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**THE COURT OF APPEAL
CIVIL**

Court of Appeal Record Number: 2025/55

High Court Record Number: 2023/627JR

Neutral Citation: [2026] IECA 42

**The President
Butler J.
Collins J.**

**IN THE MATTER OF THE CLIMATE ACTION AND LOW CARBON
DEVELOPMENT ACT 2015 (AS AMENDED)**

BETWEEN/

FRIENDS OF THE IRISH ENVIRONMENT

**APPELLANT/
APPLICANT**

– AND –

**THE MINISTER FOR THE ENVIRONMENT, CLIMATE AND
COMMUNICATIONS AND IRELAND AND THE ATTORNEY GENERAL**

RESPONDENTS

JUDGMENT of Ms. Justice Butler delivered on the 19th day of March 2026

Introduction

1. Although the legal issues in this appeal are strenuously contested between the parties, both were agreed that climate change represents what is probably the single most serious issue we face as a society and one which has the potential to have catastrophic effects on the world

in which we live. The need for urgent action to be taken at both national and international level is undisputed. The court has approached this appeal conscious of the undeniable and seminal importance of the underlying issues.

2. However, the legal issues in this appeal are narrower and concern whether actions taken at a national level pursuant to legislation enacted for the purpose of “*pursuing the transition to a low carbon, climate resilient and environmentally sustainable economy*” comply with the relevant statutory provisions of the Climate Action & Low Carbon Development Act 2015, as amended in 2021 (“the 2015 Act”). In reading this judgment it may be useful to bear in mind that, notwithstanding the existential importance of the underlying subject matter, the appeal deals with issues of a type which routinely arise in public law litigation. In essence, the appellant contends that the respondents have failed to comply with certain statutory requirements and, procedurally, that the High Court erred in holding that the appellant had not discharged the onus on it to show such non-compliance.

3. The legislation in issue, the 2015 Act as amended in 2021, forms part of the State's response to the climate crisis. Leaving aside altogether the politics surrounding what should be the appropriate response to climate change, the legislation has had a difficult and litigious history. The National Mitigation Plan 2017 (“NMP17”), adopted under an earlier iteration of the same Act, was struck down by the Supreme Court for a lack of specificity in a challenge brought by this appellant (*Friends of the Irish Environment v. Government of Ireland* [2021] 3 IR 1, which I will refer to using the title adopted by the trial judge as “*Friends I*”). At the time this appeal was heard, separate challenges were outstanding to the adoption of the Climate Action Plan 2024 and the Sectoral Emission Ceilings 2023. Shortly prior to this judgment, the Supreme Court delivered a seminal judgment on the obligation under s. 15 of the 2015 Act on every public authority to perform their functions in a manner consistent with the various

national climate plans and strategies (see *Coolglass Wind Farm Ltd v. An Comisiún Pleanála* [2026] IESC 5).

4. The obligations imposed by the 2015 Act on State authorities, such as the respondents in this case, are both far-reaching and complex and there is undoubtedly a large element of the population which is sufficiently concerned about the threat posed by climate change to be prepared to litigate to ensure that these obligations are properly complied with. Needless to say, the court's decision in any such case is neither an endorsement nor a condemnation of the stance adopted at a political level in relation to climate change. Rather, it reflects the extent to which the legal framework within which such policy decisions are made has been complied with.

Appellant's Challenge

5. The appellant has challenged the validity of the respondents' actions in adopting the Climate Action Plan 2023 and its associated Annex of Actions (collectively referred to as "CAP23" unless the context indicates otherwise). The "*core ground*" upon which CAP23 is challenged is an alleged failure to comply with s. 3(3), (4) and (5) and s. 4(2)(a) and (b) and (3) of the 2015 Act as amended in 2021. Throughout the balance of this judgment, I will refer to the amended Act simply as the "2015 Act" unless I am specifically referring to the unamended version thereof. It is important to appreciate that CAP23 was the first such plan adopted under the provisions of the 2015 Act subsequent to their amendment in 2021.

6. The central thrust of the appellant's case is that the respondents have failed to quantify, justify and explain the measures included in CAP23 in order to show that the anticipated reductions in greenhouse gas emissions ("GHG emissions") are, firstly, achievable and, secondly, that they will be sufficient to meet the statutory objective of a 51% reduction in such emissions by 2030 over those reported in 2018 (see s. 6A(5)) within the permitted carbon

budget periods. The appellant's argument focused on sections of CAP23 dealing with agriculture and, in particular, measures which depend for their successful implementation on significant changes in agricultural practices and in farmers' behaviour.

7. This challenge was unsuccessful in the High Court (Humphreys J. [2025] IEHC 61) on the basis that the appellant had not discharged the onus of proof on it to show that the respondents had erred in the manner alleged in the adoption of CAP23. This was largely because the High Court held the appellant had failed to engage with the detail of what is actually contained in CAP23 and its Annex of Actions nor with the supporting documentation, expert analysis and modelling on which it was based. Although the High Court also expressed the view, with which the appellant takes issue, that expert evidence would be required to engage with that material, the respondents say that these were *obiter* comments in circumstances where Humphreys J. found the appellant had failed to discharge the onus of proof on it due to a lack of engagement with the material *simpliciter*.

8. The appellant has brought a wide-ranging appeal against that decision. Although multiple grounds of appeal are advanced, they raise three broad issues. First, was the High Court correct to dismiss the application on the basis that the appellant had not discharged the onus of proof on it? Second, was the appellant required to adduce expert evidence in order to prove its case? Mixed in with this is a question as to whether the appellant can rely on a report produced by the Environmental Protection Agency ("EPA") *after* CAP23 was adopted as evidence of the inadequacies of CAP23. These two issues are obviously closely related. Third, what is the standard or test that must be met by the respondents in order to validly adopt a CAP under the 2015 Act and most importantly under s. 4(2)(a) and (b) and s.4(3)?

9. This latter issue was the focus of the appellant's main legal argument. As shall be seen, the statutory language requires the Minister to ensure that CAP is consistent with a carbon budget program and that it includes a roadmap which specifies certain actions. The appellant

argues that these provisions mean the respondents must have a very high degree of confidence, equivalent to reasonable scientific certainty, that the carbon budgets will be achieved. The respondents, whilst acknowledging the serious nature of the obligations on them, contend for a lower standard in the context of what they characterise as a forward-looking, iterative plan, namely a reasonable degree of confidence.

10. These issues are all interrelated. The height of the onus of proof borne by the appellant in challenging the plan will vary depending on the strictness of the standard to be met by the respondents in adopting the plan. It is commensurately more difficult to establish that the respondents did not have or could not have had a reasonable degree of confidence in the measures proposed then it would be to show that they did not have or could not have had a very high degree of confidence - amounting to reasonable scientific certainty - in the same measures. Therefore, even though the High Court dismissed the challenge on the basis the appellant had not discharged the onus of proof on it, I propose to consider the nature of the statutory obligation on the respondents before addressing the proof issue. However, before doing that, I will outline the statutory scheme within which CAP23 was adopted, the chronology of events leading to its adoption and look at CAP23 itself. I will then look briefly at the decision of the Supreme Court in *Friends I* which concerned an earlier iteration of the 2015 Act. There is also a significant preliminary issue as to the potential mootness of the appellant's claim in circumstances where CAP23 had been overtaken by the adoption of CAP24 before the case was heard in the High Court and indeed by CAP25 before the appeal was heard. Finally, I will consider the substantive issues.

2015 Act – Statutory Scheme Post-2021 Amendments

11. Insofar as climate planning is concerned, the 2015 Act operates by creating an interlocking series of obligations imposed primarily on the Minister for the Environment,

Climate and Communications (“the Minister”) and on the Government as a whole (collectively “the respondents”). Separately it establishes the Climate Change Advisory Council (“CCAC” or the “Advisory Council”), an expert body with the statutory function of advising and making recommendations to the Minister and the Government. Further, it imposes an obligation on all public bodies to perform their functions in a manner consistent with the various statutory plans and strategies adopted by the Minister and the Government under the 2015 Act.

12. The primary objective of the 2015 Act shifted significantly between 2015 and 2021. In 2015 the focus was on the transition to a low carbon, climate resilient and environmentally sustainable economy by 2050 through what was termed the “*national transition objective*”. By 2021 the obligation had crystallised and required that such an economy be achieved by 2050. To this end s. 3(1) provides: –

“The State shall, so as to reduce the extent of further global warming, pursue and achieve, by no later than the end of the year 2050, the transition to a climate resilient, biodiversity rich, environmentally sustainable and climate neutral economy (in this Act referred to as the “national climate objective”).”

13. Section 3(2) sets out the range of plans and strategies which the respondents must adopt in order to achieve the national climate objective. These are: –

*“(a) carbon budgets in accordance with sections 6B and 6D,
(b) a sectoral emissions ceiling in accordance with section 6C,
(c) a climate action plan in accordance with section 4,
(d) a national long-term climate action strategy in accordance with section 4, and
(e) a national adaptation framework in accordance with section 5.”*

The Minister must and the Government may consult with the CCAC for the purpose of performing functions under s. 4, 5 and 6 (see s.3(4) and (5)). Further, under s. 3(3)(b) in

carrying out their functions under s.4, 5, 6 and 6A – 6D, the respondents must do so in a manner which: –

“Which takes account of the most recent national greenhouse gas emissions inventory and projection of future greenhouse gas emissions, prepared by the Agency”.

The Agency in question, the EPA, produces an annual report entitled “*Ireland’s Greenhouse Gas Emissions Projections*”. One of the issues on the appeal is whether the 2023 version of that report, produced after CAP23 had been adopted, which shows that targeted emissions rates are being exceeded, can be relied on as evidence that the respondents breached s.4 in adopting CAP23.

14. Although the appellant’s challenge included grounds contending that the respondents had not sought or received the advice of the CCAC nor taken account of the most recent national GHG emissions projections prepared by the EPA and thus breached s.3 of the 2015 Act, these grounds did not play any role in this appeal. Instead, as just noted, the appellant contends that the High Court failed to have adequate regard to the EPA’s 2023 GHG emissions projections – a somewhat different point which goes to its argument on the onus of proof rather than the respondents’ compliance with section 3(3)(b).

15. One of the main changes in the 2015 Act pre- and post- its amendment in 2021 is the introduction in s.3(1) of the tiered hierarchy of plans and similar policy decisions to be made by the Minister and approved by the Government. The 2015 Act as originally enacted included only a national mitigation plan (“NMP”) which was to be updated/replaced at least every five years (s. 4) and a national adaptation framework (“NAF”) (s. 5). The NMP was to include sectoral mitigation measures, and the NAF was to be supplemented by sectoral adaptation plans to be made by the relevant ministers in respect of their areas of responsibilities. The intended link between the NMP and the NAF was not expressly stated in the legislation.

16. In contrast, the climate action plan to be adopted under s. 4(1) is one which is not just informed by, but which must be consistent with, the carbon budget programme under s. 3(2)(a) and must specify actions which are required to comply with both the carbon budget programme and the sectoral emissions ceilings to be adopted under s. 3(2)(b). Therefore, in order to fully understand s. 4 under which the CAP is to be adopted, it is necessary to appreciate how the carbon budget programme and the sectoral admissions ceilings are intended to operate.

