



[2026] IEHC 413

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2025.0000610]

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT CLG

APPLICANT

AND

AN COIMISIÚN PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL AND THE MINISTER
FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE

RESPONDENTS

AND

SHANNON LNG LIMITED

NOTICE PARTY

(No. 2)

<i>Date of impugned decision:</i>	<i>13 March 2025</i>
<i>Date proceedings commenced:</i>	<i>7 May 2025</i>
<i>Date of principal judgment:</i>	<i>1 April 2026</i>
<i>Date of leave to appeal hearing:</i>	<i>15 June 2026</i>
<i>Date draft judgment circulated:</i>	<i>19 June 2026</i>

JUDGMENT of Humphreys J. delivered on Friday 26 June 2026

"[Counsel for the applicant] said if the Commission did not have the information specified by the EIA Directive it could not reach the reasoned conclusion that's required. ... I would be tempted to offer to him the same response that the Spartans gave to King Philip II of Macedonia when he said 'if my armies enter Laconia I will destroy your city and enslave your people' and they replied, according to Plutarch, 'if', and that's the nub of it here ..." (submission by counsel for the notice party, transcript p. 22, citing Plutarch, "Περὶ ἀδολεσχίας/ De garrulitate" §17, in *Ἠθικά, Ethiká/ Moralia* (c 100 CE).

1. The notice party in the just-quoted submission hit on something absolutely central to appellate dynamics. Would-be appellants always put it like this: Is there an interesting legal point in this area that warrants prolonged discussion and attention at appellate level? Framed in that way, the answer is *always* Yes. There is *always* an interesting legal point that can be dreamed up by free association on leafing through any set of papers. But the real question which should be the focus of any properly-functioning legal system is the much more prosaic – one might even say laconic – question: Does this properly arise? Unfortunately, more often than one would like to think, the answer to that is No. The answer is frequently No for a variety of reasons – the point was not pleaded or argued, it is based on a factual premise that has not been evidentially established or a legal premise that does not actually obtain, it mischaracterises, sometimes tendentiously, the law, the facts, the submissions, the judgment under appeal. In the present case a number of these situations arise. That characteristically unglamorous problem is, as the notice party perceptively submitted, "the nub of it".

Judgment history

2. This is the eighth written decision relating in one way or another to this project.

3. In *Friends of the Irish Environment v. An Bord Pleanála & Anor.* [2019] IEHC 80, 2 JIC 1501 (Unreported, High Court, 15 February 2019) (a case commenced in 2018), Simons J. decided to refer questions to the CJEU concerning whether renewal of a permission to the notice party engaged Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the habitats directive).

4. In the judgment of 9 September 2020, *Friends of the Irish Environment Ltd v An Bord Pleanála*, C-254/19, EU:C:2020:680, the CJEU in summary concluded that a renewal was potentially capable of requiring appropriate assessment. On foot of that, the extension of the permission was quashed by consent in the High Court.

5. In separate proceedings, *Friends of the Irish Environment CLG v. Minister for Communications, Climate Action and the Environment, Ireland and the Attorney General & Shannon LNG Limited* [2020] IEHC 383, [2020] 9 JIC 1405 (Unreported, High Court, 14 September 2020), Simons J. refused to refer to the CJEU an issue regarding validity of the 4th Union list of Projects of Common Interest insofar as it includes the proposed Shannon LNG terminal and connecting pipeline.

The list of projects of common interest had been adopted by the EU Commission by way of delegated regulation: Commission Delegated Regulation (EU) 2020/389.

6. In *Friends of the Irish Environment CLG v. Minister for Communications, Climate Action and the Environment, Ireland and the Attorney General & Shannon LNG Limited* [2021] IEHC 177, [2021] 3 JIC 3003 (Unreported, High Court, 30 March 2020), Simons J. dismissed the balance of the challenge in respect of the List of Projects of Common Interest.

7. In *Friends of the Irish Environment CLG v. Minister for Communications, Climate Action and the Environment, Ireland and the Attorney General & Shannon LNG Limited* [2022] IECA 298 (Unreported, Court of Appeal, Noonan J., 21 December 2022), the Court of Appeal dismissed an appeal against Simons J.'s order declining to refer the issue of the List of Projects of Common Interests to the CJEU.

8. In *Shannon LNG Limited v. An Bord Pleanála* [2024] IEHC 555 (Unreported, High Court, 30 September 2024), I quashed the commission's refusal of permission for the Shannon LNG project.

9. In *Friends of the Irish Environment CLG v. An Coimisiún Pleanála* [2026] IEHC 205 (Unreported, High Court, 1 April 2026), I upheld the commission's grant of permission for a 600 MW powerplant, 120 MW battery storage system, above ground installation and associated ancillary works near Tarbert, Co. Kerry (ABP Ref PA08.319566).

10. The applicant now seeks leave to appeal.

Procedural history

11. Following the substantive judgment, the applicant delivered legal submissions seeking leave to appeal, dated 13 May 2026. The opposing parties delivered replying submissions and the matter was heard on 15 June 2026.

12. Judgment was reserved at the end of that hearing. I would like to record my thanks to all of the lawyers involved for their unfailingly courteous, professional and helpful assistance. As I have previously sought to make clear, insofar as any points advanced are not being accepted in this or any other given judgment, that is solely to do with the inherent merits of such points and is no reflection on those instructed to convey such points, a distinction that most certainly should be, and I believe generally is in fact, self-evident to all concerned.

13. On 19 June 2026, a draft of the present judgment was sent to the parties to give an opportunity to identify any errors. The rules of engagement in such a situation are that the draft is without prejudice to the right of the court ultimately to issue a judgment in whatever form or with whatever content it considers appropriate.

14. Any comments must be emailed to the court and uploaded to ShareFile in writing by the notified deadline, and should not be to reargue the substance (submissions to that effect will be disregarded) but are confined to matters such as:

- (i) informing the court as to whether the party prefers an alternative to a formal written judgment as proposed, and if the party so considers, whether that party considers that the entire matter or some specified part of it can be disposed of (a) by order without a reasoned judgment, or (b) by *ex tempore* reasons without a written judgment;
- (ii) informing the court, assuming that the court proceeds with a formal judgment, as to whether the party wishes to propose any corrections to the draft such as:
 - (a) any typographical, factual, legal or other errors in the decision;
 - (b) any redaction of personal or other information that a party wishes to request;
 - (c) in the event that the court proposes to refer to any matter (whether factual, legal (including reference to authorities or other legal material), *obiter* comment or otherwise) not referred to at the hearing, any comment as to why such reference is not relevant or otherwise should not be included or why such matter if included should not lead to the proposed conclusion;
 - (d) any other matter in the draft judgment that the party considers should be omitted;
 - (e) any matter not included in the draft judgment that the party considers should be added to it (including where the party considers that procedural, factual or legal points not set out in the judgment should be addressed or where the party considers that reasons for any aspect of the decision are not set out or where an overall ground is disposed of but detail of the ground or sub-ground is not expressly addressed, or where an issue arose the disposition of which would be *obiter* but on which the party concerned considers that there would be a benefit in the court expressing a view); and
 - (f) any other suggestions as to the wording (as opposed to substance) of the decision if the proposed wording causes any significant issue for a party for any identified reason.

