[2019 IEHC 755

THE HIGH COURT

[2017/13 C.A.T.]

BETWEEN

THE ENVIRONMENTAL PROTECTION AGENCY

APPLICANT (RESPONDENT)

AND

THOMAS DEEGAN

RESPONDENT (APPELLENT)

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 31st day of July, 2019

1. This case comes before the Court by way of an appeal from the order of His Honour Judge Teehan, made the 30th day of May, 2014, at Kilkenny, whereby the Appellant was restrained from carrying out the commercial extraction of peat at certain bog lands known as Timoney Bog, Cappalahan, County Tipperary.

2. The proceedings were commenced by way of an originating notice of motion pursuant to s. 99H of the Environmental Protection Agency Act, 1992, (the 1992 Act) as inserted by s. 15 of the Protection of the Environment Act, 2003 (the 2003 Act) (the EPA Acts). Section 99H confers jurisdiction on the High Court and the Circuit Court to make certain orders on the application of any person in relation to certain activities carried on in contravention of the 1992 Act, as amended, which in this case is the extraction of peat in the course of a business where the area involved exceeds 50 hectares. The Agency contends that the harvesting of peat by the Appellant on Timony Bog in the course of his business meets the statutory threshold for licensing. The Agency initiated the proceedings in circumstances where although the requirement for an Integrated Pollution Prevention and Control licence (IPPC licence) had been accepted and an application intimated by the Appellant's solicitors it was subsequently not pursued.

Licensing; Relevant Statutory Provisions

3. Section 82 of the 1992 Act, as amended by s. 15 of the 2003 Act, provides, *inter alia*, that a person shall not carry on an '*activity'* other than an '*established activity'* unless an IPPC licence or a revised IPPC licence under Part IV of the Act in relation to the activity is in force. Section 3 of the 1992 Act, as amended by s. 5 of the 2003, Act, defines '*activity'* as meaning "any process, development or operation specified in the First Schedule (to the act) and carried out in an installation". *Installation* is defined as meaning:

> "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]

3. Plant is defined for the purposes of the Act as including "...*any land or any part of any land* which is used for the purposes of, or incidental to, any activity specified in the First Schedule" which includes at Class 1.4 "the extraction of peat in the course of business which *involves* an area exceeding 50 hectares."

The 'established activities' exemption from the licensing requirements was made subject to the proviso, contained in s. 82 (2), that the Minister for the Environment and Local Government could, by order, provide that an established activity of any class specified in the order shall not be carried on, on or after such date as specified in the order, unless an IPPC licence or revised IPPC licence under Part IV of the Act is in force in relation to the activity. Section 18 of the 2003 Act substituted the First Schedule to the 1992 Act. In this regard the attention of the reader is drawn to the wording of the specified activity listed at Class I.4 of the substituted schedule which is identical to the wording utilised in the First Schedule to the 1992 Act.

4. On the 3rd of December, 1998, the Minister promulgated the EPA, 1992, (Established Activities) Order, 1998, (S.I. 460 1998) (the 1998 Order) pursuant to s. 82(2) of the 1992 Act. A number of established activities were specified (see Article 4) and made subject to licensing as and from June 10th 1999, including peat extraction in the course of business involving an area in excess of 50 hectares. The 2003 Act provided for the repeal of enactments and for the revocation of statutory instruments. The 1998 Order was not included, moreover, section 82(9), as inserted by s. 15 of the 2003 Act, provided that every such order made under s. 82(2) of the 1992 Act, in force immediately before the commencement of s. 15 of the 2003 Act, (which includes the 1998 Order) remains in force as if it were an order made under the provisions of that section [s. 82(4) as inserted by s.15 re enacts s. 82(2) of the 1992 Act]

5. This provision is significant in the context of the Appellant's submission that the relief sought by the Agency under s 99H amounted to a retrospective reliance upon provisions enacted to transpose Council Directive 96/61 EC, the Integrated Pollution Control and Protection Directive, without recognition of the principals of Community law on proportionality, legal certainty and legitimate expectation in circumstances where the Minister had yet to make an order under s. 82(4) of the 2003 Act. Clearly, the contention that an order has yet to be made under the 2003 Act is addressed by the provisions of s. 82(9); the 1998 Order, which was in force immediately before s.15 came into effect, is to treated as if it were an order made under s. 82(4).

The Issue; Origins

6. Although there are a number of grounds of appeal advanced by the Appellant, the fundamental question and issue at the centre of the controversy between the parties is whether an IPPC licence is required for the commercial harvesting of 'sod turf' from Timoney Bog. The origins of the issue are of some antiquity. Enquiries in relation to this question were first made by the Agency as long ago as 2005, when a letter dated the 7th July, 2005, was sent to the Appellant seeking details of his business operation on the bog. The stated purpose of the enquiry was to ascertain whether the requirements for an IPPC licence had been satisfied; the letter went unanswered. Further letters, dated 29th September, 2005, and 29th May, 2007, followed; they too went unanswered. The Agency subsequently carried out its own investigations in the course of which, on the 7th June, 2007, John Doherty, an enforcement officer employed by the Agency, eventually

managed to speak to the Appellant. He was informed that the Appellant had retained solicitors to deal with the queries raised in the correspondence.

7. The Appellant's solicitor subsequently wrote to the Agency on the 16th January, 2008, advising that an engineer had been retained to carry out enquiries and furnish a report into the business operation on the bog. On the 12th May, 2008, the Appellant's engineer, John M. Hayes, sent an email to John Doherty in which, amongst other things, he stated the Appellant had been advised that an IPPC licence was required for the continued commercial extraction of peat from the bog. Following receipt of the advice the Appellant retained another engineer, Frank Abbott. He prepared a report in which he acknowledged the necessity to comply with the licensing requirements pending which he proposed all but 50 hectares of the bog would be 'sterilised'.

8. Further correspondence ensued culminating in a letter dated the 21st July, 2009, in which the Appellant's solicitors made an application on his behalf for an IPPC licence so as to enable the continuance of present operations and to enable the Appellant "*…commence his planned peat moss harvesting and to carry out associated and required development works including drainage as is required for such peat moss harvesting*." Welcoming the decision to apply for a licence in a letter to the solicitors dated the 29th July, the Agency advised that application had to be made directly to its licensing office, the address details of which were also furnished. No further steps were taken to advance the application; instead the Applicant thereafter appears to have decided on a different course of action.

Subsequent Events

9. In December, 2009, a claim for compensation was made against the National Parks and Wildlife Service for pecuniary loss arising as a result of the designation of Timoney Bog as a Natural Heritage Area (NHA).The order had prohibited the harvesting of peat without the consent of the Minister for the Environment and Local Government; consent was not forthcoming. As a result of the order the Appellant subsequently brought declaratory proceedings against the Minister and the State. In 2014 the Government published a report into raised bog lands in the State and decided to accept its recommendations as consequence of which the designation order in quo is to be revoked. Appellant subsequently brought an application which was determined in 2016, to have the declaratory proceedings found moot; the High Court acceded to the application.