17. At para. 3.1 of CAP23 it describes carbon budgets as follows: –

“A carbon budget represents the total amount of emissions, measured in tonnes of CO₂ equivalent, that may be emitted by a country or region during a specific time period... Under the legislation, the proposed carbon budgets must provide for a reduction of 51% in the amount of GHG emissions by 2030, relative to 2018, and set Ireland on a pathway consistent with our 2050 target of delivering a sustainable economy and society where emissions are balanced or exceeded by the removal of GHGs.”

It should be noted that “emissions” is defined in s. 1 of the 2015 Act in a manner that relates to greenhouse gas (“GHG”) emissions which is in turn defined to include several different types of gases.

18. Under s. 6A(1) carbon budgets are proposed by the CCAC, finalised by the Minister and approved by the Government for successive five-year periods commencing with the period January 2021 to December 2025. Section 6A(2) provides: –

“A carbon budget shall be made for three sequential budget periods so that, at any one time, there is a series of three carbon budgets which have effect under s. 6B (in this Act referred to as a “carbon budget programme”).”

The carbon budget for the third of these 3 periods (described as a provisional carbon budget) shall be in draft form and may be amended under s.6D. The obligation to reduce GHG emissions by 2030 to 51% less than those reported for 2018 is to be found in s. 6A(5). Other

provisions in s.6A set out how the CCAC is to perform its function in proposing carbon budgets and provides the Government with the power to make regulations concerning certain technical matters such as determining the mechanism for removal of GHG emissions and for the calculation and accounting of such removals.

19. Section 6B provides for the approval of a carbon budget (which may be amended before its finalisation) by the Minister and its submission to the Government. The Minister must consult with members of the public before finalising a carbon budget (under s. 6A(4)(b)). Separately, the carbon budget as proposed by the CCAC must be laid before both Houses of the Oireachtas (s. 6B (1)(a)) and the Dáil may refer it to a joint committee which then reports back to the Oireachtas. The carbon budget may be approved by the Government (s. 6B(6)) and then by both Houses of the Oireachtas (s. 6B(7)).

20. It is useful to appreciate that unlike a typical fiscal budget where the Government allocates what it hopes will be an ever-increasing revenue stream between various Government departments to meet the competing needs of sectors of society, carbon budgets represent an ever-reducing figure for the GHG emissions which various sectors will be allowed to produce. There is a similarity in that policy choices have to be made in the allocations within either budget. Whilst under s. 3(1) of the 2015 Act all sectors of the economy will be required to achieve climate neutrality by 2050, the rate at which each of them will be either able to or expected to achieve reductions of 51% by 2030 will vary depending on the choices made in the plans to be adopted under s. 3(2). Thus, there is an element of discretion left to the respondents within the otherwise strict legal framework of the 2015 Act provided its overall objectives are met. Consequently, decisions as to which sectors must immediately reduce emissions and by how much are especially important.

21. Paragraph 3.2 of CAP23 describes sectoral emissions ceilings as follows: –

“These ceilings represent the maximum amount of GHG emissions permitted within different sectors of the economy during a carbon budget period.”

This language is taken from s. 6C(1) under which SECs are to be prepared by the Minister “*within the limits of the carbon budget*”. The Government determines the sectors of the economy to which SECs shall apply (see s. 6C(2)). The Minister then prepares a SEC for each sector which is in turn submitted to the Government which can approve or modify the proposed ceilings. Section 6C does not provide for public consultation regarding SECs.

22. In the case of CAP23 eight sectors have been chosen. These are electricity, transport, the built environment – residential, the built environment – commercial, industry, agriculture, LULUCF and a catchall category of “*other*”. In fact, no SEC was imposed for the LULUCF sector (land use, land-use change and forestry), because due to what the respondents’ deponent describes as a “*significant development in scientific knowledge of net LULUCF emissions which emerged shortly before the government’s decision on SECs*”, a decision on the emissions ceiling for this sector was deferred for 18 months. The decision of the Government adopting the SECs is the subject of a separate challenge by the appellant. Although the LULUCF issue was raised in the High Court and is dealt with descriptively in the High Court judgment (see paras.10 to 15 inclusive) it does not form part of the grounds of appeal and will not be dealt with further in this judgment.

23. Finally on carbon budgets and SECs, carbon budgets can be amended under s. 6D. The circumstances in which this can be done are set out in section 6D(2) and relate either to a new legal obligation on the State under EU or international law or “*significant developments in scientific knowledge in relation to climate change*”. This latter possibility is important in that it recognises that climate science is a rapidly developing field in which steps which may be realistically possible in 2040 are currently unknown but also in which something recognised as best practice now may be overtaken and rendered obsolete in the future.

24. In practical terms revision may be most likely to arise under s.6D(4) and (5). Under s. 6D(4) where reductions in GHG emissions over a budget period are greater than anticipated, the surplus may be carried forward. Conversely, under s. 6D(5) where GHG emissions exceed the carbon budget over the relevant period, the excess emissions must be carried forward and the carbon budget for the subsequent period must be decreased by that amount. As the carbon budget reflects the amount of emissions permitted, more stringent measures will be required to achieve any decrease in that amount. In circumstances where the appellant contends that the level of justification required under s. 4 essentially means that the Government must be able to prove that the measures in CAP23 will work, the respondents point to provisions such as section 6D(5) to argue that this is not so as the statutory scheme has in-built correction mechanisms which, of themselves, suggest that the posited level of certainty is not required.

25. All of this brings us back to the adoption of a CAP under s. 4. As these provisions are central to the argument on the appeal, I will set them out in full.

“(1) The Minister shall, to enable the State to pursue and achieve the national climate objective-

(a) prepare an annual update to the Climate Action Plan 2019 to Tackle Climate Breakdown, published by the Minister on 17 June 2019 (in this Act referred to as a "climate action plan"), and

(b) prepare, not less frequently than once every 5 years, a national long-term climate action strategy’).

(2) The Minister shall, when preparing a climate action plan under subsection (1)(a) –

(a) ensure that the plan is consistent with the carbon budget programme,

(b) set out a roadmap of actions, to include -

(i) sector specific actions that are required to comply with the carbon budget and sectoral emissions ceiling for the period to which the plan relates,

(ii) sector specific actions that are required to address any failure, or projected failure, to comply with the carbon budget and sectoral emissions ceiling for the period to which the plan relates, and

(iii) other actions and measures that are reasonably necessary to support Government policy on climate change, including measures to inform, and promote dialogue with, the public regarding the challenges and opportunities in the transition to a climate neutral economy, and

(c) consult with –

(i) Any other Minister of the Government as he or she considers appropriate, including each Minister of the Government who has responsibility for sector specific actions, and

(ii) the public and such persons as he or she considers appropriate.

(3) The roadmap of actions referred to in subsection (2)(b) shall –

(a) specify measures that, in the Minister's opinion, would be required for the first budget period in a carbon budget programme,

(b) set out an overview of the policies and, to the extent feasible, measures, that in the Minister's opinion, will be required for the second budget period in a carbon budget programme, and

(c) outline potential policies that, in the Minister's opinion, may be required for the third budget period in a carbon budget programme.

(4) The Minister shall, in each year, commencing with the year 2021, submit a draft of the climate action plan to the Government for approval.”

I will return to these provisions when considering the appellant’s arguments regarding the standard or test that must be met by the respondents in adopting a CAP. However, it may be of assistance to note a number of features at the outset. First, the CAP to be prepared under s. 4(1) is in fact an annual update to the CAP adopted in 2019. This predated the 2021 amendments to the 2015 Act and, thus, when adopted CAP19 was not a statutory plan. Although CAP19 was updated in 2021, CAP23 is the first update adopted under the statutory provisions at issue in this appeal. This is of some relevance to the question of mootness which is considered further below.

26. Second, the extent to which the CAP is not just linked to but constrained by the carbon budget programme and the sectoral emission ceilings is clear from the text of subs. (2), especially subs. (2)(a) and (b). This makes it materially different to the National Mitigation Plan under the 2015 Act as originally enacted. In turn, this may have a bearing on the continuing relevance of Clarke C.J.’s remarks in *Friends 1* regarding the level of specificity necessary in the plan. The NMP was “*at large*” in the sense that although it was required to specify how the National Transition Objective was to be achieved and the policy measures required to do so, it was not premised on the existence of either carbon budgets or sectoral emission ceilings within which it had to operate.

27. The third feature of relevance is that under s.4(3) the roadmap, which is required to set out sector-specific actions, is framed differently with respect to each five-year period budget period covered by the carbon budget programme. For the first five-year period the measures must be specified; for the second five-year period an overview of those measures must be set out to the extent feasible and for the third five-year period potential policies must be outlined. Further, the requirement is that the measures in question are those which “*in the Minister's*

opinion” will be required for the relevant period. It goes without saying that the Minister's opinion must be reasonable and that there must be an evidential basis for it. Nonetheless, the Minister's opinion is necessarily a subjective standard with which others, such as the appellant, might not agree.

28. There is some discussion in the High Court judgment as to whether or not the Annex of Actions comprises the roadmap required under s. 4(3) and indeed whether or not it was part of CAP23. The High Court found that the Annex of Actions was in fact the roadmap (see para. 70 of the judgment). Perhaps sensibly, there has been no cross-appeal on this point and, consequently, the status of the Annex of Actions as the roadmap is not in issue on this appeal.

29. There is a change in the public consultation provisions between the 2015 and the 2021 versions of the Act. Under s. 4(a) as originally enacted in 2015, before making the NMP the Minister had to publish a notice inviting members of the public to make written submissions on the proposed plan and allowing a two-month period for such submissions to be made. This obligation has been reduced somewhat and now, under s. 4(2)(c) the Minister must consult with “*the public and such persons as he or she considers appropriate*”. The form which such public consultation might take is not specified. The replacement of the original text of s. 4(a) is perhaps unsurprising when account is taken of the fact that under s. 4 the CAP requires annual updating. A two-month consultation period following publication of a formal notice was practical in the context of a plan to be updated every five years but is likely to prove unwieldy and difficult to comply with in the context of the timeframe for an annual update. Nonetheless citizen engagement is still a hugely significant element of the climate planning process, not least to ensure ongoing public support for the measures proposed.

30. Further, s. 4(8) sets out a list of 18 matters to which the Minister and the Government must have regard in performing their functions under this section. I do not propose to set out all of these but note that the range is significant and points to the political nature of the decisions

that must be made within the framework of the statutory obligations imposed by the 2015 Act. They include value for money consistent with sustainable management of the public finances (a), climate justice (d), behavioural change (i) and the requirement for a just transition that maximises employment opportunities and supports communities negatively affected (k). In the context of the arguments made in this appeal, of particular note are the matters set out at sub-paragraph (h):

“the fact that the means of achieving a climate neutral economy and other measures to enable the State to pursue the national climate objective may not yet be fully identified and may evolve over time through innovation, evolving scientific consensus and emerging technologies”

and sub-paragraph. (n)

“the special economic and social role of agriculture, including with regard to the distinct characteristics of biogenic methane”.

