

THE HIGH COURT

2019/55/MCA

IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT  
AND IN THE MATTER OF AN APPLICATION

BETWEEN

RONALD KRIKKE  
PIA UMANS  
SEAN HARRIS  
CATHERINE HARRIS  
PATRICK KENNEALLY  
CAROLINE KENNELLY  
KENNETH GEARY

APPLICANTS

AND

BARRANAFADDOCK SUSTAINABILITY ELECTRICITY LIMITED

RESPONDENT

JUDGMENT of Mr Justice Garrett Simons delivered on 6 December 2019

**INTRODUCTION**

1. This matter comes before the High Court by way of an application pursuant to Section 160 of the Planning and Development Act 2000 (*"the PDA 2000"*). Section 160 is intended to provide a summary procedure whereby breaches of the planning legislation can be brought before the court expeditiously. The procedure is colloquially described as an application for a "planning injunction". The procedure is available to "any person", and benefits from special costs rules under Part 2 of the Environment (Miscellaneous Provisions) Act 2011.
2. The principal legal issues which fall for determination in the present case all concern the interaction between the respective competences of local planning authorities, An Bord Pleanála and the courts. In particular, an issue arises as to the weight, if any, which must be given to a Section 5 declaration in subsequent enforcement proceedings. An issue also arises as to the legal status of a decision made by the local planning authority purporting to agree points of detail pursuant to a planning condition.
3. The facts of the case are straightforward. The respondent is the operator of a wind farm (hereinafter *"the Developer"*). The wind farm is located in the townland of Ballyduff, County Waterford. The relevant planning permission had authorised the erection of wind turbines of a particular scale and dimensions. In the event, wind turbines of a different scale and dimensions have been erected instead. The principal distinction between the "as permitted" and the "as built" turbines is that the rotor blade diameter has increased from 90 metres to 103 metres. This deviation is said, by the Developer, to have been compensated for by a reduction in hub height, which has the consequence that the overall tip height has remained at the permitted level of 125 metres.
4. An Bord Pleanála has since made a declaration pursuant to Section 5 of the PDA 2000 to the effect that the alterations to the turbines, including the length of the rotor blades, do not come within the scope of the planning permission. The Applicants contend that the Developer is precluded by the existence of this Section 5 declaration from rearguing before this court an argument that the "as built" turbines are authorised by the planning

permission. In response, the Developer seeks to rely on an earlier decision, namely the decision of the planning authority to “agree” points of details in respect of the wind turbines. This earlier decision was made pursuant to a condition of the planning permission which left over points of detail, including the design, height and colour of the turbines, for agreement with the planning authority. It is said that neither the Applicants nor this court is entitled to look behind this decision in circumstances where same has not been challenged in judicial review proceedings.

5. The Developer has advanced a number of other arguments for saying that there has been no “unauthorised development”, and contends, in the alternative, that relief should be refused as a matter of discretion.
6. The Developer, whilst maintaining the formal position that the change in turbine type is authorised by the planning permission, has, nevertheless, made two attempts to obtain development consent retrospectively in respect of the “as built” turbines. First, the Developer made an application for leave to apply for “substitute consent” under Part XA of the PDA 2000. The application for leave was refused by An Bord Pleanála by decision dated 13 August 2019. This decision is now the subject of judicial review proceedings before the High Court. These judicial review proceedings have been taken by all of the Applicants herein. The parties informed the court last week (28 November 2019) that the judicial review proceedings are not being opposed by An Bord Pleanála, but that there is likely to be a dispute as to whether the matter should be remitted to the Board. This matter is listed for hearing in the Commercial List this morning (6 December 2019).
7. Secondly, the Developer had made an application for retention planning permission to the local planning authority pursuant to Section 34(12) of the PDA 2000. This application had been submitted to Waterford City and County Council on 4 October 2019. This application has since been withdrawn in early November 2019.

#### **STRUCTURE OF THIS JUDGMENT**

8. This judgment is structured as follows. The factual background to the dispute will be set out in more detail under the next heading below. This chronology will include more recent events, such as the decision on the part of An Bord Pleanála to refuse leave to apply for substitute consent.
9. The legal issues will then be addressed in the following sequence. First, the legal status of the Section 5 declaration will be considered. This will be the lengthiest part of the judgment. This is because there is a significant body of case law in relation to Section 5, and it is necessary to examine same in some detail. Secondly, the court will consider *de novo* the question of whether the change in turbine type represents unauthorised development. This exercise is carried out on a *de bene esse* basis. Thirdly, the legal status of the planning authority’s purported agreement to the compliance submission will be considered. Fourthly, the factors which are relevant to the exercise of the court’s discretion will be addressed. Finally, the principal conclusions of the court will be summarised at the end of this judgment.

## **FACTUAL BACKGROUND**

### **THE PLANNING PERMISSIONS**

10. An Bord Pleanála granted planning permission on 22 November 2005 for the development of a wind farm. (Reg. Ref. 04/1559) (*"the 2005 planning permission"*). The planning application had initially sought permission for the erection of twelve wind turbines. It seems, however, that revised plans and particulars were subsequently submitted, and one of the proposed turbines was omitted and the scale and dimensions of three of the turbines were reduced.
11. The development is of a type which is subject to the requirements of the Environmental Impact Assessment Directive (2011/92/EU) (*"the EIA Directive"*). This is because the proposed development exceeded the threshold for a mandatory environmental impact assessment (*"EIA"*) under Schedule 5 of the Planning and Development Regulations 2001. As such, the planning application had to be accompanied by an environmental impact statement (*"EIS"*), and An Bord Pleanála was required to carry out an EIA as part of its decision-making.
12. The planning permission, as granted by An Bord Pleanála, allowed for the erection of eleven wind turbines and other associated development. More specifically, the planning permission authorised the erection of eight wind turbines with a hub height of 80 metres and a blade length of 40 metres (equivalent to a rotor diameter of 80 metres), and a further three wind turbines with a hub height of 60 metres and a blade length of 40 metres (equivalent to a rotor diameter of 80 metres). The two sets of wind turbines would have had an overall tip height of 120 metres and 100 metres, respectively.
13. The following two conditions of the 2005 planning permission are relevant to the issues which arise in these proceedings.
  1. The development shall be carried out in accordance with the plans and particulars lodged with the application, as amended by the revised information received by the planning authority on the 3rd day of February, 2005, the 22nd day of February, 2005 and the 27th day of May, 2005, except as may otherwise be required in order to comply with the following conditions. For the avoidance of doubt, this permission relates only to 11 number turbines only with the layout of the turbines as that received on 27th day of May, 2005.

Reason: In the interest of clarity.
  3. Prior to commencement of development, details of the proposed turbines and associated structures, including design, height and colour shall be submitted to and agreed in writing with the planning authority. The wind turbines shall be geared to ensure that the blades rotate in the same direction. In default of agreement, the matter shall be referred to An Bord Pleanála for determination.

Reason: In the interest of visual amenity.

14. The first condition had the legal effect of confining the permitted development to that as set out in the revised information received by the planning authority, i.e. the scale and dimensions of three of the turbines had been reduced. The third condition has since been replicated in a subsequent decision of the planning authority (2011) which authorised certain modifications in respect of the proposed development.
15. The next event of relevance is that the “appropriate period” of the 2005 planning permission, i.e. the time period within which development works could be lawfully carried out, had been extended on 29 November 2010 for a further period of five years. (22 November 2015). But for this extension, the planning permission would have withered in 2010.
16. The Developer subsequently submitted an application in 2011 for permission for a “modification” to the permitted wind farm development. The hub height of the three smaller turbines was to be increased to 80 metres; and the blade length of all eleven turbines was to be increased to 45 metres (equivalent to a rotor diameter of 90 metres). All eleven turbines would, therefore, have an overall tip height of 125 metres.
17. The application had been made, at first instance, to the local planning authority, Waterford County Council. (Reg. Ref. PD 11/400). The planning authority made a decision on 23 November 2011 to grant planning permission (*“the 2011 planning permission”*).
18. Condition No. 1 of the 2011 planning permission provides as follows.
  - “1. The proposed development shall be carried out in accordance with plans and particulars lodged with the Planning Authority on 30 September 2011 save where amended by the conditions herein.  
  
Reason: to clarify the scope of the permission in the interests of development control.”
19. As explained under the next heading below, Condition No. 3 of the 2011 planning permission required points of detail to be agreed subsequently with the planning authority.
20. It does not appear from the face of the planning authority’s decision of 23 November 2011 that an EIA had been carried out by the planning authority.
21. For the sake of completeness, it should be noted that a *further* application for planning permission was made in 2013. This related to what has been described as “Phase 2” of the wind farm. The decision of the planning authority at first instance was to grant planning permission for an extension to the permitted wind farm, comprising three (additional) turbines with a tip height of up to 130.5 metres and associated access tracks and site works. An environmental impact statement (*“EIS”*) had been submitted with this application. Thereafter, there was an attempt made by third parties to appeal the

planning authority's decision to An Bord Pleanála. The appeal was, however, dismissed as invalid.

22. Condition No. 7 of the 2013 planning permission stipulates that the maximum blade tip height of the (three) proposed wind turbines shall be 130.5 metres. No complaint is made in these proceedings in respect of this second phase of the wind farm.
23. The wind farm, as constructed, consists of twelve turbines. Nine of these turbines have been constructed pursuant to the earlier planning permissions. (Two permitted turbines have been omitted). The balance of three turbines has been constructed pursuant to the 2013 planning permission. These Section 160 proceedings are concerned only with the first nine turbines.

**COMPLIANCE SUBMISSION: 13 DECEMBER 2013**

24. Condition No. 3 of the 2011 planning permission provides as follows.

"3. Prior to commencement of development, details of the proposed turbines and associated structures, including design, height and colour shall be submitted to and agreed in writing with the planning authority. The wind turbines shall be geared to ensure that the blades rotate in the same direction.

Reason: In the interest of visual amenity."

25. Given the importance which they have since assumed as an issue in these proceedings, it is necessary to set out in some detail the events in relation to the compliance submission made pursuant to this condition.
26. The consultants acting on behalf of the Developer, Fehily Timoney & Company, made a compliance submission to Waterford County Counsel under cover of letter dated 6 November 2013. This compliance submission sought the agreement of the planning authority in relation to points of detail under a number of the conditions of the 2011 planning permission. Relevantly, the compliance submission addressed Condition No. 3 of the planning permission as follows.

"4.1. Condition Wording

*Prior to commencement of development, details of the proposed turbines and associated structures, including design, height and colour shall be submitted to and agreed in writing with the planning authority. The wind turbines shall be geared to ensure that the blades rotate in the same direction.*

Reason: In the interest of visual amenity.

4.2. Developers Compliance Proposal

The preferred model being considered for installation at Barranafaddock Wind Farm is the GE 2.x Series wind turbine.

## Design

Technical details of the selected turbine model are included in Appendix B of this report. The document summarizes the technical description and specification of the GE 2.x Series wind turbines and includes a number of available turbine variants. The 2.x Series are three-bladed, upwind, horizontal-axis wind turbines with the turbine rotor and nacelle mounted on the top of a tubular tower.

## Height

The preferred turbine is installed on a tapered tubular tower of hub height 73.5m with a maximum tip height of 125m. Schematic details of the GE turbine arrangement proposed are included in Appendix B.

## Colour

The wind turbines will be finished in a light grey colour.

At this stage the developer requests that the Planning Authority confirm that the proposed turbine is considered appropriate.

The turbines will be geared to ensure that the blades rotate in the same direction."

