# AN CHÚIRT UACHTARACH
# THE SUPREME COURT

**Supreme Court Record No. 2021/133**

**Court of Appeal Record No. 19/511**

**O'Donnell C.J.**

**Charleton J.**

**Woulfe J.**

**Hogan J.**

**Murray J**

**Between**

**RONALD KRIKKE, PIA UMANS, SEAN HARRIS, CATHERINE HARRIS, PATRICK KENNEALLY, CAROLINE KENNEALLY AND KENNETH GEARY**

**APPELLANTS**

**-and-**

**BARRANAFADDOCK SUSTAINABLE ELECTRICITY LIMITED**

**RESPONDENT**

**JUDGMENT of Mr. Justice Woulfe delivered on the 3rd day of November, 2022**

**Introduction**

**1.** The appellants appeal to this Court against a decision of the Court of Appeal (Donnelly J.; Costello J. and Collins J. concurring) delivered on the 30th July, 2021, which allowed the respondent's appeal against the judgment of the High Court (Simons J.) which was delivered on the 6th December, 2019, and his order made on the same date. The High Court judge decided that certain wind turbines "as built" were not authorised by planning permission, and were therefore unauthorised development, and he made an order pursuant to s. 160 of the Planning and Development Act 2000 ("the 2000 Act") restraining the use of the turbines *pro tem.*

**Background**

**2.** The respondent is the operator of a wind farm located in the townland of Ballyduff, County Waterford. An Bord Pleanála ("the Board") granted planning permission in 2005 for the erection of wind turbines of a particular scale and dimension. The development was subject to the requirements of the Environmental Impact Assessment Directive (2011/92/EU) ("the EIA Directive"), and the Board was required to carry out an EIA as part of its decision-making.

**3.** The respondent subsequently submitted an application in 2011 for permission for a "modification" to the permitted wind farm development. The relevant detail, for the purposes of this appeal, is that, as particularised in the planning application process, the turbines were intended to have an increased rotor blade diameter of 90 metres. The planning authority made a decision on the 23rd November, 2011 to grant planning permission, and this permission contained two relevant conditions. Condition 1 of the 2011 permission stipulated that the development was to be carried out in accordance with the plans and particulars lodged with the application, save where amended by the conditions attached to the permission. Condition 3 of the 2011 permission ("condition 3") provided that prior to the commencement of development

details of the proposed turbines and associated structures, "including design, height and colour", were required to be submitted to and agreed with the planning authority.

**4.** It does not appear, from the face of the planning authority's 2011 decision, that an EIA was carried out as part of that decision-making process.

**5.** Consultants acting on behalf of the respondent made a compliance submission to the planning authority in November, 2013. The covering letter enclosing the submission stated that the respondent was seeking the approval of the planning authority to those conditions which required written agreement in accordance with the conditions. The submission included, in the body of the document, details as to the proposed height of the turbines. The document also referred to schematic details of the turbine arrangement proposed being included in Appendix B, and a drawing in Appendix B showed a schematic of a wind turbine and indicated that the rotor blades would have a diameter of 103 metres.

**6.** In December, 2013 the planning authority sent a letter ("the decision-letter") to the respondent, in which it dealt with each aspect of the compliance submission. Under the heading "Condition 3", the decision-letter stated, "Noted and agreed". There was no analysis in the decision-letter of the compliance submission, nor was there any specific acknowledgement that the planning authority were agreeing to an increase in rotor diameter from 90 metres to 103 metres.

**7.** The respondent erected turbines with a rotor blade diameter of 103 metres. The tip height (that is, at the highest point reached by the tip of a blade) was not altered, as the height of the turbine hubs was lowered so that the tip height remains as permitted by the 2011 permission. The turbines became operational in 2015.

**The Section 5 Referral**

**8.** In May, 2018, in response to complaints from these appellants and other residents, the planning authority made a referral to the Board pursuant to s. 5 of the 2000 Act ("s. 5"). The question referred was whether the deviation from the "permitted blade length of…90 metres diameter…to the constructed blade length of …103 metres diameter" was or was not development, or, if it was development, was or was not exempted development. One might query the way this question was phrased technically speaking, as it seems doubtful as to whether a deviation in blade length could itself be development, as opposed to the construction of the blade with one or other blade length. One might also query the use of the phrase "permitted" blade length of 90m diameter, as this appears a somewhat loaded formula, given the planning authority's direct involvement in the imposition and implementation of Condition 3, an issue which I will return to below.

**9.** An Inspector's report was prepared dated the 30th August, 2018. As part of her assessment the Inspector noted that the purpose of s. 5 is not to determine whether something is unauthorised development, and she cited the High Court decision in *Heatons Limited v. Offaly County Council* [2013] IEHC 261 ("*Heatons*").

**10.** The Board issued a decision in December, 2018 which stated, *inter alia*, as follows:

"**AND WHEREAS** An Bord Pleanála has concluded that –

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

(b) the alterations to turbines, including the length of the rotor arm/blades, do not come within the scope of the permission granted,

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

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

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

**The High Court**

**11.** The appellants brought an application to the High Court pursuant to s. 160 of the 2000 Act ("s. 160"), colloquially described as an application for a "planning injunction", seeking to restrain the operation of the wind turbines on the ground that they constituted unauthorised development.

**12.** The High Court considered first the legal status of the s. 5 decision, and concluded that the decision was binding on the respondent and precluded it from arguing before the Court that the "as built" wind turbines were authorised by the 2011 planning permission. Simons J. referred to the respondent's position that the s. 5 jurisdiction did not allow the Board (i) to determine whether particular works come within the scope of a planning permission, nor (ii) to make a finding of "unauthorised development", but held that this position was untenable in the light of the case law.

**13.** Simons J. stated that the precise same issues which the respondent sought to agitate in the High Court had been raised before the Board and were determined against the respondent. If the respondent had wished to challenge that determination, then the remedy was to make an

application for judicial review, but the respondent did not do so. Accordingly, he was satisfied that the s. 5 decision made by the Board in this case should be treated as binding on the respondent, and as conclusive of the question of whether or not the "as built" wind turbines came within the scope of the 2011 planning permission.

**14.** In case he was incorrect in this finding, however, the trial judge went on to embark upon his own assessment of whether the "as built" turbines came within the scope of the planning permission. He concluded that the decision-letter of December, 2013 could not be relied upon as authorising the alterations to the rotor diameter of the wind turbines, for two reasons. Firstly, as a matter of interpretation, the decision-letter could not be read as "agreeing" to an increase in rotor diameter in circumstances where the respondent did not expressly request agreement to this increase. Secondly, there was no evidence that the planning authority carried out any form of screening exercise, in relation to any potential effects on the environment which might result from a change to a permitted EIA development project, prior to the issue of the decision-letter.

**15.** Simons J. also considered an argument by the respondent that, in circumstances where it was not challenged at the time, the decision-letter of December, 2013 was immune from judicial review, by virtue of s. 50 of the 2000 Act ("s. 50"), and therefore it could not be questioned in these enforcement proceedings. He held that this argument overstated the effect of s. 50, as reliance on that section was not available in circumstances where a decision is bad on its face and/or exhibits an error of law. The argument for saying that the Court was entitled to disregard a planning decision which is bad on its face was even stronger in the context of EIA projects. The respondent's argument could not be reconciled with the requirements of the EIA Directive and the manner in which domestic time-limits have been treated of in the case law of the Court of Justice of the European Union ("CJEU"). The Court's obligation to give effect to the EIA Directive could not be negated by the decision-letter of December, 2013.

**The Court of Appeal**

**16.** On appeal, the Court of Appeal again considered first the issue of the effect of the s.5 determination. The Court disagreed with the trial judge and held that the respondent was correct that the Board was not entitled to make a determination that there had been unauthorised development. The only role of the Board was to determine whether there was development or exempted development. In those circumstances, the High Court was not bound to follow the conclusion reached by the Board as to unauthorised development.

