Re: Appeal against Section 5 Declaration Ref 0042/20

Appellant: Cliona Cleary

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1. *McCabe v Coras Iompair Éireann and Iarnód Éireann*, [2006] IEHC 356.
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4. *McArdle v Carroll*, [2019] IEHC 850.
5. *Krikke and Others v Barranafaddock Sustainability Electricity Limited*, [2019] IEHC 825.
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[2006] IEHC 356.

THE HIGH COURT

[2005 No. 79 MCA]

IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT, 2000

BETWEEN

BERNADINE McCABE

APPLICANT

AND

CORAS IOMPAIR ÉIREANN AND IARNRÓD ÉIREANN – IRISH RAIL

RESPONDENT

JUDGMENT of Mr. Justice Herbert delivered of ~~9th~~ 10th day of November, 2006

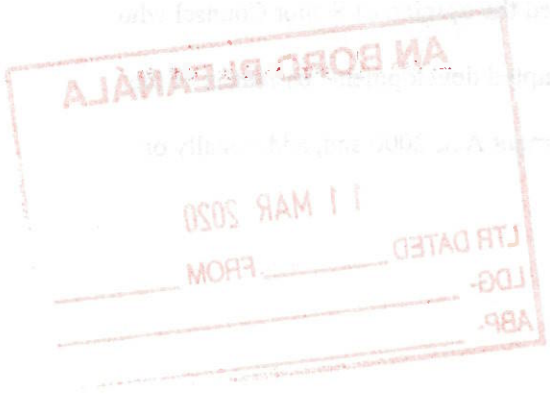
The Applicant seeks an Order of this court, pursuant to the provisions of s. 160 of the Planning and Development Act, 2000, directing the Respondent to restore a 161 years old railway under-bridge at Gingerstown, Caragh, Naas, Co. Kildare, to its condition prior to what is claimed to have been unauthorised development carried out by the Respondent at the bridge on the 16th, 17th and 18th days of March 2002.

On the 13th February, 2002, the Applicant wrote to the Respondent asserting that in her belief the intended works of which she had just become aware required a grant of planning permission and, advising the Respondents that unless they could demonstrate that they did not require planning permission for the intended works, she would seek injunctive relief from the courts if the works were to proceed. The letter

was copied to 26 other parties: the Planning Section and the Roads Section of Kildare County Council, the Garda Authorities at Naas, the Secretary of the Department of the Environment and Local Government, the Secretary of An Taisce, Members of Dáil Éireann, Local Government Councillors and the Editor of the Leinster Leader Newspaper.

The Applicant was not being merely officious or acting from some disinterested sense of concern for the observance of the Planning Laws. As she explained in this letter, she and her family, since about 1995 have been inconvenienced and affected by the increased use of the regional public road straddled by this bridge on the main railway lines between Dublin and Cork, and also serving Waterford, Limerick, Galway, Kilkenny, Killarney, Tralee and other towns. In particular, she instanced the increasing use of this road by heavy goods vehicles, especially very large refuse trucks of abnormal height. The Applicant stated that she resided approximately 2.5 miles from this railway bridge, which she accepted was being repeatedly struck by these vehicles.

Receipt of this letter was acknowledged by the Planning Section of Kildare County Council by a letter dated 19th February, 2002. By letter dated 1st March, 2002 the Respondent replied that what Iarnród Éireann proposed to do was to reconstruct the bridge in materials similar to those of which it was constructed but eliminating the arch and, providing an orthogonal section through the bridge to allow high vehicles to pass in safety, without materially affecting the character, design and external appearance of the bridge. The writer informed the Applicant that following receipt of her letter the Respondent had sought and obtained the opinion of Senior Counsel who had advised that the proposed works were "exempted development" by reason of the provisions of s. 4(1)(h) of the Planning Development Act, 2000 and, additionally or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alternatively, Class 23 of Part I of the Second Schedule of Planning and Development Regulations, 2001. The writer stated that the works were urgently required to ensure the safety of the public travelling both in trains and on the road and he enclosed in the letter a plan and elevation of the proposed works.

On 27th February, 2003 a Notice pursuant to the provisions of s. 75 of the Roads Act, 1993 was published by the Roads Section of Kildare County Council in the Irish Independent newspaper informing the public of the temporary closure of the R 409 road between Halverstown Cross Roads and Capagh, from 00.01 hours on Saturday 16th March, 2002 to 16.00 hours on Tuesday 19th March, 2002, for the purpose of renewing under-bridge number 409 at Gingerstown, Co. Kildare. By letter dated 4th March, 2002 the Applicant lodged her objection to the closure and to these works. The Applicant stated that it should be the duty of the Planning Authority to, "endeavour to preserve our heritage items not destroy them": that the bridge could be reinforced without defacing it, and could be protected from future damage by a traffic calming system which would permit only one heavy goods vehicle at a time to pass under the bridge. By letter dated 7th March, 2002 Mr. Michael O'Neill, Solicitor, acting on behalf of the Applicant, wrote to the Solicitor for the Respondents stating that the Applicant did not accept that the proposed development was "exempted development" within the meaning of s. 4(1)(h) of the Act of 2000 or Class 23 of Part I of the 2001 Regulations.

Further letters dated 7th March, 2002, 8th March, 2002 and 12th March, 2002 were exchanged between Mr. O'Neill and the Respondent. By letter dated 8th March, 2002 Kildare County Council advised the Applicant that notice of a decision by Kildare County Council to grant permission for the temporary closure of the relevant

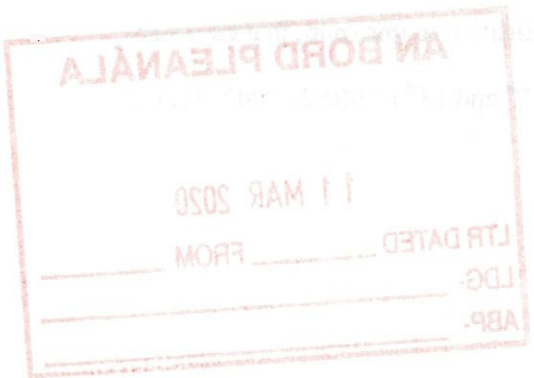
section of the R 409 road would be published on Saturday 9th March, 2002 in the Irish Independent Newspaper. This letter stated:-

> "Please note that the appearance of this Notice gives permission for the temporary closing of the road only. It does not imply that Iarnród Éireann have been given permission by the Council to carry out the works until such time as it has been established, beyond doubt, that these works are exempt from permission under the Planning and Development Acts."

On 11th March, 2002, s. 5 of the Planning and Development Act, 2000 became operational. By letter dated 11th March, 2002, the Applicant sought a declaration from Kildare County Council, as the relevant Planning Authority, as to whether or not the development proposed by the Respondent was "exempted development" within the meaning of that Act. By Order made on the 13th March, 2002 it was declared that the proposed works were not "exempted development". This Declaration was forwarded by Mr. O'Neill to the Solicitor for the Respondent by letter dated 15th March 2002, with a request that the Respondent confirm that they would not proceed with the proposed development without first obtaining a review of the Declaration by An Bord Pleanála or applying for planning permission. By letter dated 15th March, 2002 the Solicitor for the Respondent protested to the Planning Section of Kildare County Council, complaining of what was described as the unfair, unconstitutional, high-handed and unlawful manner in which it had issued the Declaration:-

> "In a manner that affects Iarnród Éireann without giving us an opportunity of making our views known".

It was accepted by both parties to this application to this court, that the works were carried out by the Respondent on the 16th, 17th and 18th of March, 2002, without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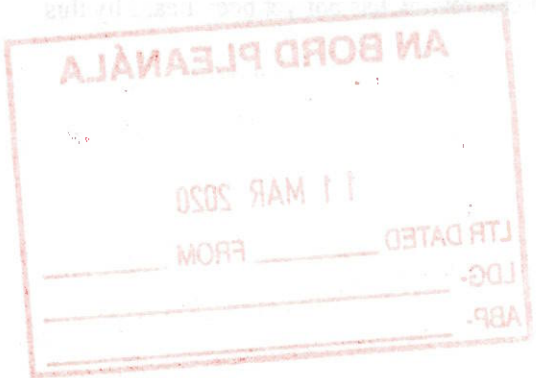
obtaining a grant of planning permission or without seeking a review by An Bord Pleanála of the Declaration. It was also accepted that the railway bridge in question is not a "protected structure" as defined by s. 2(1) of the Planning and Development Act, 2000. In judicial review proceedings entitled, "Córas Iompair Éireann and Iarnród Éireann (Irish Rail), Applicants, the County Council of the County of Kildare, Respondent and Bernadine McCabe Notice Party," this court (Mr. Justice Murphy), by Order made on the 21st October, 2004, granted the Respondent an Order of *Certiorari* quashing the Declaration notified to the Applicant on the 15th March, 2002, on the grounds that the decision was a quasi-judicial decision and not an administrative decision and, the Respondent should have been given time to make submissions before the Declaration was made.

By Order of this court (Mr. Justice Abbott) made 28th November, 2005, in proceedings entitled Judicial Review No. 2005/1288 J.R., Córas Iompair Éireann and Iarnród Éireann – Irish Rail, Applicants the County Council of the County of Kildare Respondent and Bernadine McCabe, Notice Party, the Applicant was granted leave to apply by way of Judicial Review for, *inter alia* an Order of Prohibition restraining Kildare County Council from taking any steps, including the serving of an Enforcement Notice, on foot of the Declaration, an Order of *Certiorari* quashing a statutory Warning Letter purportedly issued by Kildare County Council on the 15th March, 2002 and, an Order of Prohibition, in effect prohibiting Kildare County Council from further considering an application for a s. 5 Declaration in relation to this development. This application for judicial review has not yet been heard by this court.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The Applicant seeks relief pursuant to the provisions of s. 160(1)(b) and s. 160(2) of the Planning and Development Act, 2002. These subsections provide as follows:-

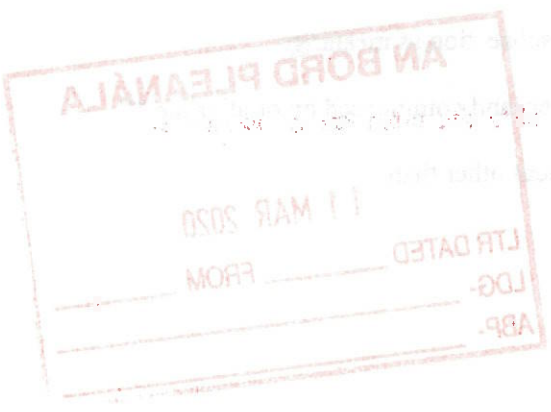
> "160(1)(b) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure as appropriate the following: insofar as is practicable, that any land is restored to its condition prior to the commencement of any unauthorised development.
>
> 106(2) In making an order under subs. (1), where appropriate, the Court may order the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or other feature."

"Unauthorised Development" is defined by s. 2(1) of the Act of 2000 as meaning:-

> "In relation to land, the carrying out of any unauthorised works (including the construction, erecting or making of any unauthorised structure) or the making of any unauthorised use".

"Unauthorised Works" is defined in the same subsection as meaning:-

> "Any works on, in, over or under land commenced on or after the 1st October, 1964, being development other than: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(a) Exempted development (within the meaning of s. 4 of the Act of 1963 or s. 4 of this Act), or,

(b) Development which is the subject of a permission granted… being permission which has not been revoked…"

"Works" is defined in s. 2(1) of the Act of 2000, as including:-

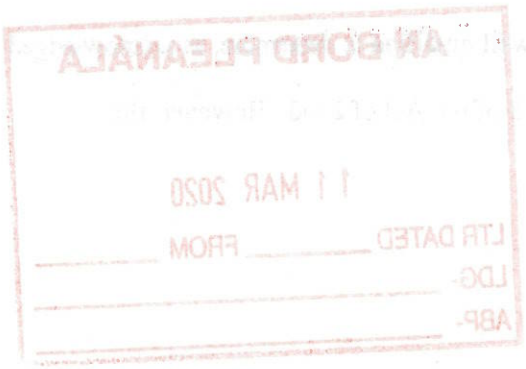
"Any Act or operation of construction, excavation, demolition, extension, alteration, repair or renewal…"

In the same subsection, "Land" is defined as including:-

"Any structure and any land covered with water (whether inland or coastal)."

It was not disputed by the parties at the hearing of this application before the court that what was done by the Respondent at Caragh Bridge on the 16th, 17th and 18th March, 2002, fell within this definition of "works" and, that the general obligation to obtain planning permission contained in s. 32 of the Act of 2000, applied to such works unless the development was exempted development.

The Respondent did not have a grant of planning permission to carry out the development. The Respondent argues that the development is "exempted development" within the provisions of s. 4(1)(h) of the Planning and Development Act, 2000. At the hearing of this application before the court the Respondent abandoned all reliance upon the provisions of Class 23 of Part I of the Second Schedule of the Planning and Development Regulations, 2001. Whether or not the instant development is or is not "exempted development" within the provisions of s. 4(1)(h) of the 2000 ~~Regulations~~ Act is a matter which a Planning Authority and An Bord Pleanála, on review, are uniquely well qualified to determine, as acknowledged by the legislature by the enactment of s. 5 of the Act of 2000. However, the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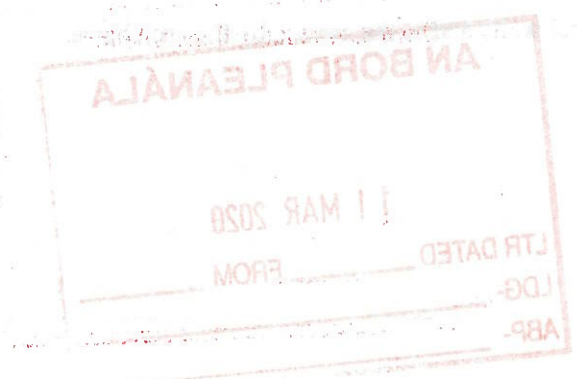
provisions of s. 5 are not mandatory in nature and in the special circumstances of this application, particularly, in view of the Order of this court made the 28th November, 2005, in my judgment it would not be just or appropriate to adjourn this application to enable the Applicant or the Respondent to obtain a declaration pursuant to the provisions of s. 5 of the Act of 2000.

The primary issue, which therefore becomes necessary for this court to consider, is whether or not the development at railway under-bridge No. 409, Gingerstown, Caragh, Naas, County Kildare, is or is not "exempted development" within the provisions of s. 4(1)(h) of the Planning and Development Act, 2000.

The following description of the bridge, prior to the carrying out of the works by the Respondent is taken from paragraph 6 of the affidavit of Mr. Tom Ruane, Engineer and Production Manager of Infrastructure, Tracks and Structures of Iarnród Éireann – Irish Rail, a subsidiary of Córas Iompair Éireann, sworn on 16th December, 2005. No dispute arose between the parties at the hearing of this application before the court in this regard. Mr. Ruane states as follows:-

> "The bridge as constructed comprised an arch barrel consisting of brick units, placed in uniform courses to form a semicircular profile. The arch face also consisted of limestone units or voussoirs. The thrust induced by the arch self weight and applied load was resisted by abutments consisting of vertically constructed masonry, interfacing with the arch barrel at the springing points. The fill material laid on top of the arch back is contained by the spandrel walls, which are of masonry construction. Parapets, consisting of concrete block work, are supported by the spandrel walls and at the crown, by the arch barrel.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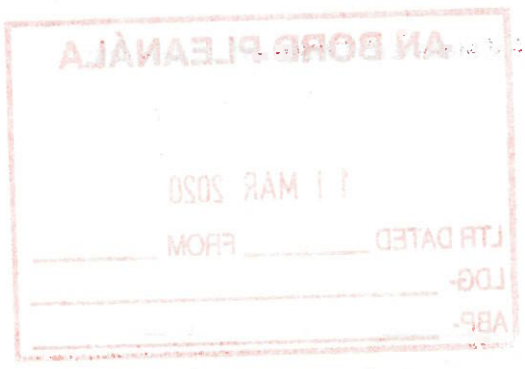
Above the block work there was also a railing present, although this is of no structural significance."

At paragraphs 17 to 20 inclusive of his said affidavit, Mr. Ruane gives details of the works carried out by the Respondent on the 16th, 17th and 18th March, 2002. He avers that the works were carried out on these days in accordance with the normal practice of the Respondent in order to minimise the level of disruption to both road and rail users. There was no controversy between the parties at the hearing of this application with regard to this description of the works which is as follows:-

"17. The nature of the works carried out consisted of the brick/stone arch bridge structure being replaced with a flat span pre-cast concrete deck structure. The new deck beams were placed on new pre-cast concrete bed stones which in turn sit on the original stone abutment walls. The new bridge deck was placed at a higher level than the original arch bridge in order to allow the safe passing of high sided vehicles underneath, thus mitigating the risks associated with bridge bashing. Replacing an arch structure with a flat structure also provides benefits in relation to clearance restriction from road level...

18. Pre-cast concrete elements were used to enable fast reconstruction of the bridge and thus minimise the closure of the Dublin-Cork line. In order to enhance the appearance of the bridge reconstituted stone facing was used on the new parapet walls and abutment. As much of the existing stone structure as possible was maintained, for example, wing walls and lower section of the abutment walls. More specifically, elements of the existing bridge which were maintained include four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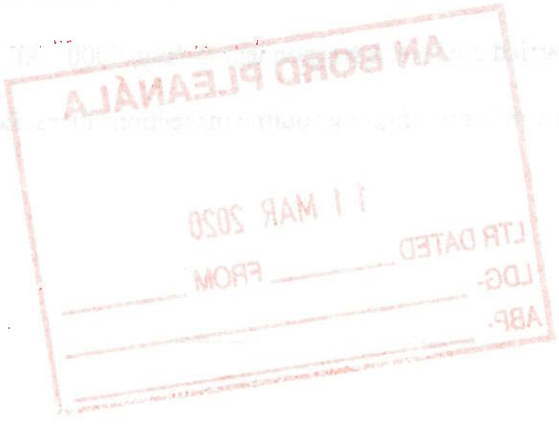
stone wing walls to each corner of the bridge… and section of two abutment walls…

19. The concrete bed stones which formed the upper sections of the bridge abutments were faced with stone in order to help it blend in with the original stonework. Further, although the road clearance height of the bridge was increased to a limited extent for safety reasons, the dimensions of the bridge have not otherwise been significantly altered. A plan area of the bridge bash footprint area which is 23 degrees offset to the public road, was not altered from the original. The removal of the arch and rising of the bridge deck has caused a minor increase in the dimensions of the vertical walls which support the bridge…

20. The stability of the railway embankments were also enhanced by extending the parapet walls on each side of the bridge thus preventing ballast falling down onto the road…"

At paragraphs 20 – 23 inclusive of his said affidavit, Mr. Ruane explains why the arch structure was not repeated. The Respondent accepted the submission of Senior Counsel for the Applicant that such reasons are entirely irrelevant to the issue of whether or not the works were "exempted development" within the provisions of s. 4(1)(h) of the Planning and Development Act, 2000.

However, in my judgment it is relevant to consider the reasons offered by Mr. Ruane as to why it was necessary to carry out these works. At paragraphs 7 – 11 inclusive of his affidavit sworn on the 16th December, 2005, he sets out the results of an assessment of the bridge carried out by the Respondent in July, 2000. At paragraph 12 of his affidavit he refers to ongoing routine inspections thereafter of the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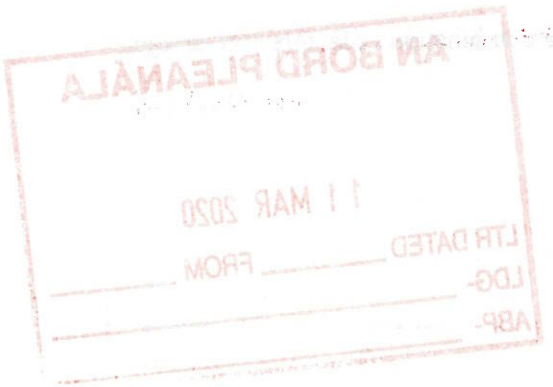
bridge. At paragraph 13 he describes the carrying out of emergency repairs to the bridge following a reported bridge strike on the 23rd December, 2001, when it was found that one of the large stones which formed the ring arch had been dislodged and had fallen onto the road. At paragraph 14 he sets out the results of a close visual survey of the bridge, undertaken by the Respondent's Divisional Engineer Office in conjunction with the Structural Design Office. At paragraph 14 he avers that the following primary defects were noticed:-

"(i) Lamination of the brick coursing in the bridge soffit, that is the section of the external layer of the brick had become detached from the remaining layers.

(ii) Sections of the brick arch barrel had become soft and brittle. Some minor section of the brick could be removed by hand. This was primarily due to constant bashing and scraping by high sided vehicles on the bridge soffit.

(iii) A crack/gap of approximately 20 – 25 mm had appeared along the interface between the stone ring arch and adjacent brick soffit. This crack had occurred since May 2000 when the bridge had been repaired after a strike which resulted in similar serious damage to the stone ring arch on the Naas side of the bridge. This indicated that the stone arches were tending to spread away from the main body of the bridge structure.

(iv) The cores taken from the brick soffit again indicated lamination of the brick layers and poor condition of the brick work, which had deteriorated over time due to a combination of factors such as age, poor drainage, etc."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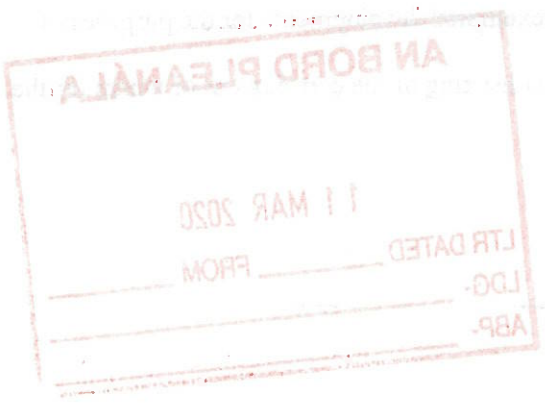
At paragraph 15 of his said Affidavit, Mr. Ruane states that due to the severe nature of these defects a temporary 40 miles per hour running restriction was imposed on all trains crossing this bridge, with a view to having the bridge renewed at the earliest available opportunity. Senior Counsel for the Applicant attached very great importance to the use by Mr. Ruane of the phrase, "having the bridge renewed". Ms. Butler also pointed to the use of the phrase, "what Iarnród Éireann proposes to do is to reconstruct the bridge…", in the letter dated 1st March, 2002 from Mr. Michael Carroll, Solicitor for the Respondent to the Applicant and copied to the other persons and bodies, (other than the Members of Dáil Éireann, the various Local Government Councillors, and the Newspaper Editor), to whom the Applicant had copied her letter of 13th February, 2002.

Ms. Butler submitted that works of renewal or reconstruction, which she said had taken place in this instance, were outside the provisions of s. 4(1)(h) of Planning and Development Act, 2000, which, she said, only applied to works for the maintenance, improvement or other alteration of the existing structure. She submitted that the reconstruction or replacement of a structure with something that was essentially a different structure (even of the same type), is fundamentally different to and of a greater order than the maintenance, improvement or alteration of the original structure.

Mr. Macken, Senior Counsel for the Respondent submitted that the works carried out were solely for the maintenance and improvement of this bridge so that the subsection applied to them. Section 4(1)(h) of the Planning and Development Act, 2000, provides as follows:-

> "The following shall be exempted developments for the purposes of this Act – Development consisting of the carrying out of works for the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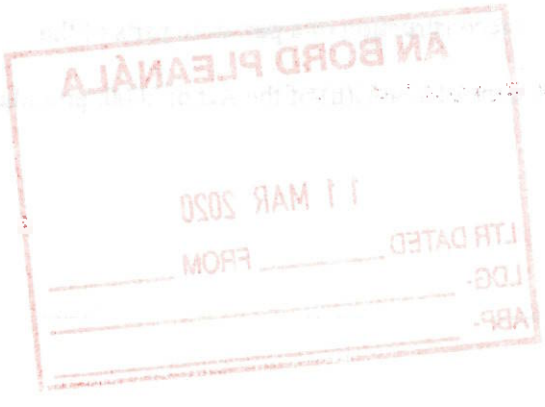
maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures."

It was conceded on behalf of the Respondent that the works carried out were not only to the interior of the structure but that they had also affected its external appearance. Ms. Butler submitted that the external appearance of the bridge had been materially affected, while Mr. Macken submitted that the changes wrought by the Respondent did affect but did not materially affect the external appearance of the structure, because the overall dimensions remained the same. He referred to the case of *Dublin County Council v. Arnold Lowe and Signways Limited* [2004] 4 I.R. 259.

In my judgment, by reference to the photographic record, the external appearance of the bridge has indeed been changed by the elimination of the arch and its replacement with a flat deck and that this necessarily connotes that its external appearance has been materially affected. This is not dependent upon any aesthetic considerations but just on the physical form of the bridge viewed externally. Serious issue was joined between the parties as to whether or not these works had rendered the post works appearance of the bridge inconsistent with the character of the structure. A considerable number of very helpful photographs of the bridge and of various features of the bridge, both before and after the works had been carried out were exhibited in the Affidavits of the Applicant and of Mr. Ruane and were referred to in the course of argument.

In my judgment the renewal or reconstruction of a part or of parts of the bridge would be covered by the provisions of s. 4(1)(h) of the Act of 2000, provided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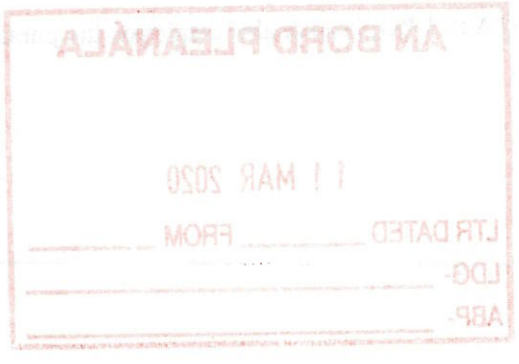
that the extent of that renewal or reconstruction was not such as to amount to the total or substantial replacement or rebuilding of the original structure. The question is one of fact and degree whether in the instant case the original railway under-bridge has been so changed by the works that one could not reasonably conclude that it remains the same bridge even though with some alternations, improvements or indications of maintenance work.

I find, on the affidavit evidence that the replacement of the brick and stone arch and fill material with a new flat span pre-cast concrete deck structure is undoubtedly an improvement of the structure. I find that the other works described at paragraphs 17 to 20 inclusive of the affidavit sworn by Mr. Ruane on 16th December, 2005, which I have already quoted, are works of necessary maintenance and also improvements. I find that the original bridge has not been so totally altered that it has become a new bridge even though maintaining some parts of the former bridge. I therefore find that the works carried out by the Respondent were works for the maintenance, improvement OR other alteration of the bridge and are to that extent within the provisions of s. 4(1)(h) of the Act of 2000.

Ms. Butler, Senior Counsel for the Applicant submitted that the result of the works carried out by the Respondent was to render the appearance inconsistent with the character of the structure. She submitted that an objective bystander looking at the pre-reconstruction and post reconstruction photographs could not fail to notice the significant differences between the shape, form, materials and construction of the two structures. Both Counsel referred to the decision of the Supreme Court in *Cairnduff v. O'Connell* [1986] I.R. 73, where Finlay C.J., (Walsh and Griffin J.J. concurring), held, with reference to s. 4(1)(g) of the Local Government (Planning and Development) Act, 1963 (which also employed the phrase, "which do not materially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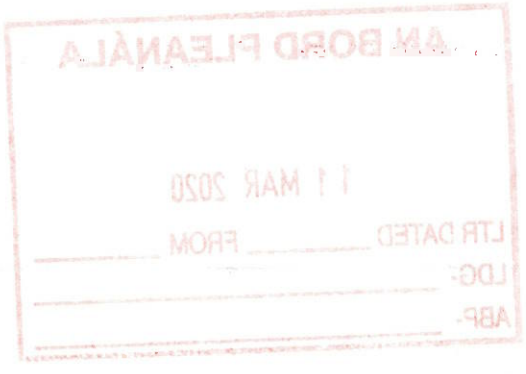
affect the external appearance of the structure so as to render such appearance inconsistent the character of the structure"), that the insertion of a window in a side wall of a three storey terrace house, the replacement of a window by a door and, the construction of a balcony and staircase for the purpose of converting it into a residence with two flats, had not so materially affected the external appearance of the structure, as to render it inconsistent with the character of the house itself or of adjoining houses. In the course of his judgment, Finlay C.J., (at page 77) held as follows:-

> "Secondly, I am satisfied that the character of the structure provided for in the sub-section must relate, having regard to the provisions of the Act in general, to the shape, colour, design, ornamental features and lay-out of the structure concerned. I do not consider that the character of the structure within the meaning of this sub-section will depend on its particular use at any time...."

I accept as correct the argument of Ms. Butler that the mere fact that a pre-development structure and the post-development structure is used for the same purpose, as a railway under-bridge, does not mean that the character of the structure has not been materially affected. The Court was also referred to a number of other cases such as: *Westport Urban District Council v. Golden* [2002] 1 I.L.R.M. 439, (High Court); *Boroughs Day v. Bristol City Council*, (January 18th 1996, - Q.B.D.); *Dublin Corporation v. Bentham* [1993] 2 I.R. 58 (High Court); *Esat Digifone Limited v. South Dublin County Council* [2002] 3 I.R. 585, (High Court). However, these cases do not appear to me to expound any new principles with regard to the interpretation of s. 4(1)(h) of Act of 2000, or its predecessor s. 4(1)(g) of the Act of 1963, relevant to this particular issue, or to vary in any way the principles as stated by Finlay C.J.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I find that prior to the carrying out of the works by the Respondent this particular bridge presented as a simple, plain and very common type of minor railway under-bridge erected in hundreds from 1839 onwards throughout the island of Ireland. It was a narrow single span structure carrying main line double railway tracks over a minor regional road. It consisted of a brick built barrel vault springing from abutments of five courses of rusticated ashlar limestone blocks. At each end of the vault it had a semicircular voussoir arch of similarly dressed limestone blocks and spandrels of horizontally laid courses of similarly dressed limestone blocks surmounted by a plain concrete parapet. It had heavy steeply angled masonry wing walls or buttresses up to crown top level on either side of the arch. There was no evidence offered at the hearing of this application before the Court that it possessed any features of particular interest from an engineering, architectural, artistic or historical view point. I find that in every respect it conformed to the standard of architectural character stated by Sganzin (Boston Translation from original French, 1827) and cited by O'Keeffe and Simington in "Irish Stone Bridges – History and Heritage"(Irish Academic Press, 1991) pages 198 – 199 as follows:-

> "Bridges should correspond with the locality – simple and plain upon roads: bold, rich and varied in cities."

Following the works carried out by the Respondent I find that the overall dimensions of the bridge remain the same. So also, I find, does its essential and immediate visual impact as a minor masonry railway under-bridge on a minor road leading through a railway embankment. Substantial sections of the original limestone abutments remain as do the masonry wing walls or buttresses. The limestone voussoir arches and spandrels have been replaced by a horizontal lintel of pre-cast pre-stressed grey coloured concrete supported by vertical bed stones in similar material resting

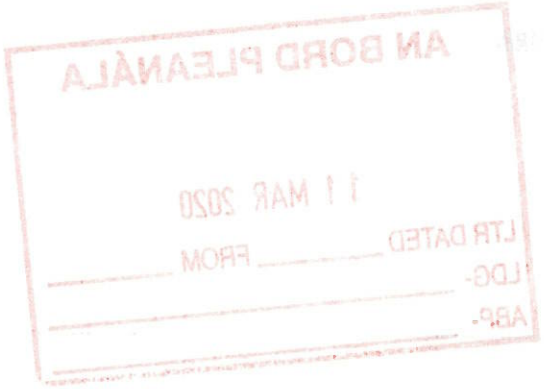
upon the original limestone abutments, but entirely faced with reconstituted stone blocks. The original horizontally laid rusticated ashlar limestone and concrete block parapet has been replaced by a similarly laid parapet of reconstituted stone blocks. I find that the visible replacement stone work was designed to blend, and does effectively blend the new single span flat deck of pre-cast pre-stressed concrete with the existing stone structure. I find that the new concrete deck is not of such a thickness, colour or design as to contrast discordantly with the overall darker coloured masonry of the bridge. I find that the post-development visible surface treatment of the bridge is such, that in form, proportion, harmony with its environment, gradation, rhythm of composition, details, colour and reaction to light and shade, it retains its original character [see Steinman and Watson, "Bridges and their Builders" (Dover Publications Incorporated, New York 1957) page 393].

The Applicant claims that the removal of what she describes as the "distinctive" Victorian semicircular arch and intricate stone work on the approach faces of the archway has caused this bridge to lose its character. I find that the only really noticeably difference in this bridge from the point of view of an ordinary observant person travelling along the R 409 regional road, is the replacement of the semicircular arch with an opening of rectangular appearance. Undoubtedly the semicircular arch was a distinctive feature of the unaltered bridge. However, as was pointed out by Finlay C.J., in *Cairnduff v. O'Connell*, (above cited), shape is only one of the features which contribute to the character of a structure. I find that vertical masonry walls supporting a horizontal deck of cast or wrought iron beams or girders was not at all uncommon in this type of mid-Victorian railway bridge in Ireland, (see for example Cox and Gould, "Ireland's Bridges", Wolfhound Press 2003). Other

railway bridges of this period in Ireland had elliptical arches. I find therefore that there was nothing unique from a historical engineering perspective in this bridge.

In my judgment the court must assess the character of this structure by looking objectively at the entity as a whole, taking all of the matters identified by Finlay C.J., into account. From a purely subjective point of view, one observer might consider that the character of the bridge lay in its environmental context and overall dimensions, its locus, height, width, length and the dimensions of the road opening; another might see its character in the type, cut, colour, size and placement of its structural materials and ornamental work; while yet another might see the semicircular voussoir arches and spandrels as entirely determining its character. I find that it is all these features taken together and other features to which I have adverted and their interaction with each other which gives a structure such as this its character.

There are undoubtedly exceptional cases in which a single feature of a structure is so outstandingly remarkable or so important from an aesthetic, architectural or engineering perspective, that it could properly and rationally be said to derive its entire character from that single feature. In my judgment the existence of a semicircular voussoir arch in this instance was not such a case. Undoubtedly some persons, from long familiarity, from social conditioning or from individual preference in the matter of line and form, or for some other reasons, might prefer a semicircular arch to a rectangular opening in this sort of bridge. However, I find for the reasons I have stated that there is no objective basis for considering that one particular type of opening rather than another should be regarded in itself as establishing the character of this sort of bridge.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I find that the works carried out by the Respondent to this bridge do not render its present appearance inconsistent with the character of the bridge. In these circumstances, I find that the development carried out by the Respondent in the instant case was "exempted development". As no unauthorised development has therefore been carried out by the Respondent, the Applicant cannot establish a case for relief pursuant to the provisions of s. 160(1)(b) of the Planning and Development Act, 2000. The court will therefore dismiss this application.

Approved.
Daniel Herbert


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Judgment delivered by Fennelly J. [non diss]
[2009] IESC 19

THE SUPREME COURT

Appeal No. 006/2005

(Record No. 383 JR/2002)

Fennelly J.

Macken J.

Peart J.

JUDICIAL REVIEW

Between:

JAMES KENNY

Applicant

And

DUBLIN CITY COUNCIL

Respondent

And

THE PROVOST FELLOWS AND SCHOLARS OF THE UNIVERSITY OF DUBLIN, TRINITY COLLEGE

Notice Party

And by order of the Court made on 20th January 2003

MICHAEL McNAMARA & COMPANY

Notice Party

JUDGMENT of Mr. Justice Fennelly delivered the 5th day of March, 2009.

1. By a decision of 4th January 2000 the respondent (Dublin City Council, hereinafter "the Council"), certified compliance by the notice party (hereinafter "Trinity") with the terms of planning permission for the building of Trinity Hall. This

is an appeal against a High Court decision (Murphy J) refusing to quash that decision at the instance of the appellant (hereinafter "Mr Kenny").

2. This is not the first and may not be the last case in which Mr Kenny contests the building by Trinity of its new Trinity Hall buildings. My judgment of 10th April 2008 in *Kenny v The Provost, Fellows and Scholars of the University of Dublin, Trinity College* [2008] 2 I.R. 40, mentioned the *"saga of litigation in which Mr Kenny, through a multiplicity of proceedings, contests the validity of a planning permission granted to Trinity in 1999 to redevelop Trinity Hall, the University's hall of residence in Dartry."*

Planning history

3. On 12th April 1999, Trinity applied for planning permission for a development consisting of the construction of new student halls of residence at Trinity Hall.

4. The development was large and complex. It covers an area of approximately 25,000 square metres and comprises, *inter alia,* three new student-residence buildings ranging in height from three to seven storeys to accommodate 832 bedrooms arranged in 180 apartments, a 400 seater dining facility, a launderette, a students' shop, the refurbishment of Trinity Hall, a listed building, the removal of a gate lodge, a new atrium between Trinity Hall and the sports hall and further and other associated buildings, works and facilities.

5. One of the buildings is opposite Mr Kenny's residence. He and the Dartry and District Preservation Association, of which he is a member, opposed the development. In the course of the planning process the Council made a request to Trinity to submit revised plans under Article 35 of the Local Government (Planning and Development) Regulations, 1994. Trinity complied on 7th October 1999.

6. On 11th November 1999, the Council (under its former description, Dublin Corporation) made a decision to grant planning permission subject to 14 conditions.

7. Mr Kenny and the Association appealed the decision to An Bórd Pleanála ("the Board"). Mr Kenny was represented at the oral hearing. On 4th August 2000 the Board made a decision to grant planning permission subject to 19 conditions.

8. The planning conditions relevant to the present appeal are:

Condition 1

"The proposed development shall be carried out in accordance with the revised plans submitted to the planning authority and received on the 7th day of October, 1999, in response to a request for revised plans under Article 35 of the Local Government (Planning and Development) Regulations, 1994, except as may otherwise be required in order to comply with the following conditions.

Reason: In the interests of clarity."

Condition 2

"The western arm of Building Number 3, that is on the full Dartry Road elevation, shall be reduced in height by the omission of the first floor. Revised drawings incorporating this modification to Building Number 3 shall be submitted to the planning authority for agreement prior to the commencement of development.

Reason: In the interest of visual amenity."

Condition 8

"Revised drawings of the proposed development, with floor plans and elevations corresponding in detail, shall be submitted to and agreed in writing by the planning authority prior to the commencement of development.

Reason: In the interest of orderly development."

Condition 9

"Existing trees shall be retained and areas shown as open space on the lodged plans shall be planted and landscaped in accordance with the plans submitted to the planning authority. The open areas shall be available for use by the students on completion of the proposed residential units. All landscaping works shall be carried out within 12 months of the completion of the buildings in the proposed development. Services and utilities shall not be laid within 10 metres of the bole of any of the trees to be retained. Prior to the commencement of the development the developer shall submit details and agree with the planning authority measures necessary to protect the trees to be retained. All trees to be retained shall be protected during the development by a timber post and rail fence which shall enclose the crown spread of the trees.

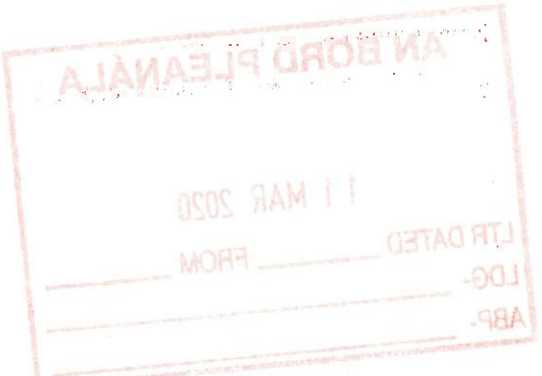
Reason: To protect the existing trees and in the interest of visual and residential amenity."

[emphasis added]

9. Mr Kenny has contested the validity of the planning permission. Those judicial review proceedings ended with the decision of this Court on 10th April 2008, mentioned above. Certain conditions of the planning permission required Trinity to submit certain matters to the Council for agreement. The present proceedings concern compliance with conditions of the permission.

10. In August 2001, Trinity's architects, Murray O'Laoire, made a planning-compliance submission of some seventy pages to the Council. An addendum of some twenty five pages was submitted in November 2001.

11. By report dated 24th December 2001, Patrick McDonnell, Dublin City Council Planning Office, reported that the details submitted by the developer were satisfactory and complied with the requirements of of the relevant conditions.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12. The Council, by a decision of 4th January 2002, determined that the compliance submissions were satisfactory and in compliance with the relevant conditions of the planning permission. That is the decision which Mr Kenny challenges in the present appeal. I will call it the Council decision

Judicial Review

13. On 4th July 2002, Mr Kenny obtained leave ("the leave order") from the High Court (O'Caoimh J) to apply for judicial review of the Council decision. Mr Kenny claims that the Council permitted major changes to the permitted development. The decision was, therefore, made without or in excess of jurisdiction and *ultra vires*. I will examine these features of the Council decision in greater detail. The judicial review concerns essentially four aspects of the Council decision, namely:

1. The Council permitted compliance with Condition No. 2 by the omission of a floor other than the first floor of the western arm of Building No 3 as was required by that condition;

2. The Council approved the installation of boilers and boiler rooms in the roof spaces of buildings nos 2 and 3, which was not allowed by the permission and so as to alter the roof design and profile and to depart from revised plans submitted in October 1999;

3. The Council permitted an increase in the number of bed spaces permitted in building no. 3;

4. The Council permitted the laying of services and utilities within ten metres of the bole of trees and the erection of timber post-and-rail fences which fail to enclose the crown spread of trees which were to be retained.

14. Murphy J, by his judgment of 8th September 2004, refused the application for judicial review. The learned judge based his decision primarily on Mr Kenny's delay in seeking judicial review together with the prejudice suffered by Trinity. The college openly carried out the development during the period of delay. Secondly, and

alternatively, the learned judge concluded that, in any event, the agreement of the Council was reached within the scope of the conditions imposed in the planning permission.

15. Mr Kenny, in his notice of appeal, challenges the decision of the High Court both in respect of the finding of delay and the determination that the Council had, in its decision of 4th January 2002, acted within jurisdiction and *intra vires* the planning permission granted by An Bórd Pleanála.

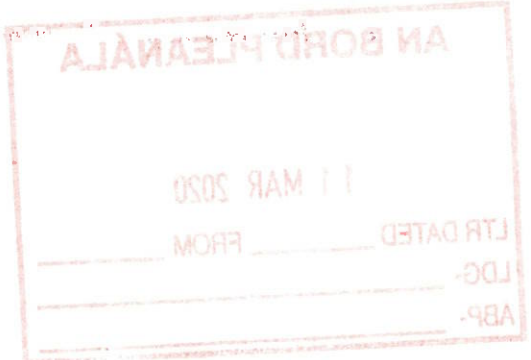
16. The contested planning issues involve the interpretation of the planning permission and the limits to the discretion which may be exercised by the planning authority in approving compliance with conditions.

Legal principles

17. To begin with, some simple matters of common sense need to be mentioned concerning planning permissions. I make these preliminary remarks, because Mr Kenny asks the Court to examine, at least in certain respects, the fine details of the development.

18. There will inevitably be small departures from some or even many of the plans and drawings in every development. There can be discrepancies between and within plans, drawings, specifications and measurements; there can be ambiguities and gaps. It seems improbable that any development is ever carried into effect in exact and literal compliance with the terms of the plans and drawings lodged. If there are material departures from the terms of a permission, there are enforcement procedures.

19. However, planning laws are not intended to make life impossible for developers, for those executing works such as architects, engineers or contractors or for the planning authorities in supervising them. Nor are they there to encourage fine-tooth combing or nit-picking scrutiny of the works. I will mention later one or two examples of this type of exercise in the present case. The exchange of affidavits amounts to some 300 pages.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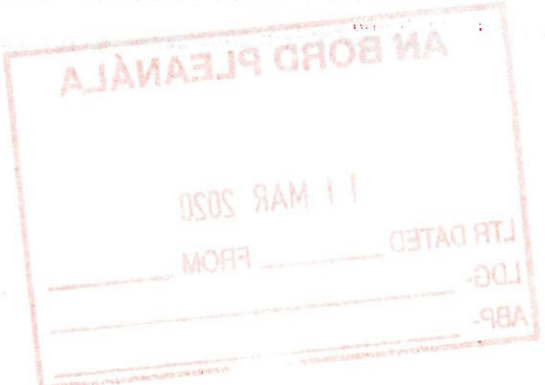
20. While the planning authority or An Bórd Pleanála on appeal grants the permission, it is a common feature of permissions, especially for large developments, that additional detail is necessary in order to carry the development into effect and such detail, often in the form of further plans, drawings, specifications or other explanations, will require approval by the planning authority prior to commencement of the development. There is an obvious practical necessity for a procedure whereby matters of detail can be agreed between the planning authority and the developer. This ensures supervision but allows a degree of flexibility within the scope of the permitted development.

21. The distinction between the statutory and quasi-judicial function to grant permission and the ministerial function to approve details is clear as a matter of principle. It may be a difficult line to draw in practice.

22. It is obvious that neither the planning authority nor An Bórd Pleanála can determine each and every aspect of a development. The Board, in particular, determines the fundamental issues. Conditions frequently impose modifications on the developer and provide that the details be worked out in agreement with the planning authority.

23. In some cases, the planning authority may consider the detail provided in the application to be insufficient. In other cases, the planning authority or An Bórd Pleanála may decide to grant permission for a development provided changes are made. In such cases, the authority granting the permission will not draft the plans for the altered development. It will require the developer to do so. The practice of requiring plans, drawings or other details to be approved by the planning authority is both reasonable and practical. This division of function was approved by the Supreme Court in *Boland v An Bórd Pleanála* [1996] 3 I.R. 435, a case where an objector sought *certiorari* of the planning permission on the ground that the conditions involved an improper abdication of the functions of the planning authority. The scope of this faculty and its limits are described in the judgment of Hamilton C.J., who referred, *inter alia*, to *"the desirability of leaving technical matters or matters of detail to be agreed between the developer and the planning authority, particularly when such matters*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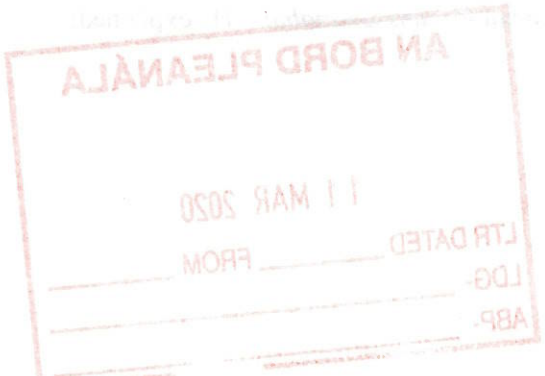
or such details are within the responsibility of the planning authority and may require re-design in the light of the practical experience..."

24. There may also be questions of interpretation. The planning permission is a formal and public document. The applicant, the planning authority and the public have participated in a formal statutory procedure, leading to its grant. The permission enures to the benefit of the land on which the permitted development is to be carried out.

25. Consequently, the planning permission is to be interpreted according to objective criteria. The subjective beliefs either of the applicant or the planning authority are not relevant or admissible as aids to interpretation. (see *Readymix (Eire) v Dublin County Council,* Supreme Court, unreported 30th June 1974). The matter is well expressed in the following passage from Simons on *Planning and Development Law* (2nd Ed., 2007, paragraphs 5.06-5.07):

> *"A planning permission is a public document; it is not personal to the applicant, but rather enures for the benefit of the land. It follows as a consequence that a planning permission is to be interpreted objectively, and not in light of subjective considerations peculiar to the applicant or those responsible for the grant of planning permission.*
> *A planning permission is to be given its ordinary meaning as it would be understood by members of the public without legal training, as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning."*

26. It follows from the principle of objective interpretation that the correct interpretation is a matter of law and can ultimately be decided only by the court. In *Gregory v Dun Laoghaire Rathdown County Council* (Supreme Court, unreported 28th July 1977), to which I will refer shortly in more detail, the respondent planning authority had submitted that the interpretation it had placed on a planning condition, even if erroneous, was reasonable. Murphy J, speaking for the majority of this court described that argument as *"unsustainable."* He explained: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"The proper function of the Council was the implementation of the condition imposed by the Board. If they erred in that regard the error was as to the nature of their duties rather than the performance thereof. The only power exercisable by the Council was to agree details in relation to the revision of plans on the basis of the implementation of the condition imposed by the Board. Any agreement reached without that condition having been fulfilled was necessarily ultra vires *the Council."*

27. However, an objective interpretation will not provide the complete answer in every case. It is not a synonym of literal interpretation. All parties to the present appeal accepted the following statement of McCarthy J in *Re XJS Investments Ltd v Dun Laoghaire Corporation*, [1986] IR 750 at 756:

"Certain principles may be stated in relation to the true construction of planning documents:

(a) To state the obvious, they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draftsmen and inviting the accepted canons of construction applicable to such material.

(b) They are to be construed in their ordinary meaning as it would be understood by members of the public without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning..."

28. A court, in interpreting a planning permission, may need to go no further than the planning document itself, or even than the words of a condition in issue within the context of the permission. The words may be clear enough. However, it will very often need to interpret according to context.

29. On this point, the case of *Gregory v Dun Laoghaire Rathdown County Council* is also helpful.

30. The interpretation of the condition in that case undoubtedly presented a difficulty. An application was made for retention of what was called a garage/loft. Permission was granted. An Bórd Pleanála, on appeal, imposed a condition as follows:

> "The proposed loft shall be omitted. The proposed garage shall be of a single storey construction. Revised details shall be agreed with the planning authority……."

31. The reason given was: "in the interest of residential amenity."

32. The planning authority agreed revised details, purportedly in compliance with the condition: the loft was to be omitted but the approved change led to no alteration in the height of the garage. The compliance order was challenged. Geoghegan J, upheld by the Supreme Court, considered that the agreement was not in compliance with the condition. He believed that the height of the structure, though not specified, was the main concern.

33. The Council argued, in defence of its decision, that the condition had been complied with: the loft was omitted; the garage was single storey. That was a literal approach. The Council argued that if the Board had intended that the height was to be reduced, *"it would have expressly so provided."* It had not done so. This Court, on appeal, relied heavily on the reason for the complaint which had been made by the objector, which had led to the imposition of condition. His only concern was with the height of the structure. He was not in any way concerned with the internal layout. Murphy J said:

> *"By imposing the condition in question they clearly required the reduction of the height of the structure by the removal of the loft area as shown on the plans before them and the second storey which constituted that loft. The omission or deletion of the loft was the means by which the reduction in height of the structure was to be achieved."*

34. Thus, the principle of objective interpretation excludes purely subjective considerations, such as the understanding of the developer or the planning authority, but it does not provide a result where a provision is unclear, ambiguous or contradictory.

35. The principle does not resolve the problem which, as I explain later, arises in respect of Condition No. 2, namely that the condition is, itself, contradictory or, at least, ambiguous. The *Gregory* case shows that the court does not confine itself to a purely literal interpretation of a condition. It will seek to ascertain its true meaning from its context in the planning process.

36. I turn then to a consideration of the four individual complaints made by Mr Kenny.

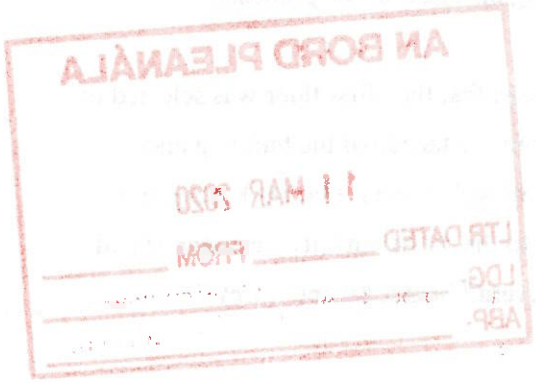
Removal of first floor

37. Condition No. 2 required that building No. 3 on the Dartry Road elevation be "reduced in height by the omission of the first floor…" The reason for the condition was the *"interest of visual amenity."*

38. It is common case that Trinity omitted a floor other than the first. The condition was interpreted by the Council as requiring that the overall height of the building be reduced by one floor.

39. The Council accepted that the option selected for compliance with Condition No. 2 "as illustrated in the compliance documents [was] an appropriate reflection of the intention of the Condition while maintaining the spirit of the proposal."

40. Mr Kenny, in his grounding affidavit, says that the "first floor was selected by the Board for omission because it protruded from the façade of the building and increased its domineering effect." It is worth noting, however, that Mr Kenny, in a memorandum of 22nd January 2002, addressed to the Assistant City Manager, stated: "the intention is clearly stated – to reduce the overall height by one storey."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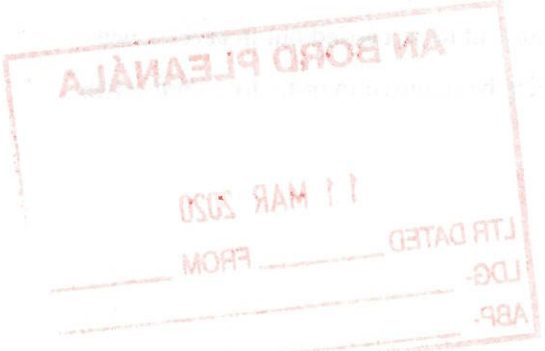
41. Mr Declan McGrath, barrister at law, on behalf of Mr Kenny, submitted that it was not permissible, under the guise of a compliance order, to approve design changes. He distinguished the power of the court to decline to make an order pursuant to section 160 of the Planning and Development Act, 2000 where there have been immaterial departures from the terms of the planning permission. Condition No. 2 is, he says, clear on its face and very specific. The fact that no reason was given for the choice of the first floor for omission is immaterial and that the Council fundamentally misunderstood their role in dealing with compliance.

42. Trinity contends that the strictly literal interpretation of Condition No. 2 proposed by Mr Kenny would render the condition meaningless. The first floor and the two floors immediately above have identical layouts. On the other hand, externally the first floor steps out over a foot past the rest of the façade. This was a design feature intended to avoid flat façade monotony and is common to Buildings 1, 2 and 3. It is also intended to reflect the historical buildings on site. The Dartry Road elevation is described in all submitted documents as a "composite elevation." Design coherence and consistency was a requirement of the Council. Removal of the first floor would adversely affect consistency of the design. A complete redesign might be required.

43. Condition No. 2 presents a problem of interpretation. It is clear from the terms of the condition itself that the purpose of the removal of the first floor was the reduction of the height of the building. The reference to the interests of "visual amenity" can only be read in that light. There is nothing either in the planning history or in the terms of the planning permission to indicate that An Bórd Pleanála wished to alter the façade of the building. The Inspector's report did not recommend the removal of any floor. The evidence produced suggests that the profile of the façade was a consistent and desirable element of the design throughout the planning process. The planning permission makes no mention of protrusion or "domineering effect" suggested by Mr Kenny as the reason for the condition.

