THE COURT OF APPPEAL

Neutral Citation Number [2022] IECA 222
Record Number: 2019/339
High Court Record Number: 2018/257MCA

Noonan J.
Faherty J.
Collins J.

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT, 2000 (AS AMENDED)

BETWEEN/

JOHN CASEY

APPLICANT/APPELLANT

-AND-

BIOATLANTIS AQUAMARINE LIMITED

RESPONDENT/RESPONDENT

-AND-

MINISTER FOR HOUSING PLANNING AND LOCAL GOVERNMENT

NOTICE PARTY/RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered on the 11th day of October, 2022

1. The essential question arising in this appeal is whether the harvesting of wild kelp, a type of seaweed, by mechanised means on the foreshore, is an activity that requires planning permission to render it lawful.

Facts

2. The appellant (Mr. Casey) is an environmental activist who was formerly a solicitor practising in the sphere of environmental law. The respondent (BioAtlantis) was incorporated in 2004. The evidence of a director of BioAtlantis, John T. O'Sullivan, is that it was incorporated with a focus on identifying natural marine ingredients which could alleviate certain problems in modern agriculture, including the overuse of antibiotics in the pig and poultry industry. Since 2005, BioAtlantis, in partnership with University College Dublin, has conducted research into identifying compounds in seaweed and kelp that could enhance the gut microbiome, prime the immune system and reduce pathogenic infection in pigs. This research has resulted in two patented products and the publication of over 50 peer reviewed scientific papers. One of the patented products is known as LactoShield®, which contains constituents derived from kelp. This in turn requires a supply of kelp as a raw material.

3. BioAtlantis proposed to mechanically harvest kelp in an area of approximately 1,868 acres over five locations located in Bantry Bay which constitutes approximately 0.3% of the area of the bay. In its application for a foreshore licence to the notice party (the Minister), BioAtlantis indicated that the kelp is to be harvested from low water to a depth of 20 metres and up to 5,000 tons of kelp per boat per year is envisaged. The licenced areas are not within the area of any European site, the nearest of which are land based.

4. The foreshore licence application was submitted to the Minister on the 22nd June, 2009, approved in January 2011 and the licence itself was executed in March 2014. The grant of the licence was preceded, *inter alia*, by a public consultation in which Mr. Casey did not participate. The proposed activity is described in the application for a licence in the following terms:

> "BioAtlantis proposes to harvest Laminaria hyperborean in the area applied for using a purposely designed vessel equipped with a winch, suction pump and cutter. In an initial study BioAtlantis found Laminaria hyperborean to be the main species in the areas applied for. Laminaria digitata was not present in any of these areas. This is the preferred species and was present in Kenmare Bay. The object is to harvest the material without disrupting the foreshore i.e. without making physical contact with the foreshore surface. This will be achieved by applying moderate suction which will draw the weed into the cutter where it will be cut and pumped into the boat. There, it will be stored in bags for transportation to the factory by road. The weed will be cut at a minimum 25 centimetres from its holdfast. This will be controlled by using sonar and sounder automation to operate the winch so the cutter is maintained at this set point distance (*sic*) the foreshore."

5. The application for a licence includes at section 3 a heading entitled "Record of documents enclosed with this application" and at subparagraph (iii) thereof, the following appears:

> "Decision of Planning Authority or An Bord Pleanála Under Planning Acts (required)

Developments on the foreshore require planning permission in addition to a foreshore lease/licence/permission. All foreshore leases, licences and permission are without prejudice to the powers of the local planning authority. Applicants should, therefore, consult initially with the local planning authority regarding their proposal."

6. Each item in section 3 of the application, including the foregoing subparagraph (iii) has a tick box located beside it and this was left blank at subparagraph (iii). In the course of the hearing before the High Court, the parties prepared a Statement of Agreed Facts of the 23rd May, 2019 which includes the following relevant passages:

"6. The Department's consultees recommended the grant of the licence subject to conditions, one of which *was 'that the project will be subject to an agreed monitoring programme/environmental study drawn up by the Marine Institute and Inland Fisheries Ireland. This monitoring programme can be used as a foundation for developing a policy framework for the exploitation of seaweed on a sustainable basis'*.

7. In considering the foreshore licence application, Dominic Gallagher, Senior Port Officer, Castletownbere stated in an email dated 5 September 2009:

'I don't see the venture having an impact on either commercial or leisure activity'

8. As part of the foreshore licence application, the Minister consulted with eight State bodies, namely the National Parks and Wildlife Service, the Marine Institute, the Marine Survey Office, the Sea Fisheries Protection Authority, the Eastern Regional Fisheries Board, the Central Fisheries Board, the Underwater Archaeology Unit of the Department of the Environment, and the Marine Licence Vetting Committee. Those State bodies informed the decision ultimately made by the Minister. The Marine Licencing Vetting Committee concluded:

> 'The MLVC concludes that, subject to compliance with the specific conditions set out below, the proposed harvesting of the seaweed is not likely to have a significant negative impact on the marine environment, would not adversely impact on the marine Natura 2000 sites and therefore recommends that a permit be issued.'

9. In considering the application for the foreshore licence, the Assistant Principal noted in a short report dated 7 December 2010 that there were no objections to the development from the Department's consultees subject to the inclusion of a number of conditions. The Foreshore Unit within the Department also stated in the 'foreshore licence application case summary':

> 'Planning permission is not applicable in this case as it is an application to harvest seaweed and has no land based aspect.'

10. In completing the legislation compliance checklist, the Department concluded that the activity to be licenced was not of a class requiring the submission of an Environmental Impact Statement (EIS) and also stated:

'The development is not likely to have significant effects on the environment.'

11. Under the heading Appropriate Assessment, the Department's legislative checklist stated:

'The proposed development is not likely to have a significant effect on European sites.'

12. The MLVC recommended the attachment of seven conditions to the licence. Condition 7 of these recommended conditions provided as follows:

'In the event that unacceptable impact on the environment is observed, the Minister reserves the right to modify/restrict harvest practices and schedule as necessary.'

