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IPI SPRING BRIEFING
"JR PROOFING" PLANNING DECISIONS

Presented by Rachel Minch

08 May 2020

SOME STATISTICS

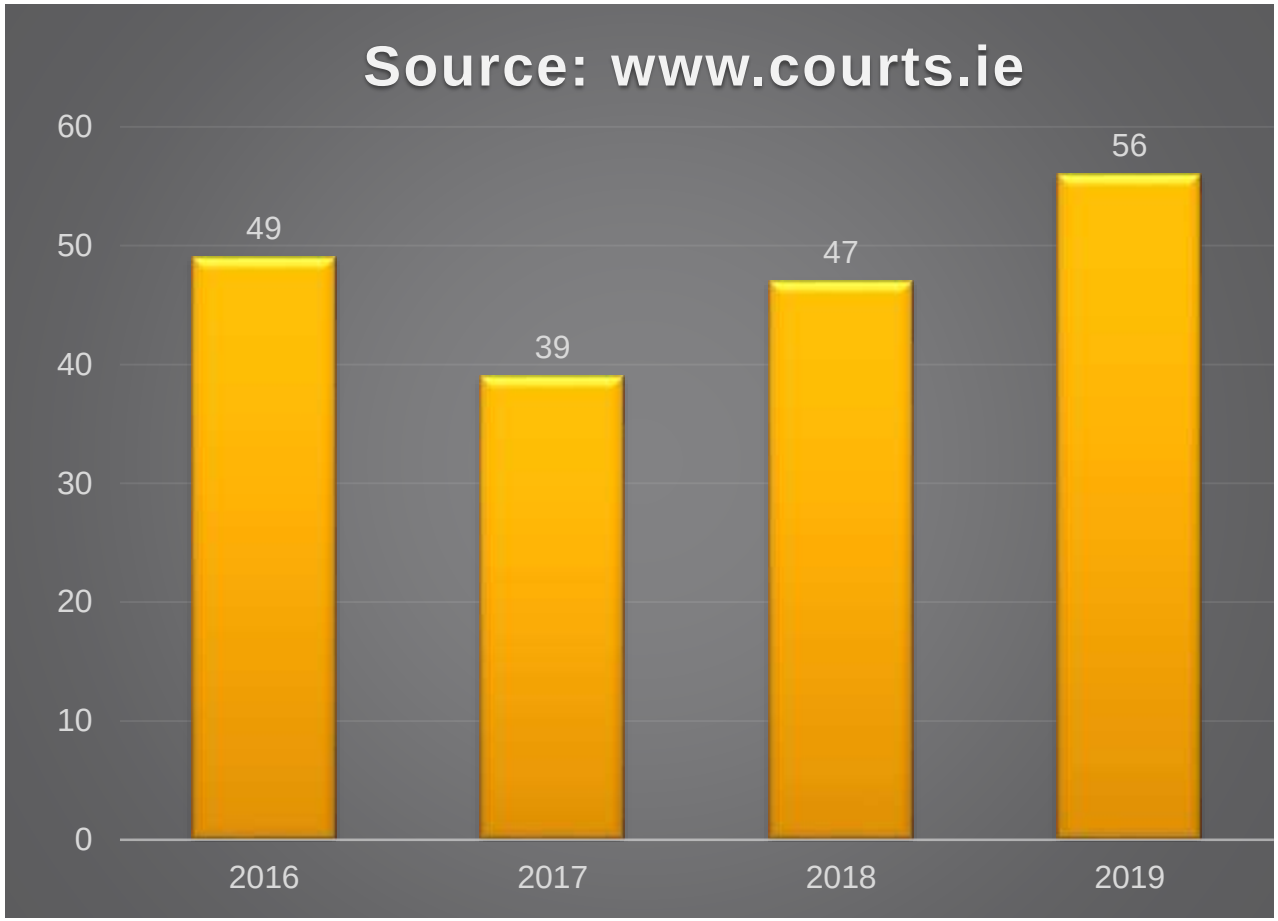
