[2020] IEHC 666

THE HIGH COURT
JUDICIAL REVIEW

[2019 No. 65 JR]

BETWEEN

CLAIRE BOYLAN

APPLICANT

AND
LIMERICK CITY AND COUNTY COUNCIL

RESPODENT

AND
P&D LYDON PLANT HIRE LTD

NOTICE PARTY

JUDGMENT of Mr. Justice Heslin delivered on the 16th day of December, 2020

Introduction

1. In the present proceedings the Applicant seeks an order of *certiorari* by way of an application for judicial review quashing the determination of the Respondent to grant the Notice Party a waste facility permit (WFP/L/2018/188), which permit was granted on 2 November 2018 in respect of lands at Clondrinagh, Co. Limerick (hereinafter "the permit"). The Applicant is the owner of lands adjacent to the lands which are the subject matter of the aforesaid waste permit. By order made on 4 February 2019, the court granted the Applicant leave to seek the reliefs set out in para (c) on the grounds set out at para. (d) of the Statement of Grounds dated 31 January 2019.

The Grounds upon which relief is sought

2. For the sake of clarity, is appropriate to set out, verbatim, the grounds upon which relief is sought, as they appear in para. (d) of the Statement of Grounds, as follows:-

> "(d) Grounds upon which relief is sought:
>
> 1. The Council granted waste facility permit (WFP/L/2018/188) without carrying out or recording either an environmental impact assessment or a screening for environment impact assessment (EIA) contrary to national and European law. The Council sought an environmental impact statement (EIS), however, there is no record of any actual environmental impact assessment having been conducted. Moreover, an EIS was submitted and not an environmental impact assessment report (EIAR) as required under the 2014 EIA Directive, accordingly, it was not possible for the Respondent to carry out a lawful EIA. No EIA is apparent under either directive (2011 or 2014).
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> 2. The Council granted the said waste facility permit without carrying out or recording an appropriate assessment or a screening for appropriate assessment (AA) contrary to national and European law. Insofar as the developer submitted an appropriate assessment screening report, this screening report purported to screen out the development for AA having regard to mitigation measures. This is impermissible having regard to, *inter alia*, the recent decision of the CJEU in *POW v. Coillte*, Case C – 323/17. Moreover, in any event, the screening report appears to be in respect of a smaller development comprising the deposition of 40,000 m^3 of material. In

addition, given the proximity of the site to European Sites and in particular the Lower River Shannon SAC (350m). The findings of the screening report do not meet the required legal standard and are irrational. The decision does not account for, or deal at all with, the concerns expressed by the OPW in respect of the drainage mechanisms on site and/or the risks to the surrounding watercourses. This is one of a number of significant lacunae contained in the screening assessment presented by the Notice Party and/or otherwise in the information presented to the Council.

3. The Council granted the said permit contrary to Article 18(4)(d) of the Waste Management (Facility Permit and Registration) Regulations 2007 as amended by the Waste Management (Facility Permit and Registration) (Amendment) Regulations 2008, in that the facility is and was not compliant with the planning permission granted in respect of the facility. In particular, no planning permission exists for the activities permitted under the said waste facility permit. The planning permission granted in respect of the site only authorised the deposition of 40,000 cubic metres of material onsite, the permit greatly exceeds this quantity. Granting a permit in these circumstances is contrary to law.

4. The Council failed to properly notify the public and/or the Applicants of its determination. The Council have not provided any or any adequate reasons or considerations for its determination contrary to law. Insofar as reasons for the decision are given on p. 4 thereof, same do not meet the requirements of law. In particular, the said reasons are generic in nature and appear to deal with a development that is yet to be carried out. The decision does not at all deal with the fact that in fact the development has already been completed. The Council have failed to either provide an environmental impact assessment or appropriate assessment or any details of any of the assessments or screening assessments that it was required to carry out by law. In particular, there is no record of any EIA or AA or screening for either, contrary to national and European law. The decision fails to give any information on the rights of the public, including the Applicant, to review or appeal the said decision, nor does it give any practical information in respect of the procedure to be followed, including time limits, applicable legislation etc. This is contrary to national and EU law.

5. The Council have granted a permit that requires EIA in circumstances where the development has already been carried out. This is in breach of the requirements in the EIA Directive and Habitats Directive which required that the assessments to be carried out are carried out *before* the developments is commenced or completed. In particular, the decision is in breach of the decision of the CJEU in the *Commission v. Ireland* Case C – 215/06 that precludes the granting of retrospective development consents in respect of developments requiring EIA's. In addition, the waste facility permits as granted, the reasons there for and the conditions attached thereto all appear to be generic and appear to regulate a development that has yet to occur. The fact that this development has in fact already been carried out is nowhere

apparent. The permit is not fit for purpose, the conditions are irrational, and, it is contrary to EU law.

6. The permit has been granted for a development that required EIA, however, no EIA was ever carried out in the context of the planning application. In these circumstances, it was not possible for a complete assessment to be carried out in advance of the grant of the waste facility permit as issues relating to land use, planning, traffic, site selection, alternatives etc. were never assessed for the purposes of EIA as part of the original planning application. Granting a permit in such circumstances is contrary to national and EU law and in particular contrary to the decision of the CJEU in Case C – 50/09 *Commission v. Ireland*.

7. The Council failed to have regard to the submission of the Applicants in respect of the application. This submission raised serious concerns in relation to the operation of the existing site, its planning status and lack of compliance, the local nuisance being generated, the issues arising in relation to drainage and the environmental pollution resulting. The decision in the council does not address any of these concerns and records no consideration of any of these submissions. This is contrary to fair procedures, natural and Constitutional justice and to the obligation to give reasons for administrative actions. The said determination is also contrary to Article 18 of the 2007 Regulations. The said determination is unreasoned and unreasonable. The Council is precluded from granting a permit unless it is satisfied that the development to which the permit applies has not caused and is not causing environmental pollution. In fact, this facility is causing such pollution and the council have made no enquiries in this regard, accordingly, the said grant of the permit is *ultra vires*".

The Respondent's primary contention ie that the proceedings are moot or misconceived

3. The relevant verifying affidavit was sworn by the Applicant on 31 January 2019 and a statement of opposition was filed on behalf of the Respondent which is dated 24 June 2019, the first paragraph of which reads as follows: -

"1. The present proceedings are moot and/or misconceived insofar as the waste facility permit (WFP/L/2018/188), the subject matter of proceedings, has been surrendered by the Notice Party and is spent. The relief and all of the grounds are directed towards the grant of the said waste permit which has been surrendered as of the 12th April 2019. As of the 12th April 2019, the certificate of registration (COR/L/2017/188) has also been surrendered".

The Statement of Opposition

4. The statement of opposition contains a number of pleas, all of which are expressed to be without prejudice to the primary contention, set out in para. 1 of the statement of opposition, that the present proceedings are moot and/or misconceived. Among other things, it is confirmed in the statement of opposition that, in December 2017, the Notice Party deposited material on the lands at Clondrinagh. It is also confirmed that, at the time of the application for the permit, on 18 April 2018, "the . . . *material had been deposited*

with the remaining activity being the laying of topsoil and levelling of the field". The foregoing is clear from paras. 2 and 3 of the statement of opposition. In para. 4, an express plea is made that the Council requested an EIAR by way of a request for further information and it is also pleaded that the same was submitted by the Notice Party. The foregoing assertion is disputed and, later in this judgment, I will examine the evidence in relation to the said plea. Paragraph 5 of the statement of opposition includes the explicit plea that the Council conducted an EIA with respect to the 2 November 2018 decision to grant the relevant permit. Later in this judgment I will examine the evidence in detail, but it can be said at this juncture that no such EIA is before the court.

5. Paragraph 6 of the statement of opposition refers to certain conditions in the permit, namely Condition 1.8 which stated that no further soil and stone or any other new material shall be accepted on site unless directed by the Respondent and Condition 10.2 which required the surrender of the permit to the Respondent in accordance with Article 29 of the Waste Facility Permit Regulations 2007 (as amended), subject to satisfactory restoration of the site. Paragraph 7 of the statement of opposition refers to a November 2018 covering letter which accompanied the permit, drew attention to certain specific conditions, referred to the requirement to surrender the permit and the COR and also included a link to the relevant surrender form which was available to download. Paragraph 8 of the statement of opposition pleads that, on 12 April 2019, the permit was surrendered to the Respondent in accordance with Article 29 of the Waste Facility Permit Regulations 2007 (as amended) which Article is set out. It is also expressly pleaded that, following the Notice Party's 29 January 2019 application, the Respondent " . . . *investigated the site and was satisfied that the conditions for the surrender of the waste facility licence had been met*".

6. At paragraph 9 of the statement of opposition it is pleaded that insofar as planning permission 17/544 included conditions for restoration of the land, these were complied with in that the land has been returned to agricultural land as per the planning granted. In para. 10, it is pleaded that, as a result of the surrender of the permit, it no longer exists and is spent. It is also expressly pleaded that "*The grounds of challenge in the proceedings and factual circumstances relating to the same are irrelevant and no purpose is served by engaging with the same*". Paragraph 10 also states that the Respondent makes no admissions regarding the grounds of challenge. While the foregoing is pleaded, that is not the same as a denial of the various grounds which are set out at (d) of the Applicant's statement of grounds and which detail the basis upon which the relief is sought. An unusual feature of this case is that the Respondent has not denied each and every one of the grounds upon which the relief is sought.

7. On the contrary, and in a manner explained more fully later in this judgment, the Respondent accepts that, in at least one crucial respect, the decision to grant the permit was a decision which was made other than in accordance with law. Specifically, it is acknowledged on behalf of the Respondent that the decision-making process in respect of the permit had regard to a screening report which did not comply with the Habitats Directive. It is accepted that for the Respondent to have had regard to mitigation

measures in a screening report was not consistent with the position which pertained under EU law, as and from 12 April 2018. It is also accepted on behalf of the Respondent that, when the EIS was submitted in the context of the Notice Party's application for the permit, the relevant works had already been carried out. In light of the foregoing, and before looking further at the contents of the statement of opposition, I would pause to emphasise that, even from the Respondent's perspective, the decision which is challenged in the present proceedings has an acknowledged infirmity.

8. Returning to the statement of opposition, para. 11 thereof states that the Applicant was granted leave to seek judicial review, on 4 February 2019, at a time when the Notice Party had applied to surrender the permit. Paragraph 11 goes on to plead that the Applicant failed to properly investigate and/or disclose to the court the material fact that the permit had been surrendered and was, therefore, spent. The foregoing will be examined in greater detail later in this judgment but at this point it is appropriate to observe that it is common case that neither the Notice Party nor the Respondent informed the Applicant, on or before 4 February 2019, that the Notice Party had applied to surrender the permit.

9. Reference is made in para. 12 of the statement of opposition to proceedings brought by the Applicant pursuant to s. 57 of the Waste Management Act, 1996, as amended, entitled "*Boylan v. B&D Lydon Plant Hire Ltd & Anor*. [2018] 242 MCA". It is pleaded that, in the said proceedings, the Applicant alleges that the Notice Party is and/or was causing environmental pollution in relation to the deposit of soil which was the subject matter of the permit. It is pleaded at para. 13 of the statement of opposition that, insomuch as the Applicant alleges that the Notice Party has caused or is likely to cause environmental pollution, the aforesaid proceedings under s. 57 constitute an adequate alternative remedy. In para. 14 of the statement of opposition, it is pleaded that the Applicant has failed to pursue an adequate alternative remedy under s. 58 of the Waste Management Acts in respect of the permit and/or under s. 160 of the Planning and Development Acts in respect of the extant planning permission.

10. At para. 15 it is pleaded that, as a matter of discretion, the court should refuse the reliefs sought in circumstances where the proceedings are said to be moot and/or misconceived and/or where the Applicant has an adequate and more appropriate remedy and is pursuing same under s. 57 of the Waste Management Act, 1996 as amended. It is also said that any issue regarding the surrendered permit is adequately addressed in the Applicant's s. 57 proceedings and constitutes an adequate alternative remedy. Finally, in para. 16 of the statement of opposition, it is pleaded that the permit granted under the Waste Management (Facility Permit and Registration) Regulations 2007, as amended, is not a waste licence within the meaning of s. 40 of the Waste Management Acts, such that subs. [12] of s. 40 is disapplied. It is pleaded that, as such, the existence and/or validity of the waste facility permit and/or its surrender is irrelevant to the Applicant's s. 57 proceedings. Again it is pleaded that the challenge to the validity of the surrendered permit is moot and/or misconceived.

11. Having fairly summarised the pleas made in the Respondent's statement of opposition dated 24 June 2019, it is clear that there is no explicit denial by the Respondent of all of the pleas made in the Applicant's statement of grounds. In particular, the Applicant's plea that the screening report purported to screen out the development for appropriate assessment having regard to mitigation measures which was impermissible in light of the decision of the CJEU in *POW v. Coillte* Case C-323/17 is not denied. Indeed, in light of the facts of the case, counsel for the Respondent fairly acknowledged this infirmity, while submitting that this was not relevant, having regard to the surrender of the permit resulting in these proceedings being moot. Nor is there an explicit denial that the permit was granted contrary to Article 18(4)(b) of the Waste Management (Facility Permit and Registration) Regulations 2007 (as amended). Furthermore, the statement of opposition does not explicitly deny the Applicant's plea that the Respondent failed to provide any or any adequate reasons or considerations for its determination insofar as the permit was concerned. Furthermore, there is no explicit denial that the permit was not fit for purpose and that the conditions in the permit were irrational and that it is contrary to EU law having regard to the Applicant's plea that the Respondent granted a permit that required an EIA in circumstances where the development had already been carried out. In addition, the statement of opposition makes no explicit reference to the Applicant's plea that the Respondent failed to have regard to the Applicant's submissions.

12. It is fair to say that the Respondent's case is based squarely on the proposition that the present proceedings are moot or misconceived, having regard to the surrender of the permit, as well as the proposition that the Applicant has an adequate alternative remedy in the form of proceedings brought by the Applicant under s. 57 of the Waste Management Act 1996. Against the foregoing background I now turn to an examination of the evidence in this case.

The evidence before the Court

13. The Applicant owns the lands contained in Folio LK 2158 F of the Land Registry Co. Limerick, and these lands adjoin those of the Notice Party at Clondrinagh described in Folio LK 3286 F of the Register. It is not in dispute that the Applicant's lands are bounded on the south by the Notice Party's lands and the Channel 7/5/1/1 and to the east by Channel C7/5/1 which flows through the Notice Party's lands and, to the west, by the Crompaun River which is a tributary of the River Shannon.

The COR dated 12 October 2017

14. In 2017, the Notice Party sought and obtained a certificate of registration (hereinafter "COR") reference no COR/L/2017/188 which was issued by the Respondent under the Waste Management Act, 1996 (as amended) and the Waste Management (Facility Permit & Registration) Regulations, 2007 (as amended). This COR issued on 12 October 2017 and stated inter alia that: - "*This Certificate of Registration is for the acceptance of soil and stone as covered under LoW Code 17 05 04*". It is not in dispute that the COR authorised the filling of up to 25,000 tonnes of uncontaminated waste soil and stones on the Notice Party's lands at Clondrinagh, Co. Limerick. A copy of the COR appears behind Tab 1 of the verifying affidavit of the Applicant which was sworn on 31 January 2019.

