THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 217
Record No.: 2019/511

Costello J.
Donnelly J.
Collins J.

BETWEEN/

RONALD KRIKKE AND OTHERS

PLAINTIFF/APPELLANT

-AND –

BARRANAFADDOCK SUSTAINABLE ELECTRICITY LIMITED

DEFENDANT/RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 30th day of July, 2021

I. Introduction

1. This is an appeal against the decision of the High Court (Simons J.) to make an order under s. 160 of the Planning and Development Act, 2000 as amended (hereinafter "the Act of 2000") restraining the operation of certain wind turbines. Section 160(1) provides that where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the court considers necessary to ensure, as appropriate, *inter alia*, that the unauthorised development is not carried out or continued or that it is carried out in accordance with the planning permission or any condition attached thereto.

2. Barranafaddock Sustainable Electricity Limited (hereinafter, "the developer") operates a wind farm in the townland of Ballyduff, County Waterford. The wind farm comprises twelve turbines in associated development. I will sketch some of the salient features of the planning history; a more complete picture is set out in the judgment of Simons J. found at [2019] IEHC 825. Three of those turbines were constructed in accordance with the grant of planning permission made under Register Ref. 13/32 ("PD 13/32"). Nine turbines were constructed in purported compliance with the grant of planning permission made under Register Ref. 11/400 ("PD 11/400"). The order of the High Court concerns these nine turbines. The respondents to this appeal (hereinafter, "the applicants") are all people living within the immediate vicinity of the wind farm.

3. At issue in the case is the authorisation of the turbines under PD 11/400. That grant authorised the erection of wind turbines of particular scale and dimensions. PD 11/400 was in fact a modification of an earlier grant of planning permission ("PD 04/1559") which permitted eleven wind turbines to be built with eight wind turbines having a hub height of 80 metres and a rotor blade diameter of 80 metres and a further three wind turbines with a hub height of 60 metres and rotor blade diameter of 80 metres. The development proposed in PD 04/1559 was accompanied by the required mandatory environmental impact assessment (EIA). That permission had specified an exact hub height and blade diameter. No tip height (being the highest point that the turbine will reach to include the rotor blades) had been mentioned, though it was easily ascertained from the hub height and the rotor blade dimension. Under the modification by PD 11/400, the hub height of the three 60 metre turbines was increased to 80 metres and the blade length of all eleven turbines was to be increased from 40 to 45 metres (the equivalent of a rotor diameter of 90 metres). No maximum tip height of the turbines was specified, but by adding the rotor length to the hub height the maximum tip height could have been no more than 125 metres. PD 11/400 was granted subject to twenty conditions, the most relevant of which were conditions 3,7 and 10.

4. Condition No. 7 of PD 11/400 established the limits of shadow flicker permitted. Shadow flicker is produced when the rotating blades pass between the observer and the sun. Condition No. 10 regulated the extent of the noise levels permitted. A particular point of contention is Condition No. 3. Condition No. 3 stipulated that "prior to the commencement of development, details of the proposed turbines and associated structures including design, height and colour shall be submitted to and agreed in writing with the Planning Authority…"

5. Following a compliance process, described in more detail below, with the planning authority Waterford City and County Council (WCCC), the wind turbines actually constructed ("the "as built" turbines") differed in scale and dimension to that stated in the planning permission. Only nine turbines, instead of eleven turbines were constructed under PD 11/400. The hub height was reduced by 6.5 metres to 73.5 metres. The rotor blade diameter increased from 90 metres to 103 metres, an increase of about 14.4%. The overall tip height did not increase. The result of this is that the swept path of the blade area (the area of the circle swept by the rotor blades: πr^2) increased by 31%. Each turbine is now a more squat structure but with the turbine blades longer and therefore reaching closer to the ground.

6. As part of the compliance process, on the 21st October, 2013, the planners acting on behalf of the developer Fehily Timoney & Company (FTC), met with WCCC the planning authority. The first issue considered was the operational life of the project. It was indicated that a modification of the planning permission was required to extend the life of the project and this was subsequently granted. The notes of the meeting indicate that the project was under significant time pressure to meet the deadline for completion and if a planning application was required it could jeopardise the entire project. The reduction in the number of the turbines was also discussed and WCCC confirmed that they would not be issuing enforcement orders to construct omitted turbines. Furthermore, there is a reference to the

preferred turbines and the one which they are choosing which is "GE model and the turbine height will not exceed the permitted height." The WCCC representative raised concerns that the noise profile of the selected turbines should be equivalent or less than the "permitted" arrangement.

7. On the 6th November 2013, FTC wrote to WCCC enclosing their compliance submissions in respect of PD 11/400 and PD 13/32 including a Phase One Planning Compliance Report regarding planning 11/400 ("the compliance report"). In particular with respect to Condition No. 3, it was confirmed that the developer proposed to install the GE 2.85/103 Series Wind Turbine. The technical details of the selected turbine were said to be included in Appendix B of the compliance report. The compliance report stated of Appendix B: "The document summarizes the technical description and specification of the GE 2X Series wind turbines and includes a number of available turbine variants. The 2X Series are three bladed, upwind, horizontal-axis wind turbines with a turbine rotor and nacelle mounted on top of a tubular tower." Under the heading, "Height", it was stated that: "The preferred turbine is installed on a tapered tubular tower of hub height 73.5m with a maximum tip height of 125m. Schematic details of the GE turbine arrangement proposed are included in Appendix B."

8. Among the complaints made by the applicants is that this information failed to indicate a particular turbine type that was to be erected; instead it grouped together a number of turbines. No particular turbine within the document enclosed had a hub height of 73.5 metres. A main complaint however was that on its face, the information contained in the report did not make it clear that the diameter of the rotor blades was to be extended from 90 metres to 103 meters. On the other hand, the schematic enclosed with the compliance submission indicated a turbine with a hub height indicated of 73.5m, a maximum tip height of 125m and *a* maximum *rotor diameter of 103m*.

9. WCCC, on the 13th December 2013, sent a letter ("the compliance decision") to the appellant in which it dealt with each aspect of the compliance report. I use the phrase "decision" in "compliance decision" merely as a shorthand to indicate that this was what the decision purported to be on its face. Under Condition No. 3 (which dealt with the detail of the 0proposed turbines and associated structures) and Condition No. 7 (dealing with the issue of shadow flicker) the decision stated: "Noted and Agreed". Under Condition No. 10 (dealing with the issue of noise) it was stated: "Noted".

10. Several years after expressing agreement with the compliance report, in response to complaints from these applicants and other residents, WCCC , on the 23rd May 2018, made a referral to An Bord Pleanála (hereinafter referred to as "An Bord Pleanála" or "the Board") seeking declarations under s. 5 of the Act of 2000 as to whether the deviation from the permitted blade length of 45m (90m diameter) to the "as built" blade length of 51.5m (103 diameter) is or is not development and is or is not exempted development as relating to PD 11/400. In the referral, WCCC said that the deviations were brought to the attention of the planning authority by residents over the last 2 years. The letter stated that in respect of one turbine it was now within 2 rotor diameter lengths of the land boundary of one resident

without written consent and not in compliance with a section of the Wind Energy Development Guidelines, 2006. By way of mitigation, according to the referral, the developer submitted a report which confirms that the increased blade size does not change the fundamental matters such as "Noise, Shadow Flicker, Avian Monitoring". Various submissions, reports and correspondence were enclosed.

11. On foot of that application brought by WCCC, and subsequent to an Inspector's Report, An Bord Pleanála decided that "the deviation from the permitted blade length of 45m (90m diameter) to the constructed blade length of 51.5m (103m diameter) as relating to PD 11/400, […] is development and is not exempted development." Furthermore, in the body of its decision, An Bord Pleanála stated that the alteration to the turbines, including the length of the rotor blades does not come within the scope of the planning permission.

12. The trial judge concluded that the s. 5 declaration precluded the developer from reagitating the argument that the "as built" turbines are authorised by the 2011 planning permission. In circumstances where the developer did not challenge the declaration that the deviation in blade length is development, the developer was estopped from seeking to re-open the findings of An Bord Pleanála in these proceedings. The trial judge went on to hold that PD 11/400 did not authorise the erection of the "as built" turbines. He held that where the wind farm is subject to the requirements of the EIA Directive, the proposed increase in rotor diameter constituted a "change" or "extension" of a permitted development and could only have been lawfully authorised by way of the making of an application for planning permission.

13. In relation to the compliance decision, the trial judge held that it did not have the effect of providing authorisation for the "change" or "extension". He held that there was no jurisdiction in any event to approve such a change or extension. He held that the developer should have the opportunity to regularise the planning status of the wind turbines. He held therefore that it would be inappropriate to make an order requiring the immediate removal of the wind turbines and he permitted the developer time to seek to regularise the planning status of the lands. He made an order restraining the operation of the wind turbines *pro tem* while permitting the developer to apply on notice to vacate the order in the event that An Bord Pleanála made a decision to grant leave to apply for substitute consent.

14. In this appeal, the applicants rely heavily upon the s. 5 declaration to say the developer is precluded from arguing that the "as built" turbines comply with PD 11/400. The developer disputes the effect of the s. 5 declaration and instead seeks to rely on the earlier decision of WCCC to "agree" points of detail in respect of the wind turbines. Should the developer not be permitted to rely upon the "agreement", the developer submits that the change or extension was an immaterial variation/deviation from the planning permission, but in any event the developer submits that the discretion of the Court should have been exercised not to make the restraining order that it made.

II. The issues in this appeal

15. As identified by the developer, the issues arising on the appeal are: -

(i) Whether the decision of An Bord Pleanála on the s. 5 reference conclusively determined the question of whether the "as built" turbines constitute unauthorised development.

(ii) Whether the applicants are precluded from contending that the change in rotor diameter of the turbines constitutes unauthorised development in circumstances where this was agreed and approved by the planning authority on foot of the compliance submission submitted by the respondent.

(iii) Subject to the answer to issue (ii), whether the change in the rotor diameter of the as built turbines constituted a material or immaterial variation from what was permitted by PD 11/400.

(iv) Whether, in the event that the Court concludes that the change in the dimensions of the turbines constitutes unauthorised development, the Court should make an order restraining the operation of the wind farm pending the outcome of the application for substitute consent to An Bord Pleanála.

16. From the applicants' perspective, the s. 5 determination of the Board is dispositive of the issue concerning unauthorised development and was so found by the trial judge. As the finding that the s. 5 determination was a form of issue estoppel precluding the developer from arguing to the contrary, I propose to deal with the issues in the order as set out by the developer in so far as the issues arise.

17. Prior to that I am of the view that there is a preliminary issue to be considered and that is whether the application for substitute consent which the developer made in the aftermath of the s. 5 determination precludes them from arguing that there was no unauthorised development.

III. Preliminary Issue:

What is the effect on the s. 160 proceedings of the application by the developer for substitute consent?

18. The modified constructed development became the subject matter of an application by the developer for leave to apply for substitute consent. Although the applicants in affidavits, in particular that of the planning expert Ann Mulcrone, refer to that as an acknowledgement that the development is unauthorised, I do not understand the applicants to be submitting that there is a type of estoppel operating to prevent the respondents making the case in the s. 160 proceedings that no such permission is required. In light of the decision of the Supreme Court in *Fingal County Council v. William P. Keeling & Sons Ltd.* [2005] 2 I.R. 108, there would appear to be no basis for contending that the application for substitute consent bars the developer from contesting the case.

19. In respect of the application for substitute consent amounting to an evidential acknowledgement, Keith Mangan, director of the developer, avers that the application for leave to apply for substitute consent was made as an abundance of caution. The trial judge found at para. 155 of his judgment that the conduct of the developer in relying on Condition No. 3 as the basis for changing the turbine type was a genuine mistake. That was in the

context of considering the exercise of his discretion concerning the making of an order under s. 160 and not directly related to the issue at hand. It is however of assistance in that it establishes that in its dealings with the planning authorities the developer was acting in good faith. I am not therefore prepared to find that the application for leave to apply for substitute consent has any relevance to the assessment of the issues before this court.

IV. Issue No. 1

Does the decision of An Bord Pleanála on the s. 5 Declaration conclusively determine the question of whether the wind turbines "as built" constitute unauthorised development?

20. The relevant provisions of s. 5 of the Act of 2000 are: -

> "(1) If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.
>
> (2)(*a*) Subject to *paragraphs (b) and (ba)*, a planning authority shall issue the declaration on the question that has arisen and the main reasons and considerations on which its decision is based to the person who made the request under *subsection (1)*, and, where appropriate, the owner and occupier of the land in question, within 4 weeks of the receipt of the request.
>
> (*b*) […]
>
> (*ba*) […]
>
> (*c*) […]
>
> (3)(*a*) Where a declaration is issued under this section, any person issued with a declaration under *subsection (2)(a)* may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration.
>
> (*b*) […]
>
> (4) Notwithstanding *subsection (1)*, a planning authority may, on payment to the Board of such fee as may be prescribed, 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."

21. Within the Act of 2000, development has a particular meaning. Section 3 defines development as:

> "…except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land."

Section 4(1) provides for a list of what is exempted development. For the purposes of this appeal it is unnecessary to consider this further.

22. Section 2 defines unauthorised development as "in relation to land, the carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use." The phrases "unauthorised use" and "unauthorised works" also have specific definitions in s. 2 of the Act of 2000. They mean respectively, in relation to land, use commenced on or after the 1st October, 1964, being a use which is a material change in use of any structure or other land and being development or works on, in, over or under land commenced on or after the 1st October, 1964 *other than*:

> "(*a*) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or
>
> (*b*) development which is the subject of a permission granted under Part IV of the Act of 1963 or under *section 34, 37G* or *37N* of this Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject;"

23. At its most simple, the first matter arising under this issue is whether the reference in s. 5 of the Act to development includes unauthorised development.