**17.** As regards the decision-letter of December 2013, the Court held that the trial judge was incorrect in finding that there was in fact no agreement with the planning authority as to the increase in rotor diameter, on the basis that this was not expressly requested by the respondent. Condition 3 provided that details of the proposed turbines **including** design, height and colour were left to be agreed between the respondent and the planning authority. The compliance submission did request agreement to an increase in rotor diameter, and the terms "noted" and "agreed" in the decision-letter related back to what was in the compliance submission. The Court considered this sufficient to enable the hypothetical reader of the document to be satisfied that details had been agreed under this heading.

**18.** As regards the s. 50 issue, in the absence of a challenge to the planning authority's decision-letter, the appellants were precluded from contending that the change in rotor diameter constituted unauthorised development, in circumstances where this was agreed by the planning authority on foot of the compliance submission. It was no answer, to reliance on s. 50 by the respondent, for the appellants to assert that it was beyond the powers of the planning authority to agree the revised drawings and the details of the turbines, as that section required any such challenge to be taken by way of judicial review within the timeframe provided for in s. 50(2).

**19.** As regards the High Court's reliance upon the EIA Directive, the Court of Appeal felt that there was no evidence that condition 3 left anything more than technical details to be agreed between the planning authority and the respondent, and thus the argument in relation to the EIA Directive simply did not arise on the facts of this case. Even if it did arise, the Court was satisfied that any challenge to the compliance decision, on the basis that no EIA or screening process had been carried out, was one that ought to have been brought pursuant to the provisions of s. 50(2). In circumstances where the development had been carried out in accordance with an unchallenged and thereby valid compliance decision, there were no grounds upon which a Court could find that there had been unauthorised development.

**Determination**

**20.** This Court granted leave to the appellants to appeal by a determination dated the 28th February, 2022: see [2022] IESCDET 29. The Court was of the view that matters of general public importance did arise, firstly, regarding the scope and effect of an agreement pursuant to a "points of detail" condition imposed under s. 34(5) of the 2000 Act, and regarding public participation and EIA requirements in that context. In addition, there were matters of general public importance regarding the scope and effect of a s. 5 decision, and regarding the interplay between s. 5 and s. 50 and s. 160 of the 2000 Act. The Court noted that these issues may arise in a number of other cases, and felt that it was in the public interest to obtain further clarity.

**Submissions in this Appeal**

*Submissions of the Appellants*

*(i)Agreement pursuant to condition 3?*

**21.** The appellants refer to the legislative framework governing "points of detail" conditions, and this Court's consideration of the scope and validity of such conditions in

*Boland v. An Bord Pleanála* [1996] 3 I.R. 435. They note that the Planning Act and Regulations do not prescribe how points of detail conditions are to be implemented, and how it appears that there is no obligation to publicise the process other than (since amending legislation in 2018) to record any agreed points of detail in the planning register. They submit that the whole point of leaving over points of detail is that the detail must be specified in the compliance process. In the first instance, that requires clarity and precision from the developer if the compliance process is to be treated as incorporating the compliance detail into the permission.

**22.** The appellants submit that a developer cannot produce ambiguous or contradictory material on foot of a compliance submission, and then claim it has got agreement for whatever version ultimately suits it best. They suggest that the approach of the trial judge, regarding the need for any proposal to increase the rotor diameter to have been stated in express terms in the body of the compliance submission, is to be preferred to the approach of Donnelly J. in the Court of Appeal who simply observed that more express terms "would have been in ease of all concerned with this development". They submit that it is of note that there was no diagram which enabled a comparison between the turbines permitted in 2011 and the proposed "as built" turbines.

**23.** It is submitted that where there is ambiguity in a proposal on foot of a points of detail condition, it is not appropriate to resolve such ambiguity in favour of the party who is responsible for such ambiguity. If the request is not made with sufficient precision and clarity, then no agreement can be inferred. The appellants cite the *dicta* of Charleton J. in *Weston Limited v. An Bord Pleanála* [2010] IEHC 255 to the effect that planning permissions are construed not simply on the basis of the decision, but by reference to an active consideration as to what has been sought what has been sought, and submit that the same principle applies here as to whether there was an agreement pursuant to condition 3.

**24.** The appellants submit that while there is some conflicting authority on the application of *contra proferentem* as regards planning conditions, its application cannot be excluded here, for the very reason that condition 3 expressly envisaged that points of detail be "agreed" with the planning authority. They argue that the logic behind the rule, as identified by Clarke J. in *Law Society v. MIBI* [2017] IESC 31, clearly applies here. As regards the onus of proof, the appellants cite the comments of Simons J. in *Waterford City and County Council v. Centz (No.2)* [2020] IEHC 634("*Centz*"), where he stated that the resolution of the question of which party bears the onus of proof under s. 160, insofar as the existence of a planning permission is concerned, fell to be addressed in other proceedings where it was necessary to the outcome of the proceedings and where it had been more fully argued.

**25.** The appellants refer to what they describe as the vague and conditional language used in the compliance submission submitted on behalf of the respondent in November, 2013. They argue that language such as a "preferred" model being "considered" and the developer requesting confirmation "at this stage" is not consistent with a final proposal being made by the developer, and the planning authority cannot be held to have agreed to more than what was asked for. They state that express reference to the rotor diameter is conspicuously absent from the text of the proposal in the body of the document, and there is a lack of clarity and precision about what is actually being proposed, in circumstances where other turbine models with varying dimensions are also referred to in the technical document in Appendix B.

**26.** Finally, on this issue, the appellants cite the *dicta* of Hedigan J. in *Pearce v. Westmeath County Council* [2012] IEHC 300, to the effect that a decision that a condition has been complied with is a decision of equivalent importance to that of the planning permission itself, and should be recorded in a manner that reflects that significance. They note that the December 2013 decision-letter from the planning authority was signed on behalf of an Executive Planner in the Planning Section, rather than by or on behalf of the Manager, and submit that the absence

of the Manager's signature further supports their contention that agreement had not been reached.

**27.** It is therefore submitted that the Court of Appeal was incorrect in finding that the planning authority had agreed to the increase in the rotor diameter in December 2013, pursuant to condition 3, and that in circumstances where there had been no such agreement the turbines as built amounted to unauthorised development.

*(ii) The Section 5 Decision*

**28.** The appellants refer to the conclusion of Donnelly J. in the Court below that the question of whether a particular development as carried out comes within the scope of the planning permission, i.e. whether it was authorised, is not an issue that the planning bodies have jurisdiction to decide under s. 5. They submit that this conclusion is incorrect, for the reasons outlined in the judgment of the trial judge at paras. 63 – 105, and they highlight certain authorities which they say led the trial judge to his alternative conclusion that the Board did have such jurisdiction.

**29.** It is submitted that the finding of Donnelly J. is not supported by the terms of s. 138(1) of the 2000 Act, which provides that the Board shall have an absolute discretion to dismiss a referral where the Board is satisfied that, in the particular circumstances, the referral should not be further considered by it having regard to any previous permission which in its opinion is relevant. This ability to have regard to any previous permission is said to make perfect sense, on the basis that the question of whether something "is or is not development or is or is not exempt development" is largely (if not entirely) academic if the contentious work/use are already covered by a permission.

**30.** The appellants also refer to a point made by Donnelly J., in support of her construction of s.5, about the absence of enforcement powers granted to the planning authority or the Board

under that section. It is argued that this point is not a good one, on the basis that after all the Board has no enforcement powers if it finds that development is exempted development, but that clearly does not constrain it from making such a finding.

