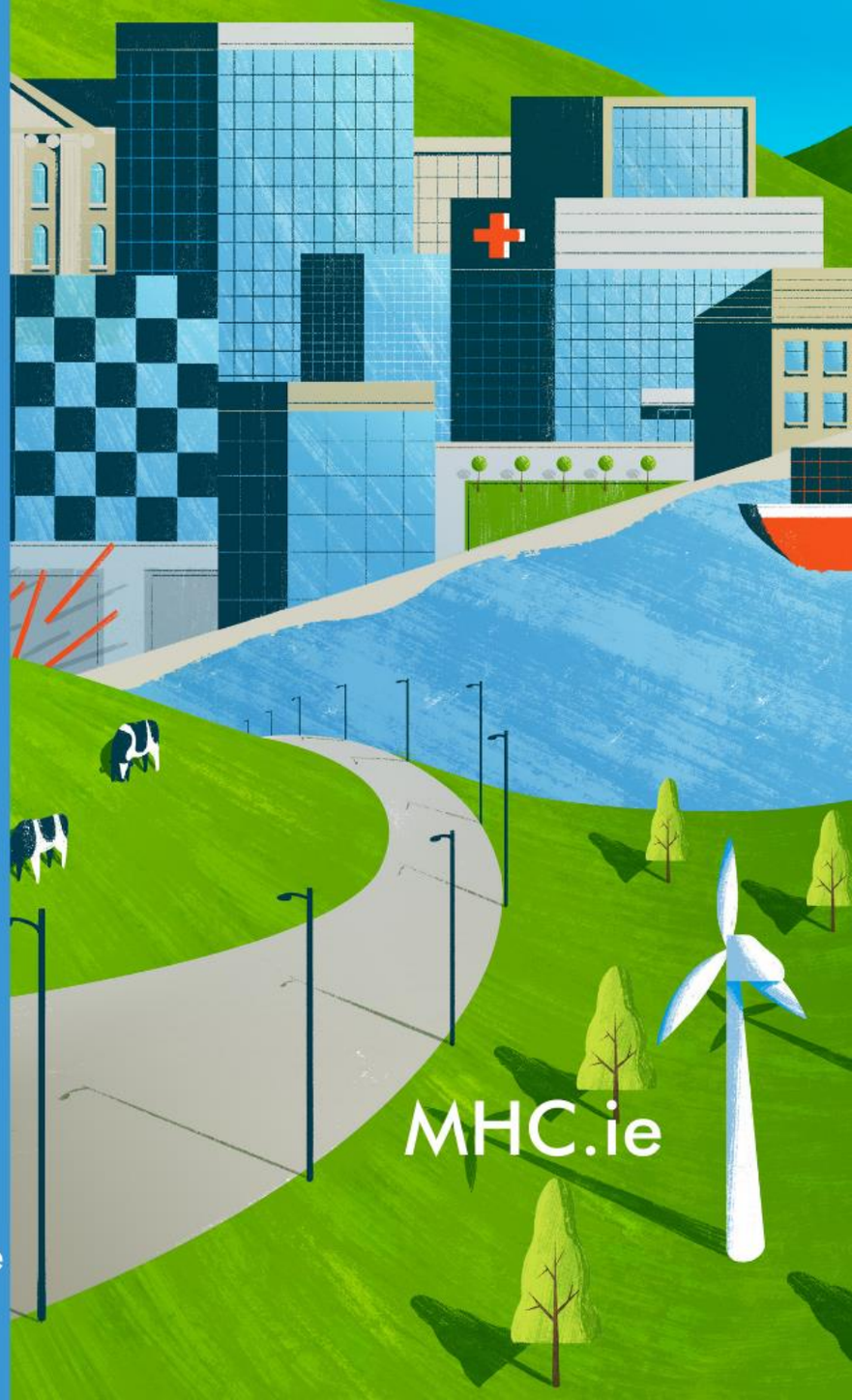
MASON HAYES & CURRAN

Welcome

Planning & Environment Webinar

We will begin shortly.....Please note this webinar will be recorded.

