**THE HIGH COURT**

**2017 No. 151JR**

**IN THE MATTER OF AN APPLICATION PURSUANT TO THE PLANNING AND DEVELOPMENT ACT 2000**

**– and –**

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50 AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000**

**– and –**

**IN THE MATTER OF AN APPROVAL GRANTED UNDER SECTION 182B OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)**

**BETWEEN:**

**NORTH EAST PYLON PRESSURE CAMPAIGN LIMITED**

**First-Named Applicant**

**– and –**

**MAURA SHEEHY**

**Second-Named Applicant**

**– and –**

**AN BORD PLEANÁLA**

**First-Named Respondent**

**– and –**

**THE MINISTER FOR COMMUNICATIONS, CLIMATE ACTION AND ENVIRONMENT**

**Second-Named Respondent**

**– and –**

**IRELAND AND THE ATTORNEY GENERAL**

**Third and Fourth-Named Respondents**

**– and –**

**EIRGRID PLC**

**Notice Party**

**JUDGMENT of Mr Justice Max Barrett delivered on 22nd August, 2017.**

**TABLE OF CONTENTS**

*(Numbers in square brackets are paragraph numbers).*

## I. Introduction

1. These proceedings concern a challenge to the decision of An Bord Pleanála on 19th December last to grant planning approval to EirGrid under s.182B of the Planning and Development Act 2000 for the proposed North-South 400kV Interconnector development located in counties Monaghan, Cavan and Meath. The overall North-South Interconnector project comprises a 400kV overhead line circuit that is approximately 138km long, inclusive of approximately 34km in the North, linking an existing 400kV substation in Woodland, County Meath with a planned substation in Turleenan, County Tyrone. If it proceeds, the North-South Interconnector project will provide a second high-capacity all-Ireland electricity interconnector. (The existing interconnector, a 275kV double circuit overhead line (such lines being sometimes referred to in the documentation before the court as 'OHLs') connects existing substations in counties Louth and Armagh).

## II. Reliefs Sought

2. The principal reliefs sought by the applicants in their application are as follows:

> (1) an order of *certiorari* quashing the decision of An Bord Pleanála, on 18th December, 2016, to grant approval under s.182A(1) of the Planning and Development Act 2000 for an interconnector of 138km length (inclusive of 34km located in Northern Ireland which will link the existing electricity network of Northern Ireland between Turleenan in County Tyrone and Woodland (near Batterstown) County Meath, which interconnector has been designated as a project of common interest (PCI) pursuant to the provisions of Regulation (EU) No. 347/2013 of the European Parliament and of the Council of 17th April, 2013, on guidelines for trans-European energy infrastructure (O.J. L115/39, 25.4.2013) (the 'PCI Regulation'), and in particular a new single circuit 400kV overhead transmission line between Crossbane, County Armagh and Lengare, County Monaghan to the townland of Bogganstown, County Meath, which transmission line crosses the jurisdictional border between Ireland and the United Kingdom in the townlands of Lengare, County Monaghan and Crossbane, County Armagh and comprises 299 new lattice steel support structures ranging in height from 26 to 51 metres above ground and associated conductor, insulators and other apparatus, which determination was approved pursuant to s.182B of the Act of 2000; (notwithstanding the applicants' contention to the contrary the impugned decision of An Bord Pleanála, as per the court's analysis later below, extends solely to the portion of the North-South Interconnector that sits south of the border between this State and Northern Ireland);
>
> (2) a declaration that in making its decision of 19th December, 2016, An Bord Pleanála failed to have regard (and/or sufficient regard) to the designation (pursuant to Commission Delegated Regulation (EU) 2016/89 of 18 November 2015 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest (O.J. L19, 27.1.2016, 1) (the '2015 Regulation')) of the proposed development as a Cluster-Ireland-United Kingdom interconnection, including one or more of the following PCIs: Ireland-United Kingdom interconnection between Woodland (IE) and Turleenan (UK) and Ireland-United Kingdom interconnection between Srananagh (IE) and Turleenan (UK);
>
> (3) an order of *certiorari* quashing the "*purported*" decision of An Bord Pleanála of 19th December, 2016, granting approval under s.182B of the Act of 2000 for the proposed development of a 400kV electricity transmission interconnector linking the electricity transmission networks in Ireland and Northern Ireland;
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> (4) a declaration that the "*purported*" decision of An Bord Pleanála of 19th December, 2016, is contrary to and in breach of Council Directive 2011/92/EU of the European Parliament and of the Council of 13th December, 2011, on the assessment of the effects of certain public and private projects on the environment (O.J. L26, 28.1.2012, 1), as amended (the 'EIA Directive');
>
> (5) a declaration that An Bord Pleanála failed properly to consider and/or comply with the EIA Directive and failed to carry

out an EIA, failed to ensure that the documentation lodged complied with the obligations under the said directive and failed to ensure appropriate public participation and/or failed to consider and/or apply any or any appropriate mitigation measures in respect of the EIA process;

(6) a declaration that the "*purported*" decision of An Bord Pleanála of 19th December, 2016 is contrary to and in breach of Council Directive 92 /43 /EEC of 21 May, 1992, on the conservation of natural habitats and of wild fauna and flora (O.J. L206, 22.7.1992, 7) (the 'Habitats Directive');

(7) a declaration that the "*purported*" decision of An Bord Pleanála of 19th December, 2016, infringes and/or violates the applicants' rights pursuant to Arts. 40.3, 43 and 40.5 of the Constitution;

(8) a declaration that the said "*purported*" decision is contrary to Art. 6, Art. 8 and Protocol 1 of the European Convention on Human Rights as given effect by the European Concvention on Human Rights Act 2003;

(9) an order of *certiorari* quashing the decision of An Bord Pleanála of 19th December, 2016, as a "*purported*" competent authority under the PCI Regulation and/or the 2015 Regulation to grant the approval aforesaid;

(10) a declaration that An Bord Pleanála was not lawfully designated as a competent authority (as described in the PCI Regulation) in the "*purported*" decision of An Bord Pleanála of 19th December, 2016;

(11) a declaration that the decision of An Bord Pleanála of 19th December, 2016, is null and void (and/or voidable) as An Bord Pleanála was not, it is claimed by the applicants, lawfully designated as a competent authority as described in the PCI Regulation (and/or the 2015 Regulation);

(12) a declaration that the decision of An Bord Pleanála of 19th December, 2016, contains an error of law on the face of the record of the decision, as An Bord Pleanála was not, it is claimed by the applicants, lawfully designated as a competent authority as described in the PCI Regulation (and/or the 2015 Regulation);

(13) in the alternative, a declaration that the decision of An Bord Pleanála of 19th December, 2016, is *ultra vires* as An Bord Pleanála, it is claimed by the applicants, was not lawfully designated as a competent authority as described in the PCI Regulation and/or the 2015 Regulation;

(14) a declaration that the decision of An Bord Pleanála of 19th December, 2016, is *ultra vires*, in that there was no lawful basis for An Bord Pleanála to exercise decision-making powers in relation to a permit-granting procedure for PCIs and/or clusters of PCI;

(15) a declaration that the decision of 19th December, 2016, whereby An Bord Pleanála stated that it confined its decision to the matters pertinent to the Strategic Infrastructure Development ('SID') application and in particular issues arising in respect of appropriate assessment, environmental impact assessment and the consideration of the proper planning and sustainable development and did not consider that it was conflicted in any way by the separate administrative role fulfilled by An Bord Pleanála as the competent authority for PCIs constitutes an error of law on the face of the record; and

(16) an order of *certiorari* quashing the entirety of the decision of An Bord Pleanála considered, dealt with and/or determined the application in its decision of 19th December, 2016, gives rise to a reasonable apprehension of bias.

**III Some General Points Arising**

3. Before proceeding further, the court pauses to make some general remarks:

(1) the burden of proof to establish the grounds on which judicial review is sought rests on the applicants. (See, *inter alia, Harrington v. An Bord Pleanála* [2014] IEHC 232).

(2) the decision of An Bord Pleanála enjoys a presumption of validity. (See, *inter alia*, *Ratheniska Timahoe and Spink (RTS) Substation Action Group & anor v. An Bord Pleanála* [2015] IEHC 18).

(3) the applicable standard of review, in particular relating to the decision of An Bord Pleanála, for the purposes of the EIA Directive and in relation to the Appropriate Assessment is that identified in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39.

(4) it is a significant feature of the case as pleaded that no leave has been granted to challenge the accuracy of any matter in the inspector's report.

(5) although the applicants have put affidavit evidence before the court that addresses matters of visual impact, health and property values, no leave has been granted to raise any challenge in relation to those matters save in respect of two identified landowners.

(6) the effect of the permission is not to grant any interest in property, nor indeed to authorise anything other than the development, the subject of the of the application. Although, as counsel for the applicants noted, "*permission is an appendage to the title to…property*" (per Henchy J. in *Readymix Éire Ltd v. Dublin County Council* (Unreported, Supreme Court, 30th July, 1974), 6) that observation was made in the context of a decision that the terms of the permission had to be clearly ascertainable and identifiable and nothing more.

(7) although the amount of material before the court was extensive, the court cannot but note the vastness of the enterprise that has preceded the within application. Thus (i) the oral hearings in this case were preceded by an extremely detailed environmental impact statement that extended over five volumes and comprised some 14,000 pages of text and maps; (ii) some 903 sets of submissions from members of the public were responded to by detailed submissions or replying submissions from EirGrid; (iii) those (entirely proper) public submissions, as one would instinctively expect, presented a wide range of issues from matters affecting the particular situations of particular landowners to very general issues; (iv) there were 35 days of oral hearing over a period of eleven weeks, with some 204 people addressing the inspector; and (v) the inspector's report features over 600 pages of analysis.

**IV. Consent**

*(i) Critical Issue Arising*.

4. So far as the issue of consent is concerned, the critical issue arising is whether there is any rule (a) in legislation, (b) at common law, or (c) pursuant to the Constitution or the European Convention on Human Rights which mandates that EirGrid can only seek approval pursuant to s.182A of the Act of 2000 with the consent of the owners of an affected property?

*(ii) Legislative Requirements*.

5. Section 182A of the Act of 2000 provides, *inter alia*, as follows:

> *"(1) Where a person (hereafter referred to in this section as the 'undertaker') intends to cary out development comprising or for the purposes of electricity transmission, (hereafter referred to in this section and section 182B as 'proposed development'), the undertaker shall prepare, or cause to be prepared, an application for approval of the development under section 182B and shall apply to the Board for such approval accordingly.*
>
> *(2) In the case of development referred to in subsection (1) which belongs to a class of development identified for the purposes of section 176, the undertaker shall prepare, or cause to be prepared, an environmental impact statement or Natura impact statement or both of those statements, as the case may be, in respect of the development.*
>
> (3) *The proposed development shall not be carried out unless the Board has approved it with or without modifications…."* [Emphasis added].

6. By way of initial observation, it is perhaps notable that the requirement to prepare an application for approval (or to cause same to be prepared) rests on the person who intends to carry out a development within the meaning of s.182A.

7. As to what constitutes "*transmission*", this is defined in s.182A(9) by reference to the Electricity Regulation Act 1999 and reflects the division of function which is provided for under the regulations envisioned in that earlier legislation. Per s.182A(9):

> *"In this section 'transmission', in relation to electricity, shall be construed in accordance with section 2(1) of the Electricity Regulation Act 1999 but, for the purposes of this section, the foregoing expression in relation to electricity, shall also be construed as meaning the transport of electricity by means of –*
>
> *(a) a high voltage line where the voltage would be 110 kilovolts or more, or*
>
> (b) *an interconnector, whether ownership of the interconnector will be vested in the undertaker or not*." [Emphasis added].

8. A number of points might usefully be made at this juncture:

> (1) the above-quoted provisions make no reference to, nor are they obviously or necessarily consistent with a requirement of landowner consent as an element of a successful development consent application.
>
> (2) in contrast to applications made under s.34 of the Act of 2000, there is no provision in the regulations governing applications of the kind now in issue that demonstrates any intention that consent from owners of property affected by development is required for the purposes of such an application.
>
> (3) on a more general note, if one steps back for a moment from the detail of the legislative provisions in issue, it is unsurprising that there would be a want of provision making landowner consent a pre-requisite to, or a necessary component of, a successful development consent application. There are a range of applications that can be brought under the legislation involving public utility works which would conceivably involve development on the lands of many different persons. (Another example of such an application is an application under s.182C of the Act of 2000 which is concerned with strategic gas infrastructure developments.) Were the consent of all of those persons to be a mandatory element of such applications, the applicable application process would quickly become unworkable. Thus, regrettably but almost certainly necessarily, and not without regard for individual rights, but concomitant with that concern for the overall public good which central government invariably and properly brings to the formulation of national policy and legislation, individual landowner consent is neither a pre-requisite to, nor a necessary component of, a successful development consent application, whether by virtue of primary or secondary legislation.

*(iii) Frescati, et al.*

a. Overview.

9. To sustain the contention that the court should interpolate into the applicable legislation a requirement for landowner consent, counsel for the applicants has sought (a) to rely upon the decision of the Supreme Court in *Frescati Estates v. Walker* [1975] I.R. 177, and (b) to deduce from An Bord Pleanála's standard application form and a letter written by ESB in the course of the events under consideration, an implied obligation to obtain landowner consent even in the context of an application made under s.182A. Both propositions, the court respectfully concludes, are without foundation.

b. The decision in *Frescati*.

10. Frescati House is one of the lost gems of 18th-century Irish architecture, allowed by an earlier generation to fall into decay and eventual ruin despite its architectural merit and, as importantly (perhaps even more importantly), its historical significance as the onetime favourite residence of Lord Edward Fitzgerald, the prominent United Irishman. In the case that went before the Supreme Court in *Frescati Estates v. Walker*, the plaintiffs were the owners of the house and surviving demesne. They proposed to demolish it and to build in its place a shopping centre wanting in aesthetic merit. Ms. Walker, the defendant, was an activist concerned about the demolition of the house. Despite having no estate or interest in the plaintiff's property, she applied for planning permission that

would have required the retention of the house had it been granted. The Supreme Court decided that in those circumstances Ms Walker's application for permission was not a valid application on the basis that although the Local Government (Planning and Development) Act 1963 did not require Ms Walker to have an estate or interest in the property described in her application, it did require that her application should have the imprimatur of the owner of an estate in the property sufficient to enable such applicant to carry out the proposed development. Per Henchy J., at 185-187:

> *"Not alone has the defendant no legal estate or interest in it but the trial judge found as a fact that "she has no intention or hope of acquiring any estate of any kind in the property or of developing it."*
>
> *…*
>
> *The sweep of the argument of counsel for the defendant, however, carries with it the further submission that because no limiting qualifications are laid down by the relevant sections for an applicant, anyone can be an applicant for development permission. An applicant may not be debarred, the argument runs, not alone because he has no legal estate or interest in the property but also irrespective of the genuineness or otherwise of the proposed development, or whether the applicant is acting in good faith or not, or whether those with a legal estate or interest know or approve of the application, or whether other (and possibly conflicting) applications have been made or are pending. There is nothing in the Act, it is said in effect, to debar a pauper from making an application for permission for a multi-million pound development of a property which he has only read about in a newspaper.*
>
> *…*
>
> *That the proposition that virtually anyone may apply for permission to develop a particular property could lead to strange incongruities was shown by instances raised in the course of the argument. However, it is a matter of principle that a statute - particularly a statute like the present one which makes substantial inroads on pre-existing rights - should not be construed as intending to confer unqualified and indiscriminate rights on people generally in respect of another's property such as the right to avail themselves of the legal processes of a planning application so as to gratify what may be merely an idle or perverse whim. The long title of this Act proclaims its purpose to be '…to make provision in the interests of the common good, for the proper planning and development of cities, towns and other areas…' The powers given by the Act must be read as being exercisable in the interests of the common good and the Courts should lean against a construction which would make the exercise of such powers available to an individual for the purpose of advancing a purely personal motive at the expense of the general purpose of the Act.*
>
> *Apart from the irreconcilability with the general principle of the proposition put forward on behalf of the defendant, a number of specific provisions of the Act clearly show its unsoundness. For the sake of brevity I shall confine myself to a selection of those provisions for the purpose of showing that the operation of the Act requires that an applicant for permission must have a particular degree of standing…."*

11. A couple of points might be made in connection with the above-quoted text:

> (1) the "*Not alone…developing it*" element of same provides a significant and obvious point of distinction between the circumstances that pertained in Frescati and the type of situation with which the court is now concerned, where a legislative provision (s.182A) is directly engaged by an application by a party (EirGrid) which intends to carry out the relevant development.
>
> (2) the "*That the proposition…perverse whim*" element of same is also significant. In this segment of his judgment Henchy J. formulates and/or applies a common law rule of statutory construction as to how statute-law falls properly to be construed – and unsurprisingly elects to construe the applicable statute as a whole, and to have the effect that it does not permit an application by a party who is gratifying an idle or perverse whim or seeking an unqualified and indiscriminate right over somebody else's property. The court cannot but note in passing that that is a long way from the facts of the within proceedings where the court is confronted with a body (EirGrid) that is designated by statute with particular purposes concerning the operation of the State's electricity transmission system and seeking development consent under a self-contained legislative code designed for that end.

12. Henchy J. moves on in his judgment to consider a selection of provisions from the Act of 1963 that he believes to show that the operation of that Act (and the judgment has equal applicability in the context of current planning legislation) requires that an applicant for planning permission have a particular degree of standing. Per Henchy J., at 188-190:

> *"Section 25, sub-s. 1, of the Act of 1963 requires the Minister to make permission regulations and enacts that permission shall be granted on application being made in accordance with the regulations and subject to the requirements of the regulations. Sub-section 2 of that section proceeds to set out what the regulations may require from applicants. The regulations may require any applicants 'to furnish to the Minister and to any other specified persons any specified information with respect to their applications' (para. c) and 'to submit any further information relative to their applications (including any information as to any estate or interest in or right over land)' and 'the production of any evidence to verify any particulars of information given by any applicants' – see paras. (d) and (e).*
>
> *Since applications cannot be successful unless they comply with the requirements of the regulations (s. 25, sub-s. 1), the legislature must be credited with the intention of delineating the range of eligible applicants by the extent of the permitted requirements. Thus, a total stranger to the property, who has no liaison with those interested in it, could scarcely have been envisaged as a successful applicant, for normally he could not furnish the specified information (including any estate or interest in or right over the land) or produce evidence to verify particulars given as to such information.*
>
> *Furthermore. when we turn to s. 9, sub-s. 1, of the Act of 1963 we find that a planning authority may, for any purpose arising in relation to their functions under the Act, require the occupier or the person receiving the rent to state in writing within a specified period particulars of the estate, interest or right by virtue of which he is an occupier or receives the rent and the name and address (so far as they are known to him) of every person who to his knowledge has any estate or interest in or right over or in respect of the property. Sub-section 2 of that section makes it an offence punishable on summary conviction with a fine not exceeding £20 for a person from whom such information is required to fail to state it within the time specified, or to make a statement in writing which is to his knowledge false or misleading in a material respect.*

*The effect of s. 9 is that when an application for permission to develop is made, the planning authority, in order to carry out their functions under the Act, may find it necessary to serve on the occupier or the person receiving the rent the notice referred to in sub-s. 1 of the section; if the person so served does not comply with the notice in the way specified in sub-s. 2, he will become liable to the sanction of the criminal law. If, as counsel for the defendant contends, applications for development permission may be made in multiplicity and indiscriminately by persons at large, obligations would be cast on occupiers of or persons receiving rent out of property and failure to comply with those obligations would subject such people to a fine with a liability to imprisonment in default of payment. The fundamental rule that a statute must be construed so as to keep its operation within the ambit of the broad purpose of the Act rules out such an interpretation; otherwise it would be possible for persons, by means of frivolous or perverse applications, to cause the imposition of duties and liabilities which would be wholly unnecessary for the operation of the Act in the interests of the common good.*

*Section 83 of the Act of 1963 provides an equally cogent reason why the Act does not envisage persons unconnected with any real interest in property or its development being allowed to apply for development permission. That section provides that an authorised person (i.e. , a person so authorised for the purposes of the section by the planning authority or the Minister) may enter, subject to an order of the District Court prohibiting or restricting the entry, on any land for any purpose connected with the Act and may do all things reasonably necessary for the purpose for which the entry is made and, in particular, may survey, make plans, take levels, make excavations, and examine the depth and nature of the subsoil. If the Act had to be read as allowing that degree of intrusion at the behest of any individual who chooses to make a development application in respect of another person's property, the constitutionality of the statute would be very much in question.*

*The inequities and anomalies that would follow if there is to be an unrestricted right to apply for permission to develop another person's property is shown by the terms of many provisions of the Act. For example, since the planning authority must investigate and deal with each application with sufficient care to ensure that their decision will have due regard to the development plan required by Part III of the Act, a group of people making multiple applications in respect of properties in which they have no legal interest, and which they have no intention or hope of developing, could put such a strain on the resources of the planning authority as to stifle the operation of the Act in delay and confusion. Since s. 41 requires particulars of all applications for development permission to be entered on the register (which s. 8 requires the planning authority to keep), and since s. 28, sub-s. 5, provides that a grant of permission will normally inure for the benefit of the property and all persons interested in it, the register (which incorporates documents by reference) would become encumbered with bulk and detail if applications without restriction were allowed, and consequently might prove confusing or misleading for those who would be required to consult it.If there need never be a connexion between the applicant and those who have a legal estate or interest in the property, the period for appealing against the decision of the planning authority would be, for the applicant, one month from the receipt of the decision, but for others (who, if the argument on behalf of the defendant is correct, could include those with a legal estate or interest) it would be 21 days from the day of the giving of the decision (s. 28, sub-s. 5) – thus giving preferential treatment to someone who may be merely a meddlesome interloper. It is no answer to this complaint to say that a grant or refusal of an application for development permission cannot prejudice a subsequent application. As I have shown, the mere making of an application by a person with no legal interest can operate to the detriment of the owner or occupier. And in any case, I find nothing in the scheme of the Act that would allow interfering, if well-intentioned, outsiders to intrude into the rights of those with a legal interest to the extent of lumbering the property with unwanted grants or refusals of permission, thus cluttering the title.*

*To sum up, while the intention of the Act is that persons with no legal interest (such as would-be purchasers) may apply for development permission, the operation of the Act within the scope of its objects and the limits of constitutional requirements would be exceeded if the word 'applicant' in the relevant sections is not given a restricted connotation. The extent of that restriction must be determined by the need to avoid unnecessary or vexatious applications, with consequent intrusions into property rights and demands on the statutory functions of planning authorities beyond what could reasonably be said to be required, in the interests of the common good, for proper planning and development.*

*Applying that criterion, I consider that an application for development permission, to be valid, must be made either by or with the approval of a person who is able to assert sufficient legal estate or interest to enable him to carry out the proposed development, or so much of the proposed development as relates to the property in question. There will thus be sufficient privity between the applicant (if he is not a person entitled) and the person entitled to enable the applicant to be treated, for practical purposes, as a person entitled.*

*As for the present case, the defendant's application was invalid and should not have been entertained for she had no legal estate or interest in the property and her application was made without the knowledge or approval of the plaintiffs who, as the owners of the fee simple, are the only persons who would be legally competent to carry out the development for which the defendant sought permission."*

13. Perhaps five points might usefully be made in connection with the just-quoted text:

(1) Henchy J.'s observations concerning s.25(2) of the Act of 1963 are of no relevance in the context of the within application because, as mentioned previously above, the regulations applicable to the form of application now in issue do not require the provision of such information as falls to be provided in applications under s.34 of the Act of 2000. That this is so inclines the court to the conclusion that s.182A, properly construed, does not envision, let alone require, that landowner consent be provided as a pre-requisite to, or a necessary element of a successful development consent application.

(2) Henchy J.'s observations regarding s.9 of the Act of 1963 (a provision reflected but not repeated in s.8 of the Act of 2000) are not of relevance to the within application because the application in issue does not even begin to approach, let alone occupy the realm of frivolity and/or perversity.

(3) Henchy J.'s observations concerning s.83 of the Act of 1963 (as reflected in s.252 of the Act of 2000) are not of relevance in the context of the within application for much the same reason as was just touched upon in the last point, being that the court is not concerned here with an application that is made by, to borrow a colloquialism 'any old person' but rather by an entity that is an 'undertaking' both within the meaning of s.182A of the Act of 2000 and for the purposes provided for in that legislation.

(4) as to Henchy J.'s points concerning *"[t]he inequities and anomalies that would follow if there is to be an unrestricted right to apply for permission to develop another person's property…",* again his reasoning is not of relevance in the context of the circumstances now presenting, where the court is confronted with an entity that is an 'undertaking' within the meaning of s.182A and for the purposes provided for in that legislation. Here the court is not dealing with an entity that, to use the terminology of Henchy J., though the court suspects that even in his day it was the terminology of a bygone era, can properly be described as a *"meddlesome interloper".*

(5) as to Henchy J.'s summation of his analysis and, in particular, his observation that *"while the intention of the Act is that persons with no legal interest (such as would-be purchasers) may apply for development permission, the operation of the Act within the scope of its objects and the limits of constitutional requirements would be exceeded if the word 'applicant' in the relevant sections is not to be given a restricted connotation",* the court would merely observe that when it comes to s.182A one is dealing necessarily and solely with a restricted class of would-be applicant.

14. By way of overall observation, it can be seen from the preceding analysis that Frescati is a case the rationale of which is applicable to applications for permission of the kind now reflected in s.34 of the Act of 2000; it has no application to s.182A for at least three reasons:

(1) the regulations applicable to permission granted under s.34 of the Act of 2000 specifically require information as to interest or estate in land; by contrast, the regulations applicable to s.182A do not (a point that is returned to again later below).

(2) the legislation governing what might be styled applications for planning permission (as opposed to s.182A approval) was found by the Supreme Court in *Frescati* to be inconsistent with a scenario in which persons not having a legal interest in lands could be allowed make an application. By contrast, the legislation which governs the application made by EirGrid is consistent (and consistent only) with EirGrid being entitled to bring an application of the form that it has brought, and not requiring the consent or agreement of any other party so to do.

(3) none of the reasoning of the Supreme Court in *Frescati*, insofar as it is directed towards intermeddlers applies in the context of a statutory body empowered to undertake public utility works of a very specific kind such as those in issue here.

15. The court respectfully considers that the foregoing analysis suffices to deal with the consent issue raised by the applicants: there is no consent requirement in applicable legislation (it would perhaps be surprising if there were); and the decision in *Frescati*, pointed to by the applicants as a source of such a requirement, has no application to the construction of the provisions with which the court is now concerned. The court does not consider that it is necessary to address in detail the decision of the Supreme Court in *Keane v. An Bord Pleanála* [1998] 2 I.L.R.M. 241, beyond noting that nothing therein detracts from the court's uncontroversial reading and application, in the foregoing pages, of the decision of the Supreme Court in *Frescati*.

c. Section 53 and *Gormley*.

16. Section 53 of the Electricity Supply Act 1927, as amended by the Electricity (Supply) (Amendment) Act 1945 – it has been amended again since – provided, *inter alia*, as follows in respect of wayleaves:

*"(1). The Board and also any authorised undertaker may, subject to the provisions of this section, and of regulations made by the Board under this Act place any electric line above or below ground across any land not being a street, road, railway, or tramway….*

*(3). Before placing an electric line across any land or attaching any fixture to any building under this section the Board or the authorised undertaker (as the case may be) shall serve on the owner and on the occupier of such land or building a notice in writing stating its or his intention so to place the line or attach the fixture (as the case may be) and giving a description of the nature of the line or fixture and of the position and manner in which it is intended to be placed or attached….*

*(4). If within seven days after the service of such notice the owner and the occupier of such land or building give their consent to the placing of such line or the attaching of such fixture (as the case may be) in accordance with such notice either unconditionally or with conditions acceptable to the Board, or to the authorised undertaker and approved by the Board (as the case may require), the Board or the authorised undertaker may proceed to place such line across such land or to attach such fixture to such building in the position and manner stated in such notice.*

*(5). If the owner or occupier of such land or building fails within the seven days aforesaid to give his consent in accordance with the foregoing sub-section the Board or the authorised undertaker with the consent of the Board but not otherwise may place such line across such land or attach such fixture to such building in the position and manner stated in the said notice….*

*(9). Where the Board or an authorised undertaker is authorised by or under this section to place or retain any electric line across any land or to attach or retain any fixture on any building the Board or such authorised undertaker (as the case may be) may at any time enter on such land or building for the purpose of placing, repairing, or altering such line or such fixture or any line or apparatus supported by such fixture."*

17. In *Electricity Supply Board v. Gormley* [1985] I.R. 129, Mrs. Gormley had acquired property after ESB obtained planning permission for development comprising the development of a transmission system which crossed her land. Wayleave notices were served under section 53 as it then stood. Mrs Gormley raised a number of objections to what was to be done by ESB, one of which was that the applicable legislation was unconstitutional because it did not provide any mechanism for the payment of compensation for what was in effect the imposition of a wayleave on her property. She failed in this contention in the High Court but she succeeded on appeal to the Supreme Court, that court deciding that the planning permission in issue was invalid consequent upon the absence of any facility for compensation. As mentioned in the above-mentioned report of the judgment, at 158, as a consequence of the decision of the Supreme Court, the Oireachtas subsequently enacted the Electricity Supply (Amendment) Act 1985 which substituted a new s.53(5) into the Act of 1927, which new provision provided as follows:

*"(5). If the owner or occupier of such land or building fails within the seven days aforesaid to give his consent in accordance with the foregoing subsection, the Board or the authorised undertaker with the consent of the Board but not otherwise may place such line across such land or attach such fixture to such building in the position and manner stated*

*in the said notice, subject to the entitlement of such owner or occupier to be paid compensation in respect of the exercise by the Board or authorised undertaker of the powers conferred by this subsection and of the powers conferred by subsection (9) of this section, such compensation to be assessed in default of agreement under the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, the Board for this purpose being deemed to be a public authority."*

18. Although *Gormley* is a renowned decision in terms of the conclusions arrived at by the Supreme Court as to the entitlement to compensation, its particular significance in the context of the within application is that, in the High Court, Mrs Gormley raised an issue by reference to *Frescati*, being that although she had acquired the property after the ESB obtained planning permission for the development, nonetheless the ESB did not have her consent to the development. Dealing with this aspect of matters, at 141, Carroll J. observes as follows:

> *"I am satisfied that the ESB had sufficient interest to support their application for planning permission. In Frescati Estates v. Walker [1975] I.R. 177 Henchy J. said the word 'applicant' must be given a restricted connotation and the extent of that restriction must be determined by the need to avoid unnecessary and frivolous applications for planning permission. The test which Mr. Justice Henchy laid down in that context at p. 190 of the report was that in order to be valid an application must be made:-'either by or with the approval of a person who is able to assert sufficient legal estate or interest to enable him to carry out the proposed development, or so much of the proposed development as relates to the property in question. There will thus be sufficient privity between the applicant (if he is not a person entitled) and the person entitled to enable the applicant to be treated, for practical purposes, as a person entitled.'*
>
> *When this is applied to the present case, the ESB had sufficient interest given by statute to enable it to carry out the proposed development on the property in question. It is also obvious that the application was neither frivolous nor unnecessary. Therefore the ESB falls within the restricted meaning of the word 'applicant' as set out in that judgment."*

19. The reasoning of Carroll J. in the above-quoted text applies with equal vigour to the within proceedings. Yes, there are differences between that case and this because (i) in *Gormley*, ESB was carrying out the development and was the party which sought planning permission, whereas (ii) (and in truth this is just the 'flip-side' of (i)) the impugned application in the within proceedings has been brought by EirGrid and the only body with powers under s.53 of the Act of 1927 is the ESB. However, to focus on those differences is, to borrow a colloquialism, 'to miss the wood for the trees'. The critical points to note are that (a) EirGrid is in a position whereby it can procure ESB to do the works and ESB is in a position where it can exercise the powers, and (b) s.53 is directed to and concerned with the intent of the undertaker – and the undisputed evidence before the court (and the planning inspector) is (was) that EirGrid intends to carry out the development, it intends to do so with ESB constructing the development, and ESB has the requisite powers, insofar as the need arises, to allow that development to be done where there is no landowner consent. So while it is certainly the case that there is a difference, and an obvious one, between ESB as repository of the statutory power and EirGrid as applicant, it is a distinction without a difference.

d. The Form and the Letter.

*A. Overview*.

