**THE HIGH COURT**

**COMMERCIAL**

**JUDICIAL REVIEW**

**[2016 No. 715 JR]**

**BETWEEN**

**PETER SWEETMAN**

**APPLICANT**

**AND**

**AN BORD PLEANÁLA AND CORK COUNTY COUNCIL, KERRY COUNTY COUNCIL, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**AND**

**ESB WIND DEVELOPMENT LIMITED**

**NOTICE PARTY**

**JUDGMENT ON APPLICATION FOR CERTIFICATION**

**Judgment of Mr. Justice Robert Haughton delivered on the 3rd day of March, 2017.**

**Background**

1. This judgment concerns an application by the applicant to certify leave to appeal my judgment and decision dated 2nd February, 2017, ("the principal judgment").

2. In the principal judgment I granted orders setting aside in part an order of Humphreys J. made on 10th October, 2016, granting the applicant leave to seek judicial review ("the Leave Order"). The part set aside was leave to seek the reliefs claimed in subparagraphs 2, 3 and 4 in para. (c) of the Statement of Grounds, namely:-

> "(2) An order of certiorari by way of application for judicial review quashing the determinations of the second and third named respondents pursuant to section 5 of the Planning and Development Act 2000 as amended dated the 1st day of April 2015, and the day of 6th of May 2015 determining that the construction of the grid connection servicing the proposed development was exempted development.
>
> (3) A declaration that the decisions of the first, second and third named Respondent was in breach of and contravenes Directive 92/43/EEC on the contravention of wild habitats and flora and fauna (the Habitats Directive) and Direction 2011/92/EU of 13th December, 2011 on the assessment of the effects of certain public and private projects on the environment ("the consolidated Environmental Impact Assessment (EIA) Directive"), the Birds Directive 2009/147/EU and the jurisprudence of the European Court of Justice (ECJ) and the Court of Justice of the European Union (CJEU).
>
> (4) A declaration that section 5 of the Planning and Development Act 2000 is contrary to European law and the Aarhus Convention and in particular, the said provisions violate the public participation provisions of the EIA Directive, Birds Directive, Habitats Directive and the Public Participation Directive 2003/35/EC."

3. The basis upon which I determined that leave to seek the reliefs at (2) and (3) should be set aside was that the application for leave was made outside the period of eight weeks provided for in s. 50(6) of the Planning and Development Act 2000 (as amended) ("the 2000 Act"), and that there was not, within the meaning of s. 50(8) of the 2000 Act, "good and sufficient reason" for extending time. It is important to note that, contrary to written and oral submissions made by counsel for the applicant at the certification hearing, I did not set aside the leave order in respect of (2) and (3) on the basis that the applicant lacked or might be said to lack *locus standi* or "sufficient interest" for the purpose of seeking such reliefs.

4. In relation to the setting aside leave to seek the relief sought at (4), the reasons for this are set out in para. 18 of the principal judgment. I found that the applicant did not have "sufficient interest" within the definition of that term in s. 50(a)(3) and (4) of the 2000 Act to make a 'free-standing' and general challenge to the validity of s. 5 on the basis that it infringes EU law (see para. 18.6 – 18.10). In particular I found that the applicant was not entitled to pursue by way of judicial review under s. 50 a 'free-standing' challenge to a provision of the 2000 Act unless the challenge engaged a particular act or decision of a planning authority (see para. 18.9). I also determined that the applicant did not have "sufficient interest" to raise such challenge by reason of the principles enunciated in *Cahill v. Sutton* [1980] I.R. 269, and applied in Nawaz v. Minister for Justice [2013] 1 I.R. 142 (see para. 18.11 in the principal judgment). I further found at para. 18.14:-

> "Further to now permit a general challenge to s. 5 would be to permit a collateral attack on the s. 5 declarations, or at least the validity of those declarations insofar as they were relied upon by the Board in reaching its approval decision. …"

**Preliminary Issue**

5. A preliminary issue arose as to the extent to which (if any) the applicant required certification in order to pursue an appeal to the Court of Appeal. The requirement for a certificate is set out in s. 50A(7) of the 2000 Act (as amended):-

> "(7) The determination of the Court of an application for section 50 leave or of an application for judicial review on foot of such leave shall be final and no appeal shall lie from the decision of the Court to the Supreme Court in either case save with leave of the Court which leave shall only be granted where the Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court."