Planning Permission 17/544, dated 13 September 2017, to import inert fill material

15. On 8 August 2017, the Respondent issued a notification of decision to grant planning permission to the Notice Party under Planning Register No. 17/544 and this was followed, on 13 September 2017, by a notification of grant of permission. Copies of the foregoing comprise Tab 3 of the Applicant's exhibits. As can be seen therefrom, permission was granted to the Notice Party: "*to import inert fill material from the Coonagh to Knockalisheen Distributor Road Scheme, Advanced Works contract to lands at Clondrinagh, Co. Limerick for agricultural improvements purposes with associated site works*". The reference to the Coonagh to Knockalisheen Distributor Road Scheme was a reference to the Limerick Northern Distributor Road which the Respondent county council was developing. It is not in dispute that the Notice Party was awarded the Coonagh to Knockalisheen Distributor Road Scheme advanced work contract, an element of which required the removal of infill and inert material. It is a matter of fact that neither the notification of decision to grant, nor the grant of permission made any reference to an Environmental Impact Assessment (hereinafter "EIA"). The second schedule of the planning permission specified eight conditions. For example, Condition No. 6 stated inter alia, that: - "*The site is bounded on the eastern side by Channel C7/5/1 and on the northern side by Channel C7/5/1/1 of the Coonagh Embankment Scheme. A 5m wide strip shall be provided for maintenance on both sides . . .*" Whereas Condition 7 stated that:

> "*the Applicant shall maintain a 5m buffer from all drains with appropriately graded slopes to the fill body to prevent sedimentation and collapse of material into drains. The fill material to be reseeded as quickly as possible and in stages to minimise runoff from bare soil. A plan for the staged filling and reseeding of the fill material to be submitted and agreed in writing with the Planning Authority prior to the commencement of the development".*

There was no reference in the planning permission to a tonnage limit. Nowhere in the planning permission is there any record of any environmental impact assessment (hereinafter EIA) having been conducted and the planning permission does not refer to any EIS having been submitted.

16. Condition 1 of the planning permission required that the development be carried out in accordance with the plans and particulars lodged with the application and it is not in dispute that the flood risk assessment report stated inter alia that the ". . . *proposed development is to import fill material [OF] 40,000m3 and consequently raise the existing ground levels by approximately 1.0 metre on average".*

The Notice Party's Screening Statement dated 28 July 2017

17. Tab 4 of the Applicant's exhibits comprises a document entitled "*Appropriate Assessment Screening Report: Land Improvement Site – screening statement for appropriate assessment – proposed infill of inert material for P&D Lydon – planning application 17/544, prepared in accordance with Article 6(3) and (4) of the European Commission Directive 92/43/ European Commission and the European Communities (Natural Habitats Regulations, 1997 (as amended) (in particular Regulation 27) 28th July 2017*". (hereinafter "the screening statement"). It is clear from the foregoing that the screening

statement was prepared in the context of and contemporaneous with the Notice Party's application for planning permission. The screening statement deals with a "*Proposed Project*" which, on internal p. 5 at para. 1.2 of the screening statement is described in the following terms: -

> "*The proposed works will involve the acceptance of surplus excavated natural material from construction works on the Coonagh to Knockalisheen Distributor Road Scheme and the placement of this inert material on site. This Land Improvement site will facilitate the development of the scheme. Natural material removed from the road development will be placed on site under planning permission and facility permit authorised by Limerick City & County Council. The material accepted onsite will be used to raise low lying area and will be worked to render the site more agriculturally viable as pastoral land.*
>
> *An extensive series of silt management and other site protection measures have been drawn up by the contractor. These are to be put in place to ensure surface water and groundwater are protected during and post construction phase. Site works will also be put in place in order to prevent any impacts to surrounding areas, in particular sensitive receptors including designated conservation sites.*
>
> *The fields in the general area are supported by back channels and in this particular field is completely surrounded by a narrow deep channel. The lands at present are drained by the Crompaun river which is set back 120m from the northern boundary of the lands which meanders south-westerly directly into the River Shannon".*

Proposed Works

18. It is wholly apparent from the contents of the 28 July 2017 screening statement that it related to *proposed* works, rather than any development which had already been carried out. This is also made clear in the introduction section of the document, the final paragraph on internal p. 4 of which reads as follows: -

> "*This document firstly describes the nature of the proposed development then goes on to provide information on the ecology of the site and surrounding area based on the results of both desk and field surveys. This information is then used to accurately predict the impacts that this development will have on the site and surrounding area with particular reference to adjacent lands that are designated for conservation. The main findings of the report are then summarised in a format designed to facilitate the carrying out of an EU Habitats Directive Article 6(3) Appropriate Assessment".*

Summary of Findings

19. Section 8 of the screening statement sets out the "Summary of Findings". There are two types of EU site designation, namely the special area of conservation ("SAC") and the special protection area ("SPA"). SAC's are designated for the conservation of flora, fauna and habitats of European importance, whereas SPA's are for the conservation of bird species and habitats of European importance. These sites form part of a network of protected areas throughout the European Union known as "Natura 2000". Section 8 of the

screening report refers to two Natura 2000 sites being the lower River Shannon SAC (Site code 002615) and the River Shannon and River Fergus estuaries SPA (Site code 004077). The following is a verbatim quote from s. 8.2 of the screening report: -

"8.2 Assessment of significance of effects

Describe how the project is likely to affect the Natura 2000 site.

- *The project as planned will not significantly affect sites and therefore a Stage II appropriate assessment is not required.*

Explain why these affects are not considered significant.

- *None of the qualifying interests of the SAC or SPA are affected.*
- *No Annex I habitats or Annex II species will be affected.*
- *Indirect impacts in the form of runoff or discharge of pollutants to the SAC or SPA will be avoided with appropriate mitigation and restriction of construction activity to areas away from the drainage channel network.*
- *Best environmental practice will be employed during both construction and operational phases to prevent pollution from entering onto the drainage channels and thus its transportation to the SAC or SPA . . ."*

Potential Impacts and Mitigation

20. The screening statement sets out, inter alia, potential adverse impacts affecting Natura 2000 designations. Having stated, at s.5, that "*the installation of 40,000m3 of inert topsoil to raise the land profile for agricultural improvement purposes is not located within the Natura 2000 network*", s. 5.1 goes on to deal with "*Potential Impacts*" stating, inter alia, that:-

> *"A worst – case scenario would occur whereby the project would result in a significant detrimental change in water quality either alone or in combination with other projects or plans as a result of indirect pollution of surface or groundwater. The effect would have to be considered in terms of changes in water quality which would affect the habitats or food sources for which the SAC habitats and species are designated".*

21. Section 6 deals with "*Impacts of proposed development on ecology of the area and related mitigation*". Section 6.2.2 refers to "*Short term negative impact – runoff pollutants from the site".* It states inter alia that:

> *"Construction activities associated with developments of this kind create such as earth moving and levelling have the potential for pollution in various forms to run off the site and enter the surrounding environment. In this case, works adjacent to the open drainage channels could have the potential to result in the runoff of pollutants including hydrocarbons. Though the only works that are proposed*

adjacent to the open channels are very minor, it is possible that materials could be stored in this area thus increasing the risk of pollution running off the site to areas if (sic) ecological sensitivity.

Mitigation

- *There will be no storage of materials, machinery, fuel or any other construction related items within five meters of the open channel network.*
- *It is not anticipated that fuel will be stored in large volumes on the site. Any fuel or other chemicals that are used onsite will be stored in a bundled tank.*
- *A spill kit will be kept on – site at all times. Vehicles will never be left unattended during refuelling. Hoses and valves will be checked regularly for signs of wear and will be turned off and securely locked when not in use.*
- *All machinery used on the site will be regularly maintained and checked for leaks of fuel or oil.*

Residual impact

With mitigation in place there will be no significant negative residual impacts on adjacent lands".

22. Section 6.2.3 deals with the "*Spread of invasive species*" and states that with best practice measures, as outlined, in place, the potential for the introduction, establishment and spread of invasive plant species is not anticipated. Section 6.2.4 acknowledges that construction activity of this type has the potential to result in the disturbance of wildlife and specifies a mitigation measure namely "*Construction access will be limited to one access point*". It is stated that with mitigation in place no significant residual impact is predicted. Section 6.3.1 acknowledges that "*The construction of the proposed infill project has the potential to result in a number of indirect impacts on the adjacent SAC. The works are however of small scale and are limited to importation of inert topsoil from a designated and trustworthy location"*.

23. Three separate mitigation measures are then specified, following which it is stated that, with mitigation in place, impacts on the SAC will be imperceptible and not significant. It is clear that the screening statement identifies several risks in respect of what was then proposed development. It is also clear that those risks are only considered to be insignificant in the context of specified mitigation measures. Indeed "*appropriate mitigation*" is specifically referred to when the findings in the screening statement are summarised at s. 8. As I will return to later in this judgment, due to a 12 April 2018 European judgment, it is impermissible to take account of mitigation measures in the context of screening out and a full appropriate assessment was required as of April 2018 onwards. The reason I make this point here is that the very same screening statement, dated 28 July 2017, reappears in the chronology of relevant events in the context of the

grant of the permit which the Notice Party applied for in April 2018 and which was granted on 2 November 2018. This will be examined later in this judgment.

The Applicant's averments

24. In para. 10 of her 31 January 2019 affidavit, the Applicant avers, inter alia, that the filling by the Notice Party of soil began in December 2017 and ended on or about 22 December 2017 and that, due to heavy rainfall from the start of January 2018, the water in the boundary drain rose to land level and overtopped, flooding the Applicant's lands. The Applicant avers that waste deposited by the Notice Party was not placed on, in or under the lands in accordance with the requirements of the COR. In particular it is averred that excessive quantities of waste were placed over and above the 25,000 tonnes maximum that can be regulated by the COR. It is averred that over 78,000 tonnes of material was in fact deposited and the Applicant also avers that material was deposited without proper layering and compaction needed to facilitate agricultural use thereafter, describing the development as disposal of waste onto the lands, and not recovery.

25. In para. 11 of her affidavit, the Applicant asserts that the Notice Party was in breach of several conditions of the COR and, in para. 12, the Applicant avers that the relevant works caused the blockage of a drain which resulted in flooding of the Applicant's lands and pollution of both drainage channels C7/5/1 and C7/5/1/1 with suspended solids. The Applicant also avers that there is a risk of other contaminants known to be associated with fill from construction sites including hydrocarbons from the fuelling of construction vehicles and nitrates and phosphates from topsoil.

Replying Affidavits

26. The short affidavit sworn by Mr. Seamus Martin, planning development inspector of the Respondent council, dated 24 June 2019, is silent in relation to the various averments made by the Applicant with respect to what occurred in December 2017 and from January 2018. In the affidavit sworn by Mr. Gerrard Doherty, senior executive engineer of the Respondent, on 24 June 2019, Mr. Doherty does not comment on the assertions made by the Applicant, although it is clear from the final sentence in para. 6 of his affidavit that the Respondent knows that the deposit of soil on the relevant land took place ". . . *in or around December 2017 by the Notice Party".*

S. 55 Notice issued by the Respondent on 20 March 2018

27. It is, however clear from the documentary evidence that, as of 20 March 2018, the Respondent was of the view that the disposing of waste on the land at Clondrinagh by the Notice Party was unlawful on the basis that the 25,000 tonne limit permitted by the COR had been exceeded. This is clear from the contents of a notice pursuant to s. 55 of the Waste Management Act 1996 (as amended), dated 20 March 2018 (hereinafter "the S. 55 Notice"), a copy of which comprises Tab 5 of the Applicant's exhibits. The S. 55 Notice begins in the following terms: -

> *"TAKE NOTICE that Limerick City and County Council pursuant to the powers conferred on it by s. 55 of the Waste Management Act 1996 (as amended), hereby requires you, as the person who is or was holding, recovering or disposing of waste*

within the meaning of s. 55 of the Acts, on land at Clondrinagh, Co. Limerick, to adhere to the following: -

1. Cease holding, recovering or disposing of waste on the land at Clondrinagh, Co. Limerick which is in excess of the 25,000 tonnes as permitted for Certificate of Registration reference number COR/L/2017/188.

You are advised of the following in relation to the terms of this notice: -

- *That representations with regard to the terms of this Notice may be made to the Director, Planning & Environmental Services, Limerick City and County Council, in writing within fourteen days from the date of service from this notice in accordance with s. 55(4) of the Waste Management Act 1996 (as amended);*

- *Pursuant to s. 55(8) of the Acts, that non – compliance with the terms of this Notice is an offence liable for prosecution;*

- *Pursuant to s. 55(6) of the Acts, that if a person on whom a notice is served under this section does not, within the period specified in the notice, comply with the terms thereof, the local authority may take such steps as it considers reasonable and necessary to secure compliance with the notice and may recover any expense thereby incurred from the said person as a simple contract debt in any court of competent jurisdiction".*

Permit application dated 13 April 2018

28. Within a very short period of being served with the S.55 Notice, dated 20 March 2018, the Notice Party submitted a "Waste facility permit & certificate of registration application form", dated 13 April 2018 (hereinafter "the permit application") to the Respondent. A copy of the permit application comprises Tab 6 to the Applicant's exhibits. Before looking, in some detail, at the contents of the permit application, I am entitled to find, as a matter of fact, that the said application was made by the Notice Party in direct response to the service upon it of a S. 55 Notice. The evidence demonstrates that the Respondent took no further action against the Notice Party on foot of the S. 55 after the application for the permit was made on 13 April 2018, which permit was subsequently granted on 2 November 2018. I am entitled to find as a fact that the application for the permit had the effect of regularising the breach complained of in the S. 55 Notice.

29. In response to an application by the Notice Party, the Respondent later decided, on 12 April 2019, that the relevant permit could be surrendered and this was notified to the Notice Party, by letter dated 18 April 2019. Despite the foregoing, the surrender of the permit did not result in any action whatsoever on the part of the Respondent with regard to the issue complained of in the s. 55 notice. As a matter of fact, therefore, the following can be said having regard to the evidence before this Court the application for the permit on 13 April 2018, which permit was granted on 2 November 2018, and subsequently surrendered in April 2019 (1) resulted in no further action being taken by the Respondent

against the Notice Party, (2) regularised the breach complained of in the s. 55 notice and (3) the foregoing remains the case up to the date of the trial, notwithstanding the surrender of the permit itself.

30. The foregoing is the factual position in light of the evidence and, in my view, is of very considerable relevance to the Respondent's submission that the relief claimed in respect of the decision to grant the permission on 2 November 2018 is moot and no purpose would be served by granting relief. The evidence paints a different picture and demonstrates, that as a matter of fact, the grant of the permit and its existence both halted action on foot of the S. 55 Notice issued against the Notice Party and continues to regularise the position to this day, by virtue of the permit having been "live" from 2 November 2018 to 12 April 2019. In my view, it cannot be the case that the permit both regularised the exceeding, by the Notice Party, of the 25,000 tonne limit which applied to the COR *and* also be, as the Respondent contends, spent, past, irrelevant and of no legal effect upon being surrendered. The Respondent's own actions are consistent with the permit continuing to regularise the S. 55 Notice issue as a matter of fact, and to this day, despite the permit's surrender. It is important to note that these findings of fact are supported by the contents of the Respondent's report dated 11 March 2019 which is examined in detail later in this judgment, where it appears in the chronology. I now turn to a close examination of the contents of the permit application dated 13 April 2018 which was submitted by the Notice Party to the Respondent.

31. The first page of the waste facility permit application form bears the Respondent's planning & environmental services date stamp of 13 April 2018. It is quite a lengthy form, the first four pages setting out an introduction and guidance information which is followed by sections A to G on pp. 5 – 28 inclusive. The application form is pre – printed and in a standard format, with the Applicant required to fill in information which, in the present case, was done in manuscript on behalf of the Notice Party. Section G of the permit application form comprises a statutory declaration which was made on behalf of the Notice Party on 6 April 2018 before a member of An Garda Síochána, wherein it was declared that the information given in the application was correct and that no information required to be included in the application was omitted. As to what was included in the application, it was plainly an application for a waste facility permit, with the relevant box being "ticked". As to the type of application. Section B relates to details concerning the Applicant and the following appears at S.B.8: - "*P&D Lydon is a civil engineering company who have successfully completed major projects all over the country. We have previously applied for received and managed sites with certs of registration in counties Roscommon, Mayo & Limerick. A competent qualified civil engineer will be appointed to manage the site. P&D Lydon also holds a waste collection permit*". The foregoing statement does not make clear that the Notice Party had already carried out the relevant works for which the waste permit was sought. Having regard to the contents of the statutory declaration made on behalf of the Notice Party, one would certainly expect that the application form, submitted in April 2018, would make clear that the deposit of soil took place in December 2017 (as averred by Mr. Doherty in the final sentence of para. 6 of his affidavit sworn 24 June 2019). Section C.6 concerns the expected lifetime, in years, of the facility or activity.