20. If applicable legislation does not require landowner consent (and here it does not) and if *Frescati* is inapplicable (and for the reasons identified previously above it is inapplicable), on what legal basis can the applicants construct a requirement that landowner consent be obtained by EirGrid? Perhaps surprisingly, the applicants have pointed in this regard, *inter alia*, to (a) An Bord Pleanála's standard 'Application Form for Permission/Approval in respect of a Strategic Infrastructure Development' and (b) a letter of 14th May, 2015, from the ESB to An Bord Pleanála.

*B. The Form.*

21. As to An Bord Pleanála's 'Application Form for Permission/Approval in respect of a Strategic Infrastructure Development' there is: (i) no such form prescribed by law; (ii) for the reasons stated previously above, no requirement that a person making application under s.182A of the Act of 2000 obtain landowner consent; and (iii) no way that the said form could change this legal position – in and of itself the form is something of a legal nothing. Be that as it may, the applicants have pointed to Box 7 of the said form as support of their argument as to the need for landowner consent. The detail of that box, as completed, is replicated below:

**"7. Legal Interest of Applicant in respect of the site the subject of the application:**

| | | |
|---|---|---|
| Please tick appropriate box to show applicant's legal interest in the land or structure: | Owner | Occupier |
| | Other | |

Where legal interest is 'Other', please expand further on your interest in the land or structure.

EirGrid plc is the licensed Transmission Service Operator for Ireland pursuant to the provisions of the Electricity Regulation Act 1999. Pursuant to the provisions of S.I. N. 445/2000, EirGrid plc has the exclusive function to operate and ensure the maintenance of and, if necessary, develop a safe, secure, reliable, economical and efficient electricity transmission system.

The Electricity Supply Board is the licensed Transmission System Owner for Ireland pursuant to Section 14 of the Electricity Regulation Act 1999.

The proposed transmission infrastructure will be constructed by the Electricity Supply Board pursuant to statutory powers.

| |
|---|
| **If you are not the legal owner**, please state the name and address of the owner and supply a letter from the owner of consent to make the application as listed in the accompanying documentation.<br><br>The owner of **Woodland 400 kV Substation** is the Electricity Supply Board. A letter of consent and approval to the making of the application from the Electricity Supply Board of 27 Lower Fitzwilliam Street, Dublin 2 is included in **Schedule 2 attached to this Application Form**. The Electricity Supply Board is the licensed Transmission System Owner for Ireland pursuant to Section 14 of the Electricity Regulation Act, 1999.<br><br>The owner of the **Temporary Construction Material Storage Yard** to be located in the townlands of Monaltyuff and Monaltybane, Carrickmacross, County Monaghan is [Name and Address Stated]. A letter of consent and approval to the making of the application form from [the person aforesaid] is included in **Schedule 2 attached to this Application Form**. |
| Does the applicant own or have a beneficial interest in adjoining, abutting or adjacent lands? If so, identify the lands and state the interest. |
| EirGrid plc, the applicant for approval, does not have a beneficial interest in adjoining, abutting or adjacent lands. However, EirGrid Interconnector Limited (a wholly owned subsidiary of EirGrid plc) has an interest in lands within and adjacent to the southern portion of the overall 400 kV Substation, in the townland of Woodland, in the Barony of Ratoath, in the Electoral Division of Dunshaughlin, County Meath which comprises the western termination node of the existing East West Interconnector (EWIC). |

22. Try as it has, the court does not see in the text inserted by EirGrid in the above-quoted segments of the application form anything other than a description of EirGrid's interest that conforms with (i) the requirements of s.182A of the Act of 2000 and (ii) the decision of the High Court in *Gormley*. EirGrid commences by identifying itself as the licensed transmission system operator which, pursuant to the Act of 1999, has the exclusive function to operate, ensure the maintenance of and, if necessary, develop a safe, secure, reliable, economical and efficient electricity transmission system. That is its interest. It is its statutory interest in pursuing the development and it is properly recorded in the context in which the question is asked. By contrast, the ESB is (correctly) described as the licensed transmission system owner pursuant to the Act of 1999 Act. And that is where the ESB comes into the process, not just because of its sub-station ownership but because it is the transmission system owner for Ireland. Of final note in this regard is that the proposed transmission infrastructure will be constructed by the ESB pursuant to its statutory powers, being the very interest that Carroll J. found to be sufficient in *Gormley*, having regard to her construction of *Frescati*. As to identifying the legal owner and providing a suitable consent letter, the owner of the Woodland substation is (correctly) identified as the ESB; reference is made to a letter of consent but again it is made clear that the ESB is the licensed transmission system owner for Ireland under s.14 of the Act of 1999. So the application form in its own terms makes it clear that ESB is being referenced, not merely in the context of ownership of the substation, but also in the context of its ownership of the transmission system.

23. At the end of An Bord Pleanála's 'Application Form for Permission/Approval in respect of a Strategic Infrastructure Development', the following "*General Guidance Note"* (in the version as furnished to the court) appears:

> *"The range and format of material required to be compiled/submitted with any application in respect of a proposed strategic infrastructure development shall generally accord with the requirements for a planning application as set out in the Planning and Development Regulations, 2001 to 2011 and those Regulations should therefore be consulted prior to submission of any application."*

24. As the court understands the applicant's contentions, they include the contention that this general guidance note creates a legal obligation which does not otherwise exist under the legislation on EirGrid to obtain landowner consent. But if the court might borrow from the Ronseal man, this "*General Guidance Note*" 'does exactly what it says on the tin'…and no more. Thus it is general guidance (so it is not specific), it is merely guidance (so it is not prescriptive), and it neither purports to, nor could, establish a legal obligation of the type contended for.

*C. The Letter*.

25. Turning to the letter of 14th May, 2015, from the ESB to An Bord Pleanála, it is, with respect, very hard to see how this letter adds to the legal analysis one way or the other. Nonetheless it was the focus of some attention on the part of the applicants at hearing and thus falls to be considered here. The letter commences with a statement of the statutory background and role of each of the ESB and EirGrid, then continues as follows:

> "*Pursuant to Regulation 18.1(a) of* [the European Communities (Internal Market in Electricity) Regulations 2000 (S.I. No. 445 of 2000)] *…ESB and EirGrid are required to enter into an agreement for the purpose of enabling EirGrid as Transmission System Operator to discharge its functions under S.I. No. 445/2000. On 16th March, 2006, ESB and EirGrid accordingly entered into such an agreement, known as the Infrastructure Agreement.*
>
> *Pursuant to clause 7.6 of the Infrastructure Agreement, all activities connected with, seeking and/or obtaining planning permission/approval (if required) and any other consents required by the Transmission System Operator to discharge its functions as such, shall be the sole responsibility of the Transmission System Operator, i.e. EirGrid.*

ESB is obliged under the legislation and the Infrastructure Agreement cited above to facilitate EirGrid's planning intentions in the furtherance of EirGrid's functions as Transmission System Operator. Therefore, pursuant to the Infrastructure Agreement and for the purposes of the Planning and Development Act 2000, as amended, ESB, as the licensed Transmission System Owner (and a person with a legal interest in the lands the subject-matter of the enclosed application for planning approval) hereby consents to the making by EirGrid of this application for planning approval, which EirGrid considers necessary."

26. The most sensible reading of this letter as a whole is that its provision is referable (a) to its interest in the Woodland substation, and (b) to ESB's status as licensed transmission system owner. Any suggestion that the letter is referable solely to (a) is patently wrong when one has regard to the substance of the letter. After all, were it not for (b), there would be no need to repeatedly state, as the letter does, that ESB is the licensed transmission system owner under Section 14 of the Act of 1999.

27. In passing – and the court will return to the EirGrid-ESB Infrastructure Agreement in more detail later below – the court notes the reference in the above-quoted text to cl. 7.6 of that agreement. Though the significance of that agreement was somewhat underplayed at the hearing of the within application, it seems to the court notable that the Infrastructure Agreement itself provides in cl. 7.6 for EirGrid's function in seeking a consent of the kind that was in fact provided by ESB in the context of the now-impugned application process. The ESB, in other words, is obliged under, *inter alia*, the Infrastructure Agreement to facilitate EirGrid's planning intentions. Hence, in the letter, pursuant to the Infrastructure Agreement, and for the purposes of the Act of 2000, ESB (as licensed transmission system owner) consents to the making by EirGrid of the now-impugned application; and on its own terms the letter is provided to facilitate EirGrid's planning intentions and in furtherance of EirGrid's functions as transmission system operator.

28. The court began this section of its judgment by posing the question whether there is any rule (a) in legislation, (b) at common law, or (c) pursuant to the Constitution or the European Convention on Human Rights which mandates that EirGrid can only seek approval pursuant to s.182A of the Act of 2000 with the consent of the owners of an affected property? In this regard, the following conclusions, it seems to the court, may reasonably be stated by reference to the foregoing analysis:

> (1) the question of whether a person needs a legal or beneficial interest to make an application for development consent is determined by the statutory provisions governing that consent.
>
> (2) the decision of the Supreme Court in *Frescati* establishes a rule of statutory construction which, when brought to bear on the Act of 2000 yields the result that that Act allows EirGrid to make the now-impugned application and imposes no constraint by reference to landowner consent.
>
> (3) the decision in *Frescati* is limited in scope to an applicant for permission who is seeking to assert an indiscriminate and unqualified right in order to gratify a whim. Thus it is not applicable to a body such as EirGrid that is discharging a function in the public interest and common good.
>
> (4) having regard to the fact that ESB will construct the interconnector, having regard to the fact that it has the statutory power to acquire interests and having regard to the relationship between ESB and EirGrid under the internal electricity market regulations, the requisite interest under *Gormley* exists (if it is necessary indeed to proceed to an application of *Gormley* and, for the reasons stated elsewhere above, the court is not persuaded that it is).
>
> (5) no part of the application form can or does change the legal position as described by the court in the preceding pages; nor does the letter from the ESB.
>
> (6) no provision of the Constitution or the European Convention on Human Rights alters the foregoing conclusions.

## V. Entitlement to Make Application?

*(i) Critical Issue Arising.*

29. The next issue that the court considers is whether EirGrid is entitled to make an application for approval for the North-South Interconnector under s.182A of the Act of 2000. Although counsel for the applicants suggested at hearing that this issue was not being pressed, it seems that it may continue to be a live issue and the court will therefore address it. In essence, the issue 'boils down' to the meaning of the phrase "*carry out development*" in s.182A. The court will also consider hereafter (i) the wayleave powers of the ESB under s.53 of the Act of 1927 and (ii) the issue contended to present as regards the East-West connector, both of which matters were referenced by counsel for the applicants in this context, though neither of which, the court respectfully concludes, is relevant to the issue of entitlement.

*(ii) The Act of 1999 and the Regulations of 2000.*

30. Mention has already been made of the text of s.182A, the reference therein to "*electricity transmission*", the definition of that term in s.182A(9) by reference to the Electricity Regulation Act 1999, and the express provision in that subsection that "*for the purposes of this section, the foregoing expressi*on [i.e. 'electricity transmission'], *in relation to electricity, shall also be construed as meaning the transport of electricity by means of [inter alia]…(b) an interconnector, whether ownership of the interconnector will be vested in the undertaker or not*". But perhaps especially worth remembering in the context of the issues now under consideration is the emphasis placed on the concept of 'development' in s.182A. It will be recalled that that provision commences "Where a person… intends to carry out development comprising or for the purposes of electricity transmission…[that person] shall prepare, or cause to be prepared, an application for approval of the development…". Indeed, it would not be an overstatement to assert that the notion of 'development' dominates s.182 and, as will be seen hereafter, the function of development has been vested by statute in EirGrid. Also notable in this context are the European Communities (Internal Market in Electricity) Regulations 2000 (S.I. No. 445 of 2000) which provide as follows, at regs. 8(1), 8(6)(a), 18(1)(a) and 19:

> *"(1) Subject to paragraph (2), the transmission system operator shall have the following exclusive functions:*
>
> > *(a) to operate and ensure the maintenance of and, if necessary, develop a safe, secure, reliable, economical and efficient electricity transmission system, and to explore and develop opportunities for interconnection of its system with other systems, in all cases with a view to ensuring that all reasonable demands for electricity are met and having due regard for the environment….*
>
> *…*
>
> *8(6)(a) Within such time that the Commission may direct, the transmission system operator shall prepare a plan (in these Regulations referred to as the 'development plan') for the development of the transmission system in order to guarantee security of supply, which shall relate to a period of 5 calendar years from the date on which the plan is prepared by the transmission system operator.*
>
> *…*
>
> *18(1)(a) EirGrid and the Board shall, no later than the effective date and subject to the approval of the Commission, enter into an agreement (in these Regulations referred to as the 'infrastructure agreement') for the purpose of enabling*

*the transmission system operator to discharge its functions under these Regulations.*

*…*

*19. The transmission system owner shall –*

*(a) as asset owner, maintain the transmission system and carry out construction work in accordance with the transmission system operator's development plan, subject to the provisions of Regulation 18(3),*

*(b) in accordance with the infrastructure agreement with the transmission system operator under Regulation 18 implement any other works required under the development plan, and carry out any other requirement applicable to it under these Regulations, having due regard for the environment,*

*(c) provide to the transmission system operator such information as the transmission system operator requires to ensure the secure and efficient operation, development and maintenance of the transmission system or otherwise in order to discharge its functions under these Regulations,*

*(d) have a duty to indicate to the transmission system operator and the Commission, within such period as shall be specified by the direction of the Commission, the measures which it proposes to take to implement the development plan in accordance with the infrastructure agreement,*

*(e) have a duty not to dispose of any assets constituting part of the transmission system or to create any encumbrance over the transmission system without prior notification, in writing, to the transmission system operator and the Commission.*

*(f) have a duty not to dispose of to an extent considered material by the Commission, any assets constituting part of the transmission system or create to an extent considered material by the Commission, any encumbrance over the transmission system, without the prior written consent of the transmission system operator and the Commission,*

*(g) comply with any regulations or directions applicable to it made by the Commission under these Regulations or under the Act of 1999, and*

*(h) otherwise comply with the licence issued under section 14(1)(f) of the Act of 1999."*

31. So EirGrid is the transmission system operator and has the exclusive function of developing the grid, whereas ESB, as transmission system owner, has the function of carrying out construction, as well of course as owning the grid.

*(iii) A Consideration of Certain of the Affidavit Evidence.*

32. How the legislative scheme plays out in practice is helpfully teased out in detail in some of the affidavit evidence before the court and certain of that affidavit evidence is worth reciting here. Thus Mr John Fitzgerald, the Director of Grid Development and Interconnection at EirGrid, avers, *inter alia*, as follows:

*"EirGrid plc is a public limited company and is the licensed Transmission System Operator [TSO] for Ireland. EirGrid plc has the exclusive function to operate and ensure the maintenance of and, if necessary, develop a safe, secure, reliable, economical and efficient electricity transmission system. The functions of EirGrid as TSO and the Electricity Supply Board (as Transmission Asset Owner or TAO) are prescribed in legislation and in their respective licences. In terms of the relationship between EirGrid as TSO and ESB as TAO, ESB as asset owner maintains the transmission system and carries out construction work in accordance with EirGrid's development plan. ESB has no function in respect of the development of transmission lines other than constructing same and the construction of the North-South 400kV Interconnector, which is the subject-matter of these proceedings will be undertaken by the ESB….*

*I say further that it is EirGrid's intention to carry out the development the subject of these proceedings. EirGrid conceives, designs, [and] procures the construction of the infrastructure, and has the supervisory role provided for under the infrastructure agreement in respect of that construction. The construction itself shall be undertaken by the ESB…."*.

33. This aspect of matters is subsequently taken up by Ms Aimee Treacy, a director and the company secretary of the first-named applicant, who avers, *inter alia*, that *"Mr Fitzgerald states that the development shall be carried out by the ESB."* However, this, with respect, is a mis-casting of what Mr Fitzgerald in fact avers. He avers, and this is most certainly not a distinction without a difference that "*The construction…shall be undertaken by the ESB*". But returning to Mr Fitzgerald's affidavit evidence, he further avers as follows:

"[Ms] *Treacy asserts that EirGrid has no legal interest in privately-owned lands and is incapable of acquiring any interest in same.*

*Whilst the issue of EirGrid's interest and the lawfulness of the application for approval are more properly matters for legal submission. I am advised by EirGrid's solicitor and so believe that the following points should be noted:*

☐ *the application for approval in respect of the proposed development was made under section 182A of the 2000 Act, which does not require the applicant for approval to assert any interest in respect of the lands the subject-matter of the application;*

☐ *the Electricity Supply Board [ESB] is the licensed Transmission Asset Owner [TAO] and owns the transmission system and is responsible for its construction in accordance with EirGrid's development plan and is further responsible for the execution of maintenance;*

☐ *EirGrid is solely responsible for making applications for planning approval or permission;*

☐ *the application for approval was made by EirGrid, with the consent and approval of the Electricity Supply Board;*

☐ *the application documentation…expressly stated that…EirGrid is the licensed TSO for Ireland and 'has the exclusive function to operate and ensure the maintenance of and, if necessary, develop a safe, secure, reliable, economical and efficient electricity transmission system', and that 'the proposed transmission infrastructure will be constructed by the Electricity Supply Boatd pursuant to statutory powers….*

*Accordingly, I am advised and so believe that EirGrid could and did lawfully make the application for approval….*

[A]*t the oral hearing, on March 23 2016, Aidan Geoghegan (EirGrid's Project Manager for the North-South 400kV Interconnection Development) gave uncontroverted evidence explaining the respective functions of EirGrid and the ESB and the legal and contractual relationship between these entities, insofar as is relevant to this application. Mr Geoghegan explained what ESB does in relation to the works and precisely why it is EirGrid that carries out the development; EirGrid conceives the plan, designs the project, procures construction and has a supervisory role during that construction. ESB's role is to build and fix the transmission system to specifications set by EirGrid. EirGrid specify what, where and how; ESB acts under direction from EirGrid".*

34. In a separate affidavit, Mr Fitzgerald further avers as follows in this regard:

*"EirGrid's principal role as TSO is to plan the development of and operate the transmission system, and to ensure its maintenance. Under article 8(1) of the Regulations of 2000, EirGrid has the exclusive function to operate and ensure maintenance of, and, if necessary, develop a safe, secure, reliable, economical and efficient electricity transmission system. EirGrid further has the obligation to prepare a development plan for the development of the transmission system in order to guarantee security of supply….*

*The functions of both EirGrid as TSO and ESB as TAP are prescribed in legislation and in their respective licenses. In terms of the relationship between EirGrid as TSO and ESB as TAO…ESB as asset owner maintains the transmission system and carries out construction work in accordance with EirGrid's development plan. ESB has no function in respect of the development of transmission lines other than constructing same….*

*The relationship between EirGrid and ESB is managed via an 'Infrastructure Agreement' which was entered into between the parties on the 16th March 2006….This agreement can only be amended with the approval of the CER….*

*Section 7 of the Infrastructure Agreement deals with 'Development and Construction Activities' and the following provisions are of particular importance to the issue which the Applicants seek to raise in the proceedings:*

*(i) EirGrid has the sole and exclusive right to determine and identify which development projects will be undertaken and the timing requirements for the development of such projects (clause 7.3.1)*

*(ii) It is Eirgrid's decision to proceed with any project (clause 7.4.2);*

*(iii) Design standards and designs are a matter for EirGrid (clause 7.5)*

*(iv) Where a project is to proceed, the ESB must give EirGrid a project implementation plan with all details of how the project will be implemented, method statements, etc. EirGrid is given the power to reject the draft Project Implementation Plan with any disagreement between ESB and EirGrid being determined through dispute resolution (clause 7.7.4);*

*(v) EirGrid appoints a client engineer – and that description is itself significant – who are agents of EirGrid and who have rights of inspection of all aspects of a project (clause 7.9.1);*

*(vi) The client engineer then, representing EirGrid, has the power to monitor progress and ensure that ESB carries out the project in accordance with the Project Agreement (para. 7.9.3)*

*(vii) EirGrid has an input into procurement through its members of the Procurement Strategy Committee (7.10)*

*(viii) EirGrid has an ongoing role of review and assessment over delivery of the project (clause 7.11)*

*(ix) EirGrid has, subject to clause 11 (Access to transmission assets), unrestricted access and rights of inspection with respect to all aspects of the execution and completion of construction works carried out on the Transmission System and to ensure that such construction works comply with the Project Agreement (clause 7.12.2);*

*(x) Commissioning of the Development is undertaken in accordance with EirGrid's procedures and the certificate of acceptance issues from EirGrid (clause 7.13.9)…".*

*(iv) The Infrastructure Agreement.*

35. Following on from the foregoing, the court would but note in passing, clauses 7.13.9 and 21.1 of the Infrastructure Agreement, with clause 7.13.9 of that agreement providing that *"When the Board considers that a Project or section has been substantially completed in accordance with the Project Agreement and a Certificate of Acceptance has been issued for that Project or section, the Board may apply to the TSO for a Certificate of Completion in respect of that Project or section, stating the date on which it considers the Project or section to be substantially complete", and clause 21 giving EirGrid various step-in rights where it "considers that the Board is in delay or default of its construction or maintenance obligations"* under the Infrastructure Agreement. In essence, on the transmission side, the ESB's role is to be a contractor, building whatever is decided by EirGrid to the specification set by EirGrid.

*(v) Some Conclusions.*

36. In the preceding pages the court has described at some length the legal framework that governs, and the infrastructure agreement that exists between, EirGrid and ESB, and how that legislative and infrastructural schema operates in practice. Taking all of the foregoing together, the legal issue that presents when it comes to deciding eligibility to make an application under s.182A is not who is *constructing* the development, but who is *carrying out* the development? And looming through the preceding pages is the clearest of answers to this question: EirGrid is carrying out the development. It is the body which designs the development, as only legally it can do. It decides that the development is necessary. It identifies the route. It decides on voltage. It chooses the pylons. It determines their location. Yes, having done all of that, having obtained the necessary approvals, EirGrid then instructs and requires ESB to construct the infrastructure, though with a significant measure of control and oversight, including step-in rights. But with every respect to the applicants, they have never really elucidated how it is, as it must be if they are to be right in their contentions in this regard, that EirGrid is not the person that, to borrow from the wording of s.182A(1) "*intends to carry out* [the] *development*". There is reference by the applicants, it is true, to the fact that ESB is doing the construction work; and some reliance is placed by them on the fact that it is ESB that has the power to obtain wayleaves under s.53 of the Act of 1927. But does the fact that ESB is doing the construction work change the fact that it is EirGrid which is the party that intends to carry out the development and procures the various steps that are required to achieve that end? The short answer, unfortunately for the applicants, is that it does not.

37. Some reference was made in this context, by counsel for EirGrid, to the decision of the High Court of England and Wales in *Blaenau Gwent Borough Council v. Khan* (1993) 35 Con LR 65. The case is perhaps something of a distraction in that the proposition for which counsel seeks to pray it in aid is not especially adventurous; indeed it might even be suggested to be fairly obvious – a suggestion from which counsel for EirGrid would himself perhaps be unlikely to demur. Thus *Blaenau Gwent* is an example of a case in which a building owner who hired a contractor was held, for the purposes of building regulations, to be the person who carried out building work for the purposes of particular enforcement provisions. It therefore offers support for the proposition, if support is required, that the notion of 'carrying out development' is, properly construed, a notion that is apt to cover the person who authorises and procures the relevant works, that person being EirGrid in the context of the within proceedings. How then can the applicants contend that EirGrid is not the person carrying out the works? Aside from the suggestion that one has to be the person actually doing the physical work of construction, a proposition which both everyday experience and the decision in *Blaenau Gwent* suggest to be (and is considered by the court, with respect to be) misconceived, great emphasis has been placed by the applicants on s.53 of the Act of 1927. Some emphasis was placed too, by counsel for the applicants, on the example offered by the East-West Interconnector, which the court now proceeds to consider.

*(vi) The East-West Interconnector*.

38. Perhaps the best way to introduce the issue of the East-West Interconnector is to flag certain aspects of the respective written submissions of the applicants and EirGrid. The East-West Interconnector is a 500 megawatt link between the electricity transmission grids of Ireland and Britain. It plays an important role in transferring power between Ireland and the the United Kingdom. At para. 119 of the applicants' written submissions, the following appears:

> *"The actual practice carried out by EirGrid in relation to the previous East West Interconnector between…Britain and Ireland can be seen in the application for a special order which was made by EirGrid to the Commission for Energy Regulation ('the CER') in relation to private lands affected by that development….As can be seen from same, EirGrid therein stated that it (i.e. EirGrid and not the ESB) had engaged the contractor (ABB) to carry out the construction in question…and confirmed that it could not use a section 53 wayleave notice under the 1927 Electricity Supply Act since the road in question was a private road. In light of the foregoing, there is no reason to suspect that any different methodology would be used in the current development and that Mr Fitzgerald is incorrect in asserting that ESB would construct the interconnector and simply cannot state same as he has no basis for such assertion and no authority to state same on behalf of the ESB which is independent of EirGrid. It is submitted that the Applicant herein has [not] obtained any such special orders of the type sought in relation to the East-West Interconnector in relation to this scheme and such orders are not within its control."*

39. The court cannot but note in passing that in fact Mr. Fitzgerald, in his evidence before the court and, as it happens, before the Inspector, has stated in the clearest terms that, pursuant to the infrastructure agreement (to which EirGrid is a party and which it has the power to invoke) ESB will be doing the construction of the North-South Interconnector. But leaving that not insignificant detail to one side, it is worth reciting the following detail that appears at para. 84 of EirGrid's written submissions:

> *"The submissions of the Applicants…refer to the purported practice of EirGrid in relation to the East West Interconnector between Britain and Ireland….[T]he issue of the use of wayleave notices in particular circumstances or special orders is entirely irrelevant to the validity of the Board's decision which is the subject-matter of these proceedings. The East-West Interconnector has significant differences to the proposed North South Interconnector. For example, the East-West Interconnector is owned by EirGrid and not ESB and accordingly, is not part of the transmission system. Rather, EirGrid was authorised to construct the East-West Interconnector by the Commission for Energy Regulation [*CER*], pursuant to section 16 of the Electricity Regulation Act, 1999. The CER also consented, pursuant to section 49 of the Electricity Regulation Act 1999, to the exercise by EirGrid of the powers conferred on ESB by subsections (1) to (5) and (9) of section 53 of the Electricity (Supply) Act, 1927. Moreover, Special Orders were sought from the CER under section 45 of the Electricity (Supply) Act, 1927 as the development required the breaking up of a private road for the laying of cables under the road. As this was a private road, there was some doubt whether section 51 of [*the*] Electricity (Supply) Act, 1927 applied. In respect of the North-South Interconnector project, there is no breaking up of private roads to lay underground cables."*

40. Where does the truth lie when it comes to these competing submissions? To answer this, it is worth turning briefly to the Transmission System Operator Licence granted by the Commission for Energy Regulation to EirGrid in March, 2017 and, in the first instance, to the definitions of "*North/South Circuits*" and "*Republic of Ireland Interconnector*" therein, which definitions show that a distinction falls to be drawn between the North-South Circuit, which is part of the transmission system on the island of Ireland single electricity market and the Republic of Ireland Interconnector, which is a connector between this State and another jurisdiction:

> ***"'North/South Circuits'** means the electric lines and electrical plant and meters used for conveying electricity directly to or from a substation or converter station within the Republic of Ireland directly to or from a substation or converter station within Northern Ireland (and not for conveying electricity elsewhere);*
>
> …
>
> "'***Republic of Ireland Interconnector'** means for the purpose of this Licence, equipment used to link the transmission*

*system to electricity systems outside of the island of Ireland, and (for the avoidance of doubt) does not include the North/South Circuits".*

41. Moving on, the term "*transmission system*" is defined in the Transmission System Operator Licence as meaning:

> *"the system of electric lines comprising wholly or mainly the Board's high voltage lines and electric plant and which is used for conveying electricity from a generating station to a substation, from one generating station to another, from one substation to another or to or from any Republic of Ireland Interconnector or to final customers (including such part of the North/South Circuits as is owned by the Board) (but shall not include any such lines which the Board may, with the approval of the Commission, specify as being part of the distribution system), and shall include any Republic of Ireland Interconnector owned by the Board".*

42. So as far as the East-West Interconnector is concerned, the ownership of this 'Republic of Ireland Interconnector', as that term is defined in the Transmission System Operator Licence, rests (as is recognised in the authorisation to construct that interconnector) in EirGrid. In the North-South Interconnector context, by contrast, what one is dealing with is a transmission system which will not be owned by EirGrid but rather by the ESB. And that is why, in essence, the two situations (North-South versus East-West) are not analogous and why, when it comes to the manner in which the two projects have been described, there has not been any sleight of words, let alone dishonesty, on the part of EirGrid or, so far as the court can see, any of the respondents in this regard. The two projects are, to use a metaphor, 'chalk and cheese'.

*(vii) Section 53 of the Act of 1927.*

a. Overview.

43. The substance and thrust of s.53 of the Act of 1927 has already been touched upon in the court's consideration of *Gormley* and need not be repeated here. Suffice it to note that, regrettably for the applicants, their reliance on s.53 is misplaced insofar as they see in that provision a means of advancing their argument that EirGrid does not intend to carry out the development. It is quite clear from the evidence before the court that as a matter of fact EirGrid does intend to carry out the development, it intends to require ESB to construct it in accordance with the infrastructure agreement, and ESB has the statutory power to acquire wayleaves – and the fact that it is ESB that has that power, and not EirGrid, does not in any way affect the question of whether EirGrid intends to carry out the North-South Interconnector development.

b. The decision in *Killross*.

44. The court turns to consider briefly the decision of the Court of Appeal in *Electricity Supply Board v. Killross Properties Limited* [2016] IECA 210. Though *Killross* represents precedent binding on this Court at this time, it is perhaps worth noting in passing that, at the time of writing, the Supreme Court has recently given liberty for an appeal to be brought against the decision of the court below. As a result the decision in that case, though fully binding in all respects on this Court, nonetheless occupies at this time that netherworld in which appealed judgments are generally perceived to dwell pending adjudication on appeal.

