Neutral Citation: [2017] IEHC 171

**THE HIGH COURT**

**[2016 No. 785 JR]**

**PEOPLE OVER WIND AND PETER SWEETMAN**

**Applicants**

**– and –**

**COILLTE TEORANTA**

**Respondent**

**JUDGMENT of Mr Justice Max Barrett delivered on 16th March, 2017.**

**I. Overview**

1. The applicants seek to challenge a determination of Coillte dated 14th July, 2016, made pursuant to Art. 42 of the European Communities (Birds and Natural Habitats) Regulations 2011 (the 'Habitats Regulations') whereby Coillte determined that grid connection works to connect Cullenagh Windfarm to the ESBN substation at Abbeyleix Road in Portlaoise did not require a Stage 2 Appropriate Assessment. The applicants seek, *inter alia*, an order of *certiorari* quashing the determination and a declaration that the determination was 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. L206/7 22.07.92) (the 'Habitats Directive') and the jurisprudence of the Court of Justice of the European Union and of the European Court of Justice. The possibility of a reference to the CJEU under Art. 267 TFEU has also been mooted.

2. The essence of the applicants' case is that (i) the grid connection works, either on their own, or as part of the overall Cullenagh Windfarm project require a Stage 2 Appropriate Assessment on the basis that the grid connection works, individually or in combination with other plans or projects, are likely to have a significant effect on a European Site; (ii) Coillte erred in taking mitigation measures into consideration when carrying out a Stage 1 Screening Assessment in respect of the grid connection works; and (iii) the mitigation measures proposed were not clearly defined and do not form part of any enforceable development consent.

3. By contrast, Coillte maintains that the impugned determination complies with the requirements of Art. 42 of the Habitats Regulations and Art. 6(3) of the Habitats Directive and that, on the basis of the outcome of the Stage 1 Screening Assessment, there was no requirement to progress to a Stage 2 Appropriate Assessment. Coillte also maintains that mitigation measures, in the form of protective measures which have been applied at the design stage of a proposed development and which form an integral part of the design can be taken into account in the Stage 1 Screening Assessment.

4. As can be seen, the issue of whether or not mitigation measures can, as a matter of law, be considered at the screening stage lie centre-stage in terms of the resolution of the application at hand.

**II. Article 6(3) of the Habitats Directive**

(i) Some General Principles.

5. Article 6(3) of the Habitats Directive provides, inter alia, as follows:

> *"Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives."*

6. By way of amplification on this portion of Art. 6(3), the court has been referred in argument to the opinions of the Advocates General and the decisions of the CJEU in the *Waddenzee and Sweetman* cases. (Cases C-127/02 and C-258/11). It seems to the court that the following principles can be identified from the text of Art. 6(3) and from those opinions and decisions:

> (1) There are three 'trigger requirements' that prompt the need for an appropriate assessment pursuant to Art. 6(3): (1) there has to be a plan or project; (2) it must be a plan or project that is not directly connected with or necessary to the management of the site; (3) it must be plan or project which is "*likely*" to have a significant effect on the site. (Text of Art.6(3)).
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> (2) The term "*likely*" when used in Art. 6(3) does not involve that degree of probability which the ordinary English usage of the word involves. All that is required is that there must be a possibility that there may be a significant effect. (*Sweetman*, AG Sharpston).
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> (3) One does not get through to the appropriate assessment stage unless there has been a conclusion in the screening (Stage 1) assessment that the test as to likelihood of significant effect is satisfied. (*Waddenzee*, CJEU).
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> (4) The threshold at the first (screening) stage of Article 6(3) is "*a very low one*" (*Sweetman*, AG Sharpston).
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> (5) The requirement that the effect be "*significant*" exists in order to law down a de *minimis* threshold. Plans or projects that have no appreciable effect on the site are excluded. (*Sweetman*, AG Sharpston). (It appears to follow that plans that have an appreciable effect on the site are included).
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> (6) The decision as to the possibility of significant effect must be decided on a case-by-case basis. (*Waddenzee*, AG Kokott/CJEU).
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> (7) A risk of significant effect exists if it cannot be excluded on the basis of "*objective information*" that the plan or project will have significant effects on the site concerned. (*Waddenzee*, CJEU).
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> (8) The phrase used by the CJEU in Waddenzee is "objective information", not 'scientific evidence' or 'scientific knowledge'. Those latter terms are not employed by the CJEU in respect of the screening for appropriate assessment stage. (Nor, it might be noted, does the decision of the Court of Appeal in *People Over Wind, Environmental action Alliance Ireland v. An Bord Pleanála* [2015] IECA 272 seek to import such a requirement into the screening for appropriate assessment stage).

