



**THE HIGH COURT
JUDICIAL REVIEW**

2022/944 JR

IRONBORN REAL ESTATE LIMITED

Applicant

-and-

DUN LAOGHAIRE-RATHDOWN COUNTY COUNCIL

Respondent

JUDGMENT of Mr Justice Rory Mulcahy delivered on 31 July 2023

Introduction

1. In these proceedings, the Applicant (“**Ironborn**”) challenges the Respondent’s decision, made pursuant to section 42 of the Planning and Development Act 2000, as amended (the “**2000 Act**”), to refuse Ironborn’s application to extend the appropriate period of a planning permission granted by An Bord Pleanála (“**the Board**”) in 2011.
2. To explain briefly, section 40 of the 2000 Act provides that a planning permission shall cease to have effect upon the expiry of “the appropriate period”. The Act sets a default appropriate period of five years, but section 41 of the Act empowers a planning authority or the Board to specify a longer period during which the planning permission will have effect, up to a maximum of ten years in the case of a residential development. The planning permission the subject of these proceedings was a ‘ten-year permission’.

3. Section 42 of the Act provides that an application may be made to the relevant planning authority to extend the appropriate period, *i.e.* the period for which the planning permission will continue to have effect. If the criteria in section 42 are satisfied, the planning authority is required to grant the extension.
4. In this case, Ironborn claims that its application met the statutory criteria for such an extension but the Respondent (“**the Council**”) disagrees. The disagreement turns not on the substance of the application, but rather on the correct interpretation of section 42 and, in particular, section 42(1)(a)(i)(IV) and section 42(8).
5. The requirement set out in section 42(1)(a)(i)(IV), that the planning authority must be satisfied that the development the subject of the extension application will be completed in a reasonable time, has been a feature of the 2000 Act since it was first enacted. Section 42(8) limits the circumstances in which an extension can be granted to those where no environmental impact assessment (EIA) or appropriate assessment (AA) would be required in relation to the proposed extension.
6. Before considering the issues raised in these proceedings in detail, it might be helpful to briefly set out the factual background, none of which is in dispute.

Factual Background

7. On 5 December 2011, the Board granted planning permission for a mixed-use development of 355 residential units, four office units, two retail units, a crèche and a community / sports facility on lands at Murphystown and Woodside, Stepside, Dublin 18 (the “**Parent Permission**”). Condition 2 of the Parent Permission stated that “*the proposed development hereby permitted shall be for a period of ten years from the date of this order*”. The application for permission had been accompanied by an environmental impact statement and had been the subject of both an environmental impact assessment and screening for appropriate assessment.
8. The Parent Permission was subsequently revised by a decision of the Council, **Planning Permission** Register Reference D16A/0511 (the “**Amendment Permission**”). The Amendment Permission permitted amendments to what is referred to in the Parent Permission as “Sector 3” of the development permitted by the Parent Permission and authorised the development in Sector 3 of 243 apartments and duplexes in 11 blocks, a

community building, basement parking and site works. The Amendment Permission was granted on 16 December 2016.

9. Construction on foot of the Parent Permission commenced in May 2013. The development, known as Aiken's Village, is not yet complete. As at the time of the extension application, 234 residential units have been constructed at Aiken's Village under the Parent Permission, all of which are located in Sectors 1 and 2. 121 of the units permitted by the Parent Permission have not been constructed. There remains 263 residential units to be constructed as part of Sectors 1 and 3 according to the terms of the Parent Permission as amended by the Amendment Permission. This consists, *inter alia*, of 1 apartment block consisting of 20 residential units in Sector 1, permitted under the Parent Permission, and 243 residential units in Sector 3 permitted under the Amendment Permission.
10. On 6 December 2021, an application for an extension of duration of the appropriate period of the Parent Permission ("**the Application**") was lodged by Ironborn with the Council pursuant to section 42 of the 2000 Act. The Application related to 263 residential units, *i.e.* the total number of remaining units as permitted by the Parent Permission as amended by the Amendment Permission. Nonetheless, on the same day, an application for an extension of the duration of the appropriate period of the Amendment Permission was also lodged with the Council. That application related to the 243 residential units permitted in Sector 3 of the Parent Permission. These proceedings are concerned solely with the first application. No issue was or is taken by the Council regarding the fact that the application to extend the Parent Permission seems to have been made by reference to the Parent Permission *as amended*. The Court was told that the Council has delayed a decision on the second application pending the determination of these proceedings.
11. The Application was accompanied by a Report from Stephen Little & Associates which included a section on environmental impact assessment. The Report noted that as there were only 263 units remaining to be constructed on a site of 3.2 hectares, an EIA was not mandatory. The Report concluded that the requirement for an EIA could be screened out and invited the Council to concur.

12. The Application was also accompanied by an AA Screening Report prepared by Scott Cawley. This detailed Report concluded that the requirement for an AA could be screened out.
13. The Council issued a request for further information on 4 February 2022 which asked Ironborn to address two issues:
 1. *Given that [the Parent Permission] exceeds the threshold set in Item 10(b)(IV) of Part 2 of Schedule 5 of the Planning Regulations, and for which an Environmental Impact Statement was submitted, it is considered that extending the appropriate period would appear to be contrary to s. 42(8) of the Planning and Development Act 2000 (as amended). The applicant is invited to respond to this matter.*
 2. *The applicant has failed to address fully Section 42(1)(a)(IV) of the Act which requires the Planning Authority to be “satisfied that .. the development will be completed within a reasonable time”. While it is acknowledged that the development could be completed within the additional 5 year period sought, this is not sufficient to allow the planning authority to come to a positive conclusion on this matter. The applicant is requested to provide clarity around the intent or otherwise to implement the permission that is subject to this request for Extension of Duration, including reference to the recent planning history on this site.*
14. Stephen Little & Associates responded on behalf of Ironborn on 3 March 2022. They disputed the Council’s interpretation of section 42(8) and contended that the *“assessment carried out as part of an Extension of Duration (EoD) relates only to **the balance** of the development (i.e. the remaining unimplemented parts of the development).”* The Report also included further detail on why an EIA was not required for the balance of the development.
15. The response also included details regarding the proposed completion of the development. The response referenced that planning permission for a strategic housing development (SHD) had been granted in 2021 relating to the same lands as the remaining portion of the Parent Permission but that the SHD permission was subject to pending judicial review proceedings. It also referred to a further planning application for the same lands being the subject of a pre-application consultation and which it expected would be submitted that year. It concluded that in those circumstances,

Ironborn *‘considers it prudent to extend the duration of the extant permission on the subject site to retain the potential to have an implementable planning permission.’*

16. The Council’s decision to refuse the Application, dated 16 September 2022 was based on a Planner’s Report dated the same day and contained two reasons for refusal as follows:
 1. *Given that Reg Ref D10A/0044 (ABP Ref PL06D.239332) exceeds the threshold set in Item 10(b)(iv) of Part 2 of Schedule 5 of the Planning and Development Regulations 2001 – 2022, and therefore, exceeds the threshold above which a development is likely to have significant effects on the environment, thus requiring the preparation of an Environmental Impact Statement, it is considered that extending the appropriate period is contrary to s. 42(8) of the Planning and Development Act 2000 (as amended).*
 2. *The Planning Authority is not satisfied that the permitted development will be completed within a reasonable time. Therefore, the criteria set by Clause IV of section 42(1)(a) is not considered to be met.*
17. As appears from the Planner’s Report, the Council was satisfied that all other statutory criteria were met.
18. Ironborn obtained leave to bring these proceedings by Order dated 12 December 2022 (Holland J) and the matter was heard by me on 6 and 7 July 2023.

The Issues

19. There are two main issues in dispute:
 - i. Did the Council err in its interpretation and application of section 42(8) of the 2000 Act?
 - ii. Did the Council err in its interpretation and application of section 42(1)(a)(i)(IV) of the 2000 Act (“**the Clause IV requirement**”)?
20. In respect of the first issue, the parties’ positions in the proceedings are broadly consistent with their positions on the application itself. Ironborn says that section 42(8) only precludes an extension where an EIA or AA would be required for the works

remaining to be completed on foot of the planning permission sought to be extended. The Council interprets the section as precluding an extension whenever an EIA or AA would be required for the entire development the subject of the planning permission.

