[2026] IEHC 656

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2024.0000037]

BETWEEN

PADDY MASSEY

APPLICANT

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

RESPONDENTS

AND
CURNS ENERGY LIMITED

NOTICE PARTY

(No. 6)

Date of impugned decision:	*8 November 2023*
Date proceedings commenced:	*11 January 2024*
Date of main hearing of this Module:	*29 September 2026*
Date draft judgment circulated:	*30 September 2026*

JUDGMENT of Humphreys J. delivered on Friday 2 October 2026

1. The CJEU on foot of a reference in this case has clarified the general need for site-specific conservation objectives when conducting appropriate assessment (AA) screening: C-27/25, *Knocknamona*. The present judgment applies that decision to the particular facts of this case.

Judgment history

2. In *Massey v. An Bord Pleanála & Ors. (No. 1)* [2021] IEHC 783 (Unreported, High Court, 21st December 2021), the applicant challenged the board's decision that the present planning application should be given strategic infrastructure development (SID) status. That would normally be an impermissibly premature action but in fact the opposing parties were happy to have it decided, so it was – adversely to the applicant. No order was made as to the costs unnecessarily imposed on the respondent and notice party.

3. In *Massey v. An Bord Pleanála & Ors. (No. 2)* [2025] IEHC 206 (Unreported, High Court, 11 April 2025), the court dismissed the applicant's claim for an order quashing the commission's decision of 8 November 2023 granting planning permission under section 37G of the Planning and Development Act 2000 for a proposed 17-turbine strategic infrastructure development wind farm. The court granted certain declaratory relief and decided to refer to the Court of Justice a question concerning possible further declaratory relief.

4. In Massey v. An Bord Pleanála & Ors. (No. 3) [2025] IEHC 218 (Unreported, High Court, 11 April 2025), the Court issued the formal judgment making the preliminary reference. The reference concerned whether further declaratory relief should be granted; the court had refused to quash the development consent.

5. In Massey v. An Bord Pleanála & Ors. (No. 4) [2025] IEHC 309 (Unreported, High Court, 30 May 2025), the Court refused the applicant's application under section 50A(7) of the Planning and Development Act 2000 for a certificate permitting an appeal to the Court of Appeal.

6. In *Massey v. An Bord Pleanála* [2025] IESCDET 126 (Supreme Court, 30 May 2025) (Woulfe, Murray, Donnelly JJ. Concurring) the Supreme Court refused leave to appeal from the No. 2 judgment.

7. In Massey v. An Bord Pleanála & Ors. (No. 5) [2025] IEHC 709 (Unreported, High Court, 9 December 2025), the High Court issued an addendum to the request for a preliminary ruling in Case C-356/25. The addendum clarified that the refusal to quash the development consent was final, but that the applicant's claim for declaratory relief remained pending and the referred question was not moot.

8. On 16 April 2026, Advocate General Kokott delivered her Opinion in Joined Cases C-27/25 and C-356/25, ECLI:EU:C:2026:315.

9. On 16 July 2026, the Court of Justice (Fourth Chamber) delivered its judgment in Joined Cases C-27/25 (Knocknamona) and C-356/25 (Massey), ECLI:EU:C:2026:596.

Geographical context

10. The windfarm project here (https://www.pleanala.ie/en-ie/case/309121) is at the following location: Link to 2026 satellite view of site location via Google Maps - https://www.google.com/maps/@52.0351356,-

7.9545698,2340m/data=!3m1!1e3?entry=ttu&g_ep=EgoyMDI2MDkxNC4wIKXMDSoASAFQAw%3D%3D.

Parties

11. The parties are described in the statement of case as follows:

(i) Applicant – Gentleman;
(ii) First respondent – An Coimisiún Pleanála, the decision taker ("the commission");
(iii) Second, third and fourth respondents – Ireland, the Attorney General and the Minister for Housing, Local Government and Heritage ("the State respondents"); and
(iv) Notice party– developer of Lyrenacarriga windfarm ("the notice party"/ "Curns").

Facts

12. The Blackwater Callows Special Protection Area (SPA) was designated in 2012 under the European Communities (Conservation of Wild Birds (Blackwater Callows Special Protection Area 004094)) Regulations 2012 (S.I. No. 191 of 2012).

13. On 28 May 2020, an SID determination letter issued to Innogy Renewables Ireland Limited.

14. On 8 January 2021, relying on that determination, the notice party, Curns Energy Limited, applied under section 37E of the Planning and Development Act 2000 for development consent for a 17-turbine wind farm and associated infrastructure. The application included an environmental impact assessment report, an appropriate assessment screening report and a Natura impact statement.

15. In March 2021, the Chief Executive of Waterford City and County Council prepared a report on the proposed development under section 37E(4) of the 2000 Act. The Chief Executive of Cork County Council also prepared a report in March 2021.

16. Submissions were received from six prescribed bodies, including Inland Fisheries Ireland, the Development Applications Unit (the National Parks and Wildlife Service) and Irish Water.

17. A total of 679 observations were submitted by members of the public, including the applicant.

18. On 26 January 2022, generic conservation objectives were adopted for the Blackwater Callows SPA and other sites.

19. On or about 8 April 2022, the commission sought further information from Curns Energy Limited. Curns responded on 11 October 2022 and provided appendices containing expert reports.

