Neutral Citation: [2014] IEHC 308

THE HIGH COURT

[2013 No. 202 MCA]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 99H OF THE ENVIRONMENTAL PROTECTION AGENCY ACT, 1992 (AS INSERTED BY S.15 OF THE PROTECTION OF THE ENVIRONMENT ACT, 2003)

BETWEEN:

THE ENVIRONMENTAL PROTECTION AGENCY

APPLICANT

AND

HARTE PEAT LIMITED AND LISMOHER LIMITED

RESPONDENTS

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

1. This case involves the interpretation of various aspects of the environmental impact assessment regime established by the Environmental Protection Act 1992, as amended, pursuant to the Environmental Impact Assessment 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), considered here in the context of the peat extraction industry. The court has been required in this case to consider the extent to which the principle of harmonious interpretation that arises under European Union law falls to be applied by the court in its consideration of domestic legislation that has a European provenance and how this principle interacts with the traditional rules of statutory interpretation.

Facts

2. An agreed statement of facts and issues has been submitted to the court. The agreed facts are set out hereafter. Notwithstanding that these facts have been agreed for the purposes of the instant proceedings, the parties have each reserved the right to argue at the trial of the full issue that the facts are otherwise than as stated below.

3. Harte Peat Limited and Lismoher Limited carry out, *inter alia*, peat extraction. The two companies have common shareholders and some common directors and secretaries. Harte Peat Limited is the freehold owner of lands at a number of sites in different counties within the State which in aggregate exceed 50 hectares. Lismoher leases lands (the 'leased lands') from Harte Peat in County Westmeath. The leased lands are less than 50 hectares in total, comprising an area of circa. 44 hectares. Harte Peat owns lands adjacent to the leased lands. A public road runs between Harte Peat's lands and the leased lands. The aggregate area of these owned/leased lands exceeds 50 hectares. Part of the lands consists of an area from which peat has been cut; part consists of areas used for the storage of peat; the lands also include an access road and drainage works. The court has been shown a map in which the lands are divided into various areas. One of these areas (Area A1) includes a sedimentation pond, peat deposition site and access roads, as well as an area of land which acts as a buffer zone separating another demarcated area (Area A) from a river, all of which lands and facilities comprise an area of circa. 10 hectares. The peat deposition site is used, *inter alia*, for the deposit of peat extracted from Area A. The sedimentation pond is used to trap suspended peat contained in water drained from Area A prior to its discharge into the River Inny. The peat is processed at an entirely different site that is situated in County Monaghan at a distance of some 70km from the aforementioned sites. The parties to these proceedings are in dispute as to what areas of the various lands should be reckoned for the purposes of calculating a 50 hectare threshold that arises under the Act of 1992 and which is key to determining the precise application of same to the activities of Harte Peat and Lismoher.

Relevant legislation

4. Section 82 of the Act of 1992 (as amended), so far as relevant to the facts of the present case, provides that a person shall not carry on a licensable "*activity*" unless a licence or revised licence under Part IV of the Act is in force in relation to the activity. The licence is referred to as an 'Integrated Pollution Prevention and Control Licence' or an 'IPPC licence'.

5. What is an "*activity*" for the purposes of the Act? Section 3(1) of the Act defines the term to mean:

> *"any process, development or operation specified in the First Schedule and carried out in an installation". [Emphasis added].*

6. What is an *"installation"* for the purposes of the Act? Section 3(1) of the Act defines this term to mean:

> *"a stationary technical unit or plant where the activity concerned referred to in the First Schedule is or will be carried on, and shall be deemed to include any directly associated activity, whether licensable under this Part or not, which has a technical connection with the first-mentioned activity and is carried out on the site of that activity". [Emphasis added].*

7. What is "*plant"* for the purposes of the Act? Section 3(1) of the Act defines the term as including:

> *"any equipment, appliance, apparatus, machinery, works, building or other structure or any land or any part of land which is used for the purposes of, or incidental to, any activity specified in the First Schedule". [Emphasis added]*

8. Among the activities specified in the First Schedule are:

> *"1.4 The extraction of peat in the course of business which involves an area exceeding 50 hectares."*

This is the critical 50 hectare threshold that was referred to in the account of the facts above.

9. The First Schedule also contains an interpretation section which provides, *inter alia*, that:

> *"If 2 or more activities falling within the same paragraph under a particular heading of this Schedule are carried on in the same installation by the same person, then, for the purpose of any threshold specified in that paragraph, the capacities of such activities shall be aggregated."*

Some contentions made

10. The case made by the Environmental Protection Agency might perhaps be summarised as follows. The Agency submits that an IPPC licence is required where peat extraction is being carried out and the area of land involved exceeds 50 hectares. In calculating the area of land involved, the EPA maintains that one should reckon not only the 'footprint' from which peat has been cut or harvested, but should also include all land which is used for the purposes of, or incidental to, peat extraction, *e.g.* lands used as access roads, for the storage of harvested peat, for sedimentation ponds or for buffer zones, *etc.* The Agency further contends that one should also reckon all areas which are within the same bogland, e.*g.* where there is a 'technical connection' in terms of a hydraulic connection between what might otherwise be regarded as individual sites, albeit that counsel acknowledged at the hearings that when it came to a 'hydraulic connection' there would have to be a rational limit to same. Counsel for the EPA contends that the Agency's contentions are borne out by a literal reading and also by a purposive approach to interpretation that is consistent with applicable European Union legislation.