15. It is then entirely a matter for the court as to whether to give judgment with or without amendment including any amendment that appears appropriate to the court whether arising from submissions or not. Any judgment may be given without further notice following the expiry of the specified period, whether comments are made or not. That period will not be extended save in exceptional circumstances. All parties involved are required to positively confirm to the court the position including if they have no observations on the draft legitimately falling within the foregoing parameters. Overall the draft judgment procedure is a concession which parties can engage with but must do so with immediate dispatch, discipline and focus – it is not the opening of a new phase of the litigation that gives rise to “an entitlement to elaborate procedures at every point” (to use a phrase of O’Donnell C.J. (Dunne, Charleton and Baker JJ. concurring) in *O’Sullivan v. Health Service Executive* [2023] IESC 11 (Unreported, Supreme Court, 10 May 2023) at para. 39); and still less should the procedure invite the perhaps “serious error, to which lawyers are prone, to approach any such case on the tacit assumption that only procedures which approximate to a criminal trial are fair, and anything which departs from that is somehow dubious” (O’Donnell J. in *O’Sullivan v. Sea Fisheries Protection Authority* [2017] IESC 75, [2017] 3 I.R. 751, [2018] 1 I.L.R.M. 245, 780).

16. Draft judgments are not public domain materials and, while they can be shared between the lawyers concerned and their clients, subject to the following, it is inappropriate for any person to refer to them for any purpose other than to assist the court in relation to the finalisation of the formal judgment. Therefore anyone with information as to the text, content or proposed outcome of any draft is required not to publish or transmit such information to others save solely by way of private transmission for the legitimate purposes of assisting in the finalisation of the judgment and subject to a similar restriction on any recipient. Trial participants should take reasonable steps to keep drafts confidential. On this topic, see *Attorney General v. Crosland (No. 2)* [2021] UKSC 58, [2022] 1 W.L.R. 367, [24/01/2022] T.L.R. 1 which discusses why restriction on publication of draft judgments is in the interests of the administration of justice; see also *Baigent v. Random House Group Ltd* [2006] EWHC 1131 (Ch), [2006] 5 WLUK 45, (2006) 150 S.J.L.B. 603 (Smith J.); *R. (Counsel General for Wales) v. Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 181, [2022] 1 W.L.R. 1915, [2022] 4 All E.R. 599 (Sir Geoffrey Vos MR; Davies and Dingemans LJ. concurring); *Public Institution for Social Security v. Banque Pictet & Cie SA and others* [2022] EWCA Civ 368, [2022] 3 WLUK 291, [2022] B.L.R. 349 (Carr LJ; Jackson and Simler LJ. concurring); *Itkin v. Wood* [2023] JRC 101 (Unreported, Royal Court of Jersey, 22 June 2023). The contents of this paragraph constitute an immediately effective direction of the court to the parties and anyone having notice of the draft judgment with effect from the date of circulation of the draft.

17. The deadline for such comments from the parties was to be 16:00 on Wednesday 24 June 2026. Comments were:

- (i) applicant – no comments;
- (ii) commission – no comments;
- (iii) State – case previously struck out so not participating further; and
- (iv) developer – no comments.

Leave to appeal

18. The statutory criteria for leave to appeal are familiar. Some of the major elements required for the grant of leave to appeal are as follows:

(i) The point must properly arise

- i. The question **must fall within the pleadings**: *Concerned Residents of Treascon and Clondoolusk v. An Bord Pleanála & Ors.* [2024] IESC 28, [2024] 7 JIC 0402 (Unreported, Supreme Court, 4 July 2024) *per* Murray J. at paras. 39 *et seq.* (O’Donnell C.J., Woulfe, Collins and Donnelly JJ. concurring). The issue of whether a point falls within the pleadings, as determined by the trial court, does not normally raise a point of law suitable for an appeal: see *Leech v. An Bord Pleanála* [2025] IESCDet 106 (O’Malley, Murray and Donnelly JJ., 30 July 2025) at 30 “The essential point made by the Applicant is that the trial judge granted relief quashing the decision of the Board on a basis that was not pleaded, that misinterpreted the decision of the Board granting the permission in question, and that failed to properly apply the general presumption that a decision of an administrative body is lawful. Issues of pleading and of an alleged misinterpretation of a specific administrative decision will usually be case specific and will not present issues of law of public importance. While the presumption of validity attaching to administrative decisions represents an important legal principle, the fact of that presumption and its effect are not the subject of any uncertainty and the application of the

presumption to a particular decision will not usually involve an issue of law of public importance”.