45. The respondents in *Killross* brought a wide ranging challenge to wayleave notices issued under s.53 by the ESB. One of these is described as follows in the judgment of Cregan J., under the heading "*Improper Delegation of Power Pursuant to Section 53* – Delegatus Non Potest Delegare ['One to whom power is delegated cannot himself further delegate that power']", at para. 38:

> *"The appellant also makes a number of arguments under this heading. These are as follows:*
>
> *(i) That ESB, in effect, delegated its power and/or discretion to issue wayleave notices to EirGrid and/or ESB Networks Ltd to such an extent that it no longer has any ability to exercise a discretion as to whether to issue a wayleave notice or not;*
>
> (ii) *That Mr Waldron* [the man authorised by the Chief Executive of ESB to issue the wayleave notice] *is, in effect, directed and controlled by ESB Networks Ltd and therefore he is not in a position to exercise his power to issue a wayleave notice for* [and] *on behalf of ESB*;
>
> *(iii) That the delegation by the Board to the Chief executive and by the Chief Executive to Mr Waldron of the Board's power to issue wayleave was* ultra vires *s.9 of the 1927 Act, was an unlawful delegation of power and was a breach of the principle delegatus non potest delegare."*

46. One slight point of confusion that can arise on reading the judgment, and that is worth noting before proceeding further with a consideration of the decision of the Court of Appeal, is that there is a division within ESB called ESB Networks and a legal entity, separate from ESB, known as ESB Networks Limited. In any event. Cregan J. observes as follows, at paras. 39-43, 46-50, 59 and 61-64:

**"The regulatory structure of the electricity transmission system.**

> *39. It appears that under the current regulatory structure in Ireland the following is the division of responsibility for the transmission of electricity:*
>
> ☐ *ESB – Transmission Asset Owner (TAO)*
>
> ☐ *Eirgrid Plc – Transmission System Operator (TSO)*
>
> ☐ *ESB Networks Ltd – Transmission Asset Manager*
>
> *40. The division in responsibility in relation to the distribution of electricity is as follows:-*
>
> ☐ *ESB – Distribution Asset Owner (DAO)*
>
> ☐ *ESB Networks Ltd – Distribution Systems Operator (DSO)*

☐ *ESB Networks Ltd – Distribution System Manager.*

*41. Mr. Padraig Ó hIceadha in these proceedings swore an affidavit on behalf of ESB and Eirgrid to set out:*

*(1) who ESB is, who ESB Networks is, who ESB Network Ltd is, and who Eirgrid Plc is*

*(2) the relationship between these entities;*

*(3) who gave what direction in relation to the notice of 28th June 2013.*

*42. In the course of that affidavit Mr. Ó hIceadha explained that ESB owns the electricity transmission system, that the Commission for Energy Regulation (CER) has granted it the Transmission Asset Owner (TAO) licence and that ESB's functions and duties as TAO include the carrying out of maintenance tasks on the transmission network in accordance with the specifications of the Transmissions System Operator (TSO), namely, Eirgrid. As a condition of its TAO licence ESB was required to designate an internal division of its business to carry out its TAO functions. Accordingly ESB designated a division of its business called ESB Networks for this purpose. (Indeed much of the confusion in relation to this issue is caused because there is an internal division of ESB called 'ESB Networks' and a separate company called 'ESB Networks Ltd'.)*

*43. Mr. Ó hIceadha's affidavit also sets out the fact that ESB Networks Ltd is the electricity distribution system operator (DSO) and that ESB Network Limited fulfils the same role in respect of the electricity distribution system as that which Eirgrid fulfils in respect of the transmission system. Article 15 of EU Directive 2003/54/EC requires that the DSO must be independent in terms of its legal form from other activities of ESB not relating to distribution. ESB remains the owner of the distribution system (the distribution asset owner) (DAO) but ESB Networks Ltd, as a wholly owned subsidiary, was established to discharge the DSO function. ESB Networks Ltd. is independent of ESB and is the holder of the DSO licence in its own right, not as the agent of ESB. Thus, decisions in respect of operating and ensuring the maintenance and development of the distribution systems are in the remit of the ESB Networks Ltd as DSO….*

*…*

***(1) The appellant's first argument – that ESB delegated its power to issue wayleaves to Eirgrid and ESB Networks Ltd and that ESB does not exercise any discretion in relation to service of notices.***

*46. The appellant submits that ESB has essentially delegated its statutory functions to issue wayleave notices under the Act to Eirgrid, that Eirgrid directed the operation of the particular project in this case, that Eirgrid then appointed ESB Networks International to carry out this project, that Mr. Waldron is under the control and direction of ESB Networks Ltd and that therefore Mr. Waldron in signing the wayleave notice is in effect 'cut adrift' from the Board and the Board can exercise no supervisory powers over him. As a result therefore it submits that the wayleave notice was invalid.*

*47. In order to assess this submission it is necessary to consider each link in the chain of this argument.*

*48. Firstly, the appellant says that the ESB delegated its power to create wayleave notices to Eirgrid. It makes this argument based on clause 7.6.2 of an Infrastructure Agreement dated 14th March 2006 between the ESB and Eirgrid. Clause 7.6.2 provides as follows:*

'The Board, irrevocably for as long as this agreement exists, hereby appoints the TSO [Eirgrid] as its agent to
(a) ……

(b) make and process all applications for the acquisition of wayleaves and rights of entry on behalf of the Board and

(c) exercise all rights of entry on lands vested in the Board pursuant to regulation 29 of the statutory instrument or any other relevant statutory provision.

Insofar as these rights may be required for the development of the transmission system.'

*49. The appellant seeks to argue that under this contractual agreement the ESB has in effect delegated its power to serve all wayleave notices to Eirgrid.*

*50. However Clause 7.6.4 of the agreement provides as follows:*

'Following receipt of relevant landowner details from the TSO under clause 7.6.2 the Board will issue wayleave notices, survey notices, borehole notices and similar instruments in accordance with the terms and arrangements agreed between the TSO and the relevant landowner and make all necessary payment arising under those terms.'

*…*

*59. I am satisfied, therefore, that the submissions of the appellant in this regard are, in effect, mischaracterising or misinterpreting the legal reality of what was going on between ESB, Eirgrid, ESB Networks Business Unit and ESB Networks Limited. Given the degree of overlap between names, functions and agreements it is hardly any surprise that there should be such a miasma of confusion over the roles, functions and legal responsibilities of the various parties involved. However I am satisfied that there is a clear legal distinction between ESB and ESB Networks Limited and that there is a clear distinction between the ESB Networks Business Unit (as a division within ESB) and ESB Networks Limited.*

*It is also clear that ESB and ESB Networks Limited carry out different functions under the regulatory structure now in place in Ireland. It is clear that ESB and ESB Networks Limited have entered into various agreements required by the regulatory structure and it is also clear that ESB and ESB Networks Limited have entered into an Asset Management Agreement whereby ESB Networks Limited manage the ESB Networks Business Unit of ESB for and on behalf of ESB. However, this does not change the fundamental legal fact that nowhere in any of the arrangements or agreements between ESB and ESB Networks Limited can it be said that ESB has delegated the power of issuing wayleave notices to ESB Networks Limited. Indeed, it is clear that the Board of ESB has specifically retained the power to issue wayleave notices not only in its infrastructure agreement with Eirgrid but also in its agreement with ESB Networks Limited.*

*…*

*61. The appellant also submits in the alternative, that even if neither EirGrid nor ESB Networks Ltd have the power to acquire wayleaves under s. 53, that 'this dilemma has been addressed and practiced by a very troubling three card trick: where EirGrid decide, as in the present case, to develop or 'operate' an electricity line and to acquire a wayleave for that purpose, it directs ESB Networks Ltd to effect the acquisition by serving a notice describing itself as ESB Networks so that it can argue that wearing its wayleave acquisition hat it is actually part of the ESB. This is despite the fact that all works are actually carried out by ESB Networks Ltd at the direction of EirGrid'.*

*62. However, in my view, the description of this issue as a 'three card trick' is not correct. First, it is not correct to say that where EirGrid decide to 'acquire a wayleave" it directs ESB Networks to effect the acquisition…' because EirGrid has no legal power to 'acquire' a wayleave for that purpose; secondly, EirGrid cannot direct ESB Networks Ltd to effect the acquisition by serving a notice describing itself as ESB Networks as it does not have the legal authority to issue a wayleave notice in the first place and therefore it could not direct any other party to serve a wayleave notice; thirdly the notice describing itself as ESB Networks is in fact a reflection that ESB Networks is an internal business unit of ESB which has retained the power to issue wayleave notices.*

*63. One of the errors which pervades the appellant's submissions in this regard appears to be its unwillingness to accept the distinction between the role of ESB Networks Ltd as the separate contractual entity carrying out certain functions under the new regulatory structure and the entirely separate and distinct role of ESB Networks Ltd in managing the ESB Networks Business Unit of the ESB. The appellant has conflated both of these roles and sought to argue that ESB has delegated its power to issue wayleave notices to ESB Networks Ltd when there is simply no evidence that this is so and indeed all the contractual documents appear to point in the opposite direction.*

*64. In summary, therefore, the argument that ESB has delegated its statutory power to issue wayleave notices to EirGrid and/or ESB Networks Ltd is wrong as a matter of law and is misconceived. The appellant's argument that EirGrid has a right to issue wayleave notices and, in effect, is directing ESB Networks Ltd to issue wayleave notices is also incorrect as a matter of law."*

47. That then is the up-to-date legal position on the points addressed in the above-quoted extracts from the judgment of Cregan J. in the Court of Appeal, and is noted by the court.

(*viii) Some Further Conclusions.*

48. The court began this section of its judgment by posing the question whether EirGrid is entitled to make an application for approval for the North-South Interconnector under s.182A of the Act of 2000. In this regard, the following conclusions, it seems to the court, may reasonably be stated by reference to the foregoing analysis:

(1) the applicable legislation entitles EirGrid to apply if it intends to carry on a development (which it does). Legislation does not require that EirGrid intend to do the construction work. Given that EirGrid is the person designing and for whom the work is being done, it clearly intends in every sense to carry out the development.

(2) the applicable legislation must be construed in the light of the statutory function of the transmission system operator (EirGrid). It is the person in charge of the development. It would make no sense that the legislation would deprive the body with the statutory function of development of the legal power to develop.

(3) the position in relation to the East-West Interconnector is completely different from that arising in respect of the North-South Interconnector. The East-West Interconnector was not concerned with a development that formed part of the transmission network and s.53 and the other powers of the ESB do not affect any of that. ESB is entitled to exercise those powers and its entitlement to do so does not affect, one way or another, the inquiry as to who intends to carry out the development.

## VI. Designation, Bias, and Validity of Decision

*(i) Overview.*

49. Three more issues arise now to be addressed and their inter-relationship is such that they are perhaps best addressed under a single heading, viz. (1) is it correct to say that legislation is required to vest in An Bord Pleanála the function of competent authority under the PCI Regulation? (2) does the vesting of such a dual function in An Bord Pleanála present an appearance of bias such as gives rise to an entitlement to legal relief on the part of the applicants? and (3) if there is a legal infirmity attendant upon the designation of An Bord Pleanála, does that affect the validity of the decision granting approval under s.182B of the Act of 2000?

50. When it comes to the just-mentioned issues, the court is dealing with what might be described as the State dimension of the within application. Insofar as that dimension of the proceedings is concerned, the claims made by the applicants are directed to no little extent at the designation of An Bord Pleanála as competent authority. So, for example, the applicants allege that:

(1) that designation should have been done by way of legislation, whether primary or secondary. In support of this contention, the applicants make the point that An Bord Pleanála is a creature of statute and thus can only act 'within the four corners' of statute. In support of this contention, reference was made by the applicants to: (a) the Planning and Development (Amendment) Act 2006, and the conferral of powers thereby in relation to railway orders and road schemes (with a contrast being drawn between the situation in the case at hand where there is no domestic legislation conferring

additional powers on the Board in relation to its role as a competent authority); and (b) the decisions in *Dellway Investments Ltd v. NAMA* [2011] 4 I.R. 1 and *Murphy v. Cobh Town Council* [2006] IEHC 324. But underplayed in the applicants' contentions, or so it seemed to the court, is the fact that the impugned designation of An Bord Pleanála has been done pursuant to European Union regulation, a fact that, as will be seen hereafter, carries with it certain legal consequences so far as the contentions made by the plaintiffs are concerned.

(2) there is a conflict of interest between the one entity, An Bord Pleanála, acting as competent authority and development consent authority. But what was, with respect, notably missing from the applicants' submissions, was any explanation as to how that alleged conflict arises: they have not pointed to anything that is required to be done by the competent authority which impinges on the role of An Bord Pleanála as a consent authority. Moreover, the role of An Bord Pleanála becomes clearer when one has regard not just to the monochrome of what it is doing in the within proceedings but the full colour of what it might be called upon to do in other proceedings. In essence, the role of An Bord Pleanála as competent authority is what might be styled a 'case management' role. There is not a lot of case management to be done when, as here, there is only one development consent required. However, matters would be different and the case management role of An Bord Pleanála more apparent in a case where there was a number of consent authorities involved, as, for example, would be the case in a gas project where a battery of bodies have a role to play. In that latter context, An Bord Pleanála would play the role of 'clock-watcher' and would seek to ensure that applicable timelines were observed by all. When it comes to its interpretation of legislation, the court must ever be careful not to be blinkered by the monochromatic version of events represented in a single set of proceedings, but instead to keep its eyes open to the full colour of what particular legislation seeks generally to achieve, so that the court's interpretation of that legislation holds good both in the general and in the particular. Just as a person may do wrong but be good, so legislation may appear wrong yet hold good.

(3) the vesting of a dual function in An Bord Pleanála presents an appearance of bias such as gives rise to an entitlement to legal relief on the part of the applicants, an allegation which, it seems to the court, is roundly met by the decision of the High Court in *Callaghan v. An Bord Pleanála* [2015] IEHC 357, considered later below.

*(ii) The Question of Designation.*

a. The PCI Regulation.

51. As mentioned previously, the decision challenged in these proceedings is a decision made by An Bord Pleanála, on 19th December last, to grant approval under s.182B of the Act of 2000 for the proposed construction and development of the North-South Interconnector. The relevant application for approval was made by EirGrid on or about 9th June, 2015. The proposed development was classified as a strategic infrastructure development (or 'SID'). (Under s.2 of the Act of 2000, the definition of SID includes "*any proposed development referred to in s.182A(1)").* In granting approval for the project under s.182B of the Act of 2000, An Bord Pleanála was carrying out its role as the decision-making body in applications for strategic infrastructure consents under Irish planning law. However, An Bord Pleanála also carried out a related role, namely that of national "*competent authority*" under the PCI Regulation, a European Union law measure, and it is to certain aspects of European Union law that the court now turns.

b. The European Union Law Dimension.

52. Article 288(2) of the Treaty on the Functioning of the European Union ('TFEU') provides that "[A] *regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States*". In O'Neill, A., *EU Law for UK Lawyers* (2011), a work which is useful also to non-UK lawyers, the learned author observes, at 36, that "*The 'direct applicability' of EU regulations means that no national legislation is required to implement the regulations in order to give them legal effect in the domestic legal systems of Member States. Regulations bind the Member States and have the force of law within the national territories without the intervention of national parliaments*". In a similar vein, Craig, P. and G. de Búrca observe, in *EU Law and Materials* (5th ed., 2011), at 190, that "[R]*egulations will immediately become part of the domestic law of Member States, without needing transposition*".

53. It is well established by the Court of Justice of the European Union ('CJEU') that, when it comes to European Union regulations, member states are not required to adopt implementing domestic legislation, not least because such domestic measures might contain changes which affect the uniform application of the relevant regulation. In Case C-39/72 *Commission v. Italy* (1973), the European Court of Justice observes as follows, para. 17:

> *"Regulations are, as such, directly applicable in all Member States and come into force solely by virtue of their publication in the Official Journal of the Communities, as from the date specified in them, or in the absence thereof, as from the date provided in the Treaty.*
>
> *Consequently all methods of implementation are contrary to the Treaty which would have the result of creating an obstacle to the direct effect of Community Regulations and of jeopardizing their simultaneous and uniform application in the whole of the Community."*

54. It is clear, therefore, that the CJEU wishes to guard against the fragmentary impact of unnecessary implementing measures. The various member states are also, of course, bound by the duty of sincere cooperation that presents under Art. 4(3) of the Treaty on European Union whereby:

> *"Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.*
>
> *The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.*
>
> *The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."*

55. In Case C-34/73, *Variola v. Amministrazione Italiana delle Finanze* (1973), a preliminary ruling was sought of the European court of Justice as to whether a regulation could be implemented by domestic measures which effectively reproduce the provisions of the regulation. In its judgment, the European Court of Justice explained as follows, at paras. 10-11:

> *"10. The direct application of a Regulation means that its entry into force and its application in favour of or against those subject to it are independent of any measure of reception into national law.*
>
> *By virtue of the obligations arising from the Treaty and assumed on ratification, Member States are under a duty not to obstruct the direct applicability inherent in Regulations and other rules of Community law.*
>
> *Strict compliance with this obligation is an indispensable condition of simultaneous and uniform application of Community Regulations throughout the Community.*
>
> *11. More particularly, Member States are under an obligation to introduce any measure which might affect the jurisdiction of the Court to pronounce on any question involving the interpretation of Community law or the validity of an act of the institutions of the Community, which means that no procedure is permissible whereby the Community nature of a legal rule is concealed from those subject to it."*

56. The decision in *Variola*, cited with approval in numerous subsequent judgments of the CJEU, is clear authority that the provisions of a European Union regulation should not be replicated in a national measure, particularly if the effect would be to obscure from citizens the fact that it is the regulation which is the direct source of obligations. One such later judgment is the judgment of the CJEU in Joined Cases C-539/10P and C-550/10P *Stichtung Al-Aqsa v. Council of the European Union* (2012), in which the CJEU considered whether a freezing of funds imposed by national provisions against a person who is also subject to a freezing of funds imposed by a European Union regulation may affect the scope of a regulation. Per the CJEU, at para. 87:

> *"Member States are under a duty not to obstruct the direct applicability inherent in regulations, given that the scrupulous observation of this duty is an indispensable requisite for the simultaneous and uniform application of European Union regulations throughout the Union (see, to that effect, Case 34/73* Variola *[1973] ECR 981, paragraph 10; Case 94/77* Zerbone [1978] *ECR 99, paragraphs 24 and 25; and Case 272/83* Commission v Italy [*1985] ECR 1057, paragraph 26). In particular, Member States must not adopt a measure by which the Community nature of a legal rule and the consequences which arise from it are concealed from the persons concerned (see* Variola, *paragraph 11*; Zerbone, *paragraph 26; Case C 113/02* Commission v Netherlands [*2004] ECR I 9707, paragraph 16; and Case C 316/10* Danske Svineproducenter *[2011] ECR I 13721, paragraph 41)."*

57. Closer to home, in *Maher v. Minister for Agriculture and Food* [2001] 2 I.R. 139 what was in issue was a rule that had been introduced in relation to milk quotas by a statutory instrument that was implementing Community regulations, which statutory instrument was contended unsuccessfully by the applicants (both at first instance and on appeal) to violate the Constitution in that it did not come within the "*necessitated*" text of Art. 29, yielding the resut that the respondent minister had effectively been legislating contrary to Art. 15 of the Constitution. Keane C.J., at 181, observed that there were two routes by which to approach adjudication on these contentions:

> *"One can initially decide whether the making of the regulation in the form of a statutory instrument rather than an Act of the Oireachtas was 'necessitated' by the obligations of membership. If it was, then it is clearly unnecessary to consider whether it is in conflict with Article 15.2 or, for that matter the Articles guaranteeing the private property rights of the applicants. Alternatively, one can determine first whether it violates either Article 15.1 or the private property rights or both of them. If the latter course were adopted, and the conclusion were reached that no breach of the Constitution had been established, it would be unnecessary to consider whether enactment in the form of a regulation rather than by an Act was necessitated by the obligations of membership."*

58. The Supreme Court as a whole preferred the second approach. Fennelly J. was of the view, at 254-5, that "[T]*he essential question is whether the first respondent was in breach of Article 15.2.1 of the Constitution. If he was, the Regulations of 2000 will be invalid, since unlike those involved in* Meagher [*v. Minister for Agriculture* [1994] 1 I.R. 329]*…they are not 'necessitated'.*" (The Chief Justice had already made a finding on this last point in his preceding judgment). Fennelly J., at 260, identified the test applicable to be "*whether the scope of the discretion conferred by Community law in regulations which become part of national law was so independent of principles and policies laid down by those Community regulations, as to place the State in conflict with Article 15.2.1 of the Constitution."* This, of course, is akin to the test identified by O'Higgins C.J. in *Cityview Press v. An Chomhairle Oiliúna* [1980] 1 I.R. 381, 399, save that *Maher* involves the substitution of the European law measure for the parent statute referred to in Cityview, and a possible stretching of the *Cityview* language so as to require not only independence but a large degree of independence ("*so independent*") before implementing legislation would be held to be in breach of Art. 15.2.1°. The implications of *Maher* in the context of the within application are touched upon further hereafter.

*(iii) Some Particular Aspects of the Case at Hand.*

59. Perhaps nine points might usefully be made at this juncture.

60. (1) In *Maher* the Supreme Court was concerned with the principles and policies test under Article 15 of the Constitution. What the court ultimately decided was that the principles and policies presenting could legitimately be found in the relevant European legislation and hence there was no breach of Article 15. In effect, the Supreme Court treated the European legislation as they would a piece of primary legislation for the purpose of the *Cityview* test, though subject to the differences that have been touched upon previously above. So far as independence from the principles and policies of the PCI Regulation is contended, if it is contended, to present in what the State has done as regards designation of An Bord Pleanála as a national "*competent authority*" under Regulation (EU) No. 347/2013, the court sees none.

61. (2) Here the second-named respondent contends, and the court accepts, that if one were to regard the PCI Regulation as if it were equivalent to a domestic piece of legislation and then to ask 'what would happen if a piece of primary legislation allowed the designation of a competent authority?' it becomes clear that, absent some requirement to the contrary in the primary legislation, no further legislation would be required. To put a practical gloss on the foregoing, it is often the case that legislation will empower a minister or some other body to designate a person as say, a competent authority or an authorised officer (such authorised officers often enjoying quite extensive powers). That power to designate/authorise derives directly from the parent legislation, and clearly a ministerial edict will issue whereby the designation/authorisation is effected. That is all that presents here, save that the legislation in question is a European Union regulation, i.e. the PCI Regulation.

62. (3) The court notes the following observations of Denham J. in her judgment in *Maher*, at 206-7, under the heading "*European Regulations*":

> *"Community regulations are binding on member states and are directly applicable within member states. They are of*

*general application. They are norms created by the Community. They are used extensively in relation to agriculture. As they are directly applicable they are part of national domestic law automatically: see Variola* SPA v. Amministrazione Italiana delle Finanze (Case 34/73) *[1973] E.C.R. 981 at p. 990….Regulations, being part of domestic law of the State, may be treated as instruments setting out policies and principles for subordinate legislation. If the principles and policies are set out in the Community Regulations then there may be no role for the national parliament to determine principles and policies. If the principles and policies are established in law in the State, albeit in Community regulations rather than domestic legislation, then it is open to the first respondent to make the required and technically detailed statutory instruments."*

63. In the above-quoted text one sees Denham J., in dealing with an Article 15 argument, viewing a European Union regulation as akin to a piece of national legislation. That analogy also holds good in the within case – and in circumstances where the PCI Regulation did not in fact require detailed implementing measures because it is itself prescriptive, nothing further, it seems to the court, was required other than the designation by way of administrative act.

64. (4) The court notes too the following observations of Fennelly J. in his judgment in *Maher*, at 249:

*"Community regulations are directly applicable, in that their entry into force and their application are "independent of any measure adopting [them] into national law."* ( Zerbone v. Amministrazione delle Finanze dello Stato *(Case 94/77) [1978] E.C.R. 99, para. 23.) As Denham J. explains in different words, they do not require any national act of implementation for their binding effect. Indeed, where they are, in their own terms, capable of being directly applied, it has been said that:- "Member States must not adopt or allow national institutions with a legislative power to adopt a measure by which the Community nature of a legal rule and the consequences which arise from it are concealed."*

*…Where, however, as frequently happens, especially in the case of a common organisation of the market, regulations, in addition to being directly applicable, allow member states discretion in their implementation, some national act of implementation or transposition will be required."*

65. Simply put, what flows from the foregoing is that it is a question of fact and degree in respect of any individual European Union regulation, as to whether or not implementing measures are required. Here, in circumstances where the PCI Regulation did not in fact require detailed implementing measures because it is itself prescriptive, nothing further, it seems to the court, was required other than the designation by way of administrative act.

66. (5) Turning to the text of the PCI Regulation, one can see the very limited effect of the impugned designation process. So, for example, Article 7(1), (2) and (8) of the PCI Regulation provide as follows, under the heading "'*Priority status' of projects of common interest":*

*"1. The adoption of the Union list shall establish, for the purposes of any decisions issued in the permit granting process, the necessity of these projects from an energy policy perspective, without prejudice to the exact location, routing or technology of the project.[1]*

[[1] Under Article 3 of the PCI Regulation, *inter alia*, the European Commission is empowered to adopt delegated acts in accordance with Art.16 of the Regulation that establish a Union list of projects of common interest, the characteristics of which projects include that the project is of a particular significance in the energy realm and involves at least two member states by directly crossing the border of two or more member states.]

*2. For the purpose of ensuring efficient administrative processing of the application files related to projects of common interest, project promoters and all authorities concerned shall ensure that the most rapid treatment legally possible is given to these files.*

…

*8. With regard to the environmental impacts addressed in Article 6(4) of* [the Habitats] *Directive 92/43/EEC and Article 4(7) of Directive 2000/60/EC, projects of common interest shall be considered as being of public interest from an energy policy perspective, and may be considered as being of overriding public interest, provided that all the conditions set out in these Directives are fulfilled.*

*Should the opinion of the Commission be required in accordance with Directive 92/43/EEC, the Commission and the competent authority referred to in Article 9 of this Regulation shall ensure that the decision with regard to the overriding public interest of a project is taken within the time limit pursuant to Article 10(1) of this Regulation."*

67. It is clear from Art. 7(1) that the effect of designation is relatively limited: it simply establishes "*the necessity of…projects from an energy policy perspective, without prejudice to the exact location, routing or technology of the project*" So all of those 'without prejudice' issues are, to use a colloquialism, 'up for grabs', *i.e*. they are not predetermined in any way by, *inter alia*, the fact that that An Bord Pleanála is acting as a competent authority.

68. As to Art. 7(2), perhaps two aspects of that provision might usefully be noted. First, the desired-for rapidity is subject to what is legally possible. So this is not a regulation that 'rides roughshod' over the ordinary processing of these applications: it merely requires that applications are to be given some level of swiftness of despatch. Second, Art.7(2) requires that *"all authorities concerned shall ensure…the most rapid treatment legally possible".* And that is important, because it applies not only to the competent authority as designated, it applies to other consent authorities – and while there are none other in this case, in other cases, such as for example in a gas infrastructure development, there would be a clutch of them.

69. As to Art. 7(8), Article 6(4) of the Habitats Directive only comes into play after a screening assessment (and, if required, an appropriate assessment) has been undertaken pursuant to Article 6(3) of the Habitats Directive. So all has to be done in the ordinary way: the consent authority must carry out its functions in the ordinary way; An Bord Pleanála must carry out its Habitats Directive assessment; and nought in this regard is affected by the provisions of the PCI Regulation. The PCI Regulation in this regard only comes into play if the consent authority decides that a project does adversely affect the integrity of the site. But on the facts of this case, An Bord Pleanála decided that there was no adverse effect on the integrity of the site.

70. (6) Continuing with its consideration of the PCI Regulation, the court turns next to Art. 8 of same, in particular Art. 8(1) and (3), which provide as follows under the heading "*Organisation of the permit granting process*":

*"1. By 16 November 2013, each Member State shall designate one national competent authority which shall be responsible for facilitating and coordinating the permit granting process for projects of common interest.*

*…*

*3. Without prejudice to relevant requirements under international and Union law, the competent authority shall take actions to facilitate the issuing of the comprehensive decision. The comprehensive decision shall be issued within the time limit referred to in Article 10(1) and (2) and according to one of the following schemes:*

*(a) integrated scheme: the comprehensive decision shall be issued by the competent authority and shall be the sole legally binding decision resulting from the statutory permit granting procedure. Where other authorities are concerned by the project, they may, in accordance with national law, give their opinion as input to the procedure, which shall be taken into account by the competent authority;*

*(b) coordinated scheme: the comprehensive decision comprises multiple individual legally binding decisions issued by several authorities concerned, which shall be coordinated by the competent authority. The competent authority may establish a working group where all concerned authorities are represented in order to draw up a permit granting schedule in accordance with Article 10(4)(b), and to monitor and coordinate its implementation. The competent authority shall, in consultation with the other authorities concerned, where applicable in accordance with national law, and without prejudice to time limits set in accordance with Article 10, establish on a case-by-case basis a reasonable time limit within which the individual decisions shall be issued. The competent authority may take an individual decision on behalf of another national authority concerned, if the decision by that authority is not delivered within the time limit and if the delay cannot be adequately justified; or, where provided under national law, and to the extent that this is compatible with Union law, the competent authority may consider that another national authority concerned has either given its approval or refusal for the project if the decision by that authority is not delivered within the time limit. Where provided under national law, the competent authority may disregard an individual decision of another national authority concerned if it considers that the decision is not sufficiently substantiated with regard to the underlying evidence presented by the national authority concerned; when doing so, the competent authority shall ensure that the relevant requirements under international and Union law are respected and shall duly justify its decision;*

*(c) collaborative scheme: the comprehensive decision shall be coordinated by the competent authority. The competent authority shall, in consultation with the other authorities concerned, where applicable in accordance with national law, and without prejudice to time limits set in accordance with Article 10, establish on a case-by-case basis a reasonable time limit within which the individual decisions shall be issued. It shall monitor compliance with the time limits by the authorities concerned.*

*If an individual decision by an authority concerned is not expected to be delivered within the time limit, that authority shall inform the competent authority without delay and include a justification for the delay. Subsequently, the competent authority shall reset the time limit within which that individual decision shall be issued, whilst still complying with the overall time limits set in accordance with Article 10.*

*Acknowledging the national specificities in planning and permit granting processes, Member States may choose among the three schemes referred to in points (a), (b) and (c) of the first subparagraph to facilitate and coordinate their procedures and shall opt to implement the most effective scheme. Where a Member State chooses the collaborative scheme, it shall inform the Commission of its reasons therefor. The Commission shall undertake an evaluation of the effectiveness of the schemes in the report referred to in Article 17."*

71. Perhaps three observations flow from the above-quoted text:

(i) Art. 8(1) is clearly directly applicable: it is the provision that allows and allowed the designation of An Bord Pleanála without any further legislative measure being required. It is akin to an Act of the Oireachtas for this purpose, and it is open for the competent authority to be designated: nothing further is required other than an administrative step.

(ii) of the three schemes identified in Art. 8(3), viz. the integrated scheme, the coordinated scheme and the collaborative scheme, the integrated and coordinated schemes are far more invasive. Under the collaborative scheme there is a much less invasive role for the competent authority; it effectively cajoles the other consent authorities to meet time limits and, if necessary, re-sets those time limits.

(iii) by virtue of the final ("*Acknowledging…Article 17*") sub-paragraph, if a member state elects to go for the collaborative scheme, a rationale for that election must be provided to the European Commission. Notably, in the letter of designation of 4th December 2013 (considered later below) the explanation given as to why Ireland has chosen the collaborative scheme is the, frankly laudable, desire to preserve the independence other consent authorities. In other words, Ireland has deliberately chosen the system which best ensures independence and that each of the individual consent authorities gets to have its say in relation to the matter. And that matters should be so reinforces the point that the competent authority's role is very limited in the Irish context, being essentially a co-ordinating role.

72. (7) Turning next to Arts. 9 and 10 of the PCI Regulation (and it makes sense to consider them in reverse), Art.10 introduces a two-stage permit-granting process which operates subject to particular time limits, providing, *inter alia*, as follows, under the heading "*Duration and implementation of the permit granting process*":

*"1. The permit granting process shall consist of two procedures:*

*(a) The pre-application procedure, covering the period between the start of the permit granting process and the acceptance of the submitted application file by the competent authority, shall take place within an indicative period of two years.*

*This procedure shall include the preparation of any environmental reports to be prepared by the project promoters.*

*For the purpose of establishing the start of the permit granting process, the project promoters shall notify the project to the competent authority of the Member States concerned in written form, and shall include a reasonably detailed outline of the project. No later than three months following the receipt of the notification, the competent authority shall,*

*including on behalf of other authorities concerned, acknowledge or, if it considers the project as not mature enough to enter the permit granting process, reject the notification in written form. In the event of a rejection, the competent authority shall justify its decision, including on behalf of other authorities concerned. The date of signature of the acknowledgement of the notification by the competent authority shall serve as the start of the permit granting process. Where two or more Member States are concerned, the date of the acceptance of the last notification by the competent authority concerned shall serve as the date of the start of the permit granting process.*

*(b) The statutory permit granting procedure, covering the period from the date of acceptance of the submitted application file until the comprehensive decision is taken, shall not exceed one year and six months. Member States may set an earlier date for the time-limit, if considered appropriate."*

73. What is perhaps most significant about Art. 10, at least in the context of the within application, is that Art.10(1)(b) preserves existing statutory permit-granting procedures in the member states, being in this case the classic SID procedure. What is new is the pre-application procedure. What is comprised in that pre-application procedure is set out in Art. 9 which makes due obeisance to the *demos*, containing lengthy provision as regards public consultation/participation and general transparency of process – and there is not, and could be on the facts of this case, any complaint that An Bord Pleanála did not ensure public participation. There is, however, a not unrelated contention that An Bord Pleanála, as competent authority, is required to promote the North-South Interconnector Project and that this in some way has given rise to bias on the part of the An Bord Pleanála. But a close consideration of Art. 9 shows this contention, with respect, to be both unfounded and wrong. Thus Article 9(4) provides as follows:

*"At least one public consultation shall be carried out by the project promoter, or, where required by national law, by the competent authority, before submission of the final and complete application file to the competent authority pursuant to Article 10(1)(a). This shall be without prejudice to any public consultation to be carried out after submission of the request for development consent according to Article 6(2) of Directive 2011/92/EU. The public consultation shall inform stakeholders referred to in Annex VI.3(a) about the project at an early stage and shall help to identify the most suitable location or trajectory and the relevant issues to be addressed in the application file. The minimum requirements applicable to this public consultation are specified in Annex VI.5. The project promoter shall prepare a report summarising the results of activities related to the participation of the public prior to the submission of the application file, including those activities that took place before the start of the permit granting process. The project promoter shall submit that report together with the application file to the competent authority. Due account shall be taken of these results in the comprehensive decision."*

74. Shortly put, Art.9(4) requires public consultation to be carried out by the promoter or competent authority before the submission of the application file. Thereafter, the project promoter must prepare a report summarising the results of activities related to the participation of the public prior to the submission of the application file, including those activities that took place before the start of the permit-granting process. This report must then be submitted together with the application file to the competent authority, with due account to be taken of the said results in the comprehensive decision. If one turns then to Annex VI, as referenced in the above-quoted text, one finds at para. 3(a), under the general heading "*Guidelines for Transparency and Public Participation*" the following provision:

*"(3) To increase public participation in the permit granting process and ensure in advance information and dialogue with the public, the following principles shall be applied:*

*(a) The stakeholders affected by a project of common interest, including relevant national, regional and local authorities, landowners and citizens living in the vicinity of the project, the general public and their associations, organisations or groups, shall be extensively informed and consulted at an early stage, when potential concerns by the public can still be taken into account and in an open and transparent manner. Where relevant, the competent authority shall actively support the activities undertaken by the project promoter."*

75. Any suggestion, and there is suggestion, in the applicants' submissions that the word "*activities*" in the last line of the above-quoted text must be read as requiring a competent authority actively to support a project is, with respect, incorrect: the activities being referred to there are the activities referenced in Article 9(4) and they are the public participation activities. So through Art. 9(4) and Annex VI, para. 3(a) a competent authority is being required 'merely' to make sure that public participation is effective, e.g., by making documents available on its website. In no sense is a competent authority being required to promote or support a project.