31. The respondents rely heavily on the statutory nature of CAP23 as a single iterative plan which is subject to constant updating and modification. They point not just to the provision made for possible improvements in science and technological advances but also to the potential for the reallocation of carbon budgets depending on the achievements or shortfalls within a budget period. Thus, they contend that the obligation to ensure consistency with the carbon budget programme (s.4(2)(a)) and to specify measures required for the first carbon budget period (s.4(3)(a)) must be looked at in that broader context.

Factual Background

32. There is no dispute between the parties as to the factual background to this case which consists largely of a chronology of when the particular steps required under the 2015 Act were taken. The chronology starts prior to the enactment of the 2021 amendments with the adoption

and publication of CAP19 on 17th June 2019. This was replaced on 4th November 2021 with the publication of CAP21 and its Annex of Actions. Both CAP19 and CAP21 were adopted on a non-statutory basis but it is clear from the format and language of CAP21 that it envisaged the legislative changes that were, at the material time, progressing through the Oireachtas. The 2021 Act amending the 2015 Act was commenced on 7th December 2021.

33. On 25th October 2021, the CCAC submitted its proposed carbon budgets for 2021 to 2035 to the Minister. These were ultimately approved by the Oireachtas on 26th February 2022 and took effect on 6th April 2022. The budgets in question, which are described in metric tonnes of CO₂ equivalent emissions, and each of which requires a significant reduction in GHG emissions over the preceding periods are: –

2021 – 2025 – 295 Mt CO₂ eq

2026 – 2030 – 200 Mt CO₂ eq

2031 – 2035 – 153Mt CO₂ eq (provisional).

34. In June 2022 the EPA published its 2022 GHG emissions projections, which concluded that annual reductions of 8.4% would be required. On 14th September 2022 the Government published its sectoral emissions ceilings (except for the LULUCF sector). Meanwhile preparatory work, including drafting, consultations with stakeholders and technical research, analysis and modelling was underway in relation to the proposed CAP23. CAP23 was approved on 21st December 2022 and the associated Annex of Actions was approved on 7th March 2023.

35. The appellant issued these proceedings by filing an *ex parte* docket on 2nd June 2023 and leave to apply for judicial review was granted on 20th June 2023. Whilst initially an issue was raised by the respondents as to whether the Annex of Actions was part of CAP23, an issue which might have had a consequential impact on whether the appellant's proceedings were within time, this was resolved in the appellant's favour by the High Court and no issue

regarding compliance with the time limits contained in Order 84 of the Rules of Superior Courts now arises.

36. On 12th June 2023, between the filing of the *ex parte* docket and the hearing of the leave application, the appellant's deponent swore a supplemental affidavit for the purposes of exhibiting a report published by the EPA, dated June 2023 entitled "*Ireland's greenhouse gas emissions projections 2022 – 2040*". Given its date, this is obviously not a document which was considered by the respondents in the adoption of CAP23 but the same report for the preceding year (covering a period from 2021 to 2040) was published in June 2022 and was taken into account. The appellant relies on the EPA's 2023 projections and a subsequent EPA report published in January 2024 entitled "*Ireland's climate change assessment*" to make the case that the State's actions are falling short of what is required and, consequently, that the respondents could not have had the requisite very high level of confidence that the measures in CAP23 would achieve their objectives.

37. Finally, in the context of the mootness issue, it is relevant to note that CAP24 was adopted on 21st May 2024 prior to the hearing of this case in the High Court on 28th and 29th January 2025. Likewise, CAP25 was adopted on 15th April 2025 before the hearing of this appeal in June 2025.

Climate Action Plan 2023

38. For factual context it is appropriate to look briefly at CAP23 and its associated documents. CAP23 is a detailed document running to some 282 pages. It is divided into 22 chapters, the early chapters identifying the current position, the nature of the challenge and the governing legislation then moving on to an analysis of the need for a just transition and citizenship engagement. CAP23 then considers in separate chapters each of the sectors for which SECs are set and also LULUCF for which no sectoral emissions ceiling has been set and

the marine sector which is not a sector chosen by the Government under s. 6C(2). CAP23 concludes by examining the circular economy and international climate action.

39. The Annex of Actions comprises an additional 100 pages. It sets out, largely in tabular form, the precise actions to be taken under each chapter of CAP23. In the case of each sectoral heading it identifies individual measures providing a key performance indicator (“KPI”) for 2025 and the abatement potential of the measure, also for 2025. Under each measure, a list of actions is provided along with a brief description of the steps necessary for its delivery, the expected outputs, the timeline for its implementation, the Government department or public body responsible for taking the lead and the stakeholders likely to be affected. Much of the debate between the parties concerned whether it was sufficient to identify the abatement potential of a measure if it was not certain that that potential could be achieved and whether it was appropriate to list actions under relevant measures without ascribing an emissions reduction or abatement to be achieved by such actions.

40. Each of the parties chose to look at different elements of CAP23 with the appellant focusing on agriculture in chapter 16 and the respondents on the built environment in chapter 14. Needless to say, the points each made were probably best illustrated by the chapter chosen by them. It is I think fair to acknowledge, as the respondents point out, many of the actions required to implement CAP23 do not themselves have an abatement potential – i.e. they will not themselves produce a reduction in emissions - but they are necessary to facilitate or support other actions which do. In the case of agriculture, which is the sector with the largest amount of GHG emissions in Ireland, the respondents’ case is that achieving the necessary reductions will require significant changes in behaviour and practice by farmers. Consequently, the measures identified in CAP23 require a significant input in terms of funding research, the creation and making available of information and databases for use by farmers, assistance in providing education on new scientific methodology as well as active supports, including

financial support, to farmers to make the necessary changes. The appellant focused on an item under the heading “*inputs and additives*” which requires a reduction in the use of chemical nitrates as fertiliser in favour of the use of protected urea on grassland farms. The respondents submit that many of the actions under this heading constitute ancillary measures which do not themselves provide a reduction in GHG emissions but, in their absence, farmers are significantly less likely to move voluntarily from the established and commercially successful practice of using chemical nitrates to a newer, potentially more expensive and less established option. Even allowing for these considerations, the appellant argued that the key performance indicator expressed as a target figure of an uptake of between 80% and 90% of farmers using protected urea on grassland farms, was aspirational rather than concrete.

41. Much of the working material on which CAP23 is based was made publicly available by the respondents. Some but not all of this material has been exhibited in these proceedings. There were essentially three streams of analysis and associated modelling. The National Transport Authority and EirGrid carried out modelling of various scenarios to predict the potential reduction in carbon emissions in the transport and electricity sectors respectively. The respondents engaged external consultants (McKinsey) to carry out a broader modelling exercise in respect of other sectors. The engagement of these consultants was part of an ongoing tranche of work which included analyses previously done by them in support of the preparation of the SECs. The documentation originally published by the respondents did not include all of the analysis and modelling carried out by the consultants as some was covered by commercial confidentiality. However, following an access to information on the environment request, McKinsey agreed to the release of further material to the appellant. On the issue of whether the appellant has proved its case, the respondents rely strongly on the fact that there was no engagement by the appellant with the detail of this material subsequent to it having been exhibited on behalf of the respondents in the proceedings.

42. I accept of course that it does not follow simply from the volume of material relied on by the respondents in the drafting and adoption of the plan, nor the length and detail of the plan itself, that it necessarily meets the relevant statutory standards in s. 4(2) and (3) of the 2015 Act. However, the comprehensive nature and detail of the plan coupled with the public dissemination of the material relied on in its preparation, does make it commensurately more difficult for the appellant to establish that CAP23 is insufficiently specific or otherwise inadequate without a detailed engagement with the material that is available. This is what led the High Court to consider the extent to which expert evidence was necessary, not as a matter of principle to mount any challenge to a CAP, but to succeed in this challenge to this plan.

Friends 1

43. Significant reliance is placed by the appellant on the judgment of the Supreme Court in its earlier successful challenge to the National Mitigation Plan 2017 (“NMP17”), although the appellant acknowledges the sweeping changes in the statutory context between 2017 and 2023. Some of these changes have been outlined above. However, the judgment in *Friends 1* remains relevant, not least because the Supreme Court emphatically confirmed that, notwithstanding the significant policy component of any such plan, where legislation imposes obligations regarding the adoption and/or contents of a plan, then compliance with those obligations is a matter of law rather than a matter of policy. As Clarke C.J. put it (at para. 108): –

“Whether a plan complies, for example, with the obligation that it be specific as to how the NTO is to be achieved is, in my view, clearly a matter of law.”

Therefore, a climate plan is, in principle, justiciable. Certainly, it is so insofar as the challenge to it is based on alleged non-compliance with statutory requirements.

44. Other elements of the decision in *Friends 1* such as the extent to which there are “*climate rights*” derived from either the Constitution or the European Convention on Human Rights and,

if so, the extent to which the appellant, as a corporate body, could invoke such rights (both of which issues were decided against the appellant) are not relevant here. The appellant's claim is based exclusively on alleged non-compliance with the relevant statutory provisions. No additional legal issues were raised based on either the nature or importance of the underlying climate issue.

45. At the start of his judgment in *Friends I*, between paras. 7 and 14, Clarke C.J. sets out what he describes as “*a brief overview of the science*”. Even though all of this information was already in the public domain and had been the subject of much public discourse, the contents of these paragraphs are nonetheless stark. The existing environmental and societal impacts of climate change in Ireland and the likelihood that the most severe impacts of global warming will be felt in the developing world where the population is least equipped to cope with the consequences are both striking and profoundly troubling. Unsurprisingly, Clarke C.J. echoed the views of climate scientists as to the need to act urgently to tackle global warming whilst acknowledging (at para. 19) the debate over the precise measures required to prevent the worst consequences of climate change materialising.

46. In describing the plan under challenge, Clarke C.J. noted a point of central concern to the appellant which was that despite the target of net zero by 2050, NMP17 envisaged an increase rather than a decrease in emissions over the initial period of the plan. One of the central disputes between the parties was whether any or any sufficient basis was given in NMP17 for adopting an initial target which allowed for an increase in emissions. Other aspects of the plan are not addressed in the judgment in any detail.

47. The portions of Clarke C.J.'s judgment relied on by the appellant are those relating to specificity and the requirement under s. 4(2)(a) of the original text of the 2015 Act that the NMP “*specify the manner in which it is proposed to achieve the national transition objective*”. Clarke C.J. rejected the notion that the 2015 Act contemplated a series of 5-year plans, holding

instead that it contemplated “*a series of rolling plans each of which must be designed to specify, both in general terms and on a sectoral basis, how it is proposed that the NTO is to be achieved*”. He characterised the NMP as a 33-year plan which the legislation understood would be adjusted within 5 years to take account of further developments. He continued (at paras. 101 and 102 of his judgment): –

“It also seems to me that the legislation does contemplate, therefore, that the level of detail about what is to happen between, say, 2040 and 2050, may be less than the level of detail about what is to happen in the immediate future. By recognising the possibility of the need to adjust at least every five years, the legislation implicitly accepts that it may become possible, as time goes on, to give greater detail about precisely what is to be done in the latter part of the period up to 2050. However, that analysis does not seem to me to take away from the fundamental obligation of a compliant plan to, in the words of the statute itself, “specify” how it is intended that the NTO will be met by 2050.

