



# THE COURT OF APPEAL

Appeal Number: 2020/181

Whelan J.  
Noonan J.  
Binchy J.

Neutral Citation Number [2022] IECA 172

**BETWEEN/**

**CLONRES CLG**

**APPELLANT**

**- AND -**

**MINISTER FOR ARTS, HERITAGE AND THE GAELTEACHT  
AND  
IRELAND AND THE ATTORNEY GENERAL  
AND  
CREKAV TRADING GP LIMITED**

**RESPONDENTS**

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**JUDGMENT of Ms. Justice Máire Whelan delivered on the 28<sup>th</sup> day of July 2022**

**Introduction**

1. This is an appeal from the order of the High Court (Twomey J.) of 28 July 2020, perfected on 31 July 2020, following the delivery of a judgment on 16 July 2020, wherein the proceedings against the first, second and third respondents were struck out for failure to bring same within the time limits prescribed by O. 84, r. 21(1) of the Rules of the Superior Courts (“RSC”) Further, the reliefs sought by the appellant by notice of motion of 16 March 2020, including an order to extend time to seek judicial review and leave to amend the statement of claim, were refused and the proceedings against the fourth respondent were struck out. No order as to costs was made.

**Background**

2. The appellant is a limited company with objects which include the protection of the environment of Clontarf. It is comprised of Clontarf residents and was active for over 30 years as a residents’ organisation before being incorporated on 27 November 2006.

3. These proceedings concern lands at St. Paul’s, Sybil Hill, Clontarf, Dublin 3 which, it is claimed, are an important feeding ground for light bellied brent geese and black tailed

godwit. For that reason, the appellant is seeking, *inter alia*, to have the St. Paul's site designated as a special protection area ("SPA") for the purposes of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds ("the Birds Directive"). The appellant also seeks declarations that the Minister is required under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive") to take protective measures and under the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) ("the 2011 Regulations") to issue directions or notices requiring the fourth named respondent ("the Developer") to take protective measures.

4. In 2008 and 2009 the Minister published notices of intention to designate six sites in the locality of the St Paul's site as SPAs; namely, Malahide Estuary SPA, Rogerstown Estuary SPA, Skerries Islands SPA, South Dublin Bay and River Tolka SPA, Baldoyle Bay SPA and North Bull Island SPA - located approximately 1.2km from the St Paul's site.

5. In March 2015 the St. Paul's site was purchased by the fourth respondent (the Developer). On 22 December 2017 the Developer submitted an application to An Bord Pleanála for planning permission for a housing development on the St Paul's site comprised of 536 residential units. Permission was granted by An Bord Pleanála on 3 April 2018.

#### **The 2018 judicial review proceedings - the First Proceedings**

6. In May 2018 the appellant issued judicial review proceedings challenging the decision of An Bord Pleanála to grant planning permission to the Developer. The Minister and Ireland were named as respondents to those proceedings. The appellant sought an order for *certiorari* quashing the decision of An Bord Pleanála. In addition, it sought declarations that the Minister was under an obligation to designate the St. Paul's site as an SPA under the Birds Directive.

7. Leave to seek judicial review was granted to Clonres on 14 June 2018.
8. An Bord Pleanála conceded that there was an error on the face of the record at a hearing on 28 June 2018. In a judgment delivered on 31 July 2018 ([2018] IEHC 473), Barniville J. granted an order of *certiorari* and remitted the application to An Bord Pleanála on terms.

### **Correspondence of July and August 2018**

9. Prior to the conclusion of the first proceedings, by letter dated 18 July 2018, which is considered extensively hereafter, Clonres wrote to the Chief State Solicitor who was on record for the State parties, requiring confirmation within 7 days that the process for designation of the St. Paul's lands as a SPA under the Birds Directive would be actioned. The State parties did not accede to the demands in the said correspondence. The first proceedings were concluded on 31 July 2018 without any order being sought or obtained against the State parties and without any undertaking or agreement being given by the State parties in respect of the designation demands specified in the letter of 18 July 2018. Neither did Clonres intimate to the court that it was reserving its position against the State parties in respect of the claims being pursued against them in the first proceedings.

10. By letter dated 31 July 2018, following conclusion of the first proceedings the CSSO noted that the letter of 18 July 2018 had been "overtaken by events" as the judicial review proceedings had since concluded and "the claims against the State have fallen away." It stated:-

"...the State refutes any suggestion that there is a requirement to extend the area of the North Bull Island SPA and will fully defend any future proceedings which seek relief to this effect. The existing boundary of North Bull Island SPA encompasses the core areas used by the bird species by the inclusion of relevant wetland habitats.

These wetland habitats provide safe roosting and feeding resources for the birds. ...it is not appropriate to extend the designation to include non-wetland areas...because *inter alia* of the fact that there is temporal variation of usage of non-wetland areas by the birds, and the fact that same are not an integral part of the core habitat for the species.

For similar reasons, the State also refutes that suggestion that it would be appropriate to make orders under the EC (Birds and Natural Habitats) Regulations 2011 (as amended).”

**11.** On 7 August 2018, the appellant’s solicitors wrote directly to the Minister requesting her to issue an order pursuant to Regulations 28 and 29 of the 2011 Regulations requiring the Developer to cut the grass at the St Paul’s site. The said letter asserted that if no such order was issued by the Minister within 14 days, the appellant would issue proceedings pursuant to Article 4(3) of the Treaty on European Union (“TEU”) relating to a breach of the State’s duty to give effect to the Birds Directive and the Habitats Directive.

**12.** On the same date, the appellant’s solicitors also wrote to the CSSO, advising that if the Minister failed to take the requested action within 14 days, proceedings would issue pursuant to Article 4(3) TEU.

**13.** By letter dated 24 August 2018 from the CSSO on behalf of the Minister, the appellant’s requests of 7 August 2018 were refused. The Minister’s position, as set out in the letter of 31 July 2018, was reiterated:-

“The existing boundary of North Bull Island SPA encompasses all of the core areas used by the bird species by the inclusion of relevant wetland habitats. These wetland habitats provide safe roosting and feeding resources for the birds. The conservation status of light-bellied brent goose, black-tailed godwit and curlew are considered to

be favourable at this SPA.

There is no requirement under the Birds Directive to include as part of a SPA all and any lands which might be used on occasion as feeding grounds. This is especially so in the case of non-wetland habitats which might only be used on a temporary basis.”

It was stated that that there was no basis for issuing the requested directions under the 2011 Regulations:-

“The lands...do not form part of a designated European Site, and there is no activity being carried out on the lands which meets any of the criteria for the issuing of directions under either Regulation 28 or Regulation 29.”

It was reiterated that the State would fully defend any proceedings seeking reliefs similar to those sought in the 2018 judicial review proceedings.

The appellant did not respond to the letter of 24 August 2018. I conclude for the reasons set out in detail below that the said correspondence is of central importance in determining the central issue in this appeal.

#### **Other proceedings in relation to proposed development of St Paul’s lands**

**14.** On 10 September 2018 An Bord Pleanála made a decision to refuse the remitted planning permission application. The Developer brought proceedings challenging this decision in November 2018 and a judgment of Barniville J. was delivered on 31 July 2020 *Crekav v. An Bord Pleanala, Clonres & Ors. (Notice Parties)* [2020] IEHC 400, which held, *inter alia*, that Crekav was entitled to an order of *certiorari* quashing the said decision and granting certain declaratory reliefs as the reasons provided by the Board for refusing planning permission did not comply with the requirements as to reasoning set out by the Supreme Court in *Connelly v An Bord Pleanála 2018 IESC 31*.

**15.** The Developer made a fresh application for planning permission on 16 October 2019



and same was granted by an Bord Pleanála in February 2020. Two further judicial reviews were then issued, one by the appellant, and on 11 June 2020 a consent order of *certiorari* was made on the basis that an appropriate assessment had not been correctly carried out. The matter was remitted once more to An Bord Pleanála.

16. On 20 August 2020 an Bord Pleanála granted permission for 657 dwellings, a crèche and associated site works. Three judicial reviews were instituted in respect of that decision. On 7 May 2021 Humphreys J. delivered judgment in respect of two of these proceedings, one of which was brought by the appellant, and granted an order for *certiorari* ([2021] IEHC 303). There are various strands of litigation concerning various aspects of the proposed development between sundry parties before the courts.

#### **The instant plenary proceedings**

17. On 10 April 2019 the appellant issued a plenary summons, seeking *inter alia*:
- i. a declaration that the Minister is required to designate the St Paul's site as an SPA for the purposes of the Birds Directive and/or an injunction to compel her to do so;
  - ii. a declaration that the Minister is required pursuant to Article 4(4) of the Birds Directive to take protective measures to prevent disturbance to migratory birds at the St Paul's site and/or an injunction to compel her to do so;
  - iii. a declaration that the Minister is required to take protective measures pursuant to Article 6(2) of the Habitats Directive and/or an injunction compelling her to do so;
  - iv. a declaration that the Minister is required under the 2011 Regulations to issue a direction or notice to the Developer to take protective measures and maintain the lands at St Paul's to prevent disturbance to migratory birds;

- v. a mandatory injunction requiring the Developer to maintain the lands;
- vi. a mandatory injunction requiring the Minister herself to maintain the lands;
- vii. a declaration that the State has failed to adequately implement the Birds and Habitats Directives and a declaration that it is obliged to remedy that defect and ensure compliance with the Directives and/or an injunction compelling it to do so; and,
- viii. a declaration that the State is in breach of its obligations pursuant to Article 9(3) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (“the Aarhus Convention”).

***Application of the State parties***

**18.** By notice of motion dated 27 January 2020, the first, second and third respondents applied for *inter alia*:

- i. a declaration that the appellant’s claim against the State was subject by analogy to the requirements of O. 84 RSC;
- ii. an order dismissing or striking out the appellant’s proceedings against the State for failure to comply with the requirements of O. 84 RSC; and,
- iii. an order dismissing the proceedings pursuant to the rule in *Henderson v. Henderson* (1843) 3 Hare 100 on the basis that the reliefs sought could and should have been pursued in the 2018 judicial review proceedings.

***Application of the appellant***

**19.** By notice of motion dated 16 March 2020, the appellant sought *inter alia*:

- i. an order pursuant to O. 28, r. 1 RSC granting liberty to deliver an amended

plenary summons and statement of claim; and,

- ii. an order pursuant to O. 84, r. 21(3) RSC extending time within which to seek the reliefs sought.

### **Judgment of the High Court**

**20.** Given the extensive nature of the grounds of appeal and the criticisms of the High Court, it is necessary to consider the judgment in some detail. Following a 3-day hearing, judgment was delivered on 16 July 2020. At para. 30 the court noted that the State respondents had argued that since the proceedings involve public law issues, the time limit of three months “from the date when grounds for the application first arose” (*per* O. 84, r. 21(1) RSC) applied and the appellant had failed to comply with such. It had been argued that any challenge to the non-designation of the St Paul’s site as an SPA should have been taken within three months of the decision made in 2009/2010 to designate sites in the area of St Paul’s as SPAs. Alternatively, if time began to run from the August 2018 letter refusing to designate the St Paul’s site, the proceedings were out of time.

**21.** At para. 32 it was noted that the appellants had argued that the time limit in O. 84, r. 21(1) did not apply because it was not challenging either a decision allegedly taken in 2009/2010 or one allegedly taken in August 2018. The appellant claimed that there was no public law measure being challenged in these proceedings but, rather, that the Minister is under a continuing obligation to designate SPAs under the Birds Directive and so the appellant was not in breach of any time limit.

**22.** The trial judge noted at para. 33 that the appellant acknowledged that the proceedings involve public law issues. On that basis and on the authority of *O’Donnell v. Corporation of Dun Laoghaire* [1991] I.L.R.M. 301 and *Shell E & P Ireland Ltd. v. McGrath* [2013] IESC 1, [2013] 1 I.R. 247, the trial judge held that the time limits set out in O. 84, r. 21 did apply

to the proceedings, notwithstanding that they are plenary proceedings. Therefore, the court concluded, the proceedings ought to have been issued “within three months from the date when grounds for the application first arose” *per* O. 84, r. 21(1).

**23.** The court then turned to consider when grounds to seek relief first arose. The trial judge began by observing that, since the proceedings issued on 10 April 2019, the latest date by which the grounds for the proceedings must have arisen (based on a three-month time limit) was 10 January 2019:-

“...Yet, nowhere does Clonres state in its pleadings or in its submissions, the date of the decision, or the date of the omission to make a decision by a public body, that it is challenging in what are in essence judicial review proceedings.” (para. 35)

**24.** The court then considered what comprised “the decision” which the appellant was challenging in the proceedings. The trial judge noted that, even if the appellant did not accept that the specific decision of the Minister was the 2009/2010 decision or the decision in the letter of 24 August 2018, it was nonetheless clear that the appellant was challenging *a decision* (whether an act or omission) of the Minister not to designate the St. Paul’s site an SPA. This is because, he found, the declaratory/injunctive relief sought by the appellant presupposed that the Minister had unlawfully failed to take a decision to designate the site as an SPA.

**25.** The court then assessed whether the declaratory and injunctive reliefs sought by the appellant, which would require the Minister to designate the St. Paul’s site as an SPA, were in substance or effect an order of *mandamus*. Reference was made to para. 5-57 of Collins and O’Reilly, *Civil Proceedings and the State* (3<sup>rd</sup> ed., Round Hall, 2019):-

“An order of mandamus is a command to a public body to perform a legal duty of a public nature. For mandamus to issue, there must be a demand made of a public body

to perform such a duty and a refusal or failure on its part to act on foot thereof.”

Since the appellant was seeking in effect to command a public body, the Minister, to perform her legal duty under the Birds Directive, the trial judge found that there could be little doubt but that the appellant was seeking in effect an order of *mandamus*.

**26.** The trial judge observed that it was a “further curiosity of this case” that the appellant did not claim to have made a demand that the Minister perform her duty to designate the St Paul’s site as an SPA which she failed to perform so as to justify what was in effect an order of *mandamus* (para. 42). In particular, he noted, the appellant did not claim that it demanded (and was refused) such a designation in August 2018 during its correspondence with the Minister. He further noted that the appellant denied that the August 2018 letter was even a decision that is subject to judicial review, let alone a refusal following a demand.

**27.** It was the court’s view that the appellant had in fact made a demand and got a refusal from the Minister regarding the designation of the St Paul’s site, “since no other interpretation could be put on the exchange of correspondence between the parties” between 18 July 2018 and August 2018 (para. 44). However, the court noted, if the appellant had relied on this “demand and refusal”, these proceedings, issued in April 2019, would on their face be outside the three-month time limit.

**28.** The court considered that, at a macro-level, there was a fundamental contradiction in the appellant’s approach:-

“Clonres either made the demand of the Minister to designate the St. Paul’s site by letter on 7<sup>th</sup> August, 2018 and got the refusal on 24<sup>th</sup> August, 2018 (which Clonres denies), in which case the proceedings are out of time, or as Clonres implies, no decision was ever taken by the Minister and so it is not out of time (but then there was no demand and refusal). However, since a demand and refusal is a pre-condition

for the grant of an order of mandamus (which in substance Clonres is seeking), it is *prima facie* not entitled to such an order.” (para. 46)

**29.** The trial judge determined at para. 48 that the decision which the appellant was actually challenging, and which should have been specified, was “the failure of the Minister in 2009/2010 to designate the St. Paul’s site as an SPA or perhaps the refusal of the Minister to comply with the appellant’s demand for the site to be designated in August 2018.”

**30.** At para. 49 he stated that the appellant was claiming that the Minister had failed to comply with her continuing obligation to designate the St Paul’s site but had avoided stating when this failure (whether an act or omission) had occurred. It appeared to the trial judge that the appellant was arguing that a continuous obligation means that there was a continuing failure to designate the St Paul’s site so the appellant was “at liberty to judicially review this failure on any date, for as long as the Minister fails to designate the site”, although the trial judge noted that the date on which this failure commenced was not specified.

**31.** The trial judge did not accept that where a Minister has not been called upon to make a decision that she can nonetheless be judicially reviewed for that failure since the whole purpose of judicial review is to challenge a decision but here the appellant had not specified a date when the Minister had made a decision not to designate the St Paul’s site. The trial judge considered that if the appellant’s “continuing obligation” position was correct, in effect no time limit would apply to a challenge to a failure to designate a site as an SPA which would “no doubt” result in prejudice to third parties (para. 51).

**32.** The trial judge then turned to consider the application of the three-month time limit to a challenge to the failure to designate the St. Paul’s site as an SPA in 2009/2010. It was noted that the appellant was in existence and had as its objective the protection of the environment in the Clontarf area at the time of the original designation of the SPA sites in

2009/2010. It was further noted at para. 52 that the appellant chose not to challenge the decision not to designate the St. Paul's site at that time even though in a letter dated 5 February 2018 (submitted as part of the planning process for the proposed development on the St Paul's site) it stated *inter alia* that the St. Paul's site is:-

“...located within St Anne's Park which is adjacent to and **inextricably linked with the North Bull Island**. As such any proposal for redevelopment in the area must be considered in the context of the importance of North Bull Island.” (emphasis added by trial judge)

The trial judge considered it relevant that the appellant had claimed for the first time in February 2018 that the St Paul's site was inextricably linked with the North Bull Island, which was designated as an SPA in 2009/2010. Since no evidence was produced to the court to suggest that this “inextricable link” was brand new or had not existed in 2009/2010 or that there had been some change since 2009/2010, the trial judge considered that, on the appellant's case, the St. Paul's site should have been designated as an SPA in 2009/2010 because of this “inextricable link”. Therefore, it seemed to the court, the administrative decision which was the subject of judicial review in this case was the decision taken by the Minister to not designate the St. Paul's site as an SPA in 2009/2010 and on that basis, the three-month time limit had expired almost a decade before these proceedings were issued in April 2019.

**33.** In the judge's view, nothing turned on the reasons why the appellant did not challenge the failure to designate the St Paul's site as an SPA within three months of the decision in 2009/2010. The court stated that the only issue of importance in these proceedings was the failure to comply with the three-month time limit, not the reason for that failure.

**34.** The court then considered the alternative proposition that time began to run from the date of the August 2018 refusal by the Minister. In reliance on *F.G. v. Child and Family Agency* [2018] IESC 28, the trial judge found that the August 2018 letter was merely a confirmation of the decision taken in 2009/2010 because there were no additional information or change in circumstances requiring the Minister to re-consider the decision not to designate the St Paul's site as an SPA. Referring to para. 102 of *F.G.*, the court held that an applicant cannot get time to run afresh for the purposes of taking judicial review proceedings by simply seeking confirmation of a prior decision.

**35.** If the court was wrong in finding that the August 2018 refusal was merely a confirmation of the earlier decision, the trial judge was satisfied that August 2018 would be the latest date when grounds for these proceedings arose and so they were issued out of time in April 2019.

**36.** The court then addressed the appellant's claim that the Minister was under a continuing obligation to designate the site and therefore time limits do not apply. The appellant had relied on *Mungovan v. Clare County Council* [2020] IESC 17, [2020] 2 I.L.R.M. 1 to support the proposition that the decision on whether to designate lands as an SPA does not relate to a decision arising from an individual application process (from which point time would run) "but is of a general nature more *akin* to policy-making which is not subject to that type of time-limit" (para. 62) (*italics in original*).

**37.** The court noted that *Mungovan* was concerned with a fixed policy regarding the type of qualifications an engineer had to have to get an appointment from the county council and that the Supreme Court had held that because of that fixed policy, each of the decisions refusing to appoint the applicant was not like an individual assessment of a given situation taking account of particular factors and so time limits ran from the date of the last refusal rather than the first refusal. The trial judge distinguished *Mungovan* on the basis that there



was no fixed policy in the instant proceedings.

**38.** Accordingly, the court could not see any basis for concluding that the appellant was somehow exempt from time limits in challenging the non-designation of the St. Paul's site because of the alleged continuing obligation of the Minister to designate the site. The trial judge referred to para. 16 of *Mungovan*, which the appellant had relied on, wherein Charleton J. stated:-

“By not making a challenge to a particular decision, time runs. That is beyond dispute. But, a decision generally leads to result, for instance a licence is refused, someone cannot use a facility or obtain a grant. Those decisions must be challenged in time. But where the matter is analogous to secondary legislation, it is difficult to reason that fixed and unalterable policies become immune to judicial scrutiny simply because there has been a particular refusal that remained without challenge.”

The trial judge emphasised that Charleton J. had indicated that decisions which generally lead to a result must be challenged in time and that is what had happened in this case: a decision was made in 2009/2010 and the result was the non-designation of the site which was not challenged in time.

**39.** The trial judge further noted that the appellant had not pleaded that since the decision in 2009/2010 new information came to hand which justified a different decision, which was ignored by the Minister, thereby justifying the subsequent refusal being subject to fresh judicial review time limits. It was also noted that in its submissions the appellant confirmed that it was not claiming that there had been a failure by the Minister to take into account new information or relevant considerations or that the failure to designate the St Paul's site was irrational. The trial judge commented that this was curious because even if the case was not out of time, it would be difficult to successfully challenge the non-designation without

claiming that some evidence was not taken into account by the Minister or that her decision was irrational, particularly because it was accepted that case involved public law issues and so was, in his view, in substance a judicial review.

**40.** For the above reasons, the court did not accept that the Minister was under a continuing obligation to designate sites such that the appellant would be exempt from judicial review time limits in challenging the Minister's decision not to designate the St Paul's site in 2009/2010 (or even the confirmation of this decision in August 2018).

**41.** The court then turned to consider the appellant's application to extend time in which to bring the proceedings.

**42.** The court noted that the only basis put forward by the appellant as a good and sufficient reason for the extension of time was the averment by Ms. Deirdre Nichol on its behalf that reliance was placed upon all the circumstances of the case and the fact that the proceedings allege breaches of ongoing European environmental law obligations. The trial judge characterised this as a "most perfunctory attempt at coming up with a good and sufficient reason" to extend the time limit and considered that it did not engage to any degree with the underlying facts or circumstances of the case:-

"...It amounts to a claim that a good and sufficient reason for bringing judicial review proceedings almost a decade late is that the judicial review concerns European environmental law." (para. 74)

It was further observed that that if the court accepted the appellant's implicit proposition, it would mean that there would never be any legal certainty regarding administrative decisions relating to European environmental law issues, meaning third parties would always be susceptible to having their plans set at nought at any time, which in the court's view, could not be correct. Accordingly, the court held that the "bald" averment on behalf of the appellant

fell well short of providing good and sufficient reason for the extension of time and so the application under O. 84, r. 21(3) must be refused since the court “shall” only extend the time limit “if” there is “good and sufficient reason for doing so”.

**43.** The trial judge proceeded to consider whether the circumstances which had caused the delay were outside the control of the appellant. It was noted that the appellant placed reliance on the averment of Ms. Deirdre Nichol that:-

“...on the 11<sup>th</sup> October, 2018 we met with Mr. Richard Bruton and Senator Catherine Noone to discuss the matter and the minutes from that meeting are at Tab 3 of the Booklet. Subsequent to that we had a follow-up meeting with Minister Madigan in or around 13<sup>th</sup> December 2018. No minutes were taken at that meeting but it was to the same effect *i.e.* we asked her to designate the site and the Minister indicated that she would come back to [the appellant]. I say that we never heard back from the Minister. Having waited a number of months for that response we ultimately were forced to issue the within proceedings.”

**44.** Reference was also made to the minutes of the meeting with Minister Bruton and Senator Noone. The trial judge characterised the appellant’s conduct as “political lobbying” (para. 85) and considered that the time it took had led to the appellant’s failure to issue the proceedings in time and as such were not outside its control. While the court had concluded that time had run from 2009/2010 when the St Paul’s site was not designated as an SPA, it proceeded to also consider whether the failure of the appellant to issue proceedings within three months of the August 2018 letter could be said to arise from circumstances which were outside the appellant’s control.

**45.** It was noted that the appellant had written to the Minister and CSSO through its solicitors on 7 August 2018 threatening to issue legal proceedings if the Minister failed to

designate the St Paul's site. The court found that that the appellant would have been "very familiar" with the strict three-month time limit for judicial review proceedings as it was legally represented at this time and had already issued the 2018 judicial review proceedings against An Bord Pleanála and the Minister (para. 87). The court further noted that the appellant chose not to institute the threatened proceedings within three months of the Minister's August 2018 letter, even though the appellant did not get its desired response.

**46.** The court did not accept that the undertaking of political lobbying by a prospective applicant in judicial review proceedings came in any way close to making it impossible or even difficult for that applicant to issue proceedings. It was not accepted that the undertaking of political lobbying was a circumstance outside of the appellant's control such as to cause the delay in issuing these proceedings.

**47.** The trial judge found that, despite being aware of the time limits, the appellant chose not to institute proceedings in time. Instead, it seemed to the trial judge, the appellant decided to pursue another way of achieving its "primary aim" of preventing the development of housing on the site, namely by pursuing the designation of the site as an SPA through political lobbying (para. 92).

**48.** The court referred to the decision of *O'Donnell v. Corporation of Dun Laoghaire* which was relied upon by the appellant to claim that political lobbying amounted to circumstances outside its control which led to delay in issuing proceedings. The trial judge held that this decision was of limited assistance since it predated the significant changes to the law introduced by O. 84, r. 21(3) which were "clearly designed to introduce greater certainty to administrative decisions by tightening up the grounds upon which an applicant could get an extension to the time-limit" (para. 93). He noted that the amended rule introduced the "exacting requirements" that there be good and sufficient reason for extending the deadline and that the circumstances be outside the control of the applicant (or

could not reasonably have been anticipated). He further noted that sub-rule (5) introduced the requirement that the reasons for the delay be verified on affidavit and sub-rule (4) allowed the effect of any extension on third parties to be taken into account. It was noted that in the *O'Donnell* case there was simply a requirement that there be “good reasons” for extending the time limit and there was no requirement that the circumstances which caused the delay to be outside the applicant’s control.

**49.** The court considered that the decision of the Supreme Court in *M.O’S. v. Residential Institutions Redress Board* [2018] IESC 61, [2019] 1 I.L.R.M. 149 was of greater relevance. In that decision Finlay Geoghegan J. considered the current O. 84, r. 21(3) and the caselaw on the extension of time and concluded at para. 51 that:-

“Each of the judgments set out clearly the obligation on a person who does not apply within the time limit **to give good reasons which both explain the delay and offer a justifiable excuse.**” (emphasis added by trial judge)

He also referred to para. 60 of that decision wherein Finlay Geoghegan J. noted that, *inter alia*, O. 84 requires an applicant to satisfy the court of the reasons for which the application as not brought both within the time specified in the rule and also during any subsequent period up to the date upon which the application for leave was brought and the court must consider whether the reasons proffered by an applicant objectively explain and justify the failure to apply within the time specified.

