UNAPPROVED
THE COURT OF APPEAL
CIVIL

Record Number: 2022/100

Faherty J.
Power J.
Collins J.

Neutral Citation Number [2022] IECA 276

IN THE MATTER OF SECTION 50B OF THE PLANNING AND DEVELOPMENT ACT, 2000
AND IN THE MATTER OF THE ENVIRONMENTAL PROTECTION AGENCY ACT, 1992 (AS AMENDED)

BETWEEN:

HARTE PEAT LIMITED

APPELLANT

- AND -

THE ENVIRONMENTAL PROTECTION AGENCY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENT

Judgment of the Court dated the 6th day of December 2022

1. This is an application by the Appellant ("*Harte Peat*") for an order staying an injunction granted by the High Court to the Respondent (the Environmental Protection Agency (*"EPA"*)) pursuant to section 99H of the Environmental Protection Agency Act 1992 (as amended) (*"the 1992 Act"*). In terms of timing, the application for the stay is somewhat unusual, coming as it does after arguments on the substantive issues in the appeal have been heard.

2. It is important to emphasise, however, that the hearing of the appeal has not concluded in that the Court has decided that it should hear from the Attorney General in relation to certain issues canvassed in the course of the appeal to which further reference is made below. Further argument has been listed for 7 December 2022. While the issues before the Court on that date are not directly related to the section 99H injunction, the Court is not in a position to reach a final view on any of the issues in the appeal at this stage and has not done so. The necessity (from the Court's perspective) to hear from the Attorney General has unavoidably prolonged the determination of Harte Peat's appeal. At this point, the Court cannot confidently predict when it will be in a position to give its decision on the appeal. It may be appropriate to make a reference to the CJEU. Moreover, once it gives its decision, there is the possibility of a further appeal to the Supreme Court. These are some of the contextual issues to which the Court must have regard in determining the application for a stay on the Order of the High Court.

3. The Court has in fact, already, communicated its decision on the stay application to the parties. On 22 November 2022 it informed the parties that it did not consider it appropriate to grant a stay at this stage. However, the Court noted that the complexion of the

appeal might change and indicated that Harte Peat should not be shut out from renewing its application at a later stage.

4. This judgment, to which all members of the Court have contributed, sets out the Court's reasons for refusing the stay sought by Harte Peat.

The background to the stay application

5. By way of judicial review proceedings bearing Record No. 2021/14/JR, Harte Peat sought orders, including *certiorari,* quashing the decision of the EPA made on 24 November 2020 refusing to consider Harte Peat's application for an Integrated Pollution Control licence (*"IPC licence"*) in respect of its wet peat extraction activity at bog lands in Counties Westmeath, Cavan and Monaghan. While, altogether, the lands in issue span a total area of some 150 hectares of bog lands, the application for an IPC licence was in respect of some 73.33 hectares, with a stated peat extraction area of circa 49 hectares. That decision of the EPA was made pursuant to section 87(1C) of the 1992 Act. For ease of reference, the bog lands will be referred to as Areas A, B, F and G, as they are so described in the EPA's statutory injunction proceedings. The lands in County Westmeath drain into the Inny River which in turn flows into the nearby Lough Derravaragh, a designated Special Protection Area ("*SPA*") and a National Heritage Area ("*NHA*").

6. The excavation of wet peat (sometimes referred to as black peat) by Harte Peat is for the supply of mushroom casing which is the growing medium for Ireland's commercial mushroom production and which consists of a mixture of wet peat and other products including a form of straw compost containing mushroom sporium on which mushrooms are grown and from which they are harvested. Harte Peat is a supplier of mushroom casing to a number of mushroom growing enterprises.

7. Harte Peat applied for the IPC licence against the backdrop of an already complicated factual and legal history which is summarised below. Before setting out that history,

however, in order to best explain the backdrop to the judicial review and statutory injunction proceedings, and to provide context for the arguments that are made in the stay application, it is useful to refer briefly (purely by way of overview) to the legislative regimes, both at the EU and domestic level, which govern the licence application in issue here and the grant of planning permission involving the extraction of peat.

8. Firstly, peat extraction is a prescribed activity for the purposes of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (to which, as amended, is hereafter referred to as "*the EIA Directive*"). The first iteration of the EIA Directive was Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment. Directive 85/337/EEC was amended three times, in 1997, in 2003 and in 2009. Subsequently, this Directive and the amendments thereto were codified by Directive 2011/92/EU, itself amended in 2014 by Directive 2014/52/EU. Peat extraction where the surface area of the site exceeds 150 hectares is designated as an Annex I project, in respect of which an environmental impact assessment (EIA) is mandatory. Peat extraction below that threshold is included in Annex II and an EIA is required if the project is assessed as likely to have a significant effect on the environment. In fact, as we shall see, the threshold fixed in Irish law for triggering a mandatory EIA of new or extended peat extraction projects is significantly lower than the threshold in Annex II of the EIA Directive.

9. The 1992 Act governs the licencing of peat extraction in the State and is one of a number of legislative enactments which give effect to the EIA Directive. The legal position is that with the exception of a period in 2019 when subsequently nullified ministerial regulations applied, large scale peat extraction is subject to licencing by the EPA under Part IV of the 1992 Act.

10. Section 82 of the 1992 Act provides that a person shall not carry on a licensable "*activity*" unless a licence or a revised licence under Part IV of the 1992 Act is in force in relation to the activity by way of an IPC licence. For present purposes, Class 1.4 of the First Schedule to the 1992 Act identifies the relevant activity which requires a licence, as follows:

> "*The extraction of peat in the course of business which involves an area exceeding 50 hectares*."

11. This 50-hectare threshold represents the gateway to the licencing regime under the 1992 Act and the EPA does not have jurisdiction to entertain a licence application for a project under that threshold.

12. Where an application is made to the EPA for an IPC licence in respect of peat extraction the legislation imposes an express obligation on the EPA to carry out an EIA in certain circumstances: Section 83(2A)(b) of the 1992 Act provides:

> *"(b) The Agency as part of its consideration of an application for a licence shall ensure before a licence or a revised licence is granted, and where the activity to which such licence or revised licence relates is likely to have significant effects on the environment by virtue, inter alia, of its nature, size or location, that, in accordance with this subsection and section 87(1A) to (1I), the application is made subject to an environmental impact assessment as respects the matters that come within the functions of the Agency including the functions conferred on the Agency by or under this Act. […]"*

The licence application at issue here was accompanied by an Environmental Impact Assessment Report ("*EIAR*") pursuant to the EIA Directive and a Natura Impact Statement ("*NIS*") pursuant to the requirements of the EU Directive on the conservation of natural habitats and wild flora and fauna (92/43/EEC) ("*the Habitats Directive*"). The Habitats

Directive has been transposed into Irish law by the European Communities (Birds and Natural Habitat) Regulations 2011.

13. It should be noted at this juncture that the licencing regime provided for in the 1992 Act exists separate and parallel to the planning regime governing the extraction of peat.

14. For reasons that will become apparent, this judgment is not the place to rehearse the finer details of the statutory planning regime which governs peat extraction in the State (that will be left to the judgment on the substantive issues in the appeal). For present purposes, the following will suffice.

15. Section 4 of the Local Government (Planning and Development) Act 1963 ("*the 1963 Act*") (the precursor to the Planning and Development Act 2000 ("*the 2000 Act*")) exempted "*agriculture*" (the definition of which included the use of land for turbary/ extraction of peat) from the requirement for planning permission under the Act. However, consequent on the coming into effect of the original version (Directive 85/337/EEC) of the EIA Directive on 3 July 1988, for EIA purposes, and to conform with EU law, the benefit of "*exempted development*" under section 4 of the 1963 Act was disapplied in the case of "*peat extraction which would involve a new or extended area of 50 hectares*" (see Article 6 and First Schedule, Part II, para. 2(a) of the European Communities (Environmental Impact Assessment) Regulations (S.I. 349 of 1989)) ("*the 1989 Regulations*").

16. The 1989 Regulations, which came into operation on 19 December 1989, and the Local Government (Planning and Development) Regulations 1990 ("*the 1990 Regulations*"), which came into operation on 1 February 1990, transposed Directive 85/337/EEC into Irish law. Article 7 of the 1989 Regulations amended the 1963 Act by, *inter alia,* requiring "*the submission to the planning authority, in the case of specified applications or classes of applications, of an environmental impact statement, in respect of the development to which the application relates*" (section 25(2)(cc)(i) of the 1963 Act). Pursuant to Article 8 of the

1989 Regulations, the 1963 Act was amended by the insertion of section 26(1A) which provided:

> *"Without prejudice to subsection (1) of this section, a planning authority shall, in dealing with an application for permission for the development of land in respect of which an environmental impact statement was submitted to them in accordance with a requirement of or under regulations under section 25 (as amended by the European Communities (Environmental Impact Assessment) Regulations, 1989) of this Act, have regard to that statement…*".

Thus, a planning authority, when determining a planning application in respect of which an EIA was submitted by an applicant, was required to have regard to that statement and to other information relating to the effects of the development on the environment.[1]

17. "*Peat extraction which would involve a new or extended area of 50 hectares*" was one of the classes of development specified in Article 24 of the 1989 Regulations as being development for the purposes of the Regulations (see First Schedule, Part II, para. 2(a)).

18. Consequent on the decision of the CJEU in *Commission v. Ireland* (Case C-392/96 EC) EU:C:1999:431, [1999] E.C.R. I-05901, which criticised the 50 hectare threshold set out in the 1989 Regulations, the applicable thresholds were revised downwards following the enactment of the 2000 Act.

