



[2026] IEHC 653

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2025.0001205]

BETWEEN

IN THE MATTER OF SECTIONS 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT
ACT 2000

BETWEEN

MARTIN BUSER, JOSEPH MC CLOSKEY, BRIAN MELICAN, IVAN GRAYDON, TOM BOLAND
AND TERRY REYNOLDS

APPLICANTS

AND
AN COIMISIÚN PLEANÁLA

RESPONDENT

AND
UISCE EIREANN

NOTICE PARTY

(No. 3)

<i>Date of impugned decision:</i>	<i>11 June 2025</i>
<i>Date proceedings commenced:</i>	<i>5 August 2025</i>
<i>Date of principal judgment:</i>	<i>3 July 2026</i>
<i>Date of leave to appeal hearing:</i>	<i>8 September 2026</i>
<i>Date draft judgment circulated:</i>	<i>22 September 2026</i>

JUDGMENT of Humphreys J. delivered on Friday 2 October 2026

1. The way the system is supposed to work is that as and when major questions of law are decided by appellate courts, the answers are then applied to the facts of individual cases by trial courts. In the principal judgment, I referred to a number of well-established principles from Supreme Court jurisprudence (see in particular cases cited at paras. 50 and 97). I applied such principles here. The project has already undergone administrative scrutiny at first instance and on appeal before the commission, where it was found acceptable, and the applicants have had the benefit of a failed motion regarding directions, and a full contest at High Court level. We are now on the third judgment after two prior tiers of administrative decision-taking. To allow a further appeal here would be to engage in a form of “litigious perpetual motion” (to use a phrase of O’Donnell J. (Clarke and Dunne JJ. concurring) in *Rooney v. Minister for Agriculture and Food* [2016] IESC 1 (Unreported, Supreme Court, 28 January 2016) at para. 3).

Judgment history

2. In *Busher v. An Coimisiún Pleanála* (No. 1) [2026] IEHC 362 (Unreported, High Court, 10 June 2026), Farrell J. rejected a motion seeking an order requiring the commission to explain its decision. She subsequently made no order as to costs (in the absence of any contrary submissions).

3. In *Busher v. An Coimisiún Pleanála* (No. 2) [2026] IEHC 434, [2026] 6 JIC 2604 (Unreported, High Court, 3 July 2026), I upheld the permission for the construction of a new foul pumping station and a new wastewater treatment plant and all associated works at lands located at Kilkee, Co. Clare.

4. The applicants now seek leave to appeal.

Procedural history

5. Following the substantive judgment, the applicants delivered legal submissions seeking leave to appeal, dated 31 July 2026. The opposing parties delivered replying submissions and the matter was heard on 8 September 2026.

6. 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.

7. On 22 September 2026, a draft of the present judgment was sent to the parties, pursuant to paragraphs 16, 196 to 199 and 205 of Practice Direction HC 137 issued by the President of the High Court (as amended by the President with effect from 1 August 2026), to give an opportunity to address matters such as errors/ ambiguities on the basis set out below.

8. Parties are required to:

- (i) Read the draft or have their legal representatives if applicable do so on their behalf.
- (ii) Identify any matters falling within the below.

- (iii) Positively communicate with the court in writing in response to the draft by the deadline specified, such responses to be emailed to the court and uploaded to ShareFile, either stating that they have no comments or setting out the comments.
- (iv) Carry out the foregoing without delay - 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. (Clarke C.J., McKechnie, MacMenamin, Dunne JJ. concurring) in *O’Sullivan v. Sea Fisheries Protection Authority* [2017] IESC 75, [2017] 3 I.R. 751, [2018] 1 I.L.R.M. 245, 780).
- (v) Keep the draft confidential. 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 (Briggs, Kitchin, Burrows, Rose, Arden SCJJ) 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 LJJ. 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 LJJ. concurring); *Itkin v. Wood* [2023] JRC 101 (Unreported, Royal Court of Jersey, 22 June 2023).

