping*

point" threshold. This characterisation of the development as one carried out on a 1000-hectare site artificially favours the appellants' arguments. Typically, wind farms consist of a number of turbines spread out over a large site and sharing common infrastructure. The development tends to be linear in nature in the sense that it follows the line of a road off which smaller access roads lead to the individual turbine structures. The site may be large, but the footprint of the development is not. In this case the development site to which the planning application related was indeed a 1000-hectare site but the area within that larger site upon which any development was permitted to take place was much smaller.

97. Were the case to be decided on this basis, I would agree with the Council that the number, nature and location of the material deviations in this case is such that they easily reach the threshold for rendering the entire development unauthorised. If one looks at that part of the overall site which was to be developed, the material deviations are spread out across the development with almost no part wholly unaffected. Eleven of them are characterised as being of potential environmental significance. I have already highlighted two which I regard as fundamentally connected with all aspects of the development - the access road from the main road and the two hectare borrow pit/peat cell for which there is no planning permission at all. The fact that almost all the peat storage areas are not compliant with the planning permission must impact on the overall status of the development as must the fact that there are eleven deviations from the permitted internal access roads. In my view, this is not a case where the development which has resulted from works which materially deviate from the planning permission can easily be separated from the rest of the development.

98. In deference to the fact that neither party wished the court to dispose of the case by asking whether cumulatively the material deviations did or did not reach a tipping point which rendered the entire development unauthorised, I will not decide it on this basis.

However, I am firmly of the view that if the deviations were to be looked at cumulatively, they would undoubtedly reach the threshold at which it would be appropriate to hold that the entire development was unauthorised.

Case Law on Unauthorised Development

99. A very large number of authorities were opened to the trial judge which he considered in some detail in his judgment. The argument before this court was somewhat narrower and ultimately focussed on three cases, *Horne v. Freeney* [1982] WJSC-HC 2157, *Dwyer Nolan Developments v. Dublin County Council* [1986] IR 130 and *Hillside Parks v. Snowdonia National Park Authority* [2022] UKSC 30, [2022] 1 WLR 5077. By way of an overarching submission, the appellants relied on the comments of Denham J. in *Mahon v. Butler* [1997] 3 IR 369 to the effect that the planning code should be construed strictly; the court should not attempt to fill any lacuna in the legislation and that policy decisions regarding the legislation are exclusively a matter for the Oireachtas. As a matter of purely domestic law this is undoubtedly correct but, due to subsequent developments in EU environmental law which would not have been readily apparent in 1997, it may have to be modified to take account of the duty of sincere cooperation identified by the CJEU in *Comune di Corridonia* and *Inter-Environnement Wallonie* (above). In cases concerning development which requires environmental assessment, the courts are under an obligation to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out the required assessment. Whilst clearly this does not permit a court to act *contra legem*, it potentially has a bearing on the strictness with which the legislation should be construed.

100. The earlier of the two Irish cases is *Horne v. Freeney* (1982). In developing an amusement arcade, a developer altered the development in ways which materially deviated

from the grant of planning permission. Injunction proceedings were taken by a neighbour under the precursor provision to section 160 and the developer argued that he would have been entitled to carry out these changes to the completed development as exempted development. Consequently, he contended that it would be absurd to be forced to comply with the plans and particulars on foot of which permission was granted when he could make the same changes at a later date without seeking planning permission.

101. In a commendably short judgment, Murphy J. identified the issue as being whether, in light of the admitted departures from the permitted plans, it could be said that the development was being carried out in conformity with the permission granted. This phrase still appears, albeit in a slightly altered form, in section 160(1)(c)(i). He concluded that the question had to be answered in the negative saying: -

> "*Whilst I see the force of that argument I take the view that if Planning Permission is indivisible: that it authorises the carrying out of the totality of the works for which approval has been granted and not some of them only. A developer cannot at his election implement a part only of the approved plans as no approval is given for the part as distinct from the whole*.
>
> *Accordingly I propose to grant an injunction in the terms of paragraph 1 of the Notice of Motion prohibiting the carrying on of further development works*."

102. Holland J. saw significant parallels between the facts of *Horne* and this case for two reasons (see para. 77 of his judgment). First, the reference to the implementation of "*part only*" of a planning permission was not made in the context of a failure to complete the development but related to the substitution of different elements from those permitted. Second, an injunction was granted to prevent the completion of incomplete works subject to the grant of liberty to apply should the developer obtain retention permission for the changes.

103. The second Irish case, *Dwyer Nolan*, arose in a different context but is similar to the line of UK cases concerning multi-unit developments relied on by the appellants. The factual background to *Dwyer Nolan* is complex but ultimately the issue narrowed down to whether a developer could build a housing estate under a planning permission granted in 1984 but rather than using the access conditioned in that permission, use a difference access permitted in an earlier grant of planning permission from 1978 for a housing estate on a larger version of the same site. Further, the access had been interfered with by road works carried out by the local authority which rendered it unusable for the purposes of gaining access to the proposed development. The developer sought a mandatory injunction to compel the local authority to restore the access.

104. In granting an injunction in favour of the developer, Carroll J. identified the central issue as being whether planning permission was severable so that access arrangements permitted under the first permission could be grafted onto the second permission which conditioned different access arrangements. Inherent in that issue was the question of whether a planning permission had to be implemented in its entirety. Following the authority of Winn J. in *Lucas (F.) & Sons Ltd v. Dorking and Horley RDC* [1964] 62 LGR 491, she held that it did not. However, it did not automatically flow from this that a developer could develop a site partly under one planning permission and partly under a different and mutually inconsistent planning permission. Notably, the decision in *Lucas* has since been disapproved by the UK Supreme Court in *Hillside Parks Limited*, a decision to which I will presently turn.