Number of Judicial Reviews

Subject matter

Drivers

Range of Issues

2016 – 2019: High Court JRs – An Bord Pleanála



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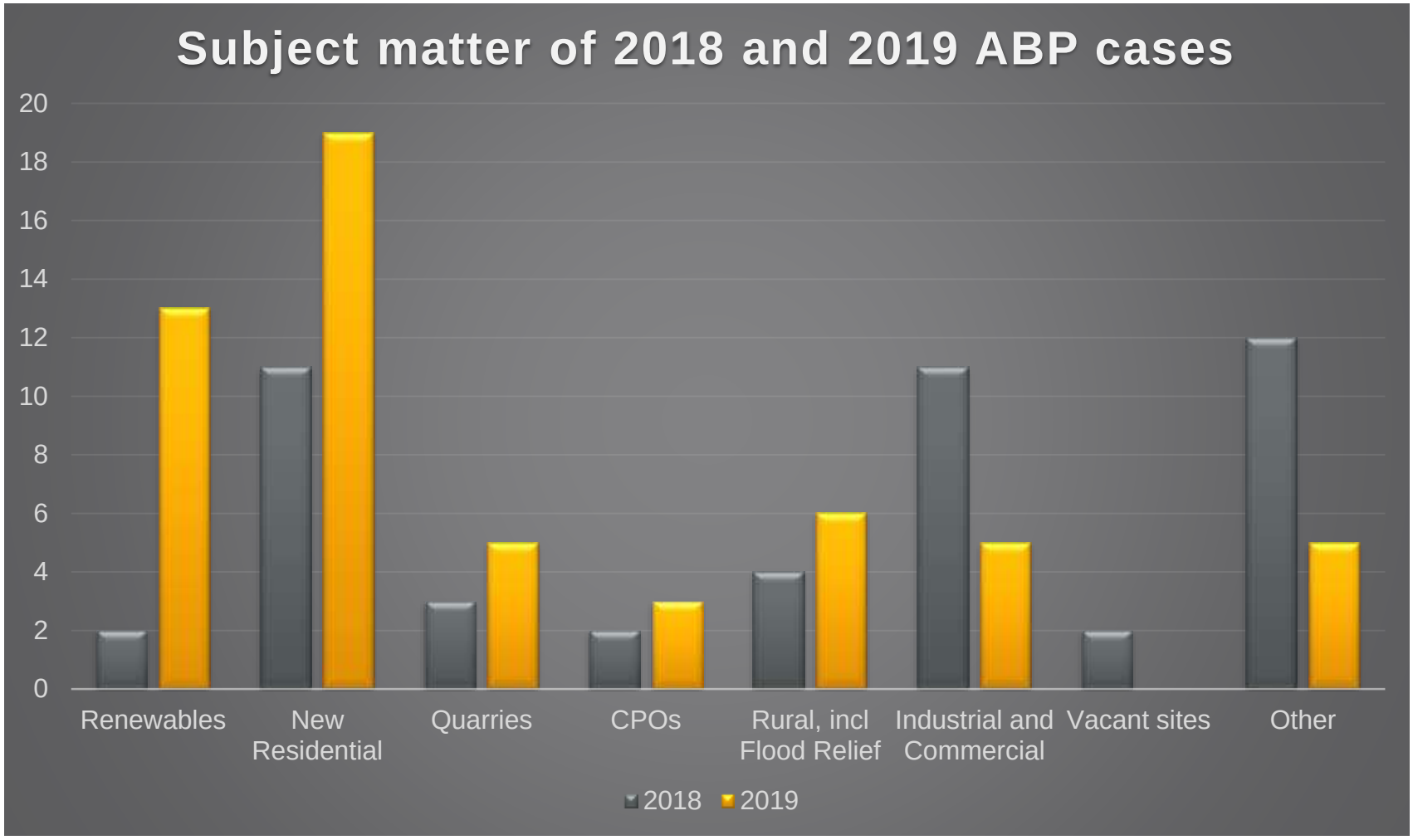