(9) In case of doubt as to the absence of significant effect, an appropriate assessment must be carried out. (*Waddenzee*, CJEU).

(10) The CJEU's use in *Waddenzee* of the term "*case of doubt*" echoes but, notably, does not mirror the term "*reasonable doubt*", as used by AG Kokott in her preceding Opinion. What the CJEU appears to the court to have meant to refer to in this regard is doubt the basis for which is capable of being reasoned, and which, in that limited sense, is 'reason-able', but no more.

(11) It would seem to apply as a matter of logic that the more endangered a species, the easier it must be to cross the "*very low*" threshold set by Art. 6(3).

(ii) Mitigation Measures.

a. Overview.

7. One key question not answered in the European case-law to this point is whether mitigation measures can be considered as part of a screening for appropriate assessment. Those bodies and courts that have considered matters have come up with a variety of responses that are considered below.

b. The Approach of the European Commission.

8. The approach to screening contemplated and endorsed by the European Commission to date in its non-legally binding guidance is that effective mitigation of all the adverse effects of a proposed plan/project can only take place once all of those effects have been fully recognised and assessed. Then, and only then, can one determine rationally what type and levels of mitigation are appropriate. Thus in its publication "*Assessment of plans and projects significantly affecting Natura 2000 sites*" (2001) (referred to hereafter as the 'EU Methodological Guidance'), the European Commission states as follows, at para. 2.6:

> *"Project and plan proponents are often encouraged to design mitigation measures into their proposals at the outset. However, it is important to recognise that the screening assessment should be carried out in the absence of any consideration of mitigation measures that form part of a project or plan and are designed to avoid or reduce the impact of a project or plan on a Natura 2000 site. The proponent's notion of effective levels of mitigation may vary from that of the competent authority and other stakeholders. To ensure the assessment is as objective as possible the competent authority must first consider the project or plan in the absence of mitigation measures that are designed into a project. Effective mitigation of adverse effects on Natura 2000 sites can only take place once those effects have been fully recognised, assessed and reported. It will then be for the competent authority, on the basis of consultation, to determine what type and levels of mitigation are appropriate."*

c. The Approach of the Department of Housing, etc.

9. Closer to home, in late-2009, under its previous guise as the Department of the Environment, Heritage and Local Government, the Department of Housing, Planning, Community and Local Government published guidance for planning authorities entitled "*Appropriate Assessment of Plans and Projects in Ireland*". As ever with such guidance, it does not purport to be anything more than one government department's assessment of applicable obligations; however, it offers insightful analysis by the government department that is most directly involved in the environmental arena and therefore merits serious consideration. At p.27 of this document, in a chapter entitled "*The AA Process*" the Department observes as follows under the heading "*Stage 1. Screening for Appropriate Assessment*":

> *"Screening is the process that addresses and records the reasoning and conclusions in relation to the first two tests of Article 6(3):*
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> *i) whether a plan or project is directly connected to or necessary for the management of the site, and*
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> *ii) whether a plan or project, alone or in combination with other plans and projects, is likely to have significant effects on a Natura 2000 site in view of its conservation objectives.*
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> *If the effects are deemed to be significant, potentially significant, or uncertain or…[if] the screening process becomes overly complicated, then the process must proceed to Stage 2 (AA). Screening should be undertaken without the inclusion of mitigation, unless potential impacts clearly can be avoided through the modification or redesign of the plan or project."*

10. This guidance appears to the court to be consistent with the EU Methodological Guidance. The only difference between the two appears to be that the Department of Housing, *etc*. takes the view that where potential effects can clearly be avoided through the adoption of a particular mitigation measure, that measure can be counted in the screening, presumably on the basis that if something is simply never going to happen, then there is no point in treating it as an effect. There is of course a profound distinction between an avoidance measure and a mere mitigation measure.

d. The Approach of the United Kingdom Courts.

