



[2025] IEHC 158

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2024.0000708]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED) AND SECTION 15 OF THE CLIMATE ACTION AND LOW CARBON DEVELOPMENT ACT 2015 (AS AMENDED)

BETWEEN

COLIN DOYLE, FRIENDS OF THE IRISH ENVIRONMENT CLG,
FUTUREPROOF CLARE, MARTIN KNOX AND CHRISTINE SHARP

APPLICANTS

AND

AN BORD PLEANÁLA, THE GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY
GENERAL

RESPONDENTS

AND

ART DATA CENTRES LIMITED

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Friday the 21st day of March 2025

1. *The Bat in Building 6C* could be an episode title in a Scandi Noir series. But it describes our subject here. This judgment concerns a single roost containing a single Leisler's Bat, who as of March 2022 was a resident in a crack in the external wall of a structure with the forbidding, if not slightly Soviet, name of Building 6C, a barn shed in farmland near Ennis, Co. Clare. The species is named for Dr Johann Philipp Achilles Leisler (b. 1771/72) of Hanau in Germany, who in 1813 proposed the introduction of legal protection of insectivorous bats. He has been described as the father of legal bat protection in Europe, although his efforts took some time to reach fruition. The first law in that regard was enacted in Hungary in 1901, followed by Salzburg in 1909, Finland in 1923, Denmark in 1931, Liechtenstein and Prussia in 1933, Portugal in 1934, Germany more widely in 1936, Austria overall in 1939, Italy in 1939, Yugoslavia in 1947, Poland in 1952, the USSR in 1960, Bulgaria in 1962, Czechoslovakia in 1965, Switzerland in 1967 and Sweden in 1968. Ireland, not uncharacteristically in environmental matters, brings up the rear in 1976, a mere 200 years after Leisler's birth. (See Gustav Kirk, "Gesetzlicher Fledermausschutz in Europa", *Decheniana-Beihefte* Nr. 18, Seite 45–50 Bonn, Oktober 1971)

(https://www.zobodat.at/biografien/Leisler_Johann_Philipp_Achilles_Decheniana_BH_18_0045-0050.pdf).

Geographical context

2. Two related board decisions are challenged here. The data centre decision (<https://www.pleanala.ie/en-ie/case/314474>), involves the construction of six two-storey data centre buildings, associated structures and all ancillary site works on a 60 hectare site at Tooreen, Cahernalough and adjacent townlands, Tulla Road, Ennis, Co. Clare, subject to conditions for a 10-year period at Tooreen, Cahernalough, Knockanean, Ballymacahill, Muckinish and Rosslevan, Tulla Road, Ennis, Co. Clare

3. The substation decision (<https://www.pleanala.ie/en-ie/case/313895>) involves the development of a 110kV GIS substation with two 110kV underground transmission cables connecting to existing 110kV overhead lines to the north, and two 110kV underground cables connecting to the existing Ennis 110kV substation and associated works in the Townlands of Tooreen, Cahernalough, Knockanean, Ballymacahill, Muckinish and Rosslevan to the north-east of Ennis, on the Tulla Road (R352), Co. Clare.

4. The inspector takes up the detail (section 1.0):

"The appeal site is located within the townlands of Toureen and Cahernalough, c.4km to the NE of Ennis in County Clare. The rural site is located on the northside of the Tulla Road (R352) and the site and surrounding area is characterised by agricultural uses. There are several dispersed houses and farm buildings in the vicinity and the lands form part of a larger area that has been designated for future development.

The site is located to the E of the M18 motorway and the Junction 13 slip road, N of the R352 (Tulla Road) and S of the L4608 local road at Cahernalough and Ballymacahill. It is bound to the N and E by agricultural land, to the W and NW by the Spancelhill Stream, and to the S by the Tulla Road. There are several dwelling houses and farm buildings located within and to the N of the site, and to the S along the Tulla Road, and there is a small residential area located on the westside of the M18. The Ennis 110kV substation is located

to the W of the site and the M18 slip road, the site is traversed by several overhead electrical cables and the lands in the E section of the site are traversed by a gas pipeline along a N-S axis. The main vehicular access to the site is off the R352 (Tulla Road) in the E section of the site.

The overall c.60 ha moderately elevated site (data centre & substation) mainly slopes up gently from SW to NE. The site and field boundaries are defined by mature hedgerows, trees and stone walls, and there are pockets of woodland around the perimeter of the site and within the W and SW sections. There are several ponds within and adjacent to the site, including Toureen Lough (SW) and Ardnamurry Lough (NE). The lands mainly drain in a SW direction via surface and groundwater towards the Ballymacahill / Spancelhill Stream, which flows between 2 x attenuation ponds associated with the M18 motorway, before joining the Gaurus River to discharge S to the River Fergus and ultimately the River Shannon."

Facts in relation to the application

5. On 16th July 2021, the notice party submitted a planning application to Clare County Council (the **council**) for a development comprising the construction of six two-storey data centre buildings, associated structures and all ancillary site works on a 60 hectare site at Tooreen, Cahernalough and adjacent townlands, Tulla Road, Ennis, Co. Clare (Planning Reg. Ref. No. 21/757) (the **data centre application**). The data centre application was accompanied by, *inter alia*, an environmental impact assessment report (**EIAR**) and a Natura Impact Statement (**NIS**).

6. On 8th September 2021, the council sought further information in relation to the data centre application (the **RFI**) and a response to the RFI was provided on behalf of the notice party on 25th February 2022. The RFI response was readvertised as required by the council on the basis that it contained significant additional data.

7. Clarification on the RFI response was sought by the council on 28th April 2022, and a reply was submitted on 10th June 2022, which included an updated EIAR (described in the board's order as a "consolidated EIAR"). The clarification response was readvertised as required by the council on the basis that it contained significant additional data.

8. On 8th August 2022, the council made a decision to grant planning permission, which decision was the subject of a number of third-party appeals to the board, including by the applicants.

9. Relatedly, on 23rd June 2022, the notice party submitted a strategic infrastructure development (**SID**) application to the board under s. 182A of the Planning and Development Act 2000 (as amended) (**the 2000 Act**) for the development 110kV GIS substation with two 110kV underground transmission cables connecting to existing 110kV overhead lines to the north, and two 110kV underground cables connecting to existing Ennis 110kV substation to the west and associated works (the **substation application**).

10. On 11th December 2023, an inspector appointed by the board to prepare a report in respect of the data centre appeals, submitted a report to the board, which contained a recommendation that planning permission should be granted, subject to 17 conditions. The inspector also conducted an environmental impact assessment (**EIA**) and an appropriate assessment (**AA**).

11. The same inspector was also appointed by the board to prepare a report on the substation application and on the same date, she submitted a report to the board on that application, in which she recommended that planning permission be granted, subject to 14 conditions.

12. A board direction dated 27th March 2024, in respect of the data centre application, indicated that the board decided to grant permission generally in accordance with the inspector's recommendation. The board direction indicated that the board had undertaken an AA in respect of a number of "screened in" European sites. The direction indicated that the board considered that the information before it was sufficient to undertake a complete assessment of all aspects of the proposed development in relation to the conservation objectives of the said European sites using the best available scientific knowledge in the field.

13. The board's direction also indicated that the board undertook an EIA of the proposed development.

14. A board direction dated 27th March 2024, in respect of the substation application is framed in similar terms to that relating to the data centre application.

15. On 5th April 2024, the board granted planning permission for the data centre development, subject to 17 conditions. On the same date, it granted permission for the substation development, subject to 14 conditions. The board's orders, in respect of both, records that it carried out an EIA and an AA of the proposed development.

Procedural history

16. On 30th May 2024, the applicants' statement of grounds was filed in the Central Office.

17. On 26th June 2024, I granted the applicants leave to apply for judicial review seeking, *inter alia*, an order quashing the board's decisions taken on 5th April 2024. On the same date, I fixed a hearing date of 25th February 2025 for the judicial review, as a two-day case.

18. On 7th October 2024, in advance of delivering a statement of opposition, the board's solicitors wrote to the other parties indicating that the board had decided not to oppose the applicants' claim for *certiorari* quashing the board's decisions on the data centre application and the substation application. Their letter stated:

"Having regard to the circumstances of this case and, in particular, the plea(s) advanced at Core Ground 6 of the said Statement of Grounds – namely, that the Board erred in law in failing to consider adequately the environmental effects of the proposed developments on the environment, specifically in terms of impacts on bat fauna for the purposes of the Environmental Impact Assessment carried out by the Board".

19. On 25th November 2024, the notice party communicated to the court that it was seeking that the hearing date of 25th February 2024 would be retained to facilitate a hearing in relation to core ground 6 only (as it turned out, only in respect of part of that core ground), as the notice party intended to resist *certiorari* being granted by reference to the ground on which the board's concession was made. I directed that the matter proceed as a modular hearing for one day on 25th February 2025, on the question of whether the court should quash the decisions in light of the board's concession.

20. On 5th December 2024, the notice party's solicitors wrote to the board's solicitors stating: "We note that there are sixteen paragraphs contained in the Applicant's Statement of Grounds with respect to Core Ground 6. Can you please confirm the exact point(s) pleaded, under Core Ground 6, which forms the basis of your client's concession, so that the precise contours of the upcoming hearing can be defined".

21. On 9th December 2024, the board's solicitors wrote to the solicitors for the other parties, clarifying that:

"The Board accepts the errors pleaded in the particulars set out at §91-§93 of the Statement of Grounds insofar as same are premised on the Inspector's statement (at pg.74 of the Inspector's Report) ... On the basis that the information before the Board, including the updated EIAR, the evidence demonstrated that the Proposed Development would result in the loss of a bat roost. Thus, in failing to recognise the loss of the bat roost, it is conceded that the Inspector and the Board erred in failing to identify, consider and assess the potential impacts of the Proposed Development on bat fauna for the purposes of EIA."

22. On 16th December 2024, I directed that the hearing scheduled for 25th February 2025 would be in relation to the matters in §§91-93 only of the applicants' statement of grounds, following that clarification from the board.

23. On 23rd December 2024, the notice party served a limited statement of opposition, together with a verifying affidavit sworn by Ms Deborah Delaney and an affidavit of Mr Colm Clarke. The statement of opposition addressed the relevant sub-grounds but also referred to other contextual matters such as tree surveys which were touched on in other pleaded sub-grounds.

24. On 23rd January 2025, the applicants' solicitors sent a letter to the notice party's solicitors asserting that the notice party's statement of opposition addressed the entirety of the grounds pleaded in relation to core ground 6. The letter stated that:

"This was not what was required and would appear to be an attempt to impermissibly expand on the matters directed to be heard at the hearing. The Affidavit of Ms Delaney traverses matters far beyond those in ground 91- 93 of the Statement of Opposition. Furthermore, your client has delivered an affidavit of Colm Clarke ecologist and it is clear that this Affidavit also addresses issues which go far beyond what is in issue in relation to grounds 91-93 of the Statement of Opposition."

25. The letter indicated that the applicants would apply to have parts of the statement of opposition struck out and the notice party's affidavits "resworn to address the matters relevant to those to be addressed at the forthcoming hearing".

26. On 24th January 2025, the notice party's solicitors sent a letter to the applicants' solicitors stating:

"Our client fully accepts that the issue which the Court has to decide on 25 February 2025 relates specifically to paragraphs 91-93 of the Statement of Grounds, concerning the effect of a factual error which appears on page 74 of the Inspector's report on the Data Centre application, in the section of her report dealing with ecology issues and bats in particular. The extract states, inter alia, that '[t]he various EIAR desk-top and site surveys confirm that the site and environs are frequented by bats, and although some of the older farm buildings may also have roosting potential, the applicant confirmed that no roosts were recorded during the surveys ...'

It would be entirely unrealistic and artificial, and a waste of court time, to ask the Court to determine whether the Inspector's factual error should result in the Board's decision being quashed without addressing the other matters [in Core Ground 6], including the allegation that the Board had no objective information before it in terms of the impacts on bat fauna

for the purposes of the EIA and/or the issue of whether a derogation licence was required in advance of the Board's decision. Indeed, were our client to simply deal with the issue of the Inspector's factual error in isolation from the treatment of the issue of bat fauna generally, it could expect to be criticised by both your client and the Court, given the overlap between the issues and the critical requirement of the Court to have an understanding of the totality of the matters raised in Core Ground 6 in considering proportionality. Furthermore, given that our client is asking the Court to exercise its discretion against quashing, it is imperative that the Court has a full picture of the issues in order to properly consider the matter. In so doing, our client is not asking the Court to do anything other than determine the issue with respect to the Inspector's factual error."

27. On 27th January 2025, on the application of the applicants, the matter was listed before the court where I clarified – ultimately with the agreement of both parties participating in this module – that where the board concedes a ground and the court conducts a modular hearing on the notice party's application determining whether the decision should be quashed in light of the board's concession, for the purposes of determining that issue, the court must approach the application on the basis that all other issues would be resolved in the notice party's favour. However, in the event that the complaint fails under this heading as a basis for *certiorari* and the matter proceeds to a further module dealing with the remaining grounds which the board has not conceded, those other issues revert to being fully in contest for the purposes of the subsequent module.

28. On 3rd February 2025, the applicants' solicitors confirmed that the applicants would not be filing replying affidavits in response to the notice party's limited statement of opposition and affidavits.