The High Court Judgment

24. In a carefully structured judgment, Simons J. set out the legislative history of s. 5 of the Act of 2000 and referred to the differences between it and its predecessor s. 5 of the Local Government (Planning and Development Act), 1963 (hereinafter, "the Act of 1963"). He highlighted the importance of the Supreme Court decision in *Grianán an Aileach Interpretative Centre Co. Limited v. Donegal County Counci*l [2004] 2 I.R. 625 ("*Grianán an Aileach*"). Simons J. referred to the case law that has developed since that decision and at para. 95 set out what he considered to be the summary of the legal principles regarding s. 5. This summary is as follows: -

> "*(i). The fact that both the High Court and An Bord Pleanála have jurisdiction, in certain circumstances, to determine whether a particular act is "development" or "exempted development" presents a potential risk of overlapping and unworkable jurisdictions.*
>
> *(ii). In order to reduce this risk, the Supreme Court has held that the High Court's inherent jurisdiction to make declarations as to the planning status of lands is ousted. More specifically, the High Court's jurisdiction to adjudicate upon the proper construction of a planning permission is largely confined to enforcement proceedings. (It might also arise in the context of contractual or conveyancing disputes). The Supreme Court has not yet had to address the specific question of whether the High Court, in hearing enforcement proceedings, is bound by an earlier (unchallenged) Section 5 declaration.*

(iii). The Court of Appeal has held that an (unchallenged) Section 5 declaration to the effect that certain works are "exempted development" is binding on the parties in subsequent enforcement proceedings. The Court of Appeal has not yet had to address the question of the legal status of a Section 5 declaration to the effect that certain works are not "exempted development" or to the effect that certain works do not come within the scope of an existing planning permission. Put otherwise, the Court of Appeal has not yet ruled on whether a declaration which is adverse to a respondent is binding.

(iv). The High Court, in at least three judgments, has held that Section 5 declarations to the effect that planning permission is required for certain acts are, in principle, binding on the parties in enforcement proceedings.

(v). Certain judgments have expressed reservations as to the jurisdiction of An Bord Pleanála to make declarations to the effect that a particular act is 'unauthorised development'.

(vi). The principal ground for finding that a Section 5 declaration is binding is in order to reduce the risk of overlapping and unworkable jurisdictions. This would appear to involve a form of issue estoppel. A secondary ground for the finding is that it might offend against Section 50 of the PDA 2000 to allow a party to make a collateral challenge to a Section 5 declaration in the context of subsequent enforcement proceedings.

(vii). The Section 5 jurisdiction extends to questions of interpretation of planning permission.

(viii). Whereas a Section 5 declaration may be dispositive of many of the issues in enforcement proceedings, there remain a number of matters which fall outwith the Section 5 jurisdiction. In particular, An Bord Pleanála has no function in determining whether the development being enforced against has the benefit of the 'seven-year rule', i.e. whether the proceedings are statute barred by reference to the seven-year limitation period provided for under Part VIII of the PDA 2000. It also follows by analogy with the judgment in Cleary Compost that an earlier Section 5 declaration will not be binding if there has been a change in circumstances in the interim." (Emphasis in original).

25. The trial judge went on to hold that the current state of the authorities appeared to be that, at the very least, a s. 5 declaration must be given significant weight in subsequent enforcement proceedings. Applying the principles to the facts of the present case, Simons J. then concluded that the s. 5 declaration precluded the developer from reagitating the argument that the "as-built" wind turbines are authorised by PD 11/400. The trial judge held that to allow the developer to rerun the same arguments before the court as he had done before An Bord Pleanála would give rise to precisely the type of overlapping and unworkable jurisdictions which he said that the judgments discussed above were intended to avoid. He stated that were the court to embark upon a de novo consideration of the

matters and to come to a contrary conclusion to that of An Bord Pleanála, it would bring about the very mischief which the case law was intended to avoid.

Analysis and Decision

26. The developer submits that under s. 5 the Board was not determining whether the development was or was not unauthorised development and it is therefore not precluded from presenting arguments as to the meaning and scope of the planning permission in the s. 160 enforcement proceedings. In answer to the appeal, counsel for the applicants relies on the conclusions of the trial judge that the s. 5 declaration precluded the developer for reagitating the argument that the "as built" wind turbines are authorised under PD 11/400. The trial judge held that the effect of the s. 5 declaration is that it gives rise to a form of issue estoppel between the parties and this meant that in s. 160 proceedings an applicant could rely upon that declaration in support of their application (subject to considerations of fairness).

27. Counsel for the applicants places considerable emphasis on the decision of the Supreme Court in *Grianán an Aileach*. Counsel relies upon the finding that, in the words of Henchy J. in *Tormey v. Ireland* [1985] I.R. 289 (and applied to tribunals and other bodies in *Criminal Assets Bureau v. Hunt* [2003] 2 I.R. 168), that continued existence on the part of the High Court of a general jurisdiction to adjudicate upon a proper construction of a planning permission would create a danger of "overlapping and unworkable" jurisdictions. The Supreme Court, in the applicants' submission, held that the making of a declaration under the general jurisdiction of the High Court might have the result that neither An Bord Pleanála nor the local planning authority would thereafter be in a position to exercise a statutory jurisdiction under s. 5 without finding itself in conflict with that earlier determination by the High Court. The Supreme Court found that the existence of a s. 5 referral procedure ousted the High Court jurisdiction to grant free standing declarations in respect of planning matters. Counsel submits that this was a significant limitation on the part of the court to revisit the findings of a s. 5 determination.

28. Counsel for the applicants relies upon the following *dicta* of Keane CJ. in *Grianán an Aileach* at p. 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 Pleanala.*"

29. In my view, it is of relevance that *Grianán an Aileach* did not concern an application under s. 160 of the Act of 2000. Instead, it was an application to the High Court to exercise its general (*i.e.* non-statutory) jurisdiction to make certain findings concerning development. The question addressed by the Supreme Court was whether the High Court continued to have a general jurisdiction. Section 5 of the Act of 2000 was referred to in the course of the judgment. Having referred to his decision in *Criminal Assets Bureau v. Hunt* which

applied the principle set out in *Tormey v. Ireland* to tribunals and bodies other than courts, Keane CJ. stated at p. 638 :-

> "*Thus, in the present case, if the jurisdiction of the planning authority or An Bord Pleanala under s. 5 were invoked and they were invited to determine whether the uses in controversy were within the uses contemplated by the planning permission or constituted a material change of use for which a new planning permission would be required, either of those bodies might find itself in a position where it could not exercise its statutory jurisdiction without finding itself in conflict with a determination by the High Court. No doubt a person carrying out a development which he claims is not a material change of use is not obliged to refer the question to the planning authority or An Bord Pleanála and may resist enforcement proceedings subsequently brought against him by the planning authority on the ground that permission was not required. In that event, if the enforcement proceedings are brought in the High Court, that court may undoubtedly find itself having to determine whether there has been a material change of use or whether a development is sanctioned by an existing planning permission. […] But for the High Court to determine an issue of that nature, as though it were the planning authority or An Bord Pleanála, in proceedings such as the present would seem to me to create the danger of overlapping and unworkable jurisdictions referred to by Henchy J.*" (*Emphasis added)*

30. The decision in *Grianán an Aileach* directly related to the general jurisdiction of the High Court in the situation where the Oireachtas had designated either the planning authority or An Bord Pleanála as the bodies to make the determination as to whether something was or was not development (or exempted development). It deals with a different situation to the present. The decision was not directly concerned with s. 5 at all, indeed reference to powers under s. 5 were only made at the appeal stage. In the present case, s. 5 is directly at issue as it has already been utilised. There is no reason to believe that *Grianán an Aileach* applies at all in the circumstances of this case, though the concerns which inform it are relevant to the determination of the issue presenting in these proceedings.

31. On the other hand, in the case of *Meath County Council v. Murray* [2018] 1 I.R. 189, McKechnie J., in a passage that also must be acknowledged as obiter dicta, stated as follows at p. 213 :-

> "*A further word about s. 5 of the 2000 Act: the power given to both planning bodies under that section relates to what is a 'development' or what is an 'exempted development'. Even though a decision on either issue may have significant consequential effect, it is not an end in itself. Without more, and simply on that basis, a s. 160 order could not be made: one must go further and establish the 'unauthorised' nature of the underlying development. Thankfully, the difficult question of the courts' review power where a declaration one way or the other has been made on a section 5 reference does not arise on this appeal (see the judgment of the Court of Appeal (per Hogan J.) in Bailey v. Kilvinane Wind Farm Ltd [2016]*

I.E.C.A. 92 (Unreported, Court of Appeal, 16 March 2016), which judgment is under appeal to this court)."

32. As the foregoing *dicta* acknowledged, of note in s. 5 is the absence of the phrase "unauthorised development". The Superior Courts have pronounced upon that in previous decisions. In the case of *Roadstone Provinces v. An Bord Pleanála* [2008] IEHC 210 ("*Roadstone Provinces*"), Finlay Geoghegan J. held at para. 35 that An Bord Pleanála: -

> "*has no jurisdiction on a reference under s. 5(4) of the Act [of 2000] to determine what is or is not 'unauthorised development'. It may 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.*"

33. That decision is somewhat complicated by the fact that the quarry at issue in the case had operated prior to the coming into force and effect of the Act of 1963 on the 1st October, 1964. Such pre-1964 development is not treated as exempted development, nor even development within the meaning of the Act of 2000.

34. At para. 82 of his judgment in the present proceedings, the trial judge opined that the point being made in *Roadstone Provinces* was that An Bord Pleanála does not have jurisdiction to determine whether a particular development constitutes the lawful continuation of pre-1964 development. While undoubtedly the fact that it was pre-1964 development cannot be disregarded, it does appear from the above *dicta* of Finlay Geoghegan J. that she was making a much broader point in the context of the jurisdiction of the Board under s. 5 of the Act of 2000.

35. That view of the judgment has been taken by other judges of the High Court. In *Heatons Limited v. Offaly County Council* [2013] IEHC 261, Hogan J. in dealing with a question of whether a Local Authority could refer to An Bord Pleanála the question of whether a premises was being used in a manner which contravened a condition attached to a planning permission, stated at para. 29 that :-

> "*It is accordingly plain that the Board's single function under s. 5(4) is to determine whether in any given case there has or has not been development or, as the case may be, exempted development. Questions as to whether a particular use is unauthorised is not a function of the Board under s. 5(4) and, indeed, it may be observed that the Board has no enforcement role at all.*"

36. This line of authority was approved by the Supreme Court in *Meath County Council v. Murray* as referred to above. As the Supreme Court explicitly acknowledged; the question of the court's review power where a declaration one way or the other has been made on a s. 5 reference did not arise in that case.

37. Baker J., in *Cleary Compost and Shredding Limited v. An Bord Pleanála (No. 1)* [2017] IEHC 458, having referred to the *dicta* from Keane CJ. in *Grianán an Aileach* in which he referred to the reasoning in *McMahon* and *Palmerlane*, stated at para. 105 as follows:-

> "*A declaration made under s. 5 is not a determination that activity is authorised. It is a determination pursuant to the statutory power of a local authority or An Bord Pleanála that activity is development, and where appropriate that development is or is not exempt. It is part of the planning history of a site. The application under s. 5 is an application to clarify the planning status of an activity or works. This is because whether a development is 'authorised' can and often does involve the question of whether it has planning permission, but can also engage the question whether it is exempt, or if there is a relevant pre-1964 user.*"

38. In respect of the decision in *Roadstone Provinces*, Baker J. stated at para. 109 :–

> "*The judgment of Finlay Geoghegan J. is authority for the proposition that development which does not have the benefit of a planning permission is not always in legal terms a development which is 'unauthorised', and the jurisdictional limit of s. 5 is to determine whether there is development, after which there arises the second question whether permission is required or exists.*"

39. Having noted that a development is not unauthorised merely on account of the fact that an activity or works are found to be development, Baker J. referred to the situation where a development could be a pre-1964 use or could be exempt. Baker J. went on to say at para. 112:-

> "*However, it must be the case that, absent an argument that there is relevant pre-1964 use, if works or activity are declared in the s. 5 process to amount to development and if a determination is made that it is not exempt, then the inevitable conclusion is that the development does not have the benefit of planning permission, is not authorised in planning terms, and is 'unauthorised'.*"

The challenge in *Cleary Compost and Shredding Limited* was not a direct challenge to a s. 5 declaration but involved consideration of whether they formed part of the planning history of the site. More importantly the primary s. 5 declaration at issue was different to that at issue here; Baker J. was concerned with use rather than works. For this reason this particular *dicta* is *obiter dicta*.

40. Later on in her judgment, Baker J. stated that an earlier s. 5 declaration will not preclude a subsequent declaration to a different effect being made by the High Court in s. 160 proceedings if there had been a *change in circumstances* between the dates of the two declarations.

41. In the case of *Killross Properties Ltd. v. the Electricity Supply Board* [2016] 1 I.R. 541 ("*Killross Properties*") the Court of Appeal also opined upon section 5. Hogan J. stated as follows at p. 548 :-

> "*Yet if [An Bord Pleanála] (or, as the case may be, a planning authority) rules that a particular development is not exempted development, the logical corollary of that decision is that planning permission is required. In practice, there is often only a very slender line between ruling that a development is not exempted development since this will generally – perhaps, even, invariably – imply that the development is unauthorised on the one hand and a finding that a particular development is unauthorised on the other. Conversely, where (as here) the Board (or the planning authority) rules that the development is exempt, this necessarily implies that the development is lawful from a planning perspective since, by definition, it has been determined that no planning permission is required.*"

The sweep of this dicta may be overbroad. Apart from the issue of pre-1964 developments, there may be situations, like the present one, where the dispute is whether the development is authorised by an existing planning permission.

42. The judgment of the Supreme Court in the case of *Michael Cronin (Readymix) Ltd v. An Bord Pleanála* [2017] 2 I.R. 658 is also instructive. The quarry owner judicially reviewed An Bord Pleanála's declaration pursuant to s. 5 of the Act that certain construction at the quarry was not exempted development within the meaning of s. 4(1)(h) of the Act of 2000. Before the Supreme Court it was argued that the particular sub-section had to be strictly interpreted. This was on the basis that the principle of strict construction of penal provisions was applicable on the basis that s. 151 of the Act of 2000 created the offence of carrying out unauthorised development. This is a "freestanding" offence unrelated to the service of an enforcement notice. Section 156(6) created a reverse burden or onus of proof by providing that in a prosecution under s. 151 it was not necessary for the prosecution to show and shall be assumed until the contrary is shown by the defendant, that the subject matter of the prosecution was development and was not exempted development.