*(iii) Collateral Attack*

**31.** The appellants state that this case presents two aspects of "collateral attack"; firstly, the absence of a challenge to the 2013 decision of the planning authority on the points of detail proposal on EU law grounds such as EIA in late 2013, and secondly, the absence of a challenge to the subsequent s. 5 decision. It is submitted that the approach of the Court below produced the bizarre result that a party who participated fully in the s. 5 process is not bound by the outcome of same, but a party who had no opportunity to participate in the compliance process is nevertheless bound by its outcome.

**32.** The appellants point to changes between the turbines as constructed relative to details considered in the EIA as carried out, and submit that the modified development has never been subject to the requirements of the EIA Directive. They cite various EU measures on EIA and various Irish measures implementing same, including para. 13(a) of the Planning and Development Regulations 2001, requiring an EIA in the case of certain changes or extensions to development already authorised, executed or in the process of being executed. Accordingly, they submit that at the very least an EIA screening was required for the compliance process.

**33.** Regarding s. 50 and time limits within which a challenge to the validity of a planning decision must be brought, the appellants submit that the issue is not so much whether time limits are themselves compatible with EU law, but rather whether the effects attributed to expiry of those time limits are compatible. It is submitted that EU law does not equate the expiry of time limits with the conferral of validity, in the manner which a strict application of s. 50 does.

**34.** The appellants cite various EU authorities on time limits in the context of EU law requirements, and also the judgment of this Court in *An Taisce v. An Bord Pleanála (McQuaid/Ballysax)* [2020] IESC 39. In that case this Court stated that the influence of EU law on the area of substitute consent may require a particular approach to the exercise of the collateral attack jurisprudence in at least some cases, but it was not necessary for the purposes of those proceedings to resolve or further advance that particular question.

**35.** As regards public participation, the appellants submit that public participation and the right to judicial review are essential components of EIA. Where public participation is excluded from a post-consent points of detail process, and the results of that process are not adequately publicised, the operation of time limits cannot confer a validity which does not exist. Where a screening determination was required, it should have been published as required by Article 4(2) of the EIA Directive. Placing material on a file where the public have no reason to inspect the file is, it is submitted, insufficient.

**36.** While reference was made in the Court below to the possibility of seeking an extension of time to bring a challenge by way of judicial review, the appellants submit that it must be recalled that a party seeking such extension faces an additional hurdle which does not arise in the case of timely and appropriate notification, namely the effect of an extension on third party rights. So even if the publicity was inadequate, the party seeking an extension of time faces an additional hurdle that would not have presented if the publicity was adequate. That it is submitted cannot be regarded as "effective".

**37.** As regards the second aspect of collateral attack, the appellants suggest that the Court of Appeal had little to say about the respondent's failure to challenge the s. 5 decision, which concluded that the alterations to the rotor diameter did not come within the scope of the permission granted. They argue that the Court below appears to have proceeded on the basis that, having decided that the Board was not entitled to make a determination that there had been

an unauthorised development, that was the end of the matter. It is submitted that no justification exists for not applying s. 50 to the s. 5 decision, in circumstances where the respondent expressly raised the compliance procedure during the s. 5 process. The appellants argue that collateral attack must be applied even-handedly, and that it is unjust that this did not happen in this case.

*Submissions of the Respondent*

*(i) Agreement pursuant to condition 3?*

**38.** The respondent notes that the compliance submission of November, 2013 identified that the respondent proposed to install a preferred turbine model at the wind farm. The compliance submission also included the dimensions, including the rotor diameter, of the turbine proposed to be installed (*i.e.* the schematic details in Appendix B which were expressly referenced), and these details were presented as a proposal as they required the agreement of the planning authority. The final details of the turbines could not have been determined without the agreement of the planning authority, so is unsurprising that the compliance submission is couched in language which suggests that a proposal is being made.

**39.** It is submitted that the compliance decision reflects the agreement of the planning authority with these details, which were "Noted and agreed". While the appellants have argued that the compliance decision cannot be interpreted as the agreement of the planning authority to the details of the proposed turbines, there was never any evidence presented to suggest that the planning authority did not understand the compliance submission or understood themselves to be agreeing to something different.

**40.** The respondent refers to the appellants' suggestion that "WCC cannot be construed as having agreed to more than what was asked for", and they note that the appellants highlight the fact that the compliance submission did not specifically identify the length of the rotor diameter

in the body of the submission, and suggest that there was ambiguity as to the nature of the proposal. The respondent submits that this argument ignores the totality of the information available. The rotor diameter was easily ascertainable from the information contained in section 4 of the compliance submission and was evident from the schematic in Appendix B, to which specific reference was made.

**41.** The respondent submits that the argument that condition 3 should be read *contra proferentem* cannot be relied upon against the respondent, and could only be relied upon by the respondent against the planning authority. In addition, the issue referred to by Simons J. in *Centz*, which relates to where the burden of proof lies as to the unauthorised nature of a development, does not arise in this appeal.

**42.** It is submitted that there is nothing in the appellants' submissions which would justify overturning the decision of the Court of Appeal that the planning authority did, in fact, make a compliance decision whereby it agreed to the details of the proposed turbines at the wind farm. The respondent states that it is also the case that the compliance decision was available on the public file maintained by the planning authority, and so was publicly available.

*(ii) The Section 5 Decision*

**43.** The respondent refers to the finding made by the Court of Appeal that the jurisdiction vested in the Board pursuant to s. 5 is limited to a determination as to whether something is development or is exempted development, and does not extend to a determination as to whether something is unauthorised development. It submits that the decision of the Court of Appeal is consistent with both the language used in the 2000 Act, which draws a distinction between the concepts of development, exempted development and unauthorised development, and the manner in which the jurisdiction established by s. 5 has been interpreted.

**44.** As regards the language used, s. 5(4) permits the Board to make a decision on "what, in a particular case, is or is not development or is or is not exempted development". If something is development and not exempted development, that does not tell you whether it is authorised or unauthorised development. That requires a separate inquiry outside the scope of s. 5, as to firstly, whether a planning permission has been granted, and secondly, whether the activity in question is within or outside the scope of the planning permission granted. It is submitted that the jurisdiction is therefore expressly limited to questions relating to what is development and exempted development. Section 5 does not encompass that separate inquiry as to "unauthorised development", which is addressed separately under s. 160.

**45.** The respondent submits that the decision of the Court of Appeal is also consistent with the manner in which the interaction between the two jurisdictions has previously been considered by the Superior Courts. They cite passages from Finlay Geoghegan J. in *Roadstone Provinces Limited v. An Bord Pleanála* [2008] IEHC 210 ("*Roadstone*"), and from Hogan J. in *Heatons*, and submit that those authorities are consistent with *obiter* comments made by McKechnie J. in *Meath County Council v. Murray* [2018] 1 I.R. 189.

**46.** The respondent refers to the text of the Board decision in this case, and describes the conclusions in the second last paragraph which starts with the word "WHEREAS" as mere recitals. It compares this paragraph with the last paragraph which begins with the words "NOW THEREFORE" and describes this last paragraph as the "actual decision" which decides what it is supposed to decide, *i.e.* that the deviation in blade length is development and is not exempted development.

**47.** As regards the concern raised by the High Court as to the risks associated with there being overlapping jurisdictions, the respondent submits that this concern does not arise. The jurisdiction conferred by s. 5 enables the Board to determine whether there is development and whether that development is exempted, so that there can be clarity as to whether an application

for planning permission is required to be made. The confined nature of the jurisdiction arising from s. 5, in that it is limited to the question of whether there is development or exempted development rather than extending to include the proper interpretation of a planning permission in order to determine an allegation of unauthorised development, means that there is no conflict with the jurisdiction vested in the High Court by section 160.

**48.** As regards the appellants' reliance upon s. 138(1) of the 2000 Act, the respondent submits that this provision has no relevance to the issues before this Court (and has not been cited previously by the appellants). The grant to the Board of a power to dismiss an appeal or referral having regard to a previous grant of planning permission does not extend the jurisdiction vested in it by s. 5, nor does it suggest that the Board is to be permitted to determine what is or is not unauthorised development.

