THE SUPREME COURT

S:AP:IE:2020:000081

High Court 2018 No. 186 JR

Clarke C.J.

O'Donnell J.

MacMenamin J.

Dunne J.

Baker J.

BETWEEN/

JOHN CASEY

Applicant/Respondent

- AND –

THE MINISTER FOR HOUSING, PLANNING AND LOCAL GOVERNMENT, THE MINISTER FOR STATE AT THE DEPARTMENT OF HOUSING, PLANNING AND LOCAL GOVERNMENT, IRELAND AND THE ATTORNEY GENERAL

Respondents/Appellants

- AND –

BIOATLANTIS AQUAMARINE LIMITED

Notice Party

Judgment of Ms. Justice Baker delivered on the 16th day of July, 2021

1. This appeal concerns provisions of the Foreshore Act 1933, as amended ("the Act of 1933"), the public notice and publication requirements of the Act, and the procedures to be employed in a challenge to the grant thereunder of a lease or licence. It also concerns the difficult question of the consequence of the making by a court of a decision in regard to a matter not pleaded and raised by a judge of his or her own motion.

2. It is the appeal of the Minister for Housing, Planning and Local Government, the Minister for State at the Department of Housing, Planning and Local Government, Ireland and the Attorney General (where appropriate, collectively "the State parties") of the order of Murphy J. made on 7 July 2020, declining jurisdiction to determine the application for judicial review for the reasons set out in her written judgment delivered on 20 May 2020 ([2020] IEHC 227).

3. The cross-appeal of John Casey ("Mr Casey") concerns the decision of Murphy J. that his application for judicial review was wrongly constituted as an application under O. 84 of the Rules of the Superior Courts ("RSC") rather than one pursuant to s. 21B of the Act of 1933.

Background: the proceedings

4. Mr Casey sought judicial review to quash the decision of the Minister for Housing, Planning and Local Government on 30 November 2017 to approve a baseline study and monitoring programme, one of the conditions imposed by the foreshore licence (the "licence") granted to the notice party, BioAtlantis Aquamarine Limited ("BioAtlantis"), on 21 March 2014 for the mechanical harvesting of kelp from Bantry Bay, County Cork pursuant to s. 3 of the Act of 1933.

5. The licensed area is some 753 hectares within Bantry Bay which shares a boundary with the Beara Peninsula and with the Sheep's Head SAC, although the site itself is not a site protected by EU law. The grant of the licence was made *inter alia* for the purposes of enabling

an assessment of the environmental effects of kelp harvesting with a view to informing seaweed harvesting policy in the State into the future. The parties do not argue that the grant of the licence required an EIA. While Bantry Bay is not a protected site under the Habitats Directive, Mr Casey argues that a proper Appropriate Assessment or AA screening was required before approval was granted to the baseline study and monitoring programme. The State parties say that the intended activity was subthreshold, not likely to have a significant effect on the environment and not likely to affect any Natura 2000 site, and that an EIA, AA or screening was not necessary. This judgment does not concern the correctness of these assertions. No EIA was conducted before the grant of the licence or the approval of the monitoring plan and baseline study

6. The licence was agreed to be granted to BioAtlantis on 6 January 2011, but was not executed until 21 March 2014, and is subject to the special conditions in the second schedule, including the one relevant to the judicial review, that the licensee should submit a detailed monitoring plan for approval by the Department prior to the commencement of the harvesting activity. The term of the licence was ten years from 1 January 2014 and an annual rent became payable from the date of execution. Certain further requirements were to be met before BioAtlantis could commence the permitted works, including the submission of an acceptable baseline study and monitoring programme. The decision approving that plan and survey is the subject of this application for judicial review.

7. On 7 December 2010 the principal officer of the Department of the Environment, Heritage and Local Government recommended that the licence application be approved, this being done *inter alia* in reliance on a report on 1 December 2010 from the Marine Licence Vetting Committee. Thereafter, the Minister for Environment, Heritage and Local Government (the appropriate Minister at that time) approved the licence application, as is signified by his signature on the application.

8. It was some three years later that the licence was finally executed, although for present purposes nothing turns on the delay. Thereafter, the monitoring programme and baseline study was submitted to the Department for approval and this approval was given on 30 November 2017 by the Minister for State with delegated power from the first named respondent under the Housing, Planning, Community and Local Government (Delegation of Ministerial Functions) (No. 2) Order 2017, SI No. 352 of 2017.

9. The monitoring plan was significant for future government policy and it was central to the decision made in 2011 for the grant of the licence by the Minister, although the State parties say that it was not the sole basis on which the licence was made as other factors were also at play, including that there were no objections from members of the public, that the application was for a trial licence, and that valuable scientific information would be gathered and considered in the process.

10. It is important to observe at the outset that the applicant did not, and does not in these proceedings, challenge the grant of the licence, perhaps on account of the fact that the application would have been out of time. His challenge is to the approval of the baseline study and monitoring plan by the Minister for State on 30 November 2017, and the State parties argue that the challenge is in effect a collateral challenge to the licence itself.

11. Mr Casey argues that information about the grant of the licence or the conditions attached thereto was not properly disseminated in the locality and that he became aware of it only in the summer of 2017. He says he now knows that an advertisement was placed on 12 December 2009 in the local Southern Star newspaper which he did not see, but which he says did not identify either the scale of the proposed harvesting, the actual harvesting locations, nor the fact that the kelp was to be mechanically harvested. It seems that from "at the latest" 31 March 2016 the licence agreement was available on the Department's website. No

representation was received from any member of the public regarding the application for the licence

12. The State parties accept that the only notice of the licence application in a newspaper or other locally circulating journal was that published in the Southern Star newspaper, but point to the fact that the relevant documents were placed on display at Bantry Garda Station for 21 days, although the precise dates are not clear. Mr. Casey says the Castletownbere Garda Station was a more appropriate and geographically closer location for the deposit of the documents.

13. The primary issue of substance giving rise to the present appeal arose from the fact that the Minister had not published a notice of the making of the foreshore licence in *Iris Oifigiúil* and in one or more newspapers circulating in the area of the foreshore. That publication was required was not raised in the pleadings or written submissions of either party but was raised by the trial judge in the course of the hearing and she decided that the notification requirements in s. 21A of the Act of 1933 applied to the decision to grant the licence.

14. The ancillary question then arose as to the effect of the failure to publish, as the trial judge, having held that the publication and notification requirements were triggered, went on to conclude that the licence had not been validly granted, and declined to determine the underlying judicial review which in its terms challenged the decision that the precondition to the commencement of the harvesting activity had been satisfied.

15. Mr Casey cross-appeals the trial judge's decision that his application for judicial review, brought under the standard procedure contained in O. 84 RSC, was not properly constituted, as she held that any challenge had to be brought under what she regarded as a new statutory scheme and new and different procedural requirements created by s. 21B(d) and (f) of the Act of 1933, different from those provided for conventional judicial review under O. 84 RSC.