29. On 5th February 2025, the notice party delivered its legal submissions.

30. On 19th February 2025, the applicants delivered their legal submissions.

31. The module was heard on the basis of the expedited procedure on 25th February 2025, and judgment was reserved on that date.

The effect of modularisation

32. One notable procedural skirmish that developed during the hearing was a fall-out from the issue just referred to. The question was as to the effect of the order for modularisation of sub-grounds 91-93 as Module I in respect of the argument that there was no prior derogation licence. It's true that the notice party did mention this in correspondence, as noted above, but this wasn't particularly pursued in advance as an issue to form part of this module, if for no other reason than the fact that the central plea of lack of a prior licence arises in later sub-grounds and not in sub-grounds 91-93. The effect of the modularisation order was that the board and the State absented themselves from Module I and the issue proceeded as between the applicants and the developer. The idea was that if the developer won the present issue, there would be a Module II on all other issues. The skirmish was about whether the applicants could now advance sub-grounds 91-93 by reference to the lack of a derogation licence which is an issue pleaded in sub-grounds 96-101.

33. As noted above, the whole basis of modularisation is that one has to proceed on the assumption that the other grounds don't add anything – that the decision is valid on all grounds other than the ones to which the module relates. Another example – in the case of modularising domestic points, it is to be assumed that EU law doesn't add anything. That is only an assumption which is revisited if the challenging party loses the module and if we therefore have to move on to the next module.

34. Applying that here, the upshot is that the present module has to proceed on the assumption that the lack of a prior derogation licence did not give rise to illegality. That has the effect that the applicants can't argue, in the present module, that the inspector's error is material because of an issue pleaded in sub-grounds falling outside the module. But it doesn't have the effect that the applicants can't make that argument at all. The logical outcome (which the developer did, after discussion, accept) is that if we get to a Module II, the applicants can at that stage argue that the error is material due to the lack of a derogation licence (although what this adds, or in other words how they can win on that issue but lose on the substantive issue of the lack of a licence, isn't at all obvious at first sight).

35. Furthermore, attempting to deal with the derogation licence issue now would be procedurally inappropriate in the absence of potentially interested parties, the board and the State. So that was a non-starter in any event.

36. Of course the applicants' misconceived attempt to go beyond sub-grounds 91-93 in this module is somewhat ironical placed in the context of their strident and equally misconceived attempts to condemn the developer for allegedly going beyond those sub-grounds by referring to issues regarding trees, as referenced above. But we don't need to get into that further at this stage.

Relief sought

37. The reliefs sought in the statement of grounds are as follows:

"1) An Order of Certiorari quashing the decisions, and each of them, dated 5 April 2024 of the first named Respondent granting planning permission to the Notice Party for:

(a) the construction of a proposed data centre (PDC) located in Ennis, County Clare, comprising six two-storey data centre buildings with three storey plant/office levels and associated ancillary development that will have a combined gross floor area of 118,740 square metres, including a 120MW gas powered electricity generation facility and dispatchable electricity generation facility powered by 66 diesel generators (ABP-314474-22, 'the Data Centre Decision');

(b) the provision of a new 110 kilovolt (kV) Gas Insulated Switchgear (GIS) grid substation (the Substation), two 110 kV underground transmission cables connecting to existing 110kV overhead lines to the north of the proposed substation, and two 110kV underground transmission cables connecting to the existing Ennis 110kV grid substation (located to the east of the M18 and to the north of the Tulla Road (R352), along with associated and ancillary works) (ABP-313895-22, 'the Substation Decision').

[In this Statement of Grounds any reference to a document contained in the planning files before the Board or the Planning Authority relate to the application and appeal in respect of the PDC, unless otherwise stated].

2) Such declaration(s) of the legal rights and/or legal position of the applicants and (if and insofar as legally permissible and appropriate) persons similarly situated and/or of the legal duties and/or legal position of the respondents as the court considers appropriate.

3) A declaration that the State's adoption of the 'Government Statement on the Role of Data Centres in Ireland's Enterprise Strategy July 2022' is invalid as it was not subject to assessment for the purposes of Articles 1 and 3 of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

4) If necessary, a stay on works being carried out pursuant to the Data Centre Decision and the Substation Decision pending the resolution of these proceedings.

5) A Declaration that the within proceedings are covered by the protective costs provisions of Section 50B of the Planning and Development Act 2000 (as amended), and/or otherwise.

6) Further or other orders.

7) Costs."

Grounds of challenge

38. The core grounds of challenge are as follows:

"DOMESTIC LAW GROUNDS

1. The Data Centre Decision is invalid in that the Board failed to apply and/or consider its mandatory obligation under section 15 of the Climate Action and Low Carbon Development Act 2015 (as amended by Section 17 of the Climate Action and Low Carbon Development (Amendment) Act 2021), namely in so far as practicable, to perform its functions in a manner consistent with the matters stated in section 15, including (a) the most recent approved climate action plan, (the Climate Action Plan 2023), (d) the furtherance of the national climate objective, and (e) the objective of mitigating greenhouse gas emissions (GHG emissions) and adapting to the effects of climate change in the State; and/or failed to provide sufficient reasons to explain how it sought to apply and/or consider its mandatory obligation under the 2015 Act, further particulars of which are contained below.

2. The Data Centre Decision is invalid in that the Board acted irrationally, erred in law and/or failed to provide reasons and/or adequate reasons, in finding that the PDC would have potentially positive environmental impacts, based on a future switch to the use of sustainable/renewable gas supplies, which do not exist in sufficient volumes for any practical application in respect of the PDC and which are not expected to exist in sufficient volumes for any practical application in respect of the PDC at any point during the operational phase of the PDC, further particulars of which are contained below.

3. The Data Centre Decision is invalid in that the Board acted irrationally by failing to require any mitigation of the GHG emissions from the PDC, further particulars of which are contained below.

EUROPEAN LAW GROUNDS

4. The Data Centre Decision is invalid in that the Board treated the Government Statement on the Role of Data Centres in Ireland's Enterprise Strategy July 2022 as the framework for development consent in respect of data centres; while simultaneously deciding that the Government Statement on the Role of Data Centres in Ireland's Enterprise Strategy July 2022 is not a plan or programme to which Article 3(2) of the Strategic

Environmental Assessment (SEA) Directive applies, further particulars of which are contained below.

5. The Data Centre Decision is invalid as it relied on the Government Statement on the Role of Data Centres in Ireland's Enterprise Strategy July 2022 which is invalid as it was not assessed for the purposes of Articles 1 and 3 of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, further particulars of which are contained below.

6. The Data Centre Decision and the Substation Decision are invalid as the Board failed to consider adequately or at all the environmental effects of the proposed development on the environment in terms of impacts on bat fauna for the purposes of the EIA assessment carried out by the Board and/or had no objective information before it to support a conclusion of no significant effects on the environment for the purposes of the Board's EIA assessment and/or impermissibly granted development consent prior to a decision granting a derogation licence authorising bat roost removals and/or disturbance to bat species, further particulars of which are contained below.

7. The Data Centre Decision is invalid as the Board granted planning permission in breach of Article 4(1) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (the 'Water Framework Directive') and/or Regulations 4 and 5 of the European Communities Environmental Objectives (Surface Waters) Regulations 2009 because the Board did not ensure that the grant of planning permission would not cause a deterioration of the status of a body of surface water or that it would not jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status and/or the Board could not have arrived at that conclusion in the absence of the developer making available to the public during the procedure for approving the project the data which were necessary in order to assess the effects of the development on receiving waterbodies, further particulars of which are contained below.

VALIDITY GROUND

8. The State's adoption of the Government Statement on the Role of Data Centres in Ireland's Enterprise Strategy July 2022 is invalid as it was not subject to assessment for the purposes of Articles 1 and 3 of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, further particulars of which are contained below."

Pleas regarding the error in the inspector's report

39. The relevant ground for present purposes is core ground 6:

"6. The Data Centre Decision and the Substation Decision are invalid as the Board failed to consider adequately or at all the environmental effects of the proposed development on the environment in terms of impacts on bat fauna for the purposes of the EIA assessment carried out by the Board and/or had no objective information before it to support a conclusion of no significant effects on the environment for the purposes of the Board's EIA assessment and/or impermissibly granted development consent prior to a decision granting a derogation licence authorising bat roost removals and/or disturbance to bat species, further particulars of which are contained below."

40. As noted above, we are not dealing with the totality of that ground now, just one issue in sub-grounds 91 to 93. Sub-grounds 86 to 90 set out necessary context:

"86) By way of further particulars of the claim, the revised Environmental Impact Assessment Report submitted by the Developer in June 2022, in respect of both the PDC and the Substation identified very significant impacts on bats. The trees and hedgerows within the site were identified as significant commuting and foraging pathways for bats. Tree surveys identified a total of 17 trees with roost potential, albeit roost emergence/re-entry surveys on trees were not carried out (EIAR Chapter 7 p.69). Figure 7.23 which was supposed to show the location of these trees is missing from the EIAR. A number of the farm buildings on the site were identified as either containing roosts or having roost potential. Residential buildings were assessed externally but not internally owing to concerns over Covid 19. At Table 7.9 of the EIAR the suitability of the buildings for bat roosts was identified, including a number of confirmed bat roosts on site. It noted, in the revised EIAR, that an additional roost was identified in Barn 6C in March 2022 bringing the total to 20. The proposed development will result in the loss of significant amounts of hedgerow (2.7km) and 30 trees, albeit with replacement planting in excess (4.86km and 57 trees) of those removed. Lesser Horse[s]hoe Bat are a Qualifying Interest for Old Domestic Building (Keevagh) SAC, Dromore Woods and Lough SAC and Old Domestic Building, Ryland SAC which are within the foraging zone of the proposed development.

87) The revised EIAR confirmed the loss of one Leisler's bat roost which it identified as a significant effect at a local scale. It is unknown how many trees with tree roost potential are to be removed as this is not identified in the revised EIAR (p. 95). One of the trees on the site is identified as having a high roost potential but it is unknown if this tree was investigated to establish that fact or whether it is scheduled for removal. Impacts on bats from loss of commuting and foraging habitats was identified as significant at a local scale.

88) A number of remediation/mitigation measures are identified at §7.6. There are specific measures to mitigate impacts on Lesser Horseshoe Bats (p. 124), including the planting of replacement hedgerows and trees at an early point in the project life-cycle and the installation of low spill lighting.

89) In relation to structures involving known (Building 6C) or possible (Building BB 1B, BB 4A-D, BB6A-B and BB 7) bat roosts it identifies the relevant mitigation as demolition only taking place at certain times of the year pursuant to a derogation licence. The demolition would only take place after additional surveying and restriction on access for bats. Additional mitigation measures (pp. 131 and 132) are identified for the removal of trees, although the number of trees with potential bat roosts are not identified. Compensatory measures are identified at p. 143. The revised EIAR concluded that with the application of strict mitigation measures there would be no significant effects on the environment,

90) The Board's Inspector identified that

'Bats: The farm buildings, and linear hedgerows and stone walls that traverse the site have breeding, roosting, foraging and commuting potential for bats (incl. Lesser horseshoe, Brown long-eared, Soprano & Common pipistrelles and Leisler's bats), and several of the further afield SACs and pNHAs are designated for Lesser Horseshoe Bat. The various EIAR desk-top and site surveys confirm that the site and environs are frequented by bats, and although some of the older farm buildings may also have roosting potential, the applicant confirmed that no roosts were recorded during the surveys. The applicant should carry out a pre-construction survey of the any buildings to be demolished and seek a Derogation Licence for the safe and humane removal and relocation of any species present in the buildings. The removal of mature hedgerows trees and stone walls would have an adverse impact on foraging and commuting bats in the short term, however the proposed replanting would reduce this impact in the long term, provided that the replanting takes place during Phase 1 and before the end of the first year of construction. The planting of local indigenous hedgerow species should be required along with on-going monitoring to ensure that the replacement hedgerows mature to a satisfactory level Given that a 10-year permission is being sought, any delay in or prolongment of the replacement planting could have significant adverse impacts on bat populations in the area. Subject to compliance with the above requirements, I am satisfied that bats would gradually habituate with no significant adverse long-term impacts anticipated. Any on-site artificial lighting should be designed, installed and managed in a manner that does not interfere with bat activity whilst also ensuring public safety''

41. The critical sub-grounds relate to a single issue as follows:

'91) This is completely incorrect. The Notice Party identified 20 roosts on the site in buildings, with 17 trees identified as having roost potential and the loss of one confirmed roost in a residential building. The Inspector identified that bats used the site for feeding and foraging and may be affected by the demolition of the farm buildings and that (p. 98) 'A Derogation Licence would be sought to ensure the humane relocation if required'. In the Inspector's summary the impacts on bats are not identified as involving roost loss (pp. 113 and 133) 'changes to the vegetation on the site, loss of foraging habitat and disturbance to otters, badgers, birds and bats'. The Inspector's Report in respect of the Substation contains similar errors, at pages 34-35.

92) The Applicants makes a number of points.

93) Firstly, the Board's Inspector's Reports (with whom the Board did not disagree) each contain a significant and material error. The Notice Party did identify roosts on the site of the proposed development and the proposed development will involve the loss of at least one identified roost and the potential loss of other roosts in buildings and trees. The Board was obliged but failed to consider the significance of the certain roost loss (and the other potential roost losses) and Board's conclusion of no significant effect on the environment is based on material errors of law and of fact sufficient to vitiate the decision."

