THE HIGH COURT

JUDICIAL REVIEW

2018 No. 734 J.R.

IN THE MATTER OF SECTION 50 AND 50A OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

SHANNON LNG LIMITED

NOTICE PARTY

JUDGMENT of Mr Justice Garrett Simons delivered on 15 February 2019

Abbreviations

CJEU Court of Justice of the European Union

PDA 2000 Planning and Development Act 2000

EIA Directive Environmental Impact Assessment Directive

SID Strategic infrastructure development

OVERVIEW

1. The principal issue in these proceedings is whether a decision to extend the duration of a planning permission engages the Habitats Directive. The requirements of the Habitats Directive will be discussed in detail presently, but for introductory purposes it is sufficient to note that the Directive obliges a competent authority to fulfil certain procedural requirements before agreeing to a project which is likely to have a significant effect on a European conservation site.

2. The dispute between the parties in the present case centres on whether these procedural requirements apply only on the occasion of the original grant of a planning permission, or, alternatively, whether they also apply to a subsequent decision which extends the duration of the planning permission but involves no physical change to the project as permitted. The planning permission the subject of these proceedings was to have been implemented within ten years, but An Bord Pleanála has purported to extend this period by an additional five years. It is this decision to extend the duration of the planning permission which is impugned in these proceedings.

3. An Bord Pleanála and the Developer maintain the position that a mere temporal change, i.e. a change to the period within which the development can be carried out and completed, does not require screening or assessment under the Habitats Directive.

4. (As it happens, An Bord Pleanála says that it did, in fact, carry out an ad hoc screening exercise notwithstanding that it contends that there was no legal requirement to do so. For the purposes of this screening exercise, what was assessed was the impact of the change in the time period within which the development could be carried out and completed; the board did not assess the impacts of the *entire* project).

5. Legal issues similar to those arising in the within proceedings were recently considered by the High Court (Barrett J.) in *Merriman v. Fingal County Council* [2017] IEHC 695. In a reserved judgment delivered on 21 November 2017, the High Court ruled that the Habitats Directive did not apply to a decision to grant an extension of the duration of a planning permission pursuant to the provisions of section 42 of the Planning and Development Act 2000 (as amended). The High Court subsequently refused leave to appeal to the Court of Appeal (*Merriman v. Fingal County Council* [2018] IEHC 65); and, thereafter, the Supreme Court refused leave to appeal to that court by Determination dated 6 July 2018 (*Merriman v. Fingal County Council* [2018] IESCDET 102).

6. There has been a significant legal development since the disposal of the litigation in *Merriman v. Fingal County Council*. Specifically, Advocate General Kokott has delivered an opinion in proceedings pending before the CJEU saying that the extension of duration of a development consent is, in principle, subject to the Habitats Directive. See Case C 411/17 *Inter Environnement Wallonie*.

7. The opinion of the Advocate General was delivered on 29 November 2018. A date has not yet been fixed for the delivery of judgment in that case. All parties before me accepted that the outcome of Case C 411/17 could have a significant bearing on these judicial review proceedings.

8. Given the existence of the Advocate General's opinion, it cannot be said that the question of the applicability of the Habitats Directive to an extension of the duration of a development consent is *acte clair*. In the circumstances, I have decided that it is necessary for this court to refer a number of questions to the CJEU pursuant to Article 267 of the TFEU for preliminary ruling. I set out these questions in an annex to this judgment.

9. The parties herein had suggested that I might consider deferring judgment in these proceedings—and deferring any decision on whether to make an Article 267 reference—until after the CJEU delivers its judgment in Case C–411/17. Having carefully considered this submission, I have concluded that—irrespective of the outcome of Case C–411/17—it will be necessary for me to make a reference to the CJEU in any event. I set out my reasons for this decision in full at paragraph 73 below. For introductory purposes, my rationale might be summarised as follows. The facts and legal issues arising in Case C 411/17 are sufficiently different from those arising in the proceedings before me that the judgment in that case is very unlikely to resolve all of the issues which I will have to decide. In particular, there are features peculiar to the Irish planning legislation which may well influence the approach of the CJEU. First, Irish planning legislation imposes a time-limit on the period during which *construction works* can be carried out, but does not

usually impose any time-limit on the subsequent *operation* of the project. Secondly, the legislative regime under which the planning permission the subject of these proceedings was originally granted did not properly implement the Habitats Directive. See Case C 418/04 *Commission v. Ireland*.

10. My approach is also influenced by the fact that these proceedings are subject to the imperative under section 50A(10) of the PDA 2000 to act as expeditiously as possible consistent with the administration of justice.

11. I have also given careful consideration to whether—applying the principle of judicial self restraint—it might have been possible to dispose of these judicial review proceedings by reference to national law alone, and thus to avoid the necessity of requesting a preliminary ruling under Article 267. One of the grounds advanced by the Applicant might, at first blush, appear to raise an issue which is exclusively a matter of national law. More specifically, the Applicant contends that an extension of duration cannot be granted in respect of a planning permission which has already expired. As discussed in more detail presently, section 40(1) of the PDA 2000 provides that a planning permission "ceases to have effect" after the expiration of the appropriate period. On the facts of the present case, the ten year period specified under the planning permission had already expired prior to the date of An Bord Pleanála's decision. The Applicant contends that a planning permission which has ceased to have effect cannot be revived by a subsequent decision to extend its duration.

12. If I had been in a position to decide what might be described as the "ceases to have effect" argument in favour of the Applicant *as a matter of national law*, then the decision to grant an extension of duration could have been set aside on that narrow ground alone. It might not have been necessary therefore to embark upon a consideration of the issues arising under the Habitats Directive. However, for the reasons set out in more detail at paragraph 140 below, I think that the "ceases to have effect" argument cannot be dealt with in isolation. The interpretation of the relevant provisions of the PDA 2000, and, in particular, the identification of whether there is preclusion on extending an expired planning permission, is not purely a matter of national law. Rather, it also requires consideration of EU law.

FACTUAL BACKGROUND

13. Planning permission for a liquefied natural gas regasification terminal ("*the gas terminal*") was granted by An Bord Pleanála on 31 March 2008 ("*the 2008 planning permission*"). The decision bears the Board Reference "PL08.PA0002".

14. The decision to grant planning permission was made pursuant to the special statutory procedure governing applications for "strategic infrastructure development". I will refer to this procedure by the shorthand "*the SID procedure*". The SID procedure was introduced under the Planning and Development (Amendment) Act 2006. One of the features of the SID procedure is that the application for planning permission is made directly to An Bord Pleanála, i.e. there is a single stage decision-making process, and there is no first stage before the local planning authority.

15. As part of its decision-making process, An Bord Pleanála was obliged to carry out an environmental impact assessment ("*EIA*") of the proposed development. An EIA is mandatory in the case of all projects subject to the SID procedure. An EIA was also required as a matter of EU law in circumstances where the project falls within one of the categories of project prescribed under Annex II of the EIA Directive.

16. The position in this regard was summarised by An Bord Pleanála's inspector in his report of 14 March 2008 as follows (at page 7 of 91).

> "As required under section 37(e) of the Planning and Development Act, 2000, as amended by the Planning and Development (Strategic Infrastructure) Act, 2006, an Environmental Impact Statement is included with this application. The submission of an Environmental Impact Statement would have been required, in any case under schedule five, part two of the Planning and Development Regulations, 2001 for an installation for the surface storage of natural gas where the storage capacity exceeds 200 tonnes."

17. I will examine the approach adopted by An Bord Pleanála to the Habitats Directive under the next heading below.

18. Turning now to the duration of the permission, the default position under the PDA 2000 is that a planning permission has a duration of five years. It should be explained that this is the period during which the permitted development must be carried out and completed. It does not impose any limitation on the period thereafter during which the completed development can remain *in situ* and the authorised use can continue to be carried on. Put otherwise, the duration of a planning permission simply describes the period during which the planning permission can be *implemented*.

19. This distinction can be illustrated by reference to the hypothetical example of a wind farm. A planning permission for a wind farm will sometimes specify two time periods: the first represents the period during which the development must be carried out, i.e. the wind turbines and other ancillary works erected, and the second represents the period during which the wind farm may be operational. A wind farm operator might, therefore, only have a five year window within which to implement the planning permission, but assuming that this is done on time, then the wind farm can be operational for, say, twenty-five years thereafter.

20. A planning permission will almost always be subject to a time-limit of the first type, i.e. an implementation period. (There are some exceptions provided for under section 40(2) of the PDA 2000 but none of these are relevant to this case). The default position is that the implementation period will be five years, but a planning authority and An Bord Pleanála have discretion to prescribe a different time period under section 41 of the PDA 2000.

21. Time-limits of the second type, i.e. an operational period, are much more unusual, and have a different legal basis. Such a time-limit can be imposed pursuant to the provisions of section 34(4)(n) of the PDA 2000.

22. As discussed at paragraph 73 below, An Bord Pleanála contends that this distinction between the implementation period and the operational period may allow the facts of the present case to be distinguished from those under consideration by the CJEU in Case C 411/17 *Inter-Environnement Wallonie*.

23. The 2008 planning permission only imposes a time-limit on the carrying out and completion of the proposed development works. The permission does not purport to impose a time-limit on the operation of the gas terminal thereafter.

24. As noted above, the default position is that a planning permission will have an implementation period of five years. In the case of the 2008 planning permission, however, this period was fixed at ten years. This was provided for under Condition No. 2 of the 2008 planning permission as follows.

> "2. This permission shall, in accordance with the application, be for a period of ten years from the date of this order.
>
> Reason: In order to allow a reasonable period for the completion of this extensive development."

25. In the event, however, no development works were ever commenced during this ten year period. The explanation for this has been set out in detail as part of the 2017 application to An Bord Pleanála discussed immediately below. In brief, it was explained that delays arose *inter alia* as a result of changes to the Irish policy on access to the national gas transmission grid, and more generally the economic situation from 2008.

26. I pause here to note that the fact that no development works had been commenced pursuant to the 2008 planning permission has certain legal consequences. First, in accordance with section 40(1)(a) of the PDA 2000, the 2008 planning permission ceased to have effect as regards the entire development upon the expiration of the ten year period. Secondly, had an application been made for an extension of duration pursuant to section 42 of the PDA 2000, it would have been necessary to consider whether an assessment under the Habitats Directive, if required, had been carried out in 2008.

27. In September 2017, the Developer made an application to alter the terms of the development. Specifically, it was sought to alter the terms of Condition No. 2 so as to read as follows.

> 2. This permission shall, in accordance with the application,* be for a period of fifteen* years from the date of this order.
>
> Reason: In order to allow a reasonable period for the completion of this extensive development.
>
> *Strike-through and underlining added.

28. This application was made pursuant to the provisions of section 146B of the PDA 2000. I have very real doubts as to whether an application for an extension of the duration of a planning permission can ever lawfully be made pursuant to section 146B. It seems to me that the application can only be made pursuant to the provisions of section 42. I will return to address this issue in detail at paragraph 78 below.

29. The procedure under section 146B requires An Bord Pleanála to consider a number of issues in sequence. Specifically, the board must consider (i) whether the proposed alteration is a "material alteration"; and (ii) if the alteration is a "material alteration", then the board must consider whether it is likely to have significant effects on the environment such as to trigger a requirement for an EIA. The question of whether the proposed alteration is a "material alteration" is a threshold issue. If the alteration is non-material, then there is no requirement for any further assessment or public participation, and An Bord Pleanála is obliged to allow the proposed alteration ("*shall*").

30. An Bord Pleanála has a discretion as to whether or not to invite public participation in respect of this threshold issue of whether the proposed alteration is material or not. On the facts of the present case, after a false start, An Bord Pleanála did invite public participation on this issue. Ultimately, An Bord Pleanála concluded that the alteration was not material, and therefore it made a decision on 13 July 2018 allowing the proposed alteration to Condition No. 2.