Grounds of Appeal

10. The outcome founds one of the grounds of appeal, namely, that the decision undermines the basis for and warrants the discharge of the Circuit Court order the subject of the appeal. Two related grounds centre on the content, findings and recommendations made in the Review of the Raised Bog Natural Heritage Area Network report, which was commissioned by the Department of Arts, Heritage and the Gaeltacht. Although the decision to designate Timoney Bog, amongst others, has yet to be implemented one important consequence of a de-designation order is that peat extraction will cease be a prohibited activity. The Appellant submits that for all practical purposes the making of the order is a formality; the Government wrote to him confirming its intention to de-designate

the Bog and indicated turf cutting could continue, a decision which, it is contended, further undermines the basis for the Circuit Court order.

11. The remaining grounds of appeal are;

(i) that mechanical peat harvesting is a long established activity on the bog,

(ii) the environmental concerns of the Agency deposed to on affidavit in the course of the proceedings have been fully addressed by ecologists Pascal Sweeney and Roger Goodwillie

(iii) the Circuit Judge relied on a decision of the High Court which was subsequently set aside by the Court of Appeal on consent, and,

(iv) the Appellant's intention is to restrict the peat extraction operation to an area of 30 hectares.

12. With regard to the last ground, the significance of the 30 hectare area is deserving of mention at this juncture. Section 83 (2A) (b) of the 1992 Act, as amended, inserted by the EU (Environmental Impact Assessment) (Integrated Pollution Prevention and Control) Regulations, (S.I. No. 282 of 2012), imposes an express obligation on the Agency to carry out an Environmental Impact Assessment (EIA) where the activity in respect of which a licence is required is likely to have significant effects on the environment by virtue of its nature, size and location. The carrying out of an EIA as part of the licensing process is mandatory where the activity exceeds the thresholds prescribed in the 5th schedule of the Planning and Development Regulations, 2001 to 2015; the prescribed activities include peat extraction involving a new or extended area of 30 hectares or more.

13. Having regard to the nature of the issues arising as well as the rather protracted and involved history concerning the status and exploitation of the bog it is considered desirable in the interest of a comprehensive understanding of the controversy between the parties that the factual and legal background to the present and other proceedings involving the bog should be set out in some detail.

Background

Location, Area and Ownership of Timoney Bog

14. The bog is located 6 kilometres South East of Roscrea town in the parish of Cappalahan, Barony of Ikerrin, Tipperary North Riding and is bounded on the North East by the river Nore, to which it has a hydrological connection via a number of drains. While the precise acreage of the entire bog was not established in the course of the hearing the documentary evidence shows the Appellant to be by far and away the largest owner of the bog with legal title to 345 acres (139.617 hectares), purchased in three separate transactions between 1994 and 1997.

History of Peat Extraction;

15. Peat has been harvested from Timoney Bog for generations. Records establish with certainty that from the 18th Century turf was commercially harvested there and

transported in barges on the Nore and through connecting canals to Birchgrove Distillery where it was used as fuel in the production of Roscrea Whiskey, a user which continued until the closure of the distillery in the mid 1850's.Thereafter the bog was utilised to provide 'sod turf' for local domestic consumption. One of the Appellant's predecessors in title, John Maher, swore an affidavit in which he deposed to having worked the bog, as had his father before him, for personal consumption as well as for the commercial supply of turf locally and to people from Roscrea until 1972, when he sold the bog to Kenneth Slevin.

16. An adjoining landowner, Tim Ryan, also swore an affidavit on behalf of the Appellant in which he deposed to having grown up in the vicinity and to having assisted his father cutting turf on the bog during Patrick Maher's ownership.While he and his father had harvested peat manually using the traditional turf cutting spade, known as a 'slean', he had also witnessed the mechanised development and use of the bog for commercial purposes by Mr Maher and Mr Slevin; commercial development was certainly the main driver behind his acquisition of the bog. In furtherance of this objective he dug 9-inch-deep parallel drains in the 'high bank' (virgin bog) using a mechanical digger to prepare the bog for harvesting by turf cutting machinery. By the early 2000's the area of 'high bank' drained in this way extended to approximately 82.8 hectares, a fact about which there is no dispute. In addition to the 'high bank' drains peripheral drainage channels were also dug to facilitate the flow of surface water into the Nore.

17. In the event that an IPPC licence is required and an application for a licence is made the hydrological connection to the river Nore is a potentially significant factor which would have to be taken into account by the Agency when considering any such application. The obligation arises by virtue of the Barrow/Nore Special Area of Conservation (SAC), designated for the purposes of the Habitats Directive under the European Communities (Birds and Natural Habitats) Regulations 2011, (S.I. No.477 of 2011) (the 2011, Regulations). In this regard it seems clear on the evidence that an EIA and screening for an Appropriate Assessment (AA) would most likely have to be carried out. Furthermore, as long as the Nore Valley Bogs NHA Order 2003 remains extant the NHA status of Timony Bog would also have to be taken into account.

18. The system of mechanical peat extraction adopted by Mr Slevin involved the use of a specialised cutting machine which laid the cut peat, known as 'sod turf', in lines on the 'low bank' (cut away area of the bog from which peat has already been extracted).'Sod turf', to be distinguished from 'milled peat', which is produced by milling from the surface of the bog, is used primarily as a fuel in a traditional hearth or open fire. The lines of 'sod turf' were sold to local people who would then come onto the bog to turn, stack and eventually draw the turf away when dry for domestic use.

19. The total area of the 'low bank', referred to by Tim Ryan as "the Hollows," was measured by Mr. Frank Abbott, in July, 2008, at 77.8 acres (31.5 hectares). When re-measured three years later by the RPS Group in November, 2011, engineers retained by the Agency, the area of 'low bank' had extended to 132.35 acres (53.56 hectares), an

increase in area indicative of a significant harvesting operation. If it is to be included in reckoning the 50 hectare threshold the increase in the 'low bank' area is also potentially significant. It is clear from the affidavits sworn to ground the original application that between 2008 and June 2011, the Appellant engaged in harvesting turf from the bog and that this activity is the probable explanation for the increase.

20. The bog was worked commercially for 20 years by Mr Slevin before he sold it as a 'going concern' to the Appellant. Having acquired the vast majority of bog through a number of transactions during the mid to late 1990's, mainly from Mr Slevin, the Appellant set about further development of the bog for commercial purposes. In 2003, he 'freshened' the drains which had previously been dug into the 'high bank'. The purpose of the exercise, which increased the drain depth from 9 inches to a metre, was to prepare the bog for the mechanical extraction of milled peat, used commercially in a range of fuel as well as horticultural products, such as peat moss. Following the completion of the drainage works the Appellant decided to abandon the plan to harvest the bog by this method and continue with the production of 'sod turf' from the area of 'high bank' into which the drains had been dug. For completeness, it should be observed that there is an area of virgin 'high bank', measured by Frank Abbott in 2008, at 39.7 hectares, in which drains have not been cut and which has not been utilised for turf production.

21. While the extraction of peat was confined to the commercial harvesting of 'sod turf' until production ultimately ceased on foot of the order from which the appeal is taken, it appears that when the Appellant applied for an IPPC licence in July, 2009, his intention was to not only to continue with 'sod turf' harvesting but also to commence milled peat production and carry out further associated drainage works as specified in his solicitor's letter. The ecological consequences of the drainage works already undertaken, not to mention works associated with the proposed development, are material and merit some examination. Indeed, the significance of the potential impact of the business operation on the environment and the freshwater muscle population through the hydrological connection to the Nore SAC was recognised by the parties in the retention of ecological and engineering experts to advise and report into these and other aspects of the matter.