42. The notice party phrases its point thus:

- (i) the inspector's factual error falls into the category of harmless error which was immaterial in the overall context of the inspector's consideration of the issues related to bats (submissions para. 16); and

- (ii) even if the error is one which might go to *certiorari*, the notice party submits that its quashing would be entirely disproportionate and that the court should exercise its discretion against quashing, in circumstances where, having regard to the information in the EIAR regarding, *inter alia*, mitigation and compensation measures for bat fauna, which were taken into account by the inspector and the board in conducting an EIA, the outcome would have been no different if the inspector hadn't made the error (para. 17).

43. These two formulations in fact come to the same thing and can best be summarised as being a "harmless error" point.

44. The parties' positions as recorded in the statement of case are summarised as follows:

"Notice Party's position:

(i) The Inspector's mistake, underlined in the extract set out at paragraph 90 of the Statement of Grounds, overlooked the fact that the revised June 2022 EIAR had indicated the presence of a single Leisler bat roost in Building 6C which required to be removed as part of the development.

(ii) The single bat roost identified in Building 6C in March 2022 was documented in the revised EIAR. The roost was of local importance only and too small for a nursery roost. Comprehensive mitigation measures were included in the EIAR and are required to be implemented of foot of conditions attaching to the Data Cent[re] permission. The EIAR concluded there would be no significant residual effects on biodiversity. The public was not misled as the information was available in the amended EIAR.

(iii) There is a suggestion in paragraph 91 of the Statement of Grounds of further errors by the inspector in failing to identify 20 bat roosts and in failing to note the presence of 17 trees with potential roost features (PRFs). It is not accepted that these were errors and even if they were, they could not be characterised as material as the roosts and PRFs in question were to remain in situ. However, in so far as roosts were identified on the site, none were required to be removed to facilitate the proposed development, other than the single bat roost in Building 6C. Therefore, the identification by the Applicants of the existence of roosts which would not be affected or disturbed by the proposed development is not of any potential significance to the EIA which the Board was obliged to carry out. Further, insofar as 17 trees were identified as having roost potential, there is no evidence of the Inspector having made an error regarding these. Moreover, these tree PRFs are to be the subject of mitigation measures as detailed in the EIAR and herein, and which are binding on Art pursuant to condition 3 of the Data Centre permission.

(iv) Properly considered, the Inspector's factual error falls into the category of harmless error which was immaterial in the overall context of the Inspector's consideration of the issues related to bats in respect of a development on a site of 60 hectares. The error did not affect the substance of the Inspector's (or the Board's) overall assessment of biodiversity issues, including in relation to bat fauna, as part of the EIA. Given that the Inspector and the Board accepted the conclusion in the EIAR, which was reached in the knowledge of the existence of the single Leisler bat roost in Building 6C which would need to be removed as part of the development, the Board's decision would have been no different had the Inspector not made the factual error, as recorded on page 74 of her report.

(v) The immateriality of the error in the overall context of the assessment does not require any intervention on the part of the Court. The question of the Board's decisions being quashed on the basis of this immaterial error ought not to arise.

(vi) The Notice Party contends that the error in the Inspector's report does not constitute a basis for quashing the Board's decision on the basis that it is immaterial, having regard to the Inspector's overall conclusions on the impact of the proposed development on bat fauna.

(vii) Alternatively, the Court should withhold relief on the basis of discretion, on the basis that the Inspector's mistake was a harmless error: see *Carrownagowan Concern Group v. An Bord Pleanála (No.3)* [2024] IEHC 549 at §52, where Humphreys J. concluded that, by reference to a mix of identified EU, national and UK judgments, there was nothing controversial in proposition that errors that make no difference should not be quashed 'particularly in a context where the evidence to that effect was unchallenged'.

(viii) In considering whether to quash on the basis of an admitted error, the matter could be considered by reference to the material before the Board 'as a whole', which includes the EIAR: *Carrownagowan (No.3)*, paragraph 31.

(ix) In the circumstances, quashing the Board's decisions would be entirely disproportionate. In *Eco Advocacy v An Bord Pleanála* [2025] IEHC 15 at §§169-170, Humphreys J. referring to the opinion of Advocate General Bobek delivered on 14 January 2021 in *UH v An tAire Talmhaíochta Bia agus Mara and Others*, ECLI:EU:C:2021:14 concerning the Court's discretion to withhold relief: 'the national court is doing nothing more

than carrying out its judicial function which is to find, for each dispute, the most appropriate solution by looking at the specific context and all the relevant circumstances’.

(x) The context and the relevant circumstances as fully set out in the Notice Party’s Statement of Opposition justify the withholding of certiorari on the basis of the Inspector’s factual error. None of the Applicants (or any other party) took issue with the conclusions in the EIAR of ‘no likely significant residual negative effects’ on, inter alia, bat fauna. Given the Inspector’s conclusion in the same section of her report which overlooked the findings in respect of Building 6C ‘that bats would gradually habituate with no significant adverse long-term impacts anticipated’, it can be concluded that the Inspector’s conclusion would have been no different had she not made the factual error in question.

Applicant’s position:

a) Bat roosts are strictly protected by virtue of Article 12(1)(d) of the Habitats Directive. Any destruction of a bat roost is, by definition, a significant environmental impact.

b) The size of the bat roost is irrelevant as a matter of European law.

c) The Board did not consider the environmental impact of the destruction of the bat roost.

d) The Board has correctly conceded because its decision is indefensible in the light of the acknowledged error.

e) The Notice Party simply says ‘properly considered, the Inspector’s error falls into the category of harmless error’ but it has, and can have no basis for that statement. The Notice Party does not know what weight the Board would have put on the certain destruction of a strictly protected roost and the phrase ‘properly considered’ is meaningless when the Notice Party is not the decision maker.

f) Equally, the Notice Party simply says that the loss of a strictly protected bat roost is ‘immaterial’. As above any breach of Article 12 of the Habitats Directive is significant and the question of materiality is for the Board and not the Notice Party. The Honourable Court knows the view of the Board and should not lightly interfere with it.

g) The standard the Notice Party has to reach is to establish that the decision maker would have definitely made the same decision absent the error. The Notice Party has not done so.

h) It is correct that the Inspector and the Board accepted the conclusion of the EIAR. However, in doing so they were unaware that the proposed development would result in the destruction of a strictly protected bat roost. The ‘acceptance’ was based on a fundamental mistake as to fact.

i) Furthermore, the carrying out of an EIA is a matter for the competent authority and not the Notice Party and the Notice Party, respectfully, ignores that division of functions. The competent authority carried out an EIA and that was premised on a fundamental mistake that the proposed development would certainly lead to the loss of a strictly protected bat roost.

j) The Notice Party’s reliance on Carrownagowan and Treascon are misconceived. In both of those cases the evidence was that the Board’s errors had not resulted in any environmental impact not being considered by the Board. In this case, the acknowledged error has resulted in significant environmental impact – a breach of Article 12(1)(d) – not being considered by the Board and relates directly to the Inspector’s ‘inflection point’ as between potential and actual roost loss.

k) The Notice Party asserts ‘Given the Inspector’s conclusion in the same section of her report which overlooked the findings in respect of Building 6C ‘that bats would gradually habituate with no significant adverse long-term impacts anticipated’, it can be concluded that the Inspector’s conclusion would have been no different had she not made the factual error in question;’ the Applicant says this is incorrect for the very reason that the Inspector overlooked the findings in respect of Building 6C, ie the destruction of the roost.

l) Separately, the acknowledged error means that the Board could not lawfully have granted planning permission in the absence of a derogation licence having been granted prior to the grant of development consent. The decisions of the Court of Justice in Namur Est and Hellfire Massey are unequivocal that a derogation licence must be granted prior to the grant of development consent. The argument that the Notice Party has to make is that if the Board was (i) aware of the bat roost, (ii) it would have granted permission even without the necessary derogation licence and (iii) that the Board would have breached European law in so doing.

m) The Court should reject the implicit assumption that the Board would have granted permission in breach of European law.”

The law in relation to harmless error

45. The law in relation to harmless error and discretion can be summarised as follows:

- (i) A decision **should not be quashed for error (including in application of EU law) if the error was harmless** and did not materially affect the result: *Walton v. Scottish Ministers* [2012] UKSC 44, [2013] P.T.S.R. 51; judgment of 7 November 2013, *Gemeinde Altrip and Others v Land Rheinland-Pfalz*, C-72/12, ECLI:EU:C:2013:712; *R (Champion) v. North Norfolk District Council* [2015] UKSC 52, [2015] 1 W.L.R. 3710; *Canterbury City Council v. Secretary of State for Housing Communities and Local Government* [2019] EWHC 1211 (Admin.), [2019] 5 W.L.U.K. 225; *R. (Hudson) v. Windsor and Maidenhead Royal Borough Council* [2021] EWCA Civ 592, [2021] 1 W.L.R. 5588 (Coulson L.J. at §§77-78); *Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanála* [2019] IEHC 888, [2019] 12 JIC 2017 (Unreported, High Court, McDonald J., 20th December 2019); opinion of Advocate General Bobek delivered on 14 January 2021, *UH v An tAire Talmhaíochta Bia agus Mara and Others*, ECLI:EU:C:2021:14; *Reid v. An Bord Pleanála (No. 2)* [2021] IEHC 362, [2021] 10 JIC 0606 (Unreported, High Court, 6th October 2021) at §53; *Heather Hill Management Company CLG v. An Bord Pleanála* [2022] IEHC 146, [2022] 3 JIC 1603 (Unreported, High Court, Holland J., 16th March 2022) at §257 *et seq.* and §326(d) and (e); *Concerned Residents of Treascon and Clondoolusk v. An Bord Pleanála* [2022] IEHC 700, [2022] 12 JIC 1609 (Unreported, High Court, 16th December 2022) at §80; *Toole v. Minister for Housing (No. 6)* [2023] IEHC 592, [2023] 10 JIC 3102 (Unreported, High Court, 31st October 2023) at §39; *Eco Advocacy v. An Bord Pleanála* [2025] IEHC 15 (Unreported, High Court, 15th January 2025). The term “procedural defect” in *Altrip* has an autonomous EU meaning which is not limited to narrow technical issues that do not include errors in relation to the facts – the phrase covers any defects committed in the impugned procedure: see for example the opinion of the Advocate General Cruz Villalón delivered on 20 June 2013 in *Altrip*, ECLI:EU:C:2013:422 at paras. 44 and 45. In *Altrip* the law in relation to environmental impact assessment was viewed as procedural. In any event there is no logical or rational basis to limit the *Altrip* doctrine to particular kinds of harmless error. Indeed generally speaking it would trivialise judicial review and be an exercise in self-indulgence to quash decisions because of things that make no difference, in the absence of a mandatory provision that compels such an approach.
- (ii) The determination of whether the error would have affected the result is one **for the court, which can act on evidence in the proceedings from an interested party such as a developer** – the CJEU says this expressly in *Altrip* para. 53. While non-precedential, this point was seen as not raising doubt by the Supreme Court in *Carrownagowan Concern Group v. An Bord Pleanála* [2025] IESCDET 9 (Charleton, Collins and Donnelly JJ., 27th January 2025), para. 21: “*Altrip* – which was concerned with the EIA Directive – clearly indicates that not every ‘defect’ will necessarily have consequences that can possibly affect the purport of a decision to approve a development: §49. While the defect in *Altrip* was characterised as ‘procedural’, the complaint appears to have been that the EIA carried out before development consent was given was ‘inadequate’ (§16) which is effectively the complaint made here (albeit, in the present case, in respect 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**) rather than the EIA Directive). *Altrip* also makes it clear that in this context a court may rely on evidence provided by the developer. In light of the first of the questions which the Applicants tentatively suggest may require a reference to the CJEU, it may be observed that the fundamental point in *Altrip* was that a reviewing court might properly conclude that an error was ‘harmless’ without having to send the decision back to the original decision-maker”. Accepting such evidence and making a finding of harmlessness is not a substitution of the court’s views for those of the decision-maker, a standing in the latter’s shoes, a trespass onto forbidden territory, or any other alarmist cliché: *Altrip*; *R (Champion) v. North Norfolk District Council*; *Canterbury City Council v. Secretary of State for Housing Communities and Local Government*; *Carrownagowan Concern Group v. An Bord Pleanála (No. 3)* [2024] IEHC 549 (Unreported, High Court, 23rd September 2024) at §52. As the notice party submits here we “could not have a rational and sensible system” if there was “some kind of exclusionary rule” that prevented the court from receiving developer’s evidence. Such a rule would be inconsistent with the Supreme Court’s finding in *Ballyboden Tidy Towns Group v. An Bord Pleanála & Ors* [2024] IESC 4 (Unreported, Supreme Court, Donnelly J., 22nd February 2024) that a developer can defend a permission even if the decision-taker does not.