44. This means that there was a contradiction or ambiguity at the heart of the condition. Condition No. 1 required the development to be carried out in accordance with the plans submitted except as may otherwise be required in order to comply with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the following conditions. Compliance with Mr Kenny's proposed literal interpretation of Condition No. 2 would lead to inconsistency with Condition No. 1 by altering the façade. I do not agree with the submission made on behalf of Mr Kenny that it is plain and unambiguous. I am satisfied that the true objective of Condition No. 2 was the reduction in the height of the building. This objective has been achieved. There is no evidence that An Bórd Pleanála chose the elimination of the first, rather than any other floor in order to secure the desired reduction in height or that it wished to alter the composite elevation in any way. I am satisfied that the Council acted within the scope of its powers by approving the compliance plans submitted by Trinity in August and November 2001.

45. It is of interest to contrast Mr Kenny' objection to the removal of the first (rather than another) floor of building no.3, with his acceptance of the modification, also through the compliance process, of the condition in relation to what became known as the "bookends" issue. The north wing of the west elevation of building Number 3 remained at five storeys, though the remaining western arm was reduced by one storey to comply with Condition 2, and although this was not in keeping with a literal reading of condition 2. Otherwise the visual amenity of the structure would have been adversely affected with the two bookends of the building being at different heights. Mr Kenny explained that he did not object to this departure from a literal reading of Condition No. 2 as follows:

> " Most people who are acquainted with compliance procedures appreciate that a planning authority in seeking to give effect to a Bord Pleanala planning permission condition, may be presented with a problem of design detail which arises from the condition, which is not material and which needs to be resolved with the Appellant. The above "bookend" case is an example of an issue which emerges from a Bord Pleanala condition producing a design problem. Residents could not reasonably object to the manner in which this design difficulty is resolved because it has to be resolved in good architectural design terms. Either both "bookends" are to be allowed to remain at their original height or only one is"

46. I cite this passage, not to turn Mr Kenny's own words against him or to treat them as an admission, but rather because it consititutes an excellent explanation of the scope for resolution of a design difficulty.

47. Regrettably, it represents a rare example of balance and commonsense. I will give but one example of the type of trivial detail into which Mr Kenny would have the Court enter. As part of his complaint regarding Condition No. 2, he says that the changes made to the roof details related to an increase in the pitch of the roof with "the effect that the height of the building has not been reduced by one storey as required." Trinity has replied to this in some detail. It says that the pitch of each roof is as indicated in the October 1999 section drawings. There was an error in the elevational drawings. An addendum to the compliance submission corrected the error. It also explains a minor change in roof pitch because a "steeper roof-pitch in set back areas ensures that eaves and ridge heights are consistent across building elevations." The change prevents an unsightly flat fascia at the Dartry Road elevation. It does not affect the height of the building.

48. I do not believe that the judicial review procedure is intended to lead the courts into such intricate matters of design detail or scrutiny of the planning and development process.

49. Mr Kenny submits that the problem encountered by Trinity in complying with the literal interpretation of the condition could be solved only by means of a new planning application. Such an approach is extreme. It is unrealistic and pointless. There has been no suggestion that it was ever the intention to change the profile of the building, which was the only thing that would have been achieved by the order sought by Mr Kenny.

Boilers and boiler rooms in the roof spaces

50. The essence of this complaint is that boiler facilities and other plant have been placed in the roof spaces of buildings 2 and 3 and that Mr Kenny maintains that the 1999 plans did not provide for any use to be made of these spaces.

confusion and their inclusion was considered appropriate in the interests of clarity

Solution/Response:

Plant is adequately housed therefore at the over-staircore areas under the roof an specifically on the courtyard side of the buildings in order to ensure that their volumes will not be apparent from street level. The plant areas are clad in zinc to match the roof finish and in no case break the ridge line of the roof."

54. Trinity submits that that the installation of the boilers is in compliance with the permission. Following the oral hearing, it was intended that a boiler would be located in each house of each building. In addition, it was determined to use boilers of a more domestic scale which were free-standing and not affixed to the buildings. As roof space had become available, (because, *inter alia* of the adoption of lifts without machine-rooms) it was determined to locate boilers at that level. This had no impact on the roof pitch and profile. Owing to design innovations, the boilers are now located in plant rooms at roof space level. Planning permission was granted for the said plant rooms. Accordingly, the fact that a different element of plant, namely, free standing domestic type boilers are located therein, cannot affect the validity of the permission.

55. In my view Mr Kenny's complaint is without merit. It was explicitly envisaged in the original planning application that a number of plant rooms would be located in the roofspace. The installation of the boiler equipment in the plant room in the roof space does not require planning permission. The notion of "plant" is wide enough to include boilers, such as the decentralised and relatively small boilers which have been installed. The location of the boilers has no impact on the roof pitch or profile.

56. The matter of the precise location of the boilers within the development is an eminently suitable matter for agreement pursuant to the procedure envisaged by Condition No. 8.

57. Moreover, this very issue was the subject of a ruling by McKechnie J in the different legal context of Mr Kenny's application for judicial review of the planning permission (*Kenny v An Bórd Pleanála* [2001] 1 I.R. 565.) The learned judge expressed himself at some length on the topic. He recalled the planning process and the fact that the isssue of location of boilers had been discussed at the oral hearing. The following is a brief extract:

> *"Whilst I am satisfied that all of these matters were adequately dealt with at the oral hearing and that many are also suitable to be dealt with by agreement with the local authority, in addition could I say that I would set my face totally against such a microscopic examination by this court of such matters of details."*

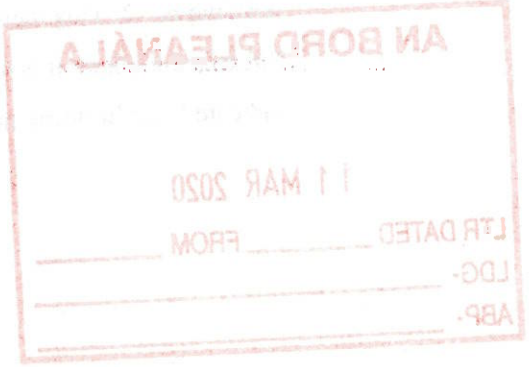
58. That reasoning is at least equally applicable to the present appeal concerning judicial review of the compliance order. I treated the issue of the location of boilers at some length in my judgment in *Kenny v The Provost, Fellows and Scholars of the University of Dublin, Trinity College*, cited above in the somewhat different context of Mr Kenny's claim that Trinity had fraudulently concealed their intentions regarding the issue from McKechnie J. I cited the same passage from the judgment of McKechnie J.

59. In my view, the complaint is without substance or merit.

Permitting an increase in the number of bed spaces

60. Mr Kenny's complaint is that the number of bed spaces in building no.2 was increased from 308 to 324. In the affidavit he swore to ground his application for judicial review, Mr Kenny said:

> "The decision to relocate all plant to the roof spaces is linked to another significant departure from the 1999 plans, an increase in the bed spaces in building no. 2. This increase is addressed in the addendum to the Compliance Submission where it is argued by the architects that, although the 1999 plans indicated that building no. 2 would contain 300 bed spaces, this was a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miscalculation and that the building would actually have contained 308 bed spaces. However, even if the architects are correct in that regard and I do not accept that the revised calculation is correct, the Compliance Submission indicated that building no. 2 would contain a revised total of 324 bed spaces. In relation to the increase of 16 bed spaces, it was explained that 6 arose from correctional actions to rectify design discrepancies and 10 from assigning an extra bedspace to an oversized room to achieve a desired bedroom mix."

61. The complaint does not relate to any aspect of the design or construction of the buildings or of building no. 2 in particular, but to the internal allocation of the use of space. Mr Kenny says that it constitutes a breach of Condition No. 1. On closer analysis, the following emerges.

62. According to both the public notice for the October 1999 proposal and the application then made, the development would incorporate:

"3 no student buildings to contain 832 no bedrooms arranged in 180 no apartments over 3 to 7 storeys."

63. The scheme project total in all public notices refers to the overall total for the combined development and not to individual totals for individual buildings. The decision of An Bórd Pleanála to grant permission also refers only to the total number of bedrooms.

64. An appendix to the architects' original submission showed building 2 with a total of 300 bed spaces in 60 apartments. The compliance documents of August 2001 changed this to 324 bed spaces in 62 apartments. The removal of one floor from building 3 resulted in a reduction from 377 to 346 in that building. As explained in the preceding section, there were changes in the disposition of plant and boilers. This resulted in space becoming available for use as bedrooms. There were some alterations of internal layout.

65. There was no increase in the total number of bed spaces in the development.

66. Condition No. 8, in the interest of orderly development, required the submission of revised drawings of the proposed development, with floor plans and elevations corresponding in detail, all to be agreed by the Council prior to the commencement of development. It is perfectly obvious to me that these minor adjustments to the number and location of bed spaces are matters of detail and are most appropriate to agreement in accordance with that procedure. They followed on from other natural, normal and reasonable alterations in the plans. Mr Kenny has not identified anything in the nature of a planning consideration, any departure from the overall development objective or, in short, anything worthy of serious consideration under this head of complaint. This complaint is also without merit.

Laying of services and utilities within ten metres of the bole of trees

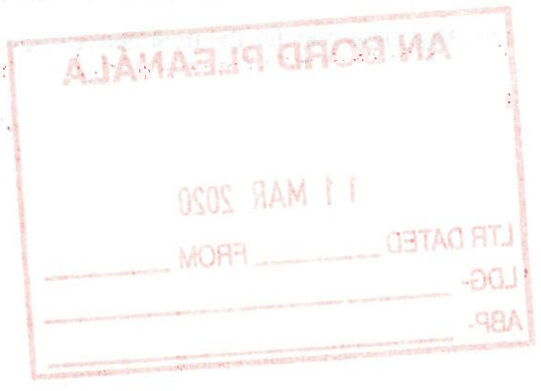
67. Condition No. 9 is quoted above. It is directed to the preservation of trees on the development site. Mr Kenny made two complaints in his application for leave, namely:

1. that Trinity had not complied with the requirement that services and utilities were not to be laid within 10 metres of the bole of any of the trees to be retained;

2. that Trinity had not observed the requirement that all trees being retained were to be protected during the development by a timber post and rail fence which shall enclose the crown spread of the trees.

68. Mr. Kenny does not specify, in his grounding affidavit, how he alleges that the second of these requirements was breached. It now seems irrelevant. The development has long since been completed.

69. The planning application involved "the retention of existing trees and the western arboretum and site perimeter and is accompanied by a comprehensive management plan for the treatment of existing and proposed trees."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70. The real focus is on the first requirement. Mr Kenny complains that Trinity persuaded the Council to permit non-observance of the condition in the case of some trees. Trinity made submissions to the Council along the lines that it was:

> *"neither useful, realistic nor practical in the interests of the development or of the trees on the site. A number of trees on the site will necessarily require more than the stipulated 10m tree protection zones. Others will never attain such a requirement throughout their lifespan..."*

71. It went on to suggest:

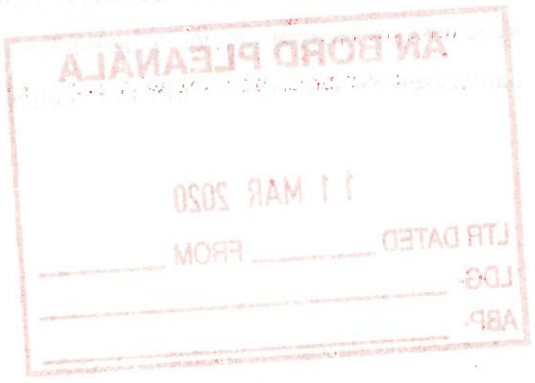
> *"Having examined this condition as potentially overly onerous in some cases under its current wording a professional and respected arborist was commissioned to assess each individual tree that the development appears to place in jeopardy and to advise on the potential impacts of the development and how best to adequately protect these specimens."*

72. It is clear that strict and literal compliance with the condition presented problems. It is equally clear that Trinity, with the agreement of the Council, has breached the condition to some extent.

73. The Council points out, however, that:

- some of the buildings, whose construction is permitted by the planning permission, are closer than 10 metres to the bole of a tree;
- there were some pre-existing services and utilities within 10 metres of the bole of a tree.

74. Trinity retained the services of a highly qualified arborist, Mr Joseph McConville, who has sworn a number of affidavits dealing with Mr Kenny's complaints in great detail. The evidence shows that the 10-metre condition has been breached to a lesser or greater degree in the case of 16 out of 275 trees on the site. In many cases, the distance is still 7 or 8 metres, though in the case of two trees the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distance will be 5 metres. Mr McConville has gone to great pains to demonstrate the extent of care taken to protect all trees, including those which will be within the 10-metre zone. The Council agreed the adjustment on that basis.

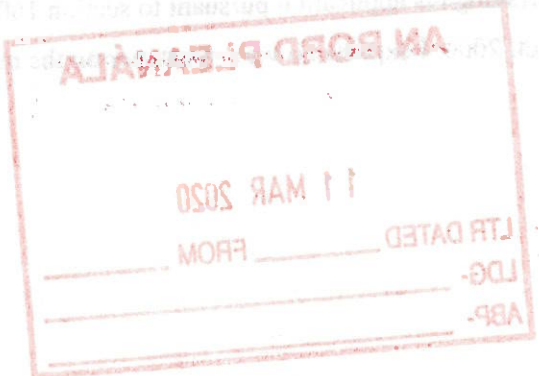
75. Mr McConville explains, for example, that services were laid as close as possible to buildings and that it would have been impossible to provide services without encroaching on the 10-metre distance.

76. It is clear, therefore, that, in a literal sense, there has been non-compliance with part of Condition No. 9, though to a very minor extent.

77. Mr Kenny, in written submissions, acknowledges the alternative means of tree protection proposed by Trinity, but insists that alleged difficulties in complying with the condition do not justify a departure from the clear and unambiguous terms of the condition and that, consequently, the Council acted *ultra vires* in approving the plans.

78. What is involved here is a case of non-compliance with the literal terms of a condition, though to a minor if not trifling degree. The problem goes back to the terms of the permission itself. It is a mistake to take it out of context. This was a very large and complex development. Literal compliance with the 10-metre part of Condition No. 9 was not feasible if the development was to be carried out as approved.

79. Mr Kenny has been able to demonstrate a very minor, not to say trivial, discrepancy between the compliance submissions of Trinity in respect of the 10-metre condition and the terms of Condition No. 9 as strictly and literally interpreted. The approval of this aspect of the submissions forms a very small part of the entirety of the Council's decision. To accede to Mr Kenny's application would require the Court to quash the decision in its entirety. It has not been suggested that this aspect of the decision is severable. Certiorari is a discretionary remedy. In my opinion, the Court should not grant an order of certiorari in respect of the entire decision based on such an inconsequential discrepancy. Furthermore, Mr Kenny retains the alternative of pursuing his application pursuant to section 160 of the Planning and Development Act, 2000. I express no view whatever on the merits of that application.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In addition, I will consider the issue of delay. The learned trial judge held that Mr Kenny's application for judicial review failed, in any event, by reason of his own lack of promptness in applying to the Court.

Delay

80. Order 84, rule 21(1) of the Rules of the Superior Courts requires that all applications for judicial review "be made promptly" and in any event within three months from the date when the grounds for the application first arose, or six months when the relief sought is *certiorari*. The Court has power to extend the time where it considers there is "good reason" for doing so.

81. The decision of the Council was made on 4th January 2002. The application for leave to apply for judicial review was made on 3th July 2002. The leave order was made on 4th July. The application was thus, to the extent of one day, made within the permitted period of six months. Mr Kenny's application can be rejected on delay grounds only if he failed to apply promptly. I addressed the issue of the need to move promptly in two cases, which have been cited to the Court in argument.

82. In *Dekra Éireann Teoranta v Minister for the Environment and Local Government* [2003] 2 IR 270 at page 302 I dealt with an application in the special context of judicial review of public-procurement decisions, where Order 84A, rule 4 of the Rules applies. That rule substitutes the expression "at the earliest opportunity" for the term "promptly," which applies in the present case. I said:

> *"The nature and extent of the burden to show "good reason" calls for some further remarks. The time to be explained by the applicant may commence to run within the period. This flows from the need to move at "the earliest opportunity". Nonetheless, a claim cannot normally be defeated for delay if it is commenced within the relevant period. There would need to be some special factor such as prejudice to third parties (The State (Cussen) v Brennan [1981] IR 181). Thus, different levels of importance may be attached to time falling within and without the period. The fact of delay within the period may affect the approach of the court to time falling without. The court must always have*

regard to the circumstances of the particular case and to the fact that the power to extend the time is there in the interest of permitting the courts to do justice between the parties."

83. In my judgment in *O'Brien v Moriarty* [2005] 2 ILRM 321 at 335, while observing on the somewhat stricter approach to compliance with time limits adopted by the courts in recent years, I said:

"Nonetheless, matters have not reached the stage where an application within time can be defeated in the absence of some special factor."

84. I then proceeded as follows:

"The prejudice to a third party, in the case of State (Cussen) v Brennan was singular. The prosecutor, by his delay, had allowed the successful candidate for the post he had applied for to act on foot of his appointment by, for example, giving notice of termination of his existing employment and instructing solicitors in the purchase of a new house. That case remains, nonetheless, a solitary example. I remain of the view I expressed in the Dekra case, namely that an applicant for leave to apply for judicial review will not normally be defeated for failure to move "promptly" where the application is made within the permitted time. The burden would be on the respondent to establish the contrary."

85. It is necessary, therefore, to consider whether Mr Kenny's application should, as was held by the learned trial judge, be defeated on the ground of his lack of promptness in making his application.

86. As always, context is everything, but, in the context of a large development such as that on which Trinity was embarking the failure to apply until the eleventh hour, the second last day of the six-month period, cannot fail to attract attention.

87. There was already a significant history to this planning dispute. Mr Kenny had opposed the application throughout the planning process with determination and

tenacity. He applied for judicial review of the decision of An Bórd Pleanála dated 4th August 2000. In order to do so, he had had to comply with the strict time limit laid down by section 82 (3A) of the Local Government (Planning and Development) Act 1963 as amended as amended by insertion by s. 19(3) of the Local Government (Planning and Development) Act, 1992. He had suffered the rejection of that application by McKechnie J in the High Court on 15th December 2000.

88. He concerned himself intensively, not to say obsessively, with the minutiae of the development. He made phone calls to and visited the planning offices of the Council. On one of his visits in September 2001, he learned of the first compliance submission made by Murray O'Laoire. He was so concerned about it that he wrote to the Council on October and November 2001.

89. There is a great deal of material in the affidavits and the exhibits which shows how active and aware Mr Kenny was as to what was happening on site. Of course, he lives immediately opposite.

90. From Mr Kenny's grounding affidavit, it is clear that, on 4th January 2002, he was "concerned as to the increased activity on the site;" he observed that "work commenced in or about 7th January 2002."

91. On 10th January 2002 he said:

> "I obtained a copy of the compliance letter. I was shocked that the [Council] would issue a compliance letter on the basis of the revised plans and details submitted by the developer's architects which clearly, in my view did not comply with the conditions of the permission."

93. On 14th January, he wrote to the Senior Planning Enforcement Officer "drawing attention to the non-compliance with those conditions." He said: "If the development work currently being undertaken is not halted pending the outcome of the judicial review leave application, the financial consequences may be very serious for those who continue with such work." He sent a covering letter of the same date to the architects for Trinity enclosing copies of his letters to the Council. That appears to

be the only form of contact he ever made with Trinity. His affidavit proceeds, most materially, on the delay issue:

> "In my letter of 14th January 2002.....I expressed my view forcefully that conditions 2, 8 and 9 of the permission had not been complied with and signalled my intention to apply for judicial review of the decision of the Council."

94. This correspondence demonstrates that Mr Kenny was fully aware that the Council, by its decision of 4th January 2002 had approved the compliance submissions provided by Trinity, that the terms of the decision were inconsistent with his own views of the proper interpretation of the planning permission and that Trinity was proceeding with the development.

95. He made no attempt to contact Trinity or their architects, other than by copying the latter with his letter of 14th January. He threatened judicial review, but did not follow through with his threat. Thereafter, he bombarded the Council with letters and phone calls. On 22nd January 2002, he sent a 24-page memorandum to Mr S. Carey, the Assistant Manager-Planning and Development. He received no comfort that the Council would accept his submissions. The Council stood over its decision.

96. Mr Kenny's excuse is that, having applied unsuccessfully for judicial review, he was "extremely reluctant to bring another application." He sought instead to exhaust every avenue to avoid having to do so. At the same time, he thought the Council had not treated his complaints and enquiries seriously.

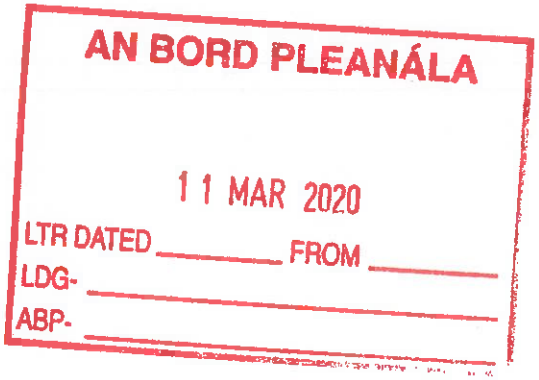
97. In the result, according to the architect for Trinity, by 4th July 2002, building no. 2 was 15% structurally complete and building no. 3 was 55% structurally complete. More particularly, the first floor of the western arm of building no. 3, which was the subject of Condition No. 2 was 100% structurally complete.

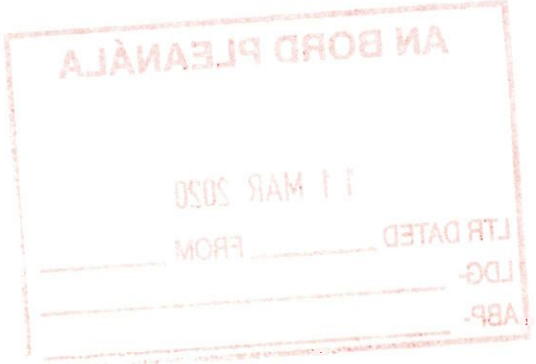
98. This is a particularly clear case of failure to apply promptly for judicial review. Knowing that the developer was acting contrary to his own views of the interpretation of the planning conditions, he allowed the matter to proceed. In full

knowledge that "the financial consequences [might] be very serious…," he threatened judicial review but failed to follow through. He allowed matters to proceed to such a stage that they were irreversible. He has offered no plausible excuse other than his own reluctance to commence a fresh proceeding.

99. My primary view is that, apart from some doubt regarding the distance between a very small number of trees, and the bole of the nearest tree, Mr Kenny has failed to show any respect in which the Council's decision is not within the scope of the authority given to it by An Bórd Pleanála. The application is, therefore, without merit. In the unlikely event that the extent of non-compliance with Condition No. 9 could be considered of such significance as to justify quashing the decision, the application would fail on the ground of delay.

100. I would, for these reasons, dismiss the appeal and affirm the order of the High Court.

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Judgment delivered by Clarke J [Nem diss]

THE SUPREME COURT

[2016] IESC 46

[Appeal No: 200/2008]

Denham C.J.
Clarke J.
Dunne J.

In the Matter of the Planning & Development Act, 2000 (as amended)

Between/

Robert Lanigan, Deirdre Lanigan and Benghazi Limited t/a Tullamaine Castle Stud

Plaintiffs/Respondents

and

Michael Barry, Brenda Barry and Motor Speedway Limited t/a Tipperary Raceway

Defendants/Appellants

and

South Tipperary County Council

Notice Party

Judgment of Mr. Justice Clarke delivered the 27th July, 2016.

1. Introduction

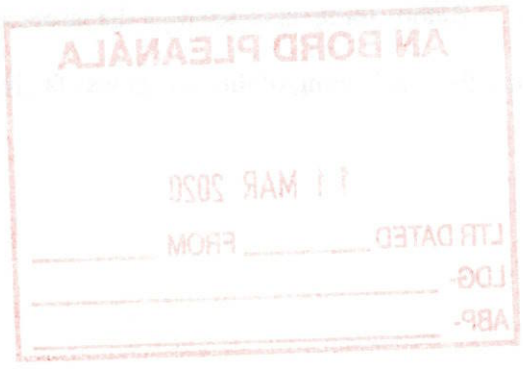
1.1 The underlying dispute between the parties to this litigation stems from a complaint which principally focuses on noise. The defendants/appellants ("Tipperary Raceway") run a motor racing circuit. The plaintiffs/respondents ("Tullamaine") run a nearby equine stud farm. Tullamaine essentially alleges that an increase in the type of activity being carried out by Tipperary Raceway, particularly over relatively recent years, has had a significant effect on its stud business.

1.2 In general terms the claim brought by Tullamaine was based in part on a contention that Tipperary Raceway was acting in breach of the planning laws. In that context there was an allegation that there had been a material change of use of the motor racing circuit by reason of a significant intensification of use. In addition, Tullamaine contended that the manner in which the motor racing circuit was operated amounted to a private law nuisance.

1.3 The High Court (Charleton J.) gave judgment in favour of Tullamaine (*Lanigan & ors v Barry & ors* [2008] IEHC 29). As appears from that judgment the claim succeeded both in respect of the planning and nuisance aspects of the case. An injunction, which has the effect of significantly restricting the operation of the motor racing circuit, was imposed.

1.4 Tipperary Raceway has appealed against that judgment to this Court. While a number of specific issues require to be decided on this appeal it is, I think, fair to say that the central overall question is as to whether the scope of the injunction imposed by the High Court was, for a variety of reasons, excessive. It should be recorded in passing that the notice party did not participate in this appeal.

1.5 Before going on to consider the issues arising I think it is appropriate that I should record that the hearing of this appeal was facilitated by the first use in this Court of a new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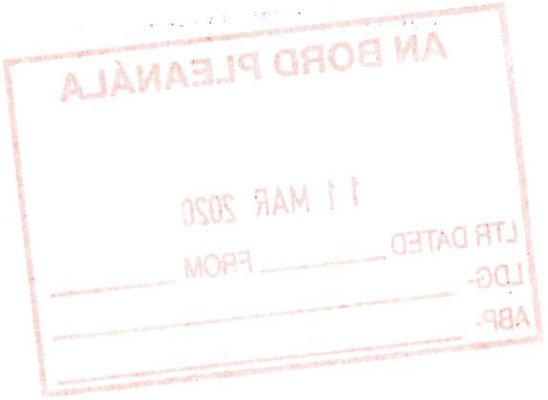
system known as eCourt. That system involves all of the documentation for the appeal being placed on tablets, one of which is made available to each of the members of the Court with additional tablets being provided to the legal teams representing the parties. The software facilitates ease of access to any particular document which may be under discussion at a specific point in the hearing. While, doubtless, as will always be the case with a new experiment, improvements can and will be made, I should record my own view that the experiment must be regarded as a success. In addition the co-operation of the legal teams and court staff with those providing the service is very much to be welcomed.

1.6 However, in order to understand the specific issues which arise on this appeal, it is necessary to say a little about the case which was ultimately made on behalf of Tipperary Raceway at the oral hearing.

2. The case made by Tipperary Raceway

2.1 There may have been some legitimate debate about the precise scope of the appeal at varying stages in the process (for example the notice of appeal underwent radical surgery) but it seems to me to be absolutely clear that any such doubt was removed by the positions adopted by both counsel at the oral hearing. It should first be noted that counsel for Tipperary Raceway fully accepted the limitations which the jurisprudence of this Court, in cases from *Hay v O'Grady* [1992] 1 I.R. 210 onwards, imposes on appeals which raise questions of fact. In that context counsel accepted that this Court was bound to accept the findings of fact of the trial judge in this case. There was no suggestion that any of those findings were capable of being questioned within the limited scope of appeal in relation to the facts which the jurisprudence in question permits.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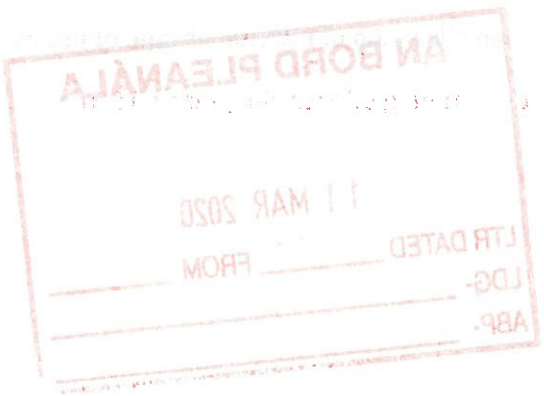
2.2 The focus of the appeal was, therefore, on legal issues. It is necessary, at least to a significant extent, to consider the appeal separately in respect of the two limbs of the case made by Tullamaine.

2.3 So far as the planning aspect of the case is concerned the principal focus of the argument put forward on behalf of Tipperary Raceway was to suggest that the trial judge was incorrect to disregard the seven year limitation period which is to be found in the Planning and Development Act, 2000 (as amended) ("the 2000 Act"). Rather, it was argued, the trial judge should have conducted an exercise similar to that which occurred in *Cork County Council & ors v. Slattery Pre-Cast Concrete Limited & ors* [2008] IEHC 291 ("*Slattery*") and thus should have determined whether any breach of planning legislation could be said either to pre-date or post-date the limitation period. In substance it was argued that the type of breach of the 2000 Act contended for on behalf of Tullamaine was a material change of use by reason of intensification of use. It was said that, contrary to the view expressed by the trial judge, such a material change of use was subject to a limitation period in the same way as any other development. On that basis it was said that any material change of use which pre-dated a time seven years prior to the commencement of these proceedings was no longer capable of enforcement under the 2000 Act. It followed, it was argued, that the failure of the trial judge to attempt to segregate any material change of use into changes which occurred more than seven years prior to the commencement of the proceedings and changes which occurred thereafter led the trial judge wrongly to conclude that all material changes of use were not only in breach of the 2000 Act but also remained capable of enforcement. Therefore, the first issue which arose was as to the proper application of the planning limitation period in a case such as this involving, as it does, an allegation of material change of use by reason of intensification of use.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2.4 However, a second, and subsidiary, planning issue arose from the reliance placed by Tullamaine on the provisions of s.160(6)(b) of the 2000 Act which excludes from the relevant limitation period any claim which is brought seeking to enforce a condition in a planning permission. The backdrop to that issue in the context of these proceedings was that there were certain references in the documents filed in the context of the original application for planning permission which made reference to the scale and timing of the operation of the motor racing circuit then contemplated. Tullamaine argued that, on a proper construction of the planning permission as a whole, it should be held that there were conditions thereby imposed on Tipperary Raceway as to the maximum scale and timing of its operations. Tipperary Raceway argued, to the contrary, that no specific condition concerning the scale or timing of operations had been imposed. While it was accepted that the content of the documents in question, to which it will be necessary to refer in due course, might legitimately be taken into account in identifying the broad scope of the scale of use for which permission was granted (by reference to which the question of whether there had been a sufficient intensification to amount to a material change of use could be judged), it was argued that, on a proper construction, no relevant condition as such had been imposed. Thus there was a clear issue between the parties as to whether, on a proper construction of the planning permission concerned, it could be said that there was a condition relating to scale and timing of operation.

2.5 In fairness to counsel on both sides it should be acknowledged that there was a measure of agreement on what would flow from a decision by this Court on that contested question of whether there was or was not such a condition to be found in the planning permission. Counsel for Tipperary Raceway largely accepted that if, contrary to his submission, it was proper to regard the permission as containing a condition concerning scale and timing of operation, then s.160(6)(b) might allow such a condition to continue to

be enforced notwithstanding that there may have been a breach of that ongoing condition for more than seven years.

2.6 Likewise, counsel for Tullamaine accepted that if, contrary to his submission, it were not appropriate to construe the planning permission as containing a condition of the type asserted, then any increase or intensification of the use of the motor racing circuit could well need to be assessed generally for the purposes of ascertaining whether any element of the planning claim was statute barred.

2.7 Thus, as the debate evolved, it was clear that the key issue between the parties on the planning aspect of the case was as to whether, on a proper construction, the planning permission did or did not contain a condition as to matters of scale and timing of operation. I propose shortly to turn to that question.

2.8 In respect of the claim in nuisance, counsel for Tipperary Raceway accepted that, having regard to the findings of fact of the trial judge, it was not open to him to seek to argue that no finding of nuisance was permissible. However, counsel noted that the injunction granted by the High Court was in terms which very much followed the description found in the original planning application which, by the time of these proceedings, was upwards of 30 years old.

2.9 The focus of counsel's argument was that, in identifying the appropriate injunctive regime to put in place as a result of a finding of nuisance, it was inappropriate for the Court to have regard almost exclusively to an elderly planning application or permission but rather it was said that the Court should have considered what form of injunctive relief was appropriate today to deal with the nuisance established. Counsel noted that no distinction was made by the trial judge between the injunction which was required to be put in place to meet respectively the planning and nuisance sides of the claim. This was argued to be

an error in that, it was said, so far as the nuisance side of the claim was concerned, the Court should have independently looked at what was required to deal with the nuisance rather than to adopt measures which might have been appropriate to deal with the planning aspect of the case.

2.10 As counsel pointed out, that distinction may not have appeared to have been particularly important in the light of the view which the trial judge had taken to the effect that he was entitled to enforce the planning permission in a manner that did not require any adjustment or alteration by virtue of the planning limitations period. In one sense, provided that a particular form of injunction was justified under either the planning or nuisance heading it did not make any great practical difference as to which heading justified any particular aspect of the injunction concerned. However, counsel for Tipperary Raceway argued that, in the event that he succeeded on the planning aspect of his appeal and thus established that some (or perhaps all) of the injunction granted under that heading could no longer be justified on planning grounds then, it was said, the type of injunction which was appropriate to deal with nuisance came into much greater focus in circumstances where the nuisance claim remained the only or principal legitimate basis for some or all of the injunction.

2.11 Put simply, an excessive injunction granted to deal with nuisance might not make any practical difference if the injunction as actually granted was, in any event, justified on planning grounds. But the same excessive injunction granted on nuisance grounds might make a significant difference if it were no longer considered permissible to grant an injunction of the type in question for planning reasons.

2.12 Against that background it is clear that the first issue which logically calls for determination relates to the proper interpretation of the original planning permission with

particular reference to whether it can be said that, on its proper construction, it contains a condition relating to matters such as scale and timing of use. I, therefore, turn to that question.

3. The Interpretation of the Planning Permission

3.1 The starting point has to be a consideration of the grant of planning permission itself which occurred in the earlier part of 1981. The permission was subject to a number of conditions but none of them expressly relate either to the frequency with which racing or practise was to take place on the motor racing circuit or issues directly connected with noise. There are conditions concerning access roads, toilets, parking and an absolute restriction on shops, stalls or vending operations. However, the only conditions which could have any potential relevance to the issues which arise in this case are condition 1, which is in the usual form requiring that the development be carried out in accordance "*with the applicant's submitted drawings and outline specifications*", unless modified by other conditions, and condition 7, which required the applicant "*to take whatever steps are deemed necessary by the Planning Authority*" to remedy any situation which gave rise to "*justifiable complaints by local residents*".

3.2 For understandable reasons there was little emphasis on the latter condition. It is, at a minimum, open to the comment that it may be far too vague to be capable of realistic enforcement. In any event no such requirements were made by the Planning Authority so that, on any view, it could not be said that there has been a failure to comply with the condition concerned.

3.3 The principal focus of the argument put forward on behalf of Tullamaine centred on the standard condition concerning drawings and specifications.

purposes for it would undoubtedly affect traffic and potentially the amenity of other property occupiers in the vicinity. But such a description would be unlikely to be taken as imposing an absolute limit on the amount of customers which the retail unit would be permitted to entertain on any given day. Likewise, the documents filed in respect of a planning application might suggest that a retail unit was designed for daytime use. That might indicate the sort of use which might implicitly be approved by the granting of planning permission for the unit concerned. It is well settled that, in considering the use which may be regarded as being permitted, it is possible to look at the development for which permission has been granted together with any documents submitted in the context of the relevant planning application.

3.8 In such a case the Planning Authority might choose to impose a specific condition concerning hours of opening. If it did so choose then the matter would be clear and it would be a breach of the relevant condition for the retail unit to open outside the hours as specified. However, even if no such specified opening hours were included as conditions attached to the planning permission, it would always be open to a court to consider whether opening significantly outside the parameters which were contemplated by the planning application itself might amount, in all the circumstances, to a sufficient intensification of use (over the use impliedly authorised by the permission) so as to justify a finding of a material change. However, in that latter case it would be necessary to take into account a range of factors, including the degree of difference from the use which it might be inferred had been permitted by the planning permission, so as to assess whether any variation from that contemplated use could be said to involve a material change of use.

3.9 Thus, at the other end of the spectrum, descriptions of the likely scale and timing of operations may simply be matters which go to the information on which a planning

authority must make its decision and may inform the broad level of use for which it might be inferred that permission has been granted. In such a case a deviation would not, in and of itself, be a breach but rather the relevant information may provide the benchmark against which a decision as to the permitted type and scale of use might be made thus in turn informing any decision as to whether current use might be said to be materially different to a sufficient extent and thus involve an unauthorised development.

3.10 The distinction is between a specific requirement which must be obeyed more or less to the letter, on the one hand, and a general indication which may inform the baseline use by reference to which the materiality of an intensification of use may be judged. An assessment as to which of those two categories any particular description may fall into is one involving the proper construction of the planning permission as a whole including how that planning permission should be construed in the light of the documents filed by the applicant insofar as it can be said that those documents have been incorporated by reference into the permission itself.

3.11 The principles applicable to the construction of a planning permission are, of course, well settled and were described by McCarthy J. in the oft-quoted passage from *In re. X.J.S. Investments Ltd* [1986] IR 750 as requiring the Court to construe planning documents not as complex legal documents drafted by lawyers but rather in the way in which ordinary and reasonably informed persons might understand them. It might, in passing, be appropriate to note that this was, perhaps, an early example of the move towards what has been described as the "*text in context*" method of construction appropriate to the determination of the meaning of all documents potentially affecting legal rights and obligations. This approach has now become well established. The "*text in context*" approach requires the Court to consider the text used in the context of the

circumstances in which the document concerned was produced including the nature of the document itself.

3.12 Against the background of that general approach it is necessary to consider the proper construction of the permission in this case.

4. Application to this Planning Permission

4.1 The starting point has to be to note that it would have been easy for the Planning Authority concerned, if it had wished so to do, to impose specific terms as to hours, scale and timing of use. This the Planning Authority did not do. While that is not, necessarily and in and of itself, and end to the matter, it nonetheless is, in my view, a significant factor to be taken into account. To interpret a general clause such as condition 1 (which imposes an obligation to carry out the development in accordance with the drawings and specifications submitted) in a way which imposes very specific obligations in the absence of a specific condition does, in my view, require that what might reasonably be considered to be the drawings and specifications be clearly of a nature designed to identify specific and precisely enforceable parameters for the development (including its use).

4.2 Obviously physical plans easily meet that test. A standard clause such as condition 1 in this case clearly requires that any physical building permitted is carried out in substantial conformity with the plans submitted.

4.3 But the information supplied by the applicant for the permission in this case was not at all specific so far as the scope of use was concerned. It is said that it "*would be intended*" to operate the track "*on Saturday or Sunday evenings*". Should that be taken to mean on one or other of those days or possibly both. There is then a vague reference to the possibility of practise during weekday evenings. No limitation on how often that practise

might take place is to be found. Does that mean that there could be practise on five weekday evenings if required. Likewise while there is a general indication that race meetings would take approximately three hours, there is no indication of how long practise might take. While April to October is mentioned that reference does not seem to me to amount to a clear representation that no use will be made outside that period.

4.4 In those circumstances I am not satisfied that it is appropriate to construe the two paragraphs cited as containing the sort of defined commitment to specific limits which could be taken to have been incorporated into a planning permission by virtue of a general condition such as the one which was imposed in this case. That is not to say that there might not be occasions where the language contained in a document submitted might properly be construed as amounting to a clear commitment that particular limits of one sort or another would be complied with. In such a case it might be possible to construe a general condition such as condition 1 as importing that commitment into the permission itself by means of a condition. But for that to be the case it seems to me that it would be necessary that it would be appropriate to construe the documents submitted by the applicant for planning permission as giving a clear and specific commitment rather than a general indication concerning the scale and timing of operation. I am not satisfied that the documents in this case can be so construed.

4.5 In the light of that analysis and in the light of the absence of a specific condition in that regard, I am not satisfied that the planning permission in this case contains a specific condition concerning scale and timing of operation. It does, however, seem to me that the document which I have cited can be used for the purposes of assessing the broad level of operation for which permission was granted and thus for assessing the baseline by reference to which the materiality of any intensification of use can be judged. There can be

little doubt but that the use now being made of the motor racing circuit goes, as the trial judge found, a very great deal beyond that contemplated at the time and referenced in the planning application. I have no doubt, therefore, that the trial judge was correct to conclude that the current use is so significantly intensified over the broad level of use contemplated at the time and in respect of which planning permission was granted (by reference to the planning documents to which reference has been made) that it can be said that there has been a highly material change in use and thus, in the absence of a planning permission in that regard, an unauthorised development. However, that use is not, for the reasons which I have also sought to analyse, a breach of a specific condition contained in the 1981 planning permission. It is next necessary to turn to the legal consequences of both of those findings.

5. The Legal Consequences

5.1 As noted earlier in this judgment the limitation period provided in the 2000 Act does not apply in the case of breach of a condition attached to a planning permission. However, for the reasons which I have sought to analyse, I am not satisfied that there was any condition in the planning permission in this case concerning the scale and timing of the operation of the motor racing circuit. It follows that the exclusion of the enforcement of planning conditions from the scope of the limitation period can have no relevance in this case.

5.2 In that context it is appropriate to refer to a letter, jointly written by the solicitors for both sides, which was received by the Court on the day before this judgment was listed for delivery. The letter recorded that counsel on both sides wished the Court "*to note the fact that Section 106(6)(b) [sic] of the Planning and Development Act 2000 was enacted on 11 March 2002. There was no similar provision in the earlier Section 27 procedure under the Local Government (Planning and Development) Act 1963*". If I were of the view

that the proper construction of the planning permission in this case contained a condition such that s.160(6)(b) might potentially be engaged then it would have been necessary to consider what effect the timing of the enactment of that section might have had. That question of timing might arguably be important in respect of a condition in a planning permission which was in place prior to the date of enactment and in respect of which it might be said that there was already an established use which was in breach of the relevant condition which was in place for longer than the limitation period. However, given my view that there was no relevant condition present in the planning permission in this case, as properly construed, that interesting question does not arise. I would thank the parties' representatives for bringing this matter of the Court's attention.

5.3 In any event, it is clear, again for the reasons which I have sought to analyse, that there has been a material change of use between the 1980s and the time when these proceedings came to be heard. The problem is that the trial judge did not consider that it was necessary to assess whether some or all of that material change of use had occurred outside the limitation period.

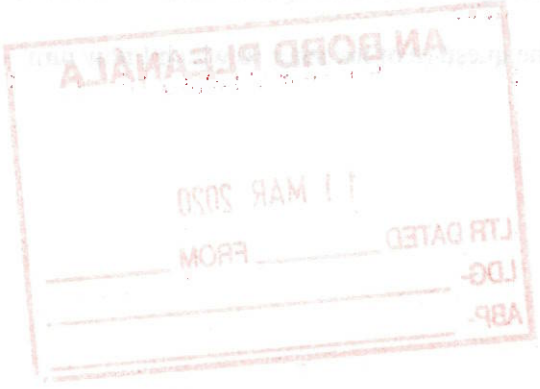
5.4 The trial judge's reasoning in taking that course of action stemmed from the fact that, as he stated, there is nothing in the 2000 Act which renders an unauthorised use lawful by reason of lapse of time. That proposition is correct so far as it goes. But it fails to have regard to the fact that there is a real distinction between the question of whether something may be lawful or not, on the one hand, and whether there remains the possibility of enforcing the breach of the law concerned, on the other. No statute of limitations absolves a wrongdoer from wrongdoing. But all statutes of limitations create the possibility that wrongdoing may no longer be capable of litigation. Similar comments could be made about any other form of legal doctrine which has the potential to prevent litigation of a

particular type from being maintained. The doctrine of laches in the context of equitable remedies comes to mind. Furthermore circumstances such as estoppel or the rule in *Henderson v. Henderson* [1843] 3 Hare 100, which can potentially prevent particular types of litigation being progressed, do not, of themselves, absolve the wrongdoing which might be the subject of the litigation. They do, however, prevent an aggrieved party from being able to bring the proceedings at all in the sort of circumstances contemplated by the respective rules.

5.5 A material change of use is, under the 2000 Act, every bit as much a development as a physical construction. A material change of use which results from a sufficient intensification of a permitted or existing use is just the same as any other type of change of use. It can properly be regarded, in an appropriate case and if sufficiently significant, as development requiring permission. In the absence of permission it can amount to an unauthorised development. The limitation period applies to any unauthorised development and I can see no reason for altering the views which I expressed in *Slattery* concerning the application of the limitation period to a case involving a contention of material change of use by reason of intensification. Likewise I see no reason to depart from the views I expressed in that same case as to the proper approach to be adopted in cases where there is a gradual intensification of use over time. In substance what is required is that the Court assess, as of the relevant date for the purposes of the limitation period, what development (in the shape of a material change of use) has taken place as of that time. That development, being the intensification which had already occurred as of the relevant date for the purposes of the limitation period, can no longer be the subject of enforcement. But any further intensification which is sufficient to ground a proper finding of a further material change of use within the limitation period, clearly can.

5.6 Unfortunately no such exercise was carried out in this case because of the view which the trial judge took as to the inapplicability of the limitation period. It is not, in those circumstances, either possible or appropriate for this Court to attempt to conduct an exercise of seeking to identify just how much of the current unauthorised use was in fact in place prior to the limitation period and thus is no longer capable of enforcement. There certainly was evidence from which it might reasonably be held that at least some of the current use is a sufficient intensification not only over the use impliedly permitted by the planning permission but also over the use which was established as of the date when the limitation period commenced, so as to justify a finding that there has been a further intensification of use within the limitation period such as, in turn, to justify a finding of development in the shape of a material change of use again within that limitation period. I have little doubt, therefore, that a sustainable finding could be made on the evidence that there has been some post-limitation period material change of use. The problem for this Court is that, in the absence of clear findings of fact by the trial judge on the evidence, it is not possible to say with any sufficient level of precision just what level of use can be described as post-limitation period material change of use.

5.7 For those reasons it seems to me that the trial judge was incorrect to grant injunctions under the planning heading by reference to the original planning permission of 1981. Rather the trial judge should have assessed the extent to which the current use amounts to a material change of use above and beyond the use which had been established at the time when the limitation period commenced and should have crafted an injunction to restrain that additional, and thus enforceable, change of use. What the Court should do in the light of that finding is a matter to which it will be necessary to return after addressing the question of nuisance to which I now turn.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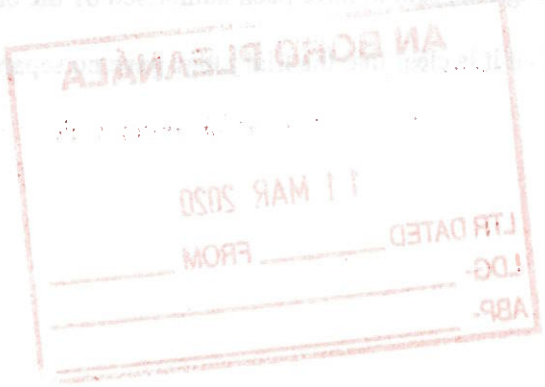
6 The Claim in Nuisance

6.1 It should be recalled that *Slattery* also involved, in addition to the planning claim, a claim in nuisance brought by local residents. In circumstances where nuisance is established I see no reason to depart from the views which are expressed in that case to the effect that the Court should adopt whatever remedy appears just in all the circumstances of the case having regard, in particular, to the need to protect those who suffer by virtue of nuisance to whatever extent might be considered just and reasonable.

6.2 I am also satisfied, and I did not really understand counsel for Tipperary Raceway to argue otherwise, that the decision of the trial judge to find that nuisance was established in this case was sustainable on the evidence and is not a finding with which this Court can or should interfere.

6.3 The Court is, therefore, faced with the situation where there is an established nuisance and where the question which arises on this appeal is as to whether the form of injunctive relief ultimately granted by the trial judge is the appropriate remedy to put in place in the context of that established nuisance. As already noted the trial judge did not impose any different injunctive terms as and between the planning and nuisance aspects of the case. For the reasons already identified I am not satisfied that the injunction put in place to deal with the planning aspect of the case can be sustained. However, I am in agreement with the submission made by counsel for Tipperary Raceway that the injunction put in place on the nuisance side is simply a reproduction of the injunction put in place on the planning side and is principally focused on bringing the situation back to that which might be said to have been authorised by the original 1981 planning permission. It follows that it is clear that the trial judge gave no separate consideration to the extent of the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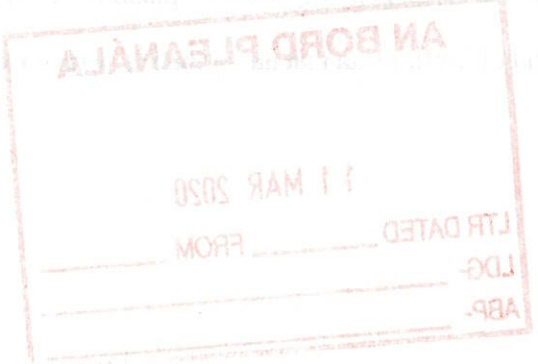
injunctive relief which was required to do justice in all the circumstances arising from the undoubtedly established nuisance.

6.4 There was a great deal of evidence before the trial court as to what might be done to ameliorate any nuisance established. However, because the trial judge formulated the injunctive relief largely by reference to the 1981 planning application and permission, there are few findings in relation to the facts which might inform a view as to the appropriate injunction to grant solely in respect of nuisance.

6.5 While the findings of fact sufficient to establish that there is a nuisance cannot, therefore, be disturbed, there are, in my view, insufficient findings of fact to allow this Court to craft an appropriate form of injunction designed to do justice in all the circumstances pertaining to the nuisance claim. That is not to say that some form of injunction will not, almost inevitably, follow in order to deal with the established nuisance. However, this Court does not have sufficient definitive findings of fact to enable a decision to be made as to the precise form in which any such injunction should be imposed.

6.6 For those reasons I am satisfied that the trial judge was in error in granting an injunction, in respect of the undoubted nuisance which was established in this case, whose terms were defined largely by reference to a 1981 planning application and permission rather than by reference to what might now reasonably and justly be required to ameliorate the nuisance which is currently occurring.

6.7 In that context I agree with counsel for Tullamaine that the fact that there may be a planning permission for an activity does not permit the commission of a civil wrong. It follows, a fortiori, that the fact that it may no longer be possible to enforce a particular breach of the planning laws, on planning limitation grounds, does not, necessarily and in and of itself, mean that an injunction, which would have the same effect as that now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impermissible enforcement, may not be justified as an appropriate measure designed to ameliorate a nuisance.

6.8 Just as the appropriate injunction for the amelioration of a nuisance may not be as extensive, either in general or in some particular respect, as an injunction designed to enforce a specific aspect of the planning code, equally the injunctive relief which may be justified for nuisance purposes may, again either generally or in a specific respect, go further than that which might be justified on planning grounds. The two jurisdictions are not coextensive. It follows that the relief which may be appropriate under both headings may not necessarily be the same.

6.9 But for like reasons to those which I have analysed in the context of the planning aspect of this case, I am not satisfied that this Court is in a position to craft an appropriate injunction to deal with the nuisance aspects of the case any more than it is in a like position in the context of the planning aspects of the case.

7 Consequences

7.1 For those reasons I am satisfied that, under both headings, there was more than ample evidence before the trial judge to justify a finding of a breach of the planning laws (including breaches which post-dated the limitation period) and also a finding of a continuing nuisance. It inevitably follows that some injunction ought to have been granted. However, for different reasons, I am satisfied that the injunction as actually granted cannot be stood over either in respect of the planning or the nuisance aspects of the case.

7.2 In the context of planning, the injunction imposed failed to have regard to the fact that some of the intensification of use which amounted to a material change of use was, in

substance, statute barred. On the nuisance aspect the injunction was crafted largely by reference to a 1981 planning application and permission rather than, as it should have been, by reference to the measures which were reasonably required to do justice in all the circumstances of the case in the light of the established nuisance.

7.3 However, what is much less clear is as to the precise injunction which should have been put in place under either heading. Again, under both headings, I am not satisfied that it is open to, and, therefore, appropriate for, this Court to determine the precise form of injunction which should be granted. While it is regrettable, it seems to me to follow that the only proper course of action available to this Court is to remit the matter back to the High Court for the purposes of determining the appropriate injunction or injunctions which should be granted in the light of the analysis of the legal situation as determined by this Court. To that extent I would allow the appeal and remit the matter back to the High Court. However, there remains the question of what should be done in the meantime. That question comes into particular relief given the views which I have expressed as to the virtual inevitability that some form of injunction will ultimately be imposed.

7.4 In that context it is appropriate to address a key aspect of the evidence which is relevant both to the question of intensification of use in more recent, post-limitation period, times and also to the existing nuisance. That concerns the so-called practise of "drifting" which, as I understand it from the evidence, is a form of driving on a motor race track which involves attempting to "drift" the car around bends at least in part by the use of brakes. There was ample evidence to suggest that the noise associated with this activity was particularly acute. There was also evidence to suggest that there had been a significant growth in the activity concerned in recent times such that there is a realistic prospect that

much, if not all, of the practise of drifting might be found to be a material change of use post-limitation period and also to be a significant contributor to the current nuisance.

7.5 It is also clear from the evidence that drifting constitutes a significant portion of the current use of the motor racing circuit. In the circumstances I would propose that Tipperary Raceway be restrained, until such time as the High Court has the opportunity to consider the appropriate forms of injunctive relief to be put in place on a permanent basis, from engaging in the practise of drifting. Given the uncertainty about all other aspects of the case I would not propose that any further restrictions be placed on the activities of Tipperary Raceway until such time as the High Court has had the opportunity to consider the matter fully.

7.6 It is important that I emphasise that both the measure prohibiting drifting and the absence of any measures restricting activities in any other way are designed to meet that short-term situation where this Court has held that some injunction is undoubtedly justified but does not feel that it is in a position either to sustain the injunction granted by the High Court or to determine itself what form of injunction should replace it. It should not be taken that the High Court judge to whom this matter is remitted should in any way be governed or influenced by that interim measure. If the High Court judge is persuaded that drifting should, either generally or to a specific extent, be permitted in the light of the principles set out in this judgment, then the High Court judge should make whatever order in respect of drifting is appropriate (including no order). Likewise, if the High Court judge is persuaded that any particular restriction on the general operation of the motor racing circuit is justified on either or both of planning and nuisance grounds, then such an order should be put in place even though this Court has not, on an interim basis, put in place any restrictions in that regard.