While dealing with the proper interpretation of the statute, it also seems to me that it provides for two important obligations which inform the statutory purpose. Firstly, s. 4(8) provides for a significant national consultation whenever a plan is being formulated. Thus, there is a clear statutory policy involving public participation in the process. Second, the very fact that there must be a plan and that it must be published involves an exercise in transparency. The public are entitled to know how it is that the government of the day intends to meet the NTO. The public are entitled to judge whether they think a plan is realistic or whether they think the policy measures adopted in a plan represent a fair balance as to where the benefits and burdens associated with meeting the NTO are likely to fall. If the public are unhappy with a plan then, assuming that it is considered a sufficiently important issue, the public are entitled to vote

accordingly and elect a government which might produce a plan involving policies more in accord with what the public wish. But the key point is that the public are entitled, under the legislation, to know what the plan is with some reasonable degree of specificity.”

48. Under the heading “*Specificity*” Clarke C.J. reached the following conclusions (at paras. 118 and 119): –

“First it is necessary to reach some overall conclusion as to the level of specificity which the Act requires. It seems to me that the starting point for a consideration of that question must be to consider the purpose of the 2015 Act as a whole. The public participation element of that purpose is, of course, met by the public consultation process set out in s. 4(8). But it is to the transparency element of the purpose of the legislation as a whole that the specificity mandated by s. 4 is directed. The purpose of requiring the Plan to be specific is to allow any interested member of the public to know enough about how the Government currently intends to meet the NTO by 2050 so as to inform the views of the reasonable and interested member of the public as to whether that policy is considered to be effective and appropriate.

What the public thinks of any plan and what the public might do about it if they do not like a plan is a matter for the public to consider. But the 2015 Act requires that the public have sufficient information from the Plan to enable them to reach such a conclusion as they wish. On that basis, it seems to me that the level of specificity required of a compliant plan is that it is sufficient to allow reasonable and interested members of the public to know how the government of the day intends to meet the NTO so as, in turn, to allow such members of the public as may be interested to act in

whatever way, political or otherwise, that they consider appropriate in the light of that policy.”

49. At slightly later point (para. 127) Clarke C.J. points out that while the detail of the plan might become more fixed as knowledge evolves, that did “*not... prevent there being a clear and present statutory obligation on the Government, in formulating a plan, to at least give some realistic level of detail about how it intends to meet the NTO*”. Thus, the test espoused by Clarke C.J. for a plan to meet the statutory requirements to specify the manner in which the NTO would be achieved was that the contents of the plan must be sufficient and contain a realistic level of detail to allow a reasonable and interested member of the public to know what the Government intends to do. On this basis the Supreme Court held the NMP¹⁷ failed to meet the level of specificity required because, *inter alia*, “*too much is left to further study or investigation*”. Even where reliance is being placed on the future development of new technology it is necessary “*to give some estimate as to how it is currently intended that such measures will be deployed and what the effect of their deployment is hoped to be*” (see para. 128).

50. *Friends 1* was undoubtedly a seminal judgment and it was hugely significant that the Court held the Government to account for failing to comply with obligations the Oireachtas had imposed upon it regarding planning for the climate crisis. However, there are a number of key differences between *Friends 1* and this case. Although both cases nominally concern the 2015 Act, that Act was significantly amended between the adoption of the NMP in 2017 and the adoption of CAP23. The legislative framework is now itself more detailed and more specific. A CAP is adopted within a carapace bounded by the carbon budget programme and sectoral emission ceilings. There is an additional express statutory requirement to reduce GHG emissions by 51% by 31st December 2030 as well as the more long-range target of net zero by 2050, the latter being the only target originally set in the 2015 Act. On one hand, the greater

legislative detail contained in the 2021 amendments makes it easier to see if the respondents have complied with the obligations imposed upon them. In contrast, the lack of surrounding legislative detail in the 2015 Act as originally enacted made the obligation to specify what was proposed so that members of the public could know what the Government intended to do a more essential and more compelling obligation.

51. Consequently, this is in many ways a simpler case than *Friends I*. Broader issues such as justiciability and standing do not arise and there is no rights-based challenge before the court. Nonetheless, I regard the trial judge’s criticism of the appellant as “*returning to try out the previous challenge one more time*” (para. 1), “[*lying*] *back passively*” (paras. 122) and “*just whining that the plan could contain more*” (para. 128) as unfair. The appellant’s counsel squarely acknowledged the changes in the legislative framework under which CAP23 was adopted compared to NMP17 and, thus, within which he had to make his case. He engaged with the nuances of the new statutory language in considerable detail. Indeed, much of the argument before this court concerned the meaning of the word “*ensure*” in s.4(2)(a), a word that did not appear at all in s.4(2) as originally enacted. This is of course a different issue as to whether the appellant engaged sufficiently with the documentary material before the court in making its challenge. However, I do not think that the appellant can be fairly characterised as having assumed that because its challenge to a particular plan adopted pursuant to particular statutory provisions was successful, all it had to do was institute a challenge to a different plan under different statutory provisions to achieve the same outcome.

Mootness

52. Prior to the hearing of the appeal, the court notified the parties that it wished to be addressed on the issue of mootness, i.e. whether the court should adjudicate on the appeal in circumstances where the object of the application for judicial review (CAP23) was overtaken

by two plans made subsequently (CAP24 and CAP25), whether the nature of the issues the appellant sought to raise were specific to CAP23 and whether a challenge to a climate action plan for any given year could be taken and fully disposed of during the lifetime of that plan. Unsurprisingly, the appellant contended both that the appeal was not moot and, if it were, that the short lifespan of a CAP meant it would almost inevitably expire before any challenge could reach a final conclusion. In fact, in its Notice of Appeal the appellant acknowledged that the original relief sought by it, an order of *certiorari* quashing CAP23, was no longer appropriate in circumstances where CAP23 was already replaced and, in the event the appeal were to be successful, sought declaratory relief in lieu of *certiorari*.

53. The respondents, who had not raised a mootness objection in the High Court, took a neutral stance on whether the appeal was moot. Importantly, the respondents accepted that even if the appeal were moot, the court retained discretion to hear it. Further, the respondents accepted that because the CAP under the 2015 Act is iterative in nature, any error in the making of a plan is capable of repetition and acknowledged that it would be difficult to determine a challenge through any appeal in the lifetime of one plan.

54. The appellant brought the court's attention to three authorities on mootness, namely the decision of the Supreme Court (McKechnie J.) in *Lofinmakin v. Minister for Justice* [2013] 4 IR 274, [2013] IESC 49; *Odum v. Minister for Justice* [2023] 2 ILRM 164, [2023] IESC 3 and the decision of the Court of Appeal in *Carvill v. Dublin City Council* [2025] IECA 84.

55. *Lofinmakin* involved a challenge to a deportation order made against the Nigerian parents of Irish citizen children. The High Court refused to grant *certiorari* of the Minister's decision but, before the appeal against that decision could be heard, the Minister revoked the deportation order due to developments in EU law regarding the rights of citizen children. The Supreme Court ultimately dismissed the appeal on the basis that it was moot. The court held that an appeal (or an issue) was moot where the court's decision could have no practical impact or

effect on the resolution of a live controversy between the parties (McKechnie J. at para. 82(i)). However, McKechnie J. explained that the normal rule, i.e. that the court will not hear a moot case or offer a purely advisory opinion, is not absolute saying at para. 82(v): –

“that rule is not absolute, with the court retaining a discretion to hear and determine a point, even if otherwise moot. The process therefore has a two-step analysis, with the second step involving the exercise of a discretion in deciding whether or not to intervene, even where the primary finding should be one of mootness;”.

56. In the following paragraph McKechnie J. confirmed that the second step, i.e. the exercise of the court’s discretion to disapply the general rule regarding mootness, should only arise where overriding requirements of justice require the case to be heard. Matters which might influence whether the court should exercise its discretion are listed on a non-exhaustive basis at para. 82 (vii). These include the importance of the point and the frequency of its occurrence (b), the opportunity of further review in actual, presumably live, cases (d) and the potential benefit and utility of the decision (f). Interestingly, many of the factors listed focus on the impact on the judicial system of determining the moot issue rather than on the underlying issue itself and include matters such as judicial policy (g), the importance of the decision to the administration of justice (h), the resource costs of determining it (i), and the role of the court decision on the point within the legal framework (j).

57. The appellant relied on these factors together with the observations made by Sopinka J. of the Canadian Supreme Court in *Borowski v. Canada (Attorney General)* [1989] 1 S.C.R. 342 (and summarised at para. 68 (ii) of the McKechnie J. judgment). These were to the effect that the determination of an otherwise moot point may be justified if an important and recurring point *“by the nature of the proceedings is likely to evade review if the doctrine is strictly applied”*.

58. Counsel for the appellant described *Odum* as providing a “gloss” on *Lofinmakin*, a case with a similar factual background in that it involved the potential deportation of the parent of citizen children. Many of the additional issues teased out by O’Donnell C.J. in *Odum*, although undoubtedly important, are not especially relevant to this appeal. For example, O’Donnell C.J. regarded the fact that the appeal had satisfied the constitutional threshold under Art. 34.5.4 for the grant of leave to appeal to the Supreme Court as tending to support the exercise of discretion in favour of hearing the otherwise moot appeal. To meet the constitutional threshold the appeal had to raise an issue of general public importance which meant the point was both likely to recur and that it was almost inevitable when it did recur that it would require determination at Supreme Court level. This is clearly not relevant here as the appellant is exercising an automatic right of appeal from a decision of the High Court under Art. 34.4.1 of the Constitution, in respect of which no threshold applies.

59. Further, the significance of an extant order for costs made by the court from which the appeal is taken was recalibrated in *Odum*. O’Donnell C.J. characterised the fact that such an order would stand if the appeal was treated as moot as “*itself a powerful factor leaning towards hearing such appeals*”. Again, this observation is of no direct relevance to this case. The appellant’s Statement of Grounds sought a costs order premised on the application of the Aarhus Convention and/or Part II of the Environment (Miscellaneous Provisions) Act 2011. Whilst the order made by the High Court does not expressly refer to either of these instruments, no order for costs was made against the unsuccessful appellant. Therefore, treating the appeal as moot would not subject the appellant to liability to meet a costs order while simultaneously depriving it of the opportunity to establish that the substantive result of the High Court proceedings on which the cost order was based was legally incorrect.

60. Thus, the only novel aspect of *Odum* on which the appellant can realistically rely is the discussion of the distinction between the law of mootness in the USA contrasted with the law

on mootness in this and other common law jurisdictions. The essential difference identified by O'Donnell C.J. is that in the USA when an appeal becomes moot and is not heard (there being little or no discretion for the court to hear a moot appeal) the decision of the lower court from which the appeal was taken is vacated and loses all precedential value. The appellant argues that in this case to treat the appeal as moot would leave a High Court decision in place with precedential value especially as regards the need for expert evidence to support the challenge to a CAP. In my view this is an overstatement of the precedential value of the High Court judgment on this point. The observations made by Humphreys J. on the lack of expert evidence are expressly linked by him to the circumstances of the case and the nature of the particular challenge. This is an issue to which I will return in considering the substantive grounds of appeal.

