Neutral Citation: [2014] IEHC 307

THE HIGH COURT

[2014 No. 122 J.R.]

[2014 No. 32 COM]

IN THE MATTER OF AN APPLICATION UNDER THE ENVIRONMENTAL PROTECTION AGENCY ACT 1992 – 2013, AND IN THE MATTER OF AN APPLICATION

BETWEEN:

MARTIN HARRINGTON

APPLICANT

AND

THE ENVIRONMENTAL PROTECTION AGENCY

RESPONDENT

AND

SHELL E & P (IRELAND) LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Barrett delivered on the 30th day of May, 2014.

1. These proceedings are judicial review proceedings brought under O. 84 of the Rules of the Superior Courts 1986, as amended. The applicant has sought in the proceedings to challenge the decision of the Environmental Protection Agency on 6th January, 2014, to amend Integrated Pollution Prevention and Control or 'IPPC' Licence (P0738-01), granted on 12th November 2007. The hearings centred on the issues of delay, whether the quashing of a decision to grant a revised IPPC licence resurrected or reinvigorated the previously subsisting licence, the possibility that this application represents an impermissible collateral attack on the 2007 IPPC licence, a purported failure by the EPA to state any reasons for its decision of 6th January last, and various alleged errors on the face of the decision of 6th January last.

Background facts

2. The EPA granted Shell E & P (Ireland) Limited an IPPC licence on 12th November, 2007 pursuant to section 83 of the Environmental Protection Agency Act 1992, as amended. This licence was for the operation of a gas refinery and the operation of certain combustion installations in County Mayo. In March 2010, Shell applied to the EPA for a review of the 2007 IPPC licence. This review was primarily necessitated by an agreement entered into between Shell and the Erris Inshore Fishermen's Association, whereby Shell, as a good corporate citizen, agreed to use an alternative location to that which had already been approved in the 2007 licence, for the discharge of treated water from the gas refinery. Under the 2007 licence, the discharge point for the treated water was an outfall point some 12.5 kilometres offshore from the landfall location. The agreement entered into between Shell and the Fishermen's Association involved the change in the location of the discharge point to some 65 kilometres offshore. This review application culminated in a decision of the EPA on 5th June, 2013, to grant a revised IPPC licence to Shell. This decision of the EPA to grant a revised IPPC licence to Shell was the subject-matter of judicial review proceedings instituted by the applicant in these proceedings, Mr. Harrington, in July 2013. In those proceedings, Mr. Harrington sought an order of *certiorari* quashing the decision of 5th June. On 15th October, 2013, with the consent of the EPA, the High Court granted an order of *certiorari* quashing the decision of the EPA on 5th June, 2013, to grant the revised IPPC licence. A week later, by letter dated 22nd October, 2013, the EPA wrote to Mr. Harrington, Shell and other interested parties advising that the 2007 licence continued in force. However, the EPA's views in this regard had in fact been widely known since 17th October, 2013, by virtue of an Irish Times article in which a statement of the EPA as to its views was published. The copy of the revised IPPC licence available on the EPA's website soon after the order of 15th October, 2013 also stated that the licence had been quashed by order of the High Court and referred readers to the 2007 licence which was stated to continue in force.

3. Separately, by 7th January, 2014, the EPA was required to have examined all licences issued in respect of activities listed in Annex I to the Industrial Emissions Directive, *i.e.* Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (Recast) (O.J. L334, 17.12.2010, p. 17), in order to determine if each such licence complied with the requirements of that directive. This examination process was mandated by section 82A of the 1992 Act, as inserted by regulation 8 of the European Union (Industrial Emissions) Regulations 2013 (S.I. No. 138 of 2013). Section 82A provides that, if the EPA is of the opinion that the licence can be brought into conformity with the Industrial Emissions Directive by amending one or more of the conditions or schedules to the licence, and the making of the amendment will not significantly alter the character of the licence, the EPA is statutorily empowered to make those amendments. In the case of Shell, the activity for which the 2007 IPPC licence was granted was an activity listed in Annex I of the Directive. Accordingly, the EPA was required by law, and not consequent upon some application by Shell, to examine the terms of the 2007 IPPC licence to determine if it complied with the requirements of the Industrial Emissions Directive. On 6th January, 2014, the EPA duly amended the 2007 IPPC licence to bring it into conformity with the Industrial Emissions Directive. From that date the 2007 IPPC licence was deemed to be an industrial emissions licence (P0738-01), granted under Part IV of the 1992 Act. On 5th February, 2014, prior to the commencement of the instant proceedings and in circumstances where no challenge had been brought or intimated to the clearly communicated position of the EPA that the 2007 IPPC licence continued in force, Shell applied to the EPA for a review of this industrial emissions licence. This last application is currently before the EPA and, of course, Mr. Harrington will have a full opportunity to make whatever submissions he wishes to make as part of that process.

