Judgment in the High Court of Justice in Northern Ireland

Queen's Bench Division (Judicial Review)

before Mr Justice Humphreys

Delivered: 21 October 2021

Reference: HUM11648

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY ABO WIND NI LIMITED & ENERGIA RENEWABLES COMPANY 1 LIMITED FOR JUDICIAL REVIEW AND IN THE MATTER OF THE CHIEF PLANNER'S UPDATE 7

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Stewart Beattie QC and Philip McEvoy (instructed by TLT NI LLP) for the Applicants
Paul McLaughlin QC and Michael Neeson (instructed by the Departmental Solicitor's Office) for the Respondent

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HUMPHREYS J

Introduction

[1] The applicants for judicial review in these proceedings are two limited companies which operate in the renewable energy industry in Northern Ireland. The respondent is the Department for Infrastructure ('the Department').

[2] Periodically the Department publishes 'Chief Planner's Updates' which provide guidance, news and information to the Heads of Planning in each of the 11 councils in Northern Ireland.

[3] On 16 December 2020 the Department published Chief Planner's Update 7 ('CPU 7') which, *inter alia*, provided advice and guidance in relation to Battery Energy Storage Systems ('BESS').

[4] The applicants contend that the relevant part of CPU7 was wrong in law and is also vitiated on a variety of other grounds.

Background

[5] The evidence before the court revealed that the first applicant is a subsidiary of ABO Wind AG, a world wide developer in the renewables market. It has already invested significant sums in the Northern Irish market and proposes to bring forward projects with an estimated value of some £300m. The second applicant is part of the Energia group which currently provides around 20% of the renewable electricity in Ireland.

[6] BESS are a recent addition to the technology which is involved in renewable energy projects. By their very nature, wind and solar energy are produced intermittently and therefore facilities to store excess energy which is produced at time where supply outstrips demand represent a valuable addition to the infrastructure in this field.

[7] In the year to September 2020 some 47.7% of the total electricity consumption in Northern Ireland was generated from local renewable sources, ahead of the 40% target which had been set by the Strategic Energy Framework in 2010. The United Kingdom is now committed to 100% reduction in greenhouse gas emissions by 2050 and this move towards a net zero carbon emission economy also features as a key theme on an all Ireland basis.

[8] In simple terms, BESS work by absorbing electricity, converting it to chemical energy and storing it until such times as supply is required by the grid, at which time it is re-converted to electrical energy. Their use will play an important part in the progress towards meeting renewable energy targets and ensuring continuity of supply.

[9] In CPU7, the Chief Planner advised that such development fell within the meaning of 'electricity generating station' and it is this advice which gives rise to the core application for judicial review.

The Legislative Context

[10] The existing two tier system of planning control in this jurisdiction was introduced by the Planning Act (NI) 2011 ('the 2011 Act'). It obliges the Department to formulate and co-ordinate policy on a regional basis whilst councils create local development plans and determine local planning applications.

[11] Section 25 of the 2011 Act provides:

> *"(1) For the purposes of this Act, a development belongs to one of the following categories –*
>
> *(a) the first, to be known as "major developments"; and*

(b) the second, to be known as "local developments."

(2) The Department must by regulations describe classes of development and assign each class to one of the categories mentioned in paragraphs (a) and (b) of subsection (1).

(3) But the Department may, as respects a particular local development, direct that the development is to be dealt with as if (instead of being a local development) it were a major development."

[12] Section 26 requires an applicant for planning permission for a major development to consult with the Department who will determine if the proposed development is one of regional significance.

[13] Section 27 sets out the requirement for pre-application community consultation in the case of major developments. Section 50 requires either the council or the Department to decline a planning application when the requirements of section 27 have not been complied with.

[14] Section 29 permits the Department to 'call-in' planning applications:

"(1) The Department may give directions requiring applications for planning permission made to a council, or applications for the approval of a council of any matter required under a development order, to be referred to it instead of being dealt with by councils.

(2) A direction under subsection (1) –

(a) may be given either to a particular council or to councils generally; and

(b) may relate either to a particular application or to applications of a class specified in the direction."

[15] Sections 68 and 72 give power to the councils and the Department respectively to modify or revoke any planning permission already granted. In the case of a council modification or revocation this must be confirmed by the Department under section 70. In either case a revocation or modification may be referred to the Planning Appeals Commission ('PAC').

[16] The obligation to make regulations under section 25(2) gave rise to the Planning (Development Management) Regulations (NI) 2015 ('the 2015 Regulations'). Regulation 2 prescribes the classes of development belonging to the category of 'major development' as being those in Column 1 of the table in the

Schedule, where the threshold in Column 2 was met or exceeded. All other development is categorised as local development.

[17] There are nine classes of development belonging to the category of major development. The second of these is 'Energy Infrastructure' and the first sub-class is 'Electricity Generating Stations.' The major development threshold is met when the development consists of the *"construction of an electricity generating station where its capacity is or exceeds 5 megawatts."* 'Storage' is the third sub-class of Energy Infrastructure and its thresholds are:

> *"1. Installations for the storage of petroleum, petrochemical, chemical products or natural gas where the storage capacity of the facility is expected to be 30,000 tonnes or more.*
>
> *2. Installations for the underground geological storage of petroleum, natural gas, carbon dioxide or compressed air energy storage."*

[18] The ninth class is 'All Other Development', being described as:

> *"Any other development not falling wholly within any single class of development described in Parts 1 to 8 above."*

The threshold for class 9 is met where it is:

> *"(a) development that comprises 5,000 square metres or more gross floor space; or*
>
> *(b) the area of the site is or exceeds 1 hectare."*

[19] Any planning officer tasked with considering an application for permission must therefore apply the rules and thresholds in the Schedule to the 2015 Regulations in order to determine whether the development is major or local. If the development falls wholly within one of the classes 1 to 8, then the next question is whether the threshold is reached. If not, then the development is local. If the development does not fall within classes 1 to 8, then it is treated as 'all other development' and the threshold based on either the floor size or the area of the site is applied. If neither of these is met, the development is local.