- ii. The question **must actually arise on the facts** and should not be launched in the abstract: see analogously *Minister for Justice and Equality v. Andrzejczak (No. 2)* [2018] IEHC 11, [2018] 1 JIC 1603 (Unreported, High Court, Donnelly J., 16 January 2018), para. 10.
- iii. The question raised **must actually have been argued** by the would-be appellant and must not be a new issue formulated for the purposes of an appeal: *GOCE Limited v. An Bord Pleanála* [2025] IEHC 43 (Unreported, High Court, Farrell J., 31 January 2025).
- iv. While not an absolute rule, the question should be determinative in some sense and **should make a difference to the outcome** – generally it should not be one which, if answered in a sense favourable to the would-be appellant, would leave the result unchanged: *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646, 2016 WJSC-HC 439, [2016] 11 JIC 1404 (Unreported, High Court, 14 November 2016); *Morehart v. An Bord Pleanála* [2025] IEHC 701 (Unreported, High Court, Farrell J., 8 December 2025) at 9. This is part of a broader principle that prolonging the process by recourse to a further instance can’t be based on just identifying some shiny and interesting point – the whole thing has to be going somewhere. O’Donnell J. (Clarke and Dunne JJ. concurring) put this vividly in *Rooney v. Minister for Agriculture and Food* [2016] IESC 1 (Unreported, Supreme Court, 28 January 2016) at para. 3: “Some litigants, and not just those who represent themselves, prefer the comfort of focusing exclusively on the debatable ruling or judicial comment reinforcing a sense of grievance rather than recognise the forest of problems in the overall case. The cycle continues and becomes almost a form of litigious perpetual motion”.
- v. The question **must accurately reflect the judgment and must not be an addition, exaggeration or distortion** launched for the purposes of creating a case for appeal: *Monkstown Road Residents Association v. An Bord Pleanála* [2023] IEHC 9, [2023] 1 JIC 1907 (Unreported, High Court, 19 January 2023) *per* Holland J. at §9(d); *Stapleton v. An Bord Pleanála* [2025] IEHC 178 (Unreported, High Court, 1 April 2025) *per* Holland J. As put more generally by the Supreme Court in *Cooper v. An Bord Pleanála* [2025] IESCDT 96 (O’Malley, Collins and Donnelly JJ., 28 July 2025) at 15, “The applicant’s misunderstanding of the legal situation does not amount to a matter of general public importance”.
- vi. The application for leave to appeal **should be made within time**, generally within 28 days from the order to be appealed against: *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646, 2016 WJSC-HC 439, [2016] 11 JIC 1404 (Unreported, High Court, 14 November 2016).
- vii. The question should be specific and should identify something specific that makes a difference – it **should not be an invitation to an appellate court to write an essay** on a particular topic or engage in a discursive, roving response: *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646, 2016 WJSC-HC 439, [2016] 11 JIC 1404 (Unreported, High Court, 14 November 2016); *Stapleton v. An Bord Pleanála* [2025] IEHC 178 (Unreported, High Court, 1 April 2025) *per* Holland J.

(ii) The point must be one of law

- i. The point **cannot be an essentially factual question** such as construing the import and effect of a particular decision: *Leech v. An Bord Pleanála* [2025] IEHC 157 (Unreported, High Court, 24 March 2025) *per* Farrell J.
- ii. Relatedly, the question **should not be one of application of law to particular facts** but rather one of the substance, content and interpretation of law. Questions about the application of established principles to particular facts are not pure questions of law and are at best mixed questions of fact and law, and are generally unsuitable for appeal in such a context: *B.S. v. Director of Public Prosecutions* [2017] IESCDT 134 (Clarke C.J., O’Donnell, McKechnie, MacMenamin, Dunne, Charleton and O’Malley JJ., 6 December 2017); *per* Simons J. in *Halpin v. An Bord Pleanála* [2020] IEHC 218, [2020] 5 JIC 1501 (Unreported, High Court, 15 May 2020), para. 60; *per* Barniville J. in *Rushe v. An Bord Pleanála* [2020] IEHC 429, [2020] 8 JIC 3101 (Unreported, High Court, 31 August 2020);

per Phelan J. in *Stanley v. An Bord Pleanála* [2022] IEHC 671, [2022] 11 JIC 2805 (Unreported, High Court, 28 November 2022); *Eco Advocacy CLG v. An Bord Pleanála, Keegan Land Holdings Limited, An Taisce - The National Trust for Ireland and Client Earth AISBL* [2024] IESCDET 62 (Charleton, Woulfe and Collins JJ., 27 May 2024); *per* Farrell J. in *Leech v. An Bord Pleanála* [2025] IEHC 157 (Unreported, High Court, 24 March 2025).

(iii) **The point of law must be of public importance**

- i. The question **must not be fact-specific** arising in the particular context of a particular case – rather it must transcend the facts in order to create a point of public importance: see analogously and albeit non-precedentially, *Patrick McCaffrey & Sons Limited v. An Bord Pleanála* [2024] IESCDET 145 (Dunne, Hogan and Collins JJ., 29 November 2024). See also *Leech v. An Bord Pleanála* [2025] IESCDET 106 (O'Malley, Murray and Donnelly JJ., 30 July 2025) at 30: “The essential point made by the Applicant is that the trial judge granted relief quashing the decision of the Board on a basis that was not pleaded, that misinterpreted the decision of the Board granting the permission in question, and that failed to properly apply the general presumption that a decision of an administrative body is lawful. Issues of pleading and of an alleged misinterpretation of a specific administrative decision will usually be case specific and will not present issues of law of public importance. While the presumption of validity attaching to administrative decisions represents an important legal principle, the fact of that presumption and its effect are not the subject of any uncertainty and the application of the presumption to a particular decision will not usually involve an issue of law of public importance”.
- ii. Advancing the proposed question **should resolve doubt rather than create doubt where none exists** – this is consistent with the views of Baker J. in *Ógalas v. An Bord Pleanála* [2015] IEHC 205, [2015] 3 JIC 2008 (Unreported, High Court, 20 March 2015) that an appeal may be necessary in the public interest to resolve doubt. But if no doubt exists, the function of the appeal mechanism is not to introduce new uncertainty into the system. *Nagle View Turbine Aware Group v. An Bord Pleanála (No. 2)* [2025] IEHC 3 (Unreported, High Court, 10 January 2025) endorsed a submission that “where the law is not uncertain, the public interest suggests an appeal is not warranted”.
- iii. The application for leave to appeal should **engage with the rationale of the judgment being appealed against and provide a plausible basis as to why that judgment is wrong** to the level that meets the criteria for an appeal. While a leave to appeal application is in one sense premised on the view that the decision may be incorrect, that does not relieve a would-be appellant from actually engaging with the logic and reasoning of the judgment as opposed to merely repeating his or her position: see analogously and non-precedentially, *Nagle View Turbine Aware v. An Bord Pleanála* [2025] IESCDET 41 (O'Malley, Murray and Donnelly JJ., 10 March 2025).
- iv. The fact that an official body is seeking leave to appeal is a relevant factor (*Sherwin v. An Bord Pleanála (No. 2)* [2023] IEHC 232, [2023] 5 JIC 0802 (Unreported, High Court, 8 May 2023)) but **the mere fact that the request for leave to appeal is made by an official entity does not convert a point into one being suitable for appeal** if it would not otherwise be so. As pointed out in *Stapleton v. An Bord Pleanála* [2025] IEHC 178 (Unreported, High Court, 1 April 2025) *per* Holland J., a body concerned that it is bound by a decided issue is the whole point – the system is not a one-way ratchet whereby only applicants are bound by caselaw.
- v. The fact that a point is “novel” is not determinative as to whether a point is suitable for the granting of a certificate, or to put matters another way, **the mere fact that a point is novel does not render it a suitable basis for appeal if it would not otherwise be so**: *Callaghan v. An Bord Pleanála* [2015] IEHC 493, [2015] 7 JIC 2405 (Unreported, High Court, Costello J., 24 July 2015). And as Hyland J. observed in *Maguire T/A Frank Pratt & Sons (No. 2)* [2023] IEHC 209, [2023] 3 JIC 1307 (Unreported,

High Court, 13 March 2023) at §27: “the mere fact that an applicant for leave disagrees with a conclusion in the judgment cannot be relied upon to characterise the state of the law as being uncertain”.