27. As appears from the foregoing, the compliance submission does not expressly state that the planning authority's agreement was being sought in respect of an increase in rotor diameter from 90 metres to 103 metres.
28. The above text from the compliance submission does, of course, refer to Appendix B. One of the documents included in Appendix B is a drawing labelled "LE13-731-04-0 10 (Rev. A)". This drawing had been submitted in A3 format. This drawing shows a schematic of a wind turbine, and indicates, albeit in very small font, that the rotor diameter is 103 metres.
29. The compliance submission also included a document prepared by GE Energy entitled "Technical Documentation Wind Turbine Generator Systems 2.x Series". Page 14 of this latter document sets out, in tabular form, Technical Data for the 2.x Series. The rotor diameter for the various models of the turbines is indicated as ranging between 100 metres and 103 metres.
30. The response of Waterford County Council to the compliance submission was to issue a letter to the Developer, care of Fehily Timoney & Co., on 13 December 2013 ("*the decision-letter*"). The decision-letter is less than three pages in length. In effect, the decision-letter merely lists off various conditions of the 2011 planning permission, with a brief observation below each.
31. Insofar as Condition No. 3 is concerned, the decision-letter states as follows.

"Condition 3

Noted and agreed."

32. There is no analysis in the decision-letter of the compliance submission. Nor is there any express acknowledgement that the planning authority were agreeing to an increase in rotor diameter from 90 metres to 103 metres.

#### **SECTION 5 REFERENCE**

33. Waterford City and County Council made a reference to An Bord Pleanála pursuant to the provisions of Section 5 of the PDA 2000 on 24 May 2018. (Ref. ABP-301738-18).

34. The question referred was as follows.

“Whether the deviation from the permitted blade length of 45 metres (90 metres in diameter) to the constructed blade length of 51.5 metres (103 metres in diameter) in relation to permission granted under planning register reference number PD 11/400 for modifications to a windfarm at Barranafaddock Wind Farm, County Waterford is or is not development or is or is not exempted development?”

35. The Developer made a detailed submission on the Section 5 reference through its consultants, Fehily Timoney & Company, on 29 June 2018. It is apparent from this submission that the Developer was fully aware that an earlier Section 5 Declaration issued by An Bord Pleanála in respect of the Kilvinane Wind Farm was potentially relevant. The Developer also sought to rely on the planning authority's decision-letter of 13 December 2013.

36. The submission on behalf of the Developer summarised its conclusions as follows.

#### “7.0 Conclusion

In summary, the deviation of the rotor diameter from 90m to 103m can be considered immaterial in planning terms because:

1. The nature and scale of the windfarm development is such that the increase in rotor diameter is not a material alteration.
2. There has been no alteration to the turbine locations and the increase in rotor diameter of 14% is significantly less than the 40% alteration which was found to be material in *Bailey v. Kilvinane*.
3. On the basis of the comparative environmental analysis, it can be concluded that there are no significant changes to the environmental impacts arising from the change in rotor diameter.
4. Waterford County Council, in approving the detailed design of the turbines in 2013, did not consider the increase in rotor diameter to be material in planning terms.”

37. The reference above to a “comparative environmental analysis” is to a separate document which had been included as part of the submission to An Bord Pleanála. This is a detailed six-page analysis which compares the environmental impact of the “as permitted” and “as built” wind turbines. The comparative environmental analysis concludes by stating that “there are no significant changes relating to the environmental impacts, based on the

methodologies employed in the September 2011 Environmental Report submitted as a part of the planning application for the permitted development”.

38. As is standard practice, An Bord Pleanála assigned an inspector to prepare a report and recommendation in relation to the Section 5 reference.
39. It is evident from the inspector’s report that the Developer had made a similar jurisdictional objection to that which it seeks to agitate in these proceedings. More specifically, as appears from the following passage at page 5 of the inspector’s report, the Developer had sought to rely on the decision-letter of 13 December 2013 as authorising the alterations in the scale and dimensions of the wind turbines.

“The owner / occupier has submitted a response to the PA referral request which provides for a summary of the planning history associated with the wind farm development. The submission also note that Waterford City & County Council issued a compliance response in December, 2013 indicating that the turbine erected on the site was noted and agreed. The response questions the appropriateness of the Section 5 Referral with regard to the particular question raised by WCCC in the context of the planning compliance agreed. It is further considered that the statement under the heading ‘Reason for Referral’ may give the incorrect impression that WCCC was not aware of the change in blade length before 2016. [...]”

40. This summary in the inspector’s report reflects the points made, in particular, at §5.2.1 of Fehily Timoney & Company’s submission.
41. The inspector indicated (at pages 10 and 11 of her report) that she would have “no objections in principle” to the alterations given that the overall tip height of the wind turbines continued to comply with the specific condition of the planning permission. (It will be recalled that the increase in the length of the rotor blades had been off-set by a reduction in the hub height). The inspector went on to say, however, that An Bord Pleanála itself had adopted a different approach in relation to the Kilvinane Wind Farm. As discussed presently, the Kilvinane Wind Farm is the subject of a judgment of the Court of Appeal. An order had been made under Section 160 restraining the operation of a wind farm, the turbines of which did not comply with the scale and dimensions permitted.
42. The approach which An Bord Pleanála had taken in relation to the Kilvinane Wind Farm had been summarised as follows in the inspector’s report.

“The Board will note a similar Section 5 request in relation to the Kilvinane Wind Farm, PL88.RL2891 refers, whereby the developer of that windfarm received confirmation from the PA that a number of changes made, including a reduction in turbine hub heights, increased rotor blade lengths, reduction in the number of turbines installed and a change of location of turbines within 20m of the permitted locations, were not material and complied with the permission granted. The Board, following a Section 5 request from a third party, concluded that –



- (a) the erection of the turbines comes within the scope of the definition of development contained in Section 3 of the Planning and Development Act 2000,
- (b) the relocation of and alterations to turbines, including the modification to the overall height of the turbines and the length of the rotor arms/blades do not come within the scope of the permission granted,
- (c) there is no provision for exemption for the said relocation and alterations to turbines provided for in either Section 4, as amended, of the said Act or Article 6 of the Planning and Development Regulations 2001, and
- (d) therefore, the construction of the wind turbines as currently erected on site including alterations and modifications to the turbines height and rotor arms/blades is development and is not exempted development."

43. The inspector's own conclusion was then set out as follows.

"8.9. Is or is not exempted development

While I would have no objections in principle to the alterations to the blade length as constructed, given that the hub heights have been reduced and the overall tip height has complied with the specific condition of planning permission, in light of the determination in relation to PL88.RL2891, a precedent might be considered as having been set. In this regard, I refer to the Board's consideration of the physical alterations to turbines - in particular the alterations to blade length and the overall height of the turbines - did not come within the scope of the relevant planning permission, it is possible to conclude in this case that the reduction in the hub height and the increased length of the rotor length, notwithstanding the fact that the permitted tip height of 125m has been maintained, do not come within the scope of the planning permission granted. In addition, the Board will note that there is no provision for exemption for the alterations to turbines provided for in either Section 4 of the Planning & Development Act 2000, as amended or Article 6 of the Planning & Development Regulations, 2001, as amended. As such, the development is not exempted development."

44. An Bord Pleanála ultimately accepted the inspector's recommendation. The Board made a declaration on 4 December 2018.

45. The operative part of the Board Order reads as follows.

"AND WHEREAS An Bord Pleanála has concluded that -

- (a) the erection of the turbines comes within the scope of the definition of development contained in Section 3 of the Planning and Development Act 2000,
- (b) the alterations to turbines, including the length of the rotor arms/blades, do not come within the scope of the permission granted,

- (c) there is no provision for exemption for the said alterations to turbines in either Section 4, as amended, of the said Act or Article 6 of the Planning and Development Regulations 2001, and
- (d) therefore, the construction of the wind turbines as currently erected on site including the alterations to the rotor arms/blades is development and is not exempted development.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the 2000 Act, hereby decides that the deviation from the permitted blade length of 45 metres (90 metres in diameter) to the constructed blade length of 51.5 metres (103 metres in diameter) in relation to permission granted under planning register reference number PD11/400 for modifications to a windfarm at Barranafaddock Wind Farm, County Waterford is development and is not exempted development."

46. The Developer took no steps to challenge the validity of An Bord Pleanála's determination by way of judicial review proceedings.

#### **ENFORCEMENT NOTICE**

47. Following on from An Bord Pleanála's declaration, the planning authority issued a warning letter dated 20 December 2018. An enforcement notice was subsequently issued in respect of the wind farm development. This enforcement notice is dated 22 March 2019. The Developer then instituted judicial review proceedings in May 2019 seeking to challenge the validity of the enforcement notice. It seems that the operation of the enforcement notice has been stayed pending the outcome of these judicial review proceedings.

#### **APPLICATIONS FOR RETROSPECTIVE DEVELOPMENT CONSENT**

48. The Developer maintains the position that the change in the scale and dimensions of the wind turbines is authorised by the 2011 planning permission. Without prejudice to this position, the Developer had submitted an application to An Bord Pleanála for leave to apply for substitute consent on 29 January 2019.
49. It may be of assistance to the reader to pause briefly here, and to explain the concept of "substitute consent". The planning legislation had to be amended following a judgment of the Court of Justice of the European Union ("*CJEU*"), Case C-215/06, *Commission v. Ireland*, which had held that the blanket provision made for retention planning permission under the pre-2010 version of the PDA 2000 was inconsistent with the EIA Directive. The option of making an application for retention planning permission is no longer available in respect of an EIA development project which has been carried out in breach of either the requirement for a screening determination or for a full EIA.
50. The planning status of such an EIA development project may only be regularised by an application for substitute consent under Part XA of the PDA 2000. There is no automatic right to apply for substitute consent. Rather, a developer will, generally, be required to apply first for leave to make the application. Such an application for leave is made to An

Bord Pleanála. (There are special rules in relation to quarrying activity, but these are not relevant to this case).

51. On the facts of the present case, the Developer had made a leave-application to An Bord Pleanála on 29 January 2019, that is, shortly after An Bord Pleanála had issued its Section 5 declaration. An Bord Pleanála subsequently made a decision refusing leave to apply on 13 August 2019. The approach adopted by An Bord Pleanála appears to have been that it was not necessary to obtain substitute consent. The validity of An Bord Pleanála's decision has been challenged in two separate sets of judicial review proceedings which have been entered into the Commercial List of the High Court. The first of these proceedings has been taken by the Applicants herein; the second by Mr Peter Sweetman.
52. The parties informed me last week (28 November 2019) that An Bord Pleanála does not intend to oppose those judicial review proceedings. The Board is conceding the judicial review proceedings on the very narrow ground that the Board's records of the decision-making process are inadequate. The Board has been careful to note in correspondence that its approach does not involve any concession by the Board of any of the additional grounds of judicial review relied upon by the Applicants.
53. The parties to the judicial review proceedings are in disagreement as to the precise basis on which the Board's decision is to be set aside, and, as to whether the application for leave to apply for substitute consent should be remitted to An Bord Pleanála for reconsideration. These matters are to be the subject of a separate hearing before the Commercial List of the High Court this morning.
54. The Developer had also made an application for retention planning permission to Waterford City and County Council. That application had been made on 4 October 2019, but has now been withdrawn.
55. I will return to consider the relevance of these applications, towards the end of this judgment, when I come to address the factors informing the exercise of the court's discretion in Section 160 proceedings.

#### **SUPPLEMENTARY LEGAL SUBMISSIONS**

56. By order dated 28 November 2019, the parties were given liberty to file supplemental written legal submissions addressing the implications for the within proceedings, if any, of the very recent judgment of the CJEU in Case-261/18, *Commission v. Ireland (Derrybrien)* and *Mone v. An Bord Pleanála* [2010] IEHC 395. The submissions were received by the court on 5 December 2019.