20. Following correspondence from the commission, Curns published notices of the further information and the deadline for submissions. Three prescribed bodies made submissions and members of the public submitted 196 observations. The planning authorities made no further submissions.

21. On 8 May 2023, the commission decided that no oral hearing would be held.

22. Curns was invited to respond to the public observations on the further information. The commission received that response on 23 June 2023.

23. In August 2023, the commission's inspector issued a report recommending that planning permission be granted, subject to conditions.

24. The commission considered the file on 19 October 2023 and issued a direction that planning permission be granted.

25. By order dated 8 November 2023, the commission granted planning permission for the proposed development.

26. On 24 March 2024, site-specific conservation objectives and conservation measures were put in place for the Blackwater Callows SPA.

Procedural history

27. The summary in the statement of case is:

"1. 21 December 2021 — In Massey v. An Bord Pleanála & Ors. (No. 1) [2021] IEHC 783, the High Court dismissed the applicant's challenge to the Commission's decision to categorise the proposed development as strategic infrastructure development.

2. 11 January 2024 — The within proceedings were issued.

3. 22 January 2024 — The application for leave to apply for judicial review was opened and adjourned to 29 January 2024. On 29 January 2024, Farrell J. granted leave for all reliefs and on all grounds, with liberty to file an amended statement of grounds.

4. 1 February 2024 — The applicant filed an amended statement of grounds.

5. 25 July 2024 — The Commission filed its opposition papers.

6. 3 October 2024 — The State respondents filed their opposition papers.

7. 10 October 2024 — The notice party filed its opposition papers, including three affidavits.

8. 2, 3 and 20 December 2024 — The applicant filed replying affidavits.

9. 27 January 2025 — Counsel for the applicant informed the court that the applicant would not proceed against the State respondents in respect of relief D3 and core ground 6.

10. 27 January 2025 — The issue of whether certain core grounds should be heard separately was raised following the preliminary reference made by the Court of Appeal to the Court of Justice in Case C-27/25. The issue was not determined at that stage.
11. 7 February 2025 — Correspondence confirmed that the Minister would consent to the following declaration:
"A Declaration that the Second and or Third and Fourth Respondents failed to fulfil their obligations under Articles 3, 4(1) and 4(2) Birds Directive and Article 6 of Council Directive [92]/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ('the Habitats Directive'), as implemented by SI 477 of 2011 and in particular Article 26 thereof, by failing, as of the date that the decision of the Commission under challenge was made, to have in place the necessary site specific conservation objectives and conservation measures in the Blackwater Callows Special Protection Area."
12. 3 March 2025 — When the matter was called over, the court confirmed that no order for modularisation had been made and that none would be made at that time.
13. 4 and 5 March 2025 — The matter was heard. As oral submissions concluded, the applicant referred the court to the Supreme Court determination in Friends of Ardee Bog v. An Bord Pleanála & Ors. [2025] IESCDET 29 (Dunne, Woulfe and Hogan JJ., 21 February 2025). The court invited further written submissions on specific questions concerning core ground 7. The questions were circulated to the parties and to the parties in Punchestown Area Community Group v. An Bord Pleanála [2024] 431 JR, where a similar issue arose. That case was later compromised, after submissions had been delivered to the court.
14. 25 March 2025 — The court was referred to Friends of Ardee Bog v. An Bord Pleanála & Ors. [2025] IESC 13 (Unreported, Supreme Court, Hogan J., Dunne and Woulfe JJ. concurring, 25 March 2025). The matter was put back to 31 March 2025 for further submissions. On 31 March 2025, those submissions were completed and judgment was reserved. On 7 April 2025, the parties made further submissions on the appropriate reliefs in the event of a reference.
15. 11 April 2025 — In Massey v. An Bord Pleanála & Ors. (No. 2) [2025] IEHC 206, the High Court dismissed the applicant's claim for an order quashing the Commission's decision of 8 November 2023 granting planning permission under section 37G of the Planning and Development Act 2000 for a proposed 17-turbine strategic infrastructure development wind farm. The court granted certain declaratory relief and decided to refer to the Court of Justice a question concerning possible further declaratory relief.
16. 11 April 2025 — In Massey v. An Bord Pleanála & Ors. (No. 3) [2025] IEHC 218, the High Court issued the formal judgment making the preliminary reference. The reference concerned whether further declaratory relief should be granted; the court had refused to quash the development consent.
17. 30 May 2025 — In Massey v. An Bord Pleanála & Ors. (No. 4) [2025] IEHC 309, the High Court refused the applicant's application under section 50A(7) of the Planning and Development Act 2000 for a certificate permitting an appeal to the Court of Appeal.
18. 26 September 2025 - The Commission submitted written observations to the CJEU on the reference
19. 1 October 2025 - The Applicant submitted written observations to the CJEU on the reference
20. 2 October 2025 - The State parties submitted written observations to the CJEU on the reference
21. 8 October 2025 - The Notice Party submitted written observations to the CJEU on the reference
22. 16 October 2025 — In Massey v. An Bord Pleanála [2025] IESCDET 126, the Supreme Court refused leave to appeal from the No. 2 judgment.
23. 9 December 2025 — In Massey v. An Bord Pleanála & Ors. (No. 5) [2025] IEHC 709, the High Court issued an addendum to the request for a preliminary ruling in Case C-356/25. The addendum clarified that the refusal to quash the development consent was final, but that the applicant's claim for declaratory relief remained pending and the referred question was not moot.
24. 25 March 2026 — The Court of Justice of European Union (CJEU) held a hearing in Joined Cases C-27/25 and C-356/25.
25. 16 April 2026 — Advocate General Kokott delivered her Opinion in Joined Cases C-27/25 and C-356/25.
26. 16 July 2026 — The Court of Justice (Fourth Chamber) delivered its judgment in Joined Cases C-27/25 and C-356/25".