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Drivers

- More exacting legal standards and complex legislative interaction
- (Some) more sophisticated cases/SHD challenges
- Increased judicial interest …and increased judicial activism?
  - ***FOIE v ABP*** [2019] IEHC 80 (Shannon LNG – CJEU referral on Court raising grounds of its own motion. AG opinion issued 30.04.2020)
  - ***Dempsey v ABP*** [2020] IEHC 188 (SHD – CJEU referral on whether parties can withdraw an EIA challenge)
- Planning Authorities
  - ***Sweetman v Clare CoCo*** [2018] IEHC 517 (appeal FH CoA October 2020)
  - ***Mount Juliet Estates Residents Group v Kilkenny CoCo*** [2020] IEHC 128

Range of Issues

- **EIA**: Whether solar PV subject to EIA (*Sweetman (IGP Solar*), *Kavanagh)*
- **Section 5**: Legal status of, and whether Board is bound by, prior unchallenged s.5 declaration of local authority (*Krikke v B.S.E.L*, *Narconon, Sweetman (Ballycumber)*)
- **SHD**: Whether the Board has power to request further information in SHD cases (*Crekav*)
- **Vacant sites levy**: Interpretation and scope of legislation (*Navratil*)
- **Weekly list obligations**: Implications of delay (Sweetman (IGP Solar))
- **Validation procedures:** Compliance with Section 127 (*Dalton*)
- **Leave to apply for Sub Con:** Right of public participation? (*Sweetman (Ballysax), An Taisce*)
- **AA Screening and Mitigation Measures:** (*Kelly, Heather Hill, Sweetman*)

LEGAL DEVELOPMENTS

Record and Reasons for Decisions

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Source of Reasons: Connelly v ABP [2018] IESC 31

- 7.5 ...It is possible that the reasons for a decision may be derived in a variety of ways, either from a range of documents or from the context of the decision, or in some other fashion. However, as is clear from the above analysis, this is always subject to the requirement that the reasons must actually be ascertainable and capable of being determined.
- 9.2.. Any materials can be relied on as being a source for relevant reasons subject to the important caveat that it must be reasonably clear to any interested party that the materials sought to be relied on actually provide the reasons which led to the decision concerned.

Source of Reasons: Connelly v ABP [2018] IESC 31

- In principle, in assessing the adequacy of reasons, it is appropriate to have regard not only to the Board's formal decision, but also to the Inspector's Report which is made available to the public at the same time.
- It may also be appropriate to have regard to the documentation submitted by the applicant for planning permission and other submissions.
- It is not necessary that all of the reasons must be found in the decision itself or in other documents expressly referred to in the decision. The reasons may be found anywhere, provided that it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contended actually formed part of the reasoning. If the search required were to be excessive then the reasons could not be said to be reasonably clear.

Submissions: Balz v ABP [2019] IESC 90

- The Board had granted permission for a windfarm development.
- Its Inspector had concluded that:

> "The 2006 Guidelines are based on the....ETSU publication. Claims by objectors that this ETSU publication is outdated and not fit for purpose **is not a relevant planning consideration.** The 2006 Guidelines are as they are, and remain in force. Proposed changes to these guidelines... have not yet been adopted."

- The High Court determined that it would be *ultra vires* the Board to decide not to apply the Guidelines and would in effect be trespassing on issues of policy.
- The Supreme Court granted leave to appeal the following question:

Balz v ABP

- The Court considers that the application raises issues of general public importance as to the **proper approach to the ministerial guidelines by the Board**. It is statutorily bound to have regard to them but, it is agreed, is not obliged to follow them in any individual case.

- Clearly, a distinction could be drawn between a submission that the guidelines would not be appropriate in a particular case, for specified reasons, and a **submission that the technical aspects of the guidelines have been overtaken by scientific understanding, and become outdated to the extent that they should not be applied at all.** In the first example, any submission or information presented to the Board would relate directly to the potential environmental effects of the development.

- In the second, the submissions or information might not necessarily have any relationship with the effects of the particular development and **might appropriately be described as not dealing with a relevant planning consideration** as far as that development was concerned. **The question then is the extent, if any, to which the Board is obliged to consider such submissions and information when received**.