6. The applicant argued that, in relation to his challenge to the validity of s. 5 under EU law – his 'freestanding claim' - he does not require certification because this is not a challenge coming within s. 50(2) of the 2000 Act. which provides that:-

> "2. A person shall not question the validity of any decision made or other act done by –
>
> (a) a planning authority, a local authority or the Board in the performance or purported performance of a function under this Act,
>
> (b) the Board in the performance or purported performance of a function transferred under Part XIV, or
>
> (c) a local authority in the performance or purported performance of a function conferred by an enactment specified in section 214 relating to the compulsory acquisition of land, otherwise than by way of application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (the "Order")."

Counsel argued that his freestanding challenge to s. 5 did not question the validity of "any act made or other act done by" a planning authority and was not therefore captured by subsection (2).

7. Firstly, I am satisfied that the applicant does require certification in relation to any appeal on points of law related to the principal judgment arising out of the setting aside of the leave to challenge the two s.5 declarations. These were clearly decisions of a local planning authority having a status in law that was confirmed by the Court of Appeal in *Killross v. ESB* [2016] IECA 207, which decision was followed and discussed in the principal judgment (see para. 12.4 – 12.9).

8. Secondly, I am of the view that certification under s. 50A(7) is required if the applicant is to pursue an appeal to the Court of Appeal related to the freestanding s.5 challenge in this case. In this regard I accept the submission by counsel on behalf of the State that the challenge of s.5 was initially presented as an adjunct to the challenge to the s.5 declarations of Cork County Council and Kerry County Council, and connected with the challenge to those declarations. In attempting to decouple the relief sought at (4) from the reliefs at (2) and (3) the applicant was belatedly deconstructing his original claims.

Of course if my view on this preliminary issue is not correct, then the applicant is entitled to take an appeal in the normal way from the principal judgment insofar as it sets aside the leave to seek the relief sought at (4).

**The Test for Certification**

9. The test for certification for leave to appeal that should be applied to the court under s. 50A(7) is that the decision involves "a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the [Court of Appeal]". The elaboration of this test by the courts was not disputed. The factors to be taken into account were summarised by McMenamin J. in *Glancré Teoranta v. An Bord Pleanála* [2006] I.E.H.C. 250:-

> "I am satisfied that a consideration of these authorities demonstrates that the following principles are applicable in the consideration of the issues herein.
>
> 1. The requirement goes substantially further than that a point of law emerges in or from the case. It must be one of exceptional importance being a clear and significant additional requirement.
>
> 2. The jurisdiction to certify such a case must be exercised sparingly.
>
> 3. The law in question stands in a state of uncertainty. It is for the common good that such law be clarified so as to enable the courts to administer that law not only in the instant, but in future such cases.
>
> 4. Where leave is refused in an application for judicial review i.e. in circumstances where substantial grounds have not been established a question may arise as to whether, logically, the same material can constitute a point of law of exceptional public importance such as to justify certification for an appeal to the Supreme Court (Kenny).
>
> 5. The point of law must arise out of the decision of the High Court and not from discussion or consideration of a point of law during the hearing.
>
> 6. The requirements regarding "exceptional public importance" and "desirable in the public interest" are cumulative requirements which although they may overlap, to some extent require separate consideration by the court (*Raiu*).
>
> 7. The appropriate test is not simply whether the point of law transcends the individual facts of the case since such an interpretation would not take into account the use of the word "exceptional".
>
> 8. Normal statutory rules of construction apply which mean *inter alia* that "exceptional" must be given its normal meaning.
>
> 9. "Uncertainty" cannot be "imputed" to the law by an applicant simply by raising a question as to the point of law. Rather the authorities appear to indicate that the uncertainty must arise over and above this, for example in the daily operation of the law in question.
>
> 10. Some affirmative public benefit from an appeal must be identified. This would suggest a requirement that a point to be certified be such that it is likely to resolve other cases."

10. Further, in relation to the requirement of public interest/benefit, in *Arklow Holidays Ltd. v. An Bord Pleanála* [2007] 4 I.R. 112, at p. 116 Clarke J. stated:-

"…

> (iii) The requirement that the court be satisfied "that it is desirable in the public interest that an appeal should be taken to the Supreme Court" is a separate and independent requirement from the requirement that the point of law be one of exceptional public importance; see *Kenny v. An Bord Pleanála (No. 2)* [2001] 1 I.R. 704. On that basis, even if it can be argued that the law in a particular area is uncertain, the court may not, on the basis, *inter alia*, of time or costs, consider that it is appropriate to certify the case for the Supreme Court …"

In that case Clarke J. was satisfied that a point raised by the applicant was a point of law of exceptional and public importance but decided not to certify it having regard to the public interest. He stated at page 122:-

> "The public interest, in an issue such as this, needs to take into account the nature of the development proposed and the potential consequences of a significant further delay in the matter being finally disposed of before the courts."