13. The application was approved by the Minister for Environment, Heritage and Local Government in January 2011.

14. The licence itself was executed in March 2014. Condition 21 of the licence is headed 'Compliance with Planning'. Condition 21.1 provides:

'The licensee shall obtain all planning permissions and fire safety certificates required for the construction, installation and operation of the facilities and comply at its own cost therewith and any local authority requirements. On completion of the construction and installation of the facilities, the licensee shall furnish the Minister with its architect's certificate of compliance in respect of such permissions.' "

7. A number of conditions are set out in the second schedule to the licence which are reproduced in the statement of agreed facts which continues:

"17. The five licensed areas are depicted on the foreshore licence map prepared in February 2014, and on the map prepared in the course of these proceedings by Departmental Engineer Barry McDonald. That map has been admitted for illustrative purposes only and is not probative of the locus of any water mark or where, in fact, the foreshore lies in this case. This latter map shows the relationship of the licenced sites to various SAC's and SPA's. The land above the high water mark on all sides of Bantry Bay, and the land described in s. 28(1)(a) of the Local Governments (Reorganisation) Act, 1985, is within the functional area of Cork County Council. The licenced areas are not within the new boundary of the functional area introduced by this section.

18. The kelp growing in the licenced harvesting areas in Bantry Bay, once harvested as proposed, will be used in the manufacture of products for animal health and that this is an innovative use for which patents have been granted and which has positive aspects."

8. The method by which kelp is proposed to be harvested is described in the statement of agreed facts as follows:

"30. The harvesting method proposed consists of a cutting system that is towed behind the harvesting vessel and is acoustically controlled to stay circa 25cms off the seabed. In harvesting kelp in this manner the respondent will not be making direct contact with the seabed. The stipe is to be cut at a minimum height of 25cms from the holdfast and a suction system is used to draw the cut frond and stipe into the pump from where it is transferred to the harvesting vessel. The system selectively harvests older kelp plants.

31. The stipe is below the meristem. If the plant is cut below the meristem the plant which is cut will die. Kelp in the understory, below 25cm from the seabed, will not be harvested …

34. BioAtlantis propose to cut in strips with an unharvested area left between these strips. The strip method is not referred to in the licence proposal or in the licence process or in the reports approved in 2017 …

36. Mechanical harvesting of kelp has taken place in Norway and France for over 40 years. The methods employed in those countries are not the same as the methods proposed here. For example, dredging is a method used which involves direct contact with the seabed."

The Section 160 Application

9. On the 23rd July, 2018, Mr. Casey issued an originating notice of motion seeking a planning injunction under s. 160(1) of the Planning and Development Act, 2000 (as amended) ("the PDA") restraining BioAtlantis from carrying out what is alleged to be unauthorised development including the mechanical harvesting of seaweed at Bantry Bay. He also seeks a declaration that this activity constitutes development which is unauthorised and which is not exempted development. There was an extensive exchange of affidavits between the parties before the High Court, much of which consists of argumentative matter and, as described by the trial judge, appears to generate more heat than light.

10. It should be noted that prior to the issuing of the motion in this application, Mr. Casey had brought separate judicial review proceedings in March 2018 seeking to challenge a decision of the Minister of the 30th November, 2017 to approve a baseline study and monitoring programme which was one of the conditions attached to the foreshore licence and to grant a development consent. No challenge was brought at any stage by Mr. Casey or by any other party to the decision to grant the foreshore licence or to the licence as granted.

11. Although that judicial review application appears to have been heard in tandem with the s. 160 application, the High Court ultimately determined that it should not proceed to judgment on the application on the basis of its view that the foreshore licence had not become operative or effective because of a failure on the part of the Minister to comply with the mandatory publication requirements of section 21A of the Foreshore Act 1933 (as amended) ("*the Foreshore Act*") by failing to publish notice of the determination to grant the licence ([2020] IEHC 227).

12. That decision was appealed to the Supreme Court and, while the Court agreed that the Minister had failed to comply with section 21A, it held that such failure did not affect the validity of the licence and remitted the judicial review application to the High Court for determination ([2021] IESC 42).

13. In his affidavit grounding this application, the essential contention made by Mr. Casey is that harvesting kelp in the manner proposed by BioAtlantis amounts to "development" within the meaning of the PDA and thus requires planning permission.

Relevant Legislation

14. The foreshore licence in this case was granted by the Minister pursuant to the Foreshore Act. "Foreshore" is defined in s. 1 of the Act as follows:

> "The word 'foreshore' means the bed and shore, below the line of high water of ordinary or medium tides, of the sea and of every tidal river and tidal estuary and of every channel, creek, and bay of the sea or of any such river or estuary and the outer limit of the foreshore shall be determined in accordance with s. 1A of this Act …"

15. Accordingly, the foreshore commences at the high water mark ("HWM") and includes the seabed extending to the seaward limit of the State's territorial waters, being 12 nautical miles.

16. The Act also defines "beach material" in the following terms:

> "The expression 'beach material' means sand, clay, gravel, shingle, stones, rocks, and mineral substances on the surface of the seashore and includes outcrops of rock or any mineral substance above the surface of the seashore and also includes bent grass growing on the seashore and also seaweed whether growing or rooted on the seashore or deposited or washed up thereon by the action of tides, winds, and waves or any of them;" (My emphasis).

17. It will be seen therefore that kelp is "beach material". "Seashore" is further defined in the Act as including the foreshore.

18. The Minister's power to grant licences of the foreshore is provided for in s. 3:

> "(1) If, in the opinion of the appropriate Minister, it is in the public interest that a licence should be granted to any person in respect of any foreshore belonging to the State authorising such person to place any material or to place or erect any articles, things, structures, or works in or on such foreshore, to remove any beach material from, or disturb any beach material in, such foreshore, to get and take any minerals in such foreshore and not more than thirty feet below the surface thereof, or to use or occupy such foreshore for any purpose, that Minister may, subject to the provisions of this Act, grant by deed under his official seal such licence to such person for such term not exceeding ninety-nine years commencing at or before the date of such licence, as the Minister shall think proper."

19. The harvesting of kelp is therefore an activity in respect of which the Minister may grant a licence pursuant to s. 3.

20. Section 13A deals with environmental impact assessments of certain proposals relating to the foreshore and provides that before granting a licence, where the project involved is likely to have significant effects on the environment, it shall be subject to an environmental impact assessment. As already noted, the Minister here determined that the proposed harvesting of kelp was not likely to have significant effects on the environment.

21. Turning now to the PDA, s. 3 provides:

> "3.—(1) In this Act, 'development' means, 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."
>
> "Land" is defined in s. 2 as including "any structure and any land covered with water whether inland or coastal."