31. There is one further factual matter which should be flagged now. It is accepted by all parties that as of the date that An Bord Pleanála made the impugned decision to grant an extension of duration, the 2008 planning permission had already ceased to have effect. As discussed at paragraph 141 below, there is some debate as to whether the planning permission expired in March 2018 or June 2018. This does not affect the legal issue in that—under either analysis—the planning permission had certainly expired by 13 July 2018.

32. It is noteworthy, however, that the Developer was clearly concerned that the expiry of the planning permission might "compromise" An Bord Pleanála's ability to grant an extension of duration. This concern is reflected in a letter dated 20 June 2018 from Shannon LNG to An Bord Pleanála as follows.

> "In September 2017, we sought that the SID planning approval for the Shannon LNG Terminal would be extended by 5 years (copy attached).
>
> On 15th June 2018, we were advised that a Decision on the Application had again been postponed. Our existing planning approval is scheduled to expire on 29th June and we are concerned that this expiry might somehow compromise our planning extension application if a timely decision is not made.
>
> We do appreciate the rigorous process within which applications to An Bord Pleanála must be considered, but would request that the extension application for this Strategic Infrastructure Project and EU Project of Common Interest (PCI) be processed as a matter of extreme urgency."

33. Notwithstanding the concerns it had expressed in June 2008, the Developer now maintains the position in these proceedings that the expiration of the 2008 planning permission did not preclude the grant of an extension of duration retrospectively.

HABITATS DIRECTIVE

34. The first stage of the procedure under article 6(3) of the Habitats Directive requires the carrying out of a "screening" exercise. The competent national authority is required to decide whether a "plan" or "project" is likely to have a significant effect on a European Site. If the screening exercise produces a "positive" result, i.e. the plan or project is likely to have a significant effect, then it is necessary for the competent authority to carry out an "appropriate assessment". These two stages are sometimes described as a Stage 1 screening and a Stage 2 appropriate assessment. This language is not, however, used in the Habitats Directive.

35. The CJEU has considered what is required by an "appropriate assessment" in a number of judgments. In *Mechanical Cockle Fishing case* (Case C-127/02 *Waddenzee*), the CJEU stated that an "appropriate assessment" implies that all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. In Case C 404/09 *Commission v. Spain*, the CJEU held that an assessment cannot be regarded as "appropriate" if it contains gaps and lacks complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the site concerned. This requirement has been restated in more recent judgments, including Case C 258/11 Sweetman, [44] and Case C 521/12 *Briels*.

36. Both the Stage 1 screening exercise and the Stage 2 appropriate assessment are to be carried out by reference to the

conservation objectives established for the relevant European Sites. As discussed below, at the time the decision was made to grant the 2008 planning permission, no conservation objectives had yet been established for the two relevant sites.

37. The proposed project is to be located adjacent to what are now two European Sites, namely (i) the Lower River Shannon SAC, and (ii) the River Shannon and River Fergus Estuaries SPA.

38. The current position is set out as follows at page 5 of the "Report on Screening for Appropriate Assessment" prepared on behalf of the Developer by Ove Arup & Partners Ireland Ltd. ("*Arup*"). This report is dated 18 September 2017.

> "The Shannon LNG site does not lie within any designated site. However, a mosaic of habitats adjoining the development site do lie within the Ballylongford Bay proposed Natural Heritage Area (pNHA) and the Lower River Shannon SAC and within the River Shannon and River Fergus Estuaries SPA.
>
> Since the detailed assessment undertaken as part of the original Shannon LNG Terminal application the entire Shannon Estuary in the vicinity of the site has been included in the River Shannon and River Fergus Estuaries SPA. At the time of the original planning application for the terminal, the SPA designation only applied to sections of Ballylongford and Tarbet Bay.
>
> The Lower River Shannon SAC is adjacent to the Shannon LNG site along the northern/north-western boundary and also along part of the eastern boundary of the site. The River Shannon and River Fergus Estuaries SPA is adjacent to the northern boundary of the site."

39. As of the date of An Bord Pleanála's decision to grant planning permission on 31 March 2008, national law did not properly transpose the Habitats Directive. The principal implementing regulations, namely the EC (Natural Habitats) Regulations 1997 (S.I. No. 94 of 1997) incorrectly assimilated the carrying out of an appropriate assessment for the purposes of the Habitats Directive with the carrying out of an environmental impact assessment for the purposes of the EIA Directive. See Regulation 27(1) and (2) as follows.

> "27. (1) A local authority when duly considering an application for planning permission, or the Board when duly considering an appeal on a application for planning permission, in respect of a proposed development that is not directly connected with, or necessary to the management of, a European site but likely to have a significant effect thereon either individually or in combination with other developments, shall ensure that an appropriate assessment of the implications for the site in view of the site's conservation objectives is undertaken.
>
> (2) An environmental impact assessment in respect of a proposed development prepared in accordance with a requirement of or under the Local Government (Planning and Development) Regulations, 1994 (S.I. No. 86 of 1994), shall be an appropriate assessment for the purposes of paragraph (1).
>
> […]".

40. This approach to transposition was condemned by the CJEU in its judgment in Case C 418/04 *Commission v. Ireland*. See, in particular, paragraphs [230] and [231] as follows.

> "230 Ireland adds that it implements the assessments pursuant to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) and to Directive 2001/42, also transposed by the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 and by the Planning and Development Strategic Environmental Assessment Regulations 2004.
>
> 231 Those two directives contain provisions relating to the deliberation procedure, without binding the Member States as to the decision, and relate to only certain projects and plans. By contrast, under the second sentence of Article 6(3) of the Habitats Directive, a plan or project can be authorised only after the national authorities have ascertained that it will not adversely affect the integrity of the site. Accordingly, assessments carried out pursuant to Directive 85/337 or Directive 2001/42 cannot replace the procedure provided for in Article 6(3) and (4) of the Habitats Directive."

41. The judgment in Case C 418/04 was delivered on 13 December 2007, some three months prior to An Bord Pleanála's decision to grant the 2008 planning permission.

42. The qualitative distinction between the assessments required under the EIA Directive and the Habitats Directive, respectively, has been reiterated in a number of judgments. Most recently, it has been reconfirmed by the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31; [2018] 2 I.L.R.M. 453.

43. An Bord Pleanála's decision of 31 March 2008 does not make any reference to the Habitats Directive, still less does it record whether the board had carried out a Stage 2 appropriate assessment, or, alternatively, had screened out the necessity for same at Stage 1.

44. The board's inspector's report of 14 March 2008 does address ecology, and indicates that the board had retained the services of an ecologist, Mr John Brophy, as an advisor. See page 67 of 91 as follows.

> "In relation to the ecological aspects of the proposed development, the Board retained the services of an ecologist, Mr John Brophy, as an advisor. Mr Brophy reviewed those aspects of the application, and in particular, the Environmental Impact Statement, in relation to ecology and the written submissions received by the Board. He also sat in on the Oral Hearing and considered the matters, which were raised during the ecology module of the hearing. Mr Brophy's report is attached at the end of my report. It may be seen from this report that Mr Brophy is generally satisfied that the proposed development would be acceptable from an ecological point of view, provided certain further requirements are met. These requirements could be stipulated by way of conditions attached to a permission."

45. Mr Brophy's report of February 2008 has also been exhibited in these judicial review proceedings. Given that one of the complaints made by the Applicant relates to the assessment of the impact on the bottlenose dolphin, it may be useful to set out the following analysis from Mr Brophy's report (at page 7 thereof).

> "Bottlenose dolphins

> The resident population of bottlenose dolphins in the Shannon estuary is one of qualifying interests for the designation of the sites as an SAC. Bottlenose dolphins are listed under Annex II of the Habitats Directive and protected under the Wildlife Act 1976 (amended 2000). TPODs were employed in establishing the baseline situation with respect to the bottlenose dolphins in the Shannon Estuary and this method is the most appropriate for assessing dolphin activity in the area as monitoring is possible at night and in poor sea conditions were visual surveys would be ineffective. While the TPODs were subject to loss and malfunction, resulting in an incomplete monitoring timeseries, this is a difficulty inherent in deploying high-tech equipment in a marine environment.
>
> No reference is made to the potential impact of onshore blasting on the bottlenose dolphins in the Marine and Estuarine Ecology section, though it is discussed in the noise section. A more detailed discussion of the hearing capabilities given by Dr Simon Berrow at the Oral Hearing expanded on this topic. From this it can be accepted that onshore blasting should have no significant negative impact on the bottlenose dolphins of the Shannon Estuary. While construction phase mitigation measures include the possibility of Marine Mammal Observers being required during the offshore construction phase, this should also be considered for the onshore blasting phase. It may be appropriate to adhere to the Code of Practice for the Protection of Marine Mammals during Acoustic Seafloor Surveys in Irish Waters (DoEHLG, 2007).
>
> The impact assessment presented a short and does not adhere closely to the EPA guidelines (EPA, 2002), however due to the low potential of negative impacts it is generally adequate. There are no 'Do Nothing' or 'Worst Case' scenarios presented in this section on bottlenose dolphins. While there is some reference to continuing acoustic monitoring through the construction phase, and the possibility of post-construction monitoring after consultation with the NPWS, there is no monitoring section. It is considered important the post-construction monitoring be carried out to assess any changes in the bottlenosed dolphin usage of the area. A monitoring section should include the ecological element to be monitored, the monitoring design, timescale, etc."

46. As appears from the terms of the 2008 planning permission, a number of specific planning conditions were attached thereto to address these concerns.

47. In summary, therefore, the 2008 planning permission was granted pursuant to a national legislative regime which did not properly transpose the Habitats Directive. The formal decision to grant planning permission makes no reference to the Habitats Directive at all nor does it refer to the two European Sites. Accordingly, the decision cannot be said to contain "complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the site concerned" as required under Case C 404/09 *Commission v. Spain*.

48. There is an assessment of the potential impact of the proposed project on ecology, including, in particular, on the bottlenose dolphin. This assessment seems to have resulted in a number of planning conditions having been imposed especially in relation to monitoring. This assessment was, however, carried out at a time prior to the conservation objectives of the European Sites having been established by the NPWS on behalf of the Minister. It was also carried out prior to the subsequent expansion of the geographical area of the SPA.

49. The decision to grant the 2008 planning permission was challenged at the time in judicial review proceedings instituted by the Applicant. These earlier proceedings were entitled *Friends of the Irish Environment Ltd. v. An Bord Pleanála* (High Court 2008 No. 597 J.R.). These proceedings came on for hearing before the High Court (MacMenamin J.) in October 2008. However, the Applicant withdrew the proceedings before the hearing had concluded, and the proceedings were dismissed. I have not seen the Statement of Grounds in the 2008 proceedings, but it does appear from the order of the High Court of 17 October 2008 dismissing the proceedings that the proceedings did raise issues in respect of the Habitats Directive.

50. As discussed at paragraph 127 below, both An Bord Pleanála and the Developer attach significance to the fact that the Applicant had sought to challenge the 2008 planning permission at the time. This is said to be relevant to the collateral challenge objection. In brief, it is said that the Applicant cannot seek to re-agitate its criticisms of the 2008 planning permission under the guise of a challenge directed to the 2018 decision to grant an extension of duration.

HABITATS DIRECTIVE: EVENTS SINCE 2008

51. Leading counsel on behalf of the Applicant, Mr James Devlin, SC, submits that there have been at least three significant changes since the 2008 planning permission was granted on 31 March 2008. First, conservation objectives have now been established for the SAC by the NPWS on behalf of the Minister. Secondly, additional survey work has been carried out in relation to the bottlenose dolphin, and this has disclosed the existence of what have been described as "critical areas" within the vicinity of the proposed project. Thirdly the boundaries of the SPA have been expanded.

52. The "Conservation objectives supporting document – marine habitats and species" produced by the NPWS in 2012 states as follows (at page 12).