Ecological Consequences of Drainage on the Bog

22. The opinions of the experts were set out in reports which have been exhibited on affidavit and considered by the Court. Amongst the issues addressed the reports contain helpful information on the formation and ecology of the peat bogs in Ireland which are generally of two types, raised bogs and blanket bogs;Timoney Bog is classified as a raised bog. These were formed naturally over ten millennia and grew out of the thousands of tiny lakes which filled the depressions in the glacial moraine left behind by the retreating glaciers at the end of the last Ice Age. They quite literally grew up wards from the chaotic rock strewn poorly drained base of the moraine; the explanation for the growth process is germane to the ecological consequences and economic potential associated with drainage.

Raised Bog as a Living Structure

23. A bog consists of two layers; the upper comparatively thin layer (typically 30 cm in depth), known as the Acrotelm, mainly comprised of Sphagnum mosses (the spongy

living layer) and a lower very much thicker layer making up the bulk of the peat, known as the Catotelm. This layer consists of an amorphous, chocolate coloured, mass of dead Sphagnum fragments which when cut and dried is traditionally known as 'turf'.Rain water passes through the Acrotelm relatively quickly but water movement through the amorphous peat is very slow. The importance of the Acrotelm to the bog lies in its the regenerative function, acting like a sponge drawing water up from below, keeping the upper level of the bog wet except in the driest of conditions. The almost ever present moisture maintains the living flora including mosses growing at or near the surface which, on dying off, become compressed by the weight of the living flora above thereby adding to the bed of peat below.

Effect of Drainage on the Acrotelm

24. It follows that any intervention which leads to the removal or terminal deterioration of the Acrotelm ultimately operates to hinder and ultimately destroy the regeneration process and with it the growth of the peat bed. The harvesting of turf, particularly by mechanical extraction for 'sod turf' or milled peat and the installation of even superficial drainage causes a lowering of the ground-water table and an increase in water run-off. This leads not only to a shrinking of the peat due to loss of moisture content but also to the gradual decay and loss of the active raised bog habitat defined by the presence of a functioning Acrotelm. Coincidentally this process also enhances the extraction and production of peat, whether milled or as 'sod turf'. It follows that the digging and subsequent deepening of drains in the 'high bank' facilitates the harvesting of peat whichever method of extraction is adopted.

Enhanced Peat Extraction Conditions; Economic Benefits

25. Until restrained from doing so by the order of June 8th, 2011, the Appellant carried on the business of 'sod turf' production by mechanical extraction in much the same way as Mr Slevin. The operation was a substantial commercial enterprise as evidenced by the claim for compensation advanced following the designation of the bog as a National Heritage Area in 2003. The claim was made pursuant to s. 22 of the Wildlife (Amendment) Act 2000 (the 2000 Act) and led to arbitration proceedings, against the Minister for the Environment, Heritage and Local Government, commenced in 2009. The Points of Claim delivered in the proceedings included a claim for loss of income for the years 2001 to 2007 inclusive, particularised at an average of €78,581 gross per annum: the total value of the claim advanced was estimated at €22,970,000.

26. These claims and the declared intentions of the Appellant with regard to the development of the bog have a particular significance when viewed in the context of the limited operations undertaken or proposed to be undertaken by the Appellant following the assessment of his business operation and the subsequent determination by the Agency that an IPPC licence was required. On my view of them, the submissions made on the Appellant's behalf in this regard stand in marked contrast to not only to the claim advanced for compensation in the arbitration proceedings but also with his express long term business objective, namely, to harvest all of the peat and turn the bog over to agricultural uses, a finding for which there is convincing documentary evidence.

27. In this regard reference has already been made to the email sent by John M. Hayes, Consulting Engineer, on May 12th 2008, to John Doherty initiating a claim under the 'Bog Compensation Scheme' and in which the Appellant's expectation of what could be done and his long term plan for the bog was stated, namely, that *"… he can continue to extract peat and on completion use the land for agricultural activities*…." a view entirely consistent with a conversation he had had a year earlier with John Doherty who made a memorandum of the conversation, dated the 11th July, 2007. The memo was exhibited in the affidavit of Irene Doyle, sworn the 16th May, 2011, to ground the originating notice of motion in these proceedings. The Appellant is recorded as having said "…*he has been cutting turf for years and intends to cut the whole bog*…" a position also consistent and compatible with the claim for compensation advanced in the subsequent arbitration proceedings.

Protection of Timoney Bog; Designation as a Natural Heritage Area (NHA); Proximity to an SAC/ European Site

28. The Wildlife (Amendment) Act, 2000, (the 2000 Act), provided for the creation and designation of Natural Heritage Areas further to which 75 NHA's were designated by the Government for the protection of raised bog habitats. The NHAs compliment the main areas of protected raised bog in Ireland, nominated as Special Areas of Conservation (SACs) in accordance with the Habitats Directive {Directive 92/43/EU, amended by Directive 97/62/EC} now transposed into Irish domestic law by Part XAB of the Planning and Development Act 2000, as amended, and by the European Communities (Birds and Natural Habitats) Regulations (S.I. 477 2011) (the 2011, Regulations). The designation of Timoney Bog as an NHA was achieved through the National Heritage Area (Nore Valley Bogs NHA (site identification code 001853) Order 2003 (S.I. No.606 of 2003) (the 2003 Order). As mentioned earlier, Timoney Bog also drains directly into the Nore, part of the Barrow / Nore SAC (site code 002162), or European Site as it is sometimes called, designated for the purposes of the Habitats Directive in accordance with 2011 Regulations.

Consequences of Designation as an NHA; Peat Extraction

29. As mentioned earlier designation as an NHA has certain consequences for commercial activities. Section 19 of the 2000 Act, provides for restrictions on carrying out certain works on land to which an NHA applies. The carrying out of works specified in an NHA order is unlawful unless carried out with the consent of the Minister for the Environment, Heritage and Local Government; Peat extraction and drainage works affecting the hydrology of the site are amongst the works specified in the schedule to the 2003 Order. On the 7th July, 2007, the Minister requested the Appellant to discontinue use of Timoney Bog for the extraction of 'sod turf'. Section 22 of the 2000 Act, provides for compensation to be paid to land owners for pecuniary loss arising as a consequence of designation and on foot of which the claim for compensation referred to earlier was brought. It will be noted that the application made on behalf of the Appellant for an IPPC licence in July, 2009, followed quickly on the Agency's request to cease operations. In the course of the subsequent arbitration proceedings a preliminary issue arose in respect of which written

submissions were made on behalf of the Appellant. The submissions were exhibited on affidavit and have been read by the Court.

Declaratory Proceedings

30. The preliminary issue concerned a question of jurisdiction on which the decision of the Arbitrator was awaited. If decided in favour of the respondents the arbitration would have ended without any payment being made to the Appellant. At this juncture he decided to stay the arbitration and resort to court proceedings commenced against the Minister for the Environment, Ireland and the Attorney General in which certain declaratory reliefs were sought, including a challenge to the validity of the 2003 order, together with a claim for damages; the proceedings were instituted on the 19th January, 2011.