*(iii) Collateral Attack*

**49.** As regards the compliance decision, the respondent submits that the starting point is that this is a decision which was not challenged in the Courts in accordance with s. 50 and therefore, as a matter of principle, the decision cannot be impugned in subsequent proceedings. It cites a recent decision of the Court of Appeal in *Arthropharm (Europe) Limited v. The Health Products Regulatory Authority* [2022] IECA 109 regarding the importance of time limits and the need for certainty, especially in the commercial sphere. While it is correct that compliance decisions are not subject to public participation in the same manner as decisions to grant or refuse planning permission, they state that in this instance the uncontroverted evidence is that the compliance decision was on the public file maintained by the planning authority. The appellants have never explained when they became aware of the decision or why they did not challenge it, even if that required an application for an extension of time to do so.

**50.** The respondent describes the focus of the appellants' argument as a contention that the compliance decision breaches obligations arising from the EIA Directive and, in particular, that the application of the time limits in s. 50 are incompatible with the EIA Directive. It submits that this argument must be dismissed for the following reasons.

**51.** Firstly, EU law permits points of detail to be left over for agreement with the planning authority. The respondent submits that there is nothing inconsistent about national law allowing points of detail to be left over for agreement with the planning authority, and the EIA Directive, and it cites in support Case C- 461/17 *Holohan v. An Bord Pleanála*.

**52.** Secondly, it is submitted that the scope of the matters left over for agreement with the planning authority is not such that would require a screening for EIA or would require EIA. They are not matters which would fall within any of the classes of development in Annex II of the EIA Directive (as it stood at the time of the compliance decision in 2013), nor do they fall within any of the equivalent classes of development in Part 2 of Schedule 5 to the Planning and Development Regulations 2001, as amended. Any screening exercise required has already been done at the stage of granting of permission, and it is not necessary to do a screening exercise again at the compliance stage.

**53.** Thirdly, and it is said most significantly, EU law does not preclude the imposition of time limits in respect of challenges to administrative decisions relating to development consent. The rules in relation to time limits are a matter of national procedural autonomy, subject to the principles of equivalence and effectiveness. The respondent submits that the CJEU has recognised that the laying down of reasonable time limits in which decisions must be challenged, in the interests of legal certainty, is compatible with EU law, and they rely on passages from that Court's judgment in Case C-348/15 *Stadt Wiener Neustadt*. They argue that the only limitation to this principle is that the expiry of the time limit could not result in the project being deemed to be lawfully authorised "as regards the obligation to assess their effects

on the environment". It is submitted that that issue does not arise in the instant case, where the effects on the environment have already been assessed and the wind farm operates in accordance with the conditions attached to the relevant planning permission.

**54.** The respondent submits that the appellants' reliance on Case C-261/18 *Commission v. Ireland ("Derrybrien (No. 2)")* is misplaced. That case related to an alleged failure by Ireland to comply with obligations arising from the judgment of the CJEU in Case C-215/06 *Commission v. Ireland*. In finding that Ireland had failed to fulfil its obligations under the EIA Directive, the CJEU addressed the obligations placed on a Member State when a project has been granted consent without having had a prior EIA carried out, which does not arise in this instance where an EIA was carried out. It is further submitted that the only discussion of time limits in *Derrybrien (No. 2)* relates to whether Ireland could rely on the time limits contained in s. 50 in defence of the complaint brought by the Commission. The CJEU did not lay down a general proposition that time limits cannot apply in the context of a decision which relates to a development which was subject to the requirements of the EIA Directive. In certain instances, it may be necessary for there to be intervention to prevent a breach of EU law or to rectify an existing breach of EU law. However, on the facts of this case, it is submitted that this does not arise and that there is no requirement for the disapplication of national rules on time limits.

**Decision**

**55.** It seems to me that three questions arise for decision on this appeal:

(i) Whether the increase in rotor diameter was agreed in writing with the planning authority pursuant to condition 3.

(ii) Whether the appellants can now challenge the validity of any such decision made or act done by the planning authority on EU law grounds, in the light of s. 50.

(iii) Whether the s. 5 decision should be construed as extending to a determination of unauthorised development, and if so, whether any such determination is binding on the High Court on a s. 160 application.

***The first question: Was there an agreement?***

**56.** As stated above, condition 3 of the 2011 permission provided that prior to the commencement of development, details of the proposed turbines and associated structures, "including design, height and colour", were required to be submitted to and agreed with the planning authority. It is clear from the evidence that such details were submitted to the planning authority for agreement in November 2013, by way of the compliance submission made by consultants acting on behalf of the respondent. The covering letter enclosing the submission stated that the respondent was seeking the approval of the planning authority to those conditions which required written agreement in accordance with the conditions.

**57.** As noted in the judgment of the Court below, the details of the proposed turbines to be submitted for agreement were details "including" but not limited to design, height and colour. The compliance submission included in the body of the document, under the text of condition 3 and under a heading "Developers Compliance Proposal", details of the proposed height of the preferred turbine. The same paragraph of the document also referred to schematic details of the turbine arrangement proposed being included in Appendix B, and a drawing at the start of Appendix B entitled "Schematic GE Turbine Barranafaddock 1 PD11/400" showed a schematic of the proposed turbine which indicated that the rotor blades would have a rotor diameter of 103 metres.

**58.** The planning authority responded to the compliance submission by the decision-letter dated the 13th December, 2013. Under the heading "Condition 3" it was stated "Noted and agreed". There was no analysis in the decision-letter of the compliance submission, however,

nor was there any specific acknowledgment that the planning authority was agreeing to an increase in rotor diameter from 90 metres to 103 metres.

**59.** The trial judge held that the decision-letter could not be relied upon as authorising the increase in rotor diameter, firstly, for the reason that it could not be read as "agreeing" to such an increase in circumstances where the respondent did not expressly request agreement to this increase. Simons J. stated that had the developer wished to obtain the planning authority's agreement to an increase in rotor diameter, then this should have been stated in express terms in the body of the compliance submission.

**60.** Like Donnelly J. in the Court below, I am not convinced that, because the proposed increase in rotor diameter was not expressly referred to in the body of the compliance submission, the decision-letter cannot be read as conveying agreement to such an increase. As Donnelly J. points out, the schematic is expressly referred to in the body of the compliance submission, and it expressly refers to a rotor diameter of 103 metres. The terms "noted" and "agreed" in the decision-letter related back to the material in the compliance submission, which included the schematic.

**61.** In their submissions to this Court the appellants argue that the compliance submission had contained ambiguous or contradictory material, and that as the proposal to increase the rotor diameter had not been made with sufficient precision and clarity, then no agreement could be inferred. The allegation of ambiguous or contradictory material related to the fact that the material in Appendix B also contained a technical document about the series of wind turbines in question (the GE 2.X Series wind turbines), and this document set out varying specifications and dimensions for different turbine variants within that series.

**62.** In my opinion, however, the inclusion of the schematic drawing at the front of Appendix B made it sufficiently clear as to the precise details of the turbines which were in fact being proposed by the respondent. While there could have been greater precision and

clarity, there was sufficient precision and clarity for the planning authority to understand what was being proposed, and it is important to note that there is no evidence that they did not so understand.

**63.** I might briefly address some other submissions made by the appellant. As regards the possible application of the *contra proferentem* principle, it seems to me that this principle could only be relied upon, if at all, by the respondent or the planning authority. As regards where the burden of proof as to unauthorised development lies, this issue does not appear to have featured in the Courts below in this case, and it is not in any event necessary for me to rule on the issue for the purposes of resolving this appeal. As regards the absence of the Manager's signature on the decision-letter, I do not think that this has any bearing on whether an agreement was reached, as opposed to a possible argument as to validity which was not made.