Relief sought in the instant proceedings

4. The principal relief sought by Mr. Harrington in these proceedings is an order of *certiorari* quashing the decision of the EPA on 6th

January, 2014, to amend the 2007 IPPC licence in order to bring it into conformity with the requirements of the Industrial Emissions Directive. Various declaratory reliefs are also sought. The principal grounds upon which the order of *certiorari* is sought can be summarised as follows. First, the EPA could not seek to amend the 2007 licence to bring it into conformity with the Industrial Emissions Directive. This is because the revised IPPC licence, granted on 5th June, 2013, was granted in substitution for and superseded the 2007 IPPC licence and, as of 5th June, 2013, the 2007 IPPC licence ceased to have effect. The revised licence was itself quashed by order of the High Court on 15th October, 2013. This quashing, per Mr. Harrington, did not reactivate the 2007 IPPC licence and thus, as of 6th January, 2014, there was no IPPC licence in existence in respect of the facility that the EPA could amend. Second, the EPA did not, when granting the 2007 IPPC licence, comply with the requirements of the EIA Directive, *i.e.* Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2012 on the assessment of the effects of certain public and private projects on the environment (O.J. L26, 28.1.2012, p.1), or the Habitats Directive, *i.e*. Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (O.J. L206, 22.07.1992, p.7). Third, the EPA failed to give reasons for its decision of 6th January, 2014.

Delay

5. Counsel for Shell devoted a considerable portion of his argument to the contention that Mr. Harrington is debarred from seeking any reliefs in respect of the legal status of the 2007 IPPC licence because of alleged delay in instituting these proceedings. By way of legal background to this contention, Order 84, rule 21(1) of the Rules of the Superior Courts, 1986, as amended, which governs these proceedings, provides that an application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose. The terms of the rule are mandatory in nature, providing that:

> *"An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose."*

6. Shell contends that the grounds of Mr. Harrington's contentions which relate to the legal status of the 2007 IPPC licence crystallised between 15th October and 22nd October, 2013, when Mr. Harrington was aware or should have been aware, from a number of sources, what the EPA's position was with regard to the status of the IPPC licence. The court does not consider that it is reasonable to expect Mr. Harrington or individuals in the exact same position to purchase the *Irish Times* or continuously to consult the EPA website so as to determine the EPA's position from time to time on various matters. Consequently the court concludes that Mr. Harrington was made aware of the EPA's position in the letter of 22nd October, 2013, sent from the EPA to him and advising him personally and expressly of the EPA's stance. This letter was presumably received a day or two after being sent. However, the Notice of Motion grounding the instant proceedings is dated 6th March, 2014, over four months after Mr. Harrington was made personally aware of the EPA's position in that letter. It is quite clear that the issues that he now seeks to ventilate in relation to the 2007 IPPC licence could easily have been raised and pursued following his receipt of the letter of 22nd October, 2013. It is certainly not the case that the issues that he has sought to raise concerning the 2007 licence only became apparent when the EPA amended the 2007 IPPC licence on 6th January last. In this regard, Mr. Harrington's position is not unlike that of Mr. Sloan in *Sloan v. An Bord Pleanála* [2003] 2 I.L.R.M. 61 or that of John Paul Construction Limited in *John Paul Construction Limited v. The Minister for the Environment* [2006] IEHC 255 (Unreported, High Court, Kelly J., 15th August, 2006), where applications failed on grounds of unwarranted delay. In the later case, one of the points made by Kelly J., in arriving at his decision, was that:

> *"John Paul is a substantial commercial entity and has available to it as much advice, legal and otherwise as it requires. If it did not choose to take legal advice as to the Minister's entitlement until 2006, that is its own business. But it cannot use that as a basis for seeking an extension of time."*

7. The courts in applying the law must be sensitive to the personal and social background of persons who present before them. This is what makes our courts hallowed places in which, subject at all times to what the law requires, measured justice is dispensed and unmerited harshness avoided. The correctness of this approach has been confirmed by the Supreme Court in the recent past. Thus in *Comcast International Holdings Limited v. Minister for Public Enterprise and Others* [2012] IESC 50 (Unreported, Supreme Court, 17th October, 2012), McKechnie J. states, at para. 33, that:

> *"Justice is not always referenced to the highest bar. If that were the case the wealthy, powerful, and the influential would set it. That should not be allowed. Justice sets its own bar. A failure of the average man and his average lawyer to match the gold standard of their opposite in society and in practice must not be necessarily condemned."*

8. In the same case, Clarke J. states, at para. 3.10 of his judgment, that:

> *"The circumstances of the parties and, in particular, any disparity in the resources available to the parties must always be a factor which the court takes into account. The degree of expedition and compliance with time limits which could properly be expected of large corporations involved in commercial disputes cannot reasonably be expected of poorly resourced or otherwise disadvantaged litigants".*

9. So what was true of John Paul Construction Limited in one case – that it could have put itself in a position where it knew of its obligations to proceed swiftly – might not be true of Mr. Harrington in this case. That said, Mr. Harrington, the court notes, is an individual who has brought two previous judicial review challenges to different consents/licences granted to Shell in respect of its operations in County Mayo and thus by virtue of this experience is aware, no doubt to a more heightened extent than many of his peers, as to the need to move promptly when instituting such proceedings, a fact which makes him more vulnerable to the court holding against him when he does not.