43. O'Malley J., in giving judgment, recalled that the case arose from a ruling made under the s. 5 procedure. She observed that the procedure is an expedient method of determining the status, within the regulatory regime, of a particular development about which some doubt may exist. She referred to *Grianán an Aileach*, the decision of Hogan J. in *Wicklow County Council v. Fortune* (No. 3) [2013] IEHC 397 and her own decision in *Wicklow County Council v. O'Reilly* [2015] IEHC 667. She then went on to say at p. 673 :

> "*It follows that the primary role in determining whether a development is exempted or not is given to (depending on the circumstances) either the planning authority or the Board. A decision by one of those bodies is an authoritative ruling on the issue, subject to the potential for a judicial review. However, it plainly does not, and could not, result in a determination of guilt or innocence of a criminal offence. There was no suggestion to the contrary at any stage of these proceedings. In my view, therefore, it is entirely inappropriate to read the provisions of s.4 of the 2000 Act as if they related to the 'imposition of a penal or other sanction'. What they are concerned with is the exemption of categories of development from the general requirement to obtain permission.*"

44. In each of those cases, the precise question that is asked of this Court was not directly at issue. The discussions in those cases are nonetheless informative and persuasive even if not legally binding precedent. In the aftermath of *Grianán an Aileach*, the authorities draw a distinction between a determination of what is or is not *authorised development* and what is or is not *development* or *exempted development* in looking at the role of the decision-maker in a s. 5 application.

45. I consider it important to go back to the meaning of the relevant statutory provisions. On the face of it, s. 5 of the Act of 2000 is clear in its terms. It refers to a decision on development or on exempted development. Both of those terms have themselves specific statutory meanings under the Act of 2000. Unauthorised development has a separate statutory meaning. The legislation therefore does not provide in clear or direct terms that the declaration to be made under s. 5 by An Bord Pleanála or the Planning Authority is one concerning *unauthorised development*.

46. If the declaration under s. 5 is to include a finding that the development was unauthorised, it is highly surprising that the section does not state this expressly. A number of observations arise given the absence of express wording. For example, in the absence of express provision in either s. 5 or s. 160, there is nothing to indicate that a planning authority or An Bord Pleanála was given the power to bind a court in the exercise of its jurisdiction under s. 160 of the Act. The absence of clear words renders it implausible that the intention of the Oireachtas was that the decision of either a planning authority or An Bord Pleanála was to bind the court in that fashion. The purpose of s. 5 is directed towards providing a speedy and inexpensive means for determining in relation to works, whether the particular works constitute development and, if so, whether they are exempt. If not, they require permission. There is nothing either in the language or purpose of the section that suggests that it confers on a planning authority or on An Bord Pleanála any power to determine whether a particular development is authorised by a particular planning permission or not. Moreover, s. 160 grants the power of injunction to the courts in respect of unauthorised developments. Conversely, there is no enforcement power granted to the planning authority or An Bord Pleanála under s. 5 of the Act. Indeed, An Bord Pleanála has no enforcement powers at all under the Act, and if it has the power to determine that a development is unauthorised then separate enforcement proceedings would have to be taken under s. 160 or elsewhere. This would lead to the incongruity that An Bord Pleanála could determine whether the development was authorised but could do nothing about it, whereas the court could restrain the development but not decide if it was unauthorised or not.

47. Furthermore, even after the decision in *Roadstone Provinces* was delivered in 2008, the Oireachtas did not take any of the opportunities offered by the legislative amendments to the Act of 2000 in 2010, 2011, 2013 to amend s. 5 of the Act of 2000. Importantly, the Act of 2000 has specific definitions of "development", "exempted development", "unauthorised development", "unauthorised use" and "unauthorised works". The assessment of "unauthorised development" was expressly left to the court in s. 160 of the Act. That is consistent with the approach taken by the court that, whereas the decision as

to what constitutes development and exempted development is entrusted to the planning authority or An Bord Pleanála as expert decision makers on planning matters, the correct interpretation of a planning permission is an issue of law. As regards issues of law, the decision of a planning authority or An Bord Pleanála is not given deference by the courts e.g. *Tennyson v. Corporation of Dun Laoghaire* [1991] 2 I.R. 527 where Barr J. stated at p. 534 :-

> "*However, where the dispute raises an issue regarding a matter of law such as the interpretation of the wording of a development plan in the light of relevant statutory provisions and the primary objective of the document, then these are matters over which the court has exclusive jurisdiction. An Bord Pleanála has no authority to resolve disputes on matters of law.*"

48. For all of the foregoing reasons, I am of the view that the decision making function of An Bord Pleanála or the planning authority under s. 5 does not extend to making declarations in respect of "unauthorised development".

49. Having reached that conclusion, it must be said that frequently the facts of the case will be such that the inevitable implication of a finding that a development is not exempted development, is that the development is not authorised. This is more obvious in respect of the situation where the issue is whether there has been a material change of use. The making of a material change of use, unless exempted or covered by a planning permission, is both development and unauthorised development. Therefore, in some respects a declaration under s. 5 may already concern the precise factual issue that the court is asked to determine under s. 160. On the other hand, there may be a change in the facts in the interval between the s. 5 declaration and the s. 160 proceedings and given the time lag, the s. 5 declaration may be overtaken by events and no longer determinative of the facts before the court when hearing the s. 160 application.

50. What therefore, is the interplay between the findings of the planning body and the decision-making function of the courts under s. 160 of the Act? What is the effect of a s. 5 declaration? Where the declaration is that the works in question represented exempted development, the Court of Appeal has already decided in *Killross Properties* that the courts may not go behind that determination. In giving judgment, Hogan J. gave a variety of overlapping reasons for that at p. 552 :-

> "*[29] First, it can be said that as the planning authorities (or, An Bord Pleanála, as case may be) determined that the works in question represent exempted development, it necessarily follows that no planning permission is required. The logical corollary of this conclusion is that the development in question cannot by definition be 'unauthorised' within the meaning of s. 160 if no planning permission is required so that consequently any such s. 160 application is bound to fail.*
>
> *[30] Second, it could equally be said that the s. 160 application represents a collateral attack on the decision of the planning authority, since it effectively invites the court to re-visit the merits of the issue which had already been determined in the course*

of the s. 5 determination. This is further reinforced so far as the present proceedings are concerned, since Killross elected to challenge the validity of three of the s. 5 determinations in judicial review proceedings and failed in that endeavour.

[31] Third (and related to the second argument), it could be said that the s. 160 proceedings represents an attempt indirectly to challenge the validity the s. 5 determinations otherwise than by means of the judicial review requirement specified by s. 50 of the 2000 Act."

51. The developer distinguishes the above case on the basis that it refers to a determination on "exempted development", which is a determination *intra vires* An Bord Pleanála. Anything beyond what is permitted under s. 5 would be *ultra vires* and the decision in *Killross Properties* would not apply. Furthermore, the developer says that the decision was not concerned with a situation where it was a respondent to s. 160 proceedings who was querying the s. 5 determination.

52. The developer submits that there was no determination by the Board in the present case that there was unauthorised development. Alternatively, if there was such a determination, the developer submits it would be *ultra vires*. Separate arguments are made on that issue as to why the developer should not be bound by the s. 5 determination if it is construed as a determination that the change of the turbines does not come within the scope of the planning process. It is necessary in the first place to look at the assessment by the Board.

53. An Bord Pleanála's determination is dated the 23rd November, 2018. In the course of its order, An Bord Pleanála recites the question referred to it by the planning authority and refers to the matters to which it had regard such as statutory provisions, PD 11/400, the submissions made and "the physical alterations to the turbines, in particular the alterations to the blade length". The order goes on to state as follows:

> "WHEREAS An Bord Pleanála has concluded that:
>
> (a) the erection of the turbines comes within the scope of the definition of development contained in section 3 of the Planning and Development Act 2000,
> (b) the alterations to the 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 for the said alterations to turbines provided for in either Section 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 section 5(3)(a) of the 2000 Act, hereby decides that the deviation from the permitted blade length of 45m (90m diameter) to the constructive blade length of 51.5m (103m

diameter) as related to planning permission PD 11/400, all at Barranafaddock Wind Farm, Co. Waterford, is development and is not exempted development."

54. The developer submits that the operative part of the determination is contained in the final paragraph above. The operative part is therefore limited to a determination that the deviation in the blade length is development and not exempted development. It is submitted that on a correct reading of the declaration, it is not a determination that it was not authorised by the planning permission. Furthermore, An Bord Pleanála could not make such a determination as it had no jurisdiction to do so.

55. Following on from the findings I made above in respect of the limitations on the role of the planning bodies under s. 5 of the Act, the developer is 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 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. 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.

56. The fact that An Bord Pleanála has reached such a conclusion, is however a matter to which the court in its determination of matters under s. 160 should have regard. This is because it represents the opinion of the expert body given general jurisdiction over planning matters. Ultimately however, it is a matter for the High Court (or Circuit Court) to determine if there has been unauthorised development based upon its assessment of the factual situation. That factual situation can include the inspectors report upon which the Board reached its conclusion and the reasoning of the Board set out in its determination. The weight to be placed upon the Board's determination will depend on the facts of each particular case.

57. Before the Court can address those issues there must be a decision on the effect, if any, of the compliance decision of the planning authority. This is because it may give rise to a question of whether the High Court was entitled to consider the validity of compliance of the development with the planning permission because of the expiration of the time limits set out in s. 50 of the Act of 2000.

V. Issue No. 2

The Effect of the Compliance Decision of the Planning Authority

58. Under the provisions of s. 34(1) of the Act of 2000, a planning authority may decide to grant planning permission subject to, or without, conditions. Under s. 34(5), those conditions "may provide that points of detail relating to the grant of permission may be agreed between the planning authority and the person carrying out the development; if the

planning authority and that person cannot agree on the matter the matter may be referred to the Board for determination."

59. In *Boland v. An Bord Pleanála* [1996] 3 I.R. 435 at p. 466 the Supreme Court identified the matters to which the Board/planning authority is entitled to have regard in imposing conditions to be agreed with the planning authority. The purpose of the conditions is to permit a degree of flexibility having regard, *inter alia*, to the nature of the enterprise and technical matters that may require redesign in the light of practical experience. According to the principles, in imposing these conditions, the Board/planning authority is obliged to set forth for the purpose of such details, the overall objective to be achieved by the matters which have been left for such agreement, to state clearly the reasons therefore and lay down criteria by which the developer and the planning authority can reach agreement.

60. Section 50 and s. 50A of the Act of 2000 provides for judicial review of various matters under the planning code and outlines the procedure for making for such applications. Section 50(2) provides that a person shall not question the validity of any decision made or act done by a planning authority, a local authority or the Board in the performance or purported performance of a function under this Act except by way of an application for judicial review under Order 84 of the Rules of the Superior Courts. It was not disputed by the parties that a compliance decision is a type of decision that will generally come within the remit of s. 50(2) of the Act. The time limit permitted to bring an application for leave to apply for judicial review in respect of a decision or other act to which s. 50(2) applies is eight weeks from the date of the decision or act. That time can be extended under strict statutory conditions which do not arise in this case. The issue for this Court is whether the provisions of s. 50(2) required the High Court in the exercise of its s.160 jurisdiction to accept the compliance decision as valid in the circumstances of this case where the validity of the compliance decision has never been directly challenged in s. 50 proceedings. Put another way, the issue is whether a court in s. 160 proceedings, in seeking to go behind what was agreed by a planning authority in purported exercise of its power under the Act to agree details as set out in the conditions of the planning permission, is engaging in an impermissible attack on the validity of the compliance decision?

The High Court judgment

61. In his judgment, having found that the s. 5 determination was binding on the developer, Simons J. embarked upon his own assessment of whether the "as built" turbines came within the scope of the planning permission. He did so without prejudice to the findings as to the binding effect of the s. 5 declaration due to the urgency of the proceedings and unnecessary delay that might be occasioned should his finding on s. 5 be overturned.

62. The trial judge stated that the developer, in submitting that there were "*immaterial deviations*" from the permitted development was inviting him, in effect, to engage in a form of screening exercise analogous to that required under the EIA Directive. He held that the definition of "works" within the Act of 2000 were in principle subject to a requirement to obtain planning permission; the Minister could provide by regulation to exempt certain classes of development. Simons J. held that the only role the court could have is where there may be an "*immaterial deviation*" relying on the principles set out by Fennelly J. in

Kenny v. Provost, Fellows & Scholars of the University of Dublin, Trinity College and Anor [2009] IESC 19 ("*Kenny*"). He held that for reasons similar to those set out in *Bailey v. Kilvinane Wind Farm* [2016] IECA 92 ("*Kilvinane Wind Farm*") that the increase in rotor diameter of 13m amounted to material deviation. He held that the materiality had to be assessed by reference to the description of the permitted development as *per* the grant of planning permission. The description expressly referred to a rotor diameter of 90 metres; indeed, the precise purpose of the application had been to allow for an increase in 10 meters under PD 04/1559.

63. There was a further reason, according to the trial judge, why the developer could not rely upon the concept of "immaterial deviations". The case law indicated that the rationale was to allow some flexibility in planning permission to address unexpected contingencies during the course of carrying out the development. On the facts, he held that the decision to change turbine types was a deliberate decision that was made for reasons other than visual amenity *i.e.* it was to facilitate the use of the best available technology at the wind farm, ensuring that the wind farm can harness the local wind capacity to its full potential, thus ensuring that the viability of the development was not compromised.

64. The trial judge held that the court was not tasked or properly qualified to determine whether the planning permission should be granted. He held that the correct legal analysis was that the court was merely deciding whether the developer is required to make a planning application. The court does not decide whether it will be granted or whether the planning is subject to an EIA under the Directive. Matters of planning judgment are best left to the local planning authorities and An Bord Pleanála.