> "Bottlenose dolphins are known to range widely throughout the site and, due to the size of the site and consistent data available, research effort has predominantly targeted the broader downstream area lying to the west of Tarbert and extending as far as Kerry Head and Loop Head. Members of the Shannon dolphin population have occasionally been recorded outside the site (e.g. within Tralee Bay or Brandon Bay; generally within 25km of the estuary) while a lower-level genetic connection is described to a small semi-resident community recently utilising waters in outer Cork Harbour. However the vast majority of records are contained within the Lower River Shannon site. Within its downstream study area, continued robust research effort has led to the identification of two core locations within which the majority of dolphin records occur. These 'critical areas' (figure 7) represent high value habitats used preferentially by the species within its overall range at the site and they broadly coincide with areas of steep benthic (i.e. seafloor) slope, greater depth and stronger currents. A degree of community partitioning is also described, whereby certain individuals/groups are more likely to occur further upstream than others. Records are also available of dolphins occurring east of Tarbert, e.g. off Foynes Island, Aughinish Island and the Fergus Estuary and occasionally as far upstream as Limerick City. Since the upstream area within this extensive and complex site has seen significantly less survey coverage, both spatially and temporally, it should be noted that all suitable aquatic habitat (figure 7) is considered relevant to the species' range and ecological requirements within the site and is therefore of potential use by bottlenose dolphins."

AN BORD PLEANÁLA'S POSITION

53. An Bord Pleanála's position, as set out in its Statement of Opposition dated 6 December 2018, involves a two-fold response. First, it is pleaded that there was no legal obligation to carry out a screening assessment in the context of an application for the extension

of the duration of the 2008 planning permission. Secondly, it is pleaded that An Bord Pleanála did, in fact, carry out a screening exercise, but that same was confined to the effects of the alteration requested rather than the effects of the underlying permitted development.

54. This position is set out, in particular, at paragraphs 22, 23 and 29 of the Statement of Opposition as follows.

> "22. Notwithstanding the foregoing, however, in the context of its jurisdiction under section 146B to consider whether the alteration requested would constitute a material alteration to the terms of the development, the Board carried out screening for appropriate assessment to determine whether the *alteration* would be likely to have significant effects on any European site. Consistent with the scheme of section 146B, this screening assessment was confined to the effects of the alteration requested rather than the effects of the underlying permitted development. The Board concluded that the alteration was not likely to have a significant effect on any European site.
>
> 23. In circumstances where the requested alteration comprised solely of an extension of the duration of the 2008 Planning Permission, the Board was not, however, as a matter of law, required to carry out such screening for appropriate assessment. Article 6(3) of the Habitats Directive does not apply in respect of an application to extend the duration of a planning permission. A decision to extend the duration of an existing planning permission does not alter the 'project' and/or does not constitute the 'agreement' of a project for the purposes of article 6(3) of the Habitat Directive.
>
> […]
>
> 29. The Applicant's complaints at (E) (37) to (39) are premised on the suggestion that the Board was purporting to carry out, or was required to carry out, screening for appropriate assessment in respect of the *development permitted under the 2008 Planning Permission*. However, the Board assessed whether, under the application of the test as aforesaid, the alteration proposed, in and of itself, would be likely to have a significant effect on any relevant European site. As the Board's Inspector noted at paragraphs 19.2 and 19.5 of his third report, *'[a]s the request relates to an extension of time only, it will not have any impact on the Conservation Objectives for'* the relevant SAC (Lower River Shannon SAC – 'the SAC')) and relevant SPA River Shannon and River Fergus Estuaries SPA – 'the SPA'). The Board correctly confined the scope of the assessment it carried out to the effects of the alteration the subject matter of the application and excluded the possibility that the alteration would have a significant effect on any European site."

55. The pleadings on behalf of An Bord Pleanála reflect the approach recorded in the decision of 13 July 2018 (Board Ref. 08.PM0014B). The board's approach to the Habitats Directive issues is dealt with at follows.

> "Matters Considered
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> In 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 the submissions and observations received by it in accordance with statutory submissions.
>
> Reasons and Considerations
>
> Having regard to the reason cited for Condition number 2, as originally stated, *the Board considered that the amendment sought to extend the period of the planning permission would not give rise to any significant change in the overall impact of the development on the area** and, following on from this, that it would not have any significant consequences in terms of impact on the residential amenities or ecology of the area. *The proposed alteration would not otherwise have material consequences, over and above those already considered under case reference number 08.PA0002 (as amended by case ref. 08.PM0002),** and would, therefore, be in accordance with the proper planning and sustainable development of the area.
>
> Appropriate Assessment Screening
>
> In conducting a screening for appropriate assessment, the Board considered the nature, scale and context of the proposed alteration, the documentation on file generally, in particular the Appropriate Assessment screening report submitted with the application, the submissions on file – including from the planning authority, the planning history, and the assessment of the Inspector in relation to the potential for effects on European Sites. In undertaking the screening exercise, the Board accepted and adopted the analysis and conclusions of the Inspector. The Board concluded that, by itself and in combination with other plans and projects in the vicinity, the proposed alteration would not be likely to have significant effects on any European sites in light of their conservation objectives, and a Stage 2 Appropriate Assessment is not, therefore, required."
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> *Emphasis (italics) added.

56. The position was put as follows in An Bord Pleanála's written submissions of 22 January 2019.

> "22. Moreover where, as here, the alteration sought simply consists of an extension of duration, for the reasons discussed further below, Article 6(3) is not engaged at all. In the alternative, if the Court finds that it is engaged, the obligation to screen for and/or carry out appropriate assessment applies only to the decision to extend the duration of the permission. In other words, the Board was required only to consider whether the carrying the development in the period between 2018 and 2023 would be likely to have significant effects on European sites *over and above those which it would have had* had it been carried within the timeframe originally permitted in the 2008 Planning Permission. As is clear from Section 19 of the Inspector's third and final report dated 28th June 2018, this was done in the present case."

57. Leading counsel for An Bord Pleanála, Ms Nuala Butler, SC, helpfully encapsulated the board's position in relation to screening as follows at the conclusion of her oral submission (Transcript, Day 4, page 33). The board accepts that the whole or the entirety of the project was not screened for Habitats Directive purposes. It was considered as baseline, but not considered as the subject of the assessment.

THE ISSUES IN DISPUTE

58. The principal issues in dispute between the parties are as follows. The first issue is whether a decision which merely extends the duration of a planning permission, without any physical change to the permitted project, engages article 6(3) of the Habitats Directive

at all.

59. The second issue, assuming that the Habitats Directive is engaged, concerns the extent of what has to be screened or assessed. More specifically, An Bord Pleanála maintains that the most that has to be screened or assessed are the changes, if any, in the regulatory background. Thus, for example, it may be necessary to have regard to an expansion in the geographical area of a European Site in the interim. Conversely, the Applicant maintains that it is necessary to screen and assess the impacts of the *entire* project.

60. A third, related issue is whether different considerations might apply if the assessment carried out at the time of the original grant of planning permission in 2008 was inadequate. An Bord Pleanála maintains that it is impermissible to question the validity of the earlier assessment. Whereas the board *appeared* to accept that the position might be different in a (hypothetical) case where it was admitted that no assessment for Habitats Directive purposes had been carried out at the time of the original grant, once an assessment has been carried out, then the board maintains that the *adequacy* of same cannot be criticised. Conversely, the Applicant adopts the position that it is open to raise concerns as to the assessment carried out at the time of the original grant of planning permission.

61. It is proposed to examine these issues, first, by reference to the Advocate General's opinion in Case C 411/17, and then by reference to national law.

ADVOCATE GENERAL'S OPINION IN CASE C 411/17

62. The preliminary reference in Case C-411/17 *Inter Environnement Wallonie* raises a great number of legal issues, only some of which are relevant to the within judicial review proceedings. In brief, the background to the preliminary reference is as follows. In 2003, the Belgian legislature decided to cease production of electricity from nuclear energy. National legislation provided that no new nuclear power station was to be built, and that the power stations in operation were to be gradually taken out of service after they had been in operation for forty years.

63. The effect of this legislation was that the two nuclear power stations the subject-matter of the preliminary reference were required to cease electricity production in 2015. However, in June 2015 the legislation was amended so as to allow electricity production to be carried out for a further period of ten years. Two environmental organisations instituted proceedings seeking the annulment of the amended legislation on the basis that it purported to authorise an extension of the activity without an environmental assessment and a public participation procedure having first been carried out. It was alleged that the requirement to carry out an environmental assessment arose under the Espoo Convention, the Aarhus Convention, the EIA Directive, the Habitats Directive and the Birds Directive.

64. Much of the Advocate General's opinion is dedicated to a discussion of the circumstances in which national legislation can be relied upon for the purposes of carrying out an environmental assessment, and on the extent, if any, to which the public interest in ensuring security of electricity supply can be relied upon to justify the grant of development consent. However, the Advocate General also had to address the threshold issue of whether the extension of the period within which an activity, namely electricity production, can be carried on triggers assessment under any or all of the conventions or directives relied upon. As explained in her opinion, the requirements in relation to each of the legal instruments are slightly different.

65. The aspect of the opinion of most immediate relevance to the within judicial review proceedings is that addressing the position under the Habitats Directive. Before turning to consider that, however, it may be useful to refer briefly to the analysis of the position under the EIA Directive. This is because, as explained by Advocate General Kokott, there is some overlap in the concept of "project" as between the two directives.

66. The Advocate General explains, at paragraph [66], that the previous case law of the CJEU indicates that the mere renewal of an existing permit to operate a project cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a "project" within the meaning of article 1(2)(a) of the EIA Directive. The Advocate General cites in this regard the judgment in the *Brussels Airport* case (C 275/09 *Brussels Hoofdstedelijk Gewest*), and Case C 121/11 *Pro-Braine*. The Advocate General goes on at paragraph [67] to state that this interpretation is not consistent with the Espoo Convention and the Aarhus Convention.

67. Ultimately, the Advocate General invites the CJEU to depart from its previous case law in respect of the EIA Directive. During the course of her discussion, Advocate General Kokott acknowledges the paradox that—whereas the EIA Directive does not *require* a Member State to impose a time-limit on a development consent—if a Member State does do so, then there may be a requirement for a further assessment before the consent can be extended. The Advocate General identifies the benefits of an assessment at paragraph [87].

> "87. Furthermore, it is also reasonable to undertake an environmental impact assessment upon an extension of the period of production of electricity because in the course of the long-term operation of a power station new scientific findings are usually made concerning the associated risks, which could not be taken into account previously. In addition, as Portugal asserts, an environmental impact assessment with public participation has never been undertaken for many older plants in particular."

68. The benefits are also described at paragraph [109].

> "109. Even going beyond this, however, for purely domestic cases the broader interpretation of the definition of 'project' is more consistent with the purpose of the EIA Directive and the Aarhus Convention of ensuring an assessment of the environmental impact of projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location. In this regard, the extension of the operation of an installation may, of course, have significant effects on the environment, not only as a result of continued operation, but also because of the altered environmental conditions in the surrounding area. In addition, new scientific findings may be available at the time when a decision on extension is taken."

69. This paragraph is important in that it indicates that the approach of the Advocate General is not confined to the specific example of nuclear power stations or to projects with transboundary effects. It can also apply to what the Advocate General describes as "purely domestic" cases.

70. Turning now to the Advocate General's analysis of the position under the Habitats Directive. Given its importance to the facts of the present case, it is necessary to set same out in full.

"1. Question 8(a) — Definition of 'project' in the Habitats Directive

164. By Question 8(a), the Cour constitutionnelle (Constitutional Court) wishes to know whether Article 6 of the Habitats Directive applies to the extension of the period of industrial production of electricity by a nuclear power station.

165. Under the first sentence of Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, is to be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. If such an assessment should be necessary, it would include public participation in accordance with Article 6 of the Aarhus Convention. (75)

166. It must therefore be clarified in particular whether the extension of the period of industrial production of electricity by nuclear power stations is a plan or project within the meaning of that provision.