8. Conclusions

8.1 For the reasons set out in this judgment I have, therefore, come to the conclusion that the injunction granted by the High Court cannot be sustained either on the basis of the planning claim or on the basis of the claim in nuisance. While satisfied that some type of injunction was likely to have been justified on planning grounds I am satisfied that the trial judge was incorrect to disregard the planning limitation period and that the order actually granted was, therefore, incorrect. In that context I am also satisfied that, on a proper construction, there was no relevant condition attached to the planning permission in this case concerning scale and time of use. Thus s.160(6)(b) of the 2000 Act does not, in my view, have any application to this appeal. The timing of the enactment of that measure is not, therefore, relevant in this case.

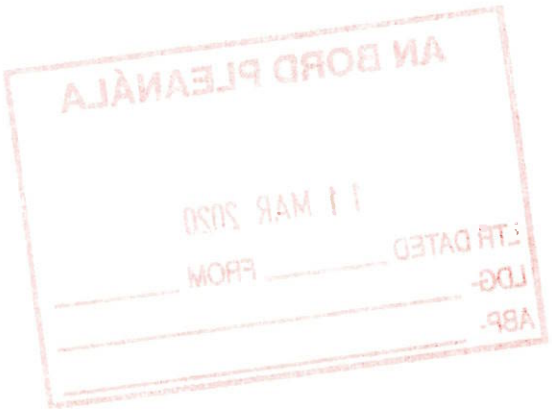
8.2 Similarly I am satisfied that, while some injunction was justified on the basis of the established nuisance, it was incorrect to formulate the injunction concerned by reference to a 1980s planning application and permission rather than by reference to what was reasonably required to deal, in a just fashion, with the nuisance today.

8.3 Having concluded that the injunction granted could not, therefore, be sustained on either basis it seems to me that the appeal must be allowed. However, again for the reasons analysed in this judgment, I am not satisfied that it is either appropriate or possible for this Court to substitute its own injunction. It follows that, in my view, regrettably, the case must be remitted back to the High Court to determine what form of injunction is appropriate in the light of the analysis of the issues conducted by this Court.

8.4 However, for the reasons set out at paras. 7.4 and 7.5 above, I would propose as an interim measure that the practise of drifting be restrained until such time as the High Court

has the opportunity to consider the appropriate form of injunctive relief to put in place on a permanent basis. I would, however, again emphasise that the choice of that interim measure is very much designed to deal with matters on a temporary basis and should not influence the ultimate determination, by the High Court judge to whom these matters are remitted, of the appropriate form of permanent injunction to be granted.

Approved
27th-VII-2016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[2019] IEHC 850

THE HIGH COURT

[2018 No. 234 MCA]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT, 2000 (AS AMENDED)

BETWEEN

SHARON MCARDLE, SHIRLEY MCARDLE AND OLIVIA MCARDLE

APPLICANTS

AND

DONAL CARROLL

RESPONDENT

JUDGMENT of Mr.Justice MacGrath delivered on the 3rd day of December, 2019.

1. These proceedings were commenced by way of notice of motion dated the 8th June, 2018. The applicants, inter alia, sought an order pursuant to s. 160(1) of the Planning and Development Act 2000 as amended ("*the Act of 2000*") to restrain the respondent from carrying out an unauthorised development on his lands, being a boundary wall. It was contended that the wall was of such a height as required planning permission in accordance with the provisions the Act of 2000 and Regulations made thereunder. An order was also sought for inspection of the respondents' property. In circumstances outlined hereunder, it is accepted that proceedings have now become moot and the sole remaining issue requiring the court's determination is in relation to costs.

2. The applicants and the respondent are neighbours and reside at Rock Road, Blackrock, Co. Louth. Before the emergence of this dispute in April, 2018, there is nothing to suggest that they were on anything but good terms. The respondent has described his family's relationship with the applicants as cordial and friendly. This situation pertained before the respondent decided to build a boundary wall. The wall was constructed to the rear of the applicant's dwelling house and behind an existing boundary wall thereon. The lands of the respondent are zoned for residential use. The respondent, in an affidavit sworn in opposition avers that he built the wall to improve and secure his own boundary. The applicants objected.

3. In circumstances outlined hereunder, the respondent applied to the local planning authority for permission to retain the wall and in the events which have transpired, An Bord Pleanála confirmed the local authority's decision to grant retention permission. The decision of the Board was made on 17th December, 2018. Thus, it is agreed that the proceedings became moot at this time.

4. The application for retention was lodged with the planning authority on 12th June, 2018. Some days prior to that, a site notice was erected. On the evidence, this occurred on the morning of the 7th June, 2018, being the day on which the first applicant swore her affidavit grounding the proceedings and one day prior to the institution of these proceedings. It appears, nevertheless, that the preparation of the proceedings was in train prior to the 7th June, 2018. This is evident from the supporting affidavit of Mr. J.P. Murphy, engineer, which was sworn on 6th June, 2018. He deposed to having inspected the planning register and he addressed the planning status of the property in his affidavit. He confirmed that the lands are zoned residential, that no applications had been

submitted for planning permission and that a warning letter had been issued to the respondent by the local planning authority.

5. In her affidavit, the first named applicant also complained that the wall had been erected over pipes servicing the dwelling house of the second and third named applicants and that a gap had been left between the two walls which was considered by the applicants to be dangerous and hazardous, particularly to children. The court was informed that separate proceedings had been commenced in respect of an alleged trespass. These also issued on 8th June, 2018. Apart from being served on the respondent, they have not been progressed to date.

6. The applicants maintain that the wall was built at such a pace that it was substantially completed by the morning of the 9th April, 2018, despite conversations which had taken place on site and the sending of a letter written on the 5th April, 2018 in which the applicant had expressed concerns. They maintain that they sought to avoid proceedings.

7. On the evidence, I am satisfied that the works commenced without prior consultation by the respondent with the applicants. I accept, on the evidence, that Mr. Carroll engaged a contractor on Wednesday 4th April, who in turn commenced excavation and poured the foundations for the wall.

8. I am also satisfied that there was communication on that day when the third applicant, Ms. Olivia McArdle, who leaned over the rear wall of her home and queried what was happening. She maintains that certain assurances were given to her as to the pace at which the works might take place. In his affidavit, para. 10, the respondent avers that she enquired of him as to when he proposed to construct a wall and he responded that it would probably be Monday or the following week. Ms. McArdle queried why he had not informed her that he was building a wall and Mr. Carroll states that he had intended to inform her sister, Ms. Shirley McArdle, in short course. On enquiry as to the height of the wall, Mr. Carroll avers that he confirmed that the wall would be the same height as the wall to the east, which bounded the property of another neighbour, approximately 1.8m above her garden level but that it would not be as high as a wooden partition fence dividing the applicant's garden into two sections. He also states that Ms. Olivia McArdle said to him *"[w]hat about my view?"*. She inquired about the sewage pipe passing from her property to a council sewer running under and through her own property and he confirmed that he was aware of the council pipe and that he would not be encountering any pipe work in the course of excavating the foundation for the wall. This was because the pipe was approximately 2.6m underneath the ground.

9. Mr. Carroll also accepts that on the 5th April, at approximately 8:30a.m., Ms. Olivia McArdle once again leaned over the wall and requested that he cease all works immediately. A discussion ensued about the height of the wall and the respondent avers that he informed her that he understood that it was permissible to build a wall up to 2m in height without planning permission and that the finished wall would be less than 2m above ground level on her side. He states that Ms. McArdle informed him that she wished to have her engineer inspect the works to which he replied that he had no difficulty with

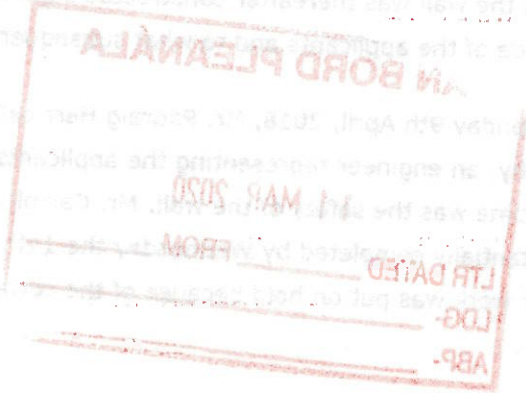
such course of action. Ms. McArdle also expressed concerns regarding the foundation of her boundary wall and Mr. Carroll states that he put her mind at ease about this. However, Mr. Carroll maintains that Ms. McArdle again demanded, in what he described as a very pointed and aggressive fashion that all works cease immediately, to which he responded that the works were in progress with men and all materials on site and advised her that he had a delivery of concrete arriving to fill the foundations which was "arriving imminently".

10. Mr. Carroll also confirms at para. 13 of his affidavit that the construction of the wall commenced on the 7th April, 2018 and that he was approached at approximately lunchtime by Ms. Sharon McArdle and Ms. Olivia McArdle who he says were quite aggressive towards the blocklayers and who demanded that they immediately cease laying blocks otherwise they would call the Gardaí. Mr. Carroll states that he believes the import of this communication to the workers in question was that they were in some way committing a criminal offence. Later that afternoon, Saturday 7th April, Ms. Olivia McArdle called to his front door. He was not there and his daughter informed Ms. McArdle that she was unaware of his whereabouts. Once again Mr. Carroll complains about the demeanour, tone and what he describes as the aggressive and oppressive nature of that demeanour, which made his daughter feel uncomfortable.

11. Mr. Carroll avers that on Sunday 8th April, 2018, he was present in the garden with a number of blocklayers and was confronted again. He informed Ms. Sharon McArdle that this was not a party wall, it was built entirely on his property, that the blocklayers were independent contractors who started on Saturday as they had another job waiting and because the weather was forecast to deteriorate. However, he confirmed that engineers retained by the applicants were welcome to inspect the works and could liaise with his engineer, Mr. McMahon, of Messrs. Padraig Herr and Associates who, he states, had already inspected the works the previous day and found that there was nothing wrong with either the wall or the foundations. He forwarded a copy of the engineer's report to them on Monday, 9th April, 2018. However, he states that Ms. Sharon McArdle dismissed this immediately and indicated that the report would not stand up in court. He acknowledges that Ms. Olivia McArdle accused him of deliberately misleading her because the workers had started on site on Saturday and not on the following Monday. That apparently was the last verbal communication between the parties.

12. I am satisfied that while there may have been no legal obligation to do so, the actions of the respondent in not communicating with the applicants in advance and the haste with which the wall was thereafter constructed significantly contributed to the colouring of the attitude of the applicants and to what subsequently transpired.

13. On Monday 9th April, 2018, Mr. Padraig Herr called on the respondent with Mr. J.P. Murphy, an engineer representing the applicants. It is evident that the primary concern at that time was the safety of the wall. Mr. Carroll confirms that at that time the wall was substantially completed by Wednesday the 11th April, 2018. He also avers that certain other work was put on hold because of the correspondence between the parties.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14. On the 17th April, 2018 the respondent received a warning letter issued by the local authority pursuant to s. 152 of the Act of 2000, advising that the wall was or may be unauthorised. This issued on foot of a complaint made by the applicants to the local authority on the 13th April, 2018.

15. In early May, 2018, the respondent advised the local authority that he intended to make an application for retention permission. This appears to have been in response to the warning letter and on the advice of his engineer. On the 2nd May, 2018, Ms. Sharon McArdle made a formal complaint to the local authority that the wall was a dangerous structure. This was not accepted by the local authority and on the 2nd May, 2018 Mr. Fergus Fox, council engineer who inspected the wall, recommended that the file be closed.

16. It would also seem that on the same day, Mr. Herr wrote to the local authority, informing them that he had been instructed by Mr. Carroll to prepare and submit a planning application for retention of the wall. In the meantime, communications were taking place between the parties regarding inspection facilities and an issue arose concerning whether such inspection facilities would be permitted in the absence of an indemnity (presumably to indemnify the respondent in respect of anything that might happen while the plaintiff's engineer was on the property). Mr. Carroll makes the complaint that this was not progressed before the proceedings issued on the 8th June, 2018. He also points to the fact that in the letter of 10th May, 2018, prior to the institution of proceedings, the solicitors on behalf of the plaintiff stated that they wished to have confirmation that not alone would the wall be removed but trees recently planted would also be removed and that there no reference request was made that the planning status of the wall be regularised by way of a grant of permission. The demand was one for removal of the wall.

17. Mr. Carroll also says that on the 7th June, 2018 being the date on which Ms. McArdle swore her affidavit, at approximately 8:30 a.m., a site notice was placed directly at his entrance gate (the main access road of Rock Road where all of the parties live) stating that the respondent was applying for retention permission for the wall. It is submitted that this site notice was clearly visible to all passers-by but that despite this, the applicants nevertheless went ahead with this application. The site notice stated:-

"LOUTH COUNTY COUNCIL

SITE NOTICE

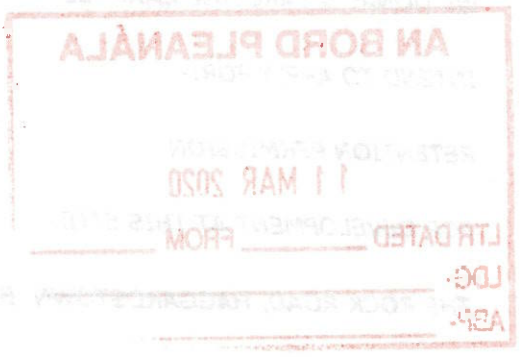
WE DONAL & CAROLINE CARROLL

INTEND TO APPLY FOR:-

RETENTION PERMISSION

FOR DEVELOPMENT AT THIS SITE:-

THE ROCK ROAD, HAGGARDSTOWN, BLACKROCK, DUNDALK, COUNTY LOUTH.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THE DEVELOPMENT WILL CONSIST OF:-

RETENTION OF A BOUNDARY WALL BETWEEN ACGRICULTURAL LANDS AND NEIGHBOURING DWELLINGS AND ASSOCIATED SITE DEVELOPMENT WORKS.

The planning application may be inspected, or purchased at a fee not exceeding the reasonable costs of making a copy, at the offices of the planning authority during its public opening hours.

A submission or observation in relation to the application may be made in writing to the planning authority on payment of the prescribed fee, €20, within the period of 5 weeks beginning on the date of receipt by the authority of the application, and such submissions or observations will be considered by the planning authority in making a decision on the application. The planning authority may grant permission subject to or without conditions, or may refuse to grant permission.

SIGNED:- (agent) Padraig Herr

DATE OF ERECTION OF SITE NOTICE:- 07TH JUNE 2018."

18. The application for retention was made on the 12th June, 2018 and the applicants and others objected. A report was prepared by representatives of the local authority's planning department. This was based on a site visit which occurred on 28th June, 2018. The authors described the height of wall as ranging between 2.4 m and 2.8 m. They observed that while:-

> *"...no application for residential has been submitted, the provision of such a wall of this nature would not be an uncommon feature/requirement as part of a planning application and is a requirement under s.6.7.13.[of the development plan]."*

The principle of the development was considered acceptable and it was recommended that retention permission be granted.

19. On the 26th July, 2018, the planning authority issued a decision to grant retention permission. A number of conditions were attached, including that the development comply with certain requirements of Irish Water. An appeal was lodged to An Bord Pleanála by the applicants and the Board of Management of the local school. On the 17th December, 2018, the Board granted retention permission on terms in accord with those specified by the planning authority on the 26th July, 2018.

20. By letter of the 7th August, 2018 the respondent's solicitors wrote to the applicants proposing that in order to avoid further legal costs, the proceedings should be adjourned pending the issue of a grant of planning permission or a final determination. This and a further letter of reminder were not responded to at that time. The applicants changed their solicitor at that time. While complaint is made that these letters were not responded to, nevertheless, it appears that no further substantial step was taken by the applicants. The respondent filed a replying affidavit. The respondent also filed and delivered an

affidavit sworn by a chartered engineer, Mr. Roger Cagney. This followed a number of inspections of the wall, including a joint inspection which occurred on 19th July, 2018 and which concerned the structure and the safety of the wall. In the affidavit he responded to a letter which had been sent by the applicants dated 4th May, 2018, in which concerns regarding the design, safety and structure of the wall were expressed. He refuted those concerns.

21. Mr. Connolly S.C., on behalf of the respondent points out that a court order was extant requiring the filing of a replying affidavit within a specified time and that in the absence of agreement to defer further proceedings pending the outcome of the appeal to An Bord Pleanála, the respondent was obliged to file that affidavit, thereby incurring costs.

22. Thereafter, it may be said that little occurred until after the application for retention was granted by An Bord Pleanala and before the issue of costs became a significant matter between the parties. It appears that the proceedings were adjourned on at least one occasion while the appeal was pending before the Board. No further affidavits were exchanged until early 2019. These included a supplemental affidavit sworn by the respondent on 17th January, 2019 in which he updated the situation regarding the granting of retention permission. A further affidavit was sworn by the first applicant on 10th April, 2019 to respond to and refute the contentions outlined in the respondent's first affidavit. She denied that the applicants were being unreasonable and reiterated her concern about the safety of the wall. She refuted any suggestion that the applicants were themselves in breach of the planning laws. She expressed her belief that the construction of the wall was in anticipation of an application for planning permission for a housing development and raised doubts as to the respondent's belief that the development was exempt. Reference was made to the fact that the respondent, in response to another warning letter under s. 152 in respect of another wall, had made application for retention permission for that wall which was also granted; and an issue was raised regarding compliance with the condition attached to the retention permission. She also stated her belief that the open market value of the lands exceeded €3,000,000 and that they had been acquired in 2006 for in excess of €5,000,000.

23. Mr Kavanagh, engineer, swore an affidavit on 29th April 2019. This was submitted on behalf of the applicants. He refuted certain assertions contained in Mr. Cagney's affidavit and reiterated his concern that the design of the wall was fundamentally flawed.

24. Mr. Gunne, auctioneer, in an affidavit sworn in support of the land valuation, stated that his valuation of the property was based on a valuation of €300,000 per acre, giving a gross value of €3,111,000. He avers that the residence was valued at €425,000 and given that it may be necessary to sacrifice the residence or to pay a premium for access, the net value of the land was, in his opinion, just over €3 million. Mr. Gunne avers that since the date of his first valuation, he learned that the respondents also have additional adjoining landholding which was not included in his initial evaluation. Reference is also made to a right of way which the respondent benefits over adjoining property. In conclusion, Mr. Gunne confirmed his valuation of €3,111,000.

25. These affidavits led to a further extensive affidavit in reply from Mr. Carroll. He referred to the meeting of engineers on 9th April, 2018. He rejected the suggestion that the application for retention was provoked by the institution of these proceedings. He exhibited a report from valuers, Sherry Fitzgerald Carroll, in relation to the valuation of his lands. It is fair to observe that this is more detailed than Mr. Gunne's.

26. The provisions of O. 99 of the Rules of the Superior Courts provide that, although ultimately it is a matter for the discretion of the court, an award of costs follow the event. If the court is minded to dis-apply this rule then, in accordance with dicta in *Godsil v. Ireland* [2015] 4 I.R. 535, it can only do so on a reasoned basis and one which is rationally connected to the facts of the case to include the conduct of the participants. The court has also been referred to a passage from *Delaney and McGrath on Civil Procedure,* (4th ed., 2018) that it enjoys a wide discretion not to award costs or to reduce the costs awarded where it disapproves of how the proceedings were conducted by the successful party.

27. The parties now essentially agree that the proceedings have become moot, and that the only issue which is now outstanding is that of costs. Both parties seek their costs.

28. Mr. O'Donnell B.L, counsel for the applicant, in reliance on the decision of Clarke J. (as he then was) in *Telefonica O2 Ireland Ltd v. Commission for Communications Regulation and Others* [2011] IEHC 380, a decision which shall be discussed in more detail below, submits that the generally accepted principle that where proceedings become moot as a result of an external event that the parties should bear their own costs does not apply because these proceedings were rendered moot by the actions of the respondent in applying for retention permission. The decision of An Bord Pleanála, which had the effect of rendering the proceedings moot, therefore, was not an event which was truly independent of the actions of the parties. It is submitted, that the court should exercise its discretion to award costs in favour of the applicants. To this end, significant emphasis was placed by counsel on the conduct of the respondent in constructing a wall at a height which attracted the requirement for permission under the Act of 2000, without prior notification to the applicants and which, despite their concerns and objections, he completed in a hasty manner. Emphasis is placed on certain assurances or representations made by respondent when the matter first arose on 4th April, 2018, that the wall would not be constructed until the following Monday but that the work was substantially completed earlier, over the weekend, and in spite of correspondence between the parties. It is submitted that the wall was built at a height which was considerably in excess of that for which permission is required under the Planning and Development Regulations. On 17th April, 2018 the planning authority issued a warning letter which indicated that unauthorised development may have been carried out and the applicants were unaware that the respondent intended to apply for retention permission before these proceedings were instituted. It is contended that the application for retention was made in response to the proceedings. Mr. O'Donnell B.L. submitted but for the proceedings being brought, the unauthorised structure would have remained in situ and

that it was only the subsequent decision of the Board that the structure obtain the benefit of planning permission that render that which was unauthorised, authorised.

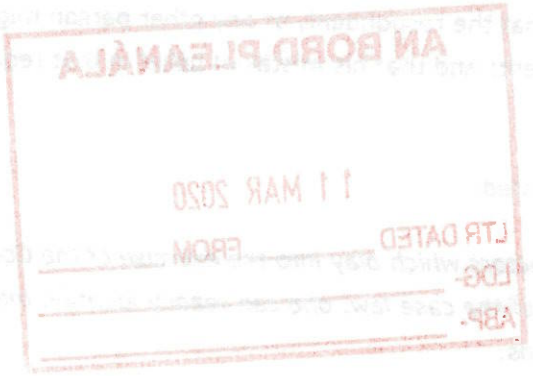
29. Significant emphasis is placed on s. 162(3) of the Act of 2000 which provides that no enforcement action, including an application under s. 160 shall be stayed or withdrawn by reason of an application for permission or retention of unauthorised development under s. 34(12) or the grant of that permission. Counsel submits that this provision applies in a situation such as this, and that it was designed to avoid the type of scenario which is relied upon by the respondent and for which the provisions of s. 162(3) were enacted. It is submitted that the respondent waited for a considerable time before taking action despite having been notified of the applicants' concerns both verbally and in writing. Further, it is submitted that the respondent refused to allow inspection notwithstanding concerns raised about the structural stability of the wall.

30. The respondent's position is that he did not make the application for retention in response to the institution of these proceedings. It was made in consequence of the warning letter and on the basis of the advice which he received from his engineer. He believed that he did not require planning permission, as the construction of the wall to the height intended was exempt from the requirement to obtain planning permission. He states that his approach has been to limit the cost of the proceedings at an early stage, but that the applicants have added to the costs by the submission of further affidavits in April, 2019. This had the effect of significantly enlarging the case subsequent to the granting of the retention permission. The respondent also maintains that the filing of the affidavits must be viewed in the context of the respondent having made proposals to avoid escalating legal costs with particular regard to the letter of the 7th August, 2018, which went unanswered.

31. Mr. Connolly S.C., counsel for the respondent, submits that s. 162(3) of the Act of 2000 does not preclude the court from exercising its discretion in relation to costs in favour of the respondent. He points to several matters which, he submits, had the case gone to a full hearing, in accordance with the principles in *Morris v. Garvey* [1983] I.R. 319, as applied in *Meath County Council v. Murray* [2018] 1 I.R. 189, may have resulted in the court, in the exercise of its discretion, refraining from making the order. Counsel confirmed that it was not being suggested that, if deciding the case, the court might take another view i.e. that it was at all times an exempted development. Nevertheless, he advanced these matters such that the court may take into account in concluding that there was a plausible view that the respondent, or any other person might take, that this was an exempted development; and that his mistaken belief in that regard is also plausible.

32. In *Murray*, Mc Kechnie J. stated:-

> *"90. What, then, are the factors which play into the exercise of the Court's discretion? From a consideration of the case law, one can readily identify, inter alia, the following considerations:*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(i) *The nature of the breach: ranging from minor, technical, and inconsequential up to material, significant and gross;*

(ii) *The conduct of the infringer: his attitude to planning control and his engagement or lack thereof with that process:*

- *Acting in good faith, whilst important, will not necessarily excuse him from a s. 160 order,*
- *Acting mala fides may presumptively subject him to such an order;*

(iii) *The reason for the infringement: this may range from general mistake, through to indifference, and up to culpable disregard;*

(iv) *The attitude of planning authority: whilst important, this factor will not necessarily be decisive;*

(v) *The public interest in upholding the integrity of the planning and development system;*

(vi) *The public interest, such as:*

- *Employment for those beyond the individual transgressors, or*
- *The importance of the underlying structure/activity, for example, infrastructural facilities or services,*

(vii) *The conduct and, if appropriate, personal circumstances of the applicant;*

(viii) *The issue of delay, even within the statutory period, and of acquiescence;*

(ix) *The personal circumstances of the respondent; and*

(x) *The consequences of any such order, including the hardship and financial impact on the respondent and third parties,*

91. *The weight to be attributed to each factor will be determined by the circumstances of a given case. Some, because of their importance, may influence whether an order is or is not in fact made: others, the scope, nature or effect of that order. This list is not in any way intended to be exhaustive, and it may well be that other matters might require consideration in an appropriate case. For example, in Pierson v. Keegan Quarries Ltd. [2010] IEHC 404, Irvine J took account of the hardship which demolition might cause to third parties, and referred also to the possible effect of the developer having relied in good faith on professional advisers. The jobs of non-related members of the public, mentioned at para. 90(iv), above, featured in Stafford v. Roadstone Ltd and Dublin County Council v. Sellwood Quarries Ltd [1981] I.L.R.M. 23. There are many other examples. However, the above list is generally representative of the type of factors which the judge will normally be called upon to consider. It is thus an appropriate framework within which to analyse the High Court's exercise of discretion in this case, conducted, as it only could be, by reference to the traditional or customary approach (see paras. 134-139, infra)..."*

33. Adopting the above approach, Mr. Connolly S.C. points to the following factors:

a. The reasonable belief of the respondent, objectively verified, that the construction of the wall was an exempt development, or that he held a plausible view that the development was exempt. Particular emphasis is placed on his belief that it was permissible to measure the height of the wall from the perspective of the lands whose amenities were said to be affected;

b. The concern about the hazard allegedly created by the wall brought a sense of urgency into the proceedings was *nihil ad rem* and unrelated to planning matters;

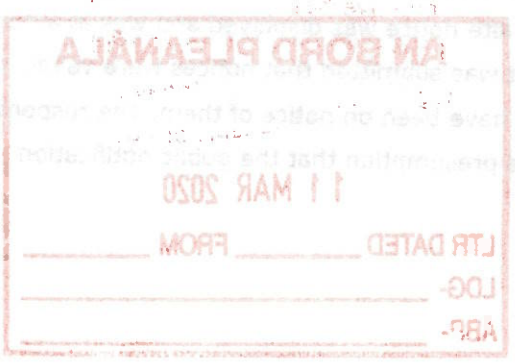
c. The failure of the applicants to bring to the court's attention in the grounding affidavit the events and communications which occurred between the time of the construction of the wall and the date of the application before the court, particularly those in relation to the safety of the wall. The correspondence and a report on the safety of the wall which had been commissioned by the respondent and furnished to the applicant in April, 2018 was not exhibited or referred to in the grounding affidavit. The report of the engineer which had been furnished to the applicants on 9th April, 2018 was not exhibited in the grounding affidavit of Ms. McArdle, something which is described as significant omission particularly where it was Mr. McMahon's opinion that the wall would not adversely impact any existing drains or other services. In passing, it is to be noted however, that this letter did not address the planning status of the wall or whether permission was required for a development of such a nature and height. It is contended that by failing to refer to the available information unfairly coloured the urgency of the case from a safety perspective. Further, an application to the local authority under the dangerous structure legislation was not notified;

d. The absence of concern by other neighbours;

e. That the respondent applied for retention in response to the warning letter, rather than the proceedings and that in so doing he acted on the advice of his engineer;

f. At the time of the institution of the proceedings, the applicants were aware that the council had been investigating the issue, because they had made the complaint and a s. 152 warning letter had issued;

g. The applicants must be presumed to have been on notice of the making by the respondent of the application for retention, something which had been triggered by the Council's planning enforcement process but nevertheless, these proceedings were brought. Emphasis is placed on the site notice and the planning officers report on the 28th June, 2018 that the site notice was displayed and was in accordance with regulations and therefore, it was submitted that notices were validly in place and that the applicants ought to have been on notice of them. The respondent relies on what it describes as the presumption that the public notification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requirement in relation to the making of their retention application was complied with;

h. The applicant's initial demand for the removal of the wall, rather than its regularisation;

i. The unreasonable failure on the part of the applicant to furnish the respondent an engineering report and the exchange between the parties in relation to the engineer and the basis upon which an inspection might take place. It is emphasised in this regard that the applicants' engineer was not refused inspection facilities;

j. The respondent also maintains that the applicants' purported structural concerns in relation to the wall are unsustainable given the expert evidence which has been adduced. While the respondent maintains that this was a matter of agreement between the engineers, Mr. Murphy in his affidavit disputes this. The wall is structurally sound and has been built within the respondent's private property and within the curtilage of his dwelling.

k. It is suggested that the breach of the planning code in this case was undoubtedly "*minor, technical and inconsequential*", as discussed in Murray and that it was therefore wholly inappropriate for the applicants to seek to invoke the jurisdiction of the court under s. 160 in pursuit of what is described as a personal advantage, being the preservation of a view to the rear of their property, and a view which is beyond the rear garden boundary wall. No such general right exists;

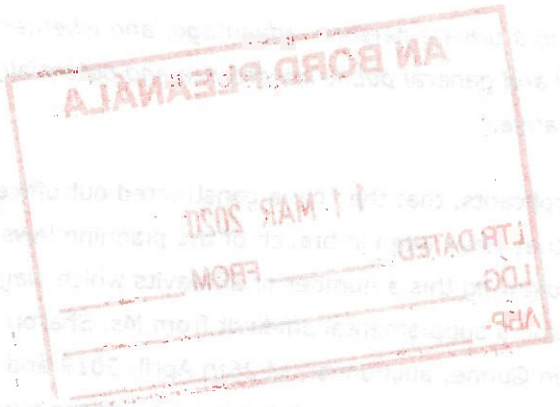
l. The attitude of the planning authority - reliance was placed on the fact that no enforcement notice was ever issued.

m. It is also submitted it cannot be plausibly be argued that the public interest in upholding the integrity of the planning and development system necessitated the bringing of the proceedings.

34. The court has been referred to a number of authorities including the decision of Simons J. in *Tanager DAC v. Ryan* [2019] IEHC 649 as authority for the proposition that account is to be taken of factors such as:-

> *"whether the proceedings were seeking a private personal advantage, and whether the legal issues raised were of special and general public importance and potentially relevant but not necessarily determinative."*

35. Reference is made to the conduct of the applicants, that they have constructed out office buildings on a common boundary and that they have been in breach of the planning laws. The respondent also makes the point that following this a number of affidavits which were delivered on behalf of the applicants, including a supplemental affidavit from Ms. Sharon McArdle of the 29th April, 2019, Mr. Stephen Gunne, auctioneer, of 26th April, 2019 and Mr. Kavanagh, chartered engineer on the 29th April, 2019, that this necessitated the filing of further affidavits by both the respondent and by an engineer on his behalf.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36. In so far as the respondent's application for costs is concerned, the court has also been addressed in relation to the provisions of the Environment (Miscellaneous Provisions) Act 2011 *("the Act of 2011")*. *In North East Pylon Pressure Campaign Limited v. An Bord Pleanála No. 5* [2016] IEHC 490, Humphreys J. observed at para. 32:-

> *"The upshot is that the not-prohibitively-expensive rule applies (to the fullest extent that it is possible to read national law to that effect) to challenges based on national environmental law within the field of EU environmental law even if the challenges do not relate to the public participation rules. Thus there is no need to get unduly caught up in classifying challenges as relating to public participation only as opposed to national environmental law within the EU law field more generally because ultimately both come to the same thing. As regards the rider that national law should be read to this effect 'to the fullest extent possible', this is not a problem for Ireland as the discretion arising from O. 99 is sufficiently flexible that it can always be read in an EU law-compatible manner."*

37. In essence, the respondent maintains that if the court should determine that s. 3 of the Act of 2011 applies, the respondent is entitled to seek its costs pursuant to s. 3(3)(b) of the Act of 2011.

38. In response to these particular submissions, Mr. O'Donnell B.L. emphasises the statutory basis for an application under s.160 of the Act. He submits that the wall was built at a height which ought not to be regarded as a minor and technical or inconsequential breach, given that the height to which it was constructed was well in excess of that in respect of which permission is required. There was no acquiescence over a long period nor has there been shown gross and disproportionate hardship such as might have influenced the court to exercise its discretion to refuse any relief. Counsel relies on the decision of Morris v. Garvey in this regard. There, Henchy J. stated:-

> *"When s. 27(2) is invoked, the Court becomes the guardian and supervisor of the carrying out of the permitted development according to its limitations, and in carrying out that function it must balance the duty and benefit of the developer under the permission as granted against the environmental and ecological rights and amenities of the public, present and future, particularly those closely or immediately affected by the contravention of the permission. It would require exceptional circumstances (such as genuine mistake, acquiescence over a long period, the triviality or mere technicality of the infraction, gross or disproportionate hardship, or such like extenuating or excusing factors) before the Court should refrain from making whatever order (including an order of attachment for contempt in default of compliance) as is "necessary to ensure that the development is carried out in conformity with the permission". An order merely restraining the developer from proceeding with the unpermitted work would not alone fail to achieve that aim but would often make matters worse by producing a part completed structure which would be offensive to the eye as well as having the effect of devaluing neighbouring property."*

Further, he submits that the respondent has displayed in his affidavits a knowledge of planning laws and that if he was confident that it was an exempted development, he should have had no difficulty in approaching his neighbours in advance. He submits that the making of the retention application was, in effect, an acceptance that planning permission was required and that at the when the application was lodged, the wall was an unauthorised structure and the proceedings were in being. If a genuine mistake was made by the respondent, Mr O'Donnell B.L. observes that no remorse for such a mistake was expressed in the replying affidavit.

39. I have taken into account the above submissions and the responses thereto, all of which I have considered in balancing how the discretion of the court ought to be exercised.

40. These proceedings were instituted on the 8th June, 2018 seeking an order pursuant to s. 160 of the Act of 2000 to restrain the unauthorised development being the boundary wall which as it transpires and despite the respondent's belief, was one to which the planning inspector, Mr. Niall Haverty, concluded that because of its height dimensions, required permission.

41. It must also be considered, nevertheless, that certainly in the initial stages, the applicants' concerns centred on the safety and stability of the wall. Letters were issued by and on behalf of the applicants on 5th April, 2018 and 11th April, 2018. The letter of 5th April was sent by the third named applicant who requested that he refrain from taking any further steps to construct any wall, foundation or other structure next to or near the wall at the rear of their property:-

> *"so as to allow us the opportunity to be appraised of the extent of the proposed works and ascertain whether or not they would affect the structure, stability, amenity, or otherwise of our property and/or the connection small property to and from the public main services."*

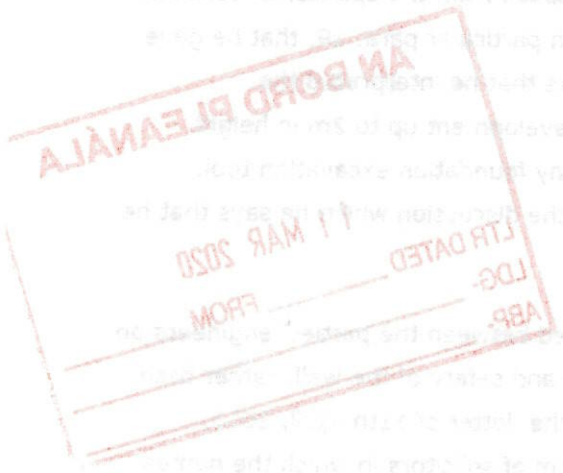
She felt that the request was reasonable in circumstances where the applicants had no prior notification of the proposed works such as would have afforded them an opportunity to ascertain the position. The letter concluded: "*we trust you will appreciate our concerns herein and would hope that this matter might be resolved amicably in due course*".

42. Unfortunately the response of the respondent was to persist with the works and while it may be that engineers were retained to look at the structure and stability of the wall, the fact remains that the wall was constructed despite the request of the applicants that it not be. In his replying affidavit, Mr. Carroll states that he built the wall to improve the security zone boundary because the boundary arrangements in place at that time consisted of a broken down concrete post and chain link fence. In the same affidavit, he avers that he had a number of concerns with respect to the applicants' low level garden wall. He states that these did not meet the appropriate standards for a wall retaining so many cubic tonnes of soil, it had no piers or expansion joints and was built with a single course of block laid on its edge. He also expressed concern about the lack of privacy and security. Nowhere is it suggested, that prior to his decision to construct this wall had he

raised any such concerns with the applicants. It is also evident from the respondent's affidavit, that he accepts that the third named applicant, Ms. Olivia McArdle, when she approached him on 4th April, enquired as to when he proposed to construct the wall and that he responded to her that it would probably be Monday of the following week. The works continued. He accepts that on 5th April, Ms Olivia McArdle once again leaned over the wall and requested that he cease all works. She queried the height of the wall because she thought the wall should only be six foot high. The respondent avers that he indicated to Ms. McArdle that it was his understanding that it was permissible to build the wall of up to 2m in height without planning permission, and that such measurement be taken from the ground level point on his side of the boundary line. This was above her foundation level before the pre-existing soil was stripped away. He informed her that the finished wall would be less than 2m above ground level on her side. It is clear, therefore, on the respondent's own evidence that the issue of the requirement for planning permission, or the lack of such requirement, was discussed as early as 5th April, 2018. It is also clear that when the wall was being constructed over the weekend, despite the protestations of the applicants, the respondent continued with the work and it is also of note that in his affidavit sworn on 6th September, 2018, he accepts that on Sunday, 8th April, 2018, Ms Olivia McArdle stated "*... that I had deliberately misled her because the workers had started on site on Saturday and not on Monday.*" Mr. Carroll does not, in this affidavit, suggest that he made any response to this.

43. While the applicants maintain that the works were substantially completed by Sunday, 8th April, the respondent maintains that it was not until the 11th April that works were substantially completed, but other works including backfilling, repointing, drainage weep installation and closing of cavities were put on hold because of the threats in correspondence "*and the present proceedings which issued from the applicants' solicitor.*" It is also evident from the respondent's affidavit and in particular para. 19, that he gave some consideration to planning requirements. He avers that he interpreted the regulations to mean that the wall was an exempted development up to 2m in height measured from the pre-existing ground level before any foundation excavation took place. This corresponds with the averment regarding the discussion which he says that he had with Ms. McArdle on site on 5th April, 2018.

44. It appears that the focus of the meeting which occurred between the parties' engineers on Monday 9th April 2018 was on the structural integrity and safety of the wall, rather than on planning considerations. This is also evident from the letter of 11th April, 2018, written on notepaper of Messrs. McArdle and Co., a firm of solicitors in which the names two of the three applicants appear on the letterhead, in which the principal expressed concern relating to the structural impact of the works on the applicants' property. Proceedings were threatened. A request was also made for all planning permissions relating to the subject works together with the engineer's certificate of compliance in respect of same. Thus, it appears to me to be evident that planning issues were under consideration. Further, it emerges from para. 6 of the respondent's affidavit sworn on 11th June, 2019, that the respondent was aware that the warning letter had issued in response to a complaint to the planning enforcement section of the local authority, by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way of submission of an enforcement complaints form dated 13th April, 2018, on behalf of the applicants. He also avers that an official in the council planning enforcement section confirmed to him on 22nd May, 2018, in advance of the institution of these proceedings, that:-

> *"whilst rightly respecting the anonymity of the complainant, that receipt of the complaint... was officially acknowledged in writing to the complainant, together with confirmation that the council were investigating the matter".*

The respondent further accepts that the issuing of the warning letter was a matter which he considered to be of the utmost seriousness.

45. The letter of 4th May, 2018 from the applicants' solicitors, while heavily emphasising the issue of trespass and safety, advised that the applicants reserved the right to apply for any necessary orders to ensure that the danger was removed.

46. In all the circumstances, I am satisfied that prior to the institution of the proceedings, while the principal focus was on the safety of the structure and issues relating to trespass, the respondent ought to have been aware that the applicants were concerned, *inter alia*, about the planning status of the wall. There is no evidence of an attempt being made prior to the proceedings to expressly or directly communicate with the applicants or otherwise inform them that an application for retention was in contemplation or was in the process of being made, save for the erection of a site notice which I address below .

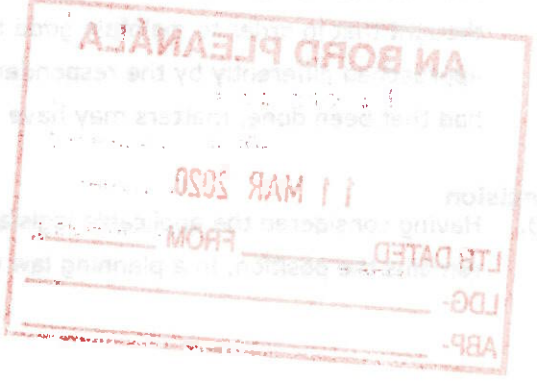
47. While the respondent maintains that he was of the belief that he did not require planning permission, nevertheless, he does not appear to have made appropriate inquires either before construction or when objection was raised.

48. With regard to issues relating to engineering inspection prior to proceedings, any dispute between the parties as to the basis on which such inspection might take place or the requirement for an indemnity, was removed when the parties consented to an order for inspection on 2nd July, 2018. It also seems to me that the issue of the planning status of the applicants' premises was unlikely to have been raised but for these proceedings.

49. It seems to me that in balancing all matters to which Mr. Connolly S.C. and Mr. O'Donnell B.L. have referred and which, had this case gone to a conclusion, a court might have had regard to in determining whether to exercise its discretion to grant the relief claimed under s. 160, significant weight must be attached to the actions of the respondent from the outset, without which this dispute might never have arisen. While prior consultation with the applicants may not have been required as a matter of law, one would have thought that in order to maintain good neighbourly relations, matters ought to have been approached differently by the respondent, particularly when objection was raised. Perhaps had that been done, matters may have turned out differently.

Decision

50. Having considered the applicable legislation and the authorities, I am satisfied that it remains the position, in a planning law context, but with particular regard to the facts of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this case, that this Court retains a discretion in relation to costs as specified in O. 99 of the Rules of the Superior Court. Therefore, had there been an event, on the basis of the rules and on the authorities, costs ought to follow that event unless there is good, expressed and stated reason to the contrary. Where proceedings become moot, different considerations may apply to the exercise by the court of its discretion. *Cunningham v. The President of the Circuit Court* [2012] 3 I.R. 222 and *Telefonica O2 Ireland Ltd* indicate that the default position is that there should be no order as to costs where the proceedings have been rendered moot by the happening of an external and independent event or occurrence, over which the parties have no control. This was addressed by Clarke J. (as he then was) in *Telefonica O2 Ireland Ltd* at para 2.6.1 of his judgement where he observed:-

> *"2 6.1A question can become moot for a whole range of reasons. It is impossible to be overly prescriptive as to the proper approach which the court should adopt for the range of factors that may be relevant are wide, However, it seems to me that a factor which is at least of some significance is an analysis of how it came about that proceedings had become moot. Sometimes (as was the case in Eircom), external factors over which the parties have no control render proceedings moot. In many such cases there may at least be an argument for the court making no order as to costs. It clearly would, at least in the vast majority of cases, be an unacceptable use of scarce court resources for a hearing to have to go ahead to decide a moot issue simply for the purposes of deciding who should pay the costs. Indeed, given that all that will be at issue are the costs up to the time when the proceedings become moot, it would seem particularly foolish for parties to have to incur much more costs solely for the purposes of deciding who should bear the costs up to the point when the case became moot."* (emphasis added).

Having analysed the position of both parties in such a situation, he continued:-

> *"That analysis seems to me to lead to a view that a court should favour making no order as to costs in proceedings which became moot in the absence of other significant countervailing factors. However, that analysis is based on a situation where the case becomes moot by reason of factors entirely outside the control of the parties. It seems to me that somewhat different considerations apply where the reason (or at least a significant contributory reason) to the proceedings becoming moot derives from the actions of some but not all of the parties to the case."* (emphasis added)

Referring to the decision of the Supreme Court in *Murray & Anor v. Commission to Inquire into Child Abuse* [2004] 2 I.R. 222, he observed at para 6.6.5:-

> *"It seems to me, therefore, that a significant factor to be taken into account in the exercise of the court's discretion as to costs in proceedings which have become moot is to analyse whether it can reasonably be said that the actions of any relevant party have rendered the proceedings moot. If that be so, then that is a significant factor to be taken into account in the award of costs. The situation with*

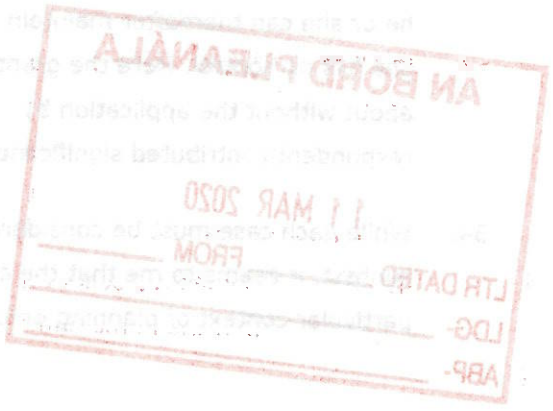
which the court is then faced remains one where, in the absence of trying a moot case, the court will not know who would have won. However, the situation of any party who was not involved in rendering the issue moot, in not being able to establish that their side of the case was right, has resulted not from any action which that party took or, indeed, from some entirely external event over which no one had any control, but rather from actions taken by their opponent. That is a factor which ought weigh significantly in favour of the grant of costs to the party who was not involved in the action which led to the proceedings being moot. This remains the case even where, as here, there were entirely understandable reasons why the parties took the actions - settling the case - which they did."

51. On the facts, I am satisfied that a decision was made by the respondent to seek retention some weeks prior to the institution of these proceedings. This is evident from the letter written by Mr. Herr on the 2nd May, 2018 which confirmed that the application for retention would be made within two weeks. Nevertheless, while that decision may not have been made in response to the institution of proceedings, it was significantly prompted by what had occurred up to that time. There is no evidence, however, that the intention of the respondent to apply for retention was expressly communicated to the applicant in advance of the institution of the proceedings. The respondent maintains, however, that the applicant ought to have been aware of the application because it was made in response to a warning letter which he had received from the local authority and which warning letter had been precipitated by the applicant's complaint. In essence, the claim of the respondent in this regard is that the applicant was precipitous in seeking the relief sought in these proceedings.

52. In consideration of why the proceedings became moot, the applicants submit that the decision of the Board is not a truly independent event, but one to which the respondent contributed. The respondent maintains that it does not follow that by engaging in the statutory process that one has or assumes control over the outcome of that process or that it is or becomes a unilateral act; and that the process of application and granting retention is one in which an independent decision is made by an independent body.

53. It is difficult to accept that where a person a) who is subject to enforcement proceedings, or where he or she has been in receipt of a warning letter; and b) where at the time of the institution of the proceedings he or she may have been in default of his or her planning obligations; and c) is subsequently successful in his or her application for a retention permission thus thereby bringing the proceedings to a stage of mootness, that he or she can thereafter maintain that this is a truly independent event over which he or she has no control. Here the granting of the retention permission could not have come about without the application by, and participation of, the respondent in that process. The respondent contributed significantly to that process.

54. While each case must be considered on its merits and within its own factual and legal context, it seems to me that the court's conclusion in this regard is reinforced in the particular context of planning enforcement legislation. In my view the proposition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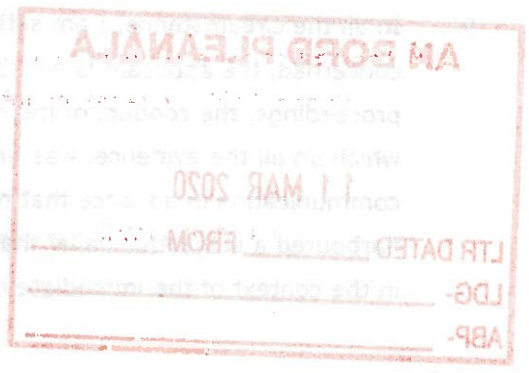
advanced by the respondent is difficult to reconcile with the provisions of s. 162 (3) of the Act of 2000, which expressly provides that no enforcement action, including an application under s.160, shall be stayed or withdrawn by reason of an application for retention of permission under s. 34(12) or the grant of that permission (emphasis added). To hold that the granting of permission in respect of the subject matter of the enforcement action thereby renders those proceedings moot would appear to be inconsistent with the express provisions of that subsection. I am therefore not satisfied that it has been established that, as a matter of principle, because the proceedings are now moot that the generally stated proposition that there should be no order as to costs applies. Thus, I am not satisfied that the circumstances which arise in this case require the application of any general principle that each party should be required to bear its own costs on the grounds of mootness of proceedings.

55. Nevertheless, there continues to remain the issue of the manner in which the court ought to exercise its discretion in the light of the necessity, timing or circumstances surrounding the commencement of proceedings. On this issue, it appears to me that, on the authorities, the court is required to assess the overall circumstances including the conduct of the parties. Further, it is also relevant to consider the criteria to which this Court has been referred and as outlined in *Morris v. Garvey* and as discussed in *Murray* in the context of planning injunctions.

56. In my view, the failure of the respondent to engage with the applicants in advance of the works, and the expedition with which such works took place contrary to certain representations made as to when they might commence, contributed significantly to the subsequent course of events and to the institution of these proceedings. While it may have been, and on the facts I am satisfied that it was, decided that an application for retention was to be made considerably in advance of the institution of the proceedings, it is clear that this intention was not communicated to the applicants. The fact that a site notice may have been in place at 8a.m. on the morning on which the grounding affidavit was sworn does not appear to me to be of great significance. Such notices are required to be put in place for particular periods of time to give the public a reasonable opportunity to be aware of the application in respect of a proposed development. That someone does not see that notice immediately when it is erected is not, in my view, a matter for which he or she ought to be criticised, and this is particularly so when a letter in advance of action had been served. Again, a simple communication would have removed any mystery about what was intended. Further, placing the site notice in position did not alter the planning status of the wall or render authorised that which may have been unauthorised.

57. In all the circumstance, I am satisfied that in so far as the timing of the proceedings is concerned, the applicant is not to be criticised, particularly in the light of the threat of proceedings, the conduct of the respondent in the hasty construction of the structure, which on all the evidence, was unauthorised because of its height and in the absence of communication in advance that retention would be sought. That the respondent may have harboured a subjective belief that planning permission was not required must be viewed in the context of the immediate objection by the applicants to what was taking place.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58. The respondent, however, also raises issues concerning the failure of the applicants to disclose the course of dealings between the parties and communications with the local authority, together with that authority's response, relating to the safety of the wall. Mr. O'Donnell B.L., counsel for the applicants, submits that the applicants could not to be criticised for their failure to inform the court about these matters. He submits that this is particularly so where no interim or interlocutory relief is sought and where it is anticipated that after the commencement of proceedings a further exchange of affidavits, and the joining of the issues between the parties, is to be anticipated.

59. In applications under s. 160 it is accepted that even where a prima facie case for relief is established, the court retains a discretion to refuse relief, to be exercised in accordance with principle. In my view, if a position is stated on affidavit which does not provide a complete and fair picture of the circumstances leading up to and surrounding the application, this may be taken into consideration by the court in determining how it might exercise its discretion. The weight to be attached to this must relate to the nature of the application and the relief, statutory or non-statutory which is sought. Here, the matters that were not fully expressed to the court concerned issues relating to the safety of a structure, rather than its planning status, nevertheless it is a factor which in the particular circumstances of the case I ought to take into consideration.

60. It also appears to me that I should consider, and take into account, the conduct of the parties while the proceedings were ongoing including, in this case, the lack of response to the respondent's invitation in August, 2018 that matters might be stayed pending the decision of An Bord Pleanála on appeal. In view of the provisions of s. 162(3), it may be said that there was no obligation on the applicants to desist from pursuing the proceedings, and further, it may also be contended that had the respondent applied for a stay on the proceedings it is likely to have been refused in the light of the express wording of s. 162(3). Nevertheless, I do not believe it is appropriate, when considering the question of costs, that the reply to communications or the failure to do so should be ignored by the court.

61. The contents of the affidavits which followed subsequent to August, 2018, on both sides, far from lowering the temperature served only to increase the tension with allegations of a hate campaign, breach of the Act of 2000 by the applicants - a matter which appeared not to concern the respondent up to this time - and the introduction of matters regarding other planning issues concerning the respondent, and his regularisation thereof; again something which does not appear to have exercised the minds of the applicants before now.

62. The parties are neighbours and may continue to be long after these proceedings have concluded. Taking everything into account, in my view, any inclination of the court to award costs of the application, up to the time of the proceedings becoming moot, must be considered in the light of the absence of constructive communication thereafter, to which both parties have contributed.

63. I have come to the conclusion that in all the circumstances and weighing all matters in the balance including the respective conduct of the parties, the applicant should be entitled to their costs up to the date on which an event occurred which rendered the proceedings moot, namely the 12th December, 2018 and that the court should make no order as to costs incurred by the parties arising thereafter. It seems to me that the primary precipitating factor giving rise to the dispute between the parties and the subsequent institution of the proceedings was the conduct of the respondent in erecting a wall of a height, which was shown in the events which transpired, required planning permission and which was constructed in a hasty fashion without prior consultation and communication with the respondents, his near neighbours.