11. In the United Kingdom, a number of High Court judges have taken a directly contrary view to that adopted, for example, by the European Commission in the EU Methodological Guidance as regards the relevance of mitigation measures when a screening assessment is conducted. The principal judgment in this area appears to be that of Sullivan J. in *R. (Hart District Council) v. Secretary of State for Communities and Local Government and others* [2008] EWHC 1204 (Admin), with later United Kingdom judges adhering to his logic. (See, for example, the decisions of the High Court of England and Wales in *R. (Long) v. Monmouthshire County Council v. Optimisation Development Ltd* [2012] EWHC 3130 (Admin), *Feeney v. Secretary of State for Transport and ors* [2013] EWHC 1238 (Admin) and the decision of the Northern Ireland High Court, another court of the United Kingdom, in *Alternative A5 Alliance's Application for Judicial Review* [2013] NIQB 30).

12. Whether *Hart* is, strictly speaking, a case on point is open to question in that it was a case which, on its facts, was concerned with what amounted to avoidance measures. However, Sullivan J., in his judgment, expressed an opinion on mitigation measures also,

and given that the entirety of his judgment is but persuasive authority in an Irish court, it matters less than it would, for example, in an English court, whether such views as he expressed in *Hart* as to mitigation measures were obiter or not. Perhaps the critical observation of Sullivan J. in *Hart* occurs at para. 54 when he observes that when it comes to Art. 6(3), "*avoidance or mitigation measures forming part of the plan or project can, as a matter of law, be considered at the screening stage*". The court moves on to consider the judgment of Sullivan J. in greater detail later below. However, it is worth pausing at this juncture to consider how *Hart* has been received in Ireland to this point.

e. The Approach of the Irish Courts.

13. It has been suggested before this Court that the reasoning of Sullivan J. in *Hart* has, to borrow a colloquialism, been incorporated 'lock, stock and barrel' into the Irish legal system in the years since *Hart* was decided, such that it is a matter of settled law in Ireland that avoidance or mitigation measures forming part of a plan/project can, as a matter of law, be considered at the screening stage. Three principal cases have been referred to by counsel in this regard, *viz. Rossmore Properties Limited and anor v. An Bord Pleanála and ors* (Unreported Preliminary Judgment, High Court, Hedigan J., 28th August, 2014; there is also a related application for leave to appeal at [2014] IEHC 557), *Ratheniska Timahoe and Spink (RTS) Substation Action Group v. An Bord Pleanála* [2015] IEHC 18, and *Carroll v. An Bord Pleanála* [2016] IEHC 90. The court does not see that any of these cases represent an unqualified endorsement by the Irish High Court of the reasoning in *Hart*. Specifically:

> – the two judgments of Hedigan J. in *Rossmore* are concerned with "*intrinsic*" mitigating measures. So, for example, in his preliminary judgment, Hedigan J. refers, at 18, to where a mitigating factor is "*an intrinsic part of the work to be carried out*". And in his later judgment on leave for appeal he refers, at para. 6, to the mitigation measures before him as having been "*an intrinsic part of the work to be carried out*", and to the position "*where mitigation measures are an intrinsic part of the project in question*". The *Oxford Online Dictionary* defines the adjective "*intrinsic*" as meaning "*belonging naturally; essential*". It is difficult to conceive that many mitigation measures would belong naturally, or be essential, to a particular plan/project; given that the definition of the verb 'to mitigate' in the *Oxford Online Dictionary is "to make (something bad) less severe, serious or painful*", it would seem almost inherent to the nature of a mitigating measure that it is generally what might be described as an 'add on' to a plan/project proper; at best, "*intrinsic*" mitigating measures are a sub-set of mitigating measures as a whole. So Hedigan J.'s carefully worded judgments in *Rossmore*, with their repeated references to "*intrinsic*" mitigating measures cannot properly be perceived as, for they do not in truth involve, the wholesale incorporation into Irish law of the quite sweeping conclusions reached by Sullivan J. in *Hart*. In truth, the effect of the judgments in *Rossmore*, having due regard to the careful vocabulary deployed therein, appears relatively limited.
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> – the decision in *Ratheniska* contains, at para. 130, the entirely obiter observation, on a point touched upon in the statement of grounds but never referred to in submissions, that a particular assumption as to the "*prevention*", (i.e., to borrow again from the *Oxford Online Dictionary, "the action of stopping of something from happening*") of any deterioration of water quality was not "*irrelevant or irrational*". This does not seem to the court to be so very far removed from the observation in the Department of Housing, *etc.* guidelines, referred to previously above, that where potential effects can clearly be avoided (nullified) through the adoption of a particular mitigation measure, that measure can be counted in the screening; after all, if something is simply never going to happen, then there would appear to be no point in treating it as a possible significant effect.
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> – *Carroll* is not a case on point: it was concerned with a screening for appropriate assessment that Fullam J. found was not required by law to be conducted and so is a case on the conduct of a screening not required by law, and thus contains no observations binding on this Court when dealing with a screening that is required by law.