**50.** The trial judge held that the fact that the appellant decided to adopt another approach to achieve its aim of preventing the housing development (by political lobbying to designate the site as an SPA) did not mean that it could not have issued proceedings within time against the Minister or that doing so was in any way outside its control. In the court’s view, these were not good reasons which objectively explained the delay or offered a justifiable excuse.

**51.** He further noted that the appellant was able to institute the earlier judicial review proceedings in May 2018 within time so it was “surprising” that the appellant would claim that it was outside its control to issue these proceedings within the time limits against the same Minister for “very similar relief, simply because it was also engaged in political lobbying to achieve this end” (para. 96).

**52.** The court then turned to consider the effect of an extension of time on third parties. He referred again to the decision in *M.O'S* in which Finlay Geoghegan J. observed that the court is entitled to take account of any possible prejudice to third parties in deciding whether to extend the time limit.

**53.** The trial judge noted that the Developer in this case “paid tens of millions for the St. Paul’s site with the aim of providing housing to the Dublin market” (para. 98). The trial judge referred to the following averment by Mr. Patrick Crean, a director of the Developer:-

“At no time prior to the completion by Crekav of the purchase of the Subject Lands on 7 April 2016, was there any suggestion by anyone that the Subject Lands, or any part of them, were to be designated as a special protection area or that there was any possibility of this occurring. If there had been, Crekav would simply not have bid on them.... Crekav opted to purchase the Subject Lands instead of pursuing a number of these opportunities. The purchase of the Subject Lands was funded by Crekav’s finance partner and any suggestion of a negative change in the designation of the Subject Lands as a special protection area would have meant that funding would not have been forthcoming. This is because no financial backer would assume such a risk.”

The court was satisfied that the Developer would not have invested in the St Paul’s site if there was any possibility of it being designated as an SPA and that the appellant had made

no attempt to challenge the non-designation of the site in 2009/2010. Therefore, the trial judge held that to extend the time limit to allow the appellant to challenge the non-designation, despite its failure to do so in time and before the Developer purchased the site, would prejudice the latter.

**54.** The court emphasised that the appellant “effectively sat on its hands for 10 years while a developer spent tens of millions on the lands” and only brought these proceedings in April 2019, almost a decade after other sites in the vicinity were designated as SPAs (para. 100). It was further noted that the first move by the appellant regarding the non-designation of the site was the May 2018 judicial review proceedings, three years after the Developer purchased the site, and similar relief was sought in these proceedings which, if successful, would render the site economically worthless.

**55.** The trial judge reiterated that the appellant’s primary aim was to prevent housing being built on the site which it sought to achieve through its “ancillary aim” of having the site designated as an SPA. He found that, in any case, the appellant had successfully pursued its primary aim at that date, it having obtained revocations of two decisions of An Bord Pleanála granting permission for housing on the site.

**56.** The court found that, in the context of O.84 r. 21(4), there would still be prejudice to the Developer in extending the time limit even if the August 2018 letter, rather than the non-designation in 2009/2010, was regarded as the administrative decision being challenged because the Developer would be faced with a challenge to its housing plans five months after it should have been issued which would delay any building works commencing by that period of time.

**57.** It was further noted, although it was not a determinative factor, that if granted an extension of time, the appellant intended to apply to amend its statement of claim in order to

facilitate a reference to the Court of Justice of the European Union (“CJEU”). In its proposed amendments to its statement of claim and in its submissions, the appellant had indicated that it intended to seek a reference to the CJEU on whether the existence of a three-month time limit was contrary to EU law which, the court noted, could involve a further two-year delay, thereby causing future prejudice to the Developer.

**58.** The court considered whether an environment-related decision has to be published in order to be judicially reviewable. The appellant had claimed that the August 2018 letter containing the Minister’s refusal to designate the St. Paul’s site as an SPA was not an act which set time running for the purposes of time limits for judicial review because it was not sufficiently public and transparent to amount to a decision *per* the terms of Article 3(1) of the Aarhus Convention. However, the trial judge noted that this article refers to a “framework” of implementing measures that have to be transparent and, in the court’s view, that did not mean that when a public body has a dispute with a citizen about measures to be taken, the public body would be in breach of the Aarhus Convention if it did not publish its decision on a website or by some other means.

**59.** The court further noted that the appellant had provided no authority to the effect that a letter which contains a decision in the field of EU environmental law which was not published, whether on websites, official journals, papers of record or otherwise, contravened the Aarhus Convention or did not constitute a decision for the purpose of judicial review time-limits. The court accordingly rejected the suggestion that the August 2018 letter was in some way legally deficient or otherwise did not constitute a valid decision of a public body so as to be judicially reviewable and the suggestion that time could not run from the date of that letter.

**60.** The trial judge considered that the decisions of *Barth v. Bundesministerium für Wissenschaft und Forschung* (Case C-542/08) EU:C: 2010:193, [2010] E.C.R. I-3189 and



*Commission v. Ireland (Case C-456/08)* EU:C: 2010:46, [2010] E.C.R. I-859 made clear that it is not incompatible with EU law to have a time limit on the bringing of proceedings asserting a right or entitlement that derives from EU law. Furthermore, the trial judge noted, the necessity of time limits for legal certainty was a factor in the CJEU's conclusion in the latter case, a particular concern of the trial judge in this case.

**61.** The court regarded the appellant as arguing that different rules should apply to decisions relating to the protection of environmental rights, particularly those derived from EU law, such that there should be no time limits applicable. While the court acknowledged some differences between environmental litigation and other litigation (in particular, differences relating to the rules on costs) which exist for good policy reasons, it did not accept that other rules such as time limits, “which exist for equally good policy reasons (*i.e.* ensuring legal certainty for third parties)”, should not apply to environmental litigation (para. 115).

**62.** The appellant had also argued, in reliance on *Commission v. Cyprus (Case C-340/10)* EU:C:2012:143, that the time limit should not apply as the case raised a transposition issue. It was noted that *Commission v. Cyprus*, concerning the Habitats Directive which requires Member States to take measures to establish a system of strict protections for certain animals, established that it is not enough for a Member State to introduce legislation, as concrete and specific protection measures have to be implemented to protect those animals.

**63.** The trial judge noted that all that was said in the appellant's statement of claim regarding transposition was para. 45 which states:-

“Insofar as [the appellant] may not be entitled to the above reliefs or any of them, [the appellant] pleads that same is due to the failure of the State to properly transpose the Habitats Directive and the Birds Directive.”

The court found that there was a lack of particularisation in the statement of claim regarding what measures Clonres was alleging had not been properly transposed. The trial judge considered that an assertion by the appellant that the Minister should have designated the lands at St Paul's as an SPA was not a transposition issue.

**64.** The court held that *Commission v. Cyprus* was not authority for the proposition that where, as in this instance, there is a legislative framework (namely, the European Communities (Birds and Natural Habitats) Regulations 2011) that complies with the relevant directive and a decision is taken by a Minister pursuant to those Regulations not to issue a direction, that a failure to issue such direction amounts to a transposition issue.

**65.** The court observed that if a transposition issue were to arise in this scenario, almost any alleged failure by a public body pursuant to the terms of a regulation (which transposes EU law into Irish law) could be challenged without any time limit on the basis that it amounts to a transposition issue. The trial judge held that this would run contrary to the principles derived from the *Barth* decision and *Commission v. Ireland* that not only permit time limits but which require them in the interests of legal certainty.

**66.** As a final point, the court addressed the appellant's argument that it was not appropriate as part of interlocutory proceedings for the State respondents to seek a declaratory order to the effect that the plenary proceedings were subject, by analogy, to the requirements of O. 84. The trial judge found that the interlocutory proceedings had the potential to be a final application since, if the relief sought in the State's notice of motion was granted, the proceedings may be struck out. Therefore, the court saw no merit in that point, particularly as there are many reliefs which are sought during interlocutory proceedings which end up being final, such as discovery orders and security for costs orders.

**67.** In summary, the court concluded that the proceedings were subject to the time limit

contained in O. 84, r. 21(1) and ought to have been brought within three months of the Minister's decision in 2009/2010 not to designate the St Paul's site as an SPA. Separately, the proceedings were also be out of time if the August 2018 letter was taken to be the subject of the challenge. The court further concluded that there was no valid basis for extending the time limit. The court was disposed to grant the reliefs sought by the State respondents in the notice of motion dated 27 January 2020 and striking out the proceedings as against them. The reliefs sought by the appellant in its notice of motion dated 16 March 2020 were also refused. Further submissions were heard on the precise form of the orders to be made and any other matters arising from the judgment.

### **Notice of appeal**

**68.** In its notice of appeal dated 27 August 2020, the appellant raised 28 grounds of appeal which may be summarised briefly as follows:

- i. The trial judge erred in finding that the reliefs sought in the proceedings are out of time (grounds 1 and 2).
- ii. The trial judge erred in finding that the proceedings were judicial review proceedings in nature (grounds 3, 4, 6 and 7).
- iii. The trial judge erred in concluding that the proceedings are a challenge to a decision (whether an act or omission) of the State respondents to not designate the St Paul's site as an SPA (ground 5).
- iv. The trial judge erred in concluding that the appellant is effectively seeking an order for *mandamus* (ground 6).
- v. The trial judge erred in characterising the August 2018 letter as a demand and refusal and/or formal decision of the State respondents on environmental matters under European law and/or confirmation of a decision taken in

2009/2010 (grounds 8, 15 and 24). The trial judge further erred in failing to consider that if time ran from the August 2018 letter, another request to designate the site could be made and fresh proceedings could thereafter be brought within time (ground 21).

- vi. The trial judge erred in mischaracterising the argument that the continuing failure of the State respondent meant the appellant was at liberty to judicially review the failure at any date and/or that no time limit applies to a challenge to designate the site as an SPA and erred in his consideration of authorities dealing with alleged continuing breaches and ongoing accrual of time (grounds 9, 10 and 16).
- vii. The trial judge failed to take into account that there was no evidence that the State respondents considered designating the St. Paul's site as an SPA in 2009/2010 and that the State respondents did not aver that a decision not to designate was made. The trial judge further erred in considering that a decision to designate some sites in 2009/2010 necessarily implied a decision not to designate the St. Paul's site (grounds 11, 18 and 19).
- viii. The trial judge erred in stating at paras. 53, 60 and 67 that there was no evidence produced to suggest that there was some change or additional information since 2009/2010 (grounds 12, 15 and 19).
- ix. The trial judge erred in improperly imputing and/or taking into account that the primary aim of the appellant in the previous judicial review proceedings was to prevent the building of housing on the St. Paul's site and mischaracterised and/or misunderstood the submission concerning the rule in *Henderson v. Henderson* and that the designation of the site as an SPA was

an ancillary claim in those previous proceedings (grounds 13 and 14).

- x. The trial judge failed to consider that there was a continuing obligation on the State respondents under European law (ground 17).
- xi. The trial judge erred in refusing to extend time to bring the within proceedings and finding that the appellant had not demonstrated a “good and sufficient reason” to grant an extension of time, that the circumstances leading to its failure to institute the proceedings within time were within its control and that an extension of time would cause prejudice to the Developer (ground 20).
- xii. The trial judge failed to take into account the “exceptionally strong nature” of the environmental claims in the present proceedings (ground 22).
- xiii. The trial judge erred in failing to make a preliminary reference to the CJEU by taking into account irrelevant considerations, namely, potential prejudice to the Developer (ground 23).
- xiv. The trial judge erred in mischaracterising the issue of time limits in the context of EU law requirements as dealing with “EU rights” as opposed to obligations on Member States (ground 25).
- xv. The trial judge erred in considering that there was a lack of particularisation in the statement of claim regarding what had not been properly transposed (ground 26).
- xvi. The trial judge failed to address submissions that the motion to dismiss was improperly brought and that there was no jurisdiction for the court to make the orders sought (ground 27).
- xvii. The trial judge failed to consider the appellant’s motion to amend the

statement of claim at all and/or in a coherent and/or appropriately sequential manner with the motion to dismiss and failed to consider whether, if the amendments were allowed, the proceedings ought to be dismissed (ground 28).

69. The appellant sought, *inter alia*, an order setting aside the orders of the High Court; if necessary, an order extending time to bring the within proceedings; and, an order granting liberty to amend the plenary summons and statement of claim herein. The appellant also requested this court to make a preliminary reference pursuant to Article 267 TFEU as to whether the State can rely upon time limits as a defence to a claim that it was obliged to designate lands as an SPA and/or take protective measures under the Birds and Habitats Directives, if this court is minded to affirm the order of the trial judge based on existing domestic law.

#### **Applicability of time limits set out in O. 84, r. 21(1) RSC**

##### ***The appellant's submissions***

70. The appellant submitted that the trial judge erred in characterising the proceedings as judicial review in nature. It contended that there are types of public law proceedings, such as enforcement proceedings or constitutional challenges, where the appropriate procedure is a plenary action and not judicial review. Reliance was placed on *Blehein v. Minister for Health* [2008] IESC 40, [2009] 1 I.R. 275, *Riordan v. An Taoiseach (No. 2)* [1999] 4 I.R. 343 and *S.M. v. Ireland (No. 1)* [2007] 3 I.R. 283. The appellant contended that *Cosgrave v. An Bord Pleanála* [2004] 2 I.R. 435 is authority for the proposition that a challenge to whether the State has properly transposed an EU directive should be more appropriately brought in plenary proceedings.

71. The appellant submitted that it is not challenging a “decision” and there is no relief

sought in these proceedings concerning a “decision”. It was further submitted that there is no such decision to challenge in this case, there having been no relevant decision made in 2009 and no process in place for a member of the public to apply for the Minister to make a decision. It contended that what is at issue in this case is the failure of the State to fulfil obligations under the Birds Directive. With regard to the trial judge’s findings at paras. 35 to 43 that these proceedings concern a claim for *mandamus*, the appellant submitted that *mandamus* can be sought in a plenary action.

**72.** The appellant submitted that the question of whether a decision not to designate the site as an SPA was taken in 2009/2010 is one of fact and there was no evidence and no averment that such decision was taken. It was submitted that the claim that such a decision was taken was based on the fact that statutory instruments were issued to designate other sites but none were made for the St. Paul’s site. It was submitted that there was no factual or evidential support for the finding that a decision was taken in 2009/2010 and, insofar as there was a conflict of evidence, it ought to have been resolved in the appellant’s favour on an application to dismiss.

**73.** The appellant submitted, the evidence indicates that no decision could have been taken because there was no survey or evidence collected of the use of the St. Paul’s lands by birds in 2008/2009. The appellant referred to the Natura Impact Statement (“NIS”) of Scott Cawley, at Tab 2 of the affidavit of Deirdre Nichol of 6 March 2020, and a particular table therein which indicated that there was no data available for the St. Paul’s site from 2007 to 2010. Therefore, the appellant submitted, the trial judge erred in determining that the Minister made a decision in 2009/2010 not to designate the St. Paul’s site.

**74.** The appellant further submitted that the part of its claim that alleges that the Minister must take action in relation to the St. Paul’s site in order to protect neighbouring SPAs could not possibly be time barred three months after a decision not to designate in 2009/2010.

**75.** With regard to the trial judge's findings in relation to whether the August 2018 letter amounted to a fresh decision or merely a confirmation of an earlier decision, the appellant contended that it did present and/or refer to new information not available in 2009/2010, such as the Scott Cawley NIS. The appellant contended that this information was referred to by the Minister in her response and that the Minister did not state that this survey evidence was consistent with data available to her when a decision was made in 2009, nor has she stated such on affidavit in these proceedings.

**76.** The appellant further submitted that it was not permissible for the trial judge to make contested findings on whether the appellant presented new information to the Minister at an application to strike out on a time point as the appellant's case must be taken at its height.

**77.** The appellant submitted that the August 2018 letter does not amount to a decision that is amenable to judicial review or which can be properly considered a refusal of an application to designate a site as an SPA because it has none of the *indicia* and/or meets none of the requirements of a formal decision under the Habitats Directive, the 2011 Regulations or otherwise, referring in particular to Article 3(1) of the Aarhus Convention. It was submitted that there is nothing on the face of the letter to indicate that Minister made the decision herself; the letter was from the Minister's solicitors, rather than made under her own hand, and the Minister has not gone into evidence on the point. The appellant contended that it did not view the letter as a formal decision on the scope of an SPA made by a competent authority under the Birds Directive when it was received and that the issue will likely be the subject of a discovery application.

**78.** The appellant referred to para. 11 of *Moore v. Minister for Arts, Heritage and the Gaeltacht* [2018] IECA 28 and submitted that, if it had sought to judicially review the letter of August 2018, it would have been vulnerable to the allegation that it had contrived to set up judicial review proceedings when it should have proceeded by plenary action which



would allow for oral evidence, cross-examination and discovery.

**79.** The appellant further alleged that the letter of August 2018 dealt with a different matter than these proceedings; that letter refused to extend the boundaries of the North Bull Island SPA, while what is sought in these proceedings is the designation of the St. Paul's site as an SPA in its own right. The appellant noted that the CSSO appears to have misinterpreted the letter of 18 July 2018 as a request to extend boundaries when it was not.

**80.** More fundamentally, the appellant submitted, private correspondence could not be appropriate for a decision to designate under environmental law which should be the subject of publicity and transparency, placing reliance on Article 3(1) of the Aarhus Convention and *Commission v. Belgium (Case C-415/01)* EU:C:2003:118, [2003] E.C.R. I-2081 wherein it was stated, in the context of the Birds Directive, that the principle of legal certainty requires appropriate publicity for the national measures adopted pursuant to EU rules. While that statement was referring to a decision to designate an area, the appellant contended that the same principles would apply to a decision not to designate. It argued that if another member of the public made a similar request to designate, they would not be time barred by the August 2018 letter.

**81.** The appellant submitted that, in any case, whether the August 2018 letter amounts to a decision is a mixed question of fact and law which could not be determined on an application to dismiss. The appellant reiterated that the August 2018 letter was not a proper target for judicial review and time could not run from the date of its issue.

**82.** A key aspect of the appellant's submissions as to how the trial judge erred in applying the time limits contained in O. 84, r. 21(1) to these proceedings was the argument that, where there are ongoing obligations on a State party and associated continuous breaches, the time limit within which to bring a challenge cannot expire.

**83.** The appellant submitted that it is a well-recognised principle of administrative law that where there is a continuing breach time does not start to run until the continuing act has ceased and, in that regard, placed reliance on *R.(G.) v. Secretary of State for the Home Department* [2010] EWHC 3407 (Admin.), *M.R. (Albania) v. Minister for Justice* [2020] IEHC 402, *Miah v. Newham London Borough Council* [2020] EWHC 327 (Admin.), *Mungovan v. Clare County Council* and *Duffy v. Laois County Council* [2014] IEHC 469. It was submitted that the obligations on the State under the Birds and Habitats Directives, such as the obligation to take conservation measures or the obligation to take protective measures under Article 6(2) of the Habitats Directive, are ongoing and reliance was placed on *Commission v. Austria (Case C-209/04)* EU:C:2006:195, [2006] E.C.R. I-2755; the opinion of AG Sharpston in *Commission v. Austria (Case C-535/07)* EU:C:2010:85, [2010] E.C.R. I-9483; and, *Grüne Liga Sachsen eV and Others v. Freistaat Sachsen (Case C-399/14)* EU:C:2016:10, [2016] P.T.S.R. 1240.

**84.** The appellant relied on *Emmott v. Minister for Social Welfare (Case C-208/90)* EU:C:1991:333, [1991] E.C.R. I-4269 and *Commission v. Ireland (Case C-261/18)* EU:C:2019:955 to assert that the State may not rely on national procedural rules relating to time limits by way of defence to a claim that it has failed to comply with EU law obligations. The appellant further contended that, insofar as the State has failed to take measures, these measures are akin to transposition requirements under the Directives and relied on *Commission v. Cyprus (Case C-340/10)* in that regard. It was submitted that the present case is wholly distinguishable from *Barth (Case C-542/08)* and *Commission v. Ireland (Case C-456/08)* which were public procurement cases concerning the entitlement of individuals to assert EU rights.

#### ***The State's submissions***

**85.** The State submitted that the trial judge correctly determined that the appellant's

claim was in the nature of public law proceedings which must be subject to the time limits prescribed by O. 84, r. 21(1) and that he correctly held that the appellant had failed to bring its challenge within three months of the non-designation of the site when proximate sites were designated.

**86.** Reliance was placed on cases such as *O'Donnell v. Dun Laoghaire Corporation, Shell E & P Ireland Ltd. v. McGrath, Dun Laoghaire Rathdown County Council v. Westwood Club Ltd.* [2019] IESC 43, *Clare County Council v. McDonagh* [2019] IEHC 662 and *Sweetman v. An Bord Pleanála* [2016] IEHC 277 to support the submission that public law challenges to the classification of SPAs and other ministerial duties arising under the Birds Directive should, in the interests of legal certainty and good administration, be channelled into the appropriate forum, made subject to appropriate procedural rules and resolved with dispatch.

**87.** The State posited that *Cosgrave v. An Bord Pleanála* was of little assistance to the appellant since in that case it was determined that the transposition relief did not relate to the particular decision of the Board, whereas in this case the preponderance of the appellant's claim constitutes a challenge to the decision-making of the Minister.

**88.** With regard to the appellant's contention that it was not challenging a "decision", the State argued that the appellant's pleadings were "vague and oblique" (para. 14) and had failed to identify the specific decision it wishes to challenge, to properly set up a case for mandatory relief, or to adequately particularise a case of failure to transpose or implement EU law. It was contended that the proposed amendments would not bring any clarity or specificity to the underlying claim or provide any insight into what specific order the court could make. Such deficiencies in pleadings, the State submitted, are not a basis to circumvent procedural time limits. The State submitted it was appropriate to identify the impugned act or omission as the non-designation of the site.

**89.** The State argued that the invocation of EU law by the appellant does not obviate the need to identify a “demand and refusal” to act and it was for the appellant to disclose what specific act or omission occurred which constitutes a breach of the obligation to protect neighbouring SPAs.

**90.** The State submitted that the non-designation of the St Paul’s site must be considered in light of the broader scheme of operation of the 2011 Regulations. It was submitted that it was clear from the dates upon which notices of intention to designate the other sites were advertised in 2008 and 2009 that the St. Paul’s site had not been proposed for classification as an SPA. In response to the appellant’s assertions that there was no evidence of matters informing non-designation and that it had presented new information to the Minister in 2018, the State referred to correspondence dated 31 July 2018 and 24 August 2018 in which the Minister explained that it would not be appropriate to extend the existing wetland SPA at North Bull Island since it was not necessary to include all and any lands which might be used on occasion as feeding grounds. The State contended that nothing arose from the appellant’s point that the August 2018 letter addressed an extension of existing SPAs, rather than non-designation of the St. Paul’s site, since an SPA does not need to comprise geographically contiguous areas.

**91.** The State characterised the appellant’s arguments in relation to continuing obligations as amounting to the proposition that a challenge can be launched at any stage to a designation decision, or a failure to treat a site as though it were designated, even if no new grounds have arisen for a fresh decision.

**92.** The State argued that the appellant’s contention that a letter sent in private correspondence could not amount to a formal decision underscored the appellant’s own failure to situate its claim within the applicable statutory scheme. The State pointed to the appellant’s failure to indicate whether or how it had attempted to invoke the statutory process

required for classification of a site. The State further highlighted the contradiction in the appellant raising public participation concerns where it is seeking declarations requiring the direct classification of a site by the court without the commencement of a consultation process.

**93.** The State submitted that the appellant's arguments with respect to continuing breach are misconceived. The State referred to *R. (G.) v. Secretary of State for the Home Department* in which a distinction was drawn between a "continuing obligation" and a "continuous obligation". The State submitted that the Birds Directive could not impose the type of obligation advocated – rather, at most, a call to action arising from a change of circumstances could give rise to an obligation to consider commencing a classification process by way of a notice to designate. However, the State contended that that event is out of time and could not have resulted in an order directly requiring designation. It was submitted that the authorities on continuing breach relied upon by the appellant were distinguishable from the present case.

**94.** It was submitted that the trial judge was correct to hold that judicial review time limit applied to the proceedings notwithstanding that they involve EU rights. The State relied on *Arklow Holidays Ltd. v. An Bord Pleanála* [2011] IESC 29, [2012] 2 I.R. 99 wherein the Supreme Court (Finnegan J.) confirmed that domestic procedural rules may apply to claims based in EU law so long as they do not offend the principles of equivalence and effectiveness. Reference was also made to *Barth (Case C-542/08)* wherein the CJEU found time limits to be compatible with EU law. The State contended that the appellant's reliance on *Emmott (Case C-208/90)* was misplaced as that case confirmed that in the absence of EU rules, it is for the domestic legal system of each Member State to determine the procedural conditions governing actions at law intended to ensure the protection of EU rights, provided that such conditions are not less favourable than those relating to similar actions of a

domestic nature nor framed so as to render virtually impossible the exercise of rights conferred by EU law. The State further submitted that the appellant's reliance on *Commission v. Ireland (Case C-261/18)* was misplaced as it is distinguishable on the basis that the CJEU was imposing a sanction on a Member State.

***The Developer's submissions***

**95.** The Developer submitted that the trial judge correctly held that, having regard to the public law remedies sought by the appellant, the proceedings were public law proceedings and therefore judicial review in nature, necessarily attracting the time limits prescribed within O. 84. The Developer submitted that the appellant was asking this court to depart from the established jurisprudence of *O'Donnell v. Corporation of Dun Laoghaire* and *Shell E & P Ireland Ltd. v. McGrath*.

**96.** In response to the appellant's argument that these are not judicial review proceedings because it is not challenging a decision and is not seeking relief challenging a decision, the Developer submitted that the proceedings do seek to challenge a decision of the Minister. This is so, the Developer said, because the reliefs sought are referable to the Minister's refusal to designate the St. Paul's site as an SPA and/or issue a direction.

**97.** The Developer submitted that the trial judge was correct to characterise the relief sought by the appellant as, in substance, an order for *mandamus* and to conclude, therefore, that the appellant was bound by the time limits in O. 84, r. 21(1).

**98.** It was argued forcefully that in circumstances where the appellant has in 2018 issued judicial review proceedings seeking a declaration that the State is under an obligation to designate the St. Paul's site as an SPA, it cannot now seek to argue that in these proceedings the designation sought is not in nature a public law remedy.

**99.** The Developer submitted that the trial judge did not err in determining that the

Minister made a decision in 2009 not to designate the St. Paul's site as an SPA and referred to the fact that, following *Commission v. Ireland (Case C-418/04)*, the State commenced a review of the network of SPAs in the State in 2005 and in 2008/2009 the State had given notice of its intention to classify six SPAs near to the St. Paul's site but did not include the latter site in those designations.

**100.** The Developer contended that the August 2018 letter sent by the CSSO was a decision of the Minister and noted that it was clearly written on the Minister's behalf to set out her position and that the appellant had written both to the Minister and the CSSO.