- vi. The **mere inclusion of a request for a reference to the CJEU does not convert a point into one suitable for appeal** if it is otherwise unsuitable for appeal by reason of being abstract, or not arising having regard to the findings of fact, or being an issue of application of law rather than interpretation, or due to lacking sufficient factual foundation or due to there not being any demonstrable reasonable doubt, for example: see analogously *Carrownagowan Concern Group v. An Bord Pleanála* [2025] IESCDT 8 (Charleton, Collins and Donnelly JJ., 27 January 2025); *Carrownagowan Concern Group v. An Bord Pleanála* [2025] IESCDT 9 (Charleton, Collins and Donnelly JJ., 27 January 2025).

(iv) The public importance must be exceptional

If the would-be appellant establishes that there is a point of law of public importance, it **must also be established that the importance is exceptional**.

(v) An appeal must be in the public interest

- i. The context is the objective of the Oireachtas in seeking finality, certainty and expedition in challenges brought by way of judicial review in planning cases (*Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála* [2022] IEHC 231, [2022] 4 JIC 2601 (Unreported, High Court, 26 April 2022) *per* Barniville J. at para. 32; *Freeney v. An Bord Pleanála* [2025] IEHC 36 (Unreported, High Court, 24 January 2025) *per* Bradley J.). The nature of the project and the risks of further delay are factors going to the requirement that **an appeal must be in the public interest**: see *per* McGovern J. in *Dunnes Stores v. An Bord Pleanála* [2015] IEHC 387, [2015] 6 JIC 1805 (Unreported, High Court, 18 June 2015) at §15 and §16. See also analogously and non-precedentially *Eco Advocacy CLG v. An Bord Pleanála, Keegan Land Holdings Limited, An Taisce - The National Trust for Ireland and Client Earth AISBL* [2024] IESCDT 62 (Charleton, Woulfe and Collins JJ., 27 May 2024) at para. 24: “The Court must have regard to the potential impact upon the notice party of any further delay in these proceedings”.
- ii. Any assertion of problems in practice caused by a judgment **must be backed up with evidence**: see *Stapleton v. An Bord Pleanála* [2025] IEHC 178 (Unreported, High Court, 1 April 2025) *per* Holland J.; *Phoenix Rock Enterprises v. An Bord Pleanála & Ors.* [2023] IESCDT 97 (Dunne, Baker and Donnelly JJ., 20 July 2023) at §22 and §30 which dealt with an argument that alleged uncertainty in the law was creating alleged difficulties in practice, but rejected this on the basis that there was “no evidence before the High Court that the quarry industry was being seriously affected by the issues in the case”, and that “[t]he decision in this case was fact-specific to this quarry and it must be recalled that the role of the Supreme Court on an Article 34 appeal is not to give advisory opinions but to deal with the controversy at issue between the parties once the constitutional thresholds have been met”. See also *McCaffrey v. An Bord Pleanála* [2024] IEHC 476 (Unreported, High Court, Gearty J., 26 July 2024) at §3.7, leave to appeal refused *McCaffrey v. An Bord Pleanála* [2024] IESCDT 145 (Dunne, Hogan and Collins JJ., 29 November 2024).

19. Contextually, perhaps I can point out that if there is a solid case for leave to appeal, it will presumably be granted – see *R.A. v. Refugee Appeals Tribunal* [2015] IEHC 830 (Unreported, High Court, 21 December 2015); *B.W. v. Refugee Appeals Tribunal* [2015] IEHC 833 (Unreported, High Court, 21 December 2015); *K.R.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 421 (Unreported, High Court, 24 June 2016); *S.T.E. v. Minister for Justice and Equality* [2016] IEHC 544 (Unreported, High Court, 14 October 2016); *R.A. v. Refugee Appeals Tribunal (No. 3)* [2016] IEHC 671 (Unreported, High Court, 21 November 2016); *B.S. (India) & Anor. v. Minister for Justice and Equality & Ors. (No. 3)* [2020] IEHC 485, [2020] 10 JIC 1202 (Unreported, High Court, 12 October 2020); *Dublin City Council v. An Bord Pleanála (No. 2)* [2021] IEHC 34 (Unreported, High Court, 28 January 2021); *Waltham Abbey Residents Association v. An Bord Pleanála* [2021] IEHC 597, [2021] 10 JIC 0702 (Unreported, High Court, 7 October 2021); *Sweetman v. An Bord Pleanála (Sweetman XVII) (No. 2)* [2021] IEHC 662, [2021] 10 JIC 2601 (Unreported, High Court, 26 October 2021); *Save Roscam Peninsula CLG v. An Bord Pleanála (No. 2)* [2022] IEHC 328, [2022] 6 JIC 0903 (Unreported, High Court, 9 June 2022); *Joyce-Kemper v. An Bord Pleanála (No. 5)* [2022] IEHC 349

(Unreported, High Court, 10 June 2022); *Kerins v. An Bord Pleanála (No. 5)* [2023] IEHC 280 (Unreported, High Court, 25 May 2023); *Coolglass Wind Farm Ltd v. An Bord Pleanála* [2025] IEHC 1 (Unreported, High Court, 10 January 2025); *Heavey v. An Bord Pleanála (No. 2)* [2025] IEHC 311 (Unreported, High Court, 30 May 2025). It does not necessarily assist matters to certify superfluous issues that do not meet the necessary criteria.

The proposed questions of alleged exceptional public importance

20. The applicant's proposed questions are as follows:

- (i) "Where an applicant has standing as a matter of European law to raise a ground in JR proceedings without having raised the issue before the decision maker, is the court entitled to confine the scope of the review to material before the decision-maker, or exercise discretion to refuse relief because the issue was not raised? Is that compatible with C-137/14 *Commission v Germany*, and/or the right to an effective remedy? Not having raised this issue before the decision maker, was the Applicant entitled to introduce material impugning the "efficiency" projections in the EIA where the details of the forecasting/methodology were withheld on grounds of confidentiality?"
- (ii) "Can the Commission be regarded as acting within the range of possible outcomes for the purposes of s15 Climate Action and Low Carbon Development 2015, where the developer has not supplied information specified by the EIA Directive which is relevant to section 15 and the 'reasoned conclusion' required by Article 1(2)(g)(iv) EIA Directive? Does the Commission have the ability to dispense with information specified by the EIA Directive?"