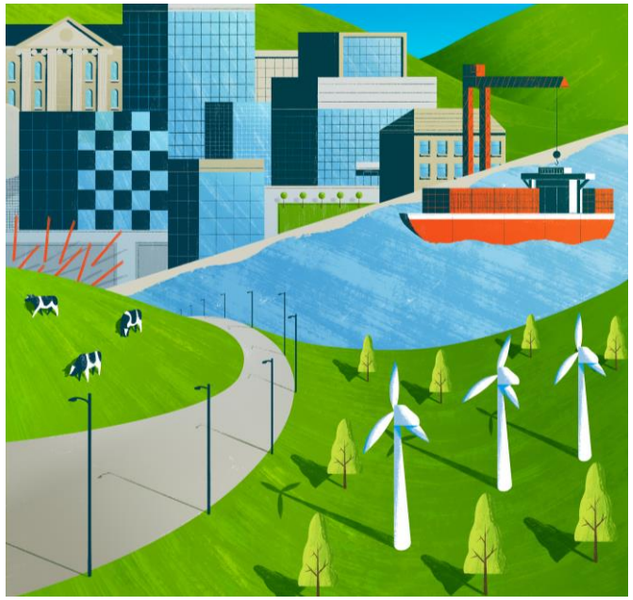
Dublin London New York San Francisco



MASON HAYES & CURRAN

Introduction

Deirdre Nagle, Head of Planning & Environment, Mason Hayes & Curran LLP – dangle@mhc.ie



MASON HAYES & CURRAN

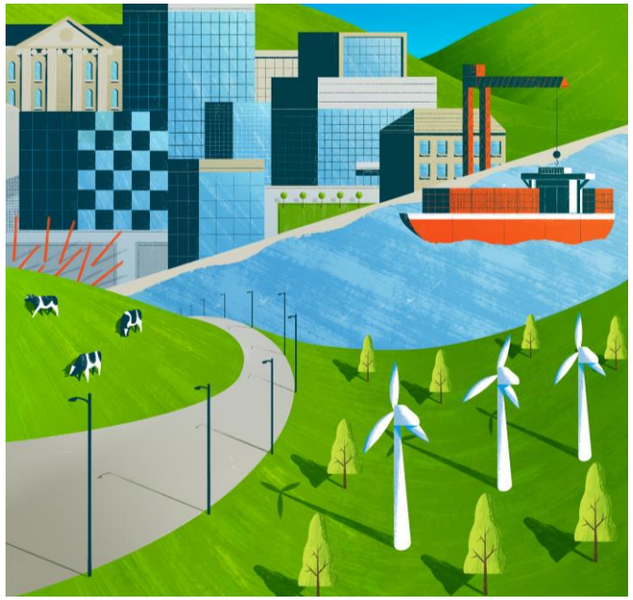
Speakers

- Rory Mulcahy SC
- Margaret Gray SC
- Elaine Keating, Associate, Planning & Environment, Mason Hayes & Curran LLP elainekeating@mhc.ie
- Jay Sattin, Associate, Planning & Environment, Mason Hayes & Curran LLP jsattin@mhc.ie
- Grainne Tiernan, Associate, Planning & Environment, Mason Hayes & Curran LLP gtiernan@mhc.ie

MASON HAYES & CURRAN

Case Updates

Elaine Keating, Associate, Planning & Environment, Mason Hayes & Curran LLP



MASON HAYES & CURRAN

Reid v An Bord Pleanála (No. 1)

Key judgment setting out principles of Judicial review

- Of the 4 judgments delivered by Judge Humphreys in 2021, this first (No. 1) [2021] IEHC 230 focused on an application for the exclusion of some of the Applicant's evidence.
- This procedural application seeking to dismiss the applicants evidence raised questions that *go to the heart of what judicial review actually is*.
- The complaint essentially regarding the applicant's evidence has three dimensions:

  (i) that the evidence goes beyond the pleadings;

  (ii) that the points, legal or otherwise, should have been made to the decision-maker; and

  (iii) that new evidence is introduced which should have been put to the decision-maker.