167. It is true that the Habitats Directive does not define 'project'. The Court has ruled, however, that the definition of 'project' in Article 1(2)(a) of the EIA Directive is relevant in defining the concept of plan or project as provided for in the Habitats Directive, which seeks, as does the EIA Directive, to prevent activities which are likely to damage the environment from being authorised without prior assessment of their impact on the environment. (76)

168. It is not possible, however, to treat 'project' in the two directives in exactly the same way because the assessment under the Habitats Directive is inextricably linked to the consent requirements for plans and projects which are likely to have a significant effect on protected areas. The competent authorities may agree to a plan or programme only if the impact assessment contains complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works likely to have an effect on the protected area concerned. (77) On the other hand, the EIA Directive does not lay down any substantive rules for consent for a project. (78)

169. I therefore understand this statement by the Court regarding the meaning of the 'project' in the EIA Directive in the context of Article 6(3) of the Habitats Directive to mean that in any case projects within the meaning of that definition are also projects for the purposes of the first sentence of Article 6(3) of the Habitats Directive. However, I assume that the concept of project in the Habitats Directive is not thereby exhaustively defined. (79)

170. Accordingly, if the Court concurs with my view and the extension in itself is to be regarded as a project within the meaning of the EIA Directive or if the Cour constitutionnelle (Constitutional Court) concludes that the extension together with the improvement measures forms a project, a project therefore also exists within the meaning of Article 6(3) of the Habitats Directive. However, even if no project exists under the EIA Directive, that does not preclude the application of Article 6(3) of the Habitats Directive.

171. The Court has thus also held that it is not permitted to exclude from the duty of assessment certain categories of projects on the basis of criteria which do not adequately ensure that those projects will not have a significant effect on the protected sites. (80) In the subsequent examination of the different exclusions provided for in national law, it did not give detailed consideration as to whether they relate to projects within the meaning of Article 1(2) of the EIA Directive. Instead, the likelihood of a significant effect on the protected sites was sufficient to reject the exclusions for the activities in question. (81)

172. The definition of 'project' in Article 1(2)(a) of the EIA Directive therefore does not definitively delimit the concept of 'project' under the first sentence of Article 6(3) of the Habitats Directive. Rather, the crucial factor is whether the activity concerned is likely to have a significant effect on a protected site.

173. Thus, the remaining risk of protected areas being affected by a serious accident in one of the power stations in particular points to the existence of a project within the meaning of Article 6(3) of the Habitats Directive. Furthermore, the operation of the cooling mechanism is likely to have an effect on fish and cyclostomata particularly, (82) for which both Belgium and the Netherlands protect the Scheldt. On the basis of the available information, it cannot be ruled out that other damage is also possible.

174. The answer to Question 8(a) is therefore that the extension of the period of industrial production of electricity by a nuclear power station is to be regarded as a project within the meaning of the first sentence of Article 6(3) of the Habitats Directive even if that extension would not constitute a project as such within the meaning of the EIA Directive or on account of its connection with works to improve the installation."

71. As appears, whereas the Advocate General does draw a link between her earlier analysis of the definition of a "project" under the EIA Directive, her conclusion, i.e. that a decision to extend the period during which an activity can be carried out engages the Habitats Directive, can be reached *without* the necessity of the CJEU having to depart from its earlier case law in relation to the EIA Directive.

72. All of the parties to these judicial review proceedings accept that the judgment of the CJEU in Case C 411/17 may well affect the outcome of the proceedings. The Applicant and An Bord Pleanála both suggested that I should consider deferring my judgment until after the CJEU has issued its ruling.

73. For the following reasons, however, I think that the judgment in Case C 411/17 is unlikely to address all of the issues which I have to resolve in these judicial review proceedings. First, the nature of the extension of duration being sought is different as between the two sets of proceedings. The CJEU is concerned with a time-limit on the *operational phase* of a project. Specifically, the production of electricity would have been required to cease by 2015 but for the amendment subsequently made to Belgian national legislation. The proceedings before me, conversely, are concerned with a time-limit on the *construction phase* of a project. An Bord Pleanála, in its submissions, contends that this distinction is an important one. I suspect that this issue will not have to be addressed by the CJEU in Case C 411/17. It can be anticipated, therefore, that even if the CJEU were to hold that the Habitats Directive was engaged on the facts of that case, there would be an outstanding issue before me as to whether different principles apply to a time-limit on a construction phase.

74. Secondly, the underlying facts of Case C 411/17 involve a nuclear power station. The case thus presents issues in respect of *transboundary* impacts, and this gives rise to issues in relation to the Espoo Convention which are inapplicable to these judicial review proceedings. It also potentially raises issues under the Treaty establishing the European Atomic Energy Community.

75. Thirdly, the fact that An Bord Pleanála carried out a screening exercise on an *ad hoc* basis means that it may be necessary to determine the question of what considerations a decision-maker is required to take into account in carrying out a screening assessment in the context of an application to extend the duration of a development consent. The question then becomes what precisely has to be assessed. Is it sufficient that the competent authority identifies changes in the regulatory background, e.g. (i) the designation of European Sites in the interim; (ii) altered environmental conditions in the surrounding area; and (iii) new scientific findings; or, alternatively, is the competent authority required to reconsider the very principle of the project. It will also be necessary to examine whether the answer to this question might be different in circumstances where there had not been proper compliance with the requirements of the Habitats Directive at the time of the grant of the original planning permission. (cf. Case C 201/02 *Wells*, and Case C 399/14 *Grune Liga*). Again, I suspect that these issues will not have to be examined on the facts of Case C 411/17, and the CJEU will instead simply address the "headline" issue of whether an extension of duration engages the Habitats Directive.

76. Fourthly, the fact that the 2008 planning permission had ceased to have effect *prior* to An Bord Pleanála making its decision to extend the duration of the permission may be relevant to the analysis of the CJEU in an Article 267 reference from this court. It is at least arguable that a decision to revive a planning permission which has expired is more akin to the grant of a "development consent" than is a decision to prolong a subsisting planning permission.

77. Finally, and as discussed under the next heading below, there is already provision made under Irish national law which would appear to be intended to ensure compliance with the requirements of the Habitats Directive in the context of an application to extend the duration of a planning permission, namely section 42 of the PDA 2000. Again as explained presently, a related issue arises as to whether the interpretive obligation upon a national court, such as the High Court, can be made contingent on the parties to the proceedings having raised an express plea in that regard.

SECTION 42 OF PDA 2000

78. Express provision is made under section 42 of the PDA 2000 for the extension of the duration of a planning permission. This section applies not only to conventional planning permissions, i.e. a permission granted under section 34, but also applies to SID permissions granted pursuant to section 37G. The term "permission" is defined under section 2 of the PDA 2000 as meaning *inter alia* a permission granted under section 37G. See also the amendments made to section 41 which introduce an express reference to section 37G.

79. In brief, section 42 provides two alternative bases upon which an application for an extension of duration can be made. The first is where substantial works have been carried out pursuant to the planning permission during the period sought to be extended, and the development will be completed within a reasonable time. The second is where there were considerations of a commercial, economic or technical nature beyond the control of an applicant which substantially militated against either the commencement of the development or the carrying out of substantial works pursuant to the planning permission.

80. In the case of the second basis, i.e. commercial, economic or technical considerations, there are a number of safeguards built into section 42 in order to ensure that stale planning permissions do not undermine the evolution of planning policy. For example, an extension of duration cannot be granted if there have been significant changes in development objectives in the development plan since the date of the permission such that the development would no longer be consistent with the proper planning and sustainable development of the area. It is also necessary that there not be an inconsistency with Ministerial guidelines.

81. Relevantly, a further safeguard is built-in to ensure compliance with both the EIA Directive and the Habitats Directive. More specifically, *where the development has not commenced*, the local planning authority must be satisfied that an environmental impact assessment, or an appropriate assessment, or both of those assessments, if required, was or were carried out before the planning permission was granted. (Section 42(1)(a) (ii)(IV)).

82. There was some debate at the hearing before me as to what precisely the local planning authority had to be satisfied of in this regard. In particular, it was suggested on behalf of An Bord Pleanála that the local planning authority was only entitled to consider whether an appropriate assessment had been carried out; the planning authority had no entitlement to appraise the adequacy of that appropriate assessment. It is doubtful whether this analysis is consistent with the judgments of the CJEU in Case C 72/12 *Altrip* and Case C 137/14 *Commission v. Germany*. Be that as it may, what is clear is that had the Developer made an application for an extension of the duration of the 2008 planning permission pursuant to section 42, then there would have had to be some sort of consideration of whether the Habitats Directive had been complied with at the time of the granting of the planning permission on 31 March 2008.

83. Section 42 contains a further safeguard in terms of the length of time for which an extension of duration can be granted. It is expressly provided that the additional period cannot exceed five years. Moreover, an application for an extension of duration can only be made once. A planning authority shall not further extend the appropriate period. See section 42(4).

84. In summary, section 42 of the PDA 2000 is a precise provision which addresses one specific contingency, namely the extension of the duration of a planning permission. Section 42 contains a number of important safeguards in terms of *inter alia* (i) the criteria governing a decision to extend the duration; (ii) the length of any extension of duration; and (iii) ensuring compliance with the Habitats Directive. Having regard to these factors, I have concluded that an extension of duration may only be granted pursuant to section 42. It is not open to a developer to seek to invoke the general power under section 146B to seek an extension of duration. Section 42 represents a form of *lex specialis*.

85. Both An Bord Pleanála and the Developer submitted that section 146B itself also constitutes a form of *lex specialis* in that it was confined to a particular class of planning permission, namely SID permissions. It was further submitted that a beneficiary of an SID permission thus had a choice as to whether to invoke section 42 or section 146B. With respect, I cannot accept this submission. It is clear from the structure of section 146B that it can accommodate a wide variety of alterations, ranging from the non-material through to the significant. It is, therefore, dealing with a much more general jurisdiction than section 42. Section 42 confers a very narrow jurisdiction, and addresses one specific contingency, namely the extension of the duration of a planning permission. As explained earlier, section 42 applies equally to SID permissions as it does to conventional planning permissions.

86. My conclusion in this regard is informed by the existence of safeguards under section 42 which are absent from section 146B. In a sense, the argument on behalf of An Bord Pleanála and the Developer proves too much. On their interpretation, a developer is entitled to an extension of duration (i) without having to show any cause for the delay in implementing the planning permission; (ii) without having to demonstrate that the development remains consistent with updated planning policy; and (iii) without having to demonstrate compliance with the Habitats Directive. Moreover, there is no outer limit on the period for which the extension of duration can be granted. Put shortly, the safeguards under section 42 could be set at naught by the simple expedient of making an application under section 146B.

87. In this regard, a useful analogy can be drawn with the judgments of the Supreme Court in *Ashbourne Holdings Ltd. v. An Bord Pleanála* [2003] 2 I.R. 114, and *Dublin Corporation v. Hill* [1994] 1 I.R. 86. In each of these cases, the Supreme Court appears to suggest that where a particular measure falls within a specific statutory power under the planning legislation which is subject to restrictions, it is not legitimate to rely on a *general power* to seek to achieve the same result.

88. On the facts of *Ashbourne Holdings*, An Bord Pleanála had purported to impose a number of planning conditions requiring the developer to provide public access in the context of the development of a golf clubhouse. Under the applicable legislation, namely, the Local Government (Planning & Development) Act 1963, there was a general power to attach planning conditions, and a power to attach a series of specific planning conditions. Section 26(2)(a) allowed for the imposition of conditions for regulating the development or use of any land which adjoins, abuts or is adjacent to the land to be developed and which is under the control of an applicant, so far as appears to the planning authority to be expedient for the purposes of or in connection with the development authorised by the permission.