10. Turning to Mr. Harrington's statement of grounds and the arguments made on his behalf in court, the court was struck throughout these proceedings that the gravamen of virtually all of his complaints was that the EPA treated the 2007 IPPC licence as continuing in force. However, the truth of the matter is that the applicant knew from sometime in October 2013 that this was the position of the EPA; he knew this because he was expressly told as much in the letter of 22nd October, 2013. Even so, Mr. Harrington did not raise any issue with the content of this letter, nor did he seek to challenge it by way of judicial review, an option that was available to him. It is an unavoidable truth that the EPA made a decision on 6th January, 2014, but that was but a further instance of the EPA doing what it indicated in its letter of 22nd October, 2013 that it would do, *i.e.* treat the 2007 IPPC licence as subsisting. Unhelpfully for Mr. Harrington, there is case-law which indicates that the date for determining when time runs on the bringing of proceedings such as the instant proceedings is the date when the claimant knew or ought to have known that it was appropriate for him or her to commence proceedings. So, for example, in *Uniplex (UK) Limited v. NHS Business Services Authority* (Case C-406/08) [2010] ECR I-00817, the High Court of England and Wales sought a preliminary ruling from the European Court of Justice as to whether, amongst other matters, in proceedings seeking to establish an infringement of the public procurement rules the time runs from the date of the infringement of those rules or from the date on which the claimant knew or ought to have known about the infringement. In giving judgment, the European Court of Justice stated, at para. 32, that:

> *"It follows that the objective laid down in Article 1(1) of Directive 89/665 of guaranteeing effective procedures for review of infringements of the provisions applicable in the field of public procurement can be realised only if the periods laid down for bringing such proceedings start to run only from the date on which the claimant knew, or ought to have known, of the alleged infringement of those provisions."*

11. Thus the European Court of Justice held, albeit in the context of challenges to public procurements, that time runs from the date on which a claimant knew, or ought to have known, of an alleged infringement of those provisions. This approach was applied by Peart J. in *Baxter Healthcare Limited v. Health Service Executive* [2013] IEHC 413 (Unreported, High Court, Peart J., 16th July, 2013), in which, having referred to the decision in Uniplex, Peart J. stated as follows:

> *"[T]his Court must decide at what point did the present applicant possess sufficient knowledge of facts to enable it to consider that it had reasonable grounds to challenge the decision that Beacon Dialysis Services Limited had qualified in the competition. As soon as it had sufficient facts at its disposal to commence its challenge, an effective remedy was available to it, and therefore the clock started to run against it. From that point on, it could not sit on its hands and hold the point over until it saw the final decision on the award of the contract. It was obliged to act immediately….It is not necessary for the party to know all the facts, and be possessed of all the information which may only emerge during the course of the proceedings from affidavits filed in response, through discovery of documents or through replies to interrogatories. But a party must know or ought to know sufficient to have reasonable grounds for making a challenge to the decision, before the clock begins to run against it."*

12. In the instant case, Mr. Harrington was possessed of sufficient knowledge and information within days of 22nd October, 2013, for him to commence judicial review proceedings against the EPA regarding its stance as to the continued subsistence of the 2007 IPPC licence. He failed to do so within the applicable three-month time limit and has offered no convincing reason for his failure to do so. In the circumstances the court cannot but find that Mr. Harrington's proceedings are out of time so far as any reliefs are sought by reference to the contention that the 2007 IPPC licence did not continue in force after 5th June, 2013.

Legal Status of the 2007 IPPC licence

13. The order of the High Court dated 15th October, 2013, granted an order of *certiorari* quashing the decision of the EPA on 5th June, 2013, to grant a revised IPPC licence to Shell. The order recites that it was made on the grounds that the EPA in making its decision to grant the revised licence *"failed to carry out an Environmental Impact Assessment that complied with the requirements of Section 87(1I) of the Environmental Protection Agency Acts 1992 to 2012, as inserted by Article 5 of the European Union (Environmental Impact Assessment) (Integrated Pollution Prevention and Control) (No. 2) Regulations 2012."* It will be recalled that the revised 2013 licence was granted in lieu of the 2007 licence. The question that arises for this Court is what is the effect of an order of *certiorari* quashing a later invalid licence granted in lieu of an earlier one. Is the earlier licence resurrected Lazarus-like from the legal tomb to which it was consigned for a time, is it reinvigorated after a period in suspense, or is there simply a void, an empty space where once two orders successively dwelled and neither now remains extant?

14. A preliminary issue that arises is whether the decision of the EPA, once quashed, was to be treated as void *ab initio*. Here the weight of authority suggests that it should be so treated. In *Murphy v. The Attorney General* [1982] 1 I.R. 241, the Supreme Court held that certain provisions of the Taxes Consolidation Act 1967 which were found to be repugnant to the Constitution were void *ab initio* and never had the force of law. In *A v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88, where an offence established under the Criminal Law (Amendment) Act 1935, was found to be unconstitutional, that unconstitutionality pertained from the moment the *Bunreacht* came into force. In *Shelly v. District Justice Mahon* [1990] 1 I.R. 36, the Supreme Court held that a criminal conviction imposed by a District Court judge who had not been properly appointed was, per Walsh J. at 43, "*absolutely null and void and not simply voidable*". Of particular interest in the context of the instant proceedings is the fact that Walsh J. did not consider that this finding affected in any way the legality of the initial complaint which grounded the conviction. Thus, per Walsh J., at 44:

> *"On the assumption that the initial complaint was a valid complaint and was made within time the position is that this complaint has not yet been heard and is outstanding and has yet to be tried."*

15. Perhaps two points can be drawn from this observation. First, the invalidity of the conviction did not undermine the entire process. Thus, subject to the caveats that Walsh J. mentions, the complaint that underpinned the process remained. Second, the Supreme Court was alive to the practical realities of the situation and satisfied that the result of its finding was not that an alleged wrongdoer should go unprosecuted and, if guilty, unpunished. The analogies with the instant proceedings are obvious. First, Shelly lends support to the contention that the quashing of the decision of 5th June, 2013, does not mean that every event which preceded it is impacted by that invalidity. Second, the courts do not operate in a void where legal interpretation proceeds oblivious to practical consequence.

16. The position that an *ultra vires* enactment is void *ab initio* and has no effect has also been adopted by the courts of England and Wales and by the Privy Council in a longstanding suite of cases from *F. Hoffmann La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295, through *Percy v. Hall* [1997] Q.B. 924, to Mossell (Jamaica) Limited v. Office of Utilities Regulations [2010] UKPC 1. Closer to home, Hogan and Morgan, at para. 11-85 of their definitive text on *Administrative Law in Ireland* (4th edition), assert that the "*conventional view"* is that the principle accepted by the Irish and English courts that legislation found to be unconstitutional/invalid is void *ab initio* also applies, subject to exceptions, to administrative decisions that are held to be *ultra vires* a statute, *i.e.* the decision is void *ab initio*. Given the abundance of Irish and foreign case-law and learned commentary to which the court has just referred, the court holds that the effect of the High Court's order of 15th October, 2013, was to render the EPA's decision of 5th June, 2013, void *ab initio*.

17. What are the implications of this last finding for the 2007 IPPC licence? The argument before the court on this point focused largely on two previous decisions of the Irish courts, in *The State (Abenglen Properties) v. Corporation of Dublin* [1984] I.R. 381 and *Deerland Construction v. Aquaculture Licence Appeals Board* [2009] 1 I.R. 673. In *Abenglen*, Walsh J. pointed to the practical absurdity that would arise if an allegedly invalid decision of Dublin Corporation had the effect that the person challenging such decision was to obtain default planning permission, however outrageous that person's proposed development. Thus, per Walsh J., at 396:

> *"In my view, the default provisions were enacted for the purpose of compelling a planning authority to direct its mind to an application…It is not possible to attribute to the Oireachtas the intention that every decision which has been proved to be unsustainable in law for one reason or another shall have the effect of giving the applicant permission for his proposed development – however outrageous it might be and however contrary to both the spirit and letter of the planning laws. It would require quite clear affirmative language in the statute to evidence any such legislative intention. No such language appears in the present legislation."*

18. In the present case, the question that arises is whether Irish lawmakers intended that, in the event that a revised licence which issued in lieu of another licence was itself avoided, a legal vacuum should arise in which no licence pertained and the entity which had enjoyed the benefit of both the licence and, ostensibly at least, the avoided revised licence, should be exposed to all the liabilities that flow from being engaged in unlicensed activity. The court returns to this issue below but continues for the moment with its analysis of the key case-law arising.

19. The decision of the High Court in *Deerland* appears, at first glance, to create a significant difficulty for the EPA and Shell. In that case, Kelly J. held that the quashing of a decision of the Aquaculture Licence Appeals Board that had itself annulled a previous decision of the Minister of the Marine and Natural Resources did not have the effect that the Minister's decision was revived. One possible conclusion to be drawn from this, and one urged upon the court by Mr. Harrington, is that in the present case the quashing of the decision of 5th June 2013 did not have the effect that the 2007 licence was thereafter to be treated as continuing in effect. Counsel for Shell has made much play of the fact that the legislative framework in *Deerland* provided for the 'annulment' of the Minister's decision by the later decision of the Aquaculture Licence Appeals Board whereas in this instance section 90(2)(b) of the 1992 Act provides that a revised licence "*shall have effect in lieu of*" the original licence. The effect of this difference in wording, counsel for Shell contended, was that the EPA's decision of 5th June, 2013, to grant the revised licence had a suspensive effect insofar as the 2007 licence was concerned and that once the decision of 5th June was quashed, the 2007 licence was reinvigorated. In approaching Shell's line of argument in this regard, the court is reminded of the emphasis placed by Henchy J. in *Inspector of Taxes v. Kiernan* [1981] I.R. 117 on what the ordinary person would think of a finding that the term "*cattle*" when used in particular tax legislation might also embrace pigs, even if in some contexts such a reading might make or might at one time have made sense. Thus, per Henchy J., at 122:

> *"In regard to 'cattle' which is an ordinary and widely used word, one's experience is that in its modern usage the word, as it would fall from the lips of the man in the street, would be intended to mean and would be taken to mean no more than bovine animals. To the ordinary person, cattle, sheep and pigs are distinct forms of livestock."*