MASON HAYES & CURRAN

Reid v An Bord Pleanála (No. 1)

Key Points of Judicial Review

- The basic rule in judicial review proceedings was that a party could only pursue grounds set out in the pleadings
- Limited circumstances in which new evidence can be admitted in judicial review proceedings (Lancefort Ltd v An Bord Pleanála (No. 2)[1999] 2 I.R. 270).
- If the decision is adverse, the applicant can't be allowed to challenge the decision for failure to consider something that was never put forward.
- Key exception to this rule arises in respect of EU environmental law Commission v. Germany (Case C-137/14)
    - access to justice provisions of art. 11 of directive 2011/92/EU on EIA and art. 25 of directive 2010/75/EU on industrial emissions

MASON HAYES & CURRAN

Reid v An Bord Pleanála (No. 1)

Exceptions to the Evidence Rule

- Judge Humphreys provided an extensive list of instances where new evidence may be admitted during a judicial review including :-
  - The complaint of illegality is jurisdictional;
  - procedural unfairness;
  - Lack of reasons;
  - Under the principle of access to justice in EU law (including the Habitats Directive);
  - misconduct by the decision-maker;
  - the decision maker made an error of fact;
  - Demonstrating what material was before the decision-maker;
  - Information required to explain technical terms or processes;
  - Required to show a process of reasoning involved technical error;
  - A decision-maker had an independent duty to inquire, and relevant information could reasonably have been available;
  - Acceptable explanation as to why the Applicant failed to raise the point at the appropriate time.

MASON HAYES & CURRAN

Reid v An Bord Pleanála (No. 1)

Conclusion

The majority of the disputed evidence constituted impermissible new evidence, largely consisting of new scientific information.

It is not the court's function to sift through such a proposed affidavit to indicate how it might be rewritten in order to preserve any potentially admissible parts.

The judgment provided clear instruction as to the key principles of Judicial Review, including a comprehensive list of exceptions to the general rule of introducing new evidence.

MASON HAYES & CURRAN

Reid v An Bord Pleanála (No. 2)

Substantive Hearing [2021] IEHC 362

- The court dismissed revisiting No. 1 Judgment.
- A party cannot respond to a motion to exclude evidence by filing affidavits which include additional evidence for the purposes of the case proper without leave to do so. *That would logically lead to a death spiral for the case*.

MASON HAYES & CURRAN

Reid v An Bord Pleanála (No. 2)

Role of the Decision Maker - screening for Appropriate Assessment

- Resolution of the complaint turns on the distinction between matters:-
  - The board has to consider only if such matters are raised, and
  - matters that the board has to deal with autonomously.

The Test

- Whether the Applicant has demonstrated that a “reasonable expert” (a reasonable person with the relevant sufficient expertise and aware of, and in a position to fully understand and properly evaluate, all the material before the decision-maker) could have a reasonable scientific doubt as to whether there could be an effect on a European site.

MASON HAYES & CURRAN

Reid v An Bord Pleanála (No. 2)

The concept of “sufficient expertise”

Two dimensions

1. Fact-specific examination
    - an expertise to be able to fully understand and properly evaluate the developer's fact-specific material / science underlying it
2. Measuring those fact-specific matters against general scientific standards
    - to evaluate in the context of expert knowledge of prevailing general standards and scientific information.
- The logic that “other people have looked at this, therefore it must be OK” is the sort of thing that leads to systems failures.

MASON HAYES & CURRAN

Reid v An Bord Pleanála (No. 2)

Judgment

The Applicants failed to establish that a reasonable person with all of the necessary “sufficient expertise”, having read and fully understood the materials before the board, would have seen the materials on their face as not excluding reasonable scientific doubt.

The approach of regarding the board and its inspectors as “experts” *simpliciter*, to be automatically deferred to, requires review in the light of both the amended EIA directive and compliance with EU law.

Judge Humphreys *without much enthusiasm* dismissed the proceedings. That lack of enthusiasm stems from a suspicion that the board didn't fully understand the science behind the developer's proposal.

MASON HAYES & CURRAN

Reid v An Bord Pleanála (No. 1 & 2)

Conclusion

- Whilst the general rules around evidence that can be brought before a Judicial Review are set, the extended set of exceptions requires full understanding in the face of a challenge.
- For developers, the key to ensure accuracy, as any inadvertent errors could enhance any claim in relation to the scrutiny of application materials.

MASON HAYES & CURRAN

Kerins & Anor v An Bord Pleanála & Ors

The meaning of “plans and programmes”

- [2021] IEHC 369
- Strategic environmental assessment (SEA) is required under the SEA Directive for ***“plans and programmes”*** which are likely to have significant effects on the environment.
- 2018 Urban Development and Building Heights Guidelines for Planning Authorities were issued under Section 28 of the PDA.