19. The position under the 2000 Act is as follows: peat extraction is "*development*" for the purposes of the Act. "*Peat extraction in a new and extended area of less than 10 hectares*" is exempted development (Schedule 2, Part 3, Class 17 of the Planning and Development Regulations 2001 (S.I. 600 of 2001) (as amended) ("*the Planning and Development Regulations*"). "*Peat extraction which would involve a new or extended area of 30 hectares or more*" is subject to mandatory EIA (Schedule 5, Part 2, para. 2(a) of the Planning and

[1] See also Articles 4 and 10 of the 1990 Regulations.

Development Regulations). In other words, any new development involving more than 10 hectares thenceforth required planning permission and, where that development involved more than 30 hectares, an EIA was required. Sub-30 hectares development might also require an EIA, on a case-by-case basis (Article 103 of the Planning and Development Regulations). Peat extraction is defined in Article 3(3) of the Planning and Development Regulations as including "*any related drainage of bogland*".

20. Under the 2000 Act, the use of land for agriculture continued to be an exempted development save that the definition of agriculture was amended so as to no longer include "*the use of land for turbary*".

21. The effect of the foregoing provisions on the extraction of peat by developers was in fact mitigated to some degree in the Planning and Development Regulations. Article 11 provided that development commenced prior to the coming into operation (21 January 2002) of the relevant parts of the Regulations and which was exempt development for the purposes of the 1963 Act or the 1994 Regulations, "*shall notwithstanding the repeal of that Act and the revocation of those Regulations continue to be exempted development for the purposes of that Act*." However, pursuant to amendments made by the Environment (Miscellaneous Provisions) Act 2011, development shall not be exempted development under the Planning and Development Regulations if an EIA or AA is required (Section 4(4) of the 2000 Act)[2].

22. Apart from any issue of exempted development, section 24(1)(b) of the 1963 Act effectively excluded "*any development*" commenced before 1 October 1964 from the requirement of the Act.

23. Harte Peat does not seek to rely on the exempted development provisions of the 2000 Act. Rather, the central plank in the appeal of the High Court's findings in the judicial review

[2] "As enacted, section 4(4) provided that the Minister could "*in connection with the Council Directive, prescribe development or classes of development which, notwithstanding subsection 1(a), shall not be exempted development*."

proceedings is Harte Peat's assertion that its peat extraction activity does not require planning permission on the basis that its user is pre-1 October 1964. It contends that pre-1 October 1964 development continues to be excluded from the requirement to obtain planning permission under the 2000 Act notwithstanding that the 2000 Act does not contain a provision equivalent to section 24(1)(b) of the 1963 Act.

24. Turning again to the provisions of the 1992 Act, section 87(1B), in relevant part, provides that where an application for a licence is made to the EPA in respect of an activity that involves development or proposed development for which a grant of permission is required, the applicant shall furnish to the EPA—

> *"(a) confirmation in writing from a planning authority or An Bord Pleanála, as the case may be, that an application for permission comprising or for the purposes of the activity to which the application for a licence relates, is currently under consideration by the planning authority concerned or An Bord Pleanála, and in that case shall also furnish to the Agency either —*
>
> > *(i) a copy of the environmental impact assessment report where one is required by or under the Act of 2000 relating to that application for permission, or*
> >
> > *(ii) confirmation in writing from the planning authority or An Bord Pleanála that an environmental impact assessment is not required by or under the Act of 2000,*
>
> *or*
>
> *(b) a copy of a grant of permission comprising or for the purposes of the activity to which the application for the licence relates that was issued by the planning authority concerned or An Bord Pleanála and in that case shall also furnish to the Agency either-*

(i) where the planning authority or An Bord Pleanála, accepted or required the submission of an environmental impact assessment report in relation to the application for permission, a copy of the environmental impact assessment report, or

(ii) confirmation in writing from the planning authority or An Bord Pleanála that an environmental impact assessment was not required by or under the Act of 2000."

25. Pursuant to section 87(1C) of the 1992 Act, where an application for a licence is made to the EPA in respect of an activity that involves development or proposed development for which a grant of permission is required but the applicant does not comply with subsection (1B), the EPA shall refuse to consider the application and shall inform the applicant accordingly.

26. Section 99H of the 1992 Act provides in relevant part:

"99H. — *(1) Where, on application by any person to the High Court or the Circuit Court, that Court is satisfied that an activity is being carried on in contravention of the requirements of this Act, it may by order —*

(a) require the person in charge of the activity to do, refrain from or cease doing any specified act (including to refrain from or cease making any specified emission),

(b) make such other provision, including provision in relation to the payment of costs, as the Court considers appropriate."

The previous proceedings

27. In 2013, the EPA commenced proceedings (Record No. 2013/302 MCA) against Harte Peat and another company pursuant to section 99H of the 1992 Act (hereafter "*the 2013 Proceedings*").

28. Harte Peat sought the determination of a preliminary issue in relation to the meaning of the phrase "*extraction of peat in the course of a business which involves an area exceeding 50 hectares*" as appears in Class 1.4 of the First Schedule to the 1992 Act. The EPA consented to this preliminary issue being determined.

29. On 30 May 2014, the High Court (Barrett J.) delivered a judgment on the preliminary issue which upheld the EPA's position as to the interpretation of "*extraction of peat in the course of a business which involves an area exceeding 50 hectares*". Harte Peat appealed that judgment to this Court. On 25 November 2016, the EPA agreed to set aside the Order and judgment of Barrett J. on consent in circumstances where this Court ruled that the preliminary issue should not have proceeded in the absence of agreement as to the underlying facts.

30. In November 2018, a 3-day hearing for an interlocutory injunction took place before Meenan J. in the High Court. The EPA was seeking interlocutory injunctive relief against Harte Peat. The request for interlocutory relief was refused by Meenan J. on 21 November 2018.

31. On 21 May 2019, the EPA's application for final orders in the 2013 Proceedings was compromised on agreed terms. In short, it was agreed that, not later than six months from the date of the Order, Harte Peat would apply pursuant to section 82B of the 1992 Act (as inserted by the European Union (Environmental Impact Assessment) (Peat Extraction) Regulations 2019 (S.I. 4 of 2019)) for an IPC licence for peat extraction in respect of Areas A, B and G as shown on the map annexed to the Order, and Harte Peat agreed that it would not extract peat in any other area pending the determination of the licence application.

32. The settlement agreement included what has been referred to as "*a sidebar agreement*" by which the parties agreed that in the event that section 82B of the 1992 Act was found to be unlawful or invalid, or amended or revoked, in whole or in part, such illegality or

invalidity affecting performance of the Order of 21 May 2019, the proceedings and the Order of 21 May 2019 should not constitute a barrier to any fresh proceedings that the EPA might wish to institute.

33. Harte Peat contends that the terms of the sidebar agreement precluded the EPA from issuing any such injunction proceedings before determining Harte Peat's application for an IPC licence (which Harte Peat says the EPA wrongly declined to do).

The IPC licence application

34. On the 7 October 2019, Harte Peat lodged an IPC licence application with the EPA which, as we have seen, was accompanied by an EIAR and an NIS. As already referred to, the IPC licence application concerned a total licence area of 73.33 hectares with a stated extraction area of circa 49 hectares.

35. On 18 October 2019, the EPA wrote to Harte Peat's agent acknowledging receipt of the application and on the same date, the EPA notified the prescribed bodies of the application.

36. In the period 23 October 2019 to 4 February 2020, the EPA received third party submissions from the HSE, the Department of Culture, Heritage and the Gaeltacht, Friends of the Irish Environment and an anonymous individual in respect of the IPC licence application. On 7 November 2019, the EPA sought the observations of Westmeath County Council on the EIAR that had been submitted by Harte Peat.

37. On 18 December 2019, the EPA wrote to Harte Peat seeking permission to extend the period for its determination to 1 May 2020 to which Harte Peat consented. On 1 May 2020, the EPA sought a further extension for its determination to 30 June 2020.

38. It should be noted at this juncture that in the timeframe during which Harte Peat and the EPA were engaging in respect of the IPC licence application, two ministerial regulations, namely the EU (Environmental Impact Assessment) (Peat Extraction) Regulations 2019 (S.I.

No. 4 of 2019) and the Planning and Development Act, 2000 (Exempted Development) Regulations 2019 (S.I. No. 12 of 2019) were held to be invalid by the High Court (Simons J.) (see, respectively, *Friends of the Irish Environment v. Minister for Communications* [2019] IEHC 555 and *Friends of the Irish Environment v. Minister for Communications* [2019] IEHC 646). These two Regulations purported to exempt peat extraction (of whatever scale) from the requirement to obtain planning permission and to constitute the EPA as licensor under the 1992 Act as the single competent authority providing development consent where peat extraction required assessment under the EIA and Habitats Directives. Here, of course, Harte Peat maintains that its activities do not require planning permission because they constitute pre-1964 development and, as such, were excluded from the application of the 1963 Act and remain outside the scope of the 2000 Act.

39. In March 2020, the Friends of the Irish Environment commenced judicial review proceedings identifying the EPA as respondent and Harte Peat as notice party (Record No. 2019/910 JR). Amongst the reliefs sought were an order of *certiorari* quashing the decision of the EPA to accept Harte Peat's application for an IPC licence and declaratory relief that the EPA had erred in law and acted contrary to section 87(1C) of the 1992 Act in accepting the application when it knew or ought to have known that the development was not exempt from planning permission and that no such planning permission had been sought, nor confirmation obtained from a planning authority that such permission was not required.

40. On 25 May 2020, the EPA wrote to Harte Peat requesting details of the planning status for the activity pursuant to section 87(1B) of the 1992 Act and noting that failure to comply may result in the licence application not being considered.

41. Harte Peat responded on 29 May 2020 confirming that no grant of planning permission existed/that no application was under consideration and enclosing a memorandum to the

effect that no permission was required for peat extraction commenced before the planning legislation came into force.