- (iii) Whether the test should be set at the level of the error being unlikely to make a difference or one being satisfied that it would not make a difference may be semantic in most cases other than the borderline. A working approach is to phrase it by saying that **the court should exclude a reasonable possibility that the error would have made a difference to the actual outcome**. Obviously an error would definitionally make a difference to the wording of the reasoning but that can't be a barrier to the application of the doctrine because the doctrine would be meaningless on that impossible condition. The CJEU puts the matter in terms of excluding doubt (*Altrip* para. 53: "impairment of a right cannot be excluded unless, in the light of the condition of causality, the court of law or body covered by that article is in a position to take the view, without in any way making the burden of proof fall on the applicant, but by relying, where appropriate, on the evidence provided by the developer or the competent authorities and, more generally, on the case-file documents submitted to that court or body, that the contested decision would not have been different without the procedural defect invoked by that applicant") which means reasonable doubt because exclusion of all doubt is an impossibility. AA does not require the decision-maker to disprove "any effect whatsoever" even those having "no appreciable effect" or "hypothetical risk": opinion of Advocate General Kokott of 29 January 2004 in *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij*, ECLI:EU:C:2004:60, paras. 102-106; judgment of 7 November 2018, *Holohan v An Bord Pleanála*, C-461/17, ECLI:EU:C:2018:883 at paras. 33-37; Holland J. in *Heather Hill Management Company CLG v. An Bord Pleanála* [2022] IEHC 146, [2022] 3 JIC 1603 (Unreported, High Court, 16th March 2022), citing *R Mynydd Y Gwynt Ltd v The Secretary of State for Business, Energy and Industrial Strategy* [2016] EWHC 2581 (Admin), [2016] 10 W.L.U.K. 396, [2017] Env. L.R. 14 (at para. 259). Absence of reasonable doubt therefore does not mean "absolute certainty" (paras. 44, 58, 59, and 61 of the CJEU's judgment of 7 September 2004, *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij*, C-127/02, ECLI:EU:C:2004:482 (Grand Chamber) and paras. 102 to 108 of the Advocate General's opinion in *Waddenzee*, and the judgment in *Holohan*, at paras. 33-37, Lord Carnwath in *Champion* at para. 41). Insofar as some caselaw refers to whether it is "conceivable" that the decision could have been different (*West Cork Bar Association v. The Courts Service* [2016] IEHC 388, [2017] 2 I.L.R.M. 281, [2016] 7 JIC 0802 (Noonan J.); *Baile Eamoinn Teoranta v. An Bord Pleanála* [2020] IEHC 642, [2020] 12 JIC 0405 (Unreported, High Court, Barr J., 4th December 2020)) those statements were fact-specific. In the way that the applicants here try to generalise that as being some sort of mandatory test, the applicants' wording is not the optimum phrasing because it could lend itself to an erroneous reading that any possibility of difference, no matter how tenuous, theoretical or unreasonable, would be deadly to a permission. That can't be the law in any workable sense – virtually anything is "conceivable", but not everything is reasonable.
- (iv) An applicant has the burden to establish the existence of error, but the successful demonstration of error shifts the onus. Therefore **the onus of proof that a demonstrated error was harmless lies not on an applicant but on the party asserting harmlessness** (*Altrip* para. 53). Hence if a developer's affidavit asserting harmlessness is properly controverted, that issue should be resolved in favour of the applicant in the absence of cross-examination, applying *RAS Medical v. The Royal College of Surgeons in Ireland* [2019] IESC 4, [2019] 1 I.R. 63, [2019] 2 I.L.R.M. 273, [2019] 2 JIC 0501 (Clarke C.J.).
- (v) The determination of whether a particular error would have made a difference must also be carried out by reference to **the totality of the material** before the decision-taker, considered as a whole, as well as to such further material as the court may receive in the proceedings: *Carrownagowan (No. 3)*, para. 31.
- (vi) The question of **whether public participation was materially compromised** is also relevant: *Altrip*.
- (vii) Where by contrast the error would have had a material effect on the outcome, **any breach of EU law should normally be remedied by certiorari**. Any after-the-event assessment which would allow a permission to stand should only be permitted in exceptional circumstances: the judgment of 12 November 2019, *Commission v Ireland (Derrybrien Wind Farm)*, C-261/18, ECLI:EU:C:2019:955 (Grand Chamber).

- (viii) Where the error relates to **purely domestic law, then even if it would have had a material effect, the court has a wider discretion** although is not fully at large: *Independent Newspapers v. IA* [2020] IECA 19 (Unreported, Court of Appeal, Murray J., 22nd January 2020).

The facts in relation to the error

46. One point to note at the outset is that while there are hints in the relevant sub-grounds of additional errors, no basis for this has been made out. It's correct that 17 trees were of PRF status (potential roost features), but they are not being removed.

47. The 2006 publication, McAney K., *A conservation plan for Irish vesper bats – Irish Wildlife Manuals, No. 20* (National Parks and Wildlife Service, Department of Environment, Heritage and Local Government, Dublin, Ireland) referred to in the EIAR (referenced below and available at <https://www.npws.ie/sites/default/files/publications/pdf/IWM20.pdf>) at pp. 23-24 notes highly mobile behaviour even for nursery roosts (and the crack-in-a-wall roost we have here is too small to house a nursery):

"Nursery roosts begin to form in April, the young are born in June and are on the wing a month later. There is a dramatic decrease in the number of bats at the nursery roost once the young are independent, as the adult females leave at this time, followed some weeks later by the juveniles (Shiel & Fairley, 2000). Leisler's bats emerge early in the evening, often leaving the roosts before sunset; they emerge earlier on overcast nights (McAney & Fairley, 1990; Shiel & Fairley, 2000). Forsyth (I. For[s]yth, pers. comm.), in a study of a maternity roost in the Lagan Valley in Northern Ireland using passive identification transponders and an infrared video camera found that females moved between 20 roost sites a total of 120 times during a 6-year period; also, up to a quarter of the bats using the roost would often not emerge on a given night."

48. As averred to on behalf of the developer, the bat surveys which underpin information in Chapter 7 (Biodiversity) in the consolidated EIAR were conducted based on the professional judgement of expert ecologists from Mr Scott Cawley, with reference to published guidance on survey methodologies, in particular Jan Collins, (2016), *Bat Surveys for Professional Ecologists: Good Practice Guidelines*, 3rd edition (Bat Conservation Trust, London). The assessment considered the overall "roost resource" in terms of PRFs, as distinct from merely considering confirmed roosts.

49. The 2016 Bat Conservation Trust guidelines (https://cdn.bats.org.uk/uploads/pdf/Resources/Bat_Survey_Guidelines_2016_NON_PRINTABLE.pdf?v=1542281971) state that they have been endorsed by CIEEM (Chartered Institute of Ecology and Environmental Management). I note that they state at p. 7 that they do not deal with mitigation which is dealt with in separate 2004 guidelines (Mitchell-Jones).

50. In a discussion regarding roosts in trees, the guidelines state (p. 44):

"Surveying trees for bat roosts can be more challenging than surveying buildings because many species that use trees for roosts are known to exhibit roost switching behaviour, including barbastelle, Bechstein's bat, Daubenton's bat, Natterer's bat, Leisler's bat, noctule, common pipistrelle and brown long-eared bat (Harris and Yalden, 2008, Dietz et al., 2011). Some UK examples are as follows: Smith and Racey (2008) observed roost switching in Natterer's bat on average every 3 days; and Waters et al. (1999) observed roost switching in Leisler's bat between every 2 and 10 days. Frequent roost switching has also been observed in barbastelle (Billington, 2003; Greenaway, 2001; Zeale, 2011) and Bechstein's (Palmer, 2013), two of our rarest species.

Additional difficulties inherent in finding tree-roosting bats are as follows: droppings do not persist in trees in the same way as they do in buildings; some tree-roosting bats echolocate very quietly (and sometimes not at all) and are therefore difficult to detect using bat detectors; some tree-roosting bats emerge from their roosts very late and return very early; and emergence surveys are often constrained due to the height of tree roosts above ground level and restricted observation due to foliage or lack of light under the canopy. The chances of discovering a roost, even if one is present, are relatively low. However, some of our rarest species are heavily reliant on tree roosts.

Due to these limitations and from what is known about the ecology of tree-roosting bats, it is arguable that all trees with bat roosting potential should be considered part of a resource that will be used at one time or another by tree roosting bats in order to determine the extent of impacts. Survey work on individual trees may confirm presence but is unlikely to conclusively confirm absence. Precautionary measures are likely to still be essential during works even where surveys have not identified occupancy..."

51. The Waters study cited is noted at p. 82 as Dean Waters, Gareth Jones, Mick Furlong, "Foraging ecology of Leisler's bat (*Nyctalus leisleri*) at two sites in southern Britain", 28 February 2006, *Journal of Zoology*, Volume 249, Issue 2, October 1999, pp. 173-180. The Journal is published by the Zoological Society of London:

<https://zslpublications.onlinelibrary.wiley.com/doi/10.1111/j.1469-7998.1999.tb00755.x>. The developer's evidence is that the bats in question are "highly mobile" – and by reference to the Waters study, if they switch roosts every two to ten days, what are the chances of the bat seen in March 2022 still being in the same roost – or even having been there as of the date of the board's decision? Hence the need for an overall roost resource approach.

52. The developer's ecologists applied the recommended resource approach to the site generally. As stated at para. 25 of the statement of opposition, duly verified:

"Given the tendency for bats to roost in small numbers (typically 1-5 bats) and their tendency to switch roosts frequently, Scott Cawley determined on professional judgment that the completion of roost emergence surveys on trees would be disproportionate in the circumstances. Proportionality is an important aspect of bat surveys, as confirmed in section 2.2.5, page 15 of the BCT Guidance. The Notice Party's professional ecologists determined that a roost resource approach, together with the inclusion of a corresponding and appropriate mitigation strategy relating to the loss of trees would be more appropriate in relation to the project and would comprehensively address any potential for effects on roosting bats."

53. The statement of opposition continues:

"56. In carrying out an assessment of the direct and indirect effects on bats, the precautionary principle (as provided for in the first paragraph of Article 191(2) TFEU), requires the impact on the overall roost resource, in terms of trees and buildings with bat roost potential, to be assessed. Logically, the Board has to assess the likely significant effects on bats by reference to the date of likely impact, which is the date on which construction is likely to commence rather than at the date of survey for the purposes of the application.

57. At the date of the Board's decision, the Board will not be in a position to assess with certainty the number of bats that will be affected in terms of removal or disturbance of roosts. The mobility of bats as a species and their frequent roost swapping habits, as noted in the extract from the BCT Guidance (p.45) above, necessitates an assessment of the roost resource, as a whole. It cannot be assumed that an actual bat roost which is recorded at the date of survey will remain an actual bat roost at the date of the pre-construction survey. Conversely, likely absence of occupation of a PRF by a bat or bats at the time of survey does not necessarily determine whether the PRF is likely to become occupied at the date of commencement of construction. For that reason, at the date of the Board's assessment of the impact on bats based on the survey information available, the Board is not in a position to assess the precise number of actual bat roosts that will be revealed in the context of pre-construction surveys and, accordingly, it is not in a position to precisely assess the direct impacts on actual bat roosts. In these circumstances, the precautionary principle requires a conservative approach to be taken by the Board, in assessing the likely significant effects on the roost resource as a whole, rather than conducting an assessment based on the number of actual bat roosts found at the date of survey or likely to be present at the date of commencement of construction."

54. The council requested and received further information on bat roost removal as follows (set out in inspector's report at para. 3.2):

"4. Biodiversity: **Submit details of:- bat roost to be removed**; impacts on mammal mobility; seasonal hedgerow removal; impact on fen & flush habitats (NW); examples of successful relocation of Calcareous grassland habitats; details of any habitat removal outside of project footprint that could affect other species (incl. Lesser horseshoe bat); & assess impacts of ash dieback on wooded areas – **no loss of confirmed bat roosts**, 30m buffer provided, Derogation Licence sought if required; no mammals recorded within footprint & ample surrounding support habitat; no hedgerow removal during bird breeding season; no effect on wetland features, and water quality will be protected; details provided for grassland habitat translocation; no habitat loss outside of project footprint; and adequate compensatory tree planting."

55. The EIAR of **July 2021** states as follows in relation to Leisler's Bat (pp. 67-69):

"Leisler's bat

Transect surveys

Full details from each transect survey are provided above in Appendix 7.6, and locations of each of the recorded Leisler's bat calls are shown on Figure 7.19–7.20.

Leisler's bats were the third most commonly identified species during transect surveys of the proposed development, and calls were detected on all three transects carried out in 2020, and both transects in 2018. Areas with the highest levels of activity were along Toureen Laneway, and in the wet grassland habitat adjacent to Toureen Lough.

Whilst this species was identified with higher numbers of calls in similar areas in 2018 i.e. Toureen Laneway and Toureen Lough, activities levels in 2018 were a lot lower than activity levels in 2020. Very little activity was recorded in the woodland in the north west, which differs from ... all other bat species identified within the lands. This is likely due to the feeding preferences of Leisler's bat, as it is an exclusively aerialhawking species [n33: Vincent Wildlife Trust, Ireland. Species profile – Leisler's bat. Accessed here: <https://www.vincentwildlife.ie/species/leislars-bat>], foraging up to heights of 30m. Although this species was identified from calls along hedgerows and treelines, this likely just reflects the walking route that was undertaken by surveyors, potentially resulting in missed commuting and/or foraging Leisler's bats that were feeding at a height over the fields and pastures. In this essence, whilst treelines and hedgerows are important for this species, they are less likely to be impacted directly from the removal of these features. High buildings or structures could pose collision risk issues for this species as a result.