9. The foregoing constitutes 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.

10. The responses should not be to reargue the substance (submissions to that effect will be disregarded) but are confined to matters such as:

- (i) advising the court in the event that, in the light of the draft judgment, the party concerned is not pursuing any one or more (or all) points of claim or opposition, as the case may be, such that such points do not therefore need to be decided by the court;
- (ii) advising 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;
- (iii) advising 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 apparent typographical, factual, legal or other errors in the draft;
 - (b) any apparent ambiguity or other matter in the draft that could unnecessarily multiply issues or complicate the further processing of the matter;
 - (c) any redaction of personal or other information that a party wishes to request;
 - (d) 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 submission as to why such reference is not relevant or otherwise should not be included or as to why such matter if included should not lead to the proposed conclusion;
 - (e) any other matter in the draft judgment that the party considers should be omitted;
 - (f) 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

- (g) any other proposals as to the wording (as opposed to substance) of the decision if the proposed wording causes any issue for a party for any identified reason; and
- (iv) assisting the court by providing views on such matters if any on which views are specifically invited in the draft judgment.

11. In particular, parties should draw the court's attention to any apparent error or ambiguity whether they have been successful on the point or not.

12. 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. 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.

13. The deadline for such comments from the parties was to be 13:00 on Friday 25 September 2026. Responses were as follows:

- (i) Applicants: No comments.
- (ii) Commission: No comments beyond those of the notice party.
- (iii) Notice Party: helpfully pointed out some typos. They also suggested there was an inconsistency in capitalisation of the word "regulations", but there is no inconsistency. My general preference is to avoid capitalisation if possible (there is a generalised tendency in legal documents to capitalise anything that moves - but this does nothing for the reader), hence regulations with a small "r". The large R is used only in quotations. A court is no less of a court without a capital C - and likewise for the commission, or *mutatis mutandis* for an applicant, or anybody or anything else.

General principles on leave to appeal

14. 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] IESCDT 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] IESCDT 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] IESCDT 145 (Dunne, Hogan and Collins JJ., 29 November 2024). See also *Leech v. An Bord Pleanála* [2025] IESCDT 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] IESCDT 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** or some other equivalent reliable basis: 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). One would not rule out judicial notice of problems in an appropriate case or some other similar or self-evident basis (*Colbeam v DLRCC & Jennings* [2026] IEHC 613), but normally some positive evidence of practical problems is required. Mere assertion is insufficient.

15. 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

16. The applicants' proposed questions are as follows:

- (i) "Are applicants entitled to raise an issue relating to interpretation of legislation in judicial review if they have not, in their submission, addressed the applicable legislation, but have confined themselves to saying that there are substantive issues (which the legislation addresses) which need to be addressed?"
- (ii) Is a condition that requires a developer to build in accordance with plans and particulars which includes a commitment to comply with R3 of the 2005 Regulations sufficient to comply with R6 of those regulations?"

Do the points properly arise?

17. The tendentiously-phrased first point does not arise and unfortunately misrepresents the judgment and the procedure adopted at trial level. The applicants were not disentitled from raising an issue regarding the interpretation of legislation, and a *fortiori* were not disentitled from raising the interpretation of regulations by not having addressed it in a submission to the commission. As the commission points out:

"Thus, contrary to what the question suggests, the Applicants were not precluded from raising issue with the interpretation of the 2005 Regulations. As the Judgment records, they were in fact permitted to and did so – albeit unsuccessfully."

18. The principle is not in any way new (see recently for example, *Coolglass Wind Farm Ltd v. An Bord Pleanála* [2026] IESC 5, [2026] 2 JIC 0401 (Unreported, Supreme Court, O'Donnell C.J., 4 February 2026) (Dunne, Charleton, O'Malley, Woulfe, Hogan and Murray JJ. concurring)) – it is that the validity of an administrative decision needs to be viewed primarily through the lens of the material (evidence and submissions) made to the decision-taker.

19. As the commission points out:

"The Court did not find that the Applicants were precluded from raising issues pertaining to the interpretation of legislation in judicial review proceedings if they did not raise such issues in the planning process. As outlined below, the Judgment (inter alia, §63 et seq) expressly dealt with the Applicants' interpretative point – rejecting same.

Thus, the premise of the question is entirely misconceived – a point of law cannot be manufactured out of a 'distortion' of the Judgment for 'the purposes of creating a case for appeal' – see *Friends of the Irish Environment CLG (No.2)* [2026] IEHC 413 (§18(i)(v))."