65. The trial judge rejected the developer's submission that because there was no challenge to the compliance decision, it was immune from challenge in accordance with s. 50 of the Act. He did so because he did not accept that there was an agreement to the increase in rotor length as this was not expressly requested. He held that planning documents were to be interpreted in their ordinary meaning in accordance with the principles set out in *Re XJS Investments Ltd.* [1986] I.R. 750. In circumstances where the compliance decision is headed with the reference to PD 11/400 granting permission for modifications including the increase in diameter from 80m to 90m, the person reading the compliance decision would naturally assume that was all that was permitted in so far as the permission related to rotor diameter. He held there was no other reference to rotor diameter in the compliance decision and nothing to show an increase in rotor diameter to 103m. He said there was nothing in the decision letter to show that it was intended to refer to anything other than the form of development as agreed by the planning authority. He held, relying on *Treacy v. An Bord Pleanála* [2010] IEHC 13, that any matter of detail must perforce fall within the four walls of the parent grant of permission.

66. Simons J. held that there was no jurisdiction under Condition No. 3 to authorise an increase in the rotor diameter beyond 90m. This was especially so in circumstances where the condition singles out "height" as the only aspect of the scale or dimensions of the wind turbines which might be subject to agreement. He held that the hypothetical intelligent

person reading the decision letter must be taken to be aware of the compliance submission, but he said the developer had not expressly sought the agreement of the planning authority to an increase in rotor diameter.

67. The trial judge's second, and more fundamental reason, was that it was necessary under the EIA Directive to carry out a screening exercise before any "change" or "extension" of projects already authorised, which may have significant adverse effects on the environment. He held that there should have been a screening exercise and there was no evidence that WCCC had done so. He drew a loose analogy with *Kilvinane Wind Farm* where written representations, not made under s. 34(5), were given to the effect that the extension of blade length was acceptable to the planning authority.

68. The trial judge rejected the argument that because the compliance decision was not challenged it was immune from judicial review. Relying upon the decision in *Mone v. An Bord Pleanála & Ors* [2010] IEHC 395 ("*Mone*"), he held that this was not so where the decision was bad on its face and/or exhibits an error of law. He also made reference to the High Court decision of *Wicklow County Council v. Fortune (No 3)* in which Hogan J. declined to rely upon a s. 5 determination where the court considered that the reasons given for the determination were "*not altogether satisfactory*". There had been no challenge to the s. 5 decision by way of judicial review proceedings and the proceedings before Hogan J. were enforcement proceedings.

69. The trial judge went on to say that the argument for holding that the court is entitled to disregard a planning decision which is bad upon its face is even stronger in the context of EIA projects. He referred to the decision of the CJEU in *Commission v. Ireland (Derrybrien) (Case C-261/18) (Derrybrien (No. 2)*") which he said emphasised that a Member State cannot deem a development project, which has been carried out in breach of the requirements of the EIA Directives to be authorised simply because domestic time limits for legal challenges to the relevant developments have expired.

70. Having considered the developer's argument against his view on this issue, the trial judge rejected it because the logic of the argument was that even if the court was satisfied that development consent had been granted in breach of the EIA Directive the court would be powerless to restrain the continuation of a development project no matter how egregious the breach or how defective the decision relied upon.

The submissions

71. In relation to the compliance process, counsel for the developer points to the meeting between the developer and the planning authority that took place prior to the lodgement of the compliance submission. The developer submits that there can be no doubt that the planning authority fully expected that different turbines were going to be proposed. Counsel for the developer submits that the planning authority's concern in relation to the new turbine was in respect of noise and it wanted to ensure that they had a lesser noise output than the permitted turbines. Counsel for the applicants points to the assurance given at the meeting that there would be no enforcement taken regarding omitted turbines and that noise issues were a real concern of the planning authority.

72. The developer points to the evidence in the affidavit of its operational manager, in which he states that Condition No. 3 is the type of condition common in a planning permission because the planning authorities recognise that in this area the technology in relation to turbines is moving on rapidly. This type of condition is deliberately used in order to provide a degree of flexibility to a developer. Counsel also points to the absence of a requirement in the planning permission for a maximum tip height and contrasted this with Condition No. 7 of PD 13/32 in which a maximum tip height was specified for the other three turbines which form part of this development.

73. The developer submits that the High Court erred in concluding that the developer could not rely upon the compliance decision by WCCC. Counsel submits that the trial judge was wrong in law and in fact for four reasons:

    a) The trial judge erred in the approach to the interpretation of the compliance decision and specifically erred in holding that the developer did not request agreement to the increase in rotor diameter;

    b) The trial judge erred in holding that the operation of the EIA Directive precluded the developer from relying on the compliance decision;

    c) The trial judge drew an inappropriate comparison between the compliance decision and the written representations at issue in *Kilvinane Wind Farm*; and,

    d) The trial judge erred in failing to hold that the compliance decision was binding on parties where it had not been challenged pursuant to section 50.

74. The developer submits that under Condition No. 3 of the compliance submission, the preferred model is the GE 2.X series and all technical details are included at Appendix B. The document says that in relation to the height of the hub it will be 73.5m and the developer points out that that is lower than the 80m referred to in the planning permission. It states that it will have a maximum tip height of 125m. The developer submits that it is immediately apparent therefore that the blade lengths are going to be longer. In particular, within the compliance submission, it is stated that the schematic details of the turbine arrangements are in Appendix B. The developer requested the planning authority in the compliance submission, that the proposed turbine is considered appropriate. The schematic drawing was included in the submission. It is submitted that in that regard there can be no doubt or ambiguity about what was being proposed. The developer states that the compliance decision was clear: "in relation to what was proposed for condition number three, noted and agreed." The developer submitted that the trial judge erred in holding that the developer had not expressly requested the change in rotor diameter and the planning authority had not agreed to it. Using the test of the hypothetical person reading the planning authority's letter, this person had to read the compliance submission and it was clear that the planning authority were agreeing to this precise turbine. The developer contrasted this with the situation in the case of *Kilvinane Wind Farm* where what had been at issue was a representation which was not made as part of the s. 34(5) compliance process.

75. Counsel for the applicants submits that the fact that no specific model of turbine was identified in the compliance submission was absolutely critical. Not only was no model identified, no model with a hub height of 73.5m can be found in the technical details in Appendix B. Even the schematic/drawing of the turbine which was provided with the compliance submission could not be related to any of the dimensions of the turbines mentioned in the technical report that was submitted.

76. The applicants strongly contest the relevance of the reported compliance decision to these s. 160 proceedings. In detailed submissions, counsel on behalf of the applicants refers to the differences between the turbines "as permitted" and the turbines "as built". In particular, counsel referred to the rotor length difference and how the rotors were now 22m above ground as distinct from the 35m above ground that they would have been according to the planning permission. He referred to the affidavit evidence of his expert on noise, a Mr. Stigwood, who describes a type of noise known as "amplitude modulation". In counsel's submission, Mr Stigwood's evidence was relevant to the closeness to the ground of the rotors.

77. In the submission of counsel for the applicants, there could have been no agreement with WCCC in those circumstances, because they could not have been clear as to what they were agreeing based upon what had been submitted to them. Moreover, it was not possible to reach any agreement because of the options that had been provided to them in the documentation.

78. The applicants submit that the planning authority were not aware of the contents of the submission and this can be inferred from the s. 5 application. Counsel for the developer in contrast refers to what the planning authority had stated: "the deviations as described have been brought to the attention of the Planning Authority by the residents in the area over the last 2 years" and the particular issue with the blade length brought to its attention in the last year. He submits that this was equivocal language and had to be read in the context of the compliance submission.

79. The developer submits that the trial judge was incorrect in so far as he held that the planning authority did not have jurisdiction by way of a compliance submission to agree an increase in the rotor diameter beyond 90m. Effectively, counsel submits the trial judge held that the planning authority acted *ultra vires* and therefore the developer cannot rely upon the compliance decision. The developer in submitting that the entire point of the condition was to create a degree of flexibility, referred to *Kenny*. In that case a condition had required that the first floor be omitted from the design, but a compliance submission was made where a different floor was omitted. A judicial review to challenge that decision was brought but was rejected by the Supreme Court which held that there was an obvious practical necessity for a procedure whereby matters of detail can be agreed between the planning authority and the developer.

80. The developer pointed to Condition No. 3, which was in the interest of *visual amenity* as a condition that permitted detail to be agreed. In Condition No. 3, what was important was the tip height of the turbines and the detail agreed had no effect on visual impact and

therefore this came within the flexibility allowed by Condition No. 3. Counsel also referred to the conclusions in respect of visual impact in the Inspector's Report in the original planning permission PD 04/1559 in that regard. In respect of the Inspector's Report, I note that the Report dealt with the reduction in height of the hub of three of the turbines when referring to the visual impact in the body of the report but there was no reference to any change in the rotor diameter and the effect that might have on the visual impact.

81. The developer also relied upon s. 50 of the Act of 2000, in submitting, that even if the planning authority acted outside its jurisdiction, the decision cannot be challenged in s. 160 proceedings. Counsel submitted that the trial judge was wrong when he held that the decision was bad on its face and that it was contrary to EU law.

82. In the course of the oral hearing, counsel for the applicants was asked whether the compliance decision, if made within the ambit of its jurisdiction, was a decision which attracts the protection of section 50. Counsel answered by saying it was very difficult to argue against the application of that principle. He submitted however that for a variety of reasons, this was not a decision which was so immune. This was on the basis of the subsequent s. 5 decision which was not challenged by the developer in judicial review. He also submitted that the decision was made in breach of the EIA Directive and relying on the decision of the Supreme Court in *The National Trust for Ireland v McTigue.* [2019] 1 I.L.R.M. 118 ("*McTigue*") and the CJEU in *Derrybrien (No. 2)*, s. 50 could not render the compliance decision immune from challenge under s. 160.

83. Furthermore, the applicants submitted that as a matter of law there could have been no agreement. In *Kenny*, the Supreme Court dealt *inter alia*, with a discrepancy between the compliance submission in respect of a condition and the terms of a condition as strictly and literally interpreted. Although the facts of that case were different, Fennelly J. was of the view that as *certiorari* was a discretionary remedy:-

> "*the Court should not grant an order of certiorari in respect of the entire decision based on such an inconsequential discrepancy. Furthermore, Mr Kenny retains the alternative of pursuing his application pursuant to section 160 of the Planning and Development Act 2000. I express no view whatever on the merits of that application.*"

Analysis and Decision

(a) Was there an agreement?

84. The first issue is whether the trial judge was correct in finding that there was in fact no agreement to increase the rotor length as this was not expressly requested. As set out above the developer and applicants take diametrically opposed stances on this. It is important to stress that in addressing the question of whether there was an agreement to increase the rotor length, I am not addressing the validity of the purported compliance decision. This is being addressed as an issue because of the finding of the High Court that there was no such decision at all. If there was no such decision, then the provisions of s. 50, as regards the challenging of such a decision, do not arise. On the other hand, if there was a compliance decision, coming within the terms of s. 34(1), the argument that will

have to be addressed is whether the validity of that decision can only be challenged in s. 50 proceedings.

85. I am not satisfied that the applicants' contention that WCCC did not know to what it was agreeing when it entered "Noted and Agreed" or "Noted", can succeed. This argument is redolent of an argument of *non est factum* and the applicants have simply not established that the WCCC had no understanding of what it signed or that it was so fundamentally different from what they understood that they cannot be bound by it. I do not accept that the submissions of WCCC in the s. 5 application establish that WCCC was surprised by the changes in the rotor diameter to the extent necessary to satisfy a test that they did not know what they were doing. Their submissions do not give express or implied confirmation of that point. They make reference to the deviations being brought to their attention by the *residents* in the area over the last 2 years. There is no evidence in these proceedings (or in the s. 5 proceedings before An Bord Pleanála) that WCCC did not know or understand what they were being asked to agree to. While it may be the case that WCCC have not given full consideration to all aspects or implications of their decision, I am satisfied that it has not been shown that they did not know to what they were agreeing.

86. Taking it that WCCC knew it was agreeing certain conditions, it is a matter for the Court to assess in an objective manner to what it was exactly they agreed. I will turn now to the question of whether the compliance submission and the decision letter amount to an agreement that the rotor diameter be increased. The arguments on both sides have been recited above. The applicable law for the assessment of planning documents is that set out in *Re XJS Investments Ltd*. The trial judge referred to that case. Although he stated that the hypothetical person reading the documents would also be taken to have read the compliance submission, he then gave the view that the developer had not expressly sought the agreement of the planning authority to the increase in rotor diameter. It is that finding that there had been no express agreement sought that is highly contentious and merits close examination.

87. It is worth recalling Condition No. 3 of the planning permission, which was the most relevant condition placed in issue for this part of the challenge. It provides;

> "Prior to the commencement of development, details of the proposed turbines and associated structures **including** design, height and colour shall be submitted to and agreed in writing with the Planning Authority…" (Emphasis added)

It was the details which included the design, height and colour that were left to be agreed between the developer and WCCC as the planning authority.

88. On the one hand, there is a certain substance to the applicants' complaints about the quality of the compliance submission. Under Condition No. 3, the first sub heading is "design" and the submission states that "technical details of the preferred turbine model are included in Appendix B". It goes on to talk about the GE 2.x series. The document entitled "Technical Documentation" in Appendix B contains reference to a number of turbines with different hub heights and rotor diameters but none with those heights/diameters as the "as built"

turbine. On the other hand, however, the compliance submission contains a schematic which displays the dimensions of the "as built" turbines. The developer relies in particular on the fact that under the next heading, "Height" which states that "[t]he preferred turbine is installed on a tapered tabular tower of hub height 73.5m with a maximum tip height of 125m. Schematic details of the GE turbine arrangement proposed are included in Appendix B".

89. Undoubtedly, if the compliance submission had in more express terms indicated that a different rotor diameter was being proposed that would have been in ease of all concerned with this development. I am not convinced however that, because it was not expressly referred to in the compliance submission, no agreement could be reached and therefore no lawful decision was made by WCCC on the issue. A most simple mathematical calculation would permit the hypothetical reader understand what was being proposed; a person familiar with the planning process is capable of making that calculation. In addition, the schematic is expressly referred to and it expressly refers to the proposed rotor diameter. The applicants' argument concerning the lack of technical information about this particular model of turbine is perhaps a stronger one. What can the objective reader of this documentation conclude in relation to what was "noted and agreed" by WCCC? The developer again contends that it was the schematic which was obvious and took centre stage in Appendix B having been highlighted in the body of the submission.