- Re-occurring themes before Mr Justice Humphreys in the High Court, consequently took the view that the legal implications of these legal definitions and government policies require further clarification from the CJEU.

MASON HAYES & CURRAN

Kerins & Anor v An Bord Pleanála & Ors

Referable questions of EU law under Art 267 of the TFEU

1. Does the concept of a “plan or programme” within the meaning of the SEA Directive include a plan or programme that is jointly prepared and/or adopted by an authority at local level and a private sector developer as owner of adjacent lands to those owned by a local authority?

MASON HAYES & CURRAN

Kerins & Anor v An Bord Pleanála & Ors

Second Question

2. the concept of “plans and programmes which are required by legislative, regulatory or dministrative provisions” includes a plan or programme that is expressly envisaged by a local authority's statutory development plan (that development plan having been made under a legislative provision) either in general or where the development plan states that the local authority “will prepare area-specific guidance for the strategic development and regeneration areas … using the appropriate mechanisms of local area plans … schematic masterplans and local environmental improvement plans”.

MASON HAYES & CURRAN

Kerins & Anor v An Bord Pleanála & Ors

Third question - [2021] IEHC 733

3. Does the concept of a “plan or programme” within the meaning of the SEA Directive which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in annexes I and II to directive 85/337/EEC…” includes a plan or programme that is not in itself binding but which is expressly envisaged in a statutory development plan which is binding, or which proposes or envisages in effect a modification of a plan that was itself subject to strategic environmental assessment.

MASON HAYES & CURRAN

Kerins & Anor v An Bord Pleanála & Ors

Fourth Question

4. Whether the EIA Directive has the effect of precluding regard being had by the competent authority in the process of environmental impact assessment to mandatory government policies, in particular those which are not based exclusively on environmental criteria, being policies that define in certain circumstances situations where a grant of permission is not to be ruled out?

MASON HAYES & CURRAN

Kerins & Anor v An Bord Pleanála & Ors

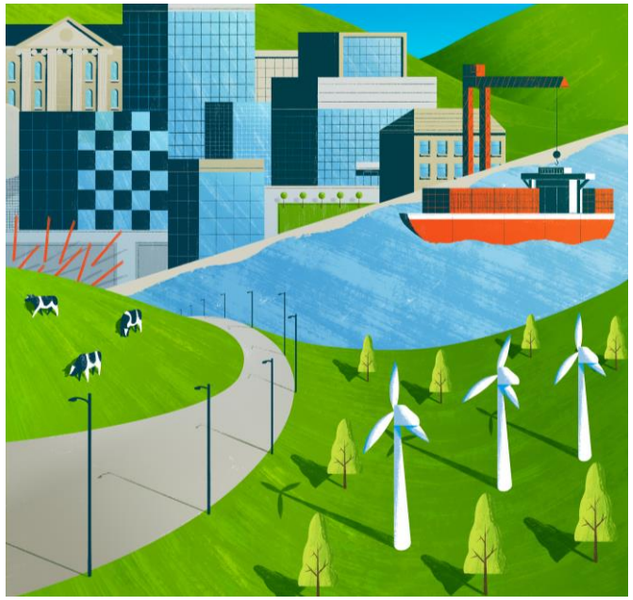
Conclusion

- Core issue is whether the EIA Directive precludes regard being had to national mandatory policies particularly such as those stated at 3.1 of the 2018 Guidelines.
- Potential invalidity of SPPRs.
- Cautionary approach recommended until CJEU determination.

MASON HAYES & CURRAN

EIA, AA, WFD, Derogation Licenses, Plans and Particulars

Jay Sattin, Senior Associate, Planning & Environment, Mason Hayes & Curran LLP



MASON HAYES & CURRAN

An Taisce – Kilkenny Cheese Manufacturing Plant

Supreme Court decision: indirect effects in EIA

- On 14 November 2019, Kilkenny County Council granted planning permission for a cheese manufacturing plant. Milk will be transported to the plant from around 4,500 farms.
- An Taisce appealed to ABP, who granted planning permission. An Taisce challenged this decision and the High Court found in favour of ABP [2021] IEHC 254. The Supreme Court allowed a leapfrog appeal.
- The Supreme Court ([2022] IESC 8) found ABP's view that the indirect effects were too remote for the EIA to be reasonable: -
  - causal connection between certain off-site activities and the operation and construction of the project itself was not "*demonstrably strong and unbreakable*"
  - the challenge was a "programmatic" issue
  - conclusions were not practicable nor feasible