16. The State parties do not oppose the cross-appeal.

General observations: the course of the hearing in the High Court

17. The first matter that requires some comment is the consequence of the raising by the trial judge of the publication requirement and her conclusion that she had no jurisdiction to entertain the judicial review because the publication requirements had not been met, that no valid licence had issued, and that the application for judicial review was therefore premature, as on its face it concerned the approval of the baseline study and monitoring programme which "assumed the existence of a valid licence" (para. 185). She continued:

> "Having determined as a matter of fact and law that the licencing process in relation to the Notice Party's licence application has not yet concluded by reason of the failure to comply with section 21A and section 21B of the Foreshore Act, the court has no jurisdiction to determine the particular dispute which has arisen between the parties.
>
> Even if the court could determine whether the 2017 Approval is a plan or project which requires screening for appropriate assessment, any such determination would be nugatory in the wider context of the court's finding that there is as yet, no valid licence, because of the failure of the respondents to comply with the obligations imposed on them by sections 21A and 21B of the Foreshore Act. Should the respondents now comply with those provisions, the public will be told of its right to question the validity of the Minister's determination and its right of access to justice will be vindicated. If, on the other hand, the required notice is not published, then the position will continue to be as it is now; that the licencing process is still incomplete."

18. The trial judge then went on to refuse "the applicant's request to proceed to judgment on his application".

19. It will be necessary later in this judgment to consider the publication requirements imposed by the Act of 1933 and whether the trial judge was correct in her interpretation of those requirements and of the consequence of a failure to publish. For the present, I observe

in broad terms that given the course of the trial before the High Court judge, once she had determined that the licence had not been validly issued, her adjudicative role required her to come to some conclusion on the merits of the application for judicial review, either that the applicant had made out his case or not. The process was adversarial and required that a determination be made as to which party had succeeded.

20. For the reasons that will be more fully elaborated below the trial judge in my view should not have declined jurisdiction to make a determination on the application.

21. The appeal is unusual because both parties argue that the trial judge fell into error in declining to assume jurisdiction, and by raising at her own motion a matter that was not pleaded. The absence of pleadings is the first matter I now turn to consider.

The function of pleadings and arguments

22. The pleadings in a case set the parameters and fix the issues in dispute between the parties and those to be determined by the court.

23. A classic statement of principle is found in the following passage from FitzGerald J. in *Mahon v. Celbridge Spinning Company Limited* [1967] I.R. 1 at p. 3, which has been cited with approval by Keane J. (as he then was) in *McGee v. O'Reilly* [1996] 2 I.R. 229, and later in *Wildgust v. Bank of Ireland* [2000] IESC 10:

> "The whole purpose of a pleading, be it a statement of claim, defence or reply, is to define the issues between the parties, to confine the evidence of the trial to the matters relevant to those issues, and to ensure that the trial may proceed to judgment without either party being taken at a disadvantage by the introduction of matters not fairly to be ascertained from the pleadings. In other words a party should know in advance, in broad outline, the case he will have to meet at the trial."

24. There are numerous examples in the authorities of the requirement to plead: see for example Laffoy J. in *Reynolds v. Blanchfield* [2016] 2 I.R. 268 (at p. 280) where she said the failure to plead a cause of action :

> "[…] should have been totally fatal to the advancement of a claim for such relief at the trial, unless the Respondent had applied for leave to amend the pleadings, the application had been acceded to, and the Appellant had been afforded an opportunity to answer and to adduce the evidence necessary to address the amended claim."

25. Pleadings also define and limit the jurisdiction of a court: see for example the decision of the Court of Appeal in *R.L. v. Heneghan* [2015] IECA 120, where the court said that it "obtains its jurisdiction from the issues brought before it by the litigants for decision by means of originating summons or notice or pleadings" (at para. 18).

26. See also the decision of Donnelly J. in *Begley v. Damesfield Ltd* [2020] IECA 171 where the absence of a plea in actionable representation was regarded as a matter of fairness.

27. Pleadings accordingly set the parameters for the jurisdiction of a court, more precisely, the jurisdiction to decide the issues so identified. They also ensure fairness in the process. In an adversarial system the role of the court is to come to a determination as to the correctness of the position of one or other party, and to find that one or other party succeeds either in whole or in part in the case advanced. While sometimes in an adversarial system the results may be a "draw" and both sides succeed in some of the issues, there is always a result that decides the dispute, and in practice if a plaintiff or applicant does not succeed in persuading a judge on the facts and on the law that plaintiff will lose.

28. There was no plea that the licence was vitiated on account of lack of publication, and neither party sought to advance that point in argument. The decision that publication was mandatory and that the failure to publish meant that the licence had not validly been granted, made as it was without pleading, led the trial judge to a conclusion that cannot be sustained

because a pleaded case for judicial review on account of a failure to publish would almost inevitably have been met with a defence that the challenge was out of time, and also because no evidential basis had been laid for that finding.

29. The way a claim is pleaded is a factor of some importance in judicial review as O. 84 r. 23(1) RSC provides that, subject to r. 23(2), no ground may be relied on or any relief sought at the hearing except the grounds and relief set out in the statement of grounds, save where amendment is permitted. Express provision is contained in O. 84 r. 20(4) RSC itself to permit such amendment, and for the purposes of the present judgment the statement of grounds does perform the same function as pleadings generally, and in the case of judicial review, having regard to the requirement to obtain leave to bring judicial review on the grounds pleaded, the requirement for clarity and specificity in pleadings and the extent to which the statement of grounds defines and confines the issues to be determined at trial could be regarded as more strict.

30. In *Keegan v. Garda Síochána Ombudsman Commission* [2015] IESC 68, O'Donnell J. explains the principle at para. 42:

> "It is not merely a procedural complaint that the ground upon which the case was decided was not one upon which leave was sought or indeed granted nor was there an appropriate amendment. The purpose of pleadings is to define the issues between the parties, so that each party should know what matters are in issue so as to marshal their evidence on it, and so that the Court may limit evidence to matters which are only relevant to those issues between the parties, and so discovery and other intrusive interlocutory procedures limited to those matters truly in issue between the parties. This is particularly important in judicial review, which is a powerful weapon of review of administrative action".

31. A matter may arise in the course of argument beyond the scope of a particular ground in which leave was granted, leave to amend should be sought to permit any extended or new ground to be argued: see *AP v. DPP* [2011] IESC 2, [2011] 1 I.R. 729, *per* Murray C.J.

32. Order 84 r. 20(4) provides that a court may, at leave stage or thereafter, permit a statement of grounds to be amended, although amendment post leave is to be brought on notice under O. 84 r. 23. A decision therefore may come to be made outside the pleaded case if the trial judge permits an amendment of the grounds, or if the parties in consultation with the judge agree that the point is sufficiently pleaded, albeit it came to take a different tone or emphasis in the course of argument. But the power to permit amendments is strictly applied: *per* Fennelly J. in *Keegan v. Garda Siochána Ombudsman Commission* [2012] IESC 29, [2012] 2 I.R. 570:

33. The commencement of judicial review proceedings has a chilling effect on administrative activity, until the issue is resolved one way or another. The requirement for leave acts to ensure precision and speed in the remedy and to weed out unmeritorious claims. Charleton J. in *Esmé v. Minister for Justice and Law Reform* [2015] IESC 26 commented, with reference to the effect of judicial review on administrative decisions and the requirement for leave, at para. 15:

> "This is the filter, which the leave application is designed to be, in order to ensure that there is sufficient reason to disrupt administrative decisions and to litigate them."