76. (8) Turning next to the letter of designation of 4th December, 2013, that issued to An Bord Pleanála from the Assistant Secretary General of what was then the Department of Communications, Energy and Natural Resources and is now the Department of Communications, Climate Action and the Environment, the substantive portion of which reads as follows under the heading "*Designation of Competent Authority under EU Regulation 347/2013 on Guidelines for trans-European Energy Infrastructure*":

*"I am writing to you in the context of the above-mentioned Regulation, concerning guidelines for the assessment, approval and permitting of cross-border energy infrastructure projects. As you may be aware, one of its requirements is the designation by Member States of a Competent Authority to oversee the permit granting process for these projects, known as projects of common interest (PCIs). Specifically, Article 8.1 of the Regulation provides that each Member State should designate a Competent Authority to facilitate and co-ordinate the permit granting process for PCIs. The purpose of this letter is to inform you that, following discussions with the Department of Environment, Community and Local Government, An Bord Pleanála is hereby designated as Competent Authority for the purposes of the Regulation. I am aware from discussions with officials from that Department that the Board is prepared to undertake the role.*

*You may also be aware of the other provisions in Article 8 of the Regulation which provide for a number of options that a Member State can take in relation to the decision-making process as regards the issuing of consents. Included in these options is the 'collaborative scheme'….Under this option, the Competent Authority would co-ordinate decisions in respect of the relevant consents, which would be left to the existing bodies or bodies with the requisite technical expertise. Both Departments and the Board kept in close contact during the negotiations with the advice and insights from officials of the Department of Environment, Community and Local Government and from the Board being very helpful in that process. During those discussions the strong view emerged that such an approach is the most workable for Ireland in terms of maintaining the effectiveness of the existing domestic legislation; both Departments agreed that the 'collaborative scheme' would prove the most workable for Ireland in that it allowed the State to retain the existing balance it has between the different permitting authorities, while respecting the statutory independence they each have. It is on that basis that this Department is designating An Bord Pleanála as Competent Authority.*

*With the enactment of the Planning and Development (Strategic Infrastructure) Act 2006 (SIA Act), it is clear that many of the requirements for streamlined planning and permitting processes under the Regulation are already in place. However, it would be useful to hold a meeting of officials from this Department, from the Department of Environment, Community and Local Government and from An Bord Pleanála to discuss any additional legislative or administrative arrangements that need to be put in place….*

*The PCI projects relevant to Ireland that are now agreed at European level have the potential to make a very significant contribution to Ireland's energy infrastructure, security of supply and competitiveness; I very much welcome An Bord Pleanála's designation as Competent Authority, given your experience, trustworthiness and effectiveness when interfacing with all stakeholders. I can assure you of the full support and co-operation of this Department and the Commission for Energy Regulation to ensure the successful operation of the PCI process in Ireland.*

*Yours sincerely…*

cc. [Name]…*Department of Environment, Community and Local Government*

[Name], *European Commission*

[Name], *Commission for Energy Regulation*".

77. There are a number of points to note about this letter:

(i) in designating An Bord Pleanála the letter complies fully with Art. 8(1) of the PCI Regulation.

(ii) the letter is copied to the European Commission, thereby discharging the obligation under Art. 8 of the PCI Regulation for a member state to give reasons if it opts for the collaborative scheme.

(iii) the reasons aforesaid, as mentioned previously, are precisely related to ensuring the independence of the decision-making authorities.

(iv) it will be recalled that under Art. 8(1) designation of a national competent authority was required to be done by 16th November, 2013, whereas the above-quoted letter of designation issued on 4th December, 2013. However, two points might be made in this regard. The first is that too often in litigation one or more parties comes to court pointing to some contended-for deficiency in process and suggests that as a consequence of that deficiency the 'house of cards' constructed on same must of necessity collapse. But houses can stand on imperfect foundations: law is an instrument of government, and government is ever an exercise in the practicable, not in perfection; a failure to do something strictly as required by law may not have any practical consequence. The second point is that a legal requirement to do something need not evaporate because the required is not in fact done by a prescribed date. Of course, legislation can provide to the contrary, but here it does not: the duty to designate contained in Art.8(1) subsisted beyond 16th November, 2013, and was satisfied by Ireland on 4th December, 2013.

(v) the applicants contend that the designation of An Bord Pleanála as a competent authority and that its role as such ought to have been done by way of primary or secondary legislation. The court admits that it harboured some initial doubt as to whether the principle of legal certainty (the principle that the law must provide those subject to it with the ability to regulate their conduct – a central tenet of any system based on the rule of law) could be satisfied where designation took place by private letter. And, in passing, the court respectfully does not accept the contention by counsel for the second-named respondent that had designation taken place by way of legislation this would necessarily have contravened the principle identified, *inter alia*, in *Variola* whereby the Community nature of a legal rule must not be concealed from those subject to it: *Variola* was concerned with the effective replication of Community provisions in the domestic context; the unvarnished designation of a competent authority consequent upon European Union regulation, so as to do what such regulation expressly requires, is but the plain and simple discharge of a European law obligation, nothing more. Indeed, it is notable in this regard that Malta, the only other member state to designate its planning authority as the competent authority in that jurisdiction for the purposes of the PCI Regulation, did so by way of secondary legislation, *viz*. the Environment and Development Planning Act (Amendment No. 2) Order 2014 (L.N. No. 362 of 2014) and nobody before the court has suggested that Malta is somehow in breach of European Union law in this regard – not that the court is competent, or would presume, to make any adjudication, or comment, upon such a suggested breach in any event. But, on reflection, it seems to the court that there must be and is a point at which the necessity for legislation may properly end and continuation by administrative mechanism may properly commence. That point, it seems to the court, was reached in the within context with the adoption of the PCI Regulation. What An Bord Pleanála has to do as competent authority is laid out in black-and-white in that regulation, especially Art.9 of same, there is no need to supplement that with domestic legislation (and to replicate in domestic law the provisions of, e.g., Art.9, would, as stated, have placed Ireland in breach of *Variola*).

As to the act of designation simpliciter, the court accepts the analogy advanced by counsel for the second-named respondent, and touched upon previously above, that here one is down to something akin to the designation of those 'authorised officers' whose appointment is so often contemplated by domestic legislation and who often have extensive powers, yet whose designation can quite properly take place other than by way of primary or secondary legislation. Nor does the court see any constitutional basis for the contention made as to the need for primary or secondary legislation: such a contention is not supported by Art. 15, this is not a case where legislation is required, the PCI Regulation is directly applicable, it gives the Minister (acting for the Government and consistent with Article 28 of the Constitution) the power to designate, such designation has been effected and that is an end of matters. And, returning to *Maher*, so far as any independence from the principles and policies of the PCI Regulation is contended, if it is contended, to present in what the State has done as regards designation of An Bord Pleanála as a national competent authority under the PCI Regulation, the court sees none.

78. (9) There is some suggestion made by the applicants that the Minister for Communications, Climate Change and Environment is not the correct Minister to make the designation. In this they are, with respect, wrong. Tracing the authority of the present minister and department back to the Ministers and Secretaries Act 1924 involves a somewhat byzantine trek through a myriad of primary and secondary legislation but, having regard to the legislative stepping-stones that take one through that journey (as identified below), there can be no doubt but that the correct minister has designated An Bord Pleanála as the national competent authority for the purposes of the PCI Regulation:

**Ministers and Secretaries Act 1924**

Establishes the Department of Industry and Commerce with responsibility for the administration and business generally of public services in connection with trade, commerce, industry, and labour, industrial and commercial organisations and combinations, industrial and commercial statistics, transport, shipping, natural resources, and all powers, duties and functions connected with the same, including the promotion of trade and commerce by means of educational grants, including in particular the business, powers, duties and functions of the branches and officers of the public services specified in the Sixth Part of the Schedule to the Act of 1924, and of which Department the head is stated to be the Minister for Industry and Commerce. (The Sixth Schedule includes the Electricity Commissioners).

***Ministers and Secretaries (Amendment) Act 1959***

Establishes the Department of Transport and Power.

***Transport, Fuel and Power (Transfer of Departmental Administration and Ministerial Functions) Order, 1959***

***(S.I. No. 125/1959)***

Transfers from the Department of Industry and Commerce to the Department of Transport and Power the administration and business in connection with the exercise, performance or execution of the functions under various Acts, including Acts in relation to electricity, gas, turf and oil. The functions of the Minister for Industry and Commerce under these Acts are transferred to the Minister for Transport and Power.

***Energy (Transfer of Departmental Administration and Ministerial Functions) Order, 1977***

***(S.I. No. 295 of 1977)***

Transfers from the Minister for Transport and Power to the Department of Industry and Commerce the administration and business in connection with the exercise, performance or execution of functions under various Acts, including Acts in relation to electricity, gas and turf. The functions of the Minister for Transport and Power under the said Acts are also transferred to the Minister for Industry and Commerce.

***Industry and Commerce (Alteration of Name of Department and Title of Minister) Order, 1977***

***(S.I. No. 306 of 1977)***

Alters: the name of the Department of Industry, Commerce and Tourism to that of the Department of Industry, Commerce and Energy; the title of the Minister for Industry and Commerce to Minister for Industry, Commerce and Energy.

***Energy (Transfer of Departmental Administration and Ministerial Functions) Order, 1980***

***(S.I. No. 9 of 1980)***

Transfers from the Department of Industry, Commerce and Energy to the Department of Energy, the administration and business in connection with the exercise, performance or execution of functions under various Acts, including Acts in relation to electricity, gas and turf. The functions vested in the Minister for Industry, Commerce and Energy are transferred to the Minister for Energy.

***Energy (Transfer of Departmental Administration and Ministerial Functions) (No. 2) Order, 1993***

***(S.I. No. 12 of 1993)***

Transfers from the Department of Energy to the Department of Tourism, Transport and Comunications the administration and business in connection with the exercise, performance or execution of functions under various Acts, including Acts in relation to electricity, gas and turf. The functions vested in the Minister for Energy are transferred to the Minister for Tourism, Transport and Communications.

***Tourism, Transport and Communications (Alteration of Name of Department and Title of Minister) Order, 1993***

***(S.I. No. 17 of 1993)***

Alters: the name of the Department of Tourism, Transport and Communications to that of the Department of Transport, Energy and Communications; the title of the Minister of Tourism, Transport and Communications to that of the Minister for Transport, Energy and Communications.

***Communications, Energy and Geological Survey of Ireland (Transfer of Departmental Administration and Ministerial Functions) Order 2002***

***(S.I. No. 300 of 2002)***

Transfers from the Department of Public Enterprise to the Department of Marine and Natural Resources the administration and business in connection with the exercise, performance or execution of functions under various Acts, including Acts in relation to electricity, gas and turf. The functions vested in the Minister for Public Enterprise are transferred to the Minister for the Marine and Natural Resources.

***Marine and Natural Resources (Alteration of Name of Department and Title of Minister) Order 2002***

***(S.I. No. 307 of 2002)***

Alters: the name of the Department of Marine and Natural Resources to that of the Department of Communications, Marine and Natural Resources; the title of the Minister of Marine and Natural Resources to that of the Minister for Communications, Marine and Natural Resources.

***Communications, Marine and Natural Resources (Alteration of Name of Department and Title of Minister) Order 2007***

***(S.I. No. 706 of 2007)***

Alters: the name of the Department of Communications, Marine and Natural Resources to that of the Department of Communications, Energy and Natural Resources; the title of the Minister for Communications, Marine and Natural Resources to that of the Minister of Communications, Energy and Natural Resources.

***Communications, Energy and Natural Resources (Alteration of Name of Department and Title of Minister) Order 2016***

***(S.I. No. 421 of 2016)***

Alters: the name of the Department of Communications, Energy and Natural Resources to that of the Department of Communications, Climate Action and Environment; the title of the Minister for Communications, Energy and Natural Resources to that of the Minister for Communications, Climate Action and Environment.

79. The applicants complain that the designation of An Bord Pleanála was effected by a letter from a senior civil servant (the letter of 4th December, 2013) , without any evidence as to the status or nature of the decision and, per the applicants' written submissions, "[p]*resumably (though this is not clear), on the application of the Carltona principle*" (so-called after the decision of the Court of Appeal of England and Wales in *Carltona Ltd. v. Commissioners of Works* [1943] 2 All E.R. 560, which, though devised by reference to the exigencies of wartime conditions, is now perceived as having recognised as a practical reality of modern government that it would be unworkable that a minister, as political head of a government department could personally take every decision given by law to that minister).

80. The suggestion that there is any deficiency from a *Carltona* perspective with the manner in which An Bord Pleanála was designated as a competent authority in the circumstances at issue in the within application is not well-founded and is perhaps best addressed by reference to the relatively recent decision of the Supreme Court in *W.T. v. Minister for Justice and Equality* [2015] IESC 73. That case was concerned with an issue which had for some time troubled judges tasked with working on the Immigration List, specifically whether a deportation order under s.3 of the Immigration Act of 1999 had to be signed individually by the Minister. The Supreme Court found that this was not a requirement of the Act of 1999. In his judgment, MacMenamin J., at para. 1, identifies, in the following terms, the substance of the *Carltona* principle:

> *"It is now well recognised in the law that each minister must both bear political responsibility to the Dáil, and legal responsibility in the courts, for actions taken by their own departments. In law, ministers are regarded as being one and the same as the government departments of which they are the political heads. Conversely, departmental officials act in the name of the minister. In making administrative decisions, therefore, discretion is conferred on a minister, not simply as an individual, but rather as the person who holds office as head of a government department, which collectively holds a high degree of collective corporate knowledge and experience, all of which is imputed to the political head of the department. Frequently a minister's officials will prepare documents for consideration, consider objections, summarise memoranda, and outline a policy approach to be taken by the Minister as an integral part of the decision-making process. Part of this arrangement, identified as the eponymous Carltona principle, is that the functions entrusted to departmental officials are performed at an appropriate level of seniority, and within the scope of responsibility of their government department. No express act of delegation is necessary. When the principle became a recognised part of Irish law, it was characterised as being a 'common law constitutional power' (see* Carltona Ltd v Commissioners of Public Works *[1943] 2 All E.R. 560;* Bushell v Secretary for State for the Environment *[1981] A.C. 75;* R. v Home Secretary, ex p.Oladehinde *[1991] 1 A.C. 254 at 282 approved by Hamilton C.J. in* Tang v Minister for Justice *[1996] 2 I.L.R.M. 46 and in* Devanney v Minister for Justice *[1998] 1 I.R. 230; [1998] 1 I.L.R.M. 81). The constitutional origins of the power derived from the executive power of the State, identified,* inter alia*, in Art.28 of the Constitution",*

and then concludes as follows, at para. 39, as to the issues raised before the court:

> *"I am not persuaded that the appellants have succeeded in demonstrating that the decision-making power in question has been negatived, confined, or restricted by express statutory provision, or by clear necessary implication. The statute of 1999 simply does not allow for such an interpretation. It is true that the Carltona doctrine can sometimes be criticised as imposing an exception of uncertain scope to what is sometimes called the rule against 'sub-delegation'. But what is in question in this appeal is clearly devolved power to an official, rather than delegation per se. Effectively, the principle is that departmental officials are the alter-ego of the Minister and their decisions are, legally and constitutionally, the Minister's acts and decisions. The decisions here cannot be impugned on the basis of the case made. But this is not to ignore the principle of vires. I would dismiss the appeal therefore."*

81. Likewise in the within case, what the applicants have sought to impugn, as somehow inconsistent with the *Carltona* principle, devolved power exercised by a very senior official (an Assistant Secretary General). The court respectfully does not see any deficiency to arise in this regard.

**VII. Bias**

82. So far as the applicants' allegation of bias against An Bord Pleanála is concerned, the court understands that what is contended for is what might be styled a 'pre-determination' argument, *i.e*. that An Bord Pleanála as competent authority has some bias in favour of the North-South Interconnector proceeding. Such a contention is not borne out by what is required under the PCI Regulation. The regulation involves, in effect, a form of case management and a form of public participation, and there is no criticism made of the public participation dimension of the application process that EirGrid underwent. The proposition that a body whose function it is to facilitate the efficient disposition of planning applications or any other sort of applications is, by reason of exercising that function, disabled from dispassionately deciding upon the application is, with respect, unusual. The court has been referred, *inter alia*, in this regard, to the decision of the Supreme Court in *Reid v. IDA* [2015] IESC 82. One of the many interesting aspects of McKechnie J.'s judgment in that case is his recitation in the context of his consideration under the heading "*The Bias Argument*", at para. 78, of the information of which he considered the notional reasonable person or "*observer*" would stand possessed. It is instructive to undertake, in the context of the case now presenting, a like analysis of what information the notional reasonable person would stand possessed. It seems to the court that that information would comprise, at the least, that: (i) contrary to what the applicants have contended, An Bord Pleanála is not the promoter of the project; (ii) EirGrid is the promoter; (iii) An Bord Pleanála's role as competent authority is effectively administrative; (iv) within An Bord Pleanála its competent authoritity-related functions are discharged by a separate unit; and (v) the object of the PCI Regulation is to expedite the consent process (something which is surely in the interests of all stakeholders).

83. In the context of bias, the court has been referred to the decision of *Callaghan v. An Bord Pleanála* [2015] IEHC 357. The statutory focus of that case was the Planning and Development (Strategic Infrastructure) Act 2006, under which applications in respect of strategic infrastructure development may be made directly to An Bord Pleanála. Before An Bord Pleanála can accept such applications, it must, under s.37A(2) of the Act of 2006, be satisfied as to certain matters, *viz*. that the development (i) would be of strategic economic or social importance to the State or the region in which it is situate, (ii) would contribute substantially to the fulfilment of any of the objectives in the National Spatial Strategy or in any regional planning guidelines in force in respect of the area/s in which it would be situate, and (iii) would have a significant effect on the area of more than one planning authority. So what happens in practice is that application is made to An Bord Pleanála, with that part of the process being essentially a bilateral process, *i.e.* it occurs between the developer and An Bord Pleanála, with the public having no opportunity to make submissions at that stage of the process. If An Bord Pleanála forms the opinion that a proposed development satisfies the criteria aforesaid, it will admit it into the Strategic Infrastructure Development (or 'SID' process) and then progress it accordingly. Among the many different arguments made in *Callaghan* was an argument that in addressing its mind to the factors aforesaid for the purposes of admission to the SID process, the Board was prejudging part of the elements of the final application and the reason why that was stated to be the case, *inter alia*, was because s.143 of the Act of 2006 requires that:

> *"The Board shall, in performing its functions, have regard to:-*
>
> *(a) the policies and objectives for the time being of the Government, a State authority, the Minister, planning authorities, and any other body which is a public authority whose functions have, or may have, a bearing on the proper planning and sustainable development of cities, towns or other areas, whether urban or rural,*
>
> *(b) the national interest and any effect the performance of the Board's functions may have on issues of strategic economic or social importance to the State, and*
>
> *(c) the National Spatial Strategy and any regional planning guidelines for the time being in force."*

84. There is an echo in the just-quoted text of the matters (mentioned previously above) that An Bord Pleanála has to consider at the 'admission to SID' stage. So one of the arguments advanced in *Callaghan* was that because An Bord Pleanála had received this information *ex parte*, without any opportunity for the public to be involved, and had adopted a view for the purposes of admission, when it then came to look at, *inter alia*, those factors for the purposes of determining the substantive planning application, it had effectively prejudged part of the considerations of proper planning and sustainable development. That argument was rejected by Costello J., who states as follows, at para.75 of her judgment:

> *"It is argued that it necessarily follows, either as a matter of fact or perception, that the Board predetermines the issue as to whether or not the proposed development is of strategic economic or social importance in the State before the application for planning permission is submitted. In my opinion, this falls very short of the position in Tomlinson.*

[Brief consideration of the just-mentioned case ensues. Then Costello J. continues as follows.]

> *…In my opinion, the cases of* Dublin And County Broadcasting Limited v. Independent Radio and Television Commission *(Unreported, High Court, Murphy J., 12th May, 1989) and* Spin Communications Ltd v. Independent Radio and Television Commission *[2000] IEHC 128 are of more relevance. The test there established is that the question of bias must be determined on the basis of what a right-minded person would think of the real likelihood of prejudice and not on the basis of a suspicion that might dwell in the minds of a person who is ill-informed and who did not seek to direct his mind properly to the facts. Applying this test, it cannot be said that such a reasonable well-informed person would reach the conclusion that the board was biased and had predetermined the planning consent application on the basis of the Section 37(B) opinion….*
>
> *In this case, the Board's decision pursuant to Section 37(B) is not determinative of socio-economic aspects of the application for planning permission and the decision it has to make pursuant to Section 37(G) [that being the decision on the substantive application]. The Board will re-visit some of the material which it considered in the context of Section 37(B) when reaching the different decision required of it pursuant to s.37(G) [i.e. to grant or refuse]. In addition, of course, at this stage, the Applicant and others will have had full opportunity to present such information or arguments to the Board in relation to this aspect and other aspects of the application as they see fit. This applies in all applications under the scheme. These matters must be considered by the Board when exercising its discretion in respect of the application for permission. In those circumstances, I do not accept that it can fairly be argued that every case which goes before the Board pursuant to the statutory scheme must appear tainted by bias and pre-determination. As the applicant's case is based on the statutory scheme and not on any particular facts, I am not persuaded by this argument."*

85. Notably, Costello J. does not, in the just-quoted text, require applicants to put their faith blindly in the inherent or natural goodness of public administration. She merely points to the fact that the scheme as constructed by statute does not yield the necessary conclusion that "*that every case which goes before the Board pursuant to the statutory scheme…[is] tainted by bias and*

*pre-determination*". If, of course, an applicant can establish "*particular facts*" which do show a contended-for prejudice to arise then the possibility presents that they will receive discretionary relief pursuant to any ensuing judicial review application.

86. Applying the decision in Callaghan to the facts at hand, in that earlier case An Bord Pleanála had to form at least a preliminary *ex parte* view on matters which were relevant to the ultimate grant or refusal of permission. Yet that dual role, on the facts presenting before Costello J. was not sufficient to lead to a reasonable apprehension of bias. The facts of the case before this Court seem even weaker than those at issue in *Callaghan* because at the competent authority stage of the process, An Bord Pleanála looks at no matters of substance and no matters of procedure turn upon the fact that there even was a competent authority PCI process prior to the permit in this case.

87. The applicants' case, so far as bias is concerned, 'boils down' to the following issue: does the fact that An Bord Pleanála, as competent authority, has a coordinating role (whereby effectively it tries to keep other consent authorities, if there are other consent authorities on track in terms of time limits) impinge in some way upon its impartiality? The short answer to that question is 'no'. There is nothing that An Bord Pleanála is required to do as competent authority that in any way directs it to grant planning approval for the North-South Interconnector project. It is simply required to ensure that there is an outcome one way or the other within the timeframes envisaged. That is all that is required. There is nothing in the PCI Regulation that presupposes that An Bord Pleanála will not duly carry out assessment in terms of the environmental impact assessment, in terms of appropriate assessment, or in terms of the national law test of proper planning and sustainable development. Even in a more complicated case with a number of consent authorities, there is a striking limit to what An Bord Pleanála is empowered or able to do. As counsel for the second-named respondent colourfully put it in the course of argument, in that multi-party situation "*all that An Bord Pleanála can do is effectively herd cats*". In other words An Bord Pleanála can attempt, to use a colloquialism, to 'put some order' on the other consent authorities; however, it cannot sanction them, it cannot make their decisions for them, and it cannot overrule their decisions. There is nothing in any of the foregoing or in the evidence before the court which suggests that either generally or on the facts of the case at hand, An Bord Pleanála can promote or has been promoting the North-South Interconnector project. In truth, notwithstanding the vigour with which the allegation of bias was contended for, it is striking that the court was never pointed to a particular provision of the PCI Regulation which creates the inevitable conflict posited to arise…and with good reason, for there is no such provision. Viewed as aforesaid, viewed through the prism of what the reasonable observer knows, it seems to the court that the claim of objective bias must and does fail.

## VIII. What if the Court is wrong?

*(i) Overview*.

88. What if the court is wrong and the designation of An Bord Pleanála as competent authority ought, whether by virtue of the principle of legal certainty or otherwise, to have been effected by way of primary or secondary legislation? The court does not consider that it is wrong in this regard; however, if it is, the proper legal conclusion is not that everything that An Bord Pleanála has done vis-à-vis EirGrid's application collapses for want of validity, with the court having to press a notional re-set button that will cast everyone involved in the within matter back to the beginning of what has already been a long and challenging process. Rather it seems to the court that the circumstances identified at (ii) below and the consequences identified at (iii) would then present.

*(ii) Issuance of Consent pursuant to s.182B.*

89. If it is the case (which the court does not accept) that An Bord Pleanála's appointment as competent authority under PCI is in some sense irregular because that designation was not done by way of primary or secondary legislation, what does that mean for the development consent? The answer to that question is 'nothing'. The development consent has issued under s.182B and stands on its own two feet. In this regard it seems to the court to be important to note the terms in which An Bord Pleanála expressed its decision having regard to the requirements of the PCI Regulation. Thus if one has regard to the Board Order that issued consequent upon the application, it states as follows, in the "Notes" section, under the heading "*Project of Common Interest (PCI) – Regulation (EU) No. 347/2013":*

> *"The Board acknowledged that the matter of PCI was raised by observers and was referred to in the Inspector's report.*
>
> *The Board considered that, even in the absence of PCI status, the need for the project and the need to improve the quality of energy transmission in the island of Ireland has been clearly established, as set out in the reasons and considerations.*
>
> *In reaching the decision in this case the Strategic Infrastructure Division of An Bord Pleanála confined its decision to the matters pertinent to the SID application and in particular issues arising in respect of Appropriate Assessment, Environmental Impact Assessment and the consideration of the proper planning and sustainable development. The Board did not consider that it was conflicted in any way by the separate administrative role fulfilled by An Bord Pleanála as the Competent Authority for Projects of Common Interest."*

90. In light of the foregoing, it appears to the court, with respect, that there is a significant disconnect between (a) the complaint that there has been some irregularity in the appointment of the Board as competent authority and (b) the challenge to the planning decision. The planning decision stands on its own; the Board was entitled (and indeed required) to reach that decision.

*(iii) De Facto Designation.*

91. Just as the acts of an officer or judge may be held to be valid in law even though her appointment is invalid and in truth she has no legal power at all, the court considers that in the event (not accepted by the court to present) that primary or secondary legislation was necessary for a valid designation of An Bord Pleanála as competent authority, the acts of An Bord Pleanála which it has been sought to impugn in the within proceedings would nonetheless remain extant and lawful. In reaching this conclusion, the court recalls, *inter alia*, the decision of the Court of Appeal of England and *Wales in Fawdry & Co. v. Murfitt* [2002] 3 WLR 1354. That was a case in which the principal issue was when could a judge who had been assigned to the Technology and Construction Court ('TCC') sit and hear a regular case in the Queen's Bench decision (of which the TCC is, apparently, a specialist division)? Much of the judgment is given up to analysing the applicable rules and regulations and is of no interest in the context of the within proceedings. However, what is of note is that ultimately the Court of Appeal did find that the judge was properly authorised to sit in the regular division of the Queen's Bench, with an *obiter* but still persuasive consideration of the concept and standing of a *de facto* officer (and in truth, when it comes to authority that is but persuasive, the standing of particular elements of a judgment as part of the *ratio decidendi* or as *obiter dicta* seems to the court to matter less than would be the case if it were treating with binding precedent: ultimately persuasive authority is but that*, i.e.* logic deployed in one context that the court may find persuasive in another context, and nothing more). In any event, at 1361-2, Lady Justice Hale, as she then was, makes the following observations:

"18…[W]e *have heard argument on whether, even if the case had not been validly transferred to the TCC, the judge's order is valid as the act of a de facto officer. This longstanding doctrine of the common law is summarised thus in Wade and Forsyth, Administrative Law , 8th edition, at pp 291–292:*

> *'The acts of an officer or judge may be held to be valid in law even though his own appointment is invalid and in truth he has no legal power at all. The logic of annulling all his acts has to yield to the desirability of upholding them where he has acted in the office under a general supposition of his competence to do so.'*

*19. It was held by Sir Jocelyn Simon P in* Adams v Adams *[1971] P 188 that despite the lack of modern English authority applying the doctrine, it was still part of the English common law (and had been overlooked in* R v Cronin *[1940] 1 All ER 618). He referred to 'two masterly judgments of great learning',* State v Carroll *(1871) 38 Conn 448 , in the Supreme Court of Connecticut, and* In re Aldridge *(1897) 15 NZLR 361 , in the Court of Appeal of New Zealand, and also to an even more learned article by Sir Owen Dixon, later Chief Justice of Australia, 'De Facto Officers' (first published in Res Judicatae, Melbourne, 1938, reproduced in S Woinarski, ed.,* Jesting Pilate*, 1965).*

*20.Sir Owen explains that the doctrine has its origin in the medieval conception of an office as property, an incorporeal thing, to which the usual principles of the law of property applied. Thus a person who dispossessed another of his office, a disseisor, was nevertheless entitled to exercise the authority of that office, unless and until the disseisee exercised his right of re-entry. Nowadays, the rule is based not on that technicality but on public policy. Sir Owen quotes from* Curtis v Barton *(1893) 139 NY 505 , at p 511:*

> *'When a court of competent jurisdiction is duly established, a suitor who resorts to it for the administration of justice and the protection of private rights should not be defeated or embarrassed by questions relating to the title of the judge, who presides in the court, to his office.'*

*21. Despite its technical rationale in the notion of disseisin, the authorities show that the de facto officer must have some basis for his assumption of office, variously expressed as 'colourable title' or 'colourable authority'. Quite what suffices for that purpose has been debated, a particularly broad view being taken in* State v Carroll *(1871) 38 Conn 448 . In that case, the elected judge of the city court not being available, the clerk of the court invited a justice of the peace to act in his place. The report does not reveal whether or not that justice knew that he had no lawful authority to sit. After an extensive review of the authorities, Butler CJ summarised the circumstances in which the doctrine would apply thus, at p 427:*

> *'An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised, First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be. Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like. Third, under color of a known election or appointment, void, because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public. Fourth, [under an unconstitutional statute, not relevant here]…'*

*The first was sufficient to validate the justice's acts."*

92. It seems to the court that (a) the above reasoning can be applied by analogy to the circumstance (not accepted by the court to arise) that An Bord Pleanála ought to have been designated as competent authority by primary or secondary legislation, (b) in that non-presenting circumstance the third instance identified by Butler C.J. and referred to above is what would then present, (c) to borrow from the above-quoted wording of Wade & Forsyth, the logic of annulling all of An Bord Pleanála's acts as competent authority would have to yield to the desirability (in the public interest) of upholding them under a general supposition of An Bord Pleanála's competence so to act.

93. The court has also been referred in this regard to still another decision of the Court of Appeal of England and Wales, being *Coppard v. Customs and Excise Commissioners (Lord Chancellor intervening)* [2003] Q.B. 1428. There, a case was heard by a circuit judge who knew that he had not been authorised under statute to sit as a judge of the High Court but wrongly believed that he had authority to sit in the Queen's Bench Division by virtue of his appointment under statute to sit in the TCC. On appeal, it was held by the Court of Appeal, *inter alia*, that (a) the doctrine that acts of a *de facto* officer were valid in law did not operate to validate the acts of a person who, though believed by the world to be a judge of a court in which he sat, knew that he was not, (b) a person who knew he lacked authority included one who shut his eyes to that fact when it was obvious, but not one who had simply neglected to find out, (c) the judge in this case neither knew not ought to have known that he was not authorised to sit as a judge of the High Court, (d) therefore, on established principles of common law, the judge was a *de facto* judge of the High Court and his judgment was a valid judgment of the High Court.