90. On this issue of whether there was an agreement I conclude that the applicants have not established that the hypothetical reader could not be satisfied that an agreement had been reached. The agreement was that the turbines would be of the "as built" dimensions *set out in the schematic* and although the turbine was not identified specifically in the technical details, it was in other respects to be within the GE 2.x series. Indeed, Condition No. 3 was related to visual issues and not technical matters *per se*. The compliance submission did request agreement to an increase in rotor diameter. The type of turbine was identified in terms of shape, dimensions, colour, general details. The terms "noted" and "agreed" in the decision letter related back to what was in the compliance submission. Indeed, I consider this sufficient to enable the hypothetical reader of the document to be satisfied that details had been agreed under this heading.

91. For the sake of completeness, in so far as the applicants relied upon the issue of design and its effect on noise levels, the indication of compliance with Condition 10 were also said to be "noted". Again, a hypothetical reader would see that the compliance indication was being noted. The applicants' reliance upon the affidavit of Mr. Stigwood, concerning noise levels, does not have a relevance to the particular point at issue here *i.e.* whether WCCC had come to an agreement as to the conditions in their decision letter of 13th December, 2013.

92. Finally, as regards Condition 7 which deals with shadow flicker, the reference to "noted and agreed" in the decision letter related back to the compliance submission. That submission referred to the shadow flicker protection system proposed and asked that the planning authority confirm that the methodology outlined is considered appropriate, I am satisfied

that there the hypothetical reader would also understand that agreement had been reached that the methodology had been noted and agreed.

(b) Section 50

93. I will turn now to the provisions of s. 50(2) as amended which provides:

> "(2) A person shall not question the validity of <u>any decision made or other act done</u> by —
>
> (a) a planning authority, a local authority or the Board in t<u>he performance or purported performance of a function under this Act</u>,
>
> […]
>
> 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)." (<u>Emphasis</u> added)

94. The remaining provisions of s. 50, as well as the provisions of s. 50A, set out a number of important rules governing such applications for leave, including the general rule that such applications be brought "… within the period of 8 weeks beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, the local authority or the Board, as appropriate… " (section 50(6)). However, pursuant to s. 50(8) the Court has power to extend that period in certain stated circumstances and I will return to that further below at para. 102.

95. Is a compliance decision "a decision made or other act done" by a planning authority "in the performance or purported performance of a function under [the] Act"? In answer to a member of the Court it seems that the applicants do not contest that the validity of a compliance decision in principle could only be challenged by way of s. 50 of the Act, instead their primary submissions were that the s. 5 determination had relevance and also that due to requirements related to Environment Impact Assessments this particular compliance decision is not subject to time limits. This later argument will be addressed further below in the section starting at para. 113.

96. I consider that counsel for the applicants had no option but to agree that in principle a compliance decision by a local authority is caught by the terms of s. 50 of the Act. Indeed, the trial judge did not make any finding to the contrary in his judgment; his reasons for holding that it did not apply were specific to the type of issue concerned in this case. In making a decision as to compliance with the conditions set out in a planning permission, a planning authority is making a decision and/or doing an act "in the performance or purported performance of a function" under the Act. The legislative history of s. 50 of the Act of 2000 is relevant. As originally enacted, s. 50(2) applied to a decision on an application for planning permission and under s. 179 concerning a local authority's own development. That change was brought about by the substitution of new provisions by the Planning and Development (Strategic Infrastructure) Act, 2006. It was only in 2006 therefore that the s. 50 time-limit on judicial review expressly referred to <u>all</u> decisions and acts done of the planning authorities and the Board in the performance or purported performance of a function under the Act rather than (primarily) related to decisions on an application for planning permission (see section 50(2)).

97. In those circumstances, the starting point for further consideration is that a person challenging a compliance decision is bound to follow the provisions of s. 50, unless there is some reason particular to the facts of this case that demonstrates that s. 50 ought not to apply.

(c) Public Participation

98. It is appropriate to deal now with an issue that arose in a somewhat oblique way in the course of the appeal and that is the issue of knowledge on the part of the applicants of the compliance decision. As referred to above the compliance decision is a procedure carried out between developer and planning authority. Section 34(5) states that, if the planning authority and the person carrying out the development cannot reach agreement, the matter may be referred to the Board for determination. There is no involvement in the procedure for those who have an interest in the planning permission or who may have made an objection to the planning. There is no notification to the public of the intention to make this agreement.

99. At the appeal hearing before this Court, there was much discussion about a letter written in September 2015 by the solicitor for the applicants requesting all documentation that had been submitted in compliance with the conditions attached to PD 11/400. This solicitor was acting for two of the applicants at that time, then ceased to act for them in the High Court proceedings but does so again in the appeal. The letter does not appear to have been followed up by the solicitors. Mr. Moore of FTC, on behalf of the developer, averred on affidavit that the compliance report and letter were placed on the public file and available for later reference by members of the public or other interested parties. The applicants have not contested that averment and there is no reason to suggest that the information concerning the compliance decision was not available for inspection by the public in the usual manner. Furthermore, the applicants were not particularly forthcoming in their affidavits as to when and in what circumstances they first became aware of the compliance decision or why no judicial review was taken,

100. Thus, persons in the position of the applicants, local residents who did not in fact object to the application for planning permission, have no right to be personally notified of proposed details that have been agreed. They are in the position of any other member of the public.

101. Public participation is a strong feature of the planning legislation: I refer to MacMenamin J. in *McTigue* when calling for urgent codification of the planning code, "*this is in (sic) area where, of its nature, legislation is supposed to have a strong public participation aspect.*" Section 160 gives an express right of participation to the public in the enforcement process. Does looking at the interaction between s. 50 and s. 160 through the prism of public participation have an effect on interpreting whether s. 50 can apply to a compliance decision? The compliance process is one which takes place between developer and planning authority. While the compliance decision may become part of the planning history of the case, it is not one to which members of the public have an input at the time it is entered into. By definition, such decisions are (or at least are intended to be) limited in nature and purpose and are not such as ought to require the further input of the public. Critically the public has previously been afforded an opportunity to make observations and objections

prior to the decision on the application for planning permission. Moreover, it appears both the compliance submission and compliance decisions were placed on the file. There appears to be no public notification procedure, but any interested person can check the file at any time. No development may commence on foot of the planning permission prior to the issue of a commencement notice and the publication of such a notice alerts interested members of the public of this fact and thus, by necessary implication, that a compliance agreement has been reached between the developer and the planning authority.

102. In written submissions, the applicants assert that as members of the public are not consulted, informed or notified of a compliance decision, there is in essence no realistic opportunity to take judicial review. Section 50(8) permits the High Court to extend the period provided for in s. 50(6) and (7) where it is 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. While the issue of what may constitute such good or sufficient reason or whether there were circumstances outside the control of an applicant is not before this Court, 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. Therefore, although s. 50 provides strict time limits for a challenge to the validity of the Act, the lack of public engagement in the compliance procedure does not have the consequence of insulating the compliance procedure from a challenge by means of s. 50 of the Act. An analogous example of a situation where lack of notification/publication of a decision in the planning sphere is provided by *Sweetman v. An Bord Pleanála* [2017] IEHC 46. In that case the applicant was unaware of the making of a s. 5 declaration and there had been no right of public participation. In those circumstances, Haughton J. held that the circumstances were outside the control of that applicant. Haughton J. held that s. 50(8)(a) and (b) were cumulative and mandatory and on the facts the subsequent delay in taking the proceedings from when the applicant became aware of the declarations meant that good and sufficient reason had not been demonstrated.

103. For the sake of completeness, I mention the decision of the CJEU in *Flausch & Ors v. Ypourgos Perivallontos kai Energeias & Ors* (Case C-280/19) which was handed down on the 7th November, 2019 but not raised in argument before us. That case involved a development consent for a tourist project on one Greek island where notice to the public had been given, in accordance with Greek law, in a newspaper local to another island and which had no, or negligible, circulation on the island in question. The local island population had no knowledge of the planned development. The CJEU held

> "*Articles 9 and 11 of Directive 2011/92 must be interpreted as precluding legislation, such as that at issue in the main proceedings, which results in a period for bringing proceedings that starts to run from the announcement of consent for a project on the internet being relied on against members of the public concerned where they did not*

previously have an adequate opportunity to find out about the consent procedure in accordance with Article 6(2) of that directive."

104. I do not consider that the situation in *Flausch & Ors v. Ypourgos Perivallontos kai Energeias & Ors* is relevant to the present situation for a number of reasons including, the application for planning permission at issue in this appeal was the subject of public notice, it was apparent on the fact of the planning permission that issues remained to be agreed, the details of the compliance were on the public file. I consider however that the most important reason is that in the present case the applicants learned of the compliance decision though the circumstances of that have not been provided to the court and, having become aware of the decision, they could have at that stage brought a challenge by way of judicial review proceedings asserting an entitlement to an extension of time. These applicants made no such application for reasons that have never been properly explained.

105. Although s. 50(2) places significant practical obstacles in the way of a person who wishes to challenge a compliance decision, challenge by way of judicial review remains an option in an appropriate case where the conditions set out in s. 50(8) have been met. I am satisfied that the lack of public engagement in the compliance process does not provide a basis on which s. 50 could be interpreted as not applying in principle to a compliance decision.

(d) The dicta of Fennelly J. in Kenny

106. A further issue is whether there is anything particular about the enforcement provisions of s. 160 that means that the provisions of s. 50 do not apply where the issue is whether the matters agreed in the compliance decision are outside the scope of the planning permission to the extent that they amount to an "unauthorised development". I refer to the *dicta* of Fennelly J. in *Kenny* in which he appeared to suggest that a s. 160 enforcement procedure might lie where the Court indicated that *certiorari* as a discretionary remedy would not lie to correct an inconsequential discrepancy in respect of a compliance submission and a planning condition. It is important to bear in mind the *dicta* of Fennelly J. must be understood in the context of relevant statutory provisions. For example, enforcement proceedings cannot be taken after the expiration of a period of seven years from the date of the commencement of the development and therefore that would amount to one limitation of the possibility of a challenge being made pursuant to s. 160 of the Act.

107. A further difficulty with applying that *dicta* of Fennelly J. to the present situation arises because of the change in wording of the provisions of s. 50 of the Act of 2000 by the substitution provisions of the Planning and Development (Strategic Infrastructure) Act, 2006 referred to above. It was only in 2006 (post the compliance decision in *Kenny*) therefore that the s. 50 time-limit on judicial review expressly referred to <u>all</u> decisions of planning authorities and the Board in the performance or purported performance of a function under the Act rather than (primarily) related to decisions on an application for planning permission (see section 50(2)). I am of the view that *dicta* of Fennelly J. in *Kenny* was *obiter* and, especially in light of the subsequent changes to the law, does not represent a persuasive statement of principle that s. 160 proceedings permit the questioning of the

validity of "any decision made or act done" by a planning authority without having to comply with the provisions of s. 50 of the Act.

(e) The decision in Mone

108. I will now turn to the other grounds upon which it is argued that the High Court judge was correct in holding that in hearing the s. 160 enforcement proceedings he was not bound by the view taken by the unchallenged planning authority in the compliance decision. Simons J., with reference to the developer's general argument on s. 50, stated at para. 140 :-

> "*With respect, this argument overstates the effect of Section 50 of the PDA 2000. Reliance on that section is not available in circumstances where a decision is bad on its face and/or exhibits an error of law. See, for example, Mone v. An Bord Pleanála [2010] IEHC 395, [83] and [84].*
>
> > *'It would seem to me that as a matter of common sense, where a grant as in this case has been issued without the relevant statutory basis, it can have no force. The fact that the erroneous grant 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 that the development was based on a valid planning permission, as well as being erroneous, was a decision it had no power to make; it was not possible as a matter of law for the Board to retroactively confer validity on the 1998 grant. 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.'"*

109. The developer sought to distinguish *Mone*. The applicants did not seek to support the breadth of the finding by Simons J. that reliance on s. 50 was not available in circumstances where a decision is bad on its face and/or exhibits an error of law. It is true to say that the facts in *Mone* were quite exceptional. In that case, the planning authority had misconstrued the legal effect of what was decided by the Board and wrongly issued a grant of planning permission in the teeth of a clear and unambiguous prohibition on doing so contained in s. 16 of the Local Government (Planning and Development) Act, 1992. That was not

challenged at the time and years later the Board argued that because of the lack of challenge, it was bound to accept the validity of the permission. It was agreed by the parties in *Mone* that the relevant application for planning permission had ceased to exist as a matter of fact and law. The purported grant of permission was therefore "*fundamentally impossible*". According to McKechnie J., "[*n]othing could be based on the written application and nothing could spring from it*" and "*against the statutory prohibition contained in s. 16 of the Act of 1992,*" the grant of permission had to be "*regarded as if it had not issued.*" (at para. 81). It was "*a clear nullity*". (para. 82) McKechnie J. held that the original grant had been wholly illusory i.e. given without any basis in law or and in fact. The developer in the present appeal also submits that "the *Mone* exception" is restricted to a situation where the decision maker cannot rely on s. 50 in defence of a subsequent administrative decision that relies upon an earlier, unchallenged, decision. The developer submits that *Mone* does not apply in the same manner where a developer seeks to place reliance on a decision which has not been challenged in accordance with section 50. The developer submits that this was not a decision from which it can be said, like in *Mone*, there was no jurisdictional basis; the agreement of the details of the condition were permitted by s. 34(5) of the Act. The developer distinguishes *Mone* on the basis that it was a decision concerning a legal nullity rather than one of whether the planning authority acted *ultra vires*.

110. I agree that the decision in *Mone* can be distinguished factually from the present situation. The ultimate rationale of *Mone* appears 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.

111. Do s. 160 enforcement proceedings come within such an exception? On the one hand, s. 160 proceedings explicitly require the court to consider whether the development is unauthorised. In the present case, the question is whether the development has been carried out in compliance with a planning permission. On the other hand, the compliance decision of WCCC was a decision by the planning authority, purporting to be made within their statutory authority to agree points of detail pursuant to conditions imposed in the planning permission. That compliance decision was that the use of the particular GE 2.85-103 turbine complied with the terms of PD11/400. Are the s. 160 proceedings to proceed without reference to that planning authority compliance decision or to the requirements of section 50?