28. The final module of this matter was heard on 29 September 2026.

29. 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.

30. On 30 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.

31. 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).

32. 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.

33. 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, so 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.

34. 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.

35. 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.

36. The deadline for such comments from the parties was to be 13:00 on 1 October 2026. Responses were as follows:

(i) Applicant: No comments.
(ii) Commission: No comments.
(iii) State: Helpfully proposed a correction.
(iv) Notice Party: No comments.

Whether there should be a declaration

37. To recap on the outstanding issue having regard to the procedural history, *Massey v. An Bord Pleanála & Ors. (No. 2)* [2025] IEHC 206 (Unreported, High Court, 11 April 2025), I granted two declarations, one against the commission and one against the State respondents, and ordered:

> "the claim for *certiorari* be dismissed and the proceedings be otherwise dismissed save in respect of core ground 7 as a basis for declaratory relief only".

38. We now turn to that last remaining relief.

39. The applicant seeks a declaration as follows:

> "6. Accordingly, as per §37 of Massey No 3 (the reference judgment) [2025] IEHC 218 – there should be a declaration that the screening exercise ought to have been carried out by reference to the conservation objectives and/or measures of the Blackwater Callows SPA."

40. The premise of the declaration (or any declaration) is that some legal error occurred that should be marked with a declaratory order.

41. While the present application has generated a lot of paper and argument, the really critical inflection point is whether an error actually occurred or not.

42. The parties' positions in the statement of case are as follows:

> "Issue of Reliefs to be granted
> The Applicant submits:
> 1. The outstanding issues are relief and costs on foot of the judgment of the CJEU.
> 2. The Court has already granted the following declarations in these proceedings:
> • A Declaration that the application for permission for development under section 37E of the Planning and Development Act 2000 should have been made by the prospective applicant under sections 37 A to 37D.

- A Declaration that the Second and/or Third and Fourth Respondents (a) failed to fulfil their obligations under Articles 3, 4(1) and 4(2) Birds Directive and Article 6 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ('the Habitats Directive'), as implemented by S.I. 477 of 2011 and in particular Article 26 thereof, by failing, before 26 March 2024, when site specific conservation objectives were made (without prejudice to any argument by the applicant as to the sufficiency of such objectives), to have in place those objectives in the Blackwater Callows Special Protection Area, and (b) have not put in place the necessary conservation measures in the Blackwater Callows Special Protection Area.

3. The High Court explained at §37 of Massey No 3 (the reference judgment) [2025] IEHC 218 –'The relevance of the question is that if the answer is Yes, the applicant will be given a declaration that the screening exercise here ought to have been carried out by reference to the conservation objectives and/or measures of the relevant SPA.'

4. The High Court explained at §12 of Massey No 5 (the addendum to the reference) [2025] IEHC 709 – '…while the referring court agrees that the answer would be devoid of pertinence for adjudicating the validity of the permission, the "substance" of the case is not limited to the question of the validity of the permission because it also encompasses the currently live issue of declaratory relief, which additionally has ancillary consequences in terms of the costs of the proceedings, as the above examples illustrate. Furthermore, as the commission points out, by default the Commission acts on any declaration made by the court as a basis for its actions in subsequent cases, even though such declarations do not have imperative force.'

5. A screening identified several European sites as being within the "Likely Zone of Impact" of the wind farm development. These included the Blackwater Callows SPA, located 9.9km north of the development site. It is clear therefore that the site was within the geographical area 'delimited' for the purposes of the judgment of the CJEU. Applying the judgment in Cases C-27/25 and C-356/25, the screening assessment should have been conducted by reference to conservation objectives specific to that site. However, no such conservation objectives existed at the time of the screening.

6. Accordingly, as per §37 of Massey No 3 (the reference judgment) [2025] IEHC 218 – 'there should be a declaration that the screening exercise ought to have been carried out by reference to the conservation objectives and/or measures of the Blackwater Callows SPA.'

7. The costs relevant to the declaration, including the costs of the reference and the submissions and any reserved costs should be awarded to the Applicant, such costs to be the subject of adjudication by the Legal Costs Adjudicator in default of agreement.