**101.** The Developer submitted that para. 11 of *Moore v. Minister for Arts, Heritage and the Gaeltacht*, relied upon by the appellant, did not provide authority for the appellant to proceed by way of plenary proceedings in a manner which disregards the application of O. 84, r. 21(1). Rather, the Developer submitted, Hogan J. at the relevant paragraph was merely making a factual observation of how that particular case was heard.

**102.** With regard to the appellant's arguments in relation to an alleged continuing breach, the Developer submitted that *Mungovan v. Clare County Council* is distinguishable from the present case on the basis that there is no fixed policy in this case which would inevitably result in the non-designation of the St Paul's site as an SPA; rather, the Developer submitted, any designation is informed by the Directives and the Regulations which mandate case-by-case assessments of candidate sites. It was further submitted that reliance placed on *Duffy v. Laois County Council* was misplaced.

**103.** The Developer maintained that the appellant was seeking to challenge the failure of the Minister to designate the St Paul's site as an SPA in 2009 and so the decision of *M.R. (Albania) v. Minister for Justice*, wherein the circumstances gave rise to a continuing breach, has no application.

**104.** With regard to publicity requirements under the Aarhus Convention, the Developer submitted that *Commission v. Belgium (Case C-415/01)* was not authority for the proposition that the August 2018 letter contravened the Aarhus Convention.

**105.** The Developer submitted that O. 84, r. 21(1) applies equally whether an applicant invokes an EU law right or a national law right and that neither *Emmott v. Minister for Social Welfare (Case C-208/90)* nor *Commission v. Ireland (Case C-261/18)* established otherwise. It was further submitted that the CJEU acknowledged in *Barth (Case C-542/08)* that time limits are generally required in order to ensure the principle of legal certainty.

**Henderson v. Henderson**

**106.** Apart from seeking to dismiss/strike out the appellant's proceedings for non-compliance with Order 84 the other key ground relied on by the state respondents in their motion was the *Henderson* Rule. While the *Henderson* Rule was not specifically addressed by the trial judge in his decision, each of the parties raised detailed arguments in relation to same in the course of the 3-day hearing in the High Court, in their written submissions to this court and in legal argument during the course of the appeal hearing. Those arguments included contentions as to the effect or relevance of the judgment of Barniville J. on 31 July 2018 first proceedings, [2018] IEHC 473.

**107.** The *Henderson* Rule is raised as a distinct ground to affirm the trial judge's decision by the State respondents;

“The Rule in *Henderson v Henderson* applies to the within proceedings. the reliefs sought are reliefs which were in substance sought in the earlier Judicial Review proceedings...or could have been sought and pursued but were not.”

This ground was engaged with, *inter alia*, at issue 6 in the appellant's written submissions to this Court.



***The appellant's key submissions on Henderson Rule***

**108.** The appellant, *inter alia*, referred to paras. 42 and 48 of Barniville J.'s judgment in which he emphasised that, in making an order for *certiorari* of An Bord Pleanála's decision, he was not adjudicating on or determining any of the other grounds advanced by the appellant in those proceedings – an approach the appellant contended was compatible with the doctrine of judicial restraint (see: *Usk v. An Bord Pleanála* [2007] IEHC 86). It was submitted that the rule in *Henderson v. Henderson* cannot apply to the within proceedings as issues such as the cutting of grass and protective measures were neither legally nor factually in issue in the 2018 proceedings, having emerged as issues only after the 2018 proceedings were conceded. The appellant also referred to a statement by the State in correspondence dated 31 July 2019 that the claim against the State had “fallen away”, which, the appellant said, was a correct acknowledgement that the declarations sought in the 2018 proceedings were ancillary to the challenge to An Bord Pleanála.

**109.** In the alternative, the appellant submitted that the rule in *Henderson v. Henderson* is discretionary and it would not be appropriate to apply it in all the circumstances of the present case, relying on *A.A. v. Medical Council* [2003] IESC 70, [2003] 4 I.R. 302 and *George v. AVA Trade (EU) Ltd.* [2019] IEHC 187.

***The State's key submissions on Henderson Rule***

**110.** The State submitted that Barniville J.'s statement that he was not determining any of the other grounds raised by the appellant in the 2018 judicial review proceedings has no relevance to the point that the reliefs sought in these proceedings as stand-alone reliefs (*i.e.* unconnected with any challenge to any decision of An Bord Pleanála's) are reliefs which were in substance sought in earlier proceedings, could have been sought and pursued and were not. Nor, the State contended, did Barniville J.'s statement affect the application of the

broader principle that litigants are precluded from keeping points over from one legal proceeding to another.

**111.** The State placed reliance on *Arklow Holidays Ltd. v. An Bord Pleanála* wherein the public interest in the rule in *Henderson v. Henderson* was explained and it was held that the rule was not contrary to public participation requirements under EU environmental law nor the principles of effectiveness and equivalence. The State submitted that there was no reason why the appellant's claim could not have been brought when Article 4(2) of the Birds Directive was invoked in the 2018 judicial review proceedings. Further reliance was placed on *A.A. v. The Medical Council* wherein the need for finality in litigation was stressed.

***The Developer's key submissions on Henderson Rule***

**112.** The Developer also referred to the Supreme Court decision in *Arklow Holidays Ltd. v. An Bord Pleanála* and submitted that the appellant could have, but did not, seek in the 2018 judicial review proceedings, the reliefs which it seeks in these proceedings; namely, a declaration that the State is required to take steps to maintain the St. Paul's site in a condition that will prevent the disturbance of the light bellied brent geese and the black tailed godwit and a declaration that the State is required to issue a direction under the Habitats Regulations. The Developer alleged that the appellant has not provided any explanation for its failure to do so. It was submitted that the fact that the 2018 proceedings were compromised before they were heard is not an answer to the rule in *Henderson v. Henderson*.

**Approach of this court to the *Henderson* ground of appeal**

**113.** Given that were the *Henderson* Rule - in the narrow sense contended for by the respondents, wherein Wigram V.C. considered it a category of issue estoppel which in certain circumstances operates to preclude a party from litigating new issues which could and should have been raised, but were not, at an earlier hearing - found to be applicable in

the instant case it has the capacity to be dispositive of the entire appeal, it is proposed to address that ground and issue first and foremost in this judgment.

### **Application to extend time**

#### ***The appellant's submissions***

**114.** The appellant contended that there were reasonable grounds for its belief that the letter of August 2018 was not a “formal decision instrument” (para. 106). It asserted that when it met with politicians and they engaged with the issue of designation of the site as an SPA, it implicitly gave the appellant comfort and support its belief that no final decision had been made. It was submitted that the ambiguous nature of the “decision instrument” and the behaviour of the relevant politicians were outside the control of the appellant.

**115.** The appellant submitted that the trial judge erred in his treatment of *O'Donnell v. Corporation of Dun Laoghaire*. It contended that it had relied on that case in the High Court to support the proposition that attempts to deal with a complaint in the political sphere can be a relevant consideration when applying the test for an extension of time.

**116.** The appellant submitted that the trial judge erred in his consideration of the effect of an extension of time on third parties. It was submitted that if the site satisfies the criteria for designation as an SPA, it should be so designated and any loss caused to the Developer, arising from a failure to be alerted to the possibility of designation or otherwise, is a matter between it and the State or the vendor and his advisors. Reliance was placed, *inter alia*, on *R. v. Secretary of State for the Environment, ex p.: Royal Society for the Protection of Birds (Case C-44/95)* EU:C:1996:297, [1996] E.C.R. I-3805 as authority for the proposition that private, economic interests are not relevant as to whether a site requires designation or protective measures as a matter of EU law. In any case, the appellant contended, An Bord Pleanála had agreed to an order quashing the grant of the second planning permission so the

Developer could not have been prejudiced by any delay in challenging the August 2018 letter.

**117.** With regard to the trial judge's findings in relation to the appellant's collateral purpose in preventing the development of housing, the appellant submitted that EU environmental law is deliberately structured so as to rely on private landowners to assist in the supervision of the implementation of directives so that proper implementation is not left to the Member States and the supervision of the Commission.

***The State's submissions***

**118.** The State submitted that it was appropriate for the trial judge to refuse an extension of time in the absence of a "good and sufficient reason". It contended that neither the affidavit of Ms Deirdre Nichol sworn on 24 January 2020 replying to the State's motion nor the draft affidavit grounding the appellant's motion proffered any explanation for the delay as required by O. 84, r. 21(5).

**119.** The State submitted that it is clear from *M.O'S. v. Residential Institutions Redress Board* that the burden of demonstrating good and sufficient reason rests with the appellant. Rather than providing a reason in the grounding affidavit, the State contended that the appellant purported to seek an extension merely as a matter of formality.

**120.** It was submitted that *O'Donnell v. Dun Laoghaire Corporation* does not avail the appellant as, firstly, political lobbying was not included as a reason in the grounding affidavit as required by the rules. Secondly, the State argued that neither meeting with the relevant politicians would bring the proceedings within the time limit. Thirdly, it contended that the trial judge was correct to point to the requirement for extension of time being different at the time *O'Donnell* was decided. Fourthly, the State said that *O'Donnell* is entirely distinguishable from this case.

121. The State submitted that the trial judge was entitled under O.84 r.21(4) to consider the potential effect of the extension on third parties.

***The Developer's submissions***

122. The Developer submitted that the trial judge appropriately exercised his discretion in refusing to extend the time for the appellant to seek public law remedies having regard to the absence of reasons which would justify any extension. The Developer also relied on *M.O'S. v. Residential Institutions Redress Board* and submitted that the appellant did not identify any basis for its application to extend time, rather Ms. Deirdre Nichol in her affidavit dated 26 May 2020 stated that it was sought "out of an abundance of caution" (para. 12). With regard to the political lobbying relied upon by the appellant, the Developer notes that the last meeting took place on 13 December 2018 so the latest the proceedings could have been issued was 12 March 2019 but the proceedings were not issued until 10 April 2019.

123. The Developer also submitted that *O'Donnell v. Dun Laoghaire Corporation* is distinguishable from the present case, pointing to the fact that the appellant has always had legal advice and had raised the issue of designation in earlier proceedings and in correspondence.

124. The Developer cited *Kelly v. Leitrim County Council* [2005] IEHC 11, [2005] 2 I.R. 404 as authority for the proposition that prejudice to a third party is a factor which the court can consider when determining an application to extend time. It was contended that, in any case, this was not a determinative factor in the trial judge's decision.

**Application to amend the statement of claim**

***The appellant's submissions***

125. It was submitted that the trial judge did not reach or consider the appellant's application for leave to amend its pleadings and that this issue ought to be remitted to the

High Court. The appellant submitted that the trial judge erred in the order in which he dealt with matters. Reference was made to *Croke v. Waterford Crystal Ltd.* [2004] IESC 97, [2005] 2 I.R. 383 in which it was stated that O. 28, r. 1 RSC was “intended to be a liberal rule” (para. 53) and also to *B.W. v. Refugee Appeals Tribunal (No. 1)* [2015] IEHC 725 in which Humphreys J. referred to the requirement for an explanation as “a very light threshold” (para. 6). The appellant asserted that it would satisfy even the higher threshold for an application to amend a statement of grounds.

**126.** The appellant further submitted that the amendment of pleadings was not sought at a late stage and would not involve any disruption to the proceedings or cause prejudice to the other parties, citing *Woori Bank v. KDB Ireland Ltd.* [2006] IEHC 156 as authority in that regard.

#### ***The State’s submissions***

**127.** The State submitted that it was reasonable for the trial judge not to make a determination on the appellant’s application to amend the statement of claim in circumstances where the proceedings were struck out. It further submitted that an application to amend a statement of claim cannot be used as a device to circumvent the time limits set out in O. 84.

**128.** The State contended that where proceedings are subject to O. 84, r. 21(1) an explanation is required for any delays and that the appellant had not object to the sequencing of motions before the high court.

#### ***The Developer’s submissions***

**129.** The Developer submitted that where the trial judge had properly refused to extend time to bring the proceedings, there was no requirement to determine the motion to amend the statement of claim. It was noted that the appellant did not seek to have its amendment

application heard first nor did it object to the manner in which the motions proceeded before the court.

**130.** The Developer noted that the appellant’s application was brought under O. 28, r. 1. However, it submitted, since the proceedings sought public remedies, O. 84 should be applied *mutatis mutandis* to the proceedings so the application should have been dealt with as if it had been brought under O. 84, r. 23(2). The Developer submitted that an applicant seeking to amend pleadings in judicial review must meet a higher threshold than they would in plenary proceedings, citing the test established in *Keegan v. Garda Síochána Ombudsman Commission* [2012] IESC 29, [2012] 2 I.R. 570, para. 21: “...when the interests of justice require that such an order be made.” In reliance on *A.B. v. X.Y.* [2019] IECA 326, para. 31, the Developer contended that the appellant has failed to comply with the “mandatory requirement” to explain its delay in seeking the amendments to its pleadings nor given reasons to explain why the proposed new grounds were not included in the original pleadings.

### **Analysis & Context**

#### ***The Henderson Ground of Appeal***

**131.** In the first instance this appeal falls to be considered in the context of earlier litigation instituted by Clonres CLG (“Clonres”) in judicial review proceedings 2018/426 JR (“the first proceedings”). This approach is necessary to gain an understanding of the extent, if at all, to which the claims now sought to be advanced by Clonres have in substance been the subject of prior relevant litigation and could or should have been pursued thereunder.

#### ***Claims against State defendants in the first proceedings***

**132.** The statement required to ground the application for judicial review (“statement of grounds”) was filed in the High Court on the 28 May 2018 in the first proceedings. Clonres

was the applicant. An Bord Pleanála was the first respondent. The Minister for Culture, Heritage and the Gaelteacht and Ireland were the second and third named respondents (hereinafter “the State parties”). Crekav Trading GP Limited (“Crekav”) and Dublin City Council were notice parties. In the first proceedings the appellant characterised itself as a residents’ association for the people of Clontarf fulfilling “the functions of an environmental non-governmental organisation that aims to protect and preserve the environment in the area...” It is noteworthy that the primary relief sought was an order of *certiorari* quashing the decision of An Bord Pleanála made on the 3 April 2018 to grant permission for a development of residential units at the lands of Crekav in Raheny, Dublin 5.

**133.** The relief sought as against the Board included: -

“a Declaration that the Board failed to comply with its obligations in relation to appropriate assessment under Article 6 of Directive 1992/43/EEC (hereinafter ‘the Habitats Directive’) and erred in law in its interpretation of zoning objective Z15 of the Dublin City Council Development Plan.”

Of relevance to the within proceedings however is the sole relief sought as against the State parties –

“2. A declaration that the Second Named respondent (hereinafter ‘the Minister’) is under an obligation to designate the lands the subject matter of the proposed development for the purposes of Art. 4(2) of the Birds Directive.”

Thus front and centre in the first litigation so far as the State parties is concerned was a specific invocation of the declaratory jurisdiction of the High Court to secure designation of the lands under the Birds Directive.

**134.** There was significant uncertainty at the hearing of the within application before the High Court as to the precise extent of the lands in issue. This was evident, *inter alia*, from



the exchanges between the court, and counsel for Crekav and Clonres respectively at the conclusion of the hearing on day 3 in June 2020. In written submissions before this Court at para. 8, the appellant varied its position significantly as to the extent of the designation sought asserting that "...the scope of the proceedings only relate to the St Paul's lands, which were the subject of the planning application, in the ownership of" Crekav. It appears that the entirety of same were at all material times up to 2015 beneficially owned by the Vincentian religious order and comprised five of six sports pitches at the said location.

**135.** The statement of grounds in the first proceedings, filed in May 2018, bears scrutiny in the context of the within proceedings having regard to the narrow aspect of the *Henderson v. Henderson* doctrine relied upon by the respondents whereby they effectively contend that the primary issues being pursued in the within proceedings could and should have been pursued by the appellants in the first proceedings such that the procedural powers of the court are engaged and the conduct of the appellant in all the circumstances require that the within proceedings be dismissed by reason of the appellant's failure and omission to pursue this claim within the first proceedings. They assert that the appellant ought to have brought forward its whole claim in 2018 rather than abandoning same on 31 July 2018.

**136.** The 2018 statement of grounds sets out in substantial detail the basis underpinning the appellant's contention that the Minister had an obligation to designate the lands the subject matter of the proposed development by Crekav a SPA for the purposes of Art. 4(2) of the Birds Directive. At para. 35 it relies on Art. 4(1) (*sic*) of the Birds Directive. It will be recalled that Art. 4(1) provides *inter alia* that: -

"The species mentioned in Annex 1 shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution."

It further provides –

“Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species in the geographical sea and land area where this Directive applies.”

Article 4(2) provides –

“Member States shall take similar measures for regularly occurring migratory species not listed in Annex 1, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.”

I note in passing that there is no suggestion by Clonres that the lands the subject matter of the proceedings constitute wetlands.

**137.** The 2018 statement of grounds, as specifically directed towards the Minister and the State, provides: -

“35. The Second Named Respondent is under an obligation to designate the site of the proposed development is a Natura 2000 site for the purposes of Article 4(1) of the Birds Directive...

36. The evidence submitted in the EIS by the notice party establishes that the geese consistently chose St Paul’s as their preferred feeding area. The site forms an integral part of a feeding network utilised by the Brent Geese in the surrounding SPA network. Where a site is designated for a species or group of species it must contain the entirety of the feeding and roosting habitat of the species, and cannot be limited to one particular habitat type or one particular function. Excluding key

feeding areas prevents the site fulfilling its function of, in this case, sustaining wintering birds over the winter. For these reasons, at the St Paul's site it is required to be designated for the purposes of Article 4 of the Birds Directive.

37. Pending designation, Ireland and any emanation of State, including the Board, is obliged to protect the site from deterioration in order to avoid undermining the achievement of the objectives of the Birds Directive and Habitats Directive, having regard to Article 4(4) of the former, Article 6(2) of the latter, and the jurisprudence of the European Court in cases C- 117/03 *Dragaggi*, C-314/08 *Adeneler* and C-129/96 *Inter- Environment Wallonie*.

It was thus clearly set forth that the claim which the State had to meet was that the threshold and all relevant criteria for designation of the St. Paul's site had been established such that it was incumbent on the State respondent to designate same for the purposes of Art. 4 of the Birds Directive.

**138.** A further relevant ground advanced at para. 45 of the statement of grounds stated: -

“...A Stay on the decision of the Board is necessary to ensure that development does not proceed and that Article 4(4) is complied with by all emanations of the State.”

**139.** The very extensive affidavit of Deirdre Nichol sworn on the 31 May 2018 in support of the first application of Clonres was directed, *inter alia*, towards the requirement of the State parties to designate the lands in question as a SPA for the purposes of the Birds Directive and is directed towards achieving that outcome. The manner in which the first proceedings were concluded and the implications of the litigation decisions of Clonres in connection with same for this appeal are considered more fully hereafter.

***The appellant's current proceedings – the second proceedings***

**140.** The Plenary Summons issued in April 2019. An amended plenary summons was served on the 30 October 2019 pursuant to an order made in the High Court on the 21 October 2019. It is made clear that the claim relates to the lands at St. Paul's the subject matter of a grant of permission by An Bord Pleanála Ref. No. 300559-18. Briefly put, the reliefs sought include *inter alia*: -

- (1) A declaration that the Minister is required to designate the said lands as a SPA for the purposes of Council Directive 2009/147/EC (The Bird's Directive) and/or an injunction to compel her to do so.
- (2) A declaration that the Minister is required, pursuant to Art. 4(4) of the Birds Directive, pending designation of the St. Paul's lands as a special protection area, to take appropriate steps – or to direct the taking of appropriate steps – to avoid disturbance to specified migratory bird species which winter at SPAs.
- (3) Further, and/or in the alternative, a declaration that the Minister is required pursuant to Art. 6(2) of the Habitats Directive to take appropriate steps to avoid disturbance to light bellied brent geese and black tailed godwit, migratory bird species which winter at special protection areas which disturbance will result from those species being deprived of a key feeding area at St. Paul's by reason of the current overgrown state of the lands and/or an injunction requiring them to do so.
- (4) A declaration that the Minister is required to issue a direction or notice pursuant to her powers under Part 4 of the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) (the Habitats

Regulations) requiring “the notice party” to cut or otherwise maintain the grass on the lands at St. Paul’s. Mandatory orders are sought accordingly requiring the third named respondent to maintain the lands at St. Paul’s “in such a condition as to avoid disturbance to... migratory bird species which winter at identified special protection areas”.

There is also a plea –

“If and insofar as any or all of the above remedies may be unavailable, a declaration that the [State defendants] have failed adequately to implement the Birds Directive and the Habitats Directive and obliging them to take all necessary action to remedy that defect and to ensure that Article 6(2) of the Habitats Directive and Art 4 of the Birds Directive are complied with ...”.

This aspect of the claim appears to be contingent on the outcome of the designation claim.

**141.** Insofar as the State parties are concerned, both sets of proceedings are directed towards the claim that the Minister is under an obligation to designate the Crekav lands at St. Paul’s which are the subject of proposed development on foot of various planning applications as a Natura 2000 site for the purposes of Art. 4 of the Birds Directive.

**142.** The additional particulars and details pleaded and asserted in the second proceedings in my view merely offer particularity to the designation claim. In substance the later claim requires the Minister to designate the St. Paul’s lands in question as an SPA and the further declaratory orders and steps, including mandatory orders contended for are ancillary to and in pursuance of that dominant claim.

**143.** Accordingly, both sets of proceedings are substantially similar in relation to the key reliefs being sought against the State by Clonres.

**Are the plenary proceedings in substance judicial review proceedings?**

**144.** It is well established that if the second proceedings are in substance judicial review proceedings, then the procedural rules governing judicial review applies to same, notwithstanding that they are framed as plenary proceedings.

**145.** In **Ground 3** of its appeal Clonres states: -

“Insofar as the proceedings concern the exercise of a public function and involve the State the Appellant accepted in this very narrow sense that the proceedings were public law in nature. The Appellant strenuously contested that public law proceedings are *ipso facto* judicial review proceedings and cited numerous case law (not cited in the judgment) against such a proposition.”

**Ground 4** contends that the trial judge had erroneously equated public proceedings with judicial review proceedings contending, *inter alia*, that the trial judge had failed to take into account “the fact that there was no decision and/or omission to make a decision challenged in the proceedings, meant that the proceedings were not judicial review proceedings.”

***No decision***

**146.** To stress-test the appellant’s proposition that there was no decision and/or omission to make a decision challenged in the proceedings it is necessary to more fully understand how the 2018 proceedings were disposed of in the first instance. The designation was pursued against the State parties by the institution of the 2018 Judicial Review proceedings without any jurisdictional or procedural objection or issue being raised by the State against Clonres as to the form of the proceedings.

***Disposal of first proceedings***

**147.** Insofar as one can ascertain from the papers and exhibits, the originating statement and grounding affidavits are dated the 28 May 2018 and 7 June 2018 respectively. The *ex*

*parte* application for leave to seek judicial review was moved on the 14 June 2018 and the order was perfected on that date. On the 28 June 2018, An Bord Pleanála had conceded that there was an error on the face of the record and indicated that it was consenting to an order of *certiorari* quashing its decision made on the 3 April 2018 granting Crekav planning permission for the construction of 536 dwellings on the St. Paul’s site.

**148.** The matter appeared in the judicial review list on several occasions from and after the 28 May 2018 throughout the months of June and July up until final orders were made by Barniville J. on the 31 July 2018. His judgment delivered on the latter date was distributed on the 21 August 2018. The order of the 31 July 2018 granting *certiorari* was perfected on the 1 August 2018.

***18 July 2018 letter***

**149.** The stance adopted by Clonres at that point in the first proceedings is of importance. A letter dated the 18 July 2018 was sent by Clonres to the Chief State Solicitor’s Office which was on record for the Minister and the State. Other parties who had brought parallel proceedings were also served with copies of the said letter. Its contents are significant. The letter states –

“As you know the matter has been put back to this Friday 20 July, for argument as to whether the court should hear the balance of the case, or simply quash and remit as the Board wishes.”

It would appear that it had previously been listed in the judicial review list on the 7, 14 and 28 June 2018 and on the 16 July 2018.

**150.** The “balance of the case” under reference encompasses the very significant relief being sought against the Minister on a standalone basis including in particular a declaration that the Minister was under an obligation to designate the lands at St. Paul’s as a SPA for

the purposes of Art. 4(2) of the Birds Directive and further obliged to take all appropriate steps to prevent deterioration of that habitat in accordance with Art. 4(4) of the Birds Directive pending designation of the site together with various stays.

The letter continues: -

“It is our client’s position that the errors in the Board’s decision are so great that the entire application is flawed and should be quashed outright.”

**151.** Critically, with regard to the Minister the letter continues: -

“The relief sought against your client is to the effect that the North Bull SPA should be extended to include the lands at Saint Paul’s, as the developer has acknowledged that these lands form a key feeding area for geese from the SPA. Indeed, up to 1,500 a day visit the site. The site is also crucial for the Black Tailed Godwit, and important for wintering curlew.”

Thus, at a time when the Board had conceded the *certiorari* claim against it, the distinct substantive claim being advanced against the Minister was asserted unequivocally by Clonres to be a distinct continuing claim.

**152.** The letter continues: -

“We should ask you to take instructions please and confirm your client accepts this contention and will take steps to designate the lands at Saint Paul’s, and to protect them in the interim, pending designation.”

**153.** Pursuant to the provisions of S.I. 477 of 2011, which replaced the Birds and Habitats Regulations 1997, S.I. 94/1997 Part 3, Regulation 10(4) it is open to an interested party to request activation of the designation process. It provides, *inter alia*, that: -



“4. Where appropriate, the Minister may modify the list of candidate sites of Community importance having regard to the surveillance carried out pursuant to *Regulation 9* or if he or she receives a request that a site be included in the list.”

The Regulations, including Regulation 10 envisage various potential processes whereby candidate sites may be proposed or identified so as to set in train the procedural steps which may lead ultimately to SPA designation pursuant to the Birds Directive.

**154.** The preparatory steps to be taken that could lead to designation are to be found in the relevant regulations including, *inter alia*, S.I. 477/2011. A reasonable construction of this correspondence is that Clonres calls upon the Minister to proceed to engage with a preliminary step to effect an identification of the St. Paul’s site for consideration as a site of community importance which was required to be selected as a candidate special protection area site which required consideration for classification as an SPA.

**155.** The steps Clonres required the Minister to take by way of interim measurements “pending designation” were significant: -

“We should ask you to take instructions please and confirm that your client accepts this contention and will take steps to designate the lands at Saint (*sic*) Paul’s, and to protect them in the interim, pending designation.