The application form states "*If the lifetime of the authorisation is less than five years demonstrate why a shorter period is appropriate*" and "*2 years*" has been stated as the expected lifetime. It is not at all clear why 2 years was stated, in circumstances where the material was already deposited on the Notice Party's lands.

Material "*will be*" excavated and spread, according to section D.1 of the application

32. Section D.1 provides the following description of the waste activity: -

> "Inert soil material *will be* excavated during the Coonagh to Knockalisheen distributor road scheme advanced works contract. This material *will be* transported to site where it *will be* spread + levelled over the existing field. Once this work is complete the area *will be* re – seeded & rolled and put pack into agricultural use". (*emphasis* added).

33. The future tense is used repeatedly in the foregoing statement. This is misleading in circumstances where, as a matter of fact, the soil had already been excavated, had already been transported to the relevant site and had already been spread on the Notice Party's land. It is incontrovertible that the foregoing activity took place in or about December 2017 and this is clear from averments made on behalf of the Respondent as well as the Applicant. That being the factual position, the foregoing statement in the application for the waste facility permit cannot be said to be accurate. On any objective reading of the statement, it conveys the impression that the work is proposed and prospective, whereas, in reality, the work had already taken place.

34. Having regard to the evidence before the court I am satisfied that this was not an innocent mistake on the part of the Applicant. The Notice Party plainly knew, as of April 2018, that the relevant works had already been carried out in December 2017. I am also entitled to hold, on the evidence, that the Respondent was equally well aware that the Notice Party had already excavated soil as part of the road scheme and transported this material to the Notice Party's lands at Clondrinagh. Not only was this the Respondent's road scheme, it is wholly apparent from the contents of the Respondent's 20 March 2018 S. 55 Notice, to which I have referred earlier in this judgment and in response to the receipt of which, the Notice Party made the application for a waste permit.

A statement that an EIS is required

35. Section D.2 of the permit application poses the question "*Is an Environmental Impact Statement (EIS) required for this activity? If yes, please enclose a copy of the EIS*". In response to the foregoing question, the Applicant has "ticked" the box marked "*Yes*" and, opposite the words "Document(s) Reference:" the Applicant has stated "*See Attached*". Despite the foregoing, there is no evidence of any EIS having been submitted by the Notice Party to the Respondent and, having carefully considered the evidence, I am satisfied that no EIS accompanied the permit application. I reach this conclusion because, in a letter dated 27 April 2018, which will be examined later in this judgment, the Respondent wrote to the Notice Party pointing out that the permit application was incomplete and requiring the Notice Party, inter alia, to submit an EIS. Section D.4 deals with waste volumes and asks the Applicant to detail the annual quantity of waste, in

response to which the Applicant has specified "*Class 5*" with an upper threshold of "*100,000 tns*", a proposed volume of "*90,000* tns", and a site throughput of "*90,000* tns".

Works which "*will be*" done, according to Section D.7 of the application

36. Section D.7 relates to waste processes and seeks a description of activities, in response to which the Applicant has stated the following: -

> "*A 20tn excavator will be used to strip the topsoil off the site. This will be stored around the perimeter of the site. Artic dumpers will haul the excavated material from the Coonagh road project and tip in the site. Wide Pad excavators will be used to spread and level this material. Once this subsoil is levelled the topsoil will be placed back over the area. When weather allows, this topsoil will be harrowed + levelled using tractor then seeded & rolled. The site will then be returned back into grassland for agricultural use".* (emphasis added)

Again, the foregoing statement uses the future tense despite the work which was done in December 2017, as both the Notice Party and the Respondent were aware. As such, the statement is materially inaccurate, painting a misleading picture of the then position in that much of the work described was not, in truth, proposed work but constituted work which had already been carried out.

Assessment which "*will be*" carried out, according to Section D.9 of the application

37. Section D.9 which deals with waste acceptance procedures, paints an equally misleading picture in response to the question "*What are the waste acceptance procedures that will be applied at the facility? Include details of what will happen with wastes that do not comply with the acceptance criteria (quarantine or rejection)".* In response to the foregoing question, a statement is made which maintains the fiction that the relevant works are prospective not historic in that the following is stated: -

> *"All material will be assessed at 2 points, the point of excavation on the road project & also at the tip site. If material is found to be unsuitable, it will be assessed by engineer, then loaded into lorries + hauled to appropriate tip then – this will does not (sic) be envisaged as all inert material will be coming from the same source".* (emphasis added).

Only excavated inert materials "will be" placed on the site, per section D.14

38. Section D.14 seeks information as to measures in place to prevent unauthorised or unexpected emissions, in response to which the following is stated by the Notice Party:-

> "*As only excavated inert materials will be placed on the site no emissions are foreseen".* (emphasis added).

Security which "*will be*" in place, according to Section D.15

39. Section D. 15 seeks details of on – site security measures, in response to which the Notice Party has stated: - "*There will be double gates at the entry/exit to the site at times when no PDL employee is working at the site. The gates will be locked*". (emphasis added). Once again, the clear impression is given that the work is entirely proposed. No impression is given that work has already been carried out.

A statement that an EIS is not required

40. Section F.1 concerns additional information, in response to which the Notice Party stated the following: -

> *"We would confirm that no EIS was required at planning stage due to the fact that all material to be imported to the site was from one source only 500m away. We would note however that under S.I. 349 of 1989, an EIS may be required so as per guidance documents a Screening Report was carried out to determine if indeed an EIS was needed, however in this instance, it was found not to be required".*

The foregoing statement is wholly inconsistent with the information inputted by the Notice Party Applicant at section D.2, wherein the Notice Party confirmed that an EIS was required and purported to attach a copy. At section F.1, opposite the words "*Document(s) Reference*" the Applicant has entered the following: "Screening Statement". I will presently look at the Screening Statement to which the Applicant referred in Section. F. 1. Before doing so, some final comments in relation to the permit application can be made, as follows. At S. G.3., under the heading "*Sign off*", it was certified on behalf of the Notice Party that the information given in the application was "*Truthful, Accurate and Complete*". For the reasons I have identified, the information including the application conveyed a misleading picture. I referred earlier to the fact that a statutory declaration was made on 6 April 2018 to the effect that the information in the permit application was correct. For the reasons set out above, I am satisfied that the information conveyed a false or misleading picture to material extent. This is notwithstanding the "WARNING" which appears at the bottom of the statutory declaration at S. G.4 of the permit application form.

Documents which accompanied the permit application

41. Among the documents which accompanied the application form is a document, dated 25 May 2017, concerning an agreement as between the Notice Party and a Mr. Tom Gleeson to rent lands and to fill with inert material arising from the construction of the new roadway at the Coonagh roundabout for agricultural land improvements, as well as permission by Mr. Gleeson, dated 4 April 2018 for the application for a waste facility permit on the part of the Notice Party. The application was also accompanied, inter alia, by a document on the Notice Party's headed paper which was entitled "C*oonagh to Knockalisheen distributor road scheme – advanced works contract, waste facility permit, statement of case*". This document was undated by the Notice Party but bears the Respondent's date stamp of 13 April 2018. The activities referred to in this document are also described entirely in the future tense, beginning with the first bullet point which states "*The material which will be placed on the site will be inert so there will be no emissions from the site"* (emphasis added). Among other things, this "*Statement of Case*" document states that "*Only material from the adjacent Road Project will be allowed enter the site, site will be locked at other times so no other material can enter*". At this point it is worth observing that the road project, being the Coonagh to Knockalisheen distributor road scheme, was part of the Respondent's project in respect of the Limerick Northern Distributor Road. As such, the relevant material came from the Respondent's road project and, despite the misleading manner in which the statement of case is phrased, relevant

works had already taken place in December 2017 as the Notice Party and the Respondent must have been aware.

The 2014 EIA Directive

42. At this juncture, and before continuing with an analysis of the documentary evidence in chronological order, it is appropriate to point out that Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment was amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 (hereinafter "the 2014 EIA Directive"). For present purposes, it is appropriate to refer to two aspects of same. Firstly, the effect of the 2014 EIA Directive was to require the preparation of an Environmental Impact Assessment Report (hereinafter "EIAR") by a developer, as referred to in Article 5(1) and (2) of the said Directive. Secondly, Article 11 entitles an Applicant to a review procedure, making it clear, inter alia, that "*1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned: (a) having a sufficient interest, or alternatively; (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition; have access to a review procedure before a court of law or other independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive…"*

The Respondent Council's 27 April 2018 letter to the Notice Party

43. Returning to the chronology of events, by letter dated 27 April 2018, the Respondent wrote to the Notice Party in relation to their permit application, informing the Notice Party that the application had been deemed incomplete and stating inter alia the following: -

> *"You are now required by notice under Article 12(7)(b) of the Regulations to provide the following information: -*
>
> *1. Confirmation of tonnage of spoil imported to application site.*
>
> *2. Confirmation of what tonnage of topsoil is required to bring the site back to agricultural use.*
>
> *3. Submit an Environmental Impact Statement".*

44. In light of the 2014 Directive to which I have referred, an EIAR was required to have been submitted. In para. 4 of the Respondent's statement of opposition, it is pleaded that "*The Council requested an EIAR by way of request for further information and the same was submitted by the Notice Party*". I am satisfied that the foregoing plea is not correct in light of the evidence. It is plain from the contents of the Respondent's 27 April 2018 letter that it sought an "*Environmental Impact Statement*" i.e. an EIS. That may have reflected the position insofar as Directive 2011/92/EU of 13 December 2011 was concerned, but it did not reflect the obligations under the 2014 EIA Directive. Insofar as it is submitted on behalf of the Respondent that the reference to an "*Environmental Impact Statement*", i.e. an EIS, should be read as a reference to an "Environmental Impact Assessment Report",

i.e. an EIAR, I cannot accept that submission. An EIS and EIAR are two specific and different things and it would be impermissible and contrary to the plain meaning of the words used in the Respondent's 27 April 2018 letter for this Court to hold that the Respondent called for the submission of an EIAR, when it so obviously called for the submission of an EIS.

The Notice Party's 30 May 2018 letter to the Respondent

45. On 30 May 2018, the Notice Party wrote to the Respondent in response to the latter's 27 April 2018 letter. A copy comprises Tab 8 of the Applicant's exhibits. The 30 May 2018 letter is relatively short and states inter alia the following: -

> *"We refer to your recent correspondence on the 27th April regarding Further Information Required for Validation and confirm the following:-*
>
> …
>
> *4. Tonnage of soil imported to application site is approx. 78,000.*
>
> *5. Topsoil was stripped before filling commenced and stored onsite. This will be re – spread over the area. Approx. tonnage of 8,000.*
>
> *6. Environmental Impact Statement (attached).*
>
> *We hope that this meets with your approval."*

46. A number of comments arise in relation to the 30 May 2018 letter. Firstly, it uses the present tense in relation to the tonnage of soil imported to the application site and uses the past tense in relation to topsoil which was stripped before filling commenced onsite. It is also specific about there being 78,000 tonnes of soil imported. Thus, the pretence that the importation of soil to the relevant lands was to happen in the future has been dispensed with and it puts beyond doubt the fact that the Respondent was aware that substantial works had already taken place, notwithstanding the fact that the contents of the permit application conveys the very clear impression that all work was prospective. Therefore, as of 30 May 2018, the factual position is that the Respondent had before it an application which was plainly misleading and which the Respondent knew to be so, in light of the contents of the 30 May 2018 letter. Furthermore, the Notice Party's reference to attaching an "*Environmental Impact Statement*" is entirely consistent with the Respondent having asked for same, not an EIAR as pleaded by the Respondent.

The Respondent's EIS dated 29 May 2018

47. The 30 May 2018 letter encloses an EIS which is dated 29 May 2018, as produced by "Ecofact Environmental Consultants". It is fair to say that this EIS does not appear to deal with the requirements of the 2014 EIA Directive which had by then come into force. It is a substantial report setting out information under the headings: -

(1) Introduction,

(2) Methodology,

(3) Receiving environment

(4) Impacts,

(5) Mitigation

(6) Conclusions.

Among the appendices to the report is a Screening Statement, to which I will refer presently. Before looking at the Screening Statement, it is appropriate to make a number of comments in relation to the 29 May 2018 EIS as submitted by the Notice Party.

Confirmation in the EIS that "works had already been completed"

48. Section 3.3 of the EIS is entitled "Land & Soils" and appears in the section which deals with the "*Receiving Environment*". It begins as follows: -

> *"The site survey of the development site at Clondrinagh, Co. Limerick revealed that works had already been completed; therefore, the land and surface soil was comprised of spoil and bare ground, with the lands infilled with inert excavated material. . ."*

In the manner examined earlier, the waste permit application purports to be in respect of proposed future development which "*will be*" carried out by the Notice Party. In the context of proposed development, one would expect an EIS to examine the potential impact of future development. Yet, in the present case, the EIS puts the Respondent squarely on notice of the fact that works had already been completed. As a consequence, the statements made by the Applicant in the permit application of 6 April 2018 were wholly inconsistent with the contents of the EIS of 29 May 2018, as the Respondent must have been well aware, including from the contents of the EIS.

Water

49. Section 3.4 under the heading "*Water*" began by stating the following: -

> *"The site survey of the development site revealed that the site is drained on all sides by drainage ditches. Some of these ditches have very steep sides and appear to have bad water quality. Evidence of siltation was noted along with some dead pond snails floating on the surface of one of the drainage ditches. These drains were also highly coloured. Silt traps and silt fences were present, scattered around the development site, however they were considered not to be sufficient to ensure that no silt entered the drainage ditches on site. Some small drains were also found to have been dug out to allow the site to drain further, as can be seen in the plates section of the current report . . .".*

50. It is clear from the foregoing that certain difficulties including with regard to drainage have been found. Section 3.4 goes on to discuss watercourses present on the site and drainage ditches bounding the site and explains that the River Crompaun flows for approximately 2.5km past the development site before it flows into the River Shannon

estuary. Reference is made to a biological monitoring on the River Crompaun upstream of the development site by the EPA. The EIS states inter alia: -

> *"It is understood that water quality in the River Crompaun in the vicinity of the development site in Clondrinagh, Co. Limerick has background water quality issues. It is also noted that the lower River Shannon special area of conservation (site code 002165) is located CA. 737m from the development site and is an SAC designated for primarily aquatic qualifying interests. Similarly, the River Shannon and River Fergus estuaries special protection area (site code: 004077) is located CA. 737m from the development site and is selected for a large number of bird species and the wetland and water birds habitat on which they depend. This SAC and SPA are illustrated in Figure 3. In addition, the Fergus estuary and inner Shannon, north shore pNHA (site code: 002048) is also located CA. 737m from the development site . . .".*

It is clear from the foregoing that the development site is near highly sensitive environments as the Respondent is aware.

Impacts – Land & Soils

51. Section 4 of the EIS deals with "*Impacts*" and para. 4.3, entitled "*Land & Soils*" states as follows: -

> *"The infilling of inert material on the development site in Clondrinagh is likely to have a localised impact on land and soils in the study area. Based on the Google Maps imagery from 2009, the soil and land on the site does not appear to have been in good condition. However, impacts on disturbance to soil and land on the development site will have occurred due to the infilling of excavated inert material on site. For this reason, a restoration plan is included in the mitigation section of the current report. This restoration plan will improve the land and soil quality of the development site contributing to a positive impact and will alleviate effects caused by the development".*

Restoration plan

52. The foregoing is plainly a finding by the Notice Party's environmental consultant that the relevant development has had effects which require to be alleviated and a "*restoration plan*" is specifically referred to in that context. It is uncontroversial to suggest that the function of an EIS is not to remediate adverse effects of development which has already taken place, but to analyse the potential effect of future development on the environment. Yet, in the present case, the evidence is that the relevant development took place in December 2017, whereas an EIS of May 2018 reveals, inter alia, adverse effects of past development undertaken by a Notice Party who purports to be applying for a permit in respect of future development.