MASON HAYES & CURRAN

An Taisce – Kilkenny Cheese Manufacturing Plant

Supreme Court decision: Appropriate Assessment evidence and WFD

- The AA was not shown to have gaps:
  - scientific evidence before the Board was that any fluvial discharges from the proposed development would be discharged from a site more than 130m from the nearest Atlantic salt meadow and that this habitat would not be affected
  - did not need to assess effects of the off-site milk production

- ABP did not breach the Water Framework Directive:
  - did not show deterioration in status of a body of surface water: no impediment on “Weser” grounds
  - not required to carry out assessment of off-site milk production on water quality

MASON HAYES & CURRAN

Sweetman vs An Bord Pleanála & Bord na Móna PowerGen Ltd

The design envelope

- An SID planning application for 24 wind turbines and associated infrastructure. Turbines up to 185 metres.
- Design envelope allows degree of commercial flexibility
- The Board granted permission on 12 June 2020.
- The Judge held that the application failed to comply with Article 214 of the PDR 2001, which requires "*plans and particulars of the proposed development*" to be submitted with an SID application [2021] IEHC 390.
- The Judge certified leave for appeal to the Court of Appeal ([2021] IEHC 662)

Sweetman vs An Bord Pleanála & Bord na Móna PowerGen Ltd

The design envelope

- If the parameters require flexibility, the parameters must:
  - have a certain limited degree of flexibility only. The Judge even suggested an indicative margin of 10% for that level of flexibility, however it would depend on the facts of the case.
  - be something specifically measured and capable of being drawn on a plan.
  - not be open ended on the scale.
  - not couched in terms of what is typical and what is maximum.
  - be assessed. Any reliance on the worst-case assessment, must still make it clear how the other scenarios have been assessed.

MASON HAYES & CURRAN

Eco Advocacy CLG vs An Bord Pleanála & Ors

Mitigation measures

- This High Court case ([2021] IEHC 265) concerned a proposed development in Trim, Co. Meath
- An Bord Pleanála granted permission in October 2020. A screening opinion concluded no stage 2 Appropriate Assessment required. Eco Advocacy CLG, a planning, environment and social justice registered charity, sought to challenge this.
- Is the surface water drainage system a mitigation measure? If it is, then it should not have been relied upon in the screening assessment.
- The main areas of difference in the jurisprudence on mitigation measures appears to be whether the measures are: (a) standard design features; and (b) intended to reduce the impact on the site as opposed to whether they result in that effect.
- The Judge referred questions to the CJEU, after hearing submissions on the proposed questions ([2021] IEHC 610)

MASON HAYES & CURRAN

Hellfire Massy Residents Association v ABP & Ors

Derogation licenses and planning permission

- ABP granted planning permission to South Dublin County Council for the construction of a Dublin Mountains Visitors Centre and associated works. Inspector had requested NIS for impacts on habitats.
- The High Court judge dismissed the applicant's argument that there was unlawful reliance by the Board on the developer obtaining a derogation license.
- There was a significant distinction between matters requiring a derogation license that arise before consent and after consent.
- The High Court referred questions to the CJEU, including:
  - whether the derogation license should be integrated within the planning process or allowed to be applied for post-consent; and
  - whether public participation should be provided for in the derogation license process.