20. Would the man in the street, the woman on the Luas, even, were his views relevant, the mythical individual presumably still motoring on the Clapham omnibus over a century after he got his first reported airing in *McQuire v Western Morning News Company, Limited* [1903] 2 K.B. 100 at 109, consider that a licence intended to apply "*in lieu of*" another merely had a suspensive effect insofar as the earlier licence was concerned, with the result that the two of them co-existed in time, yet only one of them ever had legal effect at any one time? The court cannot conceive that he or she would. Moreover, the court considers in its own right that this is too strained an interpretation of the phrase "*in lieu of*" for the court to agree with the contentions made by counsel for Shell in this regard. That said, the court is conscious of its duty under the rules of statutory interpretation to avoid a reading of legislation that would result in absurd consequences. Historically, this risk was addressed by means of the 'golden' and 'mischief' rules. However, in recent times the preference has been simply to refer to the scheme and purpose of a particular statute, rather than to the golden or mischief rules. An early example of this approach is evident in *Frascati Estates Limited v. Walker* [1975] I.R. 177. But perhaps the classic Irish case in which the approach is employed is that of *Nestor v. Murphy* [1979] I.R. 326 in which Henchy J. states, at 329, that:

> *"To construe the sub-section [at issue] in the way proposed on behalf of the defendants would lead to a pointless absurdity…[and] would be outside the spirit and purpose of the Act. In such circumstances we must adopt what has been called a schematic or teleological approach. This means that s.3(1) must be given a construction which does not overstep the limits of the operative range that must be ascribed to it, having regard to legislative scheme as expressed in the Act of 1976 as a whole."*

21. As mentioned above, there are hints of the need to avoid practical absurdity in the reasoning adopted by Walsh J. in *Shelly* and *Abenglen*. Notably too, statute-law in the form of section 5(1) of the Interpretation Act 2005 allows the courts to depart from the literal meaning in circumstances where the result would be absurd, providing in this regard that:

> *"In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) –*
>
> *(a) that is obscure or ambiguous, or*
>
> *(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of…in the case of an Act [the Oireachtas or the parliament concerned], the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."*

22. An issue that arises in this context is determining when a particular interpretation would, to borrow from the phraseology of Henchy J. in *Nestor*, constitute a "*pointless absurdity*" or, to use the wording of the 2005 Act is "a*bsurd*". Denham J., as she then was, goes some way towards addressing this issue in her judgment in *DPP (Ivers) v. Murphy* [1999] 1 IR 98 at 111, stating that:

> *"The rules of construction are part of the tools of the court. The literal should not be applied if it obtains an absurd result which is pointless and which negates the intention of the legislature."*

23. In this instance the absurdities of the situation that would arise if the court was to hold that the quashing of the revised licence meant that a legal vacuum arose in which no licence pertained are readily apparent. First, there is no obvious reason why such a result should pertain when the difficulty with the revised licence, as here, arises through no fault of the licensee. Second, it makes no sense that where a person applies for a revised licence, some error in the processing or granting of that licence should have the catastrophic consequence that in the event of that revised licence being subsequently avoided, a legal vacuum is to arise in which no licence pertains and, most likely, a business must cease doing some or all activity, at least for a time. This, to quote the colourful metaphor offered by counsel for Shell during the course of the hearings, would be "*a form of legal Russian roulette*" that would require the clearest statutory language before the court could conclude that it was what the Oireachtas intended. Third, on a related note, the EPA is under a continuing duty to review licences from time to time: can it be that the Oireachtas intended in establishing this requirement to create the terrifying possibility for industry that should the EPA in the course of such a review make any mistake in its actions, however slight, the licensee should suffer the loss of its licence? Fourth, if the court was to hold that the quashing of a revised licence at any time, and particularly where it occurs through no fault of the licence-holder, meant that no licence pertained, this would immediately expose the licence-holder to criminal liability of a type to which, as licence-holder, it is not generally exposed as a result of the statutory protections afforded licence-holders by section 84(3) of the 1992 Act, under which:

> *"It shall be a good defence –*

(a) to a prosecution under any enactment other than this Part, or

(b) to proceedings under –

(i) section 10 or 11 of the Local Government (Water Pollution) Act, 1977.

(ii) section 20 of the Local Government (Water Pollution) (Amendment) Act, 1990,

(iii) section 28, 28A or 28B of the Air Pollution Act, 1987,

(iv) section 57 or 58 of the [Waste Management Act 1996]…or

(v) section 99H,

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

Fifth, there is provision in section 92 of the Act for the continuation of certain conditions, requirements and obligations of a licence or revised licence even in circumstances where that licence has ceased, a fact which suggests most strongly that the Oireachtas was minded in the context addressed in section 92, and doubtless more generally, that the Act should not create a position in which a licence ceased and a legal vacuum thereby arose in which chaos pertained. Sixth, it beggars belief that the intention of the Oireachtas was that a person who had the benefit of a valid licence and who applied to review that licence could be deprived of the benefit of the first licence in circumstances where the decision on the second licence was invalid: this would have to be clearly provided for in the 1992 Act, and it is not. Seventh, were the type of legal uncertainty, if not anarchy, identified above to pertain in practice, the inevitable consequence would be that no rational commercial enterprise whose business was impacted by the 1992 Act could or would do business in Ireland because of the utterly absurd level of legal, and hence commercial, risk that would arise for it in so doing. As Walsh J.'s comments in *Shelly* intimate, the courts do not operate in a void where legal interpretation proceeds oblivious to practical consequence. This seems most especially to apply when a court is considering whether absurdity attaches to a particular interpretation of legislation and thus this seventh factor seems to the court another factor to which it can have regard.