42. On 4 August 2020, the EPA wrote to Harte Peat stating that the application *prima facie* involved development/proposed development for which planning permission may be required and further referenced the decision of the High Court (Meenan J.) in *Bulrush & Westland* [2018] IEHC 58. On 10 August 2020, Harte Peat sought an extension of time within which to reply to the EPA's letter. On 11 August 2020, Harte Peat wrote requesting a further extension of time and details of the statutory basis on which the EPA was requiring proof of planning status and an explanation as to why the EPA had concluded that the requirements of section 87 had not been met.

43. On 21 October 2020, the EPA wrote to Harte Peat reiterating its request for information in respect of the planning status of its peat extraction activity. This correspondence was replied to by Harte Peat on 5 November 2020 wherein Harte Peat stated that no adverse finding had been made regarding the planning status of the lands the subject of the licence application.

44. On 12 November 2020, the EPA's licensing inspectorate prepared a memorandum regarding Harte Peat's licence application recommending that the EPA's Board refuse to consider the application pursuant to section 87(1C) of the 1992 Act.

45. On 17 November 2020 the EPA's Board met to consider the memorandum and Harte Peat's application. It duly accepted the recommendation of the licensing inspectorate and decided to refuse to consider the licence application pursuant to section 87(1C) of the 1992 Act.

46. On 24 November 2020, the EPA wrote to Harte Peat informing it of the decision to refuse to consider its application for a licence pursuant to section 87(1C), on the basis that the activity involved development for which planning permission was required. In essence,

the EPA was of the view that it was precluded by section 87(1C) of the 1992 Act from considering HP's licence application in circumstances where no application for planning permission within the meaning of Part IV of the 1992 Act had been made, and where Harte Peat could no longer rely on a ministerial exemption. On the same day, the EPA communicated its decision to the relevant prescribed bodies and the third parties who had made submissions.

The present proceedings and the High Court judgment

47. Harte Peat then sought to challenge this refusal by way of within judicial review proceedings. Separately, the EPA moved to seek relief against Harte Peat by way of perpetual injunctive relief pursuant to section 99H of the 1992 Act (Record No. 2021/33MCA).

48. The two sets of proceedings were heard together in the High Court (Phelan J.). Although Ireland and the Attorney General ("*the State*") were named as respondents in the judicial review proceedings (along with the EPA) they did not participate in the High Court hearing, the High Court having decided to defer consideration of the issues in the proceedings which directly concerned the State.

49. In the High Court, Harte Peat's position in the judicial review proceedings was that as its user was pre-1964, there was no requirement for planning permission or separate EIA through the planning process. It further maintained that while it had agreed to make an application for an IPC licence in compromise of the previous 2013 Proceedings, this did not mean that the activity sought to be licenced was unlawful in the absence of a licence. Moreover, while it accepted the requirement for EIA as a matter of EU law, Harte Peat contended that this was a function of the EPA in the licencing process under the 1992 Act.

50. In its injunction proceedings, the EPA sought various orders for the cessation and further prohibition of the extraction of peat and associated activity at specified areas in

circumstances where the activity was being undertaken by Harte Peat without an IPC licence and planning permission had never been sought in respect of the said activity. In short, the EPA's fundamental position was that Harte Peat were carrying out peat extraction activity in the course of business involving an area exceeding 50 hectares, which the EPA contended required an IPC licence (which Harte Peat did not have) as well as planning permission (which Harte Peat did not have) and which would have required the carrying out of an EIA pursuant to the EIA Directive.

51. While there were thus two strands to the proceedings, it was decided by the parties that all of the affidavits in both sets of proceedings could be used by either side interchangeably. Thus, the evidence before the High Court in both sets of proceedings was a mix of the evidence in the judicial review and injunction proceedings.

52. The High Court delivered judgment in respect of both Harte Peat's judicial review proceedings and the EPA's injunction application on 16 March 2022.

53. Phelan J. was of the view that the resolution of both proceedings depended to varying degrees on whether the EPA, in dealing with the licence application under the 1992 Act, was correct in concluding that development consent through the planning process was required for the extraction of peat by Harte Peat at sites operated by it within the State, even where those sites concerned pre-1964 user, consequent upon the scale of the operation and the acknowledged requirement that such extraction was subject to EIA. Phelan J. considered the second fundamental question which arose was whether the operation of Harte Peat's business without a licence was in breach of the 1992 Act such that the High Court had jurisdiction to make the orders sought by the EPA under the 1992 Act.

54. Ultimately, the High Court found that the EPA's determination not to consider the licence application was correct and held that the EPA were not only entitled to refuse to process the licence application but was obliged to do so where satisfied that the application

concerned was one in respect of an activity for which development consent in the form of planning permission was required. The Judge rejected Harte Peat's argument that the EPA was wrong in law in concluding that it was obliged to refuse to consider Harte Peat's IPC licence application pursuant to section 87(1C) of the 1992 Act. She found that since EU law requires EIA in respect of peat extraction by Harte Peat, "*as a matter of fact and law, this in turn means that the domestic means by which an EIA which is fit for the purposes of the Directives is concluded is through the requirement to seek planning permission. This is because no other effective means exist in domestic law providing for remediation measures as part of the development consent process. Enhanced powers exist under [the 2000 Act] (as amended) in relation to remedial and mitigation measures to remedy or mitigate any significant effects on the environment relating to the development for which consent is sought which far surpass the powers of the Agency*". The Judge then went on:

> "*203. In finding that there is a requirement to obtain planning permission, the Agency is in reality making a decision that the extraction of peat by [Harte Peat] requires 'development consent' as a matter of EU law because it requires an EIA. Given the limitations on the Agency in terms of their powers and functions, the conduct of an EIA under ss. 83(2A) and 87(1H) of the EPA Act is not adequate to meet the requirements of EU law as clear when one contrasts the respective powers of the planning authority and the Agency as regards remedial and mitigation measures where environmental impact is concerned.*
>
> *204. Accordingly, it is my view that as a matter of law, pre-64 user notwithstanding, planning permission is required for the extraction of peat activity to which the licence application relates once it is accepted that an EIA is required as a matter of EU law. The requirement to obtain development consent in the form of planning permission derives from the requirements of EU law because Irish law does not provide another*

adequate mechanism which allows for the regularisation of development in accordance with the requirements of EU law. The Agency would require enhanced powers and functions similar to those of a planning authority were the IPC licence to be equated with a development consent process under the Directives..."

55. While the High Court declared that the EPA's decision on the licence application was inadequately reasoned on the grounds set out in the judgment (including, *inter alia*, that the EPA had failed to address Harte Peat's claim that planning permission was not required because of a pre-1964 user), Phelan J. declined, however, to quash the decision on the basis that she was satisfied it was the only decision to which the EPA could come and, thus, to quash it on a reasons ground would be futile.

56. For the purposes of the statutory injunction sought by the EPA, in reaching her determination that the 50 hectares threshold had been met, the Judge made a number of findings, as follows:

- There was an obligation on the High Court to apply the law in such a way that projects likely to have significant environmental effects are made subject to EIA, and for this purpose subject to a consent procedure;
- The definitions of "*installation*" and "*plant*" [in the 1992 Act] capture not merely the footprint of the land from which peat is removed, but also any land used for purposes incidental to peat extraction, including lands drained (deliberately or incidentally), access roads, storage areas, buffer zones and sedimentation ponds, all of which should be included in reckoning the threshold;
- Nothing in the wording of Class 1.4 requires that lands must be contiguous and to interpret the threshold in this manner would be inconsistent with EU and domestic authorities on project splitting;

- The lands at both Areas A and B are contiguous and form a single peat land with common drainage; the lands at Areas F and G are also contiguous and ecologically and environmentally comprise a single bog; and the threshold is met individually at both sites;
- All four Areas, A, B, F and G are part of an overall single bog complex west of Castlepollard and drain into the river Inny which in turn flows into Lough Derravaragh, SPA;
- It is also appropriate to reckon all areas under the control of an operator that have a technical or hydrological connection to an area where extraction is occurring and on this basis Areas A, B, F and G also meet the threshold;
- Harte Peat's activity is licensable on the basis that the threshold is met in Areas A and B and/or Areas F and G;
- To confine reckonable lands solely to areas where peat extraction is actively occurring, is impermissible under EU law and would defeat the legislative intent for regulation;
- Where EU law requires EIA for Harte Peat's peat extraction activity, there is a parallel requirement to seek planning permission, pre-1964 user notwithstanding;
- An IPC licence is required for Harte Peat's activity in Areas A, B, F and G;
- The EPA was required to refuse to process Harte Peat's licence application, however the decision to do so was inadequately reasoned;
- Harte Peat's peat extraction activity is in contravention of the 1992 Act and constitutes a serious and ongoing breach of environmental law;

- There is an onus on the court to ensure conformity with EU environmental law in exercising its discretion under section 99H of the 1992 Act; and,
- While the Orders under section 99H would have significant economic effects, this factor did not outweigh the very serious, detrimental and irreversible environmental consequences of allowing Harte Peat to carry on unregulated activity.

57. Consequent on those findings, on 8 April 2022 Phelan J. made an Order requiring Harte Peat, its servants and/or agents to cease peat extraction, including all associated and/or ancillary works and the associated and/or ancillary processing of peat on lands referred to as Areas F and G, in addition to an Order requiring Harte Peat its servants and/or agents to refrain from extracting peat, including all associated and/or ancillary works and the associated and/or ancillary processing of peat on lands at Areas A, B, F and G pursuant to section 99H of the 1992 Act. On the same date Phelan J. made an Order in the judicial review proceedings declaring that the EPA failed to adequately reason its decision to refuse Harte Peat a licence but refusing any further relief in those proceedings.

The appeal

58. Harte Peat appealed both Orders of the High Court. Its grounds of appeal are set out in a single composite notice of appeal. The EPA's respondent's notice contains the grounds upon which it opposes the appeal.