112. The trial judge's view that reliance on s. 50 is not available where a decision is bad on its face and/or exhibits and error of law is not one that I consider can be taken from the *Mone* decision. Indeed, even accepting *Mone* as a precedent, contained within the judgment in the section quoted above is an acknowledgement of just how exceptional it will be to permit a challenge to planning decisions where the time period for challenge has expired. McKechnie J. spoke of conferring the status of legality on a legal nullity. I do not consider that in doing so McKechnie J. intended to expand the option to challenge decisions other than pursuant to judicial review requirements whenever it is alleged that there is some error of law or fact on the face of the decision. *Mone* is not, in my view, authority for any

general proposition such as that contained in para. 140 of the High Court judgment here to the effect that s. 50 cannot be relied on where a decision is bad on its face or exhibits an error of law. 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.

113. The views of the trial judge do not sit easily with how time limits have been applied to judicial review applications generally. Judicial review is generally concerned with the power to review whether the decision-making authority has acted within its legal authority. Order 84 of the Rules of the Superior Courts provide generally for the procedure in applications for judicial review, including time limits for the making of such applications. Even where it is contended that the decision is bad on its face or exhibits an error of law, an applicant is required to comply with the time requirements. Such arguments are not an exception to judicial review applications; they represent the norm or indeed the essence of judicial review. The time limits apply regardless of whether the impugned decision can be shown to be valid or invalid.

114. Section 50(2) does not depart from that understanding of judicial review and the application of time limits to judicial review proceedings regardless of whether the impugned decision is valid or invalid. Indeed, one could add that the language of s. 50(2) itself settles that position when it refers to *purported* performance of functions as well as the performance of functions. Finally, I consider that if the assertion that a decision is bad on its face or an error of law would be sufficient to require the Court to enter into a consideration of the merits of the case, then the ability of s. 50(2) to act as a "gatekeeper" to prevent late applications would be largely nullified. I do not consider that was the intention of the legislature; on the contrary I consider that the legislature intended that the provisions of s. 50 would apply to all challenges to decisions and/or acts of planning authorities in the performance or purported performance of their duties under the Act. I therefore consider that the decision in *Mone* does not assist the applicants in answering the developers point that the failure to challenge the compliance decision under the terms of s. 50 of the Act meant that it was now immune from challenge.

(f) The Impact of the EIA Directive

115. The final issue for consideration is one upon which the applicants placed the greatest significance. This was the finding by the trial judge that the EIA Directive requires that the changes to the turbines at issue here would require a further assessment prior to these being agreed. Simons J. relied upon Article 4(2) of Directive 2011/92/EU (EIA Directive), and in particular to the reference to No. 13 in Annex II thereof.

116. While the applicants appear to accept that the logic of their argument would mean that the 2011 planning permission would have required an EIA, but did not have one, the applicants submit that this would not affect the present requirement. The applicants submit, in reliance on *McTigue* and *Derrybrien (No.2)*, that this particular decision cannot be immune.

(g) The EIA Directive, details to be agreed and the impact of Arklow Holidays Ltd.

117. The applicants submit that this development is a type of development which has crossed the threshold where an EIA assessment is required. There has been a change or extension

to the project which has occurred in the aftermath of the compliance decision in December 2013 *i.e.* by the "as built" turbines. The applicant's counsel relies upon the changes to the rotor blade, the impact on his clients as set out in the affidavits and the expert opinion of Mr. Stigwood to the effect that the length of blades is critical in terms of noise levels. The applicants submit that the decision in *McTigue* is relevant as the Supreme Court held that despite the substitute consent that was obtained an order under s. 160 could be made as the activity that was continuing had not been made subject to an Environmental Impact Assessment. Counsel submitted that the main factor behind the decision of the Supreme Court was the centrality of the EIA requirements. In effect a screening process is required.

118. The developer strongly contested the trial judge's finding that a screening decision was required. In so submitting, the developer relied upon the nature of the conditions and the decision of Clarke J. in *Arklow Holidays Ltd. v. An Bord Pleanála & Ors* [2006] IEHC 15. Clarke J. decided, and thereafter refused leave to appeal, that this type of condition, requiring agreement between the planning authority and a developer on matters of detail does not involve any breach of the EIA Directive.

119. It was uncontested that the overall project *i.e.* the erection of the windfarm was subject to the EIA Directive. In accordance with Article 4(2), any change or extension to the project which may have significant adverse effects on the environment require a determination as to whether the project shall be subject to an assessment either by case by case examination, or the application of criteria or thresholds, or both of the foregoing.

120. *Arklow Holidays Ltd. v. An Bord Pleanála & Ors* concerned a challenge by way of judicial review of permission for a waste water treatment facility together with a claim that certain EU Directives had not been properly transposed. One of the grounds of review was whether there had been an abdication by An Bord Pleanála of its responsibilities in imposing certain conditions that required further assessment by the planning authority of results of a bedrock survey or an archaeological assessment. These were imposed for very specific reasons. Clarke J. relied upon the decision of the Supreme Court in *Boland v. An Bord Pleanála* in holding that the conditions were compliant with the principles set out therein. The second leg of the claim was that based upon the conditions, there had been an inadequate assessment of the environmental impacts as required by the Directive in accordance with the decision in *Wells v. Secretary of State for Transport (Case C-201/02)*, Clarke J. held that in all the circumstances including, *inter alia*, where a member of the public could challenge the imposition of the conditions by the Board and that the agreement could be challenged if it did not meet with the criteria as agreed by the Board, there was no breach of the Directive where the Board imposed conditions which accorded with the principles set out in *Boland v. An Bord Pleanála*.

121. The applicant in that case sought leave to appeal from the High Court. In relation to the aspect of EU law, it did so on the basis that the matters left over for agreement were likely to have significant effects on the environment and that the public were excluded from the second round of consultation over the criteria. Clarke J. did not grant a certificate of leave to appeal on either of these grounds. On the first ground, he held that it would be in wholly

exceptional cases that such an effect would flow from the leaving over of agreement on technical details and he held that the second matter had not been made in argument *i.e.* that it was only the leaving over of certain agreements that had been at issue.

122. Self-evidently, *Arklow Holidays Ltd. v. An Bord Pleanála & Ors* involved a challenge by way of judicial review and was not a s. 160 enforcement proceeding. The particular point at issue in these proceedings *i.e.* change to a project, was not before the Court in *Arklow Holidays Ltd. v. An Bord Pleanála & Ors*. The Directive specifically considered in that judgment was Council Directive 85/337/EC. This was amended by Council Directive 97/11/EC by the addition of Item 13 to Annex II which states as follows: "Any change or extension of projects listed in Annex I or Annex II, already authorized, executed or in the process of being executed, which may have significant adverse effects on the environment". Article 4 was also amended to provide for a screening process by Member States to ascertain whether a full assessment is necessary. In accordance with Directive 97/11/EC, at a minimum a screening process in relation to a change or extension in projects listed in Annex I or Annex II that "may have" significant adverse effects on the environment, was required.

123. Directive 97/11/EC had come into force in March, 1999 and the application for planning permission at issue in *Arklow Holidays Ltd. v. An Bord Pleanála & Ors* had been made in July, 1999. According to the Directive, this meant that the 97/11/EC Directive should have applied to the application for development consent. In neither of the two *Arklow Holidays Ltd. v. An Bord Pleanála & Ors* judgments is that Directive referenced by Clarke J. and thus was apparently not in issue. It is also noteworthy that it is only in the Planning and Development (Amendment) Act, 2010 that Ireland gives effect to the Environmental Impact Assessment Directive (in so far as it included 97/11/EC). Thus, at the time of the decision in *Arklow Holidays Ltd. v. An Bord Pleanála & Ors*, Ireland had not transposed Directive 97/11/EC into domestic law.

124. In *Arklow Holidays Ltd. v. An Bord Pleanála & Ors*, Clarke J. was dealing with the situation where the standard in respect of a requirement that the project be subject to the environmental assessment procedure is that it must be one which is <u>likely</u> to have significant effects on the environment. The provisions of the 1997 Directive require that a screening process take place where the change or extension <u>may have</u> a significant effect on the environment. Therefore, the standard for a screening process is significantly lower than that for an environmental impact assessment. Moreover, in so far as there is any difference in emphasis between the requirements set out in *Arklow Holidays Ltd. v. An Bord Pleanála & Ors* and the observations as to the requirements more generally about compliance with the EIA, then the decisions in *McTigue* and *Derrybrien (No 2)* take precedence.

125. Finally, it must be noted that the findings in *Arklow Holidays Ltd. v. An Bord Pleanála & Ors* relate to a situation where the Court found that technical details were all that were left by the conditions to be agreed with the planning authority. The conditions at issue here, and in particular Condition No. 3, left to the planning authority the function to agree the

technical details of the turbines. Limits in terms of noise were set and anything in excess of these would amount to a violation of the express condition, Condition No. 10. The evidence does not establish that there has been any breach of that condition (Mr. Stigwood did not visit the site, made no measurements and in fact takes issue with the standard under which the noise levels are set in the planning permission) and the trial judge did not find any such breach. Shadow flicker was to be within the relevant guidelines and again the trial judge did not find a specific breach and the evidence does not establish any such breach. All that was left was the agreement of the design in light of the visual amenity.

126. Therefore, even allowing for the fact that the findings of Clarke J. may have limited precedent value due to changes in the law since that time, there is at the heart of this case no evidence that these conditions left anything more than technical details to be agreed between the planning authority and the developer and thus the argument in relation to the EIA Directive simply does not arise on the facts of this case.

127. Although I have taken that view, it is appropriate to look in further detail as to the argument that s. 50 does not apply where it is alleged that there has been a breach of the EIA Directive and by extension the Habitats Directive and the SEA Directive. That argument, if correct, would have major implications for the effectiveness of s. 50 as a control mechanism over a significant number of challenges to planning decisions and indeed incentivise applicants to circumvent the strict time limits by introducing grounds of challenge which might not otherwise be raised.

(h) The EIA Directive, Section 50(2) and Domestic Time Limits

128. In reference to the decision in *Derrybrien (No 2)*, counsel for the applicants relies upon para. 75 thereof which indicates that under the principle of sincere co-operation provided for in Article 4(3) TEU, member states are nevertheless required to eliminate the unlawful consequences of a breach of EU law. That applies to every organ of the member state including the obligation "to remedy the failure to carry out an environmental impact assessment, for example by revoking or suspending consent already granted, in order to carry out such an assessment." Counsel for the applicants submits that this is what Simons J. did in carrying out his assessment.

129. The developer submits that, even if the compliance agreement relating to the details of the turbine did involve a breach of the EIA Directive, s. 50 is still engaged. Counsel rejected the proposition that there could be any distinction between the applicability of s. 50 to EU law and to domestic law. He relied upon the decision of the CJEU in *Stadt Wiener Neustadt v. Niederösterreichische Landesregierung (Case C-348/15)* ("*Stadt Wiener Neustadt*") wherein it was held that reasonable time limits for bringing proceedings in the interest of legal certainty were compatible with EU law. He sought to distinguish *Derrybrien (No.2)* on the basis that it arose out of the contentious history of the proceedings in which Ireland had failed to comply with the ruling of *Commission v. Ireland (Derrybrien) (Case C-215/06)* ("*Derrybrien (No. 1)*"). In particular, counsel submits, it was a case which involved the failure of the State to comply with legal requirements and that the State could not rely upon the expiration of time limits to defend itself against enforcement and infringement proceedings brought by the Commission. He submitted it had nothing to do with a situation

where private persons were bringing proceedings against the developer who sought to rely upon the time limits in s. 50 of the Act.

130. It is important to consider the decision of the Supreme Court in *McTigue*. The Supreme Court (McMenamin J.) rejected McTigue's argument that the grant of substitute consent had to be read as if it were a grant of permission under s. 34 and thus the development retrospectively authorised could not amount to unauthorised development. McTigue was relying on a literal interpretation of the section. McMenamin J., having indicated that the issues in the appeal could only be understood against the historical background of EU law and the legislative intention of the Planning and Development (Amendment) Act, 2010, proceeded to give comprehensive yet concise outline of those matters. McMenamin J. held at para. 72: "*In interpreting s. 177O and the PD(A)A 2010 as a whole, a court should have regard to the overall framework and scheme of the Act.*" Having referenced the Supreme Court decision in *Michael Cronin (Readymix) Ltd. v. An Bord Pleanála*, the Supreme Court in *McTigue* answered the rhetorical question of what the framework and scheme told the reader as follows:-

> "*The words are consistent only with a legislative intention to comply with the EIA Directive. It is not consistent with a literal interpretation which would permit the quarry continuing in operation without appropriate conditions as to that operation for perhaps years to come.*"

The Court applied the Interpretation Act, 2005 and held that a literal interpretation would not reflect the plain intention of the Oireachtas that can be ascertained from the Act as a whole, that intention was to give effect to the EIA Directive. It could never have been the intention of the Oireachtas to carve out some exceptional legislative regime for a category of non-compliant quarries which, under the guise of undergoing preliminary registration procedures obtaining remedial EIAs and substitute consents, would be permitted to continue operation and thereby navigate a passage around the law, without an EIA ever having been conducted.

131. The facts in *McTigue* are not analogous to the situation in the present case. In that case the quarry had never been the subject of a grant of planning permission and in those circumstances, it was held there was no valid planning permission and therefore there was unauthorised development notwithstanding the existence of the substitute consent. The developer in the present case has sought substitute consent, it did so after the s. 5 determination and prior to these proceedings. There was however a prior planning permission in this case which is the important consideration, no matter that it is contended that development was not in accordance with that permitted. *McTigue* is however relevant to the issue of the construction of the Act as a whole and the importance of ensuring the plain intention of the legislature is accorded to the provisions of the Act.

132. The Planning and Development (Amendment) Act, 2010 is to be read together as one with the Planning and Development Acts. It is thus part of the planning code. In that sense, the words of the Supreme Court that the purpose of the Acts as a whole, is to give effect to the EIA Directive are applicable to the construction of the entire Act. The legislature

took the opportunity to amend both s. 50A (and add a s. 50B) and also s. 160 in the 2010 provisions. These amendments have no bearing on the issue in this case, I simply draw attention to the fact that the legislature was alive to these provisions at the time of enactment but did not consider it necessary to amend them in order to give effect to the EIA Directive.