22. Central to the issues in this appeal is the definition of "works" which is:

> " 'Works' includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure."

23. Part XV of the PDA deals with development on the foreshore and provides an expanded definition of the foreshore in s. 224:

> " 'foreshore' has the meaning assigned to it by the Foreshore Act, 1933 , but includes land between the line of high water of ordinary or medium tides and land within the functional area of the planning authority concerned that adjoins the first-mentioned land."

24. Another critical provision in the context of this appeal is s. 225, dealing with the obligation to obtain permission in respect of development on the foreshore:

> "225.—(1) Subject to the provisions of this Act, permission shall be required under *Part III* in respect of development on the foreshore not being exempted development, in circumstances where, were such development carried out, it would adjoin—
>
> (a) the functional area of a planning authority, or
> (b) any reclaimed land adjoining such functional area,
>
> and accordingly, that part of the foreshore on which it is proposed to carry out the development shall for the purposes of making an application for permission in respect of such development be deemed to be within the functional area of that planning authority."

25. It will be seen therefore that in respect of developments on the foreshore, in order for a development to require planning permission, that development must adjoin the functional area of a planning authority, the relevant authority here being Cork County Council. There is a significant dispute between the parties as to whether the seaweed harvesting is to take place on a part of the foreshore that adjoins the functional area of Cork County Council and in this respect, s. 227 of the Local Government Act 2001is relevant:

> "227.—(1) the maritime boundary of a county, city or town shall on the establishment day by virtue of this subsection be deemed to coincide with the ordinary high water mark for the time being, except where in accordance with *section 10(4)*, such boundary already extends beyond that high water mark."

The Arguments

26. Mr. Casey advances the argument that the kelp harvesting proposed by BioAtlantis constitutes "works" because it amounts to an alteration of the seabed. An earlier argument that it also constituted repair or renewal of the seabed is no longer being pursued. Alternatively, Mr. Casey argues that the activity in question is a material change in the use of the seabed. Finally, Mr. Casey contends that the foreshore where the activity is conducted adjoins the functional area of Cork County Council.

27. He submits that some assistance can be had from a consideration of the categories of exempted development in the PDA which includes matters such as, in s. 4, agriculture and the thinning and felling of trees. These activities are regarded as development, albeit that is exempted. His primary argument however is that the proposed harvesting of kelp constitutes "works" because it involves an alteration of the foreshore. He relies on the judgment of the Supreme Court in *Michael Cronin (Readymix) Limited v An Bord Pléanála* [2017] 2 IR 658 in which it was held that alteration, in the context of exempted development, was to be regarded as bearing its ordinary meaning of "change". The seabed will be altered or changed because the kelp will be harvested at a level which will cause the individual plants to die. It will also give rise to certain changes in the marine ecosystem which he identifies. He disputes the respondent's contention that alteration in this context refers only to alterations of structures and buildings.

28. In addition, or in the alternative, Mr. Casey contends that kelp harvesting will involve a material change in use of the seabed such as to bring it within the concept of development in the PDA. Perhaps in anticipation of an argument by BioAtlantis that there could be no change of use unless there was a pre-existing use of the kelp beds, Mr. Casey submits that even if kelp beds could be regarded as having no use, commencement of harvesting is a change of use. In that way, "no use" is in fact an existing use when considering if a change of use has occurred. He submits that the evidence establishes that the current use of the kelp forests in Bantry bay is as a natural habitat and they can also provide a very moderate form of wave dampening which in turn ameliorates coastal erosion and is thus a "use".

29. Mr. Casey accepts that a change of use alone is not sufficient and it must be shown to be material from a planning perspective. In this regard, he says that the sheer scale of the

proposed operations by BioAtlantis together with the fact that they will be closely proximate to various European sites provide strong support for their materiality.

30. On the issue of adjoining the functional area of the local authority, Mr. Casey submits that the entirety of Bantry Bay "adjoins" the functional area of Cork County Council. He argues for an interpretation of "adjoin" that does not necessarily involve contiguity or a common boundary but it is sufficient if it is "neighbouring". He also points to the fact that a significant part of Bantry Bay is in fact incorporated in the functional area of Cork County Council which is, unusually, not confined to dry land, by virtue of s. 28(1)(a) of the Local Government Reform Act, 1985 which provides:

> "28.—(1) (a) The land lying between the existing boundary of the administrative county of Cork and an imaginary straight line drawn from Muccurragh Point in Bantry Bay to League Point in the said bay shall, subject to *paragraph (b)* of this subsection, on and after the commencement of this section, be included in, and form part, of the said administrative county and the boundary of that county shall be altered accordingly."

31. Section 28 was apparently enacted following the Whiddy disaster. The imaginary line between Muccurragh Point and League Point runs well to the west of Whiddy Island, and so Whiddy and all the land lying to the east of that line is part of administrative county of Cork. None of the licensed areas are within the area encompassed by section 28(1). However, Mr. Casey says that even if a restrictive approach is taken to the word "adjoining", since part of Bantry Bay is within the functional area of the County Council, at least some of the rest of the bay must adjoin that functional area.

32. It would appear that in oral argument in the High Court, Mr. Casey went somewhat further than this. On day 8 of the hearing, the following exchange took place between the trial judge and counsel for Mr. Casey (at pp 7 – 8):

> "Ms. Justice Murphy: I am concerned with – in order to establish whether something adjoins or not then I have to know what the functional area is.
>
> Mr. Devlin: Yeah. Well, two things to say about that, judge. On my interpretation of adjoining, I am not sure that that is really relevant in the first place because it's in Bantry bay and I say all of Bantry bay is adjoining.
>
> Ms. Justice Murphy: and out to the twelve mile limit.
>
> Mr. Devlin: And, if needs be out to the twelve mile limit…"

33. In response, BioAtlantis contends that kelp harvesting does not amount to "works" within the meaning of the PDA. It does not bear any resemblance to any of the operations included in the definition. The activity concerned is expressly provided for under the Foreshore Act, 1933 as amended. It does not involve the erection of any structures on the seabed or indeed any direct contact with the seabed. The harvesting of Kelp does not alter the seabed nor any structure in any way. BioAtlantis submits that the definition of "works" in the PDA

envisages a degree of permanence which is absent in the harvesting of kelp, which will naturally regenerate.