105. It is clear that in considering the status of development built under a partially completed planning permission for a larger estate or scheme, the concern of both Carroll J. and of Winn J. was that purchasers of units within the scheme should not be left vulnerable because of the failure of the developer to complete the scheme. Carroll J. identified the

criterion by reference to which a court should determine whether partially completed development was unauthorised as being whether that which was built was severable from the balance of the planning permission. She reconciled the position regarding the two questions as follows: -

> "*In the same way it seems to me that a developer cannot operate two mutually inconsistent planning permissions at the same time but must opt for one or the other. If, having opted for one, a developer does not want or is not able to complete the estate as planned, he or his successors in title must apply for a variation in respect of the undeveloped part*.
>
> *But the failure to complete the scheme does not mean that the partial development which has taken place is unauthorised. In my opinion the position is that partial development is authorised development provided it can be regarded as severable, e.g., one could not build the bottom storey of a two-storey house and leave it unfinished with the intention of using it as a bungalow. That could not be regarded as authorised partial development since the permission was to build a two-storey house.*
>
> *In the same way Murphy J. took the view in Horne v. Freeney … that permission to construct a new building to replace existing buildings had to be carried out in all its specifications as the permission was not divisible at the option of the owner. He was obliged to carry out all the works or obtain a variation.*"

106. Carroll J. noted statutory provisions introduced in 1982 (now reflected in section 40(1) and (2) PDA) which allow for the expiration of a planning permission at the end of its lifespan without prejudice to the validity of anything done pursuant to it prior to that point. Thus, in cases where severance can take place, the development already carried out remains authorised.

107. Looking at *Horne v. Freeney* and *Dwyer Nolan* together, Holland J. (at para. 79 of his judgment) extracted three principles. First, the default position is that planning permission is indivisible such that materially non-conforming elements render the entire development unauthorised; second, the completion of partially completed non-conforming development can be restrained under section 160 and third, by way of exception, certain types of development are severable such that the unauthorised elements (including the failure to complete the development) do not render the entire development unauthorised. In those circumstances, those elements built in conformity with the planning permission may be regarded as authorised. It is difficult to see any error in these conclusions either as a matter of principle or insofar as they have been extracted by Holland J. from the relevant case law.

108. Particular objection was taken by the appellants to the reliance supposedly placed by Holland J. on *Hillside Parks* which in turn deals with the earlier decision of *Pilkington v. Secretary of State for the Environment* [1973] 1 WLR 1527 which gave rise to what is known as the Pilkington principle. *Pilkington* involved consecutive grants of planning permission to build single dwelling houses at different locations on a site. The developer executed the second of them and then sought to execute the first, the location of the house under the first planning permission being on an unbuilt portion of the site under the second planning permission. The court held that the developer could not implement mutually inconsistent planning permissions on the same site. Lord Widgery CJ based his decision on the "*physical impossibility*" of carrying out what was authorised by the unimplemented permission, in this particular case because it was a condition of the first permission that the balance of site be used as a small holding. This could no longer be given effect to because the balance of the site was now occupied by the house built under the second planning permission. Thus "*physical impossibility*" is not limited to the physical act of building the structure permitted

under the permission but incorporates compliance with all elements of the permission under which the structure was to be built.

109. The court in *Hillside Parks* relied on *Pilkington* for the proposition that a planning permission does not authorise development "*if and when, as a result of physical alteration of the land to which the permission relates, it becomes physically impossible to carry out the development for which the permission was granted (without a further grant of planning permission)*".

110. As an aside, the facts of *Hillside Parks* could never arise in this jurisdiction because the developer was seeking to rely on an extant grant of planning permission dating from 1967 on the basis that development had commenced before 1974. Planning permission in this jurisdiction expires at the end of five years from the date of its grant unless a different period is specified in the permission itself, which period cannot exceed 10 years (see sections 40 and 41 PDA). Consequently, there is simply no question of reliance being placed on a fifty-year-old planning permission to carry out further works. In my view, it is highly questionable whether the concept of a planning permission continuing to authorise fresh development works for over fifty years is compatible with the requirements of the EIA and Habitats Directives. Obviously, no environmental assessment for the purposes of those Directives could have been carried out in 1967. However, even in cases where an EIA or an AA was conducted in the 1980s or 1990s on the initial introduction of those obligations, it is doubtful whether the conclusions drawn in any such assessment would remain valid today to justify fresh development up to thirty years later. This is not because the assessments were in themselves invalid but because of changes likely to have occurred in the receiving environment, including at a minimum other development which might have taken place in the vicinity, since the original assessment and which were not in contemplation at the time

of the original assessment and changes to environmental designations, particularly the designation of EU sites in the vicinity.

111. The 1967 permission in *Hillside Parks* authorised the construction of 401 dwellings to be built in accordance with a master plan on a large site within a national park. Only 41 houses had been built by 2022 and those had been built on discrete portions of the site pursuant to a series of additional permissions. Crucially, the houses which had been built differed from the master plan in that some of them had been built on lands across which a road was shown in the master plan and a road had been constructed over lands on which houses were to be built under the master plan. The Supreme Court held that the 1967 planning permission authorised a single scheme of development which, due to physical impossibility, could no longer be implemented because of the subsequent development carried out on the site.