Review of the Raised Bog Natural Heritage Area Network

31. During the pendency of the declaratory proceedings, the Government published the long awaited 'Review of the Raised Bog Natural Heritage Area Network' in January 2014, as a result of which, as we have already seen, certain recommendations, including the complete de-designation of 46 NHAs, were set out and accepted by the Government. Suffice it to observe for present purposes that the Wildlife (Amendment) Bill, 2016, was introduced to give effect to the outcome of the 2014, Review. On the 13th December, 2019, the Bill finally passed all stages in the lower house and is at the Report stage in the Senate, where amendments are currently being debated.

Consequences of the Review and Decision to De-Designate

32. Section 4 of the Bill proposes to insert a new section 18A after s. 18 of the 2000 Act which, if passed, will give the Minister for Culture, Heritage and the Gaeltacht power to de-designate an NHA. It follows that Timoney Bog will remain a designated NHA unless and until the Bill is enacted in its present form and an order of de-designation made under s, 18(A). Having decided to accept the recommendations, on the 24th February, 2014, the Minister wrote to the Appellant informing him of the outcome of the Review and of the Government's intention to reconfigure the State's NHA network and initiate a process of de-designation. It follows that if and when the bog is de-designated the restrictions which apply to the carrying on of certain activities, including turf cutting and drainage works prescribed by the 2003 Order will no longer apply; in that event the Appellant contends, the foundation for these proceedings will have been removed.

Consequences for the Declaratory Proceedings and the Appeal

33. As mentioned earlier, the Appellant contends that the decision to de-designate the bog together with the outcome of the declaratory proceedings are central to the determination of the issue and, quite apart from other grounds, warrant the discharge of the Circuit Court order. The Appellant has always sought to link the 2003 NHA Order designation to the basis for the application. Indeed, the contention that these proceedings are based upon and inextricably linked with the 2003 Order was made by or on behalf of the Appellant in correspondence both before as well as after the issue of the originating motion on the 17th May, 2011. Moreover, the link ultimately found its way into an undertaking given on his behalf by his solicitors in a letter dated the 30th May, 2011, shortly before the return date for the hearing of the application in the Circuit Court. The undertaking given not to cut any turf was made subject to a time limited condition,

namely, the determination of the proceedings *"…challenging the lawfulness and validity of the Natural Heritage Area (Nore Valley Bogs NHA 001853) Order 2003…".*

34. The Agency contends that while the decision to de-designate the bog has yet to be implemented, the Appellant is conflating the consequences of an NHA designation /de-designation for turf cutting with entirely stand alone and distinct statutory licensing requirements which are the sole basis for the application. The question is not whether turf cutting is or is not a prohibited activity, rather whether the circumstances are such that an IPPC licence is required for the commercial harvesting of peat by the Appellant. It is significant in this context that on the 8th June, 2011, when the original application came on for hearing, he gave a sworn undertaking, accepted by the court, *"…as and from the 8th day of June 2011, not by himself his servants or agents or any other person acting in concert with him or having notice of this Order to cut, interfere with or otherwise extract turf or peat in the course of a business involving more than fifty hectares upon the bog lands owned by [him] at…Timoney Bog…".*

35. It will immediately be noted that the terms of the order make no mention of the declaratory proceedings, notwithstanding the averment in the Appellant's affidavit that the undertaking in those terms was being given conditional upon the outcome of said proceedings. Following the announcement of the Government's decision to de-designate 46 raised bogs the conditional nature of the undertaking was relied upon to ground an application for the discharge the Circuit Court order. Furthermore, the outcome of the Review and subsequent decision by the Minister to de-designate the bog had clear implications which also led to an application by the Appellant to discontinue the declaratory proceedings with an order for costs on the grounds they were moot. While the defendants did not resist the application they also sought an order for costs on the grounds that the Government's decision and intended de-designation was not material to the reliefs and did not render the validity issue moot.

Outcome of the Declaratory Proceedings

36. In a reserved judgement delivered on the 15th March, 2016, Gilligan J., upheld the contention that the proceedings were moot and permitted the plaintiff to discontinue, but in the particular circumstances of the case made no order as to costs in favour of either party. Having regard to the submissions made on behalf of the Appellant in relation to legal certainty and legitimate expectation in these proceedings it is appropriate to observe at this juncture that the learned judge also drew a distinction between the claim for damages in the declaratory proceedings and the compensation claim for pecuniary loss brought under the 2000 Act, as a consequence of the NHA designation, noting at para 32 that *"… the plaintiff may continue with the original arbitration proceedings once these proceedings are discontinued." See Deegan v The Minister for the Environment, Heritage and Local Government, Ireland, and the Attorney General* [2016] IEHC 216.

Application to Discharge Undertaking

37. By motion on notice, dated 30th April, 2014, issued during the pendency of declaratory proceedings before the application to discontinue, the Appellant applied to the Circuit

Court for an order discharging him from the undertaking furnished on the 8th June, 2011.The application was grounded on the following:

(a) the Government's decision to de-designate Timoney Bog, confirmed in a letter sent by the Chief State Solicitor, dated 4th April, 2014,

(b) the intention to restrict turf cutting activities to less than 50 hectares,

(c) the Agency had based the application for an injunction on the 2003der which was to be revoked, and,

(d) turf extraction was an important part of the Appellant's business and turnover.

38. The application came on for hearing before Judge Teehan on the 30th May, 2014 and was opposed. The learned Circuit judge made an order which permitted the removal of turf from the low bank between the 21st May and the 29th May, 2014 but otherwise affirmed the terms of the order of June 8th, 2011. In making the order reliance was placed on the decision of this court in *Environmental Protection Agency v. Harte Peat* [2014] IEHC 308. The case was subsequently appealed to the Court of Appeal which set aside the judgement and order of the High Court with the consent of the parties on the 25th November, 2016. *Harte* involved a construction of the statutory provisions upon which the application in these proceedings is based. The outcome was advanced by the Appellant as a further ground of appeal. Suffice it to say in this regard that by virtue of s. 38(2) of the Courts of Justice Act, 1936, the appeal proceeds *de novo* and the judgement in *Harte* will play no part in the Court's deliberations.

Consequences of Moot Proceedings;

39. It was submitted that the finding by the High Court that the declaratory proceedings were moot determined the validity issue between the plaintiff (the Appellant herein) and all State Authorities on the 2003 NHA designation Order; accordingly, the principle of *Res Judicata* applied herein by analogy. I took this submission to mean that the NHA designation was no longer a material consideration to the licensing issue on the ground that once the order was revoked turf cutting would no longer be a prohibited activity. In reply the Agency contended that while the designation remains in place and would be a material consideration as part of the licensing process unless and until the 2003 Order is revoked, the NHA status of the bog is not an IPPC licensing requirement nor was it the basis for the application.

40. I pause to observe that during the course of correspondence passing within the Department of the Environment, Heritage and Local Government on how best to proceed with regard to the issue of enforcement, the opinion of the Agency on the question of enforcement was set out in a letter dated 30th November, 2006. In its view this was best pursued under the Habitats Regulations and the Planning Acts since licensing as an enforcement procedure had no role to play below the 50-hectare threshold. It follows, and is accepted by the Agency, that the extraction of peat in the course of business which involves an area less than 50 hectares maybe carried on without an IPPC licence.