11. Counsel for Harte Peat and Lismoher contend that regardless of the interpretive approach adopted by the court in these proceedings, whether literal or purposive, the activities of the two companies do not come within the ambit of paragraph 1.4 of the First Schedule. Per counsel, it could not be clearer, applying a literal approach to interpretation, that each company's operations does not involve the extraction of peat in the course of business which involves an area in excess of 50 hectares. It will be recalled that the interpretation section to the First Schedule of the Act of 1992, as amended, provides for aggregation of activities done on the same installation "*by the same person*". Counsel for the respondent companies contend that each company enjoys a separate corporate existence and that this is not an appropriate case in which the court should, to use a time-hallowed phrase, 'lift the corporate veil'.

Principles of statutory interpretation

12. It appears to the court that when confronted with an issue of interpretation concerning one of the ever more numerous pieces of domestic legislation that have their genesis in European Union law, the starting-point to statutory interpretation should and must be what European Union law requires, with all other rules of statutory interpretation necessarily being viewed in the context of, and subject to, these European Union law requirements. One could perhaps see this as a facet of the supremacy of European law, as identified by the European Court of Justice a half-century ago in the context of the laws of the then European Economic Community, in *Costa v. ENEL* [1964] ECR 585, and accepted by the Irish courts in several cases and on somewhat varying grounds as a rule forming part of Irish law, commencing with the ruling of Costello J. in *Pigs and Bacon Commission v. McCarron* [1981] 1 I.R. 451. Notably, in this regard, in recent cases such as *Melloni v. Ministerio Fiscal* C-399/11 [2013] 2 CMLR 43 and *Åklagaren v. Hans Åkerberg Fransson* C-617/10 [2013] 2 C.M.L.R. 46, the European Court of Justice has referred, at paras. 59 and 29 respectively, to "*the principle of primacy of EU law*" and "*the primacy, unity and effectiveness of European Union law*", thereby confirming the transmutation of the longstanding supremacy of Community law into the supremacy of European Union law. However, in truth the interpretive genuflection by the Irish courts towards European Union law in the context of measures that have a European-level provenance can also be viewed less as an aspect of the supremacy of European Union law and more as a particular, though particularly important, dimension of the general and longstanding rule of statutory interpretation whereby the Oireachtas, when it enacts domestic legislation, is presumed to intend to comply with its international legal obligations. This presumption was referred to by both Henchy J. and McCarthy J. in the Supreme Court decision in *O'Domhnaill v. Merrick* [1984] I.R. 151 and their observations in this regard are worth quoting. Thus, while making comment in respect of the Statute of Limitations, 1957, Henchy J. states, at 159, that:

> *"Apart from implied constitutional principles of basic fairness of procedures, which may be invoked to justify the termination of a claim which places an inexcusable and unfair burden on the person sued, one must assume that the statute was enacted (there being no indication in it of a contrary intention) subject to the postulate that it would be construed and applied in consonance with the State's obligations under international law, including any relevant treaty obligations."*

13. In a similar vein, McCarthy J. writes, at 166, that:

> *"I accept, as a general principle, that a statute must be construed, so far as possible, so as not to be inconsistent with established rules of international law and that one should avoid a construction which will lead to a conflict between domestic and international law."*

14. The difference between this traditional presumption and the applicable European Union law requirements is perhaps the depth and detail of the latter requirements and of course the fact that conformity with European Union law interpretive requirements is demanded of the court in cases where European Union law comes into play.

15. *Requirements of European Union law.* A central principle of European Union law is that national courts are required to interpret national law in the light of directives, including any directive the time limit for implementation of which has expired but which remains unimplemented in a particular Member State. The case-law in this area began with *Van Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891. In that case the European Court of Justice was concerned with the application of the Equal Treatment Directive. However, for present purposes what are of interest are the Court's observations as to the interpretive obligations of domestic courts, the European Court of Justice stating in this regard, at paras. 26 and 28 that:

> *"26…[I]n applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No. 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the Directive in order to achieve the result referred to in the third paragraph of Article 189 [now Article 249]…*
>
> *28. It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law."*

16. The application of this principle to circumstances where a directive ought to have been but has not yet been implemented was made clear by the European Court of Justice in *Konstantinos Adeneler et al. v. Ellinikos Organismos Galaktos (ELOG)* C-212/04 [2006]

ECR I-6057. However, in terms of strict chronology, the next case of significance, indeed the seminal case in this area, is the decision of the Court of Justice in *Marleasing SA v. La Comercial Internacionale de Alimentation SA* C-106/89 [1990] ECR I-4135. In that case the issue referred to the European Court of Justice was, in summary, whether a national court that hears a case which falls within the scope of a directive is required to interpret national law in the light of the wording and the purpose of that directive. Per the European Court of Justice, at para. 8 of its judgment:

> *"[T]he Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 [now Article 249] of the Treaty."*