21. With regard to the second issue, Ironborn claims that the Council has interpreted the Clause IV requirement in an unduly restrictive manner. The clause requires that a planning authority be satisfied that the development will be completed within a reasonable time. Ironborn says that it is only necessary to show that the development is readily capable of being completed within a reasonable time, which it argues it had shown, but that the Council erred in imposing a requirement that it be satisfied that the works will *actually* be completed within that time, a threshold which Ironborn says would be virtually impossible to satisfy given the inherent uncertainties in carrying out any development. The Council, for its part, argues that it is necessary that an applicant for an extension at least satisfy the planning authority of its *intention* to complete the development within a reasonable time. Both parties seem agreed that the five-year extension sought by Ironborn was “a reasonable time” for the purpose of this section.
22. There are subsidiary issues. Ironborn raises a point to the effect that the Council failed to give adequate reasons for rejecting its submission regarding the proper interpretation of section 42(8). A query also arises as to whether the conclusion of the Council that it was not satisfied that the development would be completed within a reasonable time can only be successfully challenged if shown to be irrational.
23. A final issue arises only if the Court concludes that the Council erred in its interpretation and application of section 42(8), but not the Clause IV requirement. Ironborn accepts that if the Council’s interpretation of section 42(8) is correct, then there are no circumstances in which it could obtain the extension sought and accordingly it would be futile to quash the Council’s decision. However, it argues that if the Council has erred in its interpretation of section 42(8), that error taints the entire decision such that it should be quashed. The Council argues that if its interpretation and application of the Clause IV requirement is correct, then its decision on that point should stand and constitutes sufficient grounds to refuse the extension. Therefore, it argues that even if it erred in its interpretation of section 42(8), *certiorari* should be refused.

24. The two main issues therefore give rise to questions of the proper approach to statutory interpretation. The parties are agreed section 42(8) is a statutory provision intended to give effect to the requirements of EU law. This was confirmed in the recent decision of the High Court, **Barford Holdings Limited v Fingal County Council (No.2) [2023] IEHC 161** (at para. 24). Accordingly, the parties also accept that in accordance with the principles identified in **Case C-106/89, Marleasing, ECLI:EU:C:1990:395**, the provision must be interpreted to the fullest extent possible in accordance with the requirements of EU law. In fact, as discussed below, having regard to the manner in which the EU law obligations have been transposed in this case, the interpretative obligation may go further than that.
25. Before addressing the issues raised in detail, it may be helpful to consider the legislative history and the requirements of EU law which section 42(8) seeks to address.

Section 42 of the 2000 Act

26. Section 42 of the 2000 Act as originally enacted made no reference to either the EIA or Habitats Directives. As made clear in **McDowell v Roscommon County Council [2004] IEHC 396**, once the criteria set out in subsection (1) were satisfied, the relevant planning authority was obliged to grant the extension.
27. Reference to the EIA and Habitats Directives were first introduced into Section 42 by amendments made in the Planning and Development (Amendment) Act 2010. Section 28 of that Act substituted a new Section 42 into the 2000 Act. The substituted section 42 provided two alternative bases for the grant of an extension of duration. It could be obtained either where substantial works had been completed pursuant to the permission (as provided for in the original section 42), or where there were considerations of a commercial, economic, or technical nature beyond the control of the applicant which had prevented the development being carried out or completed. In respect of this second basis for an extension, a planning authority was required to be satisfied that “*where the development has not commenced, that an environmental impact assessment or an appropriate assessment or both of those assessments, if required, was or were carried out before the permission was granted.*” Thus, a planning permission could only be extended on the basis of this ground where the planning authority was satisfied that any

necessary EIA or AA had been carried out before the planning permission was granted. As long as this had occurred, the permission could be extended.

28. A further amendment was made to section 42 by section 28(1)(a)(iii) of the Planning and Development (Housing) and Residential Tenancies Act 2016 (the “**2016 Act**”) by the inclusion of a new section 42(1)(aa). This amendment required a planning authority to be satisfied in respect of any application for an extension that “*an environmental impact assessment or an appropriate assessment or both of those assessments, were not required before the permission was granted.*” This provision was never commenced, but it is worth noting that it would have precluded an extension being granted in respect of any permission where EIA or AA had been required, even where that EIA or AA had been carried out. On the basis of this provision, a planning permission for which an EIA or AA had been required could never have been extended.
29. Section 28(1) of the 2016 Act was itself amended by section 57 of the Planning and Development (Amendment) Act 2018 (the “**2018 Act**”).
30. Included in the amendments provided for by section 57 of the 2018 Act was a requirement that the Planning Authority be satisfied that “*an environmental impact assessment or an appropriate assessment, or both of those assessments, was or were not required before the permission was granted*” (section 42(1)(a)(i)(II)). This, therefore, was to similar effect to section 42(1)(aa) introduced in the 2016 Act. The provision for an extension based on commercial, economic or technical reasons for non-implementation was not included in the amendments in the 2016 or 2018 Acts. Therefore, the only circumstances in which an extension could be sought were if substantial works had been carried out under a permission.
31. Section 28 of the 2016 Act, as substituted by section 57 of the 2018 Act, was commenced by the Planning and Development (Housing and Residential Tenancies) Act Commencement Order 2021 (S.I. 455 of 2021) with a commencement date of 9 September 2021.
32. However, at the same time, section 42 was further amended by the European Communities (Planning) (Habitats, Birds and Environmental Impact) (No. 2) Regulations 2021 (S.I. No. 456/2021) (the “**2021 Regulations**”) made pursuant to section 3 of the European Communities Act 1972. These provisions were also

commenced on 9 September 2021. In effect, the section introduced by the 2018 Act was replaced before it ever came into force.

33. The 2021 Regulations introduced the version of section 42(8) the subject of these proceedings. In this regard, it is important to note that this amendment to the 2000 Act, was effected by secondary legislation. The amendment of primary legislation by secondary legislation is permitted by section 3 of the European Communities Act 1972 where the amendment is necessitated by the State's membership of the European Union. The fact that the legislative provision was introduced pursuant to these powers has important consequences for the approach to its interpretation.
34. In addition to introducing the new section 42(8), the 2021 Regulations provided for the deletion of section 42(1)(a)(i)(II) (which had been inserted by section 28 of the 2016 Act, as substituted by section 57 of the 2018 Act).
35. In relevant part, therefore, the version of section 42 operative at the time of the application the subject of these proceedings reads as follows (with the provisions at issue in these proceedings highlighted):

(1) *On application to it in that behalf, but subject to sub-section (8), a Planning Authority shall, as regards a particular permission, extend the appropriate period by such additional period not exceeding 5 years as the Authority considers requisite to enable the development to which the permission relates to be completed provided that each of the following requirements is complied with:-*

(a)(i) *The Authority is satisfied that –*

(I) *The development to which the permission relates was commenced before the expiration of the appropriate period sought to be extended,*

(II) *....*

(III) *Substantial works were carried out pursuant to the permission during that period,*

(IV) The development will be completed within a reasonable time;

(b) *The application is in accordance with such regulations under this Act as apply to it;*

(c) *Any requirements of, or made under those regulations are complied with as regards the application; and*

(d) *The application is duly made prior to the end of the appropriate period.*

(8) A Planning Authority shall not extend the appropriate period under this section in relation to a permission if an Environmental Impact Assessment or an appropriate assessment would be required in relation to the proposed extension concerned.

36. There are obvious differences between section 42(8) and its precursors. Firstly, there is “would be required” instead of “was or were required.” In addition, there is a change in the focus of the enquiry to be made. In the earlier iterations, the focus is on whether EIA or AA was required “before permission was granted”; in the current version, it is on whether it would be required “in relation to the extension concerned.” The significance, if any, of those changes will be considered below.
37. It remains the case that once a planning authority is satisfied that the criteria in sub-section (1) are met, it “shall” grant the extension. However, that obligation is now subject to the exception in sub-section (8). Even if all the criteria in sub-section (1) are satisfied, the planning authority must refuse the extension if an EIA or AA “would be required in relation to the proposed extension concerned”. It is the meaning of that phrase which is at the heart of the dispute between the parties.
38. Why, one might query, the legislative indecision about the incorporation of requirements relating to EIA and AA into section 42? The explanation, at least in part, appears to lie in uncertainty regarding the question of whether an extension of the duration of a planning permission was a development consent for the purpose of certain EU Directives.

39. To explain, Directive 2011/92/EU as amended by Directive 2014/52/EU (“**the EIA Directive**”) requires member states to conduct an environmental impact assessment of certain projects before construction of the project can take place. Article 2(1) of the EIA Directive provides:

Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. Those projects are defined in Article 4.

40. ‘Development consent’ is defined as meaning “*the decision of the competent authority or authorities which entitles the developer to proceed with the project.*”

41. Accordingly, it is not permissible to grant development consent for a project for which an environmental impact assessment may be required without first carrying out such an assessment or in the alternative screening out the necessity for such an assessment.