112. In holding that *Lucas* had been wrongly decided, Lord Sales and Lord Leggatt stated:-

> "*The aspect of the case which Winn J left out of account in his analysis is that planning permission for a multi-unit development is applied for and is granted for that development as an integrated whole. In deciding whether to grant the permission, the local planning authority will generally have had to consider, and may be taken to have considered, a range of factors relevant to the proposed development taken as a whole, including matters such as the total number of buildings proposed to be constructed, the overall layout and physical appearance of the proposed development, the infrastructure required, its sustainability in planning terms and whether the public benefits of the proposed development as a whole outweigh any planning objections. In granting permission for such a scheme, the planning authority cannot be taken (absent some clear contrary indication) to have*

authorised the developer to combine building only part of the proposed development with building something different from and inconsistent with the approved scheme on another part of the site. Therefore, it is not correct to interpret such a planning permission as severable, as Winn J did."

113. In dealing with the issue of concern to both Winn J. in *Lucas* and Carroll J. in *Dwyer Nolan*, i.e. the status of the built portion of a larger, incomplete scheme in the hands of the owners of individual units, the judges stated (at para. 52): -

"*When permission is granted for a multi-unit development, the permission authorises each stage of that development for so long as it remains practically feasible for the whole development to be implemented. The statute itself imposes no condition precedent or subsequent that the authorisation granted be implemented in full. Where the earlier stages of the development are carried out in accordance with the planning permission which has been granted, the development so carried out complies with the requirement in section 57(1) [of the Town and Country Planning Act 1990] and hence is lawful…*".

114. The appellants place significant reliance on two subsequent paragraphs, the first of which is paragraph 55: -

"*The analytical error made in the Lucas case was to fail to distinguish between two significantly different propositions. The first is that, from a spatial point of view, a planning permission to develop a plot of land is not severable into separate permissions applicable to discrete parts of the site. The second is that, from a temporal point of view, development authorised by a planning permission is only authorised if the whole of the development is carried out. The rejection of the second proposition does not undermine the first*."

115. The appellants argue that this supported the rejection of the proposition that development constructed pursuant to a planning permission would become unauthorised if the whole of the development was not carried out. Consequently, they argue that this demonstrates an error on the part of the trial judge in treating the unitary nature of the planning permission as requiring that the whole of the development authorised by the permission be carried out in order for any development pursuant to it to be regarded as authorised. However, they accepted that *Hillside Parks* was not a case about material deviation from a grant of planning permission but rather the status of the as-built but incomplete development.

116. Since *Dwyer Nolan* there has not, in fact, been any doubt in this jurisdiction about the authorised status of the built units of a larger multi-unit scheme where the developer has not completed the full development permitted under the planning permission. It may be that a court will be invited to revisit *Dwyer Nolan* in light of the views of the UK Supreme Court in *Hillside Parks* on the severability of multi-unit planning permissions, but as this is not such a case, I do not purpose to embark upon that exercise. In addition, I struggle to see the relevance of this statement in a case which concerns material deviations from the planning permission pursuant to which a development is being constructed rather than a failure to complete a development in its entirety pursuant to the relevant permission.

117. It may also be useful to be aware that the analysis undertaken by the court in *Hillside Parks* was in a legal context where it also held that planning permission for a larger scheme could not be varied (save in a non-material way) by a subsequent planning permission altering parts of the scheme. Any modification would require fresh permission covering the whole site, which would then be construed as a permission to carry out the development described in the original permission as modified to accommodate the development specifically authorised by the new permission (see para. 74 of the judgment). The High Court

in this jurisdiction has recognised the validity of a permission varying or amending an existing permission (see Costello J. in *South-West Regional Shopping Centre v. An Bord Pleanála* [2016] IEHC 84 at paras. 53-56 inclusive). The resulting development is then described as being authorised by the parent permission as modified or varied by any subsequent permission. Treating a modification or variation as requiring a fresh permission covering the whole site could have significant implications in terms of the developer's obligation under the EIA and Habitats Directives, potentially imposing an obligation to carry out further environmental assessments far in excess of those required pursuant to paragraph 13(a) of Annex II previously discussed in this judgment. In light of this, it is by no means clear and indeed possibly unlikely that an Irish court would have concluded that the discrete permissions under which the 41 houses in *Hillside Parks* had been built (many of which were described as variations to the master plan) constituted separate grants of planning permission which rendered the implementation of the original 1967 permission physically impossible.

118. I make this point in circumstances where the appellants are critical of the trial judge for the reliance he supposedly placed on this UK authority because of the very different legislative backgrounds in the two jurisdictions. I certainly agree that the usefulness of planning case law from the neighbouring jurisdiction is limited because of the different statutory contexts in which decisions fall to be made and is likely to become increasingly less useful in light of ongoing changes in EU environmental law which will not be applicable in that jurisdiction. However, in fairness to Holland J., I cannot see that he made any error in this regard. His consideration of *Hillside Parks* is very carefully couched in terms which emphasis the caution needed when considering English case law and indeed also because this case is not a multi-unit development case.

119. The final passage of *Hillside Parks* on which both sides place reliance is paragraph 69:-

> "*The Pilkington principle should not be pressed too far. Rightly in our view, the Authority has not argued on this appeal that the continuing authority of a planning permission is dependent on exact compliance with the permission such that any departure from the permitted scheme, however minor, has the result that no further development is authorised unless and until exact compliance is achieved or the permission is varied. That would be an unduly rigid and unrealistic approach to adopt and, for that reason, would generally be an unreasonable construction to put on the document recording the grant of planning permission – all the more so where the permission is for a large multi-unit development. The ordinary presumption must be that a departure will have this effect only if it is material in the context of the scheme as a whole: see Lever Finance Ltd v Westminster (City) London Borough Council [1971] 1 QB 222, 230. What is or is not material is plainly a matter of fact and degree*."