#### **DETAILED DISCUSSION OF LEGAL ISSUES**

##### **STATUS OF SECTION 5 DECLARATION**

57. The first legal issue to be addressed in this judgment is whether the finding by An Bord Pleanála, i.e. that the increase in the length of the rotor blades does not come within the scope of the planning permission granted, is binding on the parties. Put otherwise, does the Section 5 declaration give rise to a form of issue estoppel which precludes the Developer from rearguing, before this court, the argument which it had lost before An

Bord Pleanála to the effect that the deviations are within the scope of the planning permission.

58. Leading counsel for the Applicants, Mr John Rogers, SC, submits that the Section 5 reference is binding. Counsel cites, in particular, the judgment in *Cleary Compost and Shredding Ltd v. An Bord Pleanála (No. 1)* [2017] IEHC 458, [104] to [118]. That judgment, in turn, relies on the Court of Appeal judgment in *Killross Properties Ltd. v. Electricity Supply Board* [2016] IECA 207; [2016] 1 I.R. 541.
59. In the Applicants' written legal submissions, it is stated that An Bord Pleanála has concluded that the alteration was not only "development", but also that it was not an "exempted development", and that it was carried out in breach of a permission and the conditions thereof. It is further submitted that the Board's finding "removed any room for argument" on the part of the Developer with regard to the status of the development.
60. Leading counsel on behalf of the Developer, Mr Declan McGrath, SC, has sought to argue that An Bord Pleanála does not have jurisdiction under Section 5 of the PDA 2000 to make a finding that "unauthorised development" has been carried out. It is further submitted that for the Board to have found that the "as constructed" wind turbines had not been carried out in accordance with the planning permission would, by necessary implication, involve an (impermissible) finding that the Developer had carried out "unauthorised development". Counsel cites, in particular, *Roadstone Provinces Ltd. v. An Bord Pleanála* [2008] IEHC 210; *Heatons Ltd. v. Offaly County Council* [2013] IEHC 261; and *Meath County Council v. Murray* [2017] IESC 25; [2018] 1 I.R. 189; [2017] 2 I.L.R.M. 297. It is sought to distinguish the judgment in *Killross Properties* on two bases: (i) the Section 5 declaration in that case was to the effect that the development was not "exempted development" which is a finding within the Section 5 jurisdiction; and (ii) it was the applicant, not the respondent, who was held to be bound by the Section 5 declaration. It is submitted that a *respondent*, faced with proceedings which place reliance on a public law measure, may be justified in challenging the validity of the measure concerned even though that party might be, strictly speaking, out of time in maintaining a *direct challenge* to the relevant measure (*Shell E & P Ireland Ltd. v. McGrath* [2013] IESC 1, [2013] 1 I.R. 247, [49]).
61. It is further submitted that the court should lean against an interpretation of the Section 5 declaration which would involve attributing to the Board a finding that the development was in breach of planning permission. (Such a finding would, on the Developer's argument, be *ultra vires*). The court should instead interpret the Section 5 declaration as saying no more than that the erection of wind turbines constitutes "development" and is not "exempted development".
62. The Developer submits that the operative part of the Section 5 declaration is confined to the very last paragraph thereof, i.e. the paragraph commencing with the words "NOW THEREFORE An Bord Pleanála ...". (The Board's declaration has been set out in full at paragraph 45 above). This narrow interpretation of the declaration would, it is submitted, "square the circle" by rendering the Board's declaration in a manner which holds it *intra*

*vires*. The decision would otherwise be unlawful and invalid. This is because, on the Developer's argument, An Bord Pleanála had no jurisdiction to decide what falls within or outwith a planning permission.

#### **ANALYSIS OF THE ARGUMENTS ON SECTION 5**

63. It is proposed to structure this discussion as follows. First, the interaction between a Section 5 declaration and enforcement proceedings will be considered. Secondly, the Developer's argument that the Section 5 reference procedure does not properly apply to the interpretation of a planning permission will then be addressed.

(1). *Section 5 declaration and enforcement proceedings*

64. The planning legislation has, from the very outset, put in place a procedure whereby the question of whether a particular act constituted "development" or "exempted development" could be determined. This initially took the form of a reference to An Bord Pleanála, with an appeal thereafter to the High Court. This was provided for under Section 5 of the Local Government (Planning & Development) Act 1963.

65. Since the enactment of the PDA 2000, the reference is now normally made in the first instance to the local planning authority, with a right of review thereafter to An Bord Pleanála, and a right of judicial review to the High Court. The planning authority can itself make a reference directly to An Bord Pleanála, and this is what occurred on the facts of the present case.

66. The Section 5 procedure is unusual in that it confers a jurisdiction upon a public authority to determine issues which, in many instances, will necessitate an adjudication on questions of law. The constitutional validity of conferring such a jurisdiction upon An Bord Pleanála under the Local Government (Planning & Development) Act 1963 had been upheld by the High Court (Kenny J.) in *Central Dublin Development Association v. Attorney General* (1969) 109 I.L.T.R. 69.

67. The more modern case law is characterised by an enthusiasm for the revised form of procedure now provided for under Section 5 of the PDA 2000. As elaborated upon below, the case law over the last fifteen years or so has confirmed (i) that Section 5 of the PDA 2000 has largely ousted the High Court's jurisdiction to grant declaratory relief in respect of planning matters; (ii) that an unchallenged declaration may be relied upon in enforcement proceedings; and (iii) that An Bord Pleanála is an expert decision-maker, whose decisions attract curial deference.

68. This modern case law commences with the judgment of the Supreme Court in *Grianán an Aileach Interpretative Centre Ltd. v Donegal County Council* [2004] IESC 41; [2004] 2 I.R. 625 ("*Grianán an Aileach*"). The judgment addresses the question of whether the court's inherent jurisdiction to grant declarations as to the planning status of lands is consistent with the Section 5 procedure. The Supreme Court considered that the continued existence on the part of the High Court of a general jurisdiction to adjudicate upon the proper construction of a planning permission would create a danger of

“overlapping and unworkable jurisdictions”. The making of a declaration by the High Court might have the result that neither An Bord Pleanála nor the local planning authority would thereafter be in a position whereby it could exercise its statutory jurisdiction under Section 5 without finding itself in conflict with the earlier determination by the High Court.

69. The solution adopted by the Supreme Court to this conundrum was, in effect, to find that the existence of the Section 5 reference procedure ousted the High Court’s jurisdiction to grant (freestanding) declarations in respect of planning matters.
70. The judgment recognises, of course, that the High Court continues to have original jurisdiction to determine planning issues when adjudicating upon enforcement proceedings under Section 160 of the PDA 2000. The Supreme Court held that if enforcement proceedings are brought in the High Court, then that court may “undoubtedly find itself having to determine whether there has been a material change of use or whether a development is sanctioned by an existing planning permission”.
71. At a later point in the judgment, Keane C.J. stated as follows at paragraph [36].

“Some responsibility may be attributed to the defendant for the difficulties that have arisen in determining to what uses the premises may be put without a further planning permission: they might well have been avoided by the use of more precise language when the permission was being granted. I am satisfied, however, that the High Court cannot resolve these difficulties by acting, in effect, as a form of planning tribunal. As I have already indicated, if enforcement proceedings were brought in the High Court, that court might find itself having to determine whether particular operations constituted a ‘development’ which required permission and the same issue could arise in other circumstances, e.g., where a commercial or conveyancing document containing a particular term dealing with compliance with planning requirements was the subject of litigation. But in every such case, however it came before the court, the court would resolve the issue by determining whether or not there had been or would be a development within the meaning of the planning code. The only circumstance in which the court could find itself making a declaration of the kind ultimately granted in this case would be where it had been drawn into a role analogous to that of a planning authority granting a permission. That is difficult to reconcile with the law as stated thus by Finlay C.J. in *O’Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 [...]”.

72. This aspect of the judgment is entirely consistent with the approach adopted in *Cork Corporation v. O’Connell* [1982] I.L.R.M. 505. There, the Supreme Court held that the existence of a pending reference under the precursor of what is now Section 5 of the PDA 2000, i.e. Section 5 of the Local Government (Planning & Development) Act 1963, did not oust the High Court’s jurisdiction to entertain enforcement proceedings.
73. The judgment in *Grianán an Aileach* left open the separate question as to what should happen where An Bord Pleanála had already issued a Section 5 declaration in advance of the hearing of enforcement proceedings. This question has since been addressed in a

series of High Court judgments. There is now a consistent line of case law which indicates that a Section 5 declaration, which has not been challenged in judicial review proceedings, is binding and conclusive in enforcement proceedings involving the same parties as to the reference. In particular, a declaration to the effect that an act is “development” or is “exempted development” cannot normally be revisited in subsequent enforcement proceedings between the same parties or their privies. See *Wicklow County Council v. O’Reilly* [2015] IEHC 667 (waste recovery business not exempted development); and *McCoy v. Shillelagh Quarries Ltd* [2015] IEHC 838 (quarrying activity had intensified to such an extent as to amount to a material change of use).

74. There is an exception to this approach where it would be unfair to treat a party as bound by a Section 5 declaration. In *Wicklow County Council v. Fortune (No. 3)* [2013] IEHC 397, the High Court (Hogan J.) declined to treat a respondent to enforcement proceedings as bound by a Section 5 reference which had been made without a proper statement of reasons. The High Court held that it would be “quite unfair” to shut out a respondent from arguing that a structure was “exempted development” on the basis of a Section 5 declaration which, on its face, plainly failed to meet the requirements of administrative fairness specified in *Mallak v. Minister for Justice and Equality* [2012] IESC 59; [2012] 3 I.R. 297, notwithstanding that the determination had never been challenged at the relevant time by way of judicial review.
75. The correctness of this line of case law has since been upheld by the Court of Appeal in *Killross Properties Ltd. v. Electricity Supply Board* [2016] IECA 207; [2016] 1 I.R. 541, (“*Killross Properties*”). On the facts, An Bord Pleanála had issued a series of Section 5 declarations to the effect that works, consisting of the erection of a temporary electricity transmission line by a statutory undertaker, were “exempted development”. Killross Properties Ltd., who had made the Section 5 references, had sought to challenge An Bord Pleanála’s declarations in judicial review proceedings, but those proceedings were dismissed by the High Court (Hedigan J.) in August 2014 . Notwithstanding this procedural history, Killross Properties Ltd. then pursued an application under Section 160 of the PDA 2000.
76. The Court of Appeal, per Hogan J., held that the High Court was not entitled to “go behind” the Section 5 declarations.

“[...] the High Court cannot go behind an otherwise valid s. 5 determination to the effect that the development in question represent exempted development in the course of a s.160 application. The effect of such a determination is that planning permission is not required, so that by definition the development cannot be unauthorised. It follows that the High Court cannot grant the relief claimed in the s. 160 proceedings.
77. The rationale for this approach is explained as follows, at paragraphs [29] to [31] of the Court of Appeal’s judgment.

“First, it can be said that as the planning authorities (or, An Bord Pleanála, as the case may be) determined that the works in question represent exempted development, it necessarily follows that no planning permission is required. The logical corollary of this conclusion is that the development in question cannot by definition be “unauthorised” within the meaning of s. 160 if no planning permission is required so that consequently any such s. 160 application is bound to fail.

Second, it could equally be said that the s. 160 application represents a collateral attack on the decision of the planning authority, since it effectively invites the court to revisit the merits of the issue which had already been determined in the course of the s. 5 determination. This is further reinforced so far as the present proceedings are concerned, since Killross elected to challenge the validity of three of the s. 5 determinations in judicial review proceedings and failed in that endeavour.