42. Article 6(3) of Directive 92/43/EEC (“**the Habitats Directive**”) has similar effect:

“3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.”

43. The Habitats Directive uses different terminology from the EIA Directive – “agree to the plan or project only after” as opposed to “before consent is given” – but the concepts are the same. Thus, the Habitats Directive also prohibits any project to which it applies from being granted permission to proceed without a prior appropriate assessment or, in the alternative, a decision that an appropriate assessment is not required.

44. The trigger for the obligations under both the EIA Directive and the Habitats Directive is an application for development consent. An application for planning permission is clearly an example of an application for development consent, potentially engaging the obligations under both Directives. A question arose, however, as to whether an application to extend the duration of a planning permission should also be regarded as a development consent for the purpose of those Directives. I should pause to clarify that although there are very significant differences between the EIA Directive and the Habitats Directive and how the protections afforded by each operate, for the purpose of these proceedings, they both share the same essential feature: they impose a requirement to carry out an assessment, or screen out the necessity for an assessment, before consent to carry out a development can be granted. It is not necessary to distinguish further between the requirements of the two Directives for the purpose of determining the issues in these proceedings.
45. As a matter of domestic law, the question of whether a decision under section 42 was a development consent for the purpose of the Directives appeared to have been definitively answered in the negative by the High Court (Barrett J) in **Merriman v Fingal County Council** [2017] IEHC 695. In **Merriman**, the Court concluded that the EIA Directive did not apply to a decision to grant an extension to the duration of a planning permission pursuant to the provisions of section 42 of the 2000 Act, *inter alia*, because a decision under section 42 was not a decision to grant development consent (see, paragraphs 150 to 190). Leave to appeal that decision was refused by both the High Court and the Supreme Court.
46. However, in light of subsequent developments in EU jurisprudence, and in particular an opinion delivered by the Advocate General in **Case C-411/17, Inter Environnement Wallonie**, ECLI:EU:C:2019:622 the High Court (Simons J) identified that that conclusion might not be consistent with the requirements of EU law and referred a number of questions to the CJEU pursuant to Article 267 of the TFEU in **Friends of the Irish Environment v An Bord Pleanála** [2019] IEHC 80.
47. The decision in **Case C-254/19** concerned the application of the Habitats Directive and did not involve a decision under section 42. It did, however, engage the same question that had been at issue in **Merriman**: is a decision to extend the duration of a permission

a decision to grant development consent such that the requirements of the EIA Directive and/or the Habitats Directive are engaged?

48. At issue in **Case C-254/19** was a decision by An Bord Pleanála to amend a condition of a planning permission for a liquified natural gas (LNG) plant. The condition in question provided that the permission at issue was “for a period of ten years from the date” of the order. As Simons J explained in the judgment, that meant that development had to be *constructed* within ten years, but it did not impose a temporal restriction on the *operation* of the development. The developer applied to amend the condition by substituting ‘fifteen’ for ‘ten’ in the condition, effectively extending the duration of the permission by five years.
49. The application was made pursuant to section 146B of the 2000 Act which allows for amendments of permissions in certain limited circumstances. The Board, in accordance with the procedures under section 146B decided that the amendment was a non-material amendment and therefore, as required by section 146B, amended the permission. Although the section 146B provision used by the Board did not impose any requirement to screen for EIA or AA, the High Court noted that the Board had completed what the Court described as an *ad hoc* screening procedure.
50. An issue arose as to whether it was permissible to seek to extend the duration of a permission by way of amendment of a condition rather than by an application pursuant to section 42. There were also significant factual differences to the present case: the planning permission in question had ceased to have effect at the time the Board made the decision to make the amendment and no works at all had taken place on foot of the permission at the time of the Board’s decision. It was also apparent that the appropriate assessment carried out prior to the original grant of permission was defective since it had been made pursuant to a statutory provision which was not compliant with EU law.
51. The case, however, also raised the question of whether the Habitats Directive applied to an application to extend a permission *at all* and, if so, what was the extent of the obligation, *i.e.* what had to be assessed. In this regard, as Simons J characterised the positions of the parties:

“More specifically, An Bord Pleanála maintains that the most that has to be screened or assessed are the changes, if any, in the regulatory background.

Thus, for example, it may be necessary to have regard to an expansion in the geographical area of a European Site in the interim. Conversely, the Applicant maintains that it is necessary to screen and assess the impacts of the entire project.”

52. The Court considered that these (and other) issues were not *acte clair* and therefore referred the following questions, relevant to these proceedings, to the CJEU for determination:

“(1). Does a decision to extend the duration of a development consent constitute the agreement of a project such as to trigger Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (hereinafter “the Habitats Directive”)?”

(3). In the event that the answer to Question (1) is “yes”, what considerations is the competent authority required to have regard to in carrying out a Stage 1 screening exercise pursuant to Article 6(3) of the Habitats Directive? For example, is the competent authority required to have regard to any or all of the following considerations: (i) whether there are any changes to the proposed works and use; (ii) whether there has been any change in the environmental background, e.g. in terms of the designation of European Sites subsequent to the date of the decision to grant development consent; (iii) whether there have been any relevant changes in scientific knowledge, e.g., more up-to-date surveys in respect of qualifying interests of European Sites? Alternatively, is the competent authority required to assess the environmental impacts of the entire development?”

53. The decision of the CJEU, **Case C-254/19, Friends of the Irish Environment, ECLI:EU:C:2020:680** was delivered in September 2020. In respect of the first question, the Court concluded that the decision to extend the period for carrying out the LNG plant development was an agreement of a project within the meaning of Article 6(3) and therefore the requirements of the Habitats Directive regarding appropriate assessment were engaged.

54. The Court summarised the third question as follows:

“49 By its third question, the referring court asks, in essence, to specify, if the answer to the first question referred is in the affirmative, the conditions for applying the requirement to carry out an appropriate assessment of the implications for the site concerned, laid down in the first sentence of Article 6(3) of the Habitats Directive, to a consent such as the consent at issue in the main proceedings. In particular, it seeks to know whether the competent authority is required to take into account any changes to the works as originally permitted and to the proposed use as well as change in the ‘environmental background’ and in scientific knowledge since the original consent was granted. The referring court also asks whether the competent authority must assess the effects of the entire project on the site.”

55. The Court’s answer to that question is set out at paragraphs 54 – 59 of its judgment. Given the centrality of the Court’s decision to both parties’ arguments, it is worth setting out those passages in full:

“56 It follows that it is for the competent authority to assess whether a consent such as the consent at issue in the main proceedings, which extends the period originally set in a first consent for carrying out a project for the construction of a liquefied natural gas regasification terminal, must be preceded by the appropriate assessment of its implications under the first sentence of Article 6(3) of the Habitats Directive and, if so, whether that assessment must relate to the entire project or part thereof, taking into account, inter alia, previous assessments that may have been carried out and changes in the relevant environmental and scientific data as well as changes to the project and the existence of other plans or projects.

57 In the present case, it follows from the order for reference that the project for the construction a liquefied natural gas regasification terminal was to be carried out in the vicinity of two protected sites and that the original consent was not preceded by an assessment containing complete, precise and definitive conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on those sites.

58 *It follows, first, that it cannot be ruled out that such a project might have a significant effect on those sites and, secondly, that such considerations, which is a matter for the national court to ascertain, are such as to require a consent such as the consent at issue in the main proceedings to be preceded by an appropriate assessment of its implications as required under Article 6(3) of the Habitats Directive. It also follows that such an assessment cannot be a simple update of the assessment that may have been carried out previously, but must consist of a full assessment of the implications of the entire project for those sites.*

59 *In the light of the foregoing considerations, the answer to the third question referred is that it is for the competent authority to assess whether a decision extending the period originally set for carrying out a project for the construction of a liquefied natural gas regasification terminal, the original consent for which has lapsed, must be preceded by an appropriate assessment of its implications under the first sentence of Article 6(3) of the Habitats Directive and, if so, whether that assessment must relate to the entire project or part thereof, taking into account, inter alia, previous assessments that may have been carried out and changes in the relevant environmental and scientific data as well as any changes to the project and the existence of other plans or projects. That assessment of a project's implications must be carried out where it cannot be ruled out, having regard to the best scientific knowledge in the field, that the plan or project might affect the conservation objectives of the site. A previous assessment of that project, carried out before the original consent for the project was granted, cannot rule out that risk unless it contains full, precise and definitive conclusions capable of removing all reasonable scientific doubt as to the effects of the works, and provided that there are no changes in the relevant environmental and scientific data, no changes to the project and no other plans or projects.”*

56. As noted above, in **Barford (No. 2)**, the High Court (Phelan J) confirmed that section 42(8) of the 2000 Act was introduced to address a lacuna in domestic law exposed by the judgment in **Case C-254/19**:

“24. My suspicion that s. 42(8) was enacted to address the findings of the CJEU in Case C254/19 FOIE v ABP was confirmed on behalf of the Attorney General. In that case, the CJEU had held, inter alia, that a decision to extend the period originally set for the construction of a development, for which works had not commenced, must be regarded as a “project” within the meaning of [the EIA Directive and the Habitats Directive.]”