61. *Carvill* does not really advance matters further. It accepted and applied the *Lofinmakin* and *Odum* jurisprudence to an appeal in this court and determined on the particular facts that the appeal was not moot but, even if it had been, there were a number of factors, including an extant costs order against the appellant, which would lead the court to exercise its discretion in favour of hearing it. Further, the court was highly critical of the fact that mootness first arose during the hearing of the appeal because of the belated disclosure by the respondent that the impugned decision had been rescinded. Here, the basis on which the court was concerned that the appeal was moot, i.e. the adoption of CAP24 and CAP25, was both evident and publicly known before the case was heard in the High Court. Thus, the potential mootness did not arise from the change in the status of the decision or a disclosure of such change during the currency of the proceedings.

Conclusions on Mootness

62. The appellant argues that the appeal is not moot because what it describes as “*legacy measures*” contained in CAP23 are carried over to CAP24 and CAP25. This is said to arise in part because each CAP is an update of the previous CAP rather than an entirely new plan. Thus, if measures included in CAP23 are legally flawed for the reasons contended for by the appellant and are maintained in CAP25, there is still a live dispute between the parties which the court should determine.

63. The logic of this argument is impeccable. Nonetheless, to succeed it must be shown that the specific measures which have been impugned in CAP23 were carried over through CAP24 to CAP25. The appellant has not attempted to do this by reference to the content of the successive plans. Instead, it has relied on a general argument about CAP23 being flawed and on the general nature of a CAP as an iterative plan under s. 4 of the 2015 Act. I do not regard that as sufficient to demonstrate the continued existence of a live controversy in the *Lofinmakin* sense. Despite this, I do not regard it as necessary to reach a definitive decision on whether the appeal is moot, as I am satisfied that in any event the court should exercise its discretion to hear it, an approach to which the respondents do not object.

64. The primary reason I am satisfied the court’s discretion should be so exercised is as follows. Because a CAP is an iterative plan with an updated plan adopted each year, it is, as the respondents concede, extremely difficult if not impossible for a legal challenge to be taken, heard and disposed of through all appellate stages in a single calendar year before the next CAP is adopted replacing the one under challenge. It is important that the legislative framework within which a CAP is adopted, which no doubt serves an important function both in ensuring that the plan remains up to date and in keeping climate change on the Government’s agenda, does not become an impediment to legitimate challenges to government action (or even inaction). As I observed in my opening comments, the climate crisis is probably the single most important issue facing our society and it is vital that non-governmental organisations and

others with a genuine interest in the issue can exercise their right of access to the courts to litigate *bona fide* concerns when they arise.

65. Of itself, that is sufficient to justify the court in exercising its discretion to hear this appeal. However, I also regard the issues raised in the appeal as potentially having significant implications for the way in which the respondents discharge their statutory functions under the 2015 Act such that the determination of the appeal has the capacity to provide additional legal certainty in this important area. For these reasons the court has decided that will proceed to determine the substantive issues raised in this appeal.

Appropriate Standard under Section 4

66. I propose to turn next to the statutory standard the respondents must meet in adopting a plan under s. 4 of the 2015 Act. Two aspects of s. 4 are relied on by the appellant. The first is the requirement under s. 4(2)(a) that the Minister ensure the plan is consistent with the carbon budget programme and the second is the requirement of specificity regarding the roadmap of actions to be set out under s. 4(2)(b) as evident in the text of s. 4(2)(b)(i) (“*sector specific actions that are required to comply with the carbon budget and sectoral emissions ceilings*”) and s. 4(3) (“*specify measures...required for the first carbon budget period*”). The appellant relied on the decision of the Supreme Court in *Friends 1* that the “*reasonable degree of specificity*” to which the public was entitled was that sufficient “*to allow reasonable and interested member of the public to know how the government of the day intends to meet the NTO*”.

67. The appellant also points to the tightening up of the statutory language as between the 2015 and 2021 versions of s. 4. In 2015 s. 4(2)(a) required the NMP to “*specify the manner in which it is proposed to achieve the [NTO]*” whereas the 2021 version of s. 4(2)(a) requires the Minister to “*ensure*” that the plan is consistent with the carbon budget programme. The

appellant argues that “*ensure*” means to make certain, that it does not admit of any failure and contends that, as a result, the standard to be met by the Minister is a very high one. The appellant says the requirement to “*ensure*”, although only expressly stated in s. 4(2)(a), also applies to the roadmap under s. 4(2)(b) and (3). It acknowledges that the degree of confidence required in respect of measures for the first carbon budget period is higher than that required for the second and third periods as subparagraphs (b) and (c) do not require measures to be “*specified*” in the roadmap for the second and third periods. The appellant seems to accept that this allows the Minister to proceed on the basis of a lower level of confidence but nonetheless argues that the word “*ensure*” should be read across the entire of s. 4(3). In short, the appellant contends that there must be a demonstrable and realistic basis for the expectation that the proposed measures will work and that any ambiguity in the language used such as, for example, saying measures “*could*” achieve a certain level of reduction in emissions necessarily means that the obligation to ensure consistency has not been met.

68. Throughout his argument, counsel for the appellant repeatedly used the phrases “*quantified, justified and explained*” or “*specificity, explanation and justification*” as if these were terms appearing in the 2015 Act which, of course, they are not. I found this unhelpful as it tended to deflect attention from the statutory language the court must consider and the context in which that language appears. That said, the respondents accepted that to meet the test set out by the Supreme Court in *Friends1*, CAP23 had to be more than purely aspirational. It had to include specific policies and proposals by reference to which a quantified reduction in GHG emissions can be achieved. The real area of dispute between the parties lay in the extent to which the achievement of those reductions must be capable of measurable proof, not just as regards CAP23 as a whole, but as regards each individual policy proposal it contains.

69. The appellant offered two formulations of the test for which it contended. The first is drawn from *R (Friends of The Earth Ltd) v. Secretary of State for Energy Security and Net*

Zero [2024] PTSR 1293, [2024] EWHC 995 (Admin) and is that the Minister must have a very high degree of confidence that the carbon budget programme will be complied with. The appellant's argument is premised on some similarity between the statutory language in s. 4(2) and in s. 1(1) of the UK Climate Change Act 2008 which places a duty on the Secretary of State to “ensure” a particular reduction in what is termed the UK “carbon account” and the requirements of s. 4 of that Act for the Secretary of State to set carbon budgets for 5-year periods. It might be noted that the notion of a “very high level of confidence” also has an international basis and is to be found in the 6th Assessment Report of the Intergovernmental Panel on Climate Change (“IPCC”).

70. The court held, *inter alia*, that decisions made by the Secretary of State reflected in the challenged report were based on a mistaken understanding of the true factual position because he assumed that each of the proposals and policies would be delivered in full and had not identified by how much individual proposals or policies were likely to miss their targets. The information presented to him by his officials included a bar chart “*which showed the projected emissions savings from planned policies across all sectors of the economy, with carbon savings designated by level of delivery confidence...*”. These ranged in 5 steps from very high confidence to very low confidence with an additional categorisation where there was a gap in the pathway. Nearly 50% of the savings described on the chart were rated as either low or very low confidence.

71. Whilst care needs to be taken in reading a judgment from another jurisdiction under another statutory scheme across to the 2015 Act, the judgment of Sheldon J. does not seem to suggest that the Secretary of State could have only made a decision that satisfied the requirement to ensure the necessary reduction in carbon emissions by adopting a plan where he had a very high confidence that all the measures proposed would be delivered in full. However, based on the actual advice he received, there was an “*unexplained evidential gap or*

leap in reasoning which fails to justify the conclusion reached” by the decision maker. It was not possible to identify from the materials presented to the Secretary of State which of the proposals might not be delivered or delivered in full, the extent to which there might be a shortfall nor the extent to which such shortfall might be compensated by a policy which over-delivered. Thus, the decision was held to be invalid on irrationality grounds. Insofar as the judgment draws a distinction, it is between those measures in which there was a very high, high or medium confidence of delivery (just over half) and those in which the level of confidence was low or very low. I do not think it possible to extract from this decision authority for the legal proposition that the requirement to ensure something in a climate planning context necessarily means the decision maker must have a very high degree of confidence that the measure will be delivered in full and that it will achieve the anticipated level of reduction in carbon emissions.

72. The respondents identify a number of difficulties with the standard proposed by the appellant. The level of certainty required by the appellant is inconsistent with what is essentially a forward-looking, aspirational plan which is adopted or updated annually on an iterative basis. They point to the fact that s. 4(3) allows for an element of subjectivity in that measures must be specified, set out in overview or outlined in respect of each of the 3 carbon budget periods on the basis of what “*in the Minister’s opinion*” will be required for that period. Whilst accepting that the Minister’s opinion must be reasonable and evidence-based, the respondents suggest that this language precludes the type of certainty, guarantee or proof that would be required if the appellant is correct.

73. The respondents also point to the fact that built into the statutory scheme is provision for the amendment of the carbon budgets and sectoral emissions ceilings which provide the framework within which CAP is to be adopted. In particular, under s. 6D(5) where GHG emissions exceed the carbon budget for that period, the excess emissions must be carried

forward to the next budget period. This, it is submitted, shows that the level of certainty envisaged by the appellant is not required as carbon budgets and SECs can be repeatedly amended and updated to take account of the extent to which they are being met or exceeded. Of course, this may mean the obligation to achieve reductions in later periods is commensurately increased, but it does not make a plan based on earlier figures legally invalid because it could not be predicted with certainty that it would achieve its targets.

74. There is a significant level of practical reality in these arguments and consequently of impracticality in the approach urged by the appellant. To take the example of the two sectors whose emissions are most problematic in an Irish context, namely transport and agriculture, two measures in which the respondents could have very high confidence that their delivery would reduce emissions significantly would be the banning of all private vehicles and the slaughter of the national bovine herd. For many reasons, not least the extreme unlikelihood that the affected sectors would accept them, neither of these measures are practical. Instead, many of the measures chosen in these sectors, which are multiple and varied, have an element of incremental buy-in attached to them. They aim to achieve behavioural change over a period of time through a combination of the dissemination of information, the provision of more and better infrastructure, the funding of research and development into alternatives, the provision of education to encourage the take-up of these alternatives and ultimately the payment of subsidies to facilitate people in making the necessary changes. Nonetheless, there is a degree of uncertainty as to the extent to which these measures will achieve their objectives both in terms of the expected take-up and the consequent reductions to be achieved.

75. As previously mentioned, the appellant points to the inclusion of a key performance indicator in the agriculture sector, specifically reducing the use of chemical nitrates as fertiliser in favour of protected urea on grassland farms, and complains that there is no reassurance or guarantee that farmers will actually engage with and adopt the proposed change. In essence,

the appellant criticises this aspect of the plan as being impermissibly vague as the respondents have not “*specified*” why they are confident it will succeed. If the appellant is correct, measures of this nature should not be included in a CAP because the respondents cannot have a very high level of confidence that they can and will be delivered in full. Even though a carbon budget programme spans a 15-year period and the national climate objective is to be achieved within a 35 year period (from the date of the enactment of the 2015 Act), the appellant’s approach would exclude from any CAP measures which are dependent on ongoing research, scientific developments or gradual public acceptance until a point is reached where they are sufficiently concrete for their implementation and outcome to be virtually certain.