59. The appeal was listed for hearing on 14 July 2022 and was indeed heard in part on that date. In broad brush, two principal issues arise for determination in the appeals, namely (i) whether the EPA's decision to refuse to consider Harte Peat's licence application on the basis that its peat extraction activity required planning permission (including retrospective consent) was correct and (ii) whether the High Court correctly interpreted the definition of Class 1.4 of the First Schedule to the 1992 Act, to wit, "*the extraction of peat in the course*

of business which involves an area exceeding 50 hectares" in granting the injunctive relief sought by the EPA.

60. In relation to the judicial review proceedings, the principal argument advanced by counsel for Harte Peat in the appeal hearings that have taken place to date is that the determination made by the EPA in respect of its licence application, namely the decision not to engage with the application because of the absence of planning permission, is wrong. As put by counsel, since Harte Peat's peat extraction activity or "*development*" (and no one disputes that it is development as defined in the 2000 Act) predates 1 October 1964, Harte Peat was not (and is not) required to apply for planning permission under the terms of the 2000 Act or its predecessor, the 1963 Act. Harte Peat maintains that notwithstanding the absence in the 2000 Act of any equivalent provision to section 24(1)(b) of the 1963 Act, the status of its pre-1 October 1964 user has not been affected by the provisions of the 2000 Act and that user does not require permission under the Act. In this regard, it relies on the definitions of "*unauthorised development*", "*unauthorised use*" and "*unauthorised works*" as set out in section 2 of the 2000 Act.

61. Harte Peat's position, simply put, is that the provisions of the planning code do not apply to its activity, that activity having commenced prior to 1 October 1964. It also argues that insofar as certain of its activities which have an environmental impact require to be the subject of EIA, thus triggering the requirement under EU law for development consent for such activities, any such requirement does not amount to a requirement to obtain planning permission. Harte Peat says that given that its licence application was in respect of an area which exceeded the threshold provided for in Class 1.4, it duly supplied an EIAR with its licence application, for the purposes of the conduct by the EPA of EIA, as required by EU law. Harte Peat's position is that the grant of an IPC licence, once such EIA was conducted,

would amount to "*development consent*" for the purposes of the EIA Directive and would therefore satisfy the requirements of EU law.

62. The response of the EPA to Harte Peat's appeal of the High Court findings in the judicial review proceedings is that Harte Peat requires planning permission for its activities, and that at some point in the past, albeit that the EPA cannot identify exactly when, that requirement to look for planning permission arose. The EPA argues that as a result of not having obtained planning permission in the past, as it ought to have done, Harte Peat is now required to look for retrospective development consent, in other words, substitute consent. The EPA contends that the only legislative scheme which gives the competent authority power to grant retrospective consent is that established under the 2000 Act. It further says that insofar as Harte Peat relies on the provisions of the 2000 Act (insofar as it excludes ongoing works that commenced pre-1 October 1964) in aid of their reliance on their pre-1964 user, if necessary, this Court can disapply the word "*commenced on or after 1 October 1964*" from the definitions of "*unauthorised use*" and "*unauthorised works*", in order to conform to the requirements of EU law, particularly the requirements of Article 2(1) of the EIA Directive which have direct effect.

63. In respect of the injunction appeal, Harte Peat's principal contention is that the aggregation of bog lands engaged in by the High Court for the purposes of its determination that Harte Peat's activity in Area G met the required 50 hectares threshold and thus required a licence, constitutes a pure error of law on the part of the High Court. It says that this is in circumstances where all the relevant site reports indicated that the 26 or so hectares in Area G constituted the only area where peat extraction activity was taking place. In those circumstances, Harte Peat contends that for the purposes of its injunction application pursuant to section 99H of the 1992 Act it was *ultra vires* the powers of the EPA to attempt to aggregate Area G with Harte Peat's bog land holdings in other areas in aid of its argument

that Harte Peat's activity in some 26.53 hectares of bog land in Area G required a licence. It is said that the erroneous aggregation of the bog lands comprising Area F (where all peat extraction activity had ceased) with Area G has resulted in the High Court granting *quia timet*-type injunctive relief which is not provided for in section 99H of the 1992 Act.

64. The EPA's position is that the scientific evidence before the High Court was to the effect that Areas F and G comprise a single bog (which exceeds 50 hectares). It is posited that what was occurring in Areas F and G was a continuous and progressive extraction of all of the peat, bit by bit, in this single bog which, in fact, in total comprises 128 hectares.

65. While counsel for the EPA accepts that the injunction granted by the High Court in respect of Areas A and B was in the form of *quia timet* injunction since at the time the Order was made there was no activity ongoing in Areas A and B, he maintains that the position was different in relation to Areas F and G since those areas comprise a single bog with ongoing activity in Area G, as found by the High Court. It is thus contended that the peat extraction carried out by Harte Peat affects the entirety of the single bog which comprises Areas F and G. Albeit Area F is exhausted, it is the EPA's position that it cannot be that section 99H of the 1992 Act, insofar as it refers to activity that "*is being carried on*", could be read in the manner suggested by Harte Peat: were that the case, it would render section 99H redundant and unusable. It is argued that, accordingly, Harte Peat's activity in Area G must be construed as a continuation of a historic and ongoing breach of EU and environmental law.

The Court's directions post the hearing on 14 July 2022

66. At the conclusion of the hearing on 14 July 2022, and arising from certain interactions that the Court had with counsel for Harte Peat and counsel for the EPA in respect of the EPA's contention that, for the purposes of determining whether the High Court was correct in finding that Harte Peat required development consent through the planning process, the Court may have to disapply certain parts of the 2000 Act to give effect to the requirements of EU law, the Court indicated to the parties that it might wish to hear from the Attorney General (already a party to the judicial review proceedings) in respect of the issues and arguments. The Court indicated that it intended to formulate questions to be addressed in the first instance by the EPA, with an opportunity thereafter for Harte Peat to comment on the EPA's response. The Court indicated that it would further consider the involvement of the Attorney General at that stage and adjourned the appeal to 14 September 2022 for mention. The Court duly sent out its questions and received the observations of the EPA and Harte Peat and at that stage made a decision to ask the Attorney General to participate in the appeal and duly communicated that decision to the parties when the appeal came back before it for mention on 14 September 2022.

67. Also on 14 July 2022, counsel for Harte Peat indicated his intention to apply to move his client's application for a stay on the injunction granted by Phelan J. in respect of the lands in Area G limited to 26.53 hectares. Such an application had been made to Costello J. in the directions list but she had declined a stay in circumstances, *inter alia*, where it was possible to give Harte Peat a very early hearing date. Harte Peat indicated its intention to this Court to seek a stay in circumstances where it was apparent that it might be some further time before the appeal was concluded and Harte Peat accordingly pressed the Court to hear the stay application. While indicating that it intended to oppose the application, the EPA made no objection to the hearing of it.

68. The Court duly fixed the hearing of the stay application for 14 September 2022. The stay application was duly made on that date by Harte Peat and opposed by the EPA.

The stay application

69. While the Court has endeavoured to give a broad outline of the submissions the parties have made in the appeal hearing which has taken place to date (in order to give context to the stay application), it bears repeating that this judgment is concerned solely with Harte Peat's application for a stay on the High Court's Order of 8 April 2022 in the statutory injunction proceedings insofar as it relates to some 26.53 hectares of bog land in Area G (the Order made by the High Court is, on its face, broader in its terms as it applies to both Areas F & G as regards the first part of the Order and Areas A, B, F & G in relation to the second part of the Order).

70. Before further addressing the stay application, we wish to reiterate that nothing that is said in this judgment is to be taken as an indication that the Court has reached a final view on any of the substantive issues in the appeal. It has not reached any such view at this stage.

71. Harte Peat's application for a stay on the section 99H Order was first moved before Phelan J. on 8 April 2022 when counsel for Harte Peat applied for a 12-week stay. That application was refused by Phelan J. on the basis that a stay of that duration would effectively negate her judgment in circumstances where, *inter alia,* the Judge found an ongoing breach of EU law. What the Judge did was to give Harte Peat a stay in the usual terms to allow it to appeal her Orders, but she saw fit to shorten the normal appeal time. Accordingly, a stay was granted on that basis until the first directions hearing before this Court. Harte Peat duly filed a motion on affidavit before this Court seeking a stay. When Harte Peat's application for a stay was first moved before Costello J. on 17 June 2022, she was not satisfied with the state of the evidence on which Harte Peat was relying (namely the effect of the injunction on third parties, and the danger of the domestic mushroom industry collapsing overnight)

and she gave Harte Peat an opportunity to file further evidence. Subsequent to the filing of such evidence, Costello J. still found significant gaps in the evidence and, upon hearing from both parties, she duly refused a further extension of the stay. However, she directed an early hearing date for the substantive appeal and granted liberty to Harte Peat to re-apply for a stay to the Court hearing the appeal. As already explained, the appeal hearing has been listed for further hearing on 7 December next for the purpose of hearing further submissions from the parties and from the Attorney General.

The relevant principles

72. The relevant principles to be applied in this application are to be found in the case law generally applicable to stays pending appeal and, to this end, the following authorities are of relevance, having refined, as they did, the traditional *Campus Oil* test (the pre-trial injunction test and which had been formulated primarily with commercial or property litigation in mind) to accommodate applications for a stay or injunctive relief in matters, *inter alia,* of public law:

- *Okunade v Minister for Justice and Equality* [2012] 3 IR 152;
- *C.C. v Minister for Justice and Equality and Ireland* [2016] 2 IR 680; and
- *Krikke v. Barranafaddock Sustainability Electricity Ltd*. [2020] IESC 42.

73. As the case law demonstrates, the first question (i.e. the first part of the *Campus Oil* test) to be addressed in determining whether a stay should be granted is whether the moving party has established a fair or arguable case. In other words, for present purposes, whether Harte Peat, the moving party, has established arguable grounds of appeal. As said by O'Malley J. in *Krikke,* this *Campus Oil* requirement *"is equally applicable in judicial review proceedings"* and, by analogy, other proceedings of a public law nature such as in the present case, where the EPA (a statutory authority) is seeking injunctive relief.