34. BioAtlantis also places considerable reliance on the evidence of its experts with regard to the necessity for planning permission. John Crean, the only planning expert to swear an affidavit in the matter, averred that in 23 years of practice he had never come across an instance whereby planning permission was required to harvest kelp or similar activity. The evidence of Brendan O'Connor, a marine environmental scientist, on behalf of BioAtlantis, was that in his 37 year career he has been involved in obtaining consents for seaweed harvesting activities and planning permission was never required for any of them.

35. BioAtlantis argues that mechanical kelp harvesting does not involve the use of any structure or other land. It does not involve any contact with the seabed and ought to be regarded as analogous to activities such as commercial trawler fishing. It submits further that as kelp beds have no existing use from a planning perspective, harvesting wild kelp cannot amount to a change of use. In that regard it disputes the characterisation by Mr. Casey's witnesses that kelp forests have a "use" as a habitat and shelter for plants and animals. In this connection, BioAtlantis points to the evidence of Mr. Crean to the effect that "use" normally refers to use by humans.

36. The foreshore licence does not grant BioAtlantis any right to occupy any part of the foreshore and the normal activities that take place in Bantry bay are unaffected. Harvesting wild kelp does not involve any element of cultivation or farming and is thus not aquaculture, an argument originally made and subsequently abandoned by Mr. Casey.

37. BioAtlantis submits that even were kelp harvesting to be regarded as a change of use, it is not one that is material in planning terms. It imposes no burden on public infrastructure and is not visible, as it takes place underwater. The alleged environmental effects, which BioAtlantis denies, are immaterial unless it is demonstrated that the activity involves the use of land or structures on land. Similarly, the proximity of European sites is not relevant to the issues.

38. Without prejudice to the foregoing, BioAtlantis contends that the kelp harvesting is not taking place on a part of the foreshore "adjoining" the functional area of Cork County Council. In this respect it submits that "adjoining" means, contrary to Mr. Casey's position, land that is touching and sharing a common border with the functional area of the local authority and relies on a number of authorities in that regard.

39. BioAtlantis says that the onus of establishing that the area it proposes to harvest adjoins the functional area of Cork County Council rests on Mr. Casey and he has failed to prove that essential fact. The evidence shows that the kelp will be harvested exclusively in the subtidal area of the foreshore. That area does not adjoin, and is not connected to, the HWM but rather is separated by a number of intervening areas described in the evidence. Where that does not occur, for example in the case of cliffs where the HWM has the low water mark immediately below it so that it might be said that the harvesting area does in fact touch the boundary of the functional area of the Council, the evidence establishes that

the harvesting will take place, for safety reasons, at least 24 metres out from any cliff face and will therefore not adjoin the functional area.

40. BioAtlantis further argues that insofar as the boundary of the functional area of the local authority is represented by the HWM, Mr. Casey has failed to prove where the HWM is actually located and consequently cannot establish that the harvesting is taking place on a part of the foreshore that adjoins the functional area. It relies in that regard on the judgment of the Supreme Court in *Fingal County Council v Kennedy* [2015] IESC 72.

41. The Minister applied to be joined as a notice party on the basis of his clear interest in the issues in dispute between Mr. Casey and BioAtlantis and the High Court permitted his joinder to enable the Minister to make submissions. The Minister did not put any evidence before the court. The Minister's position largely coincides with that of BioAtlantis.

42. The Minister submits that the correct point of departure is the Foreshore Act which constitutes a bespoke statutory regime governing the grant of licences in respect of any foreshore belonging to the State authorising certain activities and works. Those activities include seaweed harvesting. The Minister agrees with BioAtlantis that the harvesting of kelp in the manner proposed does not constitute "development" within the meaning of the PDA. He argues that Mr. Casey seeks to strain the interpretation of the PDA to make it applicable to the circumstances arising here where there is no obvious reason to do so and where doing so would have the effect of creating overlapping and potentially conflicting regulatory regimes for the foreshore.

43. The statutory regulatory regime under the Foreshore Act already provides for the consideration of environmental concerns and if necessary for environmental assessment. The Minister submits that the wider regulatory context can inform the correct interpretation of the PDA and this shows that the Oireachtas expressed a clear legislative intent that activities on the foreshore were presumptively to be regulated outside the framework of the PDA. This is particularly so in the context of "beach material" which is expressly provided for in the Foreshore Act.

44. Insofar as Mr. Casey suggests that the definition of "works" covers the harvesting of kelp because it is an "alteration" of the seabed, the Minister points to the wording of the definition as strongly suggestive of "alteration" being clearly referable to alteration of existing structures, which would include an alteration to something which itself is capable of being development of a type that would require planning permission. He submits that this is implicit from the judgment of the Supreme Court in *Michael Cronin (Readymix)*. Accordingly, "alteration" in this context cannot apply to the activity undertaken by BioAtlantis. The Minister, in common with BioAtlantis, also argues that kelp harvesting cannot be regarded as having the necessary degree of permanence to qualify as "works" under the PDA.

45. The activity being undertaken by BioAtlantis is entirely waterborne and involves no contact with the surface of the foreshore. It is therefore not something which is being carried out "on" the foreshore but rather in the water above it. Again, in common with BioAtlantis, the

Minister argues that even if it could be regarded as a change of use of the seabed, it is not material because of the absence of the necessary level of permanence and the fact that the kelp naturally regenerates.

46. Mr. Casey has put forward no authority in support of the proposition that mechanised kelp harvesting as proposed here is a "use of any structures or other land" within the meaning of s. 3 of the PDA. In fact, as the categories of licence that the Minister may grant in respect of the foreshore make clear, BioAtlantis is not in fact licenced to carry out any work or to use or occupy the foreshore itself, that being something separate and distinct which may be the subject of a licence by the Minister.

47. Again, in relation to the question of "adjoining" the functional area of the local authority, the Minister adopts the same position as BioAtlantis. In fact, he goes further in suggesting that this issue does not in fact arise at all because the activity is not taking place "on" the foreshore but above it. He suggests that the structure of s. 225 itself makes plain that "adjoin" must mean "connected" to land within the functional area of a planning authority.

48. Were the appellant correct in the approach he advocates, it would mean that all offshore developments and structures such as windfarms would have to obtain planning permission. In effect, Mr. Casey argues that the Planning Acts extend to the territorial limits of the waters of the State. The Minister also adopts the submissions of BioAtlantis with regard to the failure of Mr. Casey to establish by evidence the extent of the functional area of Cork County Council and thus whether the foreshore in issue can be said to "adjoin" that functional area.