34. These statements of principle underline the difficulty created by the decision of the trial judge to invite submissions on a wholly new ground of challenge to the licence, where leave had not been granted, where neither party sought to advance the argument she had raised, and where no consideration was given, or could have been given, with regard to factors such as delay. The point was not adopted by either applicant or respondent, both of whom argued in different ways that the point did not arise.

35. The present case is a useful example of the effect of the interruption on the activities of the notice party which entered into a lease some 10 years ago and in respect of which it continues to have an obligation to pay rent. The term of the licence continues to run and the raising of the trial judge of the publication issue has had a direct effect on the notice party whose entitlement to avail of the benefit of the licence remains undetermined.

36. I digress here to consider briefly the fact that the trial judge raised the issue of the validity of the licence of her own motion, as my observations concerning the absence of pleadings may appear to be primarily procedural, and the course of the hearing in the High Court raises matters of a broader scope.

Judge raised points of her own motion

37. The trial judge of her own motion raised the question regarding the publication requirement as potentially important and did invite legal submissions. The fact that neither party advanced a proposition that failure to publish would render the licence invalid could not of itself have prevented the trial judge from concluding as she did. An adversarial system of law does not so restrict the adjudicative process as to render it improper for a judge to explore questions of law he or she considers do arise on the pleaded case.

38. The adversarial system does not mean that a judge is not actively engaged with the argument and course of the trial, and that the decision of the judge is a syllogism, a logical conclusion arrived at by deduction, and without intelligent questioning and active assessment of law and fact: see the recent observations of Humphreys J. in *Marioara Rostas v. The Director of Public Prosecutions* [2021] IEHC 60 at paras. 41-42).

39. A court can do a number of things of its own motion, and many procedural or interlocutory orders are made by or in the course of judicial engagement with the issues and to achieve fairness, and a judge may for reasons of fairness, and with the intention of arriving at a correct answer, invite submissions on any point not already argued in written or oral

submissions or which the judge feels has been incompletely addressed. Not to do so could give rise to a result which is wrong in law, or incomplete or likely to create an unsatisfactory precedent.

40. Illustrations of where a judge has usefully raised matters of his or her own motion include Hogan J. in *J.K. (Uganda) v. Minister for Justice and Equality* [2011] IEHC 473 where he formulated a new ground of his own motion and re-listed the matter for further argument. In *T.D. v. Minister for Justice, Equality and Law Reform* [2014] IESC 29, [2014] 4 I.R. 277, this Court noted without apparent disapproval (see judgment of Fennelly J. at p. 338) that Hogan J. in the High Court had of his own motion taken a point as to compliance with EU legislation, legislation that had not been challenged by the applicant.

41. Family law proceedings or those concerning the welfare of children are not entirely adversarial in nature (see *State (D. and D.) v. Groarke* [1990] 1 I.R. 305; *Southern Health Board v. CH* [1996] 1 I.R. 219). In *Health Service Executive v. O.A.* [2013] IEHC 172, O'Malley J. noted that childcare proceedings must reach a conclusion based on the welfare of the child beyond all other considerations. In *S. O'N. v C. D.* [2018] IEHC 478, McDermott J. thought that in the light of Article 41.3.2 the court cannot solely rely on the outcome of an ordinary adversarial process in divorce proceedings, as it is obliged to do in other litigation, and had an obligation in considering whether "proper provision" exists or will be made for the spouses and any dependent children, citing with approval the view of Abbott J. in *W(AM) v. W(S)* [2008] IEHC 452 that "the obligation of the court, of its own motion, [is] to enquire into all relevant facts which may touch upon the adequacy and propriety of provision to be made or made in a divorce case."

42. These examples might be said to derive from the particular statutory context in which they are found, but none of the decided cases would suggest that a judge hearing an application for judicial review is entitled to make a determination on a point for which leave was not

granted, which was not pleaded, where no application was made to amend pleadings, and where consideration was not given before the point was argued as to whether the time limits in judicial review, or other gateway requirements might be a bar to relief.

43. Because the trial judge allowed additional submissions and argument concerning the effect of s. 21A of the Act of 1933, the parties were in a position to argue the publication point at trial, nonetheless, I consider that the trial judge fell into error in raising and then deciding the unpleaded issue regarding the publication requirements under the Act of 1933.

44. To borrow the language used in the authorities concerning the jurisdiction to hear a dispute that is moot, there was in the present case no "live controversy" between the parties that the licence itself was invalid on account of a failure to publish notice of its making. For these reasons, in my view the trial judge was not entitled to raise the issue regarding the requirement for publication and to then decide the application on that ground. That error led her to decline jurisdiction on the ground that the licence had not yet issued. The fact that she invited formal submissions on the point she had raised did not cure the error, although it cannot be said that her conclusion lacked fairness on that account.

45. The consequence is that the judicial review is to be returned to the High Court for further consideration, as the point actually raised concerning the approval of the monitoring plan and baseline study was not decided.

46. The trial judge declined jurisdiction also on a procedural ground concerning the manner in which the judicial review was brought, which I now turn to consider.

The second jurisdictional issue: the form of the proceedings

47. A second issue arose in the course of the hearing in the High Court which was also not pleaded and in respect of which Mr Casey has cross-appealed. The State parties do not oppose the cross-appeal, but nonetheless the point decided in the High Court does merit consideration and leave to appeal was granted on that ground.

48. The issue may be briefly stated: the application for judicial review was brought in the standard form provided in O. 84 RSC and the trial judge held that the proceedings were improperly constituted because they ought to have been commenced pursuant to s. 21B of the Act of 1933.

49. This argument was not advanced by any party to the proceedings, but was raised by the trial judge of her own motion.

50. Section 21B of the Act provides that a challenge to the validity of a decision of the Minister must be made by way of judicial review under O. 84 RSC:

> "21B. – (a) A notice published under section 21A shall state that a person may question the validity of any such determination by the Minister by way of an application for judicial review, under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986)
>
> (b) The notice shall identify where practical information on the review mechanism can be found
>
> (c) A person shall not question the validity of a decision made or act done or purported to be done by the Minister in relation to a relevant application otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986).
>
> (d) The High Court shall not grant leave for judicial review under this section unless it is satisfied that—
>
> (i) the applicant has a sufficient interest in the matter which is the subject of the application, or
>
> (ii) the applicant—
>
> (I) is a body or organisation other than a State authority, a public authority or governmental body or agency the aims or objectives of which relate to the promotion of environmental protection, and

(II) has, during the period of 12 months preceding the date of the application, pursued those aims or objectives.

(e) A sufficient interest for the purposes of subparagraph (i) of paragraph (d) is not limited to an interest in land or other financial interest.

(f) The Court, in determining either an application for leave for judicial review under this section, or an application for judicial review on foot of such leave under this section, shall act as expeditiously as possible consistent with the administration of justice."