24. In the present case, the court considers, having regard to all of the factors just mentioned, that the Oireachtas cannot have intended that in the event of a revised licence being quashed a legal vacuum should pertain and chaos such as that described above should ensue. The only logical reading of the Act, and one that is consistent with the approach adopted by the Oireachtas in section 92 and indeed with basic principles of fairness, is that the licensing arrangements which pertained before the revised licence was quashed should resume force. Such an interpretation does no violence to the language of the Act and appears entirely consistent with the purpose of the Act, far more so than the alternative. In this context it does not seem to matter whether the old licence is treated as having been resurrected from the legal grave or re-awoken from a state of stasis. What matters is that a situation of legal chaos, a situation that lawmakers simply cannot have intended, does not come into being. The court has concluded that the effect of the order of 15th October, 2013, which quashed the decision of the EPA to grant a revised IPPC licence was that the decision of the EPA was void *ab initio.* Consequently the revised IPPC licence was no longer in force and, having regard to all of the factors just mentioned, the only reading of the legislation which does not admit of absurdity is that upon the issuance of the order the 2007 IPPC licence immediately took force again and applied anew. In passing, the court notes that both readings of the relevant provisions of the 1992 Act, namely that propounded by counsel for Shell and that adopted by the court, arrive ultimately at the same end, *viz.* that the 2007 IPPC licence took effect upon the quashing of the decision to grant the revised IPPC licence. However, the court considers that a conclusion which rests on the longstanding rules of statutory interpretation, as identified in *Nestor* and *Ivers* and buttressed by the Interpretation Act 2005, that the court should seek to avoid pointless absurdity and adopt a construction which has regard to the legislative scheme as a whole, is preferable to an interpretive approach that seeks to attach a particular meaning to particular phrases but which is perhaps vulnerable to the criticism that the principal purpose in ascribing those particular meanings is to arrive at a pre-ordained end.

Collateral attack on the 2007 IPPC licence

25. The court has already held above, by reference to Order 84, rule 21(1) of the Rules of the Superior Courts, 1986, as amended, that Mr. Harrington's proceedings are out of time so far as reliefs are sought based on the contention that the 2007 IPPC licence did not continue in force after 5th June, 2013. However, even were this not so, the court considers that in any event all attempts by Mr. Harrington in the instant proceedings to impugn the validity of the 2007 IPPC licence represent an impermissible collateral attack on the decision of the EPA to issue the said licence. The court is driven to this conclusion by its consideration of section 87(10) of the 1992 Act which provides that:

"[A] person shall not, by application for judicial review or in any other legal proceedings whatsoever, question the validity of a decision of the Agency to grant or refuse a licence or revised licence (including a decision of it to grant or not to grant such a licence on foot of a review conducted by it of its own volition) unless the proceedings are instituted within the period of 8 weeks beginning on the date on which the licence or revised licence is granted or the date on which the decision to refuse or not to grant the licence or revised licence is made."

26. The clear purpose and effect of section 87(10) is to give certainty to those who are affected by decisions of the EPA. Thus it provides that such decisions must be challenged within a very short period of time with the obvious intention that, thereafter, persons affected by such decisions ought to be free to rely upon such decisions, safe in the knowledge that they are beyond challenge. This policy objective is of particular importance where considerable sums are to be expended in reliance on decisions or acts of the EPA, as Shell has done here. Section 87(10) precludes not just direct challenges to the validity of decisions of the EPA but also the making of any challenge or argument that would have the effect of impugning the validity of the decision of the EPA or involving a collateral attack upon it. That this is so is clear from the wording of section 87(10) and also from decisions such as those of the High Court in *Goonery v. Meath County Council* (Unreported, High Court, Kelly J., 15th July, 1999) and *Mahon v. An Bord Pleanála* [2010] IEHC 495, each of which was made in the context of the Planning and Development Act 2000, under which a similar procedural exclusivity to that which obtains under section 87(10) in the environmental law context subsists, so that the challenging or questioning of acts or decisions of a planning authority/An Bord Pleanála is done by way of timely judicial review proceedings and not in other types of proceedings. In the present case any collateral attack on the 2007 IPPC licence is now clearly out of time, having regard to the outside limit set in this regard by section 87(10).