Static detector surveys

Leisler's bat were detected on 14 out of 15 static detectors deployed in 2020, and 11 out of 14 in 2018. Activity levels were highest in the north of the site, along Toureen Laneway, and along the southern mot hedgerow associated with the laneway. Little to no activity was recorded in the west, particularly the south west, south of the woodland habitat. Static detectors deployed in 2018, had significantly lower numbers of calls picked up on detectors, however activity was highest along Toureen Laneway, and in the north of the site.

Roost emergence/re-entry surveys

There were no Leisler's bat roosts identified within the proposed development site. Leisler's are predominantly tree roosting bats but can occasionally roost in buildings as nursery roosts [n33]. Roost emergence/re-entry surveys on trees were not carried out.

Evaluation

Leisler's bats were recorded in high numbers across the site, particularly in surveys carried out in 2020. They are known to have a widespread distribution across the region, and in Ireland (Roche et al., 2014), however Leisler's bats tend to show a southern bias in their distributions, with greater numbers occurring in the south west and east of the country than in the north. Populations of this species have shown to be increasing in recent years. Leisler's are high flying bats, and as such, they may have been using areas not covered by detectors (middle of fields etc.), and therefore potentially not identified. However, Leisler's bat calls are typically loud and can be heard from a significant distance away, and would likely have been picked up by static and/or handheld detectors despite this. Given the high suitability of the site for this species, and the increasing population trends, particularly in the south west of the country, the local population of Leisler's bat is valued as being of local importance (higher value)."

56. The EIAR relied on the lack of confirmed roosts in the buildings, but noted that one building had moderate potential and stated that a precautionary approach would be taken (p. 95):

"Myotis sp. and Leisler's bat

There were no Myotis sp. or Leisler's bat building roosts identified within the proposed development site. The buildings within the site are suitable for roosting Myotis sp. Leisler's bat can also roost in buildings (especially as maternity sites), however evidence has shown that they tend to roost in trees rather than structures or buildings [n52: McAney, K. (2006) A conservation plan for Irish vesper bats. Irish Wildlife Manuals, No. 20. National Parks and Wildlife Service, Department of Environment, Heritage and Local Government, Dublin, Ireland].

As there are no buildings with confirmed Myotis sp. or Leisler's bat roosts species within the proposed development site there is no potential for likely significant effects on the conservation status of these bat species to occur at any geographic scale as a result of this potential direct impact of building loss.

Buildings that did not have confirmed roosts (i.e. BB 1B, BB 4A – D, BB 6A-C, and BB 7) were all negligible - low potential farm buildings, with the exception of **BB 7, which was considered to be of moderate potential for roosting bats**. These buildings will be removed as part of the development. Although roosts were not identified in any of these buildings, due to the high activity levels and numbers of roosting bats across the site, **a precautionary principle will be applied, and subsequent mitigation measures implemented to ensure there are no risks of injury/mortality to local bat species as a result of the proposed development.**"

57. Section 7.3 of the EIAR sets out details of the assessment of impacts on bats. Section 7.6 relates to mitigation measures and 7.7 provides for compensatory measures (collectively running from p. 118 to 144, dealing with all biodiversity impacts, not just bats). These include the following at pp. 131-134:

7.6.1.4 Bats

Measures to Protect Bats during the Removal of Suitable Roosting Sites

All bat species and their roost sites are strictly protected under both European and Irish legislation including:

- Wildlife Act 1976 and Wildlife (Amendment) Act, 2000 (S.I. No. 38 of 2000)
- Council Directive on the Conservation of Natural Habitats and of Wild Flora and Fauna 1992 (Council Directive 92/43/EEC)
- European Communities (Birds and Natural Habitats) Regulations, 2011

It is an offence under Section 23 of the Wildlife Acts 1976-2017 and under Section 51 of the European Communities (Birds and Natural Habitats) Regulations, 2011 to kill a bat or to damage or destroy the breeding or resting place of any bat species. Under the European Communities (Birds and Natural Habitats) Regulations it is not necessary that the action should be deliberate for an offence to occur. This places an onus of due diligence on anyone proposing to carry out works that might result in such damage or destruction. Under Section 54 of S.I. 477 of 2011, a derogation may be granted by the Minister where there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species to which the Habitats Directive relates at a favourable conservation status in their natural range. Given that the proposed development will result in the loss of [a confirmed bat roost], a derogation licence under Section 54 of S.I. 477 of 2011 will be required.

The following mitigation measures are proposed in relation to structures considered to have the potential to support roosting bats:

- All structures that were confirmed as having potential for bat roosts will be reexamined immediately prior to demolition to assess whether bats are present at the time of demolition. This will be an all-night survey of these structures undertaken during suitable weather conditions to determine if bats enter the building during the night or early morning. If bats are present, then they will require exclusion from the property over several nights or, if possible, bats present will be physically removed by hand by a licensed bat specialist and placed in a bat box and then released in the evening after capture. The number, type and location of bat boxes to be included can be found in the Landscape and Biodiversity Management Plan. 15 bat boxes are proposed for installation in the proposed development site.
- For structures which have not been confirmed as bat roosts that are due to be demolished but are regarded to have potential for bats, a bat detector survey of the property to be demolished will be carried out. **If demolitions are proposed during the period of May to August and a bat roost is confirmed to be present, the proposed demolition will not be permitted. This will be an all-night survey undertaken during suitable weather conditions to determine if bats enter the building during the night or early morning. If bats are present, then they will require exclusion from the property over several nights or if possible bats present will be physically removed by hand by a licensed bat specialist and placed in a bat box and then released in the evening after capture.**
- Once structures **containing roosts are deemed to be clear of bats, the bat specialist will be on site to supervise the demolition procedure until the structure is no longer deemed able to support a bat roost. This is because bats may reenter a partially demolished structure overnight.**

Measures to Protect Bats during Vegetation Clearance

The following mitigation measures are proposed in relation to those trees identified as having potential to support roosting bats (Figure 7.23). Bats could occupy suitable roosting features at any time prior to the commencement of works. Therefore, there is an inherent risk that bats could be affected by the proposed felling works. Where possible, trees with PRFs should be retained. Where this is not possible, the following mitigation procedures will be followed:

- Felling of confirmed and potential tree roosts will be undertaken during the periods of April to May or September to October as during this period bats are capable of flight and may avoid the risks from tree felling if proper measures are undertaken, but also are neither breeding nor in hibernation
- Use of detectors alone may not be sufficient to record bat emergence and reentry in darkness. Therefore, prior to felling of confirmed and potential tree roosts, an emergence survey using infra-red illumination and video camera(s) and bat detectors will be carried out on the night immediately preceding the felling operation to determine if bats are present
- Where it is safe and appropriate to do so for both bats and humans, such trees may be felled using heavy plant to push over the tree. In order to ensure the optimum warning

for any roosting bats that may still be present, the tree will be pushed lightly two to three times, with a pause of approximately 30 seconds between each nudge to allow bats to become active. The tree should then be pushed to the ground slowly and should remain in place until it is inspected by a bat specialist

- Trees should only be felled 'in section' where the sections can be rigged to avoid sudden movements or jarring of the sections. Where remedial works (e.g. pruning of limbs) is to be undertaken to trees deemed to be suitable for bats, the affected sections of the tree will be checked by a bat specialist (using endoscope under a separate derogation licence held by that individual) for potential roost features before removal. For limbs containing potential roost features high in the tree canopy, this will necessitate the rigging and lowering of the limb to the ground (with the potential roost feature intact) for inspection by the bat specialist before it is cut up or mulched. If bats are found to be present, they will be removed by a bat specialist licenced to handle bats and released in the area in the evening following capture
- If any bat tree roosts are confirmed, and will be removed by the proposed felling works, then a derogation licence will be required from the NPWS and appropriate alternative roosting sites will be provided in the form of bat boxes.

Measure to control and reduce light spill during construction

During construction, the use of security lighting such as that around the construction compound could impact on commuting/foraging territory, however night works will not be undertaken during construction. During winter months when days are shorter, there may be a temporary level of light spill from the construction compound either side of sunrise/sunset. This will be during hibernation period for bats however, and impacts will be minimal. Therefore, mitigation is recommended for the temporary impact of light spill of bat species.

Security lighting at construction compounds or in active works areas in close proximity to bat commuting and/or foraging areas will be designed in conjunction with the EcOW/bat ecologist to minimise light spill. Measures to reduce light spill may include the following:

- the use of sensor/timer triggered lighting;
- LED luminaires will be used where possible due to their sharp cut-off, lower intensity, good colour rendition and dimming capability;
- column heights will be considered to minimise light spill; and,
- accessories such as baffles, hoods or louvres will be used to reduce light spill and direct it only where needed.

Measures to reduce impacts from habitat loss

The proposed development will result in a total loss of c. 2.7km hedgerows, and 30 trees; therefore replacement planting is required to ensure that there will be no net loss of lesser horseshoe bat foraging and commuting habitat as a result of the proposed development, and to ensure there will be no impact on local bat species, See Section 7 of the NIS (Scott Cawley, 2021), and Section 7.6.1.1 above. This will comprise of c. 4.86km of hedgerow and 57 trees within the proposed development site (see the Chapter 10 Landscape and Visual Impact Assessment, and the Landscape Design Strategy for location map, planting schedule and specific details of proposed species). Native hedgerow planting will include the following species; *Alnus glutinosa*, *Corylus avellana*, *Crataegus monogyna*, *Ilex aquifolium*, honeysuckle *Lonicera periclymenum*, *Malus sylvestris*, *Prunus avium*, *Prunus spinosa*, *Rosa canina*, *Samucus nigris*, and *Viburnum opulus*. Tree planting will include semi-mature species such as: *Quercus petraea*, *Fagus sylvatica*, *Arbustus unedo*, *Pinus sylvestris*, *Betula pendula*, *Sorbus acuparia*, *Prunus avium plena*. There will also be woodland structure planting on the peripheries of the site and of the buildings, which will total c. 58,567m² of planting, and 3300 trees per/ha. This will ensure the proposed development complies with Objective 14.11 of the Clare County Development Plan 2017-2023 (As varied), and the requirement that there is no net loss of lesser horseshoe bat habitat within the proposed development.

This proposed planting has been designed to ensure that connectivity for foraging and commuting bats is maintained - i.e. along the peripheries of the site, and within the site from the woodland in the north west to suitable foraging habitats such as Toureen Lough, and along hedgerows in the north to woodland and wetland habitats in the east, also ensuring connectivity is maintained to/from roost buildings.

Existing hedgerows along the southern boundary that are less species rich, will be enhanced through additional planting of native species. The proposed planting will occur in phases. with the earliest planting occurring along important foraging and/or commuting routes in the north, south and east of the site, at pre-construction stage and prior to removal of any habitats. This will ensure that suitable foraging and commuting habitat for bat species is

established prior to the removal of such habitat during the construction of the proposed development; therefore maintaining the site's suitability for local bat species. Cattle grazed fields are known to have higher rates of bat activity than ungrazed grassland (Downs et al. 2010) [n60 Downs, N., & Sanderson, L. (2010). Do Bats Forage Over Cattle Dung or Over Cattle? *Acta Chiropterologica*, 12(2), 349-358 [note – available at https://www.researchgate.net/publication/232677814_Do_Bats_Forage_Over_Cattle_Dun_g_or_Over_Cattle]; therefore, in addition to the hedgerows and treeline planting, areas of cattle grazed grassland will be maintained as they are currently in the east, north and west of the site with additional hedgerows separating fields, to provide further suitable habitat for lesser horseshoe bat.”

58. At p. 141:

“7.6.2.4 Bats

Measures to Control and Reduce Light Spill During Operation

A light spill model study of the proposed development site was undertaken by Hurley Palmer Flatt (June 2021) to determine the effects of artificial light and Artificial Light At Night (ALAN) on bats as a result of the proposed development and identify how to reduce or eliminate ALAN onsite, based on information from both Eurobats Guideline No.8, the Institution of Lighting Professionals (ILP) Guidance Note No.8. and Bat Conservation Ireland Guidance Notes for: Planners engineers, architects and developers. The mitigation as described above in Section 7.6.2.1, also applies for all bat species using the proposed development site.

To ensure important bat corridors are maintained throughout the site before, during and after construction, a 30m dark zone buffer will be in place along hedgerows and treelines within the site wherever possible, and along the Clare County Council Ecological buffer zones (Figure 7.24).”

59. At p. 143:

“Hedgerows are a key habitat within the proposed development site, valued as being of local (higher) importance, and forming a key network of green corridors across the site. The retention of as many of these corridors as possible and the enhancement of the existing green network through new additional corridors has been a key consideration in the design of the landscape around the Data Centres. New woodland belts and hedgerows that provide new and replacement connections across the site are utilised, with 4.86km of new native hedgerow planting proposed, as well as c. 58,567m² of woodland planting. Only native species, and species that are already found within the site, will be planted. The retention and enhancement of existing hedgerows, with additional planting of native hedgerows will provide commuting and foraging routes for local bat species across the site, and will maintain access to/from roost sites and particularly active foraging areas of the site (Toureen Lough, woodland in the north west, hedgerows in the east). These hedgerows will also provide commuting corridors, foraging areas and suitable habitat for a range of other mammals, birds, invertebrates, and reptiles.