74. If arguable grounds are established, then, in accordance with the principles set out in *Okunade*, the next step is to assess where *"the least risk of injustice"* lies. This requires the Court to consider the injustice that would ensue if the stay were granted and the Order of the High Court subsequently upheld. We must also consider the injustice that would ensue if the stay were refused and the Appellant was ultimately successful in the appeal.

75. A relevant factor which will inform the Court's assessment of where the least risk of injustice lies is the fact that the order sought to be stayed has been made after a full hearing in the High Court. As noted by O'Malley J. in *Krikke*:

> *"[T]he intention of Okunade was not to apply different tests to ordinary civil litigation, on the one hand, and public law claims, on the other, but to identify certain features of public law litigation that may mean that the general principle-the need to minimise the risk of injustice-may need to be applied in different ways in different cases. The fact that a case is at the appellate stage, and the appellate court has the benefit of the determination made at first instance, may legitimately influence the decision to be made."* (at para. 90)

76. In his judgment in *Krikke*, O'Donnell J. (as he then was) was equally conscious of this latter factor stating:

> *"An application to stay a judgment of a trial court comes after there has been a final determination by a trial court of the issue. Instead of rival contentions as to the likely state of the evidence and the law, with which a trial judge is presented on an interlocutory application, the appellate court has the judgment of the trial court, and an understanding of the analysis which applies on an appeal, particularly on a point of law. Thus in C.C. v. Minister for Justice [2016] IESC 48, [2016] 2 IR 680 ("C.C."), Clarke J. (as he then was) observed at paras. 41 and 44 of his judgment*

that the fact that the case was now at the appellate stage may influence the application of the test…" (at para. 5)

77. A further important principle which derives from the relevant jurisprudence is that where the order challenged has been made under an Act of the Oireachtas and was therefore valid on its face, in the words of O'Higgins J. in *Campus Oil*, it has *"to be regarded as part of the law of the land"* unless and until its invalidity is established. In *Okunade*, Clarke J. put it in the following terms:

"It seems to me to follow that significant weight needs to be placed into the balance on the side of permitting measures which are prima facie valid to be carried out in a regular and orderly way. Regulators are entitled to regulate. Lower courts are entitled to decide. Ministers are entitled to exercise powers lawfully conferred by the Oireachtas. The list can go on. All due weight needs to be accorded to allowing the systems and processes by which lawful power is to be exercised to operate in an orderly fashion. It seems to me that significant weight needs to be attached to that factor in all cases." (p. 189)

78. While the adequacy of damages is a relevant factor to be assessed when assessing the balance of justice in private law litigation (and may frequently be a factor of significant and perhaps decisive weight), for the reasons explained in *Okunade* it is unlikely to be a relevant factor in public law cases, although there may be some public law cases where it falls to be considered. In this case, the Court is satisfied that damages would not be an adequate remedy for the EPA in the event that this Court were to grant the stay sought by Harte Peat and the Court subsequently dismissed Harte Peat's appeal from the High Court injunction. In that event, damages for the EPA would not arise and, in any event, monetary damages would not be an adequate remedy given the permanent and irreversible consequences for Area G and its environs were peat extraction to be resumed. That is apparent from the material put before

the Court (discussed in more detail later in this judgment). On the other hand, in the event that the stay is refused, and Harte Peat's appeal ultimately allowed, there does not appear to be any reality to the EPA being liable in damages. Certainly, the EPA did not contend that damages would be recoverable from it in such a scenario. Accordingly, the question of whether a stay should be granted must turn on other factors relevant to the determination of where the least risk of injustice lies, including the Court having regard to any financial loss that the High Court Order may cause for Harte Peat and the fact that, if successful on appeal, Harte Peat will not be compensated for any such loss.

Application of the relevant principles to the present case

Are there arguable grounds for appeal?

79. Harte Peat's position is that it has compelling grounds for appeal in respect of the aggregation of bog lands engaged in by the Judge for the purpose of determining that the EPA met the requisite threshold for the section 99H injunction proceedings. It says the requisite threshold is not met in circumstances where (so it says) it is effectively the common case here that Harte Peat is not carrying out an extraction of peat in excess of 50 hectares. That threshold can only be met if the Court comes to the view that the High Court was justified in taking into account bog land located some 10 or 20 kilometres away from Area G, an approach which Harte Peat says is manifestly wrong as a matter of law. Harte Peat thus asserts that the High Court's determination of the injunction application is rendered untenable in light of the 50 hectares requirement before the EPA can move for injunctive relief (which Harte Peat asserts the EPA cannot establish in this case). Effectively, Harte Peat says, the High Court Order was effectively granted on a *quia timet* basis which, it contends, is not permissible having regard to the terms of section 99H itself.

80. The Court is satisfied that Harte Peat has made out an arguable case and has stateable grounds of appeal in relation to the aggregation of bog lands issue. We note that the EPA

did not seriously challenge Harte Peat's contention that it has arguable grounds. All that being said, it is important to emphasise at this juncture that in determining that there are arguable grounds of appeal, the Court is not weighing the strength of the case or the likelihood of success. Suffice it to say that Harte Peat has stateable grounds which would, if accepted, lead to the outcome that the injunctive relief granted by the High Court ought not to have been granted.

81. The Court is not satisfied, at this stage, that the grounds of relief relied on by Harte Peat are such as to compel this Court to allow its appeal. The issues are not as clear-cut as Harte Peat suggests.

The balance of justice

82. Being satisfied that Harte Peat has arguable grounds for appeal, the Court must now consider where the greatest risk of injustice would lie, were it to either grant or decline the stay requested by the applicant.

83. It bears repeating, once again, that we are not concerned at this stage with either determining or predicting the outcome of the appeal proceedings. In a case such as the present, where Harte Peat is asking to stay an order of the High Court before a final decision has been reached on whether the order is correct or not, *Krikke* and other jurisprudence make clear that on such an application, once arguable grounds have been established (as they have been here, although, as we have said, Harte Peat's "compelling" grounds argument may be overstated), the focus of the Court must be on making an order that minimises the risk of injustice as far as possible. In conducting this assessment, bearing in mind the established jurisprudence, the following considerations are considered relevant and have been duly assessed, having taken into account the submissions of both parties.

84. The stay application is brought in circumstances where the High Court, after a full hearing, has upheld the determination of the EPA (albeit on different grounds to those relied

on by the EPA) to refuse to consider Harte Peat's IPC licence application on the basis that the activities being carried out by Harte Peat require, but do not have, planning permission. Furthermore, the High Court has acceded to the EPA's application for injunctive relief, again after a full hearing. The High Court Orders thus carry significant weight (see O'Donnell J. in *Krikke* at para. 5).

85. The Court accepts that the circumstances of the present case are such that whatever course is adopted on the stay application, there is a clear risk of injustice. We have also had regard to the fact that when Costello J. refused to extend the stay, she did so in circumstances where she envisaged an early hearing and determination in respect of the substantive appeal. As the appeal has developed, its determination is still some way away. Given that turn of events, the absence of a stay pending the determination of the appeal has the potential to affect Harte Peat to a greater extent than was envisaged by Costello J. in June 2022 when she refused to extend it. This is a factor to be weighed in assessing where the balance of justice lies. We also note Harte Peat's submission that there was a considerable delay in the EPA coming to its decision to refuse to entertain the licence application, although it is worth recalling that Harte Peat continued to extract peat during the currency of the licence application, further to the agreement reached in May 2019. Harte Peat indeed relies on that fact in aid of its stay application.

86. There are further significant factors that require to be weighed. If the stay were to be granted and the High Court's decision ultimately upheld on appeal, then the activities which Harte Peat would have been permitted to continue because of the stay would lead to permanent and irreversible consequences for the bog lands concerned, a matter to which the Court will shortly return.

87. There are also undoubted consequences for Harte Peat if it is required to comply with the statutory injunction pending the determination of the appeal in circumstances where the

Order may, ultimately, be found to be unlawful. This is particularly so where, as we have said, Harte Peat would not be compensated for any loss caused by the High Court Order should Harte Peat be successful on appeal.

88. However, the evidence that Harte Peat has put before this Court in support of its application is, on analysis, limited and unpersuasive. Initially, in its stay application in the High Court (and at the directions stage before this Court) Harte Peat's emphasis was on the impact which the injunction would have on third parties and on the mushroom industry generally. To this end, Harte Peat put before the Court affidavit evidence from no fewer than seven individuals involved in commercial mushroom growing asserting that there would be disastrous or devastating consequences for the mushroom growing industry in Ireland were Harte Peat to be stopped from supplying mushroom casing to the industry. On 16 June 2022, Mr. Aidan O'Harte swore an affidavit in response to the replying affidavit of Mr. John Gibbons, Inspector with the EPA, sworn 14 June 2014, wherein Mr. O'Harte adverted to "*the gravest economic consequences of a stay not being granted*" which he said was evidenced from the affidavits of the mushroom growers already filed.

89. As already referred to, the stay application was first moved before this Court (Costello J.) on 17 June 2022. On that occasion Costello J. directed further affidavit evidence from Harte Peat clarifying (i) Harte Peat's ability to stockpile, and whether there were currently any stockpiles held; (ii) the exact market share held by Harte Peat in supplying the mushroom industry; and (iii) whether Harte Peat accepted it was extracting 7,000 cubic metres of peat per month as had been deposed to by Mr. Gibbons in his affidavit of 14 June 2022.