Judgment of the High Court

49. The judge delivered an *ex tempore* judgment, albeit one that is considered and lengthy. She set out the nature of the claim, noting (at p.5) in respect of s. 160 applications that:

> "The power conferred by statute is to make orders in respect of developments which are proven to be unauthorised under the Planning and Development Act, 2000. The burden of proof that an impugned activity is an unauthorised development within the meaning of the Planning and Development Act rests with the applicant and the standard of proof is the balance of probabilities."

50. That proposition appears uncontroversial and is not one with which Mr. Casey takes issue. The judge referred to the pleadings and the affidavit evidence and observed (at p. 6):

> "Notably, having regard to the nature of this application, the applicant has adduced no evidence from a planning expert."

She refers to the Minister's application to be joined as a notice party and the basis for that. She refers in some detail to the factual background as I have described it. The judge also refers to the relevant statutory provisions.

51. She summarised Mr. Casey's claim in the following manner (at p. 20):

"In order to succeed in his application, the applicant must first establish that kelp harvesting activity, licenced by the Minister, constitutes development within the meaning of s. 3 of the Planning and Development Act, 2000. Assuming for the moment that he can establish that kelp harvesting is 'development' within the meaning of the Planning and Development Act he must then establish that that development adjoins the functional area of Cork County Council within the meaning of s. 224 and s. 225 of the Planning and Development Act, 2000."

The court then went on to summarise the submissions of the various parties along the lines I have indicated above.

52. The curial part of the judgment commences at p. 46, the judge saying:

"It seems to the Court that the applicant has not discharged the burden of proving that the licenced mechanical harvesting of kelp is unauthorised development within the meaning of the Planning and Development Act, 2000…

It seems to the Court that the Planning and Development Act, 2000 regulates human activity in relation to land. The Oireachtas has seen fit to enact separate and distinct statutory regimes for regulating the naturally occurring bounty of the sea. That bounty, whether it manifests as fish or plant life, is regulated by licence. A licence is granted under the Fisheries Acts or as in this case under the Foreshore Act, and are bound by law to be compliant with EU Directives, including those relating to habitats and birds.

This licence issued after extensive consultation with eight State bodies who were already named earlier in this decision, and it was issued in consultation with all of those bodies. The licence was issued for subsection 3 of the Foreshore Act, 1933 (as amended) which empowers the relevant Minister to grant a foreshore licence to *inter alia* remove any beach material from or disturb any beach material in such foreshore.

As we have seen, the term 'beach material' is defined in s. 1 as including seaweed, whether growing or rooted on the seashore; and seashore is defined as meaning foreshore.

The applicant comes before this court arguing that the precise activity that has been licenced by the Minister also requires planning permission. In an attempt, in the court's view to shoehorn the licenced kelp harvesting into the ambit of the Planning and Development Act, 2000, the applicant submits that kelp harvesting entails an alteration of the sea bed within the definition of works in s. 2 of the Planning and Development Act.

The court is not persuaded that kelp harvesting accords with that definition and prefers the submissions of both the respondent and the Minister in that regard. The context in which alteration is used in the definition of works under the Planning and Development Act is one of a series of activities to which structures, or indeed land,

might be subjected; construction, excavation, demolition, extension, alteration, repair or renewal. Land could be altered by excavating it or by placing materials on it, but the cutting of flowers growing on land, or the cutting of kelp growing on the seabed does not constitute an alternation of land. The land remains as it was before the harvesting. And even if I am wrong in that respect, on the evidence any alteration is temporary not permanent."

53. The court then turned to Mr. Casey's second argument concerning kelp harvesting amounting to a material change of use, saying (at p. 49):

> "The applicant's second basis for contending that the harvesting of kelp is a development within the meaning of the Planning and Development Act is that it involves a material change of use. This argument in the court's view is equally contrived. For a material change of use to occur there must be an existing use of land in the first place and a change in that use that can be characterised as material. Kelp beds have no existing 'use' in planning terms. They are a naturally occurring phenomenon in our marine environment, just like fish and prawns and lobsters and mussels. And the harvesting of kelp, like catching fish, is controlled by licence issued under either the Foreshore Act or the Fisheries Act. The harvesting of kelp does not, therefore, constitute a material change of use within the meaning of the Planning and Development Act.
>
> For the foregoing reason the court is satisfied that the activity of kelp harvesting *per se* is not an activity which constitutes development within the meaning of the Planning and Development Act, 2000."

54. The judge turned to the terms of the licence itself insofar as it appeared to refer to "development" and also the issue of "adjoining" the functional area of the County Council (at pp. 50 – 51):

> "As identified by the Minister in his submissions, this entire application seems to have stemmed or originated from the fact that the licence agreement of 2014 describes kelp harvesting as development. The use of that term in commercial foreshore licences is not apparently uncommon and does not render the activity development within the meaning of s. 3 of the Planning and Development Act.
>
> Similarly, the applicant in his submissions to the Court placed emphasis on Clause 21 of the licence. That clause, which I suspect appears in all foreshore licences, imposes an obligation on the licensee to obtain all permissions required. That merely provides that in the event that planning is required to operate the licence, then the obligation is on the licensee to obtain that planning. It is not a determination that planning is required for any particular activity. It seems to the Court that there are many situations in which both a licence and planning permission would be required, for example, where a port authority is extending its pier onto the foreshore it would require both a foreshore licence from the Minister and planning permission from the local authority.

In this case were the licensee, for example, proposing to construct a ramp from Sheepshead peninsula outward to the kelp forest to facilitate access to the kelp to be harvested, then it would need both a licence from the Minister to harvest the kelp and permission from the planning authority to erect a structure to give access to it. As the activity in this instance is entirely waterborne and is not connected to the land at any point, the activity is, in the court's view, akin to fishing and, as such, requires a licence but does not require planning. And were the applicant's submissions correct, it appears to the court that all trawling, prawn fishing and activities of that nature would all, equally, require planning. It is basically the harvesting of the bounty of the sea and it does not require planning.

As the applicant has not proved that the harvesting of kelp is development within the meaning of the Planning Act, he has not established that kelp harvesting is an unauthorised development and his application must fail."