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

78. The practical effect of these various judgments is that the existence of an (unchallenged) Section 5 declaration gives rise to a form of issue estoppel whereby the parties are bound by the declaration. In circumstances where the Section 5 declaration is to the effect that a particular act constitutes “development”, then the moving party in an application for injunctive relief under Section 160 of the PDA 2000 can rely upon that declaration in support of their application. This is subject to an exception where it would be unfair. (*Wicklow County Council v. Fortune (No. 3)* [2013] IEHC 397).
79. The current legal position is, therefore, that enormous significance now attaches to a Section 5 declaration. The existence of an (unchallenged) declaration will, in certain circumstances, be dispositive of many of the issues which arise in enforcement proceedings. The precise implications of all of this have not yet been fully teased out. In particular, questions remain as to whether, for example, An Bord Pleanála would be precluded from entertaining a reference by virtue of the existence of an earlier unappealed declaration made by a local planning authority pursuant to a separate reference. Questions also remain as to whether a Section 5 declaration constitutes a “development consent” for the purpose of the EIA Directive.
80. The Developer in the present case seeks to argue that a distinction should be drawn between (i) a finding that a particular act is “development” or “exempted development”, and (ii) a finding that it is “unauthorised development”. It is contended that An Bord Pleanála does not have jurisdiction to make a finding of the latter type. Much reliance is placed in this regard on the following passage from the judgment of the High Court (Finlay Geoghegan J.) in *Roadstone Provinces Ltd. v. An Bord Pleanála* [2008] IEHC 210 (“*Roadstone Provinces*”).



"[An Bord Pleanála] has no jurisdiction on a reference under s.5 (4) of the Act to determine what is or is not 'unauthorised development'. It may only determine what is or is not 'development'. Hence, a planning authority, such as the notice party, cannot refer a question under s.5 (4) as to whether the works or proposed works or use constitutes unauthorised works or use and hence unauthorised development. Determination of what is or is not 'unauthorised development' will most likely be determined by the courts where a dispute arises on an application under s. 160 of the Act."

81. It should be noted, however, that this statement was made in the context of a pre-1964 quarry, and appears to have been informed, in part at least, by the highly technical definition of "unauthorised development". To elaborate: the planning legislation does not apply retrospectively to "development" which had commenced prior to the coming into force and effect of the Local Government (Planning & Development) Act 1963 on 1 October 1964. Such pre-1964 development is not, however, treated as "exempted development", but rather enjoys a *sui generis* status. This is achieved by confining the definitions of "unauthorised works" and "unauthorised use" to development which commenced on or after 1 October 1964. The Supreme Court in *Waterford County Council v. John A. Wood Ltd.* [1999] 1 I.R. 556 has since formulated a test which defines the extent of quarrying activity which can be carried out and completed in reliance on the commencement of works prior to 1 October 1964.
82. Returning to the facts of *Roadstone Provinces*, it appears that the point being made in the passage cited above is that An Bord Pleanála does not have jurisdiction to determine whether a particular development constitutes the lawful continuation of pre-1964 development. Put shortly, An Bord Pleanála does not have jurisdiction to apply the legal test in *John A. Wood Ltd.* This is apparent from the very next passage of the judgment in *Roadstone Provinces*, at paragraph [22].

"The reason for which I have drawn attention to the fact that the respondent was considering whether or not there was or is a development by reason of a material change in the use of the applicant's lands, as distinct from the carrying out of any works, is because of the reliance placed by both parties, for different purposes, on the decision of the Supreme Court in *Waterford County Council v. John A. Wood Ltd.* [1999] 1 I.R. 556. That is a decision on a case stated from the High Court (determining an appeal from the Circuit Court) on proceedings under s. 27 of the Local Government (Planning and Development) Act, seeking an order restraining the respondent therein from carrying on quarrying operations on certain lands. Section 27 of the Act of 1976 is similar to s. 160 of the Act of 2000. The question put by the High Court to the Supreme Court in the case stated was whether the quarrying operations being carried out by the respondent 'is development requiring planning permission?'. The resolution of that question depended upon whether or not the quarrying operations then carried on were or were not 'development commenced before the appointed day' and therefore were or were not excluded from a requirement to apply for planning permission under s. 24 (1) of the Act of

1963. That issue was resolved by the Supreme Court by considering whether or not the works then being carried out by the respondent at its quarrying operations were works which commenced prior to the appointed day. *The Supreme Court did this by considering what might have been reasonably contemplated or anticipated as the continuation of works commenced before the appointed day. In the context of the definitions in the Act of 2000, it was a determination as to whether the works were or were not 'unauthorised works'. That is not a question which the respondent has jurisdiction to determination on the instant reference under s.5 (4) of the Act of 2000.\** The Supreme Court, in *Waterford County Council v. John A. Wood Ltd.*, was not considering whether or not there had been a material change in use of the lands. On the facts, the only objection appears to have been based upon the carrying out of works without planning permission.”

\*Emphasis (italics) added.

83. It would appear, therefore, that the judgment in *Roadstone Provinces*, strictly speaking, had been concerned with the narrow question of pre-1964 user, and does not necessarily articulate a more general proposition as to the limitations of the Section 5 jurisdiction. Certainly, this seems to have been the interpretation of the judgment taken by the High Court (Baker J.) in *Cleary Compost and Shredding Ltd v. An Bord Pleanála (No. 1)* [2017] IEHC 458. Having cited the passage from *Roadstone Provinces* set out at paragraph 80 above, Baker J. stated as follows.

“This *dicta* of Finlay Geoghegan J. is regularly quoted as authority for the proposition that the jurisdiction under s. 5(4) of the Act is one which is confined to determining whether works or use is development.

Finlay Geoghegan J. was considering the import of a s. 5 declaration where what was challenged was the decision of the respondent that the expansion southward of a quarry was development and not exempted development. The decision was quashed by certiorari as there was pre-1964 use and no determination had been made whether there was an identified factual difference between that use and current use. The judgment does not go so far as to say that the consequence of a s. 5 declaration can never be understood to mean that a development is not one authorised by planning permission. The judgment of Finlay Geoghegan J. is authority for the proposition that development which does not have the benefit of a planning permission is not always in legal terms a development which is ‘unauthorised’, and the jurisdictional limit of s. 5 is to determine whether there is development, after which there arises the second question whether permission is required or exists.

[...]

A development is not unauthorised merely on account of the fact that an activity or works are found to be development. The development may, as in the case of a quarry, the context in which *Roadstone Provinces Limited v. An Bord Pleanála* was

decided, be exempt from the requirement to obtain planning permission if it is a continuation of pre-1964 user. In such cases the development is not unauthorised although it is development. A development may also be found to have occurred but to be exempt.

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

84. The judgment in *Cleary Compost* goes on to make the separate point at paragraph [90] that an earlier Section 5 declaration will not preclude a subsequent declaration to different effect being made if there has been a *change in circumstances* between the dates of the two declarations.
85. The nature of the Section 5 jurisdiction has also been considered by the Court of Appeal in *Killross Properties*. The Court of Appeal put the matter as follows (in a passage subsequently cited with approval in *Cleary Compost*).

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

86. In two recent judgments, the Supreme Court has expressed some caution as to the reliance on Section 5 declarations in criminal proceedings and enforcement proceedings, respectively. Both judgments were delivered in May 2017. The first in time is the judgment in *Cronin (Readymix Ltd.) v. An Bord Pleanála* [2017] IESC 36; [2017] 2 I.R. 658. In addressing the question of whether the planning legislation falls to be interpreted as penal legislation, the Supreme Court, per O'Malley J., stated as follows at paragraph [43] of the judgment.

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

to 'the imposition of a penal or other sanction'. What they are concerned with is the exemption of categories of development from the general requirement to obtain permission."

87. The second judgment is that in *Meath County Council v. Murray* [2017] IESC 25; [2018] 1 I.R. 189; [2017] 2 I.L.R.M. 297. McKechnie J., delivering the judgment of the court, reserved his position in relation to the status of a Section 5 declaration in the context of enforcement proceedings. See paragraphs [55] and [56] of the reported judgment as follows.

"By engaging the enforcement mechanism of, say, s. 160, there is no question of the Council making any planning determination that the structure is unauthorised: even that power is not conferred on either a planning authority or An Bord Pleanála by s. 5 of the 2000 Act (*Roadstone Provinces Limited v. An Bord Pleanála* [2008] IEHC 210, (Unreported, High Court, Finlay Geoghegan J., 4 July 2008)), nor is the situation in any way analogous to that arising in *Grianán an Aileach Centre v. Donegal County Council (No. 2)* [2004] IESC 43, [2004] 2 I.R. 625. Likewise, it seems to bear no real relationship to the other cases quoted, including *Heatons Limited v. Offaly County Council* [2013] IEHC 261, (Unreported, High Court, Hogan J., 4 June 2013) and *State (Fitzgerald) v. An Bord Pleanála* [1985] I.L.R.M. 117.

A further word about s. 5 of the 2000 Act: the power given to both planning bodies under that section relates to what is a 'development' or what is an 'exempted development'. Even though a decision on either issue may have significant consequential effect, it is not an end in itself. Without more, and simply on that basis, a s. 160 order could not be made: one must go further and establish the "unauthorised" nature of the underlying development. Thankfully, the difficult question of the courts' review power where a declaration one way or the other has been made on a s. 5 reference does not arise on this appeal (see the judgment of the Court of Appeal (per Hogan J.) in *Bailey v. Kilvinane Wind Farm Ltd.* [2016] IECA 92, (Unreported, Court of Appeal, 16 March 2016), which judgment is under appeal to this court)."

88. It should be noted that the appeal in *Bailey v. Kilvinane Wind Farm Ltd.* (referenced in the above passage from *Meath County Council v. Murray*) subsequently became moot in circumstances where the developer in that case obtained a grant of substitute consent. The Supreme Court did not, therefore, have to rule on this issue in the context of that appeal.

(2). *Section 5 jurisdiction to interpret planning permission*

89. The case law confirms that An Bord Pleanála does have jurisdiction to interpret a planning permission in the context of a Section 5 reference. The question first arose for consideration in *Palmerlane Ltd. v. An Bord Pleanála* [1999] 2 I.L.R.M. 514. This was a case decided under the *previous* version of the planning legislation. The equivalent

provision to what is now Section 5 of the PDA 2000 was to be found in the coincidentally numbered Section 5 of the Local Government (Planning & Development) Act 1963.

90. The judgment in *Palmerlane Ltd.* arose out of a dispute as to whether the use of a convenience store for the sale of hot food for consumption off the premises represented “development”. The operator of the convenience store had sought to refer the matter to An Bord Pleanála. An Bord Pleanála had refused to entertain the reference, stating that it did not have power to decide whether or not a particular development had been carried out in accordance with a particular permission. An Bord Pleanála considered that as the sale of hot food had been part of the user of the premises from the outset, there simply was no change in use, the materiality of which it could assess. The board’s decision to decline jurisdiction was then challenged in judicial review proceedings. Having noted that An Bord Pleanála would have been prepared to entertain the reference had the use for the sale of hot food been introduced subsequent to the opening of the store, the High Court (McGuinness J.) took the pragmatic view that the board’s jurisdiction should not turn on such nice distinctions.

“The decision of An Bord Pleanála in the instant case also, in my view, creates the somewhat anomalous and unreasonable situation that if the Applicant were to select another of its ‘Spar’ shops, where the position was that the premises had been in use as a retail shop under an earlier planning permission and the company had subsequently embarked on the limited sale of hot food for consumption off the premises, the Applicant could presumably successfully have sought a determination of a reference pursuant to Section 5 of the 1963 Act. I appreciate that each determination under Section 5 deals only with the particular case on its own facts. However, in a situation where a very large number of convenience stores operate in the same way as the shop in question in the instant case, it seems to me to be in accordance with reason and common sense that questions such as this should be determined on a consistent basis by those with expertise in the planning area, namely An Bord Pleanála.”