[20] The scheme of the Schedule does not admit of any discretion on the part of the decision maker. A development is either major or local and must be classified according to the taxonomy in the Regulations. If, for instance, a development comprises both retail and housing elements, it could not be said to fall *"wholly within"* either class 6 (housing) or class 7 (retailing, community, recreation and culture). Accordingly, it must be treated as class 9 (all other development) and the relevant thresholds applied.

[21] All of this is subject to the important power vested in the Department by section 25(3) of the 2011 Act whereby it can direct that a particular local development be dealt with as if it were a major development.

The PAC Kells Decision

[22] In 2018, Kells BES Limited applied for planning permission for the development of a BESS facility at the Doagh Road, Kells, Co Antrim. The application was refused by Antrim & Newtownabbey Borough Council on the grounds of unacceptable detrimental impact on visual amenity and character of the area.

[23] This decision was appealed to the PAC and heard by an experienced Deputy Chief Commissioner, Trevor Rue. Kells Vocal, a local community group, appeared at the appeal hearing and adduced evidence.

[24] It was part of the case advanced by Kells Vocal that the development fell into Category 2 in the Schedule to the 2015 Regulations as it was an "electricity generating station." Given that its capacity was approximately 50 MW, this ought to be treated as a major development. This would trigger pre-application consultation requirements and call upon the Department to determine if the application was of regional significance. The parties accepted that if Kells Vocal were correct on this issue, the planning application was procedurally flawed and there would be no valid appeal before the PAC.

[25] The PAC handed down its decision on 27 November 2019. Mr Rue rejected the argument from Kells Vocal and stated:

> *"The appellant's grid expert explained at the hearing that electricity would enter the proposed facility direct from the adjacent Kells Substation, an important node into which electricity flows from many directions. It would be stored in chemical format in lithium-ion batteries and converted back to alternating current when required to meet demand. It follows that what is being proposed is not an electricity generating facility but a facility for storing electricity that was previously generated from a primary energy source such as coal, oil, gas or wind."*

[26] For this reason, the PAC held that the application was properly classified as local and therefore it had jurisdiction to hear and determine the appeal. Having considered the other issues raised by the parties, the PAC granted planning permission subject to conditions.

[27] Neither the council, Kells Vocal nor anyone else sought to challenge this decision by way of judicial review.

CPU7

[28] On 16 December 2020 the Chief Planner issued CPU7. Insofar as BESS are concerned, he put the matter in the following context:

> *"Following correspondence from several parties on this subject matter, the Department has been reviewing these types of developments and how they are processed in the planning system both here in Northern Ireland (NI) and across the other administrations. In particular, a query arose over whether such developments should be considered 'electricity generating.'*
>
> *You will be aware that the Planning Appeals Commission (PAC) recently granted planning permission for a BESS after concluding that it was not electricity generating and did not require EIA."*

[29] The document goes on to say that the government in England, Scotland and Wales has confirmed that electricity storage facilities are a form of generating station. He states:

> *"I wish to formally confirm that, for the purposes of planning in Northern Ireland, the Department considers that electricity storage development falls within the meaning of an 'electricity generating station.' This position is based on several factors including the operation of electricity storage systems; their classification in other jurisdictions; pre-existing Northern Ireland Legislation; and the legislative history of the Planning (Development Management) Regulations (NI) 2015 and consistency with the Electricity (NI) Order 1992."*

[30] CPU7 continues:

> *"I recognise that this is an unusual step and that the position involves a departure from the PAC decision which turned on the facts and evidential context of that particular case. However, the Department considers that there is a legitimate public interest in taking this approach and providing clarity for both councils and developers.*
>
> *I should highlight that this is not a legislative or policy change and is instead provided as clarification from the Department."*

[31] In practical terms, therefore, the Heads of Planning of the councils were being told that applications involving 'electricity storage facilities', including BESS, should be considered as 'electricity generation' within the meaning of the 2011 Act and 2015 Regulations.

Statutory Construction

[32] The Chief Planner did not rehearse the provisions of section 25 of the 2011 Act or the 2015 Regulations but it is clear that he had those matters in mind when issuing CPU7. The intention of the advice was to inform the Heads of Planning, and therefore the councils, of the Department's position that 'electricity storage facilities', such as BESS, should be treated as falling within sub-class 1 of class 2 of the Schedule to the 2015 Regulations and, provided the relevant threshold is met, be dealt with as major developments.

[33] The centrepiece of the applicants' judicial review challenge is that this advice or 'clarification' is wrong in law. The corollary of that position is the PAC decision in Kells was a correct interpretation of the 2015 Regulations.

The Precedent Value of PAC Decisions

[34] In his 'Planning Appeal Principles' (2020), William Orbinson QC devotes a chapter to the question of the precedent value of the decisions of the PAC. He emphasises firstly that the PAC is a specialist independent statutory appellate body, entrusted with the task of hearing appeals from planning authorities.

[35] The planning system in England & Wales is quite different but a similar question arose in *R v Warwickshire County Planning Authority ex p. Powergen* [1998] JPL 131 as to the weight to be attached to the conclusions of an Inspector hearing an appeal in that system. Simon Brown LJ held that the authority was obliged, after the appeal was determined, to accept this decision and co-operate:

> *"The Inspector's conclusion on the issue, because of its independence and because of the process by which it is arrived at, necessarily becomes the only tenable view on the issue … and thus is determinative"*

[36] In terms of precedent, George Bartlett QC, sitting as a deputy high court judge, said in *R v East Cambridgeshire District Council ex p. Rank* [2002] EWHC 2081 (Admin):

> *"In my judgment a previous appeal decision has a particular potential relevance to a determination by a local planning authority by reason of the fact that it is a decision of the Secretary of State or by an inspector with delegated powers. It is the decision of a superior authority, made in the reasoned*

> *decision letter of an expert inspector (or in the reasoned decision letter of the Secretary of State on the basis of a reasoned report by an inspector), in the light of representations from the appellant on the one hand and the local planning authority on the other. The planning judgment that it contains has a potential relevance in itself that derives not simply from the desirability of consistency but from the status of the decision-maker, the expertise of the inspector and the process that has enabled the judgment to be formed."* [para 17]

[37] Mr Orbinson concludes that the decisions of the PAC *"must either be accepted or respected, or be challenged through the courts."*

[38] In the instant case, no challenge was brought through the courts to the Kells decision of the PAC nor has any legislative amendment or new statement of policy been promulgated. The approach adopted by the respondent was, instead, to issue advice or clarification in the form of a CPU.