55. The judge then finally considered the question of whether the kelp harvesting would occur on a part of the foreshore that was "adjoining" the functional area of Cork County Council (at p. 51 – 52):

"If, perchance, the Court is in error in so finding and the harvesting of kelp is in fact development within the Planning and Development Act, then the Court would still hold that the application fails because the development does not adjoin the functional area of Cork County Council within the meaning of s. 225 of the Planning and Development Act. The harvesting occurs in the sub tidal zone.

The Court is conscious that there has been significant academic comment but little analysis of the meaning of adjoin in the context of s. 225 of the Planning and Development Acts that the Court has concluded that in the context of the Act, adjoin means connected to the functional area of a local authority. Any other construction would potentially mean that developments anywhere on the foreshore, right out to the twelve mile territorial limit would require planning permission from the nearest adjacent local authority. I cannot conceive that this was the intention of the legislature in enacting s. 225."

The court accordingly dismissed the application.

The Issues Arising on this Appeal

56. I think it fair to say that the issues raised in the Notice of Appeal are essentially the same as those arising in the High Court. The parties are in agreement that the issues to be decided are:

(a) whether the mechanical harvesting of wild kelp proposed by BioAtlantis is "development" within the meaning of the PDA, either because the activity constitutes "works" or a "material change of use" or both;

(b) if the answer to the foregoing is in the affirmative, whether Mr. Casey has established that such development would "adjoin" the functional are of Cork County Council as provided in s. 225 of the PDA.

Is Mechanical Harvesting of Wild Seaweed "Development"?

57. It is common case that kelp harvesting on the foreshore in State ownership is an activity regulated by the Foreshore Act, now for almost 90 years. That constitutes the starting point for any consideration of the regulatory regime that applies to such activity. The case advanced by Mr. Casey involves the proposition that this regime has been changed, and changed dramatically, by the introduction of Part XV of the PDA which, on his case, applies to any "development" on the seabed extending to the limit of the State's territorial waters. Thus, if he is correct, the construction of a windfarm ten miles offshore is subject to a requirement for planning permission..

58. It is I think instructive in the context of this appeal to consider the activities in respect of which a licence is required under s. 3(1) of the Foreshore Act. These appear to include:

(1) placing anything on the foreshore;

(2) erecting any articles, things, structures or works on the foreshore;

(3) removing or disturbing beach material including seaweed;

(4) taking minerals to a depth of 30 feet below the surface of the foreshore;

(5) using or occupying the foreshore for any purpose.

Thus, erecting a wind turbine on the foreshore clearly requires a licence or permission, as it would were it erected on "dry land". The relevant point however is that s. 3 recognises that carrying out works on the foreshore is different from removing seaweed. It similarly recognises that using or occupying the foreshore for any purpose is again something that is qualitatively different from harvesting seaweed.

59. That of course is not conclusive in terms of what similar expressions in a different statute such as the PDA may mean, but it does point to a certain legislative intention in the regulation of activities taking place on the foreshore. That is at least of some relevance in construing s. 225 of the PDA which Mr. Casey says has wrought such a fundamental change in the regime then in place for some seven decades by, what appears at face value at least, to be something of a side wind. Having said that, it is undoubtedly the case that in some instances at least, activities on the foreshore will require both a foreshore licence and planning permission, as the trial judge accepted and indeed gave examples.

(i) Is Seaweed Harvesting "Works"?

60. As already noted, Mr. Casey's claim in this respect is confined solely to the argument that kelp harvesting constitutes an act of "alteration" of the foreshore. This argument is predicated on the assertion that once the kelp plants are cut below the meristem, being the regrowth point, they will die, thus altering the foreshore. In this context, Mr. Casey argues

that the Supreme Court held in *Michael Cronin (Readymix)* that an alteration is to be equated with a "change" and this is undoubtedly a change to the foreshore.

61. It is not clear to me that the observations of O'Malley J. in that case are of any particular assistance to Mr. Casey in the context arising here. In *Michael Cronin (Readymix)*, the applicant claimed that an extension of a yard in a quarry was exempt development and was an alteration of a structure within s. 4(1) of the PDA which deals with exempt development. In the course of her judgment, O'Malley J. said (at pp. 673 – 674):

> "In the first place, it seems necessary to stress that there is no single definition of the word 'alteration' for the purposes of the 2000 Act. Thus, for at least some purposes of the 2000 Act an 'alteration' may involve something that changes the external appearance in a way that is inconsistent with the character of **the structure in question**, or with the character of neighbouring structures. However, for the purpose of the exemption an 'alteration' must not have that effect.
>
> Given the different ways in which the word is used, it is best taken as simply bearing its ordinary meaning of 'change'. Obviously an extension is an alteration but that does not really advance the argument in any direction." (My emphasis)

62. In this passage, the court appears to recognise that "alteration" may mean different things when used in different contexts in the PDA. It is perhaps also of some significance that O'Malley J., in commenting on what constitutes an "alteration", appears to have considered that the PDA envisages "alteration" as involving changes to a structure. I do not therefore consider that this assists Mr. Casey's argument and, if anything, runs contrary to it.

63. As the Minister submits, I think assistance as to the meaning of "alteration" in the PDA can be gained from the fact that the definition of "works" expressly applies to a particular class of structure, being a protected structure, and includes changes to such structure by applying or removing plaster, paint, wallpaper, tiles or other material from the surfaces of the structure, being something manmade.

64. In any event, the activity in question does not involve an alteration, or a change, to the seabed itself but rather to something attached to, and growing above, the seabed. In that regard I agree with the analogy drawn by the trial judge that harvesting seaweed is akin to cutting flowers on land. The land itself is not thereby altered, and neither is the seabed. In fact, as the evidence demonstrates, there is no contact of any kind with the seabed itself, the activity being entirely waterborne and to that extent, again I find myself in agreement with the views of the trial judge that harvesting wild seaweed is much more akin to commercial fishing, another entirely waterborne activity.

65. Both BioAtlantis and the Minister place some reliance on the observation in Scannell: *Environmental and Land Use Law* (2006) that "the main criteria for deciding whether 'works' constitute development are size, permanence and the degree of physical attachment to the land." – at para. 2-79.

66. Emphasis is placed on the reference to "permanence" and BioAtlantis and the Minister draw attention to the fact that the harvested kelp will regenerate in a natural cycle. Accordingly, even if harvesting kelp could in some sense be viewed as an "alteration" of the seabed, which in my view it is not, it does not have the quality of permanence required to constitute it "development". Further, the fact that the marine ecosystem may be temporarily affected by harvesting kelp, as Mr. Casey submits, does not of itself constitute an alteration of the seabed any more than commercial fishing would.