**The Points of Law Proposed for Certification**

11. The applicant proposes in his written legal submission some twelve points for certification, although erroneously numbered (i) to (xiii) in the submission (no. (iii) is omitted). These fall under three headings:-

> (a) Sufficient interest;
>
> (b) Time limits – extension of time; and
>
> (c) Remedial obligations.

**Sufficient Interest**

12. The questions proposed are as follows:-

> "(i) To what extent (if any) does section 50 of the Planning Act 2000 apply to a challenge to section 5 of the said Act?
>
> (ii) `What is a 'sufficient interest' for the purposes of a challenge to legislation and how must an applicant demonstrate such an interest?
>
> (iv) In order to bring a challenge to section 5 on the basis *inter alia* that the process does not properly permit of public consultation and/or does not notify the public of determinations made, to what extent must an applicant demonstrate 'sufficient interest' in any particular section 5 referral?
>
> (v) Is such a 'sufficient interest' to be determined by reference to a particular connection with such a development or, can *a general or well informed interest in protection of the environment suffice?*"

13. With regard to (i) I have already determined that s.50A(7) of the 2000 Act applies to the challenge to the validity of s.5 of the 2000 Act under EU law.

14. With regard to (ii), (iv) and (v) it was argued that the principal judgment raises a point of law of exceptional public importance in relation to what constitutes "sufficient interest" for the purposes of a challenge to a provision of planning legislation and how an applicant must demonstrate such interest, and particularly a challenge to a provision such as s.5 which it claimed establishes a process that does not allow for public participation and notification. In particular counsel referred to the awaited Supreme Court determination in *Grace and Sweetman v. An Bord Pleanála and others* [2016] IESC Det 29, where the Supreme Court decided to hear a "leap frog" appeal from the refusal of Fullam J. to grant a certificate. Fullam J had decided that the applicants did not have a sufficient interest to give them standing to challenge the Board's decision because neither of them had taken part in the planning process before the Board. In deciding to entertain an appeal, the Supreme Court at p. 6 of the decision stated:-

> "First it should be said that it is clear that it is arguable that the jurisprudence of this Court in respect of standing in environmental matters may need to be revised in the light of recent jurisprudence of the Court of Justice not least Case – 137/14, *Commission v. Germany* (judgment of October 15th 2015). There can be little doubt, therefore, that the question raised in respect of standing is a matter of general public importance".

At p. 9 in its conclusion the court granted leave to the applicants to appeal directly from the High Court on three points, the first of which is relevant:-

> "(a) Whether the jurisprudence of this Court on the question of standing in environmental matters requires to be revised in the light of recent judgments of the Court of Justice and, if so, the application of any such revised jurisprudence to the facts of this case;"

15. All argument in relation to certification in the present case took place before this Court on 15th and 16th February 2017, and at the end of the hearing the court was advised that the Supreme Court's decision in *Grace and Sweetman* was due to be delivered shortly. Accordingly, this court adjourned the certification hearing for further argument. The decision of the Supreme Court (a Joint Judgment of Clarke J and O'Malley J, with whom O'Donnell J, MacMenamin J, Laffoy J, Dunne J and Charleton J concurred) was duly handed down on 24th February, 2017 and following that this court received and considered supplemental written submissions from all parties (other than An Bord Pleanála) arising from that judgment. These parties agreed that further oral submissions were not required.

16. The Supreme Court considered the question of standing in the context of Article 11 of the codified Directive 2011/92/EU under which Member States must ensure that members of the public "having a sufficient interest" or "maintaining the impairment of a right" have access to a review procedure. It did so by first considering Irish standing rules under O84, r.20(4) which require "sufficient interest in the matter to which the application relates", secondly considering the "sufficient interest" test introduced into s.50(4) of the 2000 Act in environmental matters, and thirdly considering two aspects of "the European Dimension", namely the "wide access to justice" standard in environmental matters and the "broad standing now given to environmental NGOs in Irish law".

17. As to *locus standi* under O84 r.20(4) the court endorsed what it described as "the reasonably flexible" approach adopted from the judgment of Henchy J in *Cahill v Sutton* [1980] I.R. 269 that the challenger "must show that the impact of the impugned law on his personal situation discloses an injury or prejudice which he has either suffered or is in imminent danger of suffering" but that this rule must –

> "be subject to expansion, exception or qualification…where the want of normal *locus standi* may be overlooked if, in the circumstances of the case, there is a transcendent need to assert against the statute the constitutional provision that has been invoked. For example, while the challenger may lack the personal standing normally required, those prejudicially

affected by the impugned statute may not be in a position to assert adequately, or in time, their constitutional rights."