The Nature of BESS

[39] In their Order 53 statement, the applicants make the case that an *"'electricity storage development' cannot be said to generate energy; it merely stores energy."* In common with the PAC and the Chief Planner, the applicants are guilty of using loose and potentially misleading language. BESS do not store electricity at all; they store energy.

[40] In understanding the functionality of BESS, I have derived considerable assistance from the report of Dr Robert E Brown, Chartered Electrical Engineer. He explains the following fundamentals of a BESS device:

(i) It is capable of accumulating electrical charge when connected to a generation device;

(ii) When connected, it will accumulate electrical charge to the point of saturation;

(iii) It converts electrical energy to chemical energy and stores it;

(iv) When required, it converts chemical energy back to electrical energy and discharges it.

[41] As such, a BESS device is illustrative of the first law of thermodynamics or the principle of conservation of energy. When the battery is in 'discharge' mode, it is producing or generating electricity.

[42] BESS facilities have been described as 'quad-state', i.e. they can adopt any one of four states, viz:

(i) When connected to an electrical charge generation device, a BESS device will accumulate electrical charge, i.e. it is in a 'charge' state;

(ii) A BESS will accumulate electrical charge to the point of saturation, i.e. the 'saturation' state;

(iii) A BESS will discharge electrical charge when connected between two separate points of an electrical conductor. i.e. the 'discharge' state; and

(iv) The BESS may fully discharge and then be in its 'depletion' state.

It is only when in the discharge state that the BESS acts as an electricity generation device.

The Respondent's Approach

[43] Mr Kerr, the Chief Planner, has sworn two affidavits in which he explains how the issue of BESS came to his attention and the basis upon which he issued CPU7. He describes how there was *"uncertainty within the industry and Councils about the correct interpretation of the Regulations"* prior to the issue of his advice.

[44] In fact, the evidence reveals that there was no such uncertainty. All BESS applications prior to July 2020 had been treated as local development and no direction had been given by the Department pursuant to section 25(3) to have these treated as major development. In August 2019 the respondent had received an email communication from the Kells Vocal group, attaching their statement of case, and asserting that the BESS should be regarded as an electricity generating facility. The response was simply to the effect that the outcome of the appeal would be *"interesting"*.

[45] Having taken no steps at this time to consider the question, the issue came back to the Department's attention not because of any uncertainty or risk but because of questions raised by MLA's in the Northern Ireland Assembly which particularly focussed on the claimed disparity between the approach in this jurisdiction and that which prevailed in Great Britain. To address these questions, civil servants carried out research with other public bodies and with their counterparts elsewhere in the United Kingdom.

[46] Mr Kerr states that the Department *"ultimately disagreed with"* the PAC decision in Kells and found that it ran counter to the approach adopted in other jurisdictions. He formed the view that *"energy storage development which had a capacity for electricity generation from stored energy fell within the meaning of 'electricity generating*

station.'" He advised the Heads of Planning of the local councils of this position at a meeting of the Strategic Planning Group which took place on 7 July 2020.

[47] Mr Kerr then briefed the Minister for Infrastructure at a meeting on 9 July 2020 and advised her of the view which he had formed. The Minister determined that it would be appropriate to await the formal response of the Department for the Economy ('DfE') and the Utility Regulator prior to issuing any formal advice.

[48] On 1 July 2020 Mr Kerr had asked a Mr Byrne of the DfE whether battery energy storage systems were considered as generating stations which require an 'Article 39 Consent' (a reference to the relevant article in the Electricity (NI) Order 1992) ("the 1992 Order"). In its response of 23 July the DfE stated:

> *"The Department takes the view that plant that can export electricity is producing electricity and in terms of the scope of Article 39 such a facility can be regarded as a 'generating station.'"*

[49] Article 39 of the 1992 Order prohibits the construction, extension or operation of a generating station with a capacity of 10 MW or more without a consent from the DfE.

[50] A similar query was raised with the Utility Regulator on 9 July 2020 in relation to the requirement to hold a licence from the Regulator for the generation of electricity. In reply it said:

> *"The Utility Regulator has decided to issue electricity generating licences to battery storage applicants who meet the criteria outlined in the relevant legislation."*

[51] The 'relevant legislation' is Article 10(1)(a) of the 1992 Order which provides:

> *"The Authority may grant a licence authorising any person … to generate electricity for the purpose of giving a supply to any premises or enabling a supply to be so given."*

[52] In his evidence, Mr Kerr has stated that he considered he was entitled to consult with these other bodies and take account of their approach when giving advice to councils and others relating to the 2015 Regulations.

[53] The Chief Planner prepared a submission for the Minister on 23 September 2020 which advised of the intention to issue a CPU to the Heads of Planning

[54] Mr Kerr determined that consultation with the renewable energy industry was not required on the basis that the proposed CPU was advice or guidance rather than any change in policy or amendment to existing legislation.

[55] However, the Chief Planner did receive correspondence in October and November 2020 from Energy Storage Ireland stating that there had been a change in approach by a number of councils in that BESS applications were being returned to developers on the basis statutory procedures had not been complied with. This was described by that entity as a *"significant change in policy at local council level and a departure from the position that had previously been adopted."* The Kells PAC decision was referenced as was the most recent legislative change in England. Energy Storage Ireland stated that consultation was required before any formal change in existing policy. In his reply, Mr Kerr stated that guidance would be issued within days but this would represent clarity around interpretation rather than any change in policy, reflecting the conclusion that *"electricity storage was a form of electricity generation."* Again, it must be recognised that this use of language was, at best, confusing.