51. The section in the form quoted in the last paragraph is the amended section after the insertion by the European Union (Access to Review of Decisions for Certain Bodies or Organisations promoting Environmental Protection) Regulations 2014 (S.I. No. 352 of 2014, dated 23 July 2014) which inserted sub-ss. 21B(c), (d), (e), (f) and (g).

52. This part of the judgment concerns the provisions contained in the new sub-ss. (c) to (f) inclusive which provide that the sole means by which a decision of the Minister may be challenged is by judicial review. I consider below whether the application for judicial review was one in regard to "a decision made or act done or purported to be done by the Minister in relation to a relevant application" for the purpose of s. 21B(c), and for present purposes I will deal with the form of the proceedings on the assumption that the application for judicial review was captured by the subsection.

53. Mr. Casey wished to proceed with his application for judicial review notwithstanding the conclusion of the trial judge that the licensing process was not then complete, and it seems that in the course of argument he indicated an intention to seek an order of *mandamus* to compel the Minister to publish the notice pursuant to the obligation identified by the trial judge as deriving from s. 21A. The trial judge expressed the view (at para. 181) that *mandamus* did not lie because the granting of the foreshore licence is discretionary. I do not propose to comment

any further on that proposition, but what happened thereafter in the course of the hearing is a matter before this Court on appeal. The trial judge refused to proceed with the application for judicial review on the procedural ground that the proceedings were wrongly constituted:

> "The addition of these provisions had the effect of creating a statutory scheme for judicial review of determinations of relevant applications within the meaning of section 21A and 21B, as well as other decisions or acts done by a Minister in relation to a relevant application. The approval given by the Minister to the baseline study and monitoring programme in November 2017, *prima facie* appears to be an 'act done' within the meaning of section 21B(c). As such, it appears to the court to be amenable to judicial review 'under this section' […] The applicant has not brought this application pursuant to section 21B. He has instead, brought a conventional judicial review under Order 84. In the court's view his application is therefore not properly constituted." (at para. 184)

54. The parties both argue that the trial judge was incorrect that the provisions of s. 21B provide a distinct or complete statutory scheme outside of O. 84 RSC, and that she was therefore incorrect to conclude that the proceedings were improperly constituted.

55. Order 84 RSC is expressly identified in s. 21B(a) as the applicable procedure for challenge, and that seems to me to be a useful starting point, as on a plain reading of the subsection the procedural requirements of O. 84 are incorporated by reference. Further it seems to me to be correct, as is argued on behalf of Mr Casey, that it is difficult to ascertain from the judgment what the trial judge regarded as the material differences between an application under s. 21B and one under O. 84, and which of these material differences the applicant's proceedings have infringed.

56. In its terms s. 21B has in the first place the effect of precluding a challenge by, for example, plenary proceedings, and in that the provisions are similar to those found in other

statutory schemes. It is similar to the restrictions on the form of action imposed for example by s. 5 of the Illegal Immigrants (Trafficking) Act 2000, and this Court in *Nawaz v. Minister for Justice and Others* [2013] 1 I.R. 142 held that s. 5 contemplated challenges in the immigration sphere to be by judicial review and not by plenary action.

57. Other statutory schemes provide that judicial review is the exclusive remedy available to challenge the validity of a decision and create different or additional procedural forms of action. By way of illustration, a challenge under the provisions of the public procurement regulations, European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 S.I. No. 130 of 2010, as subsequently amended by S.I. No. 192 of 2015 ("The Remedies Regulations"), is to be made by the procedures set out in O. 84A RSC, as inserted by S.I. No. 420 of 2010.

58. In *Dekra Éireann Teoranta v. Minister for Environment and Local Government* [2003] IESC 25, [2003] 2 I.R. 270 concerning the then relevant provisions of O. 84, r. 4 RSC, Denham J. (as she then was) describes the nature of the judicial review conducted in a procurement matter to be a "specialist area" which "reflect[s] a policy that such reviews be taken effectively and as rapidly as possible" (at p. 283). See also the discussion in *BAM PPP Ireland Ltd and Balfour Beatty Ireland Ltd v. National Roads Authority* [2017] IEHC 157.

59. Another example is found in the amendment to the Planning and Development Act 2000 by s. 50A and later s. 32 of the Act of 2010 and s. 20 of the Environment (Miscellaneous Provisions) Act 2011 modified conventional judicial review procedures for challenges to which they applied.

60. Many of these features of statutory specialist schemes provide for the application for leave on notice, such as s. 5 of the Illegal Immigrants (Trafficking) Act 2000, and s. 73 of the Fisheries (Amendment) Act 1997.

61. Strict and short time limits for challenge are frequently found in provisions regulating specialist judicial review and Charleton J. in *Copymoore Ltd and Others v. Commissioners of Public Works of Ireland* [2014] IESC 63, [2014] 2 I.R. 786 noted the "clear public interest in the disposal of controversies involving multiple suppliers of goods to the State within a prompt time frame". At para. 31-226 of Delaney and McGrath Civil Procedure (4th Ed., 2018) the authors comment that this provision was likely to have been inserted "to avoid litigants seeking to bypass strict time limits".

62. In contrast s. 21B of the Act of 1933 makes few specific regulations of procedure or time, save the gateway requirements for the grant of leave, that a challenge is to be brought by judicial review and that the applicant has a "sufficient interest" in the subject matter of the application. It does not provide any time limit for the bringing of an application for judicial review, which suggests that an applicant must act within the time limit set out in O. 84 r. 21.

63. Further, s. 21B contains no specific provisions regarding service, restrictions on appeal without leave or the "substantial grounds" threshold found now in many statutory regulation of judicial review. By contrast, O. 84 RSC sets out in some detail the requirements for leave applications.

64. The trial judge did note that an applicant had to show "sufficient interest" in the matter, a test she regarded as different from the normal standing required to be shown in a conventional judicial review, but that is the test under O. 84, r. 20(5) for applications for conventional judicial review:

> "(5) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

65. The current planning code also uses this precise phrase: see *Grace v. An Bord Pleanála* [2017] IESC 10.

66. There is therefore in my view no material difference between O. 84 and s. 21B for the purposes of standing.

67. In the third edition of his text Judicial Review (2017) De Blacam at para. 53-01 made the following observation with regard to statutory restrictions in the planning and immigration spheres which expressly provide for challenge by way of judicial review:

> "These restrictions do not alter the nature of the remedy, but they do affect the procedures relating to it and in some cases the way in which the remedy operates. Their object is to minimise the risk that the implementation of the decisions concerned will be delayed by involving the decision-maker in fending off spurious claims and to introduce finality at the earliest opportunity."

68. I adopt that statement of principle and in my view the purpose of the amended section is to regulate the means by which challenge may be brought by excluding any form of challenge other than judicial review, and a new or different or separately operating stand-alone form of judicial review was not intended to be created by the 2014 amendments.