There will be a loss of dry meadows and grassy verges within the footprint of the proposed development. Whilst this habitat is valued as being of local (lower) importance based on the common species found here and availability of this habitat in the wider environs, compensation for the loss of this habitat is included. Meadow grasslands are proposed around the edges of the Data Centres, with c. 5.5ha proposed. These grasslands will include wildflowers such as *Lotus corniculatus*, *Medicago lupulina*, *Hypochaeris radicata*, *Lythrum salicaria*, *Silene flos-cuculi*, *Trifolium pratense*, *Agrostemma githago*, and *Succisa pratensis* (full list of species can be found in the Landscape Design Strategy Report. These meadow grasslands will provide opportunities for a range of pollinators and other invertebrates, in addition to provide habitat for foraging birds, bats and other mammals. Feature trees and smaller tree species are also proposed within this habitat, the majority of which are seed or fruit bearing, which will offer foraging habitat for birds and mammal species.”

60. At pp. 156-157 such measures are summarised in the context of impacts for AA purposes:

“Layout designed to protect and retain confirmed bat roost buildings

Demolition of structures/felling of trees following seasonal restrictions

Roost presence/absence surveys prior to demolition of structures/felling of suitable bat roost trees

Soft felling of suitable bat roost trees

No night works will be normally undertaken during construction. Any lighting required during construction will be minimal and will avoid suitable foraging/roosting areas. Lighting will be off in normal circumstances and only used during emergencies

Planting of native hedgerows and woodlands prior to any removal of vegetation to ensure commuting and/or foraging areas are retained throughout development and operation

Lighting during operation designed to be as close to 0 Lux as possible on sensitive bat

foraging and/or commuting routes, with lighting only used for emergencies at night and for egress through the site using torches/headlights.”

61. The EIAR was revised in **June 2022**. Section 7.3 was amended to update the survey outcomes by reference to the single bat and single roost in Building 6C.

62. Relatedly, a single sentence was added on p. 69 (this was the point the inspector inadvertently overlooked):

“However; a Leisler’s bat roost with one bat was identified during daytime building inspections during surveys in March 2022.”

63. The consolidated EIAR maintained the previous conclusion at §7.9 that “Considering the elements included within the design of the proposed development (as described in the Project Description), and the implementation of the mitigation measures proposed in the EIAR and the associated planning application documents, to avoid or minimise the effects of the proposed development on the receiving environment, no likely significant residual effects on biodiversity are predicted”.

64. The applicants participated in the process and had available to them the consolidated EIAR, which included information regarding the existence of the single Leisler’s Bat roost in Building 6C which would require to be removed as part of the development (if still in being at that time). So this isn’t a case where public participation was somehow compromised.

65. The applicants did not make any submission about the bat roost in Building 6C as an issue at all, either before the council or the board, nor did they seek to suggest that it would make any difference in the assessment of environmental impacts on biodiversity, or bat species in particular, or challenge the conclusion of the consolidated EIAR of no significant residual impacts on bats. Nor indeed did anyone else controvert that conclusion. That can’t be irrelevant to the issue at hand.

66. In submissions to the board, the Development Applications Unit (**DAU**) / National Parks & Wildlife Service (**NPWS**) did not have concerns following the FI on bat roosts. The inspector records (para. 3.6):

“Observations received from the following Prescribed Bodies: -

DAU/NPWS: No objection following receipt of FI in relation to: - bat roosts; mammal mobility; seasonality of hedgerow removal; extent of habitat loss outside project footprint; and impacts on wetland habitats with resultant mitigation; subject to several conditions (incl. pre-construction surveys, habitat translocation, lighting & implementation of the Biodiversity Management Plan).”

67. In section 7.6 on biodiversity the inspector expressly envisaged replanting as a mechanism to mitigate the loss of roosts:

“National sites: The site is not located within or close to any designated National sites although there are many NHAs and p/NHAs within a c.15km radius of the project. These sites have been designated for a similar variety of habitats and species as the European sites. Although there may be an aquatic connection between the Data Centre site and some of the nationally designated sites, it is unlikely that the project would have an adverse impact on them, subject to the implementation of the EIAR surface and groundwater water quality protection mitigation measures and any recommended planning conditions (Refer to section 7.5 above). The replanting of the lost hedgerows and trees as per the landscaping proposals and the Landscape and Biodiversity Management Plan would ensure that any qualifying species (incl. birds & bats) from further afield sites would not be adversely affected in the long term by **a loss of breeding, roosting, foraging or commuting habitat.**”

68. Section 7.6 went on – this is the bit that contains the error – to envisage measures to address removal of bats present in the buildings:

“Bats: The farm buildings, and linear hedgerows and stone walls that traverse the site **have breeding, roosting, foraging and commuting potential for bats** (incl. Lesser horseshoe, Brown long-eared, Soprano & Common pipistrelles and Leisler’s bats), and several of the further afield SACs and pNHAs are designated for Lesser Horseshoe Bat. The various EIAR desk-top and site surveys confirm that the site and environs are frequented by bats, and although **some of the older farm buildings may also have roosting potential**, the applicant confirmed that **no roosts were recorded during the surveys***. The applicant should carry out a pre-construction survey of the any buildings to be demolished and **seek a Derogation Licence for the safe and humane removal and relocation of any species present in the buildings**. The removal of mature hedgerows trees and stone walls would have an adverse impact on foraging and commuting bats in the short term, however the proposed replanting would reduce this impact in the long term, provided that the replanting takes place during Phase 1 and before the end of the first year of construction. The planting of local indigenous hedgerow species should be required along with on-going monitoring to ensure that the replacement hedgerows mature to a satisfactory level Given that a 10-year permission is being sought, any delay in or prolongment of the

replacement planting could have significant adverse impacts on bat populations in the area. Subject to compliance with the above requirements, I am satisfied that **bats would gradually habituate with no significant adverse long-term impacts anticipated.** Any on-site artificial lighting should be designed, installed and managed in a manner that does not interfere with bat activity whilst also ensuring public safety."

[*this is the error]

69. The inspector proposed a condition in relation to destruction of bat roosts at para. 11.0:
 "5. The developer shall comply with the following nature conservation requirements:
 a. A suitably qualified and experienced Project Ecologist shall be appointed to oversee the protection of biodiversity during the construction phase, and for a monitoring period of 5 years following completion of development.
 b. The Project Ecologist shall certify that the completed are compliant with the EIAR / NIS mitigation measures and the following conditions.
 c. No felling or vegetation removal shall take place during the period 1st March to 31st August.
 d. A pre-construction bat survey shall be carried out by a suitably qualified ecologist during the active bat season.
e. Any destruction of bat roosting sites or relocation of bat species shall be carried out by a suitably qualified ecologist under a Derogation Licence granted by the Minister for Housing, Local Government and Heritage.
 f. A pre-construction otter survey shall be carried out by a suitably qualified ecologist.
 g. Any destruction or relocation of otter holts shall be carried out by a suitably qualified ecologist under a Derogation Licence granted by the Minister for Housing, Local Government and Heritage.
 h. Mammal friendly fencing shall be installed during the construction and post construction phases.
 Reason: In the interest of biodiversity and nature conservation."
70. In section 8.4, the biodiversity impacts were summarised by reference to the EIAR:
 "EIAR sections 5, 6 & 7 and the associated Technical Appendices and reports dealt with: - land, soils, geology & hydrogeology; hydrology & water quality; and biodiversity. Extensive desk top studies & seasonal field surveys were undertaken, and AA Screening & NIS reports were prepared (and revised). The EIAR described the receiving environment as comprising low-intensity agricultural fields defined by trees, hedgerows & stone walls, with a variety of soil types. There is an extensive wooded area parallel to the Ballymacahill / Spancelhill Stream to the W, along with a smaller wooded area around Toureen Lough in the SW section. The lands are underlain by limestone bedrock which is locally karstified, and there are several small ponds, swallow holes & springs dotted around & adjacent to the site. The lands mainly drain W and SW to the Ballymacahill /Spancelhill Stream which forms a confluence with the downstream Garrus River, which ultimately discharges to the Fergus & Shannon Rivers (SAC & SPA). The E section partly drains S towards the Tulla Road & beyond via underlying karst features. The EIAR did not identify any sensitive sites within the project site, although there are several European & national sites in the wider area which have been designated for a variety of habitats & species (incl. waterbodies, wetlands, mammals, birds, bats & fish). It recorded badger & otter activity within the site and environs, and the presence of the rare Fen bedstraw in the N section. It noted that **the site (incl. lands, hedgerows & farm buildings) may be used by roosting, nesting, foraging & commuting birds & bats**, and that the on-site pods and nearby watercourse may provide support habitat for fish. The EIAR did not predict any significant adverse impacts on biodiversity during the construction and operational phases, subject to the implementation of mitigation measures to protect ground & surface water quality, habitats & species. The consolidated EIAR and NIS did not alter the conclusions to any significant extent."
71. The assessment of this included:
 "The site & environs are not covered by any sensitive natural heritage designations. The site contains woodlands, wetlands, grasslands & hedgerows, it has an aquatic connection to a nearby watercourse, and there is evidence that **it is used / frequented by several species of animal (incl. otter, badgers, birds & bats) for nesting, roosting, foraging & commuting.** The rare Fen bedstraw was recorded in the N fenland section. The consolidated EIAR, NIS & CEMP contain several mitigation measures to protect water quality & biodiversity."
72. The sub-station inspector's report repeats the error about no confirmed roosts at p. 34:
 "Several species of bat frequent the site & environs and utilise the various habitats (incl. hedgerows) and farm buildings within the overall data centre site for roosting, foraging & commuting (although no roosts were recorded)."

73. However, she went on to envisage that there would be a need for the developer to apply an approach that was “seeking a Derogation Licence if required to enable humane relocation”.

74. It follows from these references that the inspector was seized of the scenario whereby roosts would be lost and considered that permission should be granted given the adequacy of mitigating measures. It is a consequence of that that the existence of one additional roost isn’t a critical factor changing the whole scenario – the anticipated existence of roosts is already accounted for by the mitigation measures.

75. In granting permission, the board attached the following relevant conditions (emphasis added):

“1. The proposed development shall be carried out and completed in accordance with the plans and particulars lodged with the application, as amended by the further plans and particulars received by the planning authority on the 25th day of February, 2022, the 10th day of June, 2022 and by An Bord Pleanála on the 26th day of September, 2022, except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the proposed development shall be carried out and completed in accordance with the agreed particulars.

Reason: In the interest of clarity.

...

3. The mitigation measures identified in the Environmental Impact Assessment Report, the Natura Impact Statement and other plans and particulars submitted with the planning application and appeal shall be implemented in full by the developer, except as may otherwise be required in order to comply with the conditions of this permission.

Reason: In the interest of clarity and the protection of the environment during the construction and operational phases of the proposed development.

...

5. The developer shall comply with the following nature conservation requirements:

(a) A suitably qualified and experienced Project Ecologist shall be appointed to oversee the protection of biodiversity during the construction phase, and for a monitoring period of five years following completion of the development.

(b) The Project Ecologist shall certify that the completed development is compliant with the Environmental Impact Assessment Report and Natura Impact Statement mitigation measures and the following conditions.

(c) No felling or vegetation removal shall take place during the period 1st March to 31st August.

(d) A pre-construction bat survey shall be carried out by a suitably qualified ecologist during the active bat season.

(e) Any destruction of bat roosting sites or relocation of bat species shall be carried out by a suitably qualified ecologist under a Derogation Licence granted by the Minister for Housing, Local Government and Heritage.

(f) A pre-construction otter survey shall be carried out by a suitably qualified ecologist.

(g) Any destruction or relocation of otter halts shall be carried out by a suitably qualified ecologist under a Derogation Licence granted by the Minister for Housing, Local Government and Heritage.

(h) Mammal friendly fencing shall be installed during the construction and post construction phases.

Reason: In the interest of biodiversity and nature conservation.”

76. Again the express reference to destruction of roosting sites is incompatible with the argument that the board proceeded on the basis that there were no roosting sites. The basis was that roosting sites might be identified prior to the development being carried out.

77. The developer’s statement of opposition is relevantly verified by Colm Clarke, Ecologist at Scott Cawley Limited. The relevant averments are worth quoting at length (emphasis added):

“10. As set out at the commencement of Chapter 7 of the EIAR, on page 2, the purpose of the report was to:

10.1 Establish and evaluate the baseline ecological environment, as relevant to the proposed development.

10.2 Identify, describe and assess all potentially significant ecological effects associated with the proposed development.

10.3 Set out the mitigation measures required to address any potentially significant ecological effects and ensure compliance with relevant nature conservation legislation.

10.4 Provide an assessment of the significance of any residual ecological effects.

10.5 Identify any appropriate compensation, enhancement or post-construction monitoring requirements.

11. The survey methodologies adopted by Scott Cawley with respect to bats are documented in Chapter 7, pp. 10-16 of the EIAR. As is set out in the Notice Party's Statement of Opposition, the surveys were undertaken with reference to published guidance on survey methodologies, in particular Collins, J. (2016), *Bat Surveys for Professional Ecologists: Good Practice Guidelines*, 3rd edition (Bat Conservation Trust, London) ('the BCT Guidance'). A copy of the BCT Guidance is contained at Tab 3 of the Book of Exhibits.