Do the points properly arise?

21. Unfortunately, the applicant's skilfully elaborate points now launched for the purpose of a proposed appeal don't properly arise because the substantive point was not pleaded or argued: *Concerned Residents of Treascon and Clondoolusk v. An Bord Pleanála & Ors.* [2024] IESC 28, [2024] 7 JIC 0402 (Unreported, Supreme Court, 4 July 2024) *per* Murray J. at paras. 39 *et seq.* (O'Donnell C.J., Woulfe, Collins and Donnelly JJ. concurring). The standing-type point doesn't get the applicant anywhere in the absence of a substantive point. The Supreme Court has as recently as *Coolglass Wind Farm Limited v. An Coimisiún Pleanála* [2026] IESC 5 (Unreported, Supreme Court, O'Donnell C.J., 4 February 2026) highlighted the need to assess the validity of a decision having regard to what was actually submitted in the process. This is well established at this stage. Furthermore the applicant also acknowledges that the principal judgment does address the substantive issues despite my view that the applicant's failure to raise the points in the process should be held against it. In such a context, the question now is whether the points presented are a proper basis for an appeal.

22. Unfortunately, both points involve a tendentious mischaracterisation of the factual conclusions of the principal judgment:

- (i) the court did not "confine the scope of the review";
- (ii) the decision does not rest on the court having decided to "exercise discretion to refuse relief because the issue was not raised";
- (iii) the information was not as a matter of fact "specified by the EIA directive"; and
- (iv) the commission did not "dispense" with information so specified.

23. The substantive decision finds that directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (the EIA directive) was complied with on these facts.

24. The second point does not arise as it was not pleaded or argued in this form.

25. There is no plea that the decision fell outside the spectrum under s. 15 by reason of not supplying information specified by the EIA directive. The applicant did not challenge the confidentiality issue on the pleadings as explained in the substantive judgment. Insofar as there is any complaint about reliance on confidentiality in particular, the only reference to this specifically in the pleadings is at para. 77 which is just a statement of fact and not a legal complaint. The applicant makes general pleas about lack of information but not in a way that expressly takes issue with the right to claim confidentiality.

26. The first point is purely ancillary as it comes down to a question as to whether the applicant is now entitled to pursue the second point.

27. So the points individually or collectively do not in fact properly arise.

Are the points ones of law?

28. The points are a mix of law and fact, but the substantive second question is particularly fact-based. The extent of what information is required by the directive has an evaluative element, and if planning decision-takers on particular facts consider that particular information is required they have powers to direct production of such information. So the substantive question is certainly not a pure point of law.

Are the points of public importance?

29. As the notice party submitted, “The Court applied settled law, including the recent decision of the Supreme Court in *Coolglass Wind Farm Limited v. An Coimisiún Pleanála* [2026] IESC 5. Where settled law has been applied to the particular facts of a case, especially recent Supreme Court authority, it is not in the public interest to certify an appeal merely because the unsuccessful party seeks to recast the application of that law as uncertainty” (submissions para. 56).

30. The points are not of public importance because:

- (i) In the case of the substantive question (Q 2), the wording is tendentious and the question raises issues not pleaded or argued. In any event, the judgment applies settled law to particular facts.
- (ii) In the case of the ancillary question (Q 1), the wording is also tendentious. The principal judgment does not confine the scope of the review to points made to the decision-taker, it holds that the validity of the decision should be assessed through the lens of what was before the decision-taker at the time. The applicant has not brought forward material creating doubt about the need to assess the validity of a decision by reference to what was before the decision-taker. Common sense dictates that any other approach would be unworkable in any event. Furthermore this ancillary procedural question does not arise and does not get the applicant anywhere where the substantive question does not arise.

31. The ultimate reason for the absence of public importance is that the points argue for a position that has no demonstrated substance and on the contrary the principal judgment is consistent with the application of established caselaw.

32. The commission disposes of the argument regarding the “doomsday scenario” for NGOs very effectively. Ultimately there is nothing in the substantive judgment that makes it impossible or excessively difficult to advance points – all an NGO has to do is to introduce relevant material in the process if it wants to rely on that material to knock down a decision. That does not take from its right to raise any complaint based on the material that was before the decision-taker. The commission submits (emphasis added):

“3. In support of this application, the Applicant advances what it subjectively perceives to be something of a doomsday scenario in terms of the alleged impact of the Judgment on NGOs and judicial review:

‘...if this Court’s decision stands it will have very serious implications for the ability of non-governmental organisations promoting environmental protection in the State to effectively participate in judicial processes...’

4. As to what these ‘serious implications’ actually are, the Applicant does not specify. Suffice it to state, for present purposes, that the Commission’s position is that the Applicant’s written submissions in support of its application for leave to appeal do not engage with the substance and rationale of the Judgment—or the settled legal principles underpinning it—for the purpose of demonstrating how the threshold for the grant of leave to appeal is met.

5. Furthermore, it might also be observed that there is something of a disconnect between the Applicant’s unfounded complaints about the alleged effects of the Judgment on NGOs’ ability to participate effectively in environmental decision-making processes in the future and the fact that it sought to advance these proceedings by reference to a series of contentions and evidence that it could have, but never, raised in the decision-making process at issue here. The Applicant never explained this failure, but now complains, based on what the Commission submits to be a misreading of the Judgment and existing case law, that it should have free reign to raise whatever points it wants for the first time in judicial review without any consequence. The comments of the High Court in Northern Ireland in *Re Newry Chamber of Commerce* [2015] NIQB 65 encapsulate the inherent unfairness that would be created by such an approach (§76):

‘Further, it should be noted that the EIA regime specifically provides for consultation of the public on the ES...and the taking into account of the public’s consultation responses by the decision-maker prior to a decision being taken (see Article 8 of the EIA Directive and Regulation 4(2) of the EIA Regulations taken together with the definition of “environmental information” in Regulation 2(2)); and there is express power conferred upon the decision-maker to require further environmental information from the developer if the consultation responses persuade him the ES is insufficient (see Regulation 18 of the EIA Regulations). The consultation process for EIA Development is thus designed by statute to enable the public to inform the decision-maker of all points which they consider relevant prior to the grant of permission so that the decision-maker can then take them into account prior to reaching a decision. **It would frustrate that purpose if a member of the public could come to Court after the event and seek the quashing of a planning permission for EIA Development based upon points of which he did not inform the decision-maker**

during the statutory consultation process. This is precisely what the Applicant seeks to do in the present case.'