f. The Reasoning in *Hart.*

14. The approach of the European Commission and the Department of Housing, *etc.* diverges from that taken by Sullivan J. in *Hart*; and, regardless of the correctness of the overall result in *Hart*, and with every respect to a rightly respected judge, it seems to this Court that it is possible to raise reasonable questions as regards certain of the reasoning adopted, and various of the conclusions reached, in that case.

15. In general terms, four key observations might be made:

> (1) the reasoning of Sullivan J. would appear to sit uneasily with the Opinion of AG Kokott in *Waddenzee*, para. 71, that "*In principle, the possibility of avoiding or minimising adverse effects should be irrelevant as regards determining the need for an appropriate assessment*".
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> (2) the approach taken in *Hart* relies on the decision of the Court of Appeal in England and Wales in *R. (Catt) v. Brighton & Hove City Council* [2007] EWCA Civ. 298. Notably, however, the decision in Catt related to screening for environmental impact assessment (EIA); the Habitats Directive takes a more precautionary approach than that adopted in the EIA context; and a question-mark arises as to whether it is entirely proper to import EIA-related case-law directly into the rather different context of determining whether mitigation measures should be counted in screening for appropriate assessment done within the penumbra of the Habitats Directive.
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> (3) the approach adopted in *Catt* could perhaps be criticised as being, in any event, overly subjective in determining the significance of screening.
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> (4) the approach taken in *Hart* could ultimately limit the role of public participation in a manner not consistent with the Habitats Directive if mitigation measures were to be incorporated into project design so as to circumvent the need for full appropriate assessment and thus avoid the obligation for public notification.

16. Turning to certain specific observations in *Hart*, Sullivan J. observes, for example:

> (i) at para. 55, that "*If certain features (to use a neutral term) have been incorporated into that project, there is no sensible reason why those features should be ignored at the initial, screening, stage merely because they have been incorporated into the project in order to avoid, or mitigate, any likely effect on the SPA.*" It might, perhaps not unreasonably, be suggested that "*sensible reason*" is offered by the European Commission in the EU Methodological Guidance, at para. 2.6 when it observes that "*The proponent's notion of effective levels of mitigation may vary from that of the competent authority and other stakeholders. To ensure the assessment is as objective as possible the*

*competent authority must first consider the project or plan in the absence of mitigation measures….Effective mitigation of adverse effects on Natura 2000 sites can only take place once those effects have been fully recognised, assessed and reported."*

(ii) at para. 56, that "*No authority is given for the proposition in para. 2.6 of the Methodological Guidance that 'the screening assessment should be carried out in the absence of any consideration of mitigation measures that form part of a project or plan and are designed to avoid or reduce the impact of a project or plan on a Natura 2000 site'*. It might, perhaps not unreasonably, be suggested that the European Commission does offer some comfort as to the logical rationale for its guidance in its statement, at para. 1.1 of the EU Methodological Guidance, that "*The development of this guidance is based upon research carried out on behalf of the European Commission's Directorate-General for the Environment….This research drew upon a review of existing literature and guidance in the EU and worldwide, and the experience gathered through case study material where assessments similar to those required by the directive have been carried out."* So the guidance is based on scientific analysis, it is both considered and measured, and it comes with the imprimatur of the European Commission, something not lightly to be dismissed.

(iii) at para. 56, that "*If the screening assessment should consider all of the other components or characteristics of the proposed plan or project, why should a particular component or characteristic be ignored because it has been incorporated into the project as a mitigation measure?"* It might, perhaps not unreasonably, be suggested that this question is answered by way of the logic offered by the European Commission at para. 2.6 of the EU Methodological Guidance.