The court considered that although the language was specific to a constitutional challenge the general principle was applicable across the board in judicial review cases. Subject to exceptional cases, "a challenger must establish adverse effect causing or likely to cause injury or prejudice" (para.5.7).

18. The court then considered the new s.50(4) of the 2000 Act and held, at para. 6.5, that even though persons may not have participated in the planning process they may still have standing as persons living in the immediate vicinity of the proposed development or potentially adversely affected and therefore coming within the *Cahill* standard. At para.6.6 the court mentions Mulcreevy v Minister for the Environment [2004] 1 I.R.72 where the applicant was found to have standing to challenge the validity of a statutory instrument permitting works to be carried out on a national monument even though the monument concerned was located in Dublin and the applicant lived in Kerry:

> "6.7 While it has been noted from time to time that a mere interest in ensuring that the law is upheld is not, in itself, sufficient to confer standing (for if it were then there would, in all cases, be the potential for a so-called *actio popularis* and standing rules might be of very little relevance save for excluding abuse of process and the like), nonetheless Mulcreevy seems to suggest that the nature of the measure under challenge may be such as to confer a right to challenge on a very wide range of persons (and possibly, in some cases, on all persons not motivated by bad faith or the like)."

The court then held that the decision in Lancefort Ltd v An Bord Pleanala (No.2) [1999] 2 I.R. 270 could no longer be regarded as authoritative, and stated:

> "6.9 The case law to date would seem to suggest, therefore, that a reasonably liberal approach is taken to the sort of interest which must be potentially affected in order to confer standing in environmental cases. Persons clearly can have an interest by virtue of proximity to the proposed development. The degree of proximity required may well depend on the scale and nature of the development in question. For example, a large scale development having the potential to impact on the amenity of persons within a wide catchment area might well be said to have the potential to have an adverse impact on the legitimate interests of persons living, or perhaps working or otherwise having regular contact with, a significant geographical area. A minor domestic development might well only have an impact on a much more restricted area.
>
> 6.10 In addition, regard can be had to the nature and general importance of the site or amenities sought to be protected. Developments which have the potential to have a material and significant effect on the environment generally or raise questions of particular national or international importance (such as the national monument involved in Mulcreevy) may confer standing on a much wider range of persons.
>
> 6.11 On the current state of the jurisprudence in Ireland, and without, for the moment, having regard to the requirements of European law, it seems that standing in environmental cases involves a broad assessment of whether the legitimate and established amenity or other interests of the challenger can be said to be subject to potential interference or prejudice having regard to the scale and nature of the proposed development and the proximity or contact of the challenger to or with the area potentially impacted by the development in question. Furthermore, that broad assessment should have regard, in an appropriate case, to the legitimate interest of persons in seeking to ensure appropriate protection of important aspects of the environment or amenity generally. The next question concerns the European dimension."

19. The State parties submit that there is nothing in these passages that suggests any change in the existing jurisprudence. In my view that is far from clear. At least in the context of the application of the jurisprudence to environmental challenges, it would seem that in requiring a "broad assessment" that has regard to the nature and scale of the proposed development and the amenity values that it may affect, the Supreme Court was adding to existing jurisprudence and giving new guidance that will result in more applicants having sufficient interest to seek judicial review. This is made clearer in para.s 8.7 and 8.8, quoted fully below. In para.8.7 the court makes it clear that "proximity" does not mean that the challenger must have participated in the planning process. In para.8.8 the court elaborates on the concept of an interest in amenity that may ground standing. The question in any particular case of what may constitute "the legitimate and established amenity or other interests of the challenger" will now need to be developed incrementally in future decisions of this court or appellate courts.

20. In considering the "European Dimension" and need for "wide access to justice" the court stated at para.7.1 –

> "…As Irish standing rules are, for the reasons already analysed, expressed in broad terms capable of appropriate interpretation it does not seem that any question of disapplication truly arises. However, it remains necessary for this Court, in interpreting the "sufficient interest" requirement for standing contained in national law, to ensure that the interpretation conforms with the requirements of Article 11."