64. As to the level of those costs, I have considered the affidavits of the parties including the supporting affidavit of Mr. Gunne and in particular the reports of Sherry Fitzgerald Carroll which have been exhibited to the respondent's affidavits. There is no issue but that this court has jurisdiction to entertain this application. Rather the issue is whether, given the jurisdictional limits, the proceedings ought to have been brought in the Circuit Court. In my view, the onus of proof lies on the applicants to establish that which was alleged in the initiating grounding affidavit, that the value of the respondent's lands on the open market was in excess of €3 million. On the basis of the affidavits and evidence before the court, I am not satisfied that the applicants have discharged the onus of proof on this issue. In view of the description of the property outlined in the application and grounding affidavit, and the evidence and contents of the reports of the valuers, I am not, and cannot, be satisfied that it is more likely than not that the lands the subject matter of these proceedings exceed €3 million in value. I find the report of Sherry Fitzgerald Carroll, dated 21st May, 2019, which is detailed in its description of the lands and has had regard to comparators, more convincing in this regard. Some emphasis was placed during the course of argument on the description of the land outlined in the grounding affidavit, which were confined to the property comprising one folio of land owned by the respondent. In my view, on the basis of the analysis conducted in each of the reports and in the affidavit of Mr. Gunne, even if one were to consider the land as comprising those contained in four rather than one folio and extending to 13.08 acres, rather than 4.27, I remain more convinced of the respondent's valuation.

65. For similar reasons as outlined above I am not satisfied that the respondent is entitled to a costs order. Thus, issues which may have arisen pursuant to the Act of 2011, do not require to be considered.

66. Therefore the applicants are entitled to their costs up to the time of the decision of An Bord Pleanála on 12th December, 2018, but not thereafter, costs to be adjudicated on the Circuit Court scale. Each party must bear the costs incurred by them after that date.

[2019] IEHC 825

THE HIGH COURT

2019/55/MCA

IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT AND IN THE MATTER OF AN APPLICATION

BETWEEN

RONALD KRIKKE
PIA UMANS
SEAN HARRIS
CATHERINE HARRIS
PATRICK KENNEALLY
CAROLINE KENNELLY
KENNETH GEARY

APPLICANTS

AND

BARRANAFADDOCK SUSTAINABILITY ELECTRICITY LIMITED

RESPONDENT

JUDGMENT of Mr Justice Garrett Simons delivered on 6 December 2019

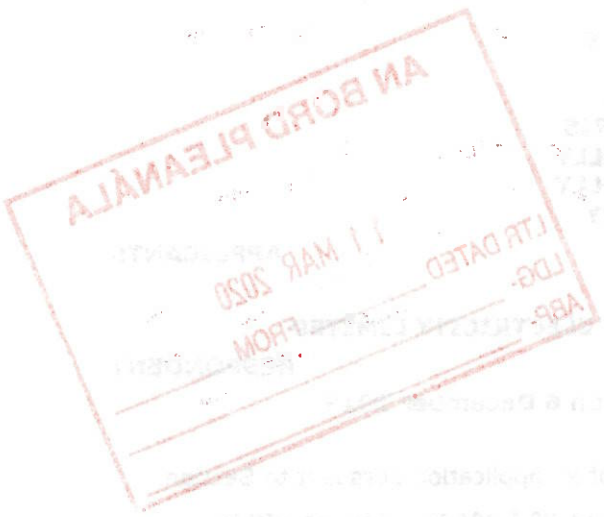
INTRODUCTION

1. This matter comes before the High Court by way of an application pursuant to Section 160 of the Planning and Development Act 2000 (*"the PDA 2000"*). Section 160 is intended to provide a summary procedure whereby breaches of the planning legislation can be brought before the court expeditiously. The procedure is colloquially described as an application for a "planning injunction". The procedure is available to "any person", and benefits from special costs rules under Part 2 of the Environment (Miscellaneous Provisions) Act 2011.

2. The principal legal issues which fall for determination in the present case all concern the interaction between the respective competences of local planning authorities, An Bord Pleanála and the courts. In particular, an issue arises as to the weight, if any, which must be given to a Section 5 declaration in subsequent enforcement proceedings. An issue also arises as to the legal status of a decision made by the local planning authority purporting to agree points of detail pursuant to a planning condition.

3. The facts of the case are straightforward. The respondent is the operator of a wind farm (hereinafter *"the Developer"*). The wind farm is located in the townland of Ballyduff, County Waterford. The relevant planning permission had authorised the erection of wind turbines of a particular scale and dimensions. In the event, wind turbines of a different scale and dimensions have been erected instead. The principal distinction between the "as permitted" and the "as built" turbines is that the rotor blade diameter has increased from 90 metres to 103 metres. This deviation is said, by the Developer, to have been compensated for by a reduction in hub height, which has the consequence that the overall tip height has remained at the permitted level of 125 metres.

4. An Bord Pleanála has since made a declaration pursuant to Section 5 of the PDA 2000 to the effect that the alterations to the turbines, including the length of the rotor blades, do not come within the scope of the planning permission. The Applicants contend that the Developer is precluded by the existence of this Section 5 declaration from reagitating before this court an argument that the "as built" turbines are authorised by the planning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permission. In response, the Developer seeks to rely on an earlier decision, namely the decision of the planning authority to "agree" points of details in respect of the wind turbines. This earlier decision was made pursuant to a condition of the planning permission which left over points of detail, including the design, height and colour of the turbines, for agreement with the planning authority. It is said that neither the Applicants nor this court is entitled to look behind this decision in circumstances where same has not been challenged in judicial review proceedings.

5. The Developer has advanced a number of other arguments for saying that there has been no "unauthorised development", and contends, in the alternative, that relief should be refused as a matter of discretion.

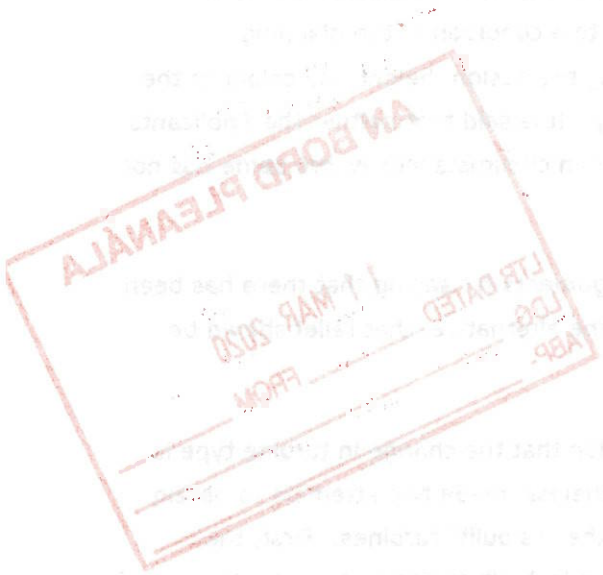
6. The Developer, whilst maintaining the formal position that the change in turbine type is authorised by the planning permission, has, nevertheless, made two attempts to obtain development consent retrospectively in respect of the "as built" turbines. First, the Developer made an application for leave to apply for "substitute consent" under Part XA of the PDA 2000. The application for leave was refused by An Bord Pleanála by decision dated 13 August 2019. This decision is now the subject of judicial review proceedings before the High Court. These judicial review proceedings have been taken by all of the Applicants herein. The parties informed the court last week (28 November 2019) that the judicial review proceedings are not being opposed by An Bord Pleanála, but that there is likely to be a dispute as to whether the matter should be remitted to the Board. This matter is listed for hearing in the Commercial List this morning (6 December 2019).

7. Secondly, the Developer had made an application for retention planning permission to the local planning authority pursuant to Section 34(12) of the PDA 2000. This application had been submitted to Waterford City and County Council on 4 October 2019. This application has since been withdrawn in early November 2019.

STRUCTURE OF THIS JUDGMENT

8. This judgment is structured as follows. The factual background to the dispute will be set out in more detail under the next heading below. This chronology will include more recent events, such as the decision on the part of An Bord Pleanála to refuse leave to apply for substitute consent.

9. The legal issues will then be addressed in the following sequence. First, the legal status of the Section 5 declaration will be considered. This will be the lengthiest part of the judgment. This is because there is a significant body of case law in relation to Section 5, and it is necessary to examine same in some detail. Secondly, the court will consider de novo the question of whether the change in turbine type represents unauthorised development. This exercise is carried out on a *de bene esse* basis. Thirdly, the legal status of the planning authority's purported agreement to the compliance submission will be considered. Fourthly, the factors which are relevant to the exercise of the court's discretion will be addressed. Finally, the principal conclusions of the court will be summarised at the end of this judgment.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FACTUAL BACKGROUND

THE PLANNING PERMISSIONS

10. An Bord Pleanála granted planning permission on 22 November 2005 for the development of a wind farm. (Reg. Ref. 04/1559) ("*the 2005 planning permission*"). The planning application had initially sought permission for the erection of twelve wind turbines. It seems, however, that revised plans and particulars were subsequently submitted, and one of the proposed turbines was omitted and the scale and dimensions of three of the turbines were reduced.

11. The development is of a type which is subject to the requirements of the Environmental Impact Assessment Directive (2011/92/EU) ("*the EIA Directive*"). This is because the proposed development exceeded the threshold for a mandatory environmental impact assessment ("*EIA*") under Schedule 5 of the Planning and Development Regulations 2001. As such, the planning application had to be accompanied by an environmental impact statement ("*EIS*"), and An Bord Pleanála was required to carry out an EIA as part of its decision-making.

12. The planning permission, as granted by An Bord Pleanála, allowed for the erection of eleven wind turbines and other associated development. More specifically, the planning permission authorised the erection of eight wind turbines with a hub height of 80 metres and a blade length of 40 metres (equivalent to a rotor diameter of 80 metres), and a further three wind turbines with a hub height of 60 metres and a blade length of 40 metres (equivalent to a rotor diameter of 80 metres). The two sets of wind turbines would have had an overall tip height of 120 metres and 100 metres, respectively.

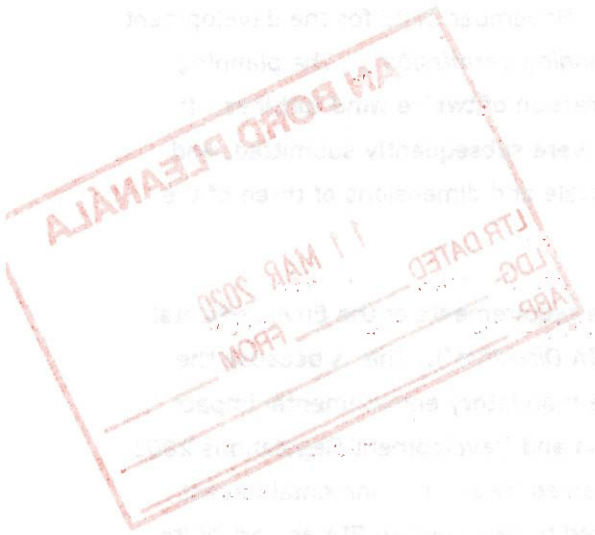
13. The following two conditions of the 2005 planning permission are relevant to the issues which arise in these proceedings.

    1. The development shall be carried out in accordance with the plans and particulars lodged with the application, as amended by the revised information received by the planning authority on the 3rd day of February, 2005, the 22nd day of February, 2005 and the 27th day of May, 2005, except as may otherwise be required in order to comply with the following conditions. For the avoidance of doubt, this permission relates only to 11 number turbines only with the layout of the turbines as that received on 27th day of May, 2005.

       Reason: In the interest of clarity.

    3. Prior to commencement of development, details of the proposed turbines and associated structures, including design, height and colour shall be submitted to and agreed in writing with the planning authority. The wind turbines shall be geared to ensure that the blades rotate in the same direction. In default of agreement, the matter shall be referred to An Bord Pleanála for determination.

       Reason: In the interest of visual amenity.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14. The first condition had the legal effect of confining the permitted development to that as set out in the revised information received by the planning authority, i.e. the scale and dimensions of three of the turbines had been reduced. The third condition has since been replicated in a subsequent decision of the planning authority (2011) which authorised certain modifications in respect of the proposed development.

15. The next event of relevance is that the "appropriate period" of the 2005 planning permission, i.e. the time period within which development works could be lawfully carried out, had been extended on 29 November 2010 for a further period of five years. (22 November 2015). But for this extension, the planning permission would have withered in 2010.

16. The Developer subsequently submitted an application in 2011 for permission for a "modification" to the permitted wind farm development. The hub height of the three smaller turbines was to be increased to 80 metres; and the blade length of all eleven turbines was to be increased to 45 metres (equivalent to a rotor diameter of 90 metres). All eleven turbines would, therefore, have an overall tip height of 125 metres.

17. The application had been made, at first instance, to the local planning authority, Waterford County Council. (Reg. Ref. PD 11/400). The planning authority made a decision on 23 November 2011 to grant planning permission *("the 2011 planning permission")*.

18. Condition No. 1 of the 2011 planning permission provides as follows.

> "1. The proposed development shall be carried out in accordance with plans and particulars lodged with the Planning Authority on 30 September 2011 save where amended by the conditions herein.
>
> Reason: to clarify the scope of the permission in the interests of development control."

19. As explained under the next heading below, Condition No. 3 of the 2011 planning permission required points of detail to be agreed subsequently with the planning authority.

20. It does not appear from the face of the planning authority's decision of 23 November 2011 that an EIA had been carried out by the planning authority.

21. For the sake of completeness, it should be noted that a *further* application for planning permission was made in 2013. This related to what has been described as "Phase 2" of the wind farm. The decision of the planning authority at first instance was to grant planning permission for an extension to the permitted wind farm, comprising three (additional) turbines with a tip height of up to 130.5 metres and associated access tracks and site works. An environmental impact statement ("*EIS*") had been submitted with this application. Thereafter, there was an attempt made by third parties to appeal the

planning authority's decision to An Bord Pleanála. The appeal was, however, dismissed as invalid.

22. Condition No. 7 of the 2013 planning permission stipulates that the maximum blade tip height of the (three) proposed wind turbines shall be 130.5 metres. No complaint is made in these proceedings in respect of this second phase of the wind farm.

23. The wind farm, as constructed, consists of twelve turbines. Nine of these turbines have been constructed pursuant to the earlier planning permissions. (Two permitted turbines have been omitted). The balance of three turbines has been constructed pursuant to the 2013 planning permission. These Section 160 proceedings are concerned only with the first nine turbines.

COMPLIANCE SUBMISSION: 13 DECEMBER 2013

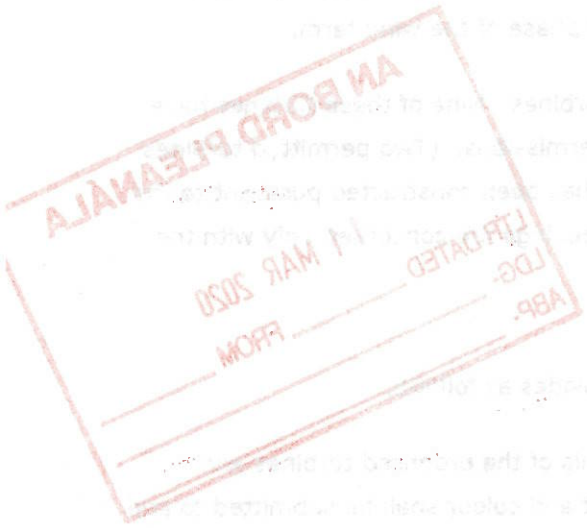
24. Condition No. 3 of the 2011 planning permission provides as follows.

> "3. Prior to commencement of development, details of the proposed turbines and associated structures, including design, height and colour shall be submitted to and agreed in writing with the planning authority. The wind turbines shall be geared to ensure that the blades rotate in the same direction.
>
> Reason: In the interest of visual amenity."

25. Given the importance which they have since assumed as an issue in these proceedings, it is necessary to set out in some detail the events in relation to the compliance submission made pursuant to this condition.

26. The consultants acting on behalf of the Developer, Fehily Timoney & Company, made a compliance submission to Waterford County Counsel under cover of letter dated 6 November 2013. This compliance submission sought the agreement of the planning authority in relation to points of detail under a number of the conditions of the 2011 planning permission. Relevantly, the compliance submission addressed Condition No. 3 of the planning permission as follows.

> "4.1. Condition Wording
>
> *Prior to commencement of development, details of the proposed turbines and associated structures, including design, height and colour shall be submitted to and agreed in writing with the planning authority. The wind turbines shall be geared to ensure that the blades rotate in the same direction.*
>
> Reason: In the interest of visual amenity.
>
> 4.2. Developers Compliance Proposal
>
> The preferred model being considered for installation at Barranafaddock Wind Farm is the GE 2.x Series wind turbine.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Design

Technical details of the selected turbine model are included in Appendix B of this report. The document summarizes the technical description and specification of the GE 2.x Series wind turbines and includes a number of available turbine variants. The 2.x Series are three-bladed, upwind, horizontal-axis wind turbines with the turbine rotor and nacelle mounted on the top of a tubular tower.

Height

The preferred turbine is installed on a tapered tubular tower of hub height 73.5m with a maximum tip height of 125m. Schematic details of the GE turbine arrangement proposed are included in Appendix B.

Colour

The wind turbines will be finished in a light grey colour.

At this stage the developer requests that the Planning Authority confirm that the proposed turbine is considered appropriate.

The turbines will be geared to ensure that the blades rotate in the same direction."

27. As appears from the foregoing, the compliance submission does not expressly state that the planning authority's agreement was being sought in respect of an increase in rotor diameter from 90 metres to 103 metres.

28. The above text from the compliance submission does, of course, refer to Appendix B. One of the documents included in Appendix B is a drawing labelled "LE13-731-04-0 10 (Rev. A)". This drawing had been submitted in A3 format. This drawing shows a schematic of a wind turbine, and indicates, albeit in very small font, that the rotor diameter is 103 metres.

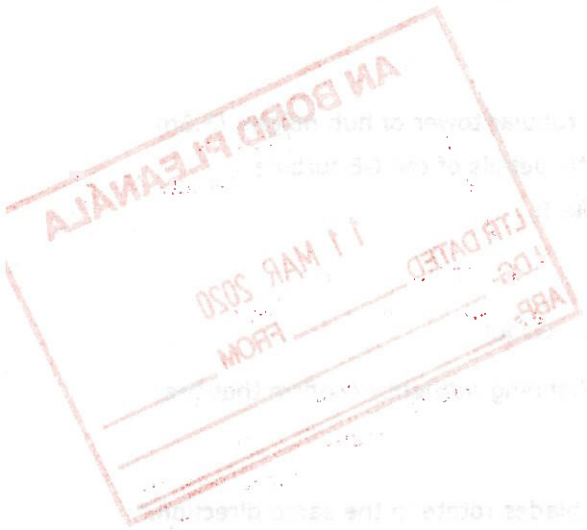
29. The compliance submission also included a document prepared by GE Energy entitled "Technical Documentation Wind Turbine Generator Systems 2.x Series". Page 14 of this latter document sets out, in tabular form, Technical Data for the 2.x Series. The rotor diameter for the various models of the turbines is indicated as ranging between 100 metres and 103 metres.

30. The response of Waterford County Council to the compliance submission was to issue a letter to the Developer, care of Fehily Timoney & Co., on 13 December 2013 ("*the decision-letter*"). The decision-letter is less than three pages in length. In effect, the decision-letter merely lists off various conditions of the 2011 planning permission, with a brief observation below each.

31. Insofar as Condition No. 3 is concerned, the decision-letter states as follows.

"Condition 3

Noted and agreed."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32. There is no analysis in the decision-letter of the compliance submission. Nor is there any express acknowledgement that the planning authority were agreeing to an increase in rotor diameter from 90 metres to 103 metres.

SECTION 5 REFERENCE

33. Waterford City and County Council made a reference to An Bord Pleanála pursuant to the provisions of Section 5 of the PDA 2000 on 24 May 2018. (Ref. ABP-301738-18).

34. The question referred was as follows.

> "Whether the deviation from the permitted blade length of 45 metres (90 metres in diameter) to the constructed blade length of 51.5 metres (103 metres in diameter) in relation to permission granted under planning register reference number PD 11/400 for modifications to a windfarm at Barranafaddock Wind Farm, County Waterford is or is not development or is or is not exempted development?"

35. The Developer made a detailed submission on the Section 5 reference through its consultants, Fehily Timoney & Company, on 29 June 2018. It is apparent from this submission that the Developer was fully aware that an earlier Section 5 Declaration issued by An Bord Pleanála in respect of the Kilvinane Wind Farm was potentially relevant. The Developer also sought to rely on the planning authority's decision-letter of 13 December 2013.

36. The submission on behalf of the Developer summarised its conclusions as follows.

> "7.0 Conclusion
>
> In summary, the deviation of the rotor diameter from 90m to 103m can be considered immaterial in planning terms because:
>
> 1. The nature and scale of the windfarm development is such that the increase in rotor diameter is not a material alteration.
> 2. There has been no alteration to the turbine locations and the increase in rotor diameter of 14% is significantly less than the 40% alteration which was found to be material in *Bailey v. Kilvinane*.
> 3. On the basis of the comparative environmental analysis, it can be concluded that there are no significant changes to the environmental impacts arising from the change in rotor diameter.
> 4. Waterford County Council, in approving the detailed design of the turbines in 2013, did not consider the increase in rotor diameter to be material in planning terms."

37. The reference above to a "comparative environmental analysis" is to a separate document which had been included as part of the submission to An Bord Pleanála. This is a detailed six-page analysis which compares the environmental impact of the "as permitted" and "as built" wind turbines. The comparative environmental analysis concludes by stating that "there are no significant changes relating to the environmental impacts, based on the

methodologies employed in the September 2011 Environmental Report submitted as a part of the planning application for the permitted development".

38. As is standard practice, An Bord Pleanála assigned an inspector to prepare a report and recommendation in relation to the Section 5 reference.

39. It is evident from the inspector's report that the Developer had made a similar jurisdictional objection to that which it seeks to agitate in these proceedings. More specifically, as appears from the following passage at page 5 of the inspector's report, the Developer had sought to rely on the decision-letter of 13 December 2013 as authorising the alterations in the scale and dimensions of the wind turbines.

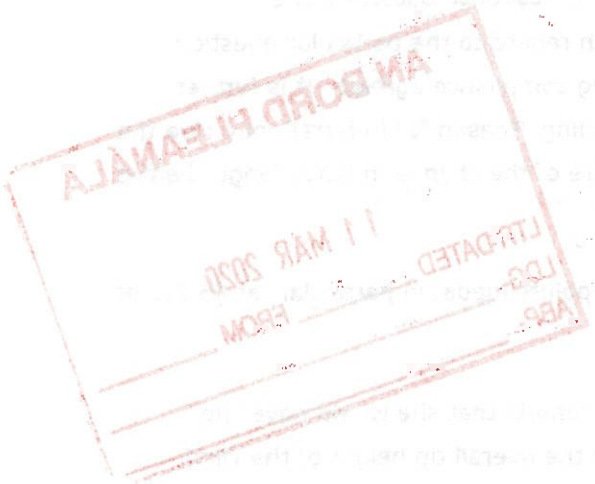
> "The owner / occupier has submitted a response to the PA referral request which provides for a summary of the planning history associated with the wind farm development. The submission also note that Waterford City & County Council issued a compliance response in December, 2013 indicating that the turbine erected on the site was noted and agreed. The response questions the appropriateness of the Section 5 Referral with regard to the particular question raised by WCCC in the context of the planning compliance agreed. It is further considered that the statement under the heading 'Reason for Referral' may give the incorrect impression that WCCC was not aware of the change in blade length before 2016. [...]"

40. This summary in the inspector's report reflects the points made, in particular, at §5.2.1 of Fehily Timoney & Company's submission.

41. The inspector indicated (at pages 10 and 11 of her report) that she would have "no objections in principle" to the alterations given that the overall tip height of the wind turbines continued to comply with the specific condition of the planning permission. (It will be recalled that the increase in the length of the rotor blades had been off-set by a reduction in the hub height). The inspector went on to say, however, that An Bord Pleanála itself had adopted a different approach in relation to the Kilvinane Wind Farm. As discussed presently, the Kilvinane Wind Farm is the subject of a judgment of the Court of Appeal. An order had been made under Section 160 restraining the operation of a wind farm, the turbines of which did not comply with the scale and dimensions permitted.

42. The approach which An Bord Pleanála had taken in relation to the Kilvinane Wind Farm had been summarised as follows in the inspector's report.

> "The Board will note a similar Section 5 request in relation to the Kilvinane Wind Farm, PL88.RL2891 refers, whereby the developer of that windfarm received confirmation from the PA that a number of changes made, including a reduction in turbine hub heights, increased rotor blade lengths, reduction in the number of turbines installed and a change of location of turbines within 20m of the permitted locations, were not material and complied with the permission granted. The Board, following a Section 5 request from a third party, concluded that –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(a) the erection of the turbines comes within the scope of the definition of development contained in Section 3 of the Planning and Development Act 2000,

(b) the relocation of and alterations to turbines, including the modification to the overall height of the turbines and the length of the rotor arms/blades do not come within the scope of the permission granted,

(c) there is no provision for exemption for the said relocation and alterations to turbines provided for in either Section 4, as amended, of the said Act or Article 6 of the Planning and Development Regulations 2001, and

(d) therefore, the construction of the wind turbines as currently erected on site including alterations and modifications to the turbines height and rotor arms/blades is development and is not exempted development."

43. The inspector's own conclusion was then set out as follows.

"8.9. Is or is not exempted development

While I would have no objections in principle to the alterations to the blade length as constructed, given that the hub heights have been reduced and the overall tip height has complied with the specific condition of planning permission, in light of the determination in relation to PL88.RL2891, a precedent might be considered as having been set. In this regard, I refer to the Boards consideration of the physical alterations to turbines - in particular the alterations to blade length and the overall height of the turbines - did not come within the scope of the relevant planning permission, it is possible to conclude in this case that the reduction in the hub height and the increased length of the rotor length, notwithstanding the fact that the permitted tip height of 125m has been maintained, do not come within the scope of the planning permission granted. In addition, the Board will note that there is no provision for exemption for the alterations to turbines provided for in either Section 4 of the Planning & Development Act 2000, as amended or Article 6 of the Planning & Development Regulations, 2001, as amended. As such, the development is not exempted development."

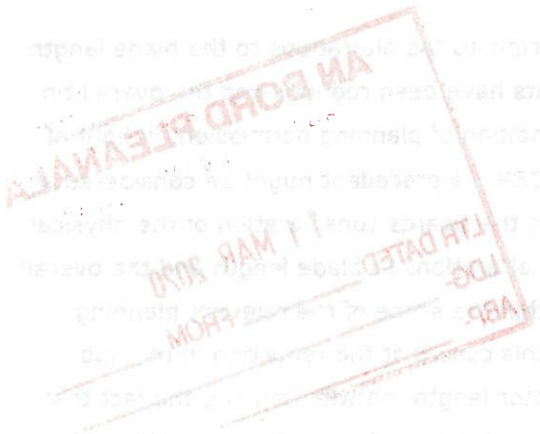
44. An Bord Pleanála ultimately accepted the inspector's recommendation. The Board made a declaration on 4 December 2018.

45. The operative part of the Board Order reads as follows.

"AND WHEREAS An Bord Pleanála has concluded that -

(a) the erection of the turbines comes within the scope of the definition of development contained in Section 3 of the Planning and Development Act 2000,

(b) the alterations to turbines, including the length of the rotor arms/blades, do not come within the scope of the permission granted,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(c) there is no provision for exemption for the said alterations to turbines in either Section 4, as amended, of the said Act or Article 6 of the Planning and Development Regulations 2001, and

(d) therefore, the construction of the wind turbines as currently erected on site including the alterations to the rotor arms/blades is development and is not exempted development.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the 2000 Act, hereby decides that the deviation from the permitted blade length of 45 metres (90 metres in diameter) to the constructed blade length of 51.5 metres (103 metres in diameter) in relation to permission granted under planning register reference number PD11/400 for modifications to a windfarm at Barranafaddock Wind Farm, County Waterford is development and is not exempted development."

46. The Developer took no steps to challenge the validity of An Bord Pleanála's determination by way of judicial review proceedings.

ENFORCEMENT NOTICE

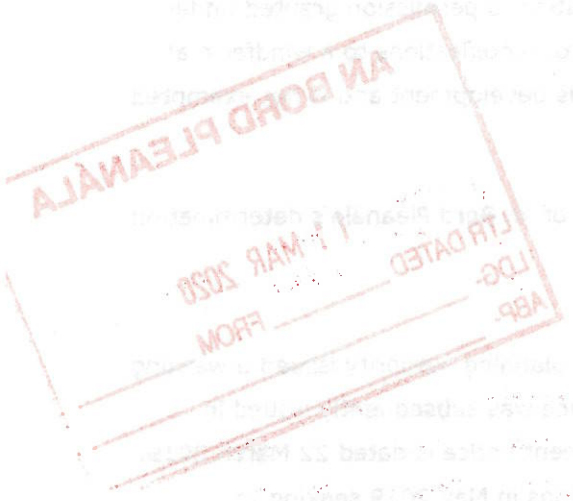
47. Following on from An Bord Pleanála's declaration, the planning authority issued a warning letter dated 20 December 2018. An enforcement notice was subsequently issued in respect of the wind farm development. This enforcement notice is dated 22 March 2019. The Developer then instituted judicial review proceedings in May 2019 seeking to challenge the validity of the enforcement notice. It seems that the operation of the enforcement notice has been stayed pending the outcome of these judicial review proceedings.

APPLICATIONS FOR RETROSPECTIVE DEVELOPMENT CONSENT

48. The Developer maintains the position that the change in the scale and dimensions of the wind turbines is authorised by the 2011 planning permission. Without prejudice to this position, the Developer had submitted an application to An Bord Pleanála for leave to apply for substitute consent on 29 January 2019.

49. It may be of assistance to the reader to pause briefly here, and to explain the concept of "substitute consent". The planning legislation had to be amended following a judgment of the Court of Justice of the European Union ("*CJEU*"), Case C-215/06, *Commission v. Ireland*, which had held that the blanket provision made for retention planning permission under the pre-2010 version of the PDA 2000 was inconsistent with the EIA Directive. The option of making an application for retention planning permission is no longer available in respect of an EIA development project which has been carried out in breach of either the requirement for a screening determination or for a full EIA.

50. The planning status of such an EIA development project may only be regularised by an application for substitute consent under Part XA of the PDA 2000. There is no automatic right to apply for substitute consent. Rather, a developer will, generally, be required to apply first for leave to make the application. Such an application for leave is made to An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Bord Pleanála. (There are special rules in relation to quarrying activity, but these are not relevant to this case).

51. On the facts of the present case, the Developer had made a leave-application to An Bord Pleanála on 29 January 2019, that is, shortly after An Bord Pleanála had issued its Section 5 declaration. An Bord Pleanála subsequently made a decision refusing leave to apply on 13 August 2019. The approach adopted by An Bord Pleanála appears to have been that it was not necessary to obtain substitute consent. The validity of An Bord Pleanála's decision has been challenged in two separate sets of judicial review proceedings which have been entered into the Commercial List of the High Court. The first of these proceedings has been taken by the Applicants herein; the second by Mr Peter Sweetman.

52. The parties informed me last week (28 November 2019) that An Bord Pleanála does not intend to oppose those judicial review proceedings. The Board is conceding the judicial review proceedings on the very narrow ground that the Board's records of the decision-making process are inadequate. The Board has been careful to note in correspondence that its approach does not involve any concession by the Board of any of the additional grounds of judicial review relied upon by the Applicants.

53. The parties to the judicial review proceedings are in disagreement as to the precise basis on which the Board's decision is to be set aside, and as to whether the application for leave to apply for substitute consent should be remitted to An Bord Pleanála for reconsideration. These matters are to be the subject of a separate hearing before the Commercial List of the High Court this morning.

54. The Developer had also made an application for retention planning permission to Waterford City and County Council. That application had been made on 4 October 2019, but has now been withdrawn.

55. I will return to consider the relevance of these applications, towards the end of this judgment, when I come to address the factors informing the exercise of the court's discretion in Section 160 proceedings.

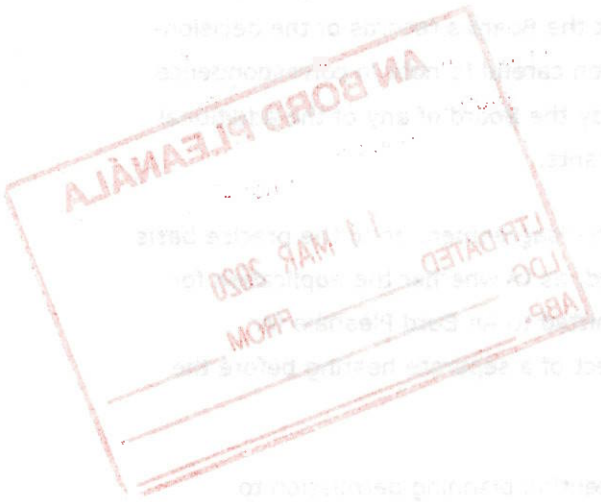
SUPPLEMENTARY LEGAL SUBMISSIONS

56. By order dated 28 November 2019, the parties were given liberty to file supplemental written legal submissions addressing the implications for the within proceedings, if any, of the very recent judgment of the CJEU in Case-261/18, *Commission v. Ireland (Derrybrien)* and *Mone v. An Bord Pleanála* [2010] IEHC 395. The submissions were received by the court on 5 December 2019.

DETAILED DISCUSSION OF LEGAL ISSUES

STATUS OF SECTION 5 DECLARATION

57. The first legal issue to be addressed in this judgment is whether the finding by An Bord Pleanála, i.e. that the increase in the length of the rotor blades does not come within the scope of the planning permission granted, is binding on the parties. Put otherwise, does the Section 5 declaration give rise to a form of issue estoppel which precludes the Developer from reagitating, before this court, the argument which it had lost before An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Bord Pleanála to the effect that the deviations are within the scope of the planning permission.

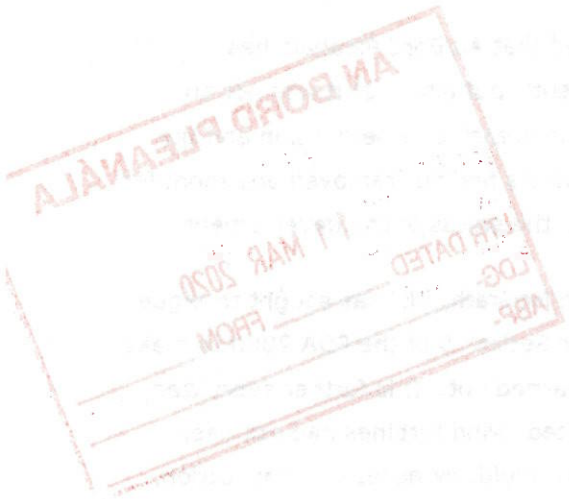
58. Leading counsel for the Applicants, Mr John Rogers, SC, submits that the Section 5 reference is binding. Counsel cites, in particular, the judgment in *Cleary Compost and Shredding Ltd v. An Bord Pleanála (No. 1)* [2017] IEHC 458, [104] to [118]. That judgment, in turn, relies on the Court of Appeal judgment in *Killross Properties Ltd. v. Electricity Supply Board* [2016] IECA 207; [2016] 1 I.R. 541.

59. In the Applicants' written legal submissions, it is stated that An Bord Pleanála has concluded that the alteration was not only "development", but also that it was not an "exempted development", and that it was carried out in breach of a permission and the conditions thereof. It is further submitted that the Board's finding "removed any room for argument" on the part of the Developer with regard to the status of the development.

60. Leading counsel on behalf of the Developer, Mr Declan McGrath, SC, has sought to argue that An Bord Pleanála does not have jurisdiction under Section 5 of the PDA 2000 to make a finding that "unauthorised development" has been carried out. It is further submitted that for the Board to have found that the "as constructed" wind turbines had not been carried out in accordance with the planning permission would, by necessary implication, involve an (impermissible) finding that the Developer had carried out "unauthorised development". Counsel cites, in particular, *Roadstone Provinces Ltd. v. An Bord Pleanála* [2008] IEHC 210; *Heatons Ltd. v. Offaly County Council* [2013] IEHC 261; and *Meath County Council v. Murray* [2017] IESC 25; [2018] 1 I.R. 189; [2017] 2 I.L.R.M. 297. It is sought to distinguish the judgment in Killross Properties on two bases: (i) the Section 5 declaration in that case was to the effect that the development was not "exempted development" which is a finding within the Section 5 jurisdiction; and (ii) it was the applicant, not the respondent, who was held to be bound by the Section 5 declaration. It is submitted that a *respondent*, faced with proceedings which place reliance on a public law measure, may be justified in challenging the validity of the measure concerned even though that party might be, strictly speaking, out of time in maintaining a *direct challenge* to the relevant measure (*Shell E & P Ireland Ltd. v. McGrath* [2013] IESC 1, [2013] 1 I.R. 247, [49]).

61. It is further submitted that the court should lean against an interpretation of the Section 5 declaration which would involve attributing to the Board a finding that the development was in breach of planning permission. (Such a finding would, on the Developer's argument, be *ultra vires*). The court should instead interpret the Section 5 declaration as saying no more than that the erection of wind turbines constitutes "development" and is not "exempted development".

62. The Developer submits that the operative part of the Section 5 declaration is confined to the very last paragraph thereof, i.e. the paragraph commencing with the words "NOW THEREFORE An Bord Pleanála ...". (The Board's declaration has been set out in full at paragraph 45 above). This narrow interpretation of the declaration would, it is submitted, "square the circle" by rendering the Board's declaration in a manner which holds it *intra*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vires. The decision would otherwise be unlawful and invalid. This is because, on the Developer's argument, An Bord Pleanála had no jurisdiction to decide what falls within or outwith a planning permission.

ANALYSIS OF THE ARGUMENTS ON SECTION 5

63. It is proposed to structure this discussion as follows. First, the interaction between a Section 5 declaration and enforcement proceedings will be considered. Secondly, the Developer's argument that the Section 5 reference procedure does not properly apply to the interpretation of a planning permission will then be addressed.

(1). Section 5 declaration and enforcement proceedings

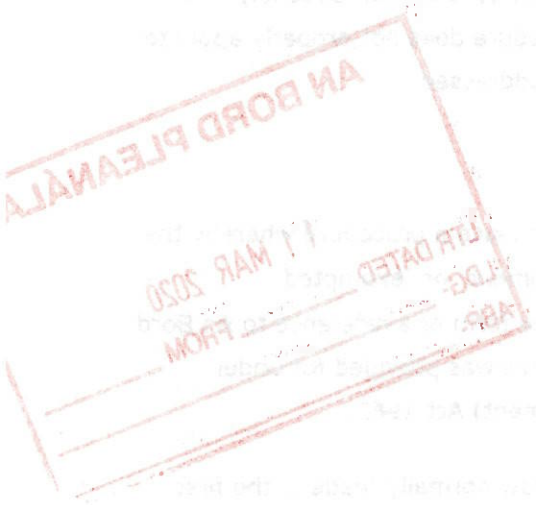
64. The planning legislation has, from the very outset, put in place a procedure whereby the question of whether a particular act constituted "development" or "exempted development" could be determined. This initially took the form of a reference to An Bord Pleanála, with an appeal thereafter to the High Court. This was provided for under Section 5 of the Local Government (Planning & Development) Act 1963.

65. Since the enactment of the PDA 2000, the reference is now normally made in the first instance to the local planning authority, with a right of review thereafter to An Bord Pleanála, and a right of judicial review to the High Court. The planning authority can itself make a reference directly to An Bord Pleanála, and this is what occurred on the facts of the present case.

66. The Section 5 procedure is unusual in that it confers a jurisdiction upon a public authority to determine issues which, in many instances, will necessitate an adjudication on questions of law. The constitutional validity of conferring such a jurisdiction upon An Bord Pleanála under the Local Government (Planning & Development) Act 1963 had been upheld by the High Court (Kenny J.) in *Central Dublin Development Association v. Attorney General* (1969) 109 I.L.T.R. 69.

67. The more modern case law is characterised by an enthusiasm for the revised form of procedure now provided for under Section 5 of the PDA 2000. As elaborated upon below, the case law over the last fifteen years or so has confirmed (i) that Section 5 of the PDA 2000 has largely ousted the High Court's jurisdiction to grant declaratory relief in respect of planning matters; (ii) that an unchallenged declaration may be relied upon in enforcement proceedings; and (iii) that An Bord Pleanála is an expert decision-maker, whose decisions attract curial deference.

68. This modern case law commences with the judgment of the Supreme Court in *Grianán an Aileach Interpretative Centre Ltd. v Donegal County Council* [2004] IESC 41; [2004] 2 I.R. 625 ("*Grianán an Aileach*"). The judgment addresses the question of whether the court's inherent jurisdiction to grant declarations as to the planning status of lands is consistent with the Section 5 procedure. The Supreme Court considered that the continued existence on the part of the High Court of a general jurisdiction to adjudicate upon the proper construction of a planning permission would create a danger of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"overlapping and unworkable jurisdictions". The making of a declaration by the High Court might have the result that neither An Bord Pleanála nor the local planning authority would thereafter be in a position whereby it could exercise its statutory jurisdiction under Section 5 without finding itself in conflict with the earlier determination by the High Court.

69. The solution adopted by the Supreme Court to this conundrum was, in effect, to find that the existence of the Section 5 reference procedure ousted the High Court's jurisdiction to grant (freestanding) declarations in respect of planning matters.

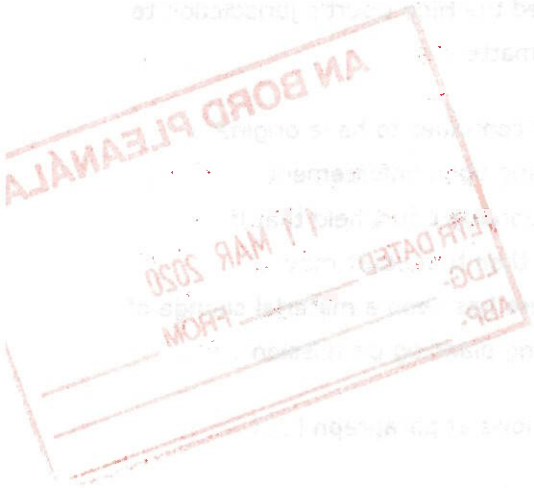
70. The judgment recognises, of course, that the High Court continues to have original jurisdiction to determine planning issues when adjudicating upon enforcement proceedings under Section 160 of the PDA 2000. The Supreme Court held that if enforcement proceedings are brought in the High Court, then that court may "undoubtedly find itself having to determine whether there has been a material change of use or whether a development is sanctioned by an existing planning permission".

71. At a later point in the judgment, Keane C.J. stated as follows at paragraph [36]:

> "Some responsibility may be attributed to the defendant for the difficulties that have arisen in determining to what uses the premises may be put without a further planning permission: they might well have been avoided by the use of more precise language when the permission was being granted. I am satisfied, however, that the High Court cannot resolve these difficulties by acting, in effect, as a form of planning tribunal. As I have already indicated, if enforcement proceedings were brought in the High Court, that court might find itself having to determine whether particular operations constituted a 'development' which required permission and the same issue could arise in other circumstances, e.g., where a commercial or conveyancing document containing a particular term dealing with compliance with planning requirements was the subject of litigation. But in every such case, however it came before the court, the court would resolve the issue by determining whether or not there had been or would be a development within the meaning of the planning code. The only circumstance in which the court could find itself making a declaration of the kind ultimately granted in this case would be where it had been drawn into a role analogous to that of a planning authority granting a permission. That is difficult to reconcile with the law as stated thus by Finlay C.J. in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 [...]".

72. This aspect of the judgment is entirely consistent with the approach adopted in *Cork Corporation v. O'Connell* [1982] I.L.R.M. 505. There, the Supreme Court held that the existence of a pending reference under the precursor of what is now Section 5 of the PDA 2000, i.e. Section 5 of the Local Government (Planning & Development) Act 1963, did not oust the High Court's jurisdiction to entertain enforcement proceedings.

73. The judgment in *Grianán an Aileach* left open the separate question as to what should happen where An Bord Pleanála had already issued a Section 5 declaration in advance of the hearing of enforcement proceedings. This question has since been addressed in a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series of High Court judgments. There is now a consistent line of case law which indicates that a Section 5 declaration, which has not been challenged in judicial review proceedings, is binding and conclusive in enforcement proceedings involving the same parties as to the reference. In particular, a declaration to the effect that an act is "development" or is "exempted development" cannot normally be revisited in subsequent enforcement proceedings between the same parties or their privies. See *Wicklow County Council v. O'Reilly* [2015] IEHC 667 (waste recovery business not exempted development); and *McCoy v. Shillelagh Quarries* Ltd [2015] IEHC 838 (quarrying activity had intensified to such an extent as to amount to a material change of use).

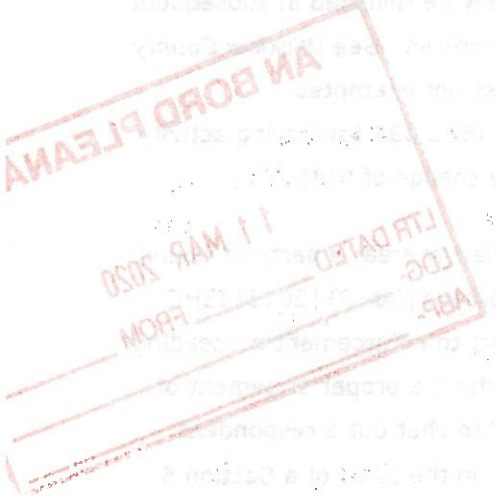
74. There is an exception to this approach where it would be unfair to treat a party as bound by a Section 5 declaration. In *Wicklow County Council v. Fortune (No. 3)* [2013] IEHC 397, the High Court (Hogan J.) declined to treat a respondent to enforcement proceedings as bound by a Section 5 reference which had been made without a proper statement of reasons. The High Court held that it would be "quite unfair" to shut out a respondent from arguing that a structure was "exempted development" on the basis of a Section 5 declaration which, on its face, plainly failed to meet the requirements of administrative fairness specified in *Mallak v. Minister for Justice and Equality* [2012] IESC 59; [2012] 3 I.R. 297, notwithstanding that the determination had never been challenged at the relevant time by way of judicial review.

75. The correctness of this line of case law has since been upheld by the Court of Appeal in *Killross Properties Ltd. v. Electricity Supply Board* [2016] IECA 207; [2016] 1 I.R. 541, *("Killross Properties")*. On the facts, An Bord Pleanála had issued a series of Section 5 declarations to the effect that works, consisting of the erection of a temporary electricity transmission line by a statutory undertaker, were "exempted development". Killross Properties Ltd., who had made the Section 5 references, had sought to challenge An Bord Pleanála's declarations in judicial review proceedings, but those proceedings were dismissed by the High Court (Hedigan J.) in August 2014 . Notwithstanding this procedural history, Killross Properties Ltd. then pursued an application under Section 160 of the PDA 2000.

76. The Court of Appeal, per Hogan J., held that the High Court was not entitled to "go behind" the Section 5 declarations.

> "[...] the High Court cannot go behind an otherwise valid s. 5 determination to the effect that the development in question represent exempted development in the course of a s.160 application. The effect of such a determination is that planning permission is not required, so that by definition the development cannot be unauthorised. It follows that the High Court cannot grant the relief claimed in the s. 160 proceedings.

77. The rationale for this approach is explained as follows, at paragraphs [29] to [31] of the Court of Appeal's judgment.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"First, it can be said that as the planning authorities (or, An Bord Pleanála, as the case may be) determined that the works in question represent exempted development, it necessarily follows that no planning permission is required. The logical corollary of this conclusion is that the development in question cannot by definition be "unauthorised" within the meaning of s. 160 if no planning permission is required so that consequently any such s. 160 application is bound to fail.

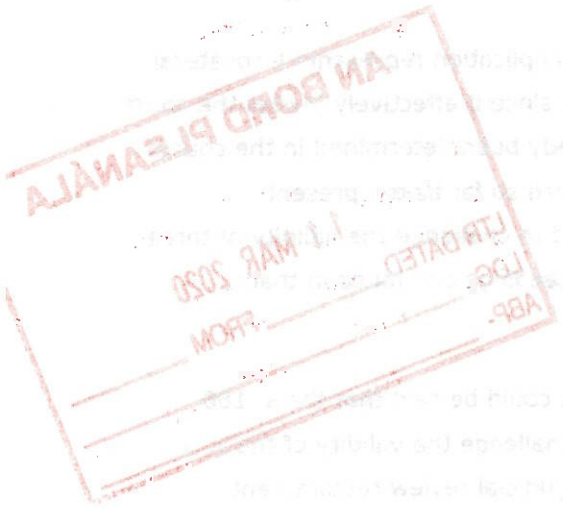
Second, it could equally be said that the s. 160 application represents a collateral attack on the decision of the planning authority, since it effectively invites the court to revisit the merits of the issue which had already been determined in the course of the s. 5 determination. This is further reinforced so far as the present proceedings are concerned, since Killross elected to challenge the validity of three of the s. 5 determinations in judicial review proceedings and failed in that endeavour.

Third (and related to it the second argument), it could be said that the s. 160 proceedings represent an attempt indirectly to challenge the validity of the s. 5 determinations otherwise than by means of the judicial review requirement specified by s. 50 of the 2000 Act."

78. The practical effect of these various judgments is that the existence of an (unchallenged) Section 5 declaration gives rise to a form of issue estoppel whereby the parties are bound by the declaration. In circumstances where the Section 5 declaration is to the effect that a particular act constitutes "development", then the moving party in an application for injunctive relief under Section 160 of the PDA 2000 can rely upon that declaration in support of their application. This is subject to an exception where it would be unfair. (*Wicklow County Council v. Fortune (No. 3)* [2013] IEHC 397).

79. The current legal position is, therefore, that enormous significance now attaches to a Section 5 declaration. The existence of an (unchallenged) declaration will, in certain circumstances, be dispositive of many of the issues which arise in enforcement proceedings. The precise implications of all of this have not yet been fully teased out. In particular, questions remain as to whether, for example, An Bord Pleanála would be precluded from entertaining a reference by virtue of the existence of an earlier un-appealed declaration made by a local planning authority pursuant to a separate reference. Questions also remain as to whether a Section 5 declaration constitutes a "development consent" for the purpose of the EIA Directive.

80. The Developer in the present case seeks to argue that a distinction should be drawn between (i) a finding that a particular act is "development" or "exempted development", and (ii) a finding that it is "unauthorised development". It is contended that An Bord Pleanála does not have jurisdiction to make a finding of the latter type. Much reliance is placed in this regard on the following passage from the judgment of the High Court (Finlay Geoghegan J.) in *Roadstone Provinces Ltd. v. An Bord Pleanála* [2008] IEHC 210 ("*Roadstone Provinces*").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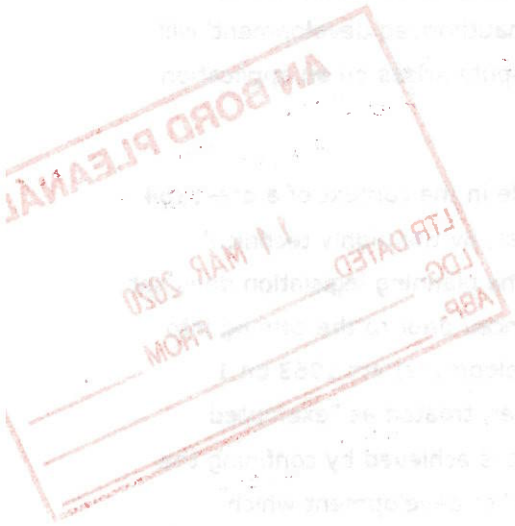
"[An Bord Pleanála] has no jurisdiction on a reference under s.5 (4) of the Act to determine what is or is not 'unauthorised development'. It may only determine what is or is not 'development'. Hence, a planning authority, such as the notice party, cannot refer a question under s.5 (4) as to whether the works or proposed works or use constitutes unauthorised works or use and hence unauthorised development. Determination of what is or is not 'unauthorised development' will most likely be determined by the courts where a dispute arises on an application under s. 160 of the Act."

81. It should be noted, however, that this statement was made in the context of a pre-1964 quarry, and appears to have been informed, in part at least, by the highly technical definition of "unauthorised development". To elaborate: the planning legislation does not apply retrospectively to "development" which had commenced prior to the coming into force and effect of the Local Government (Planning & Development) Act 1963 on 1 October 1964. Such pre-1964 development is not, however, treated as "exempted development", but rather enjoys a *sui generis* status. This is achieved by confining the definitions of "unauthorised works" and "unauthorised use" to development which commenced on or after 1 October 1964. The Supreme Court in *Waterford County Council v. John A. Wood Ltd.* [1999] 1 I.R. 556 has since formulated a test which defines the extent of quarrying activity which can be carried out and completed in reliance on the commencement of works prior to 1 October 1964.

82. Returning to the facts of *Roadstone Provinces*, it appears that the point being made in the passage cited above is that An Bord Pleanála does not have jurisdiction to determine whether a particular development constitutes the lawful continuation of pre-1964 development. Put shortly, An Bord Pleanála does not have jurisdiction to apply the legal test in *John A. Wood Ltd.* This is apparent from the very next passage of the judgment in *Roadstone Provinces,* at paragraph [22].

"The reason for which I have drawn attention to the fact that the respondent was considering whether or not there was or is a development by reason of a material change in the use of the applicant's lands, as distinct from the carrying out of any works, is because of the reliance placed by both parties, for different purposes, on the decision of the Supreme Court in *Waterford County Council v. John A. Wood Ltd.* [1999] 1 I.R. 556. That is a decision on a case stated from the High Court (determining an appeal from the Circuit Court) on proceedings under s. 27 of the Local Government (Planning and Development) Act, seeking an order restraining the respondent therein from carrying on quarrying operations on certain lands. Section 27 of the Act of 1976 is similar to s. 160 of the Act of 2000. The question put by the High Court to the Supreme Court in the case stated was whether the quarrying operations being carried out by the respondent 'is development requiring planning permission?'. The resolution of that question depended upon whether or not the quarrying operations then carried on were or were not 'development commenced before the appointed day' and therefore were or were not excluded from a requirement to apply for planning permission under s. 24 (1) of the Act of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1963. That issue was resolved by the Supreme Court by considering whether or not the works then being carried out by the respondent at its quarrying operations were works which commenced prior to the appointed day. *The Supreme Court did this by considering what might have been reasonably contemplated or anticipated as the continuation of works commenced before the appointed day. In the context of the definitions in the Act of 2000, it was a determination as to whether the works were or were not 'unauthorised works'. That is not a question which the respondent has jurisdiction to determination on the instant reference under s.5 (4) of the Act of 2000.** The Supreme Court, in *Waterford County Council v. John A. Wood Ltd.*, was not considering whether or not there had been a material change in use of the lands. On the facts, the only objection appears to have been based upon the carrying out of works without planning permission.

*Emphasis (italics) added.

83. It would appear, therefore, that the judgment in *Roadstone Provinces*, strictly speaking, had been concerned with the narrow question of pre-1964 user, and does not necessarily articulate a more general proposition as to the limitations of the Section 5 jurisdiction. Certainly, this seems to have been the interpretation of the judgment taken by the High Court (Baker J.) in *Cleary Compost and Shredding Ltd v. An Bord Pleanála (No. 1)* [2017] IEHC 458. Having cited the passage from Roadstone Provinces set out at paragraph 80 above, Baker J. stated as follows.