90. In his affidavit sworn on 21 June 2022, Mr. O'Harte averred that "*mushroom casing is essential to the commercial growing of mushrooms*" and without it "*commercial production could not take place*". He stated that there was "*no alternative to wet peat in the manufacture of mushroom casing*". He further averred that three (named) mushroom

growing enterprises represented 85% of the mushroom growers in the country and that these enterprises were in turn responsible for producing "*approximately 85 to 87% of the total commercial mushroom production of the domestic and foreign markets*". He averred that Harte Peat "*supplies at least 85% to 100% of the mushroom casing to those companies*". He averred that the remaining 15% of mushroom producers "*were serviced by smaller suppliers of peat*" who could not service the demands of the commercial producers to whom Harte Peat supplied mushroom casing. At para. 10 of his affidavit, Mr. O'Harte confirmed that Harte Peat was extracting "*approximately 7,000 cubic metres of peat*" per month. Harte Peat's ability to stockpile, or the extent of its stockpiles, was not addressed.

91. On 24 June 2022, Mr. Gibbons swore an affidavit in response wherein he complained that Harte Peat had failed to confirm its precise market share of the domestic market and that it had provided instead only a percentage range of what it supplied to three domestic enterprises. He claimed that Harte Peat failed to detail the extent of its export of mushroom casing in circumstances where it was claimed by the EPA that Harte Peat export a significant volume of mushroom casing abroad. This, Mr. Gibbons, said was "*highly relevant*" in circumstances where Harte Peat was urging on the Court that without a stay the entire domestic mushroom industry would collapse overnight. Mr. Gibbons also made reference to para. 243 of the High Court judgment which in turn had referenced para. 44 of an affidavit Mr. O'Harte swore on 11 January 2021 in the judicial review proceedings and which indicated that Harte Peat "*appear to envisage being able to continue its business using imported peat*". Mr. Gibbons also observed that Harte Peat's assertion that other domestic suppliers of wet peat would be unable to service the needs of commercial producers was not explained. Mr. O'Harte could not be regarded as independent in this respect. According to Mr. Gibbons, there was thus no clear evidence before the Court on this issue. Mr. Gibbons also deposed to the fact that there were three Bord Bia approved mushroom casing suppliers

in the State of which Harte Peat was one. There were 22 Irish mushroom producers of which Harte Peat supply three. In the view of Mr. Gibbons, it was thus clear that the 19 other mushroom producers sourced their mushroom casing from entities other than Harte Peat.

92. As already referred to, Costello J. declined to extend the stay the High Court had granted.

93. In the course of the stay hearing on 14 September 2022 before this Court, Harte Peat did not advance the case that the domestic mushroom industry has collapsed or was likely to collapse, rather its focus was on the financial consequences for the company itself. In effect, the injustice now being asserted by Harte Peat is a commercial loss to Harte Peat, as counsel acknowledged. This represents a very significant alteration in Harte Peat's position in the Court's view.

94. Harte Peat submits that the affidavit evidence shows that it is importing peat from abroad, and also sourcing peat from other smaller suppliers in the State in order to supply its customers. It is submitted that this is being done at great expense to Harte Peat who has warned its customers that there will be a price increase as a result. Moreover, Harte Peat says that there is a concern that uncertainty about its ability to supply mushroom casing will result in the movement of mainstream mushroom production out of Ireland to Britain.

95. It was acknowledged by counsel that the affidavits put before the Court say very little about the exact concrete consequences for Harte Peat of a stay not being granted, and he acknowledged that the cost to Harte Peat has not been quantified.

96. In the context of assessing the risk of injustice to Harte Peat if the stay is to be refused, the Court has closely considered the several affidavits that have been filed in support of the application for a stay. In the Court's view, these affidavits did not give the Court any sufficient information on which it could form any reliable view as to the real-world impact

of the High Court Order on Harte Peat, either in the period to date or in the period that is likely to elapse until the final determination of the appeal.

97. The affidavit evidence put before the Court by Harte Peat does not disclose the actual and/or projected losses said to be caused to Harte Peat by reason of the High Court Order. Nor was Harte Peat's capacity, or otherwise, to absorb such losses addressed in the affidavits. The reality appears to be that Harte Peat continues to engage in business. The Court was told for the first time by counsel in the course of the hearing that Harte Peat has been importing peat and obtaining supplies from smaller suppliers as a means of satisfying its contractual obligations. None of this is explained on affidavit. There is no affidavit evidence of Harte Peat's contractual obligations or of the increased cost of performing those obligations. There is no *evidence* (as opposed to statements made by counsel) that Harte Peat was suffering loss, less still evidence which would enable the Court to form a view as to the level of loss involved and the impact of such losses on the financial position and viability of Harte Peat.

98. Overall, there has been a marked failure on the part of the applicant to give any accurate picture of the alleged economic or financial consequences which the section 99H injunction has caused. The identified frailties in Harte Peat's argument must therefore impact on the weight that is to be attached by the Court to the contended-for economic and financial prejudice, particularly in circumstances where in *Krikke*, both O'Donnell C.J. and O'Malley J. found that too much weight had been given by the Court of Appeal to the financial loss to the developer. This has to be an important factor in the present case, particularly in circumstances where no effort has been made to quantify Harte Peat's losses.

99. In this context, it is also relevant that, in the event that Harte Peat succeeds in its appeal from the section 99H Order, that Order will be set aside and Harte Peat will be able to resume peat extraction activities in Area G (unless of course it is otherwise restrained from doing so). The absence of a stay simply defers such extraction. Area G (which is a

finite resource) will be available to Harte Peat in the event that its appeal succeeds: its peat can then be extracted and sold. In that regard, Harte Peat's position is unlike that of the developer in *Krikke*. The effect of the High Court order in *Krikke* (unless stayed) was to prevent the operation of the wind turbines unless and until appropriate permission was granted for their retention and operation. The income lost while the turbines were silent was not deferred but would be lost forever. Even so, it is clear from *Krikke* that the Supreme Court considered that too much weight was given to the apprehended financial loss in *Krikke*.

100. One of the principal arguments advanced by Harte Peat in aid of its argument that the least risk of injustice lies with the stay being granted is the narrow basis upon which the EPA may bring an application under section 99H of the 1992 Act. It argues that even if (as the EPA and the High Court concluded, albeit on somewhat different bases) Harte Peat's activities require planning permission/substitute consent under the 2000 Act (and that is, as will be apparent from the narrative above, vigorously disputed by Harte Peat), that would not sustain or justify the section 99H Order. It might justify an order being made under section 160 of the 2000 Act but no application for such an order had been before the High Court and the order made by that Court was not made on that basis.

101. Harte Peat's position in the appeal hearing that has taken place to date is that for the injunction to be upheld depends on the EPA establishing that Harte Peat is carrying on peat extraction as a business in an area exceeding 50 hectares and that it was doing so when the EPA commenced their proceedings and when the High Court came to determine those proceedings. The injunction granted by the High Court was predicated on the aggregation of the bog lands in Areas A, B, G and F, as done by the High Court. That is either right or wrong. Harte Peat submits that these are the factors which should inform the Court's assessment of where the balance of justice lies.

102. Thus, the gravamen of Harte Peat's argument is that the applicable principles for the grant of a stay should be applied on the basis of focusing exclusively on the injunction proceedings. It asserts that in determining where the balance of justice lies, the Court should confine itself to the parameters of section 99H of the 1992 Act since the EPA's standing in seeking an injunction pursuant to section 99H is entirely predicated on the premise that the activity in which Harte Peat was engaged at the time the EPA issued its proceedings required an IPC licence which Harte Peat did not have. It is said that the EPA is not entitled to come to Court under the guise of section 99H and assert that Harte Peat is in breach of the planning code.

103. Counsel emphasises that Harte Peat is not concerned, for the purposes of the stay application, with arguing the further implications of the judicial review proceedings, or whether Harte Peat required planning permission (as contended for by the EPA and found by the High Court). He asserts that a stay is not being sought by Harte Peat in respect of any views the High Court expressed about the need for Harte Peat to apply for planning permission or the effect of the EU Directives on the planning code. The critical fact, so Harte Peat says, is that the injunction granted by the High Court was not based -and could not have been based-on the absence of any necessary planning permission.

104. It is also submitted that it is irrelevant that there was, on the face of it, a valid administrative decision taken by the EPA to decline to consider Harte Peat's licence application. This is for two reasons. Firstly, the High Court has said that the EPA's decision was wrong as a matter of process (albeit the High Court determined that the outcome reached by the EPA was correct). Secondly, if Harte Peat had not brought judicial review proceedings, there would not have been a prior administrative decision which required to be adjudicated on by the High Court. Harte Peat's position is that the EPA is not a kind of back-up local authority for the purposes of enforcing planning law. It is in those

circumstances that Harte Peat argues that the interest which the Court should take into account, were peat extraction to be permitted pending the outcome of the appeal, is whether the *non-licenced* status of Harte Peat (under the 1992 act) is damaging to the public interest, assuming that Harte Peat is required to be licensed in the first place.

105. It is submitted the Court does not have the building block of a public law decision to which the Court would otherwise have to attach weight. The injunction proceedings do not involve an apparently valid action of an administrative decision-maker such as An Bord Pleanála in respect of a section 5 determination under the 2000 Act (as in *Krikke*) or a deportation order by the Minister for Justice (as in *Okunade*) to which weight would have to be given, as indicated by the relevant case law. That may be so but the fact of the matter is that there is a final decision and Order of the High Court on the section 99H application to which this Court must attach significant weight in this context.

106. It is also argued that even if planning permission is required for an activity under the 1992 Act, that does not mean that where the activity is carried out without planning permission, there is automatically public prejudice as a consequence. It is submitted that unless the Court has come to the view that the extraction of peat is harmful *per se*, the grant of a stay to Harte Peat is not detrimental to the public interest. Reference was made in that context to the fact that in the course of its application for an IPC licence, Harte Peat provided an EIAR and an NIS which did not identify any significant environmental effects associated with its activities the subject of the licence application. Counsel emphasises that the only reason that the requisite assessments pursuant to the Directives were not carried out is because of the EPA's erroneous conclusion that it was prohibited by statute from proceeding with the determination of the licence application.