[56] On 3 December 2020 a briefing paper went to the Minister seeking her agreement to the publication of CPU7. It noted that the Update *"may have an impact on existing BESS permissions."* Legal advice had been sought and obtained by this stage from both the Departmental Solicitor's Office and senior counsel. It records:

> *"Senior counsel has advised that he has considered the issue of statutory construction and concluded that BESS development does fall within the meaning of an 'electricity generating station.' He also advised that the recent decision of the PAC on the same issue is likely to be incorrect."*

[57] The advice from counsel was the matter could be addressed on an interim basis by issuing the guidance pending legislative change. This was not, however, accepted by Mr Kerr who expected that his advice would resolve the BESS issue across the planning system.

The Position in Other Jurisdictions

[58] In arriving at the conclusion which ultimately gave rise to CPU7, Mr Kerr had regard to a number of papers and documents emanating from other jurisdictions.

[59] Ofgem and the Department for Business, Energy and Industrial Strategy (BEIS) published a 'call for evidence' in November 2016 entitled 'A Smart, Flexible Energy System', seeking the views of energy industry players and consumers as to how the energy system could be made smarter and more flexible. This identified the absence of a definition of 'storage' in legislation and the consequent lack of clarity on the regulatory process. At this stage it said:

> *"For the time being BEIS, the Scottish Government and the Welsh Government agree that a storage facility is a form of electricity generating station."* [emphasis added]

[60] A further paper was published by BEIS and Ofgem in July 2017 following the receipt of responses to the call for evidence. It stated that, when Parliamentary time allowed, the Government intended to amend the Electricity Act 1989 to include a definition of storage as a distinct subset of the generation asset class.

[61] Following on from that paper, the Chief Planner in England, Mr Steve Quartermain, published a Planning Update newsletter setting out the findings and reaffirming the position that storage facilities were a *"form of generating station"* and that such facilities will constitute a Nationally Significant Infrastructure Project (NSIP) if the criteria in section 15 of the Planning Act 2008 apply.

[62] For reasons which are quite unclear, and despite the fact that these legislative amendments took effect in December 2020, just prior to the issue of CPU7, Mr Kerr does not depose to any account having been taking of subsequent events in Great Britain. It cannot be the case that he was unaware of these developments, given that they were expressly referenced by Mr Smith of Energy Storage Ireland in his letter of 20 November 2020.

[63] No reference is made at all to the consultation launched by BEIS in October 2019 in which the Government changed its position and proposed 'carving out' storage (save for pumped hydro) so it would no longer be considered as a form of generating station subject to the NSIP regime. This decision was based on the evidence received during the consultation process. Ultimately, this led to the Infrastructure Planning (Electricity Storage Facilities) Order 2020, made on 4 November 2020 and coming into force on 2 December 2020, which amended the Planning Act 2008. The relevant parts of this Act now read:

> *"**14 Nationally significant infrastructure projects: general***
>
> *(1) In this Act "nationally significant infrastructure project" means a project which consists of any of the following –*
>
> *(a) the construction or extension of a generating station…*
>
> ***15 Generating Stations***
>
> *(3D) The construction or extension of a generating station is not within section 14(1)(a) to the extent that the generating station comprises or (when constructed or extended) is expected to comprise an exempt electricity storage facility*
>
> *(6) In this section –*

> *"electricity storage facility" means a facility which generates electricity from energy that –*
>
> *(a) was converted from electricity by that facility, and*
>
> *(b) is stored within that facility for the purpose of its future reconversion into electricity;*
>
> *"exempt electricity storage facility" means an electricity storage facility which is not a pumped hydroelectric storage facility;*
>
> *"pumped hydroelectric storage facility" means an electricity storage facility that stores the gravitational potential energy of water that has been pumped to a higher level so that its return to a lower level can be used to generate electricity."*

[64] There now exists a statutory definition of storage which reflects the conversion from electricity into energy which is stored for the purpose of future reconversion into electricity. Any such facility in England, which is not a pumped hydroelectric storage facility, is exempt from compliance with the NSIP requirements associated with generating stations.

[65] At the same time, the Electricity Storage Facilities (Exemption) (England and Wales) Order 2020 came into force which removed the requirement for the statutory consent to generate under section 36 of the Electricity Act 1989 (the equivalent of Article 39 of the 1992 Order). Article 3 of the 2020 Order provides:

> *"(1) This article applies in the case of generating stations otherwise than in Wales or in Welsh waters which –*
>
> *(a) comprise, or (when constructed or extended) are expected to comprise, in whole or in part, an exempt electricity storage facility; and*
>
> *(b) exceed, or (when constructed or extended) are expected to exceed, the permitted capacity referred to in section 36(2)(a) and (b) of the 1989 Act or any capacity substituted for it which would otherwise apply.*
>
> *(2) Subject to paragraph (3), section 36(1) of the 1989 Act shall not apply to the generating station."*

[66] The legislative amendment also effects a clear policy objective which is to make the process of planning applications for BESS facilities more flexible and straightforward. This was explained in the response to the October 2018 consultation:

> *"This was on the basis that the planning impacts of the types of storage being deployed (predominantly batteries) are much lower than other forms of generation."*

[67] The contrast between the process adopted in England & Wales in relation to the proper planning treatment of the new technologies such as BESS and that in Northern Ireland could hardly be more stark. In England & Wales, consultation took place with all interested parties over a four year period through a range of consultation and response papers. Proposals were published and modified in light of the responses received and legislative amendments introduced to best reflect the planning needs and outcomes. In Northern Ireland, a senior civil servant published an 'update.' No consultation paper has issued, the views of the industry, of consumers and interest groups have not been sought. No legislative amendment has been proposed to accommodate important technology which may promote the attainment of renewable energy targets. Instead, this court is tasked, on an application for judicial review, to determine the proper treatment of such facilities within the existing Regulations.

[68] In 2007 the island of Ireland introduced the wholesale Single Electricity Market (SEM) which was replaced in 2018 by the Integrated Single Electricity Market (I-SEM). As such, the treatment of BESS in the other jurisdiction on the island is of significance. The principal primary legislation in Ireland is the Planning and Development Act 2000. By virtue of section 176 of that Act, the Minister has power to make regulations identifying types of development which may have significant effects on the environment.