**64.** In conclusion on this issue, therefore, I agree with the Court below that the increase in the rotor diameter did not constitute unauthorised development, in circumstances where the proposed increase was agreed in writing with the planning authority in late 2013 pursuant to condition 3.

***The second question: Section 50 of the 2000 Act and collateral attack***

**65.** A potential problem with "points of detail" conditions was identified in the early days of such conditions by McMahon J. in *Keleghan v Corby* [1976] 111 ILTR 144. He noted how the public would have no knowledge what details were in fact being agreed pursuant to such conditions, and no way of appealing against the details agreed between the developer and the planning authority. It was later held that if an interested party did become aware of the details of such an agreement, he or she could in principle seek to challenge the validity of any such agreement by way of an application for judicial review, for example on the grounds that the agreement did not comply with the criteria specified in the points of detail condition: see *Arklow Holidays v An Bord Pleanála* [2006] IEHC 15.

**66.** Any such challenge by an interested party is, however, governed by the specific statutory provisions in s. 50 of the 2000 Act. These provisions set out a number of important rules governing such challenges, including the following:

(i) A person shall not question the validity of any decision made or other act done by, *inter alia*, a planning authority in the performance or purported performance of a function under this Act otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts: s. 50(2).

(ii) Any application for leave to apply for judicial review in respect of any such decision or act shall be made within the period of eight weeks beginning on the date of the decision or the date of the doing of the act by the planning authority: s. 50(6).

(iii) The High Court may extend the eight week period but shall only do so if satisfied that –

(a) there is good and sufficient reason for doing so, and

(b) the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension: s. 50(8).

**67.** In the present case it is unclear exactly when the appellants became aware of the compliance decision made by the planning authority in late 2013, which included the decision to agree the increase in rotor diameter. Mr. O'Moore of Fehily Timoney & Company, the planning consultants who acted for the respondent, averred in his third affidavit that the compliance submission and decision-letter were placed on the planning file maintained by the planning authority, and available for later reference by members of the public or other interested parties. It is unclear, however, when that was done and if or when any of the applicants may have become aware of the compliance decision as a result of same.

**68.** There was also affidavit evidence that, by letter dated the 18th September, 2015, solicitors acting on behalf of the third named and fourth named appellants wrote to Waterford County Council seeking a copy of "all documentation which has been submitted in compliance with the conditions attached to planning permission reference 11/400", pursuant to the European Communities (Access to Information on the Environment) Regulations 2007, as amended. It is again unclear, however, what response was issued by the planning authority and when the appellants first became aware of the compliance decision.

**69.** In any event, irrespective of the said lack of clarity, the fact remains that the appellants did become aware of the compliance decision some time ago but have not at any stage sought to question the validity of the compliance decision by way of an application for judicial review, as required by s. 50. While the eight week period for making an application for leave to apply for judicial review expired in early 2014, the appellants could have sought an extension of time pursuant to s. 50(8). In that regard I agree with the comments of Donnelly J. in the Court below, where she stated that it seems reasonable to observe that where a person only became aware of a compliance agreement outside the time period provided for in s. 50(2) in circumstances where obtaining such knowledge of this was shown to be outside his or her control, they would have a strong basis on which to ask the High Court to extend the time for taking a judicial review, provided that they also demonstrate that there is good and sufficient reason to do so.

**70.** In these s. 160 proceedings the appellants, in addition to arguing that there was in fact no agreement to increase the rotor diameter, are in effect also seeking to question the validity of any such decision made or act done by the planning authority. They seek to do so on the grounds that the compliance decision involved a breach of the requirements of the EIA Directive, and that at the very least an EIA screening was required before any such decision. The obvious difficulty for the appellants is that, on the face of it, this appears to constitute a

collateral attack on the validity of the compliance decision, which appears to fly in the face of s. 50.

**71.** In the High Court the second reason given by the trial judge for finding that the decision-letter could not be relied upon as authorising the increase in rotor diameter related to the requirements of the EIA Directive. In his view, one such requirement was that any change to a permitted EIA development project must itself be subject to a form of screening exercise, in order to determine whether it is likely to have significant adverse effects on the environment, before a decision to authorise any change can lawfully be made.

**72.** Simons J. rejected the respondent's argument that the validity of the decision-letter could not now be questioned in these enforcement proceedings by virtue of s. 50, for two principal reasons. Firstly, he held that reliance on s. 50 is not available in circumstances where a decision is bad on its face and/or exhibits an error of law, and he relied principally upon the authority of *Mone v An Bord Pleanála* [2010] IEHC 395("*Mone*"). Secondly, he cited the judgment of the CJEU in *Derrybrien (No. 2)* and held that the respondent's argument could not be reconciled with the manner in which domestic time limits have been treated of in the case law of the CJEU.

**73.** In the Court below Donnelly J. disagreed with the trial judge's conclusions on s. 50, and with his reasons for same. As regards his first reason, Donnelly J. agreed with the respondent that the decision in *Mone* could be distinguished factually from the present situation. The ultimate rationale of *Mone* appeared to her to be that there are at least some exceptional situations where s. 50 does not require that an unchallenged decision should be treated as valid. In *Mone*, the Board's decision was bad because it depended on conferring validity and effect on a legal nullity and "exceptionally" that decision could not be allowed to stand.

**74.** As regards the trial judge's second reason for limiting the effect of s. 50, Donnelly J. distinguished *Derrybrien (No. 2)* and held that there was nothing in the case law of the CJEU that required the Court to conclude where the issue turns on the question of compliance with the EIA Directive, and because s. 50(2) provides for a time limit (that may be extended), that an applicant is entitled to avoid the requirements of s. 50 and is free to mount a collateral challenge to a planning decision and/or act in s. 160 proceedings.

**75.** In my opinion the decision of the Court below on the effect of s. 50 was correct, and the reasons for my conclusion require me to examine the issues arising in some greater detail.

*The decision in Mone*

**76.** Firstly, it is necessary to consider the two High Court authorities relied upon by Simons J. in support of the proposition that reliance on s. 50 is not available in circumstances where a decision is bad on its face and/or exhibits an error of law. He relied principally on *Mone*, which was an application for judicial review of a decision of An Bord Pleanála to grant permission to a developer to rebuild a petrol station in County Monaghan. The Board's decision was based upon a conclusion that valid planning permission for the use of the land as a petrol station existed on foot of an earlier planning application made in 1998 ("the 1998 grant").

**77.** The applicant argued that the Board erred in law in deciding to grant permission on the basis of that conclusion, which itself amounted to an error of law which appears on the fact of the record of the decision, in the following circumstances. The 1998 grant was erroneously issued by the planning authority notwithstanding the fact that the planning application had been withdrawn by the applicant, and the permission was therefore issued contrary to s. 16 of the Local Government (Planning and Development) Act, 1992.

**78.** However, the validity of the 1998 grant was never challenged, and purportedly relying on same the developer duly constructed and operated a petrol station on his lands. Notwithstanding the absence of any direct challenge to the validity of the 1988 grant pursuant

to s. 50, McKechnie J. held that there had been an error of law which rendered the decision of the Board invalid on its face, and he granted an order of *certiorari* quashing the decision. In his judgment he stated as follows as regards the 1998 grant:

> "83. It would seem to me that as a matter of common sense, where a grant has in this case has been issued without the relevant statutory basis, it can have no force. The fact that the erroneous ground was not challenged could in no way confer it with retroactive validity; such is wholly outside of the legislative scheme which entirely governs this area of law. The 1998 grant was therefore wholly illusory; it was a grant in name only, having no possible basis in either law or fact. No future actions could change this. The Council had no power or jurisdiction to make the grant. It must therefore follow that any subsequent decision which places reliance upon this must be similarly flawed, being based on no legitimate legal or factual basis. The Board's decision for the development was based on a valid planning permission, as well as being erroneous, was a decision it had no power to make; and it was not possible as a matter of law for the Board to retroactively confer validity on the 1998 grant.
>
> 84. The argument of the Board by reference to s. 50 of the Act of 2000 is misconceived. That section (subject to the court's power to extend time, which here is not relevant) is a time limit restriction operating not as a matter of defence but of jurisdiction. It regulates the challenge to a decision, nothing more. It leaves unaltered the legal status of the decision. It has no influence on the lawfulness or effect of the decision. It gives it no badge of either approval or disapproval. It prevents challenge. Notwithstanding these views the practical effect of this section is that in almost all cases once the time period has expired, no further consideration will be required or needed. But exceptionally, as here, where a subsequent decision depends on conferring the status of legality on a legal nullity, that decision will not be allowed to stand.