8. So far as necessary, the Applicant will also rely on the entitlement to award costs in favour of a party in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so. The importance of the point is demonstrated by the fact that An Coimisiún Pleanála (a body recognised by the courts as an expert body and which is of central importance in the implementation of the Article 6(3) procedure) and Ireland had all proposed that the question referred be answered in the negative. Further, the issue arose due to the failure of the State to adopt valid conservation objectives for European Sites, notwithstanding the fact that the European Commission had brought enforcement proceedings (Commission v Ireland C-444/21) regarding the lack of conservation objectives for SACs, with the pre-litigation procedure in that case dating back to 2013. Little v The Chief Appeals Officer [2024] IESC 53 supports such an award and is addressed in the submissions.

The Commission submits –

9. For the reasons set out in its written submissions, the Commission respectfully submits that the Court should refuse the Applicant's application for a further declaration and costs.

10. The Applicant incorrectly treats the fact that the grant of declaratory relief is still procedurally available as effectively establishing an entitlement to such relief. In this respect, and in particular, §37 of Massey (No.3) does not amount to an unconditional promise of a declaration: the statement was expressly premised on the CJEU answering the binary referred question affirmatively. The answer ultimately given was nuanced: in some circumstances, the possibility of a significant effect on a European site can lawfully be screened out in the absence of conservation objectives; in other circumstances, it cannot. At §§81–84, the CJEU distinguished between, (i) screening out sites where it is possible to rule out any risk of them being affected on the basis of objective criteria such as distance and the absence of a plausible impact pathway, which may be undertaken without SSCOs; and (ii) assessing the probability or risk of significant effects where a possibility of an effect remains, for which SSCOs will become necessary. The Applicant's proposed conclusion

therefore does not follow from either the reference judgment or the CJEU Judgment. It must first be shown that, in the present case, a possibility of effect on the Blackwater Callows SPA could not be ruled out was assessed without SSCOs; otherwise, the screening falls within the qualification expressly recognised at §81. The Applicant has failed to do so.

11. A clear flaw in the Applicant's argument is the assumption that the Blackwater Callows SPA's provisional inclusion within the screening inquiry or 'Likely Zone of Impact' necessarily placed it within the geographical area likely to be affected in the sense used at §§82–84 of the CJEU judgment. That is not what the judgment says. A competent authority may consider a site provisionally and then exclude it by applying the objective criteria identified at §81, without thereby accepting that there is fact any probability or risk of an effect on the site concerned. The legally operative assessment was the Commission's AA screening, adopting the Inspector's source-pathway-receptor analysis, rather than the developer's screening report. The Inspector's AA screening assessment addressed the SPA's qualifying interests, the 9.9 km separation distance, the absence of hydrological connectivity, the lack of suitable wintering habitat, the absence of Wigeon, Teal and Black-tailed Godwit from the surveys, the single Whooper Swan observation over two years, the site's location outside the species' 5 km core foraging range, and the absence of a regularly used commuting corridor or other plausible impact pathway. Those matters were not merely asserted: the High Court made final findings at §92 and §172 of Massey (No.2) that impacts on Whooper Swan appeared negligible and that there was 'a clear lack of any reasonable possibility of any impact whatever on the SPA on the evidence here'. The Applicant adduced no suitably qualified expert evidence to displace the detailed scientific evidence, did not test the relevant deponent in cross-examination, and did not overturn those findings on appeal (indeed, the Supreme Court, in refusing leave to appeal – [2025] IESCDET 126 - stated at §13 that the evidence that the absence of SSCOs made no difference was uncontested, that the Applicant had the opportunity to challenge it but did not, and that it was clearly open to the trial judge to regard any resulting defect (if any) as harmless).

12. The aforesaid established and final factual findings of the High Court in Massey (No.2) at §92 and §172 correspond directly with the objective criteria contemplated at §81 of the CJEU judgment. Accordingly, the Applicant has not demonstrated that the Commission crossed from permissible cataloguing and exclusion into an assessment of the significance of a residual risk requiring SSCOs.

13. Furthermore, the Applicant's proposed declaration also goes beyond the CJEU's answer insofar as it refers to conservation objectives 'and/or measures', as the operative CJEU ruling did not establish that conservation measures were invariably required at AA screening stage.

14. In those circumstances, the Commission submits that the Applicant has not established a legal basis for the declaration sought.

15. Furthermore, and without prejudice to the foregoing submission that no legal error arises on the application of the CJEU Judgment to the facts, it might also be observed that in circumstances where the final domestic court findings establish that the absence of SSCOs made no difference to the screening outcome, any legal error was harmless, and discretionary relief should not be granted merely to mark an immaterial issue or create a foundation for costs. In this respect, the CJEU Judgment itself provides authoritative clarification of the legal position.

16. The Applicant's claim to all costs of the reference, subsequent submissions and reserved matters assumes both that a declaration will be granted and that every such cost was reasonably and proportionately caused by the issue on which success was achieved. Neither proposition is established. If relief is refused—which it should be based on the application of §81 of the Judgment of the CJEU to the facts—the Applicant has not succeeded on the only live issue. If some limited relief is granted, the Court must still isolate the precise issue on which the Applicant succeeded and distinguish those costs from the costs of the unsuccessful certiorari grounds, factual disputes in respect of which he was unsuccessful and the claim for wider relief not vindicated by the CJEU Judgment.