Balz v ABP

HELD:

- 51. A decision maker must engage with such a submission, and if there is evidence that there is a consensus that the guidelines are no longer widely accepted within the relevant expert community, then that should lead to a reduced reliance on the guidelines as, in themselves, sufficient to ground a decision on any particular aspect of an application.

- 57. It is a basic element of any decision making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live.

Sliabh Luachra v ABP [2020] IEHC 888

HELD (McDonald J.):

- The approach of the High Court in *O'Brien v ABP* must now be treated with some caution in light of *Balz.*
- 38....I do not, however, believe that this always requires that every submission made to the respondent should be individually addressed in a decision of the respondent or in a report of an inspector which precedes such a decision. What seems to me to be crucial is that the points made in submissions should be addressed. In circumstances where there will frequently be an overlap between submissions made by one observer and another, it seems to me that it would not be necessary to address every submission by name so long as the substantive points made in the submissions are each appropriately addressed...
- 72...If the points are without merit, then that should be stated and the basis for that view should be explained.

Sliabh Luachra v ABP

- Decision to grant permission for a windfarm.

HELD as regards the EIA:

- The Inspector's report was silent in relation to the effects on the hen harrier in respect of the elements of the development other than turbines T8 and T9.
- The report was insufficiently complete to form the view that the inspector had identified all of the actual effects (whether direct or indirect) of the development on the hen harrier.
- This was in circumstances where the *potential* impacts on the hen harrier referred to earlier in the report arose in relation to the site area as a whole. They were not confined to the area in the immediate vicinity of turbines T8 and T9 located on or near Barna Bog.

Sliabh Luachra v ABP

HELD:

- 117….It may well be the case that the inspector was in a position to form the view that the development (other than turbines T8 and T9) would not have an effect on the hen harrier. However, as the report does not, in my view, rule out the *possibility* that such effects might occur, I am compelled to conclude that there was no sufficient evidence that an EIA was completed in respect of the effects of the development (other than turbines T8 and T9) on the hen harrier. It seems to me to follow that, accordingly, the decision of the respondent must be quashed on the grounds that there is insufficient evidence to conclude that an EIA was completed in respect of the effects of the development on the hen harrier.

Sliabh Luachra v ABP

HELD similarly as regards AA:

- If the proposed development other than turbines T8 and T9 was to pass an appropriate assessment (insofar as potential impacts on the hen harrier is concerned) there would have to be a conclusion reached as to how it was that the potential impacts previously identified would not, in fact, arise if the remaining turbines (and associated infrastructure) were to be constructed and operated.

Sliabh Luachra v ABP

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FOIE v Gvt of Ireland and Others (High Court, 24 April 2020)

- Challenge to National Planning Framework dismissed.
- Applicant - relying on *Balz* - submitted that there has been inadequate consideration of its submissions. Respondents noted the particular circumstances of that case.

HELD:

- It is not necessary to give an individual response to every submission particularly where a large number are received
- "As long as these submissions are addressed in a comprehensive and fair manner, it is appropriate for the decision maker to address them thematically and address them on an issue by issue basis."
- Much will also depend on the type of decision being taken.

Kelly Dunne v Offaly CoCo [2019] IEHC 32

- Decision to review a waste permit quashed on the basis that mitigation measures were considered at screening stage and on reasons grounds.

HELD (O'Regan J.):

- 45: ...There are no reasons whatsoever as to why the application of Guessford [Oxigen] was preferred over the counter submissions on behalf of the applicants but in the absence of such reasons either within the decision itself or the only other document referred to within the decision namely the application of Guessford [Oxigen] or the permit which issued or indeed any other document identified by the Respondent, then, as per the judgment of Fennelly J. in *Malek* aforesaid it is impossible for the applicants to make a judgment as to whether or not they have grounds for applying for judicial review on the substance of the decision being the determination to grant a review of the permit."