89. Hardiman J. suggested that as the impugned conditions were within the scope of section 26(2)(a), An Bord Pleanála could not rely on its general power to attach planning conditions under section 26(1).

> "The approach in these cases suggests a number of thoughts in the context of the present case. Firstly, the disputed conditions are all within the scope of s. 26(2)(a) in the sense that they relate to the development or use of lands adjoining the clubhouse development. If, however, they fail to meet the requirements of that sub-paragraph, that they be 'expedient' not in some general planning sense but 'for the purposes of or in connection with' the clubhouse development, I do not consider that the conditions can be justified by the general words of s. 26(1). These words require that regard be had to the various matters set out in the sub-paragraphs of sub-s. (2). If, therefore, a particular condition is within the scope of one of these subparagraphs but does not meet its requirements, it would appear to contradict the intention of sub-s. (1) to permit the condition to be imposed under the authority of general words."

90. The judgment in *Dublin Corporation v. Hill* concerned enforcement notices. The Supreme Court, *per* McCarthy J, concluded that the local authority could not rely on an enforcement mechanism which was not subject to a time-limit in preference to one which was time-limited.

> "Having regard to the ordinary principle that penal legislation must be construed strictly it would be difficult if not impossible to construe the circumstances of this case as falling outside s. 31, where there is a benefit of a five year limitation, and bring it within s. 35 where there is no such benefit."

91. It has to be acknowledged that the analogy with neither of these two judgments is precise. For example, counsel for An Bord Pleanála sought to distinguish *Ashbourne Holdings* on the basis that the 1963 Act expressly provided that the power under section 26(1) had to be exercised *having regard* to the matters referred to in subsection (2). There is no such organic link between section 42 and section 146B. The judgment in *Hill* was decided by reference to the fact that the case concerned a criminal offence.

92. Nevertheless, the judgments do appear to lend some support for the principle that statutory restrictions imposed on the exercise of a specific power under the planning legislation cannot be side-stepped by invoking a general power instead. Moreover, the fact that the present proceedings involve issues of EU law tends to reinforce that principle: a court confronted with two decision-making processes, only one of which seeks to ensure compliance with the Habitats Directive, must be required to favour that interpretation.

93. As discussed at paragraph 116 below, however, counsel for the Developer maintains that this court is not entitled to decide the case on the basis that the application was incorrectly made pursuant to section 146B. This is because, or so it is said, the Applicant has not pleaded this point.

SUBSEQUENT AMENDMENTS TO SECTION 42

94. For the sake of completeness, I should refer briefly to subsequent amendments made to section 42 but which have not yet been commenced. Both the Planning and Development (Housing) and Residential Tenancies Act 2016, and the Planning and Development (Amendment) Act 2018, introduced amendments to section 42. Relevantly, in each instance, a local planning authority would be precluded from granting an extension of duration in circumstances where an environmental impact assessment or an appropriate assessment, or both of those assessments, were required before the permission was granted.

95. The effect of these amendments, if and when commenced, would be to preclude the grant of an extension of duration in the case of a project subject to assessment under the Habitats Directive.

96. There was some debate before me as to the extent, if any, to which a court can have regard to an amendment which has not yet been commenced. Counsel for An Bord Pleanála very helpfully referred me to the discussion of this question in both *Bennion on Statutory Interpretation* (Bailey and Norbury, 7th edition, LexisNexis) and Dodd, *Statutory Interpretation in Ireland* (Tottel Publishing, Dublin).

97. Bennion states the position at §5.8 as follows.

> "Section 5.8: Courts must not pre-empt commencement
>
> 5.8 the courts must apply the law as it stands: they must not pre-empt the commencement of legislation.
>
> Comment
>
> The proposition that courts (and, for that matter, public authorities and others) cannot lawfully treat legislation as in force when it is not in force almost goes without saying."

98. Dodd considers the position to be more nuanced.

> "[4.17] There have been circumstances where courts abroad have been mindful of an enactment passed and which is due to be commenced. For example, an enactment may be in part commenced and in part not. In some circumstances, it may be inappropriate for a court to ignore 'uncommenced' provisions when considering the Act as a whole. There is authority from other jurisdictions for the view that where a court has discretion in a particular matter, it may have some regard to the future commencement of a passed enactment. Thus, for example, in *Hill v. Parsons and Co*. a court in granting an injunction took into consideration the imminent commencement of an enactment which would provide the protection

sought by the applicant. In the New Zealand case of *R. v. O'Brien*, the court in exercising its sentencing discretion reduced O'Brien's sentence from ten years, noting that a newly passed Act due to be commenced had reduced the maximum sentence to eight years it was held that Parliament's intention, in those circumstances, could not be ignored. Caution is, however, required, not least because enactments that have been passed may never be commenced."

*Footnote references omitted.

99. Happily, in a case which already presents a myriad of legal issues, it is not necessary for me to decide whether the approach of Bennion or Dodd is correct. My conclusion that section 42 provides the only legal basis for extending the duration of a planning permission is predicated on the version of section 42 as in force at the time of An Bord Pleanála's decision of 13 July 2018. That version of the legislation includes a safeguard in relation to the Habitats Directive, whereas section 146B contains none. This conclusion is not affected by the fact that a *stronger* safeguard, i.e. a prohibition on an extension of duration in the case of projects subject to assessment under the Habitats Directive, has since been enacted, albeit not yet commenced, under the 2016 and 2018 Acts referred to above.

100. I merely observe, however, that the logic of An Bord Pleanála's position must be that—if and when the amendments are commenced—a developer could readily avoid the *newly introduced* statutory prohibition under section 42 by the simple expedient of making an application for an extension under section 146B instead. With respect, I do not think that this could be the correct interpretation of the legislation. Certainly, it would be very difficult to reconcile with EU law obligations.

PART XAB / BIRDS AND HABITATS REGULATIONS

101. The national legislation implementing the Habitats Directive was overhauled following the judgment of the CJEU in Case C 418/04 *Commission v. Ireland*. The two principal pillars of the new regime are Part XAB of the PDA 2000 (as inserted by the Planning and Development (Amendment) Act 2010), and the Birds and Natural Habitats Regulations 2011 (S.I. No. 477 of 2011). The intention seems to be that the two regimes should be mutually exclusive, i.e. environmental decision-making will be subject to one or the other, but not to both regimes. As discussed, however, An Bord Pleanála maintains that there is a *third* category of environmental decision-making which falls outwith either regime.

102. In the case of each regime, the legislation establishes a general framework which fulfils the procedural requirements of the Habitats Directive, and then identifies the type of environmental decision-making which is subject to the general framework. This has the advantage of avoiding the necessity of introducing amendments to numerous pieces of individual legislation.

103. The range of decisions subject to Part XAB of the PDA 2000 is narrower than the Birds and Natural Habitats Regulations 2011. Part XAB applies to decisions defined as "consent for proposed development" under section 177U(8) of the PDA 2000 as follows.

"(8) In this section 'consent for proposed development' means, as appropriate—

(a) a grant of permission,

(b) a decision of the Board to grant permission on a planning application or an appeal,

(c) consent for development under Part IX,

(d) approval for development that may be carried out by a local authority under Part X or Part XAB or development that may be carried out under Part XI,

(e) approval for development on the foreshore under Part XV

(f) approval for development under section 43 of the Act of 2001,

(g) approval for development under section 51 of the Roads Act 1993, or

(h) a substitute consent under Part XA."

104. These are all decisions which are either made under the PDA 2000, or by An Bord Pleanála exercising a function which has been transferred to it such as, for example, under the Roads Acts.

105. Relevantly, this list of decisions does not include a decision under either section 42 or section 146B of the PDA 2000.

106. The Birds and Natural Habitats Regulations 2011 are much broader in their scope. Their range is determined by the related definitions of "consent" and "project" under regulation 2 thereof.

107. A "consent" is defined as follows.

"'consent' includes any licence, permission, permit, derogation, dispensation, approval or other such authorisation granted by or on behalf of a public authority, relating to any activity, plan or project that may affect a European Site, and includes the process of adoption by a public authority of its own land use plans or projects;"

108. A "project" is defined as follows.

"'project', subject to the exclusion, except where the contrary intention appears, of any project that is a development requiring development consent within the meaning of the Planning and Development Acts 2000 to 2011, includes—

(a) land use or infrastructural developments, including any development of land or on land,

(b) the extraction or exploitation of mineral resources, prospecting for mineral resources, turf cutting, or the exploitation of renewable energy resources, and

(c) any other land use activities,

> that are to be considered for adoption, execution, authorisation or approval, including the revision, review, renewal or extension of the expiry date of previous approvals, by a public authority and, notwithstanding the generality of the preceding, includes any project referred to at subparagraphs (a), (b) or (c) to which the exercise of statutory power in favour of that project or any approval sought for that project under any of the enactments set out in the Second Schedule of these Regulations applies;"

109. An attempt has been made in the definition of "project" to ensure that there is no overlap between the Birds and Natural Habitats Regulations 2011 and the provisions of Part XAB of the PDA 2000. As appears, if a "project" is a development requiring "development consent" within the meaning of the PDA 2000, then it falls outwith the scope of the 2011 Regulations. The difficulty with the statutory language, however, is that the term "development consent" is not actually a defined term under the PDA 2000. The closest one comes to finding such a definition under the PDA 2000 is the definition of "consent for proposed development" under section 177U(8). The term "development consent" is, of course, defined under European law, and, in particular, under the EIA Directive.

110. One might have assumed that the two regimes, i.e. Part XAB and the 2011 Regulations, would be mutually exclusive. On this assumption, the inclusion of reference to development consents under the PDA 2000 in the definition of "project" under regulation 2 of the 2011 Regulations was intended to indicate that if a particular decision-making procedure is subject to Part XAB of the PDA 2000, then there is no need to duplicate those requirements under the 2011 Regulations. However, the statutory language actually used is imprecise.

111. All of this has allowed an argument to be made by An Bord Pleanála that a decision pursuant to section 146B to alter the terms of a development is not subject to either regime. On a literal interpretation, the decision under section 146B falls outwith the 2011 Regulations because the (underlying) project is one which is subject to development consent under the PDA 2000, namely a planning permission under section 37G. However, a decision to alter the terms of a development under section 146B is not included in the definition of "consent for proposed development" under section 177U(8).

112. An Bord Pleanála has also drawn attention to the provisions of Regulation 42(20) of the 2011 Regulations as follows.

> "(20) For the avoidance of doubt, *notwithstanding the fact that the making, adoption and consent procedures relating to plans and projects which fall under the Planning and Development Acts 2000 to 2011 do not come within the scope of these Regulations,** a public authority shall, pursuant to Article 6(3) of the Habitats Directive, take cognisance of such plans and projects in assessing any effects that might arise when such plans or projects are considered in combination with any activities, plans or projects for which the public authority is undertaking screening for Appropriate Assessment or Appropriate Assessment."
>
> *Emphasis (italics) added.

113. As appears, this suggests that consent procedures relating to projects which fall under the PDA 2000 are not subject to the 2011 Regulations.

114. Counsel for An Bord Pleanála, Ms Butler, SC, accepted that this interpretation of section 146B so as to exclude it from any express requirement under national law to comply with the Habitats Directive might represent a failure in the transposition of the Habitats Directive. Ms Butler went on to say, however, that An Bord Pleanála would nevertheless seek to ensure compliance with the Habitats Directive and that, if necessary, the board would refuse an application under section 146B if the proposed alteration was such as to require assessment or screening under the Habitats Directive. (See, for example, Transcript, Day 3, page 146). If this interpretation is correct, then is reinforces my conclusion that an application for an extension for duration cannot be made pursuant to section 146B. Put shortly, if the choice is between section 42 which contains safeguards to ensure compliance with the Habitats Directive, and section 146B which fails to transpose the Habitats Directive at all, then there can only be one answer consistent with EU law.