6. For the reasons set out in these submissions, the Commission submits that the Applicant has failed to meet the cumulative requirements contained in s.50A(7) of the PDA – it has failed to identify a point of law of exceptional public importance, in relation to which it is desirable in the public interest that an appeal should be permitted."

33. Unfortunately the commission is quite right that behind the modest sounding suggestion that there are some unexplored nooks and crannies in the judgment of 15 October 2015, *European Commission v Federal Republic of Germany*, C-137/14, ECLI:EU:C:2015:683 is in reality an attack on the whole superstructure of Irish administrative law. How would judicial review ever work if someone dissatisfied with a process can simply re-run an attack on the administrative decision with fresh evidence at the court stage? If anything is settled law it is the architecture of judicial review. That settled law is decisive against the asserted right to have a decision re-analysed by reference to additional evidence that could have been, but was not, put before the decision-taker.

34. The notice party also puts this well:

"24. The Applicant's argument conflates two distinct matters: (i) whether an applicant is entitled to bring and argue a plea; and (ii) whether that plea is made out when the decision is reviewed in light of the material before the competent authority. *Commission v. Germany* concerns the former. The Judgment turned on the latter.

25. That distinction is particularly important in planning and environmental decision-making. Public participation is designed to allow alleged defects to be identified before the decision is made, so that they may be corrected. The Court of Appeal said as much in *Friends of the Irish Environment CLG v. Government of Ireland* [2021] IECA 317, paras. 275-277, in terms quoted and relied upon in the Judgment. The Applicant had already been warned against the unfairness and administrative undesirability of withholding points that could have been raised during consultation.

...

30. The Applicant seeks to elevate a routine feature of judicial review – review of the legality of a decision by reference to the record before the decision-maker – into a question of EU law. That is not a genuine uncertainty. It is an attempt to convert an evidential failure into an appealable point of law."

35. The notice party also identifies the logical misunderstandings that permeate the substantive point:

"43. The reason the Applicant failed was not simply that it had failed to raise the point before the Commission. That failure was relevant because it affected the material before the Commission when it made the Decision. The Court's reasoning was that, in the absence of material before the Commission demonstrating that the EIA conclusion and reasoning fell outside the relevant margin of evaluation, and in the absence of any demonstrated legal error, the Applicant had not discharged the burden of proof. The Applicant's complaints about effectiveness and restriction of argument therefore proceed from a selective reading of the Judgment.

44. The Judgment applied settled principles as to the burden of proof in judicial review. The Applicant bore the burden of demonstrating that the information before the Commission was legally insufficient and that the public did not have an accurate impression of the impact of the project. The Court held that this burden had not been discharged. There is no uncertainty in that principle. A party cannot create a point of law of exceptional public importance merely by rehearsing the provisions of the EIA Directive while failing to engage with the legal standard of review by which its complaint was rejected.

45. At paras. 75 and 76 of the Judgment, the Court accepted that the Commission had an autonomous duty to reach a reasoned conclusion on EIA, even where no process participant had made an adverse comment on the EIAR. The Court held that the Commission did reach such a reasoned conclusion, and that the Applicant had not displaced it. That is fatal to the proposed question. It demonstrates that the Court did not disapply the EIA Directive, or dilute the Commission's obligation under it. It applied the Directive and held that the Applicant had not proved any breach.

46. The Applicant's attempt to characterise this as a case about the Commission 'dispensing with' information is therefore incorrect. The case was decided on the basis that the information was not shown to be legally deficient, that the level of detail required varies from case to case within a margin of evaluation, and that the Court should not impose a mandatory post hoc checklist of particulars as a condition of EIA validity. That reasoning is orthodox and fact-sensitive. It does not disclose any uncertain point of law.

47. The confidentiality point does not alter that conclusion. Article 10 of the EIA Directive expressly recognises that commercial and industrial confidentiality may be protected. The

Court held that the Applicant had not demonstrated invalidity having regard to Article 10, the margin of evaluation and the overall burden of proof. Insofar as the Applicant now seeks to put confidentiality at the centre of the proposed appeal, that complaint was also rejected on pleading grounds. At para. 83 of the Judgment, the Court noted that the only specific reference to confidentiality in the pleadings was a statement of fact and not a legal complaint; while the Applicant had made general pleas about lack of information, it had not expressly challenged the right to claim confidentiality.

48. Nor is there any unresolved point about the interaction between s.15 of the 2015 Act and the EIA Directive. The Court applied the recent judgment of the Supreme Court in *Coolglass Wind Farm Limited v. An Coimisiún Pleanála* [2026] IESC 5 which settled the point. Section 15 operates within the existing statutory functions of the relevant body. It does not expand those functions, nor does it create a free-standing obligation to remake national climate and energy policy at individual development-consent level.

49. The Court then applied *Coolglass* to Core Ground 2. It held that, when viewed in light of the Applicant's failure to raise the complaints during the administrative process and/or the margin of evaluation within s.15 as identified by the Supreme Court, no error by the Commission had been demonstrated. The Applicant was not entitled to undermine the Decision by reference to new scientific arguments which had not been made in the process, without demonstrating errors that would have been obvious to any reasonable decision-maker. That was an application of settled law to the facts, not the determination of a novel point of law.

50. The Applicant does not identify any misunderstanding or misapplication of *Coolglass* by the High Court. It does not point to any statutory provision which the judgment disappplied. Nor does it identify any uncertainty in the legal test governing the adequacy of EIA information, the burden of proof in judicial review, the role of Article 10 confidentiality, or the margin of evaluation under s.15. Its complaint is, in substance, that the Court did not accept its assessment of Chapter 15, the Baringa modelling and the treatment of confidential inputs.

51. The Applicant's formulation also ignores the nature of the development and the policy context. The Court recognised that a gas plant can provide a resilience backbone, relatively rapid and controllable power, and grid stability to bridge the gap between intermittent renewable generation and demand. The Commission's conclusion that the development would provide back-up to a renewables-based grid and contribute to resilience was supported by national policy, including the reference in the Climate Action Plan 2024 to the delivery of at least 2GW of new flexible gas-fired generation.