Kelly Dunne v Offaly CoCo

- The Court considered the Supreme Court's judgment in *Connelly v. An Bord Pleanála* and the Council's suggestion "that having regard to the totality of the documents which were before the respondent … it is clear that the respondent [Council] preferred the arguments of the notice party [Oxigen] over that of the applicants"

HELD:

- 50.. "That is certainly clear however as to why those arguments were preferred and the applicants' submissions rejected is not in my view reasonably clear" and concluded that "… the reasons for the grant of the review of the permit are not reasonably clear."

Conflicting Expert Opinion: Balz v ABP [2016] IEHC 134

- Challenge to AA carried out prior to granting permission for a windfarm.
- The Inspector's report referred to the NIS but did not refer to the Applicant's submissions including a detailed report of an environmental biologist.

HELD (Barton J.):

- 230. If the Inspector considered those submissions as part of her report on the AA and in particular the scientific doubts raised by Mr. Corcoran as to potential impacts on the Natura sites – which, in my view, she was obliged to do – no reference to these was made in her report nor is any explanation given for preferring one scientific view over another in circumstances where those views clearly differed.
- No sufficient record on which the Court could conclude that the AA had been carried out based on clear, precise and definitive findings and conclusions

Expert Reports: Case C-461/17 Holohan v ABP

- The Board's Inspector had recommended that additional information should be sought from the Developer in the context of AA and the Board had decided not to do so.
- HELD (CJEU):
  - Article 6(3) of Directive 92/43 must be interpreted as meaning that, where the competent authority rejects the findings in a scientific expert opinion recommending that additional information be obtained, the 'appropriate assessment' must include an explicit and detailed statement of reasons capable of dispelling all reasonable scientific doubt concerning the effects of the work envisaged on the site concerned.

Counter-Balance I: Kelly v ABP [2019] IEHC 84

- Applicant submitted that the Board Order did not list or identify the matters to which it had regard or explain how precisely the Board had regard to them or what role (if any) they played in its decision.

HELD (Barniville J.):

- At 202, the Court warned against "the obligation on the Board to state the 'main reasons and considerations' for its decision" under section 34(10) PDA - being turned into an obligation to "require the Board effectively to recite in a pro forma matter all potentially relevant guidelines, documents and provisions notwithstanding that no issue had been raised in relation to them before the Board".

- At 203."...the applicant did not allege before the Board, and does not actually allege in the proceedings, that the Board breached its obligation under s.28 of the 2000 Act to "have regard" to the two guidelines referred to by him [the AA and Flood Risk Management Guidelines] or any obligation with regard to the statutory duty contained in s.15 of the [Climate Action and Low Carbon Economy] 2015 Act ..." and held that "[i]n those circumstances, where the issues were not raised before the Board, they could not be said to have constituted the "main reasons and considerations" for the Board's decision."

Counter-Balance II:Ardagh Windfarm v ABP [2019] IEHC 795

- There was no express reference to the carrying out of an EIA in the Board Direction or Order refusing permission for a windfarm.

HELD (Simons J.) dismissing the JR:

- The courts apply a pragmatic approach to the interpretation of planning decisions.
- The absence of a particular form of words such as, for example, “the Board adopted the inspector’s report” or “the Board completed an environmental impact assessment” is not necessarily fatal to the validity of a planning decision.

Ardagh Windfarm v ABP [2019] IEHC 795

- Rather, the decision, as with any planning document, must be read as a whole. If it is evident that the Board accepted the approach in the inspector's report, then it is legitimate to regard the assessment set out in the inspector's report as representing the EIA adopted by the Board. It is not necessary for the Board to replicate its content in the formal decision.
- The legal test as per *Connelly* is that the planning decision, or other relevant and connected materials available to any interested party, must demonstrate (i) that an EIA was carried out, and (ii) that the decision-maker properly had regard to the results of the EIA.
- It was appropriate to read the formal Board decision in conjunction with the inspector's report and there could be no doubt that the Board was adopting the same approach as its inspector.