57. The Court noted (at para 147) that the CJEU had confirmed that the position taken in **Merriman** was incorrect and (at para. 166) that “[i]nsofar as the unamended s. 42 did not require, or permit, screening and assessment under the Habitats Directive or the EIA Directive, it must therefore be considered to be non-compliant with EU law” and that “[b]y enacting s. 42(8), the legislative intention was to cure a gap in Irish law whereby EU obligations could be given effect to.”

Principles of Interpretation

58. Both parties rely on the recent decision of the Supreme Court in **Heather Hill Management Co. CLG v An Bord Pleanála** [2022] IESC 43, [2022] 2 ILRM 313 regarding the proper approach to the interpretation of statutory provisions. That case also involved the interpretation of a provision of the 2000 Act which gives effect to the requirements of EU law, section 50B. In a comprehensive judgment, Murray J reviewed the recent authorities on statutory interpretation, including **The People (DPP) v Brown** [2018] IESC 67, [2019] 2 IR 1 **Minister for Justice v Vilkas** [2018] IESC 69, [2020] 1 IR 676; **Dunnes Stores v The Revenue Commissioners** [2019] IESC 50, [2020] 3 IR 480; **Bookfinders Ltd v The Revenue Commissioners** [2020] IESC 60; and **The People (DPP) v AC** [2021] IESC 74, [2021] 2 ILRM 305. Murray J referred (at para. 106) to the judgment of McKechnie J in **Brown** as providing a good summary and said that the essential points he made were:

“(i) The first and most important port of call is the words of the statute itself, those words being given their ordinary and natural meaning (at paras. 92 and 93).

(ii) However, those words must be viewed in context; what this means will depend on the statute and the circumstances, but may include ‘the immediate context of the sentence within which the words are used; the other subsections

of the provision in question; other sections within the relevant Part of the Act; the Act as a whole; any legislative antecedents to the statute/the legislative history of the Act, including ... LRC or other - 63 - reports; and perhaps ... the mischief which the Act sought to remedy' (at para. 94).

(iii) In construing those words in that context, the court will be guided by the various canons, maxims, principles and rules of interpretation all of which will assist in elucidating the meaning to be attributed to the language (see para. 92).

(iv) If that exercise in interpreting the words (and this includes interpreting them in the light of that context) yields ambiguity, then the court will seek to discern the intended object of the Act and the reasons the statute was enacted (at para. 95)."

59. As noted by the Council in their submissions, he reiterated the first of these points in the conclusion of his judgment (at para. 214):

"The words of the section are the first port of call in its interpretation, and while the court must construe those words having regard to the context of the section, of the Act in which the section appears, the pre-existing relevant legal framework and the object of the legislation insofar as discernible, the onus is on those contending that a statutory provision does not have the effect suggested by the plain meaning of the words chosen by the legislature to establish this."

60. It should be borne in mind, however that the "first port of call" does not preclude consideration of context. Murray J notes (at para. 109) "[...] *the literal and purposive approaches to statutory interpretation are not hermetically sealed.*" And then at paragraph 124:

"But while the words of a statute are the first 'port of call' in the formal exercise in statutory interpretation, many judgments today (including this one) begin by putting the provision being construed in its place, and there is both good and obvious reason for that. Thus, to properly understand s. 50B it is necessary to at least take account of Article 10a/Article 11 and the decision in Commission v. Ireland. It is also – as I explain later – helpful to have regard to the approach adopted by the courts to the splitting of legal costs in judicial review

proceedings prior to the enactment of the legislation or for that matter the generally applicable rules governing the award of costs following ‘the event’. None of these are evident from ‘the Act as a whole’ if that phrase is construed narrowly, but I cannot see that they are properly excluded from considering whether, when viewed in that context, the legislation admits of more than one meaning even if, on its face, the words themselves seem at first glance to be clear. As I have earlier noted Woulfe J. in AC quoted with approval the view that ‘ambiguity’ for the purpose of the provision could arise where there was doubt as to the scope of the intended application of the provision (at para. 49).”

61. Section 5(1) of the Interpretation Act may also be relevant:

“In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—

(a) that is obscure or ambiguous

...

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole.”

62. Section 5(2) contains an equivalent rule in relation to the interpretation of obscure provisions in statutory instruments.

63. As noted above, there is, in this case, an important feature of the statutory provision which falls to be interpreted which was not in play in **Heather Hill** or any of the other above-mentioned cases. Section 42(8) was introduced to the 2000 Act by secondary legislation, *i.e.* secondary legislation was used to amend primary legislation. This could not have been done but for section 3 of the European Communities Act 1972 (“**the 1972 Act**”). The fact that the provision is one which owes its legal force to section 3 of the 1972 Act has particular consequences for its interpretation.

64. The circumstances in which EU law can be given effect to in domestic law by secondary legislation was the subject of discussion in the recent decision of the High Court (Simons J) in **Gerty and Anor v DPP and Ors** [2023] IEHC 409. In paragraphs 19

– 24 of the judgment, the Court reviewed the leading authorities on the entitlement of the Oireachtas to give effect to EU law through secondary legislation:

19. The Supreme Court in Meagher v. Minister for Agriculture [1994] 1 I.R. 329 held that these powers are constitutional by reference to what was then Article 29.4.5° of the Constitution of Ireland. See pp. 351–352 of the reported judgment as follows:

“The power to make regulations contained in section 3, subs. 1 of the Act of 1972 is exclusively confined to the making of regulations for one purpose, and one purpose only, that of enabling s. 2 of the Act to have full effect. Section 2 of the Act which provides for the application of the Community law and acts as binding on the State and as part of the domestic law subject to conditions laid down in the Treaty which, of course, include its primacy, is the major or fundamental obligation necessitated by membership of the Community. The power of regulation-making, therefore, contained in s. 3 is prima facie a power which is part of the necessary machinery which became a duty of the State upon its joining the Community and therefore necessitated by that membership.

The Court is satisfied that, having regard to the number of Community laws, acts done and measures adopted which either have to be facilitated in their direct application to the law of the State or have to be implemented by appropriate action into the law of the State, the obligation of membership would necessitate facilitating of these activities, in some instances, at least, and possibly in a great majority of 7 instances, by the making of ministerial regulation rather than legislation of the Oireachtas. The Court is accordingly satisfied that the power to make regulations in the form in which it is contained in s. 3, subs. 2 of the Act of 1972 is necessitated by the obligations of membership by the State of the Communities and now of the Union and is therefore by virtue of Article 29, s. 4, sub-ss. 3, 4 and 5 immune from constitutional challenge.”

20. *In its subsequent judgment in Maher v. Minister for Agriculture [2001] 2 I.R. 139, the Supreme Court reiterated that there are limits to the entitlement to make regulations under the European Communities Act 1972. In particular, if regulations went further than simply implementing details of principles or policies to be found in a European Directive or European Regulation, and instead determined such principles or policies, then such regulations would be ultra vires.*

21. *Fennelly J. summarised the findings in Meagher v. Minister for Agriculture [1994] 1 I.R. 329 as follows (at page 254 of his judgment in Maher):*

“Meagher v. Minister for Agriculture [1994] 1 I.R. 329 is clear authority for the proposition that, where a provision of Community law imposes obligations on the State, leaving no room (or perhaps no significant room) for choice, then Article 15.2.1° of the Constitution is not infringed by the use of ministerial regulation to implement it. Both the judgment of the court and that of Denham J. expressly preserve the force of that provision, as it has been interpreted, for cases where such an obligation does not exist. The ‘principles and policies’ test applies mutatis mutandis where the delegated legislation represents an exercise of a power or discretion arising from Community law secondary legislation. It applies with particular clarity to the case of directives where Article 249(EC) leaves the choice of forms and methods to the member states.”