41. The Agency maintains that references in the grounding affidavits to the NHA and the Barrow/ Nore SAC were made for contextual purposes only and not as the grounds upon which the application was being moved. Such matters are, however, considerations which fall to be taken into account in the event that an application for an IPPC licence is made. The sole question for determination on the appeal, as it was in the court below, is whether or not an IPPC licence is required for the harvesting of peat from the bog by the Appellant in the course of his business, irrespective of whether or not the bog is de designated. In short, if and when a de-designation order is made the requirement for an IPPC licence will remain; the NHA and the SAC are non-determinative of licensing requirements. The Agency contends that the Appellant's 'activity' fell within the parameters of s. 82 of the 1992 Act, as amended, accordingly, an IPPC licence is and was required.

Licensing of Peat Extraction; Role of the EPA;.

42. While the 1992 Act has been the subject of extensive amendment, many of the original provisions and statutory instruments made there under remain in force or were substantially reinserted by substitution, sometimes with modification or additions. That Act made provision for the protection of the environment, the control of pollution and the establishment of the Agency upon which certain functions and powers were conferred for the purposes of carrying into effect the objects for which the legislation was enacted. In this regard Part IV of the Act provided for the establishment of a scheme of licensing administered by the Agency in respect of which, depending on circumstances, certain licensable activities, including peat extraction, were specified.

43. Part IV of the 1992 Act was replaced in its entirety by s.15 of the 2003, Act, which was enacted for the purposes of implementing the Integrated Pollution Prevention and Control Directive, 1996/61/EC (the 1996 IPPC Directive) as well as for other purposes, including the amendment of the 1992 Act and other legislation. Indeed, subsequent legislation has been enacted to implement the 2010 Industrial Emissions (IPPC) directive and the 2011 EIA directive. In relation to the latter mention should be made of the original EIA directive (No 85/337EEC), Annex 1 of which lists the 'projects' and sets out the thresholds where an EIA is required. The extraction industries listed include peat extraction; the threshold area involved is specified at 150 hectares.

44. 'Projects' which are likely to have a significant effect on the environment, including peat extraction, but where member states are to determine the thresholds for an EIA are set out in Annex 2. The area threshold for peat extraction was subsequently set by the Oireachtas at 50 hectares, the same threshold required for an IPPC licence under the 1992 Act. The directive was first implemented in the State by the European Communities (EIA) Regulations (S.I. 349, of 1989). The 1992 Act, as amended, was further amended by the EU (EIA) (IPPC) Regulations 2012, (S.I. 282) and was also amended by the EU (EIA) Regulations, 2012 (S.I. 457 of 2012). It should be noted in passing that while the myriad of activities listed in Annex I of the 1996 IPPC Directive and the Industrial Emissions Directive (2010/ 75/EU) do not include peat extraction and the definition of *installation* does not include land, peat extraction is included in the EIA directives. It is

hardly surprising, therefore, that the definition of *installation* for the purpose of the EPA Acts has been extended to include '*plant'* as defined in the 1992 Act and thus extends to land. Similarly, the definition of "*activity*" in the 1992 Act, as inserted by s. 5 of the 2003 Act, has been amended to include an *activity* specified in the First Schedule "…and carried out in an *installation*." On a literal interpretation the specified activity of peat extraction in the course of business involving an area in excess of 50 hectares is an activity carried out in an installation. [Emphasis added]

Decision

45. It follows from the foregoing that certain findings of fact must necessarily be made as a prerequisite to any determination of the question as to whether or not the Appellant's operation on Timoney Bog meets the requirements for an IPPC licence. That the operation was carried out in the course of a business is accepted, however, how the area '*involved'* in the operation is to be reckoned is in dispute; the determination of that question is crucial to the outcome of the case; if the area involved in the operation is less than 50 hectares the threshold for an IPPC licence will not have been met and the requirement for an IPPC licence does not arise.

46. While the fact that 82.8 hectares of 'high bog' is also accepted, the Appellant submits the area is not reckonable whereas the Agency contends to the contrary. In the course of the proceedings both parties recognised the potential relevance of the area to the issue. In this regard it appears from the order of the Circuit Court made the 8th June, 2011, that amongst the reliefs sought by the Agency was a mandatory injunction requiring the closure of the drains, a claim which the court allowed "*to stand undecided".* Subsequent to the order of the Circuit Court made the 30th May, 2014, the matter surfaced again when the Appellant issued a notice of motion, returnable before the High Court on the 30th July, 2015, whereby he sought a variation of the order by authorising the back filling of the 'high bank' drains on such terms as might be directed.

47. Although it is clear from the replying affidavit of Irene Doyle that the Agency has no objection to the backfilling of the drains, sworn August 17th in response to the Application, that on any application for an IPPC licence in due course the Agency will have to have regard to the SAC and the 2011, Habitats Regulations since the works involved may impact on the integrity of a European Site which, as a matter of law, cannot be imperilled. In that event it will be necessary in the first instance to 'screen' the proposed works with a view to ascertaining whether they are likely to have a significant effect on the SAC and whether an Appropriate Assessment (AA) is required. If an AA is required the proposed works cannot be exempted development within the meaning of s. 4 of the Planning and Development Regulations, 2001, as amended; accordingly, planning permission may also be required. Against this background no order is sought by the Agency to permit the backfilling of the drains, though the Appellant has no objection to such an order being made.

Findings of Fact Summary

48. Having considered the evidence adduced on the Appeal it is convenient to summarise the Court's findings of fact as follows:

(a) Turf has probably been harvested from Timoney Bog for hundreds of years; records establish with certainty the extraction of peat for commercial purposes since the late 18th Century;

(b) The Appellant's predecessors in title developed the bog as a source of fuel for private as well as public consumption. The bog was sold to the Appellant as 'a going concern';

(c) The Appellant is the owner of 345 acres (139.617 hectares) of the bog, purchased in three separate transactions between 1994 and 1997;

(d) Between 1972 and 1997, drains to a depth of 9 inches at 15 to 17 meter intervals were dug in the 'high bank' by Kenneth Slevin for the purposes of commercial peat extraction by mechanical means; the area involved was 82.8 hectares;

(e) Peripheral drainage works were also undertaken to carry surface water from the bog to the river Nore, a designated SAC/European Site for the purposes of the Habitats Directive;

(f) In 2003, the Appellant deepened the parallel drains in the 82.8 hectares of 'high bank' to 1 metre for the purpose of commercial extraction of milled peat by mechanical means;

(g) The digging of drainage in the 82.8 hectares of 'high bank' resulted in the destruction of the Acrotelm layer of that portion of the bog, ending the generation of further layers of peat as a consequence;

(h) The digging of drainage in the 'high bank' also resulted in a loss of moisture and consequential shrinking of the Catotelm peat layer thereby enhancing the process of extraction, whether for 'sod turf' or milled peat;

(i) The man made hydrology within and peripheral to the bog is integral to and was executed for the purpose of peat extraction;

(j) Access roads were constructed and extended by the Appellant and/or his predecessors in title and/or the Local Authority for the purposes of developing the bog for peat extraction;