THE PRACTICALITIES

Application Documents

Planner/Inspector Reports

Drafting Decisions

EIA/AA Issues

Review

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Planning Reports

- Address issues/themes
- Reconcile material conflicts of fact
- Address conflicting expert reports
- Reach conclusions on expert submissions
- If submissions are without merit or not relevant - state the obvious?
- State conclusions and cover alternatives
- Use the legal test language: ***Ui Mhuirnin -v- Minister for Housing Planning and Local Government*** [2019] IEHC 824
  - Supported by **robust application documents**

Decisions

- It is preferable to expressly state if a planner/inspector's report is being adopted in full.
- If not adopting a report in full, state the reasons for not doing so:
  - *Connelly v ABP*: 9.6 "In that context it does seem to me to be worth saying that it would be preferable in all cases if the Board made expressly clear whether it accepts all of the findings of an Inspector or, if not so doing, where and in what respect it differs."
- If relying on other material or additional reasoning, refer to it.
- Reasons must also be given for materially altering or omitting an environmental condition in the planner/ Inspector's report (EIA cases)
- Recommended to give reasons for omission or variation of a other conditions central to recommendation to grant permission.

Appropriate Assessment

- Screening conclusions:
  - Which sites are being screened in/out and reasons for this.
  - If only bringing forward impacts on some of the site's conservations objectives to Stage 2AA, state reasons why.
  - Mitigation measures: ***Sweetman v ABP (IGP Solar)*** [2020] IEHC 39
- ***Connelly v ABP*** [2018] NB. Level of specificity required and the need for findings: e.g. what kind of distance was material for the hen harrier, why did the re-design of the water courses remove all scientific doubt as to impacts on downstream SAC.
- ***Sliabh Luachra v ABP*** [2020]: Requirement to expressly rule out potential adverse impacts by reference to documents.

EIA – 2014 Directive

- Requirement for a **Reasoned Conclusion**:
  - on the significant effects of the project on the environment, taking into account the results of the of the examination of the EIAR and submissions and, where appropriate, its own supplementary examination; and
- A decision to grant development consent must **incorporate** the reasoned conclusion.
- The decision maker must remain satisfied that it remains **up to date.**
- Express requirement in PDR for reasons for materially altering or not accepting **environmental conditions**/ recommendation in planner/ Inspector report.

Material Contravention of Development Plans

- In two recent decisions, the High Court (Simons J.) has determined that there was a material contravention where the Board had concluded otherwise:
  - ***Heather Hill v ABP*** [2019] IEHC 450: The Board has the ability to interpret Development Plans as part of its decision making, but *the "question of whether or not a proposed SHD involves a material contravention of the development plan must be a question of law exclusively for the court*".
  - ***Redmond v ABP*** [2020] IEHC 151
- Applicant for permission may wish to cover alternatives
- Decision to state conclusions by reference to relevant factors
- Emerging issue - interaction between Guidelines and Development Plans: ***Spencer Place Developments v DCC*** [2019] IEHC 384

Some Other Tools

- Templates
- Checklists
- Peer Review
- Legal Review
- Audit?
- Section 146A: *Sweetman -v- EPA* [2019] IEHC 81

Conclusion - Hallowed Ground

"There is a middle ground between the sort of broad discursive consideration which might be found in the judgment of a court, on the one hand, and an entirely perfunctory statement that, having regard to a series of factors taken into account, the decision goes one way or the other. There is at least an obligation on the part of decision makers to move into that middle ground, although precisely how far will depend on the nature of the questions which the decision maker had to answer before coming to a conclusion."

Clarke C.J. *Connelly v An Bord Pleanála*

Q & A

THANK YOU.

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DUBLIN | BRUSSELS | SAN FRANCISCO | LONDON

PHILIPLEE

philiplee.ie
info@philiplee.ie

DUBLIN
7/8 Wilton Terrace
Dublin 2
Ireland
T: +353 (0)1 237 3700

BRUSSELS
EU Quarter, level 6 box 6,
Schuman Roundabout, 2-4,
1040 Brussels
T: +353 (0)1 237 3700

SAN FRANCISCO
388 Market Street, Suite
1300, San Francisco,
CA 94111
T: +1 415 839 6406

LONDON
2 Eastbourne Terrace,
London, W2 6LG
United Kingdom
T: +44 20 3934 7010