52. The second proposed question is therefore fact-specific. It is directed to the adequacy of the information contained in Chapter 15, the Baringa modelling, the treatment of commercially confidential inputs, and the Court's evaluation of whether the Applicant had discharged the burden of proof. That is not a point of law of exceptional public importance.

53. Finally, the second proposed question is not stateable because it assumes the very conclusion that the Applicant failed to establish. It proceeds on the basis that information required by the EIA Directive was not supplied and that the Commission dispensed with it. The Judgment found neither. A certificate should not issue on a question which begins by assuming away the findings on which the Applicant failed."

36. So in short for a combination of reasons the asserted public importance is not made out.

Are the points of exceptional public importance?

37. This does not arise having regard to the foregoing.

Is an appeal in the public interest?

38. Without taking in any way from the right of access to the court, the approach to this project seems to be that if one keeps litigating one can block a project indefinitely. Eight written decisions on, that is not how the system is meant to work.

39. An appeal is not in the public interest, and the fact that this is a major project does not mean that an appeal advances the public interest.

40. Relevant factors include:

- (i) the fact that the case involved the application to particular facts of settled law as laid down in the recent Supreme Court decision in *Coolglass*;
- (ii) the imperative need for energy security and supply resilience particularly in the context of multiple global crises;
- (iii) the excessively litigated nature of the present project over a period of eight years;
- (iv) the contribution the project will make to the transition to net zero by displacing more carbon intensive forms of energy production, in the context of the global climate emergency;
- (v) the national policy support for the project;

- (vi) the strong element of *esprit d'escalier* about the posture now adopted by the applicant;
- (vii) the general statutory policy in favour of finality in planning law;
- (viii) the failure to raise the points in the process, which remains relevant to the public interest test;
- (ix) the tendentious nature of the questions – an appeal that is based on a misunderstanding of the principal judgment in a way that seems to “spread maximum confusion” (*Hellfire Massy Residents Association v. An Bord Pleanála* [2022] IESC 38, [2024] 1 I.R. 386, [2022] 10 JIC 2402 *per* O'Donnell C.J. at para. 22 (Dunne, Woulfe, Hogan and Murray JJ. concurring)) is not in the public interest.

Does the fact that there is an EU law point make any difference?

41. For the avoidance of doubt, I have obviously (and as always when an EU law point is argued) considered any potential relevance of art. 267 TFEU. But the obligation to refer (even for an apex court) does not apply if a point is *acte clair/ acte éclairé*: judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA*, C-561/19, ECLI:EU:C:2021:799 (Grand Chamber) at para. 33.

42. Some relevant legal principles which have been rehearsed in previous caselaw concerning references to the CJEU include the following:

- (i) The primary criteria for the admissibility of a reference are those set out in art. 267 TFEU, namely that the reference relates to interpretation or validity of EU law (*i.e.*, not its application), and that the answer to the question is “necessary” for a decision by the domestic court.
- (ii) The mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of EU law does not mean that the court or tribunal concerned is compelled to consider that such a question has been raised within the meaning of art. 267 TFEU (judgment of 6 October 1982, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, 283/81, EU:C:1982:335, para. 9; judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA*, C-561/19, ECLI:EU:C:2021:799 (Grand Chamber) at para. 54).
- (iii) As to the first condition for admissibility, a reference (even by an apex court) is only admissible on an issue of interpretation or validity of EU law, **not its application**: art. 267 TFEU. Thus a reference doesn't arise if “no acute point of interpretation is really presented by [the matter]: it really shades into issues of fact and the application of established principles of EU law”: *An Taisce v. an Bord Pleanála & Ors.* (No. 3) [2022] IESC 8, [2022] 2 I.R. 173, [2022] 1 I.L.R.M. 281 *per* Hogan J. at para. 156 (O'Donnell C.J., Dunne, Charleton and Woulfe JJ. concurring).
- (iv) As to the second condition, a reference (even by an apex court) **is not admissible if it is not “necessary”** as specified in art. 267 TFEU, and thus “would not affect in any way the outcome of the case actually before the Court (*Consorzio Italian Management e Catania Multiservizi and Catatani Multiservizi Case C-561/19* at para. 34)”: *Friends of the Irish Environment v. Legal Aid Board* [2023] IECA 63 (Unreported, Court of Appeal, Murray J., 22 March 2023) (Barniville P. and Noonan J. concurring) at 12.
- (v) In particular therefore, a reference does not arise if **the point falls outside the pleaded case**, as such an issue is not capable of affecting the result. Similarly it does not arise if premised on incorrect factual assertions: “the questions proposed by the applicant does not arise for determination on the facts here and is premised on a characterisation of the facts that is wholly at odds with the findings made by the High Court and/or is based upon a submission with regard to access to justice which is made without evidence and contrary to that which was submitted to the High Court. No issue of European Union law therefore arises which is necessary to resolve in order to determine this application for leave”: *Eco Advocacy v. An Bord Pleanála* [2025] IESCDET 74 (Dunne, Hogan and Donnelly JJ., 4 June 2025), para. 27. Thus, a court (including an apex court) is not required to refer a point that is subject to a rule of inadmissibility specific to the procedure before that court or tribunal, subject to compliance with the principles of equivalence and effectiveness (see, to that effect, judgments of 14 December 1995, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten*, C-430/93 and C-431/93, EU:C:1995:441, para. 17, and of 15 March 2017, *Lucio Cesare Aquino v Belgische Staat*, C-3/16, EU:C:2017:209, para. 56).