94. Reasoning akin to that brought to bear by the Court of Appeal in *Coppard* falls to be applied, by analogy, in the circumstance – not accepted by the court to arise – that An Bord Pleanála ought to have been designated as competent authority by primary or secondary legislation. Thus: (a) An Bord Pleanála has hitherto been generally believed to be a validly designated competent authority and did not know that it was not; (b) An Bord Pleanála has neither shut its eyes to a want of validity in its designation as competent authority nor neglected to find out – it (rightly) is simply not an issue that has been considered to present; (c) applying established principles of common law to the analogous circumstance then presenting, An Bord Pleanála's designation and actions as competent authority would fall to be treated as valid *de facto*. As Hale L.J. notes in her judgment in Fawdry, at 1366, *"As Mr* [now Lord Justice] *Sales has been at pains to remind us throughout, the other party to this case has an interest in not being deprived of the benefit of his order and not being made to go through the whole process again unless there was something materially wrong with it. There was nothing materially wrong with this trial and it would be wrong to set it aside."* Likewise, in this case, EirGrid has an interest in not being deprived of the benefit of what it has attained through the application process, unless there was something materially wrong with that process…and there was nothing materially wrong with the process brought to bear and operated by An Bord Pleanála.

**IX. Delay**

95. The issue of delay was addressed by the judge who granted leave to bring the within application. It is clear, however, from the decision of the Supreme Court in *O'Flynn v. Mid-Western Health Board* [1991] 2 I.R. 223 that the judge hearing the full judicial review ought to re-visit the issue of delay. And, in any event, the judge who acted at the leave stage was only concerned with delay as a preliminary point, the argument there being that there had been a failure to comply with the time limit presenting under O.84 of the Rules of the Superior Courts (1986), as amended. At the trial stage, by contrast, delay also feeds in as a factor, that the court is entitled to take into account as regards the exercise of its discretion.

96. When it comes to the issue of delay, it is worth turning to consider certain of the exhibits furnished to the court as part of the affidavit evidence before it:

> – on 15th May, 2014, An Bord Pleanála issued a document entitled "Projects of Common Interest, Manual of Permit Granting Process Procedures" which states as follows, at para. 1.3, under the heading "Competent Authority and Ireland":
>
> > *"The* [PCI] *Regulation seeks to facilitate the permit granting process for PCI by requiring Member States to appoint a Competent Auhtority responsible for making the comprehensive decision and to ensure that the comprehensive decision is made within the time limits specified in the Regulation. An Bord Pleanála was designated the Competent Authority in the Irish State on 4th December, 2013."*
>
> So the fact of An Bord Pleanála's designation was publicly available knowledge from at least 15th May, 2014.
>
> – in point of fact, the applicants in this case were alive to the fact of An Bord Pleanála's designation from November, 2014. Thus among the exhibits before the court is a letter from North East Pylon Pressure to the European Commission, signed by Ms Aimée Treacy, one of the deponents in the within proceedings and headed *"Formal complaint to EU Commission by North East Pylon Pressure Campaign Group in relation to EirGrid's planning applications for the North-South interconnector project, Ireland…".* This letter states, at p.39, that *"DCENR* [the Department of Communications, Energy and Natural Resources] *appointed ABP* [An Bord Pleanála] *as Competent Authority for PCIs on 4th December 2013. ABP confirmed its appointment as Competent Authority (CA) for PCI on 20th December 2013".*
>
> – also exhibited in the evidence before the court is a planning inspector's report of 2nd May, 2014. This report arose from the fact that an application previous to that which led to the within application was submitted on behalf of EirGrid to An Bord Pleanála but withdrawn; an issue then arising was whether the new application was to be treated as an entirely new or a continuation of the withdrawn application. At para. 1.1 of the inspector's report, the following observation appears:
>
> *"The Board will be aware that on the 4th December 2013 the Department of Communications, Energy and Natural Resources wrote to the Chairperson to confirm An Bord Pleanála's appointment as the Competent Authority for purposes of implementation of the permit granting and other procedures for PCI's established under Regulation (EU) 347/2013. This appointment was accepted by the Chairperson on 20 December 2013."*
>
> So again one has in this document a publicly available document clearly confirming that An Bord Pleanála is and has been designated as the competent authority.
>
> – finally, if one turns to the pleadings, one finds included among them a verifying affidavit of a Principal Officer in the Department of Communications, Climate Change and the Environment which includes the averment that *"On the 12th June 2014, the then Minister for Communications, Energy and Natural Resources, Minister Rabbitte, stated on the Dáil record that the Board was designated as the competent authority for Projects of Common Interest in Ireland, in response to two Parliamentary questions"*. So the suggestion that in some way it was a secret that An Bord Pleanála had been designated, with respect, does not bear scrutiny.

97. Be all the above as it may, the court concludes later below that it is not minded to grant any of the reliefs sought by the applicants. That is a conclusion that can safely be arrived at whether or not there has been any delay on the part of the applicants. So to the extent that delay presenting on the part of the applicants can now be counted against them, in truth it has no consequence to the within application, at least as regards the reliefs sought: the court cannot make them any more refused than they are.

## X. 'Brexit'

*(i) Concerns Raised by Applicants.*

98. The issue of 'Brexit' is touched upon at paras. 59-61 of the applicants' written submissions and it is as well to begin by quoting these so as to understand the complaint made by the applicants in this regard:

> *"59. The Single Electricity Market Operator (SEMO) aims to facilitate the continuous operation and administration of the Single Electricity Market. It is a joint venture between the two applicants for the development, the subject-matter of these proceedings, namely the Notice Party (EirGrid plc) and the System Operator for Northern Ireland (SONI Limited). The organisation is managed as a contractual joint venture between EirGrid plc, the Transmission System Operator for Ireland, and SONI, the Transmission System Operator for Northern Ireland. It is licensed and regulated by both the Commission for Energy Regulation in Ireland and the Utility Regulator for Northern Ireland. It identified in September 2016 and February 2017 as a rising high or top risk what it described as 'BREXIT Impact: Risk that Government revisits I-SEM decision, or National Grid/Ofgem choose not to comply with the European Network Codes or not actively support the Target Model cross border arrangements, resulting in changes to scope, project delays, cost overruns, reduced quality, or potentially undermine I-SEM' and inter alia recommended close liaison between the Regulatory Authorities and the Departments (of Government) as part of the mitigating controls.*
>
> *60. By virtue of Article 4(3) TEU and the principle of sincere cooperation, national courts are required, so far as possible, to interpret and apply procedural rules governing the exercise of rights of action in a way that achieves that result. Article 19(1) TEU…provides that Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by European Union law.*
>
> *61. The First Named Respondent on page 9 of the decision dated the 19th December 2016 stated that the proposed development is likely to have significant effects on the environment of Northern Ireland which is described by the First Named Respondent as 'an area of a Member State of the European Union (i.e. [the] United Kingdom of Great Britain and*

*Northern Ireland).' As a matter of EU law, the First Named Respondent by the manner in which it made its decision on the 19th December, 2016, has failed to consider the application of Article 3(4) and/or Article 5 of Regulation (EU) No. 347/2013 either as a PCI under Regulation (EU) No 347/2013 and/or as a Cluster as per Regulation (EU) 2016/89 and in circumstances where part of the said PCI and/or Cluster is within the United Kingdom and/or having regard to the consequences of the referendum held in the United Kingdom on the 23rd June 2016 (and/or in the alternative having regard to the consequences of any irrevocable withdrawal by the United Kingdom pursuant to Article 50 of the TEU."*

99. It appears from the foregoing that two separate points are made by the applicants. First, concerns are expressed about the consequences of the 'Brexit' referendum in the neighbouring jurisdiction for the North-South Interconnector project, the suggestion being that those concerns ought to have been addressed by An Bord Pleanála in its decision. Second, it is queried whether or not An Bord Pleanála was correct in concluding that the proposed development would have significant effects on the environment of another Member State in circumstances where the United Kingdom may or will at some point in the future be a non-EU member state, following on its 'Brexit' referendum of last year.

*(ii) Uncertainty as to the Future.*

100. A number of points might be made as regards the issues touched upon in the preceding paragraph:

(1) the general consequences of 'Brexit' are speculative at this time.

(2) the consequences of 'Brexit' for the implementation of the European internal energy market are speculative at this time.

(3) the consequences of 'Brexit' for the implementation of the North-South interconnector are speculative at this time.

(4) what can be stated with certainty is that: the United Kingdom was a member state of the European Union when An Bord Pleanála made its now-impugned decision, and the United Kingdom continues at this time to be so.

101. Additionally, the court notes that although the applicants indicate that there could be certain risks arising from Brexit, they do not appear to contend that those risks mean that the North-South Interconnector project should not be treated as a PCI. Insofar as there is a criticism of An Bord Pleanála having taken the view that the proposed development could have a significant effect on another Member State, that seems, with respect, a criticism that is hard to bring home. In fact, if one were to 'flip' An Bord Pleanála's reasoning, *i.e.* if An Bord Pleanála was to have decided that it would not have any regard to any effects on another member state (on the basis that Northern Ireland is part of the United Kingdom which is a member state that appears to be on the path to exiting the European Union) that course of action, it seems to the court, would offer a valid avenue of complaint as regards An Bord Pleanála's actions…but that is not what An Bord Pleanála did; in fact the opposite pertains.

102. It seems to the court that An Bord Pleanála was correct to approach matters as it did. As a matter of practical reality, no-one knows what the United Kingdom's future status vis-à-vis the European Union will mean for the United Kingdom or Ireland or the internal energy market. What is known is that the 'Brexit' referendum did not have any *de facto* effect as regards removing the United Kingdom or any part of same from the European Union. Nor did it have any *de facto* effect as regards removing the North-South Interconnector project from the European Union's list of PCI projects: the North-South Interconnector project was on the list, is on the list and will remain on the list unless and until steps are taken to remove it therefrom and those steps are completed. The applicants merely make the point that it is not clear what the United Kingdom's future relationship with the European Union will be, and one need merely read each day's newspapers to see the uncertainty that continues at this time to present in this regard, especially following the United Kingdom's recent general election. But, when it comes to the particular subject-matter of the within application, matters are actually clearer than they were, even in December, 2016, thanks to the publication, in February 2017, by the United Kingdom Government, of a White Paper entitled "*The United Kingdom's exit from and new partnership with the European Union*" (Cm 9417), in which that Government's commitment to the concept and reality of a single electricity market on the island of Ireland is manifest. Thus, at p.43 of the White Paper, the following observations appear:

*"With respect to energy, EU legislation underpins the coordinated trading of gas and electricity through existing interconnectors with Member States, including Ireland, France, Belgium and the Netherlands. There are also plans for further electricity interconnections between the UK and EU Member States and EEA Members. These coordinated energy trading arrangements help to ensure lower prices and improved security of supply for both the UK and EU Member States by improving the efficiency and reliability of interconnector flows, reducing the need for domestic back-up power and helping balance power flows as we increase the level of intermittent renewable electricity generation. We are considering all options for the UK's future relationship with the EU on energy, in particular, to avoid disruption to the all-Ireland single electricity market operating across the island of Ireland, on which both Northern Ireland and Ireland rely for affordable, sustainable and secure electricity supplies."*

103. In terms of chronology, the White Paper was published after the circumstances that are the focus of the within application. However, as counsel for the applicants properly conceded at the hearing of the within application, it is appropriate for the court, when considering whether and how to apply a discretionary relief, to have regard to matters that are known to it now: though focusing on the past in its considerations it need not be entirely blind to the contemporary. But even if the court were to ignore the White Paper, the time to judge the validity of the impugned decision of An Bord Pleanála is the date of that decision (19th December, 2016), and at that date all that had occurred was that the Brexit referendum had taken place on 23rd June, 2016. That, of course, was a non-binding referendum. Indeed the very limited effect of same can be seen from the fact that in *R. (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, the United Kingdom Supreme Court determined that even following the 'Brexit' referendum the United Kingdom could not initiate its withdrawal pursuant to Art. 50 TEU without an Act of Parliament permitting it so to do. It is true that Parliament later gave the necessary assent, leading to the 'triggering' of Art. 50 on 29th March, 2017, with the presently likely result of that 'triggering' being that there will be some kind of 'Brexit' in 2019. But at the time that An Bord Pleanála made its decision, the *Miller* case, the need for the intervention of the Westminster Parliament and the 'triggering' of Art. 50 all lay in the future. All that was known when An Bord Pleanála made its decision was that there had been a non-binding referendum of uncertain consequence in the United Kingdom, and nothing more.

*(iii) Listing of Project.*

1. The PCI Regulation.

104. It is instructive too when it comes to the 'Brexit' aspect of matters to look at the text of the PCI Regulation in this regard. Articles 3 and 5 of that Regulation provide, *inter alia*, as follows:

*"Article 3*

***Union list of projects of common interest***

*1. This Regulation establishes twelve Regional Groups ('Groups') as set out in Annex III.1. The membership of each Group shall be based on each priority corridor and area and their respective geographical coverage as set out in Annex I. Decision-making powers in the Groups shall be restricted to Member States and the Commission, who shall, for those purposes, be referred to as the decision-making body of the Groups.*

*[Court Note: Annex I of the PCI Regulation, under the heading "PRIORITY ELECTRICITY CORRIDORS" references, at (2), "North-South electricity interconnections in Western Europe" and mentions Ireland among the "Member States concerned"].*

*…*

*3. The decision-making body of each Group shall adopt a regional list of proposed projects of common interest drawn up according to the process set out in Annex III.2, according to the contribution of each project to implementing the energy infrastructure priority corridors and areas and according to their fulfilment of the criteria set out in Article 4. When a Group draws up its regional list: (a) each individual proposal for a project of common interest shall require the approval of the Member States, to whose territory the project relates; if a Member State decides not to give its approval, it shall present its substantiated reasons for doing so to the Group concerned; (b) it shall take into account advice from the Commission that is aimed at having a manageable total number of projects of common interest.*

*4. The Commission shall be empowered to adopt delegated acts in accordance with Article 16 that establish the Union list of projects of common interest ('Union list'), subject to the second paragraph of Article 172 of the TFEU. The Union list shall take the form of an annex to this Regulation. In exercising its power, the Commission shall ensure that the Union list is established every two years, on the basis of the regional lists adopted by the decision-making bodies of the Groups as established in Annex III.1(2), following the procedure set out in paragraph 3 of this Article. The first Union list shall be adopted by 30 September 2013.*

*5. The Commission shall, when adopting the Union list on the basis of the regional lists:*

*(a) ensure that only those projects that fulfil the criteria referred to in Article 4 are included…*

*Article 5*

***Implementation and monitoring…***

*8. A project of common interest may be removed from the Union list according to the procedure set out in Article 3(4) if its inclusion in that list was based on incorrect information which was a determining factor for that inclusion, or the project does not comply with Union law.*

*9. Projects which are no longer on the Union list shall lose all rights and obligations linked to the status of project of common interest arising from this Regulation.*

*However, a project which is no longer on the Union list but for which an application file has been accepted for examination by the competent authority shall maintain the rights and obligations arising from Chapter III, except where the project is no longer on the list for the reasons set out in paragraph 8."*

105. The North-South Interconnector project was first listed in Commission Delegated Regulation (EU) No 1391/2013 of 14 October, 2013, amending Regulation (EU) No 347/2013 of the European Parliament and of the Council on guidelines for trans-European energy infrastructure as regards the Union list of projects of common interest (O.J. L349, 21.12.2013, 28). To argue, by reference to Art. 5(8) of the PCI Regulation that a project listed on information that was correct at the time of listing under the Commission Delegated Regulation but which later changed, thanks to 'Brexit', would be information that would then come within the ambit of the phrase "*incorrect information*" seems to the court, with respect, to be a most tenuous contention. However, even in the event that that such a contention was found to be correct, it would still not avail the applicants. This is because the North-South Interconnector Project would come within the saving embrace of the second paragraph of Art. 5(9) of the PCI Regulation.

2. The 2015 Regulation.

106. Commission Delegated Regulation (EU) 2016/89 of 18 November, 2015, amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest [*i.e.* the PCI Regulation] (O.J. L19, 27.1.2016, 1) commences, *inter alia*, with the following recitals:

*"(3) Projects proposed for the inclusion in the Union list have been assessed by the regional groups and meet the criteria laid down in Article 4 of Regulation (EU) No 347/2013.*

*(4) The draft regional lists of PCIs were agreed by the regional groups at technical-level meetings. Following positive opinions of the Agency for the Cooperation of Energy Regulators ('ACER') on 30 October 2015 on the consistent application of the assessment criteria and the cost/benefit analysis across regions, the regional groups' decision-making bodies adopted the regional lists on 3 November 2015. Pursuant to Article 3(3)(a) of Regulation (EU) No 347/2013, prior to the adoption of the regional lists, all proposed projects were approved by the Member States to whose territory the projects relate.*

*(5) Organisations representing relevant stakeholders, including producers, distribution system operators, suppliers, and consumer and environmental protection organisations were consulted on the projects proposed for inclusion in the Union list."*

107. The Regulation then moves on to insert a new Annex VII into the PCI Regulation, identifying the Union list of projects and then makes, at para. 3 of the new Annex VII, the following provision in relation to the Union list that had been established by Commission Delegated Regulation (EU) No 1391/2013 (referenced previously above).

"(3) ***Definition of 'No longer considered a PCI'***

> *The phrase 'No longer considered a PCI' refers to projects from the Union list established by Regulation (EU) No 1391/2013 that are no longer considered PCIs for one or more of the following reasons:*
>
> *- according to the new data the project does not satisfy the eligibility criteria;*
>
> *- a promoter has not re-submitted it in the selection process for this Union list;*
>
> *- it has already been commissioned or is to be commissioned in the near future and so it would not benefit from the provisions of Regulation (EU) No 347/2013; or*
>
> *- it was ranked lower than other candidate PCIs in the selection process.*
>
> *Such projects are not PCIs, but are listed with their original PCI numbers on the Union list for the sake of transparency and clarity.*
>
> *They may be considered for inclusion in the next Union list if the reasons for not-inclusion in the current Union list no longer apply."*

108. The North-South Interconnector does not come within the definition of 'No longer considered a PCI' but continues to be listed at Annex VII, Section B, Category (2), para.2.13, under the principal heading "*Priority Corridor North-South Electricity Interconnections in Western Europe ('NSI West Electricity')" and the sub-heading "Cluster of projects increasing the integration of renewable energy between Ireland and Northern Ireland".*

*(iv) Some Conclusions.*

109. The North-South Interconnector, at the time that An Bord Pleanála assessed it, was on the Union list. In accordance with Arts. 5(8) and (9) of the PCI Regulation, it was appropriate for An Bord Pleanála to progress the application as it did, concerning (as it did) a project on the Union list. The impugned decision of An Bord Pleanála reflects the legal position as of the date of that decision. As of that time (and this time), the United Kingdom remains part of the European Union, with all of the legal consequences that follow from that; and it will remain a full member until, at the very least, March, 2019. The precise implications for the single electricity market after the United Kingdom leaves the European Union, if it leaves the European Union, are not clear. However, although the future can never be mapped with complete certainty, at this time it appears, by reference to the United Kingdom Government's White Paper of February, 2017, as quoted from above, that the United Kingdom government is committed to the concept and reality of a single electricity market on the island of Ireland.

110. In truth, although 'Brexit' is put up by the applicants as a significant part of their case, at no stage in their oral or written submissions have they identified a single authority which suggests that an event of this kind, *i.e.* a referendum result that has uncertain consequences and which will not change the law for a period of time after an administrative decision is made, nonetheless has the effect of vitiating that administrative decision. Is it the case that every administrative decision made in this State by bodies which may or may not be affected by what 'Brexit' may or may not involve are now to be declared unlawful because decision-makers apply the *status quo* and the legal position as it prevails today to the facts before them? The answer to that question is simply stated: of course it is not. None of the risks that might be attributable to 'Brexit' have yet crystallised, it is not clear what those risks even are, it is not clear what the effect of those risks may be for the interconnector project. Thus it is premature for any challenge to be made to the decision of An Bord Pleanála by reference to 'Brexit'; it was not a matter which An Bord Pleanála ought to have considered and it was appropriate for An Bord Pleanála not to do so.

**XI. Error on the Face of the Record**

111. The applicants contend, *inter alia*, that An Bord Pleanála acted *ultra vires* and without jurisdiction in purporting to grant approval for a proposed development inclusive of approximately 34km located in Northern Ireland (with the alleged error of law also appearing on various pages of the impugned record/decision). This assertion, with respect, does not withstand even the scantest of scrutiny. If one looks to the Board Order, it states as follows under the heading "*Proposed Development*":

> *The overall interconnector (approximately 138 kilometres long inclusive of approximately 34 kilometres located in Northern Ireland) will link the existing electricity transmission networks of Northern Ireland and Ireland between Turleenan, County Tyrone and Woodland, near Batterstown, County Meath. This interconnector has been designated as a Project of Common Interest (PCI) pursuant to the provisions of Regulation (EU) No. 347/2013 of the European Parliament and of the Council of 17th April 2013 on guidelines for trans-European energy infrastructure.*
>
> *he proposed North-South 400 kilovolt Interconnection Development located in Counties Monaghan, Cavan and Meath, which will be the subject of the application for approval, is approximately 103.35 kilometres long and consists of the following principal elements…"*

112. In essence, what is stated in the above-quoted text is not so very removed from saying, to use a loose analogy, 'Ms X's farm straddles Counties Donegal and Tyrone. She is applying for planning permission to build a house on the Donegal end of her farm.' The notion that in describing matters so, such an application assumes an extra-jurisdictional dimension is, with respect, fantastic. Putting an application in its cross-border context does not render that application a cross-border application. Returning to the facts at hand, EirGrid did not seek approval for development in Northern Ireland and An Bord Pleanála did not purport to grant approval for development in Northern Ireland, notwithstanding that the North-South Interconnector project in its entirety, and as its name would suggest, will reach into Northern Ireland. The decision of An Bord Pleanála on its face cannot reasonably be read as representing anything other than what it says it is, being a decision to accede to the application made by EirGrid, which application did not seek approval for any development in Northern Ireland, albeit that is it part of a wider development that in its joined-up form will straddle Northern Ireland.

**XII. The Inspector's Report**

113. It is contended by the applicants that certain matters were not dealt with adequately by An Bord Pleanála. It may be useful in

this regard to quote a portion of the applicants' submissions so as to get a sense of what is contended in this regard:

> *134. Article 3(d) of the EIA Directive (2011/92/EU) requires information to be*
>
> *provided by the developer to include 'an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects.' This requirement is replicated with identical wording, in paragraph 1(d) of Schedule 6 of the Planning and Development Regulations, 2001, as amended.*
>
> *135. The First Named Respondent erred in failing to assess the alternatives to the proposed development, including: (i) failing to properly and comprehensively consider the undergrounding option or partial undergrounding option of the proposed development; (ii) erred in determining that the overhead power line was more appropriate and cost effective when compared to other alternatives, including undergrounding; (iii) had no and/or insufficient regard to the rights of affected landowners and the potential health hazards associated with the overhead lines when assessing alternatives to the project; (iv) failed to ensure that a proper cost/benefit analysis of the proposed development was completed; (v) had no or insufficient regard to alternative interconnectors and PCIs, specifically the First Named Respondent had no regard to the potential alternative interconnector between Ireland and the United Kingdom of Great Britain (including Northern Ireland) namely the Interconnection between Srananagh (IE) and Turleenan (UK)."*

114. The court proceeds with a consideration of these lines of objection hereafter. In passing, however, the court notes that it does not understand complaint to be made by the applicants by reference to the judgment of the court in *Connolly v. An Bord Pleanála* [2016] IEHC 322. However, even had such complaint been made, the court would in any event have found ample ground for distinction between that case and this in that in *Connolly*, unlike here, An Bord Pleanála placed reliance on an inspector's report notwithstanding that (i) the development in issue had changed, and changed substantially, following the issuance of the inspector's report; and (ii) notably, even confusingly, the inspector's report was not favourable, or in material parts was not favourable, to the relevant development. In those circumstances, the court came to the conclusion that it did. In this case, by contrast, there has been no like change to the development and there is no 'clear blue water' between the inspector's findings and that of An Bord Pleanála.

## XIII. Access

*(i) Overview.*

115. Before looking at the specific arguments that have been raised around access, it is helpful briefly to analyse what the relevance of access is to the North-South Interconnector project and to the within application. This is because the notion of access can refer to a number of different things, and it is important to identify what they are and what An Bord Pleanála was and was not concerned with.

116. As should now be clear, the intended pylons are to be constructed on private land and the relevant contractors will have to get themselves and their equipment onto the land so as to engage in the act of construction. A number of access-related issues then arise:

> (1) as the land is private land, how do the contractors legally obtain access to the private land?
>
> (2) does whatever the contractors are doing in the course of getting themselves and their equipment to the location of the pylon require development consent/planning permission?
>
> (3) whether or not such consent/permission is required, insofar as An Bord Pleanála is considering an application for approval under Section 182A, is the access in the sense of getting from the road to the pylon something which needs to be assessed as part of the EIA?
>
> (4) whatever the answer to (1)-(3), is An Bord Pleanála entitled in granting development consent to have regard to the question of access when fashioning conditions attached to that consent?

117. There does not appear to be any dispute between the parties, and at law there is no uncertainty, that an application for development consent does not allow a party to do anything except construct the development for which consent is obtained. Issues of access in the sense of getting a legal entitlement to get on the land are independent of that and are resolved in one of two ways: either (a) a landowner agrees to allow a developer onto affected land or (b) a contractor resorts to the use of such statutory powers as it may possess to achieve that access.

118. As to whether planning permission is required to get contractors from road to site of construction, EirGrid's submission and position is that it is not required. It has presented methods of access which it believes can be achieved using existing entrances and using equipment which will not require the undertaking of works that would require development consent. EirGrid is either right or wrong in this regard. (It believes itself to be right). The way the inspector rationalised matters was to say, quite correctly, that An Bord Pleanála was concerned with the application before it, the developer maintained that they could obtain the necessary access and if the developer was wrong, that was for another place and day.

119. As to the third issue touched upon above – did access need to be assessed as part of the environmental impact assessment in any event? – the developer adopted the view that the information should be put before An Bord Pleanála so as to allow that assessment to occur and An Bord Pleanála, as it was entitled to do, agreed with that view and properly proceeded with its assessment.

120. Finally, if no development consent is sought in relation to access can there properly be any conditions that relate to access? At first glance, it seems almost counter-intuitive that the answer to this question would be 'yes'. Indeed, counsel for the applicants contended that where an application does not include an application for access and a condition in the permission refers to access, that is unlawful. However, if one pauses to consider this last proposition, it just cannot be true or, at the very least, it cannot always be true. Suppose, for example, that a homeowner is having a rear extension built on to her house for which she needs planning permission. Suppose too that she does not seek any permission for access (because she does not need planning approval to get contractors and materials from the front of her house to the back). She may find that such permission as issues nonetheless comes subject to access-related conditions. She may, for example, be living on a very busy road and the local authority or An Bord Pleanála may condition the planning permission by providing, for example, that the homeowner during the period that the development is being constructed is not to have any lorries outside her house before ten o'clock in the morning or after four o'clock in the afternoon, perhaps because her house is situate on the main road to the local airport. That is a condition relating to access. But, with respect,

no-one could reasonably, let alone correctly, suggest that such a condition was necessarily unlawful.

121. Returning to the conditions imposed in the case at hand, it will be recalled that these provide, *inter alia*, as follows:

> *"Prior to the commencement of development, a construction and environmental management plan, a traffic management plan and a waste management plan shall be submitted to, and agreed in writing with, the relevant planning authority following consultations with relevant statutory agencies….This plan shall incorporate the mitigation measures indicated in the environmental impact statement and shall provide details of intended construction practice for the proposed development, including…*
>
> *(c) site specific arrangements for each temporary access route, to include, where necessary:*
> *(i) arrangements for stepping down vehicle size,*
>
> *(ii) arrangements for off-loading of materials,*
>
> *(iii) short-term road closures,*
>
> *(iv) the phasing of construction works which are accessed by single-lane carriageways, and*
>
> *(v) the arrangements for the transfer and management of concrete, including wash out facilities."*

122. The criteria for conditions such as those just quoted, subject to the normal rules of *vires*, is that they are viewed by the permit granting authority as appropriate in the interests of proper planning and sustainable development and there is no evidence that in this case they were not so viewed (and the mere fact that they were included is evidence that they were so viewed). They are not affected, and their legality cannot be affected, by reason of the fact, to go back to the formulation that counsel for the applicants presented, that where an application does not include access, a condition in the ensuing consent which refers to access is unlawful.

123. So if the court stands back from the access issue and tries to analyse it element by element, matters reduce themselves to this: (1) the application before the court is for development consent; (2) if, in the course of undertaking a development for which consent is required, a developer is going to do something which does not require consent or permission, then the consent or permission need not be sought; (3) if the developer then breaches the planning laws by obtaining or seeking to obtain access in a manner which in fact requires consent or permission there are recognised methods in law for dealing with that: it is not a matter for the court to resolve before development commences. Viewed so, the *vires* objection now raised in relation to the above-quoted conditions concerning access is, with respect, an argument without merit.

*(ii) The Substance of the Inspector's Report.*

124. "*Access routes*" are first considered by the inspector at p.98 of her report, in the following terms:

> *"The applicant proposes using existing access routes to agricultural land to access tower sites, stringing locations and guarding areas. Mr Keane [counsel for the applicants] queried why these temporary access routes did not form part of the planning application.*
>
> *In the Board's pre-application meeting with the applicant, the Board advised the then prospective applicant that 'the planning application drawings should indicate access to tower locations for construction and servicing purposes at the point of the public road' (Record of Meeting, December 2013).*
>
> *I would also note that the Board advised the applicant (minutes of the Board's pre-application meeting with the applicant held on the 23rd December 2013) in respect of the access to construction towers that the drawings 'could be similar to those submitted in the application for the Laois-Kilkenny Reinforcement Project' (VA0015). Statutory drawings for this route did not identify temporary access routes to tower sites.*
>
> *It was confirmed by the applicant on numerous occasions during the oral hearing that the access roads do not form part of the planning application, but are presented in an indicative manner in order to allow environmental impact assessment of the development. In this context, it would not appear inappropriate that the access routes are omitted from the statutory drawings. The Board can only adjudicate on the application as so presented and should it transpire at some future date that works, constituting development, are required to facilitate access, then EirGrid will be constrained by the provisions of the planning acts. There is no substantial evidence before the Board at this time that any such works are likely to be required."*

125. It seems to the court that this last-quoted passage is a notable one. What An Bord Pleanála makes clear in this passage is that: it is not giving permission for any of the access roads; it is considering those access roads purely for the purposes of its environmental impact assessment; and should it transpire in the future that the temporary access routes require works such as to constitute development within the context of the planning legislation, that that is something which will have to be dealt with at another date. So in no sense are the temporary access routes being permitted by An Bord Pleanála.

126. There follows next in the inspector's report a segment headed "*Access routes in sensitive locations*", which reads as follows:

> *"Mr Keane SC also raised issues regarding 'works' including the laying down of matting to form a road which he argued constituted development under section 3 of the Planning and Development Act. He also noted the provisions of section 4(1)(ia) which states:*
>
> *(ia) development (other than where the development consists of provision of access to a public road) consisting of the construction, maintenance or improvement of a road (other than a public road) or works ancillary to such road development, where the road serves forestry and woodland.*
>
> *He stated that the type of access routes proposed by the applicant do not qualify for an exemption under this section. He also brought the attention of the Board to the provisions of Section 4(4) which de-exempts development where an environmental impact assessment of the development is required.*
>
> *It was confirmed by EirGrid that the temporary access roads will not involve 'works' as defined under Section 2 of the*

*Act. There will be no construction and no excavation. There are no proposals to develop stone roads and no timber sleepers will be installed. In the vast majority of cases, access will be along existing tracks and where this is not possible, mats will be placed on the ground surface to facilitate construction machinery.*

*I would again draw the attention of the Board to Class of the Regulation referred to above. It would appear that the placing of the temporary matting on the access routes, being land adjoining land where development is to take place pursuant to a permission, is exempt under the provisions of the Regulations. With regard to the removal of exemption under section 4(4), where an EIS is required, I note the development (works to temporary access roads) is not development of a class set out in Part 1 and 2 of Schedule 5 of the Planning and Development Regulations 2001, as amended, requiring EIA in its own right, and accordingly the matter of EIA does not apply."*

127. What is afoot (again) in this text is the following: if the pylons are to be built then, in certain cases, access from the public road to build those pylons will be required. In many cases it can be done directly from the public road but in other cases it will be necessary to secure assess by means of existing access routes, some of which will traverse over private lands. In that particular context, An Bord Pleanála thought it important to assess what the environmental effects of those access routes would be at the time of the granting or withholding of consent for the project. Again, An Bord Pleanála does not, in its impugned order, grant consent for those access routes; rather it assesses what would be the effect of same when and if the North-South Interconnector project is constructed.