22. *Keane C.J. stated in Maher v. Minister for Agriculture [2001] 2 I.R. 139, at pages 181 and 182 of the reported judgment, that it was “almost beyond argument” that the choice of a statutory instrument—rather than primary 8 legislation—as a vehicle for implementing the detailed rules required under EU legislation was not in any sense “necessitated” by the obligations of membership of what was then the European Community (now the European Union).*

23. *Keane C.J. went on to state, at page 183 of the reported judgment, that the “essential inquiry” must be as to whether the making of the impugned regulations was in breach of Article 15.2. This involved an application of the*

test in Cityview Press v. An Comhairle Oiliúna [1980] I.R. 381, treating the relevant EU legislation as the “parent legislation”:

“However, in applying that test to a case in which the regulation is made in purported exercise of the powers of the first respondent under s. 3 of the Act of 1972, it must be borne in mind that while the parent statute is the Act of 1972, the relevant principles and policies cannot be derived from that Act, having regard to the very general terms in which it is couched. In each case, it is necessary to look to the directive or regulation and, it may be, the treaties in order to reach a conclusion as to whether the statutory instrument does no more than fill in the details of principles and policies contained in the European Community or European Union legislation.”

65. Slightly different considerations arise here from those arising in **Meagher, Maher, and Gearty**. In this case, the Court is not concerned with whether there are sufficient principles and policies in the parent EU legislation to render the Regulations *intra vires*. No argument has been advanced that they are not. However, a necessary consequence of the fact that the provision at issue involves the amendment of primary legislation by secondary legislation is that the provision can only be *intra vires* to the extent that it gives effect to a requirement of EU law and is therefore necessitated by the State’s membership of the EU. This has the further consequence that the provision must be interpreted in a manner consistent with the requirements of EU law. Although member states are free to do *more* than is required by EU law, having regard to the manner of transposition in this case, section 42(8) must be interpreted as doing what is required by EU law, and amending section 42 to that extent, but it cannot, it seems to me, be interpreted as imposing restrictions or obligations in excess of the requirements of EU law.
66. In those circumstances, it seems to me that the interpretation of section 42(8) will require a consideration of what are the precise requirements of EU law to which it gives effect. Given the source of the obligations imposed in section 42(8), the manner of their introduction and that fact that they address, in any event, EU law concepts of environmental assessment, it is clear that the requirements of EU law will significantly

inform the correct interpretation of the provision. I propose, however, first to consider how section 42(8) can be interpreted applying domestic law canons of interpretation.

Discussion – Section 42(8)

i. Domestic law

67. The starting point for the interpretation of section 42(8) is, as the authorities make clear, the wording of the section itself:

A Planning Authority shall not extend the appropriate period under this section in relation to a permission if an Environmental Impact Assessment or an appropriate assessment would be required in relation to the proposed extension concerned.

68. Thus, the grant of an extension is precluded if an EIA “would be required in relation to the proposed extension concerned.” As the considerations are the same for AA and EIA, for convenience, I propose only to refer to EIA hereafter.
69. Although the parties each argue that their interpretation follows from the plain meaning of the words used in the statute, I think that it is fair to say that there is no straightforward interpretation of the provision. The parties understandably focus on the clause “the proposed extension concerned.” Ironborn says the plain, ordinary meaning of those words is that they require a planning authority to consider whether an EIA would be required for *the works remaining* to be completed and that an extension can be granted where those works do not require EIA. An immediate issue arises with that interpretation since there is no reference to ‘works’ or ‘development’ in section 42(8) at all.
70. The Council argues that the plain, ordinary meaning of the clause is that it refers to a proposed extension *of the appropriate period*. It follows, says the Council, that if it is the appropriate period for the entire permission which is being extended, then the question for a planning authority under section 42(8) is whether the entire development requires EIA.
71. The Council’s argument that ‘extension’ refers to ‘extension of the appropriate period’ seems to me to be correct. This follows from the nature of the application made under

section 42 – an application to extend the appropriate period. I also note that in section 42B(1B)(i) of the 2000 Act, which deals with modifications to section 42 arising out of the Covid-19 pandemic, that is the express terminology used: “the proposed extension *of the appropriate period.*”

72. Although I agree with the Council’s argument that ‘extension’ refers to an extension of the appropriate period, I do not agree that it follows that the question for a planning authority is whether the entire development the subject of the permission for which the appropriate period is to be extended would require an EIA. In fact, the Council’s interpretation of what ‘extension’ refers to highlights one of the difficulties of interpretation caused by the language used in the provision. An EIA is an assessment of the environmental effects of development for which authorisation is sought, not of the planning permission itself.
73. As the Council notes in its submissions, in **Highlands Residents Association v An Bord Pleanála [2020] IEHC 622**, the High Court (McDonald J) stated (at para. 44) that the words “*in relation to*”, in the absence of some indication to the contrary in the relevant statutory provision, are generally regarded as “wide words”. In this case, therefore, in order to maintain a coherent interpretation of section 42(8), “in relation to” the extension, can be taken to include “the development the subject of the extension”. While that allows for a better understanding of what section 42(8) relates to, it does not answer the question of whether an EIA would be required is referable to the entirety of the development the subject of the planning permission, or just the development still to take place.
74. Although not the focus of the dispute between the parties, it seems to me that a second difficulty in interpreting section 42(8) is in understanding what is meant by the words “would be required”. On one view, it makes no sense to refer to an EIA being ‘required’ for the extension concerned at all, in circumstances where there is no mechanism under the 2000 Act for requiring an EIA in an application for an extension. The phrasing here suggests that what is meant is not that an EIA is actually required, but rather that an EIA would notionally or hypothetically be required if at issue was a procedure where EIA could be required. In effect, what is imported by the phrase “would be required” is “were the threshold for requiring EIA is met.” In other words, as suggested by Ironborn

in its submissions, the clause imposes a requirement on a planning authority to ‘screen’ the application to determine whether an EIA would be required.

75. As noted above, an EIA is ‘required’ before development consent can be given. It is the application for development consent which determines what requires to be assessed for the purpose of determining, first, whether an EIA is required, and if so, for determining the scope of that assessment (see, **Fitzpatrick v An Bord Pleanála [2019] IESC 23**). Accordingly, in determining whether an EIA is ‘required’, it is necessary to consider what the decision the subject of the application will authorise. It is necessary, therefore, to understand the legal effects of an extension, or more accurately, the legal effects of the expiry of a planning permission which an extension seeks to avoid.
76. The starting point for this analysis is the concept of development and the requirement for planning permission in respect of same.
77. Section 3 of the 2000 Act defines development as consisting either of ‘works’ or a ‘material change of use’. Section 32 of the Act prohibits any person from carrying out development, except exempted development, other than in accordance with a permission granted under the Act. Unauthorised development is defined to include development carried out other than in accordance with a planning permission. Put simply, the carrying out of development in accordance with a valid permission is authorised development (although I note that term is not defined in the Act).
78. Section 40(1) of the 2000 Act sets out the legal effect of the expiry of a planning permission.

Subject to subsection (2), a permission granted under this Part or Part XXI, shall on the expiration of the appropriate period (but without prejudice to the validity of anything done pursuant thereto prior to the expiration of that period) cease to have effect as regards—

(a) in case the development to which the permission relates is not commenced during that period, the entire development, and

(b) in case the development is commenced during that period, so much of the development as is not completed within that period.

79. Of particular importance is section 40(1)(b). The effect of this section is that on the expiry of an appropriate period, the planning permission ceases to have effect as regards the portion of a development which is not completed. However, the planning permission does not cease to have effect as regards any works carried out on foot of the permission *before it expired*. What does this mean? It means that, in general terms, those works shall be regarded as ‘authorised development’ and therefore do not constitute development in respect of which any further permission is required. The expiry of a planning permission does not render unauthorised works already authorised by the permission which were completed before the expiry of that permission. Consequently, an extension of a permission has no legal effect in relation to the ‘planning status’ of already completed works.
80. In its decision to refuse the extension, the Council refers to the decision in **Horne v Freaney**, unreported, High Court (Murphy J), 7 July 1982, to the effect that a planning permission is not ‘severable’ and it refers to Condition 1 of the Parent Permission which, as is common with planning permissions, requires that that planning permission shall be carried out in accordance with the plans and particulars lodged. The Council argues that this mean that any assessment for the purpose of an extension application must relate to the entire development. The Council does not contend, however, that the works already carried out on foot of the Parent Permission are unauthorised or require further authorisation.
81. It seems to me that **Horne v Freaney** was directed to an issue entirely different from that which arises in these proceedings and the Council’s reliance on same was misconceived. That case involved an application for an injunction to restrain development being carried out other than in accordance with the relevant planning permission. The respondent accepted that he had departed from the relevant permission, but only by incorporating, during construction, changes to the development which would otherwise be exempted. He argued that it would be absurd to require him to carry out the development as permitted when he could then change it without permission thereafter, but not permit him to simply incorporate the changes when carrying out the development. It was in those unusual circumstances that the Court stated (at p. 5):

“Whilst I see the force of that argument I take the view that if Planning Permission is indivisible: that it authorises the carrying out of the totality of the works for which approval has been granted and not some of them only. A developer cannot at his election implement a part only of the approved plans as no approval is given for the part as distinct from the whole.”