12. At paragraph 24 of the Notice Party's Statement of Opposition, an extract from page 44 of the BCT Guidance is set out, in the context of guidance on the completion of emergence surveys on trees where a PRF is present, but where the presence of bats has not been confirmed, it also includes the following statement in relation to the limitations of surveying trees to identify bats. It states:

'... Surveying trees for bat roosts can be more challenging than surveying buildings because many species that use trees for roosts are known to exhibit roost switching behaviour, including barbastelle, Bechstein's bat, Daubenton's bat, Natterer's bat, Leisler's bat, noctule, common pipistrelle and brown long-eared bat (Harris and Yalden, 2008, Dietz et al., 2011). Some UK examples are as follows: Smith and Racey (2008) observed roost switching in Natterer's bat on average every 3 days; and Waters et al. (1999) observed roost switching in Leisler's bat between every 2 and 10 days. Frequent roost switching has also been observed in barbastelle (Billington, 2003; Greenaway, 2001; Zeale, 2011) and Bechstein's (Palmer, 2013), two of our rarest species.

Additional difficulties inherent in finding tree-roosting bats are as follows: droppings do not persist in trees in the same way as they do in buildings; some tree-roosting bats echolocate very quietly (and sometimes not at all) and are therefore difficult to detect using bat detectors; some tree-roosting bats emerge from their roosts very late and return very early; and emergence surveys are often constrained due to the height of tree roosts above ground level and restricted observation due to foliage or lack of light under the canopy. The chances of discovering a roost, even if one is present, are relatively low. However, some of our rarest species are heavily reliant on tree roosts.

Due to these limitations and from what is known about the ecology of tree-roosting bats, **it is arguable that all trees with bat roosting potential should be considered part of a resource that will be used at one time or another by tree roosting bats in order to determine the extent of impacts. Survey work on individual trees may confirm presence but is unlikely to conclusively confirm absence. Precautionary measures are likely to still be essential during works even where surveys have not identified occupancy...**

13. With regard to the last sentence of the second paragraph of the extract, whilst not explicitly stated in the BCT Guidance, it is my professional understanding that this relates to *Myotis bechsteinii* and *Barbastellus barbastellus* (the latter an Annex II species). These species are both resident in Great Britain but are not resident in Ireland.

14. Paragraph 28 of the Notice Party's Statement of Opposition refers to the Bat Mitigation Guidelines for Ireland (Kelleher & Marnell, 2006) and a copy of the BCT Guidance is contained at Tab 4 of the Book of Exhibits.

...

17. In Chapter 7 (Biodiversity) of the consolidated EIAR (submitted to the planning authority in June 2022 as part of the clarification of the RFI response) at page 69 there is a general observation made in relation to Leisler's bats occasionally roosting in buildings as nursery roosts. For the avoidance of doubt, it should be clarified that it is apparent from the information furnished in the EIAR in Chapter 7 (Biodiversity), Section 7.3.3.5, Table 7.9 and Table 7.10 p 49 and in text on p 69 relating to the size of the bat roost in Building 6 C that it is too small to be used as a nursery roost. Furthermore, a roost emergence survey was conducted to determine presence / likely absence of roosting bats at building 6C on 28 July 2020, e.g. during the season for detection of nursery/maternity roosts, and no bats were observed returning to roost at the building (refer to EIAR Chapter 7, Table 7.6, pp 13-14 for survey dates, and EIAR Chapter 7, Table 7.10, pp 49-50, and text on pp 94-95 for results of survey).

18. **The mobility of bats as a species and their frequent roost swapping habits, as noted in the extract from the BCT Guidance (p.45) above, necessitates an assessment of the roost resource, as a whole. It cannot be assumed that an actual bat roost which is recorded at the date of survey will remain an actual bat roost at the date of the pre-construction survey. Conversely, likely absence of occupation**

of a PRF by a bat or bats at the time of survey does not necessarily determine whether the PRF is likely to become occupied at the date of commencement of construction. For that reason, at the date of the Board's assessment of the impact on bats based on the survey information available, the Board is not in a position to assess the precise number of actual bat roosts that will be revealed in the context of pre-construction surveys and, accordingly, it is not in a position to precisely assess the direct impacts on actual bat roosts. In these circumstances, the precautionary principle requires a conservative approach to be taken by the Board, in assessing the likely significant effects on the roost resource as a whole, rather than conducting an assessment based on the number of actual bat roosts found at the date of survey or likely to be present at the date of commencement of construction.

19. Scott Cawley determined that a roost resource approach, together with the inclusion of a corresponding and appropriate mitigation strategy relating to the loss of trees would be more appropriate in relation to the project and would comprehensively address any potential for effects on roosting bats.

20. **In light of the growth in population referenced in the EIAR and having regard to the significant numbers of Leisler's bats on the site, the disturbance of a single roost for an individual Leisler's bat does not have the potential to have any likely significant impact on the conservation status of the Leisler's bat, nor even on the individual Leisler's bat having regard to the mitigation and/or compensatory measures described in the EIAR and conditioned in the grant of permission.** This is reflected in the text in Chapter 7, Section 7.5.1.3 'Leisler's bat' pp 94-95 'In the absence of any mitigation, the potential effects of bat roost loss on Leisler's bat would be significant, although in light of the small number of bats roosting in the building, the scale of impact would be at the local level only. Potential impacts of loss of this roost would not have an impact on the conservation status for this species as they are widespread in the area, and across Ireland, and are a species listed as "Least Concern." I wish to clarify that although the plural is used in reference to the roost, only a single bat was observed roosting in Building 6C.

21. As quoted above, in Chapter 7 (Biodiversity) of the Consolidated EIAR (at page 69), 'Populations of this species have shown to be increasing in recent years.' It is further stated that 'Given the high suitability of the site for this species, the Leisler's bat roost identified, and the increasing population trends, particularly in the south west of the country, the local population of Leisler's bat is valued as being of local importance (higher value).' Further, as noted in section 7.3.3.5 of the EIAR, the Leisler's bat population within the zone of influence of the project was valued as being of local importance (higher value), but not of county, national or international importance."

78. It's true that, as the applicants complain, Mr Clarke isn't an "independent" expert in the sense of the caselaw, that is principally someone wholly independent of the developer.

79. If expert opinion evidence is not independent, the fact that it is uncontradicted is not determinative because it may be inadmissible or of minimal weight (*Duffy v. McGee* [2022] IECA 254 (Unreported, Court of Appeal, Collins J., 7th November 2022) para. 25; *Donegal County Council v. Planree Limited* [2024] IECA 300 (Unreported, Court of Appeal, Butler J., 18th December 2024) paras. 141-147). The problem with the applicants' argument on that basis is that we are not talking about expert evidence in the legal sense here. A professional can comment as to the adequacy of the work she actually carries out. The fact that it may not count as independent opinion evidence doesn't make it inadmissible. A scientist can give evidence about their own work without being an independent expert in the sense of the caselaw. Thus an applicant is liable to be found not to have discharged the burden of proof if evidence of this nature isn't contradicted, even if one applies a degree of caution and circumspection to the obvious context that a developer's deponents are defending their own work.

80. Holland J. said in *Environmental Trust Ireland v. An Bord Pleanála* [2022] IEHC 540, [2022] 10 JIC 0305 (Unreported, High Court, 3rd October 2022):

"102. It is, in my view, an all-but-inevitable commonplace that in planning and environmental judicial review of the grant of planning permissions and other licenses, the application for the permission or license will have been prepared with the assistance – indeed largely by – experts whose affidavits later feature in the developer's opposition in the judicial review. I am unaware of any case in which their evidence has been excluded on that account – and in fairness ETI does not say it should be – or deprived of weight on that account save for specific reason. It is true that, inevitably, such experts generally 'stand over' on affidavit their own work in making the relevant application. But it should be remembered – indeed emphasised – that experts making or assisting planning applications owe, to the Board and the public, similar duties of independence and professionalism to those they owe to the

courts. So, their 'standing over' in judicial review work product of that independence and professionalism should be no surprise. The delay and expense in requiring developers to generally retain a new expert team to defend a judicial review - inevitably on short notice - would not be proportionate or justifiable.

103. It is, of course, entirely open to a party to impugn the credibility evidence of expert evidence by reference to alleged conflict of interest or lack of independence but, as RAS Medical stipulates, that must be generally done by cross-examination of the expert whose credibility is impugned. That did not occur here. On affidavit and absent such cross-examination it is impossible, at least generally, to ascribe greater or lesser weight to the evidence of any expert as compared to another."

81. To repeat, the objection just means that Mr Clarke's *opinion* evidence about matters not within his direct knowledge isn't admissible. It doesn't mean that all of his evidence isn't admissible. Like any witness, he can give evidence as to what he actually did and the logical and scientific basis for that. That isn't *opinion* evidence in the sense of the caselaw. On the contrary, it is permissible evidence and is uncontradicted here.

82. There is perhaps an academically interesting question as to whether he can say that the board would not have decided the matter differently. Is that merely a logical consequence of his own evidence, or an impermissible opinion about someone else's work?

83. On the facts here it is not necessary to rely on those averments. But if I had to rely on them I would construe them as merely stating the logical consequence of his admissible evidence about his own work, not as impermissible speculation. When Mr Clarke says that the board would have decided the matter the same way, what he means is that the science was robust and covered the scenario of a roost being in place as of the date of execution of the permission, so that a reasonable decision-taker properly directing itself to the science would not have had any reason to do anything differently had it known of the existence of a roost when granting permission. That is just a permissible statement of a logical consequence of the factual situation, not impermissibly opining about matters that are not established factually. But we can class that conclusion as *obiter* because I don't need to rely on such statements.

Application of the law to the facts

84. The critical features of the situation here are as follows:

- (i) Bat behaviour involves frequent roost swapping, with the scientific material suggesting roost swapping every two to ten days for Leisler's Bat. Thus the only valid approach to identifying impacts on bats is to look at the potential roost features overall rather than place any undue emphasis on any one confirmed roost at a given time, especially a roost for only one bat.
- (ii) The bat surveys were not confined to established roosts, which would have been a defective methodology. They complied with industry guidelines which involved looking at PRFs, and hence the total roost resource. Thus the omission of reference to a particular roost by the inspector does not, in the circumstances, affect the overall conclusion.
- (iii) The conclusion in the consolidated EIAR of "no likely significant residual negative effects on biodiversity, following the implementation of mitigation measures that will be undertaken" was reached taking into account the existence of the Leisler's Bat roost with one bat in Building 6C and having regard to the mitigation measures and compensation measures set out in the EIAR, which were accepted by the inspector as justifying the conclusion of "no significant adverse long-term impacts anticipated" with respect to bats.
- (iv) The mitigation measures in the EIAR, notwithstanding a lack of finding of roosts at the time of the original surveys, clearly imply and envisage the potential for establishment of roosts between the surveys and the carrying out of the development. In one sense that's exactly what happened as of March 2022. So there isn't anything unanticipated here.
- (v) The applicants participated in the process and had available to them the consolidated EIAR. This wasn't a case where the applicants or the public generally were prevented from participation on this issue.
- (vi) Neither the applicants nor anybody else made any point about the single bat roost or challenged the conclusion of no significant residual impacts.
- (vii) Compliance with the mitigation measures in the EIAR, including the completion of checks for roosting bats in buildings BB 1B, BB 4A-D, BB6A-B and BB 7 pre-construction, has been conditioned as binding pursuant to condition 5, paras. (d) and (e) of the data centre permission.
- (viii) A finding of no material impact of the error flows in any event from the uncontroverted status of the developer's evidence on the issue.

- (ix) The developer's evidence, which is uncontradicted, that bats are highly mobile implies that a single roosting bat in March 2022 will almost certainly not be at its original location if the development were to happen now. All one can say about whether any other bat is using the crack in the wall as a roost is that that is a potential situation. Such a scenario makes it unreal to consider quashing the permission because amongst many locations identified with roosting potential, one roost was inadvertently overlooked by the inspector three years ago.

85. In the light of the foregoing, the conclusion that the inspector's error was not material is irresistible on the facts. The possibility of roosts subsequent to the initial surveys was built in and accounted for, so whether a particular roost existed pre-permission or not was neither here nor there. The fact that subsequent roosting happened doesn't change the adequacy of the mitigation measures, even if the inspector accidentally overlooked the March 2022 findings when referring to the lack of confirmed roosts.

86. The applicants in submissions have erected an elaborate inverted pyramid of European and domestic legal authority, but on these facts, this implausible construction is built on foundations of sand. The first premise is the false one insofar as it assumes that there is anything impermissible about the developer introducing new factual evidence to show that the error is harmless. The applicants ignore the facts by two misconceived moves in particular. The first manoeuvre is by saying that the inspector implicitly must have thought it was significant that there was a distinction between potential and actual roosts. The problem there is that of course it is a point to note and certainly would have affected the way the report was phrased – but that isn't the test. The existence of an actual roost would definitely affect the language of the report, but it is not decisive to the actual outcome of the permission application for the reasons spelled out in detail above. The applicants' second move is to slap the clichéd label "forbidden territory" on Mr Clarke's affidavit. But it isn't forbidden territory. Developer's evidence in the proceedings – not just the consent process – to show harmlessness was expressly allowed and envisaged by the CJEU in *Altrip*. The whole doctrine of harmless error couldn't work otherwise – if the court can't receive new evidence and if the only person that can evaluate them is the decision-taker, who by definition didn't do so, then all errors are potentially fatal no matter how apparently irrelevant. The cry of "forbidden territory" has a sort of superficial plausibility but it disintegrates on even cursory contact with the CJEU's jurisprudence. Anyone who needs a reminder can be directed to para. 53 of *Altrip* (emphasis added):

"Therefore, the new requirements thus arising under Article 10a of [the EIA] directive mean that impairment of a right cannot be excluded unless, in the light of the condition of causality, **the court** of law or body covered by that article is in a position to take the view, without in any way making the burden of proof fall on the applicant, but **by relying, where appropriate, on the evidence provided by the developer** or the competent authorities and, more generally, on the case-file documents submitted to that court or body, **that the contested decision would not have been different** without the procedural defect invoked by that applicant."