76. I cannot construe the language of s. 4 as requiring this level of certainty so as to limit the potential measures which can be included in a CAP to those whose effectiveness is capable of concrete proof before the Minister can be said to have discharged the obligation of ensuring the CAP is consistent with the carbon budget programme. Notwithstanding the undoubted urgency of the climate crisis, construing the statutory requirements so strictly as to preclude all but those measures guaranteed to reduce emissions directly seems counter-productive. Scientific research and development, education and the promotion of behavioural change are all integral elements in the transition to a climate neutral economy. To preclude the respondents factoring the abatement potential of such measures into a CAP would make the entire climate planning process very unrealistic. This is especially so when regard is had to the fact that unlike the NMP17, the CAP is updated each year and must be made within a framework of the carbon budget programme and sectoral emissions ceilings which are themselves subject to ongoing amendment and revision depending on the extent to which their targets are met, not met or exceeded.

77. Further, I accept the respondents’ submission that the plan must be looked at in its entirety. Weaknesses or exceedances of the budget in one sector may be made up through

abatements achieved in another. As CAP23 was the first iteration of the plan to be adopted under this statutory framework, it was perhaps not possible at the time of its adoption to predict exactly how the balancing as between the various sectors might operate. I accept that abatement potential is necessarily predictive and forward-looking and may not be capable of precise measurement until the plan is operative and its measures are put into effect. Not all of the measures contained in the roadmap will of themselves have an abatement potential. Some measures are necessary as part of the overall framework within which structural changes and behavioural change can occur. The tables and figures in each chapter must be read alongside, and in the context of, the narrative contained in that chapter. The respondents criticised the appellant for taking figures in isolation and not engaging with the narrative that supports the figures in the tables contained in CAP23 nor the calculations and modelling in the associated material relating to the figures in question. There is considerable merit in these arguments and I will return to this point when considering whether the appellant has proved its case.

78. The respondents suggest that the standard that must be met by the Minister in preparing the CAP which flows from the use of the word “*ensure*” in s.4(2) is a reasonable degree of confidence that the plan is consistent with the carbon budget programme. The respondents emphasise that the carbon budget programme covers the full 15 years and not just the individual budget periods of five years.

79. Counsel for the respondents relied on the judgment of the Supreme Court in *Killegland Estates Ltd v. Meath County Council* [2023] IESC 39. That case considered, *inter alia*, the decision of a local authority to rezone certain land in a manner that precluded residential development and whether, in taking this decision, the local authority had complied with a statutory duty to ensure that its development plan was consistent with the objectives specified in the National Planning Framework (“NPF”) and the Regional Spatial and Economic Strategy (“RSES”). At paragraph 101 of his judgment, Hogan J. observed that the statutory provision

in question required only consistency with the objectives of the NPF and the RSES which meant that the development plan must be “*consistent generally, as distinct from complying in every detail and minor particular*”. He went on to observe that the NPF itself was “*largely precatory and aspirational*”. This latter observation stands in contrast to CAP23 given the obligation to achieve both a 51% reduction in emissions by 2030 and a climate neutral economy by 2050.

80. This theme was recently revisited by the Supreme Court in a case dealing with s.15(1) of the 2015 Act, namely *Coolglass Wind Farm Ltd v. An Coimisiún Pleanála* [2026] IESC 5, albeit in a judgment delivered after the appeal in this case was heard. It is not normally appropriate to consider a judgment which was not raised by the parties in argument, but in this instance the Supreme Court’s decision on the particular issue, namely the meaning of “*consistent*” was itself largely consistent with the earlier decision in *Killegland* on which the respondents did rely. The judgment of the court, which was delivered by the Chief Justice, considered the interpretation of s. 15(1) which imposes an obligation on relevant bodies to perform their functions “*in a manner consistent with*” *inter alia*, the most recent CAP. The court held that the obligation to act “*consistent with*” something was distinctly different from, and imported a more demanding obligation, than merely “*having regard to*” something (para. 99). However, it was not the same as an obligation to “*comply with*” which the court described as being a “*more hard edged...granular and specific obligation*” (para. 102). The court stated at paras. 101 and 102: –

“101. The language of ‘consistent with’ particularly when contrasted with both ‘in compliance with’ and ‘have regard to’ is instructive, both in expressing the nature of the obligation imposed on the relevant body, and the range of options open to it on the one hand, and the matter with which consistency must be achieved on the other. An obligation to perform a function consistent with certain matters, is more than a process

obligation. It does not simply dictate what steps must be taken before a function is performed. It is addressed to the outcome, which must be capable of being demonstrated to be consistent with an identified standard.

102. However, the formula implies that there is more than one possible outcome which may satisfied the test.”

81. In light of these decisions, I am of the view that the interpretation of the statutory standard or threshold proposed by the appellant is too strict. At the same time, that proposed by the respondents may not meet the full height of the intended obligation. This would certainly be the case if the “*reasonableness*” of the degree of confidence required were to be interpreted as that word is usually understood in a public law context. This would leave the decision maker with a broad discretion which would be largely un-reviewable unless no reasons were provided for the choices made or there was no evidence to support the chosen options. Clearly, neither of these circumstances arise here.

82. “*Consistent with*” certainly suggests, as the Supreme Court have said in *Coolglass*, that there are a range of possible outcomes open to the Minister which may satisfy the obligation under s. 4(2) and a “*degree of tolerance in the manner*” in which that obligation can be achieved. In my view, the use of the word “*ensure*” (which does not appear in s. 15(1)) raises the level of the obligation regarding consistency beyond showing merely a reasonable level of confidence that the plan is consistent with the carbon budget programme. Notwithstanding that the word “*ensure*” makes the obligation to ensure consistency with under s.4(2)(a) marginally more onerous than the requirement to act consistently under s.15(1) *per Coolglass*, it is still not an obligation that reaches the heights of “*comply with*”. Strict compliance between the CAP and the carbon budget programme is not required, not least because the carbon budget programme is, in a sense, a moving target subject to constant revision and amendment depending on the extent to which it is met or exceeded.

83. In addition, the height of the obligation to ensure consistency with the carbon budget programme has to be seen in the overall context of section 4. This includes the references in s. 4(3) to the matters to be specified, set out in overview or outlined in the roadmap as being those which are required “*in the Minister’s opinion*” and the very long list of factors to which both respondents must have regard in the exercise of their functions under s. 4(8). Many of the factors in this list are undoubtedly policy oriented and require consideration of classically political matters such as the public finances, climate justice and the need for a just transition.

84. Further, as the respondents point out, the obligation is to ensure consistency with the carbon budget programme which spans a period of five years and not with the individual five-year carbon budgets. This necessarily entails a significant degree of forward-planning which must take into account the fact that appropriate measures “*may not yet be fully identified and may evolve over time through innovation, evolving scientific consensus and emerging technologies*” (s. 4(8)(h)). As noted above, the carbon budget programme has a built-in correction mechanism that allows for reallocation in the event of emissions targets being either met or exceeded which makes strict compliance between the CAP and the carbon budget programme at any given point in time difficult to ensure.

85. Consequently, the measures proposed in a CAP must have a realistic evidential foundation and be capable, if fully implemented, of producing reductions in emissions at or close to the projected levels. A realistic evidential foundation in this context should not be confused or equated with proof in the legal sense. Rather it means that there should be a real basis in current scientific and technical knowledge for what is proposed, even if that science is still evolving and the subject of on-going research and development. Measures cannot be proposed on a purely speculative basis but the respondents are not precluded from including a measure which is still the subject of research where there is some realistic prospect of that research coming to fruition. Measures to be fully implemented in the current carbon budget

period will necessarily require to be more concrete and have a higher likelihood of full implementation than those to be implemented during the course of subsequent periods. Although it is open to the respondents to do so, they are not required to expressly state whether they have a very high level or any other level of confidence in individual measures in a CAP.

86. The forward-looking nature of a CAP coupled with the express statutory recognition that science and technology in the field is constantly evolving, allows for the inclusion of measures which will require both behavioural change and/or future technical innovation although it may not be possible to predict with certainty whether such changes will take place and what their actual, as opposed to predicted, impacts will be in terms of reducing emissions. The iterative nature of the CAP means that if it subsequently becomes apparent that a measure cannot or will not be implemented, the respondents must take steps to re-allocate the necessary reduction in emissions from those measures to other measures. The statutory obligation is to ensure consistency with the carbon budget programme. This can be achieved in a number of different ways and the methods chosen may require to be amended in light of practical experience.

Reasonable Scientific Certainty

87. The other formulation of the test proposed by the appellant is that to ensure consistency with the carbon budget programme, there should be reasonable scientific certainty that the measures proposed will be implemented and will achieve the anticipated reduction in emissions. This test is derived from that applicable under Article 6(3) of the Habitats Directive (Council Directive 92/43/EEC) according to the jurisprudence of the Court of Justice. Although counsel for the appellant phrased this test positively, i.e. as requiring reasonable scientific certainty, the case law on Article 6(3) in fact expresses it negatively – i.e. there must be no reasonable scientific doubt as to the absence of an adverse effect on the integrity of a protected European site. The presence of reasonable scientific certainty and the absence of

reasonable scientific doubt amount to the same thing. It is accepted by the CJEU that reasonable scientific certainty does not require absolute certainty, but nonetheless it requires a very high degree of proof. Although it is not an exact analogy, a comparison with the common law standard of proof in criminal cases, beyond a reasonable doubt, is instructive.

88. Article 6(3) of the Habitats Directive requires that an appropriate assessment be carried out when any plan or project is likely to have a significant effect on a protected site in light of the site's conservation objectives. Where the assessment cannot exclude reasonable scientific doubt as to the absence of an adverse effect, the plan or project may not be permitted to proceed unless there are imperative reasons of overriding public interest justifying it (under Art. 6(4)). The appellant contends that this test is appropriate because the exclusion of reasonable scientific doubt can be equated with a very high degree of confidence that the proposed measures will work. It argues that this is necessary to ensure that the reductions required in the carbon budget programme will be achieved.

89. I am not convinced that a test which has been formulated to apply in circumstances where a developer seeks permission in advance of commencing a proposed development can be appropriately translated to circumstances where a Minister makes policy decisions as regards the contents of a forward-looking plan. This is for two main reasons. Firstly, when an appropriate assessment is carried out, the potential effects of an actual, proposed development the design and location of which is known, are assessed by reference to specific protected sites, the conservation values of which are also known. There are established scientific pathways through which the effects of the former on the latter can be identified, quantified, described and assessed for the purposes of applying the no reasonable scientific doubt test. This is not the case in relation to climate change nor a CAP which is a forward-looking, long-range plan which must cover the entire country and all relevant sectors of the economy. Thus, the exercise of establishing consistency between the CAP and the carbon budget programme is, of necessity,

materially different to that of establishing the lack of an adverse effect from a proposed development on a protected site.

90. Secondly, and perhaps more importantly, where a developer cannot establish that there is reasonable scientific certainty its proposed development will not adversely affect the integrity of a protected site, the default response of the decision maker must be to refuse consent for the development. If the development does not proceed, then the potential adverse effects which cannot be excluded to the requisite degree of scientific certainty will simply not occur. In contrast, in planning for climate change the respondents do not have a “*do nothing*” option. Steps must be taken, not just to comply with the statutory obligations under discussion here, but to ensure the viability of the planet for future generations. The imposition of a standard of reasonable scientific certainty for the measures proposed in a CAP would significantly reduce the range of options open to the respondents. It would, on the basis of the appellant’s arguments, absolutely exclude measures the subject of ongoing scientific and technological research notwithstanding the express reference to them in s. 4(8)(h). It would also exclude measures which depend on achieving public behavioural change until such change has taken place, even though public acceptance for the adoption of any climate planning proposal is essential for its long-term success.