115. In the event that the CJEU rules that a decision to extend the duration of a development consent is subject to screening and, if necessary, appropriate assessment under the Habitats Directive, I will have to consider whether—notwithstanding the cogent arguments made on behalf of An Bord Pleanála—the Birds and Natural Habitats Regulations 2011 can be interpreted flexibly and in a way which is consistent with EU law without the necessity to do violence to the language thereof.

INTERPRETATIVE OBLIGATION

116. For the reasons outlined above at paragraphs 84, I have reached the conclusion that the correct interpretation of the PDA 2000 is that an extension of the duration of a planning permission can only be granted pursuant to section 42. The section represents a *lex specialis,* and a developer cannot sidestep the safeguards built into section 42—in particular, in terms of the maximum period of extension, and compliance with the Habitats Directive—by making an application pursuant to section 146B instead.

117. This conclusion should have been sufficient to dispose of these judicial review proceedings. The application—and the impugned decision—were made pursuant to the incorrect section. However, leading counsel for the Developer, Mr Jarlath Fitzsimons, SC, submits that I do not have jurisdiction to determine the case on this basis in circumstances where the Applicant has not pleaded that the decision to grant an extension of duration was made pursuant to the incorrect section. Mr Fitzsimons, SC submits that the High Court's jurisdiction on an application for judicial review is limited by the grounds upon which leave to apply has been granted. Counsel refers me in this regard to the provisions of section 50A(5) of the PDA 2000 as follows.

> "(5) If the court grants section 50 leave, no grounds shall be relied upon in the application for judicial review under the Order other than those determined by the Court to be substantial under subsection (3)(a)."

118. Counsel also refers me to the judgment of the Supreme Court in *A.P. v. Director of Public Prosecutions* [2011] 1 I.R. 729 which emphasises that a court is limited in a judicial review to the grounds ordered for the review on the initial application for leave, unless the grounds have been amended. Reference was then made to a very recent example of the application of this principle by the High Court (McDonald J.) in *Sanofi Aventis Ireland Ltd. v. HSE* [2018] IEHC 566.

119. The principle that parties should be bound by the pleadings is an important one, and is designed to ensure fairness for all sides. As the facts of the judgment of McDonald J. in *Sanofi Aventis Ireland Ltd*. indicate, the introduction of a new argument at the eleventh hour can prejudice the other side in that it denies them an opportunity of putting forward a detailed response and, in particular, from adducing evidence which may be relevant to the new point. The position in the present case is, however, much less extreme. The issue is a net point of law turning on statutory interpretation. The issue was fully ventilated before me, with all sides

offering submissions on the correct interpretation of, and interaction between, section 42 and section 146B. As the issue is one of statutory interpretation, there is no question of evidence being relevant to the issue, and thus no side was denied opportunity to put forward evidence. Moreover, the issue is inextricably linked to the issues that are clearly raised in the pleadings, and again, it is difficult to understand how any of the parties can be said to have been taken by surprise by this issue.

120. At all events, it occurs to me that a more flexible approach to pleadings may be required in circumstances where the court is seeking to comply with its obligation under European law to interpret national legislation insofar as possible in the light of the aims and objectives of relevant European Directives.

121. This issue has been considered, indirectly, by the Supreme Court in *Callaghan v. An Bord Pleanála (No. 1)* [2017] IESC 60.

> "4.4 Where an Irish court is considering the proper interpretation of a statutory measure it may well take into account any constitutional principles which might impact on the proper construction of the legislation concerned. Indeed, it is fair to say that a court might very well be reluctant to disregard such constitutional questions of interpretation even if they were not specifically raised by the parties. A court, and in particular a court of final appeal, is, as a matter of national law, required to give a definitive interpretation of a legislative measure which comes into question in the course of proceedings properly before it. It could not be ruled out, therefore, that a court in such circumstances would be reluctant to give a construction to legislation without having regard to any constitutional issues which might impact on the proper construction of the measure concerned in accordance with *East Donegal* principles. This might well be so where there would be a real risk that the Court would give an incorrect interpretation of the legislation in question if it did not itself raise the constitutional construction issue. It must be recalled that the proper interpretation of legislation is objective and is not dependent, necessarily, on the arguments put forward by the parties.
>
> 4.5 By analogy it seems to me that it is at least arguable that an Irish court, in order to comply with the principle of conforming interpretation, would be required to have regard, even on its own motion, to provisions of Union law where those provisions might have an impact on the proper interpretation of national measures under consideration."

122. The statement that the proper interpretation of legislation is objective and is not dependent, necessarily, on the arguments put forward by the parties, appears to me to have a particular resonance. In circumstances where this court is confronted with two possible statutory procedures for obtaining an extension of the duration of a planning permission, only one of which makes provision for compliance with the Habitats Directive, i.e. section 42, then it seems to me that I am obliged under European law to interpret national law in order to ensure compliance with the Habitats Directive.

123. If and insofar as national procedural law precludes the court from giving this interpretation, then it is at least arguable that the national court is required to disapply that procedural rule.

124. The principal issue raised in these proceedings concerns the Habitats Directive. The judgment in *Brown Bear II* (Case C 243/15) confirms that proceedings which raise issues under the Habitats Directive are subject to the procedural requirements of the Aarhus Convention. See also Case C 664/15 *Protect Natur*. By analogy with the judgment in C 137/14 *Commission v. Germany*, it is at least arguable that a restriction on pleadings is inconsistent with access to the judicial review procedure.

125. The final point to note is that if the Developer's objection is well-founded, then it has the anomalous consequence that this court would be required to uphold a decision which the court considers was *ultra vires*. As in the case of an error on the face of the record, this might be more than judicial flesh and blood can bear. See an earlier edition of Wade and Forsyth, *Administrative Law*, (Seventh edition, Oxford 1994) at page 306.

126. However, given the vehemence with which counsel for the Developer has pursued this objection, I think that it is advisable to include a question in this regard as part of the proposed Article 267 reference to the CJEU.

COLLATERAL CHALLENGE

127. Both An Bord Pleanála and the Developer have raised an objection that the Applicant, in seeking to criticise the assessment carried out at the time of the grant of the 2008 planning permission, is engaged in an impermissible collateral challenge. It is suggested that this is especially so in circumstances where the Applicant had, in fact, instituted proceedings in 2008 but did not pursue these to conclusion. An Bord Pleanála has invited the court to deal with this "collateral challenge" objection as a preliminary issue.

128. The concept of an impermissible collateral challenge is an incident of the statutory time-limit on judicial review proceedings. Section 50 of the PDA 2000 (as amended) provides that a person shall not question the validity of a planning decision other than by way of an application for judicial review. An application for judicial review is subject to an eight-week time-limit. The High Court has a limited discretion to extend time in certain specified circumstances.

129. The existence of this time-limit has been interpreted as precluding an applicant from raising—in judicial review proceedings directed to a *subsequent* decision—complaints that are in substance directed to an earlier decision in respect of which the time-limit has long since expired. A court may strike out judicial review proceedings on this basis. In this regard, the court will look to the *substance* of the challenge rather than merely its form. Thus the absence of a formal plea seeking to set aside the earlier decision is not conclusive.

130. The existence of this jurisdiction to strike out proceedings on the basis that same constitute an impermissible collateral challenge has recently been reaffirmed by the Supreme Court in *Sweetman v. An Bord Pleanála* [2018] IESC 1.

> "7.1 The rationale behind the collateral attack jurisprudence is clear. A party who has the benefit of an administrative decision which is not challenged within any legally mandated timeframe should not be exposed to the risk of having the validity of that decision subsequently challenged in later proceedings which seek to quash the validity of a subsequent decision on the basis that the earlier decision was invalid. Like consideration would apply to a State decision maker who has rejected an application or other similar decisions.
>
> 7.2 The requirements of legal certainty make clear that a person who has the benefit of a decision which is not challenged within whatever time limit may be appropriate is entitled to act on the assurance that the decision concerned is now immune from challenge subject to very limited exceptions such as fraud and the like."

131. Although much of the case law is concerned with what might be described as interim and final decisions made in the context of a

staggered decision-making process, other judgments do appear to establish a principle that an objector cannot rely on the occasion of an application for a further consent to criticise an earlier development consent. See, in particular, *Harrington v. Environmental Protection Agency* [2014] 2 I.R. 277 (at 294), and *Merriman v. Fingal County Council* [2017] IEHC 696, [9] to [12].

132. There appears to be a tension between the domestic jurisprudence on time-limits and the case law of the CJEU which identifies a remedial obligation on a competent authority. This remedial obligation had been identified as early as the judgment in Case C-201/02 *Wells*. It has recently been considered in Case C 348/15 *Stadt Wiener* as follows.

"41 The Court also considers that it is compatible with EU law to lay down reasonable time limits for bringing proceedings in the interests of legal certainty, which protects both the individual and the administrative authority concerned. In particular, it finds that such time limits are not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (see, to that effect, judgments of 15 April 2010, *Barth*, C-542/08, EU:C:2010:193, paragraph 28, and of 16 January 2014, *Pohl*, C-429/12, EU:C:2014:12, paragraph 29).

42 Consequently, EU law, which does not lay down any rules on the time limits for bringing proceedings against the consents issued in breach of the obligation first to assess the effects on the environment, set out in Article 2(1) of Directive 85/377, does not preclude, in principle and subject to compliance with the principle of equivalence, the Member State concerned from setting a time limit of three years for bringing proceedings, such as that provided for in Paragraph 3(6) of the UVP-G 2000, to which Paragraph 46(20)(4) of the UVP-G 2000 refers.

43 However, a national provision under which projects in respect of which the consent can no longer be subject to challenge before the courts, because of the expiry of the time limit for bringing proceedings laid down in national legislation, are purely and simply deemed to be lawfully authorised as regards the obligation to assess their effects on the environment, which it is for the referring court to ascertain, is not compatible with that directive

44 As the Advocate General noted, in essence, in points 42 to 44 of her Opinion, Directive 85/337 already precludes, as such, a provision of that nature, if only because that provision has the legal effect of relieving the competent authorities of the obligation to have regard to the fact that a project within the meaning of that directive has been carried out without its effects on the environment having been assessed and to ensure that such an assessment is made, where works or physical interventions connected with that project require subsequent consent (see, to that effect, judgment of 17 March 2011, *Brussels Hoofdstedelijk Gewest and Others,* C-275/09, EU:C:2011:154, paragraph 37).

45 Furthermore, it is the Court's settled case-law that the Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment (judgment of 7 January 2004, *Wells*, C-201/02, EU:C:2004:12, paragraph 66).

46 To that end, the competent authorities are obliged to take all general or particular measures for remedying the failure to carry out such an assessment (judgment of 7 January 2004, *Wells*, C-201/02, EU:C:2004:12, paragraph 68)."

133. The CJEU thus appears to distinguish between (i) the setting of a time-limit for the bringing of proceedings against development consents alleged to have been issued in breach of the EIA Directive, and (ii) the (continued) remedial obligation on a competent authority. Presumably, similar principles apply to the Habitats Directive: certainly, the judgment in Case C 399/14 *Grune Liga*—albeit in the context of article 6(2) of the Habitats Directive—accepts that the adequacy of an appropriate assessment may have to be reviewed subsequently.

134. On one view, this might suggest that whereas a development consent, such at the 2008 planning permission, cannot be invalidated now given that the eight week time-limit has long since expired, it may be legitimate to criticise the assessment carried out at the time the decision to grant development consent was made.

135. At the hearing before me, Ms Butler, SC, on behalf of An Bord Pleanála, sought to distinguish *Stadt Wiener* on the basis that the remedial obligation generally only arises where (i) there has been a failure to carry out any EIA or AA at the time of the principal decision, and (ii) the subsequent consent application entails works or physical interventions, as in the *Brussels Airport* case (Case C 275/09). Neither of those two contingencies were said to arise in respect of the 2008 planning permission and the subsequent application to extend its duration. (Transcript, Day 4, pages 10 to 27).