120. The appellants say that this must be read in the context of the immediately preceding summary which records, in paragraph 68, that "*failure or inability to complete a project for which planning permission has been granted does not make development carried out pursuant to the permission unlawful. But (in the absence of clear express provision making it severable) a planning permission is not to be construed as authorising further development if at any stage compliance with the permission becomes physically impossible.*" The appellants argue that this illustrates the principle that development carried out pursuant to a planning permission is authorised and remains authorised, notwithstanding the fact that it cannot be completed in accordance with the planning permission and contend that the same must apply when there are deviations in the execution of a scheme.

121. I cannot see that the same logic applies. There is a material difference between not building something you are entitled to build and building something which you are not entitled to build. Even if this development could be neatly packaged into parts which are authorised and parts which are unauthorised (which, for reasons previously explained, I do not believe to be the case) there is still a fundamental difference in principle between not doing the entirety of something you were allowed to do and doing something which you are not allowed to do. The comments made in paragraph 69 of *Hillside Parks* are clearly predicated on an acceptance that a material departure from the permitted scheme will mean that no further development is authorised until compliance is achieved or the permission varied. Given that the deviations in this case are accepted to be material, it would seem to follow that any further development is unauthorised unless and until substitute consent is granted. The passage does not say in its terms that the as-built development is unauthorised but in circumstances where the development in issue in *Hillside Parks* had been carried out on foot of grants of planning permission, I do not think that it can be inferred that development which includes works which are a material deviation from the planning permission should be treated as authorised.

Analysis and Conclusions on Unauthorised Development

122. What conclusions then can be drawn from this case law? On the basis of *Horne v. Freeney,* the planning permission for the wind farm development is a unitary permission and the developer cannot choose which elements of the permission it will implement and which it will not. A developer cannot decide unilaterally to vary a permitted development where the variations are material in planning terms. Certainly, the SID permission did not authorise the material deviations and therefore the development which has been built is not that authorised by the SID permission.

123. On the basis of *Dwyer Nolan*, the extent to which the entire development will be unauthorised depends on the extent to which the works comprised in the material deviations can be severed from the balance of the planning permission. For reasons which I have already discussed, albeit in a different context, in light of the nature, number, location and scale of the material deviations I do not think that they can be severed from the rest of the wind farm development so as to leave intact a development which makes planning sense on the ground. The material deviations are predominately to be found in the site infrastructure (roads) and the ancillary works (borrow pits and peat cells). Those elements serve no purpose without the turbines they are intended to serve. Equally the turbines cannot be constructed without using the infrastructure and benefitting from the ancillary works in which the material deviations are to be found.

124. In so far as *Hillside Parks* held that the analysis in *Lucas* under which each unit in a multi-unit development could be treated as severable from the balance of the permission authorising this scheme is incorrect, it is at the very least unclear whether the notion of severance has ceased to have relevance here. This is because the legislative context is very different in this jurisdiction. I tend to think that severance continues to be relevant, albeit not necessarily for the purpose of treating a planning permission for a multi-unit development as severable into its constituent units prior to its implementation. Rather, it remains relevant when asking whether what is contended to constitute an authorised development under a planning permission can be separated from unauthorised works carried out in the course of implementing the planning permission and constructing the development. No doubt the answer to this question will be clearer in the case of multi-unit developments than in the case of other types of schemes.

125. I accept that severance is not a purely legal concept and that determining whether what has been built ostensibly in compliance with a planning permission can be separated

from what has been built in breach of the permission or what remains unbuilt will in each case be a question of fact and degree. This will require an analysis of the terms of the permission in the context of the circumstances of the development as a whole. In my view, those circumstances must include whether the development was subject to an environmental assessment. Increasingly, it is understood that an environmental assessment must be holistic in that it must consider elements of a development as part of the whole rather than as distinct elements and must place the development in the broader context of the environment in which it is located and with which it interacts. An alteration to any element of the development will require, at the very least, consideration as to whether a fresh assessment is required. No doubt, in many instances a fresh assessment will not be required but there are certainly serious issues under EU law as to whether elements of a large-scale development can be severed from the development authorised by the development consent without undermining the validity of the assessment that has been carried out for the project as a whole.

126. Whilst much of the argument concerned this case law, having considered it in some detail, I think the issues really fall to be decided by reference to the language used in sections 2 and 3 of the PDA. Unauthorised development is defined by reference to the carrying out of any unauthorised works, and unauthorised works are defined by reference to any works in respect of which there is not a planning permission in being (unless the development is pre-1964 or exempted). The use of the word "any" in both these definitions suggests that the concepts so defined should not be construed in the narrow sense contended for by the appellants. Further, the definition of unauthorised works is expressly referable to the absence of a planning permission authorising those works. In circumstances where the unitary nature of a planning permission is accepted, it is difficult to see the logic in treating the development authorised by the planning permission as being other than unitary in nature. This conclusion flows logically from *Horne v. Freeney*. Exceptionally, multi-unit developments may, in

certain circumstances, be treated differently but it was not contended (nor could it be) that this wind farm is a multi-unit development.

127. Further, the wind farm is a structure as defined in section 2 of the PDA. There is of course a planning permission in being in relation to the development but as the development has not been carried out in accordance with that planning permission, it cannot be relied on to establish the authorised nature of the resulting structure. Consequently, as the wind farm is not the subject of a planning permission it is an unauthorised structure and for that reason also, it falls within the definition of unauthorised development. I have considered whether, in ease of the appellants, the wind farm could be considered as a series of structures. Again, there is an immediate difficulty in that the planning permission does not authorise the construction of individual structures, whether they be roads, turbines or borrow pits as part of a series. It authorises the construction of the wind farm as a whole – i.e. all of the turbines, roads and associated infrastructure in accordance with the terms of the permission.