67. I am therefore satisfied that kelp harvesting does not constitute "works" within the meaning of the PDA.

(ii) Does Seaweed Harvesting amount to "the making of any material change in the use of any structures or other land"?

68. In my view, to succeed under this heading, Mr. Casey must establish that (a) there is an existing use, (b) there has, as a matter of fact, been a change in that use and (c) that change is material in planning terms – see *Roadstone Provinces v An Bord Pleanála* [2008] IEHC 2010 *per* Finlay Geoghegan J. at para. 34. It seems to me that in considering the term "use" as it appears in the PDA, one must in the first instance have regard to its natural and ordinary meaning which is use by humans, as suggested by Mr. Crean. As the trial judge pointed out, the PDA regulates human activity, and when it refers to a "use" of land or a change of "use", it is in the context of human use. It does not appear to me to be correct to suggest, as Mr. Casey does, that the wild kelp forest has a "use" as an animal and plant habitat or in reducing coastal erosion through wave dampening. These are not in my view "uses" but would more accurately be described by nouns such as "function" or "effect".

69. I also agree with the views expressed by *Scannell* that "for a material change of use to occur, there must be both an existing use and a change in that use that can be characterised as material in nature" – op. cit. at para. 2-82.

70. Mr. Casey argues in the alternative that there can be a change of use even if there is no existing use and from a planning perspective, "no use" is an existing use. That appears to me to be a contradiction in terms and there is nothing in the PDA to suggest that the word "use" should be accorded such an artificial meaning which is, on its face, illogical.

71. However, even were that not so, Mr. Casey still faces the difficulty that the activity in question involves no physical contact with the seabed and thus the foreshore. As such, it is difficult to see how it can amount to "the use of any structures or other land". There are no structures involved nor is there any contact with, or use of, land. Mr. Casey has sought to argue that kelp harvesting should be regarded by analogy as similar to agriculture and tree felling, in that, insofar as these are classified as exempted developments, this means they are in fact developments albeit ones that are exempt. The analogy with these activities is not valid because whilst one might equate agriculture with aquaculture, as indeed Mr. Casey originally sought to do, there is no cultivation or farming involved in this activity. Felling trees requires physical contact with the land, unlike the seaweed harvesting method here.

72. Insofar as Mr. Casey suggests that commercial kelp harvesting represents an intensification of the hand harvesting use that has occurred to date, I agree with the contention of BioAtlantis that Mr. Casey has adduced no evidence of such prior alleged activity and even if it occurred, it clearly did not occur in the sub tidal zone.

73. Further, as I have already mentioned, the harvesting of kelp is a transient event lacking the quality of permanence required to constitute it "works". In that regard, Simons: *Planning and Development Law* (2nd Edn.) observes (at para.2-28):

> "It would appear from the judgment of Keane J. in *Butler v Dublin Corporation* [1999] 1 IR 565 that one aspect of materiality in material change in use is materiality in terms of time. Thus a short term or transient event (such as a one or two day pop concert) does not involve a material change in use."

74. Therefore, even if kelp harvesting could be regarded as constituting a change of use, it is not in my view one that is material because it is transient. I am however satisfied that the trial judge's conclusion that kelp beds have no existing "use" in planning terms is correct.

75. Further support for this conclusion is to be found in the terms of the Foreshore Act itself which, as previously noted, distinguishes between seaweed harvesting, on the one hand, and the use and occupation of the foreshore for any purpose on the other. BioAtlantis has no right to use or occupy the foreshore to the exclusion of any other party and all activities hitherto carried on in the licenced areas remain unaffected.

76. The licenced activity therefore does not constitute a material change in the use of any structures or other land.

Does the Seaweed Harvesting "adjoin" the Functional area of Cork County Council?

77. The uncontroverted evidence of Mr. Crean at para. 13 of his affidavit is of assistance in understanding the various areas that may be relevant to a consideration of "adjoining" the local authority's functional area. He avers:

"The various aspects of the land, foreshore and water may be divided in order as follows:

13.1 Land - This clearly falls within the functional area of a planning authority.

13.2 The supratidal zone, or the 'splash zone' – This area is located just above the ordinary high water mark and therefore forms part of the functional area of a planning authority.

13.3 Ordinary high water mark, or the high tide mark – This area forms part of the functional area of a planning authority.

13.4 The upper inter tidal zone – The upper portion of the upper inter tidal zone is connected to the ordinary high water mark and therefore may form part of the functional area of a planning authority.

13.5 The middle inter tidal zone – This area is not connected to the ordinary high water mark and therefore does not form part of the functional area of a planning authority.

13.6 The lower inter tidal zone – This area is not connected to the ordinary high water mark and therefore does not form part of the functional area of a planning authority.

13.7 Low tide mark – This area is not connected to the ordinary high water mark and therefore does not form part of the functional area of a planning authority.

13.8 The subtidal zone - This area is not connected to the ordinary high water mark and therefore does not form part of the functional area of a planning authority."

78. In making these averments, Mr. Crean appears to equate "adjoin" with "connected to" which is of course a matter in controversy between the parties.

79. The effect of s. 224 of the PDA is to extend the definition of "foreshore" under the Foreshore Act landward from the HWM to the boundary of the existing functional area of the planning authority concerned so as to close any gap that may have existed between the two lines of demarcation. The effect of s. 225 is that lands which were previously in that "gap" zone now constitute foreshore that adjoins the functional area of the planning authority and are thus, by virtue of s. 225, deemed to be within that functional area.

80. The question that arises in this appeal however is whether the subtidal zone where the kelp harvesting occurs is properly to be regarded as "adjoining" the functional area of the planning authority, here Cork County Council.

81. In that respect, as I have already noted, Mr. Casey in effect argues that the entirety of the foreshore out to the limit of the State's territorial waters is to be regarded as adjoining the HWM and thus the functional area of the planning authority.

82. The difficulty with that contention appears to me to be immediately apparent from a reading of s. 225. If planning permission is required for every development on the foreshore, as Mr. Casey says it is, then that part of the section that follows the words "not being exempted development" is otiose and the words used therein represent surplusage. However, it must be assumed that the legislature in enacting s. 225 did not use redundant or unnecessary words and that being so, the foreshore adjoining the functional area must have a different meaning than the entirety of the foreshore. The Oireachtas could have provided that the entirety of the foreshore (as defined in the Foreshore Act) is within the functional area of the relevant authority and that any development on the foreshore as so defined (other than exempt development) requires planning development. Clearly, however, it did not do so.