In particular, our clients ask that the Minister will make an order requiring the cutting and keeping cut, of the grass at the Saint Paul’s playing fields, the subject of these proceedings, pending their designation.” (emphasis added)

The letter asserted that the Minister had power to issue notices pursuant to Regulations 28 or 29 of the Birds and Natural Habitats Regulations, 2011 S.I. 477/2011 and had further powers pursuant to Regulation 38 of the said Statutory Instrument if necessary to seek an injunction for such purpose. Regulation 28 empowers ministerial directions to be made in

respect of activities requiring consent where the Minister has reason to believe that any activity is of a type that may have a significant effect on a European site or an adverse effect on its integrity or may cause a deterioration of natural habitats or the disturbance of species. Regulation 29 provides for ministerial directions to be made to control specified activities in specified places, including where the Minister is of the view that such activity is of a type that may cause the deterioration of natural habitats or the habitats of species or the disturbance of species for which the European site may be where it has been designated pursuant to the Habitats Directive or has been classified pursuant to the Birds Directive. Regulation 38 provides for injunctions and the Minister can apply where she has reason to believe that any activity may, *inter alia*, cause the deterioration of natural habitats or the habitats of species or their disturbance.

**156.** The first proceedings were listed once more in the non-jury list on the 20 July 2018. It was again in the judicial review list on the 26 July and yet no response was forthcoming from the Minister notwithstanding that the ultimatum of 7 days specified in the letter had expired. The 31 July 2018 was the third occasion subsequent to the sending of the letter of the 18 July 2018 when this matter appeared on the High Court Judicial Review list. Clonres could have been under no illusion but that the Minister was not agreeing and had not agreed to the specific relief sought against her in the first proceedings, namely that she was under an obligation to designate the lands at St. Paul's for the purpose of Art. 4(2) of the Birds Directive and to take all appropriate steps to prevent deterioration of the foraging habitat of the Brent Geese and Black Tailed Godwit on the said lands in accordance with Art. 4(4) of the Birds Directive. Nor is it asserted that Clonres could have been under any misapprehension that the Minister was agreeing to the steps sought by virtue of the terms of the letter of the 18 July 2018.

***Hearing 31 July 2018***

**157.** The Minister had not agreed to instigate the designation or to taking the steps otherwise sought. The High Court concluded the first proceedings along with two other related sets of proceedings with which we are not concerned in this appeal and granted an order of *certiorari* quashing the decision of the Board dated 3 April 2018 to grant planning permission to Crekav on the grounds that the said decision contained an error on the face of the record as regards the recording of the test applied by the Board in reaching its appropriate assessment conclusion. The Court made no order as against the Minister and none was sought by Clonres.

**158.** The stance adopted by Clonres in open court on the 31 July 2018 appears to represent a substantial change of heart from its expressed position set out in the correspondence with the Minister of 18 July 2018 and a significant abandonment of its designation claim *vis-à-vis* the State defendants in the first proceedings.

The primary focus of the judgment of Barniville J. is directed to the arguments advanced in relation to the decision of the Board under challenge. Barniville J. notes at para. 15 –

“... it was stated that Clonres was not consenting to the proposed order and that, unless the Board consented to an order quashing the decision simpliciter, Clonres would be asking the court to determine the other grounds raised in the proceedings and to fix the time for the filing of opposition papers. It was further asserted that the proposed order of *certiorari* should be made in the Clonres proceedings also.”

**159.** In his judgment at para. 16 Barniville J. noted that the Board’s solicitors responded on the 13 July, 2018: -

“In that letter it was noted that the Board had conceded the matter on a specified ground and was seeking to have the application remitted to it to be determined in

accordance with law. The Board was not prepared to consent to an order quashing the decision simpliciter. In response to the indication that Clonres would be asking the High Court to proceed to hear its application for judicial review, the letter stated:-

*'In circumstances where the Board has conceded the application for judicial review on a specified ground, such an approach is contrary to well-established principles and practice and would entail an unnecessary and inappropriate use of resources, including Court time, to determine what would, in effect, be a moot. Any such application by your client will therefore be vigorously opposed by the Board.'*

The response by Clonres to the Board's solicitor is not recorded in the judgment - assuming that there was one.

**160.** The position of Clonres in oral submissions before the High Court on the 26 July 2018 are noted at para. 18 of the High Court judgment where it is stated: -

“Counsel for Clonres argued that an order of *certiorari* should be made in respect of the Board's decision. It was not contending that the court should proceed to hear the case (as had been urged in the letter from Clonres's solicitors of 13th July, 2018). However, counsel disagreed that the application should be remitted to the Board on the terms proposed by the Board or at all. He submitted that the application should go back to scratch, as it were, and should start again. He further objected to the manner in which the Board had communicated its position in the letter from its solicitors of 29th June, 2018 and submitted that this effectively amounted to the Board *'adding to, explaining or contradicting'* the decision in a manner precluded

by the Supreme Court decision in *The State (Crowley) v. Irish Land Commission & Ors* [1951] I.R. 250 ...”

Detailed arguments were advanced on behalf of Clonres *vis-à-vis* the Board and whether its decision incorrectly recorded the test applied by it in carrying out the appropriate assessment or rather if the issue was whether the Board had applied an incorrect test and that such an error on the part of the Board had tainted the entire proceedings before the Board. Clonres offered no arguments and sought no remedies, directions or orders against the State defendants. Neither did it seek directions from the court or attempt in any way to reserve its position regarding its claim for designation of the lands.

**161.** At paragraph 33 of the judgment the Court noted that counsel for the State supported the Board’s submissions and stressed that the 2016 Act envisages an expeditious process. In those circumstances, the State supported the remittal of the application to the Board. Barniville J. noted that the Board had made a limited concession that an error on the face of the record was made. He observed at para. 40 that many grounds had been advanced by each of the three applicants in their separate proceedings and that the Board had conceded that an order of *certiorari* could be made on one ground raised directly by one of the applicants and indirectly or peripherally by Clonres. Barniville J. observed: -

“... it has not been suggested by any of the applicants that the court should require the delivery of opposition papers in respect of all of the other grounds raised and should proceed to conduct a hearing and deliver judgment on all of those other grounds.” (para. 40)

**Assessment of stance adopted by Clonres on 31 July 2018**

**162.** It is evident from the tenor of para. 40 of the judgment that Clonres did not at any time intimate to the Court or the State parties that it wished to pursue its substantive claim against the Minister to compel designation of the lands as a SPA.

**163.** The decision in *Usk*, sought to be relied upon by the appellant to justify its litigation decision in this regard, is distinguishable including insofar as the Minister was not a party to the said proceedings and no substantive orders had been sought against a Minister. At para. 140 of the judgment in *Usk* in the High Court it states: -

“The residents originally sought relief alleging failure in the transposition of various EC Directives including the Environmental Impact Assessment Directive. By virtue of Art. 10 EC and Art. 249 EC the State is the entity ultimately responsible for any failure in the transposition of any EC Directive. While the residents had withdrawn a range of pleas against the State, they now limited the extent of their claim to the proposition that the Board’s interpretation and application of the EIA Directive remained a ‘live issue’. The residents did not serve a notice of discontinuance on the State. Thus the State remained a party to the proceedings.

They emphasise that because of what occurred, no transposition issue remained in contention in the case. The residents withdrew that plea. Therefore I expressly refrain from expressing any view on the question.” – (*Per* judgment of Mr. Justice McMenamin, 8 July 2009 *Usk and District Residents Association Limited v. An Bord Pleanála & Ors* [2009] IEHC 346, [2010] 4 I.R. 113.

I do not find *Usk* persuasive or of any assistance in support of the stance adopted by Clonres in the High Court. Further, it is noteworthy that the decision of Kelly J. ([2007] IEHC 48) was delivered on the 14 March 2007, over 11 years prior to the matter coming to be disposed

of in the High Court. In the ensuing years the importance of litigants bringing forward and disposing of all issues within litigation - whether public or private- in a timely and expeditious manner has been repeatedly emphasised with ever increasing force by the courts.

**164.** The observations of Barniville J. at para. 42 of his judgment must be taken in their context. He notes that *certiorari* in the terms of the draft order proposed by the Board was “... the only basis on which I am making the order of *certiorari*.” He acknowledged that he had not adjudicated on or determined any of the other grounds advanced by the various applicants in any of the three sets of proceedings. He accepted that “no issue of *res judicata* or issue estoppel arises by virtue of the order of *certiorari* which I have decided to make on the basis of the limited concession made by the Board.”

**165.** Paragraph 42 of the judgment is clearly directed to the Board. It is the Board that is referenced throughout, the Minister and the State are not referred to: -

“Should the applicants decide to commence fresh proceedings arising out of any further decision which the Board may make in light of the order of *certiorari*, they will be free to advance all or any of the grounds which they have advanced (and on which I had previously found to be ‘*substantial grounds*’) in those proceedings. This is, of course, subject to the applicants persuading the court in the event of such further proceedings being brought that ‘*substantial grounds*’ arise in respect of a challenge to any further decision which the Board may make on foot of Crekav’s application.”

**166.** Paragraph 48 of the Barniville J. judgment in the first proceedings substantially reiterates that position and the Board is specifically referenced on four separate occasions in the said paragraph - the State is not mentioned at all.

**167.** There is no evidence that it was ever asserted on behalf of Clonres on the 31 July 2018 in open court that it was entitled to hold in reserve its claims for significant declaratory reliefs against the Minister and the State, in particular the contention that there was an obligation to designate the subject lands for the purposes of Art. 4(2) of the Birds Directive or that it had an ongoing entitlement to pursue such a claim in fresh litigation as and when it elected to do so. Such a proposition would be rationally inconsistent with the order made remitting the matter back to the Board since the determination of the designation issue – were it subsisting after the orders of 31<sup>st</sup> July 2018 were made – would logically have to be determined prior to the Board making a determination in relation to the planning application in question.

**168.** In my view, the available evidence all points to Clonres having effectively abandoned their claims against the Minister and the State for designation of the subject lands as a SPA in the first proceedings on 31 July 2018.

***The State's position***

**169.** In a letter dated 31 July 2018 which appears from its context to have been sent to the appellant's solicitors on the day the matter was disposed of in the High Court but subsequent to the conclusion of the first proceedings and orders against the Board being made, the State wrote to Clonres in the following terms: -

“We refer to your letter of 18<sup>th</sup> July, 2018. That letter has been overtaken by events in that the High Court has since made an order of *certiorari* setting aside An Board Pleanála's decision to grant planning permission. (Ruling of 31<sup>st</sup> July, 2018). The above entitled judicial review proceedings have now concluded, and the claims against the State have fallen away.”

This is no more than a statement of fact made after conclusion of the first litigation.



**170.** Given that Crekav was a property developer and in light of the tenor of the order made by the High Court on 31 July 2018 which remitted the matter to An Board Pleanála on terms, it must have been very obvious to Clonres that Crekav would be actively pursuing on an ongoing basis the obtaining of a grant of planning permission in relation to its lands at St. Paul's. Hence Clonres would have known that it was of profound importance to Crekav to be informed if Clonres, contrary to the ostensible abandonment of its claim that the Minister was under an obligation to designate these lands for the purposes of Art. 4(2) of the Birds Directive, and the conclusion of the first litigation without pursuing such designation or even reserving its position in relation to same, considered the issue of designation to be in any sense a live one.

**171.** Such designation if granted would be incompatible with the known development intentions of Crekav. Since all of these facts were known to Clonres on 31 July 2018 and indeed the Board had conceded its position about a month beforehand, it must be inferred that Clonres fully understood the practical impact on the other parties to the first proceedings of its litigation decision in relation to the designation as a SPA to, in substance, abandon that claimed position before the High Court.

**172.** The letter of the 31 July 2018 from the CSSO insofar as it states "the claims against the State have fallen away" is entirely correct, but not in the sense that Clonres now appears to contend, namely that the issues were all put into abeyance until the next time around. They had "fallen away" because Clonres earlier that same day in the High Court had not pursued them nor asserted an intention to seek to have the issue of designation determined.

**173.** Standing back from the exchange of correspondence, a reasonable construction would be that as of 18 July 2018 in the first instance the appellant was seeking a concession or acknowledgment that the Minister would support or accept or positively consider what in effect was a request that the disputed site at St. Paul's be considered as a site of community

importance which would lead to a formal process whereby the Minister would in due course select the site as a candidate SPA to which the provisions of Regulation 477/2011 including Articles 15 *et sequitur* would apply.

**174.** If the reply presented any surprise to the appellants, that was not made evident by Clonres. Rather, on the 7 August 2018 the appellant's solicitors wrote to the Minister directly and the CSSO. Having outlined the terms of the order of 31 July 2018 quashing permission for the construction of housing on the playing pitches at St. Paul's the letter stated: -

“In the course of those proceedings it emerged that those pitches form a key feeding ground of light bellied brent geese, black tailed godwit and curlew all threatened or endangered species for which protection measures are required under Directive 2009 147 on wild birds. Our clients maintain that the State was obliged to designate the Saint Paul's lands under that Directive.”

The letter continues –

“As the proceedings were conceded by the Board, no order was made in relation to the designation of the site. However, the issue of protection of this key feeding area remains live.”

The letter continued: -

“In this respect we note the letter received from the Chief State Solicitor on your behalf and dated 31 July. That letter indicates that the State does not properly understand or apply either the Habitats Directive or the Birds Directive, for the reasons set out in our accompanying reply to the CSSO.”

Pointing out that Crekav had not responded to a call by Clonres that it cut the grass, the letter stated –

“We now call on you to issue an urgent order pursuant to Regulations 28 and/or 29 of the 2011 Habitats Regulations requiring it to be done.”

**175.** This letter is consistent with Clonres attempting to retrieve its position to lay the basis for the launch of a renewed claim, freestanding from the concluded litigation, that might reasonably be characterised based on a fresh request that the site at St. Paul’s be designated by the Minister under the Directive. It appears to be a request of the kind contemplated by Part 3 of the 2011 Regulations. Further, it asserts that Ministerial directions in respect of certain activities and/or controlled specified activities ought to be issued by the Minister and directed towards Crekav.

**176.** The letter continues: -

“Please note that, if you do not issue such an order, our clients will issue proceedings against you relating to a breach of the State’s duty to give effect to Council Directive 92/43 on natural habitats and 2007/149 on wild birds. Details are included in the attached letters to the Chief State Solicitor.”

The letter concludes –

“Please note that, if your client fails to take the action requested within 14 days, we are instructed to issue proceedings pursuant to Article 4(3) of the Treaty of European Union *inter alia* to compel the issue and enforcement of such a notice.”

In substance the letter in its tenor is a pre-litigation originating letter and non-compliance with its terms by the Minister within the specified time-frame ostensibly triggers an entitlement on the part of Clonres to litigate the matter raised. In certain respects, both letters of the 7 August 2018 are remarkable insofar as they issued barely a week following the conclusion of the litigation where there had been no assertion of any claim being pursued

against the Minister and the litigation against the State parties was abandoned. Yet one of the letters stated: -

“Our clients also maintain there has been an unlawful failure to designate the Saint Paul’s site as a special protection area under Art. 4 of Directive 2009/147 on wild birds. They further assert that the failure to protect the Saint Paul’s lands constitutes the failure to take appropriate steps to avoid deterioration of habitats or any disturbances affecting the birds that use the Saint Paul’s site, either of itself or as part of their use of the existing protected sites in the Dublin area, and the asserted failure to strive to avoid deterioration of habitats outside those protected sites, both of which are contrary to Art. 4(4) of the Directive.”

Thus, it is asserted that there are failures on the part of the State substantially similar to those asserted, advanced, contended for and abandoned in the first proceedings.

**177.** By response of the CSSO dated 24 August 2018 all of the appellant’s contentions are refuted; it being made clear that the lands do not form part of a designated European Site, there was no activity being carried out on the lands which met any of the criteria for the issuing of directions under either Regulation 28 or Regulation 29. It was specifically denied that there had been any failure to take appropriate steps to avoid deterioration of habitats or any disturbances affecting the birds that use the St. Paul’s site, nor any failure to strive to avoid deterioration of habitats outside protected sites. “We note that your clients have failed to adduce any evidence of such effects.” It was denied that there was a requirement to extend the area of the North Bull Island SPA and that said denial had already been communicated in the earlier letter of the 31 July 2018. “There is no requirement under the Birds Directive to include as part of a SPA all and any lands which might be used on occasion as feeding grounds. This is especially so in the case of non-wetland habitats which might only be used

on a temporary basis.” The letter continued: “The State will fully defend any fresh proceedings which seek reliefs similar to those in the now concluded proceedings”.

**178.** It was accordingly very clear by late August that the Minister was not acceding to Clonres’ contention that she was obliged to designate the St. Paul’s lands under the Directive on any basis asserted by Clonres and or to make orders or directions pursuant to various provisions of the Directive including Regulation 28 and 29.

***No decision***

**179.** The contention of Clonres that the second (plenary) proceedings are not in the nature of judicial review proceedings and not governed by O. 84 for the reasons stated including that the correspondence on behalf of the Minister in August 2018 does not constitute a decision is difficult to understand. It is obviously entirely inconsistent with the stance adopted in the first proceedings. The Directive does envisage in certain instances the right of the individual to request the minister that a step be taken such as the identification of a site for consideration as a “site of community importance”.

**180.** One example of this might be found in Reg. 10(4) of the 2011 Regulations. The process of identifying sites is set out in detail and with due regard to Annex 3, Stage 1 of the Habitats Directive. However, where the Minister considers appropriate to do so, the Minister is expressly entitled by virtue of Regulation 10(4) to modify the list of candidate sites of community importance having regard to the surveillance carried out pursuant to Regulation 9 or if he or she receives a request that a site be included in the list. (emphasis added)

**181.** This offers an example of a situation where an individual or entity can directly requisition the Minister that a site be included in the process that leads to designation . It is noteworthy that Regulation 10(4) refers to the possibility that “... the Minister may modify the list ...”.

**182.** Leaving aside for the moment the issue of the non-prosecution by Clonres of the specific claim against the Minister in the first proceedings, it is clear that the Minister made a decision as she was requested by Clonres to do in the letter of the 18 July 2018 by these words; “[w]e should ask you to take instructions please and confirm that your client accepts this contention and will take steps to designate the lands .... and to protect them ... pending designation”. That request was not acceded to by the Minister within the time-frame mandated in the letter.

**183.** In the circumstances, at the latest there could have been no doubt in the mind of Clonres, when it received the letter of the 24 August 2018 but that the Minister was refusing to take the steps and acts sought and that the designation which Clonres once more sought would not be entertained. Furthermore, as the said letter made clear, no orders in the nature of directions in respect of activities requiring consent or to control specified activities and specified places pursuant to either Regulation 28 or 29 of the Birds Directive would be made by the Minister in relation to the St. Paul’s lands. The letter encompassed a decision amenable to Judicial Review.

### **Political Lobbying**

**184.** An alternative argument advanced by Clonres is to the effect that time did not begin to run from the date of receipt of communication from the Chief State Solicitor’s Office on 24 August 2018 regarding the Minister’s decision not to accede to its demands but rather from subsequent engagement with politicians. The first replying affidavit of Deirdre Nichol in relation to the strike-out motion exhibits a note of a “Meeting re Campaign to Save St Anne’s” said to have taken place between Deirdre Nichol and three other named individuals characterised as “representatives of Save St. Anne’s” and a government Minister and a Senator from Dublin Bay North Constituency in October 2018 wherein the subject property is situate. It is not clear what nexus, if any, exists between “Save St. Anne’s” as an entity

and Clonres. It records under the heading “Action Requested” –“ Save St. Anne’s representatives sought the support of Minister Bruton and Senator Noone in progressing these matters with their colleague Minister Madigan.” The note states; “[t]he matter of grass cutting is urgent as the migrating birds are now arriving and will not be able to use this feeding ground unless the grass is cut immediately.” It is unclear whether the note was submitted to the other side, namely the Minister and the Senator for their agreement that it was a true record of the meeting or as to its terms. It appears at best to record a request for support for their stance: “... sought the support of...”. It does not record any undertaking or agreement to take any step. It does not appear to be the case that the appellant was specifically named or identified as being represented at the said meeting. Surprisingly, the existence of the first litigation which had resulted in a compromise with the Board and orders made on the 31 July 2018 but concluded with no orders obtained against the State respondents, despite substantially similar declarations being sought in the proceedings, does not appear to have been disclosed to the Minister and the Senator.

**185.** Subsequently, in December 2018 there was a meeting with the Minister for Arts, Heritage and the Gaeltacht. Nothing in the appellant’s engagements with the Senator or either Minister could be said to offer a valid basis for the stopping of time.

Political activity including lobbying has fallen into disfavour somewhat as a mechanism for achieving outcomes, especially in the context of planning and development. The appellants invoke the decision of Costello J. in *O’Donnell v Dun Laoghaire Corporation* [1991] I.L.R.M. 301. Costello J. noted at p. 317 that Mr. O’Donnell had established that from June 1988 he had been contesting his liability to pay water charges not through the Courts but rather with the assistance of three different public representatives. “Is the course of conduct a ‘good reason’ within the meaning of O.84, r. 21 which would have justified the Court in

extending the time for applying for a judicial review of the orders?” the court had asked itself. Costello J. observed: -

“Assistance in answering this question is to be found in *The State (Furey) v The Minister for Defence* [1988] ILRM 89. There the applicant had been a member of the Defence Forces. He was discharged on the 15 August, 1975. He instituted proceedings four years later for an order of *certiorari* to quash the discharge. He was successful in the High Court and the Minister appealed. One of the grounds of appeal was that the application should have been refused on the grounds of delay. This was rejected by a majority decision. The evidence of the plaintiff was to the effect that he did not realise that he could pursue his complaint through the Court, that he could not afford legal advice, that over a four year period he had written many letters to the Department, to local members of parliament and to successive Ministers for Defence. On these facts it was concluded that the applicant had not disentitled himself by his delay to the remedy he sought.” (p. 317)

**186.** The facts in the instant case are wholly distinguishable from *O'Donnell*. Clonres was at all material times legally represented by solicitors and counsel. They were so represented in the first litigation instituted in May 2018. It could not be suggested that Clonres “did not realise that it could not pursue this complaint through the courts.”

**187.** Whereas Costello J. at p. 318 of his judgment in *O'Donnell* makes clear that the applicant had “tried to get redress through political pressure”, neither *O'Donnell* nor *Furey* concerned planning. In both there was an absence of legal advice at critical stages.

**188.** A further notable development in the intervening years since both the *Furey* and *O'Donnell* decisions has been the introduction of the Regulation of Lobbying Act, 2015



which was signed into law in March 2015. Ministers and Ministers of State as well as TD's and Senators are designated "public officials" for the purposes of the Statute.

**189.** A "relevant matter" for the purposes of the legislation includes the initiation, development or modification of any public policy or of any public programme. It is noteworthy that, where the provisions of the Act are engaged, any party communicating about the development or zoning of land generally must register to carry on lobbying activities. It was not argued that the Appellant was subject to the provisions of the 2015 Act. It not having been argued, I express no view on the matter.

**190.** Leaving the 2015 Act to one side, the record shows that the items recorded as having been discussed at the meeting of the 11 October 2018 included: -

"Following on from the recent decision of An Bord Pleanála to refuse planning permission for the proposed development on the St Paul's playing pitches in St Anne's ..."

**191.** The evidence suggests that the engagement by the appellants with both Ministers and the Senator pertain to either the development or the zoning of land or indeed both. A relevant matter for the purposes of the legislation also includes preparation or amendment of any law to include secondary legislation such as statutory instruments and bye laws.

**192.** No valid basis has been made out whereby the appellant can establish an entitlement to rely on its interface with the said Ministers and the Senator as operating to provide a good and sufficient reason or explanation on any basis to extend time. Furthermore, on the basis of the information put before the Court no lawful, binding or justiciable commitment or obligation was assumed by either Minister or the Senator. No factor or circumstance said to be outside the control of Clonres, or not reasonably to be anticipated by it, was demonstrated to have caused or contributed to the delay. At best, it could be said that nothing was done

and no obligation was assumed by either Minister or the Senator to proceed to exercise or discharge a relevant legal function which could be prayed in aid in the context of seeking an enlargement of time pursuant to O. 84, r. 21(3). The appellant's encounters with the said politicians and/or Ministers did not have the effect of stopping time running for the purposes of O. 84 r. 21. Neither do they give rise to or establish any valid basis for the exercise of discretion pursuant to Order 84 r. 21 to extend time as the appellant seeks.

**Whether both claims are substantially similar**

**193.** As outlined above, the essence of the relief sought against the Minister in the 2018 judicial review proceedings was a declaration that the Minister was under an obligation to designate lands owned by Crekav the subject matter of the proposed development for the purposes of Art. 4(2) of the Birds Directive.

**194.** In the appellant's own submissions filed in this Court in the within appeal the claim in these proceedings is characterised thus at para. 1: -

“The State has failed to comply with its obligations under the Birds Directive in respect of lands at St Paul's ... ('the St Paul's Site') by failing to designate the site as an SPA and by failing to take protective measures such as issuing a direction/notice to protect the site as if it was an SPA.”

At para. 2 of the said submissions the appellant states: -

“It is further alleged that the State is under a duty to take measures to prevent the disturbance of bird species at St. Paul's so as to protect nearby SPAs. This obligation relates to a failure to protect existing SPAs and arises irrespective of whether St. Paul's ought to be designated an SPA.”

Protections against disturbances affecting birds arises, *inter alia*, pursuant to Art. 4(4) of the Birds Directive and Art 6(2) of the Habitats Directive and is directed towards the obligations of Member States, *inter alia*, in regard to disturbance of species.

**195.** It is clear from the correspondence, and in particular the letter of the 18 July 2018 from Clonres' solicitors to the Chief State Solicitor that the relief being sought in the 2018 proceedings was, not alone that the North Bull Island SPA should be extended to include the lands at St. Paul's and that the Minister would confirm that steps would be taken to so designate the said lands, but also that steps would be taken to protect them in the interim pending designation.

### **Grass Cutting**

**196.** In addition, a significant factor is that as of the 18 July 2018, the Minister was being requested by Clonres to make an order "requiring the cutting and the keeping cut of the grass at St. Paul's playing fields, the subject of these proceedings pending their designation."(emphasis added) Cutting of grass was a claim and a live issue before the courts when the appellant freely agreed to the disposal of the judicial review proceedings on the 31 July 2018 in substance abandoning its claims against the State.