> …
>
> 87. In conclusion, given the most unusual, if not unique circumstances of this case, I cannot accept the argument that by granting relief the objectives of s. 50 of the Act of 2000, as outlined in *KSK Enterprises Limited v An Board Pleanála* [1994] 2 IR 128 ("*KSK Enterprise Limited*"), are threatened or undermined. In fact, if on discretionary or policy grounds the 1998 grant continued as a legal foundation for the impugned and perhaps later permissions, the established and accepted reputation of the planning code could suffer. Therefore, I do not accept the conclusion reached in this judgment could have the effect as submitted."

**79.** In the Court below Donnelly J. agreed with the respondent's submission that the decision in *Mone* could be distinguished from the present situation, on the basis that in *Mone* the Board's decision was bad because it depended on conferring validity and effect on a legal nullity and "exceptionally" that decision could not be allowed to stand. She also felt that the trial judge's view that reliance on s. 50 is not available where a decision is bad on its face and/or exhibits an error of law was not one that she considered could be taken from the *Mone* decision.

**80.** With respect, I think it is difficult to distinguish the decision in *Mone* factually from the present case, although I note that McKechnie J. referred to "the most unusual, if not unique circumstances" of the *Mone* case. He and Simons J. both appear to have believed that the Court was entitled to disregard or treat as invalid a planning decision which they were satisfied was bad on its face and/or exhibited an error of law, even though the validity of the decision had not been quashed by way of an application for judicial review in accordance with s. 50. In addition, I do consider that a principle that reliance on s. 50 is not available for decision is bad on its face and/or exhibits an error of law was one that could legitimately be taken from the trial judge from the *Mone* decision, notwithstanding that there may be different views as to the

application of that principle on the facts of a given case. Given the exceptional circumstances in *Mone* it may suffice to say, as Donnelly J. did in the Court below, that *Mone* cannot be authority for any general proposition such as that advanced by the trial judge. If necessary I would, however, decline to follow the decision in *Mone* as in my opinion that principle cannot be reconciled with the clear terms of s. 50. The provisions of s. 50 govern the questioning of the validity of planning decisions on any legal grounds, including grounds that a decision is bad on its face and/or exhibits an error of law, and no exception for any such grounds was carved out by the Oireachtas.

**81.** I would also consider, contrary to the view expressed by McKechnie J. in *Mone*, that by granting relief on the basis of any such principle the objectives of s. 50, as outlined in *KSK Enterprises Limited*, are threatened and undermined. On the contrary I agree with the view expressed by Donnelly J. in the Court below, that to adopt such an approach to s. 50 would radically alter its scope and significantly undermine the evident purpose of the Oireachtas in enacting it.

**82.** It is also necessary to consider the second authority relied upon by Simons J., the case of *Wicklow County Council v Fortune* [2013] IEHC 397 ("*Fortune (No. 3)*"). In these s. 160 proceedings the planning authority sought, *inter alia*, an order against the defendants providing for the demolition and removal of two wooden timber shed structures. Mr. Fortune had previously requested a declaration from the planning authority, pursuant to s. 5 of the 2000 Act, on the question as to whether the larger shed was or was not exempted development. It appears that the planning authority issued a declaration that it was not exempted development, and gave several reasons for their conclusion. The validity of this decision was never questioned in judicial review proceedings.

**83.** Hogan J. concluded that he had no jurisdiction to determine the question of exempted development in circumstances where the planning authority had already refused to grant a s. 5

declaration that the development was exempted development. He felt that in strictness, therefore, the planning authority should be entitled to the appropriate s. 160 order. He nevertheless concluded that in the particular circumstances of the case it would be unfair to allow the matter to rest there, having regard to the reasons given by the Council for the decision. He stated that while it was true that the actual validity of the decision was not under challenge, yet one could not help thinking that the reasons given for the decision were not altogether satisfactory.

**84.** Hogan J. went on to examine the reasons given for the decision and stated that, unfortunately, the basis for the s. 5 decision to refuse to grant exempted status could not readily be followed or understood by reason of the resort to vague generalities of language. He then concluded as follows:

> "18. This, of course, is not to suggest that the Council were wrong to refuse to grant the s. 5 declaration, as I express no view at all on this topic. It is rather to say that it would be quite unfair to shut out Mr. Fortune at this stage on the basis of a decision which on its face plainly fails to meet the requirements of administrative fairness specified in *Mallak* and the basis of which decision cannot easily be ascertained, even if that decision was never challenged at the relevant time by way of judicial review.
>
> 19. In these special circumstances I propose to adjourn the making of any order under s. 160 to enable Mr. Fortune to make a fresh application for exemption under s. 5 should he be minded to do so. I stress that the making of any such application is entirely a matter for him. When the Council has ruled on the new s. 5 application (should one be made), then the finalisation of any possible orders under s. 160 can be reviewed at that point."

**85.** In the present case the trial judge suggested that "a similar approach" to the approach in *Mone* had been taken by Hogan J. who "declined to rely on a s. 5 determination",

notwithstanding that the actual validity of the s. 5 determination had not been challenged. I do not agree that the two approaches can be viewed as entirely similar. In *Mone* the Court treated an earlier planning decision as invalid, notwithstanding the absence of any judicial review challenge, as required by s. 50. In *Fortune (No. 3*), while Hogan J. did use some language which chimes with the *Mone* approach ("a decision which on its face plainly fails to meet the requirements of administrative fairness … even if that decision was never challenged at the relevant time by way of judicial review"), and while taken on its own and at its height this language could be viewed as straying into the territory of questioning the validity of the unchallenged s. 5 decision, ultimately he simply exercised his discretion to adjourn the making of any order under s. 160 to enable Mr. Fortune to make a fresh request to the planning authority under s. 5 (assuming the planning authority had jurisdiction to entertain same: see *Narcanon Trust v. An Bord Pleanála* [2021] IECA 307). In my opinion Hogan J. did not go quite as far as treating the earlier unchallenged planning decision as invalid.

**86.** In the light of this analysis, again I do not think that *Fortune (No. 3)* is authority for any general proposition, such as that suggested by the trial judge at para. 140 of his judgment, to the effect that reliance on s. 50 is not available in circumstances where a decision is bad on its face and/or exhibits an error of law. For all of the reasons set out above I do not believe that any such proposition is correct.

*EU Law and domestic time limits*

**87.** Secondly, it is necessary to consider the alternative reason given by Simons J. for the disapplication of s. 50, *i.e.* that application of s. 50 cannot be reconciled with the requirements of the EIA Directive and the manner in which domestic time limits have been treated of in the case law of the CJEU.

**88.** In my opinion the manner in which domestic time limits are treated by the CJEU has been clearly set out in cases such as Case C-348/15 *Stadt Wiener Neustadt*. In that case the CJEU held as follows:

> "40. … It is indeed settled case-law of the Court that, in the absence of EU rules in the field, it is for the national legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, provided that such rules are not less favourable than those governing similar national actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness).
>
> 41. The Court also considers that it is compatible with EU law to lay down reasonable time limits for bringing proceedings in the interests of legal certainty, which protects both the individual and the administrative authority concerned. In particular, it finds that such time limits are not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (see, to that effect, judgments of 15 April 2010, *Barth*, C-542/08, EU:C:2010:193, paragraph 28, and of 16 January 2014, *Pohl*, C-429/12, EU:C:2014:12, paragraph 29)."