91. This pragmatic approach on the part of the High Court was elevated to a more general statement of principle by the judgment of the Supreme Court in *Grianán an Aileach*. As discussed under the previous heading above, the central issue in the appeal had been whether the High Court continued to enjoy a parallel jurisdiction to grant declarations as to the interpretation of planning permissions notwithstanding the existence of Section 5 of the PDA 2000. In the course of its adjudication on the central issue, the Supreme Court had cause to consider the nature and extent of the Section 5 jurisdiction. The Supreme Court, per Keane C.J., concluded that a question as to whether proposed uses constitute “development” which is not authorised by planning permission is one which may be determined under Section 5 of the PDA 2000.

“In the present case, the issue that has arisen between the plaintiff and the defendant is as to whether the proposed uses are authorised by the planning permission. I am satisfied, however, that, although the issue has arisen in that

particular form, it necessarily requires the tribunal which determines it to come to a conclusion as to whether what is being proposed would constitute a material change in the use of the premises. If it would not, then the question as to whether the particular uses were authorised by the permission simply would not arise. In the present case, the defendant at all times has been contending, in effect, that the proposed uses would constitute a material change in use which is not authorised by the present planning permission. Equally, for its part, the plaintiff has been contending that the uses are authorised by the existing planning permission but has not contended that, if that were not the case, it would in any event be entitled to carry them out as not constituting a material change of use. It would seem to follow that the question as to whether planning permission is required in this case necessarily involves the determination of the question as to whether the proposed uses would constitute a 'development', i.e. a question which the planning authority and An Bord Pleanála are empowered to determine under s. 5 of the Act of 2000."

92. Keane C.J. at a later point in his judgment stated as follows (at pages 636/37 of the reported judgment).

"The reasoning adopted in both *McMahon v. Dublin Corporation* and *Palmerlane v. An Bord Pleanála* which, I am satisfied, is correct in law would indicate that, in such circumstances, a question as to whether the proposed uses constitute a 'development' which is not authorised by the planning permission is one which may be determined under the Act of 2000 either by the planning authority or An Bord Pleanála. In the present case the question is as to whether the various proposed uses, which the defendant contends, would involve the regular use of the premises for events associated with a concert/entertainment venue rather than a visitors' centre, are in a planning context materially different uses from use as a visitors' centre and the uses indicated on the lodged plan, in which case they would not be authorised by the planning permission."

93. There is no principled distinction between (i) a finding that a particular act of development is or is not "exempted development", and (ii) a finding that a particular act of development does not come within the scope of a planning permission. In each instance, An Bord Pleanála is required to assess the difference between two forms of "development", and to reach a determination as to whether the difference between the two is material or immaterial. In the case of the user of lands, the exercise is to determine whether there has been a material change of use. In the case of permitted works under a planning permission, the exercise is to determine whether the difference is an immaterial deviation.
94. An Bord Pleanála is the expert body entrusted under the planning legislation with this task. For the court to carry out the same exercise subsequently gives rise to the very mischief which the judgment in *Grianán an Aileach* is intended to avoid.

#### **SUMMARY OF LEGAL PRINCIPLES RE: SECTION 5**

95. The current state of the case law can be summarised as follows.

- (i). The fact that both the High Court and An Bord Pleanála have jurisdiction, in certain circumstances, to determine whether a particular act is “development” or “exempted development” presents a potential risk of overlapping and unworkable jurisdictions.
- (ii). In order to reduce this risk, the Supreme Court has held that the High Court’s inherent jurisdiction to make declarations as to the planning status of lands is ousted. More specifically, the High Court’s jurisdiction to adjudicate upon the proper construction of a planning permission is largely confined to enforcement proceedings. (It might also arise in the context of contractual or conveyancing disputes). The Supreme Court has not yet had to address the specific question of whether the High Court, in hearing enforcement proceedings, is bound by an earlier (unchallenged) Section 5 declaration.
- (iii). The Court of Appeal has held that an (unchallenged) Section 5 declaration to the effect that certain works are “exempted development” is binding on the parties in subsequent enforcement proceedings. The Court of Appeal has not yet had to address the question of the legal status of a Section 5 declaration to the effect that certain works are not “exempted development” or to the effect that certain works do not come within the scope of an existing planning permission. Put otherwise, the Court of Appeal has not yet ruled on whether a declaration which is adverse to a *respondent* is binding.
- (iv). The High Court, in at least three judgments, has held that Section 5 declarations to the effect that planning permission is required for certain acts are, in principle, binding on the parties in enforcement proceedings.
- (v). Certain judgments have expressed reservations as to the jurisdiction of An Bord Pleanála to make declarations to the effect that a particular act is “unauthorised development”.
- (vi). The principal ground for finding that a Section 5 declaration is binding is in order to reduce the risk of overlapping and unworkable jurisdictions. This would appear to involve a form of issue estoppel. A secondary ground for the finding is that it might offend against Section 50 of the PDA 2000 to allow a party to make a collateral challenge to a Section 5 declaration in the context of subsequent enforcement proceedings.
- (vii). The Section 5 jurisdiction extends to questions of interpretation of planning permission.
- (viii). Whereas a Section 5 declaration may be dispositive of many of the issues in enforcement proceedings, there remain a number of matters which fall outwith the Section 5 jurisdiction. In particular, An Bord Pleanála has no function in determining whether the development being enforced against has the benefit of the “seven-year rule”, i.e. whether the proceedings are statute barred by reference to

the seven-year limitation period provided for under Part VIII of the PDA 2000. It also follows by analogy with the judgment in *Cleary Compost* that an earlier Section 5 declaration will not be binding if there has been a change in *circumstances* in the interim.

#### **FINDINGS OF THE COURT ON SECTION 5 REFERENCE**

96. The current state of the authorities, therefore, appears to be that, at the very least, a Section 5 declaration must be given significant weight in subsequent enforcement proceedings. The principal rationale underlying this case law is the desirability of avoiding overlapping and inconsistent decision-making.
97. Applying these principles to the facts of the present case, I have concluded that the Section 5 declaration precludes the Developer from reagitating the argument that the “as built” wind turbines are authorised by the 2011 planning permission. The Developer had a full opportunity of making its case in this regard to An Bord Pleanála. In particular, the Developer had made submissions before the Board to the effect, first, that the decision-letter of 13 December 2013 authorised the change in scale and dimensions; and, secondly, that the circumstances were distinguishable from those of the Kilvinane Wind Farm. Those submissions were, ultimately, rejected by An Bord Pleanála.
98. To allow the Developer to rerun the same arguments before this court would give rise to precisely the type of overlapping and unworkable jurisdictions which the judgments discussed above are intended to avoid. Were this court to embark upon a *de novo* consideration of these matters, and to come to a *contrary* conclusion to that of An Bord Pleanála, this would bring about the very mischief which the case law is intended to avoid.
99. Of course, different considerations would apply where a party had not been afforded fair procedures before An Bord Pleanála or where the declaration is bad on its face, e.g. the decision is not fully reasoned. See, for example, *Wicklow County Council v. Fortune (No. 3)* [2013] IEHC 397 (discussed at paragraph 74 above). A Section 5 declaration would not be binding in such circumstances. No such contingencies arise, however, on the facts of the present case.
100. In reaching this conclusion as to the status of the Section 5 declaration, I have given careful consideration to the legal submissions—both written and oral—advanced on behalf of the Developer. It will be recalled that one of the arguments advanced is to the effect that the court should apply a “double construction” rule to the Section 5 declaration, i.e. if the declaration is open to two constructions, then it should be interpreted in the manner which holds it *intra vires*. More specifically, it had been argued that the declaration should be interpreted as confined to a finding that the erection of the wind turbines is “development” and not “exempted development”. (See paragraph 62 above).
101. With respect, the narrow interpretation which the court is invited to give to the Section 5 declaration is entirely artificial. It would require the court to disregard large portions of the text of the declaration, and also to disregard the underlying inspector’s report. Such



an artificial approach would be contrary to the well-established principles governing the interpretation of planning decisions. (See *In re XJS Investments Ltd.* [1986] IR 750). The rationale for a decision of An Bord Pleanála is to be found by reading the Board's decision in conjunction with the underlying inspector's report (save in cases where the Board had disagreed with the inspector's recommendation). See *Connelly v. An Bord Pleanála* [2018] IESC 31; [2018] 2 I.L.R.M. 453.

102. On the facts of the present case, it is obvious the Board followed its inspector's recommendation, and had adopted the same approach as it had in respect of the Kilvinane Wind Farm. This entailed making an express finding, at sub-paragraph (b) of the Section 5 declaration, to the effect that the alterations to the turbines, including the length of the rotor arms/blades, do not come within the scope of the planning permission granted. Put otherwise, An Bord Pleanála expressly addressed the interpretation of the planning permission and resolved this issue against the Developer.
103. Notwithstanding the fact that the Developer did not seek to challenge An Bord Pleanála's declaration at the time, the Developer now maintains the position in these enforcement proceedings that the Section 5 jurisdiction does not allow An Bord Pleanála (i) to determine whether particular works come within the scope of a planning permission, nor (ii) to make a finding of "unauthorised development". This position is untenable. As discussed in detail under the previous headings, the case law establishes that the Section 5 jurisdiction is not as narrow as the Developer contends.
104. Similarly, the attempt on the part of the Developer to distinguish the facts of the present case from those of *Killross Properties* is not well-founded. Whereas it is correct to say that *Killross Properties* was concerned with a declaration to the effect that certain works were "exempted development", and that this declaration was, therefore, adverse to the case which the applicant, as opposed to the respondent, was making in those proceedings, these points of distinction do not affect the underlying rationale. The underlying rationale of the judgment is to avoid unworkable and overlapping jurisdictions. This mischief arises equally in the case of a Section 5 declaration which is adverse to a respondent as in the case of a declaration which is adverse to the applicant. In each instance, An Bord Pleanála will have made findings on issues which are relevant to the subsequent enforcement proceedings. For the court hearing the enforcement proceedings to embark on a *de novo* consideration of these issues would involve the court re-opening the very issues which had been determined by An Bord Pleanála. This would be contrary to the general principle stated in *Grianán an Aileach* to the effect that the Oireachtas may confer on statutory bodies, expressly or by implication, an exclusive jurisdiction to determine specific issues. Section 5 of the PDA 2000 has conferred just such a jurisdiction on An Bord Pleanála.
105. It might, perhaps, be said that the legal status now attaching to a Section 5 declaration is more significant than a literal interpretation of the section might at first suggest. The case law from the last fifteen years is, however, clear. Section 5 has been given a purposive interpretation, which is intended to reflect the fact that An Bord Pleanála has

been entrusted with specific competences under the PDA 2000. More generally, this interpretation is also consistent with the principle of finality in litigation and that parties are estopped from re-agitating issues which have been decided against them. This is subject to the exceptions discussed under the next paragraph.

106. The High Court will retain original jurisdiction to determine planning issues in enforcement proceedings where there is no Section 5 determination in existence. It will also have jurisdiction where, as in *Wicklow County Council v. Fortune (No. 3)*, the Section 5 declaration is bad on its face or had been reached in breach of fair procedures. The High Court will also retain original jurisdiction where an issue arising in enforcement proceedings has not been specifically addressed by An Bord Pleanála or where there has been a change in circumstances in the interim. None of these contingencies arise on the facts of the present case. The precise same issues which the Developer seeks to agitate in this court had been raised before An Bord Pleanála and were determined against the Developer. If the Developer had wished to challenge that determination, then the remedy was to make an application for judicial review. The Developer did not do so.
107. Accordingly, I am satisfied that the Section 5 declaration made by An Bord Pleanála in this case should be treated as binding on the Developer, and as conclusive of the question of whether or not the “as built” wind turbines come within the scope of the 2011 planning permission. The declaration is not, of course, determinative of the outcome of the enforcement proceedings. The Applicants would still have to prove to the satisfaction of the court that works had been carried out by the Developer, and that proceedings were instituted within the relevant seven-year limitation period. It remains open to the Developer to resist the proceedings on the basis of the court’s discretion.