69. Geoghegan J. in *McCarthy v. An Bord Pleanala* [2000] 1 I.R. 42 provides a useful statement of principle:

> "Counsel for the applicant points out that under the inserted sub-s. (3A) of s. 82 of the Act of 1963, a person is prohibited from questioning the validity of a decision of the respondent on any appeal 'otherwise than by way of an application for judicial review under O. 84 of the Rules of the Superior Courts, 1986 (S.I. No. 15 of 1986)'. The Oireachtas, therefore, in enacting the Act of 1992, was not intending to introduce some new kind of judicial review application in relation to planning matters different from judicial review applications in relation to all other matters. It was merely altering the procedures and requirements for obtaining leave." (at p. 45)

70. For these reasons the statutory provisions in my view do not create a new or stand-alone statutory scheme but rather limit the form of challenge to judicial review. Accordingly, the proceedings were not wrongly constituted

71. I would allow the appeal on this ground and remit the application for judicial review to the High Court.

72. These two conclusions regarding standing and the making of the decision on the ground not pleaded could lead to the conclusion that the proceedings be returned to the High Court without further comment here, as each of these conclusions is dispositive. However, as the substantive issues for which leave to appeal was granted are likely to be relevant in the rehearing, and as the conclusions of the trial judge regarding the publication requirements are of systemic importance, it seems correct, as counsel for both parties urge, to deal with these issues on which we heard argument.

73. I propose then to deal with two substantive issues in the balance of this judgment:

(1) Whether the application by BioAtlantis was a "relevant application" within the meaning of the Act of 1933, such that the mandatory publication requirements in s. 21A were operative;

(2) If the application was such, whether the failure by the Minister to comply with s. 21A of the Act of 1933 meant that no valid licence had issued.

The Foreshore Act, 1933

74. Section 3 of the Act of 1933 *inter alia* gives power to the relevant Minister (now the Minister for Housing, Planning and Local Government) to grant a foreshore licence, subject to such covenants, conditions and agreements as the Minister shall consider proper or desirable in the public interest under s. 3(7). The broadly similar power to make a lease is contained in s. 2.

75. A licence has the effect of authorising a person to place any materials, articles, things, structures or works upon the foreshore, or to get and take any minerals therefrom and not more than 30 feet below the surface thereof.

76. The Act of 1933 has a complex legislative history and has become somewhat unwieldy and overly difficult to navigate as a result. For the purposes of meeting certain obligations under EU law ss. 13A, 19A, and 21A were inserted first in 1989, and later amended. The legislative changes will be set out in detail below

77. The first question I consider is the amendment that provided for mandatory publication of the making of a licence or lease. The legislation has long provided a discretion to the Minister to publish notice of a proposal to make a foreshore lease or licence, and to provide opportunity for the making of objections and representations. Section 19, which remains largely unamended, provides:

> "19. Whenever the appropriate Minister proposes to make an order under this Act or an application is made to that Minister for the making of a lease or an order or the granting of a licence under this Act, that Minister may, if he so thinks fit, cause notice of such proposal or application to be published at such times and in such manner as he thinks proper, and may by such notice give to all persons interested an opportunity of making to that Minister objections and representations in respect of such order, lease, or licence (as the case may be) and may include in such notice directions as to the time, manner, and place in and at which such objections and representations may be made."

78. Substantial amendments were made to the Act in 1989 by the European Communities (Environmental Impact Assessment) Regulations 1989 (S.I. No. 349 of 1989), transposing Council Directive (No. 85/337/EEC). Section 19A in its relevant form, inserted by s. 13 of the Foreshore and Dumping at Sea (Amendment) Act 2009 ("the Act of 2009"), provides for mandatory notification and publication of detailed information regarding the location and

nature of the intended works and providing for inspection of the EIS lodged with those applications for a foreshore licence where an EIS is submitted. That section does not form part of the reasoning of the trial judge as it concerns the requirements of publication by an applicant for a foreshore licence, and it was the failure of the relevant Minister to publish that concerned her, and this arises from s. 21A.

79. Section 21 remains largely unamended, and the amendments made by s. 6(2)(a) of the Act of 2009 are formal in nature.

80. Section 21A was first introduced in 1989 by reg. 13(e) of the European Communities (Environmental Impact Assessment) Regulations 1989. In turn it was substituted by s. 15 of the Act of 2009, and a further substitution, of a new sub paragraph (b), made by European Union (Environmental Impact Assessment) (Foreshore) Regulations 2012 (S.I. 433 of 2012). The intermediate amendment in 1999 (S.I. 93 of 1999) was not materially different.

81. Section 21A as originally enacted was limited in scope and provided that a publication obligation arose "when a decision is taken on a relevant application in respect of which an environmental impact statement was submitted in accordance with a requirement of or under s. 13A of this Act".

82. The new version of s. 21A was substituted by S.I. 404 of 2009 (with effect from 30 September 2009), and later by primary legislation, the Act of 2009, s. 15 whereof substituted, with effect from 15 January 2010, a new s. 21A, containing mandatory publication obligations. The limitation that the application be one in respect of which an EIS was submitted was removed in 2009, and is not found in subsequent amendments.

83. Section 21A was amended by the Act of 2009 which transferred the functions from the Minister for Agriculture, Fisheries and Food to the Minister for the Environment, Heritage and Local Government. It does not alter the scope of the mandatory requirements.

84. This sequence of amendments means that s. 21A has, since the amendment of 2009, omitted reference to an EIS and the publication obligations now arise when the Minister determines a relevant application, and there is no express restriction of the requirement to publish only decisions on those applications in respect of which an EIS was submitted.

85. This convoluted legislative history has led to this current formulation of the section:

> "21A.— When the appropriate Minister determines a relevant application, that Minister shall—
>
> (a) publish a notice, in *Iris Oifigiúil* and in one or more newspapers circulating in the area where the foreshore subject to the determination is situate, of the determination and specifying the means by which any material received by that Minister upon which that Minister determined the application may be inspected free of charge or purchased at a price to be determined by that Minister (which shall not be more than the reasonable cost of making the copy or copies concerned),
>
> (b) ensure that arrangements to comply with paragraph (c) are available for inspection or for purchase by members of the public on the terms specified in the notice published in accordance with paragraph (a),
>
> (c) inform a Member State to which s. 19C of this Act applies in respect of the relevant application of the determination and matters specified in paragraph (a) of this section, and
>
> (d) arrange to make the environmental impact statement relating to the relevant application and other material upon which the determination was based available for inspection for such period as that Minister considers appropriate."

86. These mandatory publication requirements in s. 21A apply only to "relevant applications" and this in turn is defined in s. 13A(5) substituted by the European Union

(Environmental Impact Assessment and Appropriate Assessment) (Foreshore) Regulations 2014, S.I. No. 544 of 2014, Regulations 2(a) and (b) which came into effect in accordance with Regulation 1(2) on 5 December 2014.

87. The material current section provides as follows:

> "(5) In this section and in sections 13B, 19A, 19C, 21A and 21B 'relevant application' means, as the case may be—
>
> (a) an application to the appropriate Minister for a lease under section 2 of this Act,
>
> (b) an application to the appropriate Minister for a licence under section 3 of this Act,
>
> (c) an application to the appropriate Minister for his approval under section 10 of this Act for maps, plans, and specifications for erection of structures on the foreshore."
>
> (d) an application to the Minister for the Environment, Heritage and Local Government for his consent under section 13 of this Act for the deposit of material on the foreshore."