17. A number of supplementary points may be made in this regard. First, it was clarified in *Marleasing* that the harmonious interpretation obligation applies even to legislation that pre-dates a directive and has no ostensible connection with same. Later cases such as *Pfeiffer v. Deutsches Rotes Kreuz, Krieversband Waldshut eV* (Joined Cases C-397/01 to C/403/01) [2004] ECR I-8835 have made clear that the obligation applies to the entirety of a national legal system. Second, in *Kolpinghuis Nijmegen* Case 80/86 [1987] ECR 3969, the Court indicated that the principle of harmonious interpretation cannot result in aggravated criminal liability for an individual. Third, when it comes to non-criminal liability it appears from the opinion of the Advocate General in *Centrosteel v. Adipol* C-456/98 [2000] ECR I-6007 that a directive may well lead to the imposition upon an individual of civil liability or a civil obligation which would not otherwise have existed. Fourthly, and potentially of great significance in the instant proceedings, is the fact that the obligation of harmonious interpretation does not require a *contra legem* interpretation of national law. This has been made clear in a number of cases such as *Paola Faccini Dori v Recreb Srl* Case C-91/92 [1994] ECR I-3325, *El Corte Inglés v. Cristina Blásques Rivero* Case C-192/94 [1996] ECR I-1281, *Evobus Austria v. Niederösterreischer Verkehrsorgination* C-111-97 [1998] ECR I-5411, *Alcatel Austria v. Bundesministerium für Wissenschaft und Verkehr* C-81-98 [1999] ECR I-7671, and IMPACT v. Minister for Agriculture and Food and Others Case C-268/06 [2008] ECR I-2483. However, there have also been cases such as *Pupino* Case-C 105/03 [2005] ECR I-5285 where, although the European Court of Justice has deferred to the ultimate assessment of the national court, it has nonetheless suggested that an interpretation in accordance with European Union law appears possible. More recently, in the *IMPACT* case, a reference under Article 234 of the EC Treaty (now Article 267 of the Treaty on the Functioning of the European Union) from the Irish Labour Court, the European Court of Justice returned again to the interpretive obligation that arises for national courts under European Union law and summarised the applicable principles, stating at paras 98 to 101:

> *"[W]hen applying domestic law and, in particular, legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, national courts are bound to interpret that law, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result sought by it and thus to comply with the third paragraph of Article 249….The requirement that national law be interpreted in conformity with Community law is inherent in the system of the EC Treaty, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of Community law when they determine the disputes before them….However, the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law contra legem….The principle that national law must be interpreted in conformity with Community law nonetheless requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it…".*

18. It is perhaps worth noting that the obligation of national courts to interpret national law, so far as possible, in conformity with European Union law, has been affirmed at least twice in the recent past by the Supreme Court. Thus in *Albatros Feeds v. Minister for Agriculture and Food* [2007] 1. I.R. 221, Fennelly J. observes at 243ff., that:

> *"[It is] perfectly clear that the Court is under an obligation to interpret national law, so far as possible, in the light of the Community provisions it is designed to implement. The national court is subject to the obligation of 'conforming interpretation' as the [European Court of Justice]…described it in its judgment in…Pupino".*

19. Again, in the more recent judgment of *Eircom Limited v. Commission for Communications Regulation* [2007] 1 IR 1 at 24, McKechnie J. observed that the Supreme Court, and the same is true of this Court, was and is obliged to interpret national regulations which "*were passed in order to incorporate…directives into national law, in a manner, so far as is possible, in conformity with the directives*".

20. The various European Union law requirements mentioned above might usefully be summarised as follows. First, national courts are required to interpret national law in the light of directives, including any directive the time limit for implementation of which has expired but which remains unimplemented in a particular Member State. Second, this obligation applies even to legislation that pre-dates a directive and has no ostensible connection with same. Third, the obligation applies to the entirety of a national legal system. Fourth, the principle of harmonious interpretation cannot result in aggravated criminal liability for an individual. Fifth, the application of harmonious interpretation may result in the imposition of civil liability on a private party. Sixth, the obligation as to harmonious interpretation does not require a *contra legem* interpretation of national law. Seventh, not mentioned above, though extant under Article 4(3) of the Treaty on European Union, and affirmed by Fennelly J. in *Dellway Investments v. NAMA* [2011] 4 I.R. 1, is the court's obligation to apply the principle of sincere cooperation whereby the European Union and the Member States are each obliged, amongst other matters, to ensure fulfilment of obligations arising from the acts of European Union institutions, to facilitate the achievement of the European Union's objectives and to refrain from any measure which could jeopardise the attainment of the European Union's objectives. Any consideration of the traditional principles of statutory interpretation must, in cases that are concerned with the interpretation of domestic laws that have their provenance in European Union law, be done in the context of, and in compliance with, these requirements of European Union law.

21. *The traditional rules of statutory interpretation.* Separate from the European Union law requirements referred to above, there are two principal canons of interpretation that have been adopted by modern Irish courts, *viz.* the literal approach and the schematic or teleological approach. At this time the interpretation of legislation in Ireland is also governed by the Interpretation Act 2005.