128. As to the issue of works, which is also touched upon in the above-quoted text, it appears from the environmental impact statement that, in general terms, there will be three different kinds of lands that need to be traversed: first, good quality lands where no temporary tracks are required; second, relatively dry or peaty land where a defined track is required and in which case temporary rubber matting or aluminium in road panels will be used to distribute the weight evenly; and third, poor, boggy, undulating land. The environmental impact statement identifies that: the vast majority of the access routes for the building of the pylons along the North-South Interconnector route will be of the first type, i.e. land which can be traversed without any special provision being made; the remainder of the access routes are of the second type, where all that would be required would be aluminium matting or aluminium road panels; and no land has been identified as falling within the third category (where there might be excavation of topsoil or other matters required). However, all that will require to be assessed at another point; it is not something that An Bord Pleanála has decided in this case; and the Board has granted no permission for these access routes.

129. Turning then to the segment of the inspector's report entitled "*Construction*", the court notes the following observations:

*"Access to construction sites, guarding locations and stringing areas will be via the public road network and the temporary use of existing private access lanes/lands which currently provide access to property and lands within the project area. The applicant is not seeking to consent for these routes but they are put forward to enable the Board to carry out its environmental impact assessment of the proposed development."*

130. Immediately following the above-quoted text, reference is made to various drawings and documents. Certain of these documents were handed in to court and the court's attention drawn to the fact that the temporary access routes were marked thereon in yellow. These yellow lines and other purple lines were to play a prominent part in the closing stages of the hearing and will be returned to later below.

131. Under the heading "*Temporary Access Routes*", the planning inspector makes the following observations:

"*During the oral hearing, NEPPC* [the North-East Pylon Pressure Campaign], *CMAPC* [the County Monaghan Anti-Pylon Committee] *and many individual landowners raised concerns regarding:*

☐ *The outdated aerial photography used by the applicant in the application documentation,*

☐ *The absence of access to lands and the ability of the applicant to identify and assess the suitability of access routes, and*

☐ *The adequacy of the proposed temporary access routes to accommodate the construction traffic associated with the development.*

*The concerns raised regarding the adequacy of access routes included the minor nature, inaccessibility and severe slope of some of the proposed routes, inadequate structure/width of some routes to accommodate the weight and size of construction vehicles and damage to drains, bridges and soils as a consequence of the large construction vehicles.*

*Other issues in respect of access routes are discussed in other sections of this report notably Legal and Procedural Issues, Human Beings – Land Use and Material Assets – Traffic."*

132. What follows next is a treatment by the planning inspector of each of these points. Under the heading "*Viability and Adequacy of Access Routes*", the following text appears:

*"In response to the site specific concerns raised by observers regarding the viability and adequacy of each access route the applicant (a) described the applicant's approach to the use of access routes and (b) uploaded more recent, detailed aerial photography and Google street view to demonstrate the ability of a temporary access route to accommodate construction traffic. The following was emphasised in relation to the construction methodology:*

☐ *It is not the intention of the applicant to create any new entrance onto the public road but to use existing access routes, preferably those which provide direct access to lands but if necessary, via existing accesses to farm yards.*

☐ *Typically, agricultural scale equipment would be used to access construction sites (for example, using a tractor and trailer to transport bundles of steel for tower construction). However, for minor access routes or those with poor ground conditions, equipment would be scaled down to suit the nature of the access route. For example, use of a 26 tonne concrete lorry instead of [a] 32 tonne lorry, use of a 6 tonne wheeled dumper to transfer concrete from the concrete lorry to the construction site, use of a mini piling rug where necessary (applicant's submission No 53).*

☐ *Use of temporary matting or aluminium tracks for more sensitive access routes (Type 2), or if required by landowners, with the matting or aluminium tracks laid (by the transporting vehicle) at a width to suit the width of the*

*access route e.g. less than 4m if required.*

*☐ Use of temporary aluminium bridges to facilitate access over ditches etc. and to protect existing bridges (see visual image of bridge provided in submission No 26 presented to oral hearing).*

*☐ Over sensitive ground, tracked, low pressure vehicles would be used to traverse sites to prevent damage to lands.*

*☐ Use of tracked vehicles to traverse steep ground.*

*☐ The assessment of temporary access routes allowed for bad weather conditions…Construction sites would not be accessed in storm conditions.*

*For the majority of cases referred to by the observers, I would accept that the applicant was able to demonstrate a viable access to each construction site, guarding location or stringing area. For example, by identifying existing gateways at the public road, existing agricultural tracks that would be followed to access tower sites and existing gaps in hedgerows to allow access between fields. Furthermore, the applicant was able to demonstrate appropriate 'step down' equipment (as described above) for some of the minor access routes proposed and tracked equipment for some of the steep routes proposed."*

133. There follows next a discussion of the fact that access there were alterations to certain of the access routes and consideration of those alterations. Thus, under the heading "*Alterations to Access Routes*", one finds the following text:

*"Notwithstanding the above, during the oral hearing the applicant brought forward a large number of changes to the proposed access routes, with 50 alterations and 23 minor deviations. These are set out in the applicant's submissions to the oral hearing….*

*The proposed alterations are brought forward by the applicant in response to, or as a consequence of the following:*

*a. Issues raised by observers, for example, to make use of existing farm tracks/existing gaps in hedgerows, to avoid banks/fences or structures…*

*b. 'Mapping discrepancies' or 'minor deviations' where the mapped access point differed from the intended point… i.e. the access was incorrectly identified when moved from one scale of map to another.*

*The alterations brought forward under 'a' above would suggest that the survey of access routes was in a number of cases less than robust. Whilst some of this can be explained by a lack of access to lands for survey work, in other cases it arose due to the use of outdated aerial photography and in others because aerial photography could not pick up changes in levels e.g. banks etc. Alterations brought forward under 'b' were generally not substantial. Whilst these were deemed to be mapping anomalies, for an application at an advanced stage these discrepancies are remiss.*

*Whilst the above alterations are made late in the application process, as noted in the section on Legal/Procedural Issues, the applicant is not seeking approval for the temporary access routes. They are simply presented, in an indicative manner, to enable environmental impact assessment. Within this context, the submission of alternative routes to overcome issues raised by observers in response to the application or oral hearing, is acceptable.*

*Furthermore, in bringing forward the alterations to proposed access routes or alternative access routes, the applicant has ultimately demonstrated a viable access route to each tower site, guarding location or stringing area for the entire route corridor. As argued by the observers, it is possible that other issues may arise which prevent use of a proposed access route e.g. a bank or wall which a landowner has not drawn to the Board's attention. However, in these instances, the applicant's construction methodology and principles in respect of the use of access routes can be relied on to assess any environmental effects which may arise. It is considered therefore that the applicant has provided sufficient information in respect of access routes to enable environmental impact assessment."*

134. What one can see in all of the foregoing is the clarity that there was in the inspector's report concerning access routes and that, decidedly, permission was not given and was not purported to be given for the access routes. Under the heading "Summary and Conclusion", many of the points touched upon previously above were considered again in the following terms:

*"The key issues arising in his section of the report [i.e. Section 5, "Planning Assessment"] relate to the ability of the applicant to predict ground conditions and assess the viability of access routes, based on the limited access to lands for survey.*

*It is considered that the applicant has demonstrated that the use of primarily desk top survey work (which includes LiDAR survey), supplemented by walkover survey, shallow augers and vantage point survey where possible, is consistent with the approach taken by the applicant in respect of other electricity transmission projects in the State and is sufficient to predict ground conditions for the design of foundations.*

*It is noted that the methodology adopted in respect of the proposed access routes (which was not subject to LiDAR survey) has resulted in alterations to access routes during the course of the oral hearing. As the applicant is not seeking approval for the proposed access routes, it is considered that this approach is acceptable. Furthermore, it is considered that the applicant has demonstrated a viable access route to each tower site, guarding location or stringing area for the entire route corridor and has set out clear principles regarding the proposed use of access routes for environmental impact assessment, should the indicative routes change."*

135. Further mention of access then appears at 287 et seq., under the headings "*Disruption Arising from the Temporary Use of Access Routes"* and "*Adequacy of Access Routes and Damage to Lands":*

*"As stated in the Construction section of this report it is the applicant's intention to access construction sites, guarding locations and stringing areas via the public road network and the temporary use of existing private access lands/roads which currently provide access to property and lands within the project area. For the farming community, this could*

*mean the temporary use of existing agricultural access tracks within their landholding and the movement of construction traffic through their working farm yards and the movement of vehicles across agricultural land.*

*I would accept in many cases that the use of such tracks, in particular if routed through a working farmyard, could impact on the day to day operation of the farm. However, whilst inconvenient, I am mindful of the applicant's mitigation measures…which include liaison with landowners prior to construction and, as stated in the course of the oral hearing, agreements regarding the use of access lanes to enable farming practices to continue and use of an observer for HGV movements through sensitive sites (including farm yards). I would consider therefore that the shared use of access routes could be managed for the short duration of the construction phase by liaison between the parties to facilitate the on-going operation of the farm….*

*Many landowners draw the Board's attention to the inadequate nature of…some of the proposed temporary routes which the applicant proposes to use, with heavy construction equipment damaging the lane or proposed route, for example surface condition, underlying drains, culverts etc. In addition, having regard to the nature of land within the study area, in particular, typically heavy soils, wet ground conditions and the steep topography of some of the tower sites…the observers argue that construction equipment would also damage agricultural land over which it traverses with long term effects."*

136. However, the inspector notes that in the "*Construction*" section of her report, she had concluded that, having regard to the proposed construction methodology, the applicant had demonstrated that the proposed temporary access routes would be adequate to accommodate the proposed development, the said construction methodology including: use of existing entrances from the public road; use of agricultural scale equipment or 'stepping down' vehicles to match the scale of the access route; means to minimise damage to access lanes/land/vulnerable soils; and proposals to engage with landowners prior to construction works so as to identify concerns and to repair or compensate for any damage caused.

137. Under the heading "*Control of Contractors*", the inspector notes the mitigation elements of the outline construction environmental management plan (CEMP) and observes as follows:

*"The above arrangements are acceptable and consistent with good practice, and should ensure the adherence to mitigation measures. However, I note that the outline CEMP does not refer to the appointment of agricultural liaison officers. I consider that due to the potential for impacts on the farming industry and the importance, therefore, of mitigation measures, I consider that this specific aspect of the development should be further controlled by condition (if the Board are minded to grant approval for the development) i.e. that prior to the commencement of construction the applicant shall appoint an Agricultural Liaison Officer who shall be responsible for liaison with landowners during the construction phase of the project, and thereafter, to identify issues of concern to individual landowners and to agree a detailed methodology for construction, in accordance with the measures set out in the application for approval."*

138. The mooted condition now appears as Condition 2 of the Board's Order, requiring as follows:

*"Prior to the commencement of development, an Agricultural Liaison Officer or Officers shall be appointed and shall be responsible for liaison with landowners, prior to and during the construction phase of the project, to identify and address issues of concern to individual landowners including disease protocols, if relevant, in accordance with the measures set out in the application for approval, and thereafter for the operational phase of the development."*

139. Then, under the heading "*Impact of Temporary Access Routes*", the planning inspector concludes as follows:

*"Having regard to the mitigation measures proposed in respect of the use of temporary access routes (as discussed in the Construction and Traffic sections of this report), it is considered that the use of temporary access tracks to construction sites, guarding locations or stringing areas will not give rise to significant environmental effects on soils, geology or hydrogeology receptors."*

140. Later in the inspector's report, there is consideration of the "*Use of Temporary Access Routes by Construction Traffic*" which it does not seem necessary for the court to consider in detail herein.

*(iii) Question as to Consideration of Access.*

141. One point that arose at hearing is whether, why and when An Bord Pleanála would consider the issue of access at all when access (as here) was not being applied for. In this regard, the court was referred to the decision of the High Court in *O'Grianna & ors v. An Bord Pleanála* [2014] IEHC 632. There, Peart J. found that connection of a proposed wind farm to the national grid was an integral part of an overall development of which the construction of turbines was the first part and, in effect, that by neglecting to undertake an environmental impact assessment in respect of that integral part of the overall development, there had been project splitting which had precluded a cumulative assessment of the likely impact on the environment of the entire project presenting. In the subsequent related case of *Ó Gríanna v. An Bord Pleanála* (No.2) [2017] IEHC 7, An Bord Pleanála had gone on to carry out the cumulative assessment of the wind turbines, wind farm and grid connection. However, the applicants then contended that that further assessment was ineffective and/or inadequate and that any mitigation measures arising were incapable of being effected because the grid connection did not form part of what might be styled 'the permission envelope'. That argument (which is not advanced in these proceedings) was rejected by McGovern J., whose thinking in this regard is perhaps best captured by McGovern J. in his own later decision in *North Kerry Wind Turbine Awareness Group v. An Bord Pleanála & ors* [2017] IEHC 12 where he observes as follows, at para.9:

[T]*here is no necessity that a grid connection must be included in the planning application for the purpose of seeking consent in order for an EIA to be carried out; rather, the EIA requires information on the grid connection to enable a full EIA to be carried out and for the Board to assess the likely significant impact of the wind farm and grid connection as a whole."*

142. Here, access is not integral to the North-South Interconnector project in the same way that the grid connection was perceived by Peart J. in *O'Grianna* (No. 1) to be integral to the project before him. The reason access is not perceived to be integral is because, as counsel for An Bord Pleanála indicated at hearing:

"[I]*n Ó Gríanna the grid connection would have to be built and would have to be there for ever and all time, whereas [here] the access is a very temporary arrangement that will occur for the purposes of construction effectively. I don't think one could necessarily say that it has the same integral nature. Be that as it may the Board did embark on a full EIA*

*of the access insofar as same could have environmental effects."*

143. There will, it seems to the court, likely always be some element of legitimate divergence between professionals, acting in good faith, as to the proper parameters of an environmental impact statement, at least at the outer limits of those parameters; however, as will be clear from the balance of this judgment, the court does not see that any legal deficiency or issue presents in the fact that access was considered by An Bord Pleanála in the case at hand.

*(iv) Complaints about information provided.*

144. In his affidavit evidence, Mr John Fitzgerald, the previously mentioned Director of Grid Development and Interconnection with EirGrid, who avers, *inter alia*, as follows:

> *"It is…patently incorrect for [the applicants' principal witness]…to assert [in her affidavit evidence]…that none of 'the planning documents describe the works or give details of the specification of the works to the 299 separate structures'. On the contrary, the works are extensively described in the documents which were submitted with the application to the Board and which include the Planning Report…the Public and Landowner Consultation Report…and multitudinous references in the EIS…and in the Outline Construction and Environmental Management Plan. I say that, in addition, details were also furnished at the oral hearing in response to each individual landowner who made submissions. 'Development' as defined in the Planning Acts will only be carried out within a corridor of 19 metres in width, save at angle towers where the width extends to 24 metres. In addition, as set out in the application documentation, there are 4 no. tower locations where, due to specific excavation requirements, this standard corridor width is exceeded. The corridor within which the development is to take place is delineated by a red line in the planning application drawings. I reiterate that no new entrances onto the public road are required to be created for the proposed development; rather existing entrances and/or direct access (for example where there is no boundary hedgerow or wall) will be used. In certain limited instances, rubber matting or aluminium road panels will be laid on the ground such as where there are poor ground conditions or sensitive land use. In these cases there will be no excavation or construction works involved. Furthermore, there will be no construction of roads…..*
>
> [The same witness also*]…asserts that the application amounts to an infringement of the constitutional rights of the landowners on whose behalf NEPPC advocates, none of whom have given their consent. However, for the reasons set out in the Statement of Opposition, I am advised by counsel and so believe that NEPPC does not have standing and/or a sufficient interest to advance grounds purporting to arise from alleged breaches of the interests or rights of individual landowners. Moreover, there is no requirement under the Planning Acts or Regulations that an electricity transmission development under section 182A requires the consent of the owners or occupiers of land. In addition, all landowners were extensively consulted with in advance of the making of the application. As a result whereof, and in response to such engagement as did occur, certain pylons were moved and alterations were considered to the proposed temporary access routes in respect of certain landholdings (as was described in the documentation submitted with the application for approval and at the oral hearing). Finally, and again prior to the submission of the application for approval, landowners on whose lands a pylon was to be located were furnished with indicative details of the temporary access routes in respect of those structures. Indeed, such prior consultation is noted in the Inspector's report in the following terms..:*
>
> > *'Consultation with landowners, identified through the PRAI database, took place in phases between 2011 and 2013, with letters to landowners on the 12th December 2013, advising them of the final line design….Subsequently, following a final technical review of the line design, 16 landowners were advised of changes affecting them in March 2015 (changes were made to tower locations not to the route alignment). All landowners were also advised of the proposed application in May 2015 and provided with details of the application in June 2015 (the application was lodged on the 9th June 2016)….*
>
> *Moreover…the Inspector stated:*
>
> > *'…it would appear to me from the documentation on file and oral hearing proceedings, that the applicant has been able to identify the vast majority of landowners along the route and has made significant efforts to engage with them.'*
>
> *…The extent of landowner engagement is detailed in the Public and Landowners Consultation Report…which was before the Board…..*
>
> *It must also be stressed that the access routes are merely temporary access routes required only for the limited duration of the works at any one pylon location. Also, as was noted previously, the EIS also contained a suite of numerous mitigation measures and commitments by EirGrid…which are relevant to individual landowners which involve notification to landowners, addressing the concerns of landowners in advance of any construction works or construction traffic coming onto their land and indeed after the completion of the works. Indeed, such mitigation measures and commitments have now been incorporated as part of the approval granted pursuant to Condition 1(b) attached to the decision to grant approval….*
>
> *I further say that landowners and members of the public were afforded the opportunity to make submissions or observations on any issue which they deemed appropriate and, as noted in the Inspector's report, circa 900 observers made observations, including observations made by Eileen and Maura Sheehy…and on behalf of…[*NEPPC*]. Thereafter, by way of its response document dated 19th October 2015, EirGrid responded to those submissions and observations. Moreover, as a result of EirGrid's consideration of the submissions and observations made to the Board and in response to issues raised by certain landowners, certain modifications were proposed by EirGrid to a number of the temporary access routes….*
>
> [In her affidavit evidence, the same witness for the applicants*]…again addresses the 'red line' boundary issue. As noted above the corridor within which the development is to take place is delineated by a red line in the planning application drawings. It should also be observed that, as set out in the Statement of Opposition, the requirements of the Planning Regulations in relation to planning applications are not applicable to application to an application for approval under section 182A of the 2000 Act. Nonetheless the application complies with the advice contained in the General Guidance note of the Board that applications for strategic infrastructure development should 'generally accord' with the*

*requirements for a planning application set out in the Regulations….*

*It is also asserted by* [the same witness]…*that no details relating to access arrangements were included in the application. This statement is manifestly incorrect. Access arrangements are extensively described in the documentation submitted with the application for approval…as well as indicative access routes for each tower being included in figures with the application. In order to carry out the works for which approval was sought, access to the relevant lands will be required and accordingly temporary access routes were included within the application documentation so as to enable the Board to conduct an EIA of all aspects of the project, whether or not development consent was required for any aspect of the project. In this respect, a total of 584 no. temporary access routes have been identified within the EIS on 1:5000 scale mapping. Modifications to certain of those temporary access routes were presented by EirGrid as part of EirGrid's review of temporary access routes and in some cases, in order to respond to issues raised at the oral hearing, EirGrid presented those modifications on 7 March 2016, 22nd March 2016, 19 April 2016, 26 April 2016 and 10 May 2016….*

*Maps were sent to the landowners affected which show the modified access route on each land holding with the revised section of the access route delineated in purple. These maps and accompanying letters were sent during the course of the oral hearing and landowners were subsequently facilitated to make submissions in respect of these alterations. Further, information on all the alterations to access routes was made publicly available during the course of the oral hearing. Under the heading 'Access Routes'…it was stated as follows:*

> *'In the Board's pre-application meeting with the applicant, the Board advised the then prospective applicant that 'the planning application drawings should indicate access to tower locations for construction and servicing purposes at the point of the public road'.*
>
> *I would also note [the Inspector says] that the Board advised the applicant…in respect of the access to construction towers that drawings 'could be similar to those submitted in the application for the Laois-Kilkenny Reinforcement Project'. Statutory drawings for this project did not identify temporary access routes to tower sites.*
>
> *It was confirmed by the applicant on numerous occasions during the oral hearing that the access roads do not form part of the planning application, but are presented in an indicative manner in order to allow environmental impact assessment of the development. In this context, it would not appear inappropriate that the access routes are omitted from the statutory drawings. The Board can only adjudicate on the application as so presented and, should it transpire at some future date that works constituting development are required to facilitate access, then EirGrid will be constrained by the provisions of the Planning Acts. There is no substantial evidence before the Board at this time that any such works are likely to be required'.*

[The same witness for the applicants, in her affidavit evidence,] *incorrectly asserts that there was 'a lack of any approximate detail' relating to access routes. It is worth emphasising that Part 2 of the oral hearing was entirely devoted to site-specific issues which included temporary access routes. It is clear from an overview of the documentation previously referred to in this Affidavit that the contention that the likely effects of the development are impossible to discern is completely mistaken. Moreover, the viability of the project is underscored by the accepted need for a second North-South interconnector, a summary of which was contained in the Planning Report referred to previously."*

145. Ms Sheehy, the second-named applicant, also made comment, in her affidavit evidence, about the access routes insofar as they affect her property. Mr Fitzgerald touches on those averments in the following way:

> *"At paragraph 4 of her Second Affidavit, Ms. Sheehy refers to two pylons on lands in the ownership of her sister, with whom she resides, and also says that certain planning drawings in respect of the cables are unclear and other matters. Towers 308 and 309 straddle the hedgerow of lands in the ownership of Eileen Sheehy, the sister of Maura Sheehy, with whom she resides….I say and believe that Tower 308 is located approximately 123 metres from the residence of Ms. Sheehy whilst Tower 309 is located approximately 392 metres away. Towers 306 and 307, which are not located on lands belonging to Ms. Sheehy but on adjacent lands, are located at distances of 339 metres and 149 metres respectively from the residence of Ms. Sheehy. Whilst the assertions made by Ms. Sheehy in relation to the planning drawings go to the merits of the application for substantive judicial review as opposed to addressing the issue of the discharge, Ms. Sheehy's contentions in this regard are not accepted by EirGrid."*

146. This is picked up by Mr Fitzgerald, at a later point in his affidavit evidence when he avers as follows:

> *"Insofar as Ms. Sheehy says, at paragraph 4 of her Affidavit, that the application was made without her consent or that of her sister, as noted earlier in this Affidavit, there is no legal requirement for such consent. Furthermore, where a tower or pylon is to be located on a person's lands, the landowner will receive compensation plus an annual interference payment per tower to ensure the landowner is not at a financial loss. In addition, EirGrid has recently established a proximity payment scheme whereby payments are to be made to homeowners within 200 metres or closer to a new line of towers or a new transmission system, and this scheme will apply in respect of the residence shared by Ms. Sheehy….*
>
> *At paragraph 5 of the Affidavit under reply, Ms. Sheehy states that the proposed development will involve a conductor 'within eleven metres of the curtilage' of residence. I say the lands owned by Ms. Sheehy's sister and the distance from the nearest point of the overhead line to her dwelling were* identified [he then gives the map reference]…[on a map] *included…with the documentation submitted to the Board. As appears therefrom, the distance provided in the drawing was 58.4 metres from the nearest point of the residence to the outer conductor and 67.9 metres to the centre line. The Line Route Map…also shows the configuration of the conductors which is clearly explained in the drawing legend information regarding the proposed alterations of the existing line which is located approximately 60 metres from Ms. Sheehy's residence.…*
>
> *In her affidavit, at paragraphs 7 and 8, Ms. Sheehy refers to a number of environmental impacts arising from the proposed development. I am advised and so believe that these are planning matters which were extensively addressed in the documentation submitted to the Board and at the oral hearing convened by the Board and extensively considered*

*in the Inspector's report. I am further advised that it is not appropriate for the Applicants to seek to re-argue such issues in these proceedings, which do not institute an appeal on the merits of the Board's decision….*

*At paragraph 9 of the Affidavit under reply, it is asserted that Ms. Sheehy and her sister are in an uncertain position of not knowing how access to lands will be achieved. However, this statement is incorrect. [Mr Fitzgerald then exhibits certain correspondence sent to Ms Sheehy and continues as per the below]….*

*In relation to the content of paragraph 10 of* [Ms]*…Sheehy, wherein issues are raised in relation to matters such as long-term effects of pylons on machinery, dangers of electrocution and potential for pollution during construction such as through spillages. I say that all of these matters were addressed in very considerable detail in the documentation submitted to the Board on the application and, in particular, in the EIS (and the Outline Construction and Environmental Management Plan appended thereto) and indeed these issues were discussed at length at the oral hearing. As noted earlier, the EIS contains a schedule of mitigation measures and commitments which addresses many of these concerns and these mitigation measures and commitments have been incorporated into the grant of approval by way of Condition 1(b)….Accordingly, Ms. Sheehy is incorrect in her assertion that the conditions of the Board give EirGrid a 'charter of flexibility permitted by agreement to do as they like'. Moreover, given that these matters have been set out in the application documentation, which has been publicly available since June 2015, and that there was a ten-week period in which parties could (and did) make submissions and observations on those matters, followed by a 35-day oral hearing at which these issues were considered, she is incorrect in her reference to affected parties being excluded from the terms of the decision made by the Board to grant approval. Finally, EirGrid does not an accept that a sterile corridor is created by the positioning of the alignment, whether in the manner suggested by Ms.Sheehy or at all….*

*At paragraph 11, Ms. Sheehy refers to the previous application for approval which was withdrawal in 2010. However, as set out in detail in an earlier section of this affidavit, subsequent to the withdrawal of the application, EirGrid engaged in a detailed re-evaluation of the project, which included three round of public and landowner consultation….*

*The characterisation of the oral hearing set out in paragraph 12 of Ms. Sheehy's Affidavit is inaccurate. Insofar as there were modifications to the proposed temporary access routes during the oral hearing, it is important to emphasise again that information on the proposed access routes was included with the application documentation as to enable the Board to conduct the required assessment of all aspects of the project, regardless of whether or not development consent is required for any particular aspect of the project. The proposed access routes do not form part of the development. Therefore, no part of the development was changed in any way in the course of the oral hearing. A total of 584 no. access routes were identified within the EIS. Following submissions to the Board in the period June to August 2015, in relation to temporary access routes, EirGrid carried out a review of certain access routes, and an alternative access route was identified in respect of 6 no. locations, which alternative access routes were identified on Day 1 of the oral hearing (7 March 2016). Subsequently, following the submission of a number of observations to the Board in relation to temporary access mutes, EirGrid carried out a further review of all proposed access routes described within the EIS and, as a result, a number of mapping anomalies were identified. An evaluation was conducted of these anomalies and 19 no. redrawn access routes were presented to the oral hearing on 22 March 2016. As the oral hearing progressed, EirGrid carefully considered the submissions made by landowners and other parties to the oral hearing, and continued to keep the issue of access routes under review. EirGrid considered all potential deviations or mapping discrepancies, whether those issues arose from the EIS access route mapping or the larger-scale landowner mapping. The review process revisited aerial imagery, landowner access mapping and EIS figures with follow-up vantage surveys, as necessary. In this context, EirGrid brought a number of access routes to the attention of the attendees at the hearing in order to enable the Board to assess the modifications proposed to those access routes and those modifications were brought to the attention of affected landowners and were all assessed. Furthermore, and contrary to a statement at paragraph 13 of the Affidavit of Maura Sheehy, none of these modifications involved the creation of new entrances or accesses….*

*The suggestion made at paragraph 14 of the Affidavit under reply that the development has not been properly been properly assessed because of the limitation on access of lands…is completely unfounded and rejected. The Board's Inspector addressed this issue in the following terms:*

> *'The majority of the route is situated on lands classified as improved agricultural grassland i.e. with a uniform land cover. It has been selected to avoid sensitive receptors and to ensure that the siting of the towers etc. minimises potential impacts. The appraisal of the existing environment was not limited to desk top studies as contended by the observers. I would point out to the Board that EirGrid were granted access to c. 25% of the lands and were in a position to conduct visual assessment of another c. 38%, resulting in an assessment of c. 63% in total of the lands along the alignment. The appraisal was assisted by the use of LiDAR (recognised to have a high degree of accuracy), high resolution aerial photography, the use of third party published data sets/on line mapping, vantage point surveys, extended ecological surveys etc., allowing a comprehensive and detailed evaluation of existing environmental conditions to be established.*

*Whilst many of the observers query the efficacy of such measures, and I accept that it was not possible, for example, to obtain the level of detail required to identify specific species types in woodland in the Brittas estate, EirGrid were able to demonstrate the accuracy of the information provided during the various modules of the oral hearing. The Board will note from the various sections of this report the level of detail obtained and presented on the existing environment….Having reviewed the EIS, NIS and all the supporting documentation to the application, the observers' submissions, applicant's response and having considered the matters raised at the oral hearing, I am satisfied that the information is sufficiently detailed and comprehensive to allow the Board to carry out the robust and accurate assessment of the development for the purposes of EIA and EIS."*

147. It is useful at this point to turn to the environmental impact statement and the point at which it sets out an explanation of the locations and terrain relevant to the access routes, stating, *inter alia*, as follows:

*"Temporary access routes capable of accommodating construction plant, construction materials and personnel are required for the construction of each tower, installation of the conductor and the setting up of guarding locations….*

*There are three locations along the proposed route where vehicular access is typically required for construction of OHL:*

☐ *Access to tower sites….*

☐ *Access to stringing locations….*

☐ *Access to guarding locations….*

*Access routes to tower sites enable the deployment of excavators or piling rigs together with foundation materials…and for the removal of excess spoil. For tower erection, approximately 10 tonnes for an intermediate tower to 32.5 tonnes for an angle tower of steelwork will be delivered to each tower location site and erected using a gin/derrick pole….*

*As noted previously, appropriate route and site selection is the most effective method of avoiding or minimising the environmental effects of development….*

*The first part of the identification process is to develop some general principles to guide the decisions about identifying potentially suitable temporary access routes to construct the proposed development."*

148. The general guidelines are identified and the text of the environmental impact statement then continues as follows:

*"Temporary access tracks tend only to be laid where there may be poor ground conditions, a sensitive receptor or sensitive land use….While the terrain of the proposed development is generally undulating with favourable ground conditions likely to be encountered for a vast majority of the proposed route, construction techniques and machinery may vary to accommodate localised ground conditions along specific parts of the route and/or as a result of weather conditions during the construction period. For the purposes of this appraisal, all temporary access routes have been assessed based on very wet weather conditions, expansive construction techniques with heavy machinery/equipment.*

*Details of the alternative types of temporary access route for wet conditions relative to land use, condition and having regard to specific environmental conditions are set out below. It is noted that these are not mutually exclusive in all cases and that a particular temporary access route may incorporate different track types along its length.*

☐ *Type 1.*

*Good quality land…: In general, the laying of temporary tracks is not required. Using tracked machinery (low ground pressure vehicles where possible) usually means that access to tower sites can be achieved with relative ease using existing roadways where available and the crossing of fields.*

☐ *Type 2*

*Relatively dry/peat land or very sensitive areas: Where a defined track is required, temporary rubber matting or aluminium road panels would be used to distribute the weight evenly. Low ground pressure vehicles would also be used where possible.*

☐ *Type 3*

*Very poor, soft, wet boggy and/or undulating land with unfavourable ground conditions: In such conditions roads with stone or wooden sleepers may need to be constructed. This involves the excavation of the topsoil and storage of this to one side of the track. A geotextile reinforcement would be placed on the subsoil surface and stone placed on top and compacted to form the track….*

*Based on the assessment criteria…the vast majority of access routes identified…will be Type 1. The access routes or part of the routes to the following tower locations and associated ancillary works have been identified as Type 2 which potentially require rubber matting or aluminium tracks….Type 3 roads constructed with stone or wooden sleepers will not be required at any of the proposed tower locations, stringing areas or guarding locations, stringing areas or guarding locations."*

149. Over the next number of pages of the environmental impact statement there follows a detailed appraisal of the methodology that will be used.