#### **DE NOVO ASSESSMENT**

108. For the reasons set out under the previous heading, I have found that the Section 5 declaration is binding on the Developer. The Developer cannot, therefore, seek to defend the enforcement proceedings before this court on the basis of an argument that the “as built” turbines come within the scope of the planning permission.
109. Lest I be incorrect in this finding, however, I propose to address the question of compliance with the planning permission *de novo*. Put otherwise, I propose to embark upon my own assessment of whether the “as built” turbines come within the scope of the planning permission. This exercise is being carried out *de bene esse*, and without prejudice to my finding as to the binding effect of the Section 5 declaration. The exercise is only being undertaken on account of the urgency of the proceedings. There is a risk that if this judgment were to be decided on the narrow basis that the Section 5 determination is binding, then this might result in unnecessary delay in the event of an appeal. More specifically, if the finding on the narrow issue were to be overturned on appeal, and this court had not addressed separately the question of compliance with the planning permission, then it would become necessary to remit the matter to the High Court for rehearing (with all the attendant delay and cost). It seems preferable that this judgment should, insofar as reasonably practicable, address all issues and contingencies.

110. The Developer's argument can be summarised as follows. A planning permission provides for some flexibility, and "immaterial deviations" from the permitted development are implicitly authorised by the permission. The court should, therefore, engage in the process of examining whether the environmental impact of the deviations between the "as permitted" and "as built" wind turbines are material. The Developer has filed detailed affidavit evidence which, it is said, indicates that there is no material difference between the two.

111. The court is, in effect, being invited to engage in a form of screening exercise analogous to that required under the EIA Directive. With respect, this is not what the planning legislation requires. The term "works" is broadly defined under the PDA 2000, and, in contrast to the term "use", is not subject to a "materiality" test.

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

112. The legal consequence of this is that even very minor "works" are, in principle, subject to a requirement to obtain planning permission. The broad definition of development "works" is counterbalanced by the putting in place of legislative measures which exempt prescribed classes of development from the requirement to obtain planning permission. Some of these exemptions are provided for under Section 4(1) of the PDA 2000, but most are to be found in Regulations made by the Minister for Housing, Planning and Local Government (*"the Minister"*) pursuant to Section 4(2) of the PDA 2000. This section reads as follows.

"(2)(a) The Minister may by regulations provide for any class of development to be exempted development for the purposes of this Act where he or she is of the opinion that—

- (i) by reason of the size, nature or limited effect on its surroundings, of development belonging to that class, the carrying out of such development would not offend against principles of proper planning and sustainable development, or
- (ii) the development is authorised, or is required to be authorised, by or under any enactment (whether the authorisation takes the form of the grant of a licence, consent, approval or any other type of authorisation) where the enactment concerned requires there to be consultation (howsoever described) with members of the public in relation to the proposed development prior to the granting of the authorisation (howsoever described)."

113. The position under the planning legislation is, therefore, that planning permission is required for even minor development “works”, the definition of which includes relevantly an “extension”, *unless* the works fall within a class of “exempted development”.
114. The decision as to whether to exempt particular classes of development “works” from the requirement to obtain planning permission resides principally with the Minister. As appears from Section 4(2), the Minister is required to consider whether or not the carrying out of such development would “offend against principles of proper planning and sustainable development”.
115. The courts do not have an equivalent jurisdiction to waive the requirement to obtain planning permission for minor development “works”. The only role which a court has in assessing the materiality of development “works” is where a developer seeks to argue that a departure from the terms of a planning permission represents an “immaterial deviation”. The principles governing this assessment have been set out, with characteristic clarity, by Fennelly J. in *Kenny v. Provost, Fellows & Scholars of the University of Dublin, Trinity College* [2009] IESC 19 (“Kenny”) at paragraphs [18] to [20] of the judgment as follows.

“There will inevitably be small departures from some or even many of the plans and drawings in every development. There can be discrepancies between and within plans, drawings, specifications and measurements; there can be ambiguities and gaps. It seems improbable that any development is ever carried into effect in exact and literal compliance with the terms of the plans and drawings lodged. If there are material departures from the terms of a permission, there are enforcement procedures.

However, planning laws are not intended to make life impossible for developers, for those executing works such as architects, engineers or contractors or for the planning authorities in supervising them. Nor are they there to encourage fine-tooth combing or nit-picking scrutiny of the works. I will mention later one or two examples of this type of exercise in the present case. The exchange of affidavits amounts to some 300 pages.

While the planning authority or An Bórd Pleanála on appeal grants the permission, it is a common feature of permissions, especially for large developments, that additional detail is necessary in order to carry the development into effect and such detail, often in the form of further plans, drawings, specifications or other explanations, will require approval by the planning authority prior to commencement of the development. There is an obvious practical necessity for a procedure whereby matters of detail can be agreed between the planning authority and the developer. This ensures supervision but allows a degree of flexibility within the scope of the permitted development.”

116. The planning permission in *Kenny* had included a number of conditions, of the type flagged in the last paragraph above, i.e. conditions which left over points of detail to be

agreed between the developer and the planning authority. The planning authority had relied on the conditions to authorise certain departures from the strict terms of the planning permission. As discussed under the next heading below, the Developer in the present case seeks to rely on the existence of such a condition in the 2011 planning permission as authorising the increase in rotor diameter.

117. Staying for the moment with immaterial deviations, the case law indicates that the flexibility allowed under a planning permission is very limited. Thus, for example, the High Court in *Cork County Council v. Cliftonhall Ltd.* [2001] IEHC 85 held, *with some reluctance*, that an exceedance of the ridge height of one block of apartments of between 0.5 metres and 1.3 metres was immaterial in the context of an overall residential development of six blocks. The court calculated that the deviation between the “as permitted” and “as built” height was in the order of some 7 per cent.
118. In *O’Connell v. Dungarvan Energy Ltd.*, unreported, High Court, Finnegan J., 27 February 2000, it was held that the relevant planning permission implicitly authorised the erection of a steel structure *to replace* an existing structure. Crucially, the replacement structure was of the same dimensions as the existing structure, and would, in any event, have been “exempted development”.

“It was therefore necessary, if the development should proceed, that a stronger steel structure capable of supporting the cladding be provided. This replacement steel structure as to its external dimensions will correspond both as to height and floor area with that which is being demolished. The external appearance of the building will be in accordance with the planning permission condition 3 thereof. In these circumstances the course of conduct which the Respondent has undertaken is in direct consequence of the imposition of the said condition 8 in the Integrated Pollution Control Licence. It is therefore within the category of unforeseen variations mentioned by Denning M R and as such authorised by the planning permission. It is also immaterial having regard to what I have said as to its floor area, height and the fact that its external appearance will be determined in accordance with condition 3 of the planning permission and so unaffected by the variation. In short the variation in the development is within the terms of the planning permission. It is also exempted development pursuant to the Local Government (Planning and Development) Regulations 1995 Article 9 A as inserted by the Local Government (Planning and Development) Regulations 1995.”

119. The judgment most directly on point is that of the Court of Appeal in *Bailey v. Kilvinane Wind Farm* [2016] IECA 92. The Court of Appeal held at paragraph [87] that an increase in rotor diameter of 23 metres was a material deviation.

“The same reasoning also applies in the context of the diameter size of the turbines. As constructed the two turbines, T3 and T4, each have a rotor diameter of 90m, which is 23m. larger than that sanctioned by the 2002 planning permission, thus very significantly extending the sweep of the rotor circumference. The sweep of the rotor diameters thus rises from 57m (57 x 3.1416 = 179m.) to 90m

( $57 \times 3.1416 = 283\text{m.}$ ). It is impossible to say that such a large and appreciable increase in the diameter size of the rotors beyond that sanctioned by the planning permission is not material. The potential impact in terms of sightlines (and other visual impacts), noise, shadow flicker and the overall footprint of these larger turbines on third parties is simply too great.”

120. The increase in rotor diameter in the present case is 13 metres. I am satisfied, for reasons similar to those set out in the judgment in *Kilvinane Wind Farm* that this is a material deviation.
121. The materiality of the deviation has to be assessed by reference to the description of the permitted development as per the grant of planning permission. The description expressly refers to a rotor diameter of 90 metres. Indeed, the precise purpose of the application had been to allow for an increase of 10 metres from that permitted under the 2005 planning permission.
122. There is a further reason that the Developer cannot rely on the concept of “immaterial deviations”. The case law indicates that the rationale for allowing some flexibility in planning permissions is to address unexpected contingencies during the course of the carrying out of the development. On the facts of the present case, the decision to change turbine types was a deliberate decision made in advance of the carrying out of the works. This was not an unexpected event such as might benefit from the concept of “immaterial deviations”. The materials put before the Board in the context of the Section 5 reference indicate that this decision was informed by considerations other than visual amenity.
- “The reason for this selection is to facilitate the use of the best available technology at the wind farm, ensuring that the wind farm can harness the local wind capacity to its full potential, thus ensuring that the viability of the development is not compromised.”
123. The court is not tasked nor properly qualified to determine whether or not planning permission should be granted. For this reason, the arguments made by the Developer which touch upon the merits of the proposed development, and invite the court to engage in a detailed “compare and contrast” exercise as between the environmental impacts of the “as permitted” and “as built” turbines is inappropriate. This is not the function of the court. It is no answer to a complaint that a person has carried out development without the requisite planning permission to say that it is highly likely that had a planning application been made same would be granted. A developer cannot short-circuit the process in this way. This is especially so in the context of an EIA development project such as that in issue in the present proceedings.
124. The correct legal analysis is that the court is merely deciding whether or not the Developer is required to make a planning application. The court is not making any adjudication as to whether planning permission will be granted, or whether the planning application is subject to environmental impact assessment for the purposes of the EIA Directive. These are all matters for the expert decision-makers who have been entrusted

with these functions under the planning legislation. The case law is all in one direction, and it is to the effect that matters of planning judgment are best left to the local planning authorities and An Bord Pleanála.

#### **COMPLIANCE SUBMISSION**

125. The Developer contends that the change in wind turbine type has been authorised by dint of the planning authority having “agreed” to the compliance submission by its letter dated 13 December 2013. In circumstances where no application for judicial review has been made seeking to question the validity of this decision-letter, it is said to be immune from challenge. The decision-letter is said to be binding on the court and cannot be impugned in these enforcement proceedings. Counsel relies in this regard on Section 50 of the PDA 2000, and the judgment of the Supreme Court in *Kenny v. Provost, Fellows & Scholars of the University of Dublin, Trinity College* [2009] IESC 19.
126. I have concluded that the decision-letter of 13 December 2013 cannot be relied upon as authorising the alterations to the rotor diameter of the wind turbines for the following two reasons.
127. First, as a matter of interpretation, the decision-letter cannot be read as “agreeing” to an increase in rotor diameter in circumstances where the Developer did not expressly request agreement to this increase. Planning documents are to be interpreted in their ordinary meaning as they would be understood by members of the public, without legal training, as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning. (See *In re XJS Investments Ltd.* [1986] IR 750).
128. The decision-letter is headed up as follows.
- “Re: PD 11/400 – permission for a modification to the permitted Barranafaddock Wind Farm (Planning Ref. 04/1559 & An Bord Pleanála reference number PL 24.213290 in the townlands of [...] Co. Waterford. The modifications include a proposed increase in turbine hub height (to 80m) of three of the permitted 11 turbines, and an increase in rotor diameter of all turbines to 90m (from 80m) and the micro-siting of ten of the permitted turbines. As a result of this modification there will also be associated minor revisions to the supporting civil infrastructure design including the provision of a borrow pit and the modification and relocation of the permitted substation.”
129. As appears, the description of the development expressly refers to a rotor diameter of 90 metres. A person reading the decision-letter would naturally assume that this is all that is permitted. There is no other reference to rotor diameter in the decision-letter, and there is literally nothing which indicates that an *increase* in rotor diameter to 103 metres has been agreed to.
130. It is no answer to this to suggest that the heading of the decision-letter might have been intended merely to reflect the description of the permitted development as per the 2011

planning permission. There is nothing in the decision-letter which indicates that the heading is intended to refer to anything other than the form of development as agreed by the planning authority. Moreover, the very fact that the planning permission only permits a rotor diameter of 90 metres emphasises that the planning authority could not use the occasion of agreeing points of detail to rewrite the planning permission. See *Treacy v. An Bord Pleanála* [2010] IEHC 13, [78]. The High Court (MacMenamin J.) emphasised that Section 34(5) of the PDA 2000 cannot be read in such a manner as to allow a matter of detail turn the framework or substance of the grant of planning permission on its head. Any matter of detail must perforce fall within the four walls of the parent grant of permission. It cannot denature it.