88. Thus an application for a foreshore licence is a "relevant application" within this definition of s. 13A(5)(b).

89. But s. 13A(1) seems to link certain "relevant" classes of application to the requirement for an EIS. The State parties argue that the correct reading of s. 13A(5) must have regard to the limitation in s. 13A(1):

> "(1) A relevant application to the Minister which proposes the undertaking of development of a class for the time being specified under Article 24 of the European Communities (Environmental Impact Assessment) Regulations, 1989, or under any provision amending or replacing the said Article 24, shall be accompanied by a

statement of the likely effects on the environment (hereinafter in this Act referred to as an "environmental impact statement") of such proposed development."

The first issue: obligation to publish

90. It became apparent in the course of the hearing that the Minister had not published notice of the determination of the application in *Iris Oifigiúil* and one or more newspapers circulating locally. It is that fact, which Murphy J. held to be a failure by the Minister to comply with a mandatory obligation, that led her to the conclusion that the foreshore licence had not been validly granted. The Minister chose not to publish in reliance on what, for the reasons I now explain, was a misreading of the legislative provisions.

91. This part of the judgment concerns the proper interpretation of ss. 13A and 21A of the Act of 1933 (as amended), and specifically whether an application for a foreshore licence was a "relevant application" for the purposes of the mandatory publication requirements in those sections.

92. The State parties appeal the decision that the publication and notification requirements were applicable to the decision to grant the licence. They argue that the application for the licence, not being one that required an EIS, is not a "relevant application" for the purposes of s. 21A of the Act of 1933, but rather that the applicable section is s. 19 of the Act of 1933 which gives the Minister discretion to publish notification.

93. The point that came for consideration in the High Court was whether the Minister was correct that the obligation to publish applied only when an application for a foreshore licence was accompanied by an EIS. It seems that might have been a correct interpretation in the light of the provisions of s. 21A in the Act following the amendment in 1989, where the obligation to publish was linked to those applications where an EIS was submitted.

94. The relevant version however is that introduced following the amendment in 2009 and, thereafter, there is no restriction on the publication obligation, which appears therefore to exist in respect of any and all applications for foreshore licence.

95. The State parties say the link is not lost because the provisions of s. 21A were enacted to give effect to EU law obligations and therefore that the legislation intended to continue the link to the EIS in s. 21A. They argue that regard is to be had to the fact that ss. 13A, 19A and 21A were first introduced by the European Communities (Environmental Impact Assessment) Regulations 1989 to give effect to the EIA Directive providing for the making of an EIA and public participation in decision making, and therefore it must be said that the obligation contained in s. 21A can arise only and insofar as the application in question was one where an EIA was required by the Directive. As the licence was not granted for harvesting in a European site, no EIA or EIS was required.

96. It is also argued from first principles that if an application is not subject to the public participation requirement imposed by the EIA Directive the notification of a decision could equally not be so subject.

97. Mr Casey argues that the application for a foreshore lease or licence has since the 2009 amendment been a "relevant application" for the purposes of the publication provisions in s. 21A, and that the plain language of the subsection no longer links the publication obligation to those applications that require an EIS.

98. He agrees that the publication obligation under the old legislative scheme applied only when an EIS was submitted with an application, but that the amended s. 21A expanded the publication obligations beyond those cases where an EIS was submitted, and it now applies to all "relevant applications", including applications for a licence by virtue of the amended s. 13A (5)(b).

99. He also says that any other reading would fail to meet the requirement of conformity and would be inconsistent with Article 4(4) of the EIA Directive (2011/92/EU) which created an obligation on Member States to ensure that a screening determination for EIA was made available to the public, and an interpretation that gave the Minister discretion not to publish a decision to grant a foreshore licence would fail to meet the State's obligation under that Directive, and would fail to ensure adequate public participation in cases where an EIA is not required.

100. I agree that the interpretation for which Mr Casey contends may be found in a literal reading of the Act and that the express link to an EIS is not found in the amended s. 21A. This Court has recently in *CM v. Minister for Health and Children* [2017] IESC 76 clarified the rules of statutory interpretation and I will not restate these here, save to say that the primary purpose of statutory construction is to consider the plain meaning of the words, used in context and in the light of the legislative scheme, history and objectives.

101. In regard to the amended s. 21A therefore, the omission of the link with applications that include an EIS must be seen as a deliberative legislative choice to remove the link and thereby expand the range of decisions captured by the legislative mandate.

102. Therefore I am unable, in the light of the available clear, literal reading and the lack of ambiguity, to accept that the EIA Directive is a useful interpretative tool in regard to the provisions of s. 21A.

103. Further, the link to EU environmental provisions is not found in all of the definition provided in s. 13A(5). Included in the definition of "relevant application" is an application to the appropriate Minister for his approval under s. 10 of the Act for maps, plans and specifications for erections of structures on the foreshore: 13A(5)(c), or an application to the Minister for his consent to deposit material on the foreshore: and 13A(5)(d). These are not

linked to European sites or European environmental requirements under the EIA Directive or otherwise.

104. I note too that the amended s. 13(6) expressly excludes from the definition of a "relevant application" an application for an aquaculture licence that is accompanied by an EIS, and the link to an EIS is expressly there made, but is not in s. 13A(5)(b). Further, the obligation to carry out a screening or assessment in regard to petroleum activities is excluded in s. 13B in certain circumstances. Again, it could be said that the legislature was alive to the distinction between those projects which might require an EIA or AA or screening for either. The fact that s. 13A(5) gives a broad definition to relevant application therefore must be seen as intentional.

105. One difficulty presents, that s. 21A(d) provides that the public is to be made aware of where to find and inspect the materials on which the Minister made the decision, including "the" EIS. The reference is not to the EIS "if any". It may be in a given case that there is an EIS and no other material, or that the relevant material did not include an EIS. It is seldom necessary in interpreting a requirement containing a list such as this to expressly add the phrase "if any", and equally I see no reason to do so in the present case as it can readily be understood as a matter of plain language, and without doing any violence to the meaning of s. 21A(d).

106. I am also unable to draw any conclusion as to the proper construction of s. 21A from ss. 19 or 19A. Section 19 provides that where the Minister proposes to grant a licence he or she may cause notice of the proposal or application to be published. That section expressly provides that the notice is for the purposes of giving an opportunity to all persons interested to make objections and representations prior to the licence being made. Section 19A sets out the procedure in regard to certain relevant applications and imposes an obligation on the applicant to publish a notice of the making of the application, but only in circumstances where an EIS was submitted.

107. Section 21A is not expressly so limited, but I see nothing inconsistent or overly oppressive in reading the requirement in s. 21A as imposing a mandatory obligation on the Minister to publish notice of the making of all decisions to grant a foreshore licence. It is noteworthy too that s. 21 provides for mandatory publication in *Iris Oifigiúil* of every order made by the appropriate Minister under the Act of 1933, orders for example under s. 6 prohibiting the removal of beach materials from or disturbance of beach material in an area of seashore. Equally s. 9 provides for the making of regulations in respect of the public use of the foreshore by order which again is to be published. In that context it seems to me not to be incoherent to require the Minister to publish notice of the making of a licence or lease to use the foreshore in a particular way, and in fact might be said to bring into line the obligation to publish notice of the making of a licence with the already existing mandatory obligations in regard to the making of other classes or orders or consents under the Act.