MASON HAYES & CURRAN

Hellfire Massy Residents Association v ABP & Ors

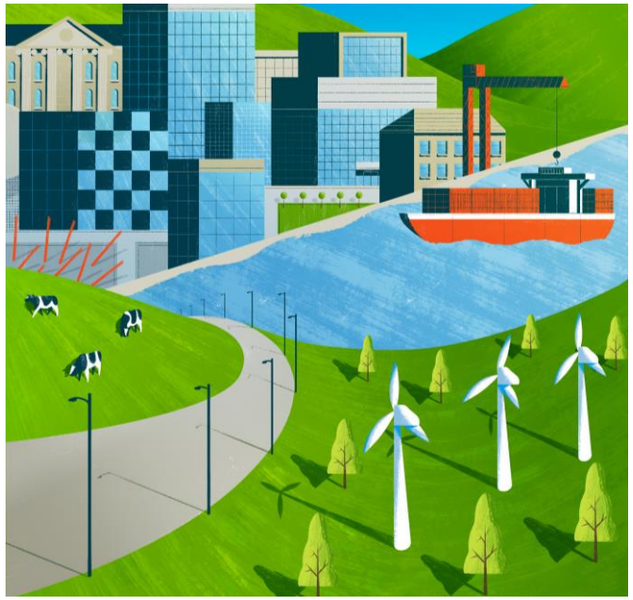
Appeals

- The High Court did not certify an appeal to the Court of Appeal
- However, the Supreme Court ([2022] IESCDET 21) was satisfied that a matter of general public importance arises: "*as to the dismissal of an application for judicial review of an individual decision to grant planning permission, pending the determination of a challenge to the validity of certain legislative provisions which arguably affect or impact upon that decision*"

MASON HAYES & CURRAN

Section 5 Declarations, Planning Compliance Submissions, Protective Costs

Grainne Tiernan, Associate, Planning & Environment, Mason Hayes & Curran LLP



MASON HAYES & CURRAN

Narconon Trust v An Bord Pleanála

Facts

- Narconon sought a Section 5 declaration from Meath County Council in 2016 that the change of use from a nursing home to a drug rehabilitation facility constituted “exempted development” and thus would not require planning permission.
- A community group sought further Section 5 declarations in 2018 as to whether the change of use was in fact “exempted development”.
- Meath County Council sent the requests to the Board who issued a declaration confirming that the change in use constituted development for which planning permission was required in November 2018.

MASON HAYES & CURRAN

Narconon Trust v An Bord Pleanála

High Court

- Judicial review proceedings issued by Narconon against the Board challenging their declaration that the change of use constituted development requiring planning permission.
- The High Court quashed the Board's 2018 decision which was subsequently appealed to the Court of Appeal by the Board who questioned whether they had the power to determine a Section 5 referral, in cases where
  - a planning authority had previously determined the same question in relation to the same land, and
  - there was no evidence of any change in the planning facts and circumstances since the decision of the planning authority.

MASON HAYES & CURRAN

Narconon Trust v An Bord Pleanála

Court of Appeal

- The Court of Appeal agreed with the High Court in finding that the Board would not always be precluded from considering a Section 5 application where there was a pre-existing Section 5 declaration but there must be changes in facts and circumstances to alter the situation in terms of planning

- The “validity” of a Section 5 declaration must be challenged by way of judicial review within the requisite time. If the same question is referred to the Board in circumstances where there is a prior declaration and the circumstances have not changed, the Board should use its discretionary power to decline to determine the referral.

MASON HAYES & CURRAN

Krikke & Ors v Barranafaddock Sustainable Electricity Limited

High Court

- Planning permission for the erection of a wind farm was granted in 2005. A planning compliance submission was made by to Waterford County Council in 2013 to agree the final turbine design.
- The Developer submitted that the deviation of the rotor diameter from 90m to 103m was “immaterial” in terms of the planning permission.
- Judge Simons rejected this. He held that as the wind farm was subject to the requirements of the Environmental Impact Assessment (the EIA) Directive, the proposed increase in rotor diameter was a “change” or “extension” to the project the subject of an EIA which could only have been lawfully authorised by an application for planning permission.

MASON HAYES & CURRAN

Krikke & Ors v Barranafaddock Sustainable Electricity Limited

Court of Appeal

- Where the development was carried out in accordance with an unchallenged and valid compliance decision, there was no basis to find that there had been “unauthorised development” in section 160 proceedings.
- The PDA provides that points of detail may be agreed between the planning authority and a developer.
- Once a decision had been made by a planning authority on the conditions imposed in the permission for a development, this may only be challenged by way of judicial review.
- Rejected arguments that judicial review time limits do not apply where there has been an alleged breach of the EIA Directive. Nothing in the jurisprudence of the CJEU that prevented a member state from applying its own procedural autonomy in matters concerning the EIA Directive.

MASON HAYES & CURRAN

Krikke & Ors v Barranafaddock Sustainable Electricity Limited

Supreme Court

- Matters of general public importance do arise.
- The scope and effect of an agreement pursuant to a "*points of detail*" condition imposed under section 34(5) of the PDA, and regarding public participation and EIA requirements in that context.
- The scope and effect of a section 5 declaration, and regarding the interplay between section 5 (exempt development), section 50 (judicial review) and section 160 (planning injunction) of the PDA.
- Leave to appeal to the Supreme Court granted on 28 February 2022.