**89.** Applying those principles to s. 50 of the 2000 Act, in my opinion the time limit rules in s. 50 governing a challenge to the validity of a planning decision based on the requirements of the EIA Directive comply with both the principle of equivalence and the principle of effectiveness, and I agree with the findings of the Court below in that regard. Such rules, including in particular the rule allowing for an extension of the eight week period, are not less favourable than those governing similar national actions. Such rules do not render practically

impossible or excessively difficult the exercise of rights conferred by EU law, considering in particular again the potential for an extension of time.

**90.** On the facts of the present case, it seems to me very difficult for the appellants to argue that the time limits in s. 50 make it in practice impossible or excessively difficult to exercise rights conferred by the EIA Directive, in circumstances where they have never sought to apply for judicial review of the compliance decision and have never tested the operation of the time limit rules.

**91.** The appellants submitted that a party seeking such an extension of time faces an additional hurdle which does not arise in the case of timely and appropriate notification of a planning decision, namely the effect of an extension on third party rights, and this they submitted cannot be regarded as complying with the principle of effectiveness. Again, however, in my opinion it is not possible to accept this submission where the appellants did not seek an extension of time and did not test the possible weight which a Court might give to any effect on third party rights in deciding whether to extend time.

**92.** For completeness, it is necessary to address the appellants' reliance on *Derrybrien (No. 2)*, a decision also cited by the trial judge in support of his approach to s. 50. In Case C-215/06 *Commission v Ireland* ("*Derrybrien (No. 1)*") the CJEU held that Ireland had failed to fulfil its obligations under the EIA Directive, *inter alia* by failing to adopt all measures necessary to ensure that the development consent given for wind farm developments and associated works at Derrybrien, County Galway were preceded by an assessment with regard to their environmental effects.

**93.** The Commission then brought the second action on the basis that the first judgment had still not been complied with. In this action Ireland contended that the principles of legal certainty and of the protection of legitimate expectations precluded the revocation of an administrative decision, such as the consents at issue in the case, which because of the expiry

of the period for bringing an action, could no longer be the subject of direct application to a court and had, therefore, become final. The CJEU rejected Ireland's arguments and stated as follows:

> "94. In any event, Ireland simply states that, after the expiry of the period of 2 months, or 8 weeks set by the [2000 Act] respectively, the consents at issue could no longer be the subject of a direct application to a court and cannot be called in question by the national authorities.
>
> 95. By its argument, Ireland fails to have regard, however, to the case law of the Court referred to … above, according to which projects in respect of which the consent can no longer be subject to challenge before the courts, because the time limit for bringing proceedings laid down in national legislation has expired, cannot be purely and simply deemed to be lawfully authorised as regards the obligation to assess their effects on the environment."

**94.** I agree with the respondent's submission that the only discussion of time limits in *Derrybrien (No. 2)* relates to whether Ireland could rely on the time limits contained in s. 50 in defence to infringement proceedings brought by the Commission. The CJEU did not alter the general propositions regarding the compatibility of reasonable national time limits with EU law, as set out in cases such as *Stadt Weiner Neustadt*.

**95.** I also agree with the conclusion of Donnelly J. in the Court below where she stated as follows (at para. 138 of her judgment):

> "There is nothing in the *Derrybrien (No. 2)* decision or in the decisions cited therein that prevents a Member State from exercising its own procedural autonomy in matters concerning the Directive. Provided that the principles of equivalence and effectiveness are complied with, a Member State is entitled to provide particular procedural routes

that a person challenging a development or development consent must take. Section 50(2) applies to both issues of pure domestic law and to matters of EU Law."

***The third question: The scope and effect of the section 5 decision***

**96.** The third issue relates to the proper construction of the s. 5 decision made by the Board, and whether it includes a determination of unauthorised development, and if so whether any such determination is binding on the High Court on a subsequent s. 160 application.

**97.** The salient part of s. 5 of the 2000 Act provides as follows:

"(4) … a planning authority may … refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board.

(5) The details … of a decision made by the Board on a referral under this section shall be entered in the register.

(6)(a) The Board shall keep a record of any decision made by it on a referral under this section and the main reasons and considerations on which its decision is based and shall make it available for purchase and inspection."

**98.** In my opinion it is clear from the plain language in s. 5(4) that the jurisdiction of the Board is to make a "decision" on two possible questions which may be the subject of a referral by the planning authority, *i.e.* firstly, whether something is or is not development, and secondly, whether something is or is not exempted development. This jurisdiction is identical in scope to the jurisdiction vested in the planning authority to make a "declaration" on the same two possible questions, upon a request from any person, under s. 5(1). I note also that s. 5(6)(a) appears to draw an express distinction between the actual "decision" and "the main reasons and considerations" on which the actual decision is based.

**99.** The relevant text of the s. 5 decision has been set out at para. 10 above. The statement in dispute is paragraph (b) of the second last part of the document, *i.e.* whereas An Bord

Pleanála has concluded that "(b) the alterations to turbines, including the length of the rotor arms/blades, do not come within the scope of the permission granted" ("the paragraph (b) conclusion"). It can be noted, on a literal reading of the document, that this conclusion does not form part of the last part of the document, which sets out what the Board actually decided as to development and exempted development "in exercise of the powers conferred on it by s. 5(4) of the 2000 Act." Instead the paragraph (b) conclusion appears to form part of the "reasons and considerations" on which the actual decision is based, and this is borne out by the wording at the start of the last part, *i.e.* "**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5(4) of the 2000 Act, hereby decides" (*etc*).

**100.** The trial judge, however, held that the Board's paragraph (b) conclusion amounted to a finding of unauthorised development which formed part of the s. 5 decision made by the Board (and which was binding on the respondent in the subsequent s. 160 proceedings). He felt that the narrower interpretation which the Court was invited to give to the s. 5 decision was "entirely artificial", and that it would require the Court to disregard large portions of the text of the decision, and also to disregard the underlying Inspector's report. Such an artificial approach would be contrary to the well-established principles governing the interpretation of planning decisions, and he cited in support the case of *In Re XJS Investments Limited* [1986] IR 750 ("*XJS*").

**101.** The Court of Appeal disagreed with the trial judge, and held that the developer was correct that An Bord Pleanála was not entitled to make a determination that there had been unauthorised development. The only role of An Bord Pleanála was to determine whether there was development or exempted development, and in effect that is what it determined. Unlike the situation where the question of whether there had been a material change of use arises (where a material change of use amounts to development), the question of whether the development comes within the scope of the planning permission, *i.e.* whether it was authorised,

was not an issue that the planning bodies have jurisdiction to decide. In those circumstances, the High Court was not bound to follow that particular aspect of the conclusions reached by An Bord Pleanála "on its way to determining" that this was development and not exempted development.

**102.** I agree with the Court below that the trial judge erred in his interpretation of the s. 5 decision for the following reasons.

**103.** Firstly, it is necessary to consider the finding made by Simons J. that the narrower interpretation is an artificial approach which would be contrary to the principles governing the interpretation of planning decisions set out in *XJS*. In that case the Supreme Court, *per* McCarthy J., set out certain principles in respect of the true construction of planning documents as follows (at 756):

> "(a) To state the obvious, they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draughtsmen and inviting the accepted canons of construction applicable to such material.
>
> (b) They are to be construed in their ordinary meaning as it would be understood by members of the public, without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicates some other meaning."