The court noted opposing arguments based on the broad standing now given to NGOs in Irish law – on the one hand that this removes the need for a broad interpretation of what might be called *Cahill* exceptional cases, and on the other that it would be anomalous if an individual did not have *locus standi* yet a small group of persons formed into an organisation could mount a challenge. However the court felt it was not necessary to explore this further if on the application of domestic standing rules the applicants had standing. Before addressing the facts the court made two points of some importance as they have general application:

> "8.7 It is, however, clear that a person who has a sufficient proximity, having regard to the nature of the development and any amenity in the location of the development (which might potentially be impaired), will have standing even without participation. Those who do not have such proximity may reasonably be required to show that they have some interest which is potentially affected and one very clear way of doing that is by demonstrating that interest by participation in the permission process. That is not, however, the only way in which such an interest can be demonstrated.
>
> 8.8 The more general and more important the amenity which may be at stake then the wider range of persons who may well be able to show that they have an interest in the amenity of the area which is the subject of the proposed development. The nature of the legal challenge intended to be mounted will be relevant also. For example, a person who cannot show proximity to a proposed wind farm and did not participate in the process is unlikely to have standing to make an argument more properly raised by a person more directly affected. In our view a challenger who has not previously participated and cannot show any direct personal prejudice must satisfy the leave judge that the point being made is one

directed solely to the purpose of the special protection of the site."

20. The Supreme Court noted that the proposed development was a site and species (Hen Harrier) protected under EU law and in an area where it was unlikely that individual objectors could show personal prejudice or injury. Although neither applicant participated in the process, or gave any explanation for non-participation, the court held that Ms Grace had standing as she lived less than one kilometre from the SPA and was involved in a number of local voluntary groups, two concerned with sustainable energy, one with establishing a "craft trail" in part of the SPA, and one (of which she was chair) promoting tourism in the area.

By contrast, in relation to Mr. Sweetman's participation, the court stated:

> "8.10 The position in respect of Mr. Sweetman is less clear. He does not have any physical proximity to the site. While he undoubtedly has an interest in environmental matters generally, he has placed no evidence before the Court to show that he has any particular interest in the specific amenity value which is potentially impaired by this development. Nor has he given any real explanation as to why he did not participate. If someone had a broad interest in a particular amenity value which they asserted was sufficient to give them standing it might be expected that their general interest in the issue would have led them to participate or, at a minimum, that there would be some reasonable explanation for non-participation. None of those factors are present in Mr. Sweetman's case.
>
> 8.11 However, given that we are satisfied that Ms. Grace has standing and given that it is appropriate, in those circumstances, to go on to consider the merits of the substantive issue, we do not find it necessary to reach a final determination on the question of Mr. Sweetman's standing in this case. We would simply reiterate that had he participated in the permission granting process or given the Court some cogent explanation for non-participation, then it would have been much easier to resolve the standing question in his favour."

21. The Supreme Court has therefore left open the question as to whether a person with a general interest in environmental matters, but insufficient proximity or connection to /or specific interest in the amenity value of the site of the proposed development, may have *locus standi* under Irish law as an exceptional case. In so doing the court has also not sought to resolve the question as to whether Irish law should be disapplied or reinterpreted to ensure compliance with "wide access to justice" under Article 11 if a person such as Mr. Sweetman does not have standing under domestic law under the principles now enunciated by the court. Thus while modernising the law, providing useful guidance, and bringing a measure of certainty to the issue of standing in environmental challenges, the decision has also left considerable uncertainty.

22. In its Supplemental Submission counsel for Cork Co. Co. argues that the scope of the decision in Grace and Sweetman was limited to standing to challenge specific decisions or specific developments/projects where there are "environmental decisions which are subject to European law" and "within the ambit of Article 11" (para.4.1 of the judgment), and where the procedural or substantive validity of such decisions is questioned. Counsel relies on the Article 1(2) of the Directive that defines a "project" as follows:

> "'project' means:
>
> • The execution of construction works or of other installations or schemes,
>
> • Other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources."

Thus it was argued that a freestanding challenge to s.5 of the 2000 Act does not fall within the scope of the EIA Directive.

23. This submission overlooks the fact that central to the Supreme Courts discussion and decision are the general principles relating to standing to challenge a statute enunciated in *Cahill v Sutton* which "have been regularly applied, across the board in judicial review cases", and which generally require "injury or prejudice" or "adverse effect", but contemplate exceptional cases where these factors may not be present. It also overlooks the citing by the Court, with apparent approval, of the decision in Mulcreevy. While the free-standing claim does not engage a specific planning decision, it does relate in the broader sense to a statutory provision, s.5 of the 2000 Act, that permits planning decisions which may or may not engage environmental considerations, and which may, at their heart, involve a determination that a development does or does not require environmental assessment or Appropriate Assessment under the Habitats Directive. The argument in relation to scope seems unduly narrow and does not reflect the breadth of debate in the decision in *Grace and Sweetman*, or the potential for its wider application.