128. To summarise, in my view in principle the existence of unauthorised works renders the development, in its entirety, unauthorised. Further, the entirety of the wind farm as constructed is an unauthorised structure as the planning permission does not authorise what is currently *in situ* on the ground. Insofar as there may be exceptional cases where a developer can clearly demonstrate that the unauthorised works are severable from the balance of the development, this is manifestly not such a case. No ready analogy as regards the status of the balance of a development can be drawn between the failure to complete a development authorised by a planning permission and the construction, within a permitted development, of elements which do not have planning permission.

129. Although I have reached this conclusion on the basis of the text of sections 2 and 3 of the PDA, I would, in any event, be hesitant to reach the opposite conclusion in respect of development which had required environmental assessment under EU law. On the facts of

this case, the need for hesitancy does not arise. Nonetheless, sight should not be lost of the duty of sincere cooperation under which the court operates and the need to ensure that the requirements of EU environmental law are fully respected in the implementation of national law. An interpretation of our domestic law which facilitated a developer in non-compliance with a development consent granted after the conduct of an EIA and AA or in carrying out or completing development prior the conduct of an EIA and AA should be avoided, if possible.

130. The logic of these conclusions is that even on the appellants' construction of section 160(1), the trial judge was entitled to make orders relating to the whole of the development. I reject the appellants' appeal on these issues.

Discretion

131. The other aspect of the appellants' appeal concerns the manner in which the trial judge exercised his discretion against the refusal of relief and, in particular, against the appellants' proposal that they be allowed to proceed with the erection of eleven turbines on foot of the SID permission pending a decision on the substitute consent application. The grounds of appeal acknowledge that Holland J. correctly identified the types of discretionary factors to be taken into account *per* the decision of the Supreme Court in *Meath County Council v. Murray* [2017] IESC 25, [2018] 1 IR 189 and that he discussed and weighed these factors. Hence, the grounds of appeal clarify that "*it is the conclusion that is the subject of this appeal*".

132. This is immediately problematic for the appellants given the jurisprudence on the scope of an appeal to this court from the High Court. There is no absolute bar on the Court of Appeal revisiting an issue decided by the High Court even where no error of principle is disclosed, subject to the important proviso that great weight should be afforded to the views

of the High Court judge. However, where the appeal is against a decision made by the High Court in the exercise of its discretion, an appellant must show that a real injustice will be done unless the High Court order is set aside. In this context, a failure by the High Court to explain the reasons for the exercise of its discretion in a particular manner, a failure to consider some relevant matter or a failure to engage with the arguments made by the parties will necessarily affect the weight this court should attach to the views of the High Court judge (see generally Collins J. in *Betty Martin Financial Services Ltd. v. EBS DAC* [2019] IECA 327 as discussed at paras. 36-39 inclusive in *Tesco Ireland Limited v. Stateline Transport Limited* [2024] IECA 46).

133. The practical effect of this is that, while this court was entirely at large in considering the purely legal issues addressed in the preceding sections of this judgment, it must now be more restrained in considering the discretionary aspects of the High Court decision. Whilst in principle this court retains the jurisdiction to exercise its discretion in a different manner to the trial judge, it should be slow to do so simply because it disagrees with the outcome of the High Court decision.

134. Perhaps because of this, the appellants advance a large number of grounds of appeal under the heading "Discretion". These can be broken down into four broad groups – (1) grounds complaining that Holland J. erroneously placed an onus of proof regarding the exercise of the discretion on the appellants rather than the Council; (2) grounds complaining about the non-acceptance of the appellants' expert evidence in circumstances where contrary evidence was not led by the Council; (3) grounds regarding the court's characterisation of the nature of the deviations as deliberate and a failure to attach appropriate weight to the appellants' attempts to resolve the material deviations and the EPA's approval of the work they had done; and (4) the relative weight attached by the High Court to various factors including the integrity of the planning system, public policy in the promotion of wind farm

projects such as this one, the hardship to the appellants including the potential insolvency and its consideration of environmental risk.

Onus of Proof of Discretionary Factors

135. Holland J. commenced his analysis regarding the onus of proof (at para. 138 of his judgment) by citing an academic text (Browne in *Simons on Planning Law* 3rd Ed sections 11-32 *et seq*.) to the effect that the applicant in a section 160 application bears the onus of proving both the existence of unauthorised development and that the court should exercise its discretion to make an order. He then queried how the imposition of an onus of proof on the applicant to satisfy the court that it should exercise its discretion fitted with a series of decisions which hold that once a breach of planning law is established, i.e. the presence of unauthorised development, it would require something akin to exceptional circumstances for a court to refrain from making an order under s.160 (per *Morris v. Garvey* [1983] IR 319). Further in *Wicklow County Council v. Forest Fencing* [2007] IEHC 242, [2008] ILRM 357 (approved by the Supreme Court in *Meath County Council v. Murray*) Charleton J. held that once the presence of unauthorised development was established, the court's jurisdiction to refuse relief was very limited and that the balancing of discretionary factors must start with the court's duty "*to uphold the principle of proper planning under clear statutory rules*". In *Meath County Council v. Murray* itself, McKechnie J. described the defaulter "*as seeking the indulgence of the court*". Consequently, Holland J. held (at para. 140 of the judgment) that once the onus of proving unauthorised development had been discharged, the developer must convince the court that exceptional discretion should be exercised in its favour against the grant of relief.