Impacts – Water

53. Section 4.4 of the Impacts Section of the EIS states inter alia the following under the heading "*Water*": -

> *"Water quality impacts were noted during the survey of the development site in May 2018. Siltation, high colouring and dead macro – invertebrates were noted in the drainage ditches bounding the development site. Silt traps and silt fences were scattered around the site, as well as dugout drains to help drain water from the construction works. These measures were not effective as water quality pollution was visible onsite. Siltation and runoff from the infilling of the lands at Clondrinagh comprise the water quality impact onsite. It is also possible that spillages of oil/fuel from machinery could have run off into the drains surrounding the site. Although water quality impacts were observed, these are likely to be localised and short – term".*

It will be recalled that in the Applicant's verifying affidavit sworn on 31 January 2019, she referred, inter alia, to blockage of a drain, flooding of the Applicant's lands, and pollution of drainage channels with a risk of other contaminants known to be associated with fill from construction sites including fuel from construction vehicles. Section 4.4 of the EIS refers *inter alia* to water quality pollution visible on site as well as the possible spillage of fuel from machinery, being issues of concern to the Applicant. As of 30 May 2018, the Respondent was provided with this information in the EIS as to actual impacts at the relevant site. This rendered meaningless those statements made by the Notice Party in the 6 April 2018 permit application which conveyed the clear impression that all development had yet to be carried out and that no adverse impacts were anticipated in the future in respect of what was, in fact, historic development. Section 4.4 of the EIS goes on to make reference to a *"restoration plan"* this of course reflects the fact that it was impossible to analyse, with a view to preventing, future adverse environmental impacts, given that the development in question was historic.

54. Despite the facts, one of the appendices to the EIS was a Screening Statement, this was the self – same Screening Statement, or Screening Report, dated 28 July 2017, to which I have referred earlier in this judgment. As such, it is the very same screening statement contemporaneous with the original application for planning permission. As is perfectly clear from its contents, it was, in fact, prepared prior to the development taking place and deals with what were then proposed works. It is not necessary to repeat, here, the comments which I made when looking at the screening statement earlier in this judgment. Suffice to say that it is the very same document. As such, its findings, which are summarised at s. 8, state that it is proposed to infill 40,000m3 of inert material into an existing low lying field measuring 4.08 ha and, having referred to the lower River Shannon SAC and the River Shannon and River Fergus estuaries SPA, the screening statement states at para. 8.2 that: -

> *"The project as planned will not significantly affect sites and therefore a Stage II Appropriate Assessment is not required".*

The reasons why the effects on the Natura 2000 sites are not considered significant are stated to include the following: -

- *"Indirect impacts in the form of runoff or discharge of pollutants to the SAC or SPA will be avoided with appropriate mitigation and restriction of construction activity to areas away from the drainage channel network;*

- *Best environmental practice will be employed during both construction and operational phases to prevent pollution from entering onto the drainage channels and thus its transportation to the SAC or SPA".*

55. When it was prepared on 28 July 2017, the Screening Statement referred to what was then proposed, or future, development. However, when appended to the EIS dated 29 May 2018, the development had already taken place and was historic. The following rhetorical questions arise. Firstly, what good are proposed mitigation measures when the development in question has already taken place? Secondly, how could any proposed mitigation measures properly play a role in the Respondent's decision making, given that the development was already a matter of history, as the Respondent and the Notice Party were well aware?

Mitigation- Biodiversity

56. Chapter 5 of the EIS is entitled "Mitigation" and at s. 5.2 under the heading "Biodiversity", the EIS states inter alia the following: - "*The main mitigation measure for biodiversity comprises a restoration plan for the development site at Clondrinagh, Co. Limerick*". The second paragraph under that heading states inter alia: - "*as the development site has had impacts on biodiversity, water, land & soils and landscape, this restoration plan is considered sufficient to offset the localised impacts caused by the development*". Sections 5.3 to 5.9 state that the restoration plan detailed in s. 5.2 will be sufficient mitigation for water, air, climate and landscape in the relevant area discussed in the EIS. Chapter 6 of the EIS provides a summary including in the form of a table which specifies each relevant "*Issue*", the "*Receiving Environment*", the "*Impacts*" created by the development and the relevant "*Mitigation*" measure.

Screening for Appropriate Assessment

57. The first page of the EIS, under the heading "*Introduction*", refers to the screening statement, stating inter alia that "*A Screening for Appropriate Assessment Report was completed by Loughman & O'Clubháin Environmental Services and is provided in Appendix 1 of the current report*". In the penultimate paragraph, on internal p. 4 of the EIS, the description of works detailed in the screening statement is set out, following which it is stated that "*The description of these works and the screening for appropriate assessment were completed prior to the works taking place*".

***Pow & Anor -v- Coillte Teoranta* Case C-323/17, 12 April 2018**

58. At this point, it is appropriate to refer to the decision of the Court of Justice of the European Union (CJEU) in *People over Wind & Anor v. Coillte Teoranta*, Case C – 323/17 of 12 April 2018. The case involved a request for a preliminary ruling concerning the interpretation of Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the "Habitats Directive"). In the aforesaid decision the court made reference to the European Communities (Birds and

Natural Habitats) Regulations 2011(the "2011 Regulations"), Regulation 42 of which provides: -

"*1. A screening for Appropriate Assessment of a plan or project for which an application for consent is received, or which a public authority wishes to undertake or adopt, and which is not directly connected with or necessary to the management of the site as a European Site, shall be carried out by the public authority to assess, in view of best scientific knowledge and in view of the conservation objectives of the site, if that plan or project, individually or in combination with other plans or projects is likely to have a significant effect on the European site.*

2. A public authority shall carry out a screening for Appropriate Assessment under paragraph (1) before consent for a plan or project is given, or a decision to undertake or adopt a plan or project is taken.

. . . .

6. The public authority shall determine that an Appropriate Assessment of a plan or project is required where the plan or project is not directly connected with or necessary to the management of the site as a European Site and if it cannot be excluded, on the basis of objective scientific information following screening under this Regulation, that the plan or project, individually or in combination with other plans or projects, will have a significant effect on a European site.

7. The public authority shall determine that an Appropriate Assessment of a plan or project is not required where the plan or project is not directly connected with or necessary to the management of the site as a European Site and if it can be excluded on the basis of objective scientific information following screening under this Regulation, that the plan or project, individually or in combination with other plans or projects, will have a significant effect on a European site".

Can mitigation measures be taking into account at the screening stage?

59. In para. 27 of the decision in Case C – 323/17, the following was stated: -

". . . the referring court asks, in essence, whether Article 6(3) of the Habitats Directive must be interpreted as meaning that, in order to determine whether or not it is necessary to carry out subsequently an appropriate assessment of a project's implications for a site concerned, it is possible, at the screening stage, to take account of the measures intended to avoid or reduce the project's harmful effects on that site".

Habitats Directive, Article 6(3)

60. Article 6(3) of the Habitats Directive states that: -

"Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate

assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public".

Taking mitigation measures into account at the screening stage compromises the effect of the Habitats Directive and the Appropriate Assessment

61. The court's reasoning in Case C – 323/17 and its answer to the question referred can be seen from para. 35 onwards of the decision, as follows: -

"35. As the Applicants in the main proceedings and the Commission submit, the fact that, as the referring court has observed, measures intended to avoid or reduce the harmful effects of a plan or project on the site concerned are taken into consideration when determining whether it is necessary to carry out an appropriate assessment presupposes that it is likely that the site is affected significantly and that, consequently, such an assessment should be carried out.

36. That conclusion is supported by the fact that a full and precise analysis of the measures capable of avoiding or reducing any significant effects on the site concerned must be carried out not at the screening stage, but specifically at the stage of the appropriate assessment.

37. Taking account of such measures at the screening stage would be liable to compromise the practical effect of the Habitats Directive in general, and the assessment stage in particular, as the latter stage would be deprived of its purpose and there would be a risk of circumvention of that stage, which constitutes, however, an essential safeguard provided for by the directive.

38. In that regard, the Court's case-law emphasises the fact that the assessment carried out under Article 6(3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected site concerned (judgment of 21 July 2016, Orleans and Others, C 387/15 and C 388/15, EU:C:2016:583, paragraph 50 and the case-law cited).

39. It is, moreover, from Article 6(3) of the Habitats Directive that persons such as the Applicants in the main proceedings derive in particular a right to participate in a procedure for the adoption of a decision relating to an application for authorisation of a plan or project likely to have a significant effect on the environment (see, to that effect, judgment of 8 November 2016, Lesoochranárske zoskupenie VLK, C 243/15, EU:C:2016:838, paragraph 49).

40. In the light of all the foregoing considerations, the answer to the question referred is that Article 6(3) of the Habitats Directive must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an

appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site". (emphasis added).

Breach of the Habitats Directive in the present case

62. The foregoing was the legal position when the Notice Party applied for the waste permit which is challenged in the present proceedings. Insofar as the Notice Party submitted what purported to be an Appropriate Assessment screening statement or screening report, the screening statement, dated 28 July 2017, purported to screen out the development for Appropriate Assessment having regard to mitigation measures. This was impermissible in light of the CJEU decision in Case C – 323/17. It was not appropriate, at the screening stage, for account to be taken of measures intended to avoid or reduce the harmful effects of the development on that site. As well as the foregoing being impermissible in law, it is also a matter of fact that the screening statement, which was prepared in advance of proposed development and which anticipated mitigation measures, was submitted to the Respondent *after* the development had taken place and was referred to in an accompanying EIS, which made it clear that adverse impacts had already occurred. The foregoing rendered invalid the Respondent's decision to issue the permit which is challenged in the present case.

The Respondent's plea that it conducted and EIA

63. It does not appear to be disputed between the parties that an Environmental Impact Assessment (EIA) was required in the context of the relevant permit application. In para. 5 of the Respondent's statement of opposition, it is expressly pleaded that "*The Council conducted an EIA with respect to the*" waste facility permit in question. In para. 9 of his affidavit sworn on 24 June 2019, Mr. Doherty, on behalf of the Respondent, avers that the council conducted an EIA with respect to the permit which is challenged in the present proceedings.

Article 2 (1) of the EIA Directive

64. Despite the foregoing, no EIA was put before the court and, therefore, what any such EIA contained or did not contain is entirely unknown. What is known is that Article 2(1) of the EIA Directive states the following: -

> "*Member States shall adopt all measures necessary to ensure that before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to requirement for development consent and an assessment with regard to their effects on the environment. Those projects are defined in Article 4".* (emphasis added)

65. It is a matter of fact that the development had already been carried out before the Respondent agreed to grant the relevant waste permit to the Notice Party in the present case. The Applicant relies on the decision of the CJEU in the *Commission v. Ireland* case C – 215/06 as precluding the granting of retrospective development consents in respect of development requiring an EIA. The Respondent submits that the relevant permit is, in

effect, a permit for the retention of the waste without a prior EIA and without the establishment of exceptional circumstances or the non-circumvention of EU law.

66. It is clear from the evidence, however, that the Respondent Council acknowledged that an EIA was required, in circumstances where the Respondent explicitly pleads and avers that one was carried out. No specific date or dates are given in relation to when such an EIA was carried out by the Respondent. It is, however, clear from Mr. Doherty's affidavit that the Respondent claims to have conducted an EIA with respect to the decision dated 2 November 2018 to grant a waste facility permit to the Notice Party. That being so, the EIA was plainly carried out after not before the development in question, contrary to Article 2(1) of the EIA Directive. I now return to the analysis of the evidence in chronological order, as follows.

The Applicant's s. 57 proceedings, issued on 21 June 2018

67. On 21 June 2018, the Applicant issued proceedings pursuant to s. 57 of the Waste Management Act, 1996, against the Notice Party on the basis that they were holding, recovering or disposing of waste on the lands in a manner that causes or is likely to cause environmental pollution. It was alleged that the activities exceeded the COR and orders were sought in respect of the removal of the waste and remediation of the lands. By way of observation, the status quo, as of 21 June 2018, was that a "live" s. 55 notice, dated 20 March 2018, had been served by the Respondent on the Notice Party, requiring the latter to "*cease holding, recovering or disposing of waste on the land at Clondrinagh Co. Limerick which is in excess of the 25,000 tonnes as permitted for* . . ." in the COR.

The Applicant's written submission to the Respondent, dated 19 July 2018

68. On 19 July 2018 the Applicant made a submission to the Respondent, concerning the Notice Party's application for a waste permit and it is appropriate to quote, verbatim, from the Applicant's 27 September 2018 submission to the Respondent's planning office, as follows:-

> ***"Re: unauthorised development planning ref: 17/544***
>
> *To whom it may concern,*
>
> *I refer to the planning permission 17/544 that I believe to be an unauthorised development as the development has exceeded 25,000 tonnes within six months, thus should have been accompanied by an EIAR. The application for planning was unaccompanied by an EIAR which should render the application invalid and the development unauthorised.*
>
> *(Ref: Attachment 1: Infill amounts)*
>
> *The location of the development is Clondrinagh, Ennis Road, Limerick.*
>
> *Development commenced: November 2018 – present.*
>
> *Infill commenced: - November 2017 – end March 2018 (several days after stop notice from Limerick City and County Council – notice was signed on the 20th*

March (Attachment 3) and received at latest 23rd yet infilling still occurred on the 28th March (Attachment 2)

The effects of the development have been flooding on large areas of my farm due to the manner in which the site was developed (Attachments 4, 5, 6, 7 and 8) noise disruption, dust and water pollution.

Other breaches: that the development is also in breach of its Certificate of Registration owing to the fact that it has install at a minimum 78,000 tonnes of waste.

If there is any other information you require you can contact me on . . .

I would ask that the matter be dealt with as soon as possible to avoid further effect to my property, neighbouring properties, and the environment. I would also ask that you consider that the residential property which sits at the same level as my farm and is just a little further down the drain from my property be considered as they are already very susceptible to flooding.

According to the planning enforcement guidelines, "a planning authority cannot accept an application for retention permission for any development which would have required an EIA", as such I would hope that the site will be restored to its original state.

I await your response".

The Respondent's internal planning memo – stating that "*the works would appear to constitute unauthorised development*"

69. Among the documents which accompanied the 27 September 2018 submission by the Applicant was what appears to be an internal memorandum from the Respondent's planning department. It is entitled "*Planning memo, Limerick City & County Council, re: 17544*". Although undated, it is clear that it post-dates the development carried out by the Notice Party from December 2017. The memo begins as follows: -

"Seamus,

No formal post-compliance has been submitted on this planning application and it would appear that fill on the site over a twelve-month period exceed (sic) 25,000 tonnes. Planning application 17/544 was not accompanied by an Environmental Impact Assessment Report and therefore the fill was limited onsite to less than 25,000 tonnes per annum. Condition No. 7 stipulated: '*The Applicant shall maintain a 5m buffer from all drains with appropriately graded slopes to the fill body to prevent sedimentation and collapse of material into drains. The fill material to be reseeded as quickly as possible and in stages to minimise runoff from bare soil. A plan for the staged filling and reseeding of the fill material to be submitted and agreed in writing with the Planning Authority prior to the commencement to the development.*

Reason: to minimise any run – off of sedimentation and offsite ecological effects.

Schedule 5 part 2(II) of the Planning and Development Regulations 2001 (as amended) states: -

"II Other projects

(b) Installations for the disposal of waste with an annual intake of 25,000 tonnes not included in Part I of this Schedule".

A plan for the staged filling and reseeding of the fill material was not submitted and agreed in writing with the planning authority prior to the commencement of development. The plan was required in order to control fill volumes and comply with the fill intake not exceeding 25,000 tonnes on the site over a twelve – month period as per environmental impact assessment report (EIAR) thresholds.