[69] The relevant regulations made thereunder are the Planning and Development Regulations 2001. Schedule 5 to these Regulations prescribes various classes of development for the purpose of section 176. Class 3(a) of Part 2 of Schedule 5 refers to:

> *"Industrial installations for the production of electricity, steam and hot water not included in Part 1 of this Schedule with a heat output of 300 megawatts or more".*

[70] There is no reference anywhere in the Schedule to energy storage or batteries. In two decisions of An Bord Pleanála made in 2019 concerning BESS facilities in Ballyglasheen, Co Tipperary and Barrettspark, Co Galway, it was confirmed that the proposed development did not fall within Schedule 5. In the Ballyglasheen case, the Inspector Mr Stephen Kay found:

> *"Specifically, the nature of the project is such that it does not generate power and therefore does not come within the scope of any of the classes of development set out in the Fifth Schedule…the proposed development is not a 'generating station' and would not therefore lead to conveyance of electricity from a generating station to a substation or from one generating station to another"*

[71] As a result, there was no requirement for Environmental Impact Assessment (EIA) screening. In the field of solar energy, the Irish High Court has confirmed that there is no EIA screening requirement since it is not expressly referenced in Schedule 5, and it does not produce heat and steam as well as electricity – see *Sweetman –v- An Bord Pleanála* [2020] IEHC 39 and *Kavanagh –v- An Bord Pleanála* [2020] IEHC 259. By analogy, it must be the case that BESS facilities would be similarly treated.

[72] It is evident that, despite the operation of the I-SEM, the Chief Planner chose not to familiarise himself with the treatment of BESS facilities in Ireland.

The Interpretation of the 2015 Regulations

[73] The starting point for any statutory interpretation exercise is the natural and ordinary meaning of words. A court should consider an enactment as a whole and per Bennion on Statutory Interpretation at 21.2:

> *"Given the presumption that the legislature does nothing in vain, the court must endeavour to give significance to every word of an enactment. It is presumed that if a word or phrase appears, it was put there for a purpose and must not be disregarded."*

[74] The applicants contend that the court must consider whether BESS development falls *"wholly within"* class 2 of the Schedule to the 2015 Regulations. If it does not, it is argued, it must fall into class 9.

[75] It is to be noted, however, that this is a somewhat different question to the one addressed in CPU7. It concludes that *"electricity storage development falls within the meaning of an 'electricity generating station'"* without reciting the provisions of the 2015 Regulations. In particular, it does not concern itself with the question as to whether BESS facilities fall wholly within class 2.

[76] There is no doubt that a BESS facility can, and does, generate electricity. Electricity is produced by the reconversion process described by Dr Brown.

[77] The natural and ordinary meaning of the word "wholly" is entirely, fully or completely. Do BESS facilities therefore fall entirely or completely into class 2?

[78] Some assistance can be drawn from Regulations made in England & Wales under the Energy Act 2013. Regulation 2 of the Electricity Capacity Regulations 2014:

> *"'storage facility' means a facility which consists of –*

> *(a) a means of converting imported electricity into a form of energy which can be stored, and of storing the energy which has been so converted; and*
>
> *(b) a generating unit which is wholly or mainly used to re-convert the stored energy into electrical energy."*

[79] This definition recognises that a storage facility carries out more than one task. It converts imported electricity into a form which can be stored; it stores the converted energy; and it re-converts the stored energy into electrical energy. In only one of these processes can it be said to be 'generating' electricity. Depending on demand, such a facility may not be called upon to generate electricity for some time. Applying the natural and ordinary meaning of all the words in the 2015 Regulations, a BESS facility does not fall wholly within any single class of development. It therefore falls within the "all other development" of class 9.

[80] Support for this conclusion can be derived from the sub-classes within class 2 of the Regulations. Sub-class 3 is headed 'Storage' and it includes *"installations for…compressed air energy storage."* Compressed air energy storage works by converting electrical energy into high-pressure compressed air which can be released on demand to drive a turbine generator to produce electricity. It is another means of storing energy for reconversion into electrical energy when required. This type of system also generates electricity but the Regulations treat it as part of the sub-class 'Storage' rather than the sub-class 'Electricity generating stations.'

[81] Given that BESS are a form of storage not expressly mentioned in the Regulations, it must therefore be the case that it falls outwith the class 2 of energy infrastructure.

[82] The comparisons with the position in England & Wales are odious for the simple reason that the statutory language is entirely different. Section 14 of the 2008 Act uses the words *"consists of any of the following…"* which have a quite different connotation than *"wholly within."* Indeed, the non-exclusive nature of the statutory language of the 2008 Act is emphasised by section 15(3C), as well as section 15(3D) set out above:

> *"To the extent that an exempt electricity storage facility forms part of a generating station…"*

[83] A storage facility may co-exist with an electricity generating station as part of the same proposed development. Such a development would consist of the construction of an electricity generating station for the purposes of section 14 of the 2008 Act but would not fall *"wholly within"* class 2 to the Schedule of the 2015 Regulations.

[84] The legislative wording in the 1992 Order relating to the requisite licences and consents for the generation of electricity is also quite different. Any generation of electricity for the purpose of supply requires a licence under Article 10. Any construction of an electricity generating station requires statutory consent under Article 39. There is no limitation that the generation or the station be 'wholly within' a particular class.

[85] Much of the difficulty in this case has arisen because the Chief Planner did not analyse the statutory provisions in this jurisdiction with sufficient rigour and thereby asked the wrong question. The correct question to ask was:

> *"Does a BESS development fall wholly within class 2 of the Schedule to the 2015 Regulations?"*

[86] Had he asked the correct question, the answer, for the reasons which I have given, must be 'no.' The consequence of that negative answer is that a BESS development falls into class 9 of the Schedule and is subject to the thresholds contained therein.

[87] As the applicants recognise, it remains open to the Department to give a direction under section 25(3) to have a given application treated as a major development.

[88] The application for judicial review therefore succeeds and my conclusion on the issue of statutory construction is sufficient to dispose of the matter. However, I did hear full argument on the other grounds and I propose to address these.

The *Wednesbury* Challenge

[89] The applicants contend that the decision is vitiated by the fact that the respondent failed to take into account, or give adequate weight to, material considerations including the Kells PAC decision. I have already set out the views of Mr Orbinson QC on this issue and it gives rise to important questions of constitutional principle as well as having practical effects.