136. It is undoubtedly correct that in general terms the applicant in a s. 160 case, here the Council, bears the onus of proof. However, it may not be an entirely useful exercise to

attempt to split the application into two parts and to seek to assign an onus of proof in respect of each part. This is for two reasons.

137. First, the decisions referenced above which identify the exceptionality of relief being refused once the existence of unauthorised development is established, assume that it will be the developer who seeks to establish the necessary exceptional circumstances. This makes practical sense. In proving the existence of unauthorised development in the first instance, the applicant will normally have addressed basic issues like the seriousness of the breach of the planning code and the potential planning and environmental consequences of the breach remaining unaddressed. In addition, if the applicant is a planning authority, it will generally have put before the court the attempts made by it to secure compliance with the planning code before resorting to a s.160 application. If this evidence is accepted by the court, it is not just the existence of unauthorised development but the accumulation of these factors which leads to the *prima facie* entitlement to relief and the expectation that something exceptional will have to be shown to justify its refusal.

138. If there were a further, discrete onus of proof on the applicant at this point it would require the applicant to disprove the existence of exceptional circumstances pertaining to the developer and its development. It would be relatively unusual for the law to place the onus of proving a negative (i.e. the absence of exceptional circumstances) on an applicant and even more so if, as here, the negative related to matters most likely within the exclusive knowledge of the other party to the litigation. Thus, while the exercise of the court's discretion may properly be regarded as a discrete step subsequent to the precondition of being satisfied of the existence of unauthorised development, it is not in my view a step in respect of which a separate and distinct onus of proof is placed on the applicant for relief.

139. Second, in my view, it is inaccurate to speak in terms of there being an onus of proof regarding the exercise of a discretion. Proof, as an evidential concept, refers to the production

of evidence to establish the existence or non-existence of facts necessary to ground a proposition in dispute between parties to litigation. Thus, it is legally correct to speak of the applicant in a s.160 application bearing the onus of proving the existence of unauthorised development, which must be shown as a matter of fact as a precondition to the existence of jurisdiction to make an order under s.160.

140. On proof of unauthorised development, the court then has a discretion to grant or not to grant relief. Whether the court should do so at this point is largely a matter on which the parties make submissions. Whilst the burden of persuading the court to make the order remains on the applicant, there is no further specific proposition which must be established in order for such relief to be granted and, thus, strictly speaking no onus of proving it lies on the applicant. No doubt the parties in any particular case will wish to advance arguments regarding the exercise of discretion and may need to adduce evidence in order to establish the factual basis for such arguments. In this case, for example, the appellants relied on the risk of insolvency if they were not permitted to proceed with even a limited form of the development. They also relied on the importance in policy terms of the State's capacity for generating renewable energy to which this wind farm, if completed and operating, would contribute. As the appellants wish to rely on these matters, the onus of proving them lies with the appellants rather than an onus of disproving them falling on the Council.

141. In a sense this can be seen as an evidential burden falling on the party who wishes to rely on certain facts in order to argue for the exercise of the court's discretion in a particular manner. If that party does not adduce sufficient evidence to ground the argument he wishes to make, the court will not be obliged to consider the implications of the argument as if the facts underlying it had been established. However, care should be taken not to push the analogy too far. Because the court is, at this point, exercising a discretion, even if the

underlying facts are established it does not follow that the discretion must be exercised in that party's favour.

142. For this reason, it is misconceived to contend, as the appellants do, that evidence led for the purposes of grounding an argument as to the exercise of the court's discretion must be treated as "accepted" if it is not contradicted by the other side. This part of the appellants' appeal is premised on the assumption that greater or determinative weight should have been attached to certain evidence, for example, their experts' views as to the environmentally satisfactory status of the site, because the Council did not contradict that evidence. In weighing up the various factors that go to the exercise of the court's discretion, it does not follow from the fact that the appellants had adduced sufficient evidence to ground their argument, that the court was obliged to accept the argument, even in the absence of evidence from the other side.

143. My analysis of this issue differs somewhat from that of the trial judge, but I don't think that the difference is sufficiently material for me to conclude that his subsequent weighing of the discretionary factors was erroneous in any way. In particular, the appellants' written submissions argue that Holland J.'s rejection of what is described as the uncontroverted evidence of their experts that the continuation of the works on site would not pose an environmental risk was legally erroneous. It is argued that he erred in starting from the premise that the appellants bore the onus of proof and then in treating the Council as if they had adduced conflicting evidence challenging those experts' views.

144. In my view, the appellants' arguments on this issue are misconceived. Holland J. correctly questioned the extent to which the appellants' witnesses could be regarded as expert witnesses, not because they lacked the necessary expertise but because they had all been actively involved in advising the appellants on the development as it proceeded and on the consequences of the peat slide as it unfolded. Thus, they were not independent in the

sense that expert witnesses are normally required to be. Like Holland J., I do not question the personal sincerity of those witnesses but given their prior involvement in a development which now includes a very significant number of material deviations and in which a significant environmental incident has occurred, I agree that caution regarding their evidence was appropriate.

145. However, all of this may be beside the point. The appellants argued that their evidence established the stability of the peat onsite; the absence of any ongoing adverse environmental effects from the peat slide; the absence of unanticipated environmental effects from the material deviations and the negligible risk of environmental consequences if the works were to be completed with additional precautionary measures. Their appeal is premised on the assertion that because such evidence was not controverted (a point disputed by the Council), it had to be accepted by the High Court and, presumably, an order should have been made allowing the development to proceed. Apart altogether from the fact that this evidence goes to an issue in respect of which the court clearly has a discretion, in my view, a court should be very slow to accept evidence of this nature.