17. Moreover, the Applicant's alternative reliance on section 50B(4) is misplaced and not made out: the requirements that the matter be of exceptional public importance and that there be special circumstances making an award fair and in the interests of justice are separate, cumulative requirements. Novelty, a preliminary reference, disagreement by public authorities or wider usefulness do not, without more, establish the requisite exceptionality for a costs award in favour of an unsuccessful, costs-protected applicant. The Applicant's contention that the issue arose from State failure does not explain why costs should be imposed on the Commission, which neither establishes SSCOs nor controls the relevant legislation. Nor does reliance on Little [2024] IESC 53 remove the need for a

balancing exercise having regard to the refusal of certiorari, the uncontested evidence that SSCOs made no difference, the absence of contrary expert evidence, and the Supreme Court's refusal of leave to appeal (see [2025] IESCDET 126 at §13).

18. The appropriate order is therefore to refuse the application for a further declaration and to direct that, as regards this limb of the case, that each party bear its own costs relating to the reference, the post-CJEU submissions and reserved matters.

The State Respondents submit –

19. The judgment delivered by the CJEU is clear in its terms and in its application to the facts of this case. It is plain from the factual findings made by the Court in its judgment in Massey v An Bord Pleanála (No.2) [2025] IEHC 206 that this is a case of the type contemplated by the CJEU at §81 of the Judgment. The Applicant is not entitled to the form of declaration sought at §25 and §35 of his written legal submissions in the light of the conclusions at §§81 to 84 of the Judgment, which speaks for itself. It is not necessary for the Court to exercise its discretion to grant further declaratory relief.

20. The State Respondents agree with the submissions of the Commission, including that the appropriate order is to refuse the application and that each party bears own costs relating to the reference for preliminary ruling to the CJEU and to the within application for further declaratory relief.

The Notice Party submits –

1. The Applicant's position before the High Court and the CJEU was that site-specific conservation objectives ('SSCOs') was a jurisdictional pre-requisite to carrying out an AA Screening in all cases. The Applicant's position was not accepted by the CJEU, which distinguished between situations where an AA Screening could be carried out absent SCCOs (as was the case here) and where one could not be carried out (which is not the case here).

2. The Applicant in his submissions have misinterpreted the judgment of CJEU by equating the reference to 15km zone of influence in the AA Screening Report (which was based on NPWS guidance) to delimiting the geographical area as described the CJEU. In fact, as is clear from the underlined passage above, the CJEU (at §81), in referring to delimitation of geographical area, was not simply referring to distance but was more broadly referring to 'objective criteria' which may include distance or absence of plausible data or other objective criteria. In the present instance, the AA screening all Natura 2000 sites were ruled out based on objective criteria. Thus, as to the facts in this case, which the Applicant ignores (as addressed below), there is no basis for any further declaratory relief – this was a case where, consistent with §81 of the CJEU Judgment, SCCOs where not necessary for the purposes of carrying out a valid AA Screening as objective criteria had delimited the geographical area.

3. The Applicant also misunderstands the CJEU Judgment and the evidence before the High Court insofar as he contends (or at least appears to) that the zone of influence/likely zone of impact is determinative of the issue. In this respect, the High Court, in Massey (No.2) [2025] IEHC 206, found (inter alia, §92, §172), that '[t]he impacts on Whooper Swan appear to be negligible given, among other things, the distance of the project from the SPA' and that 'there is a clear lack of any reasonable possibility of any impact whatever on the SPA on the evidence here.' As the High Court noted, these factual findings were grounded on expert evidence – the affidavit of Padraig Cregg, Principal Ornithologist for MKO Planning and Environmental Consultants. The central findings included:

- that the 9.9km separation from the SPA exceeded the species' 5km core foraging range;
- the development site contained no suitable habitat;
- the only recorded flight travelled in a direction that did not overlap with the SPA;
- no regularly used commuting corridor was found; and
- no hydrological or other plausible impact pathway existed.

4. Those said findings establish that there was no plausible route to the European Site and no reasonable possibility of any effect. The case clearly falls within the type of situation and objective criteria referred to in §81 of the CJEU judgment whereby SCCOs are not necessary for AA Screening.

5. Whilst the Applicant seeks to rely on §37 of Massey (No.3), where the High Court stated that, if the answer to the referred question were affirmative, the Applicant would receive a declaration – as outlined above, the CJEU did not give the unqualified affirmative answer contemplated by that statement or the answer advocated by the Applicants. Its ruling on screening was expressly qualified – with, as outlined above. More fundamentally, in the present instance the Commission was able to screen out all Natura 2000 sites including the Blackwater Callows SPA based on objective criteria and there was no need for the Commission to consider any SCCOs.

6. There is therefore no identified error to justify a declaration in this case. In this respect, where there is no basis for any relief and where the Applicant's position on the reference was not successful, there is no basis for any costs order."

43. The commission's screening decision was:

"Appropriate Assessment: Stage 1

The Board noted that the proposed development is not directly connected with or necessary for the management of a European Site.

In completing the screening for appropriate assessment, the Board accepted and adopted the screening assessment and conclusion reached in the Inspector's report that the Blackwater River (Cork/Waterford) Special Area of Conservation (Site Code: 002170), Blackwater Estuary Special Protection Area (Site Code: 004028) and Ballymacoda Bay Special Protection Area (Site Code: 004023) are the European Sites for which there is a possibility of significant effects and which, must, therefore, be subject to appropriate assessment.