> "This *dicta* of Finlay Geoghegan J. is regularly quoted as authority for the proposition that the jurisdiction under s. 5(4) of the Act is one which is confined to determining whether works or use is development.
>
> Finlay Geoghegan J. was considering the import of a s. 5 declaration where what was challenged was the decision of the respondent that the expansion southward of a quarry was development and not exempted development. The decision was quashed by certiorari as there was pre-1964 use and no determination had been made whether there was an identified factual difference between that use and current use. The judgment does not go so far as to say that the consequence of a s. 5 declaration can never be understood to mean that a development is not one authorised by planning permission. The judgment of Finlay Geoghegan J. is authority for the proposition that development which does not have the benefit of a planning permission is not always in legal terms a development which is 'unauthorised', and the jurisdictional limit of s. 5 is to determine whether there is development, after which there arises the second question whether permission is required or exists.
>
> [...]
>
> A development is not unauthorised merely on account of the fact that an activity or works are found to be development. The development may, as in the case of a quarry, the context in which *Roadstone Provinces Limited v. An Bord Pleanála* was

decided, be exempt from the requirement to obtain planning permission if it is a continuation of pre-1964 user. In such cases the development is not unauthorised although it is development. A development may also be found to have occurred but to be exempt.

However, it must be the case that, absent an argument that there is relevant pre-1964 use, if works or activity are declared in the s. 5 process to amount to development and if a determination is made that it is not exempt, then the inevitable conclusion is that the development does not have the benefit of planning permission, is not authorised in planning terms, and is 'unauthorised'."

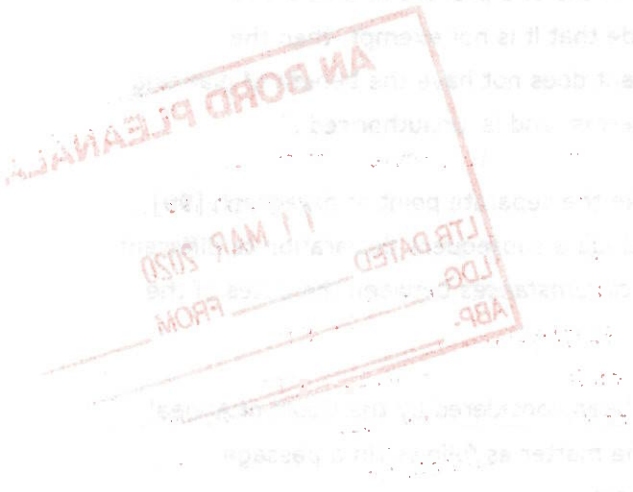
84. The judgment in *Cleary Compost* goes on to make the separate point at paragraph [90] that an earlier Section 5 declaration will not preclude a subsequent declaration to a different effect being made if there has been a *change in circumstances* between the dates of the two declarations.

85. The nature of the Section 5 jurisdiction has also been considered by the Court of Appeal in *Killross Properties*. The Court of Appeal put the matter as follows (in a passage subsequently cited with approval in *Cleary Compost*).

> "Yet if An Bord Pleanála (or, as the case may be, a planning authority) rules that a particular development is not exempted development, the logical corollary of that decision is that planning permission is required. In practice, there is often only a very slender line between ruling that a development is not exempted development since this will generally – perhaps, even, invariably – imply that the development is unauthorised on the one hand and a finding that a particular development is unauthorised on the other. Conversely, where (as here) An Bord Pleanála (or the planning authority) rules that the development is exempt, this necessarily implies that the development is lawful from a planning perspective since, by definition, it has been determined that no planning permission is required."

86. In two recent judgments, the Supreme Court has expressed some caution as to the reliance on Section 5 declarations in criminal proceedings and enforcement proceedings, respectively. Both judgments were delivered in May 2017. The first in time is the judgment in *Cronin (Readymix Ltd.) v. An Bord Pleanála* [2017] IESC 36; [2017] 2 I.R. 658. In addressing the question of whether the planning legislation falls to be interpreted as penal legislation, the Supreme Court, per O'Malley J., stated as follows at paragraph [43] of the judgment.

> "It follows that the primary role in determining whether a development is exempted or not is given to (depending on the circumstances) either the planning authority or the Board. A decision by one of those bodies is an authoritative ruling on the issue, subject to the potential for judicial review. However, it plainly does not, and could not, result in a determination of guilt or innocence of a criminal offence. There was no suggestion to the contrary at any stage of these proceedings. In my view, therefore, it is entirely inappropriate to read the provisions of s.4 as if they related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to 'the imposition of a penal or other sanction'. What they are concerned with is the exemption of categories of development from the general requirement to obtain permission."

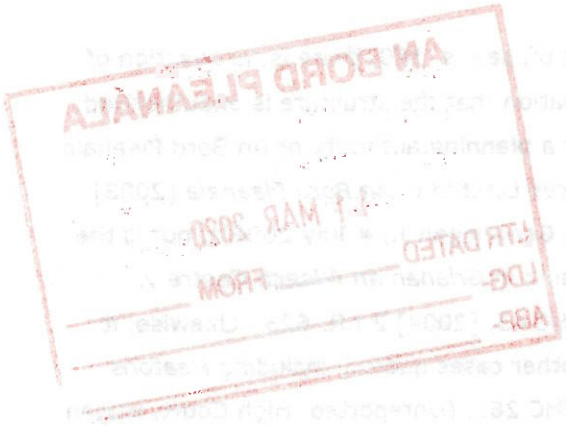
87. The second judgment is that in *Meath County Council v. Murray* [2017] IESC 25; [2018] 1 I.R. 189; [2017] 2 I.L.R.M. 297. McKechnie J., delivering the judgment of the court, reserved his position in relation to the status of a Section 5 declaration in the context of enforcement proceedings. See paragraphs [55] and [56] of the reported judgment as follows.

> "By engaging the enforcement mechanism of, say, s. 160, there is no question of the Council making any planning determination that the structure is unauthorised; even that power is not conferred on either a planning authority or An Bord Pleanála by s. 5 of the 2000 Act (*Roadstone Provinces Limited v. An Bord Pleanála* [2008] IEHC 210, (Unreported, High Court, Finlay Geoghegan J., 4 July 2008)), nor is the situation in any way analogous to that arising in *Grianán an Aileach Centre v. Donegal County Council (No. 2)* [2004] IESC 43, [2004] 2 I.R. 625. Likewise, it seems to bear no real relationship to the other cases quoted, including *Heatons Limited v. Offaly County Council* [2013] IEHC 261, (Unreported, High Court, Hogan J., 4 June 2013) and *State (Fitzgerald) v. An Bord Pleanála* [1985] I.L.R.M. 117.
>
> A further word about s. 5 of the 2000 Act: the power given to both planning bodies under that section relates to what is a 'development' or what is an 'exempted development'. Even though a decision on either issue may have significant consequential effect, it is not an end in itself. Without more, and simply on that basis, a s. 160 order could not be made: one must go further and establish the "unauthorised" nature of the underlying development. Thankfully, the difficult question of the courts' review power where a declaration one way or the other has been made on a s. 5 reference does not arise on this appeal (see the judgment of the Court of Appeal (per Hogan J.) in *Bailey v. Kilvinane Wind Farm Ltd.* [2016] IECA 92, (Unreported, Court of Appeal, 16 March 2016), which judgment is under appeal to this court)."

88. It should be noted that the appeal in *Bailey v. Kilvinane Wind Farm Ltd.* (referenced in the above passage from *Meath County Council v. Murray*) subsequently became moot in circumstances where the developer in that case obtained a grant of substitute consent. The Supreme Court did not, therefore, have to rule on this issue in the context of that appeal.

(2). Section 5 jurisdiction to interpret planning permission

89. The case law confirms that An Bord Pleanála does have jurisdiction to interpret a planning permission in the context of a Section 5 reference. The question first arose for consideration in *Palmerlane Ltd. v. An Bord Pleanála* [1999] 2 I.L.R.M. 514. This was a case decided under the *previous* version of the planning legislation. The equivalent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provision to what is now Section 5 of the PDA 2000 was to be found in the coincidentally numbered Section 5 of the Local Government (Planning & Development) Act 1963.

90. The judgment in *Palmerlane Ltd.* arose out of a dispute as to whether the use of a convenience store for the sale of hot food for consumption off the premises represented "development". The operator of the convenience store had sought to refer the matter to An Bord Pleanála. An Bord Pleanála had refused to entertain the reference, stating that it did not have power to decide whether or not a particular development had been carried out in accordance with a particular permission. An Bord Pleanála considered that as the sale of hot food had been part of the user of the premises from the outset, there simply was no change in use, the materiality of which it could assess. The board's decision to decline jurisdiction was then challenged in judicial review proceedings. Having noted that An Bord Pleanála would have been prepared to entertain the reference had the use for the sale of hot food been introduced subsequent to the opening of the store, the High Court (McGuinness J.) took the pragmatic view that the board's jurisdiction should not turn on such nice distinctions.

> "The decision of An Bord Pleanála in the instant case also, in my view, creates the somewhat anomalous and unreasonable situation that if the Applicant were to select another of its 'Spar' shops, where the position was that the premises had been in use as a retail shop under an earlier planning permission and the company had subsequently embarked on the limited sale of hot food for consumption off the premises, the Applicant could presumably successfully have sought a determination of a reference pursuant to Section 5 of the 1963 Act. I appreciate that each determination under Section 5 deals only with the particular case on its own facts. However, in a situation where a very large number of convenience stores operate in the same way as the shop in question in the instant case, it seems to me to be in accordance with reason and common sense that questions such as this should be determined on a consistent basis by those with expertise in the planning area, namely An Bord Pleanála."

91. This pragmatic approach on the part of the High Court was elevated to a more general statement of principle by the judgment of the Supreme Court in *Grianán an Aileach*. As discussed under the previous heading above, the central issue in the appeal had been whether the High Court continued to enjoy a parallel jurisdiction to grant declarations as to the interpretation of planning permissions notwithstanding the existence of Section 5 of the PDA 2000. In the course of its adjudication on the central issue, the Supreme Court had cause to consider the nature and extent of the Section 5 jurisdiction. The Supreme Court, per Keane C.J., concluded that a question as to whether proposed uses constitute "development" which is not authorised by planning permission is one which may be determined under Section 5 of the PDA 2000.

> "In the present case, the issue that has arisen between the plaintiff and the defendant is as to whether the proposed uses are authorised by the planning permission. I am satisfied, however, that, although the issue has arisen in that

particular form, it necessarily requires the tribunal which determines it to come to a conclusion as to whether what is being proposed would constitute a material change in the use of the premises. If it would not, then the question as to whether the particular uses were authorised by the permission simply would not arise. In the present case, the defendant at all times has been contending, in effect, that the proposed uses would constitute a material change in use which is not authorised by the present planning permission. Equally, for its part, the plaintiff has been contending that the uses are authorised by the existing planning permission but has not contended that, if that were not the case, it would in any event be entitled to carry them out as not constituting a material change of use. It would seem to follow that the question as to whether planning permission is required in this case necessarily involves the determination of the question as to whether the proposed uses would constitute a 'development', i.e. a question which the planning authority and An Bord Pleanála are empowered to determine under s. 5 of the Act of 2000."

92. Keane C.J. at a later point in his judgment stated as follows (at pages 636/37 of the reported judgment).

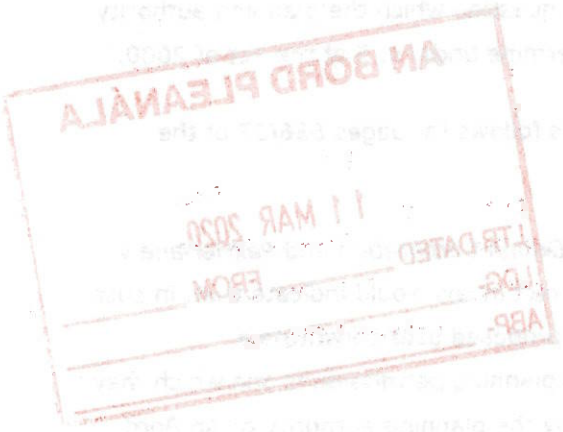
> "The reasoning adopted in both *McMahon v. Dublin Corporation* and *Palmerlane v. An Bord Pleanála* which, I am satisfied, is correct in law would indicate that, in such circumstances, a question as to whether the proposed uses constitute a 'development' which is not authorised by the planning permission is one which may be determined under the Act of 2000 either by the planning authority or An Bord Pleanála. In the present case the question is as to whether the various proposed uses, which the defendant contends, would involve the regular use of the premises for events associated with a concert/entertainment venue rather than a visitors' centre, are in a planning context materially different uses from use as a visitors' centre and the uses indicated on the lodged plan, in which case they would not be authorised by the planning permission."

93. There is no principled distinction between (i) a finding that a particular act of development is or is not "exempted development", and (ii) a finding that a particular act of development does not come within the scope of a planning permission. In each instance, An Bord Pleanála is required to assess the difference between two forms of "development", and to reach a determination as to whether the difference between the two is material or immaterial. In the case of the user of lands, the exercise is to determine whether there has been a material change of use. In the case of permitted works under a planning permission, the exercise is to determine whether the difference is an immaterial deviation.

94. An Bord Pleanála is the expert body entrusted under the planning legislation with this task. For the court to carry out the same exercise subsequently gives rise to the very mischief which the judgment in Grianán an Aileach is intended to avoid.

SUMMARY OF LEGAL PRINCIPLES RE: SECTION 5

95. The current state of the case law can be summarised as follows.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(i). The fact that both the High Court and An Bord Pleanála have jurisdiction, in certain circumstances, to determine whether a particular act is "development" or "exempted development" presents a potential risk of overlapping and unworkable jurisdictions.

(ii). In order to reduce this risk, the Supreme Court has held that the High Court's inherent jurisdiction to make declarations as to the planning status of lands is ousted. More specifically, the High Court's jurisdiction to adjudicate upon the proper construction of a planning permission is largely confined to enforcement proceedings. (It might also arise in the context of contractual or conveyancing disputes). The Supreme Court has not yet had to address the specific question of whether the High Court, in hearing enforcement proceedings, is bound by an earlier (unchallenged) Section 5 declaration.

(iii). The Court of Appeal has held that an (unchallenged) Section 5 declaration to the effect that certain works are "exempted development" is binding on the parties in subsequent enforcement proceedings. The Court of Appeal has not yet had to address the question of the legal status of a Section 5 declaration to the effect that certain works are <u>not</u> "exempted development" or to the effect that certain works do not come within the scope of an existing planning permission. Put otherwise, the Court of Appeal has not yet ruled on whether a declaration which is adverse to a *respondent* is binding.

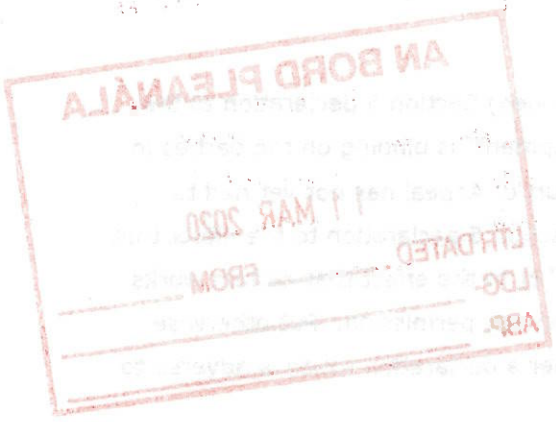
(iv). The High Court, in at least three judgments, has held that Section 5 declarations to the effect that planning permission is required for certain acts are, in principle, binding on the parties in enforcement proceedings.

(v). Certain judgments have expressed reservations as to the jurisdiction of An Bord Pleanála to make declarations to the effect that a particular act is "unauthorised development".

(vi). The principal ground for finding that a Section 5 declaration is binding is in order to reduce the risk of overlapping and unworkable jurisdictions. This would appear to involve a form of issue estoppel. A secondary ground for the finding is that it might offend against Section 50 of the PDA 2000 to allow a party to make a collateral challenge to a Section 5 declaration in the context of subsequent enforcement proceedings.

(vii). The Section 5 jurisdiction extends to questions of interpretation of planning permission.

(viii). Whereas a Section 5 declaration may be dispositive of many of the issues in enforcement proceedings, there remain a number of matters which fall outwith the Section 5 jurisdiction. In particular, An Bord Pleanála has no function in determining whether the development being enforced against has the benefit of the "seven-year rule", i.e. whether the proceedings are statute barred by reference to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the seven-year limitation period provided for under Part VIII of the PDA 2000. It also follows by analogy with the judgment in *Cleary Compost* that an earlier Section 5 declaration will not be binding if there has been a change in *circumstances* in the interim.

FINDINGS OF THE COURT ON SECTION 5 REFERENCE

96. The current state of the authorities, therefore, appears to be that, at the very least, a Section 5 declaration must be given significant weight in subsequent enforcement proceedings. The principal rationale underlying this case law is the desirability of avoiding overlapping and inconsistent decision-making.

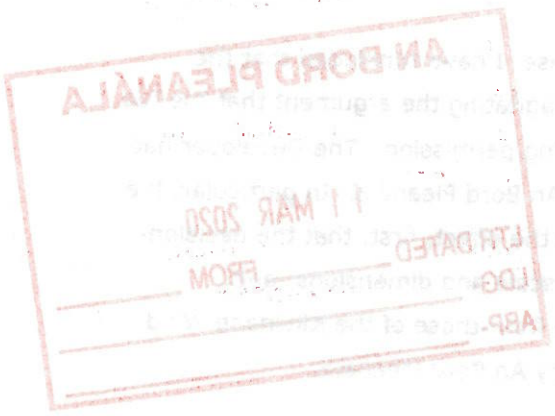
97. Applying these principles to the facts of the present case, I have concluded that the Section 5 declaration precludes the Developer from reagitating the argument that the "as built" wind turbines are authorised by the 2011 planning permission. The Developer had a full opportunity of making its case in this regard to An Bord Pleanála. In particular, the Developer had made submissions before the Board to the effect, first, that the decision-letter of 13 December 2013 authorised the change in scale and dimensions; and, secondly, that the circumstances were distinguishable from those of the Kilvinane Wind Farm. Those submissions were, ultimately, rejected by An Bord Pleanála.

98. To allow the Developer to rerun the same arguments before this court would give rise to precisely the type of overlapping and unworkable jurisdictions which the judgments discussed above are intended to avoid. Were this court to embark upon a *de novo* consideration of these matters, and to come to a *contrary* conclusion to that of An Bord Pleanála, this would bring about the very mischief which the case law is intended to avoid.

99. Of course, different considerations would apply where a party had not been afforded fair procedures before An Bord Pleanála or where the declaration is bad on its face, e.g. the decision is not fully reasoned. See, for example, *Wicklow County Council v. Fortune (No. 3)* [2013] IEHC 397 (discussed at paragraph 74 above). A Section 5 declaration would not be binding in such circumstances. No such contingencies arise, however, on the facts of the present case.

100. In reaching this conclusion as to the status of the Section 5 declaration, I have given careful consideration to the legal submissions—both written and oral—advanced on behalf of the Developer. It will be recalled that one of the arguments advanced is to the effect that the court should apply a "double construction" rule to the Section 5 declaration, i.e. if the declaration is open to two constructions, then it should be interpreted in the manner which holds it *intra vires*. More specifically, it had been argued that the declaration should be interpreted as confined to a finding that the erection of the wind turbines is "development" and not "exempted development". (See paragraph 62 above).

101. With respect, the narrow interpretation which the court is invited to give to the Section 5 declaration is entirely artificial. It would require the court to disregard large portions of the text of the declaration, and also to disregard the underlying inspector's report. Such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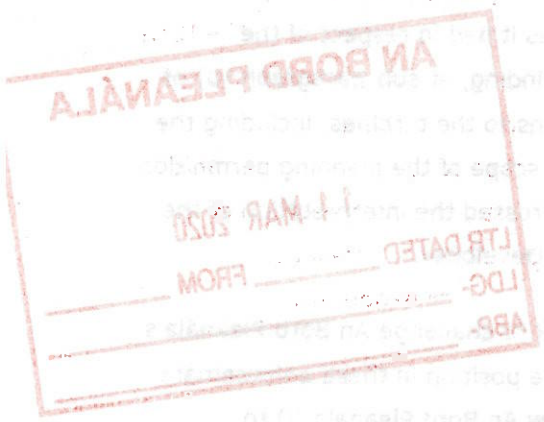
an artificial approach would be contrary to the well-established principles governing the interpretation of planning decisions. (See *In re XJS Investments Ltd.* [1986] IR 750). The rationale for a decision of An Bord Pleanála is to be found by reading the Board's decision in conjunction with the underlying inspector's report (save in cases where the Board had disagreed with the inspector's recommendation). See *Connelly v. An Bord Pleanála* [2018] IESC 31; [2018] 2 I.L.R.M. 453.

102. On the facts of the present case, it is obvious the Board followed its inspector's recommendation, and had adopted the same approach as it had in respect of the Kilvinane Wind Farm. This entailed making an express finding, at sub-paragraph (b) of the Section 5 declaration, to the effect that the alterations to the turbines, including the length of the rotor arms/blades, do not come within the scope of the planning permission granted. Put otherwise, An Bord Pleanála expressly addressed the interpretation of the planning permission and resolved this issue against the Developer.

103. Notwithstanding the fact that the Developer did not seek to challenge An Bord Pleanála's declaration at the time, the Developer now maintains the position in these enforcement proceedings that the Section 5 jurisdiction does not allow An Bord Pleanála (i) to determine whether particular works come within the scope of a planning permission, nor (ii) to make a finding of "unauthorised development". This position is untenable. As discussed in detail under the previous headings, the case law establishes that the Section 5 jurisdiction is not as narrow as the Developer contends.

104. Similarly, the attempt on the part of the Developer to distinguish the facts of the present case from those of *Killross Properties* is not well-founded. Whereas it is correct to say that *Killross Properties* was concerned with a declaration to the effect that certain works were "exempted development", and that this declaration was, therefore, adverse to the case which the applicant, as opposed to the respondent, was making in those proceedings, these points of distinction do not affect the underlying rationale. The underlying rationale of the judgment is to avoid unworkable and overlapping jurisdictions. This mischief arises equally in the case of a Section 5 declaration which is adverse to a respondent as in the case of a declaration which is adverse to the applicant. In each instance, An Bord Pleanála will have made findings on issues which are relevant to the subsequent enforcement proceedings. For the court hearing the enforcement proceedings to embark on a *de novo* consideration of these issues would involve the court re-opening the very issues which had been determined by An Bord Pleanála. This would be contrary to the general principle stated in *Grianán an Aileach* to the effect that the Oireachtas may confer on statutory bodies, expressly or by implication, an exclusive jurisdiction to determine specific issues. Section 5 of the PDA 2000 has conferred just such a jurisdiction on An Bord Pleanála.

105. It might, perhaps, be said that the legal status now attaching to a Section 5 declaration is more significant than a literal interpretation of the section might at first suggest. The case law from the last fifteen years is, however, clear. Section 5 has been given a purposive interpretation, which is intended to reflect the fact that An Bord Pleanála has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been entrusted with specific competences under the PDA 2000. More generally, this interpretation is also consistent with the principle of finality in litigation and that parties are estopped from re-agitating issues which have been decided against them. This is subject to the exceptions discussed under the next paragraph.

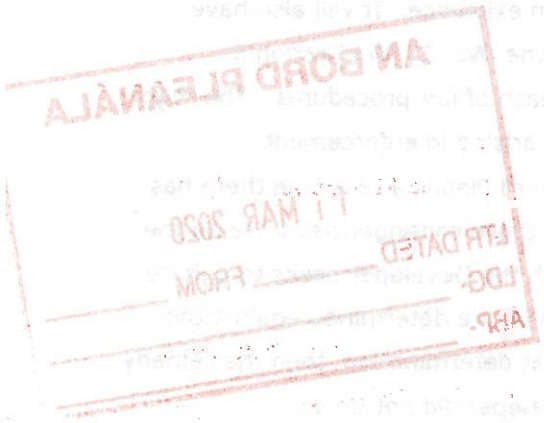
106. The High Court will retain original jurisdiction to determine planning issues in enforcement proceedings where there is no Section 5 determination in existence. It will also have jurisdiction where, as in *Wicklow County Council v. Fortune (No. 3)*, the Section 5 declaration is bad on its face or had been reached in breach of fair procedures. The High Court will also retain original jurisdiction where an issue arising in enforcement proceedings has not been specifically addressed by An Bord Pleanála or where there has been a change in circumstances in the interim. None of these contingencies arise on the facts of the present case. The precise same issues which the Developer seeks to agitate in this court had been raised before An Bord Pleanála and were determined against the Developer. If the Developer had wished to challenge that determination, then the remedy was to make an application for judicial review. The Developer did not do so.

107. Accordingly, I am satisfied that the Section 5 declaration made by An Bord Pleanála in this case should be treated as binding on the Developer, and as conclusive of the question of whether or not the "as built" wind turbines come within the scope of the 2011 planning permission. The declaration is not, of course, determinative of the outcome of the enforcement proceedings. The Applicants would still have to prove to the satisfaction of the court that works had been carried out by the Developer, and that proceedings were instituted within the relevant seven-year limitation period. It remains open to the Developer to resist the proceedings on the basis of the court's discretion.

DE NOVO ASSESSMENT

108. For the reasons set out under the previous heading, I have found that the Section 5 declaration is binding on the Developer. The Developer cannot, therefore, seek to defend the enforcement proceedings before this court on the basis of an argument that the "as built" turbines come within the scope of the planning permission.

109. Lest I be incorrect in this finding, however, I propose to address the question of compliance with the planning permission *de novo*. Put otherwise, I propose to embark upon my own assessment of whether the "as built" turbines come within the scope of the planning permission. This exercise is being carried out *de bene esse*, and without prejudice to my finding as to the binding effect of the Section 5 declaration. The exercise is only being undertaken on account of the urgency of the proceedings. There is a risk that if this judgment were to be decided on the narrow basis that the Section 5 determination is binding, then this might result in unnecessary delay in the event of an appeal. More specifically, if the finding on the narrow issue were to be overturned on appeal, and this court had not addressed separately the question of compliance with the planning permission, then it would become necessary to remit the matter to the High Court for rehearing (with all the attendant delay and cost). It seems preferable that this judgment should, insofar as reasonably practicable, address all issues and contingencies.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110. The Developer's argument can be summarised as follows. A planning permission provides for some flexibility, and "immaterial deviations" from the permitted development are implicitly authorised by the permission. The court should, therefore, engage in the process of examining whether the environmental impact of the deviations between the "as permitted" and "as built" wind turbines are material. The Developer has filed detailed affidavit evidence which, it is said, indicates that there is no material difference between the two.

111. The court is, in effect, being invited to engage in a form of screening exercise analogous to that required under the EIA Directive. With respect, this is not what the planning legislation requires. The term "works" is broadly defined under the PDA 2000, and, in contrast to the term "use", is not subject to a "materiality" test.

> "'works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure."

112. The legal consequence of this is that even very minor "works" are, in principle, subject to a requirement to obtain planning permission. The broad definition of development "works" is counterbalanced by the putting in place of legislative measures which exempt prescribed classes of development from the requirement to obtain planning permission. Some of these exemptions are provided for under Section 4(1) of the PDA 2000, but most are to be found in Regulations made by the Minister for Housing, Planning and Local Government ("*the Minister*") pursuant to Section 4(2) of the PDA 2000. This section reads as follows.

> "(2)(a) The Minister may by regulations provide for any class of development to be exempted development for the purposes of this Act where he or she is of the opinion that—
>
> (i) by reason of the size, nature or limited effect on its surroundings, of development belonging to that class, the carrying out of such development would not offend against principles of proper planning and sustainable development, or
>
> (ii) the development is authorised, or is required to be authorised, by or under any enactment (whether the authorisation takes the form of the grant of a licence, consent, approval or any other type of authorisation) where the enactment concerned requires there to be consultation (howsoever described) with members of the public in relation to the proposed development prior to the granting of the authorisation (howsoever described)."

113. The position under the planning legislation is, therefore, that planning permission is required for even minor development "works", the definition of which includes relevantly an "extension", *unless* the works fall within a class of "exempted development".

114. The decision as to whether to exempt particular classes of development "works" from the requirement to obtain planning permission resides principally with the Minister. As appears from Section 4(2), the Minister is required to consider whether or not the carrying out of such development would "offend against principles of proper planning and sustainable development".

115. The courts do not have an equivalent jurisdiction to waive the requirement to obtain planning permission for minor development "works". The only role which a court has in assessing the materiality of development "works" is where a developer seeks to argue that a departure from the terms of a planning permission represents an "immaterial deviation". The principles governing this assessment have been set out, with characteristic clarity, by Fennelly J. in *Kenny v. Provost, Fellows & Scholars of the University of Dublin, Trinity College* [2009] IESC 19 ("Kenny") at paragraphs [18] to [20] of the judgment as follows.

> "There will inevitably be small departures from some or even many of the plans and drawings in every development. There can be discrepancies between and within plans, drawings, specifications and measurements; there can be ambiguities and gaps. It seems improbable that any development is ever carried into effect in exact and literal compliance with the terms of the plans and drawings lodged. If there are material departures from the terms of a permission, there are enforcement procedures.
>
> However, planning laws are not intended to make life impossible for developers, for those executing works such as architects, engineers or contractors or for the planning authorities in supervising them. Nor are they there to encourage fine-tooth combing or nit-picking scrutiny of the works. I will mention later one or two examples of this type of exercise in the present case. The exchange of affidavits amounts to some 300 pages.
>
> While the planning authority or An Bórd Pleanála on appeal grants the permission, it is a common feature of permissions, especially for large developments, that additional detail is necessary in order to carry the development into effect and such detail, often in the form of further plans, drawings, specifications or other explanations, will require approval by the planning authority prior to commencement of the development. There is an obvious practical necessity for a procedure whereby matters of detail can be agreed between the planning authority and the developer. This ensures supervision but allows a degree of flexibility within the scope of the permitted development."

116. The planning permission in *Kenny* had included a number of conditions, of the type flagged in the last paragraph above, i.e. conditions which left over points of detail to be

agreed between the developer and the planning authority. The planning authority had relied on the conditions to authorise certain departures from the strict terms of the planning permission. As discussed under the next heading below, the Developer in the present case seeks to rely on the existence of such a condition in the 2011 planning permission as authorising the increase in rotor diameter.

117. Staying for the moment with immaterial deviations, the case law indicates that the flexibility allowed under a planning permission is very limited. Thus, for example, the High Court in *Cork County Council v. Cliftonhall Ltd.* [2001] IEHC 85 held, *with some reluctance*, that an exceedance of the ridge height of one block of apartments of between 0.5 metres and 1.3 metres was immaterial in the context of an overall residential development of six blocks. The court calculated that the deviation between the "as permitted" and "as built" height was in the order of some 7 per cent.

118. In *O'Connell v. Dungarvan Energy Ltd.*, unreported, High Court, Finnegan J., 27 February 2000, it was held that the relevant planning permission implicitly authorised the erection of a steel structure *to replace* an existing structure. Crucially, the replacement structure was of the same dimensions as the existing structure, and would, in any event, have been "exempted development".

> "It was therefore necessary, if the development should proceed, that a stronger steel structure capable of supporting the cladding be provided. This replacement steel structure as to its external dimensions will correspond both as to height and floor area with that which is being demolished. The external appearance of the building will be in accordance with the planning permission condition 3 thereof. In these circumstances the course of conduct which the Respondent has undertaken is in direct consequence of the imposition of the said condition 8 in the Integrated Pollution Control Licence. It is therefore within the category of unforeseen variations mentioned by Denning M R and as such authorised by the planning permission. It is also immaterial having regard to what I have said as to its floor area, height and the fact that its external appearance will be determined in accordance with condition 3 of the planning permission and so unaffected by the variation. In short the variation in the development is within the terms of the planning permission. It is also exempted development pursuant to the Local Government (Planning and Development) Regulations 1995 Article 9 A as inserted by the Local Government (Planning and Development) Regulations 1995."

119. The judgment most directly on point is that of the Court of Appeal in *Bailey v. Kilvinane Wind Farm* [2016] IECA 92. The Court of Appeal held at paragraph [87] that an increase in rotor diameter of 23 metres was a material deviation.

> "The same reasoning also applies in the context of the diameter size of the turbines. As constructed the two turbines, T3 and T4, each have a rotor diameter of 90m, which is 23m. larger than that sanctioned by the 2002 planning permission, thus very significantly extending the sweep of the rotor circumference. The sweep of the rotor diameters thus rises from 57n (57 x3.1416 = 179m.) to 90n

(57 x 3.1416 = 283m.). It is impossible to say that such a large and appreciable increase in the diameter size of the rotors beyond that sanctioned by the planning permission is not material. The potential impact in terms of sightlines (and other visual impacts), noise, shadow flicker and the overall footprint of these larger turbines on third parties is simply too great."

120. The increase in rotor diameter in the present case is 13 metres. I am satisfied, for reasons similar to those set out in the judgment in *Kilvinane Wind Farm* that this is a material deviation.

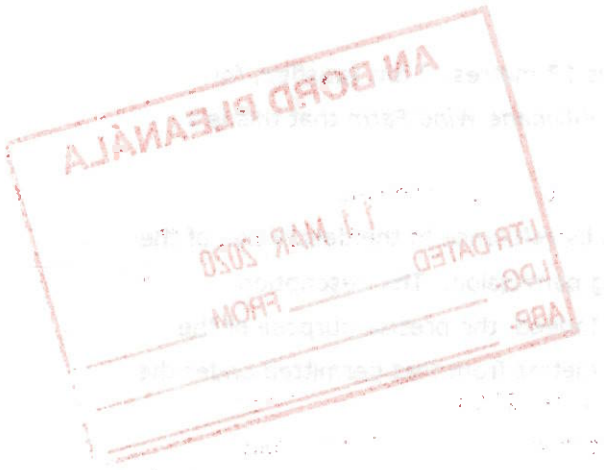
121. The materiality of the deviation has to be assessed by reference to the description of the permitted development as per the grant of planning permission. The description expressly refers to a rotor diameter of 90 metres. Indeed, the precise purpose of the application had been to allow for an increase of 10 metres from that permitted under the 2005 planning permission.

122. There is a further reason that the Developer cannot rely on the concept of "immaterial deviations". The case law indicates that the rationale for allowing some flexibility in planning permissions is to address unexpected contingencies during the course of the carrying out of the development. On the facts of the present case, the decision to change turbine types was a deliberate decision made in advance of the carrying out of the works. This was not an unexpected event such as might benefit from the concept of "immaterial deviations". The materials put before the Board in the context of the Section 5 reference indicate that this decision was informed by considerations other than visual amenity.

> "The reason for this selection is to facilitate the use of the best available technology at the wind farm, ensuring that the wind farm can harness the local wind capacity to its full potential, thus ensuring that the viability of the development is not compromised."

123. The court is not tasked nor properly qualified to determine whether or not planning permission should be granted. For this reason, the arguments made by the Developer which touch upon the merits of the proposed development, and invite the court to engage in a detailed "compare and contrast" exercise as between the environmental impacts of the "as permitted" and "as built" turbines is inappropriate. This is not the function of the court. It is no answer to a complaint that a person has carried out development without the requisite planning permission to say that it is highly likely that had a planning application been made same would be granted. A developer cannot short-circuit the process in this way. This is especially so in the context of an EIA development project such as that in issue in the present proceedings.

124. The correct legal analysis is that the court is merely deciding whether or not the Developer is required to make a planning application. The court is not making any adjudication as to whether planning permission will be granted, or whether the planning application is subject to environmental impact assessment for the purposes of the EIA Directive. These are all matters for the expert decision-makers who have been entrusted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with these functions under the planning legislation. The case law is all in one direction, and it is to the effect that matters of planning judgment are best left to the local planning authorities and An Bord Pleanála.

COMPLIANCE SUBMISSION

125. The Developer contends that the change in wind turbine type has been authorised by dint of the planning authority having "agreed" to the compliance submission by its letter dated 13 December 2013. In circumstances where no application for judicial review has been made seeking to question the validity of this decision-letter, it is said to be immune from challenge. The decision-letter is said to be binding on the court and cannot be impugned in these enforcement proceedings. Counsel relies in this regard on Section 50 of the PDA 2000, and the judgment of the Supreme Court in *Kenny v. Provost, Fellows & Scholars of the University of Dublin, Trinity College* [2009] IESC 19.

126. I have concluded that the decision-letter of 13 December 2013 cannot be relied upon as authorising the alterations to the rotor diameter of the wind turbines for the following two reasons.

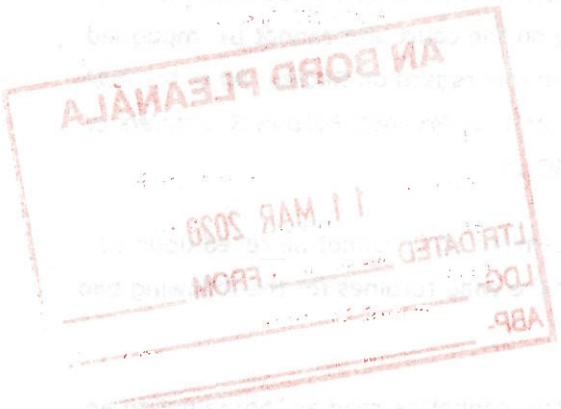
127. First, as a matter of interpretation, the decision-letter cannot be read as "agreeing" to an increase in rotor diameter in circumstances where the Developer did not expressly request agreement to this increase. Planning documents are to be interpreted in their ordinary meaning as they would be understood by members of the public, without legal training, as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning. (See *In re XJS Investments Ltd.* [1986] IR 750).

128. The decision-letter is headed up as follows.

> "Re: PD 11/400 – permission for a modification to the permitted Barranafaddock Wind Farm (Planning Ref. 04/1559 & An Bord Pleanála reference number PL 24.213290 in the townlands of [...] Co. Waterford. The modifications include a proposed increase in turbine hub height (to 80m) of three of the permitted 11 turbines, and an increase in rotor diameter of all turbines to 90m (from 80m) and the micro-siting of ten of the permitted turbines. As a result of this modification there will also be associated minor revisions to the supporting civil infrastructure design including the provision of a borrow pit and the modification and relocation of the permitted substation."

129. As appears, the description of the development expressly refers to a rotor diameter of 90 metres. A person reading the decision-letter would naturally assume that this is all that is permitted. There is no other reference to rotor diameter in the decision-letter, and there is literally nothing which indicates that an *increase* in rotor diameter to 103 metres has been agreed to.

130. It is no answer to this to suggest that the heading of the decision-letter might have been intended merely to reflect the description of the permitted development as per the 2011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planning permission. There is nothing in the decision-letter which indicates that the heading is intended to refer to anything other than the form of development as agreed by the planning authority. Moreover, the very fact that the planning permission only permits a rotor diameter of 90 metres emphasises that the planning authority could not use the occasion of agreeing points of detail to rewrite the planning permission. See *Treacy v. An Bord Pleanála* [2010] IEHC 13, [78]. The High Court (MacMenamin J.) emphasised that Section 34(5) of the PDA 2000 cannot be read in such a manner as to allow a matter of detail turn the framework or substance of the grant of planning permission on its head. Any matter of detail must perforce fall within the four walls of the parent grant of permission. It cannot denature it.

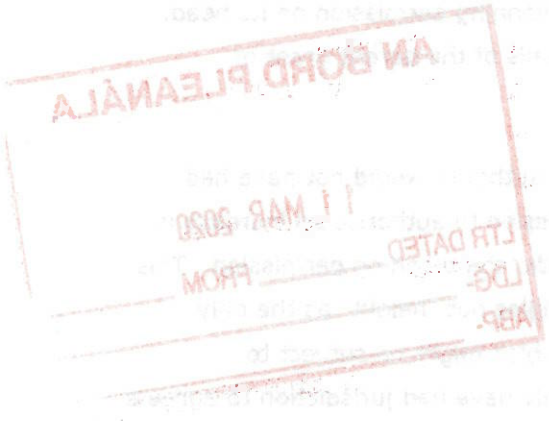
131. Returning to the facts of the present case, the planning authority would not have had jurisdiction under Condition No. 3 of the planning permission to authorise an increase in the rotor diameter beyond the 90 metres prescribed under the planning permission. This is especially so in circumstances where the condition singles out "height" as the only aspect of the scale or dimensions of the wind turbines which might be subject to agreement. Even then, the planning authority would only have had jurisdiction to agree a height equal to or less than the maximum height of 125 metres permitted under the 2011 planning permission. The reason stated for the imposition of the condition was "in the interests of visual amenity", and it thus allowed for the possibility of a reduction in the permitted height.

132. The hypothetical intelligent person reading the decision-letter must be taken as being aware of the content of the compliance submission of 6 November 2013, and as having read the decision-letter in conjunction with same. As appears from the extract from the compliance submission set out at paragraph 26 above, the Developer did not expressly seek the agreement of the planning authority to an increase in rotor diameter.

133. It is not enough, as has been contended for by counsel on behalf of the Developer, that the proposed alteration is capable of being deduced by either (i) carrying out the mathematical exercise of subtracting the figure stated for the hub height from that stated for the maximum tip height of the turbines, and then multiplying the resulting figure by two, or (ii) by a careful examination of the fine print of the A3 Schematic GE Turbine which had been included in Appendix B of the compliance submission.

134. Had the Developer wished to obtain the planning authority's agreement to an increase in rotor diameter, then this should have been stated in express terms in the body of the compliance submission. Neither a planning authority nor a member of the public should be expected to wade through extensive documentation in order to attempt to ascertain what precisely it is that a developer is seeking agreement to. Public participation lies at the heart of the planning process. This is especially so in the context of development, such as the present case, which consists of a project subject to the public participation requirements of the EIA directive.

135. The second reason for saying that the decision-letter cannot be relied upon as authorising the increase in rotor diameter is, perhaps, more fundamental. It is a requirement of the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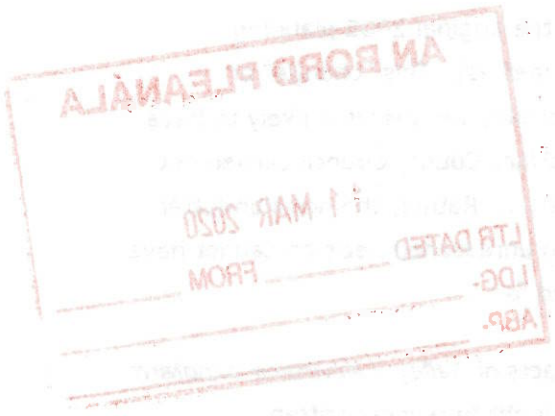
EIA Directive that any "change" or "extension" of projects already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment, must itself be subject to assessment. It is necessary, therefore, that a form of screening exercise be carried out before a decision to authorise a change or extension can lawfully be made.

136. On the Developer's case, the decision-letter is said to have authorised a change to a permitted EIA development project. This involved an increase in the rotor diameter from 90 metres to 103 metres. (It will also be recalled that the original 2005 planning permission had only allowed for a rotor diameter of 80 metres). This "change" or "extension" should have been screened in order to determine whether it is likely to have adverse effects. There is simply no evidence that Waterford County Council carried out such an exercise prior to the issuance of the decision-letter. Rather, the decision-letter baldly states: "Condition 3 Noted and agreed". Such an unreasoned decision cannot have had the legal effect of authorising the change contended for.

137. In this regard, a loose analogy can be drawn with the facts of *Bailey v Kilvinane Windfarm Ltd.* [2016] IECA 92. The developer in that case had sought to rely on written representations made by an official of the local planning authority to the effect that an extension of the blade length of proposed wind turbines were acceptable to the planning authority. (In contrast to the present case, the written representations had not been made pursuant to Section 34(5) of the PDA 2000).

138. The Court of Appeal considered that it was not reasonable for the developer in that case to have relied upon these written representations. Whereas this finding was informed, in part, by the fact that the written representations were informal, the court also attached some weight to the fact that no assessment of the impact of the changes had been carried out by either the developer or the planning authority. See paragraphs [100] and [101] of the judgment.

> "It is inherent in the doctrine of good faith as a general principle of law that any party seeking to avail of that principle should show appropriate regard for the rights of third parties who might reasonably be affected by their actions. There is nothing at all to suggest that either the developer or, for that matter, the Council official in question gave any consideration to this issue. In such circumstances no sensible developer could reasonably suppose that a planning authority could informally sanction such deviations from location and rotor diameter without a formal assessment of the potential planning and environmental impact of these changes and especially their potential effects on third parties.
>
> It is obvious that any thing other than trifling changes in terms of the location of the turbines and the size of the diameter of the rotor blades could have major implications for local residents in terms of visual impact, sight lines, noise and shadow flicker. Viewed objectively, therefore, one could not say that any conclusion that the development had been constructed in accordance with the terms of the planning permission or that these admitted deviations were not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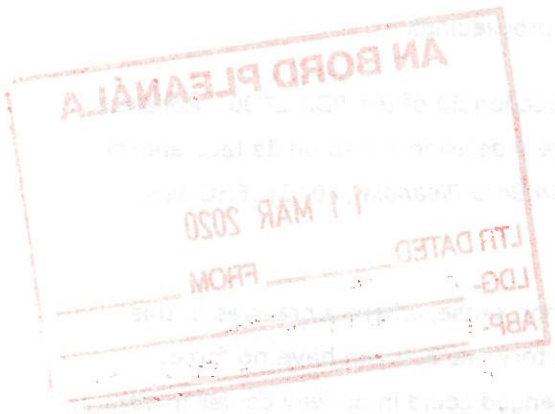
material was one which, adopting the language of O'Sullivan J. in *Altara Developments*, a developer could reasonably hold. This was especially so when no consideration whatever was given to the rights of the neighbours who lived in the immediate vicinity of the wind farm as to the potential effects of these changes."

139. Counsel on behalf of the Developer has argued that, in circumstances where it was not challenged at the time, the decision-letter of 13 December 2013 is immune from judicial review. It is said, therefore, that it does not matter whether the decision-letter is lawful or not, it cannot be questioned in these enforcement proceedings.

140. With respect, this argument overstates the effect of Section 50 of the PDA 2000. Reliance on that section is not available in circumstances where a decision is bad on its face and/or exhibits an error of law. See, for example, *Mone v. An Bord Pleanála* [2010] IEHC 395, [83] and [84].

> "It would seem to me that as a matter of common sense, where a grant as in this case has been issued without the relevant statutory basis, it can have no force. The fact that the erroneous grant was not challenged could in no way confer it with retroactive validity; such is wholly outside of the legislative scheme which entirely governs this area of law. The 1998 grant was therefore wholly illusory; it was a grant in name only, having no possible basis in either law or fact. No future actions could change this. The council had no power or jurisdiction to make the grant. It must therefore follow that any subsequent decision which places reliance upon this must be similarly flawed, being based on no legitimate legal or factual basis. The Board's decision that the development was based on a valid planning permission, as well as being erroneous, was a decision it had no power to make; it was not possible as a matter of law for the Board to retroactively confer validity on the 1998 grant.
>
> The argument of the Board by reference to s.50 of the Act of 2000 is misconceived. That section (subject to the court's power to extend time, which here is not relevant) is a time limit restriction operating not as a matter of defence but of jurisdiction. It regulates the challenge to a decision, nothing more. It leaves unaltered the legal status of the decision. It has no influence on the lawfulness or effect of the decision. It gives it no badge of either approval or disapproval. It prevents challenge. Notwithstanding these views the practical effect of this section is that in almost all cases once the time period has expired, no further consideration will be required or needed. But exceptionally, as here, where a subsequent decision depends on conferring the status of legality on a legal nullity, that decision will not be allowed to stand."

141. A similar approach had been taken by the High Court, in the specific context of a Section 5 declaration, in *Wicklow County Council v. Fortune (No. 3)* [2013] IEHC 397. Hogan J. declined to rely on a Section 5 determination issued by a planning authority in circumstances where the court considered that the reasons given for the determination were "not altogether satisfactory". This was so notwithstanding that the actual validity of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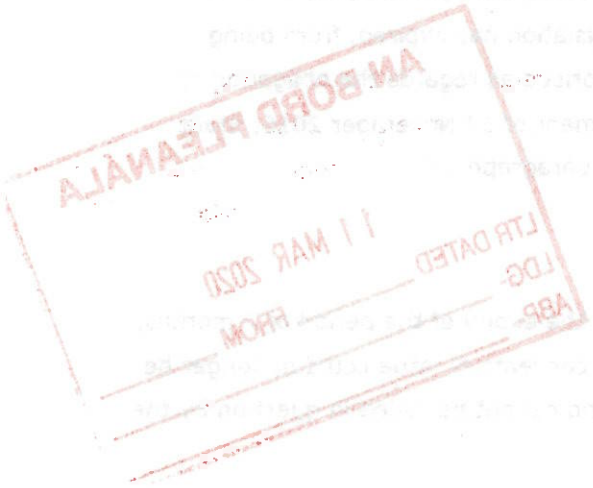
the Section 5 determination had not been under challenge in the proceedings. (The proceedings in *Fortune (No. 3)* were enforcement proceedings under Section 160 of the PDA 2000).

142. The argument for saying that the court is entitled to disregard a planning decision which is bad on its face is even stronger in the context of EIA projects. The very recent judgment of the CJEU in Case C-261/18, *Commission v. Ireland (Derrybrien)* has emphasised that a Member State cannot deem a development project, which has been carried out in breach of the requirements of the EIA Directives, to be authorised simply because the domestic time-limits for legal challenges to the relevant development consent have expired.

> "80 Similarly, Directive 85/337 precludes projects in respect of which the consent can no longer be subject to challenge before the courts, because the time limit for bringing proceedings laid down in national legislation has expired, from being purely and simply deemed to be lawfully authorised as regards the obligation to assess their effects on the environment (judgment of 17 November 2016, Stadt Wiener Neustadt, C-348/15, EU:C:2016:882, paragraph 43).
>
> [...]
>
> 94 In any event, Ireland simply states that, after the expiry of the period of 2 months, or 8 weeks set by the PDAA, respectively, the consents at issue could no longer be the subject of a direct application to a court and cannot be called in question by the national authorities.
>
> 95 By its argument, Ireland fails to have regard, however, to the case-law of the Court referred to in paragraph 80 above, according to which projects in respect of which the consent can no longer be subject to challenge before the courts, because the time limit for bringing proceedings laid down in national legislation has expired, cannot be purely and simply deemed to be lawfully authorised as regards the obligation to assess their effects on the environment.
>
> 96 It must further be noted that while it is not precluded that an assessment carried out after the plant concerned has been constructed and has entered into operation, in order to remedy the failure to carry out an environmental impact assessment of that plant before the consents were granted, may result in those consents being withdrawn or amended, this is without prejudice to any right of an economic operator, which has acted in accordance with a Member State's legislation that has proven contrary to EU law, to bring against that State, pursuant to national rules, a claim for compensation for the damage sustained as a result of the State's actions or omissions."

143. Mr McGrath, SC, on behalf of the Developer, submitted that the within proceedings did not give rise to any issue of EU law. The facts of the present case were said to be entirely distinguishable from those of *McCoy v. Shillelagh Quarries Ltd*. The original version of the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proposed development had been subject to EIA by An Bord Pleanála at the time of the grant of the first planning permission in 2005. The Applicants did not seek to challenge the 2011 planning permission, and would be precluded from doing so now by virtue of the expiration of the eight-week statutory time-limit. It is said that there is no evidence before the court that there had been any failure to comply with the EIA Directive at the time of the grant of this planning permission.

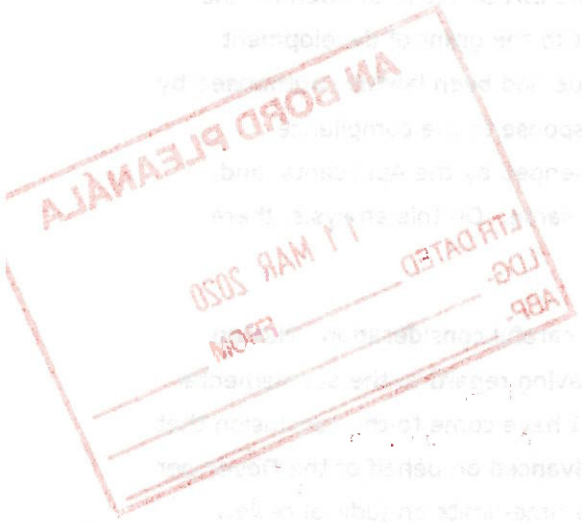
144. Counsel made a cogent argument to the effect that the EIA Directive allowed for the possibility of points of detail being agreed subsequent to the grant of development consent, and submitted that the change in turbine type had been lawfully authorised by the decision-letter of 13 December 2013 issued in response to the compliance submission. This decision-letter had never been challenged by the Applicants, and, therefore, neither they nor the court could go behind same. On this analysis, there simply was no breach of EU law.

145. This argument was made with conviction, and merits careful consideration. Having reflected on same for a number of weeks now, and having regard to the supplemental written legal submissions filed on 5 December 2019, I have come to the conclusion that the legal position is more nuanced. The argument advanced on behalf of the Developer has, at its core, the proposition that the domestic law time-limits on judicial review proceedings constrain the court's jurisdiction in enforcement proceedings. The logic of the argument is that even if a court considered that development consent had been granted in breach of the EIA Directive, the court would be powerless to restrain the continuation of a development project. This would be so irrespective of how egregious the breach is or how obviously defective the decision relied upon is. This argument cannot be reconciled with the requirements of the EIA Directive and the manner in which domestic time-limits have been treated of in the case law of the CJEU.

146. Member States are obliged under Article 10A thereof to provide effective, proportionate and dissuasive penalties for breaches of the EIA Directive. It would be inconsistent with this obligation were an obviously deficient decision to be allowed block effective enforcement against an EIA project which had been carried out in breach of the EIA Directive. On the facts of the present case, as found by this court, the Developer carried out development without the requisite planning permission. The 2011 planning permission did not authorise the erection of wind turbines of the scale and dimensions actually put up. The subsequent decision relied upon to authorise this, i.e. the decision-letter of 13 December 2013, could not have had this purported legal effect for the reasons outlined at paragraphs 135 *et seq.* above. This courts obligation to give effect to the EIA Directive cannot be negated by the decision-letter of 13 December 2013.

DISCRETIONARY FACTORS

147. The Developer submits in the alternative—without prejudice to its principal argument that there has been no "unauthorised development"—that the circumstances of the case are such that relief should be refused as a matter of discretion. Counsel emphasises that the court enjoys a broad discretion under Section 160 of the PDA 2000. The judgments of the Supreme Court in *Meath County Council v. Murray* [2017] IESC 25; [2018] 1 I.R.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189; [2017] 2 I.L.R.M. 297 ("*Murray*") and *An Taisce v. McTigue Quarries Ltd.* [2018] IESC 54; [2019] 1 I.L.R.M. 118 ("*McTigue Quarries*") are cited in this regard.