108. For these reasons, I therefore see no reason why the reading of s. 21A must be narrowed or restricted by the addition of a restriction not found in its plain words, a restriction that did exist in the earlier iteration of the section but which has not been found in its express language since 2009. I find no inconsistency with the proposition that at certain stages of the process of the granting of the licence the Minister has discretion to publish notice, but once the licence is granted then the obligation to publish is mandatory.

109. I am not persuaded by the argument of the State parties that the fact that discretion is afforded to the Minister by s. 19 in respect of applications which are not subject to the public participation requirements imposed by the EIA means that the Act cannot be read to impose an obligatory requirement on the Minister in respect of notification of a decision on such an application. I am unable to read an ambiguity in the interplay between ss. 13A(5) and 21A, but even were there to be an ambiguity it seems to me that there is nothing irrational or lacking in good sense to require a Minister to publish notification of the end product of the process, the

making of a decision to grant a licence, when such an obligation exists in regard to other decisions made by the Minister under the Act including decisions to make orders as identified above.

110. Accordingly, even were I to accept the argument of the State parties that a purposive interpretation is required of the application of s. 13A to the reading of the obligation under s. 21A, a purpose that requires a Minister to publish information after a decision to grant a foreshore licence would seem perfectly appropriate given the Minister's obligations to protect a State asset.

111. In summary, I do not read s. 13A(5)(b) as imposing an obligation in every application for a foreshore licence for the submission of an EIS. It does however define the range of decisions that are to be treated as relevant for the purpose of the mandatory publication requirement in s. 21A.

112. I consider therefore that the trial judge was correct in her interpretation of the mandatory publication requirements in s. 21A, but for the reasons I now turn to examine I do not consider that she was correct in her conclusion that the failure to publish had the effect that no valid licence had issued.

The second issue: the effect of non-publication

113. The trial judge came to the conclusion that no valid licence had issued on account of failure to publish. Both parties argue that she was incorrect.

114. The legislation is silent as to the consequences of failure to publish, but the State parties argue that s. 3(1) makes it clear that the licence commences and takes effect on the date of the licence, and that, in the absence of any other statutory provision invalidating the licence on account of a failure to publish, the trial judge's conclusion was in error. Section 21B(a) requires that the notice published should state that a person be told that the validity of a decision to grant

a licence may be challenged and how this is to be done, but there is no express provision that failure to publish impacts on the validity of a licence.

115. The regime for the grant of a foreshore licence requires a notice to be published after the making of the decision to grant the licence, and failure to publish therefore could not impact directly on the validity of the decision itself. The State parties therefore argue that the consequence of a failure to publish notice could not be that the decision itself was vitiated, but rather that a failure to publish means that the Minister might be precluded from objecting to an extension of time to challenge a decision, unless in the circumstances an applicant could be said not to have suffered any prejudice. It is argued therefore that the failure to publish has a procedural effect and could impact upon the date when time is considered to run for the purposes of O. 84 RSC generally. Counsel for Mr Casey agrees.

116. At the outset it should be noted that the Act of 1933 does not contain any provision that links the issue of a lease or licence under the legislation with the publication requirement, and there is no provision that the decision to grant a licence shall not take effect, nor that the lease or licence is not operative, until notice is published. The context of the introduction of s. 21A explains this to an extent, as that amending legislation was enacted to give effect to the Public Participation Directive (2003/35/EC) and that Directive requires sufficient publication to enable interested persons to become aware of the making of a lease or licence.

117. It could also be said on a plain reading of the legislation that what is to be notified is the making by the Minister of a decision on a relevant application. As a matter of logic the failure to publish could not impact upon the validity of the decision by the Minister to grant the licence or lease, and this interpretation is borne out by the fact that what is to be published is a notice of the making of the determination, and details of where the material relied on by the Minister to make the application may be inspected, including the application and all other material. Counsel for the State parties also point to the terms of s. 3(1) itself by which the

Minister is empowered to grant by deed a licence which takes effect at or before the date of the licence:

> "3(1) If, in the opinion of the appropriate Minister, it is in the public interest that a licence should be granted to any person in respect of any foreshore belonging to the State … that Minister may, subject to the provisions of this Act, grant by deed under his official seal such licence to such person for such term not exceeding ninety-nine years commencing at or before the date of such licence, as that Minister shall think proper."

118. The operative date of the licence therefore is the date of the deed by which it is granted, and neither that section nor the amendments stay the operation of the licence until such time as notice of the making of the licence had been published, or such time as the members of the public have been given an identified or reasonable time to object.

119. It could also be said that s. 21B is an aid to the interpretative question. That gives a right to an interested person to be told that the validity of the decision by a Minister to grant a licence may be challenged. Again, on a logical reading the Act provides the procedure by which that challenge may be brought. Not only does the notification requirement not expressly link the validity of the licence to publication, but it does not suspend its operation pending a challenge, or pending the giving of a period of time within which a challenge is to be brought.

120. The decision to grant a licence is made after the engagement with the statutory consultees and the legislation provides no right of the public to participate in the making of the decision. It is useful to note also that the Minister may under s. 3(9) hold a public inquiry before deciding whether to grant a licence and a similar provision is found in s. 2(8) with regard to the grant of a lease. Unlike the provisions of s. 21A it is clear that s. 3(9) envisages the holding of a public inquiry before the licence is granted, and the clear terms of that section regarding procedures that must or may be taken by the Minister prior to the grant of the licence

offers support for the proposition that by contrast s. 21A was not intended to act as a suspension of the operation of a licence such that failure to publish meant that precondition to the grant of the licence was not met.

121. In a similar vein s. 3(1)(b) of the Act of 1933, inserted by s. 8(a) of the Act of 2009 makes it mandatory for the Minister to consult with other Ministers before granting a licence in the circumstances there identified. No such consultation requirement is contained to support the public participation amendments effected by s. 21A. Other licences require the sanction of the Minister for Finance s. 3(4) of the Act of 1933 inserted by s. 8(b) of the Act of 2009.

122. All of these statutory amendments point to circumstances where the grant of a licence is conditional upon prior consultation or prior notification, which must therefore be seen as a condition precedent to the coming into effect of a licence. The provision to support public participation by the requirement to publish a notice is different in form, and provides for publication after the making of a licence, with no precondition or suspensory effect.

123. There is no case law of direct precedential assistance but some judgments were opened in the course of argument. *Keogh v. Galway Corporation* [1995] 3 I.R. 457 was referred to both by the trial judge and in the course of argument before this Court, and concerned the requirement to publish notice in *Iris Oifigiúil* during the course of a public consultation process on a proposed development plan. Part 3 of the then relevant Local Government (Planning and Development) Act 1963 required that the public be given notice of the proposal to adopt a development plan and an opportunity to make representations. Carney J. held that the failure to publish impermissibly bypassed the mandatory consultation process. That answer derived from the express statutory provision requiring publication before a development plan was adopted, and is useful by way of illustration of the type of statutory provisions that might have led to a conclusion that the failure to publish notice of the intention to make a foreshore licence

might impact on the power of the Minister to thereafter grant a licence. The provision in the Act of 1933 is otherwise, and in my view materially so.