107. Harte Peat also contends that had the application for a licence been properly considered by the EPA, conditions could have been attached to any licence granted by the EPA in order

for Harte Peat to carry on the extraction of peat in the manner fully respectful of the environment, having regard to the obligations imposed on the EPA pursuant to section 83 and section 87 of the 1992 Act which provide, *inter alia*, for the EPA to take into account the views of the planning authority and, if necessary, to lay down conditions which have regard to the EU Directives' criteria. Had that been done, all requirements of EU law and the Directives would have been satisfied.

108. Great emphasis is put by Harte Peat on the fact that at the time when the injunction proceedings issued, it had confined its peat extraction activity to some 26.53 hectares of bog lands in Area G. Its position is that, as the affidavits filed in support of the stay application show, its peat extraction activity has been thus confined since the consent order in 2018 (notwithstanding that the IPC licence application was in respect of a greater area). It is not suggested that Harte Peat was carrying out any activity in Areas A, B, or F, or that it has carried out activity in any other area exceeding the 26.53 hectares in Area G. Indeed, Harte Peat maintains that that peat extraction in the 26.53 hectares of Area G was the *status quo* until it was injuncted from doing so. Furthermore, it points to the fact that one of the terms of the May 2019 consent Order was that it would apply for an IPC licence. Having done so, Harte Peat says that it was unlawfully refused any consideration of its licence application or the EIAR submitted therewith. It is further pointed out that this was in circumstances where the grant of a licence for which Harte Peat agreed to apply would itself amount to development consent for the purposes of EU law, thus ensuring Hart Peat's compliance with EU law.

109. Harte Peat also argues that the notion that the EIA Directive requires its stay application to be considered in a radically different way to other cases that come before the High Court on a section 99H application, or indeed on a section 160 application, is misconceived. It asserts that if the 50 hectare threshold (for the purposes of a licence

requirement) as laid down in the 1992 Act means anything, the Court is entitled at this stage (i.e. for the purposes of the stay application) to come to a view that the EPA cannot aggregate land which is not being used for peat extraction (and which Harte Peat undertook in the High Court not to use for extraction) in order to bolster its application for injunctive relief. In other words, Harte Peat asserts that the Court is entitled to say at this juncture that the aggregation of bog lands for the purposes of establishing the 50-hectare threshold as has occurred here is neither required nor lawful. Counsel submits that if the Court comes to that conclusion, then for the purposes of the stay the balance of convenience clearly lies with Harte Peat. He contends that what it is in issue here is an adversarial hearing where the EPA has come to Court seeking injunctive relief under section 99 of the 1992 Act. The EPA did not come to Court seeking an order restraining Harte Peat from engaging in peat extraction. Moreover, the local authority, Westmeath County Council, has never attempted to take Harte Peat to court pursuant to s.160 of the 2000 Act in respect of its activities.

110. The EPA opposes the stay application. It says that if the Court refuses the stay and ultimately determines that the High Court was wrong in granting the injunction, then the sole injustice that Harte Peat will have suffered is an asserted but unquantified financial loss in circumstances where no effort has been made to quantify that alleged loss or explain how it would arise. On the other hand, if the stay is granted and Court ultimately determines that the High Court was correct, then the injustice that would have occurred is that irreversible environmental consequences will have occurred given that peat extraction is "*utterly irreversible*". This is in circumstances where peat bogs have taken millennia to form.

111. Counsel for the EPA also points to the fact that the finding by the High Court that an EIA is required has not been put in issue by Harte Peat. Yet, in the face of that finding, Harte Peat now asks the Court to lift the injunction so as to permit it to carry out an activity without such EIA, or indeed an AA, having been carried out. Counsel thus asserts that the Court is

being asked by Harte Peat to give its *imprimatur* to a breach of EU law. Moreover, while Harte Peat now seems to suggest that it never accepted that anything it did in the past required an EIA, and says that it is only the activity that is the subject of the IPC licence application that requires an EIA, the fact of the matter is that the activity the subject matter of the licence application has been engaged in without the requisite EIA or AA. It is submitted that there is no reality to Harte Peat's attempt to extract 26.53 hectares from Area G and then contend that the peat extraction at those 26.53 hectares does not require an EIA or AA.

112. The EPA's fundamental submission is that the activity being carried on by Harte Peat in respect of which the High Court was asked by the EPA to make an order under section 99H was the extraction of peat in the course of business involving an area exceeding 50 hectares. The uncontested scientific evidence is that Areas F and G comprise a single bog with common drainage. It was and remains a single bog notwithstanding that Area F is now exhausted. Thus, to ignore Area F in calculating the required threshold for the EPA to have standing under section 99H would result in the Court allowing the continuation of a breach of EU law. Accordingly, the EPA's position is that peat extraction was ongoing at Areas F and G at the time the injunction was sought. What was occurring in Area G was the continuation of a historical and ongoing breach of EU environmental law which Harte Peat, by dint of its stay application, now asks the Court to sanction.

113. In arguing that the balance of justice favours the refusal of the stay, counsel for the EPA submits that if the Court grants the stay but ultimately upholds the High Court, the injustice that will have occurred is of considerable magnitude, namely the irreversible loss of bog lands, the downstream environmental consequences for Lough Derravaragh, SPA and NHA, and for Lough Bane, a mesotropic lake of national importance and a proposed National Heritage Area, none of which have never been assessed. It is submitted that the

adverse consequences are significant in both EU and environmental terms. The activity in issue, and in respect of which an injunction was granted, is peat extraction which is likely to have a significant effect on the environment and EU sites. It is in those circumstances that the EPA contends that in assessing where the least injustice lies, the Court has to have regard as to why Harte Peat requires planning permission (including substitute consent). The Court cannot, as Harte Peat argues, confine itself to the parameters of section 99H of the 1992 Act when assessing the balance of justice.

114. In the first instance, the Court has carefully considered Harte Peat's submission that it should effectively conclude that the EPA's position on the aggregation issue is so weak as to be unsustainable, particularly given the wording of section 99H of the 1992 Act and the fact that peat extraction was occurring only in respect of the 26.53 hectares at Area G. However, it remains the case that the Court has yet to determine whether the High Court was correct to find that the 50-hectare threshold was met on the facts here. Thus, Harte Peat's reliance on the alleged weaknesses in the EPA's case on the aggregation of bog lands issue cannot be regarded as decisive for the purposes of determining the stay application in its favour.

115. Turning now to Harte Peat's submission that the determination of the stay application should be solely confined to the parameters of section 99H and its argument that the Court should proceed for the purposes of the stay application on the basis that if the stay is granted, and the Court subsequently upholds the High Court judgment, the sole prejudice or injustice that will have been caused is that the licensable activity has been permitted to proceed without a licence. As already noted, Harte Peat's contention is that there is no basis for the Court to look beyond those parameters since the application for an injunction is a stand-alone application which can only be determined by reference to the terms of section 99H,

without any consideration of any wider issues regarding the lawfulness of Harte Peat's activities.

116. The first observation the Court would make is that this argument appears to run counter to Harte Peat's previously stated position that there is an inextricable link between the injunction and the judicial review proceedings and the agreed position of the parties in the High Court that the affidavits in both sets of proceedings were to be used interchangeably. Secondly, and in any event, we consider that Harte Peat's contention that the stay application should be determined solely within the confines of section 99H puts the position too narrowly and rigidly in circumstances where what is at issue is whether the balance of justice is in favour or against the granting of a stay and, in that context, broad public interest considerations are clearly relevant to the Court's assessment.

117. We are not persuaded that the stay application requires to be framed or determined in the manner suggested by Harte Peat, without any consideration of the findings of the High Court in the judicial review proceedings. The fact that Harte Peat has established arguable grounds of appeal does not entitle it to a stay. The Court must consider the balance of justice. In that context, it appears to the Court that the fact that the EPA and the High Court has each determined that the peat extraction activities that Harte Peat carried on until restrained by the section 99H Order, and which it clearly intends to resume if a stay is granted on that Order, are such as to (1) require the carrying out of an EIA; (2) consequently, require "*development consent*" which, in the circumstances here, (3) necessitates an application for substitute consent and/or planning permission under the 2000 Act is highly relevant to its assessment of where the balance of justice lies. We are thus satisfied that the High Court's findings in the judicial review proceedings have to be a relevant factor in the Court's assessment of the balance of justice. The High Court not only found that an IPC licence was

required by Harte Peat but also that the activity being carried out by Harte Peat was a serious breach of EU law with potentially significant irreversible environmental impacts.

118. In determining where the least risk of injustice lies, the Court must look to the actual facts and the realities of the case. It cannot be gainsaid that the IPC licence application was in respect of the lands designated A, B, and G on the map annexed to the application. Given the extent of the landholding for which a licence was sought, it must follow that Harte Peat accepts that this larger area required an IPC licence and consequently an EIA to be carried out. This is demonstrated by the fact that Harte Peat itself submitted an EIAR (and an NIS) with its licence application. As recorded at paras. 11, 181 and 182 of the High Court judgment, Harte Peat did not contest that their extraction of peat is subject to an EIA pursuant to the requirement of the EIA Directive (albeit Harte Peat contend that this is a function of the EPA in the licensing process under the 1992 Act). The further reality is that the EPA reached the conclusion that planning permission (including substitute consent) was required, and the High Court has reached the same conclusion.