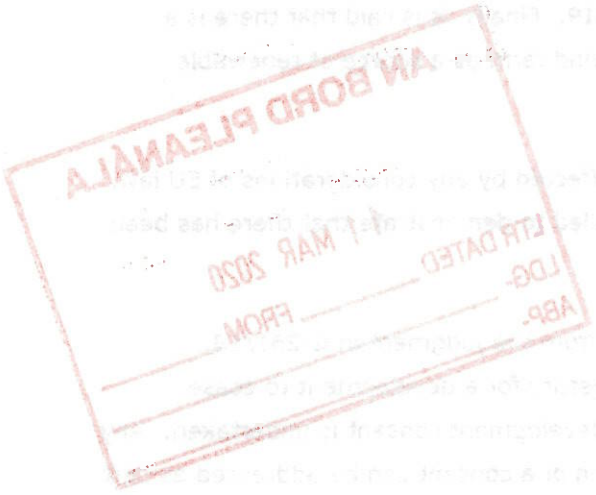
148. Counsel then identifies a number of factors which, it is said, indicate that the court's discretion should be exercised against the grant of relief. First, any departure from the terms of the 2011 planning permission is not material and does not give rise to any additional impacts on the environment when compared with the "as permitted" turbines. Secondly, the developer has acted in good faith at all times and, in particular, sought and obtained the agreement of Waterford County Council to the change in turbine type. Thirdly, the Developer had made an application for leave to apply for "substitute consent" under Part XA of the PDA 2000 as early as January 2019. An Bord Pleanála made a decision in August 2019 to the effect that substitute consent was not necessary. (The Board's decision is the subject of judicial review proceedings, and the parties informed this court that An Bord Pleanála has indicated an intention to consent to an order of *certiorari* on certain, limited grounds). Fourthly, it is said that there has been delay on the part of the Applicants: the wind farm has been operational since 2015, but the within proceedings were not instituted until February 2019. Finally, it is said that there is a public interest in the continued operation of the wind farm as a source of renewable energy.

149. Counsel submits that the court's discretion is unaffected by any considerations of EU law. In particular, it is said that the Applicants have failed to demonstrate that there has been any *breach* of the EIA Directive.

150. It is submitted that it does not necessarily follow from the judgment in C-261/18, *Commission v. Ireland (Derrybrien)* that it is necessary for a development to cease operations while an application for retrospective development consent is undertaken. Any question in relation to the suspension or revocation of a consent can be addressed as part of the substitute consent process. It is said that the grant of relief under Section 160 of the PDA 2000 would be disproportionate. See §7 of the supplemental written legal submissions of 5 December 2019, as follows.

> "In the circumstances of this case, it is submitted that the grant of relief under section 160 of the 2000 act would be disproportionate and is not required on foot of the duty of sincere co-operation. The grant of relief in this case is not necessary to achieve the objectives of the Treaty in relation to the assessment of environmental impacts and, indeed, would go beyond what is necessary. What is necessary to achieve the objectives of the Treaty is, at a maximum, the assessment of the use of the particular turbine in accordance with the requirements of the EIA Directive. That can be achieved through an application for Substitute Consent and there is no requirement for the wind farm deceased operation for that to be achieved."

151. The conduct of the Developer in the present case in seeking to regularise the planning status of the wind turbines is said to stand in "stark contrast" to that of the operator of the Derrybrien Wind Farm. See §10 of the supplemental written legal submissions.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FINDINGS OF THE COURT ON DISCRETION

152. For ease of exposition, it is proposed to address the various discretionary factors by reference to the broad categories of considerations identified by the Supreme Court in *Murray and McTigue Quarries*.

The nature of the breach: ranging from minor, technical and inconsequential up to material, significant and gross

153. The breach in this case is material. An increase in rotor diameter of 13 metres cannot be characterised as minor or technical. This breach also has to be seen in the context of a development project which is subject to the EIA Directive. The discretion of the court to "forgive" a breach of this type is more limited.

Conduct of Developer

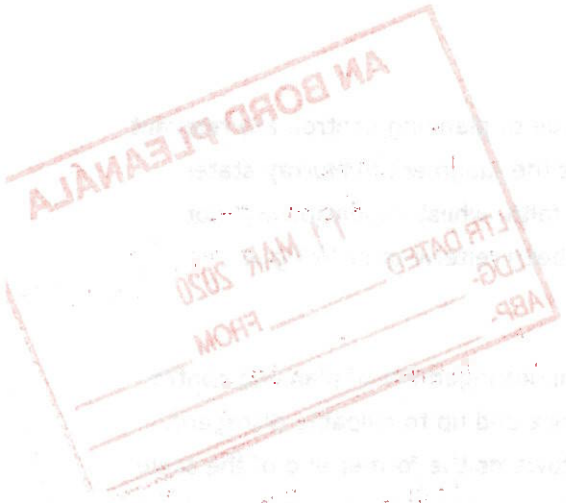
154. The conduct of a developer and, in particular, its attitude to planning control, are relevant considerations. It is important to recall, however, that the judgment in *Murray* states that the fact that a developer had been acting in good faith, whilst important, will not necessarily excuse him from an order. This point has been reiterated in *McTigue Quarries*.

155. The judgment in *Murray* indicates that the reason for an infringement of planning control may range from genuine mistake, through to indifference and up to culpable disregard. The conduct of the Developer in the present case lies towards the former end of the scale. The evidence before the court establishes that the Developer had been acting in good faith. In particular, the Developer had engaged proactively with the planning authority. See, for example, the records of meetings between the Developer's consultants and the planning authority. The mistaken attempt to rely on Condition 3 as the basis for changing the turbine type is indicative of a mistake rather than any culpable disregard. Nevertheless, ignorance of the law cannot be an excuse for non-compliance with a planning permission. It was not reasonable for the Developer to rely on Condition No. 3 as a vehicle through which to introduce significant changes to the wind turbines. Moreover, it is of little credit to the Developer that the terms of the compliance submission did not make it expressly clear that what was being sought was the agreement of the planning authority to a change in rotor blade diameter.

The attitude of the planning authority

156. Following upon the issuing of An Bord Pleanála's Section 5 declaration, the planning authority served an enforcement notice on the Developer. (The enforcement notice is now the subject of separate judicial review proceedings). The fact that the local planning authority has been moved to take enforcement action is a factor which points in favour of granting relief.

The public interest in upholding the integrity of the planning and development system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157. The fact that this development is subject to the EIA Directive is a relevant consideration under this category. Article 10A of the EIA Directive (as most recently amended by Directive 2014/52/EU) provides as follows.

> "Member States shall lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive. The penalties thus provided for shall be effective, proportionate and dissuasive."

158. Weight must be given to this the exercise of the court's discretion. One of the requirements of the EIA Directive is that any "change" or "extension" to a previously permitted project which is likely to have a significant adverse effect must be subject to (further) environmental impact assessment. It is necessary, therefore, to carry out a form of screening exercise to determine whether a change or extension is likely to have a significant adverse effect. Whereas it may well be the position that the outcome of a screening exercise in relation to the change in the scale and dimensions of the turbines would be that no EIA is required, this does not obviate the legal requirement to carry out such a screening exercise. (See Case C-215/06, *Commission v. Ireland* to the effect that the failure to carry out a screening exercise represents a breach of the EIA Directive).

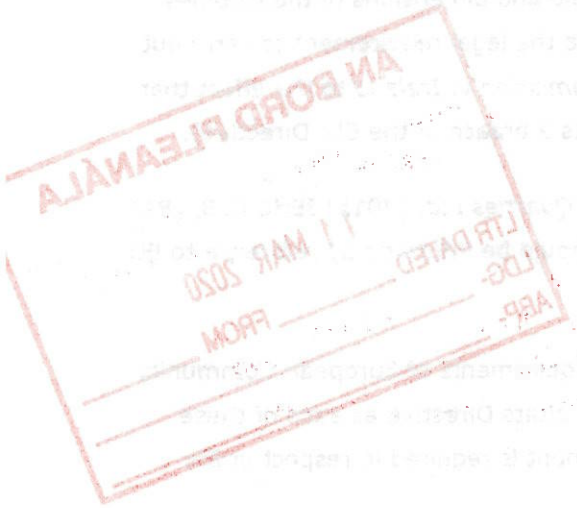
159. The High Court (Baker J.) held in *McCoy v. Shillelagh Quarries Ltd.* [2015] IEHC 838, [84] and [85]. that the exercise of the court's discretion should be informed by reference to EU environmental law.

> "I consider myself constrained further by the requirements of European Community law, and especially the EIA Directive and the Habitats Directive as each of these mandates that an Environmental Impact Statement is required in respect of the operation of this quarry.
>
> Accordingly, were I to refuse injunctive relief or grant injunctive relief with respect to some of only of the operation, I consider that my decision would be one which could be characterised as a failure to respect the integrity of the environmental legislation, and allow the development to continue when it is unauthorised under Irish and when Irish law arises as a result of the obligations of Ireland and Community law."

160. Counsel for the Developer in the present case points out—entirely correctly—that the breach of EU law at issue in *Shillelagh Quarries Ltd.* was very serious and had continued for many years, and that an application for substitute consent had been refused. Whereas the breach in the present case is of a much lesser order, the EU law dimension is nevertheless a factor to which some weight must be given.

Public interest in general

161. The Developer relies in this regard on the fact that the development is of a type which provides renewable energy and that this is in the public interest. As against this, it has to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be said that the overall impact of an order restraining the operation of this individual development project would be minimal in the national context.

Conclusion

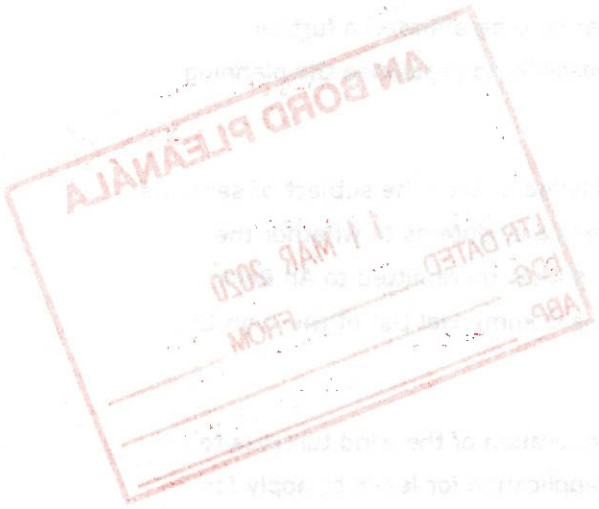
162. As appears from the foregoing discussion, there are a number of discretionary factors which are in favour of the Developer. These have to be weighed against the factors which point towards the grant of relief. The principal of these is that the development project is of a type subject to the EIA Directive. The EIA Directive obliges a Member State to provide effective, proportionate and dissuasive penalties for breaches of national legislation. The importance of ensuring compliance with the EIA Directive has very recently been emphasised by the judgment of the CJEU in Case C-261/18, *Commission v. Ireland (Derrybrien)*.

163. I have concluded that the court's discretion should be exercised as follows. The Developer should be afforded an opportunity to regularise the planning status of the wind turbines. It would be inappropriate, therefore, to make an order requiring the immediate removal of the wind turbines. Rather, the Developer is to be afforded a further reasonable period of time within which to seek, if possible, to regularise the planning status of the lands.

164. (The precise mechanism by which this might be achieved is itself the subject of separate judicial review proceedings. More specifically, there is a dispute as to whether the application for leave to apply for substitute consent should be remitted to An Bord Pleanála. This dispute is listed for hearing before the Commercial List of the High Court this morning (6 December 2019).)

165. It would not, however, be appropriate to allow the operation of the wind turbines to continue uninterrupted pending the outcome of an application for leave to apply for substitute consent. This is similar to the approach which had been adopted by the Court of Appeal in *Bailey v. Kilvinane Wind Farm*. There has been a breach of EU law, and this court is obliged to ensure that there is an effective and dissuasive remedy for same.

166. Counsel for the Developer has made a submission to the effect that—in circumstances where An Bord Pleanála has an express statutory power to direct the cessation of development pending the determination of an application for substitute consent—the court should, in effect, leave it to An Bord Pleanála to decide whether any interim measures are required. This submission is correct insofar as it goes. It is, however, clear from the wording of the relevant provision, namely Section 177J of the PDA 2000, that the Board's jurisdiction to issue a direction only arises subsequent to a decision to grant leave to apply for substitute consent. It seems that only the court has jurisdiction to make an order requiring the cessation of operations pending the making of a decision to grant leave to apply for substitute consent. I propose, therefore, to make an order restraining the operation of the wind turbines *pro tem*. The Developer has liberty to apply, on seven days' notice to the Applicants, to have this order vacated in the event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that An Bord Pleanála makes a decision to grant leave to apply for substitute consent. I will hear both parties at that stage.

167. In the event that substitute consent is granted, I would propose to vacate the order entirely. Again, however, I will hear the parties before making any order to this effect.

CONCLUSIONS AND FORM OF ORDER

168. The Section 5 declaration precludes the Developer from reagitating the argument that the "as built" wind turbines are authorised by the 2011 planning permission. The Developer had a full opportunity of making its case in this regard to An Bord Pleanála. In particular, the Developer had made submissions before the Board to the effect, first, that the decision-letter of 13 December 2013 authorised the change in scale and dimensions of the wind turbines; and, secondly, that the circumstances of the case were distinguishable from those of the Kilvinane Wind Farm. Those submissions were, ultimately, rejected by An Bord Pleanála.

169. In circumstances where the Developer did not challenge the Section 5 declaration, the Developer is estopped from seeking to reopen the Board's findings in these proceedings.

170. The 2011 planning permission did not authorise the erection of wind turbines of the scale and dimensions actually put up. In circumstances where the wind farm is subject to the requirements of the EIA Directive, the proposed increase in rotor diameter constituted a "change" or "extension" of a permitted development, and could only have been lawfully authorised by way of the making of an application for planning permission.

171. The Developer is not entitled to rely on the alleged agreement of the planning authority to the compliance submission as providing authorisation for the "change" or "extension". On its correct interpretation, the decision-letter of 13 December 2013 does not have this effect. Moreover, the planning authority would not, in any event, have had jurisdiction to approve the "change" or "extension" pursuant to Section 34(5) of the PDA 2000.

172. The Developer should be afforded an opportunity to regularise the planning status of the wind turbines. It would be inappropriate, therefore, to make an order requiring the immediate removal of the wind turbines. Rather, the Developer is to be afforded a further reasonable period of time within which to seek, if possible, to regularise the planning status of the lands.

173. There will be an order made pursuant to Section 160 of the PDA 2000 restraining the operation of the wind turbines *pro tem*. The Developer has liberty to apply, on seven days' notice to the Applicants, to have this order vacated in the event that An Bord Pleanála makes a decision to grant leave to apply for substitute consent.

THE SUPREME COURT

Supreme Court Appeal No.: 167/18

Clarke C.J.
O'Donnell J.
McKechnie J.
Charleton J.
Irvine J.

IN THE MATTER OF SS. 50, 50A, AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN/

KLAUS BALZ AND HANNA HEUBACH

APPELLANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CORK COUNTY COUNCIL, CLEANRATH WINDFARMS LTD.

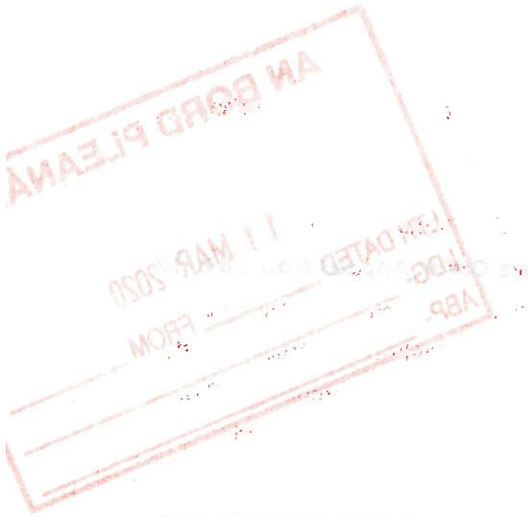
NOTICE PARTIES

Judgment of O'Donnell J. delivered the 12th day of December, 2019

1. The appellants, Klaus Balz and Hanna Heubach, have lived since 1992 at Bear na Gaoithe, County Cork, where they carry on a family horticulture nursery, flowers and gardening business. The second notice party, Cleanrath Windfarms Limited ("Cleanrath"), seeks permission to erect eleven turbines at Bear na Gaoithe. The appellants' house is 637 metres from the nearest proposed turbine.

2. Initially, Cork County Council granted permission for the development, but that permission was quashed by the High Court on judicial review for reasons which do not appear relevant to these proceedings. Subsequently, Cork County Council granted a further permission for six turbines only. This was appealed by Cleanrath, and cross-appealed by a number of objectors, including the appellants. An Bord Pleanála ("the Board") granted permission by a majority of 3:1 for eleven turbines at the site. The decision of the Board does not identify the Board members involved, the dissenting member, or the reasons for the dissent. It should not be assumed, however, that any division of opinion within the Board was in any way related to the very net issues which arise for determination on this appeal.

3. The appellants commenced judicial review proceedings which were heard in the High Court by Haughton J. A very large number of points were raised, and in a careful judgment, Haughton J. dismissed the challenge on each ground, and refused a certificate of leave to appeal to the Court of Appeal. This court granted leave to appeal on one issue only relating to the question of the application of guidelines under s. 28 of the Planning and Development Act 2000 (as amended) ("the 2000 Act"). As a result, this appeal has been focussed on a single issue which now emerges in sharp, and perhaps unrealistic,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relief having regard to the large number of other issues that were debated before the Board, and subsequently the legal issues addressed in the High Court.

4. Under s. 28 of the 2000 Act, the Department, which is now the Department of Environment, Community and Local Government, may issue guidelines for use by planning authorities and the respondent Board. The statutory obligation imposed on the planning authorities and the Board is to "have regard" to such guidelines. In this respect, standard s. 28 guidelines may be contrasted with policy guidelines issued under s. 29 of the Act, which planning authorities must implement. The clear distinction is blurred somewhat because of a subsequent amendment to s. 28 which provided that where guidelines were issued on matters of policy, they also must be followed. However, it is accepted for present purposes that what were in issue here were guidelines under s. 28 simpliciter, and that the obligation on the respondent Board was merely to "have regard" to them.

The Wind Energy Development Guidelines 2006 ("W.E.D.G.")

5. The Wind Energy Development Guidelines ("W.E.D.G." or "the guidelines") were issued under s. 28 in 2006. The guidelines constitute a comprehensive and impressive document dealing clearly and lucidly with the very many issues related to wind power developments. Only a portion of those guidelines deal with the question of noise which is central to the issue in this case. Para. 5.6 of the guidelines sets out guidance on that issue. Although not expressly acknowledged in the text itself, it is accepted by all parties that the technical section of this aspect of the guidelines was drawn in turn from a U.K. document entitled "The Assessment and Rating of Noise from Windfarms" issued by the Energy Technology Support Unit ("ETSU") of the Department of Trade and Industry U.K. a decade earlier, in 1996.

6. The W.E.D.G. observe at p. 29 that "[a]n appropriate balance must be achieved between power generation and noise impact". Indeed, that balance can be said to lie at the heart of this case. It is necessary to set out one portion of those guidelines in greater detail:-

> "In general, a lower fixed limit of 45 dB(A) or a maximum increase of 5dB(A) above background noise at nearby noise sensitive locations is considered appropriate to provide protection to wind energy development neighbours. However, in very quiet areas, the use of a margin of 5dB(A) above background noise at nearby noise sensitive properties is not necessary to offer a reasonable degree of protection and may unduly restrict wind energy developments which should be recognised as having wider national and global benefits. Instead, in low noise environments where background noise is less than 30 dB(A), it is recommended that the daytime level of the LA90, 10min of the wind energy development noise be limited to an absolute level within the range of 35-40 dB(A).
>
> Separate noise limits should apply for day time and for night time. During the night the protection of external amenity becomes less important and the emphasis should be on preventing sleep disturbance. A fixed limit of 43dB(A) will protect sleep inside properties during the night.

> In general, noise is unlikely to be a significant problem where the distance from the nearest turbine to any noise sensitive property is more than 500 metres."

A footnote also helpfully explains that the unit of measure of here is an "A" weighted decibel, which is a measure of the overall noise level of sound across the audible frequency range (20Hz-20 kHz) with A frequency weighting to compensate for the varying sensitivity of the human ear to sound at different frequencies. The decibel scale is logarithmic. A 10 dB(A) increase in sound level represents a doubling of loudness. A change of 3 dB(A) is the minimum perceptible under normal circumstances.

7. It is not in dispute that the key components of the guidelines in this respect, namely the use of an "A" weighted decibel for measurements, the recommendation of both fixed limits and an increasable background noise limit, the daytime fixed limit of 45 dB(A) and nighttime limit of 43 dB(A), and the observation that there should be no significant problem when the distance from the nearest turbine to any noise sensitive property is more than 500 metres, are all derived from the 1996 ETSU document.

8. The notice party submitted a very detailed Environmental Impact Survey ("E.I.S."). The noise and vibration portion was contained in chapter 9 and runs to 57 pages. At para. 9.2.2, the E.I.S. addresses the W.E.D.G., which it acknowledges is based in this respect on the ETSU document, and observes that, while the W.E.D.G. acknowledge that an appropriate balance must be achieved, the guidelines "give no specific advice in relation to what constitutes an '*appropriate balance*'", and "[i]n the absence of this guidance will be taken from alternative and appropriate publications". The E.I.S. identifies the 45 dB(A) daytime absolute limit and 43 dB(A) nighttime limit contained in W.E.D.G., and observes, however, that a previous planning permission from An Bord Pleanála for the site (which was still active at the time of preparation of the E.I.S.) imposed a flat limit of 43 dB(A).

9. The E.I.S. also made reference under the heading "Future Potential Guidance Changes" to proposed changes to the assessment of noise impacts as outlined in a Department document entitled *Proposed Revisions to Wind Energy Development Guidelines 2006 – Targeted Review in relation to Noise, Proximity and Shadow Flicker* (December 11, 2013). The E.I.S. recorded that a consultation process in relation to the document is currently being undertaken by the Department, and new formal guidelines had not been issued at the time of submission of the E.I.S. The consultation document, however, proposed amendments, the most significant of which was that a flat noise limit of 40 dB should be applied both day and night "in order to restrict noise from wind turbines at noise sensitive properties". The proposed approach, however, also suggested no noise limit at the properties of landowners with a financial interest in the proposed project. The E.I.S. also made reference to the assessment in the ETSU document and then proposed that:-

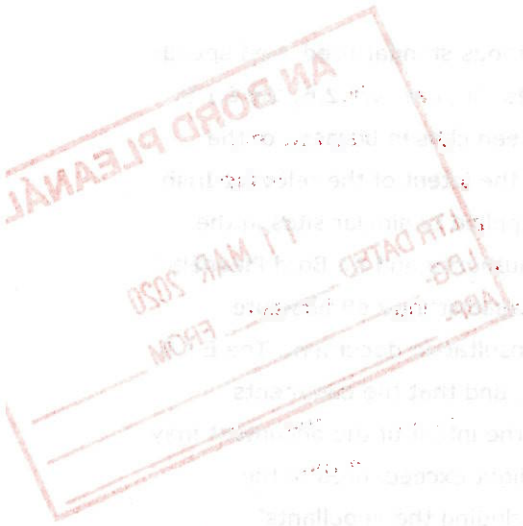
> "Due to the fact that there is a planning permission associated with the site for a development of a wind energy development, that if constructed, will operate the specific knowledge condition it is proposed to adopt a lower daytime threshold of 43 dB...in this instance."

10. The E.I.S. carried out detailed modelling of the noise at various standardised wind speeds at a number of locations, including the appellants' premises. At para. 9.4.2.6, the E.I.S. explained that the lower daytime threshold of 43 dB had been chosen because of the existing planning permission, and also "as it is in line with the intent of the relevant Irish guidance and is comparable to noise planning conditions applied to similar sites in the area previously granted planning permission by the local authority and An Bord Pleanála". At para. 9.4.2.7, the E.I.S. also modelled the noise levels against a 40 dB absolute criterion that had been put forward as part of the 2013 consultation document. The E.I.S. noted that they had been the subject of significant debate, and that the comments presented should be considered with the "knowledge that the intent of the document may change when finally published". That modelling noted "[s]light exceedances of the potential absolute noise criterion at some ten locations" including the appellants' property. The court was informed at the hearing of the appeal, by counsel for Cleanrath, that the technology adopted would permit the developer to comply with any limit, but these figures can be taken as indicating that the level of noise was a real and important one, as far as the appellants were concerned.

11. The appellants were represented in relation to the planning matter by Mr. Joe Noonan, a solicitor with experience in environmental matters. By letter of the 29th of June, 2016, he submitted the appellants' appeal to An Bord Pleanála, which set out a number of the objections raised by the appellants. In this regard, a booklet of enclosures was submitted with the letter supporting the grounds of appeal, and containing 35 enclosures. Of these, 19 appeared to be directed towards the question of noise.

12. The letter ran to 21 pages, with two further pages listing all the enclosures. The letter noted that the Board had previously granted permission for eleven turbines at the site, but that that permission had been quashed in the High Court by a judgment of Barton J. on the 25th of February, 2016, on the application of the appellants herein. The present application had been made prior to the determination of the High Court, and it was argued that accordingly it had been prepared without sight of the judgment, and without being in a position to have regard to the reasoning of the judgment. It was noted that the original application in 2012 had been refused by Cork County Council and that, in the material respects, the 2014 development plan contained the same objectives as those in the 2009 development plan which had been relied on in the refusal by Cork County Council.

13. The letter was a comprehensive challenge to the approach of the Board in respect of wind turbines. It was suggested that the 2006 guidelines rested on assumptions derived from the prevailing state of knowledge at the time they were drafted, but that the time had moved on and knowledge had evolved and the Department had publicly stated that the 2006 guidelines were not now fit for purpose in fundamental respects. The letter made reference to the public consultation notice published in 2013 by the Department in that regard and the proposed revisions issued by the Department, but not yet formally confirmed. It was argued that the initiation of the consultation process and the proposed revisions were a clear admission that the Department accepted that the 2006 guidelines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were not supported by robust or up-to-date evidence that enabled policy to be implemented in a manner which safeguards residential amenity. Radically different guidelines had been published by the Department, of which the Board was aware. It was argued that the fact that the 2006 guidelines were not robust or up-to-date was also evidenced by several expert studies which challenged what was described as the "old ETSU standard". Specific reliance is placed on an article by an acoustic consultant, Dick Bowdler. The letter asked the Board to read this article carefully, and to address it specifically in its written record.

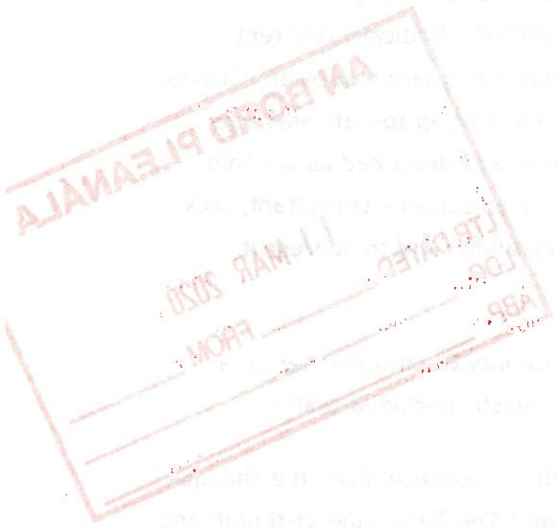
14. The letter also referred to a decision by the senior Cork County Council planner on a windfarm at Carrigareirk of the 22nd of February, 2016, which concluded that:-

> "the existing 2006 Wind Farm guidelines are not fit-for-purpose given the changes in wind turbine development over the past ten years: The 500m rule-of-thumb and fit-all set-back guideline is clearly not appropriate for turbines that stand at 140m and the height with a rotor cut covering 10,300 square metres; nor do I concur with the view that it should be normal planning practice to accept that property holders should accept up to 30 minutes a day of shadow flicker".

It was submitted the Board had no robust up-to-date evidence which would enable it to safeguard residential amenity from excessive noise or shadow flicker, and that the Board could not grant permission for this application in reliance on the 2006 guidelines so far as the issues of noise, shadow flicker, and separation distance are concerned. The letter challenged as fundamentally flawed the noise condition typically imposed by the Board, which only limited noise measured using the dB(A) weighted filter. Again, reliance was based on the paper written by Mr. Bowdler. It was also suggested that international planning and regulatory practice had already evolved and that in Germany, where some of the most advanced wind turbine manufacturers were located, Bavaria had adopted a minimum separation distance of 10 times tip-height for large industrial wind turbines and, more recently, Poland had adopted a two-kilometre separation distance. The Bavarian policy would mean a separation of 1,500 metres from people's homes. The letter went on to make a series of other points about public health and safety, public consultation, policy, zoning, and the Cork Development Plan.

15. It should be said that the document upon which most reliance was placed in the letter was the article by Mr. Bowdler of July, 2005, which predated the adoption of the guidelines. However, the appellants also referred to documents from 2012 and 2014.

16. The Inspector's Report is dated the 18th of November, 2016, and runs to 96 pages. It is a comprehensive and impressive document and the precise concentration on the issue of turbine noise and the W.E.D.G. guidelines that have been the necessary focus of this case does not give a fair reflection of the breadth of the document. There was limited reference to the appellants and the question of noise. The letter of the 23rd of June, 2016, from the solicitors on behalf of the appellants was noted as one of the four third party appeals made to the Board. The issues were summarised generally in bullet points, and the bullet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points which appear referable to the issues raised by the appellants in respect of the guidelines were as follows:-

- "The Board is biased in favour of wind farm developments just because of National Policy in favour of renewable energy. However, there are also National Policies in favour of promoting sustainable rural enterprise and preserving viable lifestyles supportive of the rural economy.
- The 2006 Wind Farm Guidelines are out of date, and were from a time when wind turbines were smaller. The noise condition recommendation is outdated (derived from an old ETSU-R-97 standard). The Board should have regard to the Targeted Review of the Wind Energy Guidelines 2013."

17. The Inspector's Report noted that the four appeals were accompanied by documentation and, again, for present purposes, the relevant documentation noted appears to be the following:-

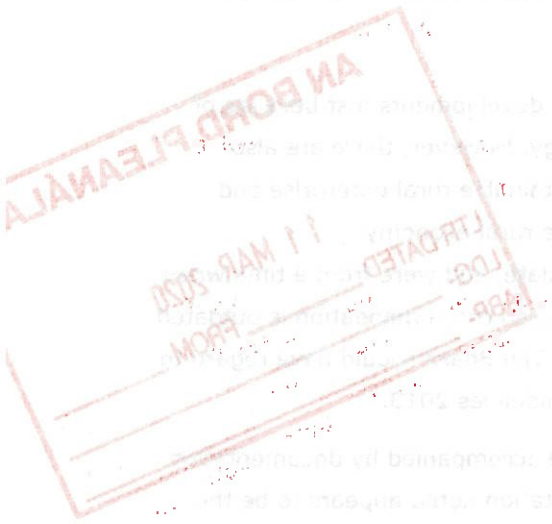
- "Proposed Revisions to Wind Energy Guidelines ...
- Series of Public Health & Safety studies in relation to noise and particular wind turbine models – including photographic examples of accidents in wind farms in Ireland.
- Irish Academy of Engineering submission (July 2014) on the review of National Energy Policy as set out in the "Green Paper on Energy Policy in Ireland"."

18. The developer's response to the appeals was noted. Again, the relevant bullet points appear to be the following:-

- "The EIS was prepared in line with all relevant guidance. The Council was satisfied that the EIS complied with Article 94 and Schedule 6 of the 2001 Planning Regulations.
- The development has the potential, if required, to comply with the stricter noise guidelines set down in the 2013 Targeted Review of the Wind Energy Guidelines 2006."

19. Para. 10.8.2 of the Inspector's Report dealt with the W.E.D.G. It set out in detail the portion of the guidelines already quoted above and then continued:-

> "The 2006 Guidelines are based on the UK Department of Trade & Industry, Energy Technology Support Unit (ETSU) publication "The Assessment and Rating of Noise from Wind Farms" (1996). Claims by objectors that this ETSU publication is out-dated and not fit for purpose is not a relevant planning consideration. The 2006 Guidelines are as they are, and remain in force. Proposed changes to these guidelines, outlined in the Department of Environment, Community & Local Government "Proposed Revisions to Wind Energy Development Guidelines 2006 – Targeted Review in relation to Noise, Proximity and Shadow Flicker" (December 2013), have not yet been adopted. The applicant notes that the 2013 revision proposes a noise limit of 40dB LA90, 10 min which should be applied to noise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sensitive properties – as measured outside such properties. The limit would apply day and night, and would not apply at properties of those with a financial interest in the wind farm." (emphasis added).

While it will be necessary to return to this in more detail, it may be noted at this point that this case has, to a large extent, consisted of rival arguments as to what was meant by the passage underlined.

20. It was noted that Cleanrath had adopted and proposed a standard for the development of 43 dB for both daytime and nighttime environments, but a 45 dB limit for both daytime and nighttime in relation to the houses of landowners who were participants in the proposed development. At para. 12 of the Report, the Inspector recommended that permission be granted for the eleven turbines for reasons and considerations set out, and subject to proposed conditions. The reasons and considerations had regard at para. (b) to "the provisions of the "Wind Energy Development Guidelines – guidelines for planning authorities" issued by the Department of the Environment Heritage and Local Government in 2006". No reference was made to the 2013 proposed revisions. Proposed Condition No. 6 provided that the wind turbine noise should not exceed the greater of (a) 5 dB(A) above background noise levels, or (b) 43 dB(A) L90 10 min when measured externally at dwellings or other sensitive receptors. It will be noted, therefore, that the Condition adopted the flat 43 dB(A) limit proposed by the developers, and extended that to all dwellings, irrespective of their ownership. Otherwise the developer's proposal was adopted and, it appears, the appellants' submission rejected.

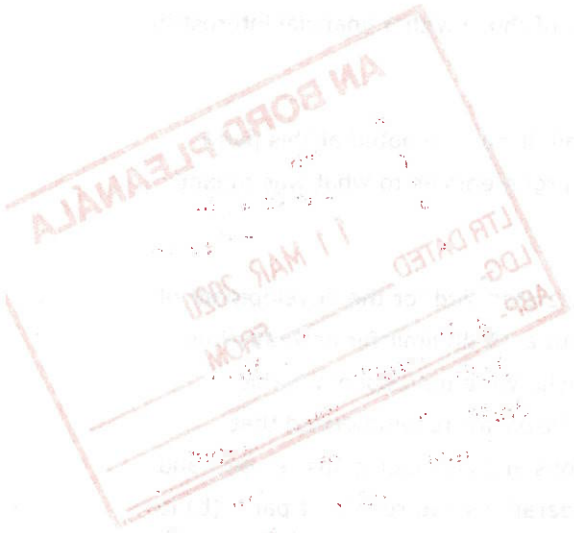
21. The submissions and Inspector's Report were considered by the Board at its meeting held on the 25th of April, 2017. It is recorded in the Board's direction that it decided by a 3:1 majority to grant permission generally in accordance with the Inspector's recommendations, and subject to reasons, considerations and conditions set out. Again, it was recorded that the Board had regard to inter alia, the provisions of W.E.D.G. Condition No. 7 of the Board's decision was identical to Condition No. 6 proposed by the Inspector. The formal decision issued on the 19th of May, 2017, and was in similar terms in respect of noise. Under the heading "Matters Considered", it was stated:

> "[i]n making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions".

Again, it was noted that the Board had regard to the 2006 W.E.D.G.

Judicial Review Proceedings

22. Judicial review proceedings were commenced. A statement of grounds raised a wide number of issues. Once again, it is only necessary to consider the issue in relation to noise, and in particular the treatment of the W.E.D.G. guidelines, albeit that the isolation of this issue may give a misleading impression as to the breadth of the matters raised.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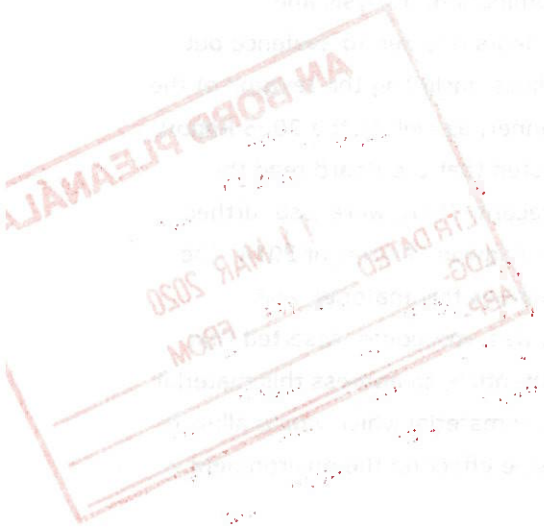
23. At para. 18 of the Statement of Grounds, the appellants referred to the fact that material had been put before the Board "describing [and] establishing the profound effects of noise from Wind Farms of the type proposed in this case... and/or raising issues which required investigation, identification, description, assessment, examination, analysis and evaluation, finding or conclusion". In particular, the appellants referred to evidence put before the Board, much of it post-dating the 2006 Guidelines, including the revision of the guidelines in 2013, the report of Cork County Council planner, as well as the 2005 Report by Mr. Bowdler, and noted that the appellants had requested that the Board read the paper research, and address it specifically in its written record. There were also further noise studies and other material, including the Large and Stigwood Report of 2014. The appellants noted that they had requested the Board to address this material, and contended that the Board was not entitled to ignore it. It was, moreover, asserted that the Inspector having failed, at least in the appellants' contention, to address this material and record his decision upon it, the Board did not have any material which would allow it conclude that the windfarm would not have an unacceptable effect on the environment in the form of noise.

24. At para. 23 of the Statement of Grounds, it was alleged that neither the E.I.S., the Inspector's Report, nor the Board's impugned decision performed or recorded any investigation or assessment of noise from the windfarm, and ignored and/or failed to take into consideration the material tendered by the appellant, which, it was alleged, demonstrated the likelihood or credibly raised the issue of profound impact of the said noise on the appellants, their home and family. Para. 24 alleged that the Board, in breach of its obligations, relied on the 2006 Guidelines in concluding that there were no adverse impacts on the residential amenity.

25. There followed a specific plea which, I think, it is useful to record *verbatim*:-

"(a) In advising the Board that the 2006 Guidelines could be applied, the Inspector determined, without any reference to the original research, reports, evidence and literature furnished by the applicants, that the applicants objection that the 2006 Wind Energy Guidelines and the ETSU publication on which they were based were outdated and not fit for purpose "*is not a relevant planning consideration. The 2006 Guidelines are as they are and remain in force*". The Board adopted this conclusion in adopting their Inspectors report.

- This conclusion constituted a fundamental error of law.
- The 2006 Guidelines remain in force and the Board was merely obliged at law to have regard to those guidelines.
- The Board was, in principle, entitled to, but not obliged to apply those guidelines.
- Accordingly, submissions that the guidelines should not be applied and the reasons and evidence on which such submissions were based were
    - Relevant planning considerations
    - Relevant EIA considerations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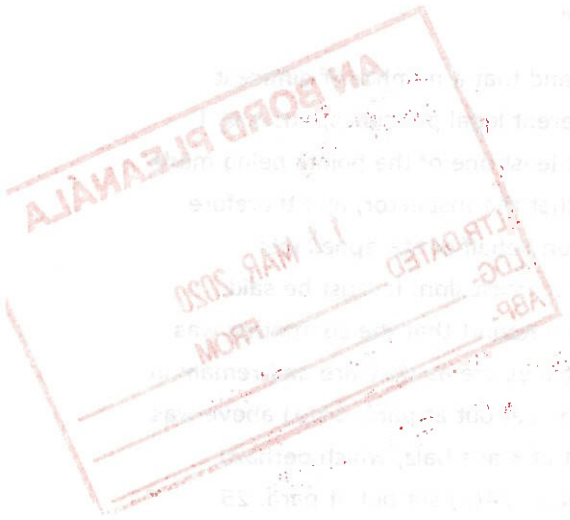
- Accordingly, neither the Board nor the Inspector was entitled to dismiss as irrelevant or to ignore (as the Inspector explicitly did by deeming them irrelevant) criticisms of those guidelines and evidence supporting such criticisms of those guidelines. The Board was entitled, I understand, to decide against such criticisms, but not to ignore them – as it did, thereby failing to take relevant considerations into account."

26. I appreciate that the Statement of Grounds is diffuse, and that a number of different contentions are raised, sometimes by reference to different legal principles, but it is, I think, tolerably clear from the above paragraph that at least one of the points being made on behalf of the appellants was that it was suggested that the Inspector, and therefore the Board, had not considered the material submitted on behalf of the appellants contending that the 2006 Guidelines were out of date; a conclusion, it must be said, which was derived from the statement in the Inspector's Report that the contention was "not a relevant planning consideration. The 2006 Guidelines are as they are and remain in force". Furthermore, it is noteworthy that the contention set out at para. 24(a) above was repeated almost verbatim at para. 19(i) of the affidavit of Klaus Balz, which perhaps explains the incongruous reference "I understand" in para. 24(a) set out at para. 25 above.

27. It is unfortunate that the contention made and cited above does not appear to have been directly engaged with in the Board's Statement of Opposition. Thus at para. 5, it said: "[n]or is it correct to allege (as alleged at F.18) that the Board failed to have regard to the submissions before it". Paras. 9 and 10 of the Statement of Opposition are particularly relevant:-

> "9. Whereas the Applicants challenge the lawfulness of the Board having regard to the Wind Energy Development Guidelines 2006, the Board was obliged to have regard to same in accordance with *inter alia* s. 28 of the PDA. Therefore, whereas the Applicants are of the view that same are not "fit for purpose" they remain guidelines to which the Board must have regard.
>
> 10. The pleadings in F24 are somewhat difficult to understand, and, indeed, appear to mistakenly contain the text of an averment therein. However, as best that can be understood, it would appear that the Applicants' complaint is, again, that the Board was not entitled to have regard to the Wind Energy Development Guidelines with regard to (it is assumed) issues of noise. In this respect, the Board relies on the above pleas and restates that the Board had determined that the proposed development will be acceptable in terms of noise impact within the threshold set out in condition 7. This was a determination the Board was entitled to reach, and the Board was, indeed entitled to (and required to) have regard to the guidelines."

28. A grounding affidavit was sworn by the secretary of the Board which exhibited a small amount of additional documents setting out a chronology of events, and suggested that the first-named appellant's affidavit was, in effect, legal submissions. The affidavit did deal in some detail with the question of confusion as to maps submitted for the purpose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of the appeal and markings thereon. The affidavit does not contain, however, any statement as to the approach either the Inspector or the Board took to the criticisms of the 2006 Guidelines, and the materials submitted in support of those criticisms. Nor, indeed, does the affidavit state what the Board understood the Inspector to have meant by the two sentences at para. 10.8.2 of his report, as highlighted at para. 18 above, and which it is worth recalling at this point:-

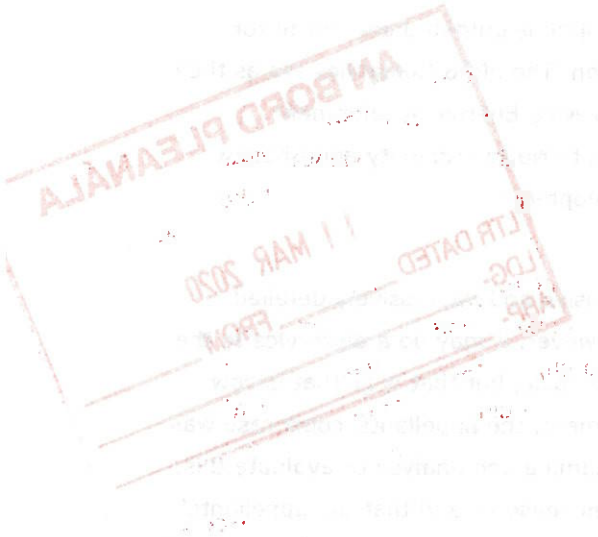
> "claims by the objectors that this ETSU publication is outdated and not fit for purpose is not a relevant planning consideration. The 2006 Guidelines are as they are and remain in force. Proposed revisions to Wind Energy Development Guidelines 2006 – Targeted Review in Relation to Noise Proximity and Shadow Flicker (December 2013) have not yet been adopted."

The High Court Judgment

29. The High Court (Haughton J.) delivered a comprehensive and impressively detailed judgment on the 30th of May, 2018. Once again, however, it may do a disservice to the judgment to select only the portion of it dealing with noise, but that is all that is now relevant to the proceedings. At para. 30 of the judgment, the appellants' court case was described as a contention that "the Board did not examine and analyse or evaluate this literature, or take proper account of it, or record their reasons, and that the appellants' submissions were deemed by the Inspector and the Board not to be relevant". At para. 32 of the judgment, the point is described as follows:-

> "The complaint of the applicants in relation to the manner in which the EIA was conducted relates to the use of the WEDG 2006 which they contend are outdated and no longer fit for purpose. The applicants point out that the WEDG 2006 have been under ministerial review since 2013. While not suggesting that the ministerial review of the WEDG 2006 was a basis for contending that the Board should have disregarded the guidelines altogether, they submitted (a) that the Board was not bound by the WEDG 2006, but merely must have regard to them, and (b) flowing from this, that the Board was obliged to take into account and evaluate any evidence presented which indicated that the guidelines were inappropriate or outdated or not suited to the particular planning application. This evidence should have been balanced with the WEDG 2006 and an assessment, analysis and examination of all evidence should have been conducted before any decision was taken. Instead, the Inspector's report explicitly states in response to the evidence proffered that the suitability of the WEDG 2006 or any evidence indicating that they are outdated or not fit for purpose "is not a relevant planning consideration. The 2006 Guidelines are as they are and remain in force." One important feature of the WEDG 2006 being adopted by the Board, allegedly without any proper consideration of contradictory information, is that the WEDG 2006 set a maximum noise level limit of 43dBA whereas the newer guidelines subject to ministerial review recommend a maximum noise level limit of 40dBA."

30. The reference to W.E.D.G. 2006 containing a maximum noise level of 43 dB(A) should be to a 45 dB(A) limit for daytime and 43 dB(A) for night. However, subject to this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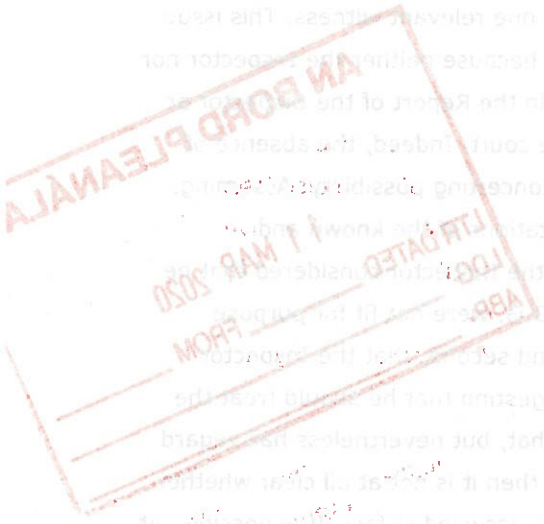
clarification, the paragraph in the judgment fairly sets out what I would have understood to be the appellants' case in this regard if reading the papers for the first time.

31. At para. 42 of the judgment, the Board's replying contention is set out. It submitted, in reliance on a previous decision in *Element Power Ireland Ltd. v. An Bord Pleanála* [2017] IEHC 550, that the court had found that there was no obligation on the Board to apply or make decisions on the basis of the 2013 Guidelines which had not yet taken effect, and that the Board was entitled, and indeed obliged, to take W.E.D.G. 2006 into account. At para. 70 of the judgment, the learned trial judge observed that, fundamentally, the appellants asked the court "to impose on the Board (and by extension planning authorities) an obligation to consider, assess and evaluate the general science around wind farm turbine noise emissions, and to reject the currency of ETSU-R-97 and the W.E.D.G. 2006 and apply some new science to the assessment of noise affect, particularly on humans". The judgment considered that it was not the function of the Board to determine matters of policy where specific statutory guidance had been given. It was difficult to see how, without conducting its own research, the Board could come to a fully reasoned policy decision sufficient to override a statutory guideline. In particular, at para. 72 of the judgment, the judge noted:-

> "The Board's decision does not indicate that it examined, analysed or evaluated the scientific materials upon which Mr. Noonan's submission that the ETSU-R-97/WEDG 2006 were outdated/not fit for purpose. The statements in the Inspector's report at 10.8.2 demonstrate a cursory consideration of that claim, but are such as to persuade the court that that the Board probably did not examine, analyse or evaluate those materials in the context of EIA because they were not considered to be "a relevant planning consideration". Instead it is clear that the Inspector and hence the Board applied the WEDG 2006 in carrying out EIA. While there may be much that is cogent and persuasive in the scientific material presented by Mr. Noonan, it must be concluded for the reasons just given in the preceding paragraphs that the Inspector was entitled in law to state that a claim that ETSU-R-97 was out-dated and not fit for purpose "is not a relevant planning consideration", and that "The 2006 Guidelines are as they are and remain in force." It follows that the Board was not required to evaluate and assess the competing scientific research/papers that would tend to undermine ETSU-R-97 and the ongoing use of WEDG 2006 as a guideline."

32. Haughton J. also delivered a judgment on the appellants' application for leave to appeal to the Court of Appeal. For present purposes, it is noteworthy that at para. 15 thereof he describes the Inspector as concluding that the appellants' submission "was "not a relevant planning consideration" and I found that this was the reason why the Board did not engage in detailed analysis of the scientific papers". In a footnote, the learned judge also noted that, by contrast, the Inspector had considered scientific papers insofar as they concern the phenomenon of "amplitude modulation".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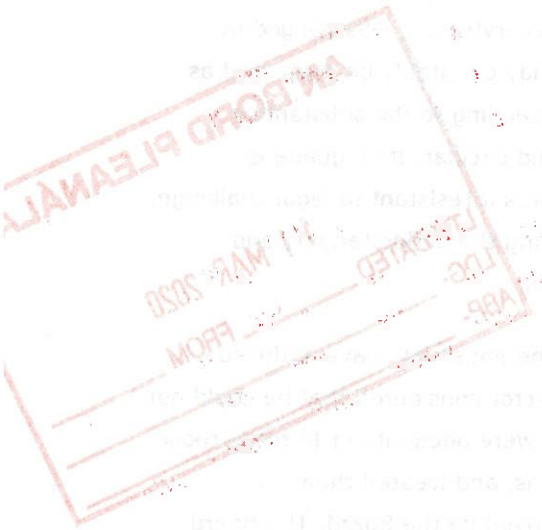
46. It is unsettling, for example, that when an issue arises where it is suggested that the Inspector (and therefore the Board) has not given consideration to a particular matter, it should be met by the bare response that such consideration was given (for a limited purpose) and "nothing has been proven to the contrary". Similarly, while the introductory statement in the Board's decision that it has considered everything it was obliged to consider, and nothing it was not permitted to consider, may charitably be dismissed as little more than administrative throat-clearing before proceeding to the substantive decision, it has an unfortunate tone, at once defensive and circular. If language is adopted to provide a carapace for the decision which makes it resistant to legal challenge, it may have the less desirable consequence of also repelling the understanding and comprehension which should be the object of any decision.

47. In this case, I would limit myself to the conclusion that the appellants have adduced sufficient evidence to lead to the inference that the Inspector considered that he could not entertain submissions directed to whether the guidelines were adequate or fit for purpose or not, and accordingly that he discounted the submissions, and treated them as irrelevant, and that that approach was adopted and approved by the Board. The Board has not produced, in this case, any evidence which rebuts that inference.

48. It follows from this conclusion, in my view, that the Board's approach was in error. It might reasonably be asked what the purpose of any s. 28 guideline is. It seems obvious that such guidelines are produced to avoid the possibility of inconsistent decisions between different planning authorities in different areas. Such guidelines also deal with technical issues and avoid considerable duplication of effort in respect of that issue, which could, moreover, be the subject of differing views, and therefore the possibility that individual planning authorities or the Board might be persuaded by one expert rather than another. If no guidelines were issued on a particular technical question, then the planning authority and the Board, on appeal, would be obliged to conduct some sort of assessment of what could be quite detailed and complex scientific matters. When guidelines are produced, then a planning authority and/or the Board must have regard to them, and can legitimately take them as the starting point, and in most cases the finishing point, of any consideration of the technical issue covered in the guidelines.

49. However, it is inevitable that, particularly where guidelines deal with matters of technology or science, the knowledge in that field may develop, or that the experience of application of the existing guidelines to particular circumstances produced greater knowledge and insight. What is to occur then?

50. In my view, it is absolutely clear that it is open to a party, whether seeking or resisting permission, to put before a planning authority and/or the Board information, material and submissions suggesting that the decision-maker should depart from the guidelines to a greater or lesser extent. This is not only what the appellants did through their solicitor's letter of the 29th of June, 2016, but is also manifestly what the developer did in referring, prudently in my view, to the 2013 Review, and also in the manner in which reference was made to the 2006 W.E.D.G. and the ETSU documents.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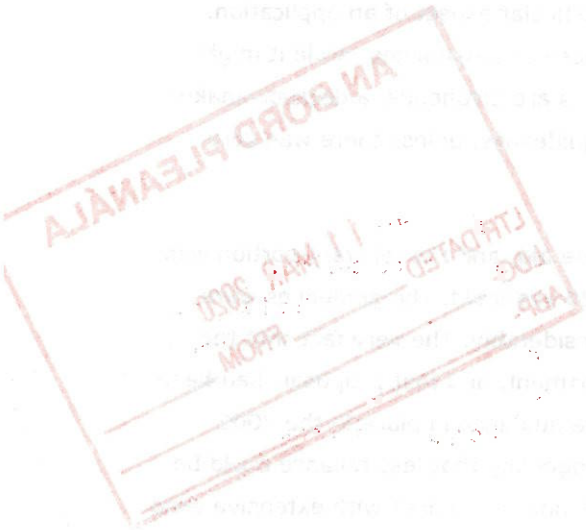
51. A decision-maker must engage with such a submission, and if there is evidence that there is a consensus that the guidelines are no longer widely accepted within the relevant expert community, then that should lead to a reduced reliance on the guidelines as, in themselves, sufficient to ground a decision on any particular aspect of an application. Eventually, new guidelines will be promulgated. In those circumstances, while it might still be open to a party to maintain that such guidelines are erroneous, a decision-maker would be justified in being slow to depart from new guidelines, unless there was very convincing evidence that they were in error.