**197.** In such circumstances, since issues requiring the cutting and keeping cut of the grass at St. Paul's were being actively pursued and asserted by the appellant as late as the 18 July 2018 it is not correct for the appellant to contend as is asserted in the affidavit of Deirdre Nichol, being the first affidavit by her sworn on the 26 May 2020: -

"The threat to the site abated as a result of the quashing of the planning permission. However, after the said proceedings were compromised, the plaintiff became aware that the integrity of the site was once again threatened, on this occasion by a failure

to cut the grass at St. Paul's, which failure would result in damage to the site as a feeding ground." (para. 15) (emphasis added)

That creates an erroneous impression that no issue had arisen with regard to the cutting of grass on the lands prior to the disposal of the proceedings by the orders made by Mr. Justice Barniville on the 31 July 2018. However, such is not the case. The averments at para. 15 and 16 of the said affidavit create the further erroneous impression that the plaintiff first wrote to the Minister raising issues concerning the cutting of the grass subsequent to the compromise of the litigation on 31 July 2018. However, the letter was sent 12 days prior. At para. 16 of the said affidavit, Ms. Nichol avers: -

"The Plaintiff then wrote to the Minister and called on her to take action to prevent damage to the site but was met with the response that as the site was not an SPA no action could or would be taken. The Plaintiff thereafter took the within proceedings seeking, *inter alia*, to compel the Minister to declare St Paul's a SPA and to take action to protect the site."

**198.** The affidavit sworn by Deirdre Nichol on the 26 May 2020 calls for close scrutiny. This is particularly so with regard to the rationale being advanced for the second set of proceedings.

**199.** It is alleged at para. 15 that the threat to the site abated "as a result of the quashing of the planning permission". It asserts that the appellant only became aware after the first proceedings were concluded "that the integrity of the site was once again threatened, on this occasion by a failure to cut the grass at St. Paul's which failure would result in damage to the site as a feeding ground."

**200.** This appears to suggest the cutting of the grass at St. Paul's had not been a live issue or known to Clonres prior to the conclusion of the first proceedings on 31 July 2018. That is

not so however. Less than two weeks prior to the conclusion of the proceedings in a lengthy letter outlined above on the 18 July 2018 Clonres' solicitor made the following specific demand to the Chief State Solicitor who was on record for the Minister and the State:

“... our clients ask that the Minister will make an order requiring the cutting, and keeping cut, of the grass at the Saint (*sic*) Paul's playing fields, the subject of these proceedings, pending their designation.”

Reliance was placed on Regulations 28 and 29 of the 2011 Regulations. It was further asserted: -

“The Minister also has power pursuant to Regulation 38, if necessary, to seek an injunction for such purpose.”

**201.** It was clearly asserted that: -

“In default of action by the Minister ... our clients will take such action as they may be advised, in particular, in exercise of their rights and obligations under the Aarhus Convention and under European Law, and will rely on this letter in an application for costs of any proceedings that they may incur, and an application that the State is liable under European Law to make good such costs.”

At no time thereafter up to the hearing on the 31 July did the Minister, either through the CSSO or otherwise, respond agreeing to any of the demands requiring the making of the said orders, or indeed the other demand therein specified to the effect that the SPA at North Bull be extended to include the lands at St. Paul's. The said correspondence was not raised in open court nor brought to the judge's attention when the matter came for consideration before Barniville J. on 31 July 2018. There is no valid basis identified for the assertion that “the threat to the site abated as a result of the quashing of the planning permission.” The issue was remitted to the Board which made its decision within weeks thereafter.

**202.** Furthermore, para. 16 of the said affidavit of the 26 May 2020 appears to be unintentionally somewhat misleading. It recalls that the plaintiff wrote to the Minister and “called on her to take action to prevent damage to the site but was met with the response that as the site was not an SPA no action could or would be taken.” It is not clarified that this correspondence was initiated on 18 July 2018 in the first litigation where an application for designation of the site was a live issue before the High Court.

**203.** The assertion at para. 23 of the appellant’s submission to the effect that it was subsequent to the 31 July 2018 that it became aware of a failure to cut grass at St. Paul’s and that same was “interfering with the integrity of the site” is undermined by the clear language of the letter of the 18 July 2018 written on behalf of Clonres to the Chief State Solicitors Office.

**204.** It scarcely needs stating that were there not a perceived failure to have the grass cut at St. Paul’s, the appellants had no need to write a letter to the Chief State Solicitors Office on the 18 July 2018 calling upon the Minister to “make an order requiring the cutting and the keeping cut, of the grass at the St. Paul’s playing fields ... pending their designation.” The said letter further stated: “[w]e have also written to the developer asking it to keep the grass cut...” It is noteworthy that on the 18 July, 2018 solicitors for Clonres asserted: -

“We submit that there is an obligation on the State to take such action, on the basis of the Habitats Directive, Birds Directive and Article 4(3) of the Treaty on European Union, and that any damage to the conservation status of the SPA is a sufficiently characterised breach of the Directive to give rise to State liability and a duty to take remedial action.”

**205.** It was a further demand in the letter of the 18 July 2018 that the Minister “... would confirm within 7 days of the date of this letter that the Minister will take adequate and

effective steps to ensure that the grass on the St. Paul's site is in good condition prior to the arrival of wintering birds at the site commencing in October." That notice expired on or about 25 July 2018 prior to the conclusion of the first proceedings.

**206.** Hence, all of those complaints which substantively find expression once more in the second proceedings – in the plenary summons, as amended and the amended statement of claim – are in substance a further repetition or reiteration of the same claim against the State parties with elements amplified and with certain modifications such as that St. Paul's site be designated as an SPA pursuant to the Birds Directive and the Habitats Regulations and that the said site be protected pending designation.

### **Decision**

**207.** It is noteworthy that had the amendments sought by Clonres in the motion for leave to amend been acceded to at their height according to the appellant's own written legal Submissions at para. 113 the said proposed amendments were categorised as: -

- “(i) A refinement of certain existing pleas by making more explicit certain existing pleas;
- (ii) Inclusion of certain updating information arising since the proceedings were issued;
- (iii) Correcting certain typographical errors, in particular the relief at para. 15 against the fourth named defendant, which is in similar terms to the relief in para. 16.”

The appellant goes on to state: -

“114. None of the above involve any radical change or enlargement of the claims.”

***Rules Governing Judicial Review Apply***

**208.** Subject to the determination of the issue as to whether there was a decision or other act on the part of the Minister in respect of which time began to run for the bringing of judicial review proceedings, it is to be borne in mind that the institution of what in substance are judicial review proceedings by means of plenary proceedings does not confer any litigation advantage on the plaintiff. As the author Browne in *Simons on Planning Law*, (3<sup>rd</sup> ed., Round Hall, 2021) observes at 12-173: -

“In the case of conventional judicial review, the Irish Courts have not followed the English line of authority that judicial review is an exclusive remedy. In *O’Reilly v Mackman* [1983] 2 A.C. 237, the House of Lords held that if the issues in dispute could be litigated by way of plenary proceedings this would run contrary to the aim of ‘speedy certainty’ as to whether a decision is valid in public law and it would amount to an abuse of process.” (footnotes included)

The author further observes –

“A broad approach has been adopted in this jurisdiction and the Irish Courts have not adopted the rigid approach of procedural exclusivity which applied in England after *O’Reilly v Mackman*.” (12-174)

**209.** It is clear since the decision of the Supreme Court in *Shell E&P Ireland Limited v. McGrath* [2013] IESC 1, [2013] 1 I.R. 247 that there is no general rule of procedural exclusivity attending O. 84 RSC. Shell had instituted proceedings against six named defendants seeking various prohibitory injunctions permanent in nature together with damages. The defendants had proceeded to join State parties and contested, by way of counterclaim the validity of statutory decisions including compulsory acquisition orders.



The State defendants contended, *inter alia*, that the claims against them were out of time for non-compliance with O. 84 RSC in a challenge to certain compulsory acquisition orders.

**210.** A key issue that fell to be determined on appeal to the Supreme Court was to the relevance of the time limits in respect of judicial review specified in O. 84 RSC in circumstances where such relief is sought in the context of plenary proceedings.

**211.** Clarke J. reviewed the jurisprudence noting that several aspects of the decision of Costello J. in *O'Donnell v. Dun Laoghaire Corporation* had been subsequently approved of by the courts including the Supreme Court.

At 7.4 of his judgment he noted: -

“Another aspect of *O'Donnell* has also been approved by this Court in *Dublin City Council v Williams* [2010] 1 I.R. 801 where it was confirmed that the ‘exclusivity principle’ as set out by the House of Lords in *O'Reilly v Mackman* does not apply in this jurisdiction. In that case, this court ruled that the legality of a fixed refuse charge could not be raised in the District Court by way of defence to a claim for a civil debt of a public nature. .... Different considerations apply to proceedings in the High Court which, of course, has a full judicial review jurisdiction and a wide declaratory jurisdiction as well. Where proceedings are brought in the High Court the only issue is one of the form of the proceedings rather than the jurisdiction of the court to entertain proceedings of that type in the first place.”

Clarke J. proceeded to express the view that: -

“... *O'Donnell* was rightly decided ... it would make a nonsense of the system of judicial review if a party could bypass any obligations which arise in that system (such as time limits and the need to seek leave) simply by issuing plenary proceedings which, in substance, whatever about form, sought the same relief or

the same substantive ends. What would be the point of courts considering applications for leave or considering applications to extend time if a party could simply bypass that whole process by issuing a plenary summons?" (para. 7.7)

**212.** Clarke J. observed at 7.8: -

"In Ireland it was accepted that challenges to the validity of public law measures could be brought by declaratory plenary proceedings but that when so brought the procedural limitations imposed by the rules of court on judicial review applications applied by analogy."

He placed reliance on the decision of Costello J. in *O'Donnell* in that regard.

**213.** At 7.11 Clarke J. observed: -

"The underlying reason why the rules of court impose a relatively short timeframe in which challenges to public law measures should be brought is because of the desirability of bringing finality to questions concerning the validity of such measures within a relatively short timeframe. At least at the level of broad generality there is a significant public interest advantage in early certainty as to the validity or otherwise of such public law measures. People are entitled to order their affairs on the basis that a measure, apparently valid on its face, can be relied on. That entitlement applies just as much to public authorities. The underlying rationale for short timeframes within which judicial review proceedings can be brought is, therefore, clear and of significant weight. By permitting time to be extended the rules do, of course, recognise that there may be circumstances where, on the facts of an individual case, a departure from the strict application on whatever timescale might be provided is warranted. The rules do not purport to impose an absolute time period."

**214.** At 7.19 Clarke J. observed that there was no express statutory time limit which debarred the proceedings in *O'Donnell*. “The only barrier was that to be found in the rules and that time limit, as was noted by Costello J., was held only to apply by analogy.” He concluded at 7.23 that *O'Donnell* was correctly decided.

“... It further follows, therefore, that the rules can be taken to apply by analogy to claims which have, as their substance, the seeking of the types of relief ordinarily obtained by judicial review even though framed in another fashion such as in declaratory proceedings.”

**215.** At 7.24 Clarke J. considered the counterclaim observing that it was “from the beginning, a substantive claim and the question of whether it was in time can, for that reason, be viewed on the basis of the claim as originally formulated and in the circumstances which then pertained.”

**216.** On the issue of time limits he observed: -

“Either there is a binding time limit in place (subject to extension by the court) or there is not. It is hard to see how there could be any justification for requiring a person who wished simply to set aside a public measure to act within the time limits provided for in the rules for judicial review applications (either because the proceedings were judicial review proceedings or because judicial review time limits applied by analogy in the case of plenary proceedings) but not to apply the same time limits to a challenge which sought to go beyond seeking to have the public law measures concerned rendered invalid by seeking to use that invalidity as a basis for claiming damages against a party who placed reliance on the measures concerned.”

**217.** Whether a decision amenable to judicial review has been made or not in any given instance is dependant primarily on context.

**218.** The appellant's stance before the High Court was to purport to unmoor its claim from any decision thereby to demonstrate that the procedural rules and time limits governing public law remedies such as Order 84 r. 21 are not applicable to the within proceedings. The trial judge observed at para. 32: -

“... Clonres claims that it is not in fact challenging a decision allegedly taken in 2009/2010 or one allegedly taken in August 2018 and hence there is no question of a time limit applying to this challenge. Instead, in its submissions, Clonres claim that ‘there is no public law “measure” challenged in the present proceedings”.

**219.** Browne in his above-mentioned text observes at 12.183: -

“In *O’Connell v Turf Club* [2015] IESC 57 at para. 37 O’Donnell J. stated that since the selection of procedure is not exclusive in this jurisdiction, and public law remedies such as declaratory relief can be sought in plenary proceedings, the choice of procedure becomes less significant and it is less important to be definitive about the question of amenability to judicial review. It should be noted that in *BPSG Limited v Courts Service* [2017] IEHC 209 the High Court (Baker J.) held that the same time limits apply where declaratory relief is sought in judicial review proceedings.” (footnotes included)

### ***Mandamus - Public Law Remedies***

**220.** In Grounds 5, 6 and 7 of its appeal the appellant contends that the trial judge erroneously characterised the proceedings as judicial review proceedings “which they are not”. Further, it was contended that the trial judge had erred in concluding that the appellant was in effect seeking an order of *mandamus* against the State respondents. It is posited (Ground 5) that the trial judge had erred in concluding at para. 38 that the appellant's proceedings are a challenge to a decision not to designate the St. Paul's site as a SPA. Rather,

the appellant contends, it seeks to establish that the State is in breach of ongoing obligations under EU law to designate the lands at St. Paul's as an SPA and/or to take protective measures in respect of same. "There was and/or is no application and/or administrative process which would result in such decision of the State respondents to make or to refuse to designate lands as an SPA."

**221.** Grounds 10, 16 and 17, in part, further reiterate that stance, contending that the trial judge had erred in characterising continuing obligations as meaning no time limit applies to a challenge to designate the site as an SPA. At Grounds 16 and 17 the appellant contended that authorities concerning an ongoing accrual of time and "where judicial review proceedings involve an alleged continuing breach, that the time limits for judicial review will not have expired, which is not the same as there being no time limits (as erroneously stated by the trial judge)". It was further contended at Ground 17 that the trial judge had failed to consider that there was a continuing obligation on the State respondents under European law.

**222.** In my view, having regard to the tenor of the letter of the 31 July 2018 when read with the intervening correspondence and the ultimate response of the 24 August 2018 on behalf of the Minister and Ireland, in substance the communication could be characterised as a clear and unequivocal communication by the Minister intimating that she had made a decision not to accede to the request submitted in the letter/letters of the 18 July 2018 as supplemented by the subsequent letter of the 7 August, 2018. The Minister had received a request that the St. Paul's site be included in the list of SPAs/candidate sites and the CSSO unequivocally communicated the refusal to accede to that request. The process, had the request been acceded to, would have involved multiple stages under the terms of the 2011 Regulations. It did not go beyond the preliminary step or stage. The appellant was in no doubt once in receipt of the letter of the 24 August 2018 that the Minister had made a clear

decision not to accede to the appellant's request to instigate the process of designation. In all the circumstances, given the significant level of publicity attendant on the ongoing planning proceedings and litigation concerning the St. Paul's site and given that the correspondence copied and made available to other environmental activists as well as the extensive membership of Clonres, there was in the context of this application, sufficient public notification of the Minister's stance in connection with the appellant's application, such that the letter of the 24 August 2018 constituted a decision *quo ad* the appellant which engaged O. 84 and the time limits therein specified. Thus, in my view, in addition to the "decision not to designate" in 2009/2010 as determined by the trial judge the evidence supported a relevant decision concerning refusal to designate the St. Paul's lands as a SPA on 24 August 2018.

**223.** It is thus well-settled that in proceedings such as those instituted by the appellant in April 2019 the time limits specified in O. 84 apply. No litigation advantage can be conferred upon Clonres arising from its decision to pursue the within proceedings by way of a plenary proceedings. Such a litigation decision may well have been informed by desire on the part of the appellant to distance itself from the substantive claims pursued against the State party in the first proceedings.

**224.** I am satisfied for the reasons stated above that there was a relevant decision made by the Minister in response to the request of the appellant and the time limits in O.84 applied thereto. Grounds of appeal contending otherwise are not made out for reasons set out in this judgment. At the latest, that decision was communicated to Clonres on the 24 August 2018. One need only consider the contrary proposition, for instance, had the letter dated the 24 August embodied an agreement that there was a requirement to designate the St. Paul's lands as a SPA and/or had there been an agreement on the State/minister's behalf to take any measure, pursuant to Regulations 28, 29 or 38 of the European Communities (Birds and

Natural Habitats) Regulations, 2011 (S.I. No. 477 of 2011) the appellants would have been perfectly entitled to characterise same as decision/s capable of enforcement against the State/Minister by way of Judicial Review.

**Henderson Rule**

**225.** As the trial judge noted, the respondents had sought that the within proceedings be dismissed or struck out for failure to comply with the requirements of O. 84 including failure to bring the proceedings within the time limits prescribed in O. 84 r. 21(1) and/or failure to meet the substantive requirements of a judicial review claim. The *Henderson* Rule was the alternative ground relied upon as a basis for the dismissal of the proceedings.

**226.** The *locus classicus* of the rule is the judgment of Wigram V.C. in *Henderson v Henderson* (1843) 3 Hare 100, at p. 115 where the latter observed: -

“... Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, it will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

**227.** Brown in *Simons on Planning Law* at 12-1842 succinctly notes that: -

“The courts have an inherent jurisdiction to guard against any abuse of process. One aspect of this jurisdiction is the power to strike out proceedings which seek to relitigate matters which had previously been determined by a final judgment. This is often referred to by the shorthand *res judicata*. The principle includes not only issues which are actually determined in the earlier litigation but extends to issues which could have raised in the earlier litigation, but were not. This latter aspect is sometimes referred to as the rule in *Henderson v Henderson* (1843) 3 Hare 100 at 114.”

It is now well established in this jurisdiction that the *Henderson* Rule is a species of the modern doctrine of abuse of process and has diverged from that aspect of the rule adumbrated by Wigram V.C. which was primarily addressed to *res judicata*.

**228.** Were the respondents to succeed in their alternative contention that these proceedings ought to be dismissed by reason of the principle in *Henderson v. Henderson* and by virtue of it being established that the reliefs sought in the within proceedings could and should have been pursued by the plaintiff in the first proceedings 2018/426JR that would potentially be dispositive of this appeal. In the narrow sense that the doctrine in *Henderson* applies in the context of these proceedings, where the issue of designation was not the subject of any findings of fact or law and no determination on the issue of designation of the St Paul’s lands as a SPA was made in the first proceedings the said issue is not *res judicata* and the respondents acknowledged this.

**229.** In the within proceedings the appellant has refined the claim in the first proceedings and reconfigured it to a proposition that the St. Paul’s site owned by Crekav the subject of a planning application ought to be designated a SPA in its own right rather than as a constituent part of the North Bull Island SPA which is situate about 1.5 km. away. I am satisfied that this is a point of detail only. The central fact is that in both the first proceedings and the



current proceedings the appellant sought to have lands at St Paul's designated by the Minister as a SPA under Article 4 of the Birds Directive. It is of secondary importance in the context of the proceedings whether such a designation would be effected, were it to take place, on a standalone basis or in conjunction with an existing SPA in the vicinity.

**230.** It is noteworthy that in their current iteration the plenary summons and statement of claim extensively mirror and amplify the reliefs being sought in the appellant's letter of 18 July 2018 to the Chief State Solicitors Office which had represented the Minister and Ireland in the first proceedings. The appellant described itself as an environmental non-governmental organisation in operation since the year 2006 representing the residents of Clontarf in Dublin. Its correspondence was cc'd to other environmental activists and litigants. The process of engagement and the formal request submitted to the Minister and the State on the 18 July 2018 was disclosed to a wide range of parties actively engaged in environmental litigation before the courts.

**231.** The so-called rule in *Henderson* Rule was argued during the 3-day hearing in the High court and in the course of this appeal. It was contended on behalf of the respondents that the doctrine in its narrow sense was dispositive of the appellant's proceedings since Clonres "*could and should*" have pursued the specific issues now sought to be litigated, in the first judicial proceedings.

**232.** It is well-established that there should be finality in litigation and that principle extends to public law litigation as well as private suits. A claimant is not generally entitled to rely subsequently on points of law or claims abandoned in earlier proceedings against the same party.

***Position in Ireland***

**233.** The iteration of the *Henderson* Rule directed towards claims which might have been brought forward in the first action but which were not, due to the negligence or inadvertence of the parties sought to be estopped and the cognate extensions of same derived from *Henderson v. Henderson* have long been established in this jurisdiction. As McDermott in *The Law in Relation to Res Judicata and Double Jeopardy* (1<sup>st</sup> ed., Bloomsbury Professional, 1999) observed at 8.01: -

“... in *Cox v Dublin City Distillery (No. 2)* [1915] 1 IR 345 at 372 which was subsequently approved by O’Brien C. in *Cox v Dublin City Distillery (No. 3)* [1917] 1 IR 203 at 223 – 224, Palles C.B. held that a party to a prior suit was bound by ‘not only any defences which they did raise in that suit, but also any defence which they might have raised, but did not raise therein’. [1915] 1 IR 345.” (citations added)

**234.** The author analysed the principles in the context of estoppel by omission. At 8.03 he observes: -

“Courts speak of defences which a party ‘might have raised’ (*Cox v Dublin City Distillery (No. 2)* [1915] 1 IR 345 at 372) where a party failing to bring forward evidence which, was either within his knowledge or which he might have discovered if he had exercised ordinary diligence in protecting his own interests”.

**235.** McDermott posited at 8.05: -

“Some relief from the operation of estoppel by omission may be available. If a party, though omitting to bring forward some fact or matter in the first suit which he now desires to raise in the second suit, can show that at the time of the former proceedings he was excusably ignorant thereof and that such fact or matter would have altered the whole aspect of the case, he is entitled to avoid a plea of estoppel

by omission. The Canadian decision of *Bernier v Bernier* 62 DLR (4<sup>th</sup>) 561 at 564 [1990] (CA, Ont.) is cited.” (citation added)

The latter decision (*per* Grange J.A.) had held that *Henderson* “special circumstances” cannot avail a party where all the relevant factors were known to the appellant’s legal representative who for whatever reasons did not advance them in argument.

**236.** The author continues –

“The estoppel stands, however:

1. if there was no newly discoverable fact;
2. if it was newly discovered only in the sense that the party realised its importance;
3. if the party had actual knowledge of the fact or might with a reasonable diligence have acquired such knowledge, or, if it was not sufficiently material. [Spencer Bower, *The Doctrine of Res Judicata* (3<sup>rd</sup> ed., Handley, 1996) at para. 196 is relied upon in that regard.]”

**237.** It is clear that a litigant may be barred from raising a different type of claim from that which has been the subject of initial proceedings if the subject matter of the new claim is so related to the original proceedings, and is one which could, with reasonable diligence, have been put forward at the original hearing.

### ***England & Wales***

**238.** The rule’s free-standing status apart from *res judicata* was recognised in a series of decisions including *Yat Tung Investment Co. Limited v. Dao Heng Bank Limited & Anor* [1975] 2 W.L.R. 690. This was an appeal from the Supreme Court of Hong Kong to the Privy Council. Lord Kilbrandon delivering the judgment of the Council observed that there

was a wider sense in which the doctrine of estoppel could be appealed to “so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings”.

The Privy Council observed in *Yat Tung*: -

“ ‘The shutting out of a subject of litigation’ – a power which no court should exercise but after a scrupulous examination of all the circumstances – is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless ‘special circumstances’ are reserved in case justice should be found to require the non-application of the rule.” (pp. 696-697)

**239.** The Privy Council also observed: -

“The Vice Chancellor’s phrase ‘every point which properly belonged to the subject of litigation’ was expanded in *Greenhalgh v Mallard* [1947] 2 All E.R. 255, 257 by Somervell L.J.:

‘... *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but... it covers issues or facts which are clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.’” (p. 696)

**240.** This aspect of the *Henderson Rule* and its application to issues and grounds and pleas left unpursued in earlier litigation was considered by the House of Lords in *Arnold & Ors v. National Westminster Bank Plc* [1991] 3 All E.R. 41 where Lord Keith of Kinkel at p. 46 - citing with approval the observations of Sir Nicholas Browne-Wilkinson V.C. in *Basingstoke and Deane BC v. Host Group Limited* [1988] 1 W.L.R. 348 at 353 – 355 - stated: -

“Cause of action estoppel arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened. ... The principles upon which cause of action estoppel is based are expressed in the maxims *nemo debet bis vexari pro una et eadem causa* and *interest rei publicae ut finis sit litium*. Cause of action estoppel extends also to points which might have been but were not raised and decided in the earlier proceedings for the purpose of establishing or negating the existence of a cause of action.”

**241.** He elsewhere observed that although *Henderson* was a case of cause of action estoppel the judgment has been held to be applicable also to issue estoppel. The House of Lords judgment cited with approval *Brisbane City Council v. AG for Queensland* [1979] A.C. 411 that the rule in its wider sense can be invoked and that a litigant may be shut out from raising in a subsequent action an issue which he could and should have raised in the earlier proceedings.

**The decision in *Johnson v. Gore-Wood & Co. (a firm)* [2002] 2 A.C. 1 (*Johnson*)**

**242.** *Johnson* is generally viewed as the decision to supersede all prior statements as to the applicable principles guiding the approach of the court where abuse of process engaging the *Henderson* Rule is raised.

**243.** The judgment of Lord Bingham of Cornhill in *Johnson* identified the parameters of this element of the *Henderson* Rule, encompassing issues which might have been brought forward to be heard at the time of the initial proceedings but were not.

**244.** The House of Lords in *Johnson* clearly framed the principle in the context that there was a public interest in the finality of litigation and in a defendant not being vexed twice in the same matter, counselling that whether an action was an abuse of process as offending against the public interest should be judged broadly on the merits taking account of all the public and private interests involved and all the facts of the case, the crucial question being whether the plaintiff was in all the circumstances misusing or abusing the process of the court. Bingham L.J. considered earlier jurisprudence including *Bradford and Bingley Building Society v. Seddon* [1999] 1 W.L.R. 1482 where the Court of Appeal of England and Wales had drawn a clear distinction between *res judicata* and other forms of abuse of process that did not qualify as *res judicata*. He noted the observation of Auld L.J. in *Bradford Bingley* that: -

“The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same tests, the task of the court being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of matter...”

“Thus, abuse of process may arise where there has been no earlier decision capable of amounting to *res judicata* (either or both because the parties or the issues are different) for example, where liability between new parties and/or determination of new issues should have been resolved in the earlier proceedings. It may also arise where there is such an inconsistency between the two that it would be unjust to permit the later one to continue.” (p. 30) (emphasis added)

245. Having reviewed the jurisprudence Bingham L.J. observed at p. 90: -

“*Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel has much in common with them. The underlying public interest is the same; that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interest of parties and the public as whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional elements such a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceedings involve what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. ....