(iv) at para. 56, that "*No support for the proposition in para. 2.6 of the Methodological Study can be found in the EC's interpretation guide for Art.6: 'Managing Natura 2000 sites. The provisions of Article 6 of the Habitats Directive 92/43/EEC'*". It might, perhaps not unreasonably, be suggested that (I) the EU Methodological Guidance is an elaboration upon the matters addressed in the interpretation guide (which guide is referred to in the EU Methodological Guidance as 'MN2000'); (II) while the EU Methodological Guidance states, at para. 1.1, that "*MN2000 is the starting point for the interpretation of the key terms and phrases contained in the habitats directive and nothing in this guidance should be seen as overriding or replacing the interpretations provided in MN2000*", the EU Methodological Guidance is a complementary and supplementary publication that comes with the imprimatur of the European Commission and is not to be deprecated merely because in providing supplementary and complementary guidance it makes reference to an aspect of matters that was not expressly touched upon (though neither is it contradicted by) the interpretation guide.

(v) at para. 57, that "*In Waddenzee the ECJ did not consider mitigation measures since none were put forward, and there is nothing in the court's judgment which might suggest that mitigation measures forming part of a project should not be considered at the screening stage*". It might, perhaps not unreasonably, be suggested that if, as is the case, the CJEU in *Waddenzee* did not consider mitigation measures since none were put forward, then the decision of the CJEU in *Waddenzee* cannot be seen either as authority for or against what the European Commission propounds in para. 2.6 of the EU Methodological Guidance.

(vi) at para. 61 as follows: "*As a matter of common sense, anything which encourages the proponents of plans and projects to incorporate mitigation measures at the earliest possible stage in the evolution of their plan or project is surely to be encouraged. What would be the point, from the proponents' point of view, of going to the time, trouble and expense of devising specific mitigation measures designed to avoid or mitigate any effect on an SPA, and incorporating those proposals into the project, if the competent authority was then required to ignore them when considering whether an appropriate assessment was necessary?"* It might, perhaps not unreasonably, be suggested that: (1) the Habitats Directive is not about the "*proponent*" and what best suits it, but about the biodiversity of our natural environment and what best suits all; (2) Sullivan J., relying on his perception of "*common sense*", may be introducing a fresh policy objective into the Habitats Directive which does not feature in that legislation as adopted, this fresh objective being that "*anything which encourages the proponents of plans and projects to incorporate mitigation measures at the earliest possible stage in the evolution of their plan or project is surely to be encouraged*"; (3) the European Commission offers good reason in the EU Methodological Guidance, para. 2.6, as to why a screening assessment should be of a plan/project simpliciter in the first instance; and (4) there is a speculative nature to many plans/projects; if the agreement among, *inter alia*, elected member state governments, as evidenced by the adoption of the Habitats Directive, is that it is in the best interests of environmental biodiversity that the evolution of an acceptable plan/project must proceed in a manner that heightens (if it heightens) the level of speculation arising for the proponents of any such plan/project, then that is what has been agreed.

(vii) at para. 72, that "*The underlying principle to be derived from both the Waddenzee judgment and the domestic authorities referred to above is that, as with the EIA Directive, the provisions in the Habitats Directive are intended to be an aid to effective environmental decision making, not a legal obstacle course*." It might, perhaps not unreasonably, be queried where the "legal obstacle course" arises in this context. The text of Art.6(3) *per se* is clear. It has been the subject of helpful commentary at European Union level in *Waddenzee* and *Sweetman*. And in the EU Methodological Guidance, the European Commission has offered a clear statement, at para. 2.6 (based on a review of practice worldwide of situations where assessments similar to those required by the Habitats Directive have been carried out) as to how best to proceed with a screening assessment. Clear legislation made clearer by case-law and amplified upon by clear guidance might, perhaps not unreasonably, be contended to yield "*effective environmental decision making*" in an area where elected member state governments, through the medium of carefully calibrated European Union legislation, have sought to balance developmental and environmental considerations in an optimal manner.