It would appear the fill volume on the site over a twelve – month period exceeded 25,000 tonnes. Accordingly, the works would appear to constitute unauthorised development".

70. It is clear from the foregoing that a view was taken within the Respondent that the development carried out by the Notice Party could be considered "*unauthorised*". It is undoubtedly the case that the Applicant drew the Respondent's particular attention to its own memorandum *prior* to the Respondent deciding to issue the waste permit in question. I now turn to look at the waste permit which is challenged in the present proceedings.

15 October 2018 letters from the Respondent

71. Between the first and the second day of the hearing of this matter, each of the Applicant and Respondent swore affidavits. No objection was taken by either side in relation to this. In an Affidavit sworn on 10 November 2020, Mr Seamus Martin, Development Inspector of Limerick City and County Council averred that, by means of letters dated 15 October 2018 which were sent to the Notice Party and to the Applicant's solicitors, respectively, the Respondent made them aware that the Planning Authority was satisfied that the terms of the Enforcement Notice were complied with. Mr Martin exhibited copies of both letters. The relevant extract from the Council's letter to the Notice Party states that "…*the Planning Authority is now satisfied that the terms of the Enforcement Notice have been complied with. Accordingly, the Planning Authority will be taking no further action on this matter*." The relevant extract from the Respondent's letter to the Applicant's solicitors is somewhat different in that it states that "…*the Planning Authority is now satisfied that the terms of the Enforcement Notice issued in respect of the submission of pre-commencement conditions have been complied with. Accordingly, the Planning Authority will be taking no further action on this matter*." The Respondent submits that the contents of these letters meets any suggestion that the Respondent was not entitled to issue the waste permit on the grounds that Notice Party was not planning compliant. By way of observation, given that pre-commencement conditions required that a plan for the staged filling and reseeding of the fill material was to be submitted and agreed in writing with the Planning Authority prior to the commencement to the

development, it is difficult to understand how such a *prior* requirement was satisfied subsequent to commencement.

The waste permit which was issued on 02 November 2018

72. On 2 November 2018, the Respondent issued the waste facility permit which is challenged in the present proceedings. A copy comprises Tab 10 of the Applicant's exhibits. On the face of the waste permit, the date of issue was 2 November 2018 and the date of expiry was specified to be 1 November 2019. The permit was in respect of waste activity specified in Class 5 of Part 1 of the third schedule of the Waste Management (Facility Permit & Registration) Regulations, 2007, as amended, namely:

> *"Class 5: recovery of excavation or dredge spoil, comprising natural materials of clay, silt, sand, gravel, or stone, and which comes within the meaning of inert waste, through deposition for the purposes of the improvement or development of land, where the total quantity of waste recovered at the facility is less than 100,000 tonnes".*

73. The permit was also stated to be in respect of waste activity specified in Class R5 and Class R13 of the Fourth Schedule of the Waste Management Act, 1996 (as amended), namely:-

> *"Class R5: Recycling/ reclamation of other inorganic materials, which includes soil cleaning resulting in recovery of the soil and recycling of inorganic construction materials.*
>
> *Class R 13: Storage of waste pending any of the operations numbered R1 to R12 (excluding temporary storage) being preliminary storage according to the definition of "collection" in s. 5(1) (pending collection, on the site where the waste is produced)."*

The effect on the Enforcement Notice of the grant of the waste permit

74. In an affidavit sworn on 3 November 2020, the Applicant referred to enquiries made to establish whether the Respondent considered the existence of the waste permit to be an adequate defence to the enforcement case (Case 330833) it had taken against the Notice Party under section 55 of the Waste Management Act 1996. The Applicant referred to a Freedom of Information Act request which she made to the Respondent on 8 September 2020 and exhibited, inter alia, a letter dated 1 October 2020 from the Respondent to her from which it is appropriate to quote the following:

> *"Please be advised that I am part granting your request and set out response below relevant to your request.*
>
> In question 1, you asked "when the case was closed and what were the reasons for the case being closed". Please be advised that the case was closed on 10th December 2018 and the reason for this was because a Waste Facility Permit ref no (WFP L 2018 188) was issued by Limerick City and County Council.

In question 2 of your request you asked for "any internal emails or memo's that relate to the issuing of these proceedings or progression or closure of the case referred to". I wish to advise you that Limerick City and County Council did not initiate legal proceedings in relation to Case 330833. In this regard, as no records exist, I am refusing this part of your request…" (emphasis added)

75. Earlier in this judgment, I referred to the contents of letters written by the Respondent to the Notice Party and to the Applicant's solicitors on 15 October 2018 both of which stated that the planning Authority was "…*now satisfied that the terms of the Enforcement Notice….have been complied with. Accordingly the Planning Authority will be taking no further action on this matter.*" Those letters were sent just 2 weeks before the grant, on 2 November 2018, of the waste permit which is challenged in these proceedings. The 1 October 2020 letter from the Respondent makes it clear that the reason why the Respondent's enforcement file was closed on 10 December, just over a month *after* the waste permit issued, was because of the said permit. No other reason is given by the Respondent in its 1 October 2020 letter. I am entitled to conclude that the Respondent saw the grant of the waste permit as answering fully the enforcement case against the Notice Party.

The reasons for the Respondent's decision to grant the permit

76. As is clear from the first page of same, the waste permit was granted subject to the conditions set out in the schedule attached thereto, of which there were 11 conditions, to which I will refer presently. Before doing so, it is appropriate to quote, verbatim, the reasons given for the decision to grant the waste permit and these were specified on internal p. 4 of the permit as follows: -

"REASON FOR THE DECISION

Limerick City and County Council has considered the application and supporting documentation received from the Applicant and is satisfied, that subject to compliance with the conditions of this permit that: -

(a) The activity concerned, carried out in accordance with such conditions as are attached to a waste facility permit, will not cause environmental pollution.

(b) Any emissions from the activity concerned will not result in the contravention of any relevant standard, including any standard for an environmental medium, or any relevant emission limit value, prescribed under any enactment.

(c) The best available techniques will be used to prevent or eliminate, or where that is not practicable, to limit, abate or reduce an emission from the activity concerned.

(d) The facility is compliant with planning or is exempt from planning permission under s. 5 of the Planning & Development Acts 2000, and;

(e) *The Applicant is a fit and proper person, a local authority may, if it considers it proper to do so in any particular case, regard a person as a fit & proper person for the purpose of this part notwithstanding that the person or any other relevant person has been convicted of an offence under the Act, the EPA Act 1992 & 2003, the Local Government (Water Pollution) Act 1977 & 1990 and the Air Pollution Act 1987".*

Analysis of the reasons given by the Respondent

77. A number of comments can be made in relation to the foregoing reasons. With regard to the reason given at (a), that the activity concerned ". . . *will not cause environmental pollution*", the foregoing is phrased in the future tense, whereas the reality is that the activity had already taken place. Furthermore, the Respondent had already been furnished with evidence to the effect that pollution had occurred. It will be recalled that, by letter dated 30 May 2018, the Notice Party furnished the Respondent with an EIS, dated 29 May 2018. Section 4 of same dealt with "Impacts" and s. 4.4 noted water quality impacts during a survey of the development site in May 2018. Siltation, high colouring and dead macroinvertebrates were noted in the drainage ditches bounding the development site. Having referred to silt traps and silt fences scattered around the site and drains dug out to help drain water from the construction works, the EIS stated clearly that "*These measures were not effective as water quality pollution was visible onsite"*. In light of the foregoing, the reason at (a) was inconsistent with the factual position.

78. As regards the reason for the permit which was specified at (c) the statement that best available techniques ". . . *will be used* . . ." to prevent or eliminate or abate or reduce an emission from the activity concerned ignores the fact that the activity had already taken place, as well as the evidence which was before the Respondent as to adverse impacts which had occurred.

79. Insofar as reason (d) is concerned, the Respondent's statement that the facility is compliant with or exempt from planning permission is wholly inconsistent with the Respondent's view, as expressed in the planning memo which the Applicant enclosed with her 27 September 2018 submission to the Respondent, which memo concluded with the following statement:- "*It would appear the fill volume on the site over a 12 – month period exceeded 25,000 tonnes. Accordingly, the works would appear to constitute unauthorised development*". Earlier in this judgment, I referred to the contents of the Respondent's letters dated 15 October 2018, to the Notice Party and the Applicant respectively. It is submitted by the Respondent that their contents mean that the Notice Party was fully compliant with planning requirements at the point when the waste permit was granted on 2 November 2018. This is a submission which is difficult to accept given that, in a letter dated 1 October 2020, the Respondent confirms that it was not until 10 December 2018 that the enforcement case was closed by the Respondent. This was plainly after, not before, the grant of the waste permit. Most importantly, the Respondent's 1 October 2020 letter gives a single reason for the Respondent's decision to close the enforcement case, namely the grant of the waste licence. It cannot be the case that the Respondent *both* considered the waste permit to be the reason why the

enforcement case was closed and considered there to be no enforcement at the point when it issued the waste permit. Weighting the totality of the evidence, it favours the conclusion that the Notice Party was not fully compliant with planning requirements at the time the waste permit was granted. The evidence favours the finding that, as the Respondent said in its 1 October 2020 letter: "…*the case was closed on 10th December 2018 and the reason for this was because a Waste Facility Permit ref no (WFP L 2018 188) was issued*…" by the Respondent. The evidence supports the finding that there was an open enforcement case against the Notice Party as of 2 November 2018 and that it was closed only because of the waste permit issuing.

80. The foregoing were the reasons given by the Respondent for the decision to issue a waste permit. In the manner analysed above, certain of those reasons appear to me to be fundamentally inconsistent with the factual position as known to the Respondent. Furthermore, none of the reasons engage with the contents of the 27 September 2018 submission which was made to the Respondent by the Applicant. Moreover, the Respondent Council granted the waste permit without carrying out or recording an Appropriate Assessment or a screening for appropriate assessment. Insofar as it is pleaded and averred that the Respondent conducted an EIA, no reference to same or to the outcome of same appears in the Respondent's reasons for the decision to grant the waste permit challenged in these proceedings. In the manner analysed earlier in this judgment, insofar as the Notice Party purported to submit an appropriate assessment screening report (specifically the 27 July 2017 screening report which accompanied the 29 May 2018 EIS furnished by the Notice Party to the Respondent under cover of a letter dated 30 May 2018) the said screening report purported to screen out the development for Appropriate Assessment having regard to mitigation measures. This was impermissible as a matter of law, in light of the decision of the CJEU in *People Over Wind v. Coillte* Case C – 323/17. In my view, the decision does not adequately, or at all, explain the reasons or considerations for the determination made by the Respondent to issue the waste permit. It is uncontroversial to suggest that a competent authority, such as the Respondent, in the context of an Appropriate Assessment must explain with clarity what it is deciding and why, yet the reasons for the Respondent's decision to grant the relevant waste permit are inadequate in that regard. The decision by the Respondent is silent with regard to the foregoing and it is difficult, if not impossible, for either the Applicant, or for this Court, to determine the basis for the decision to issue the permit in that context.

Kelly v. ABP [2014] IEHC 400 and Mellor (Case C – 75/08) [2009] ECR I – 3799

81. In *Kelly v. ABP* [2014] IEHC 400, the court considered obligations under planning legislation to give reasons for a determination made under Article 6(3) of the Habitats Directive. The court referred to the requirement to state reasons as explained by the CJEU in *Mellor* (Case C – 75/08) [2009] ECR I – 3799 with regard to an implied duty to give reasons for a negative screening decision under the Environmental Impact Assessment Directive, paras. 57 to 60 of the CJEU decision in Mellor stating as follows: -

> *"57. It is apparent, however, that third parties, as well as the administrative authorities concerned, must be able to satisfy themselves that the competent authority has*

actually determined, in accordance with the rules laid down by national law, that an EIA was or was not necessary.

58. Furthermore, interested parties, as well as other national authorities concerned, must be able to ensure, if necessary through legal action, compliance with the competent authority's screening obligation. That requirement may be met, as in the main proceedings, by the possibility of bringing an action directly against the determination not to carry out an EIA.

59. In that regard, effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general, that the court to which the matter is referred may require the competent authority to notify its reasons. However, where it is more particularly a question of securing the effective protection of a right conferred by Community law, interested parties must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts. Consequently, in such circumstances, the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request (see Case 222/86 Heylens and Others [1987] ECR 4097, paragraph 15).

60. That subsequent communication may take the form, not only of an express statement of the reasons, but also of information and relevant documents being made available in response to the request made".

Christian v. Dublin City Council [2012] IEHC 163, [2012] 2 IR 506

82. In my view, the reasons proffered by the Respondent for the decision to grant the permit which is the subject of the present proceedings falls short of the obligations outlined by the court in the *Kelly* decision. The court, in *Kelly*, also made reference to the judgment of Clarke J. (as he then was) in *Christian v. Dublin City Council* [2012] IEHC 163, [2012] 2 IR 506, concerning the extent of the obligation to give reasons in Irish law. In *Kelly*, the court quoted from p. 540, para. 78 of the judgment in the *Christian* case as follows: -

> *"The underlying rationale of cases such as Meadows v. Minister for Justice [2010] IESC 3 (in that respect) and Mulholland v. An Bord Pleanala (No. 2) [2005] IEHC 306 is that decisions which affect a person's rights and obligations must be lawfully made. In order to assess whether a relevant decision is lawful, a party considering a challenge, and the court in the event of a challenge being brought, must have access to a sufficient amount of information to enable an assessment as to lawfulness to be made. What that information may be, may vary enormously depending on the facts under consideration or the nature of the decision under challenge. However, the broad and underlying principle is that the court must have access to sufficient information to enable the lawfulness of the relevant measure to be assessed."*

Findings in relation to the duty to give reasons

83. In my view, insufficient information was provided by the Respondent in respect of its decision to grant the permit in question, having regard to the legal obligations placed on the Respondent as a result of European and domestic legislation and jurisprudence. Furthermore, such reasons as were provided contained factually inaccurate information or failed adequately to reflect then then factual position, as known to the Respondent. Moreover, there is nothing in the reasons proffered by the Respondent to indicate whether or not and if so in what manner the Respondent engaged with the Applicant's submissions. The foregoing is contrary to law in light of well – established judicial principles and renders the Respondent's decision to grant the permit invalid in my view.

11 conditions specified in the waste permit

84. The 11 conditions pursuant to which the permit was granted appear between internal pages 7 and 16 inclusive, of the permit and a number of observations can be made in relation to certain of the conditions as follows: -

> Condition 1.6 specified that: -
>
> *"The permit holder shall give notice in writing to Limerick City and County Council of any significant changes in the information furnished to the Council in the application of 13th April 2018 and subsequent information received to support the application and any subsequent information provided within one week of such changes occurring".*

85. It will be recalled that the statements made by the Notice Party, in the permit application of 13 April 2018, conveyed the very clear impression that all development was prospective and was due to take place in the future. It is fair to say that the information contained in the 13 April 2018 permit application did not reflect the factual position which was significantly different, in that development had already taken place. On any analysis, the fact that development was historic and a matter of fact, rather than potential future development is a significant change which on would reasonably expect to have been clarified as per the requirements of condition 1.6, which I have quoted above. Notwithstanding the foregoing, there is no evidence that the Notice Party submitted any amended permit application which accurately reflected the facts on the ground, nor was the court provided with any documentation from the Notice Party in which an explanation was given as to why the information in the 13 April 2018 permit application did not reflect the then reality and/or why condition 1.6 was not complied with.

86. Condition 1.8 appears on internal p. 8 of the permit in the following terms: -

> *"No further soil and stone (LoW 17 05 04) or any other new material shall be accepted onsite, unless directed by planning and environmental service of Limerick City and County Council".*

87. The foregoing appears to be the first condition which seems to acknowledge, albeit tacitly, that development has already taken place. If the development was all to be undertaken in the future, it would have made no sense to prohibit, as condition 1.8 plainly does, the

placing of any further material on site. It is fair to say that the foregoing is a condition which is inconsistent with other conditions contained in the permit.