While the result may often be the same, it is in my view preferable to ask whether in all the circumstances the party's conduct is an abuse than to ask whether the conduct is an abuse and then if it is to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

**246.** *Johnson* is a decision of some relevance in the context of a compromise such as occurred in the instant case where the first proceedings did not proceed to a substantive trial ostensibly because of a concession made by An Bord Pleanála early on in the proceedings. Bingham L.J. had no difficulty in considering that the rule applied equally to compromised suits as to those which had been litigated to a final conclusion and formal orders;

"An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. The second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first; often, indeed, the outcome would make a second action the more harassing." (pp. 91-92 of the judgment)

The major distinction is that in the instant case Clonres clearly raised and pleaded the issue of designation of the St. Paul's lands as a SPA in the first proceedings and sued the Minister and the State for that purpose and then effectively abandoned that claim unconditionally on 31 July 2018.

### **The Respondent's Motion**

**247.** The application to strike out the appellant's proceedings for abuse of process such as that identified at Ground 3 in the respondent's notice of motion of the 27 January 2020 amounts to an objection to the action being pursued at all by the appellant. The question



arises as to whether the parties to the first proceedings proceeded on the 31 July 2018, or ought reasonably to be understood to have done so, on the basis of an underlying agreement -express or implied - that Clonres remained at liberty to pursue the underlying public law remedies being sought or a variation or iteration of same and that the Minister and the State, both of whom were respondents in the first proceedings, had consented to this. I ultimately conclude that Clonres has failed to establish that such was the case for the reasons stated elsewhere in this judgment.

### **Judgment of Barniville J. on 31 July 2018**

248. The language of the judgment makes clear that matters as between the State parties and the appellant were not *res judicata* since the court had made no decision or findings in regard to same. No issue, the subject matter of the litigation, was litigated to a determination, hence no relevant issue was decided and there were no findings pertaining to the issues in dispute in the within proceedings made by the court.

249. It is necessary then to turn to an assessment of the underlying assumptions of the parties bearing in mind that in the first proceedings Clonres had sued both the Minister and Ireland. Was there or could it be said that there was an underlying assumption that the appellant remained at liberty to institute fresh proceedings, as and when it saw fit, and that the State would or could not raise an abuse of process point.

### **The determination of that issue is fact driven in each case**

250. The decisive factors that arose in *Johnson* are entirely distinguishable since in the latter case there were separate entities, the company and the individual and an express term of the compromise of the first proceedings concluded between the parties involved an acknowledgment by the defendant that insofar as a personal claim by Mr. Johnson was

concerned it “would be a separate claim and it would really be a matter for separate negotiation in due course”.

### **Ancillary argument**

**251.** The first argument advanced by the appellant in its submissions is that in the context of the first proceedings the alleged failures of the Minister/State to comply with Art. 4(4) and the contention that the lands at St. Paul’s should have been designated as an SPA was “ancillary to the challenge” against an Bord Pleanála. In my view the terms of the first proceedings are not consistent with the characterisation of the claim raised and the specific terms of the declaration sought against the Minister therein as being “ancillary” to any other aspect of the claims and grounds raised in the first proceedings. One need only consider the grounding affidavit sworn and exhibits on behalf of Clonres in the first proceedings to dispatch that argument.

**252.** Having contended in the within proceedings before the High Court that the claim against the Minister and the State in the first proceedings was merely “ancillary” the appellant *inter alia* at ground 14 of its notice of appeal objected that the trial judge had at para. 57 of his judgment “misunderstood” or “mischaracterised” its submission. Concerning the claim for a declaration against the State party, and in particular the Minister, that she was “under an obligation to designate the lands the subject matter of the proposed development for the purposes of Article 4(2) of the Birds Directive” and the further claims regarding obligations to comply with Art. 4(4) of the Birds Directive insofar as it was contended that such obligations fell upon the Minister, the appellant states at Ground 14 of its Notice of Appeal: -

“Such submission was made in the context of the claim that the present proceedings breached the principle of *Henderson v Henderson*; that the designation issue could

not be pursued once An Bord Pleanála consented to its decision being quashed and that the trial judge took the appellant's submission in that regard 'out of context' in considering that same explained why Clonres did not challenge the non-designation of the site in 2009/2010 and/or in August 2018."

**253.** It is difficult to understand the appellant's reasoning in that regard. The substantial claim against the Minister is retrospectively cloaked in a status of being ancillary in nature, in the context of the *Henderson* arguments advanced before the High Court.

**254.** The argument of Clonres that the designation issue could not be pursued once the Board consented to the planning decision of April 2018 being quashed is not understood. No effort was made to pursue the declaratory claim in the first proceedings, it was simply abandoned. The trial judge made clear on 31 July 2018 that the issue was not *res judicata* and that the doctrine of issue estoppel did not arise. Nowhere does he suggest that the rule in *Henderson* abuse of process did not arise and therefore it was self-evident to the appellant that unless the State parties were agreeing that the issue of abuse of process could and would not arise and that Clonres remained free *in futuro* to bring fresh proceedings reagitating substantially the same issue, then the *Henderson* Rule *prima facie* applied to the designation claim.

**255.** The State respondents were not direct parties to the July 2018 compromise. It does not appear to have been asserted by Clonres that it proceeded on the basis of any underlying representation or assumption into which it had been led by the Minister or the State whereby the *Henderson* Rule would not arise were the appellant to institute fresh proceedings at any time thereafter asserting a claim that the Minister/the State was under an obligation to designate the lands at St. Paul's for the purposes of Art. 4 of the Birds Directive.

***Hearing of first respondent's Motion***

**256.** On the 27 May 2020, Day 1 of the hearing, Counsel for the State, Mr. Collins observes in relation to the first proceedings starting at p. 36, line 6: -

“The key point is, that these proceedings contained within them a standalone claim against the Minister seeking an order, a declaration that she was under an obligation to designate these lands as a special protection area under Article 4(2) of the Birds Directive. In their submissions, the plaintiff takes issue with the standalone categorisation. They say, well, it was really ancillary to the challenge to the Board’s decision and it was part and parcel of why we were challenging the Board’s decision, because these lands were of importance and should have been designated, and I understand that and I can see that as a commercial and tactical matter why the two reliefs were travelling together and why they decided to join the Minister and invoke them. But it doesn’t detract from the fact that they did join the Minister as a separate party who was not necessary to be joined to the proceedings for the purposes of quashing the Board’s decision. They only party necessary to that was the Board and probably the developer as the notice party in the ordinary way, because quashing the Board’s decision would affect the developer. There was no need to join the Minister. The Minister was only joined for the purpose of seeking the relief as framed at para. 2 there. Looking for a declaration that she was obliged under statute and under the directives to ... designate the lands as an SPA.”

He continued –

“And they could have pursued that relief in those proceedings independent of and irrespective of what might have happened and what did happen to their claim for

*certiorari* as against the Board. And they chose not to pursue that relief at that time, although they now seeking to pursue it now.” (p. 37, starting at line 8)

Clonres has provided no satisfactory response to that assertion in my view.

**257.** It is noteworthy that Clonres before the High Court in its written submissions had placed reliance on a number of authorities including *Moore v. Minister for the Arts* and in particular the decision of this court delivered by Hogan J. At page 13 of the Transcript of the High Court hearing excerpts from the judgment of Hogan J. in *Moore* were opened where the latter had observed: -

“It’s as if the applicant had sought to manufacture a somewhat artificial dispute with the Minister in order that he could use these judicial review proceedings as a mechanism whereby he could, in effect, seek free standing declarations to the effect that certain areas of Moore Street and the surrounding district were national monuments ..... It is hard to see how these declarations were in truth ancillary in any real sense to these primary reliefs for *certiorari* and *mandamus* and the judicial review proceedings really proceeded as if the applicant had commenced plenary proceedings in the High Court seeking a series of declarations regarding the status of the battlefield site as a national monument ...”

By a parity of reasoning the same might be said of the instant case.

**258.** A court should exercise a high degree of circumspection where a litigant seeks to indulge in selective characterisation of like claims as either substantive or ancillary depending on the context in which the issue arises for consideration. As with the judicial review application in *Moore* the relief sought in the first proceedings was a free-standing declaration of potentially very far-reaching effect. The quashing of the decision of the Board or any orders being sought against the latter, the Developer or the Local Authority were not

contingent upon nor did they require the State to be a party to the proceedings or the substantive and extensive orders sought against the State to be pursued to a determination as indeed the ultimate compromise of the case demonstrates.

**259.** Reliance was placed by Clonres on the decision of *George v. AVA Trade (EU) Ltd.* [2019] IEHC 187 where on the facts before him McDonald J. had held, that the criteria for *res judicata* had not been met. The point at issue had not been raised, considered or determined in the original proceedings.

Having reviewed the jurisprudence, the criteria identified by McDonald J., included:

- (a) That judgment was given by a court of competent jurisdiction;
- (b) That it was a final decision on the merits;
- (c) That the judgment given determined a question which is raised in the subsequent litigation; and
- (d) That the parties to the subsequent litigation are the same as the parties to the previous litigation.

At para. 119 he had held: -

“It is sufficient to record that, in that case, Wigram V.C., observed that parties to litigation in a court of competent jurisdiction are required to bring forward their whole case. Where they fail to do so, the court will not (in subsequent litigation) permit the parties to raise an issue which the party, exercising reasonable diligence, ought properly have raised in the previous litigation.”

McDonald J. was at pains to emphasise that the formulation of unjust harassment arising in the pursuance of proceedings a second time around was not a test recognised in Irish law or for that matter under English jurisprudence. However, the estoppel under consideration

therein and in the Supreme Court in *Fassim* was directed primarily towards *res judicata*. In the instant case the first proceedings before the High Court were substantially the same proceedings as the within proceedings as regards the claims made and reliefs sought against the State parties. The action was based on the same fundamental claim (that the St. Paul's lands should be designated a SPA), the claim related to the same period of time, the situation was in all material respects the same as when Clonres instituted the 2018 proceedings seeking, *inter alia*, designation of St. Paul's lands as a SPV.

**260.** Clonres in their submissions asserted at p. 88, lines 7 – 11, concerning the first proceedings and the distinct relief therein sought against the Minister contending she was obliged to designate the St Paul's lands for the purposes of Art. 4(2) of the Birds Directive:-

“... the significance of those words is that it's clearly seeking this declaration by reference to the development which was granted permission by An Bord Pleanála. So it was clearly ancillary to the Board's decision. Those key words clearly imply that.”

**261.** That stance is reiterated at p. 89, lines 5 – 8 which state: -

“... the declaration sought at para. 2 of the previous proceedings makes entirely clear that it's ancillary to the Board because it's effectively setting up the relief which is sought under para. 3 which is a declaration in respect of Art. 4(4) that the Board failed to comply with that because this is lands which should have been designated as an SPA but wasn't designated.”

**262.** It was further contended beginning at line 13: -

“Contrary to what Mr. Collins is saying, is that the reliefs sought against the State clearly were ancillary to the challenge to the Board and in the language used by the

CSSO, because the Board's decision was being quashed, the relief against the State was falling away, that's a phrase they use in the correspondence ..."

**263.** At pages 90-91 it is again asserted on behalf of Clonres: -

"The reliefs sought against the Board at paragraph 3 which references Article 4(4) makes sense of the previous reliefs sought against the State and it confirms in fact that the reason for seeking the declaration against the State was ancillary and was for the purposes of challenging the Board's decision."

**264.** At para. 57 of the judgment the trial judge had observed: -

"... Counsel for Clonres submitted that it only raised the designation of the St. Paul's site as an 'ancillary' argument in the judicial review challenging the grant of planning permission to Crekav for hundreds of homes on the St. Paul's site. By joining the Minister to that judicial review and seeking a declaration that she was obliged to designate the site for the protection of birds (an ancillary claim) it seems Clonres hoped to render the St. Paul's site incapable of being developed for housing (the primary aim). Counsel for Clonres submitted that:

'The reliefs sought against the State were clearly ancillary to the challenge to the Board's decision. The observations of the judge appear to be based on submissions specifically made to him and significantly undermine Ground of Appeal 14 at least in that regard.'"

**265.** The letter written on behalf of the appellant dated the 18 July 2018 does not suggest at all that the claims being pursued by Clonres in the first proceedings against the State parties, *i.e.* The Minister and Ireland were ancillary or subordinate to its claim against the Board. The said letter anticipated that two days later there would be argument in court as to whether the court should proceed to hear the balance of the case. It post-dates the late June



concession by the Board of the *certiorari* aspect. It outlines the relief being sought against the Minister/State *i.e.* the extension of the SPA. The net impact would be that the subject lands at St. Paul's would be subject to an SPA.

**266.** It is difficult in the light of events not to view the letter as in material respects highly analogous to the letter the subject matter of consideration in the *Moore v. Minister for Arts and Heritage* decision.

**267.** Counsel for the appellant had described that correspondence by analogy with Hogan J.'s analysis of the letter under consideration in the *Moore* decision. Thus, on Day 3 of the hearing before the High Court at p. 20 lines 19-28, counsel for the appellant said:-

“Firstly he was saying that the letter effectively contrived a decision from which the reliefs of *certiorari* and *mandamus* were sought. So it was an artificial ... contriving by writing a letter to someone and getting a response to create a judicial review.”

**268.** Elsewhere it was contended on behalf of Clonres at p. 22, beginning at line 16: -

“I suppose the point being made is, the more broader point is that of course there can be situations where a letter can be appropriately challenged by judicial review, but it depends upon the subject matter, it depends on what exactly you are dealing with here. And the context of the letter of the 24<sup>th</sup> August, it was, as I said, in the context of a chain of correspondence of solicitors dealing with the aftermath of previous proceedings, which wouldn't really seem appropriate to set up a new judicial review. And also, that letter ... dealt with a different question which is being asked in these proceedings. ... It was dealing with an extension to the boundaries of North Bull Island SPA. In fact, that is not what we are seeking. There

is not the remotest plea in the Statement of Claim, neither in the reliefs or anywhere, to suggest that.”

As emphasised above the material letter of 18 July predated the conclusion of the proceedings by almost 2 weeks.

**269.** Beyond the necessity to disaggregate the within proceedings from the first proceedings it is difficult to understand the argument of Clonres that a wholly distinct question is being asked in the within proceedings. In substance, the issue raised is the same. The outcome sought in both *vis-à-vis* the Minister/the State is substantially identical, namely that the subject lands at St. Paul’s ought to be designated the subject of a SPA. Whether that was to be achieved *via* the extension of the boundaries of North Bull Island SPA, as was initially contended in the first proceedings, or on a stand-alone basis as in the within second proceedings, is immaterial in substance. In my view that is a point of detail. Were the appellant to succeed against the State parties under either proceedings on the designation claim the outcome in respect of the St. Paul’s lands would be substantially the same.

**270.** Further, the characterisation of the “chain of correspondence of solicitors” as dealing with the aftermath of the first set of proceedings is plainly wrong. The fundamental issues being dealt with in the 18 July 2018 correspondence predate the conclusion of the first set of proceedings and was written in the context of fundamental litigation decisions under active and immediate and direct consideration by Clonres in July 2018.

**271.** The timeframe of 7 days mandated by the letter of the 18 July 2018 clearly connoted that the Minister was being called upon to take steps to designate the lands in question in the context of the then subsisting first litigation. The fact that earlier in the letter reference was made to an extension to the North Bull SPA is immaterial. The designation being pursued in this, the second litigation, is merely a reformulation of the same relief.

**272.** Clonres contended that the *Henderson v. Henderson* rule did not arise “for the simple reason that the declarations in the first proceedings were clearly ancillary to the Board’s decision” (p. 57, lines 23-24) a contention which I conclude, having due regard to all the facts, is not made out. Clonres had advanced at p. 57, Day 3 by way of an illustration that the relief being sought in the first proceedings pertain “to the lands the subject matter of the proposed development”. At p. 58, lines 18-23:-

“And why that is important is, they are defining the lands which should have been designated by reference to what the development site was before An Bord Pleanála. They were not defining this declaration by reference to the St. Paul’s lands as a whole which is in excess of the development lands in fact.”

At page 59 it is stated: -

“But the St. Paul’s land which is the subject matter of the declaration in our proceedings is in fact a larger area altogether. It isn’t, in our proceedings, the present proceedings, it isn’t by reference to the development lands, it is by reference to the St. Paul’s lands which in fact is a larger area of 8.2 hectares.”

**273.** However this is merely a point of detail. The claim can be adjusted to match the lands in the ownership of Crekav that is the subject of a pending application for planning permission. All of the lands the subject matter of the first proceedings are encompassed within the lands the subject matter of the current proceedings.

**274.** Whereas in the current proceedings the identity of the lands in question is not “by reference to the development lands” neither is it specifically “by reference to St. Paul’s lands”. At para. 4 of the statement of claim the lands the subject matter of the proceedings are identified by reference to their ownership and the company Crekav is stated to be the owner of the “lands the subject matter of these proceedings”.

**275.** The approach of the appellants lends support to the analysis and observations of the trial judge at para. 57 of his judgment and the inferences he drew.

**276.** There can be no doubt that when both sets of proceedings are considered together the causes of action between the parties hereto relative to environmental law and the directives are substantially the same.

**277.** Likewise, unless the issue of designation pursuant to the Birds Directive was being raised for the dominant purpose of opposing a planning application rather than for *bona fide* environmental purposes it could not be said to have become moot in circumstances where the Minister by letter of the 31 July 2018, the date when the litigation was concluded, made clear that the reliefs being sought - *i.e.* the designation of the lands pursuant to Art. 4(2) of the Birds Directive was being refused and the Minister rejected the proposal of Clonres that she should take steps towards the designation of the St. Paul's lands as a SPA.

**278.** The appellant has not identified a convincing argument as to why a refusal to accede to a request to commence the process of designation ought to be treated as any less a decision than had a letter been written on behalf of the Minister agreeing to the request to commence the process of designation as a SPA nor that the declaration sought against the Minister to achieve SPA designation can be characterised as merely ancillary in nature.

**279.** I am satisfied that there is force in the arguments advanced before the High Court on behalf of the State where at day 3, page 119 it was asserted that from a legal perspective in terms of the relief being sought, the claims against the Minister were not ancillary. Further, it is correct to assert, as the State did at p. 120, lines 1-12 that even when the decision of An Bord Pleanála was quashed it did not follow that the relief sought against the State became moot. The claims against the Board and the State parties were independent of one another. There continued to subsist a live argument which was being ventilated in correspondence

between the State and the appellant in correspondence not only right up until the time the plaintiffs' counsel addressed the court on the 31 July 2018 but thereafter. As Mr. Collins SC correctly observed: -

“... It was entirely by the choice of the plaintiffs that it wasn't pursued.”

**280.** It is not in the public interest that significant claims of non-compliance with the State's obligations under the Birds Directive presented and advanced on a self-contained basis against the Minister and the State in public law/judicial review proceedings which require the dedication of very significant levels of State resources to meet, address and properly litigate, can subsequently, on a selective basis, be characterised as merely ancillary should it no longer serve the dominant ends of a litigant to pursue same. Such an approach represents a waste of public resources.

**281.** As was asserted on behalf of the State: -

“The developer was clearly going to come back again and again and again in relation to getting planning permission to develop these lands. So the question of designating them as a SPA for the purpose of protecting them against that type of development and the damage that ... the plaintiffs say will do to the lands and will no doubt do to the lands is something that was, at all times a live issue for them, and they chose not to pursue it and they must now take the consequences in the *Henderson v Henderson* context of not having so pursued it.” (High Court, Day 3, page 120-121, lines 25 – 7)

### **Henderson & Public Law**

**282.** The House of Lords made clear in *Thrasylvoulou v. Secretary of State for the Environment* [1990] 2 A.C. 273 that aspects of estoppel are not confined to adjudications in the area of private law and that where adjudications in the area of public law are subject to

a comprehensive self-contained statutory code there is a presumption that where a legislative measure has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right the principles of the *Henderson* Rule apply to give finality to a determination unless the intention to exclude that principle could be properly inferred from the relevant statutory provisions.

**283.** The Minister and the State were parties to the first litigation. The *Henderson* Rule properly understood requires that when the issues raised in the statement of grounds of the appellant became the subject of litigation before the High Court it was incumbent on Clonres within the first litigation to bring forward their whole case and they ought not, save under special circumstances, be permitted to open the same subject of litigation which might reasonably have been brought forward as part of the first suit, but which was not brought forward, notwithstanding that as of the 31 July 2018 the Minister and the State had not acceded to the appellant's demands. The designation issue properly belonged to the subject of the first litigation and had been so asserted by the appellant before its abandonment.

**284.** The *Henderson* Rule in this context is concerned with what the Court has not decided and the circumstances whereby that was achieved. The concession by the Board resulted in a compromise as outlined above. The rule in *Henderson* is designed to serve the objective of bringing finality to litigation and avoiding the oppression of subjecting a defendant, including State defendants, unnecessarily to successive actions on any basis.

**285.** It was perfectly open to the appellant to seek to proceed to litigate this issue in the first proceedings. It could have sought the directions of the court or at least disclosed its intentions to the State parties if it wished to reserve its position on the issue of designation *vis-à-vis* the Minister/State. No indication was given to the court that the appellant was reserving unto itself unilaterally an entitlement to re-litigate the designation issue as against the State that it had unconditionally elected not to pursue.

***Procedural Context***

**286.** In this context the rule in *Henderson* operates as a procedural rule based on the need to afford protection to the processes of the courts from abuse and from oppression of defendants including State defendants as Lord Sumption observed in *Virgin Atlantic Airways Limited v Zodiac Seats (UK) Limited* [2013] UKSC 46 at para. 24.

**287.** As such therefore, additional considerations fall to be taken into account and in general the rule ought only to be applied where the facts as established are such as to amount to an abuse. Consideration ought to be given to the risk of a party being shut out from bringing forward a genuine subject of litigation.

**288.** The appellant has identified no clear reason why it could not have proceeded with the claim against the State in the first proceedings. It merely seeks to retrospectively downgrade the substantive nature of the claim characterising it now as merely ancillary.

**289.** Clonres did bring a claim against the State requiring designation of the St. Paul's lands under the Birds Directive in the first proceedings. There is a strong presumption derived from the *Henderson* Rule against the bringing or pursuing of successive actions. The unequivocal litigation decision of Clonres on 31 July 2018 brought about an outcome whereby the court did not decide the issue in the first litigation.

***Arklow Holidays Limited***

**290.** As the Supreme Court has made clear in *Arklow Holidays Limited v. An Bord Pleanála & Ors.* [2011] IESC 29, [2012] 2 I.R. 99 the *Henderson* Rule essentially requires the plaintiff to advance the entirety of their claim at the first opportunity and prohibits holding back additional grounds or alternative arguments in reserve for later deployment. The Supreme Court made clear that where an applicant had sought judicial review of a planning decision and subsequently sought to review the appellate decision of *An Bord*

*Pleanála* he would ordinarily be precluded from raising in any second or subsequent set of proceedings a substantive point which could and should have been raised in the first judicial review.

**291.** It will be recalled that in the High Court judgment in *Arklow* Clarke J., upheld by the Supreme Court on appeal, had noted that were it permissible for a party to raise some points in the context of a challenge to a planning decision and thereafter raise other points which could have been raised in the original application – at a subsequent challenge to a decision made by An Bord Pleanála then the rights of all concerned, including the applicant for the planning permission, the planning authorities and the Board and the public generally would not be respected. Clarke J. very clearly rejected arguments advanced in *Arklow* that the application of the *Henderson* Rule would not be appropriate in a case which involved assertions that the requirements of EU law and in particular the EIA Directive had been breached. As he observed, litigation raising EU law issues are to be determined in a manner designated by the procedural laws of the Member State subject always to the principles of equivalence and effectiveness.

**292.** Clarke J., as the Supreme Court noted in its judgment, had been of the view that once neither of the said principles were breached – and on the facts he was satisfied that they were not – the rule applied equally to proceedings raising national law and domestic issues and the application of the rule would not render any remedy ineffective: -

“There is no practical reason why the points raised in these proceedings could not have been raised at the time of the original challenge to the decision of Wicklow County Council. If they be good points then Arklow Holidays had an effective remedy in relation to them. The way in which that remedy was to be exercised, in accordance with Irish procedural law, was to raise the points at the time of the challenge to the original Wicklow County Council decision. It does not diminish



the effectiveness of the remedy to rule that, having omitted to include those points in the original challenge, they can not now be raised in this challenge to the decision of the Board.” (para. 5.11)

**293.** Clarke J. had expressed his concern that no real explanation had been advanced as to why the issues raised in the later litigation had not been raised, advanced and litigated in the first judicial review proceedings. On appeal, the Supreme Court (Finnegan J.) in *Arklow Holidays* observed in light of the decision in *Friends of the Curragh Environment Limited v. An Bord Pleanála* (unreported, High Court, Finlay Geoghegan J., 8 December 2006), *Harrington v. An Bord Pleanála* [2006] 1 I.R. 388 and *Lancefort Limited v. An Bord Pleanála* [1999] 2 I.R. 270 that: -

“The rules regarding standing should not be applied in such a restrictive manner as would preclude the courts from checking a clear and serious abuse of process. This is particularly so where the process involves significant public participation. Directive 2003/35/EEC makes clear that public participation is an essential element of the decision making process for projects which have, or may have considerable effect on the environment and that if this is so, should inform the decision as to whether the rule in *Henderson v. Henderson* (1843) 3 Hare 100 should apply to a case of that nature.” (para. 33)

**294.** He further observed that: -

“... the court should have regard to the public interest in deciding whether or not it is appropriate to apply the rule in a particular case.” (para. 35)

He also noted at para. 36 that in *McQuaid v. Malone* (High Court, Unreported, 29 January 1998) Geoghegan J. had held that the rule in *Henderson v. Henderson* would not apply where:

- “(1) the case in the second action is not confined to the actual facts determined or that could have been determined, in the first action; and
- (2) the claims in the earlier action were defeated on purely procedural grounds.”

Finnegan J. noted that in *Arklow Holidays* the impugned decision had not been made at the time the earlier proceedings were taken, and two of the three grounds for which leave had been granted had been defeated on purely technical grounds of objection.

### **Article 267**

**295.** In support of a proposed Art. 267 reference in *Arklow Holidays*, the appellant had submitted that having regard to the decision in *Kraaijeveld BV v. Holland (Case C-72/95)* [1996] E.C.R. 1-5403 that in applying the *Henderson* Rule “... the Court is in breach of its duty to endeavour to ensure compliance with the provisions of European law.” Finnegan J. rejected that argument and drew a clear distinction between estoppel by representation, a principle that does not arise in the instant case, and the rule in *Henderson* as it extended “to matters which might have been brought forward in the first action but which were not”. He identified three principles to justify such application of the *Henderson* Rule based on the rationale of the rule: -

- (1) The public policy that an individual has the right to be protected from a vexatious multiplication of suits – *D. v C.* [1984] I.L.R.M. 173 *per* Costello J. and *Lockyer v. Ferryman* [1877] 2 App. Cas. 519 at 530, *per* Lord Blackburn. Elsewhere, at para. 51, he also referred to “The protection not just of individuals but also public bodies from a vexatious multiplication of suits..”