133. The developer has placed emphasis on the fact that the *Derrybrien (No. 2)* decision was addressed to the role of the Member State in complying with the Directive thereby negating its relevance to these private proceedings. There is some merit in that submission; those proceedings were directed towards Ireland as a member state and to its obligations to comply with the Directive. Moreover, Ireland was the controller of the windfarm at issue in the *Derrybrien* proceedings and thus had a more direct means of acting to remedy the breach of the obligations under the Directive.

134. It is however of note in the passage relied upon by the applicants, that the CJEU held in *Derrybrien (No. 2)* that :-

> "*Under the principle of sincere cooperation provided for in Article 4(3) TEU, Member States are nevertheless required to eliminate the unlawful consequences of that breach of EU law. That obligation applies to every organ of the Member State concerned and, in particular, to the national authorities which have the obligation to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out an environmental impact assessment, for example by revoking or suspending consent already granted, in order to carry out such an assessment (see, to that effect, judgments of 7 January 2004, Wells, C 201/02, EU:C:2004:12, paragraph 64, and of 26 July 2017, Comune di Corridonia and Others, C 196/16 and C 197/16, EU:C:2017:589, paragraph 35).*"

The CJEU referred to that duty later as including the local authorities who had made the decisions.

135. Of particular importance, is that the CJEU rejected Ireland's contention that the principle of legal certainty precluded the consents from being withdrawn, relying on the decision in *Commission v. United Kingdom (C-508/03)*. The CJEU, referring to the decision in *Stadt Wiener Neustadt*, went on to state at para. 95:-

> "*By its argument, Ireland fails to have regard, however, to the case-law of the Court referred to in paragraph 80 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.*"

136. The decision in *Derrybrien (No.2)* and the decision in *McTigue* are important indicators as to how the Act is to be interpreted. It must be given an interpretation which accords with the EIA Directive. The CJEU made clear in para. 95 that projects subject to the EIA Directive

cannot be deemed lawfully authorised as regards the obligation to assess their effects on the environment based simply upon the fact that time limits for challenging them have expired. That however, does not answer the question as to whether, in a case where the development is purportedly being carried on in accordance with the planning permission and the compliance decision thereof, a challenge can be made to that compliance decision by means of s. 160 rather than through s. 50 proceedings.

137. The wording of s. 50(2) of the Act is an unqualified statement that a person shall not question the validity of any decision made or act done by the relevant authority in the performance or purported performance of a function under the Act. The wording of s. 160 does not provide that enforcement proceedings made thereunder constitute an exception to s. 50(2) requirements. The legislature could have included the phrase "notwithstanding the provisions of s. 50(2)" if it intended that challenges to the validity of planning decisions and/or acts could be entertained in s. 160 applications. It did not do so despite the opportunity to do so pursuant to the amending Act of 2010.

138. There are, for these purposes, two distinct aspects to s. 50(2); the requirement to proceed by way of judicial review and the time limit for such applications. As to the requirement to proceed by way of judicial review, s. 50(2) on its face is a mandatory direction that it is only in those proceedings that challenges to the validity of planning decisions and/or acts may be made. 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. There is no difficulty with equivalence. As to effectiveness, there is nothing to indicate that a challenge made pursuant to s. 50 would not provide the relevant effectiveness, subject to further consideration of time limits.

139. I have discussed the time limits set out in s. 50(2) in the section on public participation above. The *Stadt Wiener Neustadt* decision indicates that in *principle* Member States are entitled to place procedural time limits on challenges to developments under the Directive. These time limits do not violate the principle of equivalence as they apply to decisions which are made wholly under domestic law as well as those under EU law. The Directive precludes measures which appear to allow a project which ought to have required an EIA from being deemed to have been subject to such an assessment, without even requiring a later assessment and where no exceptional circumstances have been proved. Similarly, such a project cannot be deemed lawfully authorised simply because time limits have expired. The extent to which the organs of the state can rely upon those time limits where there has been a failure to comply with the EIA Directive is at the heart of *Derrybrien (No. 2)*. That case concerned Ireland's failure to transpose properly the Directive and also to limit the unlawful consequences of the failure to fulfil those obligations. Ultimately the Court held that Ireland could not rely on legal certainty and legitimate expectations derived by the

operator concerned from acquired rights, in order to contest the consequences flowing from the objective finding that Ireland has failed to fulfil its obligations under the Directive.

140. The applicants in the present case have never brought s. 50 proceedings so they have never tested how the time limit requirements might affect, if at all, their ability to challenge the compliance decision. For example, while I acknowledge the difference between a statutory time limit and those set out in rules of court, the decision of the Supreme Court in *O'S v. The Residential Institutions Redress Board* [2019] I.L.R.M. 149 on the relatively similar time provisions of Order 84 indicates that the phrase good and sufficient reason must be considered in accordance with all the relevant facts and circumstances. I am not satisfied that the existence of a time limit under s. 50(2) compels a conclusion that it is not an effective remedy. Indeed, even s. 160 has a time limit; 7 years from a given date dependent on whether the development had or had not received any form of permission. That is a time period which does not provide for an extension. There is nothing in the case law of the CJEU that requires this Court to conclude where the issue turns on a 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. The mere assertion of a breach of the EIA Directive can hardly be a wild card that overrides the procedural rules of Member States, such as those contained in section 50. Such an interpretation is not apparent from the provisions of the Act and in any event is not required by the provisions of the EIA Directive.

141. In light of the foregoing, I disagree with the trial judge's conclusion that the time limits set out in s. 50(2) render the court powerless to restrain the continuation of a development project "*irrespective of how egregious the breach or how obviously defective the decision relied upon is*". On the contrary, I am not satisfied that the applicants have established as a matter of fact or of law that the time limits set out in s. 50 render recourse to that section an ineffective remedy in relation to any purported invalidity pursuant to a breach of the EIA Directive.

142. Moreover, the facts in *Derrybrien (No. 2)* concerned a situation where there never had been an EIA in respect of the project. This is an entirely different scenario as there has been one and the issue is whether there has been a change to the project that may have significant impact on the environment. For the reasons set out before, I am not satisfied that the evidence produced by the applicants reaches that standard.

143. I am satisfied therefore that any challenge that the applicants may have or may have had to the compliance decision on the basis that no EIA or screening process had been carried out, is one that ought to be or should have been brought pursuant to the provisions of s. 50(2) of the Act. In circumstances where the development has been carried out in accordance with an unchallenged and thereby valid compliance decision, there is no ground upon which a court can find that there has been unauthorised development.

144. There is one further matter to which I will refer and it is to draw attention to the definition of unauthorised development and in particular the reference to "unauthorised works". As

set out above post-1st October, 1964 works are unauthorised unless they are exempted development or "development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34, 37G or 37N of this Act, being a permission which has not been revoked, and which is *carried out in compliance with that permission or any condition to which that permission is subject*" (*emphasis* added). Those words give a strong indication that there cannot be a finding of unauthorised development where there has been compliance with the permission or any condition to which the permission is subject. If that interpretation is correct, then the interrelationship between s. 50 and s. 160 resolves itself by distinguishing between the challenge to the permission or condition which must be taken pursuant to s. 50(2) and the failure to comply with the permission or condition which is unauthorised development for which s. 160 provides a remedy. In between those two statutory provisions, lies the statutory function of the role of the relevant planning bodies under s. 34(5) to agree details within those conditions. It is certainly consistent with the scheme of the Act that for the purpose of s. 160, a decision taken that there has been compliance with those conditions means that there is no unauthorised development. It is only where there has been a successful challenge to that compliance decision can it be argued that the development is unauthorised. That is an observation and does not form the substance as to why I consider the applicants cannot contest the validity of the compliance decision in these proceedings.

145. For the reasons I have set out, I am satisfied that the developer must succeed on this ground of appeal.

VI. Issue No. 3

Whether the change in the rotor diameter of the "as built" turbines constituted a material or immaterial variation from what was permitted by PD 11/400.

146. Arising from the finding above, strictly speaking any further discussion of this issue is unnecessary. I will however proceed to address it, because if these proceedings are to be finally determined elsewhere, it may be in the interest of these parties to have the views of the Court of Appeal on this issue also.

The High Court Judgment

147. Despite the High Court judge having found that the s. 5 declaration was binding on the developer, he addressed the question of compliance with the planning permission *de novo*. He did so on account of the urgency of the proceedings and the danger that if his findings were overturned on the finding of the binding nature of the s. 5 determination, there would be a further delay due to the requirement to remit the matter to the High Court for determination.

148. Simons J. referred to *Kenny* for the principle that material deviations from planning permissions are not permitted. Relying on *Cork County Council v. Cliftonhall Ltd. & Ors* [2001] IEHC 85 and *O'Connell v. Dungarvan Energy Ltd.* (Unreported, High Court, Finnegan J. delivered on the 27th February, 2000), he held that the case law indicated that the flexibility allowed under a planning permission is very limited. He held that the judgment most directly on point was *Kilvinane Wind Farm*. In that case the Court of Appeal held that an increase in rotor diameter of 23m was a material deviation.

149. Having noted that the increase in rotor diameter in the present case is 13m, Simons J. was satisfied for reasons similar to those set out in the judgment in *Kilvinane Wind Farm* that there was a material deviation. He stated that the description in the planning permission expressly referred to a rotor diameter of 90m. He noted that the precise purpose of the application for planning permission in 2011 had been to allow for an increase of 10m from that permitted under PD 04/1559.

150. Simons J. also held that another reason the developer could not rely on the concept of immaterial deviation was that this was not an unexpected contingency that had emerged. This was a deliberate decision made in advance of carrying out the works to change turbine types. It had been made for considerations other than visual amenity according to the material put before the Board in the context of a section 5 referral. The reason put forward by the developer was that the selection was to facilitate the use of the best available technology at the windfarm ensuring that the windfarm can harness the local wind capacity to its full potential thus ensuring that the viability of the development is not compromised.

151. The trial judge also held that the court was not tasked or properly qualified to determine whether or not planning permission should be granted. The arguments made by the developer touching upon the merits of the proposed developments invited the court to engage in a detailed compare and contrast exercise as between the environmental impacts of the "as permitted" turbines and the "as built" turbines. The trial judge held that was inappropriate and not the function of the court. He held that it was no answer to a complaint to say that it was highly likely that had a planning application been made it would have been granted. He held that the developer could not short-circuit the process in that way; especially so in the context of an EIA development project such as that in issue in the present proceedings.

152. The trial judge held that the correct legal analysis is that the court is merely deciding whether or not the developer is required to make a planning application. The trial judge held that the Court is not making any adjudication as to whether planning permission will be granted or whether the planning application is subject to an EIA assessment for the purposes of the EIA Directive. They are all matters for the expert decision-makers who have been entrusted with these functions under the planning legislation.

The submissions

153. The developer repeats the submissions concerning the history of the planning applications, the conditions imposed and the compliance decision. Counsel submits that the trial judge erred in holding that because the Court of Appeal in *Kilvinane Wind Farm* held that the variations were material in that case, they were material in the present case. It relied upon the analysis of FTC provided to the Board in the s. 5 proceedings and set out in evidence, as to why there were significant differences between the modifications in that case and the present one.

154. Counsel for the developer pointed out that in *Kilvinane Wind Farm* the site of the turbines moved significantly whereas in the present case they did not move at all. He maintained that the siting of the turbines was significant in *Kilvinane Wind Farm* as it was a much

smaller site than the Barranafaddock site. He also referred to the fact that the rotor diameter change was 14% in the present case as opposed to 40% in *Kilvinane Wind Farm*. Furthermore, in *Kilvinane Wind Farm*, the tip height of the turbines had increased significantly (from 122m to 140m) whereas here it was not increased. In counsel's submission it did not follow from the decision in *Kilvinane Wind Farm* that there had been a material variation/deviation here. He also noted that the Supreme Court granted leave to appeal in *Kilvinane Wind Farm* on the question as to the nature and extent of the permitted deviation from a permitted development and what criteria should be used in that regard.

155. Counsel contended that the trial judge was incorrect to hold that the flexibility related to immaterial deviations was designed to address unexpected contingencies only. This was not supported by the authorities. He submitted that the trial judge failed to engage with the evidence adduced on behalf of the developer in terms of the lack of any material difference, any material impact in terms of the environment because, counsel submitted, he wrongly viewed this as involving the court acting as a planning authority. Counsel relied upon the view of the planning authority in the compliance decision that the change was not material and to the inspector's view that this was not material. The inspector had indicated she was bound by the Board's previous decision on a s. 5 in relation to *Kilvinane Wind Farm*.

156. Counsel for the applicants also relied on his previous submissions to demonstrate that the construction of the "as built" turbines amounted to a breach of the planning permission *i.e.* a material deviation. In that regard, he relied upon the s. 5 determination of the Board that this was a breach of the planning permission. He relied upon the trial judge's findings concerning material deviation from the planning permission and he placed emphasis on the importance of the grant of planning permission which had made specific reference to rotor blade length and submitted that this could not be changed by reference to conditions concerning technical details as to design or height which were to be agreed in the interests of visual immunity.

Analysis and Decision

157. The Court of Appeal judgment in *Kilvinane Wind Farm* is a recent and, because of the similarity of the subject matter, the most relevant authority on when a deviation from a planning permission will amount to unauthorised development. The findings of law should be followed by this court unless there are compelling reasons why it should not follow its own earlier decision. Hogan J. held as follows:

> "*[80] A consideration of the case-law on this topic to date suggests that the question of material/non-material deviations from the terms of an existing permission has been approached from a practical and common sense perspective: is the deviation of such materiality that it would realistically impact on the rights or interests of third parties or be such as would affect planning considerations.*
>
> *[81] The first case, Kenny v. Dublin City Council [2009] IESC 9, may be regarded as an example of a case where the breach was inconsequential or trivial. In Kenny the Supreme Court held – albeit in the context of judicial review rather than s. 160*

proceedings – that they admitted non-compliance with a stipulation in a planning permission that a line of trees be located 10m. from the building was, in the circumstances, an 'inconsequential discrepancy'. In that case all bar 16 of the 275 trees in the tree line complied with the 10m. requirement. Of the 16 non-compliant trees, 14 of them were located 8m. away and 2 were 5m. away. The expert evidence was that it would have been impossible to lay services immediately adjacent to the building had the 10m. requirement been complied with in every case.