44. So we go back to the inspector. Her assessment was as follows:

"16.4.6. The applicant, in its screening report, which is included as an appendix of the NIS document, sets out the methodology for the identification of relevant European sites within a 15km radius, in addition to the potential for connectivity with European Sites at greater distances were identified. The results of the bird surveys were consulted to provide information on whether the birds on the site could potentially be associated with any European Site. The screening report concluded that the possibility of significant effects could not be ruled out for 3 of the 5 sites and, therefore, the proposed development works must proceed to Appropriate Assessment. I have provided a summary of the information in relation to the potential impacts identified in the screening stage below.

16.4.7. I would also refer the Board to the test at screening stage which seeks to identify if a project is likely to have significant effects (my emphasis) either individually or in-combination with other plans or projects on European sites in view of the sites conservation objective.

…

Site Name	Special Conservation Interests (SCI's)	Potential receptor-pathway-source links to Development Site.
Blackwater Callows SPA Site Code - 004094 9.9km to north of site	Whooper Swan [A038] • Wigeon [A050] • Teal [A052] • Black-tailed Godwit [A156] • Wetland and Waterbirds [A999]	No – The SPA is in a separate hydrological catchment and does not have connectivity with the site. Wigeon, teal and black-tailed godwit were not recorded during the bird surveys. There is no suitable habitat within the site for wintering populations. Whooper Swan was recorded once. The site is not within the core foraging range (5km) of the species Can potential likely significant effects be excluded? – Yes

…

The following European Sites -

- Ballymacoda (Clonpriest and Pillmore) SAC [000077]
- Blackwater Callows SPA [004094]

could not be significantly affected by the proposed development works. I am satisfied that the applicant has demonstrated this objectively with reference to the geographical separation from those sites and the absence of/or weak ecological pathways between those sites. It is therefore reasonable to conclude on the basis of the information on the file, which I consider adequate in order to issue a screening determination, that the proposed development, individually or in combination with other plans or projects would not be likely to have a significant effect on these 2 European Sites in view of the sites' conservation objectives and a Stage 2 Appropriate Assessment is not therefore required for these sites."

45. This in turn takes us back to the developer's AA screening report which is appendix 1 to the NIS.

46. This defines the zone of impact in terms of an area within 15 km from the development site:

"Identification of the European Sites within the Likely Zone of Impact

The following methodology was used to establish which European Sites are within the Likely Zone of Impact of the proposed development: Initially the most up to date GIS spatial datasets for European designated sites and water catchments were downloaded from the NPWS website (www.npws.ie) and the EPA website (www.epa.ie) on the 0505/1212/2020. The datasets were utilized to identify European Sites which could feasibly be affected by the proposed development. All European Sites within a distance of 15km surrounding the development site were identified and are shown on Figure 3.1. In addition, the potential for connectivity with European Sites at distances of greater than 15km from the proposed development was also considered in this initial assessment. In this case, potential connectivity with a European Site that is located at a distance of over 15km from the proposed development was identified. This was identified following review of aerial photography and hydrological catchment mapping as described above. Other European Sites that were located over 15 km from the proposed development were excluded as no pathway for significant effect was identified. The catchment mapping was used to establish or discount potential hydrological connectivity between the site of the proposed development and any European Sites. The hydrological catchments are also shown in Figure 3.1. Table 3.1 provides details of all relevant European Sites as identified in the preceding steps and assesses which are within the likely Zone of Impact. The results of the extensive bird surveys, carried out between September 2016 to September 2018 and October 2019 to March 2020, were consulted in the course of this screening exercise and provided information on whether the birds recorded on the site could potentially be associated with any European Site. The site synopses and conservation objectives of these sites, as per the NPWS website (www.npws.ie), were consulted and reviewed at the time of preparing this report. Where potential pathways for Significant Effect such as habitat or hydrological connectivity are identified, the site is included within the Likely Zone of Impact."

47. Within the zone of impact as so delimited, and somewhat conflating the issue of exclusion of impact with lack of pathways, the screening goes on to say at pp. 13-14:

"This European Site is 9.9km to the north of the development site. There is no potential for direct impact as the proposed development is outside of the SPA boundary. This SPA is in a separate hydrological catchment and does not have connectivity with the proposed development site. Therefore, there is no is potential for indirect effects on supporting wetland habitat with regard to surface water pollution.

Wigeon, teal and black-tailed godwit are all designated for their wintering populations. These SCI species were not recorded during the extensive suite of bird surveys carried out. There is no suitable habitat within the proposed development site for wintering populations of these species given the extent of plantation forestry occurring within the study area. The site is also located outside the zone of sensitivity of any species that is listed as particularly sensitive to wind energy development in Mc Guinness et.al (2015). There is therefore no potential for impact. The proposed development site is not located within the core foraging range of wintering Whooper swan, which is listed as less than 5km, as per SNH guidelines (2016). Whooper swan were only recorded on one occasion during dedicated bird surveys of the development. Consequently, the potential for direct and indirect impacts on whooper swan populations associated with the Blackwater Callows SPA can be discounted. No pathways for significant effect on the European Site was identified. Thus it can be excluded beyond reasonable scientific doubt, in view of best scientific knowledge, on the basis of objective information and in light of the conservation objectives of the European site, that the proposed development, individually or in combination with other plans and projects, would therefore not have the potential to have a significant effect on this European Site."