Discharging the Onus of Proof

91. The appellant did not lose this case in the High Court because the High Court fundamentally disagreed with its interpretation of the legislation but rather because Humphreys J. held that the appellant had not discharged the onus of proof which it bore as the moving party in a judicial review to show that the respondents had acted in breach of the 2015 Act in adopting CAP23. The appellant has appealed against this finding. In the preceding sections of this judgment, I considered in some detail the height of the statutory obligation imposed on the

respondents by s. 4(2) and (3) of the 2015 Act as that undoubtedly has a bearing on whether the appellant has discharged the burden of showing that this obligation had not been met. Notwithstanding that I have rejected the appellant's interpretation of the relevant statutory provisions, I am satisfied that the High Court was correct to conclude that the appellant had not discharged the onus of proof that lay upon it and I would remain so satisfied even if the higher statutory standard contended for by the appellant applied.

92. There are three inter-related aspects to this issue which covers the first two of the points raised on this appeal as identified at paragraph 8 above. I propose looking firstly at the onus of proof in proceedings by way of judicial review generally and how the appellant sought to meet that onus; secondly at whether it could rely on the EPA's 2023 report on projected emissions and whether the appellant could rely on this report, either at all or as expert evidence in support of its case and thirdly at the issue of expert evidence in support of a challenge of this nature.

93. In judicial review proceedings which challenge any public decision, the applicant bears the onus of establishing that the impugned decision is invalid. If the challenge is a purely legal one which depends, for example, on the construction of a particular statute or regulatory instrument or its application to an agreed set of facts, the applicant may be able to do this simply on the basis of legal argument. However, if the challenge raises factual questions, then the onus is on the applicant to adduce evidence to establish as a matter of fact that the proposition they contend for is correct. That evidence may well lie in the material which was before the decision maker which can always be relied on by an applicant to make its case. However, if the case made depends on establishing that the material before or generated by the decision maker is inadequate or incorrect in some way, then it is likely that additional, external evidence will be required to establish the inadequacy or error in the material in question.

94. The specific issue which arises here is that the decision under challenge is a technical one. The respondents and their advisors have proceeded on the basis that CAP23 itself and the background material upon which it was based are sufficiently detailed and robust to justify the decision made to adopt it. In circumstances where the appellant disputes this, what evidence must it adduce to discharge the onus of proof which lies upon it to show that the respondents could not have been satisfied to the requisite statutory standards in making the decision? The appellant contends that it cannot be required to adduce expert evidence as it must be able to understand and engage with CAP23 as an ordinary member of the public. Alternatively, it argues that it can rely on the EPA's 2023 report as evidence in its favour.

95. It is undisputed that the appellant did not adduce any evidence which attempted to engage with (as opposed to merely exhibiting) the material which was before the respondents. Its deponent did not profess any particular scientific qualification and, while her affidavits responded to those sworn on behalf of the respondents, they did so mainly by pointing to an alleged lack of detail or quantification in CAP23 itself. Significantly, the respondents point out that the appellant originally complained that it was not possible for it to understand some of the conclusions in CAP23 in the absence of access to the material on which those conclusions were based. That material was exhibited in the third and final replying affidavit sworn on behalf of the respondents in May 2024. The appellant did not reply to that affidavit and, consequently, simply did not engage at all with this underlying material.

96. Counsel for the appellant brought the court to specific parts of CAP23 and the associated McKinsey analysis (all of which dealt with agriculture) and repeatedly asked how a member of the public could be satisfied the particular proposals were going to work. He criticised the use of words such as "*could*" to describe potential abatement that might be achieved saying that this was just not good enough, the mere fact that something might achieve a reduction was not sufficient and the respondents were obliged to say why they were satisfied the measure in

question was actually going to work. These criticisms were levied in particular at measures which require a degree of “*buy-in*” or behavioural change from farmers such as the switch to organic farming or the reduction in use of chemical fertilisers. Even when these measures were presented with a range of supporting measures, such as subsidies to encourage farmers to make the necessary changes, the appellant argued that there was no certainty that they will do so and, thus, no certainty that the necessary reductions in GHG emissions will be achieved.

97. There are two practical problems with this approach. CAP23 and its Annex of Actions is a lengthy and detailed document supported by a significant amount of technical and analytical material. It is structured in a way that is designed to demonstrate consistency with the carbon budget programme and with the sectoral emission ceilings, with each sector determined under s. 6C(2) the subject of a separate sector-specific analysis (save for LULUCF for reasons which were explained). While some of the projected reductions in emissions are contingent on achieving behavioural change within the broader population, the degree of uncertainty which results has to be seen in the context of the iterative nature of the plan and the potential for amendment of both carbon budgets and sectoral emissions ceilings is if the necessary changes are not achieved.

98. Further, as explained at the outset, unlike the position which pertained in *Friends I*, CAP23 is part of a statutory framework which includes five different levels of programs, plans and strategies. The role of the CAP is to provide the detailed mechanisms through which other elements of this framework can be moved forward most notably the carbon budget programmes and sectoral emissions ceilings. For the public to be satisfied that CAP23 is realistic (to use language taken from *Friends I*), it is not essential that it be capable of strict proof in either a legal or a scientific sense. When looking at the level of specificity required for a member of the public to be satisfied that a plan was realistic, Clarke C.J. described the purpose of such specificity as being to allow that person “*to know enough*” about how the Government intended

to meet the NTO to inform their view as to whether the policy was effective and appropriate. He did not suggest that the level of specificity required a guarantee that the plan in its then-current form would succeed.

99. In taking the court through selected portions of CAP23, the appellant did no more than establish that certain measures were not within the direct control of public authorities and were dependent on achieving behavioural change within the population or sectors of the population or on the outcome of ongoing scientific research. Insofar as these measures are contingent, they might not achieve the projected reductions in emissions. However, that does not mean that the plan as a whole is not consistent with the carbon budget programme. This is especially so in circumstances where the programme consists of three successive five-year periods and the requirement to include sector-specific actions in relation to the second and third periods is couched in far less concrete language than that used in respect of the first.

100. As noted, in the context of judicial review, the onus lies on the appellant to show that the respondents have not complied with their statutory obligations. Where the respondents have ostensibly complied with the relevant statutory provisions and no procedural error or want of natural justice is raised, it is not sufficient for the appellant merely to point to material generated by the respondents in the course of adopting a CAP and to ask “*how can that be good enough?*”. The appellant must show that it was not good enough. This requires a level of engagement with the material going beyond simply identifying what are perhaps the most contingent measures in the plan and saying that they might not work. The appellant must establish that these measures are either incapable of working or highly unlikely to work in the manner proposed such that their inclusion, even on the contingent basis described, is clearly inconsistent with the carbon budget programme. Even then, depending on the nature of the measure, the timeframe within which it is proposed to be implemented and its predicted

abatement potential, establishing that the measure is unlikely to work may not be sufficient to establish that CAP23 as a whole is not consistent with the carbon budget programme.

EPA 2023 Report

101. The appellant’s case goes somewhat beyond merely pointing to CAP23 and its Annex of Actions and suggesting that it is not good enough. The appellant also relies on an EPA report of June 2023 on Ireland’s GHG emissions projections. This report post-dates the adoption of CAP23 and therefore was not considered or taken into account by the respondents although a previous version of the same report dated June 2022 was. The report undoubtedly makes bleak reading. Its key findings include that Ireland is not on track to meet the 51% emissions reduction target by 2030, that the first two carbon budgets (2021–2030) are projected to be exceeded by significant margins and that the sectoral emissions ceilings for 2025 and 2030 are also projected to be exceeded in almost all cases, including agriculture. The projections on which these findings are based include most but not all of the CAP23 measures.

102. Although it may be a truism, it is worth observing that it does not follow from the fact that CAP23 targets are not being met, that the adoption of CAP23 was in breach of the relevant statutory provisions. The plan could be perfect and never implemented at all. Measures which could work perfectly if put into operation may stall for reasons unrelated to the plan itself. In any event, this is not the case the appellant seeks to make, at least not directly. Instead, the appellant points to the two projected scenarios set out in section 2 of the report. The first is a “*With Existing Measures*” scenario (“WEM”) which projects future emissions on the basis of the continued application of measures which were already in place by the end of 2021 (the last inventory period). The second is a “*With Additional Measures*” scenario (“WAM”) which included measures outlined in the latest government plans at the time the projections were compiled. This included the measures proposed in CAP23.

103. However, at paragraph 2.2 of the report a number of measures and policies are identified which were excluded from the WAM scenarios because “*the EPA could not see an implementation pathway to merit their inclusion at this point in time*”. Policies and measures were excluded from the projections in three sectors namely Electricity; Enterprise, Built Environment and Public Sector; and Agriculture. In particular, under Agriculture, diversification measures designed to achieve savings of 1.5 mt CO₂ eq by 2030 were excluded because “*further information is needed to model an implementation pathway for these measures*”. In total, some 26.25 mt CO₂ eq stated in CAP23 to be achieved cumulatively by 2030 are not modelled.

104. The appellant argues that the inability of the EPA to model an implementation pathway for measures included in CAP23 is evidence that those measures lacked the necessary specificity to be capable of ensuring that the carbon budget programme would be met. In response, the respondents point to the fact the appellant’s case is not pleaded by reference to the EPA 2023 report. This is true but presumably arises because of a combination of the tight timelines within which the judicial review proceedings had to be instituted and the fact the report post-dates the decision under challenge. The report was exhibited in a supplemental affidavit sworn on behalf of the appellant before the date of the High Court hearing and was clearly part of the material the appellant put before the High Court. In those circumstances I am not minded to exclude the arguments based on it merely for this technical reason. However, I accept the respondents’ point that in circumstances where the EPA 2023 report was not part of the pleaded case, the High Court cannot be criticised for failing to address that report in its judgment.

105. The respondents also counter the appellant’s reliance on the EPA 2023 report by suggesting that the problems identified arise from weaknesses in the EPA’s modelling capacity rather than from the robustness of CAP23. It is certainly the case that because all of CAP23’s

proposals were not fully modelled by the EPA, its projections exclude a number of those proposals and therefore do not fully capture the level of emissions reductions CAP23 is designed to achieve. The respondents estimate that approximately 10% of CAP23's proposals have not been included in the EPA's projections. The respondents maintain that this is not a criticism of the EPA, but arises because the EPA projections serve a different purpose to CAP23.