[82] The decision of Finnegan J. in Cork County Council v. Cliftonhall Ltd. [2001] IEHC 85 represented something of a borderline case. Here permission had been given for the construction of six apartment blocks. The ridge height of one of the blocks was 0.5m. higher than the ridge height of 11.55m. shown on the plans. While the 'footprint' of the development had deviated from the plans, the local planning office did not consider this to be material. Finnegan J. said that 'in deference to [the Council's] expertise and specialist knowledge' he proposed to regard this deviation as immaterial.

[83] So far as the height was concerned, Finnegan J. noted that the deviation was 7% in the case of one of the blocks. The judge held that 'with some reluctance' that this was 'immaterial in the context of the entire development of six blocks.' He added that:

> *'In reaching this conclusion I am influenced by the photographs exhibited in the application. Careful consideration of these satisfies me that to reduce the ridge height…even by 1.3m. would not materially alter the effect of the development in terms of visual impact [whether] on the locality in general or the occupiers of houses [on a nearby road.]'*

[84] The final example is supplied by Cork County Council v. Slattery Pre-cast Concrete Ltd. [2008] IEHC 291. In that case the defendant company had obtained permission for a small scale pre-cast concrete production facility over an area of 0.9 acres of the site. Over time the production facility expanded so that it covered 10 acres at the time of the proceedings. There had also been an enormous intensification of user of the lands, going far beyond that which might ever have been anticipated at the time of the grant of permission in 1997. It is scarcely surprising that Clarke J. held that this all represented an unauthorised deviation from the terms of the permission by reason of the expansion of the site and the material change in the use of the lands."

158. In his judgment, Simons J. viewed the developer's reliance on detailed affidavit evidence for the purpose of demonstrating that there was no material difference between the "as permitted" and "as built" turbines as an invitation to the court to engage in a form of screening exercise analogous to that required under the EIA Directive. He said this was inappropriate. His view was that the court was being asked by the developer to act as a planning authority. I would agree with the developer's submission that asking the court to engage in an analysis of the evidence is not the same as inviting the court to act as a planning authority. To engage with the evidence is a function of the court in every

application before it under s. 160 of the Act of 2000. The court may take a common sense and practical approach to the evidence as indicated in *Kilvinane Wind Farm* but that does not take from the necessity to engage with that evidence. Indeed, there would be a danger in some cases that not to so engage would give the views or complaints of an applicant in s. 160 a status to which they are not entitled. A mere assertion of unauthorised development made without supporting evidence, could rarely if ever, reach the standard required to establish such unauthorised development, at least where there is a planning permission in place *i.e.* the development is not *per se* unauthorised.

159. The trial judge's view that it was not appropriate that he be asked to engage with whether permission should have been granted was informed particularly by the fact that this was an EIA development project. The judge took the view that "*[t]he correct legal analysis is that the court is merely deciding whether or not the Developer is required to make a planning application.*" Taking that view in the context of proceedings where there has been a planning permission which provided for conditions which the developer submits have been met, does not in my view absolve the High Court of its task under s. 160; to assess whether there has been unauthorised development. It is only by engaging with the evidence before the court including the planning history as well as the details of the development, that the court will be able to assess whether the *change* to the development project was one which came within the requirement to carry out an EIA for the purpose of the EIA Directive. If the change to the project was such that an assessment was required but was not carried out, subject to my comments in the following paragraph, there may not be unauthorised development.

160. I raise the issue of whether the court's jurisdiction under s. 160 proceedings extends to consideration of whether an EIA should have been undertaken in respect of a decision as to whether there had been compliance with a condition in a planning permission already granted. I do so because as pointed out in para. 22 above, the definition of unauthorised development excludes a development carried out in accordance with a permission or any condition imposed thereunder. Regardless therefore of whether there was or was not an EIA or even a screening carried out in accordance with Article 4(2) of the EIA Directive, the court under s. 160 proceedings, by virtue of the definition of unauthorised development, arguably does not have the jurisdiction to factor into its consideration the issue of an assessment in accordance with the EIA Directive. That is not to say that where there has been a failure to comply with the requirements of the Directive that there is no remedy. The remedy is provided by way of the right to challenge the planning permission or the subsequent compliance decision in accordance with s. 50(2) and s. 50A of the Act.

161. On the other hand, the interpretation of the test in s. 160 proceedings identified by Hogan J. in *Kilvinane Wind Farm*, extends to considering if the deviation would be such to *affect planning considerations*. That raises the issue whether the deviation may have significant adverse effects on the environment which would affect planning considerations so that an EIA or, at a minimum, a screening process would have been required to be carried out. Therefore, the test the court has to apply in s. 160 proceedings concerning a change to an EIA development project, encompasses both the question of whether the deviation from

the planning permission is a material or immaterial breach *and* whether the change to the project may have significant adverse effects on the environment. Contrary to the views of Simons J., I consider that the High Court, pursuant to its jurisdiction under s. 160 and *on the assumption that s.50(2) did not prevent a challenge to the validity of the compliance decision*, was obliged to engage with the evidence in this case in order to assess whether there had been a material or non-material deviation from the planning permission or whether the change to the project may have significant adverse effects on the environment. In making that assessment the court must recall that the onus lies on the applicant under s. 160 to establish on the balance of probabilities that there has been unauthorised development.

162. In making its assessment, the court must give due weight to the decisions of the planning authorities in their assessment of whether there was a material deviation. They are the expert statutory bodies accorded a particular role within the planning code. A feature of s. 160 proceedings is that they may, like in this case, be decided without the input of planning authorities. Of itself, that is a reason why the court must give due weight to the statutory decisions and determinations of the relevant planning bodies already made in the proceedings. Examples are the determination of An Bord Pleanála pursuant to a s. 5 application and the decision of a planning authority under a compliance decision (assuming that the existence of such a decision is not required to be challenged first under s. 50). The court will also be required to assess other evidence of the parties and to give appropriate weight to the evidence of experts and any report of the inspector. In some applications under s. 160 little expert evidence may be required. For example, the absence of a planning permission for recently carried out works may render a decision simple to make. In a case where there has been planning permission subject to conditions which themselves have been subject to a compliance decision (again assuming there is no requirement to challenge that by way of s. 50(2)) the importance of expert evidence as to the effect of those conditions is of particular assistance.

163. In the present case, the s. 5 determination, on its face, appears favourable to the applicants and they have certainly relied heavily upon it. That decision was not as straightforward as may first appear. The Inspector in her report indicated that she "would have no objections in principle to the alterations to the blade length as constructed, given that the hub heights have been reduced and the overall tip height has complied with the specific condition of planning permission, in light of the determination in relation to PL88.RL2891 [concerning *Kilvinane Wind Farm*], a precedent might be considered as having been set. In this regard, I refer to the Boards consideration of the physical alternations to turbines – in particular the alternations to blade length and the overall height of the turbines – did not come within the scope of the relevant planning permission, it is possible to conclude in this case that the reduction in the hub height and the increased length of the rotor length, notwithstanding the fact that the permitted tip height of 125m has been maintained do not come within the scope of the planning permission granted." (Emphasis added). This is a less than ringing endorsement of the view that there has been a material breach of the planning permission. An Bord Pleanála, in the body of its decision concluded that the alterations to turbines, including the length of the rotor arms/blades do not come within the scope of the permission

granted. An Bord Pleanála, went on to conclude that the deviation from blade length of 45 metres to 51.5 metres was development and not exempted development. For the reasons set out earlier, it must be borne in mind that this was not a decision that the development was unauthorised.

164. In agreeing the compliance submissions with the developer, WCCC was accepting that the changes to the turbines were matters of detail on which agreement was permitted to be made under the conditions imposed by the planning permission. This is also a factor to which due weight must be given.

165. In the present case there was a large volume of affidavit evidence, including evidence from acoustics, planning, engineering and environmental experts. There was no cross-examination of these deponents and the High Court did not engage in a fact finding process in relation to the evidence for the reason outlined above. In *Kilvinane Wind Farm* it appears that a similar position occurred and that the Court of Appeal took the view it was not in a position to adjudicate on the rival contentions made by the respective experts. It appears that the Court of Appeal took the view that in applying a practical and common sense approach to the matter it could reach a conclusion on whether there was a material/immaterial breach from the terms of the existing planning permission.

166. In *Kilvinane Wind Farm*, Hogan J. said he was obliged to conclude that a deviation in terms of *location* of the turbines of between 19m and 20m was material, because despite the Windfarm Development Guidelines (2006) ("the Guidelines") envisaging a degree of flexibility being built into planning permissions regarding siting, the particular planning permission allowed for no such deviations. He held this could have significant effects on shadow flicker, sightlines and noise. In the present case, we are not dealing with deviation in terms of location of the turbine hub and thus the conclusions on that issue as a matter of fact are not relevant to the present proceedings.

167. Hogan J. went on to consider separately the deviation in both hub height and rotor diameter. In my view, the fact that he considered it separately, and not just as an additional factor to be added to the deviation from planning permission in terms of location is significant. On its own therefore, rotor diameter increase is capable of amounting to a material deviation from the planning permission.

168. In respect to the specifics regarding rotor blade diameter, Hogan J. stated as follows:

> *"[87] The same reasoning also applies in the context of the diameter size of the turbines. As constructed the two turbines, T3 and T4, each have a rotor diameter of 90m, which is 23m. larger than that sanctioned by the 2002 planning permission, thus very significantly extending the sweep of the rotor circumference. The sweep of the rotor diameters thus rises from 57ð (57 x 3.1416 = 179m.) to 90ð (57(sic) x 3.1416 = 283m.). It is impossible to say that such a large and appreciable increase in the diameter size of the rotors beyond that sanctioned by the planning permission is not material. The potential impact in terms of sightlines (and other visual impacts),*

noise, shadow flicker and the overall footprint of these larger turbines on third parties is simply too great.

[88] I take a different view, however, in the case of the T1 turbine. Applying the approach indicated by Finnegan J. in Cliftonhall, I cannot say that the deviation of 1m. in terms of the length of a rotor diameter (58m. as compared with 57m.) is material."

169. Hogan J. took the view that "*it was impossible to say*" that such a large change to the rotor blade diameter was not material due to the potential visual impacts, impact on noise and shadow flicker. That is a view taken on the facts of that case and I do not consider that it must mean that every deviation in rotor blade diameter will be material. Moreover, it is telling that the reference to the "*same reasoning*" was a reference back to his decision on turbine location. Part of his reasoning was that the planning permission had not allowed for such deviations and, in any event, the Guidelines could not change the law or impel any contrary conclusion as far as material deviation was concerned.

170. The position in the present case does not appear so clear cut. The planning permission provided for conditions to be agreed between the developer and the planning authority relating to details of design and height of the turbines, providing for shadow flicker and for noise levels. Those issues were agreed by the WCCC and that is a fact to take into account. There is a substantial body of evidence from the developer which lends support to the view that planning considerations such as noise, shadow flicker and intrusion on the landscape are not affected or not affected to a material or significant degree by the change in rotor diameter when compared with the "candidate" turbines put forward in the 2011 planning application. Far from being "*impossible to say*" that the increase in diameter was not material, there is evidence supporting the view that it was not. It cannot be the function of this Court to fact find in the absence of the court of first instance engaging with the evidence. The only way of resolving the conflict in the evidence would be to remit this matter to the High Court to engage in a fact finding exercise as to the materiality of these changes in accordance with the principles set forth herein. As I have concluded that the absence of a challenge to the compliance decision is decisive for this s. 160 application there is no need to make such a remittal.

VII. Issue No. 4

Whether, in the event that the Court concludes that the change in the dimensions of the turbines constitutes unauthorised development, the Court should make an order restraining the operation of the wind farm pending the outcome of the application for substitute consent to An Bord Pleanála.

171. In light of the conclusions I have reached it is not necessary or even realistic to enter into further consideration of this matter. It would be artificial in the extreme to engage in such an exercise.

VIII. Conclusion

172. In the course of this judgment I have addressed three of the four issues that the developer highlighted as arising in this appeal. Because of the findings I have made, the fourth issue simply does not arise and cannot be answered in the abstract. I have concluded that the decision-making function of An Bord Pleanála (or a planning authority) under s. 5 does not

extend to making declarations in respect of "unauthorised development". There may be aspects of the decision of An Bord Pleanála to which a court hearing a s. 160 application will have regard and accord due weight because it represents the decision of an expert body with decision making powers on planning matters.

173. The second issue of whether the applicants were precluded from contending, in the absence of a challenge to the planning authority's decision under s. 50, that the change in rotor diameter of the turbines constitutes unauthorised development in circumstances where this was agreed and approved by the planning authority on foot of the compliance submission submitted by the developer, is perhaps the most central to the disposal of this appeal. It is no answer to reliance on s. 50 by the developer, for the applicants to assert that it was beyond the powers of the planning authority to agree the revised drawings/technical specifications of the turbines. That section required the challenge to be taken by way of judicial review within the time frame provided for in s. 50(2). Those time limits could have been extended if the conditions set out in s. 50(8) were met. The issue of the validity of the planning decision *i.e.* the compliance decision taken in purported reliance on s. 34(1) of the Act, is not up for challenge within the s. 160 proceedings. The court's enforcement jurisdiction under s. 160 is predicated on there being unauthorised development and an unchallenged planning decision must be treated as valid by the court hearing the application.

174. Although it was not strictly necessary to consider whether the change in the rotor diameter of the "as built" turbines constituted a material or immaterial deviation from what was permitted by the planning permission, I did so as it may be in the interests of the parties to have the resolution of the Court of Appeal on this issue also. I concluded that it would have been appropriate to remit this matter to the High Court so that the High Court could resolve the conflicts of evidence as to the materiality of the changes based upon the general principles/issues I have identified. There is however, no need to make such a remittal in light of the findings I have made in respect of the other issues.

175. For the reasons set out, this appeal must be allowed.

176. If the parties cannot reach an agreement in respect of the issue of costs, the matter should be listed in the first Directions list of the new term for directions as to procedure for the determination of the issue of costs.

In circumstances where this judgment is being delivered electronically, Costello and Collins JJ. have authorised me to record their agreement with it.