48. The 15 km zone derives from ministerial guidance (https://www.npws.ie/sites/default/files/publications/pdf/NPWS_2009_AA_Guidance.pdf):

"The approach to screening is likely to differ somewhat for plans and projects, depending on scale and on the likely effects, but the following should be included:
1. Any Natura 2000 sites within or adjacent to the plan or project area
2. Any Natura 2000 sites within the likely zone of impact of the plan or project. A distance of 15km is currently recommended in the case of plans, and derives from UK guidance (Scott Wilson et al., 2006). For projects, the distance could be much less than 15km, and in some cases less than 100m, but this must be evaluated on a case-by-case basis with reference to the nature, size and location of the project, and the sensitivities of the ecological receptors, and the potential for in combination effects
3. Natura 2000 sites that are more than 15km from the plan or project area depending on the likely impacts of the plan or project, and the sensitivities of the ecological receptors, bearing in mind the precautionary principle. In the case of sites with water dependent habitats or species, and a plan or project that could affect water quality or quantity, for example, it may be necessary to consider the full extent of the upstream and/or downstream catchment."

49. The CJEU held as follows (emphasis added):

"78 The screening stage, as a preliminary step to determine whether it is necessary to carry out an appropriate assessment, is specifically intended to determine whether those conditions are satisfied.

79 That screening stage does not involve carrying out an analysis as full and precise as the analysis which must be carried out in the context of the appropriate assessment of the implications of a plan or project for the site concerned. The Court has held that the analysis of measures capable of avoiding or reducing any significant effects on the site concerned must be carried out not at the screening stage, but at the appropriate assessment stage. According to the Court, taking account of such measures at that screening stage would be liable to compromise the practical effect of the Habitats Directive generally and the appropriate assessment in particular, as the latter stage would be deprived of its purpose and there would be a risk of circumvention of that stage, which constitutes, however, an essential safeguard provided for by the directive (see, to that effect, judgment of 15 June 2023, Eco Advocacy, C-721/21, EU:C:2023:477, paragraphs 46 and 47 and the case-law cited).

80 As regards the first of the conditions referred to in paragraph 77 of the present judgment, the issue of whether the plan or project at issue is directly connected with or necessary to the management of the site concerned clearly relates to the characteristics of that plan or project considered in itself. It follows that the adoption of conservation objectives specific to the protected site cannot be regarded as indispensable in that regard.

81 As regards the second of those conditions, it involves, inter alia, cataloguing the protected sites which might be affected by the plan or project in question, taking account of the potential effects of that plan or project. It may be possible to carry out such cataloguing without it being necessary to take into account the conservation objectives specific to each of the protected sites. That may be the case where **the delimitation of the geographical area which the plan or project is likely to affect** makes it possible to rule out – with the certainty required in accordance with the precautionary principle, on the basis of objective criteria, such as the distance between that plan or project and the protected sites and the existence or absence of plausible impact pathways – any risk of certain protected sites being affected, irrespective of the conservation objectives specific to those sites.

82 By contrast, as regards **protected sites within the geographical area likely to be affected by that plan or project,** the assessment of the probability or risk that that plan or project will have a significant effect on those sites **cannot be carried out without taking account of the conservation objectives specific to those sites**. The Court notes in that regard that, as is apparent from paragraphs 76 to 79 of the present judgment, that assessment does not involve carrying out as complete and precise an analysis of the implications of the plan or project concerned for the protected site as the appropriate assessment itself, but rather an assessment of whether, taking account of the conservation objectives specific to that site, the probability or risk that that plan or project will have a significant effect on it may or may not be ruled out."

50. The critical point is that the issue the CJEU is talking about is the "delimitation of the geographical areas which the plan or project is likely to affect", not whether any particular site within the area so delimited is going to be affected because that particular site lacks a plausible impact pathway or for some other reason such as lack of sighting of particular species.

51. The mere fact that the CJEU refers to pathways for example self-evidently does not mean that any site can be excluded by reference to pathways without there being SSCOs – because the reference to pathways is not free-standing. Such a rule would have hypothetically also made sense

of course and I would have supported that, but that is not what the court decided. The pathway reference is expressly confined to "the delimitation of the geographical area" which the project is likely to affect. That is the zone of influence, not a granular analysis of each and every site within the zone - that distinction ("delimitation"/ "within the geographical area") is express on the face of the judgment. What is clear from the CJEU judgment – which, let's not forget, came down heavily in favour of the relevant applicants and against the State, the commission and the developers, is the insistence on SSCOs. The "delimitation of the geographical areas" is something of an exception to that and needs to be read in that context - as an exception, not as a licence for detailed surgery within a geographical area that has been lawfully defined, to excise particular possible impacts in the absence of SSCOs. No such licence is apparent from the judgment. The far more natural and appropriate reading of it is that it envisages an initial geographical "delimitation", followed by individual analysis of sites "within the geographical area likely to be affected by that plan or project" to be informed by the objectives, to determine whether there are pathways or impacts relevant to those particular sites within the defined zone of impact or influence.