82. Importantly, **Horne v Freaney** was decided prior to the introduction of the statutory provisions which are now contained in section 40 of the 2000 Act regarding the limit of duration of planning permissions. The significance of legislative changes introduced in the Local Government (Planning and Development) Act 1982 (“**the 1982 Act**”) was recognised by the High Court (Carroll J) in **Dwyer Nolan Developments Ltd v Dublin County Council** [1986] IR 130 (at pp. 138-139):

“Severance of planning permission by operation of law due to lapse of time can now occur by virtue of s. 2 of the Local Government (Planning and Development) Act, 1982, which provides that a permission under Part IV ceases to have effect after the expiration of the appropriate period laid down by the Act but without prejudice to the validity of anything done pursuant thereto prior to the expiration of that period. There is an exception in s. 2, sub-s. 2 (a) (v), in the case of a development comprising a number of buildings of which only some have been completed, in relation to the provision of road services and open spaces included in the relevant permission and which are necessary and ancillary to such completed buildings. The permission does not lapse in respect of those.

Similarly I am of opinion that severance of planning permission of an overall building scheme can take place within the limits I have indicated with the effect that the development which has been carried out is authorised. But I am not prepared to hold that the developer can draw on any other existing permission to complete the unfinished scheme. The developer must apply for further planning permission in respect of the completion incorporating, either directly or by implication, the partial development which has already taken place.”

83. The learned judge might well have added that the developer could, instead of seeking further planning permission, apply to extend a permission which is about to expire since

a provision allowing for such an application had also been introduced by the 1982 Act. But, in any event, it is clear that whatever about the legal effect of a developer deciding not to complete a development in accordance with the terms of the permission by omitting elements, or incorporating new or different elements, *i.e.* seeking to ‘self-sever’ certain elements of the permission, ‘severance’ by operation of law can occur and does not have the effect of rendering the completed portion of a development unauthorised.

84. Section 2 of the 1982 Act is now mirrored in section 40 of the 2000 Act and those provisions also address, at least in part, the risk of a developer ‘picking and choosing’ which elements of a development to construct, simply constructing so much of a development as is convenient to it, *i.e.* the profitable portions of a development, but omitting those intended for the benefit of the development. Section 40(2) provides that, notwithstanding the expiry of the appropriate period, a planning permission does not cease to have effect:

(iii) in the case of a house, shop, office or other building which itself has been completed, in relation to the provision of any structure or works included in the relevant permission and which are either necessary for or ancillary or incidental to the use of the building in accordance with that permission, or

(iv) in the case of a development comprising a number of buildings of which only some have been completed, in relation to the provision of roads, services and open spaces included in the relevant permission and which are necessary for or ancillary or incidental to the completed buildings.

85. Accordingly, an application for an extension of the appropriate period must be understood as an application to extend the time for a which a planning permission continues to have effect so that the uncompleted development can be lawfully completed. The extension authorises the completion of works still to be done, not the works which have already been completed. This, of course, is consistent with the understanding that the grant of an extension of the duration of a permission is a development consent for the purpose of the EIA and Habitats Directives.
86. If the application for an extension is understood as an application to authorise the remaining works still to be completed under the planning permission, then section 42(8)

can readily be interpreted as precluding an extension to a permission where an EIA would be required for the remaining works still to be completed under the planning permission. In other words, the planning authority must screen the remaining proposed development to determine whether an EIA would be required for that remaining development.

87. This interpretation is consistent with the overall statutory scheme. The alternative to seeking an extension of a permission is to apply for a new planning permission for the uncompleted portion of the previously permitted development, as suggested by Carroll J in **Dwyer Nolan**. In such an application, it is obvious that it is only the proposed development the subject of that new application which would be subject to screening and/or assessment, albeit cumulatively or in combination with the development carried out on foot of the expired permission. It is difficult to see why screening required for the purpose of section 42(8) need have a different, wider scope.
88. In my view, this interpretation is also consistent with the legislative history. In the earlier statutory provisions imposing restrictions on the grant of an extension by reference to the requirement for EIA, the language used made clear that it was a requirement for EIA of the development of the relevant planning permission. Section 42(8), which references EIA in relation to *the extension*, and, moreover, is a requirement which is referable to the position as at the date of the application, rather than as it was when the initial application was made. This clearly has a different focus to those earlier provisions. Notwithstanding that change in focus, the Council, in effect, argues that the clause has the same effect, precluding an extension where the entire development requires EIA. This appears to me to ignore the change in legislative language.
89. In the circumstances, unless it could be shown that EU law requires such an interpretation, I would reject the argument that section 42(8) precludes a planning authority granting an extension whenever the overall development the subject of the planning permission in respect of which the extension is sought would require an EIA or AA. As explained below, the amendment introduced by the 2021 appears to me to better reflect the requirements of EU law identified in **Case C-254/19**.

90. Ironborn argues that the preclusion only arises where the works remaining to be completed either meet the mandatory threshold for EIA or where screening of those works determine that EIA or AA would be required. In many cases, I think that this will be correct. However, as referenced above, a planning permission authorises not just the construction of a development but also the operation of a development. There may, therefore, be situations where the fact that development already completed comes into operation at a later time than would have been the case if all development were completed within the appropriate period may give rise to different environmental effects. It will also, of course, be necessary to consider the development still to be completed cumulatively or in combination with other permitted or existing development, including the development already completed on foot of the planning permission to be extended.
91. Although neither party sought to rely on section 5 of the Interpretation Act 2005, it could be argued that the provision is ‘obscure’ such that regard can be had to the legislative intention insofar as that can be determined. As it happens, this is an instance in which the legislative intention has already been identified in **Barford (2)**, to address a lacuna in the law exposed by the decision in **Case C-254/19**. Thus, the application of section 5 requires a consideration of the requirements of EU law which it was intended that section 42(8) would address to which, in any event, it was necessary to turn next.

ii. Requirements of EU law

92. The parties agree that the decision in **Case C-254/19** identifies the relevant obligations in EU law which section 42(8) was intended to address. However, they disagree on how the decision of the CJEU in that case should be understood.
93. The Council places emphasis on the last line in para. 58 of the judgment, already quoted above:

“It also follows that such an assessment cannot be a simple update of the assessment that may have been carried out previously, but must consist of a full assessment of the implications of the entire project for those sites.”

*my emphasis added

94. The Council argues that this makes clear that when carrying out an assessment (or screening) for the purpose of an extension application, it is the entire project which must be the subject of that assessment, including the parts of the project or development which have already been completed. With respect, that is to read that sentence divorced from its context.
95. Firstly, and most obviously, the development the subject of those proceedings had not been commenced. Therefore, any assessment which could have been required in relation to that development *necessarily* was required to be of the entire project. It is clear, in any event, from paragraph 57 that the statements made in paragraphs 57 and 58 are referable to the particular case before the Court; it starts “[i]n the present case”.
96. Secondly, the judgment contemplates in *express* terms that when carrying out an assessment for the purpose of authorising the extension of the duration of a permission, that assessment might be required of part of a project only. At paragraph 56, the Court states that it is for the competent authority (the relevant decision-maker) to determine whether an appropriate assessment is required, “*and, if so, whether that assessment must relate to the entire project or part thereof.*” Put otherwise, the assessment required can be calibrated by reference to the circumstances sought.
97. The Court concludes that it is only permissible to rely on earlier assessments to the extent that there have been no changes since those earlier assessments. Where there have been changes, in the project or the surrounding environment, then *those changes* need to be assessed. Put otherwise, it is necessary to conduct a fresh assessment of any environmental impact which has not already been assessed. In practical terms, that will include any environmental impacts which will occur outside the period for which the original authorisation was in place.
98. In my view, Case C-254/19 identifies, *inter alia*, the following requirements of EU law:
- i. A decision to extend the duration of a planning permission is an agreement within the meaning of Article 6(3) of the Habitats Directive and may therefore trigger a requirement for an appropriate assessment;

- ii. It follows that it must also be regarded as a development consent for the purpose of the EIA Directive which may trigger a requirement for an environmental impact assessment;
 - iii. In deciding whether an assessment is required, it is necessary to consider whether the extension gives rise to any environmental impacts which had not been assessed prior to the original authorisation of the project having regard to any changes which have occurred since the consent was initially granted.
 - iv. Similarly, any assessment required must be of the environmental impacts different from those assessed at the time of the original authorisation.
99. There is nothing, in my view, in the Case C-254/19 judgment which prohibits the extension of a planning permission where the overall development the subject of the permission triggers a requirement for EIA or AA, which is the necessary implication of the Council's interpretation of section 42(8). Nor is there anything in Case C-254/19 which suggests that in deciding whether an EIA or AA is required, a planning authority must consider the environmental effects not only of the development which its decision will permit to take place, but also of development which has already been authorised and completed.
100. This is entirely consistent with the provisions of the EIA and Habitats Directives: both require *prior* assessment and authorisation of projects to which they apply. Apart from the exceptional cases where retrospective consent may be required, the subject of detailed procedural rules in Part XA of the 2000 Act, the Directives are not concerned with the assessment of the environmental effects of projects which have already been carried out. There is no reason in principle, therefore, why a determination of whether an EIA or AA is required for development yet to take place should be determined by reference to development which has already been assessed, has been authorised, and has been completed.
101. Neither the EIA nor the Habitats Directive imposes a requirement that a development consent have a temporal limitation, and therefore there is nothing in either Directive directed to the question of how a change to the time within which a project will be

completed should be assessed. There are, however, provisions in the EIA Directive which indicate how a *change or extension* to a project should be assessed.