(k) Timoney Bog is a designated NHA under the 2003 Nore Valley Bogs NHA Order. The NHA (for so long as the designation remains) and the connection to an SAC are factors which the Agency would be required to take into account in the course of processing an application for an IPPC licence;

(l) Following the publication in January, 2014, of the Review of the Raised Bog Natural Heritage Area Network, the Government decided to de-designate 46 NHAs, including Timoney Bog. The implementation of the decision is dependent on the

enactment of the Wildlife (Amendment) Bill, 2016, accordingly, the bog continues to be the subject of the 2003, NHA Order pending revocation in due course;

(m) The 'low bank' area of the bog increased from 77.8 acres (31.5 hectares) as measured in July 2008 to 132.35 acres (53.56 hectares) as measured in November 2011. The increase in area is most probably due to the extraction of peat, an activity which continued with intermittent interruption until the Appellant gave an undertaking to cease harvesting peat from the bog on the 30th May, 2011;

(n) The lines of 'sod turf' cut from the face of the 'high bank' are laid out on the 'low bank' to be turned, stacked and dried; accordingly, the area of the 'low bank' is utilised as part of the process and for the purposes of peat extraction;

(o) Although the Appellant abandoned his plan to extract milled peat and sought to limit the area of operations by agreement with the Agency to less than 50 hectares, he subsequently applied for an IPPC licence by letter dated 21st July, 2009. A licence was sought to continue the business of 'sod turf' production and to commence peat moss harvesting together with required drainage works; the application was not proceeded with in the prescribed manner and a licence was not granted;

(p) In December, 2009, the Appellant brought a claim for compensation for pecuniary loss, estimated at €22,970,000, arising from the designation of Timoney Bog as an NHA;

(q) In 2011, declaratory proceedings were instituted challenging the validity and lawfulness of the 2003 Order;

(r) As a result of the Government's decision in 2014 to de-designate a number of NHA's, including Timoney Bog, following the publication of the Review of the Raised Bogs Natural Heritage Area Network, the declaratory proceedings were subsequently found to be moot by Gilligan J. on an application brought by the Appellant;

(s) In July, 2015, the Appellant issued a motion returnable to the High Court seeking a variation of the Circuit Court order to enable the back filling of the drains cut in the 'high bank' but the motion was adjourned generally and not re-entered;

(t) The Appellant is willing to submit to an order for the back filling of drains but no such order has been sought by the Agency. The works involved in back filling the drains may require planning permission and pending the making of a de-designation order would require the NHA to be taken into account as part of the application process for an IPPC licence, if such is required. An EIA and screening to determine whether an AA is required will also have to be undertaken as part of the process for planning permission, if required and/or as part of the process for an

IPPC licence, if required, in particular having regard to the drainage connection between the bog and the Nore SAC/European Site;

(u) Pollution control measures may be implemented to avoid environmental impact and maybe imposed as a condition of granting an IPPC licence, if required;

(v) In 2007/ 08, the Appellant's declared intention was to harvest all the peat from the bog and thereafter to utilise the bog for agricultural purposes, a plan consistent with the claim for compensation advanced subsequently but in conflict with the assertion that intended operations were to be limited to less than 50 hectares;

(w) The Agency has no role to play in licensing commercial peat extraction where the area threshold falls below 50 hectares. There was evidence of adjoining land owners carrying on business extracting turf without a licence but no evidence that the area involved in those instances exceeded the 50-hectare threshold;

(x) It is not for the Court to arrange for the carrying out of an EIA or an AA, nor to assess, approve or determine the adequacy or otherwise of the findings, environmental protection recommendations and measures advised by the ecological experts retained on behalf of the Appellant or any party, rather all such matters are properly to be considered as part of the licensing process by the Agency in the event that an IPPC licence is required;

(y) The requirements for an IPPC licence are not determined by or dependent upon the NHA status of the bog or upon its proximity to a designated SAC/European Site. Matters which fall to be taken into account or assessments which are required to be made as part of the application process are distinct from the factors, including the area threshold, which must be satisfied or met before an IPPC licence is required;

(z) By virtue of the EPA 1992 (Established Activities) Order 1998 (S.I. 460 of 1998), which remains in force by virtue of s.15 of the 2003 Act, the extraction of peat in the course of business carried on as an 'established activity' where the area involved exceeds 50 hectares has required an IPPC licence since the 10th June, 1999.

Agency's Submissions; Summary

49. The Agency acknowledges that the resolution of the controversy between the parties involves an interpretation of the statutory licensing provisions referred to at the outset of the judgement. In calculating the area *involved* for the purposes of the 50 hectare threshold the Court should not only take account of the ' footprint' from which peat is or has been harvested but should also include all land which is used for the purposes of or incidental to peat extraction, such as lands used for access roads, laying out the lines of 'sod turf' and all areas of the bog involving a directly associated activity which has a technical connection with peat extraction, in the instant case through the hydrological connection with the drainage in the 'high bank' and the peripheral drains. When that exercise is undertaken the area involved is unquestionably in excess of 50 hectares.

50. The Agency argues that the interpretation for which it contends is borne out by the literal and purposive approaches to statutory construction, particularly as the latter requires the Court to construe the provisions of a statute enacted for the purpose of implementing the requirements of an EU directive in light of its wording and the object for which it was adopted so as to achieve the result sought by it. As to that, the 50-hectare threshold specified in Class 1.4 represents a potential gateway to the EIA process and must be interpreted purposively in accordance with EU case law. The EIA directive has a wide scope and broad purpose consistent with which the European Court of Justice (CJEU) has given the activities and projects to which it applies a broad interpretation. In this regard, when determining whether an EIA is required the likely impact on the environment resulting from the use and exploitation of the end product of the works must be examined in addition to the works themselves.

51. Moreover, the use of thresholds must not be allowed to facilitate impermissible "project splitting" whereby what is, in reality, a single project or activity is artificially separated into individual parts, each of which is a sub threshold. Similarly, the CJEU has given a broad interpretation to the concept of a 'project' for the purposes of the Habitats Directive. The licensing requirements were the sole basis for the application and were not to be confused or conflated with requirements which had to be met as part of the licensing process, including, where relevant, the carrying out of assessments for the purpose of complying with the requirements of the EIA and Habitats directives. Nevertheless, the construction placed on the directives was material to and informed the interpretation which was to be placed on the statutory requirements for IPPC licensing.

52. A restrictive interpretation could result in projects which should be subject to EIA, as a matter of EU law, avoiding the requirement for such an assessment under national law: in short the Court should, in line with the required interpretative approach, construe the provisions *in quo* so as to ensure that an EIA cannot be avoided. In support of the Agency's submissions the Court was referred to the judgements of the CJEU in the following: Case-268/08 *IMPACT*,[98]; Case C-50/09 *Commission v. Ireland*; Case-127 /02 *Waddenzee*; Case C-72/95 *Kraaijeveld*; Case C-205/08; *Umeltanwalt von Karnten* [para 50 to 55]; Case C- 392/96 *Commission v Ireland* [at paras 75 to 82] ; Case C-142/07 *Ecologistas en Accion*-CODA v *Ayuntamiento de Madrid* [at para 44]; Case C-2/07 *Abraham and others* [43] Case C-215/06; *Commission v Ireland*: and Case C-158/ 15 EPZ, and to Irish case law in *Maher v An Bord Pleanala* [1999] 2 I.L.R.M. 198; *Shannon Regional Fisheries Bord v An board Pleanala* [1994] 3 I.R. 449; *O'Grianna v An Board Pleanala* [2014] IEHC 632 and *Balz v An Board Pleannala* [2016] IEHC 134.