52. To state the very obvious, that does not affect the more general point that an error as such does not automatically lead to *certiorari*. If the mistake can be shown not to have had any effects contrary to EU law, a declaration is the appropriate remedy for harmless error if there is to be a remedy, and that is the position here. The No. 2 judgment determined that any error was indeed harmless, rejected *certiorari* on that basis (leapfrog leave to appeal being subsequently refused by the Supreme Court), and left open declaratory relief.

53. Applying the CJEU judgment to the facts here, the fact that the commission, having delimited a 15 km zone of impact by accepting the developer's AA screening report, went on to exclude impacts on the Blackwater Callows SPA within the zone of impact without there being site-specific conservation objectives, was therefore a legal error within the doctrine as laid down in *Knocknamona*.

54. A declaration as to the error would be appropriate in all the circumstances. The fact that the error did not in fact have any material effect was fully taken into account in refusing *certiorari* but is not in itself a reason, in the unusual circumstances here, to refuse a declaration (the possibility of a declaration having been the rationale for the reference, as elaborated on in the No. 5 judgment).

Costs and consequential issues

55. In principle and provisionally, costs of the declaration should follow the event.

56. In view of the fact that a declaration is being granted, I don't need to decide on the argument that the applicant should get costs even if he lost, although my provisional view would have been that this is not a case of *exceptional* public importance that would warrant such an order. *Little* does not confer a right to a loser's costs in a case such as this. It is nonetheless a case of *some* public importance (having been the lead case on the necessity or otherwise of conservation objectives at the screening stage and the vehicle by which that point was definitively decided), which is relevant to the commission's proposal for set-off.

57. The commission's submission was that:

> "37. If the Court makes a costs order in favour of the Applicant against the Commission, the Commission seeks its party-and-party costs of the certiorari claim from 25 July 2024, when the Commission filed its opposition papers, to 11 April 2025, when Massey (No.2) [2025] IEHC 206 was delivered. The order should include the costs of written legal submissions and costs adjudication, and should be enforceable only by set-off against the Applicant's costs award, up to the amount of that award and without leaving any positive balance. That approach reflects the outcome of Massey (No.2) [2025] IEHC 206 and the set-off order made in favour of the Commission in Hoctor v An Coimisiún Pleanála (No.1) [2026] IEHC 65 at §131(vi)."

58. The State responded more vaguely:

> "17. The State Respondents reserve the entitlement to address the legal principles governing the position as to costs in these proceedings as necessary in oral submissions in due course."

59. Any such hypothetical application (which I am not inviting) is not precluded by a provisional view on costs.

60. As regards the commission's proposed set-off, when I dismissed the *certiorari* claim (by order perfected on 30 May 2025), there was no order as to the applicant's costs, and the opposing parties' costs were reserved.

61. While (provisionally at least) the case falls well short of the bar for an award of costs to a hypothetically losing party, it is a case of some public importance as noted above and on balance I consider, provisionally, that that is a sufficient factor against setting off the failed costs of the *certiorari* claim against the provisional costs of the declaratory relief.

Summary

62. For the avoidance of doubt, preambular matters prior to the first heading of this judgment, and the following summary, do not take from the operative parts of the judgment and must be read in a sense consistent with those. In outline summary, therefore:

(i) applying settled law that site-specific conservation objectives are not required for the process of the delimitation of the geographical area which the plan or project is likely to affect, provided that effects outside that area can be ruled out, but that such objectives are required for the determination of whether there may be impacts on particular protected sites within the geographical area likely to be affected by that plan or project, the commission erred in ruling out impacts on sites within the 15 km zone of impact, in the absence of site-specific conservation objectives, having delimited that geographical area lawfully in the first instance; and

(ii) applying settled law that a legal error can be marked with a declaration where appropriate, this is a case where such a remedy would be appropriate.

Order

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

(i) there be a declaration that the first named respondent erred in law in that, having delimited a 15 km zone of impact by accepting the developer's AA screening report, it went on to exclude impacts on the Blackwater Callows SPA (Site code 004094) within the zone of impact without there being site-specific conservation objectives for that SPA;

(ii) unless any party otherwise applies by way of written legal submissions within 7 days, the foregoing order be perfected forthwith thereafter on the basis of an order for costs (including reserved costs and the costs of written submissions and the costs before the CJEU) being awarded to the applicant against the first named respondent, insofar as concerns the relief now being granted against the first named respondent and limited to the costs that would have been incurred had the applicant confined his case to the relief being hereby granted, and for the avoidance of doubt not including factual disputes in respect of which the applicant was unsuccessful and any claim for wider relief not vindicated by the CJEU judgment, and noting that pursuant to the order of 30 May 2025 there has already been no order as to costs associated with the unsuccessful *certiorari* claim;

(iii) any issue as to the extent of such costs be determined, in default of agreement, by way of legal costs adjudication;

(iv) for the avoidance of doubt, the order for costs shall include an order for the costs of legal costs adjudication;

(v) there be otherwise no order as to costs; and

(vi) the matter be listed on 09:30 on Monday 12 October 2026 to confirm the foregoing.