150. So built into the environmental impact statement, all of which has been assessed, is a very considerable amount of detail which in turn is supplemented by the draft construction management plan, which was also submitted as part of the environmental impact statement. The sheer level of information that was provided and addressed in the course of the development consent process, coupled with the opportunity that was given to anybody who wished so to do, to make submissions in relation to the access routes means that the applicants' contention as to any information deficiency in this regard must fail: the information was there and a proper assessment was duly carried out.

*(v) The Agricultural Liaison Officer/s.*

151. Condition 2 contained in the Board Order provides as follows:

*"Prior to the commencement of development, an Agricultural Liaison Officer or Officers shall be appointed and shall be responsible for liaison with landowners, prior to and during the construction phase of the project, to identify and address issues of concern to individual landowners including disease protocols, if relevant, in accordance with the measures set out in the application for approval, and thereafter for the operational phase of the development.*

**Reason**: *To ensure the satisfactory completion and operation of the development in the context of agricultural activities*."

152. To the extent that there is any suggestion that the creation of the Agricultural Liaison Officer is somehow objectionable, this is

not accepted by the court. The above-quoted condition was suggested by the Inspector and adopted by An Bord Pleanála, not having been proposed by the developer. It does no more than to vest one or more officers with the function of liaising with the landowners, identifying their issues of concerns, and addressing them. It creates a conduit for ongoing engagement. It is not obvious how this could conceivably prejudice anybody, and in point of fact it does not prejudice anybody: rather than being an exclusion from dialogue, the requirement as to the establishment of the role of the said Officer/s involves the landowners in a continuing dialogue concerning matters of importance to them.

*(vi) Boland et al.*

153. It seems to the court that the conditions as to access come within what were referred to at hearing as 'the Boland criteria' as they (the conditions) pertain to matters of detail in the context of the development as a whole. It is as well to pause at this point and deal briefly with the principal case-law to which the court was referred in this regard, being the decisions in *Keleghan and Ors v. Corby and Dublin Corporation* (1976) 110 I.L.T.R. 144, *Houlihan v. An Bord Pleanála* (Unreported, High Court, Murphy J., 4th October, 1993) and *Boland v. An Bord Pleanála* [1996] 3 I.R. 435.

154. At issue in *Keleghan* was an application by the Holy Faith Sisters for the erection of three fabricated classrooms at St Brigid's Secondary School in Killester. The application included plans for access. Those plans for access were not approved but when the permission was granted details were required to be resubmitted for agreement. The case focused on the adequacy of the notice of intention to apply for planning permission (which had made no mention that the issue of access was going to be part of the application). So the *ratio* of the case is not at all on point when one comes to identifying the relevance of *Keleghan* to the within application. However, the court's attention has been drawn to the following *obiter* observation of McMahon J. in the next-to-penultimate paragraph of his judgment:

> *"I think it is better to reserve any decision on the third point made by Mr. Gaffney, namely assuming that the application had in fact been made as it was constructed by the planning authority, to include access or change of user of the land....Whether permission has been validly granted by imposing a condition that details of the access be submitted for agreement, I can see serious difficulties about that from the point of view of planning law. A planning authority is entitled to grant permission, subject to conditions requiring work to be done, but when that is done the planning permission must specify the work to be done, and any person, who thinks he is prejudiced by it, can appeal because he has before him details of the work to be done, but in this case what was granted was permission for access subject to the details to be submitted for agreement. The public would have no knowledge what details were in fact being agreed and no way of appealing against the details agreed between the applicants and the planning authority."*

155. The critical difference, and it is a very significant difference, between the facts at play in *Keleghan* and those here presenting, is that, in *Keleghan*, permission was granted for the relevant access, subject to agreement with the planning authority; here, by contrast, permission for access has neither been sought not granted. A second difference is that in Keleghan the public were to have no knowledge of what details were being agreed; here there is transparency as to what is to be agreed – and what is to be agreed is more detail than substance. So in truth when one gets down to the detail of *Keleghan*, it is, on its facts, far removed from the circumstances at play in the within application.

156. In *Houlihan*, Kerry County Council granted permission for the erection of 22 holiday homes, a reception block and the diversion of a road close by Ballyferriter. Mr. Houlihan objected to the development and an oral hearing was conducted into the application by An Bord Pleanála who granted permission for the development subject to nine conditions. Mr. Houlihan sought and obtained leave to apply for an order of *certiorari* quashing the said decision on a number of grounds. The ground relevant to the within proceedings was that the conditions attaching to the issue of the planning permission by An Bord Pleanála contained so many matters which were to be agreed between the developer and the Council that they could result in a totally different development from that originally sought and that by leaving so many matters to be agreed between the developer and the Council the statutory right of appeal from such decisions had been removed. In the course of his judgment, Murphy J. observes, at 5-7.

> '[T]*he conditions attached to the permission granted by the Board do call for discussion and agreement between the planning authority and the developer on many issues*....[C]*ondition (6) requires that a public access road along the western boundary of the site should be constructed to the requirements of the planning authority. There are, therefore, approximately twelve matters on which the agreement or approval of the planning authority is required before one can say with complete certainty what is entailed in the conditions annexed to the permission granted by the Board. Notwithstanding the number of matters on which agreement is outstanding and the subject matter thereof, counsel on behalf of the Board contends that these are essentially technical matters which in the interests of all parties, that is to say, the developer, the planning authority and the local residents, can and should be delegated by the Board to the local authority and their resolution postponed to a later date. Undoubtedly some degree of flexibility must be left to any developer who is hoping to engage in a complex enterprise. The issue then is whether the nature or quantity of the matters left undefined is such as to render the permission granted invalid. In my view - and as I understand it neither party would disagree - the extent to which flexibility or uncertainty is permissible in a planning permission is largely a matter of degree. I have little difficulty in concluding that the Board was justified in stipulating that the new access road should be completed in accordance with the requirements of the planning authority. Again I take the view, though in this case with a lesser degree of confidence, that the matters stipulated in condition (4)* [which was not concerned with access] *are essentially technical matters or matters of detail, decisions on which could be left to the planning authority and developer without invalidating the statutory decision of the Board. However, it does seem to me that the condition in relation to the effluent discharge mains deals with a matter which is rather more serious and delegates a discretion which is very wide in its scope.'"*

157. So the condition as to access, at least on the facts before him in *Houlihan*, was a condition that Murphy J. appears more wholeheartedly to have embraced than various other conditions that were before him.

158. In *Boland*, application had been made for the extension and refurbishment of the ferry terminal at Dún Laoghaire. The permission was granted with an array of matters being left for agreement with the planning authority. These included such matters as plans for the management of ferry traffic, arrangements for monitoring post-development traffic flows, the new design plans for traffic and egress arrangements, and plans for the carrying out of certain pedestrian works. Mr Boland applied for an order of *certiorari* in respect of the decision of An Bord Pleanála on the ground that the conditions attached to it constituted an improper abdication of its functions to the local planning authority, thus depriving interested parties of an opportunity to be heard. He was unsuccessful in both the High Court and the Supreme Court, Hamilton J. observing, *inter alia*, as follows, at 466-7:

> *"In imposing a condition that a matter be left to be agreed between the developer and the planning authority, the Board is entitled to have regard to:*

*(a) 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;*

*(b) the desirability of leaving technical matters or matters of detail to be agreed between the developer and the planning authority, particularly when such matters or such details are within the responsibility of the planning authority and may require re-design in the light of the practical experience;*

*(c) the impracticability of imposing detailed conditions having regard to the nature of the development;*

*(d) the functions and responsibilities of the planning authority;*

*(e) whether the matters essentially are concerned with off-site problems and do not affect the subject lands;*

*(f) whether the enforcement of such conditions require monitoring or supervision."*

159. In the application now before this Court, the "*limited degree of flexibility",* to borrow from the phraseology of Hamilton C.J. (itself borrowing from the phraseology of Keane J. in the court below) is very limited indeed, because there is already extant here the draft construction and environmental management plan, waste management plan and traffic management plan, all of which, together with the mitigation measures, have to be adhered to in any event. Moreover, the matters to be left over for agreement under Condition 3(c) fall properly to be construed as matters of detail, including, it will be recalled, *"(i) arrangements for stepping down vehicle size, (ii) arrangements for off-loading of materials, (iii) short-term road closures, (iv) the phasing of construction works which are accessed by single lane carriageways, and (v)…arrangements for the transfer and management of concrete, including wash out facilities*." These are clearly but matters of detail in the context of a major development and thus come within the embrace of item (a) in the above-quoted segment of the judgment of Keane J. in Boland (with items (b) and (c) being variations on the theme of detail) and are also justifiable by reference to items (d), (e) and (f).

160. In the course of argument, the court was also referred to the decisions in *Sweetman v. An Bord Pleanála* [2016] IEHC 277, *Dunnes Stores v. An Bord Pleanála* [2016] IEHC 226, and *People over Wind v. An Bord Pleanála* [2015] IEHC 271, [2015] IECA 272, the court's attention being drawn to how the imposition of conditions was treated in those cases as well as to such comments as were made therein regarding the limited role of the court in a judicial review application. The court notes, and has had regard to, those decisions but does not consider that it is necessary to engage in a detailed consideration of them; they merely buttress the court in its assessment of the applicable law, as outlined above.

*(vii) Some Further Observations as to Access.*

161. It seems to the court that the following further observations can be stated as regards the issue of access, some of which have been touched upon above.

162. First, as to the issue of how one can have a condition in relation to access if access is not sought, it seems to the court that the real question is not a 'how' but a 'why', *i.e.* 'why is there a condition for access when access is not sought?' The reason 'why' is because (i) as part of the EIA, An Bord Pleanála looked at access and (ii) for the reasons specified at the end of condition 3 ("*In the interest of protecting the amenities of the area, sustainable waste management, preventing pollution of surface waters, protection of existing habitats, and traffic safety*"), it has seen fit to impose conditions in relation to access – and those conditions are clearly relevant to proper planning and sustainable development. So access is neither sought nor granted; however, the manner in which access can be exercised, if it is obtained, has been restricted, even if (as may prove to be the case) that access transpires to be exempted development. As to the question whether, assuming that one is not dealing with exempted development, the 'right' public have been afforded the opportunity to participate in the planning process (or more exactly whether the public as they exist at any one time have been offered the opportunity to participate at the right time – public views and objections being varying and inconstant) that is something which, it seems to the court, is met through the due application of the full rigours of the applicable approval/permission process at the time when and if access does fall to be sought.

163. Second, the applicants complain that they (and presumably the rest of the public) have been excluded from the process leading to, or emanating from, condition 3(c). But the fact of any (if any) such exclusion is only relevant if it has a particular legal context. Here, the public were entitled to and did participate in the environmental impact assessment process, the public was extensively consulted in relation to the proposed access arrangements (with two rounds of public consultations, even before the application was lodged, and a split oral hearing, the second part of which was devoted to a seriatim examination of each access route and each access point. Some of the amendments and objections and difficulties of the land owners were taken into account during that process and changes made). When matters are viewed in that context it seems to the court that one is far removed from the facts that presented in *Holohan & ors v. An Bord Pleanála* [2017] IEHC 268, a case on which the applicants placed some reliance and which is considered below, with the contention as to exclusion becoming even weaker (to the extent that it has any strength at all, and the court respectfully does not consider that it does) when one recalls that, pursuant to condition 2, as touched upon previously above, one or more agricultural liaison officers are to be appointed who "*shall be responsible for liaison with landowners, prior to and during the construction phase of the project, to identify and address issues of concern to individual landowners",* which concerns will doubtless include issues as to access.

164. Third, it will be recalled that Condition 3(c) of the Board Order provides as follows:

*"Prior to the commencement of the development, a construction and environmental management plan, a traffic management plan and a waste management plan shall be submitted to, and agreed in writing with, the relevant planning authority following consultations with [named] relevant statutory agencies….This plan shall incorporate the mitigation measures indicated in the Environmental Impact Statement and shall provide details of the intended construction practice for the proposed development, including:*

*…(c) site specific arrangements for each temporary access route to include, where necessary:*

*(i) arrangements for stepping down vehicle size,*

*(ii) arrangements for off-loading of materials,*

*(iii) short-term road closures,*

*(iv) the phasing of construction works which are accessed by single lane carriageways, and*

*(v) the arrangements for the transfer and management of concrete, including wash out facilities."*

165. A couple of observations might now be made regarding this condition:

(1) one of the points made by the applicants is that Condition 3(c) is concerned with work/s and development. The court respectfully disagrees. There is no application for such permission, no determination that it is required, and EirGrid holds fast to the position that it is not (the issue does not fall to be resolved by this Court at this time).

(2) Condition 3(c) must be viewed in the light of Condition 1(b) which, it will be recalled, provides as follows:

*"All environmental mitigation measures set out in the Environmental Impact Statement, Natura impact statement, and associated documentation submitted by the undertaker with the application and the further information received by An Bord Pleanála by way of the 'Response to the Issues Raised'... shall be implemented in full."*

The court, in the general observations made at the outset of the within judgment, has noted the extent of the EIS that was a feature of EirGrid's application. The extensiveness and thoroughness of the EIS has, *inter alia*, the following consequence: when the applicants make the argument that Condition 3(c) goes beyond more detail, it is incumbent on them to establish that this is so. As will be clear from those parts of the EIS that the court has considered in its judgment (and these are just a part of a greater mass of most comprehensive text) it is prescriptive, it is detailed, and it has all been assessed in a process into which the public had a right of participation. In such a context it does not suffice for the applicants merely to say 'This goes beyond *Boland*-style detail'. They must show exactly what are the substantive issues that these conditions leave open and, with respect, they have failed to show so. If one looks at items (i) to (v) these seem the almost pernickety details that would classically be left over in the manner in which they have been left over. And if one looks to the types of plan to which reference is made, EirGrid put before An Bord Pleanála detailed draft construction and environmental management, traffic management, and waste management plans which specify various mitigation measures to be taken. These remain as draft plans at this time (apparently because it was not possible to finalise them in advance of the permission) but those protections, as the court understands matters, will be the minimum level of protection going forward.

166. Fourth, the applicants contend that one cannot 'leave over' assessment of environmental effects and that this condition breaches that requirement. First, An Bord Pleanála has expressly determined that it has sufficient information to assess the environmental effects of the project. Second, although sufficiency of such information is a matter for An Bord Pleanála, the court notes again that EirGrid put before An Bord Pleanála detailed draft construction and environmental management, traffic management, and waste management plans which specify various mitigation measures to be taken. So, just by way of example, one finds the following in the inspector's report (under the heading "*Construction Environmental Management Plan*" or 'CEMP'):

*"Dr Tierney (NPWS)* [National Parks and Wildlife Service] *expressed concerns regarding the final CEMP and its preparation by a contractor which may include the resolution of technical details and matters that could influence the nature and significance of the effects of the proposed development on the environment. It was made clear by EirGrid that all elements of the outline CEMP will be included in the final CEMP. It sets the minimum standards that must be achieved to ensure the protection of the receiving environment. Any additional measures that may be incorporated in the final CEMP as a result of conditions will provide at least the same or a better standard of protection. I accept that this is standard practice in construction projects and does not mean that an inferior level of protection will be provided."*

167. So in relation to flora and fauna and then *seriatim* in relation to any other consideration of this issue under any of the other environmental criteria, it is emphasised in each case that the draft plans will be subsumed into the final plans and will provide minimum levels of protection which can be enhanced but will not be diminished.

**XIV. Alternatives**

*(i) Overview.*

168. The applicants contend that An Bord Pleanála has failed to consider alternatives to the proposed development. It will be recalled that at para. 135 of the applicants' written submissions, the deficiencies contended to arise in this regard are as follows:

*"135. The First Named Respondent erred in failing to assess the alternatives to the proposed development, including: (i) failing to properly and comprehensively consider the undergrounding option or partial undergrounding option of the proposed development; (ii) erred in determining that the overhead power line was more appropriate and cost effective when compared to other alternatives, including undergrounding; (iii) had no and/or insufficient regard to the rights of affected landowners and the potential health hazards associated with the overhead lines when assessing alternatives to the project; (iv) failed to ensure that a proper cost/benefit analysis of the proposed development was completed; (v) had no or insufficient regard to alternative interconnectors and PCIs, specifically the First Named Respondent had no regard to the potential alternative interconnector between Ireland and the United Kingdom of Great Britain (including Northern Ireland) namely the Interconnection between Srananagh (IE) and Turleenan (UK)."*

*(ii) The Consideration of Alternatives Undertaken.*

a. Route Alternatives.

169. The EIS sets out the rationale for the various route alternatives considered for the proposed development, how these were evaluated against various environmental constraints and how the preferred route was justified. The inspector, in his report, concludes, *inter alia*, that "*Whilst it is correct to say that the study area and the route corridor remain largely similar to the previous proposal...it is incorrect to suggest that this was accepted as a* fait accompli." The inspector then continues:

*"The review process took place in a series of steps or phases between 2010-2012 resulting in the publication of two reports both of which were subject to public consultation. The first phase culminated in the publication of the Preliminary Re-evaluation Report in May 2011….It consisted of a comprehensive re-evaluation of the previous application, the EIS*

*and supporting documentation, written and oral submissions made to the Board in connection with the previous application and any new information that emerged since its withdrawal.*

*It re-affirmed the strategic need for the development and re-evaluated the study area and the rationale for same. One of the principal considerations determining the original study area was the need to connect to the most robust parts of the transmission systems north and south of the border."*

170. The inspector goes on to state that the Woodland substation in Meath and the planned new substation in County Tyrone were identified as the two most robust points, then continues:

*"The review process revisited the principal assumptions and recommendations of the various studies previously prepared and concluded that no new environmental consideration or other relevant material had arisen in respect of the original evaluation process....Having established that the previously identified study area remained the most appropriate for the routing of the proposed interconnector, previously identified key environmental and other constraints were re-evaluated. New information was also considered including changes in relation to constraints....Baseline data was updated and while minor variations between current and previous findings were identified...it was established that no new constraints information arose….Once key environmental and other constraints were identified, the next stage in the process was the re-evaluation of the previously identified route corridor."*

171. Given that the two book-ends of the proposed development had been identified, the corridor between them was the next stage in the process. Thus, the inspector continues:

*"Addendum reports were prepared to compliment the earlier Route Constraint Reports, providing further analysis of the impacts of each route corridor on the key constraints. It was established that the updated constraints did not have material implications for the locations of the previously identified route corridor options. EirGrid were also satisfied that the process did not result in the emergence of any previously unidentified route corridor of equal or greater merit than those already identified in respect of the previous application….Each corridor option was then evaluated against the identified constraints. The evaluation criteria were reviewed and updated….This route option was evaluated as having the lowest potential for creating long term adverse significant impacts which cannot be mitigated….*

*Phase I of the re-evaluation process concluded with the identification of a preliminary line route for the proposed interconnector within a preferred route corridor, which was considered a viable and environmentally acceptable preliminary indicative line route. The Preliminary Re-evaluation Report which resulted from the process was then subject to public consultation."*

172. The second phase of the review process resulted in the publication by EirGrid, in April 2013, of the "*North-South 400kV Interconnection Development, Final Re-evaluation Report*", which report, like the preliminary report was considered by An Bord Pleanála, as before the court. The inspector continues:

*"It* [the report] *took into consideration the feedback received through the consultation process associated with the Preliminary Re-evaluation report and important documents published in the interim, including the Independent Expert Commission Report….The robustness of the study area was confirmed, following a re-evaluation of the study areas, which included an additional area east of Navan and a straight line option at the request of the Board. No new significant environmental or other constraints were identified and it was concluded that the updated constraints did not have material implications for the previously identified route corridor options. No additional and/or previously unidentified route corridor emerged from the re-evaluation process that was considered of equal or greater merit to those identified route corridors that were considered in respect of the previous application….Corridor Option A in the CMSA* [Cavan Monaghan Study Area] *and Route Corridor 3B in the MSA* [Meath Study Area] *emerged as the overall preferred route corridor within which to route the proposed development. This route option was evaluated as having the lowest potential for creating long-term adverse significant impacts which could not be mitigated....Whilst the preferred route...is broadly similar to the 2009 line route, it is not identical. It incorporates localised modifications….Contrary to the suggestion made by the observers...EirGrid did not seek to rely solely on the information presented in the previous application….[I]t conducted a comprehensive re-evaluation….Much of the data contained in the EIS and associated studies remained relevant to the process of identifying and assessing the main effects....This highly iterative process ensured that the public and other stakeholders had the opportunity to engage and feed into this process….I accept that the re-evaluation process conducted by EirGrid is clear, unambiguous and comprehensive."*

173. As to the alleged failure to consider other route options, the inspector observes, *inter alia*, as follows:

*"It is clear that the consideration and evaluation of the various route options is an involved process, which has taken place over a considerable period of time. It is too simplistic to assume that the line can be routed in a particular way, or, away from a particular area, without having due regard to the complexities that surround the evaluation process. The merit of each of the individual route corridors has been assessed in the EIS against a plethora of environmental, technical and other constraints. It is clear that there are environmental constraints associated with each option and the aim of the evaluation process is to find the most appropriate balance (or 'best fit') between the various technical, environmental and other evaluation criteria. The geographic positioning of the development is influenced by the strategic need...to connect into robust points on both transmission systems and the desire to seek the shortest environmentally and acceptable route between those connection points. The route alignment put forward for this application has been assessed against viable alternatives and found to be the most acceptable solution."*

174. There has been suggestion by the applicants that not enough consideration was given by EirGrid to an Interconnector route that would go via Srananagh, County Sligo to Turleenan, County Tyrone, instead of by way of the intended Woodland-Turleenan route. This criticism appears to derive from the fact that both Commission Delegated Regulation (EU) No. 1391/2013 and the 2015 Regulation refer, when it comes to clusters of electricity projects on the island of Ireland refer to both the Srananagh-Turleenan and the Woodland-Turleenan routes. However, any concern in this regard appears to the court to have been allayed by Mr John Fitzgerald, the previously mentioned Director of Grid Development and Interconnection with EirGrid who avers, *inter alia*, as follows in his affidavit evidence:

*"In respect of the other project referenced [in the European Union legislation]… namely Srananagh (IE) and Turleenan (UK), I say that the Srananagh/Turleenan (via South Donegal) project (also known as RIDP 1) was identified following a set of studies carried out by EirGrid and NIE to identify solutions to facilitate a connection of existing levels of renewable*

*generation in Co. Donegal and the north and northwest of Northern Ireland. PCI status was sought because the project was cross-border in nature and had the potential to bring benefits to both jurisdictions. However, I say that whilst EirGrid was a promoter for the inclusion of Srananagh-Turleenan in the PCI List, that project was never promoted as an alternative to Turleenan-Woodland high capacity inter-connector….*

*At all events Chapter 5 of Volume 3B of the EIS considered Route alternatives and set out at Section 5.2.1.1 Broad Study Area Alternatives for a Second Interconnector, including Option 3: Western Study Area, based on a new 275kV transmission line between substations at Coolkeeragh, Co. Derry, and the then planned 220kV station at Srananagh, County Sligo. However, as set out in Volume 3B, it was found that the Srananagh node would not facilitate the level of transfer capacity required due to overloads on neighbouring 110kV circuits. Moreover, there were also transient stability limitations associated with the western option. Accordingly, having considered an interconnector interlinking the Northern Ireland transmission system with the EirGrid transmission system at Srananagh, it was concluded that any option terminating in Srananagh would not provide the required transfer capacity to Northern Ireland, including a line from Turleenan. It should be noted as the Srananagh 220kV node has only one high-capacity link (to Flagford 220kV station), issues of the same magnitude would arise with either a line terminating (there) or directly connected into Flagford station…..*

*The development of the Renewable Integration Development Project is only possible once the North South Interconnector is completed. This is because the North South Interconnector creates a duplicate high-capacity interconnector to the existing interconnector…with the necessary capabilities to commit the Irish and Northern Irish networks to securely connect and benefit from each other. The RIPD 1 does not provide these capabilities and is not alternative to the North South Interconnector.…*

*The need for the RIPD 1 project is to enable the export of renewable power from Donegal and west of north western Northern Ireland to other parts of the island. The RIPD 1 project was envisaged to achieve this with three elements. A new extra-high capacity circuit from Donegal…and another from western Northern Ireland back to the nearest extra-high capacity network stations in the Irish and Northern Irish networks (Srananagh and Turleenan) formed the first two elements. The third element is a circuit (at 275kV) that links the terminating stations in Donegal and Western Northern Ireland…across the border. This third element is required to provide an alternative path for the renewable power to be exported following the loss of either of the first two elements….*

*Subsequently, when addressing SEA-related issues in her report, the Inspector stated:*

> *'It is contended in the submissions that the statutory process is flawed due to the failure to carry out SEA level on the application and various plans and programmes which set out the framework for the project. Reference is made in the submissions to the Renewable Energy Directive [and]…the National Renewable Energy Action Plan. During the oral hearing Mr. Hillis also referred to the regional Integrated Development Plan'….*

*As outlined above, it is clear that the 'need' identified cannot not be realise from the RIDP 1 (Srananagh-Turleenan) project. In short, a circuit developed in a western study area will not provide the necessary capacity to address the identified (and accepted) need. The North- South interconnector project (Woodland - Turleenan) on its own is sufficient to address this need or 'bottleneck'. The RIPD project will ultimately provide additional capacity in counties Donegal and western counties of Northern Ireland to connect generation into the transmission network - a need which the North South interconnector project cannot achieve. Accordingly, as the needs addressed by the two projects do not 'address the same bottleneck' and cannot be competing projects, and the North South interconnector is not dependent on RIPD, the two projects are not placed in either 'a cluster of interdependent PCIs' or 'a cluster of competing PCIs'….*

*Moreover, as the level of generation in Donegal and western counties of Northern Ireland does create an 'uncertainty around the extent of the bottleneck', in this instance, the market…will ultimately determine if RIDP1 is required. In which case, both projects, and not just the second North South Interconnector project may progress."*

175. What is clear from the foregoing is that in no sense was (or indeed is) the Srananagh-Turleenan route an alternative to the Woodland-Turleenan route. That would, with respect, be like saying that the M50 motorway is an alternative to the M6 motorway; of course, they are both motorways, but they are not alternatives to each other in terms of what they can actually achieve. That simple point being so, i.e. the fact that the two interconnector routes are not alternatives, the decision of the High Court in *Holohan*, when it comes to alternatives, and a decision on which the applicants have sought to place some reliance, is, with respect, of no relevance.

*b. Consideration of Technology, including Undergrounding.*

176. Any fair review of the abundant material which is before the court and was before the Inspector discloses that EirGrid gave exhaustive consideration to the feasibility of undergrounding in a number of different guises and respects. Consideration was given to the option of an entire AC undergrounded interconnector. That presented acute technical issues. It considered a complete DC option which would have involved interposing into this part of the grid, which is AC, a DC component of significant length. It considered a partial undergrounding solution – a specific report on this question was requested by An Bord Pleanála and provided. It looked at undergrounding along the local road network, along the M3, and along a disused railway line. All of these alternatives were considered by EirGrid not to be suitable on a variety of different grounds, some concerning cost, others being more technical issues. The AC connector was not a feasible alternative because it would not be compatible with good utility practice. Undergrounding using the DC cable was not in accordance with good utility practice but was also costly. And when it came to partial undergrounding solution there were a range of environmental issues presenting. These issues, each of them the subject of comment in varying degrees by observers in the course of the written submissions were addressed by EirGrid in its responses and agitated at the oral hearing also. A useful summary of the issues presenting this regard is to be found in the affidavit evidence of Mr John Fitzgerald, in which he avers, *inter alia*, as follows:

*"As is clear, and contrary to the assertions made [in certain affidavit evidence furnished by the applicants]…EirGrid considered both an entirely undergrounded option and a partial undergrounded option….*

*By way of summary*, [the] *consideration of alternatives, including undergrounding options, comprise*[d] *the following: (a) extensive consideration by EirGrid of the undergrounding option as part of the project re-evaluation process which followed the withdrawal of the previous application in 2010; (b) specifically commissioned reports in respect of undergrounding in particular the PB Power reports and other reports which were included with the planning application in*

*volume 3B of the EIS; (c) the EIS volume 3B which addressed undergrounding and/or partial undergrounding; (d) EirGrid's 'Response to the Issues Raised in Submissions and Observations' document dated 19 October 2015 which, inter alia, addressed submissions relating to undergrounding; (e) the partial undergrounding report…which was produced in response to request from the Board; and (f) evidence at the oral hearing as part of the alternatives module and throughout the oral hearing in response to specific submissions relating to undergrounding….*

*In the latter respect, alternatives were discussed in Module 1.6 (Consideration of Alternatives) on 15 and 16 March. At the oral hearing both Mark Norton and Aidan Geoghegan responded on behalf of EirGrid to the submissions made, refuting any suggestion that EirGrid had not fully assessed the underground option. The issue of alternatives, including undergrounding, was also raised by individual landowners in Part 2 of the oral hearing and EirGrid responded to those submissions. The Inspector's Report deals with Alternatives at section 5.4. Alternative transmission technologies, undergrounding using AC cable, undergrounding using a DC cable, undergrounding under the local road network, the M3, a disused railway and partial undergrounding were all addressed as were alternative tower designs including monopole support structures. The inspector's report concludes:*

> *'I accept, following the comprehensive re-evaluation process undertaken by the applicant, that the Board can be satisfied that EirGrid has justified the final line design as the optimum solution to meet the overall objectives of the development, having regard to strategic and environmental constraints and the technical requirements for the proposed development.*
>
> *Following the consideration of alternative transmission and technology alternatives, I accept that it has been comprehensively demonstrated that the only way to meet the strategic and technical need for the proposed development is to provide and new and physically separate high capacity interconnector.*
>
> *I accept, having regard to the strategic importance of the proposed interconnector as part of the all-island transmission network, the lack of strong interconnection between Ireland and Northern Ireland and the overwhelming need for reliability and security of supply in terms of the all-island electricity market, that notwithstanding the alternatives considered and the advancements in technology, on balance it would appear that the most appropriate and cost effective technology to satisfy the requirements of the proposed North-South Interconnector development is an overhead high voltage alternating current power line.'"*

177. The material that was relied upon by the inspector in this regard and that was before her was extensive. The court seeks briefly to identify that material hereafter.

178. First, in the EIS, under the heading "*Specific Studies Commissioned by the Respective Applicants on Alternative Transmission Documents*", the following text appears:

> *"The respective applicants have worked together over many years to jointly consider and assess the various technological alternatives available for the proposed second interconnector. In order to ensure that the development process was fully and properly informed with respect to the available technological alternatives (notwithstanding the initial presumption that OHL would represent a superior solution and that an acceptable OHL route could be identified for the proposed interconnector) the respective applicants jointly commissioned five studies to evaluate potential transmission alternatives specifically for the proposed interconnector. The main objective of the studies was to inform both companies about the latest available alternative transmission technologies, and also to assist the on-going consultative and planning processes relevant to the overall project as applicable to elements being proposed within each jurisdiction….*
>
> *Four of these studies were informed by specific data on the actual technical characteristics of the transmission systems within each jurisdiction on the Ireland and by reference to the geographic locations and prospective routes applicable to the required transmission circuits. The studies were:*
>
> ☐ *The PB Power Preliminary Briefing Note (…2008)….*
>
> ☐ *The PB Power Study (…2009)….*
>
> ☐ *The TEPCO study (…2009)….*
>
> ☐ *The TransGrid Study (…2009)….*
>
> ☐ *The PB Power Technology and Costs Update (…2013)".*

179. A five-page table follows, headed "*Reports on Alternative Transmission Technologies Commissioned Jointly by the Respective Applicants*" and comprising sections headed "*Report Title*", "*Context of Report*" and "*Main Findings/Observations of Report*". All of these various documents and others were before the inspector and considered. Indeed, as the court considers the documentation that went before the inspector, it is apparent that any suggestion that the proposed North-South Interconnector Project was assessed solely on a cost basis – although certainly it was assessed, *inter alia*, on a cost basis – is patently not correct. Technical (including environmental) considerations were to the fore of the proceedings and deliberations of the inspector and hence, subsequently, An Bord Pleanála.