22. *Literal interpretation:* The literal interpretation is the modern articulation of the rule that received its classic expression in the judgment of Tindal C.J. in the *Sussex Peerage* case (1844) 11 C1 & Fin 85, as well as a more recent reformulation in the judgment of

Budd J. in *Rahill v. Brady* [1971] I.R. 69 at 86 to the effect that:

> *"In the absence of some special technical or acquired meaning, the language of a statute should be construed according to its ordinary meaning and in accordance with the rules of grammar. While the literal construction generally has prima facie preference, there is also a further rule that in seeking the true construction of the section of an Act the whole Act must be looked at in order to see what the objects and intention of the legislature were; but the ordinary meaning of the words should not be departed from unless adequate grounds can be found in the context in which the words are used to indicate that a literal interpretation would not give the real intention of the legislature."*

23. It is clear from the judgment of Budd J. that an absolute literal approach has never been favoured by the Irish courts. Historically, to avoid absurdities and inconsistencies of interpretation, the literal rule operated in combination with the 'golden rule' and the 'mischief rule'. In his judgment in *The People (Attorney General) v. McGlynn* [1967] I.R. 232, Budd J. succinctly describes the golden rule in the following terms:

> *"[T]he golden rule in the construction of statutes is that the words of a statute must prima facie be given their ordinary meaning. That literal construction has, however, but prima facie preference. As Lord Shaw said in Shannon Realties v. St. Michel (Ville de)…'where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system".*

24. The other traditional rule of interpretation which allayed the risk of absurdity that a too-rigid application of the literal rule might otherwise yield was the 'mischief rule'. This received its classic formulation in *Heydon's* case (1584) 3 Co Rep 7a. It assumed that the legislature does nothing without a reason, and so that there is a reason for the passing of every Act and every provision within it; this reason is the legal or social mischief that the Act or a provision therein is intended to address: grasp that mischief and you grasp what the Act or provision is intended to mean. Originally the mischief rule was formulated by common lawyers suspicious of Parliamentary designs on 'our lady the common law'. A possible deficiency in the rule, at least in modern times, is that statute is not now always intended to cure a mischief; sometimes it is intended to advance a positive social cause. It might also be considered that the very term 'mischief' has a slightly archaic ring to the modern ear. Even so, as a shorthand term it has a longstanding meaning and thus one still finds references to the 'mischief' against which particular measures are directed in recent cases such as *DPP (Ivers) v. Murphy* [1999] 1 I.R. 98, and *An Blascaod Mor Teo v. Commissioners of Public Works* [2000] 1 I.R. 1. So to some extent, even if only as a verbal formula, the term 'mischief' continues to reverberate within the halls of justice, albeit that, as is considered below, the rule from which the term derives has in practice been largely, if not entirely, subsumed into the schematic or teleological approach to statutory interpretation that is often employed by contemporary Irish courts.

25. One still finds the literal approach to statutory interpretation hallowed in case-law as the primary principle of statutory interpretation and in one sense it is: the courts cannot but read legislation literally in the first instance. Thus, for example, in *Cork County Council v. Whillock* [1993] 1 I.R. 231 at 237, Flaherty J. states that:

> *"[I]t is clear to me that the first rule of construction requires that a literal construction must be applied. If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences…"*

26. While this may be so, what must be remembered is that when it comes to measures that derive from European Union law, the literal rule always operates hand in glove with the European Union law principle of harmonious interpretation, with the latter enjoying primacy. In the context of such measures, if 'the ordinary and natural meaning of words and sentences' yields a result that is contrary to European Union law then the courts must seek to find a meaning that conforms with European Union law.

27. *Schematic or teleological approach:* Whereas, historically, the risk of absurdity was mitigated by means of the golden and mischief rules, in recent times the preference, certainly in Ireland, 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. However, perhaps the classic Irish case in which the approach is employed is that of *Nestor v. Murphy* [1979] I.R. 326 in which, in the course of a particularly succinct judgment, 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."*

28. Notably, statute-law in the form of s.5(1) of the Interpretation Act 2005 allows the courts to depart from the literal meaning in circumstances where, amongst other matters, the result would be absurd, providing 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."*

29. One 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 "*on a literal interpretation…absurd*". Denham J., as she then was, goes some way towards addressing this issue in her judgment in *DPP (Ivers) v. Murphy* [1999] 1 I.R. 98 at 111, stating that:

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

30. However, Denham J. couches this observation in terms which urge due deference by judges to legislators, stating that:

> *"No method of interpretation may be such as to encroach on the constitutional role of the Oireachtas as the legislative organ of the State….If the purpose of the legislature is clear and may be read in the section without re-writing the section then that is the appropriate interpretation for the court to take."*

31. The deference that unelected judges manifest towards elected legislators is apparent in the earlier case of *Rafferty v. Cowley* [1984] ILRM 350, in which Murphy J. declined to read a particular exception into certain legislation on the grounds that had the Oireachtas wanted to create such an exception it could readily have done so. However, such deference might perhaps be contended to sit somewhat uneasily with the European Union law principle of harmonious interpretation which requires of national judges that they act pro-actively to interpret domestic legislation that derives from European Union law in such a way as to conform with European Union law.

32. Having considered the applicable rules of statutory interpretation, the court turns now to apply those rules in the context of the agreed issues raised by the parties.