27. Notwithstanding the foregoing, Mr. Harrington has sought in these proceedings to rely on the decision of the European Court of Justice in *Commission v. Ireland* (Case C-50/09) [2011] ECR I-873 to support an argument that an environmental impact assessment

was not carried out in respect of the 2007 IPPC licence. However, that case was concerned with a, now historical, lacuna in Irish law whereby it was possible that, in contravention of applicable European Union legislation, the EPA might receive a licence application and decide on questions of pollution before a related application was made to the relevant planning authority which alone at the time could require a developer to prepare an environmental impact statement. In the present case this lacuna simply did not arise, so *Commission v. Ireland* is of no real relevance. Here planning permission was granted by An Bord Pleanála in 2004, an environmental impact statement accompanied this application and planning permission was granted in October 2004 before the application was made for the IPPC licence in December 2004, with which later application, as was required under the statutory scheme in place at the time, a copy of the environmental impact statement that had been submitted during the planning application was forwarded with the IPPC licence application. Thus, while Mr. Harrington, now long out of time for doing so, has contended that the 2007 IPPC licence does not have the benefit of a valid environmental impact assessment, this has not been established. As a result, consistent with the decision of Finlay P. in *Re Comhaltas Ceoltóirí Éireann* (Unreported, High Court, 14th December, 1977) that there is a rebuttable presumption that the acts of a planning authority are valid, the 2007 licence remains valid for all purposes unless and until set aside by the courts, and it has not been set aside.

Failure to state reasons

28. Mr. Harrington alleges that the EPA failed to give any reasons for its decision of 6th January, 2014. Notably, there is no statutory requirement for the EPA to give reasons for a determination made under section 82A of the 1992 Act which, it will be recalled, is the provision pursuant to which the decision of 6th January ensued. Nevertheless the EPA has in fact clearly and comprehensively stated the reasons for its decision in a document entitled "*Section 82A(11) Amendment to Industrial Emissions Licence*". The EPA also states the reason for the imposition of the new conditions in the licence at page 3 of that document, being "*[t]o bring the licence into conformity with the requirements of the Industrial Emissions Directive*", as contemplated by section 82A(11) of the 1992 Act. Accordingly, Mr. Harrington's plea that the EPA failed to provide any rational basis or explanation as to why the purported amendments were required is entirely without merit. Mr. Harrington avers in his affidavit evidence that a letter of 6th January, 2014, which was sent to various prescribed parties, including Mr. Harrington, advising of the issuance of an amendment of the 2007 IPPC licence, does not contain any reasons. However, while the letter may not do so, it expressly refers to an attached copy of the Amendment which clearly states the relevant reasons. The written submissions filed on behalf of Mr. Harrington suggest that a letter sent by the solicitors for the EPA and dated 20th March, 2014, "*sought to set out at that juncture the EPA's rationale*" (emphasis in original). However, in truth the letter does no more than regurgitate by way of rationale what the Amendment itself already expressly states. This is not a case in which a decision-making body is trying to correct or add to the reasons given in its original decision, as was for example the case in *R. v. Westminster City Council* [1996] 2 All E.R. 302, nor is it a case in which it was required to give reasons and the relevant decision would be invalidated were it to fail to do so, as for example was the case in *Nash v. Chelsea College of Art and Design* [2001] EWHC (Admin) 538 where the seriousness of the allegation raised and the formality of the applicable procedures was held by Burnton J., at 6, to create an obligation to give reasons. This is a case in which no statutory obligation existed to provide reasons, yet in which reasons for the decision and for the imposition of new conditions was clearly and expressly provided. It might perhaps be contended that it is more appropriate to laud than to lambast the actions of the EPA in this regard, let alone litigate them. At the least, the court considers there to be no merit in the contention that there was a failure by the EPA to give any reasons for its decision of 6th January, 2014.

Fair procedures and legitimate expectations

29. Mr. Harrington has contended that the EPA failed to accord him fair procedures and denied his legitimate expectation that he would have an opportunity to participate in the amendment process that was done under section 82A and which resulted ultimately in the decision of 6th January, 2014. In this regard, however, the EPA relies on the express terms of section 82(A)(10) of the 1992 Act which contemplates that there will be no consultation done as part of such a process either with the public generally or indeed with persons who participated in the application for the relevant licence or revised licence. Thus, per section 82A(10):

> *"(a) None of the requirements of Section 90 shall apply to the performance or functions conferred on the Agency under subsection (8) or (9) but the Agency shall, where appropriate, consult with the licensee before performing that function.*
>
> *(b) Where the Agency considers that it is necessary for the purpose of the performance of the functions conferred on the Agency under subsection (8) or (9), it may give notice to the licensee to furnish to the Agency, within the period specified in the notice, information, documents or other particulars specified in the notice.*
>
> *(c) The Agency shall, as soon as may be after the performance of functions conferred on it under subsection (8) or (9) notify particulars of the amendment effected by that performance to each person who made an objection to the Agency under Section 87(5) in relation to any performance by the Agency of powers conferred on it under Section 83 or 90 as respects the licence or revised licence concerned."*