20. The argument that the judgment "contradicts" other cases (conveniently of course, not cases cited at the hearing) is therefore based on a misrepresentation of what was decided and a fundamental misconception of how the system of precedent works. The need to be consistent with previous precedent is not a licence to trawl through the law books to find unrelated authorities and create a manufactured conflict. Any two cases can be made to appear in conflict if one approaches them to find conflict – that isn't how the system is meant to work. Such an exercise is particularly threadbare intellectually if the trawling is carried out after the event, with the delivered judgment in one hand and previously unopened case reports in the other, with an eye out for any newly introduced authority that can be represented as not having been considered.

21. For the avoidance of doubt, even if the supposedly crucial new cases had counterfactually been raised at the hearing, they don't establish what the applicants think they establish and don't contradict the general approach reflected in the Supreme Court decision in *Coolglass* regarding the relevance of the lens of the material before the decision-taker. The commission is correct to submit that:

"The Applicants' misunderstanding of the Judgment has informed their unfounded assertion that the Judgment 'contradicts' *Grace & Sweetman* [2020] 3 IR 286; *Balz* [2020] 1 ILRM 367, *Environmental Trust* [2022] IEHC 540; and *Reid (No.1)* [2021] IEHC 230 and (No.2) [2021] IEHC 362. This claim is unfounded; the decision is consistent with these authorities, notwithstanding that these cases are not relevant to the Court's findings when properly interpreted. Legal uncertainty does not arise from an applicant referencing unrelated authorities in support of a purported point of law."

22. The fact that the applicants raised issues about odour in the process doesn't get them anywhere. As in *100 Meter Tall v. An Bord Pleanála* [2025] IEHC 42, [2025] JIC 3104 (Unreported, High Court, 31 January 2025) at para. 46, making any mention on the papers of Hen Harrier does not allow you to pursue judicial review about any and every point in relation to Hen Harrier that subsequently occurs to you. That is the method of "a witch's brew designed to spread maximum confusion and to permit any argument to be made at the hearing that ingenuity can suggest": *Hellfire Massy Residents Association v. An Bord Pleanála* [2022] IESC 38 (Unreported, Supreme Court, 24th October 2022) (Dunne, Woulfe, Hogan and Murray JJ. concurring), per O'Donnell C.J. at para. 22.

23. The fact that the applicants here deploy the standard would-be appellant's manoeuvre of grossly exaggerating the effect of a judgment, in order to win the attention of appellate courts, does not assist them. As the commission points out:

"The Judgment does not 'drastically restrict' opportunities to challenge the legality of a decision, nor does it require applicants to pre-empt 'mistakes' in a decision. Furthermore,

it does not contravene the Aarhus Convention, as the Applicants suggest. As outlined above, the Judgment notes that the Applicants had not discharged the onus of proving any flaw in the decision to justify quashing it – particularly where the Commission had before it material regarding compliance with Art.3 of the 2005 Regulations, with which the Commission agreed and which material was incorporated into Condition 1 – and no contrary evidential basis was established to suggest any flaw in this approach. As an example of a distorted reading of a Judgment for the purposes of seeking leave to appeal – Friends of the Irish Environment CLG (No.2) [2026] IEHC 413 (§18) – it is respectfully submitted that these excessive contentions would serve well.”

24. The applicants’ complaint doesn’t get off the ground because the judgment doesn’t drastically restrict opportunities to challenge anything. Rather, it applies to this particular case the settled law that in general terms, the validity of a decision needs to be assessed through the lens of the material before the decision-taker. That follows, unfortunately for the applicants, from the general law that merits are for the decision-taker, with the court confined to legality. If the court opened the door (wider than established exceptions) for decisive new evidence and merits issues at the judicial review stage, we would be immediately in the space of revisiting the correctness of the decision rather than confining ourselves to legality. That would be contrary to the separation of powers. As the commission correctly submitted, this would be a “chaotic” procedure. If applicants think that is a restriction on their rights to challenge, that is a misconception – it is an inherent limitation of the right to challenge. The jaws of judicial review have been opened wide enough already (*Holohan v. An Bord Pleanála* [2017] IEHC 268 at 103). Judicial review as it stands is a lawful and effective remedy for domestic and EU purposes: see e.g., *N.M. (D.R.C.) v. Minister for Justice and Equality* [2016] IECA 217 per Hogan J. at paras. 53 and 54.