53. The proposition advanced on behalf of the Appellant that he should be permitted to carry on the activity in a geographically demarcated area would not only have the effect of avoiding the requirement to apply for an IPPC licence, but also of avoiding the necessity to carry out of an EIA. Furthermore, such a construction would enable the Appellant to defeat the purpose and object of the EPA Acts by carrying on his business operation in a modular fashion amounting to 'project splitting' until all of the peat was harvested from the bog.

Appellant's Submissions; Summary

54. As against this contention the Appellant maintains as a matter of simple fact that the business of peat extraction carried on is limited to an operational area well within the 50 hectare limit specified in the First Schedule. In this regard reliance is placed on the measurements and opinion of the Appellant's engineer, Mr. Abbot, that the turf cutting operation at the face of the high bank is confined to less than one hectare and that even if one was to include the 'low bank' in the calculation of the total area *involved* in the business operation, it is still less than 50 hectares. Insofar as the drained area of the 'high bank' is concerned I understood the rational for evidence regarding the abandonment of the milled peat project and the willingness to submit to an order to back fill the drains to be offered in support of the contention that the drained 'high bank' was essentially useless and did not fall to be taken into account in the reckoning of the area '*involved'*.

55. Moreover, it was not the Appellant's intention to bring the 82.8 hectares of drained 'high bank' into production in the sweeping manner suggested by the Agency. The Appellant has endeavoured and proposes to keep production under the 30-hectare threshold; accordingly, the necessity for an EIA does not arise. The long history of peat extraction and the fact that the drainage affecting the environment of the bog was carried out prior to purchase by the Appellant were relevant factors to be taken into account as were the results of the Raised Bog Review, the Government's decision to de-designate the bog and the outcome of the declaratory proceedings, matters discussed earlier in this judgement. The environmental concerns outlined in the affidavits sworn on behalf of the Agency had also been addressed by the ecological experts retained by the Appellant; in short the entire foundation on which the application rested had been addressed or removed.

56. The Appellant placed particular emphasis upon the principles of proportionality, legal certainty and respect for legitimate expectation enshrined in Community law, relied upon in the context of the factual matrix applicable to Timoney Bog and what the Appellant contended was the retrospective application of the 2003 Act and the Council Directive to the limited peat harvesting production of 'sod turf' for local domestic consumption. The historical factual matrix constituted an "established activity" for the purposes of implementing the 2003 Act. In this regard the material provision contained in section 5 provided "(a) an activity which on the 29th October, 1999, or such other date as maybe prescribed in relation to the activity, was being carried on and did not involve or have an association with unauthorised development within the meaning of the Act of 2000 [Planning and Development Act 2000]". It was submitted that whatever else, operations carried out on the bog over 20 years before the purchase by the Appellant came within this definition and as such warranted the appeal being allowed on that ground alone.

57. Additional force was added to this argument when viewed through the prism of the principles of legal certainty and proportionality enshrined in Community law; the requirements of Class 1.4 fell to be interpreted in a manner consistent with these principles. When so applied a proportionate interpretation of the words "an area exceeding 50 hectares" would not apply to the limited operation constituting the

established activity carried out and what was described as "the conservative bog maintenance programme" proposed to be carried on by the Appellant, which in any event clearly fell below the prescribed threshold. The Court was required to adopt the literal approach to statutory interpretation having due regard for the principles of Community law. In this regard the Court was referred to the statements of law set out in Case C-331/*88 R v The Minister for Agriculture Fishers and Food, ex parte Fedesa* [1990] ECR 1-4023, para 13; and Case 98/78 *Firma A Racke v Hauptzollamt Mainz* [1979] ECR 69. para 20.

58. When consideration was had to the purpose for which the 2003 Act had been enacted, namely the transposition of the 1996 IPPC Directive, the definition of "installation" used in the Act could not be divorced from the wording used in the definition of the same term in the directive. When that exercise is undertaken it becomes immediately evident that the directive is not concerned in any way with the industry of peat extraction, indeed, it is not concerned in any way with activities on land as understood in an agricultural sense; simply put, peat extraction had been 'shoe horned' by the Oireachtas into a schedule of an act which had nothing to do with small farming and rural activities such as peat harvesting, an activity which quite evidently could not be carried on in an 'installation' as defined by the directive.

Reply

59. This proposition was rejected by the Agency which contended that the incorporation of additional provisions into the definition section of the 2003 Act was entirely permissible having regard to the object and purpose of the legislation as a whole, including the legislative history of the Act and other directives concerning the environment; accordingly, the definition which fell to be construed was the definition contained in the 2003, Act which included the term 'plant', defined as including 'any land'.

Decision; Principles of Statutory Interpretation

60. Although the provisions of the 1992 Act are of domestic origin the Act was one of the first pieces of legislation in the EEC to incorporate the principles of European Environmental Policy which had been developed up to that time. As we have seen, the 1992 Act was substantially amended by subsequent legislation, including the 2003 Act which was enacted to transpose the 1996 IPPC directive into Irish law. These acts were themselves amended in light of further directives, including the IS and EIA directives. It follows that the provisions of the EPA Acts have mixed origins, domestic and European, an aetiology which has an impact on the approach which a court, charged with the task of construction, is required to adopt.

Principles of Statutory Construction

61. The principles of statutory interpretation in general have been restated and clarified in a number of recent decisions of the Court of Appeal and Supreme Court which were recently reviewed and further expounded upon in C*.M. v. The Minister for Health and Children* [2017] IESC 76. The sole and fundamental purpose of statutory interpretation is to ascertain in any given piece of legislation the objective intention of parliament in the provision it has chosen to enact. The exercise may, depending on any number of factors,

involve multiple steps with different approaches, calling in aid along the way any interpretation provision contained in the subject legislation or, where relevant, in the Interpretation Act, 2005.

62. The conventional method of dealing with a matter of statutory construction is for the court to approach the interpretation of the relevant statutory provision by first giving the words used their ordinary and natural meaning, commonly referred to by legal authors and judges alike as the 'literal approach'. The clarity of though brought to the explanation and refinement of the topic by McKechnie J., at paras 57 and 58 in the judgement of the Supreme Court he delivered in C.M., warrants repeating in full:

> "57 As might be obvious, if the objective intent of parliament is self-evident from the ordinary and natural meaning of the words or phrases used, then the task is at an end, and the court's function has been performed. Whilst it has long been said that the words themselves, in their plain meaning, best declare such wish, that and multiple other similar expressions must be properly understood. I would therefore add the following, as being part of and complementary to this primary approach to legislative construction. The Court may:
>
> (i) Look at any legislative history of relevance; …
> (ii) Consider the subject matter being dealt with, the provisions put in place for that purpose, and the harm, injury or damage – the legislative objective – which the same were intended to address. …
> (iii) Have regard to both the proximate and general context in which the phrase or provision occurs, including any other such phrase or provision, or indeed the Act as a whole, which may illuminate the correct meaning of the disputed provision. …
> (iv) Have regard to the long title of and preamble to the Act …
>
> *58. Accordingly, a consideration of both the narrower and broader context of any disputed provision, including the subject matter of the legislation itself, is an integral part of the literal approach, as is the legislative history, the subject matter of the Act and, to use an almost obsolete phrase, the 'mischief' which was sought to be remedied by its provisions*."