180. When it comes to the issue of alternative transmission technologies, the inspector was informed by a number of reports examining the technology alternatives available for the proposed development, including by reference to the wider European context, the inspector observing in her report, *inter alia*, as follows, under the heading "*European experience":*

> *"I accept that different projects require different solutions. EirGrid accepts that the DC option is feasible, but rejects it on the grounds of technical and cost considerations. Having regard to the significant technological advances made and which continue to be made in technology, the Board may wish to seek specific expert opinion on the current feasibility of integrating a HVDC system into the existing AC meshed network* [something that EirGrid had said was not possible]. *However, having taken into considerations all of the arguments made, the strategic importance of the proposed interconnector as part of the all-island transmission network, the lack of existing strong interconnection between Ireland*

*and Northern Ireland and the overwhelming need for reliability and security of supply, on balance it would appear that the technology currently best suited to satisfy the requirements of the proposed North-South Interconnector development is an overhead high voltage alternating current power line."*

181. The court ends where it starts: any fair review of the abundant material which is before the court and was before the Inspector discloses that EirGrid gave exhaustive consideration to the feasibility of undergrounding in a number of different guises and respects and the inspector's assessment and conclusion, and the order of An Bord Pleanála, were and are founded on this exhaustive analysis.

c. Cost-Benefit Analysis.

182. The alleged failure of EirGrid to conduct a proper cost-benefit analysis of the proposed development is also considered by the inspector. There is discussion as to how much more expensive undergrounding would be than over-grounding, the inspector eventually concluding as follows in this regard:

*"I accept, following the comprehensive re-evaluation process undertaken by the applicant, that the Board can be satisfied that EirGrid has justified the final line design as the optimum solution to meet the overall objectives of the development, having regard to strategic and environmental constraints and the technical requirements for the proposed development.*

*Following the consideration of alternative transmission and technology alternatives, I accept that it has been comprehensively demonstrated that the only way to meet the strategic and technical need for the proposed development is to provide a new and physically separate high capacity interconnector.*

*I accept, having regard to the strategic importance of the proposed interconnector as part of the all-island transmission network, the lack of strong interconnection between Ireland and Northern Ireland and the overwhelming need for reliability and security of supply in terms of the all-island electricity market, that notwithstanding the alternatives considered and the advancements in technology, on balance it would appear that the most appropriate and cost effective technology to satisfy the requirements of the proposed North-South Interconnector development is an overhead high voltage alternating current power line."*

*(iii) Some Legal Issues Presenting.*

183. It is difficult in the confines of a judgment to do justice to the extensive consideration of alternatives that has been undertaken by EirGrid, as assessed thereafter by the inspector. Suffice it for the court to note that in its consideration of alternatives, EirGrid has clearly gone above what the EIA Directive requires. Article 5(3)(d) of the EIA Directive requires a developer to set out "*an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects."* Nowhere in the EIA Directive is there any language which requires or suggests that the rigours of an EIA have to take place with regard to alternatives that are discounted.

184. Here, the applicants contend that there should be a full assessment (in terms of an environmental impact assessment) of all rejected alternatives. But this is not what the EIA Directive requires. It clearly states that a proposed development should be assessed for its likely significant effects on the environment. It states that to enable the competent authority so to do, information has to be provided. But this information is not required to comprise a statement of the likely significant effects of alternatives that are studied and discounted but rather, as referred to above, "*an indication of the main reasons for his choice, taking into account the environmental effects."* If the same assessment was required for alternatives as is required for the proposed development, the EIA Directive would have said this, and it does not. Whether the obligation contended for by the applicants is to be read into the EIA Directive by reference, say, to the precautionary principle or the rules of interpretation of European Union law will be the subject of welcome enlightenment by the CJEU following the reference made to it in *Holohan*. But for now the court prefers to proceed by reference to the unvarnished wording of the EIA Directive and sees naught in European Union law that requires it to do otherwise. Support, in domestic precedent, for the reading of the EIA directive that is being adopted by the court in this regard is to be found in the decision of MacMahon J. in his, if the court might respectfully observe, customarily helpful judgment in *Klohn v. An Bord Pleanála* [2009] 1 I.R. 59, the import of which is that a developer is under no obligation to describe the full range of likely significant effects of options which have been fully discounted on objective and transparent grounds. And there is, it seems to the court, much to recommend such an approach. After all, the choice for a competent authority is not between a development as proposed and a development as not proposed, but rather as to whether or not it should consent to a proposed development in light of an understanding of the likely significant effects of same on the environment. To the extent that the applicants contend, if they contend, that the most environmentally friendly option must be put forward or chosen, this does not appear to be what European law requires. As A-G Kokott observes in her Opinion in Case C-420/11, *Leth v. Republik Österreich,* para. 42, "[T]*he EIA Directive does not preclude the implementation of a project even in the case where the environmental impact assessment establishes that there are significant negative effects on the environment*."

## XV. Health Impacts

*(i) Electric and electro-magnetic fields.*

185. Among the points contended for by the applicants at the hearing of the within application were the alleged deficiencies presenting in terms of the assessment of health impacts. Again, it is necessary to turn to the detail of the inspector's report to assess the contentions made in this regard. Turning then to that report, one finds under the heading "Health Service Executive" ('HSE') the following text:

*"Electromagnetic Fields*

*Based on the weight of research in the field, the HSE is satisfied that as long as the development complies at all times with the international exposure limit guidelines as established by the* INCIRP [the International Commission on Non-Ionizing Radiation Protection], *there will be adequate protection for the public from any electromagnetic field sources",*

and, later again, after touching on an alleged association between proximity to overhead lines and childhood leukaemia, the inspector observes as follows:

*"Following the publication in 1979 of an epidemiology study by Wertheimer and Leeper that suggested an association*

*between childhood cancer and proximity of the children's homes to powerlines, numerous epidemiology studies have been published. These studies investigated many health outcomes, in both adults and children, including cancer and non-cancerous diseases such as heart disease, and reproductive effects.*

*By the turn of the millennium independent review bodies were carrying out weight of evidence reviews of the ELF EMF* [electric and magnetic field] *health research literature. These included the World Health Organisation (WHO) and the EU organisations. In 2001, the International Agency for Research on Cancer (IARC) carried out such a review. As an agency of the WHO, which is considered the primary organisation for cancer risk assessment, it regularly and systematically reviews various physical and chemical agents and exposure scenarios, to determine their potential for carcinogenicity in humans.*

*The IARC classification of ELF EMF in the 2B category as 'possibly carcinogenic to humans' was heavily influenced by two pooled analyses that combined and analysed data from available childhood leukaemia epidemiological studies. Whilst the pooled analyses showed a statistical association, it did not provide any support for a carcinogenic effect. This classification implies that the reported association was considered credible but causality was not established….*

*The second and most comprehensive weight of evidence review of both cancer and non-cancer health outcomes and ELF EMF exposure has been conducted by the WHO, which published its Environmental Health Criteria (EHC) report on ELF EMF in 2007. The EHC report confirmed the earlier conclusion of IARC about the limited evidence from epidemiological studies of childhood leukaemia and ELF EMF and inadequate evidence from in vivo studies. The EHC report did recognise the statistical association between childhood leukaemia and exposure to high levels of magnetic fields, but could not rule out the possible effect of other factors... on these results. For all other cancers... the evidence does not support an association with ELF EMF.*

*The third review of note was conducted by the Scientific Committee on Emerging and Newly Identified Health Risks (SCENIHR). It is the European Union's scientific committee….*[Its reports] *did not confirm the existence of any adverse health effects.*

*In Ireland in the same year, the Department of Communications, Marine and Natural Resources…assembled an expert group that also reviewed the evidence on ELF EMF and health effects. The conclusions of this group were consistent with those of the EHC* [that being the World Health Organisation report]….

*[T]he paper by Draper et al (2005) is one of the reports most commented on by the observers….I note that that Brunch et al., 2014 updated and extended the previous report by Draper and it reported no overall association with residential proximity to 132kV, 275kV and 400kV power lines for leukaemia or any other cancer among children. The statistical association with distance that was report in the earlier study was not apparent in the extended analysis.*

*There is also frequent reference by the observers to another report which supports an alternative view….the Bio-Initiative Report 2007.*

*[The Bio-Initiative Report]…has been heavily criticised by heavily independent and governmental research groups for its lack of balance and rigorous evaluation of the scientific evidence. It was not sanctioned by any professional or scientific organisation. The review did not follow the weight of evidence approach and the conclusions were not developed as consensus opinions, but were the opinions of individual authors. The 'evidence' is contrary to previously mentioned weight of evidence reviews, such as the WHO (2007) and SCENIHR (2009)…and (2015)….*

*The conclusions reached in the report are in line with the conclusions of the SCENIHR in its 2015 Opinion and it re-affirms the overall conclusions of the 2007 Expert Group commissioned by the Irish Government. It concludes that based on current findings, the evidence for the various potential long-term health effects of exposure to ELF with strengths below the limits in the European recommendation is limited or inconsistent.*

*In response to the argument made by Dr. P. O'Reilly... I would point out to the Board that the Council of the European Union has recommended limits on the strength of EMF to which members of the general public may be exposed. These recommendations are based on guidelines* [from the ICNIRP]….

*The European recommendation is not legally binding but has been adopted by the Commission for Energy Regulation. EirGrid is required to comply with the EU/ICNIRP limits to ensure both the protection of the health, safety and welfare of its staff and the general public. There is no suggestion in the application that the proposed development will be developed other than in compliance with the guidelines. With regard to siting of powerlines, the proposed development is routed away from towns and major centres of population, through rural countries with low population densities".*

186. The inspector's summary conclusion on the above-mentioned issues is as follows:

"[T]*he relevant scientific literature has been repeatedly and systematically reviewed by a number of international and national health, scientific and governmental agencies, all of which conclude that the available evidence does not confirm the existence of any health consequence from exposure to ELF EMF. The proposed development will be designed and operated to comply with ICNIRP guidelines to ensure protection of public health."*

*(ii) Childhood leukaemia.*

187. The inspector then moves on to consider the alleged "Increased risk of childhood *leukaemia*" that the proposed pylon-focused North-South Interconnector project is contended to present, the inspector noting, *inter alia*, as follows:

*"Several…studies are documented in the EIS and in [the] applicant's response…none of which establish a statistically significant or causal relationship between childhood leukaemia and residential proximity to power lines….*

*In conclusion, while epidemiological research carried out over an extended period has shown some association between long term exposure to ELF magnetic fields from high voltage overhead power lines and an increased prevalence of childhood leukaemia, the health effects are unproven. The relationship fails to show how long lasting exposure to ELF magnetic fields from power lines actually causes an increase in childhood leukaemia, i.e. causality has not been established. I would point out to the Board that it is the view of the ICNIRP that 'the currently available existing scientific*

*evidence that prolonged exposure to low frequency magnetic fields is causally related with an increased risk of childhood leukaemia is too weak to form the basis for exposure guidelines. In particular, if the relationship is not causal, then no benefit would accrue from reducing exposure'".*

*(iii) Other cancers.*

188. The inspector then moves on to consideration of the alleged "*Increased risk of other cancers*", observing, *inter alia*, as follows:

> *"The potential health effects of ELF EMF fields on various cancers has been researched. To date, there is insufficient evidence for a relationship between exposure to ELF magnetic and electric fields and adult cancers."*

*(iv) Non-cancerous diseases.*

189. As to the alleged "*Increased risk of other non-cancerous diseases",* the inspector makes, *inter alia*, the following observations:

> *"Potential links with various reproductive outcomes such as miscarriage and low birth weight have been extensively studied. Research by SCENIHR did not show an effect of ELF EMF on the reproductive function in humans."*

*(v) Children with Autism.*

190. When it comes to the issue of alleged "*Impacts on children with Autism*", the inspector, after noting that particular over-ground cable will be replaced with under-ground cable to allay the concerns arising in respect of a particular family, then continues as follows:

> *"Dr Hogan (EirGrid) noted that the WHO guidelines are health based and are designed to protect the most vulnerable, which would include individuals with ASD [autism spectrum disorder]. He reiterated that noise levels for the proposed development had been calculated and that not alone is it in compliance, but is significantly below the guideline level. He hoped this would provide some level of comfort to the observers….*
>
> *The question is whether the OHL [overhead lines] will make the situation significantly worse. He said the WHO guidelines do consider sensitive individuals and for something like noise, one has to consider those with ASD as most sensitive. The WHO levels are set very low and the levels that will be experienced will be below those values."*

*(vi) Compliance with the ICNIRP Guidelines.*

191. Certain observers at the hearing conducted by An Bord Pleanála raised issues regarding electromagnetic exposures on their property. In this regard, the inspector observes, *inter alia*, as follows:

> *"Mr Geoghegan (EirGrid) confirmed two surveys were undertaken by EirGrid in 2010 and 2013. The surveys were carried out at various locations*....[T]*hese surveys confirmed that the fields measured were extremely low, relative to the levels set down in the INCNIRP and EU Guidelines."*

192. At a later point, under the heading "*Other matters",* the inspector notes that among the views urged on her by counsel for one of the objectors at the hearing which preceded her report was the suggestion "*that the hearing should be advised independently by experts on the effects of electromagnetic fields*". However, the inspector did not consider this necessary: "*Having regard to the substantial information available to the Board on this topic the reviews from scientific agencies including the updated opinion from the SCENIHR and the…report commissioned by the Government and published in 2015, I do not consider that this course of action is warranted".*

193. The inspector then moves to her conclusion regarding the issue of electromagnetic fields, stating as follows:

> *"Ireland has adopted the 'precautionary principle' by adopting the internationally recognised standards and guidelines for both occupational and public exposure to electromagnetic fields.*
>
> *The proposed development will be designed and operated to comply with international exposure limit guidelines for EMF as established by ICNIRP.*
>
> *Significant research has been carried out and published opinions consistently find that exposures to EMF does not represent a health risk if the exposure remains below the existing limits set by the European Council's recommendations.*
>
> *There are currently no epidemiological studies published on autism to support a link with EMF.*
>
> *Various studies have been carried out in different scenarios on the impacts on pacemakers and other medical devices and none suggest significant evidence of interference from high voltage lines.*
>
> *Current evidence does not confirm the existence of any health consequence from exposure to ELF EMF. Similarly, there is no evidence that proximity to high Voltage power lines on crop production or quality."*

194. The foregoing is a succinct summary of the abundant evidence that was put to An Bord Pleanála through its planning inspector and her report, which evidence itself is itself backed up by even more abundant evidence that includes, in the environmental impact statement, a lengthy section devoted specifically to the analysis of health risks, which chapter is engaged with in detail in the portion of the report touched upon above. The environmental impact statement itself cross-refers to some 250 medical texts that are listed in an appendix to the environmental impact statement. So it is not only difficult for the applicants convincingly to make (and the court does not in any event accept) the contention that appropriate matters were not assessed by An Bord Pleanála, or that An Bord Pleanála did not have adequate material before it to meet a conclusion broadly akin to that which its inspector had previously reached.

**XVI. The Whooper Swan**

195. In his oral submissions, counsel for the applicants made reference to the Whooper Swan, a large swan that winters in Ireland. The court must admit to some surprise that the issue of the Whooper Swan was raised at all at hearing. This is because there is nothing in the statement of grounds about the Whooper Swan. So, to that extent, its fate is simply not part of the application at hand. Second, insofar as counsel referred to the portions of the inspector's report which deal with the whooper swan, he did not, with respect, point to any deficiency or alleged deficiency in the manner in which impact on the Whooper Swan was assessed. Third, Condition 6 of the Board Order makes provision as regards whooper swans and provides as follows:

> *"Prior to commencement of development, the undertaker shall agree a monitoring programme for the Whooper Swan with the relevant planning authority following consultation with the National Parks and Wildlife Service. The monitoring programme shall be based on standard good practice and shall include details in relation to location, frequency, duration and methodology. A copy of the results of the monitoring programme shall be submitted to the relevant planning authority and to the National Parks and Wildlife Service.*
>
> **Reason** - *To ensure appropriate monitoring of the impact of the development on Whooper Swans."*

196. Insofar as any point was made about this condition, the point appears to be that including a requirement for a monitoring programme must have as a logical premise that the assessment which preceded the imposition of such condition has been deficient in some manner. Perhaps the best way to answer this complaint is by referring to the rationale offered in the inspector's report (under the heading "*Monitoring*") as to the inclusion of such a condition, *viz*:

> *"The DAHG* [Department of Arts, Heritage and Gaeltacht] *suggest that in order to confirm the effectiveness or otherwise of the mitigation measures and to provide a greater understanding of the frequency of bird collision events with overhead lines, a targeted monitoring programme should be undertaken.*
>
> *EirGrid have responded positively to such a proposal. The monitoring programme proposed will include mortality surveys at high risk areas carried out fortnightly to assess the number of fatalities arising from collision….It will also include [inter alia] flight activity monitoring surveys….These will provide information on any spatial or temporal shifts in bird abundance and distribution relative to baseline data. It will also determine whether additional sites require vantage point monitoring for flight activity based on any changes in the distribution of key species and whether additional mitigation is required.*
>
> *There is no centralised database for collision data and the monitoring proposed by EirGrid will be advantageous in terms of accumulating information on bird movements, collision risk and the effectiveness or otherwise of the bird diverters. Should the Board be minded to grant approval for the development, I recommend that a condition be attached requiring an operational monitoring programme in accordance with the requirements of the DAHG."*

197. When one has regard to the just-quoted text, it is apparent that the reason for including Condition 6 is not because there has been inadequate assessment prior to imposition of Condition 6, but rather with a view to ascertaining the ongoing effectiveness of the mitigation measures, and ascertaining whether or not further surveys might be required or further mitigation measures required.

**XVII. Closing Submissions**

198. The court turns now to deal with a number of matters that were the subject of especial focus in the closing stages of the hearing of the within application.

*(i) Section 182B(10)(f).*

199. Section 182B(10) of the Act of 2000 provides, *inter alia*, as follows:

> *"In considering under subsection (1), information furnished [under s.182B(1)] relating to the likely consequences for proper planning and sustainable development of a proposed development in the area in which it is proposed to situate such development, the Board shall have regard to…*
>
> *(f) the provisions of this Act and regulations under this Act where relevant."*

200. Does the above-quoted provision have the effect of importing, *inter alia*, the requirement as to landowner consent that one finds in Art. 22(2)(g) of the Planning and Development Regulations (S.I. No. 685 of 2006) whereby, a planning application must be accompanied by, *inter alia*, "*where the applicant is not the legal owner of the land or structure concerned, the written consent of the owner to make the application*"? Three points might be noted in this respect:

> (1) section182B(10) requires the Board merely to "*have regard to…*", no more – and certainly not 'slavishly to adhere to...';
>
> (2) when referring to "*the provisions of this Act and regulations under this Act where relevant*", the Oireachtas presumably intends to refer, *inter alia*, to regulations that apply to the application, not to regulations that do not apply… and so not, say, to Art.22(2)(g). The court does not read s.182B(10) as rendering applicable that which is not.
>
> (3) section 182B(10) commences "*In considering under subsection (1), information furnished [under s.182B(1)]…".* If one returns to s.182B(1), the information required to be considered by An Bord Pleanála is identified there and one simply cannot extrapolate from the provision there made an obligation to provide landowner consent.

*(ii) Ordinary and legal intent.*

201. The court has touched previously above on the phrase "*intends to carry out development*" which appears in s.182A of the Act of 2000. But in his closing submissions counsel for the applicants touched upon a point which had not previously been focused, *viz*. whether there is a distinction between 'intending to do something' and 'legally intending to do something', with the latter being the intent applicable in the within context, extending only to something which, as a matter of certainty, one can achieve using powers and abilities within one's own absolute control. The court respectfully does not accept the purported distinction arising between intent and legal intent, a proposition which is not supported by authority. But apart from the absence of authority, it is an interpretation which makes little sense when one has regard to the customary meaning of the word 'intent', being a determination to do something. A person may intend to do things which are contingent on a finite or infinite number of potential contingencies, but the

existence of those contingencies does not compromise the fact or integrity of that person's intent. In truth, the court sees in this line of contention as to ordinary and legal intent but a further attempt to carry home the notion that for EirGrid to proceed with the North-South Interconnector, it must first have landowner consent. But that notion has been examined at some length by the court previously above, by reference to the applicable legislative scheme, and respectfully rejected by it.

*(iii) 'Brexit' as an issue of need.*

202. Counsel for the applicants, in his closing submissions, appeared somewhat to re-cast the 'Brexit' issue touched upon previously above as an issue pertaining to need. The issue of 'Brexit' as originally tended to the court has been addressed comprehensively elsewhere above and the court does not propose to re-visit same. As to need, that is an issue that has been comprehensively touched upon in the planning inspector's report, and the court understands there to be no issue to be taken with the assessment of need *per se*, but rather with the alleged fact that 'Brexit' is a need issue and that need ought to have been assessed in the context of same. But there is not a jot of evidence before the court by reference to which the court could properly conclude that 'Brexit' has impacted on need in any way. The truth is that changes occur in economic and/or political circumstances all the time. Those changes do not mean that there is an obligation on planning or other authorities to re-assess every assessment which has transpired simply because of the possibility, no matter how remote, that there may be an impact on aspects of the matter that they are addressing, notwithstanding that nothing has actually occurred which can be identified as having a concrete impact.

*(iv)* Vires.

203. Another point touched upon freshly in the closing submissions of counsel for the applicants was a *vires* point, being that conditions which involve matters being addressed with local authorities, *e.g.*, a condition such as Condition 3(c), are impermissible where approval is sought under Section 182B. To address this it is necessary to return to return to applicable statute and contrast the manner in which conditions are addressed under s.34 of the Act of 2000 with the approach adopted in s.182. Section 34 of the Act of 2000 provides, *inter alia*, as follows:

> *"(1) Where –*
>
> *(a) an application is made to a planning authority in accordance with permission regulations for permission for the development of land, and*
>
> *(b) all requirements of the regulations are complied with,*
>
> *the authority may decide to grant the permission subject to or without conditions, or to refuse it….*
>
> *(4) Conditions under subsection (1) may, without prejudice to the generality of that subsection, include all or any of the following…[a long and wide range of conditions follow]….*
>
> *(5) The conditions under subsection (1) may provide that points of detail relating to a grant of permission may be agreed between the planning authority and the person carrying out the development; if the planning authority and that person cannot agree on the matter the matter may be referred to the Board for determination."*

204. The position under s.34 falls to be contrasted with that which pertains under s.182B, sub-section (5) of which provides as follows:

> *"The Board may, in respect of an application under section 182A for approval of proposed development–*
>
> *(a) approve the proposed development,*
>
> *(b) make such modifications to the proposed development as it specifies in the approval and approve the proposed development as so modified,*
>
> *(c) approve, in part only, the proposed development (with or without specified modifications of it of the foregoing kind), or*
>
> *(d) refuse to approve the proposed development, and may attach to an approval under paragraph (a), (b) or (c) such conditions as it considers appropriate."* [Emphasis added].

205. To borrow a colloquialism, it seems to the court to be 'comparing apples and oranges' to say, in effect, 'Under s.34 there is express facility to impose conditions of the kind now in issue; however, there is not like provision in s.182B and so the imposition of conditions such as Condition 3(c) is not possible'. The generality of the power that An Bord Pleanála enjoys under s.182B(5)(d) to impose conditions must and does encompass a power to enable An Bord Pleanála, subject to the Boland criteria, to impose, as it did, conditions such as Condition 3(c) involving the agreement of points of detail with *"the relevant planning authority".*

*(v) Which Routes Were Approved?*

*(The 'Yellow and Purple' Issue)*

206. Counsel for the applicants, in his closing submissions, advanced the argument that the decision of An Bord Pleanála, by approving "*the proposed development*" only relates to the (yellow) access routes as originally presented and does not encompass the (purple) routes as modified during the course of the hearing before the inspector. To test that line of argument, the court proposes to return to the inspector's report and trace through exactly what was determined by the inspector and how that is reflected in the impugned decision of An Bord Pleanála.

207. Turning then to the inspector's report, she concludes her section on the proposed construction methodology with the following observations:

> *"The key issues arising in this section of the report relate to the ability of the applicant to predict ground conditions and assess the viability of access routes, based on the limited access to lands for survey.*
>
> *It is considered that the applicant has demonstrated that the use of primarily desktop survey work (which includes LiDAR*

*survey), supplemented by walkover survey, shallow augers and vantage point survey where possible, is consistent with the approach taken by the applicant in respect of other electricity transmission projects in the State and is sufficient to predict ground conditions for the design of foundations.*

*It is noted that the methodology adopted in respect of the proposed access routes (which was not subject to LiDAR survey) has resulted in alterations to access routes during the course of the oral hearing. As the applicant is not seeking approval for the proposed access routes, it is considered that this approach is acceptable. Furthermore, it is considered that the applicant has demonstrated a viable access route to each tower site, guarding location or stringing area for the entire route corridor and has set out clear principles regarding the proposed use of access routes for environmental impact assessment, should the indicative routes change.*

*The remaining technical sections of this report assess the environmental effects of the indicative access routes and the environmental effects of the proposed construction methodology for the use of these."*

208. There follows an "*Alterations Table in Respect of Access Routes to Towers, Guarding Locations or Stringing Areas*" identifying the changes which have occurred, and there is in the report considerable reference to the modifications. However, it is as well to pause and assess what the inspector is in fact saying in the above text. The historical sequence of events is that the maps furnished by EirGrid had access routes marked in yellow on them; a number of changes occurred and a suite of maps was produced bearing a purple dot which showed the revised access routes. Viewed in that context, what the inspector is saying is that the developer has demonstrated in respect of each tower, a viable access route to same, and that based on the information the inspector has been given in relation to the access routes (original and varied) she is in a position to conduct an environmental impact assessment, which she then does in the ensuing sections of the report. (And in this context it is perhaps worth noting that an environmental impact assessment is an iterative process, *i.e.* it is a process which includes the environmental impact statement, the submissions made on the strength of same, the responses to those submissions and, of course, and the forum for public participation which is afforded by way of a public hearing and in which, in this case, the alterations (the purple lines) were clearly considered).

209. Later still, in the "*Reasons and Considerations*" section of her report, the inspector writes as follows:

*"Whilst it is recognised that the proposed development will result in a limited number of localised impacts, having regard to the identified strategic need for the development, the routing and detailed design of the alignment to avoid environmental constraints, it is considered that subject to compliance with the mitigation measures set out in the EIS, the NIS and the response document and the conditions set out below, the proposed development would be in accordance with the proper planning and sustainable development."*

210. The inspector then makes her recommendation (being "*that approval for the development be granted, subject to the conditions set out below*"), following which she identifies the range of considerations to which she has had regard arriving at her conclusion and recommendation. In this regard, the inspector refers to all the documentation on file, including, *inter alia*, the environmental impact statement and the Natura impact statement, "*and the submissions and observations made in respect of the application, including at the oral hearing"*. One cannot read this text and then properly arrive at the conclusion that the inspector (whatever about An Bord Pleanála) has ignored the routing modifications and has failed to have regard to them in framing her conclusion and her suggested conditions. Among those suggested conditions are a proposed Condition 5, *viz*:

*"Prior to the commencement of development, a construction management plan, a traffic management plan and waste management plan shall be submitted to, and agreed in writing with, the relevant planning authority following consultations with relevant statutory agencies, including Inland Fisheries Ireland and the Department of Arts, Heritage and the Gaelteacht and Irish Water. This plan shall incorporate the mitigation measures indicated in the environmental impact statement, and any others deemed necessary, and shall provide details of intended construction practice for the proposed development, including…*

*(c) site specific arrangements for each temporary access route, to include, where necessary:*

*(i) arrangements for stepping down vehicle size,*

*(ii) arrangements for off-loading of materials,*

*(iii) short-term road closures,*

*(iv) the phasing of construction works which are accessed by single-lane carriageways,*

*(v) the arrangements for the transfer and management of concrete, including wash-out facilities."*

211. The temporary access routes to which reference is made in the just-quoted text can only be the varied temporary access routes which the inspector has just assessed.

212. What then of An Bord Pleanála? Despite the planning inspector having assessed, *inter alia*, the varied temporary access routes, did An Bord Pleanála in its order close its mind to those variations and return to the original proposed temporary access routes? In the "*Reasons and Considerations*" segment of its order, An Bord Pleanála states as follows under the heading "*Matters Considered*":

*"In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included the submissions and observations received by it in accordance with statutory provisions."*

213. The court notes in passing the reference to "*included*", rather than 'included and were limited to…'.

214. Under the heading "*Reasons and Considerations*", An Bord Pleanála then moves on to indicate that it had regard, *inter alia*, to

*"all documentation on file including:*

*(a) the environmental impact statement,*

*(b) the Natura impact statement,*

*(c) the joint environmental report,*

*(d) the submissions and observations made in respect of the application, including at the oral hearing*, [and]

*(e) the applicant's response to the submissions received".*

215. So those are the 'channels of information' to which regard was had by An Bord Pleanála in reaching its decision and formulating its conditions. Later, under the heading "*Environmental Impact Assessment*", An Bord Pleanála indicates that it has considered, *inter alia*:

> "☐ *the submissions from the planning authorities, prescribed bodies and from the observers in the course of the application, including submissions made to the oral hearing;*
>
> ☐ *the applicant's response to the submissions received; [and]*
>
> ☐ *the Senior Planning Inspector's report and recommendation dated the 14th day of November, 2016",*

and continues:

> *"The Board considered that the environmental impact statement supported by the 'Response to the Issues Raised in the Submissions/Observations' document, identifies and describes adequately the direct and indirect effects of the proposed development on the environment….*
>
> *In doing so the Board adopted the report of the Senior Planning Inspector."*

216. Thereafter, the conclusions are recorded, which conclusions, of course, overlap with the conclusions reached by the Inspector. And then, after all these matters are listed, An Bord Pleanála states as follows:

> *"In conclusion, it is considered that, subject to compliance with the conditions set out below, including compliance with the mitigation measures set out in the environmental impact statement, the Natura impact Statement and the 'Response to the Issues Raised in the Submissions/Observations' document, the proposed development would be in accordance with the proper planning and sustainable development of the area."*

217. Then comes the "*Conditions*" section, with a Condition 3(c) that precisely replicates the inspector's proposed Condition 5, as quoted above.

218. Despite all of the foregoing and notwithstanding the assessment by the inspector, notwithstanding the clarity as to the temporary access routes to which she was referring, notwithstanding the fact that An Bord Pleanála adopts, in relation to the environmental impact assessment, the inspector's report, notwithstanding the fact that An Bord Pleanála refers to and had regard to all documentation on file, notwithstanding that An Bord Pleanála refers to and had regard to the submissions made at the oral hearing, notwithstanding all of the foregoing, the court is asked to believe that the Board addressed its order to temporary access routes frozen in time for no apparent reason, notwithstanding the process of assessment which had been undertaken and notwithstanding the specification by the developer of what the modified routes actually were. That, with respect, is a remarkably difficult construction to place on the decision and not one that the court places upon it.

## XVIII. *Jus Tertii*

219. The thrust of the within judgment, which is not at all favourable to the applicants, is such that the issue of *jus tertii* (in effect the pleading of the rights of a third party) is not of the significance that it might otherwise have been. Be that as it may, the court considers that (i) while, in broad terms, the applicants have standing to bring the within proceedings, (ii) when the court has regard to the observations as to standing made by Henchy J. in *Cahill v. Sutton* [1980] I.R. 269, 283, as applied in the context of judicial review applications in *Lancefort Ltd. v. An Bord Pleanála* (No. 2) [1999] 2 I.R. 270, it does not see that either of the applicants, neither of them being landowners, has the requisite standing to make such claims as were made in their pleadings and submissions concerning allegedly affected landowners. That, to borrow from the phraseology of Henchy J., seems to the court to be a near-classic example of allowing "*one litigant to present and argue what is essentially another person's case".*

## XIX. Closing

220. Few if any of us would welcome the news that a great line of electricity pylons and linking wires was due to be erected on or across property that we chanced to own or otherwise enjoyed. The applicants to these proceedings, living in a beautiful part of Ireland and enjoying some of the best of the Irish countryside, understandably object to the fact that the North-South Interconnector development, as proposed, is to be built upon their properties, by their homesteads, or across their townlands. But when it comes to the decision of An Bord Pleanála, on 19th December last, to grant approval to EirGrid for the proposed North-South Interconnector development, the court, for the reasons identified in the preceding pages, is coerced as a matter of law into concluding that there is no lawful basis presenting that would justify it granting any of the reliefs that the applicants now seek. It follows that all of the reliefs sought by the applicants at this time must be and are respectfully refused by the court.