- (vi) The obligation to refer (even for an apex court) does not apply if a point is **acte clair/ acte éclairé**: judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA*, C-561/19, ECLI:EU:C:2021:799 (Grand Chamber) at para. 33.
 - (vii) The court (particularly an apex court: judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA*, C-561/19, ECLI:EU:C:2021:799 (Grand Chamber) at para. 51) should **give reasons for declining to refer a question**: *Ullens de Schooten and Rezabek v. Belgium* App. nos. 3989/07 and 38353/07 (ECHR, 20 September 2011).
 - (viii) "Article 267 TFEU does not empower the Court to apply rules of EU law to a particular case, but only to rule on the interpretation" (judgment of 19 November 2019, *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy* (Independence of the Disciplinary Chamber of the Supreme Court), joined cases C-585/18, C-624/18, C-625/19, ECLI:EU:C:2019:982 (Grand Chamber), para. 132).
- 43.** In order to demonstrate that a point is not *acte clair*, there are essentially two options:
- (i) The normal method to demonstrate doubt on an EU law point is to produce authorities or material showing divergent interpretations either at European or at national level that is capable of affecting the result. An absolutely textbook example of this was *Raidió Teilifís Éireann v. Commissioner for Environmental Information* [2025] IEHC 160 (Unreported, High Court, 21 March 2025) where RTÉ produced information showing a divergence of interpretation across 30 EEA member states or former member states surveyed.
 - (ii) An authority-free point is not completely ruled out, but a party has to demonstrate that there is a sufficiently persuasive inherent logic to an alternative interpretation of EU law to that the court is minded to uphold.
- 44.** If there is any inherent logic to a would-be appellant's point, then one would expect it to show up in a legal space as vast as that covered by EU law. If one starts with 27 member states, the 3 other EEA states and the one EFTA member (Switzerland) that is not a member of the EEA, there are 10 candidate or potentially candidate accession countries (9 recognised states and Kosovo) that are all in the process of assimilating EU law in one shape or form. There is obviously one former European member state (the UK) and (for the sake of absolute technical inclusivity) one former non-European member state, Algeria (a part of France as an EEC member from, relevantly, 1957-62). There are about 19 additional states with an association agreement, 2 further blocs of multiple states with such an agreement, about 10 further jurisdictions with a free trade agreement, and numerous other treaties with additional states. In addition, there are a large number of European and non-European special territories of the foregoing states, two of which (Greenland and Saint Barthélemy) are former EU territories. We are talking about a population of 500 million just sticking with the EEA, and nearing a billion taking a wider view of the European space that is significantly EU law. If a party dissatisfied with the court's interpretation of EU law can't come up with a single court decision or academic work either at EU-level or from that gigantic pool that would change the result of this case then a court can reasonably conclude that there is no demonstrated doubt about the point such that a reference to the CJEU would arise, even as an obligation for an apex court.
- 45.** In the present case, the point does not have an inherently weighty internal logic to propel it to the level of creating real doubt without authority. And there is simply nothing by way of authority creating doubt to suggest that other EU-law-enforcing courts would decide the matter in the way contended for.
- 46.** The applicant hasn't come forward with any judgment of any court in Ireland, or in any other member state or former member state, showing support for the point contended for. Nor is there any judgment of the Court of Justice or an opinion of an Advocate General creating doubt about the conclusion proposed in the substantive judgment (only support for generalistic high-level points that come nowhere near establishing the specific issue now argued for), or even any academic material doing so.
- 47.** The reference procedure isn't for any and every possible imaginative question – only for questions on which there can be a real dispute (see *Toole v. Minister for Housing (No. 3)* [2023] IEHC 378, [2023] 7 JIC 0302 (Unreported, High Court, 31 October 2023) paras. 86-87). No basis for such a dispute has been shown here.
- 48.** The only particularly relevant point made by the applicant as to interpretation of EU law is that the judgment of 15 October 2015, *European Commission v Federal Republic of Germany*, C-137/14, ECLI:EU:C:2015:683 decided that the member state there had failed to comply with the EIA and industrial emissions directives by limiting:
- "the standing to bring proceedings and the scope of the review by the courts to the objections which have already been raised within the time-limit set during the administrative procedure which led to the adoption of the decision;"

49. The problem with that as a point on which an appeal is to be launched is that I didn't decide anything different to that. An applicant can come to court even if she didn't participate in the process herself (that is what "standing" means), and the court can deal with any EU law point she wants to raise (that is what "scope" means). It doesn't take from either standing or scope for the court to then decide such point by reference to what was before the decision-taker, or indeed for the court to include, on an equivalent and effective basis, failure to raise a point as part of the court's discretion, as opposed to as a bar to coming to court in the first place.

50. Referring to other authorities on access to the court, standing and scope, or effective remedies (judgment of 15 May 1986, *Johnston v Chief Constable of the Royal Ulster Constabulary*, C-222/84, ECLI:EU:C:1986:206; judgment of 19 September 2006, *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg*, C-506/04, ECLI:EU:C:2006:587 (Grand Chamber); judgment of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Feryn NV*, C-54/07, ECLI:EU:C:2008:397; judgment of 15 October 2009, *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd*, C-263/08, ECLI:EU:C:2009:631; judgment of 27 September 2017, *Peter Puškár v Finančné riaditeľstvo Slovenskej republiky and Kriminálny úrad finančnej správy*, C-73/16, ECLI:EU:C:2017:725; judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd*, C-664/15, ECLI:EU:C:2017:987) doesn't get the applicant anywhere. A right to an effective remedy is not a right to win your case. In a situation where the taking into account of a point by the decision-taker depends on it being raised in the process, the potential to win a challenge depends on somebody having availed of the opportunity that is open to any process participant to put relevant material forward.

51. If, contrary to the foregoing, the European (or EU-law-applying) courts revisit this and come up with new authority of relevance, this point or any point can and will be revisited, but the *acte clair* doctrine is meaningless if it has to accommodate the hypothetical academic possibility of doubt that does not currently exist and is not currently foreseeable. What is in doubt at any given time has to be judged on the basis of the legal landscape at the time in question. No such doubt properly arises at the present moment in time.

52. Thus, if (in my view counterfactually) the applicant's point is actually sufficiently weighty to properly create doubt, any EU law error will be self-correcting as soon as contrary authority appears anywhere in the EU legal space.

Summary

53. In outline summary, without taking from the more specific terms of this judgment:

- (i) the substantive point does not properly arise given that it was not pleaded or argued in this form, and in particular in the absence of properly pleaded challenge to the confidentiality-related basis of the approach adopted;
- (ii) the ancillary point mischaracterises the decision proposed to be appealed and in any event is going nowhere in the absence of a viable and pleaded substantive point;
- (iii) the points, particularly the substantive point, are not ones of pure law in any event;
- (iv) there is no public importance in advancing these questions and there are significant public interest considerations against doing so; and
- (v) no EU law point properly arises and/or any proposed point is not one which gives rise to any demonstrated doubt.

Order

54. For the foregoing reasons, it is ordered that:

- (i) the application for leave to appeal be dismissed;
- (ii) in the event that an application for leapfrog leave to appeal is made and acceded to by the Supreme Court, the costs of the leave to appeal application be costs in that appeal;
- (iii) otherwise, there be no order as to the costs of the leave to appeal application; and
- (iv) the foregoing order and the order already pronounced in the substantive judgment, dismissing the proceedings with no order as to costs, be perfected forthwith with no further listing as the final order of the High Court in the proceedings.