136. Notwithstanding these cogent submissions, I am not convinced that the issue is *acte clair*.

137. In the second question which I propose to refer to the CJEU, I have asked *inter alia* whether the fact that the original development consent was granted pursuant to national legislation which did not to comply with the requirements of the Habitats Directive is something which should be taken into account at the time of an application to extend the duration of the development consent. If the CJEU were to answer this question in the *affirmative*, then it must be open to a party to make submissions to the competent authority, in the first instance, and, thereafter, to the High Court by way of judicial review, to the effect that the assessment carried out at the time of the grant of the original planning permission was inadequate. Yet this would appear to involve precisely the type of collateral challenge which An Bord Pleanála and the Developer say is impermissible.

138. I propose to refer a further question to the CJEU, namely whether a rule of national law which precludes a party from making criticisms of the assessment carried out in the context of an earlier decision is consistent with EU law and, in particular, the remedial obligation as recently confirmed in Case C 348/15 *Stadt Wiener*.

139. There is clearly a balance to be struck between the public interest in environmental protection and the legitimate expectations of a developer. The argument for saying that a developer who has secured a grant of planning permission, which has not been challenged within the statutory eight-week time-limit, should be allowed to rely on that planning permission is stronger than the argument for saying that a developer who has not carried out any development works pursuant to a planning permission for ten years is entitled to secure an extension of duration of the planning permission.

PERMISSION "CEASES TO HAVE EFFECT"

140. In addition to its arguments in respect of the Habitats Directive, the Applicant also raises an argument based on the *timing* of An Bord Pleanála's decision. More specifically, the Applicant contends that the fact that the 2008 planning permission had expired prior to the decision of An Bord Pleanála to alter the condition means that the subsequent decision is invalid. Put shortly, the Applicant argues that any decision to extend the duration of a planning permission can only validly be made while the planning permission subsists. If, as happened on the facts of this case, the planning permission has already ceased to have effect, then it is submitted that the permission cannot thereafter be revived by a decision to grant an extension of duration.

141. Before turning to consider this argument in detail, it may be convenient first to address the basis on which the date of the expiration of the ten-year period is to be calculated. Specifically, it is necessary to consider whether the period of grace over the Christmas and New Year holiday applies.

142. Section 251 of the PDA 2000 (as amended by the Planning and Development (Amendment) Act 2010) provides as follows.

> "251.— Where calculating any appropriate period or other time limit referred to in this Act or in any regulations made under this Act, the period between the 24th day of December and the first day of January, both days inclusive, shall be disregarded."

143. There had initially been some doubt among practitioners as to whether this period of grace applies to time-limits which are measured in years certain, as opposed to, for example, the four-week time-limit on an appeal to An Bord Pleanála or the eight-week time-limit governing an application for judicial review. However, it is now accepted that the period of grace does apply in calculating the statutory "appropriate period" of a planning permission. See *Drumquin Construction (Barefield) Ltd. v. Clare County Council* [2017] IEHC 818.

144. Notwithstanding this case law, the period of grace does not apply to Condition No. 2 of the 2008 planning permission. This is because the ten-year period is fixed by the grant of the planning permission itself, and is not reckonable by reference to any time-limit defined under the PDA 2000.

145. On this interpretation, a planning permission which is subject to the default five year duration will cease to have effect some five years and forty-five days after the date of the grant of planning permission. Conversely, if the duration is fixed by the planning permission itself—as in the present case—then the period of grace is not to be included in reckoning the date upon which the permission ceases to have effect.

146. As it happens, on the particular facts of this case it does not matter which basis of calculation is used. This is because even if one were to include an additional ninety days, i.e. to reflect ten annual periods of grace, the planning permission would still have expired prior to the date of An Bord Pleanála's decision of 13 July 2018.

147. Returning to the substance of the Applicant's argument, the two key statutory provisions are section 40(1) and section 146B(1) of the PDA 2000 as follows.

> "40.—(1) Subject to subsection (2), a permission granted under this Part, shall on the expiration of the appropriate period (but without prejudice to the validity of anything done pursuant thereto prior to the expiration of that period) cease to have effect as regards—
>
> (a) in case the development to which the permission relates is not commenced during that period, the entire development, and
>
> (b) in case the development is commenced during that period, so much of the development as is not completed within that period."

> "146B.—(1) Subject to subsections (2) to (8) and section 146C, the Board may, on the request of any person who is carrying out or intending to carry out a strategic infrastructure development, alter the terms of the development the subject of a planning permission, approval or other consent granted under this Act."

148. In circumstances where no development works were ever carried out pursuant to the 2008 planning permission, that permission ceased to have effect as regards the entire development on 31 March 2018 in accordance with subsection 40(1)(a).

149. The Applicant in its written submissions of 14 January 2019 contends that a planning permission which has lapsed cannot be resurrected Lazarus-like. The Applicant also draws attention to the use of the *present* tense in section 146B. It is submitted that the section can only be read as granting power to An Bord Pleanála in respect of developments which are *currently* subject to planning permission. The Applicant also cites *South-West Regional Shopping Centre Ltd. v. An Bord Pleanála* [2016] IEHC 84; [2016] 2 I.R. 481, [50].

> "[…] Sections 146B and 146C allow the Board to alter the terms of, *inter alia* , planning permissions granted in respect of strategic infrastructure development ("SID"). Section 146D relates to railway orders. These are the only statutory provisions authorising the amendment of existing planning permissions."

150. An Bord Pleanála, in response, suggests that, in the above passage, the High Court (Costello J.) was simply recording the *arguments* made on behalf of the applicant in that case, as opposed to setting out the court's own views. It is also suggested that the court in *South-West Regional Shopping Centre* was not called upon to engage with, and did not address, the precise issue that arises on the facts of the present case.

151. An Bord Pleanála, in its written submissions of 22 January 2019, correctly identifies that the starting-point of this analysis should be the provisions of section 40 of the PDA 2000. The written submissions observe as follows at paragraph 36.

> "36. First, as one might expect, this section is also silent as to what is to happen when an application to alter or extend a planning permission is made well before the "appropriate period" has expired, but not determined until after the "appropriate period" has expired."

152. At pages 12 and 13 of the written submissions, An Bord Pleanála discusses the legislative history of section 42 of the PDA 2000. As discussed at the hearing, however, it is also necessary to consider the precursor to section 42, namely section 4 of the Local Government (Planning & Development) Act 1963. This is addressed under the next heading below.

LEGISLATIVE HISTORY

153. Prior to 1982, the planning legislation did not impose any time-limit on the implementation of a planning permission. A time-limit was only introduced for the first time under the Local Government (Planning & Development) Act 1982. This legislation expressly addressed the contingency of an expired planning permission at section 4(6) as follows.

> "(6) This section shall not be construed as precluding the extension, or the further extension, of an appropriate period by reason of the fact that the period has expired."

154. If an equivalent provision were to be found under the present legislation—which it is not—then this would have been a complete answer to the Applicant's complaint.

155. The position under the 1982 Act was that there was a two-fold protection for developers. First, the planning authority was under a statutory obligation to make a decision on an application for an extension of duration within eight weeks of the date of receipt of a (valid) application. If the planning authority failed to meet this deadline, then a decision to grant an extension of duration arose by default. A developer who made an application for an extension of duration at a time when there was more than eight weeks to run on the existing planning permission could be assured that they would have a decision—one way or another—before the expiration of the planning permission.

156. Secondly, section 4(6) allowed for the granting of an extension of duration even after the planning permission had expired. Accordingly, a developer could lodge an application even after the expiration of the planning permission or with less than eight weeks to run, and still be assured that there was jurisdiction to grant an extension.

157. Presumably, at least part of the logic of section 4(6) was to allow developers and their professional advisors an opportunity to adjust to the new statutory regime.

158. The planning legislation was subsequently consolidated into a single Act, namely the Planning and Development Act 2000. The duration of planning permissions, and extensions of duration, were addressed at sections 40, 41 and 42.

159. Section 42, as originally enacted, is in almost identical terms to section 4 of the Local Government (Planning & Development) Act 1982. The only substantive changes are, first, that there is no equivalent to section 4(6) of the 1982 Act, and secondly, a new requirement that the application for an extension be made prior to the end of the appropriate period was introduced.

160. The combined effect of these two changes seems to be that, in order to be assured of a lawful extension of duration, a developer would have to make their application no later than eight weeks before the date of the expiration of the planning permission. This would allow sufficient time either for the planning authority to make a decision, or for a default decision to arise. In contrast to the position under the 1982 Act, a planning authority does not have power to grant an extension of duration *after* the expiration of the planning permission.

161. The provisions in respect of an extension of duration were significantly revised under the Planning and Development (Amendment) Act 2010. In particular, a new legal basis for the making of an application for an extension of duration was introduced. Previously, an extension could only be granted where the developer had satisfied the local planning authority that "substantial works" had been carried out pursuant to the planning permission during its original period.

162. A second, alternative basis was introduced under the 2010 Act, namely that there were commercial, economic or technical considerations which militated against the commencement of development or the carrying out of substantial works.

163. Relevantly, the provisions were also amended so as to require, for the first time, consideration of EU law issues. More specifically, in the case of a development which had not commenced, the planning authority is obliged to consider whether an EIA or an AA had been carried out at the time of the grant of the original planning permission. The effect of this provision is to preclude a planning authority from granting an extension of duration if there had been a failure to carry out an EIA or AA at the time of the grant of the earlier planning permission.

164. The provision for a default grant of an extension of duration was omitted. This latter amendment may also have been motivated by a concern to ensure compliance with EU law.

165. The legal position as of 2010, therefore, is that the entitlements of a developer have been reduced. In the absence of provision for a default decision, a developer could not be guaranteed that a decision on an application would be made within eight weeks. The time-limit is now aspirational only.

166. Counsel for An Bord Pleanála suggests that, against this legislative background, an interpretation which held that an extension of duration could not be granted *after* the expiration of the planning permission would be unworkable. It would mean that a developer who had made an application for an extension in accordance with law could be frustrated, and have what was said to be an entitlement to an extension lost, if the decision-maker lets the clock run down. Counsel emphasised the limited discretion afforded to a decision-maker under either section 42 or section 146B. It was suggested that, provided the objective criteria are met, the PDA 2000 is intended to enable the virtually automatic extension of the duration of the planning permission. (Transcript, Day 3, page 60).

167. Reliance was placed on *Meagher v. Minister for Social Protection* [2015] 2 I.R. 633.

> "[56] This begs the question as to whether the conclusion reached should be reassessed in light of both the common law and statutory presumption against absurdity. At common law in this context 'absurd' means contrary to sense and reason. Both *Bennion on Statutory Interpretation* (5th ed., Lexis Nexis, 2008), from p. 969 onwards and *Halsbury's Laws of England*, (5th ed., Lexis Nexis, 2008, vol. 96), at para. 1179 onwards, set out six types of undesirable consequences which come within this meaning: these are an unworkable or impracticable result; an inconvenient result; an anomalous or illogical result; a futile or pointless result; an artificial result and a disproportionate counter-mischief. As with all interpretive presumptions, the same are rebuttable but even if applicable, the disputed consequences must stand if the legislature really intended the result in issue.
>
> [57] It seems to me that each of the constructions contended for involved some measure of anomaly or inconvenience. In holding as I have, it becomes logically impossible for Mr. Meagher ever to have qualified for a pension. By accepting Mr. Meagher's view it would mean that s. 21(1)(d) of the Act of 2005 would be given a substantive meaning when in fact I am satisfied that this is not so. In such circumstances Bennion suggests that one should balance the effect of each construction and determine how best such an unsatisfactory result can be ameliorated. (pp. 985 and 998). I am satisfied that the balance rests in upholding the submission of the Minister so that the integrity of the underlying scheme is kept intact. To do otherwise would be to seriously undermine the overall structure of the scheme, even if there are but a limited number, in the same situation as Mr. Meagher. In addition, I cannot find a legally valid justification for judicially compounding a statutory mishap by adopting the alternative interpretive version which, when the Act is considered as a

whole, is not open."