25. Predictably perhaps, the applicants now try to rely on the Aarhus convention. No such argument was made at the hearing and nor is there any plausible reason to imagine that the Aarhus convention affects this in any way. To float such a point belatedly at leave to appeal stage is just a frolic in *l’esprit d’escalier* – what O’Donnell J. (Moriarty and Hanna JJ. concurring) referred to as “the principle of delayed eloquence”: *The People (D.P.P.) v. Rattigan* [2013] IECCA 13, [2013] 2 I.R. 221, [2013] 2 JIC 1901, [2013] 2 JIC 1905, at p. 245. Such a new point does not properly arise as a basis for appeal – an appellate court would be looking into the Aarhus convention as a court of first instance. In any event, the merits/ legality distinction is not some peculiarly Irish concept – it is reflected across European legal systems and indeed all legal systems, which invariably allow governments and administrations to govern and confine courts to legal issues. It is totally implausible to suggest that EU law somehow undermines that distinction and renders the known contours of judicial review a nullity. Indeed *N.M. (D.R.C.) v. Minister for Justice and Equality* [2016] IECA 217 decides otherwise. Solemn incantation of the words “Aarhus convention” is not some kind of magic spell to conjure up *certiorari* and costs out of a cocked hat.

26. Furthermore, the first point does not get the applicants anywhere in and of itself. It is parasitic on their having an actual substantive and potentially winning point in terms of the interpretation of the legislation. Since they don’t have such a point, the first question does not properly arise.

27. The second point does arise but that isn’t saying much.

Are the points ones of law?

28. The first point would be one of law, but not a point of law that arises in this case for the reasons referred to.

29. The second point is not a point of law, but rather one of the application of law to particular facts. The commission identifies the problem:

“It is not contended that the Court misinterpreted the 2005 Regulations (noting the analysis set out in the Judgment) – the basis upon which the Applicants advance this point of law comprises, in truth, their own subjective, non-expert view that further Conditions should have been imposed under Art.6 of the 2005 Regulations by the Commission, notwithstanding the complete absence of any evidential basis before the Commission to support such a view (and also not established before the Court). This is not a pure point of law – it is an attempt to reargue the merits of the planning application.”

30. The argument that art. 6 becomes “surplusage” by reason of the judgment is obviously contrived and misconceived. The application of art. 6 is a matter for the evaluation of the decision-taker on a case-by-case basis. The applicants’ complaint boils down to the belief that the commission should have agreed with them. That is not a ground for judicial review, still less for appeal. As UÉ points out, “The Applicants’ argument merely seeks to impermissibly replace the judgment’s fact-specific reasoning with a rigid rule that the 2005 Regulations do not impose.” There is nothing special about the 2005 regulations that demands some bespoke system of interpretation and application at odds from settled principles.

Are the points of public importance?

31. The first point is not of public importance because it does not arise in this case (or any case for that matter).

32. The second point is not of public importance because there is no reasonable doubt about the proposition that a condition of this kind to ensure compliance with the 2005 regulations could be within the evaluative judgment of the commission. What is tendentious about this point is that it presents as worthy of prolonged appellate debate a point about which there is no serious doubt when we look at the non-prescriptive and widely evaluative nature of the statutory provision concerned. The critical point is, as UÉ points out, "The Regulation does not prescribe any particular form of condition; it requires only **such conditions as the Commission considers necessary**" (emphasis added). The alleged high level of uncertainty is manufactured for the purposes of proposed appeal – unfortunately it does not get beyond mere assertion and evidence-free scare-mongering.

33. A further factor relevant to the public importance of an appeal is the fact that the proposed points are not determinative. As UÉ points out:

"4. A central feature of the Principal Judgment is that the Court rejected the challenge on several independent bases. The judgment begins by recording the urgent environmental need for the Proposed Development, namely that Kilkee is not served by wastewater treatment infrastructure and that untreated wastewater, including raw sewage, has been discharged to coastal waters for decades (§1). It also identifies Uisce Éireann as the developer and notice party, and the Proposed Development as a foul pumping station, wastewater treatment plant and associated works at Kilkee (§§3–4).