(2) the maxim *interest rei publicae ut sit finis litium*: *Belton v. Carlow County Council* [1997] 1 I.R. 172 *per* Keane J was considered. At para. 51, he referred to “the desirability that there should be finality to litigation”;

(3) He observed that aspects of the public interest were of significance such as the efficient and economic use of court time;

“Relevant in the present case, however, is that it has long been a concern of the legislature that infrastructural projects can be greatly delayed by the planning and related processes and litigation arising therefrom. This has resulted in legislative attempts to ensure that challenges to such projects are dealt with promptly by the courts.” (para. 51)

**296.** Finnegan J. observed that the *Henderson* Rule had already been applied in this jurisdiction to the public law area stating: -

“It is understandable that it should be. It is not just individuals who must be protected from a multiplicity of suits: why not public bodies, local authorities and ministers of state all of whom are funded by the taxpayer? The three elements of the rationale for the rule apply equally to public law litigation.” (para. 50)

Citing s. 50 of the Planning and Development Act, 2000 as amended, he noted;

“The policy of the legislature would be undermined if issues which could be raised at the first stage of the two-stage process were not in fact raised but were litigated piecemeal thereafter. Thus the possibility exists of a two-stage process in (*sic*) a challenge by way of judicial review to the decision at the end of the first stage being followed by appeal to the Supreme Court: this in turn if unsuccessful may be followed by the ordinary planning appeal process with further challenges in the High Court and Supreme Court to the same.” (para. 51)

***Interests of litigants***

**297.** In assessing the applicability of the *Henderson* Rule the interests and rights, not alone of the State parties but also of Crekav are to be borne in mind. As Finnegan J. observed in *Arklow Holidays*: -

“Clearly the interests of the appellant are affected but also affected are those of the [UDC], the other respondents and the notice parties to the proceedings in the High Court. The general public are affected as the scheme in question concerns infrastructure for the town of Arklow which has been seriously delayed notwithstanding its significance to the development of the town and to the citizens for whose benefit the scheme is intended. The rule in *Henderson v Henderson* it seems to me must apply, with even more force than was the case in *AA v The Medical Council*. For these reasons I am satisfied that there is no requirement to take a different view of the application of the rule in *Henderson v Henderson* in public law planning cases. I am satisfied that the rule in *Henderson v Henderson* has application to the two-stage planning process: on a challenge to the decision of a planning authority all issues affecting the decision which then exist must be raised.” (para. 52)

***Special circumstances and Henderson Rule***

**298.** Special circumstances can exist excusing a litigant from compliance with the duty to bring forward the entirety of their case at the outset, where such dispensation is in the interests of justice and the non-application of the rule is warranted. This is not such a case and the appellant has failed to demonstrate any special circumstances or substantive factors that warrant the non-operation of the rule which is otherwise applicable.

**299.** It is noteworthy that as long ago as 1975, it was held by the House of Lords in *Yat Tung* that where the issue in question had come to light or arisen late in the day in the first set of proceedings and had not been actively pursued within those proceedings, that, in and of itself, did not excuse non-compliance with the rule and an application should have been made to amend the proceedings in the first suit.

**300.** The Supreme Court in its decision in *Arklow Holidays Limited v. An Bord Pleanála & Ors* [2011] IESC 29 *per* Finnegan J. noted that:

“From the cases it is clear that negligence or inadvertence or accident will not necessarily excuse non-compliance with the rule: ... it is not possible to attempt to define what may amount to a special circumstance and each case must be considered on its facts and circumstances. Also relevant in deciding whether to excuse non-compliance with a duty to bring forward the whole of one’s claim is prejudice suffered by the defendant or respondent. In public law litigation prejudice to the wider public may also be relevant. The only special circumstances touched on in the present case relates to the Waste Management Act issue. The appellant says it only became aware of the issue when discovery was finalised ... However, no application was made to the court to amend the statement of grounds to include this issue. ... in these circumstances I am satisfied that this does not in the present case amount to a special circumstance which would excuse non-compliance with the rule in *Henderson v. Henderson*. The position remains as stated by Clarke J. in the High Court – no real explanation has been given as to why the Waste Management Act issue was not litigated in the first judicial review proceedings.”

(para. 53)

**Delay**

**301.** Finnegan J. in *Arklow* also emphasised the undesirability of delay invoking the judgment of Hardiman J. in *AA. v The Medical Council* at p. 318 where the latter had observed pertaining to the Medical Council: -

“The respondent is discharging a public function in the hearing and determination of allegations of professional misconduct as well as observing the profession’s interest in promoting high professional standards in public confidence. The allegations in question here relate to a time some six and a half years ago and it is manifestly in the interests of the applicant, the respondent, the profession, the complainants and the public generally that these be resolved as soon as possible and without unnecessary or unreasonable delay.”

**302.** The appellant elected to sit back and observe the spectacle of Crekav, following remittal of the issue to the Board on 31 July 2018, pursuing its application resulting in a further decision made on the 10 September 2018 by the Board refusing permission for the development. That was then the subject of a separate challenge by the developer before the High Court and other litigation. As Finnegan J. made clear in *Arklow*, the *Henderson* Rule does apply in the area of planning and environmental law.

**Assessment of applicability of *Henderson* Rule to the facts**

**303.** As the appellant contends, environmental law and compliance with all relevant EU Directives and domestic provisions effecting a transposition or the effect of operation of same in the State are of great importance. However, in an application such as this there must be a balancing of the rights of all parties. Whilst of course the rights of the developer/owner of the lands can never take precedence over the State’s obligations to effectively implement the directives, neither can it be said that the rights or interests of the owner/developer are

reduced to zero. It is in the public interest that a party such as Clonres ought not to be permitted to litigate for a second time a significant issue raised and abandoned in the first proceedings which could and should readily have been disposed of in the first litigation.

**304.** Insofar as the appellant seeks to suggest that the *Henderson* Rule does not apply by reason that a greater amount of land and a broader spectrum of issues are being agitated in the current proceedings that clearly offends the operation of the *Henderson* principle inasmuch as the judgment of Wigram V.C. is clear authority for the proposition that its operation extends to cover not only the case where a particular point has been raised and/or specifically determined in earlier proceedings but also where in the subsequent proceedings it is sought to raise points, issues and arguments which might or ought to have been but were not raised in the earlier proceedings. The full extent of the lands held by Crekav was known to the appellants at all material times as was its zoning status and the objectives of the owners to develop same. If it be the case, and there appears to have been some doubt before the High Court, that the claim within the current proceedings extends to a greater portion of Crekav lands than was the subject matter of the initial proceedings, no valid basis for same has been identified save that apparently subsequent planning applications submitted by Crekav may have extended to a wider portion of land. These points do not avail Clonres since they elected to abandon the claim and to allow the planning process continue in the first litigation. The identity of the lands the subject of their claim was shifting and unclear as evidenced by engagement with the trial judge on Day 3 pp. 150-152 where it was suggested that the claim was asserted over lands of an owner who was not a notice party to the proceedings. The position was varied again at para. 8 of the appellant's written submissions and at the appeal hearing.

**305.** It should have been obvious to the appellant that had it proceeded with the issue in the first litigation the ultimate determination of the claim for designation of the lands

pursuant to the Birds Directive would have been outcome determinative as regards the future user of the lands in question and that would have materially and significantly established whether in truth there was any legitimate basis for the designation claim in the first place.

**306.** One of the consequences of a successful outcome for Clonres in regard to that application would have been that, so far as the owner of the lands was concerned, the issue of successive applications for planning permission would have been substantially at an end. The litigation strategy adopted by the appellant imposed a significant hardship and injustice on the notice party Crekav who, apparently, proceeded to submit further and other applications for grants of planning permission subsequent to the abandonment by the appellant of its claims to have a determination that the State was obliged to designate these lands pursuant to the Birds Directive.

**307.** The abandoned issue of designation in the first litigation would have been outcome determinative of that issue. The characterisation of the issue of designation as “ancillary” is suggestive that the issue had not been brought forward as a genuine subject of litigation by Clonres. Unfortunately, that fact, if it be so, could not have been known, either to the State parties or the notice parties in the first litigation. Had the appellant wished to reserve its position in regard to the designation claim that should have been clearly communicated to the court and the other parties.

**308.** A fresh application for designation under the Directive does constitute an abuse of process in all the circumstances of this case, when a broad merits-based approach taking into account all the material circumstances is applied. It is relevant that the approach of the appellant had an impact both on the understanding of Crekav as well as the State in relation to the issue. No evidence was adduced that circumstances had materially changed between the 31 July 2018 and the institution of the within proceedings in April 2019. The order of the Court made on the 31 July made clear the direction of travel of the planning process and



it was entirely foreseeable that a further decision of An Bord Pleanála would be made in due course. Issues regarding the grass and the cutting of the grass were already well known and in issue prior to the disposal of the first proceedings. Issues regarding the grass do not constitute new evidence that came to light subsequent to the conclusion of the litigation. Neither was there any evidence that, for instance, the law had changed materially in the intervening time.

**309.** Matters being presented as significant new facts are simply points of detail which the appellant could reasonably have known or ascertained on the previous occasion. Neither has it been illustrated that the appellant is advancing any proposition of law which is now maintainable but which was not previously open to Clonres. In substance, in its totality, the within plenary proceedings are judicial review in nature. This fresh application relies on evidence which was available and on propositions of law which were reasonably maintainable on the previous application and were in fact abandoned by the appellant on the 31 July 2019.

**310.** Ultimately, I am satisfied that on a consideration of the first proceedings the *Henderson* Rule does operate since designation under the Birds Directive properly belonged to the subject matter of the first litigation and Clonres, had it elected to exercise reasonable diligence could and should have brought forward that issue or expressly raised it to obtain directions of the court with regard to same. They elected not to do so.

**311.** No special case has been identified, or argument, nor a special circumstance identified, which would allow for circumvention of the principle. The approach appears to have been adopted in pursuance of a litigation stratagem, which in and of itself is neither special nor exceptional.

**312.** In my view it would be oppressive and an abuse of process for the respondents to be subjected to the second action on the designation issue in such circumstances.

***Issues are the same***

**313.** A close analysis of the issues being agitated against the State parties in the first and within proceedings demonstrate that the claims in both are substantially the same. Insofar as they differ, and that the plenary proceedings are more expansive, there was no impediment to the appellant articulating and advancing the additional dimensions in the first proceedings had they elected to do so. Had the matter proceeded, an application could readily have been made to amend the application in point of detail. The position regarding the grass was well known to the appellants at the latest in July 2018. The appellant had ample opportunity had it seen fit to do so to advance, articulate and agitate all aspects and dimensions of the said complaint. They elected not to do so.

**Principle of effectiveness**

**314.** The appellant contended that in substance the proceedings offer an instance of private enforcement where, as it argues, the State has “failed to comply with obligations derived from EU law measures, environmental law, which the European Commission could have taken” and that judicial review time limits would have failed the principle of effectiveness because it would be undermining private enforcement of environmental law. Those contentions remain unpersuasive, particularly in view of the analysis of the Supreme Court in *Arklow Holidays*. In particular it will be recalled that Finnegan J. expressly approved the views adumbrated by Clarke J. in the High Court who had noted that counsel for the appellant in *Arklow Holidays* had correctly argued that: -

“... all organs of a Member State are required to endeavour to ensure compliance with the obligations of a Member State under applicable measures of the competent

authorities of the EU. The obligation in appropriate circumstances applies to the courts. Accordingly, it is submitted that the courts should lean against excluding on procedural grounds a challenge based on EU legal entitlements and obligations on the basis that in so doing the court might, in substance be countenancing a departure from EU mandated requirements.” (para. 54)

**315.** Finnegan J. considered how that argument had been addressed by the High Court judge in his decision where Clarke J. had observed: -

“5.8 I am not satisfied that there is any substance to that argument. It is manifestly clear that the obligations of the courts in reviewing, on the basis of compliance with EU law, the validity of development permissions or the like (or indeed the status of many other types of decisions whose validity may be challenged on EU grounds) is *prima facie*, to be determined in a manner designated by the procedural law of the Member State concerned.

5.9 That position should only be departed from where it can be established that the relevant procedural law of the Member State concerned breaches the principles of effectiveness or equivalence. Under those principles it is necessary that the procedural law of the Member State concerned should provide an effective remedy and that any limitations contained in that law, in respect of the enforcement of entitlements which may derive from EU law, should be equivalent to any similar limitations as might be applied in the domestic context.

5.10 There seems to me to be no basis for suggesting that the application of the rule in *Henderson v Henderson* (1843) 3 Hare 100 to a case such as this would breach either of those requirements. Such application is manifestly equivalent. It is a rule which applies, for the reasons which I have set out, in any public law challenge and

there is no basis for any suggestion that its application applies differently, and less favourably to a challenger, where EU environmental measures are being relied upon.

5.11 Equally, there is no basis for the suggestion that its application renders any remedy ineffective. There is no practical reason why the points raised in these proceedings could not have been raised at the time of the original challenge to the decision of *Wicklow County Council*. If they be good points then *Arklow Holidays* had an effective remedy in relation to them. The way in which that remedy was to be exercised, in accordance with Irish procedural law, was to raise the points at the time of the challenge to the original *Wicklow County Council* decision. It does not diminish the effectiveness of the remedy to rule that having omitted to include those points in the original challenge, they cannot be raised in this challenge to the decision of the Board.”

**316.** Finnegan J. cited the High Court judgment with approval and observed at para. 55:-

“It is well settled that rights arising under European Law can be subject to domestic procedural rules provided that the same are no less favourable than those governing actions seeking similar reliefs at domestic law and provided that they do not render the exercise of European law rights virtually impossible. The domestic procedural rules must not offend against the principles of equivalence and effectiveness.”

He cited the decisions in *Amministrazione Delle Finanze Dello Stato v. Ariete spA* [1980] ECR 2545 and *Frankovich v. Italian Republic* [1991] ECR 1-5357 in support of his conclusions.

**317.** The appellant in *Arklow Holidays* had advanced the decision in *Kraaijeveld BV* as authority for a proposition that when dealing with a possible breach of EU law the supremacy

of European law was relevant and an applicant should not be prevented from raising a point on the grounds that it could have been raised in earlier proceedings. Finnegan J. was unable to find any support for such a proposition in the said judgment.

“What was there decided was that, where, by virtue of national law, a court must of its own motion raise points of law based on binding domestic rules which have not been raised by the parties. Such an obligation also exists where binding community rules are concerned. The position is the same if national law confers on courts a discretion to apply of their own motion binding rules of law.” (para. 56)

Finnegan observed –

“It is not part of our national law that a court must of its own motion or may of its own motion raise points of law concerning the legality or *vires* of administrative decisions which have not been raised by the parties.” (para. 56)

**318.** It had been contended before the Supreme Court in *Arklow* that the Directive under consideration in that case (2003/35/EC) made it inappropriate to import the rule of *Henderson* into the proceedings. Finnegan J. rejected that proposition, noting that the rule was: -

“... based on the premise that a party to proceedings had an opportunity to raise all the relevant points of law in earlier proceedings which have already been finally determined. Accordingly, as a matter of fact it cannot be said that the appellant has been deprived of an effective opportunity to participate in the decision making process for the project in question, apart from the fact that the appellant has, of course, had an opportunity of fully participating in the planning application process and the appeal process before An Bord Pleanála.” (para. 57)

He was not satisfied that the policy apparent in the relevant Directive which was aimed at public participation in decisions affecting the environment could displace domestic procedural law. The rule in *Henderson* was part of our domestic law and “subject to the principles of effectiveness and equivalence the validity of decisions challenged on EU grounds is to be determined by Irish procedural law.” That the *Henderson* Rule did not infringe the principles of effectiveness or equivalence he considered to be manifestly clear from the extensive and well-established jurisprudence of the Court of Justice. He noted that:-

“There is no objection to time limits for the bringing of first instance or appeal proceedings; they are permissible if they meet the requirement of proportionality.”  
(para. 59)

He considered that the rule had a legitimate aim:

“The restriction is proportionate to the aim. There is access to the courts and it cannot be said that the very essence of the right of access is impaired.” (para. 98)

**319.** In substance, these are judicial review proceedings and the procedure and other limitations governing such proceedings are applicable. Irrespective of whether the rules governing judicial review are applicable or not, the outcome is and must be the same under this aspect of the *Henderson* Rule. Having due regard to all the circumstances of this case, the nature of the issues sought to be raised, the substantial overlap between the core claims in the first proceedings and the within proceedings, the evident litigation strategies and decisions freely made on an informed basis by the appellant in the context of the disposition of the first proceedings, I am satisfied that this is a case where in all the circumstances it is in the public interest, in the interests of justice and in the interest of fairness to the parties that the undoubted discretion not to apply the rule in *Henderson* ought not be exercised in favour of the appellant in the instant case. To decide otherwise, having regard to the nature

of the issues to be raised, the clear impact on the respondents, including the notice party and the overall conduct of the appellant, would be to visit an injustice on the respondents and would not be in accordance with the public interest.

### **Exercise of discretion**

**320.** The exercise of discretion is important in the context of the *Henderson* Rule to ensure that the court's power to intervene to prevent abuse of process is kept flexible and is not constrained by any exhaustive list of factors or circumstances predetermined to be abusive *per se*. Principles of the *Henderson* Rule in this context cannot be understood or applied divorced from the factual and legal matrix arising. That principle was reinforced by the UK Supreme Court in the observations of Lord Sumption in *Virgin Atlantic Airways Limited v. Zodiac Seats (UK) Limited* [2013] UKSC 46 although it was distinguishable from the instant case on its facts.

**321.** At para. 24 he observed: -

“The principle in *Henderson* ... has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before.”

He reviewed earlier jurisprudence, characterising the principle as “both a rule of public policy and an application of the law of *res judicata*.”.

### ***Procedural***

**322.** As was noted by the UK Supreme Court in *Virgin Atlantic*, whereas *res judicata* is the rule of substantive law, abuse of process and the *Henderson* Rule in that context is a concept which “informs the exercise of the court's procedural powers.” Lord Sumption in *Virgin Atlantic Airways Limited v. Zodiac Seats (UK) Limited* [2013] UKSC 46 observed at para. 25: -

“... They are distinct although overlapping legal principles with a common underlying purpose of limiting abusive and duplicative litigation. The absolute character is qualified where the conduct is found not to be abusive.”

Lord Neuberger observed at para. 55 of his judgment in *Virgin Atlantic*:

“The purpose of *res judicata* is not to punish a party for failing to take a point, or for failing to take a point properly... It is... to support the good administration of justice, in the public interest in general and in the party’s interest in general.”

**323.** The appellant had in its possession all of the material facts, knew the extent of the lands acquired by Crekav and its contemplated use, was conversant with the relevant Directives, knew that the notice party was a developer, was aware that a development of the property was in contemplation, was aware of issues concerning grass cutting and, in the language of the letter of the 18 July 2018, was agitating issues regarding the protection of the identified bird species pending the designation it sought. It was aware of the necessity for the keeping cut of grass and other maintenance and works and the various statutory and other powers applicable. In the instant case, the appellant, in the view of the trial judge for its own reasons, chose not to litigate to a determination an issue demonstrably of fundamental import to the notice party in light of its intentions for the lands. Clonres could readily and should have adduced the material they apparently had in their possession in July 2018 and which informed the contents of the letter of the 18 July 2018.

#### **Conclusion on Henderson Rule**

**324.** As of the 31 July, it was apparent to Clonres that the Minister was not minded to accede to the formal 7-day demand of the appellant to accept the contention being advanced and confirm her willingness to take steps to designate the lands or that she would take steps to protect the lands in question “pending designation”. Despite the strenuous arguments of



counsel for Clonres, there is no material difference between the ambit of the claim in its first iteration and in its current form as pleaded in the plenary proceedings. Accepting what the appellant asserts in its written submissions as to the nature and extent of the proposed amendments sought by its motion, had they been the subject of an order by the High Court granting leave to amend the pleadings, same – on the appellants own characterisation of same - amount to nothing more than a refinement of existing pleas, making more explicit “certain existing pleas”, inclusion of updating information and correction of certain typographical errors (*per* para. 113 of the appellant’s own submissions in this court).

**325.** In all the circumstances, applying the *Henderson* Rule and approaching the exercise of discretion in a flexible fashion and taking into account all of the circumstances of this particular case and having due regard Clonres’ own characterisation of the proposed amendments, this court could not fairly conclude that the new material and proposed amendments, in virtually all of the substantive points could not have been raised in the first proceedings.

**326.** The facts in this case disclose circumstances which engage the principle first formulated by Wigram V.C. in *Henderson* and which precludes a party from raising in later proceedings issues which were not, but could and should have been, pursued in the first suit. Allied to this are the more general procedural principles against abuse of proceedings. Lord Sumption, reviewing the evolution and the various distinct strands arising from the *Henderson* decision considered subsequent authorities, particularly in the modern era, including Lord Keith’s exposition in *Arnold* that the principle extended to “... every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.” (p. 115, *Henderson*) It is noteworthy that in *Arnold* [1991] 2 A.C. 93 the House of Lords had observed pertaining to points not decided in the first litigation at p. 105:-

“... The possibility the cause of action estoppel may not apply in its full rigour where the earlier decision did not in terms decide, because they were not raised, points which might have been vital to the existence or nonexistence of a cause of action.”

**327.** In this case all of the substantive points now being raised are reformulations and reiterations of points raised in the first proceedings such that I am satisfied that all substantive points now being agitated or sought or proposed to be agitated pursuant to the amended pleadings, including the proposed amendments as referred to by Clonres in its submissions, could with reasonable diligence have been raised on the previous occasion and also ought to have been so raised rather than abandoned as they were by the appellant.

**328.** The *Henderson* Rule applies to a litigant who fails to bring forward points pertinent to the dispute in circumstances where those issues or matters were within his knowledge at the relevant time, *i.e.* prior to the conclusion of the first round of litigation. In the instant case, as the facts demonstrate, the *Henderson* principle does clearly apply.

### **Subsequent events**

**329.** Insofar as any of the “new points” being raised in the within proceedings might be said to be exclusively derived from subsequent events they are ancillary to the substantive issues and merely go towards buttressing the contention of an underlying obligation on the part of the Minister to designate rather than establishing some new circumstance or fundamental distinct material fact. Taking a holistic view of the earlier claim advanced by Clonres *vis-à-vis* the State and the Minister and comparing same with the current iteration of that claim, I am satisfied it is not in the interests of justice to allow the claim to be pursued. The clear guidance provided to this court by *Arklow Holidays* is of significant assistance in

that regard. Justice does not demand that there be an exercise of discretion to permit Clonres to relitigate what it readily could and should have pursued in the first litigation.

**330.** I take from the decision of Finnegan J. in the Supreme Court that a court is to exercise significant restraint when reaching a conclusion that a litigant such as Clonres ought to be prevented from now raising or further pursuing issues that they had in part raised in previous litigation and including those aspects that they omitted to raise on the prior occasion but could and should have done so. *Arklow Holidays* makes clear that all concerned parties including the public, landowners, and the State are interested parties and that the calculus engaged in in reaching such a conclusion requires the court to have regard to the interests of all in the context of the court's general power to control abuse of process.

**331.** As is clear from the Supreme Court decision in *Arklow*, in this aspect the *Henderson* Rule encompasses the rationale that a party, including a State party, landowners, developers and others should not be vexed from the same cause or suit more than once. The appellant's motion to amend its pleadings was not determined by the High Court and nothing in this judgment is intended to constitute a determination of that motion save that the characterisation of the amendments by the appellant in its own submissions paras 112 *et seq.*, are in my view, highly material in the context of application of the *Henderson* Rule. Nothing in the within claim falls outside the ambit of the first claim pursued in the first proceedings against the State parties, having due regard to the characterisation by the appellant of the proposed amendments to the statement of claim, as comprising a "refinement of certain existing pleas by making more explicit certain existing pleas", the "inclusion of certain updating information" which arose subsequent to 31 July 2018 and the "correction of certain typographical errors". The appellant also asserted that the amendments it sought did not "involve any radical change or enlargement of the claims". The issue remains the same – is the Minister under an obligation to designate the lands in question for the purposes of the

Birds Directive? In the absence of countervailing factors and adopting a broad view of the totality of the competing interests no basis or subsequent event emerges which warrants deviating from the application of the *Henderson* Rule or comprises a valid basis identified by Clonres for the exercise of the undoubted discretion vested in the court not to apply the rule to the present proceedings.

**332.** In large measure one is driven to the conclusion that it is the same evidence in substance, with minor updates and details, which would have supported the appellant's claim against the Minister had the appellant elected to proceed with the first judicial review, which would be laid before the court were the appellant to be permitted to pursue the within proceedings. That factor substantially underscores also and separately the substantial identity and overlap between the two separate suits.

**333.** Ultimately the first and second proceedings are not distinct claims, even apart from this aspect of the *Henderson* Rule to permit the litigation in its current or proposed form to proceed is contrary to general abuse of process principles and would visit an undue burden upon the respondents.

**334.** I am satisfied that the appeal can be disposed of by the application of the *Henderson* Rule. In all the circumstances of the case it is in the interests of justice that the substantive order of the High Court in that regard is upheld. The application of the *Henderson* rule in that regard as adumbrated by the Supreme Court in *Arklow* is demonstrably in the public interest, promotes finality in this litigation discourages unnecessary delay. It protects environmental law remedies which operate in the public interest from the risk of improper use.

### **Other Grounds of Appeal**

335. Whilst it is not strictly necessary to engage to any extent with the other grounds of appeal given the extensive nature of same the following observations can briefly be made, in addition to observations concerning same made above.

#### ***Ground of Appeal One***

336. The procedural rules governing judicial review did apply to the within proceedings including O. 84, r. 21. The trial judge was correct in his conclusion stated at para. 8 that at the latest time expired within three months of the letter sent on behalf of the State respondents on the 24 August 2018. That being so, it is not necessary to make any determination pertaining to the running out of time from any earlier date. The relevant jurisprudence including *Shell E&P Ireland Limited v. McGrath* and the earlier decision of *O'Donnell* was appropriately considered by the trial judge.

#### ***Ground Two***

337. The appellant has failed to demonstrate that the claims advanced in the within proceedings are “entirely separate and independent claims” from the designation claim in the first proceedings. In the language of Lord Denning in *Fidelitas Shipping Co. Limited v. V/O Exportchleb* [1966] 1 Q.B. 630: -

“... Within one issue there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence or even accident (which would or might have decided the case in his favour), he may find himself shut out from raising that point again, at any rate in any case where the self-same issue arises in the same or

subsequent proceedings. But this again is not an inflexible rule. It can be departed from in special circumstances.”

The claim for SPA designation advanced in the within proceedings is not an “independent claim” in the manner contended for the reasons set out above in the context of the *Henderson* jurisprudence. It substantially mirrors the claim in the first proceedings.