88. Condition 3.3 states that: -

> *"As per planning condition no. 7 of Planning Reference 17/544, the Applicant shall maintain a 5m buffer from all drains with appropriately graded slopes to the fill body to prevent sedimentation and collapse of material into drains. A plan for the restoration of the site to be submitted and agreed in writing with the Environmental Services Department".*

89. The foregoing condition requiring the Applicant to take steps in order to "*prevent*" sedimentation is a condition specified by the Respondent *after* the Respondent had already been furnished with an EIS dated 29 May 2018, para. 4.4 on internal p. 19 of which states, inter alia, that: -

> *"Siltation, high colouring and dead macro – invertebrates were noted in the drainage ditches bounding the development site . . . siltation and run – off from the infilling of the lands at Clondrinagh comprise the water quality impacts onsite".*

In other words, the condition is expressed in terms which plainly suggest that work is anticipated and preventative measures are being specified, whereas the reality is that works already took place and adverse impacts, including of the type which the condition purports to prevent, had previously occurred.

90. Condition 3.3 is all the more difficult to understand in light of the Respondent's planning memo which accompanied the Applicant's 27 September 2018 submission. It will be recalled that the said planning memo in relation to Planning Reference 17544 made explicit reference to Condition No. 7 of the planning permission. In substance, planning condition No. 7 is similar to Condition 3.3 in the permit. This is despite the fact that, when specifying Condition 3.3 in the permit, the Respondent had already formed the view that the Notice Party had failed to comply with planning Condition No. 7. This is plain from the wording in the planning memo which states inter alia that: -

> *"A plan for the staged filling and reseeding of the fill material was not submitted and agreed in writing with the planning authority prior to the commencement of the development".*

In the manner examined earlier, the same planning memo went on to state that the works would appear to constitute "*unauthorised*" development. Condition 6.2 requires the permit holder to take adequate precautions to prevent nuisances during the course of the works and provides, inter alia, that: - ". . . *the permit holder shall abide by the Council's abatement requirements, which may include immediate cessation of operations*". The foregoing condition plainly anticipates future operations but the reality is that the material had already been deposited on site. Conditions 6.3 to 6.10, inclusive, are prospective in focus, despite the reality that work commenced in December 2017.

91. Condition 7.2 states that: - "*If so requested by Limerick City and County Council, the permit holder shall, at his own expense, make a suitable excavator available for the purposes of excavating trial holes in the waste material deposited on the site, and shall arrange for the excavator to carry out whatever works are required by the Council on the site*". The foregoing condition is not specified to be time limited. In other words, it is not a condition which is stated to cease to bind the Notice Party after the permit was due to expire on 1 November 2019. On the basis of the evidence, I am entitled to hold that it is a condition which was intended to survive the expiry, or surrender, of the licence. Similar comments apply in relation to Condition 7.3 which states that: -

> *"If so requested by Limerick City and County Council, the permit holder shall, at his own expense, carry out such further investigations and monitoring of the facility as required by the Council. The scope, detail and programme, including report structure and reporting schedule, for any such investigations and monitoring, shall be in accordance with any written instructions issued by the Council".*

Again, the foregoing condition is not specified to be limited in time and I am entitled to find that, as a matter of fact, it is a condition which was intended to apply to the Notice Party, regardless of the expiry, or surrender, of the permit. I take the same view in relation to Condition 7.5 which specifies that: -

> *"In the event that any monitoring or observations indicate a pollution incident has occurred resulting from waste activities onsite . . . remedial measures shall be carried out immediately as directed by Limerick City and County Council".*

92. On the basis of the evidence, I am satisfied that, in light of the wording in Condition 7.5, the obligation on the Notice Party to take remedial measures in respect of a pollution incident was not intended to cease on the day the permit expired or was surrendered. Even if I am entirely wrong in the foregoing analysis, it is beyond doubt that Condition 7.6 of the permit was intended to apply to the Notice Party long after any expiry, or surrender, of the permit. Condition 7.6 states the following: -

> *"The permit holder shall keep records of all monitoring carried out and shall retain such records for a minimum period of seven years. These records shall be available for inspection at the site office during normal working hours, by Authorised Officers of Limerick City and County Council and any other person authorised under s. 14 of the Waste Management Act, 1996 (as amended".*

Much emphasis has been laid by the Respondent on the surrender of the permit which, according to the Respondent, renders the permit of no effect thereafter. It is clear, however, that the permit contains obligations which subsist beyond the expiry, or, for that matter, the surrender of the permit and are expressly drafted as surviving beyond the "life" of the permit.

93. Condition 8.2 specifies the type of written record which "…*shall be kept for each load of waste*…" (emphasis added) and is difficult to reconcile with the fact that the waste had

already been extracted, transported and deposited. As well as addressing the prospective transport of waste to the site, it must also be said that it is a condition which appears to be inconsistent with condition 1.8, which condition made it clear that no further soil, stone or any other new material shall be accepted on the site unless directed by the Respondent.

94. It will be recalled that the Applicant issued separate proceedings, pursuant to s.57 of the Waste Management Act 1996 (as amended) against the Notice Party on 21 June 2018. Condition 8.6 of the permit obliges the Notice Party to notify the Respondent, in writing, within seven days of "*the imposition of any requirement on the permit holder by order under s.57 or 58 of the Waste Management Act 1996 (as amended*), *or any conviction of the permit holder for an offence under the Waste Management Act 1996 (as amended).*"

95. Conditions 8.7 to 8.9 impose requirements on the Notice Party to submit certain information, including to the environmental services section of the Respondent and to Offaly County Council, as the national waste collection permit office, and to make all records maintained on the site available at all reasonable times and to provide any relevant information when so requested by an authorised person of the Respondent under s.14 of the Waste Management Act, 1996 (as amended). Again, these conditions are not drafted on the basis that the obligations cease and are of no effect once the permit expires or is surrendered.

Cessation of activity and Surrender of the Permit

96. Cessation of activity is explicitly addressed in condition 10. Condition 10.2 imposes an obligation, following cessation of use of the site, to render it safe in the context of anything that may result in environmental pollution, whereas condition 10.2 explicitly anticipates the surrender of the permit, stating:

> *"10.2 Prior to expiry of the Waste Facility Permit, and subject to satisfactory restoration of the site, the permit holder is to surrender the Waste Facility Permit to Limerick City and County Council in accordance with Article 29 of the Waste Facility Permit Regulations 2007 (as amended)".*

97. The final condition in the permit concerns the financial contribution required from the Notice Party, namely an annual contribution of €350 payable to the Respondent "*…not later than February 28th of any given year. This fee is in lieu of monitoring undertaken during the previous year.*" Once again, the foregoing condition constitutes a subsisting obligation, regardless of surrender or expiry of the permit.

The Respondent's 5 November 2018 letter which accompanied the permit

98. As pleaded in para.7 of the statement of opposition, a covering letter was issued to the Notice Party by the Respondent, which letter accompanied the waste facility permit. It is a letter dated 5 November 2018 and a copy appears behind tab 1 of the booklet of exhibits which accompanied Mr. Doherty's affidavit sworn on 24 June 2019. The said letter drew the Notice Party's attention to certain specific conditions of the permit (namely conditions 1.8, 3.2, 3.3, 8.8, 11.1 and 11.3) and referred to the requirement to surrender both the permit and the COR. The letter concluded by supplying a link to the surrender

form which was available for the Notice Party to download from the Respondent's website. Thus, it is a matter of fact that at the very same point as granting the permit, the Respondent notified the Notice Party that "*once the site is restored to the satisfaction of Limerick City & County Council and prior to the expiration, you will be required to surrender…*" the permit and the COR and supplied a link to the relevant surrender documents. I am entitled to conclude on the evidence that, as a matter of fact, the Respondent was anxious, having issued it, that the permit be surrendered as soon as possible thereafter.

The waste permit surrender application form, 22 January 2019

99. Mr. Doherty has also exhibited the correspondence relating to the surrender of the permit and this comprises tab 2 of his booklet of exhibits. It is clear that the Notice Party completed a "*Waste Facility Permit & Certificate of Registration Surrender Application Form*" which is date stamped by the Respondent as of 22 January 2019. The reason for the surrender is specified to be that "*waste related activity has ceased*". By way of an observation, it could just as easily be said that - as the Notice Party and the Respondent were aware at all material times - the relevant activity had ceased before the application for the permit was even applied for, having regard to the fact that activity commenced in December 2017.

The Respondent's "Application to Surrender Report" dated 11 March 2019

100. In para. 13 of his 24 June 2019 affidavit, Mr. Doherty avers on behalf of the Respondent that, following notice of the proposed surrender, the Respondent investigated the site and was satisfied that the conditions for the surrender of the waste facility licence had been met. Mr Doherty refers, in particular, to an inspection of the site on 8 March 2019 and he exhibits an "*Application to Surrender Report*", which is dated 11 March 2019. That report, which was from a Mr Dermot Lambe, Executive Engineer, to Mr Doherty refers to the application to surrender, dated 22 January 2019, and it is appropriate to quote the following, verbatim, from the said report:

> *"P&D Lydon obtained planning permission under planning ref. 17/544 on 13th September, 2017. A Certificate of Registration (COR/11/2017/188) was granted on this site on the 12th October, 2017. P&D Lydon exceeded the 25,000 tonnes limit for a Certificate of Registration and a Waste Facility Permit was applied for on the 13th April, 2018, to regularise the situation. Waste Facility Permit was granted on the 2nd November, 2018. The Waste Facility Permit was due to expire on 1st November 2019.".*

The waste permit was applied for "to regularise the position"

101. It is necessary to look at the extract from the Respondent's 11 March 2019 report, which I have quoted above, alongside the contents of the Respondent's planning memo (which accompanied the Applicant's 27 September 2018 submission and which is discussed earlier in this judgment). It will be recalled that the said planning memo stated, inter alia:-

> *"…it would appear that fill on the site over a 12-month period exceeded 25,000 tonnes. Planning Application 17/544 was not accompanied by an Environmental*

Impact Assessment Report and therefore the fill was limited on site to less than 25,000 tonnes per annum"; "a Plan for the staged filling and reseeding of the fill material was not submitted and agreed in writing with the planning authority prior to the commencement of the development"; "accordingly, the works would appear to constitute unauthorised development".

Having regard to the contents of the 11 March 2019 report, it is clear that the reason why the Notice Party applied for the Waste Facility Permit which is challenged in the present proceedings was, as the Respondent put it, "*to regularise the situation*". It is equally clear, from both the Respondent's internal planning memo and from the contents of the Respondent's 11 March 2019 report, that the "*the situation*" which was regularised was the fact that the Notice Party exceeded the 25,000 tonne per annum limit. Moreover, the Respondent's planning memo records the Notice Party's failure to submit and agree a plan for the staged filling and reseeding of the fill material prior to commencing the development. It is incontrovertible that the foregoing is the Respondent's view, namely that the waste permit application was submitted to regularise the situation. It is equally clear that, as a matter of fact, the issuing of the Waste Facility Permit did regularise the situation, insofar as the Respondent was concerned. Furthermore, nowhere in the 11 March 2019 report does the Respondent say or suggest that if the permit is surrendered, the surrender will cease to regularise the situation. In other words, it is plain from the contents of the 11 March 2019 report that, insofar as the Respondent views matters; (1) the application for the permit was made to regularise matters; (2) the application for the permit, which permit was subsequently granted, did in fact regularise the exceeding, by the Notice Party, of the 25,000 tonnes limit and (3) will continue to do so, going forward, notwithstanding the surrender of the permit. Furthermore (4) it regularised what the Respondent's internal planning memo described as development which appeared to be "unauthorised" The foregoing findings are entirely consistent with the contents of the recent letter from the Respondent dated 1 October 2020 to which I have referred earlier in this judgment in which the Respondent confirms that its enforcement case against the Notice Party "*was closed on 10th December 2018"* and "*the reason for this*" was because the waste permit was issued, on 2 November 2018.

102. If the Respondent took the view that a surrender of the waste permit will cease to "regularise the situation" upon it being surrendered, one would certainly expect the Respondent to say so. No such point is made in the Respondent's 11 March 2019 Report. The foregoing facts which emerge from an analysis of the evidence, are in my view of fundamental relevance to the proposition that, once surrendered, the waste permit is spent and irrelevant and of no effect and that, as the Respondent submits, the present proceedings are moot or misconceived. This is a topic I will return to later in this judgment but, in very brief terms, such a submission is undermined by the evidence in this case which demonstrates that the permit, even though surrendered, continues to have a material effect. The Respondent's 11 March 2019 Report refers to a site visit, in respect of which the following is said in a brief paragraph which I now repeat in full:

"Investigation:

I visited the site on 8th March, 2019 and found that the land had been returned to a condition suitable for agricultural purposes. No trial holes were required as the spoil from the Coonagh to Knockalisheen Distributor Road Scheme was virgin ground and spoil went directly from that scheme to this Certificate of Registration. Please see photographs below. Contours and levels are in accordance with planning granted on this site under planning reference 17/544 and Waste Facility Permit/L/2018/188."

103. The foregoing are the relevant portions of this short report which recommends, subject to confirmation of submission of the 2018 Annual Return to the National Waste Collection Permit Office, that the Respondent agree to the surrender of the permit as per Article 29(3) of the Waste Management (Facility Permit and Registration) Regulations 2007 (as amended).

18 April 2019 letter from Respondent to Notice Party re the surrender

104. On 18 April 2019 the Respondent wrote to the Notice Party referring to the surrender application received on 22 January 2019 and advising that, following an inspection of the site on 8 March 2019, the Respondent was satisfied that the Notice Party had complied with the conditions of the Waste Facility Permit. The 18 April 2019 letter went on to advise the Notice Party that the surrender application was granted on 12 April 2019 and that waste activities were no longer permitted to be carried out at the site. A copy of the 18 April 2019 letter comprises tab four of Mr. Doherty's book of exhibits.

105. If it was the case that the Respondent took the view that the surrender of the permit ceased to regularise the position, insofar as the Notice Party having exceeded the 25,000 tonnes limit for a COR was concerned, one would certainly expect to see that referred to in the Respondent's 18 April 2019 letter. As a matter of fact, it is not. In light of the evidence I am entitled to find that, as of 12 April 2019, when the Respondent accepted the surrender of the permit, the Respondent was of the view, which it continues to hold, that the granting of the waste permit which the Notice Party applied for in April 2018, regularised what can fairly be called a planning breach on the part of the Notice Party (namely the exceeding of the 25,000 tonne limit in the COR) and continues to regularise the aforesaid breach, notwithstanding the surrender of the permit.

15 October 2018 letters from the Respondent to the Notice Party

106. On 15 October 2018 the Planning & Environmental Services Department of the Respondent wrote to the Notice Party. In the first of two letters the Respondent referred to "Enforcement Notice DC-007-18" and stated, inter alia, "*I refer to the above Enforcement Notice dated 5th February 2018 and wish to confirm that the planning authority is now satisfied that the terms of the Enforcement Notice have been complied with. Accordingly, the planning authority will be taking no further action on this matter*." In a second letter of 15 October 2018, the Respondent referred the Notice Party to "Warning Letter DC-046-18" and stated *inter alia, "I refer to the above Warning Letter dated 15th March 2018 and wish to confirm that the planning authority is now satisfied that the terms of the Warning Letter have been complied with. Accordingly, the planning authority will be taking no further action on this matter*." It will be recalled that, on 20

March 2018, the Respondent served the Notice Party with a Section 55 notice directing the Notice Party to "*cease holding, recovering or disposing of waste on the land at Clondrinagh, Co. Limerick which is in excess of the 25,000 tonnes as permitted for Certificate of Registration Reference no. COR/L/2017/188*". It is clear from the contents of the 11 March 2019 report that the Notice Party applied for a Waste Facility Permit on 13 April 2018 to regularise the foregoing situation. The fact that it did regularise the situation is also reflected in the Respondent's 15 October 2018 letters which post-date the Notice Party's application for a permit. As such, the contents of the 15 October 2018 letters are entirely consistent with the contents of the 11 March 2019 report by the Respondent.