146. Leaving the status of the witnesses aside, all of these issues are matters which will be interrogated in depth in the environmental assessments which An Bord Pleanála must undertake as part of the substitute consent process. In my view, a court is singularly ill-equipped to make findings of this nature. Further, if it were to do so in the context of a s.160 application, members of the public who are entitled to participate in the environmental assessments the Board must undertake would be excluded from having the opportunity to make submissions on these matters before the development is permitted to proceed.

147. The EIA Directive and the Habitats Directive are structured so that the requisite environmental assessments must precede the grant of development consent, which in turn must precede the carrying out of any development. This gives legal structure to the

precautionary principle under which development should not proceed unless the decision maker is satisfied in advance of granting consent that the development will not be environmentally damaging. As a matter of EU law, environmental pollution encompasses the risk of environmental pollution even where such pollution has not actually occurred. Further, under the Habitats Directive the decision maker must be satisfied that there will not be an adverse effect on any site designated for ecological protection. The level of proof required in an AA is high, namely the decision maker must be satisfied as to the absence of such risk beyond a reasonable scientific doubt. As a result, a court should be slow to exercise its discretion to permit an unauthorised development – particularly one requiring AA – to proceed on the basis that the Irish civil standard of proof has been met as to the absence of environmental risk. This is particularly so where the claim that it is met is based on the absence of contrary expert evidence being adduced by the appellant for relief.

148. An overriding feature of this case is that the original development required both EIA and AA and in granting leave to apply for substitute consent, An Bord Pleanála was satisfied that the development in respect of which that application was made (i.e. the material deviations) also required EIA and AA. Although leave to apply for substitute consent was not granted until after these proceedings had been instituted, the Council's position from the outset was that substitute consent would be required in respect of the material deviations. These facts, which were ultimately not in dispute, formed an integral part of the Council's case and can only be seen as strengthening the *prima facie* position that once the existence of unauthorised development requiring environmental assessment has been established, the court should only refuse relief in exceptional circumstances. To paraphrase the observations of Baker J. in *McCoy v. Shillelagh Quarries Ltd.* [2016] IEHC 9, the exercise of the court's discretion in a section 160 application will be constrained by the requirements of EU environmental law. In this case those requirements tend very strongly against permitting the

appellants to proceed with even a limited form of their development before the requisite environmental assessments have been carried out.

149. The appellants' relied on the decision of the Supreme Court in *Balz and Heubach v. An Bord Pleanála* [2020] IESC 22 to contend that the court has jurisdiction to make an order which would facilitate continuation of the development notwithstanding the fact that environmental assessments are due to take place in a pending substitute consent process. The application in *Balz* was for a stay on an order of certiorari which would normally have followed a judgment quashing the decision of An Bord Pleanála granting planning permission for the developer's wind farm. The reason the stay was sought was to allow the developer to retain its eligibility for a REFIT Scheme which provided a guaranteed price for the generators of renewable energy, the loss of which would have had catastrophic financial consequences. Although the court accepted that the jurisdiction existed and acknowledged that the reasons which had led to the quashing of the permission were the fault of the decision maker rather than the developer, for reasons relating to the lack of evidence before the court and the developer's conduct post-judgment, it declined to make the order.

150. I do not dispute the existence of jurisdiction to make an order under s.160 which would facilitate the continuation in some form of this development. Indeed, the Council did not contend that the jurisdiction to make the orders the appellants sought did not exist, rather they argued that it should not be exercised in the appellants' favour. Because the relief sought in *Balz* was ultimately refused, although the judgment considers the various factors which led to that conclusion, it does not provide significant guidance on the circumstances in which it might be appropriate to make an order of this nature. It may be trite to suggest that those circumstances must be exceptional but, in my view, they must be truly exceptional.

151. Insofar as *Balz* suggests that the potential insolvency of the developer will be a relevant factor, I don't disagree. However, I think there is a difference between the position

of a developer whose planning permission is held to be invalid through no fault of its own as a result of which it finds itself in a substitute consent process, and the position of a developer who must seek substitute consent because it has deviated materially from the planning permission which it was granted. The potential insolvency in both cases results from the delay to the development, which unfortunately has the potential to be quite lengthy. In this case, the delay has been exacerbated by the developers' initial refusal to accept that the deviations were material as a result of which the application for leave to apply for substitute consent was not made for nearly two years after the peat slide occurred and is currently paused at the appellants' request to await this judgment. Further, the developer's arguments regarding insolvency in *Balz* were based specifically on the fact that in the absence of a planning permission it would lose its eligibility for a REFIT Scheme upon which the generators of renewable energy depended to secure a return on their investment. In this case, apart from the assertion of Mr. Murnane that Planree faces insolvency if the development is not permitted to proceed, no detail or evidence has been provided in support of his contention.

Balancing of Discretionary Factors

152. The analysis in the preceding section of this judgment disposes of the first two groups of grounds of appeal raised against the exercise of discretion by the trial judge – namely the onus of proof and his treatment of the expert evidence. The third and fourth groups of grounds focus on the attitude taken by Holland J. to the various arguments made by the parties on a number of factors which fed into his ultimate conclusion to grant the relief sought by the Council. In *Meath County Council v. Murray* (above) McKechnie J identified, on a non-exhaustive basis, the types of matters which a court might consider in the exercise of its

discretion under section 160. These have been approved and applied in a number of cases since (see most recently *Tesco v. Stateline Transport Ltd.* [2024] IECA 46).