Agreed Issues
33. The following issues have been put to the court for determination:

34. *(1) Is the 50 hectare threshold referable (i) to the area of the 'business' involved in peat extraction, or (ii) to the area involved in peat extraction?*

35. To answer this question it assists firstly to look at what provisions of European Union law led to the establishment of this 50 hectare threshold. Article 4(1) of the Environmental Impact Assessment Directive provides that subject to certain exceptions, projects listed in Annex I of the Directive shall be made subject to an assessment in accordance with Articles 5 to 10 of the Directive. Article 4(2) empowers Member States to determine whether projects listed in Annex II of the Directive shall be subject to an assessment and identifies the forms of determination that Member States may employ. Annex I includes among a lengthy list of projects "*19…peat extraction, where the surface of the site exceeds 150 hectares*". Annex II includes among another voluminous list of projects "*2…(a)…peat extraction (projects not included in Annex I)".* The court attaches some significance to the fact that, acting pursuant to Article 4(2) of the EIA Directive, a measure that has as its ultimate purpose the attainment of improved environmental protection, Ireland has set a threshold for the application of the IPPC regime that is significantly lower than the mandatory 150 hectare threshold referred to in Annex I of the Directive. Clearly the legislative intent of the Oireachtas in this regard was to adopt a rigorous environmental impact assessment regime. In the context of the above query it appears to the court that if it is to give effect to the purpose of EIA Directive and also to accord with the clear legislative intent of the Oireachtas in terms of establishing a robust and stringent environmental impact assessment regime, it must answer the above question in a manner that affords the greatest protection to the environment. Turning to the express terms of the Act of 1992, among the activities specified in the First Schedule are "*1.4 The extraction of peat in the course of business which involves an area exceeding 50 hectares*." Is this 50 hectare threshold referable to (a) the area of the 'business' involved in peat extraction or (b) the area involved in peat extraction? It appears to the court that the interpretation at (a) is to be preferred as the area of business will exceed the 50 hectare threshold before the area of peat extraction, a sub-set of the area of business, does so. This means that an environmental impact assessment will be required sooner than later and thus is the more exacting interpretation in terms of environmental protection and so is the interpretation most consistent with European Union law and the legislative intent of the Oireachtas. The court is buttressed in this conclusion by the fact that its answer in this regard also appears to accord best with a literal reading of the provision.

36. *(2) If a business undertaking/entity carries out peat extraction at a number of different sites, should those sites be aggregated together for the purposes of calculating the 50 hectare threshold?*

37. Again, the court is conscious that this question arises for consideration in the context of European Union legislation, the clear purpose of which is to secure better environmental protection; and a clear decision by the Oireachtas to implement a rigorous domestic environmental impact regime. It appears to the court that if it is to give effect to the purpose of EIA Directive and also to accord with the clear legislative intent of the Oireachtas in terms of establishing a robust and stringent environmental impact assessment regime, it must answer the above question in a manner that affords the greatest protection to the environment. Thus the court concludes that if a business undertaking/entity carries out peat extraction at a number of different sites, those sites must be aggregated together for the purposes of calculating the 50 hectare threshold. The court finds support for this conclusion in the fact that it seems to accord best with a literal reading of para.1.4 of the First Schedule to the Act of 1992, as amended. It will be recalled that this provision refers to "*[t]he extraction of peat in the course of business which involves an area exceeding 50 hectares*". It appears to the court that it would be a strange literal reading of this provision to conclude that a single business engaged, for example, in peat extraction on a 26-hectare site in Mayo and another 26-hectare site in Wicklow and thus engaged in the same business on a cumulative 52 hectares ought nonetheless not to be construed as doing its business on an area exceeding 50 hectares. The court is reminded in this context 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."*

38. Similarly here, the court struggles to believe that the man or woman in the street would consider that a business working at two bog-land sites of 26 hectares was not in truth working on 52 (i.e. 26 + 26) hectares of bogland regardless of where they are situated. The court is further buttressed in the conclusion it has reached in relation to the above question by the fact that the alternative conclusion would appear to the court to be entirely absurd. It would mean that a business could deplete the land of peat, yet avoid the application of the environmental impact assessment regime through the simple expedient of only ever operating at individual sites none of which exceeded 50 hectares in size. In the context of legislation aimed at environmental protection, that appears to the court to be so absurd a result as to be one that the court considers the Oireachtas simply cannot have intended to pertain. The court sees no difference in principle or law where the different sites are contiguous or non-contiguous.

39. *(3) How is the definition of an "installation" to be applied to peat extraction?*

40. It will be recalled that section 82 of the Act of 1992 (as amended), so far as relevant to the facts of the present case, provides that a person shall not carry on a licensable "*activity*" unless an IPPC licence or revised licence is in force in relation to the activity. Section 3(1) of the Act defines various terms arising in this context. Thus the term "*activity*" is defined to mean:

> *"any process, development or operation specified in the First Schedule and carried out in an installation". [Emphasis*

added].