5. Against that context, the Court rejected Core Ground 1 on several independent bases – (i) the Applicants had not raised the relevant complaint in the planning process (§57(ii) and §67); (ii) the Applicants argument overstated the effect of the 2005 Regulations (§§63–65); (iii) there is nothing unlawful about the matter being dealt with by way of condition 1 (§68); (iv) the Applicants hadn't demonstrated a failure in consideration or a lack of adequate information or breach of obligations under 2005 Regulations (§§70–71); and (v) relief would in any event be inappropriate in the exercise of discretion, including by reason of the absence of demonstrated prejudice, the urgent environmental need for the development, and the disproportionate consequences of quashing the permission (§§98–102). Those findings would remain an answer to the claim even if either proposed question were answered in the Applicants' favour. Neither question is therefore determinative in the sense required by *Keogh v. An Coimisiún Pleanála* (No.2) [2026] IEHC 453 at §12(i)(d) and *Lissan Coal v. An Coimisiún Pleanála* [2026] IEHC 457 at §§29–36."

Are the points of exceptional public importance?

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

Is an appeal in the public interest?

35. An appeal is not in the public interest, primarily due to the urgent need for waste water treatment in Kilkee and the unacceptable ongoing discharge of untreated wastewater directly into the sea.

36. I agree with the commission:

Public Interest

"14. In terms of public interest – per *Condon* (No.2) [2026] IEHC 136 (§10) – 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'. See also *Friends of the Irish Environment CLG* (No.2) [2026] IEHC 413 (§18(v)).

15. As the Judgment records, there is no dispute about the need, including urgent environmental need, for the Proposed Development – noting that Kilkee is not currently served by any wastewater treatment infrastructure which has resulted in 'untreated wastewater being discharged to coastal waters'. As outlined in the Commission's Decision: '...the proposed development would deliver much needed infrastructure to address the situation where untreated wastewater is currently being discharged to coastal waters, consequently serving to protect environmental water quality and manage the availability, resilience and efficiency of wastewater services in Kilkee and provide adequate wastewater treatment for the future development requirements for the area...'

16. It is not in the public interest to certify either of the proposed questions. Similar reasoning to that applied in *Rural Residents Wind Aware and Environmental Group v An Coimisiún Pleanála* (No.3) [2026] IEHC 300 (§39 et seq) and *Doyle v An Coimisiún Pleanála* [2026] IEHC 340 (§84 et seq) can be applied here, having regard to the importance of the Proposed Development – which is not disputed by the Applicants. Respectfully, it is difficult to envisage how the public interest could be said to be anything other than in favour of refusing this application – noting the clear and undisputed environmental benefits that the Proposed Development will deliver.

17. In addition to the foregoing and also of relevance are: the failure of the Applicants to raise issues in the process regarding the substance of the requirements of the 2005 Regulations; the general statutory policy in favour of finality in planning law; and the tendentious nature of the questions – per *Friends of the Irish Environment CLG (No.2) [2026] IEHC 413 (§40).*”

37. I also agree with UÉ:

“NO PUBLIC INTEREST IN AN APPEAL

35. The Applicants have also failed to establish the separate public-interest limb under section 50A(7).

36. The Applicants’ attempt at §37 of their Written Submissions to answer each discretionary factor identified at §101 of the Principal Judgment confirms Uisce Éireann’s objection that this certificate application merely reargues the case already rejected. A section 50A(7) certificate application must engage with the rationale of the judgment sought to be appealed and provide a plausible basis for saying that it is wrong at the level required for an appeal; it is not enough simply to repeat the losing position (see, analogously and non-precedentially, *Nagle View Turbine Aware v. An Bord Pleanála [2025] IESCDT 41*). The Applicants have failed to do that. Points about alleged future odour impacts, EPA licensing, Uisce Éireann’s delivery timetable, or the weight given to wastewater infrastructure are fact-specific merits submissions. They invite an appellate court to revisit proportionality, prejudice, public interest and remedy; they do not identify a point of law of exceptional public importance. They do not make either proposed question determinative or show that an appeal is desirable in the public interest.