102. Annex I lists those projects for which an EIA is mandatory. Annex II lists the type of projects which must, at least, be screened for EIA. Annex II includes, at 13(a), the following:

Any change or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment (change or extension not included in Annex I)

103. In other words, a project for which an EIA is mandatory or has been ‘screened in’ can be changed or extended without requiring a further EIA, if the change or extension will not have significant adverse effects on the environment. The screening required for such a change or extension is, therefore, focussed exclusively on the environmental impacts of the change or extension, not of the overall project. I can see no reason in principle why the focus of an assessment where a project is changed or extended physically is on the change or extension, but where the change is to a temporal limitation regarding the date by which the project must be completed, the entire project must in all cases be considered afresh.

Conclusion on section 42(8)

104. My conclusion as to the proper interpretation of section 42(8) by reference to domestic law principles of interpretation is thus consistent with my conclusion as to the requirements of EU law. Therefore, the interpretation which I have given to section 42(8) is the interpretation which gives effect to EU law to the fullest extent possible. Moreover, it is the interpretation which gives effect to the intention of the legislature since it is clear, per **Barford (2)** that the intention was to address the consequences of the decision in **Case C-254/19**. The preclusion on extensions contained in section 42(8) allows for the calibration of the assessment obligation by reference to the extent of the development for which the extension is required, as envisaged by **Case C-254/19**, which the earlier versions did not.

105. As noted, given the manner of transposition of the requirements of EU law identified in Case C-254/19, it was not permissible to construe section 42(8) as imposing requirements which are not necessitated by EU law. On one view, section 42(8) is more restrictive than EU law requires, since it prohibits the grant of an extension where an EIA or AA is required, whereas EU law merely requires that there be a prior assessment before any such extension can be granted. However, that is to focus solely on the provisions of section 42. The 2000 Act already permits the authorisation of uncompleted works from an expired permission where those works require EIA or AA; it merely requires the making of a new planning application.
106. It follows from the above that, in my view, the Council has erred in its interpretation of section 42(8). The assessment required for the purpose of that section is not required to be conducted by reference to the whole of the development the subject matter of the original grant of permission, but rather by reference only to the environmental effects of the development yet to take place which the decision to extend has the potential to authorise together with any additional environmental effects to which the change in completion date may give rise.
107. Since I have concluded that the Council was in error in relation to its conclusion under section 42(8), it is not necessary for me to consider Ironborn's subsidiary argument that the Council failed to give reasons for rejecting its submissions on the proper interpretation of that section. I would, however, observe that if a decision-maker correctly interprets and applies the law and thus, necessarily, rejects an argument based on an incorrect interpretation of the law, it is difficult to see how there could be an onus on that decision-maker for providing reasons for so doing, still less for quashing its decision by reason of a failure so to do.
108. Before addressing the consequences of the conclusion that the Council has erred in relation to section 42(8), it is necessary to consider the other main issue, the interpretation and application of section 42(1)(a)(i)(IV).

Discussion – the Clause IV requirement

109. The interpretation of the Clause IV requirement is more straightforward than that of section 42(8).

110. Ironborn argues that its application made clear that the development was *capable* of being completed within the additional five-year period it sought, and that this was a ‘reasonable time’ within the meaning of the sub-section. In circumstances where these matters were not disputed by the Council, Ironborn argues that the Council was obliged to conclude that Ironborn had satisfied the Clause IV requirement. The Council argues, in effect, that the evidence was that the extension of the permission was a potential fall back option for Ironborn. In circumstances where it was not clear that Ironborn even *intended* to complete the development, it could not be satisfied that the development would be completed and was entitled to reject the application on that ground.
111. In large part, the difference between the parties rests on how to read the words ‘will be completed’ in the sub-section. Ironborn does not go so far as to argue that this must, in context, be read as “can be completed”. Rather it seems to suggest that the Council would have to be satisfied that the development *will not be* completed within a reasonable time in order to determine that this criterion was not satisfied. However characterised, it seems to me that Ironborn’s interpretation is not faithful to a plain reading of the text. Nor do I think the context suggests that Ironborn’s interpretation is correct. Importantly, it is an interpretation which has already been rejected by the High Court in an analysis which I gratefully adopt.
112. In **Lackagh Quarries Ltd v Galway County Council** [2010] IEHC 479, the High Court (Irvine J, as she then was) was asked to review a decision of the respondent to refuse an extension to a planning permission for a quarry. The permission contained a condition that quarrying would have to cease after ten years. The application for the extension had been refused on the grounds, *inter alia*, that the Council was not satisfied that the quarry would be exhausted within a reasonable time. The Court accepted on the evidence that the reference to ‘exhausted’ was intended to refer only to exhaustion of the reserves the subject of the permission.
113. The applicant in that case advanced a similar argument to that advanced here, that the question was whether the works permitted by the permission were capable of being completed within a reasonable time. The Court rejected that argument:

“86. I am firstly satisfied that, in applying s. 42(1)(c)(iii) to a planning permission concerning quarrying activity, the test is not that outlined by the

applicant in the written submissions, namely whether the works permitted by the original planning permission “were capable of being carried out within a reasonable period”. In this regard, the section is clear. The onus is on the applicant to satisfy the planning authority that the development “will be completed within a reasonable time”. It is not a theoretical question permitting of an aspirational answer. If this was the case it would be difficult to envisage circumstances in which any application for an extension might be rejected.”

114. The learned judge went on to conclude that the Council’s decision was only reviewable on grounds of irrationality (see para. 95), referencing **O’Keeffe v An Bord Pleanála [1993] 1 IR 39**.
115. There is nothing, in my view, in the context in which the words “will be completed” are used in the subsection which suggests an alternative meaning was intended, nor do I think that there is anything absurd about that interpretation. Although it is not entirely clear what the purpose of provision is, and it can be noted that the factors in section 42(1) taken together do not make up a coherent ‘whole’ – it is not clear, for instance, why there should be a requirement to establish that the development has commenced *and* a separate requirement to establish that the substantial works have been completed in accordance with the terms of the permission – in broad terms, the intention seems to be to afford a more administratively convenient mechanism for completing developments which have already been through the planning process, the completion of which is not likely to give rise to significant new planning considerations. In those circumstances, there is nothing absurd about limiting the availability of an extension to cases where the planning authority considers that the grant of an extension will, in fact, lead to the development being completed.
116. Nor do I think that the provision so interpreted sets an impossible threshold, as suggested by Ironborn. It merely requires that the Council be satisfied that the development will be completed. It does not require the Council to be certain, or satisfied beyond a reasonable doubt, that it will be completed. In this case, the Council decided the question by reference to whether there was an intention on the part of the developer to complete the development. In the absence of evidence of such an intention, the Council said that it was not satisfied that the development would be completed. The clear inference is that if the Council *had* been satisfied that the developer intended to

complete the development, then, in circumstances where it agreed that the development could be completed within the time sought, it would have concluded that this requirement was met. I think that this was an entirely reasonable approach for it to take.

117. In circumstances where I have concluded that the Council correctly interpreted the requirements of the section, it follows that I also agree with Irvine J that the Council's conclusion is only reviewable for irrationality.
118. On the evidence before the Council, it was entitled to conclude that it was not satisfied that the development would be completed within a reasonable time. Objectively, Ironborn has the benefit of another planning permission which, if implemented, would prevent the development the subject of these proceedings being implemented. That permission is the subject of judicial review proceedings. Moreover, it has another planning application in train which, if granted and implemented, would also prevent this development being completed. Ironborn was invited to explain its intentions for this development in light of those other options. Its response, through Stephen Little & Associates, was as follows:

“As the outcome of the Judicial Review is not yet known and the current SHD Planning Applications is not yet determined our Client considers it prudent to extent [sic] the duration of the Extant Permission on the subject site to retain the potential to have an implementable planning permission.”