**104.** Applying those principles to the true construction of the s. 5 decision, it seems to me that the ordinary meaning of the document as it would be understood by members of the public without legal training is more likely to be the literal meaning as set out in para. 99 above. In other words, the ordinary meaning would be understood on the basis of the actual words used in the text, *i.e.* understood on the basis that the Board actually "decides" only what it says it decides at the last part of the document beginning "**NOW THEREFORE**" i.e., that the deviation in the diameter is development and is not exempted development. The conclusion at paragraph (b) in the part above would be understood as a reason for the actual decision, but not

as part of what the Board actually 'decides'. It must be acknowledged, however, that application of these principles of construction is more difficult and uncertain in the present case given the ambiguity in the text of the decision, between what the Board has "concluded" and what it actually "decides".

**105.** Secondly, given that ambiguity, it seems to me reasonable and appropriate that the Court should favour the interpretation which means that the s. 5 decision would be a valid exercise of the jurisdiction conferred upon the Board by the Oireachtas, *i.e.* confined to a decision as to development and exempted development and not extending to any determination of unauthorised development.

**106.** As stated at para. 98 above, that is the extent of the jurisdiction which appears to flow clearly from a plain reading of s. 5(4) of the 2000 Act. The concepts of "development" and "exempted development" and "unauthorised development" are very distinct and separate concepts under the planning code, and the Oireachtas chose to include the first two concepts within the scope of s. 5, but not the third concept.

**107.** In my opinion this view of the s. 5 jurisdiction is fully supported by the authorities. In *Roadstone*, Finlay Geoghegan J. stated as follows as regards the Board's jurisdiction: -

> "21. The respondent has no jurisdiction on a reference under s. 5(4) of the Act to determine what is or is not "unauthorised development". It many only determine what is or is not "development". Hence, a planning authority, such as the notice party, cannot refer a question under s. 5(4) as to whether the works or proposed works or use constitutes unauthorised works or use and hence unauthorised development. Determination of what is or is not "unauthorised development" will most likely be determined by the courts where a dispute arises on an application under s. 160 of the Act."

**108.** A similar view has been taken by other judges of the High Court, including by Hogan J. in *Heatons*, who stated that the question as to whether a particular use is unauthorised is not a function of the Board under s. 5(4). These authorities are consistent with *obiter* comments made by McKechnie J. in *Meath County Council v. Murray* [2017] IESC 25, at para. 56 of his judgment.

**109.** The appellants, however, rely on certain case law which confirms that An Bord Pleanála does have jurisdiction to interpret a planning permission in the context of a s. 5 decision, and which the trial judge relied upon in holding that the Board could make a finding of unauthorised development under s. 5. In *Grianán an Aileach Interpretative Centre Limited v. Donegal County Council* [2004] 2 IR 625 ("*Grianán an Aileach")* the plaintiff sought various declarations from the High Court regarding the planning status of their premises in County Donegal, including inter alia a declaration as to whether certain proposed activities fell within the range of permissible uses as permitted by an existing grant of planning permission. As noted in the Court below, the decision in *Grianán an Aileach* was not directly concerned with s. 5 at all, but concerned the general jurisdiction of the High Court to make declarations as to the interpretation of a planning permission. In any event, Keane C.J. stated as follows (at 636):

> "The reasoning adopted in both *McMahon v. Dublin Corporation* and *Palmerlane v. An Bord Pleanála* which, I am satisfied, is correct in law, would indicate that, in such circumstances, a question as to whether the proposed uses constitute a "development" which is not authorised by the planning permission is one which may be determined under the Act of 2000 either by the planning authority or An Bord Pleanála."

**110.** It is interesting to note that Hogan J. cited the above observation of Keane C.J. in *Heatons*, yet did so later in his judgment after expressly agreeing with the finding of Finlay Geoghegan J. in *Roadstone* that the questions as to whether a particular use is unauthorised is not a function of the Board under s. 5(4) of the 2000 Act. It is clear, from para. 38 of his

judgment, that Hogan J. felt that the Board on a s. 5 referral could consider a planning permission, and whether use of premises was in a manner which breached the terms of that planning permission, but in the context of whether a particular use could amount to development for the purposes of s. 3 of the 2000 Act, and not in the context of making any determination of unauthorised development.

**111.** I therefore agree with the reasoning of Donnelly J. in the Court below, that unlike the situation where the question of whether there has been a material change of use arises (where a material change of use amounts to development), the question of whether the development comes within the scope of the planning permission, *i.e.* whether it was authorised, is not an issue that the planning bodies have jurisdiction to decide. I would then construe the s. 5 decision in light of that absence of jurisdiction,

**112.** Thirdly, in rejecting the narrower interpretation of the s. 5 decision, the trial judge stated that this would require the Court to disregard the underlying Inspector's report. The rationale for a decision of the Board is to be found by reading the Board's decision in conjunction with the underlying Inspector's report: see *Connolly v. An Bord Pleanála* [2018] IESC 31. On the facts of the present case, Simons J. felt that it was obvious the Board had followed its Inspector's recommendation, and it adopted the same approach as it had in respect of an earlier windfarm case.

**113.** I cannot, with respect, agree with this reliance on the Inspector's report, in the light of a consideration of that report read as a whole. At para. 8.5 of her report the Inspector expressly stated that the purpose of s. 5 "is not to determine whether something is unauthorised development". She noted how this proposition was confirmed by the High Court in *Heatons*, and she cited a passage from the judgment of Hogan J. in that case, where he cited with approval the judgment of Finlay Geoghegan J. in *Roadstone* with her clear ruling to that effect. Notwithstanding same, but notably under the heading "Is or is not exempted development" (as

opposed to any separate heading of "Unauthorised development"), she then referred to a previous decision of the Board in a similar s. 5 referral in relation to the Kilvinane wind farm, and stated that "a precedent might be considered as having been set". In the light of that precedent she stated that it was possible to "conclude" in this case that the increased length of the rotor blade did not come within the scope of the planning permission granted, despite this possible conclusion appearing to contradict the scope of the s. 5 jurisdiction as understood and acknowledged by her.

**114.** The Inspector went on to recommend that the Board should decide this referral in accordance with her following draft order, which was in almost identical terms to the ultimate order made by the Board. Notwithstanding the apparent contradiction mentioned above, she recommended the same para. (b) conclusion in the second last part of her draft order, but notably recommended the actual decision in the last part, which was limited to the Board actually deciding as to development and exempted development, but not actually deciding as to unauthorised development. This limitation can hardly be seen as surprising, given what she had stated earlier as to jurisdiction.

**115.** In the light of the Inspector's clear statement as to the scope of the s. 5 jurisdiction, and the text of her recommended draft order, I cannot agree that her report can be read as including a recommendation that the Board make a determination of unauthorised development, and on the contrary when read as a whole her report, in my opinion, supports the narrower interpretation of the Board's actual decision, as set out above. Overall she appeared to view the paragraph (b) conclusion as part of the "reasons and considerations" on which the decision as to exempted development was to be based, as *per* s.5(6)(a) of the 2000 Act, rather than as part of the actual decision.

**116.** In the light of my conclusion on the proper construction of the s. 5 decision, it is not necessary for me to decide whether any purported decision by the Board as to unauthorised

development would have been binding on the High Court on a subsequent s. 160 application, notwithstanding the lack of any jurisdiction to make such a decision, by virtue of s. 150.

**Conclusion**

**117.** My conclusions on the three questions arising are therefore as follows:

(i) The increase in rotor diameter was agreed in writing with the planning authority pursuant to condition 3 of the 2011 permission.

(ii) The appellants cannot now challenge the validity of any such a decision or act by the planning authority on EU law grounds, in the light of s. 50 of the 2000 Act.

(iii) The s. 5 decision should be construed as not extending to a determination of unauthorised development, and therefore it is not necessary for me to decide whether any such purported determination would have been binding on the High Court on a subsequent s. 160 application.

**118.** I would therefore dismiss the appeal.