[90] In *R (Bradley) –v- Secretary of State for Work and Pensions* [2008] EWCA Civ 36, the Court of Appeal in England & Wales considered whether the findings of the Parliamentary Commissioner for Administration ('the Ombudsman') were binding on the Secretary of State or whether it was open to him to reject the findings of maladministration.

[91] Sir John Chadwick referred to the decision in *Powergen* [supra] and *R –v- Secretary of State for the Home Department ex p. Danaei* [1997] EWCA Civ 2704 and set out the following principles:

(i) *the decision maker whose decision is under challenge (in the former case, the local highway authority; in the latter, the Secretary of State) is entitled to exercise his own discretion as to whether he should regard himself as bound by a finding of fact made by an adjudicative tribunal (in the former case, the planning inspector; in the latter, the special adjudicator) in a related context;*

(ii) *a decision to reject a finding of fact made by an adjudicative tribunal in a related context can be challenged on Wednesbury grounds;*

(iii) *in particular, the challenge can be advanced on the basis that the decision to reject the finding of fact was irrational;*

(iv) *in determining whether the decision to reject the finding of fact was irrational the court will have regard to the circumstances in which, and the statutory scheme within which, the finding of fact was made by the adjudicative tribunal;*

(v) *in particular, the court will have regard to the nature of the fact found (e.g. that the immigrant was an adulterer), the basis on which the finding was made (e.g. on oral testimony tested by cross-examination, or purely on the documents), the form of the proceedings before the tribunal (e.g. adversarial and in public, or investigative with no opportunity for cross-examination), and the role of the tribunal within the statutory scheme.* [para 70]

[92] The question therefore is whether the decision maker acted rationally in deciding to depart from or reject the findings of fact. There must be a reason, over and above the preference for one's own opinion, to reject a finding which had been made after an investigation carried out under statutory powers (see para 91 of the judgment).

[93] The issue came before the Supreme Court in *R(Evans) –v- Attorney General* [2015] UKSC 21 in which a journalist sought to judicially review the issue of a certificate by the Attorney General under the Freedom of Information Act. Prior to this, the Upper Tribunal had ruled that the material in question should be disclosed. A majority held that the Attorney General was not entitled to issue the certificate, although there were some points of distinction in their analysis. Lord Neuberger said:

> *"In order to decide the extent to which a decision-maker is bound by a conclusion reached by an adjudicative tribunal in a related context, regard must be had to the circumstances in which, and the statutory scheme within which, (i) the adjudicative tribunal reached its conclusion, and (ii) the decision-maker is carrying out his function. In particular, the court will have regard to*

> *the nature of the conclusion, the status of the tribunal and the decision-maker, the procedure by which the tribunal and decision-maker each reach their respective conclusions (e.g., at the extremes, (i) adversarial, in public, with oral argument and testimony and cross-examination, or (ii) investigatory, in private and purely on the documents, with no submissions), and the role of the tribunal and the decision-maker within the statutory scheme."* [para 66]

[94] In deciding that it was not permissible for the Attorney General to issue the certificate, Lord Neuberger was particularly influenced by the fact the decision of the Upper Tribunal could have been appealed; the Tribunal had a particular expertise; a full hearing with oral evidence and argument was conducted; the Tribunal delivered a reasoned decision; and the Attorney General had not received any fresh facts or evidence but simply disagreed with the outcome [para 69].

[95] From a constitutional perspective, Lord Neuberger identified two key tenets which were in play:

> *"First, subject to being overruled by a higher court or (given Parliamentary supremacy) a statute, it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive. Secondly, it is also fundamental to the rule of law that decisions and actions of the executive are, subject to necessary well established exceptions (such as declarations of war), and jealously scrutinised statutory exceptions, reviewable by the court at the suit of an interested citizen."* [para 52]

[96] This case is an example of the second tenet. The question to be determined is whether it was open to the respondent to, in the language of CPU7, depart from the decision of the PAC in Kells.

[97] Lord Kerr and Lord Reed agreed with Lord Neuberger's analysis. Lord Mance (with whom Lady Hale agreed) arrived at the same conclusion but found that departure from findings of fact or rulings on the law could occur but only where there was the "*clearest possible justification*" [para 130]. In the event he found that the Attorney General's disagreement had not been justified on reasonable grounds.

[98] I note that very recently the Supreme Court has, in *R(Majera) v Secretary of State for the Home Department* [2021] UKSC 46 held that the obligation on the Executive to obey the decisions of courts, including the First-Tier Tribunal, extends to situations where the order appears to be irregular or invalid, unless and until it is varied or set aside.

[99] Applying the factors set out by Lord Neuberger to the situation in this case, the following conclusions can be drawn:

(i) The statutory framework in Northern Ireland recognises the PAC as a specialist independent appellate body;

(ii) Its decisions are amenable to judicial review by any party with the appropriate standing;

(iii) It conducted a full and open hearing at which it heard evidence and submissions from all the relevant parties;

(iv) It specifically addressed the question of whether a BESS facility fell within the definition of 'electricity generating station' and gave a reasoned judgment;

(v) This matter was a question of law rather than fact or evaluative judgement;

(vi) The respondent was aware of the issue prior to the Kells hearing but elected not to challenge the PAC decision in court after it was delivered;

(vii) The Chief Planner consulted in private and took into account the views of some other agencies and in other jurisdictions;

(viii) The Chief Planner formed his own view and decided to depart from the PAC because he had formed a different opinion.

[100] I have already found that the Chief Planner asked himself the wrong question. Even if he had asked the correct one, it was simply not open to him, as a matter of constitutional propriety and *Wednesbury* rationality, to depart from the PAC decision. I recognise that the respondent is not bound by the PAC decision as a matter of strict precedent but I concur with the view expressed by Mr Orbinson that such decisions must either be accepted and respected or challenged through the courts. I would add that it is always open to the respondent to seek to amend legislation through the Assembly or to introduce new planning policies. Both those routes would ensure an appropriate level of industry and community wide consultation which can only ensure better decision making.