30. The omission of provision for consultation with the public is clearly not an oversight, as the Oireachtas has seen fit to require the EPA, pursuant to section 82A(10)(c), to provide notice of the amendment of the relevant licence or revised licence to persons who had participated in the application for that licence or revised licence. Section 82A enjoys a presumption of constitutionality and Mr. Harrington has not sought to impugn this provision on the grounds that it is in breach of his constitutional right to fair procedures and thus the presumption applies. Equally, Mr. Harrington has not sought to challenge the transposition of the relevant European Union law requirements through the mechanism of section 82A. On a related note, the court has had due regard in its deliberations to the requirements of the rule of 'harmonious interpretation' to which it is subject as a matter of European Union law and considers that in making and reaching all of the findings and interpretations that it has arrived at in the course of this judgment it has complied with those requirements. Continuing, however, with the issue of fair procedures and legitimate expectations, the court does not see how the absence of statutory provision for public consultation in section 82A would be capable in any event of giving rise to a breach to the constitutional right to fair procedures in circumstances where the amendments made by the EPA pursuant to section 82A are technical, if not indeed hyper-technical, in nature and do not significantly alter the character of the existing licence. Finally in this regard, the criteria for legitimate expectation on the part of Mr. Harrington that he would be consulted in relation to the exercise by the Agency of its functions under section 82A are simply not met: Mr. Harrington has not pointed to any representation that he would be so consulted and in any event the above-quoted statutory provisions appear sufficient to prevail over and defeat any, if any, contrary legitimate expectation that has arisen on Mr. Harrington's behalf.

Error on the face of the record

31. Mr. Harrington has pointed to what he contends are various errors on the face of the decision of 6th January, 2014. First, he points to the fact that the decision refers to the 2007 IPPC licence as subsisting. However, the court has concluded that the 2007 IPPC licence, whether resurrected or re-invigorated, has subsisted anew since 15th October, 2013, and thus the reference to it as a subsisting licence in the decision of 6th January, 2014, is not and cannot be an error on the face of the record. Mr. Harrington has also pointed to the fact that in the reasons for the decision mention is made of the fact that "*the carrying on of the activity will comply with and not contravene any of the requirements of section 83(5) of the Environmental Protection Agency Act 1992*", an

assertion that he maintains is false. Section 83(5) provides that the EPA shall not provide a licence or revised licence for an activity unless it is satisfied that, amongst other matters:

> *"(iii) any emissions from the activity or any premises, plant, methods, processes, operating procedures or other factors which affect such emissions will comply with, or will not result in the contravention of, any relevant standard including any standard for an environmental medium prescribed under regulations made under the European Communities Act 1972, or under any other enactment…*
>
> *(x) necessary measures will be taken upon the permanent cessation of the activity (including such a cessation resulting from the abandonment of the activity) to avoid any risk of environmental pollution and return the site of the activity to a satisfactory state, and*
>
> *(xa) in the case of an industrial emissions directive activity, necessary measures referred to in subparagraph (x) including measures of appropriate duration shall be taken…".*

32. Insofar as it is contended that the decision of 6th January, 2014, ought to have been preceded by an environmental impact assessment or appropriate assessment under the 1992 Act, it is clear from the terms of section 82A that neither such assessment is required. As regards an environmental impact assessment, the statutory requirement placed upon the EPA to carry out an environmental impact assessment is set out in section 83 of the 1992 Act. Pursuant to section 83(2A) the requirement applies in the context of an "*application for a licence*". However, the review process carried out by the EPA pursuant to section 82A so as to ensure that existing licences were brought into compliance with the Industrial Emissions Directive was not instigated by Shell, is in no sense carried out on foot of an "*application*" and involves nothing more than the performance by the EPA of a statutory obligation that was incumbent on it to discharge. As regards an appropriate assessment, the EPA as a "*public authority*" within the meaning of regulation 2 of the European Communities (Birds and Natural Habitats) Regulations 2011, is, pursuant to regulation 42(1) of those Regulations, only required to screen for and, if necessary, carry out an appropriate assessment in the context of a "*plan or project for which an application for consent is received*". Again, the section 82A examination carried out by the EPA, and the making of amendments pursuant to same do not arise in the context of an "*application for consent*" for a plan or project that has been brought by Shell or any other party and so the provisions of the Habitats Regulations do not apply. To the extent, if at all, that Mr. Harrington's contentions as to the error on the face of the record seek to impugn the validity of the 2007 IPPC licence and/or the process that preceded same, they represent, for the reasons stated above, an impermissible collateral attack on the decision of the EPA to issue the said licence.

Conclusions

33. For the reasons identified in this judgment, the court considers that: (1) Mr. Harrington's proceedings are out of time so far as reliefs are sought based on the contention that the 2007 IPPC licence did not continue in force after 5th June, 2013; (2) the effect of the High Court order of 15th October, 2013, which quashed the decision of the EPA to grant a revised IPPC licence was that the decision of the EPA was void *ab initio*, consequently the revised IPPC licence was no longer in force, and the only reading of the 1992 Act which does not admit of absurdity is that, upon the issuance of the order, the 2007 IPPC licence immediately took force again and applied anew; (3) having regard to section 87(10) of the 1992 Act, all attempts by Mr. Harrington in the instant proceedings to impugn the validity of the 2007 IPPC licence represent an impermissible collateral attack on the decision of the EPA to issue the said licence and are out of time; (4) there is no merit in the contention that there was a failure by the EPA to give any reasons for its decision of 6th January, 2014; (5) there has been no failure by the EPA to accord Mr. Harrington fair procedures and no denial of any legitimate expectations on his behalf as to participation in the review process that resulted in the decision of 6th January, 2014; and (6) there is no error on the face of the decision of 6th January, 2014, nor was there any requirement that the said decision be preceded by an environmental impact assessment or appropriate assessment under the 1992 Act.