Summary of findings in relation to the permit

107. In light of a careful consideration of the evidence, all of the following can be said in relation to the permit which is challenged in the present proceedings:

(1) Prior to applying for the permit, on 13th April, 2018, the Notice Party exceeded the 25,000 tonnes limit for a certificate of registration (COR/2017/188) which certificate was granted on 12th October, 2017;

(2) Prior to the permit application, the Notice Party breached Condition No. 7 in Planning Permission 17/544 which required that a plan for the staged filling and reseeding of the fill material be submitted and agreed in writing with the Notice Party prior to the commencement of the development;

(3) Prior to the permit application the Respondent's view, having regard to the Notice Party exceeding the 25,000 tonne limit, was that the works would appear to constitute unauthorised development;

(4) Prior to the permit application, the Notice Party was served, on 20th March 2018, with a s. 55 notice pursuant to the Waste Management Act, 1996 (as amended) requiring the Notice Party to cease holding, recovering or disposing of waste on the relevant lands in excess of the 25,000 tonnes permitted by the certificate of registration;

(5) The waste facility permit was applied for on 13th April, 2018 to regularise the foregoing situation;

(6) Relevant works were carried out from December 2017. Materials excavated from construction on the Coonagh to Knockalisheen distributor road scheme were transported to and placed on the relevant site and this took place prior to the application for the waste permit;

(7) Numerous statements made by the Notice Party in the waste permit application materially misrepresented the factual position, in that the application purported to be for prospective of future works, whereas the reality was that works had already taken place;

(8) Prior to granting the waste permit, the Respondent knew that the relevant works had already been carried out and, therefore, was aware that the contents of the permit application form which purported to be in respect of future development materially misrepresented the position;

(9) The Respondent did not request an EIAR, which was required having regard to the 2014 EIA Directive (in light of the (Article 3 (1)) amendment in force from 16th May, 2017). Instead of seeking the required EIAR, the Respondent sought an EIS;

(10) Although it is claimed that the Respondent conducted an EIA, no details of same were before the court;

(11) The Respondent granted a waste permit that required an EIA, in circumstances where the relevant development had already been carried out, thereby breaching the requirements of the EIA Directive and Habitats Directive, which require assessments to be carried out before the development is commenced or completed;

(12) The Notice Party submitted, on 30th May, 2018, an EIS dated 29th May, 2018, an appendix to which was an "Appropriate Assessment Screening Report" dated 28th July, 2017 which purport to screen out the development for Appropriate Assessment having regard to mitigation measures in a manner impermissible at law in view of, inter alia, the 12th April, 2018 CJEU decision in *People Over Wind v. Coillte Case* C-323/17 (something which the Respondent acknowledges);

(13) The reasons proffered by the Respondent for its decision to issue the 2 November, 2019 waste facility permit can fairly be said to contain factual errors or to be inconsistent with the factual position, as the Respondent must have been aware;

(14) The Respondent's 2 November, 2018 decision does not adequately, if at all, deal with the fact that relevant works, the subject of the permit application, had already been carried out;

(15) Certain conditions in the permit granted address works to be carried out, yet the reality was that same had already taken place as the Respondent was aware and it is fair to say that there are internal inconsistencies within the permit as regards the various conditions set out therein;

(16) The reasons given by the Respondent for the grant of the waste permit on 2 November, 2018 do not engage at all with the Applicant's 27 September, 2018 submissions to the Respondent;

(17) The reasons given by the Respondent for its decision to grant the waste permit are deficient in that there is no or no sufficient information provided within the decision to explain with sufficient clarity the basis for the decision taken.

This Court's finding that decision to grant the permit was flawed

108. For the reasons set out in this judgment, I am satisfied that the decision to grant the permit which the Applicant challenges in the present proceedings was not a decision taken by the Respondent in accordance with law. On any conventional analysis of judicial review principles, the decision challenged in the present proceedings is flawed.

The Respondent's arguments

109. In opposing this application, the Respondent argues, inter alia, that the court should exercise its discretion *against* quashing the decision impugned. In making this argument, the Respondent asserts that the relief claimed in respect of the decision to grant the permit on 2 November, 2018 is moot and that no purpose would be served by granting relief. The Respondent points to the surrender of the permit on 12 April, 2019 and submits that the decision to accept the surrender of the permit has effectively negated the original decision to grant the permit. The Respondent also argues that, in light of the foregoing, there is no permit capable of being quashed and the Respondent also submits that there has been no challenge brought in respect of the Respondent's decision to accept the surrender of the waste permit. In addition, the Respondent argues that in reaching the decision to accept the surrender, the Respondent was satisfied that the facility was not causing or likely to cause environmental pollution. The Respondent submits that the Council, having conducted its inspection on 8 March, 2019, was satisfied that this was the case and submits that this is a conclusion not challenged by the Applicant in the present proceedings. The Respondent further submits that any challenge to the decision of the Respondent to accept the surrender of the permit should have been made within three months of the surrender and, thus, is out of time since 11 July, 2019. In addition to the foregoing, the Respondent argues that the more appropriate remedy for the Applicant's complaints are injunctive type proceedings to address the alleged environmental pollution, rather than judicial review proceedings.

110. The Respondent also points to the proceedings under s. 57 instituted by the Applicant which relate to waste which is in the process of being held, recovered or disposed of in a manner that causes or is likely to cause environmental pollution. The Respondent submits that, insofar as the material was already deposited on the lands, the more appropriate proceedings may have been under s. 58 of the 1996 Act which relates to waste which has been held, recovered or disposed of, in a manner that is causing or has caused environmental pollution. The Respondent also argues that, if the Applicant's justification for pursuing judicial review of the waste permit, rather than an application under s. 57 or 58 of the 1996 Act, is that the waste permit would offer some form of defence to such application, the Respondent contends that this is not supported by a consideration of s. 40 (12) of the 1996 Act which section states:

> *"It shall be a good defence—*
>
> *(a) to a prosecution for an offence under any enactment other than this Part, or*
>
> *(b) to proceedings under—*
>
> …

(iv) section 57 or 58,

to prove that the act complained of is authorised by a waste licence granted under this Part."

111. The Respondent draws a distinction between the reference to waste licence under s. 40 (12) of the 1996 Act and the waste permit granted by the Respondent to the Notice Party. The Respondent argues that because a waste permit is not listed in the above section, therefore by implication it is not a defence to proceedings under s. 57 or 58 of the 1996 Act. Furthermore, the Respondent argues that, insofar as the waste permit has been surrendered and is no longer in existence, it could not, according to the Respondent, be raised as a defence to such proceedings. The Respondent also argues that the application for an injunction under s. 57 or 58 of the 1996 Act (as amended), is an adequate and more appropriate remedy for the Applicant to pursue, insofar as the Applicant's concerns, according to the Respondent, appear to relate to a risk of flooding as a result of deposit of materials. This, says the Respondent, would constitute "environmental pollution" within the meaning of s. 5 (1) of the 1996 Act, which defines "environmental pollution" in the following terms:

> *"'environmental pollution' means, in relation to waste, the holding, transport, recovery or disposal of waste in a manner which would, endanger human health or harm the environment, and in particular—*
>
> *(a) create a risk to waters, the atmosphere, land, soil, plants or animals,*
>
> *(b) create a nuisance through noise, odours or litter, or*
>
> *(c) adversely affect the countryside or places of special interest;"*

112. The Respondent also argues that, while the purpose of s. 57 and 58 of the 1996 Act are to address environmental pollution, an application for judicial review will have no such effect. The Respondent also submits that there is no particular exigency in the interests of justice which require relief to be granted in the present proceedings which, the Respondent submits, should be dismissed. In order to address the Respondent's submissions, a useful starting point is to summarise what the evidence reveals in relation to the surrender of the licence.

The surrendered permit

113. In the manner explained earlier in this judgment, it is clear that the permit which was granted explicitly anticipated its surrender, and, notwithstanding the foregoing, contained conditions which were clearly designed to survive the surrender or expiry of the permit. I have looked at these earlier in this judgment, the most obvious being the obligation on the Notice Party, created by Condition 7.6 of the permit, to keep records of all monitoring carried out and to retain such records for a minimum period of seven years and to make those available for inspection by authorised persons. Thus, although the permit may no longer be "live", I cannot accept the Respondent's submission that its decision to accept the surrender of the permit negated the original decision to grant the permit, in

circumstances where obligations created by the permit plainly subsist to this day as is clear from the very terms of the permit itself, and will continue to bind the Notice Party for years to come.

114. Quite apart from the foregoing, the evidence shows conclusively that, from the Respondent's perspective, the permit was applied for on 13 April 2019 in the context of the Notice Party having exceeded the 25,000 tonnes limit for a certificate of registration and the permit was applied for "*to regularise the situation*". This fact was to the fore when the Respondent considered the Notice Party's application to surrender the permit as is clear from the Respondent's 11 March 2019 report which is entitled "Re: WFP/L/2018/188: P&D Lydon Plant Hire Ltd. – Application to surrender".

115. The evidence demonstrates that, but for the permit application on 13 April 2018, the situation would not have been "regularised" from the Respondent's perspective. In other words, but for the 13 April 2018 permit application, the Respondent would not have written to the Notice Party, on 15 October 2018, to inform it that no further action would be taken, despite having previously formed the view that the works carried out by the Notice Party appeared to constitute "unauthorised development" and despite having served, on 20 March 2018, a notice under s. 55 of the Waste Management Act 1996 (as amended) directing the Notice Party to cease holding, recovering or disposing of waste on the land at Clondrinagh in excess of 25,000 tonnes as permitted by Certificate of Registration COR/L/2017/188.

116. Furthermore, the evidence demonstrates that the waste permit regularised the situation both prior to and *after* its surrender. There is no evidence that, from the Respondent's perspective, the surrender of the permit meant that it ceased to regularise matters and meant that any planning breach was no longer regularised or cured by virtue of the permit application. On the contrary, the evidence reveals that the Respondent has taken no enforcement action, nor regards the surrender of the permit as ceasing to regularise the position, post its surrender. In light of the foregoing, although the permit may no longer be "live", the evidence shows that the fact of its existence had, and continues to have, a significant effect, namely to cure a planning breach. For these reasons, I cannot accept the Respondent's submissions that the decision to grant the permit on 2 November 2018 is effectively moot and that no purpose would be served by granting the reliefs sought. The evidence in this case paints a wholly different picture.

117. One of the authorities relied upon by the Respondent is the decision of Clarke J. (as he then was) in *PV v. The Courts Service* [2009] 4 IR 264, where the current Chief Justice said, at p. 271: -

> "*. . . the starting point of any consideration of mootness has to be a determination as to whether the issue sought to be litigated is still alive in any meaningful sense such that it cannot, in the words of Murray C.J. in O'Brien, be "purely hypothetical or academic".*

Having regard to the evidence in this case, it could not fairly be said that to grant the reliefs sought in the present proceedings would be purely hypothetical or academic. In my view, there was and remains a very real, as opposed to hypothetical or academic, issue to which the Respondent's decision to grant the permit was directed . It is clear from the evidence that the permit was applied for to deal with a flaw, namely a planning breach by the Notice Party in relation to the 25,000 tonne limit in the relevant COR. The evidence demonstrates that the permit did, as a matter of fact, deal with the forgoing flaw insofar as the Respondent was concerned. The decision to grant the permit was itself flawed, in the manner explained in this judgment. Against that background, I believe another flaw would arise if the court were to refuse the reliefs sought. In my view it would be an inappropriate exercise of this Court's discretion to refuse to quash what was plainly an infirm decision to grant the permit in question, in circumstances where it is beyond doubt that the decision to grant the permit continues to have the very real consequences I have examined in this judgment.

Godsil v. Ireland

118. The Respondent also relies on the decision of McKechnie J. in *Godsil v. Ireland* [2015] 4 IR 535 where, at 549 – 550, the learned judge stated the following: -

> *"37. Having reviewed these and other authorities at para. 51 of my judgment in Lofinmakin, I summarised as follows what the legal position is: -*
>
> *'(i) A case, or an issue within a case can be described as moot when a decision thereon can have no practical impact or effect on the resolution of some live controversy between the parties and such controversy arises out of or is part of some tangible and concrete dispute then existing.*
>
> *(ii) Therefore, where a legal issue has ceased to exist, or where the issue has materially lost its character as a lis, or where the essential foundation of the action has disappeared, there will no longer be in existence any discord or conflict capable of being justiciably determined.*
>
> *(iii) The rationale for the rule stems from our prevailing system of law which requires an adversarial framework, involving real and definite issues in which the parties retain a legal interest in their outcome. There are other underlying reasons as well, including the issue of resources and the position of the court in the constitutional model.*
>
> *(iv) It follows as a direct consequence of this rationale, that the court will not - save pursuant to some special jurisdiction – offer purely advisory opinions or opinions based on hypothetical or abstract questions.*
>
> *(v) That rule is not absolute, with the court retaining a discretion to hear and determine a point, even if otherwise moot. The process therefore has a two-step analysis, with the second step involving the exercise of a discretion in*

deciding whether or not to intervene, even where the primary finding should be one of mootness.

(vi) In conducting this exercise the court will be mindful that in the first instance it is involved in potentially disapplying the general practice of supporting the rule, and therefore should only do so reluctantly, even where there is an important point of law involved. It will be guided in this regard by both the rationale for the rule and by the overriding requirements of justice. ..."

119. In my view, the issues in the present proceedings involve what can fairly be said to be a live controversy which arises out of or is part of a tangible and concrete dispute. I take the view that this case raises very real issues in which the parties retain a legal interest in their outcome. If, as the evidence demonstrates, the permit was applied for to regularise a planning breach and the grant of that permit did regularise that situation, a decision by this Court to quash, or to allow stand, the Respondent's decision to grant the permit is likely to have tangible consequences for each of the parties to the present proceedings.

120. Even if I am wrong in the foregoing view, it is clear from McKechnie J.'s decision in *Godsil* that the court retains a discretion to determine a point, even if otherwise moot. For the avoidance of doubt, I take the view that, even if the Respondent's decision to grant the permit could be said to be moot, and I do not believe it can fairly be so described, I take the view that the overriding requirements of justice favour the determination of the challenge to that decision which, for the reasons identified in this judgment, was a flawed decision on the part of the Respondent, involving inter alia a breach of European Union law.

121. In circumstances where the 2 November 2018 decision undoubtedly involved a breach of European Union law, I accept the submission on behalf of the Applicant to the effect that, having regard to the 7 January 2004 decision in Case C – 201/02 entitled *Wells -v- Secretary of State for Transport, Local Government and the Regions* (a case involving questions of interpretation of Council Directive 85/337/EEC), there is an obligation on this court within its sphere of competence to nullify the unlawful consequences of a breach of Community law. Even if I am entirely wrong in that view, it seems to me that, at the very least, the fact that the impugned decision undoubtedly involved a breach of EU law along with the principle of cooperation in good faith between member states insofar as compliance with EU law is concerned, amounts to a factor which I can take into consideration in the proper exercise of this court's discretionary jurisdiction and which is a factor weighing in favour of the quashing of the unlawful decision in the interests of justice even if it could be fairly said (and I do not accept that it can be) that the decision itself is now moot and or that the Applicant has an alternative remedy.