24. The Supreme Court's new guidelines bring into focus certain background facts in the present case that an appellate court might now consider relevant to whether the applicant has sufficient interest to make a freestanding challenge to s.5, notwithstanding this courts determination that he is not entitled to challenge the particular s.5 declarations.. For example: the fact that the proposed windfarm and grid connections fall within or are adjacent to c.SACs and SPAs protected under European law, and fall within the habitat of protected species, and may threaten protected species such as the White Tailed Sea Eagle; the fact that an area of proposed development may be remote with few if any residents who could plead injury, adverse effect or proximity; the fact that the applicant attempted to appeal the s.5 declarations; the fact that the very complaints that the applicant makes in respect of the s.5 process – lack of notification and public participation – meant that he did not become aware of it within the primary period allowed to seek judicial review; and the fact that the applicant did make observations to An Bord Pleanála on the s.37E approval application that mention the s.5 declarations.

25. While the parties opposing certification submit that my principal judgment is correct in its application of domestic law, in the light of *Grace and Sweetman* this case does now raise the question of whether the applicant has *locus standi* to challenge the validity of s.5 of the 2000 Act under EU law, or whether his challenge is impermissible as an *actio popularis*.

26. In accepting the leap-frog appeal in *Grace and Sweetman* the Supreme Court had no doubt that the question of standing raised an issue of general public importance and that the interests of justice required an appeal. That must apply equally to the questions left open by the court's decision, and which it felt it did not need to decide in that case. However, and as the Supplemental Submission from counsel for Cork Co Co. points out, the Supreme Court did indicate that the test for leave to appeal to that Court is different and less onerous than the test for a certificate for leave to appeal on the basis of a point of law of "exceptional" public importance:

> "3.6 In passing it is worth at least noting that the wording of the form of certificate which the High Court was required to consider giving in this case seems to place the bar somewhat higher than that which applies under the Constitution itself. In the case of a certificate under the 2000 Act, the High Court judge is required to be satisfied that a point of law of

> exceptional public importance arises and that it is desirable in the public interest that an appeal be pursued to this Court. It is possible, therefore, to envisage that there might be a case where the High Court quite correctly refused a certificate but this Court, without in any way disagreeing with the High Court, found that the constitutional threshold had been met. The thresholds are not the same and the certificate threshold is undoubtedly somewhat higher."

27. In seeking a certificate in respect of "sufficient interest" in the present case the applicant raises questions not dissimilar to those left unanswered by the Supreme Court, albeit in the context of a free-standing challenge as to whether a statutory provision is compliant with EU law. *Ipso facto* they are now of general public importance. In light of the Supreme Court's decision I am of the view that they must now be considered to raise points of law that reach the threshold of being exceptional. I am influenced in this conclusion by the increasing number of environmental judicial reviews being brought by individuals in recent years. For the same reasons I conclude that it is desirable in the public interest that there be greater certainty on the question of *locus standi*.

28. While I am prepared to certify for an appeal, I am not satisfied with the wording proposed. Question (ii) comes closest to what the Court considers to be the appropriate question. Question (iv) presupposes that the s. 5 process "does not properly permit of public consultation and/or does not notify the public of determinations made", which in itself is a prejudgment of the manner in which the applicant alleges s. 5 infringes EU law. Question (v) is unduly specific. Subject to hearing the parties further I would be prepared to certify the following single question:

**Does the applicant have sufficient interest or locus stand for the purposes of a free standing challenge in this judicial review to the validity under EU law of section 5 of the Planning and Development Act, 2000?**

29. For the sake of completeness mention should be made of the applicant's alternative submission that in the light of *Grace and Sweetman* this court should revisit the principal judgment. This court is now *functus officio* in respect of the motions which were determined by the principal judgment, which was final and conclusive – subject only to this court's exercise of its jurisdiction to certify leave to appeal, which raises different and distinct issues.

30. The principal judgment and order could only be interfered with in very limited circumstances, for example if there was an accidental slip or the order as drawn did not reflect what was stated or intended in the judgment. The jurisdiction is effectively to correct an error in the record. While the jurisprudence shows that in "special or unusual circumstances" a court may amend an order, it seems to me that this would be very exceptional and reserved to cases where, for example, an order was obtained by fraud . It cannot entitle the High Court to revisit its decision on the grounds that a later decision of the Court of Appeal or Supreme Court in an unrelated matter might suggest the High Court was in error.