131. Returning to the facts of the present case, the planning authority would not have had jurisdiction under Condition No. 3 of the planning permission to authorise an increase in the rotor diameter beyond the 90 metres prescribed under the planning permission. This is especially so in circumstances where the condition singles out “height” as the only aspect of the scale or dimensions of the wind turbines which might be subject to agreement. Even then, the planning authority would only have had jurisdiction to agree a height equal to or less than the maximum height of 125 metres permitted under the 2011 planning permission. The reason stated for the imposition of the condition was “in the interests of visual amenity”, and it thus allowed for the possibility of a reduction in the permitted height.
132. The hypothetical intelligent person reading the decision-letter must be taken as being aware of the content of the compliance submission of 6 November 2013, and as having read the decision-letter in conjunction with same. As appears from the extract from the compliance submission set out at paragraph 26 above, the Developer did not expressly seek the agreement of the planning authority to an increase in rotor diameter.
133. It is not enough, as has been contended for by counsel on behalf of the Developer, that the proposed alteration is capable of being deduced by either (i) carrying out the mathematical exercise of subtracting the figure stated for the hub height from that stated for the maximum tip height of the turbines, and then multiplying the resulting figure by two, or (ii) by a careful examination of the fine print of the A3 Schematic GE Turbine which had been included in Appendix B of the compliance submission.
134. Had the Developer wished to obtain the planning authority’s agreement to an increase in rotor diameter, then this should have been stated in express terms in the body of the compliance submission. Neither a planning authority nor a member of the public should be expected to wade through extensive documentation in order to attempt to ascertain what precisely it is that a developer is seeking agreement to. Public participation lies at the heart of the planning process. This is especially so in the context of development, such as the present case, which consists of a project subject to the public participation requirements of the EIA directive.
135. The second reason for saying that the decision-letter cannot be relied upon as authorising the increase in rotor diameter is, perhaps, more fundamental. It is a requirement of the



EIA Directive that any “change” or “extension” of projects already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment, must itself be subject to assessment. It is necessary, therefore, that a form of screening exercise be carried out before a decision to authorise a change or extension can lawfully be made.

136. On the Developer’s case, the decision-letter is said to have authorised a change to a permitted EIA development project. This involved an increase in the rotor diameter from 90 metres to 103 metres. (It will also be recalled that the original 2005 planning permission had only allowed for a rotor diameter of 80 metres). This “change” or “extension” should have been screened in order to determine whether it is likely to have adverse effects. There is simply no evidence that Waterford County Council carried out such an exercise prior to the issuance of the decision-letter. Rather, the decision-letter baldly states: “Condition 3 Noted and agreed”. Such an unreasoned decision cannot have had the legal effect of authorising the change contended for.
137. In this regard, a loose analogy can be drawn with the facts of *Bailey v Kilvinane Windfarm Ltd.* [2016] IECA 92. The developer in that case had sought to rely on written representations made by an official of the local planning authority to the effect that an extension of the blade length of proposed wind turbines were acceptable to the planning authority. (In contrast to the present case, the written representations had not been made pursuant to Section 34(5) of the PDA 2000).
138. The Court of Appeal considered that it was not reasonable for the developer in that case to have relied upon these written representations. Whereas this finding was informed, in part, by the fact that the written representations were informal, the court also attached some weight to the fact that no assessment of the impact of the changes had been carried out by either the developer or the planning authority. See paragraphs [100] and [101] of the judgment.

“It is inherent in the doctrine of good faith as a general principle of law that any party seeking to avail of that principle should show appropriate regard for the rights of third parties who might reasonably be affected by their actions. There is nothing at all to suggest that either the developer or, for that matter, the Council official in question gave any consideration to this issue. In such circumstances no sensible developer could reasonably suppose that a planning authority could informally sanction such deviations from location and rotor diameter without a formal assessment of the potential planning and environmental impact of these changes and especially their potential effects on third parties.

It is obvious that any thing other than trifling changes in terms of the location of the turbines and the size of the diameter of the rotor blades could have major implications for local residents in terms of visual impact, sight lines, noise and shadow flicker. Viewed objectively, therefore, one could not say that any conclusion that the development had been constructed in accordance with the terms of the planning permission or that these admitted deviations were not

material was one which, adopting the language of O'Sullivan J. in *Altara Developments*, a developer could reasonably hold. This was especially so when no consideration whatever was given to the rights of the neighbours who lived in the immediate vicinity of the wind farm as to the potential effects of these changes."

139. Counsel on behalf of the Developer has argued that, in circumstances where it was not challenged at the time, the decision-letter of 13 December 2013 is immune from judicial review. It is said, therefore, that it does not matter whether the decision-letter is lawful or not, it cannot be questioned in these enforcement proceedings.
140. With respect, this argument overstates the effect of Section 50 of the PDA 2000. Reliance on that section is not available in circumstances where a decision is bad on its face and/or exhibits an error of law. See, for example, *Mone v. An Bord Pleanála* [2010] IEHC 395, [83] and [84].

"It would seem to me that as a matter of common sense, where a grant as in this case has been issued without the relevant statutory basis, it can have no force. The fact that the erroneous grant was not challenged could in no way confer it with retroactive validity; such is wholly outside of the legislative scheme which entirely governs this area of law. The 1998 grant was therefore wholly illusory; it was a grant in name only, having no possible basis in either law or fact. No future actions could change this. The council had no power or jurisdiction to make the grant. It must therefore follow that any subsequent decision which places reliance upon this must be similarly flawed, being based on no legitimate legal or factual basis. The Board's decision that the development was based on a valid planning permission, as well as being erroneous, was a decision it had no power to make; it was not possible as a matter of law for the Board to retroactively confer validity on the 1998 grant.

The argument of the Board by reference to s.50 of the Act of 2000 is misconceived. That section (subject to the court's power to extend time, which here is not relevant) is a time limit restriction operating not as a matter of defence but of jurisdiction. It regulates the challenge to a decision, nothing more. It leaves unaltered the legal status of the decision. It has no influence on the lawfulness or effect of the decision. It gives it no badge of either approval or disapproval. It prevents challenge. Notwithstanding these views the practical effect of this section is that in almost all cases once the time period has expired, no further consideration will be required or needed. But exceptionally, as here, where a subsequent decision depends on conferring the status of legality on a legal nullity, that decision will not be allowed to stand."

141. A similar approach had been taken by the High Court, in the specific context of a Section 5 declaration, in *Wicklow County Council v. Fortune (No. 3)* [2013] IEHC 397. Hogan J. declined to rely on a Section 5 determination issued by a planning authority in circumstances where the court considered that the reasons given for the determination were "not altogether satisfactory". This was so notwithstanding that the actual validity of

the Section 5 determination had not been under challenge in the proceedings. (The proceedings in *Fortune (No. 3)* were enforcement proceedings under Section 160 of the PDA 2000).

142. The argument for saying that the court is entitled to disregard a planning decision which is bad on its face is even stronger in the context of EIA projects. The very recent judgment of the CJEU in Case C-261/18, *Commission v. Ireland (Derrybrien)* has emphasised that a Member State cannot deem a development project, which has been carried out in breach of the requirements of the EIA Directives, to be authorised simply because the domestic time-limits for legal challenges to the relevant development consent have expired.

“80 Similarly, Directive 85/337 precludes projects in respect of which the consent can no longer be subject to challenge before the courts, because the time limit for bringing proceedings laid down in national legislation has expired, from being purely and simply deemed to be lawfully authorised as regards the obligation to assess their effects on the environment (judgment of 17 November 2016, *Stadt Wiener Neustadt*, C-348/15, EU:C:2016:882, paragraph 43).

[...]

- 94 In any event, Ireland simply states that, after the expiry of the period of 2 months, or 8 weeks set by the PDAA, respectively, the consents at issue could no longer be the subject of a direct application to a court and cannot be called in question by the national authorities.
- 95 By its argument, Ireland fails to have regard, however, to the case-law of the Court referred to in paragraph 80 above, according to which projects in respect of which the consent can no longer be subject to challenge before the courts, because the time limit for bringing proceedings laid down in national legislation has expired, cannot be purely and simply deemed to be lawfully authorised as regards the obligation to assess their effects on the environment.
- 96 It must further be noted that while it is not precluded that an assessment carried out after the plant concerned has been constructed and has entered into operation, in order to remedy the failure to carry out an environmental impact assessment of that plant before the consents were granted, may result in those consents being withdrawn or amended, this is without prejudice to any right of an economic operator, which has acted in accordance with a Member State’s legislation that has proven contrary to EU law, to bring against that State, pursuant to national rules, a claim for compensation for the damage sustained as a result of the State’s actions or omissions.”
143. Mr McGrath, SC, on behalf of the Developer, submitted that the within proceedings did not give rise to any issue of EU law. The facts of the present case were said to be entirely distinguishable from those of *McCoy v. Shillelagh Quarries Ltd*. The original version of the

proposed development had been subject to EIA by An Bord Pleanála at the time of the grant of the first planning permission in 2005. The Applicants did not seek to challenge the 2011 planning permission, and would be precluded from doing so now by virtue of the expiration of the eight-week statutory time-limit. It is said that there is no evidence before the court that there had been any failure to comply with the EIA Directive at the time of the grant of this planning permission.

144. Counsel made a cogent argument to the effect that the EIA Directive allowed for the possibility of points of detail being agreed subsequent to the grant of development consent, and submitted that the change in turbine type had been lawfully authorised by the decision-letter of 13 December 2013 issued in response to the compliance submission. This decision-letter had never been challenged by the Applicants, and, therefore, neither they nor the court could go behind same. On this analysis, there simply was no breach of EU law.
145. This argument was made with conviction, and merits careful consideration. Having reflected on same for a number of weeks now, and having regard to the supplemental written legal submissions filed on 5 December 2019, I have come to the conclusion that the legal position is more nuanced. The argument advanced on behalf of the Developer has, at its core, the proposition that the domestic law time-limits on judicial review proceedings constrain the court's jurisdiction in enforcement proceedings. The logic of the argument is that even if a court considered that development consent had been granted in breach of the EIA Directive, the court would be powerless to restrain the continuation of a development project. This would be so irrespective of how egregious the breach is or how obviously defective the decision relied upon is. This argument cannot be reconciled with the requirements of the EIA Directive and the manner in which domestic time-limits have been treated of in the case law of the CJEU.
146. Member States are obliged under Article 10A thereof to provide effective, proportionate and dissuasive penalties for breaches of the EIA Directive. It would be inconsistent with this obligation were an obviously deficient decision to be allowed block effective enforcement against an EIA project which had been carried out in breach of the EIA Directive. On the facts of the present case, as found by this court, the Developer carried out development without the requisite planning permission. The 2011 planning permission did not authorise the erection of wind turbines of the scale and dimensions actually put up. The subsequent decision relied upon to authorise this, i.e. the decision-letter of 13 December 2013, could not have had this purported legal effect for the reasons outlined at paragraphs 135 *et seq.* above. This court's obligation to give effect to the EIA Directive cannot be negated by the decision-letter of 13 December 2013.