17. The court emphasises that none of the above observations are made by way of criticism: the judgment of Sullivan J. in *Hart* is a distinguished judgment by a distinguished judge who may be correct in his conclusion that mitigation measures can be considered as part of a screening for appropriate assessment done pursuant to Art. 6(3) (as implemented). What the court merely seeks, respectfully, to flag is that, regardless of the correctness or otherwise of the overall result in *Hart,* on which the court respectfully declines to opine, reasonable questions can properly be raised as regards certain of the reasoning adopted by the learned judge in that case. Notably, in their respective guidance notes, each of the European Commission and the Department of Housing, etc. contemplates a different approach being adopted from that settled upon in *Hart*. And there is perhaps a suggestion in the above-quoted observation of AG Kokott as to the drift of thinking in this regard at the European level. Moreover, notwithstanding some favourable references to the decision in *Hart*, no conclusive view has been reasoned to by the Irish High Court on the issue of whether mitigation measures can generally be considered as part of a screening for appropriate assessment done pursuant to Art. 6(3) (as implemented); and no view has been offered by the CJEU on this precise issue. Given the centrality to the resolution of the within proceedings of the question as to whether mitigation measures can be considered as part of a screening for appropriate

assessment done pursuant to Art. 6(3), it seems to the court that it is necessary to enable it to give judgment in the within application, for it to refer to the CJEU, pursuant to Art. 267 TFEU, the question of whether avoidance and/or mitigation measures forming part of a plan/project can, as a matter of law, be considered at the screening stage.

18. The court is fortified in the conclusion just reached when it recalls that the recitals to the Habitats Directive describe its "*main aim*" as being "*to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements*". Not too many mistakes would be required in terms of avoiding an appropriate assessment before Ireland's biodiversity, and hence the biodiversity of a small part of the wider European Union, would be imperilled, contrary to the objectives and provisions of the Directive and contrary to the interests of present and future generations in enjoying a wide variety of surrounding plant and animal life. That biodiversity embraces the Nore Freshwater Pearl Mussel (*Margaritifera durrovensis*), a creature thought to be unique to Ireland (and, within Ireland, to the River Nore) and whose existence as a species is considered by the applicants potentially to be endangered by what Coillte proposes to do. It is difficult, if possible, to conceive of an instance where the objectives and provisions of the Habitats Directive could be more fully engaged and require more carefully to be observed than in circumstances where the potential extinguishment of a species may be at stake. To ensure that matters are done in accordance with the imperatives of Art. 6(3) of the Habitats Directive, it is necessary that there be certainty as to what that provision requires.

## III. References to the CJEU

19. It was contended by counsel for Coillte at the hearing of the within application that *"[T]he practice has been that it is really only appellate courts who make references [to the CJEU]. It is very rare…that the High Court actually makes a reference. It is nearly always an appellate court."* The court respectfully does not accept the contention that the High Court has previously applied, let alone that it would be appropriate for it to apply, some form of self-censorship when it comes to the preliminary reference procedure under Art. 267 TFEU. The High Court, as a court of a European Union member state, is entirely competent to make a reference under Art. 267 TFEU; there is no practice whereby its competence in this regard has been yielded by it to the appellate courts.

20. The preliminary ruling procedure is an essential mechanism whereby uniform interpretation and application of European Union law across the Union is sustained. As a cooperative mechanism between judges, it provides national courts competent to apply European Union law with a means of obtaining an interpretation of that law by the body tasked with ensuring uniform interpretation of European Union law across the Union. The aim of Art. 267 TFEU is to foster cooperation between national and European judges so as to facilitate the uniform application of European Union law; any national court dealing with a dispute where such law poses, *inter alia*, interpretative issues, is enabled and entitled to make reference to the CJEU for a preliminary ruling where, as here, it considers that a decision on the question raised is necessary to enable it to give judgment; for courts of last resort, references under Art. 267 TFEU can be mandatory.

21. Through Art. 267 TFEU, the High Court is afforded an avenue of approach to the CJEU that is not afforded to individuals. It would damage the uniform interpretation and application of European Union law, diminish the preliminary ruling procedure, and be a disservice to persons coming before the courts with arguments arising out of or pursuant to European Union law if the High Court were to seek single-handedly to resolve disputes, in instances where the need for a preliminary reference is necessary, in the hope that such a reference might in the future be made by an appellate court (assuming that a party aggrieved by the High Court's judgment had the financial resources required to sustain the bringing of such an appeal).

## IV. Conclusion

22. The court will make the reference aforesaid to the CJEU. Once answer is received from the CJEU the court will give final judgment in the within application.