37. The public interest in planning judicial review includes the public interest in finality. The statutory appeal regime is deliberately restrictive. As set out by Humphreys J in *Massey v An Bord Pleanála (No.4) [2025] IEHC 309 at §6(v)(a)* when considering the principles which apply to the ‘public interest’ criterion and delay:

‘An appeal must be in the public interest (a) 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... 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 WJSC-HC 6876, [2015] 6 JIC 1805 (Unreported, High Court, 18th 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., 27th 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”.*’

38. Also relevant by analogy is the point made by Holland J. in *Lissan Coal v. An Bord Pleanála [2026] IEHC 457 at §40*:

‘In a statutory architecture in which appeal is to be exceptional and as to a public transport infrastructure project that is not merely in the public interest but is better effected sooner than later, the delay in awaiting determination of an appeal, while it might not be dispositive of the certification question by itself, weighs appreciably against certification of appeal in this case.’

39. Where, as here, no genuine legal uncertainty is identified and the proposed appeal would not be determinative, the public interest is not served by further appellate litigation. That is reinforced by the public-services context: the Principal Judgment records that Kilkee has no wastewater treatment infrastructure and that untreated wastewater, including raw sewage, has been discharged to coastal waters for decades (§1). The permission concerns a foul pumping station, wastewater treatment plant and associated works promoted by Uisce Éireann (§§3–4). The Court also accepted that the development is of critical public infrastructural and environmental importance, including for compliance with European environmental law (§100).

40. The Applicants at §37(vii) of their Written Submissions assert that UE [can’t] rely on the ‘strong countervailing public interest in the proposed project’ because it has delayed in providing the waste water treatment plant and that UE maintain that the current discharge is having no effect on the water quality in Intrinsic Bay. These issues were addressed in §§7–9 of Uisce Éireann’s written submissions filed in respect of the substantive proceedings, namely that (i) the Applicant, in asserting that Uisce Éireann cannot advance an argument that the Proposed Development is urgent because it has delayed, ignores the reality of the constraints and pressures that Uisce Éireann is under on both a national and regional scale to deliver badly needed critical infrastructure not just in Kilkee but throughout Ireland and that since 2014, Uisce Éireann has undertaken a significant programme to address untreated sewage discharges throughout the country; (ii) the Proposed Development is urgent and

Uisce Éireann remains committed to delivery of this critical project and the Proposed Development is included in Uisce Éireann's Capital Investment Plan for 2024 -2029; and (iii) the basis upon which primary treatment was advanced is set out in the Planning Report which refers to the fact that the WWDL required secondary treatment but that following an assessment carried out by Uisce Éireann it was concluded that primary treatment was appropriate and that a review of the WWDL would be submitted.

41. The Applicants have not demonstrated or pointed to any countervailing public benefit that would justify an appeal in circumstances where the two proposed questions mischaracterise the Principal Judgment, do not disclose any uncertainty in the law, and would not affect the ultimate result of the proceedings.

42. The application for a certificate for leave to appeal should be refused on the basis that an appeal is not 'desirable in the public interest'."

38. It is fairly obvious that the applicants' underlying grievance is a merits-based disagreement with the evaluative judgement of the commission, dressed up in legal language. Their primary actual complaint is not micro-analysis of a particular statutory instrument drafted in uncomplicated and clearly evaluative terms - it is that the treatment plant is located in a different location to their preferred option. The institution that decides on that merits question is the commission, not the court system. In my perhaps erroneous opinion, there something inauthentic about a solemn debate about tendentiously phrased legal quibbles in such circumstances, and a further round of forensic scrutiny on top of the two rounds of administrative examination and three judgments at trial level that would have the effect of delaying matters further and allowing the continued discharge of untreated waste water including raw sewage directly into the sea is not in the public interest, if the public interest means anything.

Summary

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

- (i) the first point misrepresents the judgment and does not properly arise;
- (ii) the second point is not one of law but rather of application of law to these particular facts; and
- (iii) there is no public importance in advancing these questions and there are significant public interest considerations against doing so.

Order

40. 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, i.e. that:
 - a. the proceedings be dismissed;
 - b. there be no order as to costs (including no order as to any reserved or adjourned costs or costs not otherwise dealt with); and
 be perfected forthwith with no further listing as the final order of the High Court in the proceedings.