122. The Respondents have relied, inter alia, on the English decision in *R (Edwards) v. Environmental Agency* [2009] 1 ALL ER 57 wherein the Court of Appeal declined to quash the grant of a permit, notwithstanding a finding of procedural unfairness. Among other things, Lord Hoffmann, in the House of Lords, held that there was no breach of European law and the only breach of domestic law was a failure to disclose information about the

predicted effects of certain emissions. The relevance of predictions was, in that particular case, overtaken by events, in circumstances where the court knew what actually happened. At para. 65 of his judgment, Lord Hoffmann stated inter alia: -

> "*As Auld LJ said in the Court of Appeal* ([2006] ALL ER (D) 309 (JUN) at [126]) '*it would be pointless to quash the permit simply to enable the public to be consulted on out – of – date data' to this pointlessness must be added the waste of time and resources, both for the company and the Agency, of going through another process of application, consultation and decision. In my opinion, therefore, the judge and the Court of Appeal were right to exercise their discretion against quashing the permit".*

123. The facts in the present case are entirely different to those found in *R (Edwards).* The decision which this Court has to make is not a "pointless" one. The Respondent's 2 November 2018 decision had real consequences which persist to date. This is clear both from the contents of the permit itself, in particular certain conditions which survive its surrender, and from the evidence which demonstrates the reason for and the effect of the permit application, the effect continuing to regularise a planning breach to this day. Real consequences are likely to flow from this Court's decision to allow, or not, what was a flawed decision to stand. In my view, the more helpful passage from Lord Hoffmann's decision in *R (Edwards),* having regard to the facts before this Court, is that in para. 63, as follows: -

> *"[63] It is well settled that 'the grant of refusal of the remedies sought by way of judicial review is, in the ultimate analysis, discretionary' (Lord Roskill in IRC v. National Federation of Self – Employed and Small Businesses [1981] 2 ALL ER 93 at 166, [1982] AC 617 at 656), but the discretion must be exercised judicially and in most cases in which a decision has been found to be flawed, it would not be a proper exercise of the discretion to refuse to quash it".*

124. In my view, it would not be a proper exercise of this Court's discretion to refuse to quash what was a plainly infirm decision made on 2 November 2018. I am also satisfied that any criticism of the Applicant's failure to challenge the Respondent's decision to accept a surrender of the permit is misplaced. The decision to grant the permit is one which, in its very terms, anticipates the surrender of the permit. The Applicant challenges this decision and has plainly brought the challenge within the relevant time limit. In the manner explained in this judgment, I do not accept the Respondent's submission that the decision to accept the surrender of the permit renders the permit spent, irrelevant, of no legal effect and negates the original decision to grant the permit. This is because (1) conditions in the permit continue to apply, notwithstanding its surrender and (2) the application for the permit, to which the Respondent acceded, was intended to and did have the effect of regularising a planning breach by the Notice Party and continues to "*regularise the situation*" (as the Respondent put it, in the 11 March 2019 report regarding the Notice Party's application to surrender the permit).

125. Insofar as the Respondent suggests that there was any lack of candour on the part of the Applicant when the *ex parte* application was made, resulting in this Court's 4 February 2019 order granting leave to seek judicial review, I am satisfied that no such criticism is fair. One cannot fairly be criticised for failing to disclose information one does not have. There is no evidence that the Applicant knew, on 4 February 2019, that the Notice Party had submitted an application, dated 21 January 2019 and received by the Respondent on 22 January 2019, to surrender the permit. The Notice Party did not inform the Applicant that it had made this application to surrender the permit, nor did the Respondent tell the Applicant at the time. Furthermore, the application to accept the surrender was not granted by the Respondent until over two months *after* the Applicant in the present proceedings sought and was granted leave to seek judicial review. Moreover, at the *ex parte* stage, the Applicant plainly drew the court's attention to the waste permit which is being challenged, namely a permit which in its own terms explicitly anticipates its surrender. In these circumstances, there is no merit in a submission that the Applicant failed to conduct proper investigations or was less than candid when seeking leave to bring the within challenge.

126. Even more fundamentally, it is not the surrender of the permit which the Applicant challenges, nor was it necessary for the Applicant to challenge the permit's surrender. It is the decision to issue the permit which the Applicant has challenged and it is this decision the court can and must determine. Having been surrendered, it could be said that the permit is no longer "live" but that is not the end of the analysis. The permit undoubtedly existed and the consequences of its existence continue to enjoy a "life" (evidenced by, firstly, those conditions binding the Notice Party which survive the surrender of the permit and secondly, the permit's regularising of a planning breach by the Notice Party, which also survives its surrender, evidenced by the Respondent's words and actions).

127. I cannot accept the Respondent's submission that the Applicant should have made a different and other case, namely that the Applicant was required to and failed to challenge the Respondent's decision to accept the surrender of the waste permit. If the Applicant is correct in the case made by her (and for the reasons given in this decision, I am satisfied that she is) the decision to accept the surrender of the permit will automatically fall away as a consequence of the decision to grant the permit not being allowed to stand.

128. I must also reject the Respondent's submissions to the effect that the court should refuse to quash what is undoubtedly a flawed decision because, the Respondent submits, the Applicant has a more appropriate remedy. I take the view that the Applicant's proceedings under s. 57 are not an adequate alternative remedy, insofar as the decision to grant the permit in question and the consequences of that decision are concerned. It will be recalled that the Respondent submits that, if the purported justification for pursuing judicial review of the waste permit, rather than an application under s. 57 or 58 of the 1996 Waste Management Act, is that the waste permit would offer some form of defence to such application, the Respondent argues that this is not supported by a

consideration of s. 40(12) of the 1996 Act. In support of the submission, the Respondent draws a distinction between the terms "*waste licence*" appearing in s. 40(12) and "w*aste permit*" as challenged in the present proceedings. It is not appropriate for this Court to comment on the future outcome of separate proceedings before a different court pursuant to s. 57 of the Waste Management Act. It can, however be said that no outcome proceedings under s. 57 or s. 58 could result in the Respondent's decision to issue the permit being set aside. Yet, the following is the position (1) the application by the Notice Party for the waste permit contains numerous factual inaccuracies; (2) the Respondent's decision to grant the permit was a flawed decision and (3) the flawed application which was followed by a flawed decision has, as a matter of fact, regularised or cured a planning flaw, insofar as the Respondent is concerned, namely a planning breach on the part of the Notice Party (as identified in the Respondent's s. 55 Notice). That being so, I cannot accept that proceedings under s. 57 or s.58 constitutes an adequate alternative remedy. The Respondent's submission to the effect that the existence of a waste permit does not provide a complete defence to a S.58 or S.58 claim fortifies me in the view that the S. 57 proceedings which the Applicant commenced by way of Motion in June 2018 are not in fact an alternative remedy. To obtain relief in the S. 57 proceedings, the Applicant will have to prove, on the evidence, the claims made against the Respondents in those proceedings, neither of which are Limerick County and City Council. Nor does the Applicant in judicial review proceedings have to demonstrate to this court that she is will or is likely to be successful in the S. 57 proceedings.

129. It is appropriate at this juncture to mention that in the S. 57 proceedings, the first relief sought against P& D Lydon Plant Hire Limited and Mr Tom Gleeson is "*An Order under Section 57 of the Waste Management Act, 1996 (as amended) restraining the Respondents from holding, recovering or disposing of waste at the lands comprised in folio LK3286F at Clondrinagh, Co. Limerick in a manner that causes or is likely to cause environmental pollution.*" In addition to noting that the County Council is not a party to the S. 57 proceedings, two further observations can be made in relation to the foregoing. Firstly, whilst evidence in an attempt to prove "environmental pollution" is likely to play a central role in the S.57 proceedings, proof of pollution is not required insofar as the relief sought in these judicial review proceedings is concerned. This strongly suggests that the S. 57 proceedings are not an alternative remedy. Secondly, among the permitted activities in the waste permit which issued on 2 November 2018 includes the "*recovery*" of certain inert waste, as well as certain "*storage of waste*". That being so, in the event of the application to quash the waste permit being unsuccessful, it seems highly likely, if not inevitable, that the waste permit will feature as part of the defence to the Applicant's S. 57 proceedings. This strongly suggests that these judicial review proceedings are far from moot.

130. The second relief sought by the Applicant in the S. 57 proceedings is "*A Declaration that the Certificate of Registration COR/L/2017/188 granted by Limerick City and County Council to the First Named Respondent on 12 October 2017 was only valid for the first 24,999 tonnes of waste filled at the site and that the disposal of any and all waste on the site thereafter was unauthorised.*" It will be recalled that the Respondent issued a S.55

enforcement notice, dated 20 March 2018, to the Notice Party, requiring same to "*Cease holding, recovering or disposing of waste on the land at Clondrinagh Co. Limerick which is in excess of the 25,000 tonnes as permitted for Certificate of Registration reference number COR/L/2017/188*" and, in the manner examined earlier in this judgment, the evidence demonstrates that the fact of the waste permit issuing on 2 November 2018 brought an end to the Respondent's enforcement case against the Notice Party, the Respondent confirming on 1 October 2020 that the case was closed on 10 December 2018. The evidence in this case demonstrates that the issuing of the waste permit had an immediate effect and that, notwithstanding its surrender, the fact of the waste permit's existence continues to this day to have an ongoing effect, an obvious example that no enforcement action was taken by the Respondent against the Notice Party following the surrender of the waste permit. The foregoing indicates that the dispute in the present proceedings as to the validity of the decision to issue the waste permit cannot fairly be said to be, as a matter of fact, moot. Furthermore, were the Applicant in the present proceedings to be unsuccessful, it seems very likely if, not certain, that the Respondents in the S. 57 proceedings would seek to rely on the existence of the waste permit as a defence to the second element of relief sought in those proceeding. The waste permit was plainly considered by Limerick County and City Council to be a full answer to its enforcement case in respect of a similar issue to that raised in paragraph number 2 of the S. 57 motion.

131. No authority was opened to the court to support the proposition that the existence of an enforcement mechanism in domestic law was considered to be a sufficient alternative remedy such that this court should exercise its discretion against quashing a decision which was unlawful and which decision involved a breach of European Union law.

132. I do not accept the proposition that the S. 57 proceedings, which were exhibited by the Applicant and which commenced by way of a Motion issued against the Notice Party in June 2018, can fairly be said to constitute an adequate alternative remedy. The Applicant in these judicial review proceedings challenges a decision by the Respondent. The 2 November 2018 decision was not taken by the Notice Party, yet P & D Lydon Plant Hire Limited and Mr Tom Gleeson are the sole Respondents in the S. 57 proceedings. A key issue in those S. 57 proceedings is likely to be proof of environmental pollution. The proposition that the S. 57 proceedings are an alternative remedy for the Applicant in the Judicial Review suggests that a prerequisite is for the Applicant to prove environmental pollution in judicial review proceedings. That is not so. On behalf of the Respondent, it was submitted that no evidence of environmental pollution was before the court and it was emphasised on behalf of the Respondent that that the Applicant has not demonstrated the fact of environmental pollution. In the manner examined in this judgment, there was certainly evidence put before the court which suggested that environmental pollution had arisen. This court does not, however, have to be satisfied, in order to grant the relief sought, that environmental pollution did in fact occur, nor is the remediation of environmental pollution a prerequisite for the proper exercise of this court's jurisdiction insofar as the present application for certiorari is concerned. Such

issues may arise in S. 57 proceedings, fortifying me in the view that the S. 57 proceedings are not an alternative remedy.

133. It is also submitted on behalf of the Applicant that, in reality, it will always be a defence to a s. 57 proceeding to point to the existence of a waste permit, whether surrendered or expired and, submits the Applicant, if this was not the case, there would be no point in obtaining a permit. Again, it is not appropriate for this Court to comment on judicial decision-making in other proceedings in other courts, but the practical effect of the permit in the present case, as demonstrated by the evidence, certainly lends force to the Applicant's submission. Moreover, the Applicant argues that the operation of s. 39 and, therefore s. 57 of the Waste Management Act, 1996, is greatly reduced by the existence of a waste permit, by reason of Article 6 of the Regulations which states: -

> *"6. Section 39(1) of the Act shall not apply in respect of the carrying on by a person of a waste recovery or disposal activity specified in parts (I) or (II) of the third Schedule of the Regulations if and for so long as the person carrying on the activity complies with the conditions specified in sub – article (2)".*

134. Section 39 states: -

> *"39.(1) Subject to subsections (4) and (7), a person shall not dispose of or undertake the recovery of waste at a facility, on or after such date as may be prescribed, save under and in accordance with a licence under this Part (in this Act referred to as a "waste licence") that is in force in relation to the carrying on of the activity concerned at that facility".*

Earlier in this judgment, I quoted from s. 57, subs. (1) of which makes specific reference to s. 39(1). For the reasons set out in this judgment, the waste permit in the present proceedings was not validly granted. In my view, whether or not it is allowed to stand cannot fairly be said to be immaterial to proceedings under s. 57. It would be wholly inappropriate for this Court to make statements purporting to determine the outcome of such proceedings, but in my view, the following can safely be said: -

(i) The existence, or not, of a valid waste permit cannot be said to be entirely immaterial to s. 57 proceedings;

(ii) The existence, or not, of a valid waste permit will not be the only relevant issue insofar as s. 57 proceedings are concerned, in circumstances where potential alternative defences will self-evidently involve the particular facts in the particular case;

(iii) By way of observation, it would be a very curious situation if a person who is lawfully operating under and in accordance with a validly granted waste permit is in the self-same position as a person who has no valid waste permit.

135. I do not accept the Respondent's submission that the more appropriate remedy for the Applicant's complaints are injunctive–type proceedings to address alleged environmental

pollution, rather than judicial review proceedings in respect of the permit. I say this for several reasons. Injunctive proceedings could not have the effect of quashing the decision which is challenged in the present proceedings, being a decision which, I am very satisfied, was infirm as a matter of law. Furthermore, although the Applicant certainly appears to be concerned in relation to pollution, a fundamental issue arising from the evidence is the Notice Party's breach of the 25,000 tonne COR limit, which breach the waste permit had the effect of regularising, insofar as the Respondent is concerned. The evidence demonstrates that this, not only has been, but will continue to be the position, absent the quashing of what was an infirm decision of 2 November 2018, the Respondent having decided, after the permit was applied for, to take no further action and having taken no action after the permit was surrendered.

136. The evidence in this case also demonstrates that the Respondent formed the view that the Notice Party breached the 25,000 tonnes limit, prior to the Applicant became aware of same. It is beyond doubt that, before the Applicant could know that the Respondent regarded the Notice Party as having (1) breached the 25,000 tonne limit and (2) having carried out unauthorised development, the Respondent first had to form that view. The fact that the Respondent formed the view that the 25,000 tonne limit had been breached is evident from the Respondent's s. 55 Notice, dated 20 March 2018. This predates the Notice Party's application for a waste permit which was made in April 2018 and also predates the Applicant's 27 September 2018 submission which enclosed a copy of the Respondent's internal planning memo, which memo used the term "unauthorised development" in relation to the development which had been carried out by the Notice Party. In the manner explained earlier in this judgment, the evidence demonstrates that the waste permit was applied for to "regularise" planning irregularities. The evidence demonstrates that, from the Respondent's perspective, it was the issuing of the waste permit on 2 November 2018 which caused the Respondent to close its enforcement case against the Notice Party on 10 December 2018.

Conclusion

137. In what were detailed and sophisticated submissions, both written and oral, Counsel for the Respondent argued against the relief sought by the Applicant and I have carefully considered same. Regardless of the skill with which the Respondent's submissions were made, I am satisfied that the Respondent's 2 November 2018 decision to grant the Notice Party a waste facility permit (WFP/L/2018/188) was a flawed and unlawful decision and the proper exercise of this Court's discretion is to quash same, satisfied as I am that the relief claimed is not moot despite the surrender of the permit, satisfied also that the grant of the relief claimed is required in the interests of justice and equally satisfied that the Applicant has neither been guilty of lack of candour with regard to seeking leave to bring the present proceedings, nor has available to her a more appropriate alternative remedy. In short, for the reasons set out in this judgment, it is necessary to grant the relief sought by the Applicant.

138. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically:-

> *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."*

Having regard to the foregoing, the parties should correspond with each other with regard to the appropriate costs order to be made. In default of agreement between the parties on that issue, short written submissions should be filed in the Central Office and, having regard to the approaching end of Term, such submissions should be filed within 28 days of delivery of this judgment.