119. We have already observed that the Orders of the High Court, coming as they do after a full hearing, carry significant weight. We are thus required to have regard to the fact that if the stay is granted, it will result in Harte Peat being free to do that which the High Court (and the EPA) has determined cannot lawfully or appropriately be done without planning permission and/or retrospective consent granted only after an EIA process. Thus, we are not persuaded by the argument that, even if the Court takes the view from the material before it that there is a risk that planning law/EU environmental law would be breached in the event a stay is granted and Harte Peat resumes peat extraction from Area G, that is a matter for a local authority or another interested person to pursue pursuant to section 160 of the 2000 Act and not a matter to which this Court should have regard. That submission reflects an

excessively narrow conception of the role of this Court in considering whether to stay the High Court's Order in the particular circumstances presented here.

120. Harte Peat's activity in Area G involves (or at least, has involved) significant commercial peat extraction. The reality is that if the Court were to grant the stay and subsequently uphold the High Court decision, the injustice that would arise, both as a matter of law and of fact, is that irreversible peat extraction from Area G would occur. In such scenario, the peat extraction would have been in breach of domestic and EU legislation. Furthermore, if peat extraction were resumed in Area G, there would likely be knock-on downstream environmental consequences for other locations such as the SPA and the NHA and Lough Bane (a proposed NHA) which this Court is not competent to address, and which can only be addressed by the actual carrying out of EIA and AA. As deposed to by Mr. Gibbons, EPA Inspector, in his affidavit sworn 14 June 2022, *"any further stay on the order even insofar as Area G alone is concerned has the capacity to affect adversely and irreversibly not only Area G but also Area F and the wider boglands*". The environmental and ecological effects of the peat extraction undertaken by Harte Peat are identified in the May 2021 report of Dr. Patrick Crushell, Chartered Ecologist, as exhibited in Mr. Gibbons' affidavit. The same report was before the High Court. Furthermore, as a matter of ecological fact, peat extraction causes irreversible loss to raised bog. As described in Dr. Crushell's report Areas F and G "*is a single raised bog unit*". The report references "*a [r]emnant of high bog"* in Area G. Raised bog is a protected habitat pursuant to Annex I of the Habitats Directive.

121. While on behalf of Harte Peat, affidavit evidence was adduced from two of its employees deposing to the fact that the digging of wet peat involved digging the face of the bank from the top of the bog to as close to the base of the bog as possible without touching

the base of the bog, Mr. Crushell's report refers to "*[t]he base of the excavation [extending] into the underlying mineral subsoil*".

122. The harm from unlawful peat extraction cannot be reversed or undone. This, the Court observes, is in contrast to the factual matrix in *Krikke*: there, the wind turbines in issue were not causing any greater nuisance than what had been authorised under the planning permission, yet in that case, the Supreme Court would nevertheless have refused a stay. In the present case, if peat extraction is now to be resumed in Area G absent an EIA or AA, there is a very significant risk that there will be adverse environmental consequences and a failure to enforce national and EU environmental law. On the basis of the High Court's findings in the judicial review proceedings, that risk is a near certainty.

123. There is also another aspect of the public interest that falls to be considered, that is preventing the accrual of profits pending the determination of the appeal from an activity that may ultimately be found to be in breach of EU law and which requires planning permission including retrospective consent.

124. The Court declines the invitation to proceed as if the only matter before it was Harte Peat's appeal from the section 99H Order. The fact is that there was an application for an IPC licence and the EPA, as it is statutorily empowered to do under section 87 of the 1992 Act, inquired into the planning status of the activity proposed to be licenced. The refusal to consider Harte Peat's licence application was one that the EPA was statutorily obliged to make if it was satisfied that the provisions of section 87 of the 1992 Act were not met. Accordingly, these realities cannot be set at nought by looking only at a "*what if?*" scenario (as in, *"what if the EPA had only sought an injunction in respect of Area G activity absent any IPC licence having been applied for by Harte Peat?"*).

125. In terms of the public interest, the Court considers that if a stay is granted and the High Court Order granting the injunction is ultimately upheld, then the nature of the injustice that

would arise is that a breach of EU law (in terms of the requirement for an EIA) would have occurred. Indeed, even if the injunction were ultimately not to be upheld, there would still be a significant risk that permitting further extraction of peat in Area G without prior EIA or AA and the granting of development consent would constitute a breach of both EU and national law.

126. Thus, contrary to the arguments of Harte Peat, it could not be appropriate that the Court would consider the stay application without having regard to the fact that the Judge made certain findings about the planning status of Harte Peat's activity which was potentially relevant to the question as to whether Harte Peat should be allowed to resume peat extraction in Area G pending the determination of the substantive appeal. It will also be recalled that the purpose of an IPC licence being required under Part IV the 1992 Act is to regulate peat extraction activity so that it does not cause environmental damage.

127. Furthermore, it is axiomatic that the Court must give significant weight to the requirements of EU law. The case law of the CJEU confirms the significant responsibility of Member States to identify and nullify any breach of EU law (see *Wells v. Secretary of State for Transport* Case C- 201/02, at paras. 64-65). That obligation was reiterated by the CJEU in *Commune di Corridonia* Case C-196/16, where, at para. 35, it stated that *"[u]nder the principle of cooperation in good faith laid down in Article 4 TEU, Member States are …required to nullify the unlawful consequences of [a] breach of EU law. The competent national authorities are therefore under an obligation to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out an environmental impact assessment, for example by revoking or suspending consent already granted in order to carry out such an assessment…".*

128. Moreover, as the CJEU explained in *Inter-Environment Wallonnie ASPL v. Council of Ministers* Case C-411/17, at paras. 171-172:

"[The obligation on Member States] is also incumbent on national courts before which an action against a national measure including such a consent has been brought…. Consequently, courts before which actions are brought…must adopt, on the basis of their national law, measures to suspend or annul the project adopted in breach of the obligation to carry out an environmental assessment …"

129. While the CJEU acknowledges that EU law does not preclude national rules which, in certain cases, permit the regularisation of measures which are unlawful in light of EU law, *"such a possible regularisation would have to be subject to the condition that it does not offer the parties concerned the opportunity to circumvent the rules of EU law or to refrain from applying them, and should remain the exception …"* (at para. 174). As the CJEU makes clear, any regularisation must not be conducted *"solely in respect of the project's future environmental impact, but must also take into account its environmental impact since the time of completion of that project…"* (emphasis added) (at para. 175). At para. 177, the CJEU lays stress on the *"primacy"* of EU law and the necessity to guard against the undermining of the uniform application of EU law.

130. Thus, in light of the precautionary and preventative principles as enunciated in the jurisprudence of the CJEU in *Commune di Corridonia* and *Inter-Environment Wallonnie*, in order to justify the granting of a stay, the Court would have to have no doubt in its mind that doing so would not have the effect of permitting Harte Peat to engage in futher peat extraction in breach of EU law. The Court is simply not in that position, in light of the findings made by the High Court on that issue.

131. We note that while conceding that its licence application (by reason of the size of the landholding) mandates an EIA, Harte Peat nevertheless maintains that in respect of the 26.53 hectares in Area G alone, there was no necessity for EIA. For present purposes, it is not necessary for the Court to decide whether peat extraction in some 26 or so hectares in Area

G alone would, in and of itself, require an EIA. That is for another day. We would merely observe, at this juncture, that on the papers before the Court, there is an arguable case that an EIA is required given the extent (26.53 hectares) of the area concerned (particularly in light of the applicable threshold for a mandatory EIA under the Planning and Development Regulations) and its location in terms of its proximity to areas of environmental sensitivity, as heretofore described. For present purposes, the Court considers it sufficient that there is a real risk of damage to the environment and to the public interest in upholding the law pertaining thereto if the stay were granted and the Court were subsequently to uphold the injunction. The importance of both the protection of the public interest in the enforcement of planning and environmental law and upholding the law protecting the environment cannot be underestimated. This is underscored by O'Donnell J. (as he then was) in *Krikke* when he stated that *"insufficient weight was given to the public interest…and…the law protecting the environment, which should have significant weight"* (at para. 9). Thus, the implementation of a decision made under a statutory scheme for the protection of the environment must attract significant weight and, as was also emphasised in *Krikke*, significant weight has to be given to the fact that the High Court has upheld the EPA's decision after a lengthy hearing.

132. On the question of whether peat extraction in the 26.53 hectares in Area G require planning permission (as the EPA contends), again, the Court considers that it would not be appropriate to express a view on this question at this stage as it is an issue to be determined in the appeal. The reality is that, as of now, the EPA has determined that the activity in question require planning permission, a determination that has been upheld by the High Court, and where that Court has also determined, with regard to the requirements of EU law, that Harte Peat requires not just planning permission but also retrospective permission by way of a grant of substitute consent. Given the significant weight which the High Court

Orders must attract, the High Court judgment and the consequent Orders, following as they do a full trial, are important considerations in determining where the balance of justice lies.

Summary

133. In all the circumstances of this case, we consider the most compelling factor in the *"balance of justice"* assessment to be as follows. If the Court were to grant the stay, then for as long as it remained in place, Harte Peat would be free to extract peat from Area G without planning permission, without any requirement at all to have obtained prior development consent and without any EIA having been conducted by a competent authority- in circumstances where there is a significant basis for thinking that such activity would be a breach of EU law (having regard to the finding to that effect made by the High Court). That is a very significant factor weighing in favour of refusing the stay.

134. No doubt, the refusal of the stay may potentially impact adversely on Harte Peat. On its case, it is entitled to work Area G and monetise the remaining peat in that area. But, as already explained, there is a very striking lack of evidence as to the actual financial impact of the section 99H Order on Harte Peat to date or how the Order will affect it in the future in the event that a stay is refused. Absent such evidence, there is nothing capable of outweighing the factors weighing against the grant of the stay.

135. For the reasons stated above, the Court considered that the balance of justice clearly favoured the refusal of the stay and that is why the Court decided to refuse Harte Peat's application, without prejudice to its entitlement to renew that application if that appears appropriate in light of the manner in which the appeal proceeds.

136. The Court will hear from the parties in relation to costs.