63. With regard to the construction of domestic legislation enacted to transpose EU Directives, the law is well settled. Such legislation must be construed in a manner which is consistent with and gives effect to the purpose of the provisions of the directive which it was enacted to transpose, sometimes referred to as a purposive approach to construction; see Case-268/08 *IMPACT*, (98) CJEU where the court observed:

> *"when 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 EC."*

Bearing in mind that some provisions have an exclusively domestic origin, it follows from the foregoing that the approach which the Court must take to the construction of the provisions in question is clear, the words are to be given their ordinary and natural meaning but qualified by the interpretation requirements of Community law where the provision is enacted for the purpose of transposing a directive. Of course it may well be the case that the meaning to be given to a provision or provisions on either approach may well turn out to be the same.

Conclusions

64. When enacting legislation to transpose the provisions of an EU directive the national parliament of a member state is not constrained or prohibited by the Treaties or Community law in general from enacting additional provisions to take account of industrial, geographical, economic and social circumstances particular to the member State provided such provisions are compatible with and are incidental to and enacted for the purpose or object of implementing and furthering the requirements of the directive. The purpose and object at the heart of the EIA directives is abundantly clear, namely, to protect, preserve and improve the environment.

65. Whereas the projects listed in Annex 1 of the directive must, subject to certain exceptions, be made the subject of an EIA, including peat extraction where the area involved exceeds 150 hectares, Article 4(2) empowers the member states to determine whether the projects listed in Annex 2, which also include peat extraction, will likely have a significant impact on the environment and should be subject to assessment and identifies the methods or means whereby such determination is to be made; in the case of peat extraction the State has adopted thresholds. I am satisfied that the purpose of enacting the scheme of IPPC licensing, which may involve EIA considerations where circumstances require, was to implement the requirements of the directives, and in choosing the thresholds it did for peat extraction where carried on as a business, the Oireachtas made clear its intention to put in place a meaningful environmental protection regime.

Meaning of 'Installation'

66. Having regard to the findings of fact made, the approach to the construction of the provisions which the Court is required to adopt and the authorities to which it has been referred, I am satisfied that the submissions made on behalf of the Agency are correct. Quite apart from the fact that the extraction of peat in the course of business where the area involved exceeded 50 hectares was a specified activity in the First Schedule to the1992 Act and consequently a provision of domestic origin, if effect is to be given to the purpose of the directives with which the EPA legislation is concerned and to the result which is sought to be achieved, the interpretation of the transposing provision must be construed in the manner most likely to achieve the stated objective. The term "*installation*" was introduced into the 1992 Act by the 2003 Act but in so doing the Oirecahtas widened the definition contained in the IPPC directive to include the term '*plant'* as utilised and defined in the 1992 Act.

67. It will be recalled that the meaning of 'installation' provided for in s. 3 of the 1992 Act, as amended, reads:

> "…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 any activity specified and the first mentioned activity and is carried out on the site of that activity" and that plant is defined as including "…any land or any part of any land which is used for the purpose of, or incidental to, fied in the First Schedule;"[emphasis added]

To confine the construction of '*installation'* to the definition contained in the IPPC directive on the grounds contended for by the Appellant---that the activity of peat extraction as defined cannot be carried out in an installation as so defined---- would require the Court to exclude '*plant'* and therefore '*any land'* from the meaning of '*installation'* and thereby to disregard an express term—for which a meaning has also been provided--- made an integral part of the definition by parliament. Neither the authorities to which the Court was referred nor the applicable rules of construction permit, never mind warrant, such a course, particularly in circumstances where the words employed by the Oireachtas are clear and unambiguous. Moreover, in my judgment, such a construction would run the impermissible risk of defeating the purpose and object of the EIA directives and would be contrary to the approach to construction which the Court is required to adopt.

Area Involved

68. With regard to the factors which are to be taken into account in determining the 'area involved' the Court is satisfied on both a literal and purposive approach to the wording of the definition that the drainage in the 82.8 hectares of 'high bank' and the peripheral drainage works constitute a directly associated activity with the specified activity. In this regard the hydrological connection satisfies the meaning of 'a technical connection' between the drainage and the extraction of peat, a specified activity to which the drainage is incidental or ancillary. It follows that the area of 'low bank,' used for laying out of the lines of 'sod turf' also comes within the definition and is reckonable for the purposes of ascertaining the threshold area requirement for IPPC licensing

69. I cannot accept the proposition that an impermissible retrospective application of statutory provisions is involved in the application or construction of the IPPC licensing provisions upon which the application is grounded. Furthermore, I cannot accept the submission that the application was based upon or founded on the 2003 NHA Order. The statutory provisions on which the application is founded are entirely separate and stand alone. I accept the Agency's submission that the question of whether or not an IPPC licence is required is solely dependent on whether or not the Appellant's business operation is a specified activity and if so whether the threshold criteria for a licence are satisfied. So far as the NHA designation is concerned, this is a matter for consideration as part of the licensing process until and unless the 2003 Order is revoked. If an EIA, screening or an AA is required these too are considerations to be taken into account as part of the licensing process; they are not determining factors in the requirements which

must be met for an IPPC licence. The Appellant's contention that the application was founded upon these considerations is, in my judgment, misconceived, rather same was based on a failure to apply for a licence where the licensing requirements had been met and a continuation of the Appellant's peat harvesting business on the bog. Nor do I accept the contention that the application and the interpretation urged on the Court by the Agency of the statutory provision upon which it is based constitutes a disregard for the Community law principles of proportionality, legal certainty, or legitimate expectation.

70. Apart altogether from any right to compensation for pecuniary loss arising from the NHA designation, the concept of licensing for specified activities, including peat harvesting in the course of business over a certain threshold and the Ministerial power to require the licensing of 'established activities', became matters of public knowledge no later than the enactment of the 1992 Act, prior to the acquisition of the bog as a going concern by the Appellant. It was clear to anyone who was carrying on an established activity at that time, including peat extraction that such was liable to be the subject of an established activities order at any time, and so it was.

71. While the Court is satisfied that at the time of enactment the Appellant's operation was more than likely an 'established activity' within the meaning of the 1992 Act, the 1998 Order, which specified the 10th June, 1999, as the date from which an IPPC licence was required for established activities, predated the works undertaken by the Appellant to deepen the drains in the 'high bank' and applied to the operation from then onwards; indeed, the 1998 Order remains in force by reason of s 82(9) of the 2003 Act. Accordingly, a licence was required for any such business operation falling within the parameters of the order as and from June 10th 1999. It was not necessary for the Minister to make a new order under the 2003 Act, the 1998 Order having been saved and continued thereby.

Ruling

72. It follows from the findings made and the conclusions reached that the area involved in the Appellant's business exceeds 50 hectares; accordingly, an IPPC licence has been and is required if the Appellant is to carry out peat extraction in the course of his business on Timoney Bog. I will discuss with Counsel the final form of the orders to be made by the Court.