41. The term "*installation*" is defined to mean:

> *"a stationary technical unit or plant where the activity concerned referred to in the First Schedule is or will be carried on, and shall be deemed to include any directly associated activity, whether licensable under this Part or not, which has a technical connection with the first-mentioned activity and is carried out on the site of that activity". [Emphasis added].*

42. The term "*plant*" is defined as including:

> *"any equipment, appliance, apparatus, machinery, works, building or other structure or any land or any part of land which is used for the purposes of, or incidental to, any activity specified in the First Schedule". [Emphasis added].*

43. And among the activities specified in the First Schedule are:

> *"1.4 The extraction of peat in the course of business which involves an area exceeding 50 hectares."*

44. Again, the court is conscious that this question arises for consideration in the context of European Union legislation that has as its purpose the goal of better environmental protection, as well as a clear decision by the Oireachtas to opt for a rigorous domestic environmental impact assessment regime. Thus it appears to the court that if it is to give effect to the purpose of the EIA Directive and also to accord with the clear legislative intent of the Oireachtas in terms of establishing a robust and stringent environmental impact assessment regime, it must accord the term "*installation*" the widest possible meaning.

45. The Environmental Protection Agency has contended before the court that the definition of "*installation*" captures not only the 'footprint' of land from which peat has been cut or harvested, but also includes any land which is used for purposes incidental to peat extraction, *e.g.* access roads, the storage of harvested peat, buffer zones, sedimentation ponds. The court agrees with this contention subject to the following observations. First, consistent with the definition of "*plant*" and the cross-reference therein to the First Schedule, such usage must take place on any land or any part of land which is used for the purposes of or incidental to the extraction of peat in the course of business which involves an area exceeding 50 hectares. Given the purpose of the EIA Directive and the legislative intention that underpins the Act of 1992, in each case as referred to above, it appears to the court that the land on which such usage takes place must itself count towards the calculation of the 50 hectare threshold. Second, consistent with the definition of "*installation*" and the cross-reference therein to the First Schedule, the relevant activity must (I) comprise the extraction of peat in the course of business which involves an area exceeding 50 hectares or (II) be a directly associated activity, licensable under Part IV of the Act of 1992 or not, that (a) has a technical connection with the extraction of peat in the course of business which involves an area exceeding 50 hectares and (b) is carried out on the site(s) of the business. It appears to the court that the use of access roads, the storage of harvested peat, the establishment of buffer zones and the creation of sedimentation ponds are all activities that are directly associated with peat extraction and thus are activities of a type contemplated by the legislation. The court considers too that an indulgent interpretation of the term "*directly associated activity*" is in any event generally merited given the purpose of the EIA Directive and the statutory intention that underpins the Act of 1992 and which has been considered above.

46. *(4) Does a requirement for a "technical connection" mean that it includes (i) all bog-land which is hydraulically connected; (ii) the area of extraction and all lands used for purposes ancillary and incidental to the harvesting/extraction of peat; (iii) the area of extraction only; (iv) the area within the ownership and/or control of the operator; or (v) some other area?*

47. It will be recalled that the term "*installation*", as defined in section 3(1) of the Act of 1992, means:

> *"a stationary technical unit or plant [i.e. certain land] where the activity concerned referred to in the First Schedule is or will be carried on, and shall be deemed to include any directly associated activity, whether licensable under this Part or not, which has a technical connection with the first-mentioned activity and is carried out on the site of that activity". [Emphasis added].*

48. It appears to the court that the question as posed above is somewhat misconstrued. This is because the court considers that section 3(1) of the Act of 1992, when it uses the phrase "*technical connection*", means to refer to any directly associated activity, licensable or not, that has a technical connection as an activity with, in the context of the present proceedings, the extraction of peat in the course of business which involves an area exceeding 50 hectares. The question as posed focuses on the place of activity but the court considers that what is in issue is more the nature of the activity. Thus, in deciding whether one activity is technically connected to another activity, the court considers that what is contemplated by the legislation is whether the activity is, for example, ancillary or incidental or supplementary to or otherwise connected with or related as an activity to the peat extraction. Moreover, the definition of "*installation*" requires that the directly associated activity be done on the site of the peat extraction, *i.e.* the area exceeding 50 hectares on which the extraction of peat in the course of business is done. The foregoing appears to the court to be the natural literal meaning of the text and to accord with the purpose of the EIA Directive and the statutory intent that underpins the Act of 1992. In general, the court considers that a broad interpretation of the term "*directly associated activity*" is merited given the purpose of the EIA Directive and the statutory intention behind the Act of 1992. In particular, it appears to the court that the use of access roads, the storage of harvested peat, the establishment of buffer zones and the creation of sedimentation ponds, being activities that were referred to in the course of the hearings, are all activities that are directly associated with peat extraction and thus activities of a type contemplated by the legislation. Although it is not inconceivable that one activity may be directly associated with another solely by reference to the locus of the relevant activities, the court considers that the legislation in this regard is concerned more with the practical nexus than the physical situs of the relevant activities.

49. *(5) Does the "installation" include lands used for purposes ancillary and incidental to the harvesting/extraction of peat – i.e. are areas used as access roads, buffer zones, peat storage, sedimentation ponds, drainage works to be regarded as part of the installation?*

50. The court has already answered this question in the context of Question (3) above.

51. *(6) In calculating the 50 hectare threshold, what is meant by the area involved? Should lands used for purposes ancillary and incidental to the harvesting/extraction of peat be included? I.e. are areas used as access roads, buffer zones, peat storage, sedimentation ponds and drainage works, to be regarded as land which is involved in peat extraction? Should peat lands affected by the extraction be regarded as part of the area involved –for instance, because they are deliberately or incidentally drained in order to facilitate the extraction, or because their moisture content is reduced as a result of drainage?*

52. It appears to the court that this is but a reformulation of the question as to what constitutes an "*installation*" in the context of peat extraction, an issue already considered in the context of Question (3) above.