* my emphasis added

119. In light of that evidence, it was entirely reasonable for the Council to conclude that it was not satisfied that the development would be completed within a reasonable time. If anything, on the basis of the evidence, it would be surprising had it concluded otherwise. Its conclusion was not, it should be emphasised, equivalent to a conclusion that the development would not be completed. It seems clear that Ironborn wished to extend the permission in order to keep its options open pending obtaining certainty in relation to its other proposals. That is an entirely reasonable approach for it to want to take. However, it was not in the circumstances, unreasonable or irrational for the Council to conclude as it did, and I therefore reject this ground of challenge.

Consequences

120. In light of my conclusions on the two main issues, it is necessary to consider what are the consequences for the Council’s decision. Ironborn argues that the Council’s error in relation to section 42(8) is sufficient to undermine the lawfulness of its decision such that it should be quashed and remitted to the Council for a fresh determination. The Council asserts that its conclusion in relation to the Clause IV requirement was a stand-alone conclusion sufficient to ground its decision to refuse the extension. If that conclusion stands, then its decision to refuse should stand.
121. There are a number of decisions in which the Courts have considered the consequences of a finding that some but not all of the reasons for refusing a planning application were unlawful. In **Talbot v An Bord Pleanála [2009] 1 IR 375**, Kearns J (as he then was) delivered a dissenting judgment in a Supreme Court appeal in which the High Court (Peart J) had refused to grant leave to bring judicial review in a challenge to a refusal of permission for a one-off house, because it would be of no benefit to the applicant where certain grounds for the refusal of permission had not been challenged. Kearns J expressed the view that *certiorari* could not be granted where only one of the reasons for refusal was challenged. He held that where there was no challenge to the second reason for refusal the overall decision remained valid regardless of any challenge to the first reason, although he did acknowledge that there may be some grounds of challenge – such as bias – which might taint the entirety of a decision irrespective of the grounds challenged. The majority view, expressed by Fennelly J, was that the considerations relevant to the reason for refusal which were not challenged were not “in a watertight compartment” from those considerations relevant to the part of the decision which was challenged. In those circumstances, he was of the view that “*a judge is not entitled to presume in advance what the outcome of an application will be. That is exclusively a matter for the statutory bodies charged with those functions.*”
122. In **O’Flynn Capital Partners v Dun Laoghaire Rathdown County Council [2016] IEHC 480**, the High Court (Haughton J) took the same view as Fennelly J and rejected an argument that Kearns J’s judgment was authority for any general principle that it was necessary to successfully challenge all reasons given for a decision in order to obtain *certiorari*. He declined to refuse relief notwithstanding the fact that there were reasons for the impugned decision which were not challenged. He held:

244. *I am not persuaded by these submissions. The factual background to Talbot was very different. It concerned a single unit dwelling on its own rural site. As Fennelly J made clear, the court had not been addressed on the issue of whether the fact that one only of a number of reasons in a refusal of permission is invalid in law, the decision as a whole is necessary invalid, and he did not decide same. The decision of Kearns J is at best obiter on the point and an argument could be advanced that s. 50A(9) does not contain wording that would warrant the restrictive construction ascribed to it in his judgment.*

245. *Even if one were to accept the observations of Kearns J as correct, at para. 40 of his decision he expressly distinguishes cases such as bias or “failure to take into account a relevant consideration” where “these would all be reasons which would taint the overall decision”.*

246. *As I have found in this case that reasons (3) and (4) were prompted by improper motive, and that the respondent took into account irrelevant considerations, the invalidity of these reasons taints the overall decision.*

123. In **Murtagh v An Bord Pleanála [2023] IEHC 345**, the High Court (Owens J) refused *certiorari*, also in respect of a decision to refuse permission for a single, rural house, despite having concluded that the Board had erred in law in respect of one of its reasons for its decision. Having quoted from *Judicial Remedies in Public Law* (Lewis, 5th ed.), he stated as follows:

“76. There are some circumstances where this excision of the bad from the good is not possible. A court cannot rewrite a decision of an administrative body. The reasoning leading to a decision may involve cumulative reasoning which makes it impossible to sort out the bad from the good. In some cases, the decision maker may have a plurality of purposes, some bad and some good. An example of a decision which involved a plurality of purposes can be found in the judgment of Fennelly J. on behalf of the Supreme Court in Kennedy v. Law Society of Ireland (No.3) [2002] 2 I.R. 458 at pp. 486 to 489. Another example of a circumstance where excision of the bad from the good was not possible in the context of bye-laws is DPP v. Hutchinson [1990] 2 A.C. 783.

77. *However, where some of the reasons for a decision are invalid and a decisive standalone valid reason given by the decision-maker produces the same result, then that result does not depend on any invalid reasoning. The valid reason for the decision remains valid and disposes of the matter. In considering this appeal the Board came to its own conclusions on why permission for the proposed development should be refused. Inevitably, this consideration also involved taking a view on whether the approach taken by the planning authority to other issues was correct.*

78. *Para. 2 of the Board's decision was a stand-alone conclusion which did not depend on evaluation of any special status enjoyed by Louise Murtagh as an established resident of a "Strong Rural Area", or the status of the planning conditions imposed in the 2005 permissions. It was not part of a cumulative process of reasoning which led to a refusal of permission. It refused permission for the proposed development for other reasons which were dispositive.*

79. *The Board stated that the proposed development would be contrary to the proper planning and sustainable development of the area by reference to planning considerations identified in that paragraph. That remains the position, irrespective of invalidity of reasoning which underpins the conclusions at paras. 1 and 3. The Board arrived at separate conclusions on separate issues for separate reasons."*

124. I have set out the reasoning of Owens J in some detail because it appears to me that similar considerations arise here. It has not been argued that **Murtagh** was wrongly decided, nor do I think that it was. It seems to me to be consistent with the earlier jurisprudence.
125. The reason for refusal in respect of which I have rejected Ironborn's claim would have been dispositive of its application. I cannot see anything in the invalid reason which taints the valid reason. They are 'stand-alone' and were based on entirely separate considerations. Insofar as Fennelly J suggested that it is not for the Court to presume the outcome of an application, it must be noted that that was stated following his conclusions that the relevant considerations in that case were not in "watertight compartments". I entirely agree that the Court should not presume that the relevant

statutory authority's reasoning will remain the same on one issue where some aspect of its reasoning on another issue has been successfully impugned. But where the reasons are truly 'stand-alone', then different considerations arise. Where the 'valid' reason for refusal involves the exercise of a judgment call as to the outcome, as will often be the case in planning applications, there may be instances where it could not safely be presumed that the judgment on one issue would be exercised in the same way once a legal error on another issue is corrected. But in this case, once the Council had concluded that it was not satisfied that the development would be completed in a reasonable time, as it was more than entitled to do on the basis of the evidence in this case, it was required to refuse the application to extend.

126. Ironborn seeks to distinguish **Murtagh** and **Talbot** from this case on the basis that both involved one-off houses, but I do not see how that effects the principles involved. Ironborn also argues that the fact that certain reasons were not challenged in those cases is a basis for distinguishing this case where both reasons had been challenged. If anything, however, an unsuccessful challenge puts an applicant in a worse position in this regard. Finally, Ironborn argues that the question of the interpretation of section 42(8) of the 2000 Act is so fundamental to the jurisdiction which is being exercised by the Council that any error in respect of that issue is something which "*taints the overall decision*". Although, as appears from the above, the challenge on the basis of section 42(8) was more complex, there is nothing in the Council's factual or legal analysis in relation to that question which was relevant to, or considered by it, in its analysis of the Clause IV requirement. The fact that, in the Council's Planner's Report, the second issue was only considered "for completeness" does not suggest that the consideration of the second issue was tainted by the unlawful conclusion on the first.

Decision

127. In the circumstances, I will refuse to make the Order of *certiorari* sought. My provisional view is that I should simply dismiss the proceedings and, in light of the provisions of section 50B of the 2000 Act, make no Order as to costs.
128. If either side wishes to contend for a different form of Order than that proposed, they should notify the Registrar and a date can be fixed for a further hearing. In default of either party so doing, an Order will be perfected in the above terms 28 days after the

publication of this judgment in accordance with the provisions of Practice Direction 119, 25(41).