124. Another case mentioned in argument in *J & J Haire & Co Ltd v. Minister for Health* [2010] 2 I.R. 615 where McMahon J. dealt with the failure to promulgate a statutory instrument in accordance with the Financial Emergency Measures in the Public Interest Act 2009. McMahon J. refused to hear an argument regarding non publication on the grounds that the plaintiffs were unable to show any prejudice from failure to publish as the plaintiffs had made it clear they had no intention of exercising the right for which the emergency measures provided. I do not propose further considering that decision save to note that it is a useful illustration of the principle that the courts do not engage in hypothetical or *jus tertii* argument.

125. In *Sweetman v. An Bord Pleanála* [2017] IEHC 46, the High Court (Haughton J.) considered the question of whether a challenge to a decision under s. 5 of the Planning and Development Act 2000 (as amended) was out of time and the application had argued that the eight week time limit could not commence to run until he had actual knowledge of the decision. Haughton J. rejected that argument as not consistent with the express language of s. 50(6) that the eight week period for challenge commenced on the date of the decision, but he did conclude that the failure to make an application for judicial review within the eight week period was outside the control of the applicant and that the provisions of s. 50(8)(b) permitted the court to extend the time as the lack of knowledge was outside the control of the applicant.

126. However, because the applicant did not move promptly once he did become aware of the decision, the court refused to extend the time to challenge the decisions.

127. By analogy then with that argument of Haughton J., the judicial review to challenge the Minister's decision under the Foreshore Act, being as it is governed by O. 84 RSC, is one where time may be extended if the applicant satisfies the test in r. 21(3) that there are good or

sufficient reasons and that the circumstances leading to the failure to make the application in time are outside the control of the applicant and could not reasonably have been anticipated.

128. McGrath J. in *Harrington v. Minister for Communications* [2018] IEHC 820 adopted a similar approach when dealing with provisions of the Gas Act 1976 (as amended). That legislation gave the Minister power to grant consent to construct and operate a natural gas production pipeline and the challenge was to the consent to operate the pipeline. The amending legislation requires publication in *Iris Oifigiúil* and in a local circulating newspaper in respect of a decision on a relevant application. Section 40A(8) and (8A) provide for publication of notice of the making of a decision in *Iris Oifigiúil* and in a local circulating newspaper and for the making of arrangements to make the EIS and other information relating to the decision available for inspection by the members of the public. The provisions are broadly similar to those contained in s. 21A of the Act of 1933. No notice was published and it was accepted that the Minister did have an obligation to publish notice of the making of the relevant decision in that case. McGrath J. found that the agreement was not made out on the facts but went on to say that even had there not been publication:

> "… unless it was a statutory requirement that notification to the notice party and to the general public be simultaneous, it is difficult to understand any legal basis upon which notification of the making of the decision could have the effect of vitiating such consent."

129. He also noted that it may be that the delay in notification might provide grounds for an extension of time on which to bring a challenge by way of judicial authority but that no authority had been opened to him to substantiate any allegation that the delay in notification might vitiate the consent.

130. That reasoning seems to me to apply with equal force to the present appeal.

131. In the recent decision in *Arthropharm (Europe) Ltd v. The Health Products Regulatory Authority & ors* [2020] IEHC 16, Simons J. was concerned with whether a challenge to the grant of a marketing authorisation in respect to a veterinary medicinal product was out of time. The decision primarily concerned the question of the means by which the public became aware of the making of the decision, and at para. 53 of his judgment he observed that the purpose of the requirement for public notification and the rights to effective judicial protection might be undermined were the three month time limit under O. 84 r. 20(1) to begin to run prior to the date of the publication of the decision. I merely note that comment as another example of a judicial consideration of the effect of the absence of publication where the judge's concern was the protection of public participation or effective judicial protection, and nowhere was it argued or considered by the trial judge that the authorisation was void on account of lack of publication.

132. I also agree with the argument advanced by the State parties that in general publication and notification requirements are broadly concerned with allowing parties to obtain sufficient knowledge of administrative decisions to enable an assessment to be made of a possible challenge. In those circumstances failure to publish could form a basis to extend time to challenge by reason of a broad consideration of fairness and I find the argument by analogy from *McCaffrey v. Minister for Agriculture* [2017] IECA 246, opened in argument, to be persuasive where the question was considered in the light of broad principles of constitutional or natural justice on the giving of notice. The old case of *Re Mountcharles' Estate* [1935] I.R. 163 concerned a Land Commission decision regarding mining rights over lands of certain tenant farmers and, as Hogan J. noted, Kennedy C.J. was unimpressed as to the sufficiency of the notice which was placed in *Iris Oifigiúil* which he regarded as not likely to reach the attention of those farmers, and which led him to the view that the decision had been made behind the backs of the farmers in question. That decision and *McCaffrey v. Minister for*

Agriculture were decided on a judicial review of a consent to an afforestation development on the grounds of lack of fairness of process. The challenge was not made on the basis that the decision had not been made, but rather that it had been made in excess of jurisdiction in the light of the lack of fair process.

133. The decision of the trial judge in the present case is one that sits uneasily with the illustrations of the nature of challenges and judicial decisions concerning deficiencies in publication, or the absence of publication altogether, and in the absence of express statutory provision that a foreshore licence is vitiated on account of non-publication, I consider that her approach was in error, and difficult to reconcile with the way in which publication requirements have been assessed in other case law concerning broadly similar types of publication requirements.

134. In summary, in my view the provisions of s. 21A must be read as meaning that the purpose of publication is to inform interested members of the public of the making of a licence and to provide the means by which a challenge can be taken. The publication is of a decision already made, and that is a proposition which I consider can be readily understood from the provisions of ss. 3 and 21B, but in my view mean that a person who wishes to challenge by judicial review the making of a licence may be able to rely on the absence of publication to seek an extension of time to bring judicial review should that be required. Failure to publish therefore can have an impact on the timing for the bringing of a challenge by judicial review, and some recent case law in the High Court offers a useful illustration of this principle.

135. I conclude therefore that the trial judge was in error in concluding as she did that the absence of publication meant that the foreshore licence had not been validly granted, but in the light of the fact that the publication obligation arises to protect public participation and effective judicial remedies, the purpose of s. 21A is to notify interested persons of the making of a licence and to inform them of the right to make a challenge and by what means. The

licensing process occurs under the statutory provisions, primarily that contained in s. 3 which has been amended from time to time, and the process is completed by the taking of those statutory steps by the relevant Minister, and the legislation does not support a conclusion that the absence of publication is a failure which vitiates the grant of the licence.

Conclusion

136. In summary then, the proceedings are properly constituted, the failure to publish does not arise on the facts or pleadings and the judicial review is to be remitted to the High Court for further hearing, and case management.