#### **DISCRETIONARY FACTORS**

147. The Developer submits in the alternative—without prejudice to its principal argument that there has been no “unauthorised development”—that the circumstances of the case are such that relief should be refused as a matter of discretion. Counsel emphasises that the court enjoys a broad discretion under Section 160 of the PDA 2000. The judgments of the Supreme Court in *Meath County Council v. Murray* [2017] IESC 25; [2018] 1 I.R.

189; [2017] 2 I.L.R.M. 297 ("*Murray*") and *An Taisce v. McTigue Quarries Ltd.* [2018] IESC 54; [2019] 1 I.L.R.M. 118 ("*McTigue Quarries*") are cited in this regard.

148. Counsel then identifies a number of factors which, it is said, indicate that the court's discretion should be exercised against the grant of relief. First, any departure from the terms of the 2011 planning permission is not material and does not give rise to any additional impacts on the environment when compared with the "as permitted" turbines. Secondly, the developer has acted in good faith at all times and, in particular, sought and obtained the agreement of Waterford County Council to the change in turbine type. Thirdly, the Developer had made an application for leave to apply for "substitute consent" under Part XA of the PDA 2000 as early as January 2019. An Bord Pleanála made a decision in August 2019 to the effect that substitute consent was not necessary. (The Board's decision is the subject of judicial review proceedings, and the parties informed this court that An Bord Pleanála has indicated an intention to consent to an order of *certiorari* on certain, limited grounds). Fourthly, it is said that there has been delay on the part of the Applicants: the wind farm has been operational since 2015, but the within proceedings were not instituted until February 2019. Finally, it is said that there is a public interest in the continued operation of the wind farm as a source of renewable energy.
149. Counsel submits that the court's discretion is unaffected by any considerations of EU law. In particular, it is said that the Applicants have failed to demonstrate that there has been any *breach* of the EIA Directive.
150. It is submitted that it does not necessarily follow from the judgment in C-261/18, *Commission v. Ireland (Derrybrien)* that it is necessary for a development to cease operations while an application for retrospective development consent is undertaken. Any question in relation to the suspension or revocation of a consent can be addressed as part of the substitute consent process. It is said that the grant of relief under Section 160 of the PDA 2000 would be disproportionate. See §7 of the supplemental written legal submissions of 5 December 2019, as follows.
- "In the circumstances of this case, it is submitted that the grant of relief under section 160 of the 2000 act would be disproportionate and is not required on foot of the duty of sincere co-operation. The grant of relief in this case is not necessary to achieve the objectives of the Treaty in relation to the assessment of environmental impacts and, indeed, would go beyond what is necessary. What is necessary to achieve the objectives of the Treaty is, at a maximum, the assessment of the use of the particular turbine in accordance with the requirements of the EIA Directive. That can be achieved through an application for Substitute Consent and there is no requirement for the wind farm deceased operation for that to be achieved."
151. The conduct of the Developer in the present case in seeking to regularise the planning status of the wind turbines is said to stand in "stark contrast" to that of the operator of the Derrybrien Wind Farm. See §10 of the supplemental written legal submissions.

## **FINDINGS OF THE COURT ON DISCRETION**

152. For ease of exposition, it is proposed to address the various discretionary factors by reference to the broad categories of considerations identified by the Supreme Court in *Murray and McTigue Quarries*.

*The nature of the breach: ranging from minor, technical and inconsequential up to material, significant and gross*

153. The breach in this case is material. An increase in rotor diameter of 13 metres cannot be characterised as minor or technical. This breach also has to be seen in the context of a development project which is subject to the EIA Directive. The discretion of the court to “forgive” a breach of this type is more limited.

### *Conduct of Developer*

154. The conduct of a developer and, in particular, its attitude to planning control, are relevant considerations. It is important to recall, however, that the judgment in *Murray* states that the fact that a developer had been acting in good faith, whilst important, will not necessarily excuse him from an order. This point has been reiterated in *McTigue Quarries*.

155. The judgment in *Murray* indicates that the reason for an infringement of planning control may range from genuine mistake, through to indifference and up to culpable disregard. The conduct of the Developer in the present case lies towards the former end of the scale. The evidence before the court establishes that the Developer had been acting in good faith. In particular, the Developer had engaged proactively with the planning authority. See, for example, the records of meetings between the Developer’s consultants and the planning authority. The mistaken attempt to rely on Condition 3 as the basis for changing the turbine type is indicative of a mistake rather than any culpable disregard. Nevertheless, ignorance of the law cannot be an excuse for non-compliance with a planning permission. It was not reasonable for the Developer to rely on Condition No. 3 as a vehicle through which to introduce significant changes to the wind turbines. Moreover, it is of little credit to the Developer that the terms of the compliance submission did not make it expressly clear that what was being sought was the agreement of the planning authority to a change in rotor blade diameter.

### *The attitude of the planning authority*

156. Following upon the issuing of An Bord Pleanála’s Section 5 declaration, the planning authority served an enforcement notice on the Developer. (The enforcement notice is now the subject of separate judicial review proceedings). The fact that the local planning authority has been moved to take enforcement action is a factor which points in favour of granting relief.

### *The public interest in upholding the integrity of the planning and development system*

157. The fact that this development is subject to the EIA Directive is a relevant consideration under this category. Article 10A of the EIA Directive (as most recently amended by Directive 2014/52/EU) provides as follows.

“Member States shall lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive. The penalties thus provided for shall be effective, proportionate and dissuasive.”

158. Weight must be given to this the exercise of the court’s discretion. One of the requirements of the EIA Directive is that any “change” or “extension” to a previously permitted project which is likely to have a significant adverse effect must be subject to (further) environmental impact assessment. It is necessary, therefore, to carry out a form of screening exercise to determine whether a change or extension is likely to have a significant adverse effect. Whereas it may well be the position that the outcome of a screening exercise in relation to the change in the scale and dimensions of the turbines would be that no EIA is required, this does not obviate the legal requirement to carry out such a screening exercise. (See Case C-215/06, *Commission v. Ireland* to the effect that the failure to carry out a screening exercise represents a breach of the EIA Directive).

159. The High Court (Baker J.) held in *McCoy v. Shillelagh Quarries Ltd.* [2015] IEHC 838, [84] and [85]. that the exercise of the court’s discretion should be informed by reference to EU environmental law.

“I consider myself constrained further by the requirements of European Community law, and especially the EIA Directive and the Habitats Directive as each of these mandates that an Environmental Impact Statement is required in respect of the operation of this quarry.

Accordingly, were I to refuse injunctive relief or grant injunctive relief with respect to some or only of the operation, I consider that my decision would be one which could be characterised as a failure to respect the integrity of the environmental legislation, and allow the development to continue when it is unauthorised under Irish and when Irish law arises as a result of the obligations of Ireland and Community law.”

160. Counsel for the Developer in the present case points out—entirely correctly—that the breach of EU law at issue in *Shillelagh Quarries Ltd.* was very serious and had continued for many years, and that an application for substitute consent had been refused. Whereas the breach in the present case is of a much lesser order, the EU law dimension is nevertheless a factor to which some weight must be given.

*Public interest in general*

161. The Developer relies in this regard on the fact that the development is of a type which provides renewable energy and that this is in the public interest. As against this, it has to

be said that the overall impact of an order restraining the operation of this individual development project would be minimal in the national context.

### *Conclusion*

162. As appears from the foregoing discussion, there are a number of discretionary factors which are in favour of the Developer. These have to be weighed against the factors which point towards the grant of relief. The principal of these is that the development project is of a type subject to the EIA Directive. The EIA Directive obliges a Member State to provide effective, proportionate and dissuasive penalties for breaches of national legislation. The importance of ensuring compliance with the EIA Directive has very recently been emphasised by the judgment of the CJEU in Case C-261/18, *Commission v. Ireland (Derrybrien)*.
163. I have concluded that the court's discretion should be exercised as follows. The Developer should be afforded an opportunity to regularise the planning status of the wind turbines. It would be inappropriate, therefore, to make an order requiring the immediate removal of the wind turbines. Rather, the Developer is to be afforded a further reasonable period of time within which to seek, if possible, to regularise the planning status of the lands.
164. (The precise mechanism by which this might be achieved is itself the subject of separate judicial review proceedings. More specifically, there is a dispute as to whether the application for leave to apply for substitute consent should be remitted to An Bord Pleanála. This dispute is listed for hearing before the Commercial List of the High Court this morning (6 December 2019).)
165. It would not, however, be appropriate to allow the operation of the wind turbines to continue uninterrupted pending the outcome of an application for leave to apply for substitute consent. This is similar to the approach which had been adopted by the Court of Appeal in *Bailey v. Kilvinane Wind Farm*. There has been a breach of EU law, and this court is obliged to ensure that there is an effective and dissuasive remedy for same.
166. Counsel for the Developer has made a submission to the effect that—in circumstances where An Bord Pleanála has an express statutory power to direct the cessation of development pending the determination of an application for substitute consent—the court should, in effect, leave it to An Bord Pleanála to decide whether any interim measures are required. This submission is correct insofar as it goes. It is, however, clear from the wording of the relevant provision, namely Section 177J of the PDA 2000, that the Board's jurisdiction to issue a direction only arises subsequent to a decision to grant leave to apply for substitute consent. It seems that only the court has jurisdiction to make an order requiring the cessation of operations pending the making of a decision to grant leave to apply for substitute consent. I propose, therefore, to make an order restraining the operation of the wind turbines *pro tem*. The Developer has liberty to apply, on seven days' notice to the Applicants, to have this order vacated in the event



that An Bord Pleanála makes a decision to grant leave to apply for substitute consent. I will hear both parties at that stage.

167. In the event that substitute consent is granted, I would propose to vacate the order entirely. Again, however, I will hear the parties before making any order to this effect.

#### **CONCLUSIONS AND FORM OF ORDER**

168. The Section 5 declaration precludes the Developer from reagitating the argument that the “as built” wind turbines are authorised by the 2011 planning permission. The Developer had a full opportunity of making its case in this regard to An Bord Pleanála. In particular, the Developer had made submissions before the Board to the effect, first, that the decision-letter of 13 December 2013 authorised the change in scale and dimensions of the wind turbines; and, secondly, that the circumstances of the case were distinguishable from those of the Kilvinane Wind Farm. Those submissions were, ultimately, rejected by An Bord Pleanála.
169. In circumstances where the Developer did not challenge the Section 5 declaration, the Developer is estopped from seeking to reopen the Board’s findings in these proceedings.
170. The 2011 planning permission did not authorise the erection of wind turbines of the scale and dimensions actually put up. In circumstances where the wind farm is subject to the requirements of the EIA Directive, the proposed increase in rotor diameter constituted a “change” or “extension” of a permitted development, and could only have been lawfully authorised by way of the making of an application for planning permission.
171. The Developer is not entitled to rely on the alleged agreement of the planning authority to the compliance submission as providing authorisation for the “change” or “extension”. On its correct interpretation, the decision-letter of 13 December 2013 does not have this effect. Moreover, the planning authority would not, in any event, have had jurisdiction to approve the “change” or “extension” pursuant to Section 34(5) of the PDA 2000.
172. The Developer should be afforded an opportunity to regularise the planning status of the wind turbines. It would be inappropriate, therefore, to make an order requiring the immediate removal of the wind turbines. Rather, the Developer is to be afforded a further reasonable period of time within which to seek, if possible, to regularise the planning status of the lands.
173. There will be an order made pursuant to Section 160 of the PDA 2000 restraining the operation of the wind turbines *pro tem*. The Developer has liberty to apply, on seven days’ notice to the Applicants, to have this order vacated in the event that An Bord Pleanála makes a decision to grant leave to apply for substitute consent.