**Time Limits/Extension of Time**

31. In para. 23 of the written submission the applicant asks the court to certify the following questions:-

> *"(vi) Do the time limits under section 50 of the PDA run against persons who do not know, and could not be expected to know of decisions made under the Act? If so, is this consistent with European law?*
>
> *(vii) In circumstances where a person discovers a decision or other act done under the Act outside of the 8 week time limit, how long does such a person have to institute proceedings?*
>
> *(viii) In circumstances where there are a number of decisions in a consent giving process to what extent must an applicant challenge every individual decision in circumstances where his/her complaint might (or should) be resolved by the later decision?*
>
> *(ix) In particular, is it the case that the O'Grianna decision does not require an EIA/AA of the entire project to be carried out? If it does so require, where has this been done? If it could have been or should have been) done by An Bord Pleanála, to what extent must the/an applicant challenge earlier decisions on the basis that no EIA/AA were undertaken by those competent authorities?"*

32. With regard to (vi), there is no uncertainty as to the first limb of this question viz. "do the time limits under s. 50 of the PDA run against persons who do not know, and could not be expected to know of a decision made under the Act"? The unequivocal answer must be that the eight week time limit runs against all persons even if they do not know or could not be expected to know of the decision. Thus in *Irish Skydiving v. An Bord Pleanála* [2016] IEHC 448 Baker J. rejected a discoverability test and at para. 51 referred to:-

> "The very clear language of the subsection which fixes the time limit by reference to the date of the decision".

With regard to the balance of (vi), there is very clear authority and no uncertainty that Member States can set time limits and procedural rules in the context of a review of decisions subject to Environmental Impact Assessment. National procedural autonomy on these subjects is established by Article 11 of Directive 2011-92-EU and has been confirmed in numerous decisions of the European Court of Justice, such as Case C-2001/02 *Wells v. Secretary of State for Transport, Local Government and the Regions* [2004] JPL 1161, and Case C-137/14 of *Commission v. Germany* (15th October 2015). Indeed, in argument that led to the principal judgment, counsel for the applicant did not dispute the freedom of Member States to legislate in relation to time limits in environmental decision making to which the Directive applies. The decisions that counsel for the applicant suggested give rise to uncertainty – *Uniplex (UK) Ltd. v. NHS Business Services Authority* C-406/08 and *R. v. London Borough*, xEx p Burkett [2002] UKHL 23 - are clearly distinguishable for the reasons given in paras. 12 and 13 of the principal judgment.

33. With regard to question (vii), this raises a question the answer to which is entirely dependent on fact and circumstance. Insofar as it raises any point of law this is answered by the factors which Clarke J. identified in *Kelly v. Leitrim County Council and An Bord Pleanála* [2005] 2 I.R. 404 as being relevant to the court's decision to grant or refuse an extension of time for seeking leave to seek judicial review. Those guidelines have been applied in many subsequent decisions, and are established jurisprudence of the High Court. Counsel for the applicant suggested that uncertainty arises because there is no definitive judgment of the Supreme Court (or Court of Appeal) addressing this question. In my view, that submission is an attempt to impute uncertainty, and falls foul of the ninth factor indentified by McMenamin J. in *Glencre*.

34. Question (viii) in its wording relates to "circumstances where there are a number of decisions in a consent giving process" and asks to what extent must an applicant challenge every individual decision where his or her complaint might (or should) be resolved by the later decision. This is a loaded question: it presupposes that the s. 5 declarations of exemption by Cork County Council and Kerry County Council are earlier "decisions in a consent giving process" culminating in the Board's grant of approval pursuant to s. 37E of the 2000 Act (as amended) in respect of infrastructural project, namely the windfarm. The question so worded is therefore based on

a false premise as this Court has decided in the principal judgment that a s. 5 declaration is made under jurisdiction that is discrete and distinct from the s. 37E approval process. See the treatment of this in para. 12, and in particular para. 12.8 of the principal judgment. I believe this conclusion is consistent with the analysis undertaken by Humphreys J. in *Northeast Pylon Pressure Campaign Ltd. v. An Bord Pleanála* [2016] IEHC 300.

35. In question (ix) the applicant asks the court to pose questions in relation to the effect of the decision of Peart J. in *O'Grianna and others v. An Bord Pleanála and others* [2014] IEHC 632. In reliance on this decision the applicant would wish to argue on appeal that *O'Grianna* requires that full Environmental Impact Assessment and full Appropriate Assessment (under the Habitats Directive) of the grid connection for the Grousemount Windfarm, as well as the windfarm itself, must be carried out in order to comply with the Directive. At para. 12.2 of the principal judgment I suggest that the decision of Peart J. does not go that far, and only requires that "a cumulative assessment of the environmental impact of both" be carried out.