87. The most important question is of course what is going to happen to our bat in Building 6C or another bat, if any, at the crack-in-the-wall roost, if a roost still exists at that location. The answer is, as stated in the EIAR (compliance with which is now conditioned): "If bats are present, then they will require exclusion from the property over several nights or, if possible, bats present will be physically removed by hand by a licensed bat specialist and placed in a bat box and then released in the evening after capture". That process was accounted for in the assessment of impacts, so observing an actual roost doesn't introduce any new factor that hadn't been already considered and taken into account. So the whole problem falls into the category of harmless error – something that one can be satisfied about as not making a difference, to a level that excludes all reasonable doubt.

88. To summarise the outcome as measured against the relevant points made by the parties and set out in the statement of case I would comment as follows.

89. As regards the notice party's position:

- (i) It is relevant that comprehensive mitigation measures were included in the EIAR and are required to be implemented on foot of conditions attaching to the data centre permission. The EIAR concluded there would be no significant residual effects on biodiversity.
- (ii) It is also relevant that the public was not misled as the information was available in the amended EIAR.
- (iii) As regards the suggestion of the existence of roosts which would not be affected or disturbed by the proposed development, this is irrelevant for present purposes and there is no evidence of the inspector having made an error regarding these.
- (iv) The inspector's factual error falls into the category of harmless error which was immaterial in the overall context of the inspector's consideration of the issues related

to bats. The error did not affect the substance of the inspector's (or the board's) overall assessment of biodiversity issues, including in relation to bat fauna, as part of the EIA. Given that the inspector and the board accepted the conclusion in the EIAR, which was reached in the knowledge of the existence of the single Leisler Bat roost in Building 6C which would need to be removed as part of the development, the board's decision would have been no different had the inspector not made the factual error, as recorded on p. 74 of her report.

- (v) I agree that the immateriality of the error in the overall context of the assessment, taken as a whole, does not require any intervention on the part of the court. The question of the board's decisions being quashed on the basis of this immaterial error ought not to arise.
- (vi) It is also relevant that none of the applicants (or any other party) took issue with the conclusions in the EIAR of "no likely significant residual negative effects" on, *inter alia*, bat fauna.
- (vii) I agree that, given the inspector's conclusion in the same section of her report that "bats would gradually habituate with no significant adverse long-term impacts anticipated", it can be concluded that the inspector's conclusion would have been no different had she not made the factual error in question.

90. As regards the applicants' position:

- (i) Bat roosts are strictly protected by virtue of art. 12(1)(d) of the habitats directive. I agree that any destruction of a bat roost is, by definition, a significant environmental impact. However, we need to bear in mind that destruction occurs at the point of execution of the permission and not at the point of grant of the permission. The critical point is that any assessment that fails to take into account the likely mobility of species between the surveys at the time of application and the situation as of date of execution would be a defective and inadequate assessment. Here, the assessment was carried out on the proper basis. Therefore the mitigation measures allow for bat mobility across this period – there isn't a significant or material distinction in that methodology between a potential roost and a roost observed in surveys. As the notice party says, "all of that was factored in".
- (ii) I agree that the size of the bat roost is irrelevant as a matter of European law at the level of principle, but that isn't relevant since I amn't placing any reliance on that.
- (iii) The argument that that the board did not consider the environmental impact of the destruction of the bat roost has a dry literal sense in which it could be said to be not entirely incorrect but is an example of the point that "the letter killeth but the spirit giveth life". Law needs to be primarily focused on substance rather than form, and in substance the board did consider destruction of actual roosts insofar as it considered potential roosts, and by providing for mitigation measures which envisaged bat mobility as between roosts as of the date of the execution of the permission. Furthermore that phrasing is disingenuous because it definitionally excludes the doctrine of harmless error altogether. Omission to consider something is simply branded as an utterly fatal jurisdictional failure even if the something was in fact considered in substance.
- (iv) The applicants' argument that the board has correctly conceded because its decision is indefensible in the light of the acknowledged error is just assertion and not a reason to preclude the notice party from defending the permission.
- (v) The applicants are totally incorrect to assert that the notice party can have no basis for the statement that the error is harmless. The developer has set out the basis on affidavit, which the applicants haven't contradicted.
- (vi) The argument that the notice party does not know what weight the board would have put on the certain destruction of a strictly protected roost is a misconception. That isn't the test. If it was the test, it could never be satisfied where the board wasn't defending the decision and thus wasn't putting in evidence. The test is whether the court can be satisfied as to the exclusion of reasonable doubt regarding a different outcome.
- (vii) The argument that the phrase "properly considered" is meaningless when the notice party is not the decision-maker is also a misconception. The question of how to properly consider the decision is one for the court.
- (viii) The argument that any breach of art. 12 of the habitats directive is significant is correct. But that doesn't get the applicants anywhere, because the whole point of the present discussion is that the error in the inspector's report doesn't in itself give rise to any breach of art. 12 of the directive for the reasons I have set out (by reference to the matters being considered in this module).

- (ix) The argument that the question of materiality is for the board and not the notice party is misconceived. Whether a mistake is harmless (or immaterial – same thing) is a question for the court.
- (x) The argument that “The Honourable Court knows the view of the Board and should not lightly interfere with it” fails to account for the Supreme Court’s decision in *Ballyboden*. The fact that a decision-taker concedes does not hamper a notice party from defending the decision or create some sort of higher threshold in itself.
- (xi) As regards the argument that “The standard the Notice Party has to reach is to establish that the decision maker would have definitely made the same decision absent the error”, I have dealt with this above. Stirring phrases like “definitely” carry the erroneous implication that a trivial or academic possibility is fatal to a permission. The issue is whether reasonable doubt can be excluded – and it can be here for reasons set out above.
- (xii) As regards the argument that, in accepting the conclusion of the EIAR, the board was unaware that the proposed development would result in the destruction of a strictly protected bat roost and thus that the “acceptance” was based on a fundamental mistake as to fact, the problem for the applicants is that the mistake wasn’t “fundamental” given the precautionary nature of the approach taken. The logic of the decision which allowed for the destruction of potential roosts inherently encompassed the destruction of roosts that were actually in use as of the date of execution of the permission.
- (xiii) As regards the argument that the carrying out of an EIA is a matter for the competent authority and not the notice party, that’s correct but it doesn’t get the applicants anywhere. The question of whether an error in the EIA would have affected the result is one for the court which can draw on evidence from the developer.
- (xiv) The argument that the error has resulted in significant environmental impact – a breach of art. 12(1)(d) – not being considered by the board is a misconception. If, as here, the error would not make any difference, then by definition it doesn’t in itself lead to a breach of art. 12. Whether there is a roost or a potential roost can’t be an “inflection point” if the analysis and mitigation measures provide for both. The applicants in effect just define “inflection point” in a way that means that any error is on the wrong side of it.

91. Overall, the applicants’ arguments prove too much. A doctrine of harmless error that depended on the decision-taker analysing what the decision would have been without the error is no doctrine at all – that is an impossible standard.

Summary

92. The situation is simple – far simpler than the elaborate legal infrastructure erected by the applicants would suggest. The central dynamic is as set out by the CJEU in a single paragraph in *Altrip* at para. 53. I have applied that here and the decision has come through intact. In a piece of summarisation that is both beautifully phrased and devastatingly lethal, the notice party in oral submissions utterly demolishes the applicants’ case in just six words: “**the potentiality necessarily includes the actuality**”. *Potential* roosts were accounted for in the surveys, the assessments and the conditions – whether any were *actually* occupied at any given time doesn’t make any difference to the outcome in terms of the issues being addressed in this module. That’s the point – anything else is just commentary and detail.

93. In *Eco Advocacy v. An Bord Pleanála* [2025] IEHC 15 (Unreported, High Court, 15th January 2025) (para. 58(83)), I noted that the developer there destroyed the applicant’s principal case in ten lines of transcript – their counterpart here has smashed even that record with an aphorism that is going to stand in the annals for some time. This illustrates the reason why opposition to time-limited hearings generally or the expedited procedure in particular is so utterly wrong-headed. What wins cases is articulating a good point, not articulating a large volume of words over a large volume of pages of transcript. I understand the natural desire to keep doing what one has historically been comfortable in doing, but the price of a fossilised, conservative, inflexible mind-set is prohibitively high when it comes to dealing with a situation whereby limited resources require a rationing of court time. The issue isn’t quantity of submissions – to complain about limiting that is squawking down the wrong tree. The issue is quality of submissions. Let nobody say that compact and time-limited advocacy equates to ineffective advocacy.

94. Whether, and to what extent, the applicants can make headway on the derogation licence issue or any other issue is for another day and for other parties to join in considering.

95. For a certain type of observer, the fate of a single roost containing a single bat will be viewed as a trivial basis for a debate about the validity of the planning permission. That is perhaps understandable at a superficial level but is a misconception. Obviously the issue isn’t trivial if you

are the bat. Nor is the protection of species and habitats generally a trivial matter. Nor is compliance with EU law. W.B. Yeats anticipated the attitude of the trivialisers in "September 1913" when he described those who "add the halfpence to the pence/ And prayer to shivering prayer". A rather nobler attitude was articulated by Kenneth Clark (also as it happens, a Yeats enthusiast), who asked, standing in the baroque, high-ceilinged, Naval Hospital in Greenwich: "What is civilisation? A state of mind where it is thought desirable for a naval hospital to look like this and for the inmates to dine in a splendidly decorated hall" (*Civilization* (London, BBC and John Murray, 1969) p. 215). He went on to suggest that accountants would never permit such superfluity of effort nowadays (p. 220). The fact that all parties in the present proceedings, and particularly the developer's professional and ecological advisers, have concerned themselves so assiduously with the outcome for our bat and its roost shows that, despite everything, as far as the state of civilization in this country is concerned, all is not yet completely lost.

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

- (i) The order for modularisation has the effect that the impact of the lack of a prior derogation licence on the materiality of the error is an issue for Module II. The present module has to proceed on the assumption that the decision is valid other than in respect of the matters pleaded at sub-grounds 91 to 93.
- (ii) A decision should not be quashed for error (including in application of EU law) if the error was harmless and did not materially affect the result.
- (iii) The determination of whether the error would have affected the result is one for the court, which can act on evidence in the proceedings from an interested party such as a developer.
- (iv) The test is that the court should exclude a reasonable possibility that the error would have made a difference to the actual outcome.
- (v) An applicant has the burden to establish the existence of error, but the successful demonstration of error shifts the onus. Therefore the onus of proof that a demonstrated error was harmless lies not on an applicant but on the party asserting harmlessness.
- (vi) The determination of whether a particular error would have made a difference must also be carried out by reference to the material before the decision-taker, considered as a whole, as well as to such further material as the court may receive in the proceedings.
- (vii) The question of whether public participation was materially compromised is also relevant.
- (viii) Where, by contrast, the error would have had a material effect on the outcome, any breach of EU law should normally be remedied by *certiorari*. Any after-the-event assessment which would allow a permission to stand should only be permitted in exceptional circumstances.
- (ix) Where the error relates to purely domestic law, then even if it would have had a material effect, the court has a wider discretion, although is not fully at large.
- (x) Applying that here, bearing in mind the highly mobile nature of the bats concerned, the comprehensive roost resource methodology that adopted a precautionary approach to both potential and actual roosts, the availability to the public during the process of the amended EIAR which had the latest survey material, the lack of any submissions from the applicants or anyone else on this issue, the comprehensive mitigation measures, the fact that these mitigation measures have been conditioned in the permission granted, the logic of the inspector's conclusions and the uncontested evidence from the developer's professional adviser, reasonable doubt as to whether the actual outcome would have been different without the error has been excluded.

97. In concluding, I can note that as far as the parties appear to be aware this case is a modest piece of recent legal history in that no previous developer in the State has succeeded in demonstrating as misconceived an objection that the board was prepared to concede.

Order

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

- (i) the proceedings be dismissed insofar as concerns Module I (sub-grounds 91-93 insofar as they are premised on the other grounds not having merit);
- (ii) the matter be listed on Monday 31st March 2025 for mention to arrange the processing of Module II (all remaining grounds, subject to contrary submission) including by way of directions as to dates for filing of further papers);
- (iii) subject to contrary submission within 7 days, there be no order as to the applicants' costs in Module I;

- (iv) subject to contrary submission within 7 days, the notice party's costs be reserved, on the basis that such costs if awarded would apply by way of set-off only (not leaving a positive balance against the applicants at a level that would be prohibitively expensive); and
- (v) the perfection of the order be postponed pending the outcome of the final module.