153. Holland J. expressly identified both the factors listed in *Meath County Council v. Murray* and the fact that the list is non-exhaustive, that the weight to be attached to each factor (if it arises) will depend on the circumstances of the case and that the factors may interact and overlap. His judgment then goes through the arguments made by the parties under a number of the *Meath County Council v. Murray* headings including the integrity of the system of planning and environmental law; the presence/absence of adverse environmental effects; proportionality and the precautionary principle; the nature of the breaches; Planree's conduct; the public interest, including that in wind energy projects; the attitude of the planning authority; and Planree's circumstances including the prospect of insolvency.

154. With one exception, it is not contended that any of these matters were inappropriately considered by Holland J. nor that anything relevant was omitted from his consideration. Rather the appeal contends that inappropriate weight was attached by Holland J. to those factors which favoured the grant of an injunction and too little weight given to those which favoured permitting the appellants to proceed with the development in some form. Where the appellants' argument was not accepted, the notice of appeal characterises Holland J. as having "disregarded" the evidence adduced to support the argument in question. I do not think that this characterisation is fair.

155. For example, the court was not bound to accept Planree's assertion that it would become insolvent just because it was not contradicted by the Council, nor more importantly, to allow a limited version of the development to proceed because of the potential consequences for the appellants if it did not do so. Holland J. acknowledged that this argument had been made and was not "*inherently incredible*", he identified the evidence

supporting it which he described as vague (a bare averment unsupported by any backing documentation or accountancy evidence). Crucially, however, he accepted (at para.212 of the judgment) that making a section 160 order would have significant economic consequences for Planree. He addressed, in light of the case law (*Bailey v. Kilvinane Windfarm Ltd.* [2016] IECA 92 and *Doorly v. Corrigan* [2022] IECA 6) the extent to which economic hardship to a developer should outweigh potential environmental impact and the need to ensure that the planning laws are upheld. Thus, Holland J. did not disregard the appellants' evidence of potential insolvency, such as it was. Rather in balancing the various factors relevant to the exercise of his discretion, he did not accept that this outweighed those factors which supported the making of an order.

156. The item which it is contended Holland J. should not have taken into account at all is the attitude of the planning authority, a factor which McKechnie J. in *Meath County Council v. Murray* regarded as being "*important*" but "*not necessarily decisive*". The appellants contend that as the Council (i.e. the planning authority) was the applicant for relief in this case, that its attitude should not have been allowed to weigh in favour of the granting of the relief it claimed. In other words, where a planning authority is a party to the proceedings, its attitude *qua* planning authority should not be afforded any particular weight. In my view it is significant that the attitude of the planning authority was identified as a relevant factor in *Meath County Council v. Murray* – a case in which the planning authority was also the applicant under section 160. It seems reasonable to assume that if McKechnie J. had regarded this factor as not being applicable in cases where the planning authority is a party to the proceedings, he would have mentioned this in *Meath County Council v. Murray*.

157. I do not think that Holland J. erred in affording the attitude of the Council *qua* planning authority "*appreciable*" weight (para. 204 of his judgment). In bringing these proceedings the Council was not acting in pursuit of any private interest, rather it was acting

as the responsible public body in pursuit of what it perceived as the public interest. Of course, the views of the planning authority do not carry any particular weight on the question of whether the development is unauthorised as this is a legal issue. However, when it comes to balancing the competing interests as regards the exercise of the court's discretion, the views of the Council as the planning authority responsible for the area in which the development is located are relevant and should be taken into account. It would, as Holland J. points out, be odd if the Council's views were to be regarded as relevant where a third party had instituted the section 160 proceedings but not where it was moved to do so itself.

158. I do not propose to go through each of the items raised in the appellants' ground of appeal to which it is contended that the trial judge attached inappropriate weight as these are matters which classically go to the exercise of a discretion. It is not the function of this court to re-evaluate matters which have been evaluated by the High Court in order to decide whether that discretion should be exercised differently. The High Court judgment in this regard is very detailed. The factors relevant to the exercise of a court's discretion, as identified in *Meath County Council v. Murray* and other authorities, are set out and the arguments made, particularly by the appellants, under those headings are examined carefully. I do not accept that it was inappropriate for Holland J. to have attached the heaviest weight to the integrity of the planning system nor that greater weight should have been attached to the appellants' positive engagement with the relevant authorities after the peat slide. I am not satisfied that the appellants have shown that Holland J. erred in any material respect, much less that any real injustice would be done to them by the orders which he made.

Conclusions

159. For the reasons set out in this judgment, I would dismiss the appeal on all grounds. In general, the presence of unauthorised works in the form of material deviations from a grant of planning permission in the as-built development will render the entire development unauthorised. Exceptionally, because of the nature of the development or the possibility of severance of the unauthorised works from the rest of the development, it might not. In this context for severance to be *bona fide* the residual development must make planning sense in the absence of the severed part, and it must be consistent with the planning rationale underlying the decision to grant permission. This case does not come within this limited and exceptional category. Further, even in the latter cases where there has been an environmental assessment particular care needs to be taken to ensure that treating the development as severable does not undermine the environmental assessment.

160. In the circumstances, as the appellants have been wholly unsuccessful in their appeal, it seems to me that the appropriate order for costs is one in favour of the Council. I propose making an order for the costs of the appeal in these terms unless, within 21 days of delivery of this judgment, any party who objects, notifies the Court of Appeal Office and submits short written submissions (no more than 1500 words) to which the other side will have a further 10 days to reply.

161. My colleagues Meenan J. and Hyland J. have read this judgment in advance and have indicated their approval with it.