106. The main difficulties in the use of the EPA 2023 report arise because the projections contained in that report cover the period between 2022 and 2040 whereas CAP23 covers the period of the carbon budget programme, namely 2021 to 2035. Further, under s. 4(3) the level of specificity required in the CAP's roadmap regarding the different carbon budget periods within the carbon budget programme varies and, significantly, decreases in respect of the second and third budget periods. The respondents point to the fact that the policies and measures excluded from the EPA projections are described by reference to periods up to 2030 and post-2030, both of which are outside (or at least partially outside) the first budget period in respect of which specific measures are required to be set out. Thus, the respondents say that it is not surprising that the EPA might be unable to model measures intended to be implemented between 2031 and 2035 when the statutory requirement for CAP23 was limited to outlining potential policies that may be required during that budget period. The EPA report identifies its second period as being post-2030 but does not expressly note that CAP23 was not required to even outline potential policies for the 2035 to 2040 period.

107. I accept that the EPA's annual GHG emissions projections form an important part of the dialogue leading to the adoption of a CAP. The EPA's annual report provides an ongoing, expert view as to what elements of a CAP are achieving their intended purpose and which elements may be falling short, thus informing the content of subsequent plans. It is important to bear in mind the context which not only requires that the CAP be updated on an annual basis

but allows carbon budgets and sectoral emissions ceilings within those budgets to be amended and for exceedances to be carried forward or assigned to another sector depending on what may be required on an overall basis to achieve the statutory targets. In this regard the respondents suggest that the EPA projections showing the projected exceedances halving between CAP23 and CAP24 are evidence of the effectiveness of the iterative process under the 2015 Act. The halving of exceedances does not, of course, demonstrate compliance, but it does indicate that the dial is moving in the right direction and by an appreciable degree. The EPA projections report does not, and is not intended to assess compliance with the current CAP to date but, rather, to provide information and analysis that can be fed into the next CAP.

108. Thus, the question arises as to the extent to which the EPA 2023 projections report is capable of constituting evidence of non-compliance by the respondents with section 4 of the 2015 Act in the adoption of CAP23. I am not satisfied that it is so capable or, at the very least, that the appellant has shown that anything in the report demonstrates the alleged non-compliance with s. 4 pleaded in the Statement of Grounds. Simply put, it does not follow from the fact that a plan has not worked as intended, that the plan was incapable of fulfilling its purpose from the outset. This is particularly so where the plan is iterative in nature and subject to constant updating and amending as the overarching targets to which it is directed approach. Additionally, in order to rely on the EPA 2023 report *simpliciter*, the appellant would need to engage in more detail with its contents. In circumstances where the period covered by the EPA report and that covered by the CAP do not coincide and where CAP23 was not required to specify measures beyond 2030, the appellant would have to demonstrate to the court how the findings in the report can be related to the obligations of which it is alleged the respondents are in breach. No effort has been made to do this.

Expert Evidence

109. The appellant takes particular issue with what it characterises as the High Court findings that expert evidence was required to challenge the CAP. It argues that the entire tenor of the Supreme Court judgment in *Friends 1*, which focuses on transparency and the need for the public not just to be able to know what the plan is but to assess whether it is realistic, is undermined if in practice members of the public must engage experts in order to understand the plan. In this regard there is an internal contradiction at the heart of the appellant's case. On the one hand it argues that there is a lack of quantification, justification and explanation for the measures contained in CAP23 notwithstanding the length and detail of the plan and the availability of much of the research and analysis on which it is based. On the other hand, it contends that the plan must be sufficiently simple and clear-cut to be understood by a member of the public (presumably Clarke C.J.'s reasonable and interested member of the public) without expert assistance.

110. To a certain extent this latter argument minimises the complexity of climate science and of the analytical techniques scientists use, particularly in modelling exercises, to predict in scientific terms the future impact or effectiveness of various measures. Many well informed and interested members of the public without a scientific background will struggle to understand the fine details and technicalities of CAP23 no matter how clearly it is presented. I note that Clarke C.J. did not say that there was an onus on the Government to make a climate plan understandable by interested members of the public in the sense the appellant contends. Rather, the plan had to be sufficiently specific to enable the public to "*know enough*" about how the Government intended to fulfil its obligations to enable the public to act in whatever way they considered appropriate in light of the policy reflected in the plan. Clarke C.J. certainly envisaged that this might be a political response by the public.

111. The appellant points out that it succeeded in *Friends 1* notwithstanding that it did not adduce expert evidence. It is difficult to draw comparison between two different cases each raising different grounds of challenge against a different plan. However, a striking feature of the NMP under challenge in *Friends 1* was that it allowed for an increase in emissions before requiring their reduction. On the face of it, this was completely inconsistent with the statutory objective of achieving substantial reductions in emissions, albeit over time. There is no such obvious dissonance on the face of CAP23.

112. On this broad issue I have found the High Court judgment difficult to follow in some respects. It is unclear, for example, whether the reference at paragraph 93 to the general administrative law principle that the onus lies on an applicant to prove a decision is irrational based on the material before the decision maker, followed by an immediate qualification that this was not how this particular case was pleaded or argued, is intended to suggest that this basic principle does or does not apply in the circumstances. For what it is worth, I accept the appellant's argument that in adopting a CAP under s. 4 of the 2015 Act, the respondents are neither limited to considering material provided to them by statutory consultees and members of the public nor entitled to adopt a plan based only on a consideration of such material. Instead, as the appellant contends, the primary onus is on the respondents to ensure that they have all information necessary to be in a position to adopt a plan which meets the relevant statutory criteria. This may include, as was the case here, the commissioning of experts to provide information and analysis both for the purpose of developing the terms of the plan and ensuring the measures adopted will be consistent with the carbon budget programme.

113. However, this is not really the issue. The issue is whether the High Court judge required that the appellant adduce expert evidence in order to make its challenge and, if so, whether that was legally inappropriate. The High Court judgment does refer to expert evidence a number of times but usually does so in the broader context of the appellant having failed to engage with

the material offered by the respondents in the plan itself and the additional material exhibited in the proceedings. For example, in paragraph 122, the High Court points to a lack of meaningful engagement by the appellant and offers the view that actually quantifying how far the material before the court advanced matters “*would normally require expert evidence*”. At paragraph 126 the judgment notes a “*lack of detailed expert interrogation of the State's material by the applicant*”; at paragraph 129 the judgment states that the appellant’s complaint “*needs to be firmly situated in the context of detailed engagement with the totality of the information that is there*”; at paragraph 134 the judgment notes a lack of granular engagement with the detail of the State’s plan by way of pleadings and evidence, suggesting that this engagement could be “*supported by expert evidence*” and in the summary contained at paragraph 137 these points are repeated before the judgment concludes at paragraph (xv): –

“Finally, the applicant’s approach of launching upon the court a detailed textual exegesis of the plan, without expert evidence, can’t be the correct procedure. The ordinary way in which the shortcomings of proposed government action would be addressed would be by way of submission prior to the decision and then complaint that the points made in the submission were not properly addressed, grounded on expert evidence in the case of technical matters. What’s lacking about the approach here is the lack of granular engagement with the detail of the plan by way of pleadings and expert evidence.”

114. There are two strands to these comments. The first is a failure on the part of the appellant to engage with the detail of the material that was before the court. I have already noted that when the respondents’ deponent swore his final affidavit exhibiting the McKinsey analysis, the appellant did not file any further affidavit in response. Therefore, all of this material went completely unchallenged. However, the appellant’s difficulties are not confined to the failure to engage with this final affidavit. There was, as the High Court pointed out, a failure to engage

with the totality of CAP23 and the material supporting it as opposed to merely taking issue with isolated parts of the text of the plan. The appellant's case is premised on a lack of quantification, justification and explanation. In circumstances where CAP23 on its face and in its supporting material manifestly quantifies, justifies and explains its contents, in order to succeed the appellant needed to go further and demonstrate to the court that the quantification, justification and explanations provided were not sufficient. As the High Court found, this was not done.

115. This gives rise to the second thread in the High Court analysis, namely that expert evidence would be required to do this. I do not think that the trial judge's comments can be read as a dicta that expert evidence will be required in every case where a climate plan is under challenge. Rather, the particular case pleaded by the appellant was a technical one. It depended on an absence of sufficient quantification and justification for the measures proposed to establish that they were capable of and would work. Given the nature of the plan and the nature of the measures involved, it is very difficult to see how inadequate quantification or justification could be established in the absence of expert evidence.

116. This is not to say that expert evidence would be required in every challenge to a CAP. Much will depend on the nature of the challenge, the manner in which it is pleaded and, perhaps importantly, the manner in which it is defended and the evidence adduced on both sides in support of the respective pleadings. The question is not whether expert evidence is required in all cases but whether expert evidence was required in this case. On this case-specific basis, the observations of the trial judge that the appellant would have needed expert evidence to make out a case which took issue with the quantification of the results likely to be produced by the proposed measures when assessed on a technical and scientific basis, was undoubtedly correct.

117. In light of the above analysis, the following are my conclusions:

- (a) Even if the proceedings are technically moot, it is nonetheless appropriate for the court to hear and determine them. This is because the lifespan of each individual, updated CAP is too short to allow a challenge to be brought and determined in the High Court and appealed to this or another court before the next CAP replaces that under challenge. Further, this case challenged the first CAP adopted under the 2021 amending legislation and raised significant issues as to the interpretation and application of that legislative scheme which merited consideration and decision.
- (b) The standard to be met by the respondents in adopting a CAP under s. 4 of the 2015 Act, as amended, is an exacting one but one which must take account of the entire statutory scheme including the place of the CAP in the hierarchy of plans and programmes set out in s.3(2), the iterative nature of the plan and that the legislation envisages amendment of both the carbon budgets and the sectoral emissions ceilings within which it must operate. There must be a realistic evidential foundation for the respondents' view that the CAP is consistent with the carbon budget programme. However, the need for specificity regarding the measures adopted and their likely impact and effectiveness varies over the lifetime of the plan and, in particular, is less demanding in respect of the 2nd and 3rd carbon budget periods. Consequently, the standard does not require the respondents to demonstrate a very high level of confidence in all of the measures contained in the plan, particularly those the implementation of which will take place or be completed after the expiration of the current carbon budget. The statutory standard does not require the respondents to demonstrate the absence of reasonable scientific doubt regarding the implementation or effectiveness of the measures concerned.
- (c) The onus lies on an applicant seeking to challenge a CAP by way of judicial review to establish that the CAP is invalid for the reasons alleged. In circumstances where

it is contended that the measures contained in a comprehensive and detailed plan, which are supported by documentation generated by external experts, are insufficiently quantified or explained such that the respondents could not be satisfied that they would be effective, the applicant must engage with the content of the plan and supporting material to establish that contention. Where the material in question is overwhelmingly technical and scientific in nature, it is likely that expert evidence will be necessary to establish the applicant's contention. This is not an absolute rule, but the nature of the appellant's challenge is such that it was unlikely to succeed in the absence of expert evidence.

118. In light of the above conclusions, the appellant's appeal must be dismissed. I note that in its proceedings the appellant sought a declaratory order regarding costs pursuant to the Aarhus Convention and the associated national legislation. While the High Court did not rule on this point, no order for costs was made by Humphreys J. and the respondents did not cross-appeal that order. Consequently, it seems to me that the appropriate order to be made on this appeal is also that no order for costs should be made against the appellant. If the respondents do not agree with this proposed order they may file written submissions (not exceeding 1,500 words) within 14 days of the delivery of this judgment, and the appellant will have a similar period within which to reply.

119. Costello P. and Collins J. have read this judgment in advance of its delivery and have indicated their agreement with it.