[101] There is also a real practical issue which underscores this principle. Following the issue of CPU7 as "guidance" or "clarification", planning officers of local councils are faced with a choice between following the PAC decision or CPU7. This is a recipe for administrative chaos since some may choose the former and some the latter, thereby creating a wholly unsatisfactory system of planning applications for BESS facilities based on location. It is only by seeking a determination from the courts in relation to the issue that clarity can be achieved.

[102] This free standing ground of judicial review therefore succeeds.

The Lack of Consultation

[103] The respondent determined that there was no duty to consult prior to the publication of CPU7. It had, of course, set about a fact finding process to determine how the matter was addressed in other jurisdictions and by other agencies but, since it regarded the matter as one of clarification rather than policy or legislative amendment, no duty to consult was identified.

[104] In *R (Plantagenet Alliance) v Secretary of State* [2014] EWHC 1662 (Admin) Hallett LJ set out the following principles:

> "(1) *There is no general duty to consult at Common Law. The government of the country would grind to a halt if every decision-maker were required in every case to consult everyone who might be affected by his decision. (Harrow Community Support Limited v. The Secretary of State for Defence [2012] EWHC 1921 (Admin) at paragraph [29], per Haddon-Cave J).*
>
> *(2) There are four main circumstances where a duty to consult may arise. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors, there will be no obligation on a public body to consult (R (Cheshire East Borough Council) v. Secretary of State for Environment, Food and Rural Affairs [2011] EWHC 1975 (Admin) at paragraphs [68-82], especially at [72]).*
>
> *(3) The Common Law will be slow to require a public body to engage in consultation where there has been no assurance, either of consultation (procedural expectation), or as to the continuance of a policy to consult (substantive expectation) ((R Bhatt Murphy) v Independent Assessor [2008] EWCA Civ 755, at paragraphs [41] and [48], per Laws LJ).*
>
> *(4) A duty to consult, i.e. in relation to measures which may adversely affect an identified interest group or sector of society, is not open-ended. The duty must have defined limits which hold good for all such measures (R (BAPIO Ltd) v Secretary of State for the Home Department [2007] EWCA Civ 1139 at paragraphs [43]-[44], per Sedley LJ).*
>
> *(5) The Common Law will not require consultation as a condition of the exercise of a statutory function where a duty to consult would require a specificity which the courts cannot*

furnish without assuming the role of a legislator (R (BAPIO Ltd) (supra) at paragraph [47], per Sedley LJ).

(6) The courts should not add a burden of consultation which the democratically elected body decided not to impose (R(London Borough of Hillingdon) v. The Lord Chancellor [2008] EWHC 2683 (QB)).

(7) The Common Law will, however, supply the omissions of the legislature by importing Common Law principles of fairness, good faith and consultation where it is necessary to do, e.g. in sparse Victoria statutes (Board of Education v Rice [1911] AC 179, at page 182, per Lord Loreburn LC) (see further above).

(8) Where a public authority charged with a duty of making a decision promises to follow a certain procedure before reaching that decision, good administration requires that it should be bound by its undertaking as to procedure provided that this does not conflict with the authority's statutory duty (Attorney-General for Hong Kong v Ng Yuen Shiu [1983] AC 629, especially at page 638 G).

(9) The doctrine of legitimate expectation does not embrace expectations arising (merely) from the scale or context of particular decisions, since otherwise the duty of consultation would be entirely open-ended and no public authority could tell with any confidence in which circumstances a duty of consultation was be cast upon them (In Re Westminster City Council [1986] AC 668, HL, at 692, per Lord Bridge).

(10) A legitimate expectation may be created by an express representation that there will be consultation (R (Nadarajah) v Secretary of State for the Home Department [2003] EWCA 1768 Civ), or a practice of the requisite clarity, unequivocality and unconditionality (R (Davies) v HMRC [2011] 1 WLR 2625 at paragraphs [49] and [58], per Lord Wilson).

(11) *Even where a requisite legitimate expectation is created, it must further be shown that there would be unfairness amounting to an abuse of power for the public authority not to be held to its promise (R(Coughlan) v. North and East Devon Health Authority [2001] 1 QB 213 at paragraph [89] per Lord Woolf MR).*" [para 98]

[105] There is no statutory duty to consult nor could the applicants demonstrate that a legitimate expectation of consultation had been created in the instant case.

Rather, they contended that such a duty arose because a failure to do so would, and has, led to conspicuous unfairness. In particular, it is claimed that the respondent ought to have taken steps to properly inform itself in relation to the financial consequences which may be attendant upon the decision to publish CPU7 and give directions to the councils.

[106] Mr Kerr's evidence is clear in that he was aware that the advice given to councils may create financial issues for those in the industry who wished to bring about BESS development, albeit he did not seek details of those consequences.

[107] The circumstances of this decision making process did not give rise to a legal duty to consult. I have already commented on the striking difference of approach between Northern Ireland and Great Britain on this issue. It may well be that consultation would have enabled greater understanding of the issues and therefore a better quality of decision making but that is not a matter for a judicial review court exercising its supervisory process. I have not identified, on the evidence, any unfairness, within the *Plantagenet* guidance, which would have given rise to a right to relief from this court. This ground of judicial review does not therefore succeed.

The Tameside Duty of Inquiry

[108] Hallett LJ in *Plantagenet* also addressed the related issue of the *Tameside* duty on public authorities to carry out sufficient inquiries:

> *"A public body has a duty to carry out a sufficient inquiry prior to making its decision. This is sometimes known as the 'Tameside' duty since the principle derives from Lord Diplock's speech in Secretary of State for Education and Science v Tameside MBC [1977] AC 1014, where he said (at page 1065B): "The question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"*
>
> *The following principles can be gleaned from the authorities:*
>
> *(1) The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.*
>
> *(2) Subject to a Wednesbury challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken (R(Khatun) v Newham LBC [2005] QB 37 at paragraph [35], per Laws LJ).*
>
> *(3) The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority*

could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (per Neill LJ in R (Bayani) v. Kensington and Chelsea Royal LBC (1990) 22 HLR 406).