52. Here, the relevant guidelines were more than a decade old, and the relevant portion was based on the ETSU document which was more than 20 years old. The guidelines were given in an area where knowledge was advancing considerably. The very fact that the process of review had been commenced by the Department, and that proposals had been made suggesting that a significant departure from the guidance in place in the 2006 W.E.D.G. were, in themselves, significant matters suggesting that less reliance could be placed on the W.E.D.G. The fact that a senior local planner in an area with extensive wind turbine development, had considered that the guidelines were not fit for purpose is another feature which could not be discounted. These matters suggested, at a minimum, that what was advanced on behalf of the appellants was not merely one rather eccentric side of an academic controversy, but rather something which was required to be considered.

53. One thing that is beyond dispute, even in the context of the fractious engagement between the parties in this case, is that *something* was considered irrelevant by the Inspector, and therefore necessarily excluded from consideration by him (and, by extension, the Board). It seems tolerably clear to me that he considered that the contention made by the appellants, that the 1996 ETSU was outdated and not fit for purpose, was an irrelevant planning consideration. It must follow that he did not address that issue or any of the material advanced in support of the appellants' contention. In stating that the 2006 W.E.D.G. "are as they are and remain in force" and that the 2013 Review "has not yet been adopted", it seems clear that he considered that the 2006 W.E.D.G. and the 1996 ETSU were the only guidance to which regard could be had and excluded from consideration any argument whether the guidelines were outdated, or that regard could be had to the 2013 proposals. If this was the approach the Inspector took – and I think it was – then it was wrong in law, and meant unavoidably that he had excluded from his decision-making relevant considerations. It follows that the Board's decision, being based on the Inspector's report must be similarly flawed.

54. The High Court judge in his admirable, comprehensive, and careful survey of a complex issue in this case did not come to this conclusion. The reasoning of the learned judge is contained, in essence, in para. 71 of his judgment. He considered that while, if there was no national or local policy, the Board might be required to decide an issue of policy, that otherwise it was not a function of the Board to determine matters of policy where specific statutory guidance had been given and was extant. The Board, while an expert body, was not designed or intended to assess and evaluate policy matters.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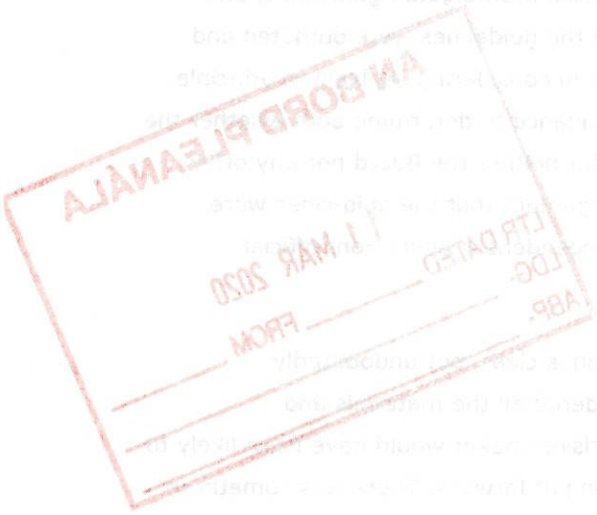
55. I sympathise with much of what is said in this passage, but in my view it leads to the wrong conclusion. These were not policy guidelines. If they were, they would be mandatory and the Board would have been obliged to follow them rather than merely have regard to them. If so, the Board must at least consider submissions to the effect that little weight should be placed on the guidelines. In doing so it is not determining a matter of policy. It is deciding an appeal before it by reference to all relevant considerations, including the guidelines. It is common sense that the Board, or any planning authority, would be slow to depart from official promulgated guidelines, and even in cases where there is a substantial argument the guidelines were outdated and required to be replaced, the Board might be justified in considering, at least in principle, that it would be a matter for the body issuing the guidance to determine both whether the guidelines should be updated and in what respect. But neither the Board nor any other planning authority could exclude as irrelevant the argument that the guidelines were outdated, particularly when that had substantial independent support from official sources.

56. To return to a theme of this judgment, this distinction is clear, but undoubtedly frustrating. It must be doubtful that if, having considered all the materials and submissions made on behalf of the appellants, a decision-maker would have been likely to accept them, and certainly the more extreme version put forward. There was something of a scattergun approach about the submissions and the voluminous material landed on the Inspector as appendices to the letter of the 29th of June, 2016. No report from any expert, still less an expert of standing in the field, was produced either by reference to the specific application made or the more general scientific contentions. As the judge observed, there was no reason to assume that the material submitted was representative of a scientific consensus, or that it would not be possible to have a similarly selective exercise which might produce an equal amount of opposing views. In the circumstances, it would not have been unreasonable to continue to give weight to the existing guidelines, and to be slow to depart radically from them.

57. However, this was not what was done here. Instead, the submission was rejected *in limine* on the basis of a determination that the matters contained therein were irrelevant. It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live. I consider, therefore, that it is necessary to quash the decision of the Board granting permission in this case. In the circumstances, I would hear counsel as to what ancillary orders should be made, and in particular whether it is possible or desirable to remit the matter to the Board, and if so, at what stage of the decision-making process.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THE HIGH COURT

COMMERCIAL

[2019] IEHC 888

[2019 No. 63 J.R.]

BETWEEN

SLIABH LUACHRA AGAINST BALLYDESMOND WINDFARM COMMITTEE

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

SILVERBIRCH RENEWABLES LIMITED AND KERRY COUNTY COUNCIL

NOTICE PARTIES

JUDGMENT of Mr. Justice Denis McDonald delivered on 20th December, 2019

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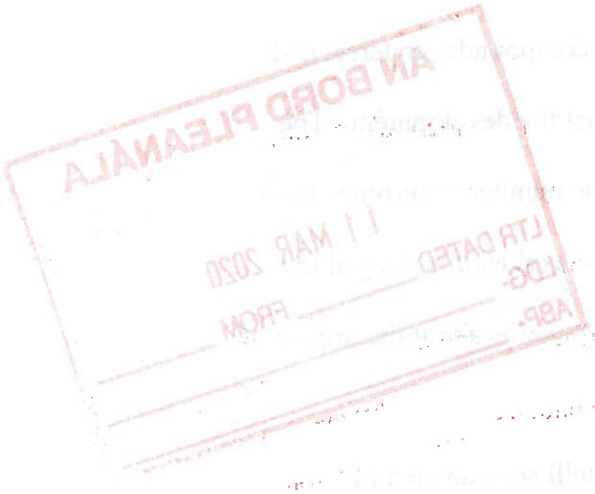
Introduction

1. In these proceedings the applicant seeks to challenge a decision of the respondent dated 27th November, 2018 granting planning permission for the construction of a windfarm and associated works on elevated ground between the villages of Gneeveguilla, County Kerry and Ballydesmond, County Cork. The application for permission for the proposed windfarm development envisaged the erection of fourteen turbines with a rotor diameter up to 120m and a blade tip height of up to 150m above ground level, two permanent meteorological masts, two medium voltage substations, one high voltage substation, thirteen site entrances comprising seven new site entrances and six upgraded site entrances, three barrow pits and adjacent repositories, the provision of new and upgraded internal site service roads and surface water management measures, temporary site compounds, underground cabling and associated infrastructure necessary to construct the development. The respondent, in its decision to grant permission, reduced the number of turbines from fourteen to twelve. As described in more detail below, the exclusion of two of the turbines from the development was largely prompted by concerns about the impact of those particular turbines on the hen harrier.

2. If allowed to proceed, the proposed development will span an area of approximately 96 hectares and will extend across 15 individual land holdings. The site is located to the west of and sloping towards the upper reaches of the Blackwater river valley. The southwestern extent of the proposed site is located close to the watershed between the Blackwater river and Laune river catchments. The site is drained by a number of tributaries of the river Blackwater including the Tooreengarriv/Carhoonoe, Mountinfant and Reansup streams. Although the site is located close to the watershed between the Blackwater and Laune catchments, all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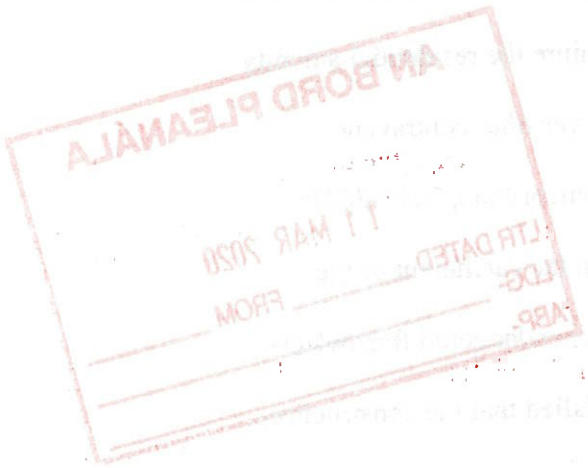
drainage serving the proposed infrastructure will be designed to discharge via the Blackwater catchment with one minor exception which is not relevant for present purposes.

3. The developer is the first named notice party namely Silverbirch Renewables Ltd *("Silverbirch")*. Its application for planning permission for the proposed development was rejected by the County Council (the second named notice party) *("the County Council")* on 30 May, 2017 for the following reasons:-

(a) In the first place, having regard to the extent, size and scale of the turbines the County Council considered that the development would create a significant visual intrusion in the landscape by reason of the height and spatial extent of the proposed turbines which would be excessively dominant and visually intrusive. The County Council took the view that the development would therefore seriously injure the residential amenity and visual amenities of the area and would, *inter alia*, contravene Objective ZL-1 of the Kerry County Development Plan, 2015-2021;

(b) Secondly, noting that the site is located within the catchment of the Blackwater river which provides a home to the endangered freshwater pearl mussel, the County Council was not satisfied that the construction would not cause pollution of local water courses;

(c) Thirdly, the County Council took the view that two of the turbines (namely T8 and T9) are located within an area known as Barna Bog used by hunting hen harriers which may breed in the nearby Stacks Mullaghareirk Mountains, West Limerick hills and Mount Eagle Special Protection Area *("The Stacks SPA")*. In particular, the County Council considered that the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proposed development would cause the loss of hen harrier hunting habitat which would have a significant adverse effect on the Stacks SPA.

4. Silverbirch appealed the refusal of Kerry County Council to the respondent. In turn, the respondent appointed an inspector to review the matter and prepare a report with recommendations. The inspector conducted an analysis of the proposed development and reported with a recommendation that planning permission might be granted by the respondent for a development comprising twelve of the proposed turbines but excluding turbines T8 and T9. Thereafter on 23rd November, 2018 the respondent, by direction of that date, decided to grant permission. The relevant decision to grant subsequently issued on 27th November, 2018.

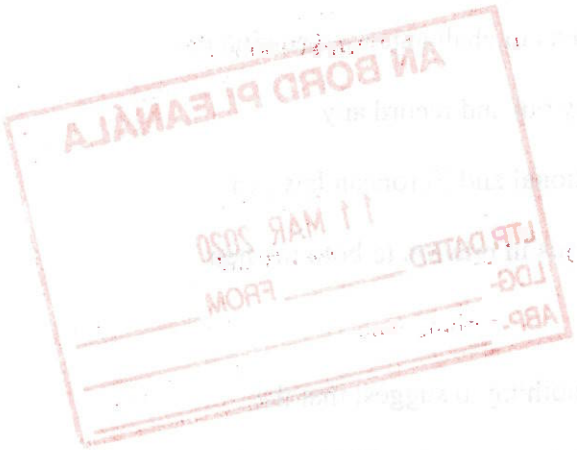
The grounds of challenge

5. The applicant seeks to challenge the decision of the respondent to grant permission for the development on the following grounds:-

(a) The principal ground on which the applicant seeks to challenge the decision of the respondent is that there was a failure to carry out and record any Appropriate Assessment in accordance with national and European law. In making this case, the applicant has raised concerns in relation to both the hen harrier and the freshwater pearl mussel;

(b) Next, the applicant makes the case that there is nothing to suggest that the respondent carried out an Environmental Impact Assessment *("EIA")*. In this context, although the issue is addressed in the report of the inspector appointed by the respondent, neither the direction nor the decision of the respondent record that the respondent carried out an EIA;

(c) Thirdly, the applicant contends that, in granting permission for the proposed development, the respondent has contravened s. 37 (2) of the Planning and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Development Act, 2000 (*"the 2000 Act"*) in circumstances where (so the applicant contends) the proposed development materially contravenes the Kerry County Development Plan (*"the development plan"*).

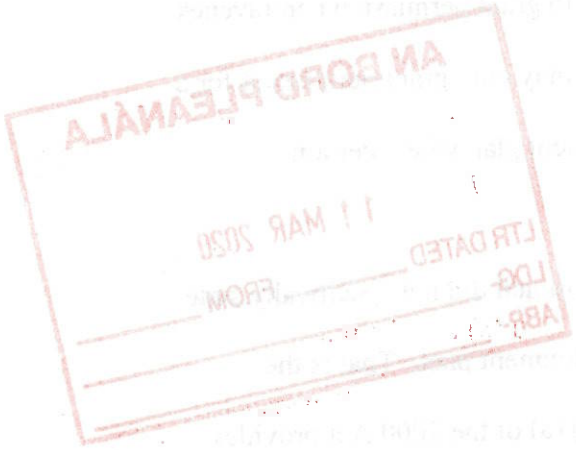
6. In circumstances where the third of those issues is very net and can be disposed of briefly, I propose to deal with that issue first. Thereafter, I will address the first and second issues listed in para. 5 above.

Material contravention of the development plan

7. As noted above, one of the three grounds on which the County Council refused permission for the proposed development was that it would contravene Objective ZL-1 of the development plan. According to that plan, the purpose of Objective ZL-1 is to protect the landscape of County Kerry as a major economic asset and an invaluable amenity which contributes to the quality of peoples' lives. The applicant contends that the decision of the respondent to grant permission contravenes s. 37 (2) of the 2000 Act. Under s. 37, the respondent may only grant permission for a development which materially contravenes a development plan where certain conditions (described in para. 9 below) are met.

8. It is important to note that, in its decision, the council did not specifically state that the development **materially** contravened the development plan. That is the language which is used in the 2000 Act. Section 37 (2) (a) of the 2000 Act provides as follows:-

> *"(2) (a) Subject to paragraph (b), the Board may in determining an appeal under this section decide to grant a permission even if the proposed development contravenes materially the development plan relating to the area of the planning authority to whose decision the appeal relates."*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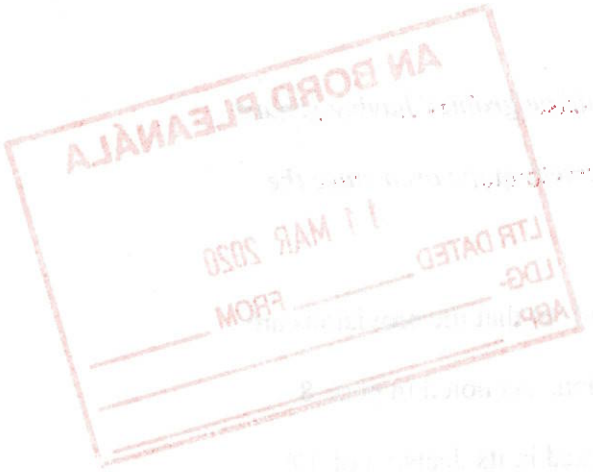
9. The power given to the respondent by s. 37 (2) (a) is significantly qualified by the provisions of s. 37 (2) (b) which are in the following terms:-

> *"(b) Where a planning authority has decided to refuse permission on the grounds that a proposed development materially contravenes the development plan, the Board may only grant permission in accordance with paragraph (a) where it considers that—*
>
> *(i) the proposed development is of strategic or national importance,*
>
> *(ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned, or*
>
> *(iii) permission for the proposed development should be granted having regard to regional spatial and economic strategy for the area, guidelines section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government, or*
>
> *(iv) permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan."*

10. It will be seen from the language of s. 37 (2) (a) and (b) that the provisions are concerned with material contravention of a development plan. As noted in para. 8 above, that is not the language which the County Council used in its decision of 30th May, 2017 to refuse permission. The relevant reference to the County Development Plan is in fact rolled up with a number of other considerations. The relevant reason is in the following terms:-

> *"Having regard to the spatial extent, size and scale of the proposed turbines relative to the nature of the receiving environment of hilly and flat farmlands*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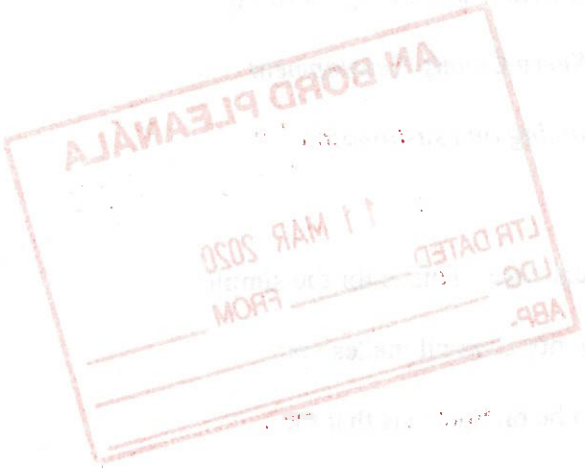
and transitional marginal landscapes, it is considered that a windfarm development of the scale proposed would create a significant visual intrusion in this landscape by reason of the height and spatial extent of the proposed turbines which would be excessively dominant and visually obtrusive when viewed from the surrounding countryside and villages. The proposed wind farm would have a significant impact on the value and character of the landscapes in the area and would seriously injure the amenity and quality of life of communities and individuals who dwell in the area. The proposed development would, therefore, seriously injure the residential amenities and visual amenities of the area, would be contrary to the provisions of the Wind Energy Guidelines... and Section 7.4.5.15 of the Renewable Energy Strategy 2012, would contravene Objective ZL-1 of the Kerry County Development Plan... and would be contrary to the proper planning and sustainable development of the area".

11. In my view, s. 37 (2) is not engaged in the present case. This is for the simple reason that, as the text of the reason relied on by the County Council makes very clear, the decision to refuse permission was not stated to be on the basis that the development would materially contravene the development plan. I can therefore see no basis to distinguish the present case from the circumstances addressed by Haughton J. in *People Over Wind v. An Bord Pleanála* [2015] IEHC 271. In that case, Haughton J. dealt with the issue as follows at para. 270:-

"270. In refusing to grant permission, the planning authority did not use the phrase 'materially contravene' when outlining that the development would breach objective NH13/001 of the Laois County Development Plan ... - it merely refers to 'contravene'. This important distinction was recognised by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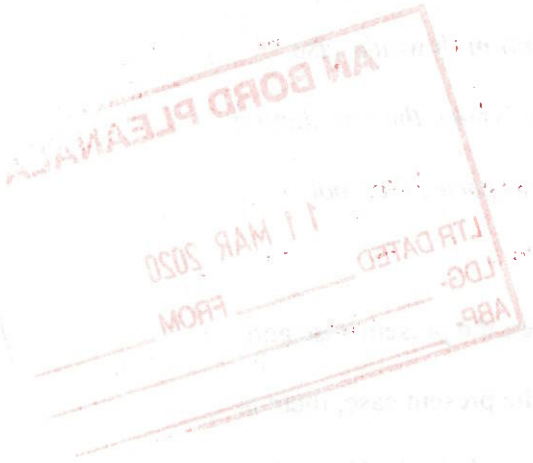
O'Malley J in Nee v. An Bord Pleanála [2012] IEHC 532 - a case in which the Court came to the conclusion that the omission of the word 'material' must have been a deliberate choice on the part of the Council. No evidence has been put before this Court to suggest that, by the wording it adopted, Laois County Council intended to refer to a material contravention."

12. The approach taken by Haughton J. is consistent with the views previously expressed by O'Malley J. in *Nee v. An Bord Pleanála* [2012] IEHC 532 (to which Haughton J. referred in the course of his judgment in *People Over Wind v. An Bord Pleanála).* In *Nee*, at para. 40 of her judgment, O'Malley J. stated:-

"...The section relied on specifically provides that the Board may grant permission 'even if' the refusal is for a material contravention. That would make little sense if every refusal by a Planning Authority for contravention of a Plan was to be deemed to be for a material contravention. It would also have the effect of very significantly reducing, if not abolishing, the jurisdiction of the board in cases not coming within the excepted categories. I do not believe that to be the intent of the section".

13. As noted above, I can see no point of distinction between the present case and the facts considered by Haughton J. in *People Over Wind.* In the present case, there is nothing in the materials before the court to support the suggestion that it had been the intention of the County Council to conclude that the development constituted a **material** contravention of the Development Plan.

14. Moreover, this is not a case where the respondent has itself purported to grant permission in material contravention of the Development Plan. The impact of the proposed development on the landscape is addressed extensively in paras. 8.12.1 to 8.12.8 of the inspector's report. Having carefully considered the issue, the inspector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came to the conclusion that he was satisfied that the overall visual impact of the development on the area would be *"within acceptable limits"*. In turn, the respondent, in its direction of 23rd November, 2018 expressly decided to grant permission in accordance with the inspector's recommendation. In doing so, the respondent stated that it had taken into account the policies of the County Council as set out in the Development Plan. Having considered, *inter alia*, the Development Plan, the character of the landscape and the topography surrounding the site, the characteristics of the site and of the general vicinity, the pattern of existing and permitted development in the area, the distances from the proposed development to dwellings or other sensitive receptors, and the report of the inspector, the respondent considered that the development would not have a significant adverse effect on the landscape or the visual or residential amenities of the area. Thus, in deciding to grant permission, there is nothing to suggest that the respondent (who, in accordance with the provisions of the 2000 Act conducts a *de novo* assessment of the application) was exercising any jurisdiction under s. 37 (2) (a). It only exercises such a jurisdiction where there is a material contravention. Based on the extensive analysis carried out by the inspector in relation to this issue, and based on the reasons set out in the Board direction (summarised above) it is clear that the respondent took the view that the proposed development was acceptable in terms of landscape and visual amenity.

15. Accordingly, in circumstances where there is nothing to suggest that the County Council refused permission on the grounds that the development would materially contravene the Development Plan and in circumstances where the decision of the respondent was not taken in exercise of its jurisdiction under s. 37 (2) (a), it follows that this ground of challenge to the decision of the respondent fails.


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The legal requirements for appropriate assessment

16. The provisions of Article 6 of the Habitats Directive are well known and do not require to be set out here. No issue arises in relation to the language used in Article 6. Nor does any issue arise in relation to the provisions of the 2000 Act implementing Article 6. It is not, therefore necessary, to set out the relevant statutory provisions which apply.

17. It is clear from the report of the inspector in this case that, although the proposed development site is not located within any Natura 2000 designation, there are a number of protected sites in the wider area including the Stacks SPA and the Blackwater River Special Area of Conservation (*"the Blackwater SAC"*). In light of the potential for the development to have adverse impacts on the integrity of those Natura 2000 sites, the inspector stated as follows at p. 112 of his report:-

> *"... any development likely to have a serious adverse effect on a Natura 2000 site would not normally be permitted and... any development proposal in the vicinity of, or affecting in any way, a designated site should be accompanied by such sufficient information as to show how the proposal will impact on the designated site. Therefore, a proposed development may only be authorised after it has been established that the development will not have a negative impact on the fauna, flora or habitat being protected through an Appropriate Assessment pursuant to Article 6 of the Habitats Directive. Accordingly, it is necessary to screen the subject proposal for the purposes of 'appropriate assessment'"*

18. Having carried out a screening exercise, the inspector concluded that the development had the potential to have an adverse impact upon, *inter alia*, the Stacks SPA and the Blackwater SAC. Insofar as those two sites are concerned, the inspector


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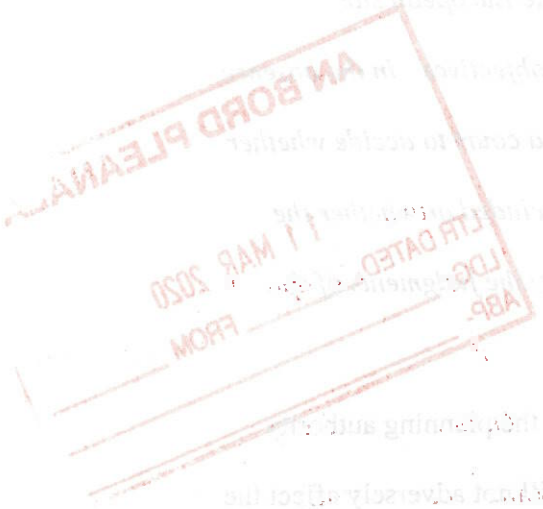
recognised, in particular, that the development could have a potential impact on the roosting, breeding, and foraging habits of the hen harrier but it also had potential implications for downstream protected habitats and species within the Blackwater SAC. These include the freshwater pearl mussel.

19. Accordingly, it was necessary to carry out a stage 2 appropriate assessment. It is now well established that there are quite stringent requirements that must be complied with where a stage 2 appropriate assessment is carried out. Those requirements have been the subject of a number of decisions of the CJEU which, in turn, have been applied in Ireland in *Kelly v. An Bord Pleanála* [2014] IEHC 400 and in *Connelly v. An Bord Pleanála* [2018] IESC 31. It is clear from the judgment of Finlay Geoghegan J. in *Kelly* and from the judgment of Clarke C.J. in *Connelly* that there are four requirements which must be satisfied namely:-

(a) In the first place, the appropriate assessment must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which have the potential, either as a consequence of the development itself or in combination with other plans or projects to affect the European site in the light of its conservation objectives;

(b) Secondly, there must be complete, precise and definitive findings and conclusions regarding the previously identified potential effects on any European site. This requires findings to be made following appropriate analysis and evaluation each in the light of the best scientific knowledge in the field. The findings and conclusions cannot have any *lacunae* or gaps;

(c) Thirdly, on the basis of those findings and conclusions, the planning authority, if it is to grant permission for the development, must be able to determine that no reasonable scientific doubt remains as to the absence of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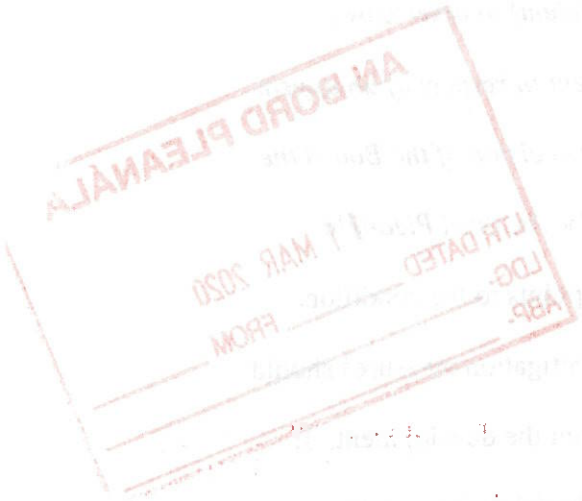
complaints in relation to EIA and, for that reason, it may be convenient, at this point, to summarise both elements of the applicant's case. In making that case, the applicant has made the following points:-

(a) In para. 4 of the statement of grounds it is alleged (in quite general terms) that there was a failure to carry out and record any or any adequate EIA in respect of the proposed development.

(b) In para. 9 of the statement of grounds, it is alleged that the respondent has failed to engage with its obligation to maintain and restore the habitat of the freshwater pearl mussel. It is alleged that the respondent has taken an entirely different approach in this case to the mitigation measures (necessary to ensure that there are no adverse effects on the mussel) to the approach taken in other cases where it is alleged more extensive measures were required to be put in place. In this context, the applicant contends that the mitigation measures which the respondent has found to be satisfactory in this case are *"different and significantly less advanced than those considered (and indeed considered insufficient) in other cases. Reference is made to the refusal by the respondent in respect of an appeal in respect of a wind farm in Doonbeg and to the decision of the Board the subject of the proceedings in People Over Wind v. An Bord Pleanála [2014] IEHC 487"*. In particular, the applicant points to the conditions imposed in the *People Over Wind* case that the mitigation measures should ensure that there would be zero silt emissions from the development. It should be noted that silt emissions are particularly deleterious to the freshwater pearl mussel and to the salmonids which are so essential for the successful reproduction of the mussel;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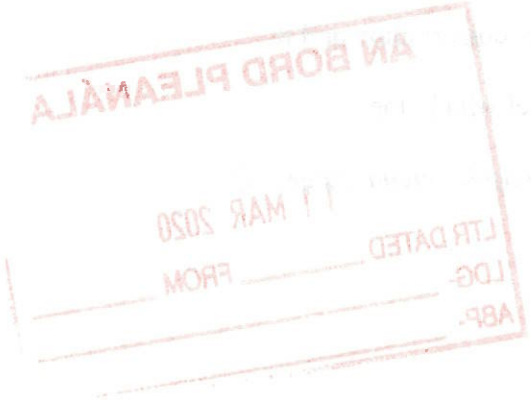
(c) It is also alleged that the assessment was conducted on the basis of inadequate information and inadequate surveys of the receiving environment. Having regard to the deficiencies and uncertainties identified in the objections to the application for planning permission made to the County Council, and the further deficiencies identified by the observers to the appeal, it is alleged that it was not possible for the respondent to conduct any proper or lawful appropriate assessment. In support of this contention in the Statement of Grounds, Mr. Fred O'Sullivan (who swore the verifying affidavit on behalf of the applicant) explained in para. 9 of that affidavit that a large number of observations were made to the respondent. These included observations from local individuals, An Taisce, Birdwatch Ireland, Raptor LIFE Project, Towercorn Ltd, Duhallow Environment Working Group and the Irish Raptor Study Group. For example, in the submission made by the Irish Raptor Study Group (authored by Dr. Allan Mee together with two others) reference was made to the fact that in 2017 a second breeding pair of hen harriers was identified within the proposed windfarm area on Barna Bog (which had not been identified in the material submitted by Silverbirch). Furthermore, in the submission made by the Duhallow Environment Working Group, attention was drawn to the proximity of the proposed development to the Blackwater SAC. The submission referred to silt entering the river from another windfarm then under construction and it highlighted the danger to the freshwater pearl mussel which, the submission explained are *"highly endangered and require clean water [to] survive"*.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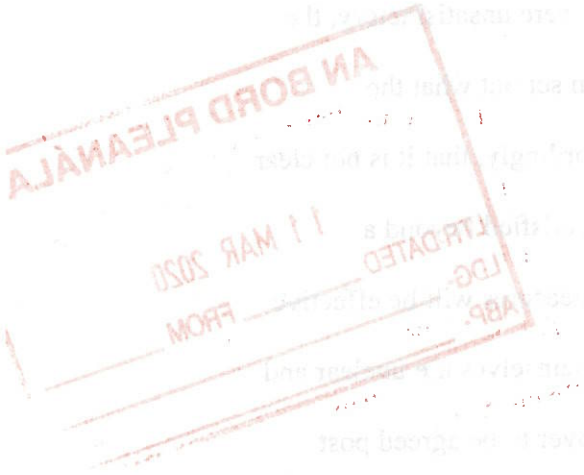
(d) It is also alleged that the respondent, in adopting the report of its inspector, did not carry out any adequate appropriate assessment. It is alleged that the report is *"wholly deficient"* and that it fails to provide any complete, precise and definitive findings in the context of appropriate assessment. Complaint is made, in particular, that the inspector, in purporting to carry out an appropriate assessment, appears to have relied significantly (if not entirely) on the EIA carried out (which is recorded in the same report). The applicant makes the point that an EIA and an appropriate assessment are conducted to a different standard and necessarily have a different focus. It was accordingly submitted in the course of the hearing that the inspector (and therefore the respondent itself) had applied the wrong standard in purporting to carry out the appropriate assessment.

(e) As pleaded in paras. 13 and 15 of the Statement of Grounds, the applicant makes the case that the conclusion of the inspector (and thus of the respondent itself) in respect of the hen harrier focussed entirely on the omission of turbines T8 and T9. This point is made both in respect of the appropriate assessment issue and in relation to the EIA issue. In particular, it is alleged that the inspector offered no assessment at all of the effects of the remaining twelve turbines on the hen harrier. The case made by the applicant is that no assessment whatever was made of the development of twelve turbines and related infrastructure for which permission was granted by the respondent.

(f) Again, with respect to the hen harrier, it is contended that the language used by the inspector (and thus by the respondent itself) is vague and uncertain and that this is not appropriate in the context of appropriate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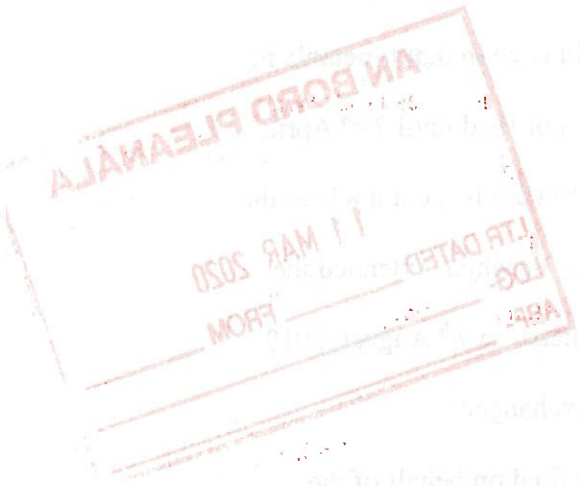
prescribe any specific level of sediment; nor does it prescribe any actual mitigation.

The challenge to the late delivery of expert evidence by the applicant

21. As noted in para. 20 (b) above, the Statement of Grounds was verified and supported by an affidavit sworn by Fred O'Sullivan on behalf of the applicant on 30th January, 2019. Thereafter, Silverbirch made an application to admit the proceedings into the Commercial List. An order to that effect was made by Haughton J. on 11th March, 2019. In that order, the court, in accordance with an agreed directions timetable, directed that opposition papers should be filed by 15th April, 2019, a replying affidavit on behalf of the applicant (if required) should be filed by 27th May, 2019 and thereafter any replying affidavits by the respondent or the notice parties should be delivered by 17th June, 2019. There was some slippage in that timetable in that the opposition papers on behalf of the respondent were not filed until 29th April, 2019. As a consequence, the timetable was adjusted. The last adjustment made to the timetable is recorded in an order made by me on 31st July, 2019 which extended the time for filing of the replying affidavit on behalf of the applicant to 7th August, 2019 following which the submissions of the parties were to be exchanged.

22. On 27th August, 2019 two additional affidavits were filed on behalf of the applicant, one was sworn by Dr. Allan Mee (who had been one of the authors of the submission made to the respondent by the Irish Raptor Study Group). Dr. Mee is a zoologist and a professional ornithologist and his affidavit, consisting of 69 paragraphs, deals extensively with the hen harrier and with the impacts of the proposed development on that bird. The affidavit also raised issues in relation to merlins, bats, woodcock, red grouse and the short-eared owl. He also raised issues in relation to cumulative impacts of the development along with other windfarm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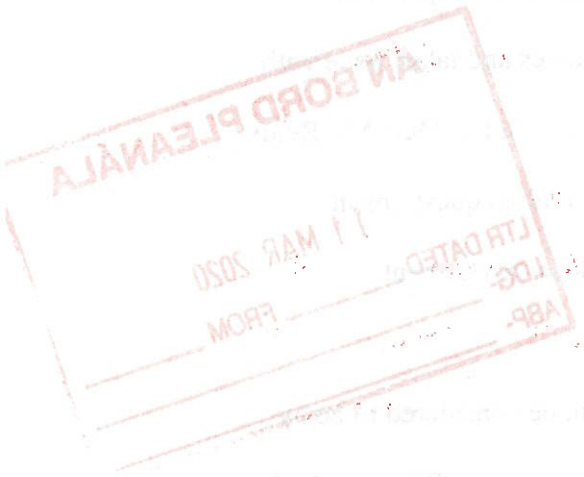
developments in the vicinity. The affidavit also contains a number of criticisms of the approach taken by the inspector and the respondent.

23. The second affidavit was sworn by Darren Reidy who is an ecologist with a particular interest in wetland and aquatic habitats. As his affidavit makes clear, Mr. Reidy is associated with the Duhallow Environment Working Group (which also made submissions to the respondent in the course of the appeal). His affidavit, comprising 59 paragraphs, deals extensively with the freshwater pearl mussel, the proximity of the known populations of the mussel to the proposed windfarm, and the threats facing the long-term survival of the mussel. He highlights that the national population of the mussel is in decline as a result of eutrophication and sedimentation of habitat. As I understand it, eutrophication arises as a consequence of algal growth which uses up oxygen in the water. The affidavit also contains a critique of the approach taken by the respondent and Mr. Reidy also addresses and takes issue with the extent of the mitigation measures proposed. In common with Dr. Mee, Mr. Reidy also raises issues in relation to cumulative impacts. He also raises questions in relation to impacts on salmon, lamprey, plant surveys and flora assessment (specifically Japanese knotweed and giant rhubarb).

24. Neither of these new affidavits could, by any stretch, be considered to be by way of a reply to the affidavits sworn on behalf of the respondent and Silverbirch. In substance and in form, they do not even purport to respond to the averments made by Mr. Pierce Dillon in his affidavit sworn on behalf of the respondent or to the averments made by Mr. Damien Courtney in his affidavit sworn on behalf of Silverbirch. They also canvass a number of issues which are not raised in the Statement of Grounds at all. In this context, in the course of the hearing before me, counsel for the applicant very properly acknowledged that the applicant is not entitled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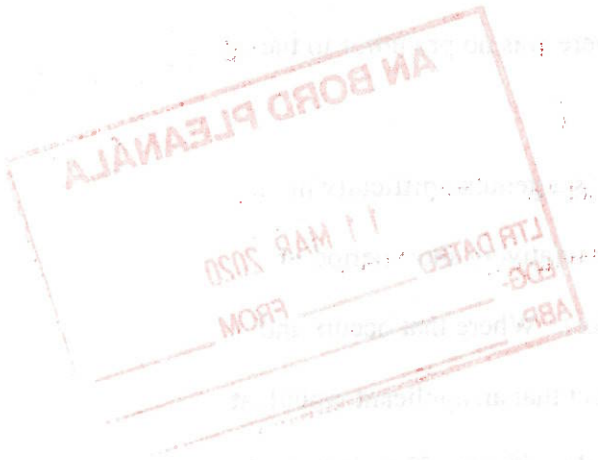
to advance a case which is not pleaded in the Statement of Grounds. In their written submissions delivered in advance of the hearing and in the course of oral argument at the hearing, both the respondent and Silverbirch have strongly objected to the admission of the affidavits sworn by Dr. Mee and Mr. Reidy.

25. Counsel for the applicant submitted that there is no obligation on a party in the applicant's position to file all of the evidence to support the case made within the relevant eight-week period allowed for the bringing of judicial review proceedings. Counsel argued that an applicant cannot be expected to source and engage experts in that timeframe. He also suggested (although there was no affidavit evidence on behalf of the applicant in these proceedings to this effect) that an applicant seeking judicial review can have great difficulty in sourcing an appropriate expert and persuading that expert to provide expert opinion evidence. Some latitude should be allowed for that purpose. Counsel also suggested that there was no prejudice to the respondent or to Silverbirch.

26. In my view, there may well be cases where there is a genuine difficulty in obtaining evidence from an appropriate expert within the relatively short period of time allowed for a challenge to a decision of the respondent. Where that occurs and where such expert evidence is necessary, one would expect that an applicant would, at the very least, make clear in the Statement of Grounds and verifying affidavit that it is intended to support the case by reference to expert evidence. In such circumstances, both the court and the relevant respondent and notice party would be put on notice of the applicant's intention and would have an opportunity to address, by means of appropriate directions, a timeline for the delivery of such evidence and any necessary response from the respondent and notice party. However, that is not what occurred here. There was no suggestion made at any point prior to August 2019 that stand-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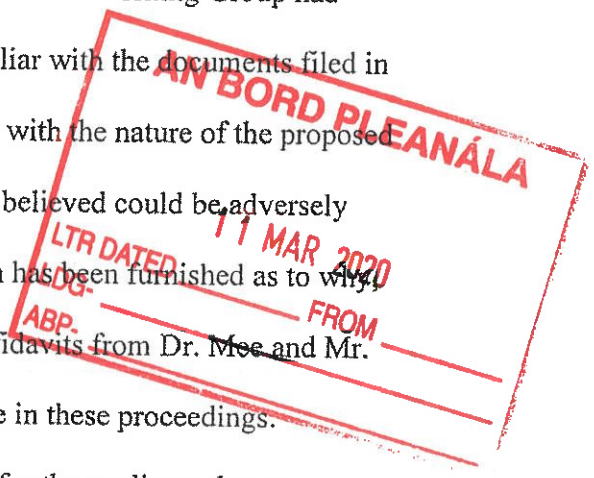
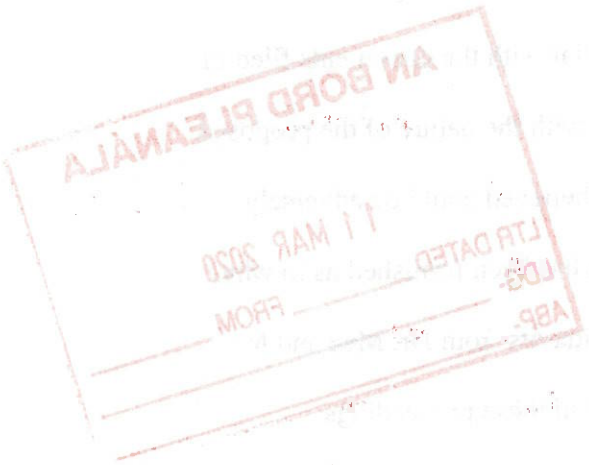
alone expert evidence would be adduced on behalf of the applicant. The directions given by the court (on the basis of an agreement between the parties) merely envisaged the delivery of a replying affidavit. As noted above, the affidavits of Dr. Mee and Mr. Reidy are not by way of reply to the opposition papers and verifying affidavits filed on behalf of the respondent and Silverbirch. In truth, both affidavits are stand-alone affidavits which make no attempt to address what was said in the opposition papers.

27. Moreover, it is manifest from the affidavits of Dr. Mee and Mr. Reidy that they were both associated with groups who participated in the appeal process before the respondent and made submissions to the respondent. In circumstances where both the Irish Raptor Study Group and the Duhallow Environment Working Group had participated in the appeal, they were already fully familiar with the documents filed in the course of the appeal and in particular were familiar with the nature of the proposed development and the Natura 2000 interests which they believed could be adversely affected by the proposed development. No explanation has been furnished as to why, in those circumstances, it was not possible to obtain affidavits from Dr. Mee and Mr. Reidy at the outset or, at the very least, at an early stage in these proceedings.



28. With regard to the suggestion made by counsel for the applicant that no prejudice has been suffered by the respondent and Silverbirch, it is important to bear in mind that, as counsel for the respondent highlighted, in the course of her submissions, the affidavits (comprising 128 paragraphs in total) were delivered in the middle of the long vacation in relation to a Commercial Court case which was due to commence on the second day of term. The arguments made in both affidavits are extensive. As counsel said they are *"roving"*. I believe counsel was correct to suggest that they bear all the hallmarks of authorship by someone who has taken a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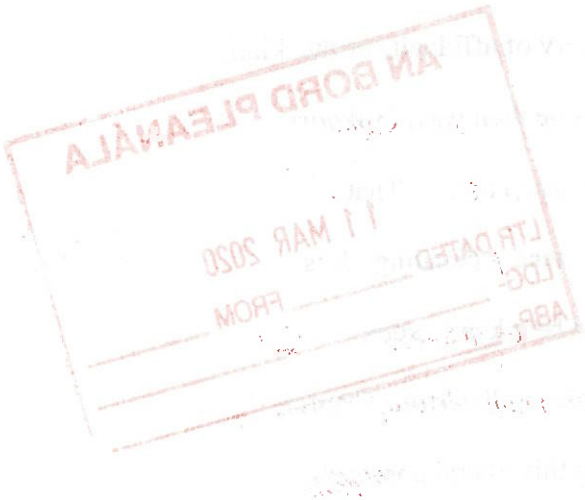
microscope to try and find any point that could possibly be made and then to cover those points *in extenso* in the affidavits. Notwithstanding the very proper confirmation by counsel for the applicant that the applicant cannot go beyond the case made in the Statement of Grounds, no attempt is made in the affidavits by either deponent to confine themselves to the matters complained of in the Statement of Grounds.

29. In my view, there is significant force in the point made by counsel for the respondent about the timing of the delivery of the affidavits. They were delivered at a time which made it virtually impossible to respond to them while, at the same time being in a position to maintain the hearing date of 8th October, 2019 (namely the second day of Michaelmas term). In this context, it seems to me that, contrary to the submissions made by counsel for the applicant, there is a real prejudice to the respondent and the notice party by reason of the late delivery of affidavits of this kind. The nature of this prejudice was described by Clarke J. (as he then was) in *Woori Bank v. KDB (Ireland) Ltd* [2006] IEHC 156 as *"logistical prejudice"*. That observation was made in the context of an application to amend a pleading. It is generally accepted that a relatively liberal approach should be taken to such applications (as the judgment of the Supreme Court in *Croke v. Waterford Crystal* [2005] 2 I.R. 283 makes clear). However, notwithstanding this liberal approach, Clarke J. identified that such an application could be refused in circumstances where prejudice (including *"logistical prejudice"* as explained by him in his judgment) would be caused to the opposing party. At para. 4.2 of his judgment in that case, Clarke J. explained the position as follows:-

> *"4.2...a party may be able to persuade the court that what I might call logistical prejudice would occur if the amendment is allowed. This will*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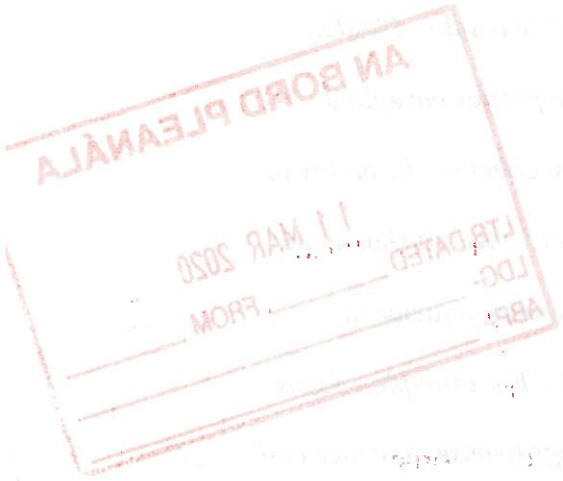
particularly be the case where the amendment is sought at a very late stage and could have the effect of significantly disrupting the intended proceedings. In such cases it may be that an amendment which could properly have been made at an earlier stage might be refused because to permit the amendment would have the effect of so altering an imminent trial as to require a significant adjournment to the prejudice of the party against whom the amendment is sought. It may well be that in the context of modern case management and the undoubted intention of the rules applicable to the Commercial Court (which rules are obviously predicated on an efficient and managed pre-trial process coupled with an early trial of the issues) that such logistical prejudice may loom larger in the considerations of the court. The effectiveness of case management can be significantly reduced if parties who do not comply with the directions of the court can escape the consequences of such failure without significant adverse results. Similarly belated applications to amend (after, for example, the parties have filed witness statements and the like) can have a significant effect on the ability to conduct a trial in a timely and orderly fashion. In that context it should also be noted that the nature of the relief sought can be a material factor in assessing the adverse consequences of a delay in trial. For example, claims for a specific performance or other similar proceedings (whose existence can have an effect on the ability of parties to deal in a commercial fashion with their assets) should be disposed of as quickly as possible and amendments which could have the effect of significantly delaying such proceedings can, in an appropriate case, give rise to a significant degree of what I have described as logistical prejudice".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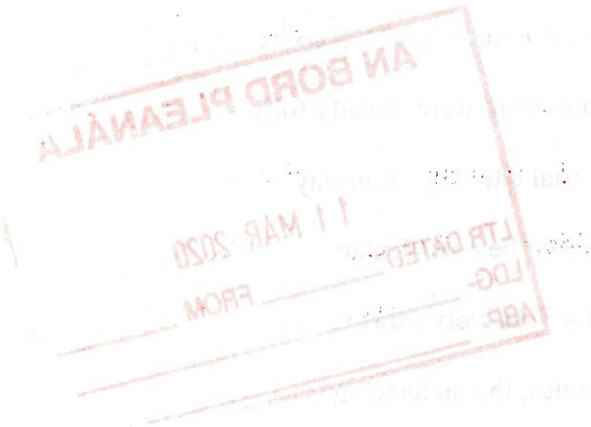
30. Although those observations were made in the context of an application to amend, it seems to me that very similar considerations arise here where, without any prior warning, expert evidence (particularly extensive expert evidence of the kind set out in the affidavits of Dr. Mee and Mr. Reidy) is delivered at a very late stage in the proceedings when a trial is imminent and when the opposing parties would have no ability to respond to those affidavits without putting the trial date in jeopardy. As noted previously, there is no basis on which it could plausibly be suggested (and counsel for the applicant very wisely did not make the suggestion) that the affidavits are in the nature of a reply to the case made by the respondent and Silverbirch in their respective opposition papers.

31. The loss of a date for a trial is a significant prejudice in the context of proceedings of this kind. Trial dates are allocated well in advance of a trial. If a trial cannot proceed on the date allocated to it, it may take many months before the court is in a position to allocate a new trial date. In this case, the trial date was fixed in March 2019 on the basis of the directions (agreed between the parties at that time) recorded in the order of Haughton J. I have no doubt that, in March 2019, there were ample trial dates available in Michaelmas term 2019. However, by the time these affidavits were delivered in August 2019, the trial dates for Michaelmas term were already fully allocated. It would not have been possible to secure a new trial date for a four day hearing before Hilary term 2020 at the very earliest. This would be a particular prejudice in a case of this kind in circumstances where, as the relatively short timeframe for challenge provided by the 2000 Act demonstrates, the underlying legislative intention is that challenges of this kind should be dealt with promptly.

32. The observations of Clarke J. apply with even added force in the context of proceedings which are brought pursuant to such statutory provisions and against a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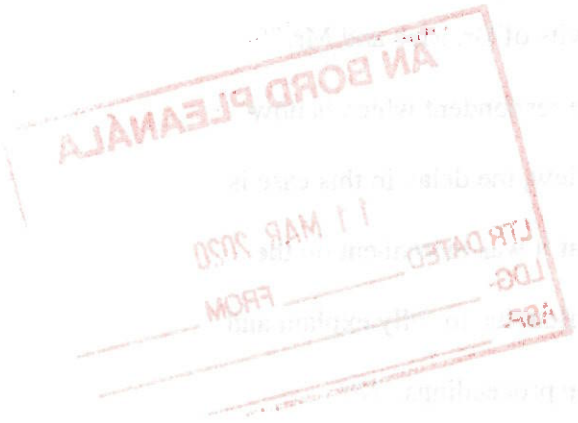
backdrop where the Commercial Court has already been persuaded that the proceedings are of sufficient urgency to merit entry into the Commercial List and case management by the judge in charge of that list. In para. 13 of the affidavit of Damien Courtney grounding the application for admission of the proceedings into the Commercial List, Mr. Courtney stated:-

> *"13. Given the importance of the Silverbirch Windfarm to meeting the State's targets for greenhouse gas emission reduction and renewable energy sources, the capital expenditure incurred to date, the further expenditure to complete the project, the long delay in the planning process already in the proposed new [Renewable Electricity Support Scheme], the awaited decision on connections after ECP-1 and the deadlines for lease options, Silverbirch is very anxious to have the within challenge to the permission granted dealt with as expeditiously as possible. Having the within proceedings case managed within the Commercial List ... is, I say and believe, the most effective way in which to achieve this outcome".*

33. Against that backdrop, it is striking that the affidavits of Dr. Mee and Mr. Reidy were delivered nine months after the decision of the respondent which is now the subject of the challenge in these proceedings. In my view, the delay in this case is such and the timing of delivery of the affidavits is such that it was incumbent on the applicant, if it wished to be in a position to rely on such affidavits, to fully explain and justify their delivery at such a late (and crucial) stage of the proceedings. No satisfactory explanation or reason has been put forward to justify the late delivery of these affidavits. The timing of the delivery of the affidavits is not addressed anywhere on oath by the applicant. In light of the failure to properly explain and justify the delivery of these affidavits, I am left with no alternative but to exclude them from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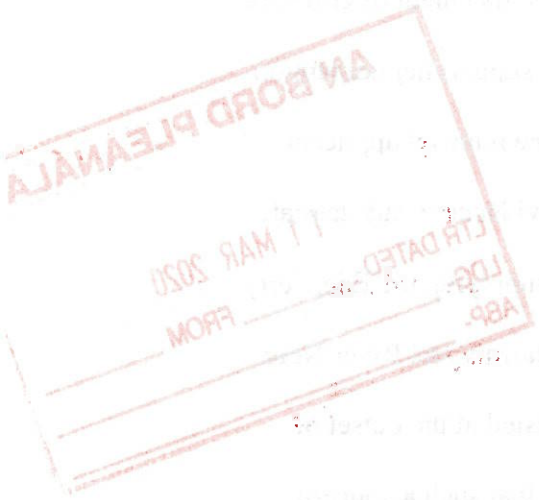
consideration. In the absence of an objectively justifiable explanation for their late delivery, the logistical prejudice to the respondent and Silverbirch is such that the affidavits must be excluded.

34. If I have correctly understood the submissions of counsel for the applicant, there appears to have been an apprehension that, without expert evidence, the applicant could find itself without any evidence to support the case made in the Statement of Grounds. This concern appears to have arisen as a consequence of the approach taken by White J. in *An Taisce v. An Bord Pleanála* [2015] IEHC 633 and by O'Neill J. in *Harrington v. An Bord Pleanála* [2014] IEHC 232. In both of those judgments, judicial review proceedings were dismissed on the grounds that the relevant applicant had failed to prove the case made by it in its Statement of Grounds. In *Harrington,* the applicant failed to provide any evidence to support her contention that the site in question was a priority habitat. In *An Taisce,* the relevant applicant (Friends of the Irish Environment) had failed to provide any evidence to substantiate a bald assertion on affidavit that the extraction of peat on bogs supplying the Edenderry Power Plant is likely to have significant effects on the River Barrow and River Nore SAC. However, if there was such a concern in this case, it existed at the outset of these proceedings. On the facts, there is no reason to suppose that such a concern could not have been addressed by filing affidavits from Dr. Mee and Mr. Reidy in early course. Moreover, it is difficult to see that such a concern could be said to arise in this case. It is clear from the entire process that took place in the course of the appeal before the respondent and from the approach taken both by the respondent and Silverbirch in these proceedings that it was acknowledged that the position of the hen harrier and the freshwater pearl mussel would have to be considered and that a Stage 2 appropriate assessment would have to be carried out which involved the requirement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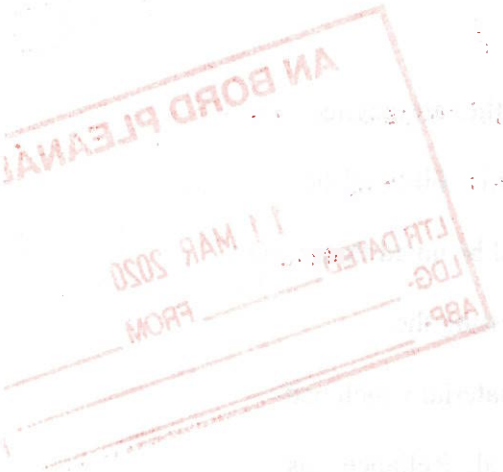
that the respondent be satisfied beyond any reasonable scientific doubt that the development will not adversely affect either of these endangered species. The concerns in relation to both species were specifically raised by a number of participants in the process. There was no dispute between the parties that the hen harrier is a special conservation interest for the purposes of Stacks SPA or that the development site lies adjacent to part of the boundary of the SPA. Likewise, there was no dispute between the parties in this case about the fact that the proposed site is hydrologically connected to the Blackwater River and that the potential exists for indirect impacts on the Blackwater SAC and on the freshwater pearl mussel in particular. Accordingly, I can see no basis for the apprehension voiced by counsel for the applicant that, without expert evidence, the applicant could find itself unable to advance the case made in its statement of grounds.