53. *(7) Is the identity of the person carrying out the peat extraction relevant in calculating the 50 hectare threshold? More specifically, is it permissible to aggregate two or more continuous sites where the activity is being carried out by different persons? If the identity of the person carrying out the activity is relevant, are related companies to be regarded as the same person?*

54. The court has referred above to the fact that the EIA Directive has as its ultimate purpose the attainment of improved environmental protection. The court has referred also to the fact that when choosing a threshold for projects listed in Annex II of the EIA Directive, Ireland opted for a threshold that is significantly lower than the mandatory 150 hectare threshold referred to in Annex I of the Directive. Thus it seems clear that the legislative intent of the Oireachtas in this regard was to adopt a rigorous environmental impact assessment regime. Consequently it appears to the court that if it is to give effect to the purpose of EIA Directive and also to accord with the clear legislative intent of the Oireachtas in terms of establishing a robust and stringent environmental impact assessment regime, it must answer the above question in a manner that affords the greatest protection to the environment.

55. *(i) Is the identity of the person carrying out the peat extraction relevant in calculating the 50 hectare threshold?* This query is slightly loosely worded and might perhaps be better worded so that it more closely ties into the wording of para. 1.4 of the First Schedule to the Act of 1992. Thus the court proceeds on the basis that what the question means to ask is if, in determining whether a business involves an area exceeding 50 hectares, the court is to have regard to the true identity of the person(s) operating that business. Having regard to the purpose of the Directive and the statutory intent that underpins the Act of 1992, as amended, the answer to this question must be an unequivocal 'yes'. Were it possible for a single individual, *e.g.* through the guise of multiple companies to acquire significant tracts of land for peat extraction, yet engineer matters so that none of those companies came within the environmental impact assessment regime, the result would be that the purpose of the EIA Directive and indeed the Act of 1992 would be capable of being entirely frustrated by that individual. This would not only be a result that would be inconsistent with the purpose of those measures but would be so patently absurd that the court considers it cannot have been what European Union or Irish lawmakers intended. Thus the court concludes that it cannot but be the case that in determining whether a business involves an area exceeding 50 hectares, one must have regard to the true identity of the person(s) operating that business.

56. *(ii) More specifically, is it permissible to aggregate two or more continuous sites where the activity is being carried out by different persons?* Having regard to the purpose of the Directive and the statutory intent that underpins the Act of 1992, as amended, the answer to this question must be, in the right instances, 'yes'. For example, were it possible for a single individual through the guise of multiple companies to acquire significant tracts of land for peat extraction, each of which companies was apparently engaged in separate businesses but the profits from all of which flowed ultimately to that individual, it would seem contrary to the purpose of the EIA Directive and indeed the Act of 1992 if the court could not peer through the legal smokescreen to the practical reality. Were the court unable to do so, the result would be that the purpose of the EIA Directive and the Act of 1992 would be capable of being entirely frustrated, a consequence that is so patently absurd that the court considers it cannot have been what European Union or Irish lawmakers intended. To ensure that this and like abuses do not arise the court concludes that it cannot but be the case that in determining whether a business involves an area exceeding 50 hectares, the court must have regard to the true identity of the person(s) operating that business so as to determine whether ostensibly separate businesses run on different sites are in truth a common business or related businesses with a common purpose or owner. The court sees no reason in law or logic to distinguish between contiguous and non-contiguous sites in this regard.

57. *(iii) If the identity of the person carrying out the activity is relevant, are related companies to be regarded as the same person?* The court has already indicated above that it considers that the identity of the person carrying out the activity is relevant. However, for the purposes of answering this question, the court merely assumes that this is the case, so that even if the court is wrong in its answer that the identity of the person carrying out the activity is relevant, its answer to this question is nonetheless capable of standing alone. Clearly there will be instances in which related companies will as a matter of agency law fall to be regarded in effect as the same person for the purposes of the environmental impact legislation. This will be the case, for example, if one company acts as the agent of the other or if they both act as the common agent of a third party. However, what is the position where neither of these circumstances pertain and it is contended that the 'corporate veil' should be lifted so that e.g. the common ownership of related companies by the same party and, presumably, that party's attempt to frustrate the purposes of the Act of 1992 and indirectly the EIA Directive can be demonstrated? In the almost 120 years since *Salomon v. Salomon & Co. Ltd.* [1897] A.C. 22 was decided, an ocean of ink has been spilled on the issue of whether and when the 'corporate veil' can be lifted, rendering this an area that certainly in theory, though perhaps less so in practice, is notably, and to some extent unnecessarily, complex. The court does not consider it useful to add still more tinder to this burning issue which is comprehensively addressed both in case-law and in many learned texts. That said, however, the court has already indicated, in its answers above, its view that it cannot but be the case that in determining whether a business involves an area exceeding 50 hectares, the court must have regard to the true identity of the person(s) operating that business. An aspect of this duty must be that the court can, to use the stock phrase, 'lift the corporate veil' in instances where it considers that the purpose of the Directive and hence the Act of 1992 would be frustrated were it not to do so. The court draws support for this conclusion from two of the leading authors on company law in Ireland and England, namely Keane and Gower. Thus as former Chief Justice Keane notes in the fourth edition of his learned text on *Company Law*, at para. 11.19:

> *"[M]odifications in special circumstances by the legislature and the courts of the principle in Salomon's case have been frequently described as occasions on which 'the veil of corporate personality' is lifted; so frequently, indeed, that it is almost impossible to dislodge the phrase in any discussion of the topic. Yet it is a singularly unhelpful and confusing metaphor; there is no veil, as Gower points out, which prevents the law from seeing who owns a company. On the contrary, the great principle underlying all modern companies' legislation is the requirement that the identity of those who control the company should be ascertainable by the public. There is nothing to prevent a court in any case from ascertaining who the persons in control of a company are, if that is relevant to any issue which the court has to resolve." [Emphasis added].*

58. Chief Justice Keane then enters a couple of caveats to this general observation but says nothing that the court considers would generally impede a court, as part of the process of determining whether a business involves an area exceeding 50 hectares, from having regard to the true identity of the person(s) operating that business.

59. *(8) Is it permissible to aggregate the areas of extraction areas that are not contiguous?*

60. This appears to the court to be merely a variant of Question (2) and the issue arising has already been addressed in the answer given to that question.

61. *(9) Can two companies be said to carry on a single activity where: (i) one owns the freehold and carves out a lease of the lands*

in respect of a third party? (ii) each operates on a separate part of the site; (iii) one holds the extraction area and another holds the ancillary area?

62. This is not a question that is amenable to a comprehensive answer when raised in the abstract. Certainly there are situations in which the answer to each limb of the above question is yes. So, for example, if one company acts as the agent of the other or if they both act as the common agent of a third party then in each of the instances posed it would seem to the court that they could be said to be carrying on a single activity. Equally, however, instances may arise in which the answer to one or more of the limbs of the question raised could be no.

63. *(10) Given that an activity is a "process, development or operation…carried on in an installation," can two plots of land form part of the same activity where (i) they are separated by a road on lands (under the control of a third party/local authority) running across the bog (but not separating the bog hydraulically)? (ii) they are separated by a distance of over a kilometre but are located on the same bog? (iii) they are separated by a distance of several kilometres but are the subject of similar activities? (iv) they are owned by different companies but are the subject of similar operations? (v) one of the plots is used for the extraction of peat while the other is used for storage, transport, sedimentation, buffer and pollution prevention for the purposes of the extraction area?*

64. This question is more easily answered when one has regard to the full gamut of definitions in the Act of 1992 and not just the correct but shorthand version of the definition of "*activity*" referred to in the question. Yes, an "*activity*" is, under section 3(1) of the Act of 1992, a "*process, development or operation specified in the First Schedule and carried out in an installation*". However, it will be recalled that the term "*installation*" is itself defined in section 3(1) as embracing "*plant where the activity concerned referred to in the First Schedule is or will be carried on*". And the term "*plant*" is itself defined in the same section as including "*any land or any part of land which is used for the purposes of, or incidental to, any activity specified in the First Schedule*". Again, among the activities specified in the First Schedule are: "*[t]he extraction of peat in the course of business which involves an area exceeding 50 hectares*." When one has regard to all of these definitions the answer to the question posed is more readily apparent. Before turning to that answer, however, it is worth mentioning again that the EIA Directive has as its ultimate purpose the attainment of improved environmental protection, and that when it came to implementing this European Union legislation it seems clear that the legislative intent of the Oireachtas was to adopt a particularly rigorous environmental impact assessment regime. Consequently it appears to the court that if it is to give effect to the purpose of the EIA Directive and also to accord with the clear legislative intent of the Oireachtas in terms of establishing a robust and stringent environmental impact assessment regime, it must answer the above question in a manner that affords the greatest protection to the environment. That said, as it happens, the purposive and literal interpretations of the just-quoted provisions appear neatly to align in this instance. Hence the most natural reading of the reference in the definition of "*plant*" to "*land or any part of land*" is that it can include entirely separate pieces of land. Helpfully, this reading accords with the purpose of the Directive and indeed the Act in that it ensures the maximum environmental protection through the aggregation of separate pieces of land which are used to the same ultimate end, the successful extraction of peat, albeit that those pieces of land may not be contiguous and may even be in very different places. The court is buttressed in this conclusion by the fact that any alternative finding would lead to absurd consequences in that, for example, a company by structuring its activities and separating them appropriately could bring itself outside the ambit of the scheme contemplated by the EIA Directive and established in Ireland by the Act of 1992, as amended. It appears to the court that such an absurdity cannot have been intended by the Oireachtas. Thus it appears to the court that the answer to each of limbs (i), (ii), (iii) and (v) above is an unequivocal 'yes'. With regard to limb (iv), this introduces the issue addressed at Question (9) above. Thus provided one is, for example, in one of the hypothetical instances posed in the answer to Question (9), viz. where one company acts as the agent of the other or they both act as the common agent of a third party, the answer in the instance posed in limb (iv) above would be 'yes', and there may be other instances in which this would also be so.