(4) The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient (per Schiemann J in R (Costello) v Nottingham City Council (1989) 21 HLR 301; cited with approval by Laws LJ in (R(Khatun) v Newham LBC (supra) at paragraph [35]).

(5) The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion (per Laws LJ in (R (London Borough of Southwark) v Secretary of State for Education (supra) at page 323D).

(6) The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it (R (Venables) v Secretary of State for the Home Department [1998] AC 407 at 466G)." [paras 99 & 100]

[109] It is evident therefore that a challenge to a public body's decision on the manner and intensity of inquiry can only be made on *Wednesbury* grounds. Approached from the perspective of giving advice to councils on the proper treatment of a particular type of development, there is no basis to impugn the Chief Planner's approach to this duty of inquiry. At the heart of the problem was not the fact that insufficient inquiries were made but that the Chief Planner asked himself the wrong question.

Error of Fact

[110] The applicants also seek to argue that the publication of CPU7 can be vitiated on the discrete ground that it was based on material errors of fact. It is said that the respondent took the matter forward on the basis that there was "*uncertainty within the BESS industry as to the correct interpretation of the 2015 Regulations*" when, in fact, no such uncertainty existed.

[111] The key to this ground of judicial review is materiality. If any alleged error of fact was not material, then the decision in question will not be vitiated. In this case, it mattered not whether there was uncertainty in the industry. All that actually mattered was the correct interpretation of the 2015 Regulations insofar as BESS developments were concerned. Again, therefore, this ground of judicial review fails.

Breach of A1P1 Rights

[112] The applicants sought, by a proposed amendment to the Order 53 statement, to assert that the impact of CPU7 was such that it interfered with their property rights, enjoyed by virtue of Article 1 of the First Protocol ('A1P1') to the ECHR, in a manner which was not in the general interest and was disproportionate.

[113] A1P1 provides:

> *"(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *(2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

[114] In *R v Attorney General ex p. Countryside Alliance* [2007] UKHL 52, Lord Bingham observed:

> *"Strasbourg jurisprudence has drawn a distinction between goodwill which may be a possession for purposes of article 1 of the first protocol and future income, not yet earned and to which no enforceable claim exists, which may not."*

[115] The desire of a developer to obtain planning permission is not a 'possession' within the meaning of A1P1. At best, it is a future hope of earning income which does not suffice as an enforceable right. The impact upon existing permissions of the publication of CPU7 was also raised but the evidence reveals that no effort has been made by any of the councils or the respondent to invoke their powers of revocation under the 2011 Act. Even if they did, such steps would trigger a right to compensation. Whether this would constitute proportionate interference with property rights is an entirely moot point.

[116] Accordingly, the claim pursuant to A1P1 is not arguable and I refuse leave to amend the Order 53 statement.

Improper Motive & Bad Faith

[117] Following service of the first affidavit from Mr Kerr, the applicants sought leave to amend to the Order 53 statement to plead an express case of improper motive or bad faith. I declined to grant leave at the interlocutory stage but adjourned the question to the full hearing for further consideration.

[118] The editors of De Smith's Judicial Review (8th edition, 2018) state as follows:

> *"Fundamental to the legitimacy of public decision-making is the principle that official decisions should not be infected with improper motives such as fraud or dishonesty, malice or personal self-interest … A power is exercised fraudulently if its repository intends for an improper purpose, for example dishonestly, to achieve an object other than that which he claims to be seeking … A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise. Bad faith is a serious allegation which attracts a heavy burden of proof."* [paras 5-095 to 5-097]

[119] It is not clear to me that the issue of malice was pursued by the applicants. It would seem that the allegations in respect of which leave was being sought were limited to issues of dishonesty.

[120] The applicants' claims resolve to four issues:

(i) The alleged inconsistency with the evidence of Mr Kerr whereby he states the respondent disagreed with the Kells PAC decision and the content of CPU7 itself which states that this decision turned on on its particular facts and evidential context. There is an apparent inconsistency here but one must read CPU7 as a whole and it does make it clear that councils are being asked to depart from the Kells decision. There is no basis whatsoever to impute any dishonesty on the part of the author.

(ii) The reference to 'uncertainty' which was said to be present both in the industry and in councils. The applicants' case is that simply did not exist before the intervention of the Chief Planner. This may be correct in a local sense but it is evident that there were different views on the issue of 'generation' which had been raised by elected representatives. Again, a court could not infer any dishonesty from these remarks.

(iii) The financial consequences which were referenced by Mr Kerr but were not the subject of any inquiry on his part. Mr Kerr clearly knew

there would be consequences and advised the Minister of such. The fact that he did not have the full picture of the financial implications from developers does not mean that he was acting dishonestly.

(iv) The allegation that the respondent was motivated to issue CPU7 to provoke a judicial review challenge. In fact, what Mr Kerr said in evidence was that such a challenge might be preferable to the judicial review of an extant application with all the consequences which could flow from that. There is nothing approaching dishonesty which arises from this.

[121] Whether taken individually or together, the applicants did not begin to meet the heavy burden of proof which rests on a litigant seeking to make a bad faith case. The points made were unarguable and leave to apply for judicial review on the ground and to amend the Order 53 statement is refused.

The Application to Cross Examine

[122] The applicants also applied, pursuant to Order 53 rule 8 to compel Mr Kerr to attend court for the purposes of cross-examination. In the language of *Re McCann's Application* [unreported, 13.5.92, Carswell J], there was nothing in this case which warranted any further examination or rendered cross-examination of the deponent necessary.

[123] As has been set out, this was a case fundamentally about statutory interpretation and legal principle, not about procedural fairness or the motivation of decision makers.

Conclusions and Relief

[124] I therefore find as follows for the reasons set out:

(i) The application for judicial review succeeds on the issue of statutory interpretation, legality and *Wednesbury* rationality;

(ii) The claims arising from procedural unfairness and error of fact are dismissed.

(iii) Leave is refused in relation to the A1P1 and bad faith claims.

[125] I note the applicants seek relief in the form of an order of certiorari of CPU7. In light of the specific findings in this judgment, I have determined that declaratory relief is both more appropriate and effective in this case and I would invite Counsel to agree a suitable form of declaration.

[126] I will also hear the parties on the question of costs.