MASON HAYES & CURRAN

Heather Hill Management Company CLG & Anor v An Bord Pleanala

High Court

- The applicants sought protective costs order (PCO) under Section 50B of PDA in its statement of grounds (64 grounds)
- Broadly, that provision applies to certain public participation provisions in the EIA Directive, the SEA Directive, the Integrated Pollution Prevention and Control Directive, and the Habitats Directive.
- Each party must bear it own costs, and the applicant may also be awarded costs from the respondent or notice party where the actions or omissions of either, or both of them, contributed to the applicant obtaining relief.
- The Board argued special costs rules did not apply to grounds alleging a material contravention of the development plan, circumvention of ministerial flood risk guidelines, and consent of the landowner to the making of the application for planning permission

MASON HAYES & CURRAN

Heather Hill Management Company CLG & Anor v An Bord Pleanala

High Court

- Mr Justice Simons decided to depart from previous High Court judgments
- Determined that all decisions taken under the PDA 2000 or PDRA 2016 attract the special costs regime created by Section 50B of the PDA 2000, as every decision requires a screening for appropriate assessment and screening for environmental impact assessment, irrespective of the basis upon which a decision is challenged.

MASON HAYES & CURRAN

Heather Hill Management Company CLG & Anor v An Bord Pleanala

Court of Appeal

- Held that special costs rules apply to those grounds of challenge which allege a breach of the requirements of the directives specified in Section 50B, but not to any other grounds for judicial review in the proceedings which are not so based.
- Certain grounds in this case that were not covered by Section 50B were not “on the basis of national environmental law” nor did they “put in issue the application of national environmental law”.
- Grounds, such as irrationality, were classic grounds of judicial review.
- A challenge to a decision to grant planning permission rather than to the development plan, does not involve a challenge based upon the Strategic Environmental Assessment Directive.

MASON HAYES & CURRAN

Enniskerry Alliance and Enniskerry Demesne Management Company CLG v An Bord Pleanala & Ors

High Court

Mr Justice Humphreys considered that the costs rules fell under four headings:

- s. 50B of the Planning and Development Act 2000
- No order as to costs under the Environment (Miscellaneous Provisions) Act 2011
- Not prohibitively expensive costs under EU rules on public participation and
- Not prohibitively expensive costs under the Aarhus Convention as applied to national environmental law grounds via an EU law interpretative obligation.

Enniskerry Alliance and Enniskerry Demesne Management Company CLG v An Bord Pleanala & Ors

High Court

- **Section 50B of the Planning and Development Act 2000**
- EIA Directive applies to the provisions to which public participation applies. Those provisions are not found in the EIA screening.
- Contravention by reference to matters such as zoning doesn't come under s.50B

MASON HAYES & CURRAN

Enniskerry Alliance and Enniskerry Demesne Management Company CLG v An Bord Pleanala & Ors

High Court

- **National environmental law grounds under the Aarhus Convention as applied through an interpretative obligation in EU law**
- Mr Justice Humphreys considered that further clarity was required on the scope of costs protection under the Aarhus Convention within judicial review cases, and referred six questions to the CJEU broadly regarding whether:
  - The approach in the *North East Pylon* applies only within the sphere of EU environmental law i.e. not prohibitively expensive
  - It is the decision or grounds of challenge that must relate to EU environmental law
  - A challenge of alleged material contravention but not of the SEA Directive falls within the sphere of EU environmental law

MASON HAYES & CURRAN

Enniskerry Alliance and Enniskerry Demesne Management Company CLG v An Bord Pleanala & Ors

High Court

- A ground on classic non-environmental specific judicial review grounds falls within the sphere of environmental law if it is raised in the context of a challenge to a development consent or other environmental issue
- A member state must provide rules that are sufficiently certain so that an applicant can know prior to initiating proceedings whether the not-prohibitively-expensive rule applies and if so what the maximum amount of the not-prohibitively-expensive costs can be predicted to be in advance
- In the absence of such rules under 5 above, where the general EU law principle of legal certainty in proceedings and the application of national environmental law is at issue, is it for the national court to give an interpretation of national procedural law under *North East Pylon* approach