36. In my view, this debate on the full import of the decision in *O'Grianna*, and debate on the ancillary questions raised in question (ix), is one that can be undertaken at the substantive hearing, because the applicant has obtained, and retains, leave to seek the following relief:-

> "(1) An order of certiorari by way of application for judicial review quashing the determination of the first named respondent to grant planning permission (Appeal Ref: PL08.PA0044) in respect of the construction of a windfarm at Grousemount, Co. Cork and Co. Kerry which the decision was made on the 21st July, 2016."

The leave to challenge that decision is based on a number of grounds addressed to the alleged absence of any or any proper EIA or AA in respect of the windfarm and the related grid connection – see in particular grounds (e) 1, 2 and 3 in the Statement of Grounds. Furthermore, while there are comments in the principal judgment on the judgment of Peart J. in *O'Grianna*, the questions posed were clearly not determined by the principal judgment, and are matters for debate and determination at the substantive hearing.

**Remedial Obligation**
37. Under this heading the applicant seeks certification of the following questions:-

> (x) To what extent (if any) is there an obligation to remediate breaches of EU law?
>
> (xi) If such an obligation exists, to what extent can a competent authority be relieved of such obligation by the actions, inaction, or delay of an applicant seeking judicial review?
>
> (xii) When does a remedial obligation first arise? Specifically, on these facts, after the decisions of the Councils? The decision of the Board? Or the decision to carry out the works?
>
> (xiii) To what extent could carrying out the development affect the remedial obligation?

38. I come to the view that none of these questions are appropriate for certification. These matters go to the merits of the impugned decisions, and were not determined in the principal judgment, and accordingly are not points of law arising out of the principal judgment. At para. 17.4 I observed:-

> "17.4. Thirdly, the applicant has obtained leave to challenge the validity of the Board's approval. As part of that substantive challenge, it remains open to the applicant to argue that the Board's decision infringes the obligation to remediate breaches of Community law."

Moreover, the questions posed ignore the legislative fact that Article 11 leaves over to Member States the determination at what stage decisions, acts or omissions concerning environmental matters may be challenged.

**"Desirable in the Public Interest"**
39. I am further not persuaded, in respect of the points of law suggested in respect of time limits/extension of time and the remedial obligation, that certifying the suggested questions (or any modified version) would be desirable in the public interest.

40. The s. 5 declarations of exemption from planning permission in respect of the grid connection works were made on 1st April 2015 and 6th May 2015, and work on those connections commenced in the Spring of 2016. It was ongoing when the applicant sought leave in September 2016, and has continued ever since. This is addressed in para. 16 of the principal judgment where I concluded that there was significant third party prejudice to the notice party, and that was a factor that this Court took into account in finding that the applicant was not entitled to an extension of time within which to challenge the s. 5 declarations. As Clarke J. found in *Arklow Holidays Ltd*., in considering the public interest the court is entitled to take into account the nature of the development proposal and the potential consequences for the developer in the event of significant further delay caused by an appeal. I accept that due to inevitable delays in the hearing of an appeal on these points the notice party is likely to suffer further prejudice particularly in terms of financial scheduling in the context of REFIT 2 deadlines – see the affidavits sworn on behalf of the notice party by John Kelly. Also relevant to this consideration is that the substantive hearing is scheduled in the commercial court for 7th March 2017. To permit an appeal on the further questions proposed by the applicant would be likely to exacerbate the prejudice already suffered by the notice party, and certification is not therefore desirable in the public interest.

41. The same objections do not apply to an appeal in respect of whether the applicant has sufficient interest to maintain a 'free standing' challenge to s. 5 of the 2000 Act, where I consider that an appeal is desirable in the public interest.

**Footnote**
42. In certifying an appeal the court wishes to emphasise that if the appeal were to succeed it would entitle the applicant to pursue a free-standing challenge to the validity of s.5 under EU law – and (subject of course to the judgment of the appellate court) no more than that. This has two consequences. First, I have already set aside leave to the applicant to challenge the validity of the two particular s.5 declarations of Cork County Council and Kerry County Council, and refused a certificate to appeal that aspect of the principal judgment. Any future attempt at a collateral attack on the validity of the two s.5 declarations would be contrary to this court's principal judgment and the reasons given above for refusing to certify questions as to time/extension of time and the remedial obligation. Second, and because the outcome of the appeal, even if the applicant succeeds, will not affect the balance of the substantive judicial review, the fact of certifying an appeal would not appear to be a good reason for deferring the substantive hearing before this court scheduled for 7th March.