35. In the circumstances, it is unnecessary to consider the further arguments advanced by the respondent and Silverbirch in relation to the admissibility of the affidavits of Dr. Mee and Mr. Reidy. For completeness, it should be noted that it was strongly urged by the respondent, as an additional basis for contesting the admissibility of the late affidavits, that the affidavits contained material which had never been placed before the respondent in the course of the appeal. Reliance was placed on the decision of Murphy J. in *Hennessy v. An Bord Pleanála* [2018] IEHC 678 and the decision of Haughton J. in *People Over Wind v. An Bord Pleanála* [2015] IEHC 271. In both of those cases the court took the view that any affidavit evidence containing new material which was not before the respondent could not be considered by the court in a judicial review challenge to a decision of the respondent. It is true that in the latter case, the court granted the applicant leave to appeal to the Court of Appeal on a number of questions pursuant to s. 50A (7) of the 2000 Act including a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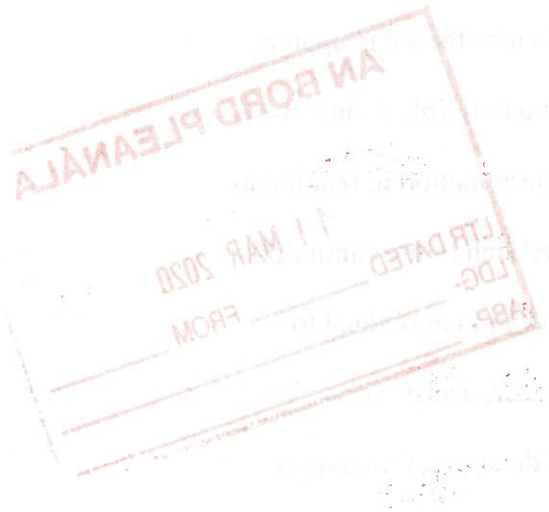
question as to whether, in reviewing the decision of the respondent, in respect of appropriate assessment, the court was confined to a consideration of matters that were before the respondent. In *People Over Wind v. An Bord Pleanála* [2015] IECA 272 the Court of Appeal did not consider it necessary to determine that question. In those circumstances, counsel for the applicant contended that the question remained open. However, as matters currently stand and, in the absence of any decision of the Court of Appeal or the Supreme Court to the contrary, the legal position is as set out in the judgments of Murphy J. and Haughton J. and, accordingly, if it were necessary to decide this issue, I would be compelled, in accordance with the principles set out in *Re Worldport Ireland Ltd (in liquidation)* [2015] IEHC 189 to take the same approach here. In light, however, of my view that the affidavits are not admissible in any event, it does not seem to me to be necessary to make any formal determination in relation to this aspect of the objection raised by the respondent and Silverbirch to the admission of the late affidavit. I merely observe that, as a High Court judge, I am obliged to follow decisions of my colleagues in the High Court, in particular, decisions of such recent vintage which were arrived at following a careful consideration of the issues. For completeness, I should also make clear that I entirely agree with the views expressed by Murphy J. and Haughton J. in those cases. For the court to entertain material that was not placed before the respondent runs the risk of subverting the role of the court in proceedings of this kind. The court is not engaged in a *de novo* hearing. The court does not itself carry out an appropriate assessment. That is a matter entirely for the respondent. It is not for the court to conduct an appropriate assessment on different material to what was before the respondent in order to reach a different conclusion. The task of the court is to assess whether the respondent, in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purporting to carry out an appropriate assessment, has complied with the requirements summarised in para. 19 above.

36. In light of the conclusions which I have reached in paras 29 to 35 above, I must consider the case on the basis of the Statement of Grounds and the affidavit of Mr. O'Sullivan together with the affidavits and materials placed before the court by the respondent and Silverbirch. I do not propose to consider the affidavits of Dr. Mee or Mr. Reidy save to observe that, while the affidavits go beyond the Statement of Grounds in a number of respects, there are significant parts of the affidavits which are consistent with the Statement of Grounds. In circumstances where, it will be necessary, in any event, to address the Statement of Grounds, the applicant can therefore be assured that the case which it makes will still be determined notwithstanding the exclusion of these two affidavits. Given that counsel for the applicant has, as previously noted, very properly conceded that the applicant is confined to the case made in the Statement of Grounds, I do not believe that the applicant is, in truth, disadvantaged by the exclusion of these affidavits.

Some subsidiary issues raised by the applicant in relation to the assessment carried out by the respondent

37. It is next necessary to consider, in the context of the case made in the Statement of Grounds, whether the assessment carried out by the respondent complies with the requirements summarised in para. 19 above. Before doing so, it may be helpful, at this point, to dispose of one aspect of the case made by the applicant. This relates to an aspect of the case summarised in para. 20 (c) above. During the course of the hearing, it was suggested by counsel for the applicant that the respondent had failed to take into account the submissions made by some of the observers who participated in the course of the appeal including the Irish Raptor Study Group and


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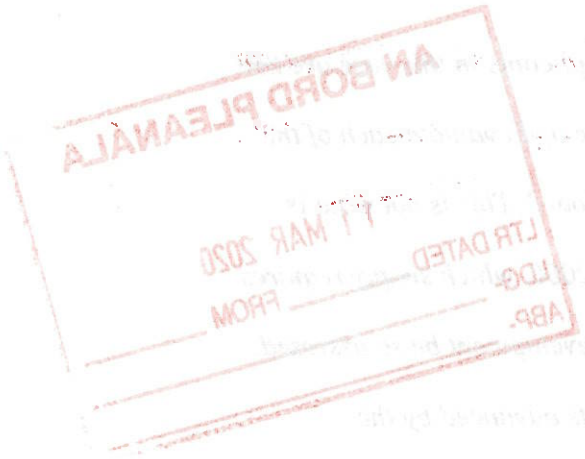
Duhallow Environment Working Group. In this context, I note the submission made by counsel for the respondent that the task facing the respondent carrying out an appropriate assessment in an appeal of this kind is not to address submissions as such but the specific issues that arise in the context of the Habitats Directive. Counsel for the respondent referred to the decision of Costello J. in *O'Brien v. An Bord Pleanála* [2017] IEHC 773. In that case, the issue arose in the context of an EIA rather than in the context of appropriate assessment. However, it was submitted by counsel for the respondent that similar considerations apply in the context of appropriate assessment where the focus of the planning authority will be on the qualifying interests in the protected site and the potential impacts of the development on those interests. In *O'Brien*, Costello J. said at paras. 44-45:-

> *"44. The implications of the submissions of the applicants in this case are that the Inspector and the Board must examine, analyse and evaluate each of the submissions or observations validly made to the Board. This is not what is required by either the EIA Directive or the Act of 2000, which simply requires that the direct and indirect effects of a proposed development be so assessed, not the submissions or observations. The arguments advanced by the applicants leads to a result which would render the provision of s. 172(1J) (c) effectively otiose. Why would the Oireachtas stipulate that the planning authority or the Board had an obligation to consider the submissions and observations submitted by third parties before the planning authority or the Board informed the public of the main reasons and considerations for their decision, if they were already obliged to examine, analyse and evaluate the individual submissions and observations and make that assessment available to the public under the provisions of s. 172(1J) (b)?*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45. In my judgment it was not necessary for the Board (or the Inspector) to examine, analyse or evaluate the Bowdler Report or the points made in the report or the experience of the applicants (or their neighbours) in relation to noise in order to carry out a lawful EIA. It is sufficient that there is an examination, analysis and evaluation of the direct and indirect effects (including the noise implications) of the proposed development on the environment as set out in ... the Inspector's report."

38. In my view, the approach outlined in *O'Brien* must now be treated with some caution in light of the very recent decision of the Supreme Court in *Balz v. An Bord Pleanála* [2019] IESC 90 where O'Donnell J. (albeit not specifically in the context of either EIA or appropriate assessment) observed at para. 57:-

"57. ... the submission was rejected in limine on the basis of a determination that the matters contained therein were irrelevant. It is a basic element of any ***decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in cases, they may profoundly disagree, and with whose consequences they may have to live. ..."*** (emphasis added).

I do not, however, believe that this always requires that every submission made to the respondent should be individually addressed in a decision of the respondent or in a report of an inspector which precedes such a decision. What seems to me to be crucial is that the points made in submissions should be addressed. In circumstances where there will frequently be an overlap between submissions made by one observer and


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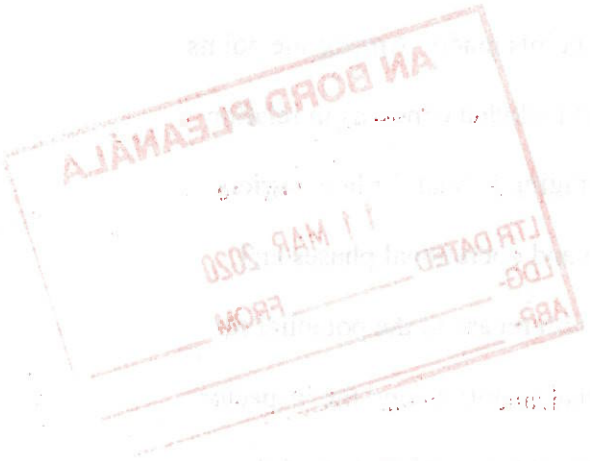
another, it seems to me that it would not be necessary to address every submission by name so long as the substantive points made in the submissions are each appropriately addressed. As noted in para. 19 above, it is a crucial part of the exercise which the respondent is obliged to carry out, in the context of appropriate assessment, that there should be complete, precise and definitive findings and conclusions regarding any identified potential effects on the qualifying interests of any European site.

39. For completeness, it should be noted that the inspector, at pp. 46-49 of his report, noted the 28 observations that had been received from interested parties during the course of the appeal and summarised the principal points made. Among the points highlighted by the inspector in this section of the report included concerns in relation to the hen harrier, the potential loss of breeding and foraging habitat for hen harriers, displacement and disturbance during both construction and operational phases and collision risk; the inspector also highlighted concerns with regard to the potential for landslides and peat slippage and the associated ecological pollution; and the inspector also drew attention to the concerns that had been expressed that construction of the development would likely have a detrimental effect on water quality and the hydrological regime of the area with adverse downstream impacts on aquatic habitats including the Blackwater SAC which supports a population of freshwater pearl mussel.

40. It may also be convenient at this point to address a further concern that was highlighted, in particular, during the course of the submissions made by counsel for the applicant. This relates to the case made by the applicant that none of the concerns of the County Council in relation to appropriate assessment are addressed in the inspector's report. This submission needs to be put in context. It is clear from a consideration of the report that the inspector carefully summarised the planning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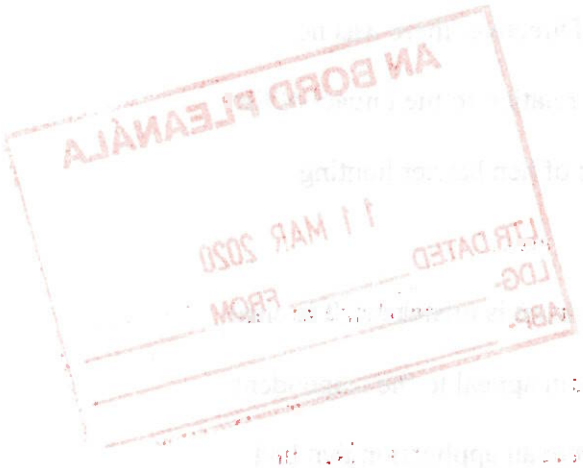
history and the particular history of the unsuccessful application to the County Council for permission which led to the appeal. Section 4 of the inspector's report addresses the process before the County Council in some detail summarising, *inter alia,* the decision of the County Council and the reasons for it and also summarising the reports of the County Council planning department (including the report relating to the environment which considers the freshwater pearl mussel) and the report of the biodiversity officer of the County Council that addresses both the impact on the Blackwater SAC and the impact on the Stacks SPA. However, counsel for the applicant submitted that, thereafter, when the inspector came to carry out the assessment for the purposes of Article 6 of the Habitats Directive, there was no reference back to the concerns of the County Council in relation to the impact of the development on the freshwater pearl mussel and the loss of hen harrier hunting habitat.

41. In my view, this submission on behalf of the applicant is mistaken. It is clear from a consideration of s. 37 (1) (b) of the 2000 Act that an appeal to the respondent requires the respondent to treat the appeal as though it were an application that had been made to it in the first instance. Insofar as relevant, s. 37 (1) (b) provides as follows:-

> *"...where an appeal is brought against a decision of a planning authority..., the Board shall determine the application as if it had been made to the Board in the first instance and the decision of the Board shall operate to annul the decision of the planning authority as from the time when it was given ...".*

42. While the analogy is not perfect, the position of the respondent on an appeal from a planning authority is not unlike the position of the High Court on an appeal from the Circuit Court under s. 38 (2) of the Courts of Justice Act, 1936 (save to the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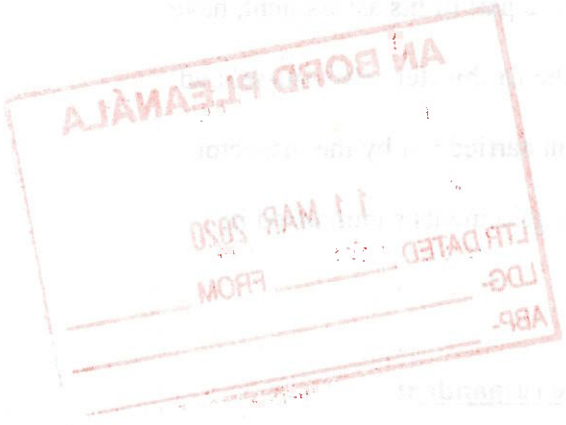
extent that the High Court, on such an appeal, is confined to hearing from the same witnesses in relation to the same subject matter as gave evidence in the Circuit Court). The High Court hears such appeals without any reference to the decision actually made by the Circuit Court and reaches its own decision on the evidence heard afresh by it. If anything, the position of the respondent on an appeal from a planning authority is even broader than the position of the High Court on an appeal from the Circuit Court. In the case of the respondent, it can entertain observations from persons and bodies who did not participate in the original application before the planning authority.

43. It is therefore unsurprising that the inspector, in his report dealing with appropriate assessment, would not refer back to the decision of the County Council or the approach taken by the County Council. It is, in any event, clear from a consideration of the report of the inspector that he did, as part of his assessment, have regard to the concerns that were voiced in relation to the freshwater pearl mussel and the hen harrier. The question is whether the assessment carried out by the inspector (and by extension the respondent) complied with the requirements summarised in para. 19 above. It is to that issue to which I now turn.

<u>The assessment carried out by the inspector and the respondent</u>

44. As noted in para. 19 above, there are four requirements which must be satisfied for the purposes of carrying out a valid appropriate assessment. As highlighted by Clarke C.J. in *Connelly* at para. 8.16, a valid appropriate assessment decision is a necessary pre-condition to a planning consent in cases where appropriate assessment is required. It is therefore necessary, in the present case, to consider each of the requirements summarised in para. 19 above. I deal below with each of those requirements in turn.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Did the assessment identify, in the light of the best scientific knowledge, all aspects of the development which could adversely affect the hen harrier or the freshwater pearl mussel?

45. In light of the case made in the statement of grounds, it seems to me that this question arises solely in relation to the hen harrier and freshwater pearl mussel since they are the relevant interests, the subject of the Stacks SPA and the Blackwater SAC respectively, which are in issue in these proceedings. It is clear from the report of the inspector in this case that these interests were at the forefront of his consideration of the application.

Potential impacts on the hen harrier

46. With regard to the hen harrier, the inspector noted that, in common with other protected species under the Birds Directive, the likely potential impacts on bird populations within the development site area would typically include:-

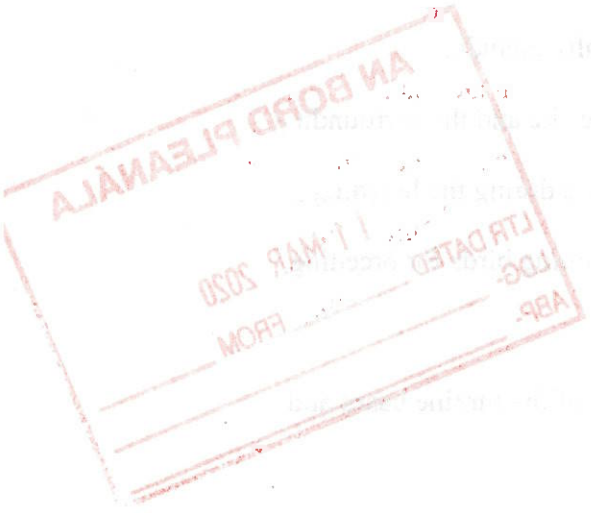
(a) The disturbance of bird communities within the site and the surrounding area which may lead to the desertion of nest sites during the breeding season or avoidance of the site by new and returning birds for breeding purposes;

(b) The direct loss of habitat from the construction of the turbine bases and hard standing area;

(c) The indirect habitat loss through site development works near the turbine locations and on access tracks to the site which may reduce the extent of suitable habitat locations;

(d) The risk of collisions with turbine blades.

47. It is important, in this context, to note that these impacts are discussed in relation to the site area as a whole. The observations are not confined to the area in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the immediate vicinity of turbines T8 and T9 located on or near Barna Bog. Thereafter, at p.p. 81-85 of the report, the inspector addresses the potential impacts on the hen harrier in more detail. He deals, first, with direct disturbance of nesting birds. The inspector notes that it is acknowledged in the EIS that breeding hen harriers could be disturbed if turbines were to be constructed in close proximity to nesting territories. The inspector records that surveys carried out in 2016 and 2017 identified the presence of one territorial pair of hen harriers within the Barna Bog area approximately 700 metres northwest of the nearest proposed turbine which successfully raised two juveniles. While the applicant draws attention to the fact that the observations made by the Irish Raptor Study Group identified one additional breeding pair in this area, I do not believe that this is material in the context of the identification of the impacts of the development. The key point is that the inspector identified the potential impact of the development on breeding pairs. Whether that is one pair or two pairs is not material. The potential for adverse impacts is the same whether one is dealing with one or more pairs of hen harrier. The inspector noted that it was in this context that the Department of Arts, Heritage, Regional, Rural and Gaeltacht Affairs (*"the department"*) submitted that, in light of this information, turbines T8 and T9 should be omitted. The inspector recorded that the department had made this submission in circumstances where those turbines were located within 1km of the SPA in an area used regularly by hunting hen harriers and that the loss of hunting habitat due to disturbance/displacement and mortality attributable to collision are significant risks which cannot be ruled out.

48. The inspector also identified on p. 82 that the availability of prey for hunting hen harriers could be reduced as a result of habitat loss following construction or through disturbance during the construction phase. The inspector noted in particular


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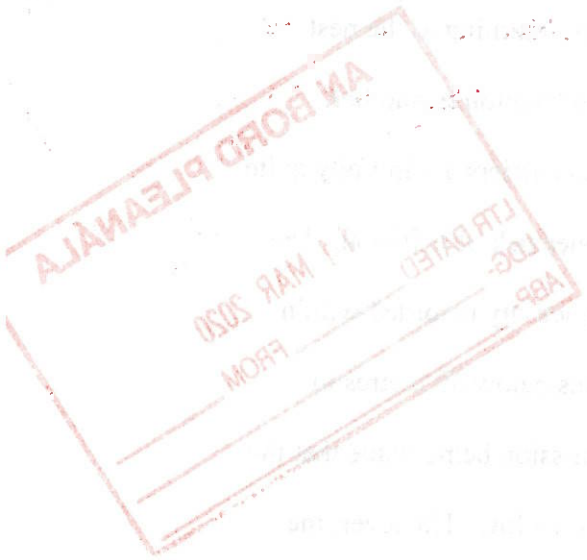
that three bird species (which make up a substantial proportion of the hen harriers' diet) have been recorded breeding within the proposed development site. This observation was made by the inspector in respect of the entire site and is not confined to the immediate area around turbines T8 and T9. In this context, the inspector, at p. 83, said that he would *"reiterate the concerns raised by the Department...that hen harriers will be displaced from hunting habitat within 250m of operational wind turbines"*.

49. The inspector next dealt with mortality due to collision with turbines. The inspector noted that a submission had been made that the hen harriers are well known to fly at lower elevations (below ten metres in height) when hunting and flights at higher elevations will usually only occur when the birds are returning to the nest, performing display flights, or simply when flying from one location to another. However, the inspector noted in particular that juvenile hen harriers are initially quite clumsy and unskilled in the air and thus would be at a greater risk of collision. The inspector also noted that the majority of hen harrier flying activity recorded within both the development site itself and the 2016 study area was below 30 metres in height. The inspector explained that this had led to a submission being made that the risk of collision with the proposed turbines is considered to be low. However, the inspector added the observation that the collision risk for juvenile birds from a nest within 500 metres of a turbine *"could be much higher"*. The inspector also noted the submission made by the department that there was evidence in the previous two-year period of hen harrier mortality within the Stacks SPA due to collisions with turbine blades and that, as a consequence, the risk of collision may have been underestimated in previous studies.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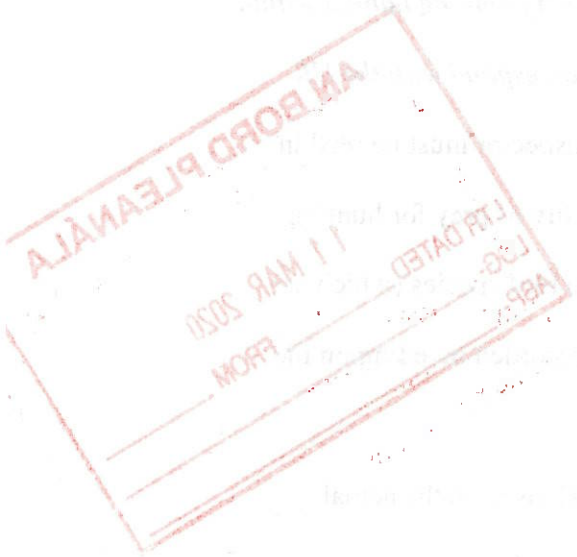
50. At p. 84, the inspector addressed the issue of site avoidance by foraging harriers leading to habitat loss. He referred to a number of studies which gave rise to mixed results which suggested that in some cases there was avoidance of an area of least 250m from a turbine while in other instances birds had been noted hunting within 50-100 metres of turbines. The inspector noted that the department had rejected the suggestion made by the applicant that hen harriers would continue to hunt and had advised that hen harriers *"will be displaced from using hunting habitat within 250m of operational wind turbines (which would seem to correspond with the UK study referenced in the EIS)"*. These observations by the inspector must be read in conjunction with his observations in relation to the availability of prey for hunting (summarised in para. 48 above). As noted in para. 48, three bird species (which are an important source of prey for the hen harrier) have been recorded breeding on the development site.

51. At p.p. 84-85, the inspector then sets out his conclusions as to the actual impact of the development on the hen harrier albeit that the applicant contends that this assessment is manifestly insufficient and, in particular, does not address anything other than the immediate area of Barna Bog and turbines T8 and T9. That is an issue that I will address when I come to consider the next element of the Article 6 (3) requirements. At this point, I will confine my consideration to the first element of those requirements.

52. I should also make clear that p.p. 81-85 of the inspector's report is in the immediate context of the EIA carried by the inspector. However, on p. 118 of his report, the inspector expressly refers back to this section of the report for the purposes of identifying, in the context of appropriate assessment, the potential impacts of the development on the hen harrier. I do not believe that the inspector can be faulted for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taking that course. It is an entirely logical and sensible course to adopt once all relevant potential impacts for the purposes of appropriate assessment have been identified.

53. In my view, the inspector has very comprehensively and fairly identified the potential impacts that arise for the hen harrier and, in the course of the hearing before me, no one has identified a potential impact which has been omitted or overlooked.

The potential impacts on the freshwater pearl mussel

54. Insofar as the freshwater pearl mussel is concerned, the potential impacts on it are addressed at p.p. 87-90 of the inspector's report. The inspector considers a number of surveys of the River Blackwater dealing with the presence of the pearl mussel. The inspector highlights, in particular, the additional impact assessment appended to the grounds of appeal which had clarified that, while previously, the nearest recorded freshwater pearl mussel in the River Blackwater were at or near Lisheen Bridge, a population of 21 mussels had been observed close to Scrahan approximately 2.6km hydrologically downstream of the site boundary (and closer than those previously recorded at Lisheen Bridge). The inspector then draws attention to the susceptibility of the freshwater pearl mussel to changes in water quality, the requirement for very high-quality rivers with clean river beds and waters with very low levels of nutrients. The inspector also noted the fact that the population of the freshwater pearl mussel in the Blackwater is currently at an unfavourable conservation status. The inspector then highlighted that, in these circumstances, it is clear that any further deterioration in surface water quality within the tributaries and watercourses draining to the River Blackwater consequent on the development could potentially have a significant indirect impact on the freshwater pearl mussel.


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55. The potentially negative impacts identified by the inspector are set out at p.p. 88-89, p.p. 91-92 and also at p.p. 97-98. The potential negative impacts are not confined to the construction phase but the inspector also said that potential negative impacts might arise at the operational stage. The potential impacts comprise:-

(a) The pollution of watercourses with suspended solids due to run off of soil from construction and clear-felled areas due to disturbance of fine subsurface substrates in the course of construction and excavations at and adjacent to watercourse crossings. At p. 98, the inspector specifically refers to the potential for sediment release during clear-felling and construction phase earthworks and the danger of the discharge of water with high concentrations of sediment to water courses due to the dewatering of the excavations required for the turbine and meteorological mast foundations;

(b) At p.p. 91-92 of his report, the inspector identifies that one of the most significant potential impacts arising as a direct result of the construction of the proposed development is the possibility of bog failure/slippage given the peaty subsoil conditions on site. While this section of his report is not concerned directly with the issue of the freshwater pearl mussel, peat slippage would have obvious consequences for the freshwater pearl mussel if peat fragments were to enter the watercourses leading to the River Blackwater thereby increasing the level of sediment. In the course of his oral argument, counsel for the applicant placed some emphasis on the possibility of peat slippage. While I do not believe that this forms part of the applicant's pleaded case (and therefore is not an issue that the applicant is entitled to pursue) I will, nonetheless, for completeness and without


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prejudice to any pleading point that may arise, briefly consider the arguments that were made during the course of the hearing in relation to peat slippage;

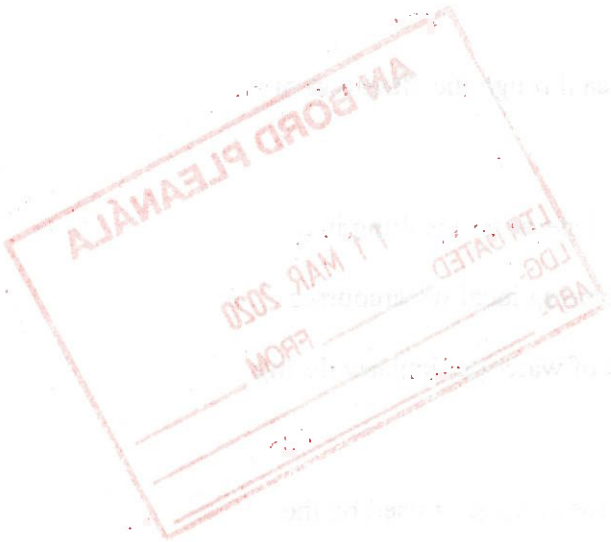
(c) The contamination of surface waters during construction (and operational works) through the accidental release or discharge of hydrocarbons or other contaminated site run-off. At p. 98, the inspector notes that this could include the risk of sewage pollution from temporary toilet facilities on site;

(d) Changes to the hydrological regime of the area through the alteration of the flow rates of streams and rivers; and

(e) The creation of preferential flow paths for surface water resulting in a significant increase in the volume of water entering local watercourses which could interfere with the sustained flow of water particularly during dry weather.

56. In addition, at p. 90, the inspector acknowledges the concerns raised by the department with regard to previous experience of construction projects in the vicinity of the Blackwater SAC impacting on downstream water quality. While the inspector does not regard an anecdotal report of serious siltation (raised by the department) as sufficiently robust evidence, it is clear from p. 90 of the report that the inspector identified that siltation or pollution of a watercourse is a potential impact of a development of this kind. This is reinforced by what is said by the inspector at p.p. 118-119 of his report where he draws attention to the potential for the pollution of watercourses through the release of suspended solids.

57. Again, as in the case of the hen harrier, while p.p. 88-90 of the inspector's report deals with EIA issues, the inspector, when he came to address the appropriate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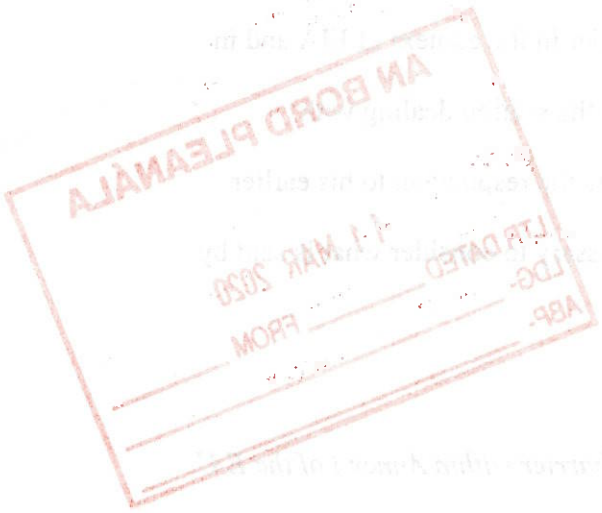
assessment issues, specifically referred back (at p.p. 118-119 of his report) to the section dealing with EIA. With regard to the Blackwater SAC, he also stated at p.p. 119-120:-

> *"Potential pathways for impact have been identified in the form of a hydrological connection from the proposed windfarm development site to the SAC, in particular during the groundworks phase of the construction of the turbines and associated roadways etc. (such as by way of sedimentation, the accidental release of pollutants and the risk of landslide). In the absence of more detailed consideration of mitigation measures (e.g. site management and drainage design measures), there is the potential for adverse effects on the European Site which will require further assessment by way of Natura Impact Statement".*

58. While the inspector does not refer, at p.p. 119-120 to the possibility for adverse effects arising from the operational stage of the proposed development, this is something which, as noted above, he expressly identified at p. 88 of his report. It seems to me that the passage quoted above which highlights the construction phase does not exclude what had previously been said by the inspector at p.p. 88-89. It should be noted that the reference to *"the groundworks phase of the construction..."* is prefaced by the words *"in particular"*.

59. It seems to me that the inspector has identified the aspects of the development project which have the potential to affect the freshwater pearl mussel. In this context, it is clear from the material available to the respondent during the course of the appeal and in particular from the expert report of Dr. William O'Connor submitted with the appeal that the principal aspects of the development which have the potential to have an impact on the freshwater pearl mussel will arise during the construction phase. At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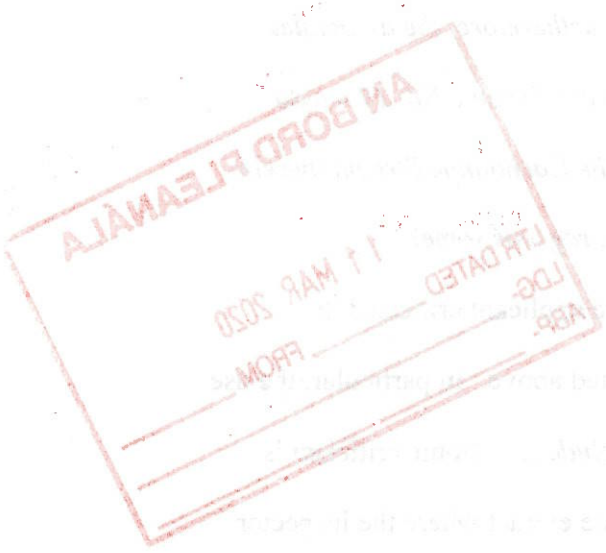
conclude that the Barna area is of local importance to hen harrier and that the proposed development of turbine Nos. T8 & T9 within same would be likely to have an unacceptable environmental impact on the hen harrier in the locality given the consequential loss/disturbance of suitable habitat and the potential risk of collision. Moreover, for the purposes of appropriate assessment, and having regard to the precautionary principle, it is my opinion that it cannot be definitively established that the development of turbines (Nos. T8 & T9) within the Barna area would not have an adverse impact on hen harrier.

Accordingly, in the event of a grant of permission, I would recommend the emission of Turbine Nos. T8 & T9.

(N.B. in support of the omission of Turbine No. 9, I would refer the Board to the 'High' risk weighting applied to the construction of that turbine in the 'Peat stability Hazard Ranking Assessment.' Furthermore, the associated omission of the road/service infrastructure serving Turbine No. T9 would negate any requirement for a new crossing of the Carhoonoe Stream thereby addressing the concerns of the Department...as regards same)".

65. In the course of his submissions, counsel for the applicant criticised the somewhat equivocal language used in the passage quoted above. In particular, the use of the words: *"on balance"* and *"I am inclined to conclude..."*. Some criticism is also made of the formula of words used later in the same extract where the inspector said that: *"it is my opinion that it cannot be definitively established that the development of turbines...T8 & T9 ...would not have an adverse impact on hen harrier"*. I do not believe, however, that the language used by the inspector warrants criticism. As counsel for the respondent made clear, in the course of her submissions, this finding by the inspector in this section of his report is a finding that the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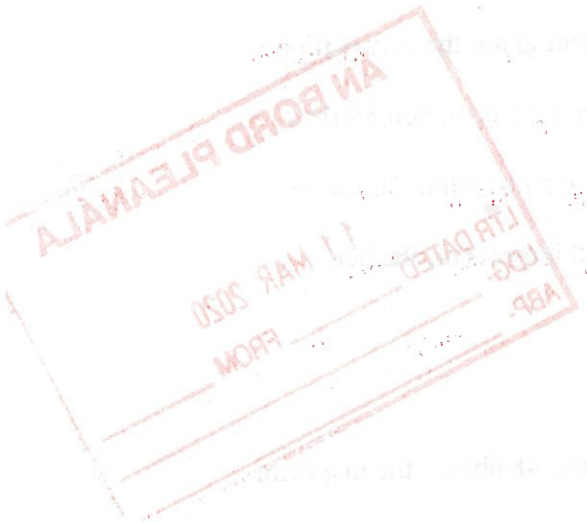
development of the windfarm (by the construction of turbines T8 and T9) in the Barna Bog area would give rise to an unacceptable impact on the hen harrier given *"the consequential loss/disturbance of suitable habitat and the potential risk of collision"*. As counsel for the respondent noted, there is no requirement that the inspector has to be satisfied that this risk exists beyond a reasonable scientific doubt. On the contrary, a precautionary approach must be taken in the context of the Habitats Directive. Thus, the inspector (and, in turn, the respondent) only has to be satisfied that the risk cannot be excluded. In my view, this submission of counsel for the respondent is entirely correct.

66. However, counsel for the applicant makes a more fundamental point that, in this section of the inspector's report, the inspector concentrates on the Barna Bog area and does not address the remainder of the development (i.e. other than turbines T8 and T9). Counsel stressed that this was particularly important given the recognition in the report that the development had the potential for adverse effects on hen harriers within the Stacks SPA. It should be recalled that, as noted in paras. 46 to 50 above, the inspector had previously identified a number of potential impacts on the hen harrier:-

(a) Mortality due to collision with turbines;

(b) Site avoidance by foraging birds. As noted in para. 48 above, the inspector had noted in particular that three bird species (which make up a proportion of the hen harriers' diet) have been recorded breeding within the proposed development site. The inspector did not suggest that this was solely within the area of Barna Bog.

(c) Habitat loss and displacement. In this context, it should be noted that, at p. 79 of his report, the inspector identified that there were *"notable levels of*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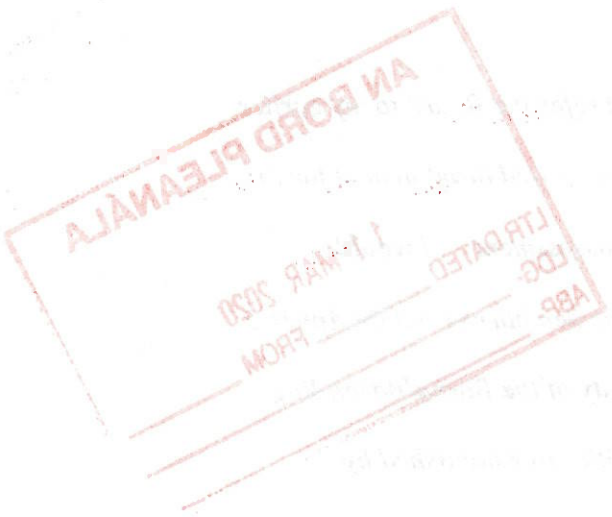
activity within Reaboy in the vicinity of Turbine Nos. T5, T6 & T7". This is also potentially relevant to the issue of mortality risk;

(d) Disturbance of nesting birds. However, the only evidence of nesting birds was in the vicinity of Barna Bog.

67. Accordingly, it is very important to consider what is said by the inspector subsequently at p.p. 121-122 where, referring back to the potential impacts of the hen harrier which he had identified in the course of his Stage 1 appropriate assessment, the inspector continued as follows:-

"The NIS has subsequently concluded that, subject to adherence of a series of specified mitigation measures, there would be [no] adverse effects on the integrity of the identified Natura 2000 sites as a result of the proposed development.

In order to avoid unnecessary repetition, I would refer the Board to my earlier comments with regard to the implications of the proposed development for the hen harrier as set out in my environment impact assessment. I would reiterate my opinion that given the inclusion of the hen harrier within Annex 1 of the E.U. Birds Directive..., the overall suitability of the Barna/Barna Bog area for hen harrier breeding and foraging activities as established by historical records and more recent survey work, and the proximity of the Barna lands to the [Stacks SPA] and the availability/potential usage of the said lands by hen harrier from within the SPA, I am inclined to include that the Barna area is of local importance to hen harrier and that the proposed development of Turbine Nos. T8 & T9 within same would be likely to have an unacceptable environmental impact on hen harrier in the locality given the consequential loss/disturbance of suitable habitat and the potential risk of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collision. Therefore, for the purposes of appropriate assessment, and having regard to the precautionary principle, it is my opinion that it cannot be definitively established that the development of Turbines Nos. T8 & T9 within the Barna area would not have an adverse impact on hen harriers. Accordingly, in order to ensure that the proposed development will not adversely affect the integrity of the SPA or undermine/conflict with the Conservation objectives applicable to same, I would recommend the omission of Turbine Nos. T8 & T9 by way of mitigation".

68. It will be seen that this is largely a repetition of what was said by the inspector at p.p. 85-86 (quoted in para. 64 above). The only other relevant observation of the inspector in this section of his report is at p. 123 where he says (having previously dealt with cumulative impacts):-

"Therefore, I consider it reasonable to conclude, on the basis of the information available, that the proposed development, when taken individually and in combination with other plans or projects, will not adversely affect the integrity of the [Stacks SPA] ...".

69. In her submissions, counsel for the respondent submitted that the inspector's report contained complete precise and definitive findings and conclusions in relation to the entire development and that the inspector was, in substance, confirming that there were no issues with the balance of the development over and above turbines T8 and T9. She also carried out a careful analysis of the submission made to the respondent by the Irish Raptor Study Group and suggested that the points made by the study group in respect of adverse impacts for the hen harrier did not withstand scrutiny. Counsel accepted that the points raised by the study group in relation to the alleged inadequacy of the surveys conducted was not specifically addressed by the


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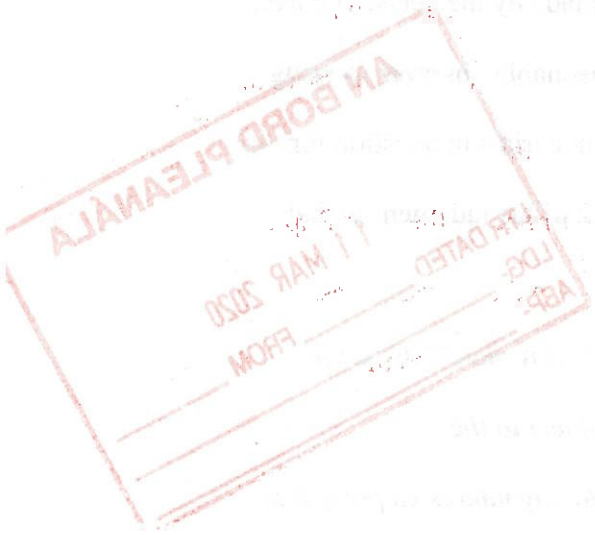
inspector but she submitted that the criticisms of the surveys were so *"manifestly wrong that it's not something that needs to be addressed..."*.

70. Counsel for the respondent may well be correct that all of the points raised by the Irish Raptor Study Group do not withstand scrutiny. She may also be correct in her submission that there was sufficient material available to allow him to be satisfied that the development (other than turbines T8 and T9) would not have an adverse impact on the hen harrier. Given the role of the court in proceedings of this kind, it would not be appropriate for me to express any view on that issue. However, I cannot accept that the conclusion articulated by the inspector and adopted by the respondent satisfies the requirements summarised in para. 19 (b) above namely the obligation to make complete, precise and definitive findings and conclusions regarding the identified potential effects on the hen harrier, following appropriate analysis and evaluation in light of the best scientific knowledge. In my view, there is nothing in the report of the inspector to explain how the development other than turbines T8 and T9 will not have an adverse impact on the hen harrier. The material just quoted focusses solely on the Barna Bog and turbines T8 and T9. It is clear from the earlier sections of the inspector's report that, as noted in paras. 46-47 above, the potential impacts listed in para. 46 arose in relation to the site area as a whole. They were not confined to the area in the immediate vicinity of turbines T8 and T9 located on or near Barna Bog. Accordingly, if the proposed development other than turbines T8 and T9 was to pass an appropriate assessment (insofar as potential impacts on the hen harrier is concerned) there would have to be a conclusion reached as to how it was that the potential impacts previously identified would not, in fact, arise if the remaining turbines (and associated infrastructure) were to be constructed and operated.

71. Furthermore, it is clear from the decisions in *Kelly* and *Connelly* that there should be appropriate analysis and evaluation. While there is, very clearly, analysis and evaluation in the inspector's report of turbines T8 and T9, there is no equivalent evaluation and analysis of the remainder of the site. In reaching a conclusion in relation to the balance of the development, the inspector may have had regard to the material contained in the Natura Impact Study (*"NIS"*). In this context, it appears to follow from the decision in *Connelly* that a person in the position of the inspector is entitled to rely on other materials for the purposes of providing reasons for findings. This appears to be so even where no express reference is made by the decision maker to those materials so long as it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contained in the materials in question formed part of the reasoning for the relevant decision. At para. 9.2 of his judgment in that case, Clarke C.J. said:-

> *"The test is, in my view, that identified in Christian. Any materials can be relied on as being a source for relevant reasons subject to the important caveat that it must be reasonably clear to any interested party that the materials sought to be relied on actually provide the reasons which led to the decision concerned. In that regard, it seems to me that the trial judge has, put the matter much too far. The trial judge was clearly correct to state that a party cannot be expected to trawl through a vast amount of documentation to attempt to discern the reasons for a decision. However, it is not necessary that all of the reasons must be found in the decision itself or in other documents expressly referred to in the decision. The reasons may be found anywhere, provided that it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contended actually formed part of the*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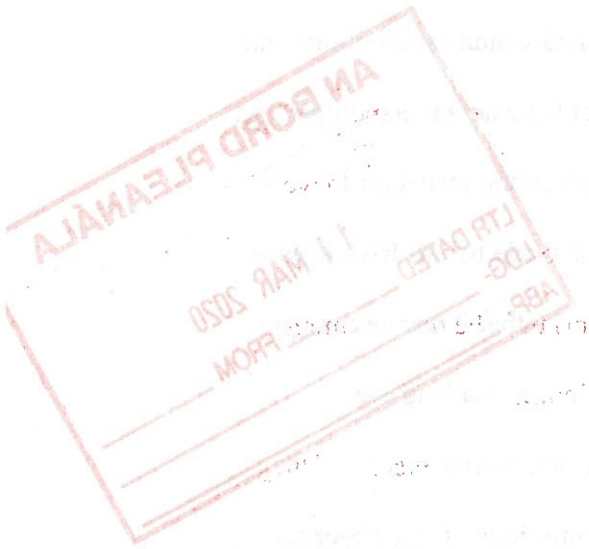
reasoning. If the search required were to be excessive then the reasons could not be said to be reasonably clear."

72. However, it is crucially important to bear in mind that the NIS predated the submission made by the Irish Raptor Study Group in the course of the appeal and it seems to me to have been incumbent on the inspector in those circumstances to address the substantive points raised by the Irish Raptor Study Group so as to explain how he came to the conclusion that the points raised by them did not alter the conclusions reached in the NIS. In my view, that required the inspector, at minimum, to identify where in the NIS the relevant analysis is contained which satisfied him that the development (other than turbines T8 and T9) would not have an adverse impact on the hen harrier. It also seems to me to have been incumbent on the inspector to explain why he was not persuaded by the substantive points made by the Irish Raptor Study Group. As noted in paras. 37-38 above, I do not believe that it was necessary for the inspector to address every individual submission that was made to the respondent so long as the substantive points relevant to the hen harrier were addressed. There will often be an overlap between the submissions of one observer and another. The crucial requirement is that the points should be addressed. If the points are without merit, then that should be stated and the basis for that view should be explained.

73. In addition, it seems to me that the inspector should also have identified by reference to the NIS where, in his view, it provides an appropriate level of assurance that the potential effects previously described by the inspector at an earlier point in his report will not give rise to the adverse effects which were identified as potential impacts at the stage 1 screening stage. In particular, there would need to be an answer to the concerns expressed about the loss of foraging for the hen harrier given the fact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recorded in the inspector's report that the entire site was frequented by three important species of bird favoured by the hen harrier as prey. It also seems to me that the inspector should have explained how he came to the conclusion that, notwithstanding what he had said (as noted in para. 66(c) above) about the level of hen harrier activity in Reaboy in the vicinity of turbines T5, T6 and T7, the development of those turbines and related infrastructure could safely proceed.

74. It also seems to me that the inspector was required to explain, either in the text of the report itself or by reference to specific sections of the NIS, why he was satisfied that the concerns outlined by him at p. 83 of his report about collision risk (in particular for juvenile hen harriers, as summarised in para. 49 above) have been satisfactorily resolved. It seems to me that the inspector should, at minimum, have identified where in the NIS there is material which explains to the requisite standard (i.e. to the extent that there be no reasonable scientific doubt) that the development other than T8 and T9 will not give rise to a material risk of collision.

75. In the absence of an appropriate explanation in the report, any person reading the inspector's report will be left at a loss to understand how the potential impacts identified in the report can be said to have been addressed to the extent necessary to enable a conclusion to be reached, following appropriate analysis and evaluation, that the adverse impacts previously identified at the screening stage will not arise.

76. Accordingly, I have come to the conclusion that the report of the inspector does not comply with the requirements summarised in para. 19 (b) above. As a consequence, it seems to me to follow that the third requirement (summarised in para. 19 (c) above) is also incapable of being satisfied on the basis of the material currently contained in the inspector's report. It follows that the decision of the respondent must be quashed on this ground. As the decision in *Connelly* makes clear, a failure to


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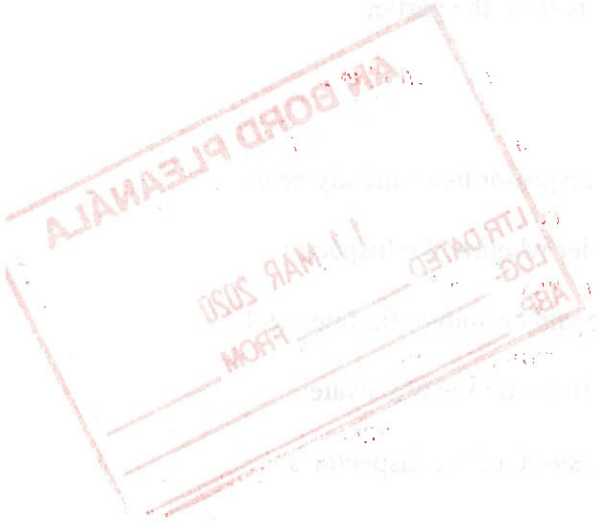
comply with the Article 6 (3) requirements goes to jurisdiction and invalidates a decision taken by the respondent in breach of those requirements. The only order that can be made in the circumstances is an order quashing the decision. I am, however, conscious that there may well be sufficient materials before the respondent which would enable the respondent to make complete precise and definitive findings and conclusions regarding the previously identified potential effects on the hen harrier as outlined in the inspector's report. There may well therefore be a basis to remit the matter to the respondent for a further determination. I will, however, postpone making any order to that effect pending further submissions from the parties.

The freshwater pearl mussel

77. The potentially negative impacts identified by the inspector have already been summarised at para. 55 – 58. It is now necessary to consider whether the Inspector (and, in turn, the respondent) have made complete, precise and definitive findings and conclusions regarding the previously identified potential effects on the freshwater pearl mussel. This is addressed, in the first instance, at pp. 89-90 of the inspector's report where he says:-

> *"In order to minimise the potential constructional and operational impacts on the aquatic environment attributable to the proposed development, it is intended to implement a series of mitigation measures as set out in Section 5.8 of the EIS, although regard should also be had to the measures contained in Chapter 6: 'Soil and Geology' and Chapter 7: 'Hydrology' of the EIS (as supplemented by the associated appendices and the additional information provided with the grounds of appeal). Of particular relevance of the context of preserving downstream water quality during the construction stage is the proposal to implement a spoil management strategy in conjunction with a*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surface water management plan in order to prevent sediment-laden surface water runoff from the earth works entering water courses. It is also proposed to prepare a detailed Construction and Environmental Management Plan for the project which will include Construction Method Statements and a Construction Stage Surface Water Management Plan that will incorporate various erosion and sediment control measures including the installation of drainage of runoff controls prior to the commencement of site development and clearance works; the minimisation of the area of exposed ground; the prevention of runoff entering the site from adjacent grounds; the provision of appropriate control and containment measures on site; the monitoring and maintenance of erosion and sediment controls throughout the project; and establishing vegetation as soon as practical on all areas where soil has been exposed. These measures are to be further supplemented by a Habitat Management Plan, the inclusion of an emergency erosion and soil control response plan as a contingency measure in the Surface Water Management Plan, the implementation of a water sampling programme both before and during construction, and the adoption of best practice techniques including the installation of interceptor drains, silt fences, check dams, silt traps and settlement/siltation ponds etc.

It is also proposed to implement an Operational Phase Environmental Management Plan for the monitoring of wildlife for the efficacy of the mitigation measures to be undertaken both during and post construction.

Whilst I would acknowledge that concerns have been raised by the Department ... as regards previous experience of construction projects


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impacting on downstream water quality ... and that reference has been made to an anecdotal report of serious siltation of an upper Blackwater Watercourse being attributable to the construction of a windfarm with general mitigation measures similar to those cited in the submitted EIS, in my opinion, this does not form a sufficiently robust basis on which to refuse permission for the subject proposal. In the event that any siltation or pollution of a watercourse could be attributed to a particular development project, I would suggest that it would be necessary in the first instance to definitively ascertain the actual cause of the pollution event. For example, it is unclear whether or not the occurrence of any such situation would be attributable to a deficiency in the overall design of the project or the mitigation measures proposed or whether it arose from a failure by the developer/contractor to adequately adhere to the prescribed programme of mitigation.

Accordingly, having reviewed the submitted information, including the measures to be implemented with respect to drainage design and site management during the construction and operational phases of the proposed development, in addition to the proposal to conduct water quality monitoring during all phases of the project which would allow for the opportunity to review and revise measures as appropriate, it is my opinion that the risk of a detrimental impact on downstream water quality and the consequence of same on aquatic ecological considerations can be satisfactorily mitigated both through the nature/design of the works proposed and the implementation of an appropriate programme of pollution control measures which are linked to good construction and site management best practice."


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78. The passage quoted above is in the section of the inspector's report dealing with EIA issues. However, in common with the hen harrier, the inspector effectively adopts this section of his report when he comes to address the appropriate assessment issues. A number of criticisms were made by counsel for the applicant of this passage. In support of the case made in the statement of grounds (summarised in para. 20(g) above), counsel emphasised that the Construction and Environmental Management Plan (*"CEMP"*) is not yet in existence and therefore could not be assessed by the inspector. He also drew attention to what he described as the *"vague"* and *"aspirational"* nature of the Surface Water Management Plan (*"SWMP"*).

79. With regard to the concerns expressed by the department (as recorded by the inspector), counsel criticised the approach taken by the inspector on the basis that the inspector did not satisfy himself as to what happened in relation to the unnamed development mentioned in the anecdotal report. However, that is not part of the case made in the statement of grounds and I therefore do not believe that it is something that I should address in this judgment. Moreover, the failure of another developer to take appropriate steps to prevent ecological damage would not, in any event, have entitled the inspector to take an adverse view in respect of the development proposed by Silverbirch.

80. Counsel also criticised what he characterised as the *"failure"* of the inspector to specifically address the concerns expressed by the Duhallow Environment Working Group. I cannot accept that this criticism is valid. The submissions made by that group do not appear to me to raise any issue which is not addressed by the inspector. I therefore do not propose to consider this criticism further in this judgment. As noted in para. 38 above, I do not believe that it is necessary that every individual submission


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