83. One must then consider the meaning of "adjoin". Mr. Casey argues that it does not mean contiguous or sharing a boundary with the functional area. He refers to authority for the proposition that, while "adjoining" will commonly be used in the sense of touching, it is capable in context of being used as no more than neighbouring. What precisely that would mean in the context of this case however is somewhat difficult to discern, but in any event,

I believe it to be misconceived. The provisions of s. 225(3) are of some relevance in this regard as it provides, insofar as material here:

"(3) This section shall not apply to –

(a) …

(b) development consisting of underwater cables, wires, pipelines or other similar apparatus used for the purpose of –

(i) transmitting electricity or telecommunications signals, or

(ii) carrying gas, petroleum, oil or water;

or development **connected to land within the functional area** of a planning authority solely by means of any such cable, wire, pipeline or apparatus." (My emphasis)

84. The legislature accordingly considered it necessary to exclude from the requirement to seek planning permission under the section developments of a certain type connected to land within the functional area of a planning authority, on the presumptive basis that they would otherwise require such permission. This suggests that the legislature, in adopting the word "adjoin" in s. 225(1) intended it to bear the same meaning as "connected to". The effect of section 225(3)(b) is that certain development is excluded from the requirement to obtain planning even where it *is* connected to the foreshore.

85. On its face therefore, it appears to me that the word "adjoin" in s. 225 bears its ordinary meaning of "connected to", "touch" or "share a border with". Thus, on the basis of the uncontroverted evidence of Mr. Crean to which I have already referred, it would appear that the kelp harvesting activity concerned will not take place in an area that would "adjoin" the functional area of Cork County Council.

86. That interpretation of "adjoin" in s. 225 is, in my view, supported by a consideration of the other provisions of Part XV PDA and in particular s. 227. That section extends the compulsory acquisition powers of a local authority under a number of specified enactments to that part of the foreshore that "adjoins" its functional area. The specified Acts include the Housing Act 1966, the Derelict Sites Act 1990 and the Roads Act 1993. Clearly, none of the purposes of such enactments could require or be facilitated by the acquisition of sea-bed in the subtidal zone and s. 227 appears to contemplate the acquisition of foreshore that is either directedly connected to the functional area of the local authority or indirectly connected by reason of its connection to reclaimed land that is in turn connected to that functional area.

87. In any event, the onus of proving otherwise rests upon Mr. Casey.

88. In that regard, for convenience I again set out para. 17 of the Statement of Agreed Facts which says:

"The five licenced areas are depicted on the foreshore licence map prepared in February 2014, and on the map prepared in the course of these proceedings by

departmental engineer Barry McDonald. That map has been admitted for illustrative purposes only and is not probative of the locus of any water mark or where, in fact the foreshore lies in this case. This latter map shows the relationship of the licenced sites to various SAC's and SPA's. The land above the high water mark and all sides of Bantry Bay, and the land described in s. 28(1)(a) of the Local Government (Reorganisation) Act, 1985, is within the functional area of Cork County Council. The licenced areas are not within the new boundary of the functional area introduced by this section."

89. Both BioAtlantis and the Minister rely on the judgment of the Supreme Court in that respect in *Fingal County Council v Kennedy*. That also was a s. 160 application in respect of the respondent's vessel, used as a home, which was moored in Balbriggan Harbour. One issue arising for determination was whether the boat was in fact on the foreshore and in that respect, the Supreme Court held that the Planning Authority failed to adduce the necessary evidence because:

> "..there is no evidence before the court that the map was duly certified as a copy of the relevant Ordinance Survey map, either by certification by an officer of Ordinance Survey or by affidavit evidence exhibiting it by an officer of Ordinance Survey."

90. I accept the submissions of BioAtlantis and the Minister in this regard that Mr. Casey failed to put evidence before the High Court which established where the relevant HWM is and thus the location of the functional area of Cork County Council. It must follow that Mr. Casey therefore failed to establish that any development to be carried out by BioAtlantis would be within, or adjoining, the functional area of Cork County Council.

The Maritime Area Planning Act 2021

91. I should note for completeness that since the hearing of this appeal, the Oireachtas has enacted the above Act of 2021, although the substantive provisions thereof have not yet been commenced. This Act, which makes substantial changes to the PDA, establishes a coherent regulatory regime for the use of the "maritime area" as defined, which extends to the outer limit of the State's territorial waters. The Act establishes a new body, the Marine Area Regulatory Authority, whose functions include the granting of marine area consents for the purpose of permitting certain maritime usages. Schedule 7 usages, which include harvesting seaweed, will not normally require a marine area consent or planning permission, unless an EIS is required.

92. The Act introduces a broader definition of "development" into the PDA including "the making of any material change in the use of the sea, seabed or any structure, in the maritime area…" and extends the functional areas of coastal planning authorities. It thus appears that the Oireachtas has taken the view that the PDA did not previously extend to the entire maritime area, contrary to the case advanced in this appeal by Mr. Casey. In saying that however, I recognise that the court cannot construe the meaning and effect of legislative provisions by reference to subsequent legislation. However, it is relevant to note that very extensive legislative changes, including but not limited to very extensive amendments of

the PDA itself, were considered necessary in order to regulate sea-based activity in the maritime area and to bring certain such activity within the scope of the planning regime.

Conclusion

93. For each of these reasons, I am satisfied that the trial judge correctly determined that this application be dismissed and I would accordingly dismiss this appeal.

94. With regard to costs, my provisional view is that as BioAtlantis has been entirely successful in this appeal, it is entitled to its costs against Mr. Casey. I note that the Minister was joined in these proceedings on the basis that he would abide his own costs. If Mr. Casey wishes to contend for an alternative costs order, he will have liberty to apply to the Court of Appeal Office within 14 days of the date of this judgment for a short supplemental hearing on the issue of costs. If such hearing is requested and results in the order proposed, Mr. Casey may additionally be liable for the costs of that supplemental hearing. If a further hearing is not sought, an order in the terms proposed will be made.

95. As this judgment is delivered electronically, Faherty and Collins JJ. have authorised me to record their agreement with it.