168. It should be noted that these passages occur under the heading "Observations on 'deeming provisions'". See also paragraph [55] of the judgment as follows.

> "[54] When dealing with statutory provisions whereby matters are not to be treated as what they are but what they are deemed or regarded as being, care must be exercised in their application. All the more so if the section is silent as to what effects or consequences must also be considered, as resulting from this putative state of affairs. This is somewhat different from a pure hypothetical situation where the outer parameters of what is entailed are frequently specified. It seems to me with such a provision, the words and phrases used should, at least in the first instance, be given their ordinary and natural meaning and if the result fits within the statutory purpose or object of the Act, further exploration will not be required.
>
> However, as Lord Browne-Wilkinson has pointed out in *Marshall v. Kerr* [1995] 1 A.C. 148 , where absurdity or injustice results the examination must continue so as to see whether such can be avoided or whether that result is in any event compelled by the provisions themselves. Where this exercise is required, it can be conducted in accordance with general interpretive principles, aided when necessary by the provisions of the Interpretation Act 2005. In this case, subject to what is next hereinafter stated, I am satisfied that the interpretation as given accords with the legislative intent, extracted as it is from the Act and the provisions as a whole."

169. I am far from convinced that an interpretation of section 42 which precludes an extension of duration where the planning permission has expired is "unworkable". As the legislative history demonstrates, there has been a recalibration of the two competing interests, i.e. the private interest of developers and the public interest in proper planning and sustainable development. In particular, the introduction of Habitats Directive considerations, and the removal of provision for default decisions, indicates that there has been a shift away from the private interests of developers.

170. As discussed under the next heading below, it seems to me that the resolution of this issue depends largely on the inference to be drawn from the fact that there is no provision equivalent to section 4(6) of the Local Government (Planning & Development) Act 1982 to be found in the current version of the planning legislation. The answer to this question, in turn, depends on whether the approach adopted by the Supreme Court in *Grace v. An Bord Pleanála* [2017] IESC 10 is apposite to this case.

PRINCIPLES OF INTERPRETATION

171. There was discussion before me as to the principles of statutory interpretation which apply to the planning legislation. Certain themes emerge from the case law but these cannot readily be reconciled.

172. First, there are a number of cases which suggest that the planning legislation is to be interpreted by having regard to the property rights of affected landowners. Thus, for example, exclusions to the statutory right of compensation are to be interpreted strictly. See, for example, In *re X.J.S. Investments Ltd*. [1986] I.R. 750.

173. Secondly, the judgment of the Supreme Court in *K.S.K. Enterprises Ltd. v. An Bord Pleanála* [1994] 2 I.R. 128 suggests that the need for legal certainty should guide interpretation. On the facts of that case, the Supreme Court was required to identify what steps had to be taken by an applicant in order to have "made" an application for judicial review within the then two-month time-limit. Finlay C.J. stated as follows.

> "I am satisfied that as a matter of general construction, where a restriction is being imposed upon the exercise of a right in a statute such as this sub-section involves, that it is desirable to the extent of being almost imperative that it should be capable of being construed and should be construed in a clear and definite fashion.
>
> It seems to me that to conclude that an application could only be made for leave to apply for judicial review under this sub-section where an actual application of some description was made in court or where it could be established that an application would have been made in court if the court had been able to reach it in a list on the day concerned is to create too imprecise a cut-off point in time for the making of an important application.
>
> It is for this reason and this reason only that I would differ to a limited extent from the decision of the learned trial judge in the court below and would conclude that if within the time limited of two months from the date of the decision a notice of motion is filed in the High Court and it is served on the mandatory parties provided in the sub-section that that must be taken as being compliance with the two month time limit.

174. It is arguable that this judgment is authority for the proposition that, when faced with a number of potential cut-off points, a court should prefer the cut-off point which provides the greatest legal certainty. If this approach were to apply to the facts of the present case, then it is arguable that an interpretation which requires that any decision to extend the duration of the planning permission be made prior to the planning permission ceasing to have effect provides the most certain cut-off point. The other interpretation creates difficulties in terms of the possibility of an extension being granted many years after the permission has ceased to have effect.

175. An Bord Pleanála relied on a third line of case law which emphasises the need to bear in mind the overall framework and scheme of the PDA 2000 Act, with the many considerations that come into play in the planning process, and to look at the context of the provision in question within that framework. Ms Butler, SC cites the judgment of the Supreme Court in *Michael Cronin (Readymix) Ltd. v. An Bord Pleanála* [2017] IESC 36; [2017] 2 I.R. 658.

176. Counsel went on to ask rhetorically whether the Oireachtas can have intended that a validly made application for an extension of duration would become incapable of determination, or that what was said to be the "entitlement" of a developer to an extend their planning permission—subject only to meeting the statutory criteria—would be lost through a delay or an inefficiency or even ill-will on the part of the decision-maker?

177. An Bord Pleanála also cites the judgment of the High Court (Barrett J.) in *Harrington v. Environmental Protection Agency* [2014] 2 I.R. 277. In particular, emphasis was placed on the reference to the courts not operating in a void where legal interpretation proceeds oblivious to practical consequence.

178. There is, however, a fourth line of case law which emphasises the requirement to have regard to EU law in interpreting the planning legislation. An early example of this is provided by the judgment of the High Court (Kelly J.) in *Maher v. An Bord Pleanála*

[1999] 2 I.L.R.M. 198. A more recent example is provided by the judgment of the Supreme Court in *Callaghan v. An Bord Pleanála (No. 1)* [2017] IESC 60 (discussed at paragraph 121 above).

179. Perhaps the judgment of most immediate relevance is that in *Grace v. An Bord Pleanála* [2017] IESC 10. In that case, the Supreme Court attached significance to the omission from a *subsequent* version of section 50 of the PDA 2000 of an express requirement for prior participation in the planning process as a prerequisite to *locus standi*.

> "6.8 On the other hand some interpretations placed on *Lancefort Ltd v. An Bórd Pleanála (No. 2)* [1999] 2 I.R. 270, might suggest a different view which would have supported the proposition that prior participation (or an appropriate explanation for non-participation) was a prerequisite for standing. Certainly the trial judge in this case placed considerable reliance on that judgment. However, it is arguable that *Lancefort* does not stand as authority for a general principle that prior participation is in all cases a prerequisite to standing. *Lancefort* certainly does suggest that it may, however, be a factor. But even if *Lancefort* might have been regarded as authority for the wider proposition it must, of course, now be read in the light of the introduction, in 2000, of an express statutory requirement for prior participation followed by the express repeal of that provision in 2006. On that basis it can no longer be held that *Lancefort* provides authority for any general preclusion of standing in the absence of prior participation or an appropriate explanation for the lack of it."

180. On one view, *Grace* suggests that an inference can be drawn from the *omission* of a statutory requirement from a subsequent version of the legislation, i.e. an inference to the effect that a deliberate change was intended. If this approach were to be applied to section 42, then the combined effect of (i) the omission of an equivalent to section 4(6) of the Local Government (Planning & Development) Act 1982, and (ii) the introduction of a new requirement that the application for an extension be made prior to the end of the appropriate period, should be interpreted as involving a deliberate change.

181. Counsel for An Bord Pleanála maintained, however, that one of the features of *Grace v. An Bord Pleanála* was that the legislation at issue had been amended in the light of EU legislation. Ms Butler, SC, submitted that in circumstances where the legislature is amending and re-amending a particular provision to take account of a higher order law on a particular topic, i.e. the Aarhus Convention and the Public Participation Directive (2003/35/EC), it is perfectly legitimate to treat the omission as deliberate. However, the same conclusion cannot be drawn in circumstances where an Act is being consolidated and re-enacted as was the case under the PDA 2000. Counsel referred, for example, to the omission from the 2000 Act of an equivalent to section 28(6) of the Local Government (Planning & Development) Act 1963 ("the permission shall be construed as including permission to use the structure for the purpose for which it is designed"), and said that it could not be suggested that this was intended to change the law. (Transcript, Day 4, pages 5 to 7).

182. It seems necessary, therefore, to consider whether the various amendments made since the 1982 Act were introduced in order to give effect to EU law. I do not think that the question of whether a planning permission can be extended notwithstanding that it has ceased to have effect can be resolved in isolation from the issues arising under the Habitats Directive. In particular, I think that there must be some possibility that the CJEU might draw a distinction between (i) a situation where a development consent has been extended whilst it is still extant, and (ii) a situation where an *expired* development consent is revived. The argument for saying that the latter constitutes a fresh development consent, capable of engaging the Habitats Directive, is stronger. This is especially so where there would be no certainty as to the timeframe within which a decision to extend the duration of the planning permission could be made. In principle, a planning permission which expired years earlier could, on An Bord Pleanála's and the Developer's argument, be revived and extended.

183. Accordingly, I am not in a position to rule on this aspect of the case until such time as the Article 267 reference has been determined.

ANNEX

PROPOSED QUESTIONS FOR ARTICLE 267 REFERENCE

(1). Does a decision to extend the duration of a development consent constitute the agreement of a project such as to trigger Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (hereinafter "*the Habitats Directive*")?

(2). Is the answer to Question (1) above affected by any of the following considerations?

> (A) The development consent (the duration of which is to be extended) was granted pursuant to a provision of national law which did not properly implement the Habitats Directive in that the legislation incorrectly equated an appropriate assessment for the purposes of the Habitats Directive with an environmental impact assessment for the purposes of the EIA Directive (Directive 2011/92/EU).
>
> (B) The development consent as originally granted does not record whether the consent application was dealt with under Stage 1 or Stage 2 of Article 6(3) of the Habitats Directive, and does not contain "complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the site concerned" as required under Case C 404/09 Commission v. Spain.
>
> (C) The original period of the development consent has expired, and as a consequence the development consent has ceased to have effect in respect of the entire development. No development works can be carried out pursuant to the development consent pending its possible extension.
>
> (D) No development works were ever carried out pursuant to the development consent.

(3). In the event that the answer to Question (1) is "yes", what considerations is the competent authority required to have regard to in carrying out a Stage 1 screening exercise pursuant to Article 6(3) of the Habitats Directive? For example, is the competent authority required to have regard to any or all of the following considerations: (i) whether there are any changes to the proposed works and use; (ii) whether there has been any change in the environmental background, e.g. in terms of the designation of European Sites subsequent to the date of the decision to grant development consent; (iii) whether there have been any relevant changes in scientific knowledge, e.g., more up-to-date surveys in respect of qualifying interests of European Sites? Alternatively, is the competent authority required to assess the environmental impacts of the entire development?

(4). Is there any distinction to be drawn between (i) a development consent which imposes a time-limit on the period of an activity (operational phase), and (ii) a development consent which only imposes a time-limit on the period during which construction works may take place (construction phase) but, provided that the construction works are completed within that time-limit, does not impose any time-limit on the activity or operation?

(5). To what extent, if any, is the obligation of a national court to interpret legislation insofar as possible in accordance with the provisions of the Habitats Directive and the Aarhus Convention subject to a requirement that the parties to the litigation have expressly raised those interpretive issues. More specifically, if national law provides two decision-making processes, only one of which ensures compliance with the Habitats Directive, is the national court obliged to interpret national legislation to the effect that only the compliant decision-making process can be invoked, notwithstanding that this precise interpretation has not been expressly pleaded by the parties in the case before it?

(6). If the answer to Question (2)(A) above is to the effect that it is relevant to consider whether the development consent (the duration of which is to be extended) was granted pursuant to a provision of national law which did not properly implement the Habitats Directive, is the national court required to disapply a rule of domestic procedural law which precludes an objector from questioning the validity of an earlier (expired) development consent in the context of a subsequent application for development consent? Is such a rule of domestic procedural law inconsistent with the remedial obligation as recently restated in Case C 348/15 *Stadt Wiener*?