### ***Ground Three***

**338.** In addition to the observations above, including para 146 *et seq.* I make the following observations. Though there may have been some infelicities in the language of the trial judge his position was entirely clear when the judgment is considered in its entirety. He was correct in concluding that the within proceedings constituted public law proceedings. The trial judge was correct in the said characterisation and in his determination that the procedural rules governing public law litigation applied. Further with regard to an extension of time the appellant has failed to establish any valid basis whereby the time limits specified in O. 84, r. 21(3) ought to be extended. The appellants appropriately accepted within the terms of Ground Three of the Notice of Appeal that the within proceedings were public law in nature. The appellant failed to comply with the principles adumbrated by Finlay Geoghegan J. in *O.S. v R.I.R.B.* 2018 IESC 61. That being so, the substance of the complaint encompassed in this Ground of Appeal falls away and lacks merit.

### ***Ground Four***

**339.** In addition to para 146 *et. seq.* I note as follows; The observations of the trial judge at paragraphs 36 and 37 of the judgment reflect the trial judge’s analysis and conclusions on the evidence before him in relation to the litigation decisions made by Clonres in connection with the institution of the within proceedings. During the 3-day hearing, the High Court had ample opportunity to evaluate such matters. The judge’s observations, which form the

subject matter of Ground Four of the Notice of Appeal are taken out of context and do not undermine his conclusions.

***Ground Five***

**340.** In this regard, and further to para. 211 *et seq.* above, it is noteworthy that the substantive reliefs being sought by the appellants in the within proceedings include several declaratory orders as well as mandatory orders. As has been observed by Collins and O'Reilly in *Civil Proceedings in the State* at para. 5-75: -

“Subject to satisfying the requirements of RSC O.84, r.18(2) a declaration may be granted on an application for judicial review without seeking another form of relief.”

The decision of Costello J. in *O'Donnell v. Dun Laoghaire Corporation* is cited as authority for that proposition. The authors continue –

“The same principles apply to the grant of declaratory relief against a public body acting as such, irrespective of whether the proceedings are taken by way of an application for judicial review or by plenary summons.”

At 5-76 it states: -

“It has been observed that the declaration is capable of covering the ground occupied by all of the other remedies potentially available at the hearing of an application for judicial review.”

Hogan and Morgan in *Administrative Law in Ireland* (4<sup>th</sup> ed., Round Hall, 2010) at p. 828 is cited as authority for that proposition. One is driven to the conclusion that the characterisation by the appellant that there has been no “decision” is at best a recasting of the facts to circumvent the operation of O. 84, r. 21. In substance what the appellant is seeking amounts to mandatory orders compelling the Minister and the State to designate the

subject lands a SPA. To that extent, reliefs being sought can be fairly characterised as, *inter alia*, including *mandamus* insofar as it is sought to compel the discharge of an alleged mandatory obligation by a State party.

***Ground Six***

**341.** For the reasons already stated including at para. 211 *et seq.* above, it was not erroneous for the trial judge to characterise certain of the reliefs being sought in the within proceedings as in substance amounting to *mandamus*. That same were being sought through the means and mechanism of declaratory orders does not detract from their effective characteristics. The appellant identified no such concern in instituting judicial review proceedings against the Minister and the State in 2018 to compel designation of St. Paul's as a SPA.

***Ground Seven***

**342.** This ground has been in part addressed above at para. 211 *et seq.* The trial judge's observations are to be taken in their context. There is force in the argument advanced on behalf of the State parties in this appeal that at para. 47 of the judgment the trial judge had identified a contradiction or otherwise an inconsistency in the stance being adopted by the appellant which the said respondents characterised as "either there was a decision in relation to which the proceedings are out of time, or there was no decision, but also no demand and refusal, in which case a precondition for the grant of an order of *mandamus* has not been satisfied."

***Ground Eight***

**343.** The appellant selectively characterises the correspondence of July and August 2018. It was not entirely engaged in "... in the context of the aftermath of previous judicial review proceedings" in circumstances where the first relevant letter is dated the 18 July 2018.



Neither could it be said, as the appellant contends, that the said correspondence concerned “a different matter”. In essence the core issue in both sets of litigation was one and the same, namely whether the lands at St. Paul’s would be designated a SPA or not. The distinctions contended for by the appellant for the purposes of characterising the within proceedings as concerning “a different matter” are wholly unconvincing. The within proceedings are a mere reformulation and a recasting of the substance of the claim made against the State in the first proceedings. I have reached this conclusion for all the reasons outlined earlier in this judgment.

As was observed by McKechnie J. in *F.G. v. The Child and Family Agency* [2018] IESC 28:-

“Sometimes a fresh decision will be called for, but mere discontent with the existing position cannot of itself suffice to place on the Agency an obligation to revise or re-appraise that situation.” (para. 103)

It is not clear that anything had changed subsequent to receipt by the State of the letter of the 18 July 2018 or any later correspondence. That was very evident to the respondents at the latest by virtue of the letter of the 24 August 2018 and remained the position at the date of institution of the within proceedings in April 2019.

### ***Ground Nine***

**344.** It is difficult to understand how the appellant could be under any illusion as to the position of the State and the Minister regarding the designation sought firstly from and after the expiry of seven days from the sending of the appellant’s letter of the 18 July 2018, secondly, from the point of receipt of the letter of the 31 July, 2018 and finally, from and after the receipt of the letter of the 24 August, 2018. The Minister had made the position very clear. The appellant could have been under no illusion that insofar as it considered it

had validly requisitioned the Minister to consider taking steps necessary to effect a designation of the St. Paul lands as a SPA pursuant to the Birds Directive she had unequivocally declined to do so. It would appear that the dominant basis for the appellant's contention that there is an ongoing accrual of time each day that the State respondents failed or omitted to take steps to effect the designation sought is posited primarily as a device to circumvent the time limits. This contention does not suffice in the context of the facts and application of the *Henderson* Rule. The appellant had a full opportunity to bring forward the said point and all other cognate points at the hearing before the High Court. Clonres omitted to raise any of these particular points in court, particularly on the 31 July 2018. The appellant is not now entitled to pursue an issue freely and unconditionally abandoned in the first proceedings for the reasons stated above.

### ***Ground Ten***

**345.** The observations of the trial judge, particularly including at paras. 49 and 51 of the judgment under appeal, are to be viewed and considered in their context. He was engaging, *inter alia*, with the practical consequences of the arguments and contentions being advanced on behalf of the appellant based on an argument that since the obligation was a continuing one, time commenced to run *de novo* each day. The argument duly considered was unpersuasive.

### ***Ground Eleven***

**346.** Ground Eleven is inconsistent with the tenor of the letters of the 31 July 2018 and 24 August 2018 from the agent for the Minister and the State, namely the Chief State Solicitor's Office. The communication was unequivocal and could leave no doubt in the mind of the appellant that the Minister was not prepared to accept the submissions and contentions of the appellant as encompassed in the letter of the 18 July 2018, including steps preparatory

to or in connection with a proposed designation of the St. Paul's lands as a SPA being taken. Further, the evidence before the Court demonstrated the process previously pursued by the State in the wake of *Case C-418/04* where the State operated a process of review in relation to subsisting SPAs in the State, including in the Dublin region from early 2005 onward. The public nature of the process, the publication of the process, including the classification of six separate SPAs, either in the vicinity of or proximate to St. Paul's in the years 2008 and 2009 together with the relevant statutory instruments the culmination of each respective designation were all put before the court and engaged in detail with by the parties in the course of the hearing.

***Ground Twelve***

**347.** The observations of the judge at para. 53 of his judgment are based on the evidence that was before him and the arguments advanced by the appellant, one of which contended that there was a substantial material nexus between the St. Paul's site and the North Bull Island SPA. The contention in effect was that though the lands at St. Paul's were not contiguous or adjacent to the North Bull Island SPA the former was "inextricably linked" to the latter. As the State parties effectively contended, no evidence was advanced by the appellant before the High Court to demonstrate that such a link or nexus was new or did not previously subsist in the years 2008 and 2009.

***Ground Thirteen***

**348.** The appellant contends that the trial judge improperly imputed a primary motive to Clonres in the first proceedings as being primarily to "prevent the building of houses on the St. Paul's site" or otherwise "preventing housing development". It is understandable that the trial judge would have a concern in light of the homelessness crisis in Dublin and the pressing social and public need for adequate housing and homes in the area that public law

remedies would be invoked and pursued in a proportionate manner. However, the trial judge, *inter alia*, at paras. 4, 5, 7, 57, 59, 92 and 102 and when the judgment is considered in its entirety, made clear that nothing is intended to turn on his said comments, which are entirely *obiter*. The appellant's contention that "the judicial review proceedings were successfully taken to address errors in the decision making process by An Bord Pleanála" is a partial and inadequate characterisation of the first proceedings. The joinder of the State parties had been wholly unnecessary and served no relevant ancillary function if, as the appellant contended, the first proceedings were brought solely in connection with a decision of An Bord Pleanála. The standalone reliefs sought against the State parties as set forth at Clause 2 of the Statement supporting the application for judicial review sought the designation of the lands as an SPA.

#### ***Ground Fourteen***

**349.** The appellant has not established that the trial judge misunderstood or misconstrued the arguments advanced on behalf of Clonres that the application for designation of St. Paul's as a SPA in the context of the first proceedings was an ancillary argument. I am satisfied that the characterisation of the claims against the Minister/State in the first proceedings as merely "ancillary" is not made out for all the reasons stated above. Hence, the *Henderson* Rule does arise and its application to the facts of this case is dispositive of this appeal in and of itself.

**350.** The appellant identified no relevant authority for the proposition that it is only where the designation is the sole or primary point in the first litigation that *Henderson* Rule would arise as is contended.

**351.** The *Henderson* Rule operates to preclude a litigant such as Clonres from litigating old issues once more or indeed new issues, which could have been raised but were not in the earlier litigation. I am satisfied that in substance what Clonres seeks to do is impermissible, namely to return to court to litigate that which could have been raised in the earlier litigation

before the court and pursued, which was in fact raised substantially in the judicial review application but was simply not pursued or was otherwise abandoned where no special or exceptional circumstances are identified referable to the Minister or the State. As was observed by the Canadian Supreme Court in *Apotex Inc. v. Merck & Co.* [2003] 1 F.C. 243 at para. 28 citing earlier decisions of the Privy Council and the Canadian Courts: -

“Parties are not permitted to bring fresh litigations because of new views they may entertain of the law of the case, or new versions which they present and so what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances.

If this were permitted litigation would have no end, except when legal ingenuity was exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. It follows that a party will not be permitted to return to court to litigate that which could have been raised in the earlier litigation before the court.”

### ***Ground Fifteen***

**352.** The appellant was entitled to view the correspondence from the State parties dated the 31 July 2018 and the 24 August 2018 as clearly communicating the Minister’s decision not to accede to the request of the appellants to instigate a process for the designation of the St. Paul’s lands. As such, in particular the letter of the 24 August 2018 could fairly be characterised by the trial judge as confirmatory that the Minister was not taking any steps such as those sought in earlier correspondence from the appellants to designate the said lands as an SPA. That the said correspondence was confirmatory in effect of the demarcations and boundaries of the SPAs designated in 2009 and 2010 does not detract from the clarity and

certainty of the communication made by the Minister and the State parties on the 24 August 2018.

***Ground Sixteen***

**353.** I am satisfied in light of the judgment in its entirety and including paras. 62, 63, 64 and 65 thereof that the trial judge was correct in distinguishing the decision in *Mungovan v. Clare County Council* [2020] IESC 17 from the salient facts in the instant case and that the designation of lands and sites under the Birds Directive or otherwise was distinguishable from the process operative and the nature of the individual decisions including categorisation based on an underlying policy under consideration in *Mungovan*.

***Ground Seventeen***

**354.** Insofar as the appellant contends that the trial judge held that the obligation to designate can be met by a “once and forever decision on designation of certain other sites” such a determination is not to be found in the judgment when properly considered in its totality. Aspects of this ground were considered at para. 211 *et seq.* above. The judgment in its totality does not support the contentions of the appellant in this regard. A consideration in particular of paras. 53, 67 and 68 demonstrates that the trial judge was keenly alive that new information of a material nature may give rise to a review or a variation of a decision previously made in the context of designation. No such evidence was apparently put before the court.

***Ground Eighteen***

**355.** In the first proceedings the appellant had framed its claim for designation based on a contention that St. Paul’s site was inextricably linked with North Bull Island. In doing so it mirrored language to be found in the application for the grant of planning permission submitted by Crekav to An Bord Pleanála in February 2018. These points are considered by

the trial judge, *inter alia*, at paras. 52, 53, 82 and 100. It was worthy of note that the contention of “inextricable linkage” between the two sites was first articulated by Clonres in 2018 over eight years following the designation of North Bull Island as an SPA by the Minister. It is further noteworthy that the appellant inferentially is resiling to an extent from the inextricability point in the within proceedings in circumstances where the claim has now been recrafted and repurposed or reframed so that the designation of the St. Paul’s lands can be pursued on a standalone basis. Nevertheless the claim is substantially the same -for designation of the St. Paul lands as a SPA.

***Ground Nineteen***

**356.** On the basis of the information and documentation exhibited it would appear that the trial judge’s observations, particularly in the latter part of para. 67 of the judgment are factually correct.

***Ground Twenty – Extension of Time***

**357.** As with all of the above grounds of appeal, the conclusions I have arrived at in light of the *Henderson* Rule and applicable principles is outcome determinative of this ground of appeal also. However, having due regard to the tenor and terms of O. 84, r.21(3) I am satisfied that the conclusion of the trial judge was one he was entitled to reach on the evidence before him and further it is a conclusion which this court ought not to interfere in circumstances where the appellant had not furnished any or any adequate reasons or tendered an adequate explanation sufficient to objectively justify its failure to make the application within time such as would have enabled the trial judge to exercise his discretion to grant the extension of time sought. There was evidence before the trial judge to which he was entitled to have regard that an extension of time as sought would visit some prejudice on the fourth named respondent. Once the appellant had in his possession a copy of the letter of the 24

August 2018, he could not reasonably have believed otherwise than that an unequivocal clear and final position and decision had been adopted by the Minister in the context of the course of correspondence that had passed between the parties from the 18 July 2018. The argument that the trial judge afforded precedence to the economic interests of the fourth named respondent over the environmental protection issues contended for by the appellant is not made out. The appellant failed to have regard to the principles outlined by Finlay Geoghegan J. in *O.S. v R.I.R.B.* 2018 IESC 61. Valid reasons for delays both in the period up to the expiration of time and from that date to the date when the proceedings were instituted need to be fully identified and engaged with. The broad reasons proffered by Clonres do not objectively justify its clear failure to apply within the time frame specified in Order 84 r. 21 (1). No sufficient basis to extend time was identified such as would justify extending time in light of the operation of O.84 r. 21 (3) and (4).

**358.** Further, the appellant's contention that it "reasonably" did not believe that a final decision had been made is unpersuasive. Neither can the appellant rely on political lobbying to extend time in all the circumstances of this case irrespective of whether it is or is not registered for lobbying purposes for the reasons stated above. Insofar as it is contended that "the economic interests of the fourth named respondent cannot take precedence over the environmental protection which requires to be afforded to the lands as a matter of European law requirements" the underlying assertion is not made out. Further, this is an issue that ought to have been litigated in 2018 rather than abandoned. The decision of the High court cannot fairly be characterised as based on according precedence to the developer as the appellant appears to imply.

***Ground Twenty-One***

**359.** Were time to run from the 24 August 2018, the appellant was nonetheless clearly out of time at the date of institution of the within proceedings in April 2019. Arguments as to



what other litigants could, might or may do are *nihil ad rem* in the context of this ground of appeal. Political lobbying does not offer a relevant answer for the delays. Further I am satisfied that the affidavit evidence put before the High Court for the purposes of exercise of judicial discretion in regard to the extension of time was inadequate and vague. It omitted to comprehensively disclose the nature and extent the appellant's actual awareness of all salient issues and a basis articulated as alleging "breaches of ongoing European environmental law obligations" is too vague. Hence the exercise by his discretion on the part of the judge of the High Court to refuse to enlarge time ought not to be interfered with for the reasons identified by the judge at, *inter alia*, paras. 74, 75, 76 and 77 of his judgment.

### ***Ground Twenty-Two***

**360.** Issues concerning the cutting of grass by the fourth named respondent were fully within the knowledge of the appellant prior to the conclusion of the first proceedings on the 31 July 2018 as is evident from the clear tenor of the letter of the 18 July 2018. Elsewhere in the documentation it appears evident that the appellant was aware that the grass was not being cut from in or about the month of September 2017. Hence the recasting of the previous proceedings in a new version as the appellant purports to do in the within plenary proceedings is impermissible for the reasons set out extensively above in the context of the *Henderson* Rule in relation to issues that ought or might have been pursued to a conclusion but were not in the earlier proceedings. As the decision in *Arklow* makes clear, the *Henderson* Rule applies in the field of public law litigation. As the author Browne in *Simons on Planning Law* observes at 12-1857: -

“The judgment of the Supreme Court in *Arklow Holidays Limited* in this regard is thus broadly consistent with the approach which the courts take to other procedural exclusionary rules.”

***Ground Twenty-Three – Preliminary Reference***

**361.** The trial judge at para. 104 makes certain observations regarding the likelihood that the appellant would seek to amend its statement of claim. He is at pains however to point out that these observations were not a determinative factor in his decision to refuse to accede to the request for a reference to the Court of Justice of the European Union. One might further add to the observations of the trial judge the substantive points raised by Browne in his textbook at 12-1864: -

“The Court of Justice has held that EU law does not require a national court to disapply domestic rules of procedure in order to review and set aside a final judicial decision even if that decision is contrary to EU law.”

They reference *Köbler v. Republik Österreich (Case C-224/01)* [2003] ECR I-10239.

The author continues –

“The Supreme Court could, reasoning by analogy, have concluded that a rule, which precludes the party from belatedly raising legal issues which could have been raised in earlier proceedings is similarly consistent with EU law. Both rules served to protect similar values, including finality in litigation and the sound administration of justice.”

Commenting otherwise on the approach of the Supreme Court in *Arklow* the author states at 12-1863: -

“It is submitted that a more convincing basis for upholding the procedural rule at issue in *Arklow Holidays Limited* is to be found in the principle of *res judicata*. As discussed earlier, the principle of *res judicata* was extended in *Henderson v Henderson* to include not only issues which were actually determined in the earlier litigation, but also issues which *could have been* raised in the earlier litigation but

were not. Had the Supreme Court emphasised the fact that the rule was but an aspect of *res judicata*, this would have allowed it to draw on the case law of the Court of Justice. In this regard the Court of Justice has emphasised the importance, both for the EU legal order and national legal systems, of the principle *res judicata*.”(emphasis added)

Crekav persuasively argued that *Emmott v. Minister for Social Welfare*, where the CJEU held that no time limit could be applied by Member States to deprive citizens of directly effective rights from a Directive that had not been properly transposed into national law, did not create any general principle that time-limits do not apply to an applicant seeking to rely on EU law rights. The *Commission v. Ireland* decision is broadly confined to situations where the CJEU is imposing a sanction on a Member State for failure to comply with an earlier decision; the State attempted to argue it could not have challenged the planning permission granted since it was out of time under Order 84 rule 21(1) however the CJEU found the State was not required to quash the planning permission instead, it was supposed to sanction the State body for non-compliance.

**362.** The imposition of time-limits is consistent with the jurisprudence on national procedural autonomy under EU law, particular with regard to legal certainty. In Case C-542/08 *Barth* wherein the CJEU held that it was compatible with EU law to lay down reasonable time-limits in the interests of legal certainty which protects both the individuals and the authorities concerned, stating at para. 17 –

“It follows that it is for the domestic legal system of each Member State to lay down such a procedural rule, provided, first, that the rule is not less favourable than those governing similar domestic actions (principle of equivalence) and, second, that it does not render in practice impossible or excessively difficult the exercise of rights conferred by European Union law (principle of effectiveness)”

The domestic procedural rule encompassed by *Henderson* Rule applies both to national and EU law. It therefore complies with the principle of equivalence.

***Ground Twenty-Four***

**363.** A consideration of the judgment *Commission v. Belgium* being relied upon by the appellant suggests that it does not support the appellant's contentions in respect of this ground of appeal in the manner in which the appellant contends. The issue arose in a materially different context. I am satisfied there is some force in the arguments of Crekav that the said decision pertains to a later stage in the process of designation requiring the relevant State authority to publish maps identifying clearly the area of land intended to be encompassed by a proposed designation of a SPA. The letter sent by the Minister was sent in response to what might reasonably be characterised as the preliminary approach or application by Clonres as it was entitled to make pursuant to the 2011 Regulations proposing to the Minister that she ought to designate the St. Paul's lands a SPA under the Birds Directive. Likewise, I am satisfied that the stance adopted by the State parties in their respondents' notice dated the 25 September 2020 wherein at para. 26 thereof they state, "Case C-415/01 *Commission v Belgium* is not authority to the effect that a letter from the Minister's solicitor to the solicitor of a group of citizens who have sought designation of an SPA under threat of legal proceedings, contravened the Aarhus Convention by reason of not being publicised", is correct. Furthermore, in the context of *Henderson* issue estoppel the appellant was fully aware of the tenor and provisions of the 2011 Regulations at all material times from the institution of the 2018 proceedings until their disposition on the 31 July 2018 and was perfectly entitled within the said proceedings to agitate issues regarding transposition had they seen fit to do so. They gratuitously elected to abandon the designation issue against the State parties and are in substance not entitled now to seek to litigate issues

they could or should or indeed might or ought have more appropriately pursued in the first proceedings.

***Ground Twenty-Five***

**364.** The trial judge gave extensive consideration to the issue of time limits in the context of EU law. As is clear from decisions such as *Ó'Grianna & Ors. v. An Bord Pleanála* [2017] IEHC 7 at para. 44 the court can have consideration to time limits in planning and environmental cases. Of particular relevance in the context of the instant case was the reasoning of the court that the appellant ought to be precluded from raising an issue which was out of time which also offended the rule in *Henderson* since it could have been advanced in the earlier set of proceedings. Time limits, provided they fulfil the principles of equivalence as procedural rules, which are not less favourable than those governing similar domestic actions are uncontroversial. Further, the court reserves a significant discretion in regard to time limits where the interests of justice require flexibility.

**365.** The sequencing of the paragraphs in the judgment are not probative of the manner in which the trial judge considered matters in circumstances where a vast array of issues, points, arguments and propositions were advanced by the appellant at the hearing and dealt with expeditiously by the trial judge in a time of pandemic.

***Ground Twenty-Six***

**366.** It is contended that the trial judge erred in considering that there was a lack of particularisation in the appellant's statement of claim regarding deficiencies in transposition of the Directive. This aspect of the claim is to be found at paras. 43 – 45 inclusive in particular of the amended statement of claim. Paragraph 45 appears to envisage or encompass a double contingency firstly, that Clonres “may not be entitled to the above reliefs or any of them” and secondly, if so “... same is due to the failure of the State properly to

transpose the Habitats Directive and Birds Directive...”. The appellant thereby appears to pursue a contingent hypothesis which only comes into play in the event that it is unsuccessful in the reliefs sought at paras.1-42 inclusive of the statement of claim. I am satisfied that the State parties in their contention that the trial judge’s said finding with regard to lack of particularisation was appropriate “given how sparsely the plea is set out at paragraph 45 of the statement of claim” is correct (para. 28, respondent’s notice for the State parties).

**367.** Furthermore, in submissions, the appellant has not adequately answered the point that the said plea “clearly does not contemplate acts or omissions of designation as the measures of transposition at issue.” (para. 28) It is difficult to understand the basis for the appellant’s contention that the designation or non-designation of the St. Paul’s lands as a SPA pursuant to the Birds Directive constitutes a transposition issue in the manner contended.

### ***Ground Twenty-Seven***

**368.** The setting down of a preliminary point was not warranted in the circumstances. The appellant has not made out a case that the motion to dismiss was improperly brought. The court clearly did have jurisdiction to consider such an application and arrived at a correct conclusion notwithstanding that this court in reviewing the totality of the evidence is satisfied that the matter can readily be addressed and disposed of based on the *Henderson* Rule alone. The setting down of a preliminary point may contribute to delay and the scheme of the planning and environmental legislation attaches value and importance to expedition. The analysis by the trial judge at para. 122 is clear and engages with an aspect of the arguments advanced by the appellant. The courts retain the right and inherent jurisdiction to control their own processes and it is noteworthy in particular that in its notice of motion which issued on the 27 January 2020 the State parties explicitly invokes the rule in *Henderson v. Henderson* as a basis for dismissing the within proceedings “by reason of the

fact that the relief sought in the within proceedings should and could have been pursued by the plaintiff in previous judicial review proceedings...”

***Ground Twenty-Eight***

**369.** The appellant’s motion issued on or about the 16 March 2020. It sought liberty to deliver an amended plenary summons and statement of claim. It also sought an order pursuant to O. 84, r. 21(3) extending time within which to seek the reliefs sought therein.

**370.** In light of the determination hereinbefore set forth and the applicability of the *Henderson* Rule to these proceedings, the within litigation is not maintainable further. As stated above, I have had regard to appellant’s own characterisation of the proposed amendments and in particular I have had regard to the submissions and arguments advanced by the appellant in regard to same in its written legal submissions including at paras. 112 – 115 inclusive and note that in substance Clonres asserts that they amount to a refinement of existing pleas making more explicit “certain existing pleas”, further that they include updating information which has arisen since the institution of the proceedings and that certain typographical errors and emendations are effected “in particular the relief at paragraph 15 against the fourth named defendant, which is in similar terms to the relief at paragraph 16.” (para. 113) I note further the written submissions acknowledge at para. 114 “none of the above involve any radical change or enlargement to the claims.”

**371.** In all the circumstances, those acknowledgments copper fasten my conclusion that *Henderson* Rule applies to the litigation in its current iteration and also to the proposed amendments and that Clonres is not to be permitted to institute now or amend or launch by the amended proceedings fresh litigations when in all material respects all of the said issues could and should have been pursued in the first proceedings.

**372.** I come to a conclusion that based on the *Henderson* Rule the within proceedings ought to be dismissed. All material issues could and should have been pursued by Clonres in the earlier judicial review proceedings record number 2018/426JR.

**373.** Accordingly I would dismiss this appeal on all grounds.

#### **Article 267 Reference**

**374.** I consider that a decision on any question of European Union law has not been identified that warrants a reference of any question to the CJEU pursuant to Article 267 TFEU and the said application is accordingly refused.

#### **Costs**

**375.** My provisional view is that there should be no order as to costs.

**376.** Noonan and Binchy JJ. have authorised me to record their assent to this judgment which is being delivered electronically.