[2020] IEHC 227

**THE HIGH COURT**
**JUDICIAL REVIEW**

**Record No: 2018/186 JR**

**BETWEEN**

**JOHN CASEY**

**APPLICANT**

**AND**

**THE MINISTER FOR HOUSING, PLANNING AND LOCAL GOVERNMENT, THE MINISTER FOR STATE AT THE DEPARTMENT OF HOUSING, PLANNING AND LOCAL GOVERNMENT, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENT**

**BIOATLANTIS AQUAMARINE LIMITED**

**NOTICE PARTIES**

**JUDGMENT of Ms. Justice Murphy delivered on the 20th day of May, 2020**

**Introduction**

1. This is an application by the notice party Bioatlantis requesting the Court to revisit, and to set aside, its judgment in this judicial review, delivered *ex tempore* on 29 July 2019. The Notice Party's application arises in the following circumstances. John Casey, the applicant, was, on the 12th March 2018 granted leave to apply by way of judicial review, pursuant to O.84 of the Rules of the Superior Courts for ten reliefs in respect of a decision of the respondents made the 30th November 2017. The impugned decision was to approve a baseline study and monitoring programme, stipulated as a condition of a foreshore licence for the mechanical harvesting of kelp in Bantry Bay, granted to the notice party on the 21st March 2014. There was an earlier 'decision in principle' to grant a license to the notice party, made by the relevant minister on the 6th January 2011. The applicant was granted leave to seek eight declarations and an order of *certiorari* of the impugned decision of 30th November 2017.

2. The respondents and the notice party filed statements of opposition and grounding affidavits in respect of the application. The notice party elected to withdraw from the substantive hearing, essentially on the grounds that it had nothing to add to the points of opposition filed by the respondents. The application came on for hearing before this court on the 25th June 2019. By that date, various reliefs sought by the applicant relating to Council Directive 2011/92/EU (the 'consolidated environmental impact directive') and Council Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (the Sea Directive) had fallen away. So too, had challenges to the vires of the appropriate minister and the status of the licence (aquaculture or foreshore) fallen away. What remained was a challenge to the decision of the 30th November 2017, based on an alleged failure to comply with the Habitats Directive together with some ancillary/alternative reliefs, based on an alleged failure to give reasons for the decision or alternatively, a failure to transpose correctly, the Habitats Directive and the Birds Directive into Irish law. In his statement of grounds, the applicant specifically acknowledged that he had made no challenge to either the 'decision in principle' to grant a licence made in January 2011, nor to the actual grant of a foreshore license to mechanically harvest kelp, sealed on the 21st March 2014.

3. In the course of the hearing, the respondents accepted that both the decision of January 2011 and the foreshore license granted on the 21st March 2014, were amenable to judicial review within three months of the respective decisions being made. Their counsel further submitted that, if a party first became aware of a decision, outside of the three month period allowed for in O.84, an extension of time within which to bring an application, could be sought. This court, as a declared neophyte in the area of environmental and planning law, enquired about the licensing process under the Foreshore Act and in particular whether there was a requirement for the Minister to publish the fact of the licence in Iris Oifigiúil. Counsel for the respondents did not answer the direct question but indicated that the evidence shows, that the fact of the license first appeared on the Department's website in March 2016, and that the evidence indicated that the applicant had had actual knowledge of the licence since February 2017, at the latest.

4. In his reply, Counsel for the applicant, in answer to the court's query as to the licensing process, brought the court for the first time, in a hearing which had lasted 5 days, to the Foreshore Act 1933 (as amended) and in particular to section 13A and sections 21A, and 21B of the act, as it was at the time of the 'decision in principle' made on 6th January 2011. Section 13A(5)(b) provides that a *'relevant application'* includes '*an application to the appropriate Minister under section 3 of this Act*.' Section 3 is the section which empowers the Minister to grant a foreshore license. Section 21A, at the relevant time provided:

> *"When the Minister determines a relevant application, that Minister shall*
>
> *(a) publish a notice in Iris Oifigiúil and in one or more newspapers circulating in the area where the foreshore subject to the determination is situate, of the determination and specifying the means by which any material received by the Minister upon which the Minister determined the application may be inspected free of charge or purchased at a price to be determined by the Minister (which shall not be more than the reasonable cost of making the copy or copies concerned)*
>
> *(b) ensure that the following information is available for inspection or for purchase by members of the public on the terms specified in the notice published in accordance with paragraph(a):*
>
> *(i) the determination;*
> *(ii) any conditions attached to such determination;*
> *(iii) the main reasons and considerations upon which the determination is based;*
> *(iv) details of the public participation process;*
> *(v) the main measures, if the Minister considers it necessary, to avoid, reduce or offset adverse effects on the environment arising from the relevant application;*
> *(vi) arrangements to comply with paragraph (c) of this section;*

*(c) inform a Member State to which section 19C of this Act applies in respect of the relevant application of the determination and matters specified in paragraph (a) of this section, and*

*(d) arrange to make the environmental impact statement relating to the relevant application and other material upon which the determination was based available for inspection for such period as the Minister considers appropriate.*

*21B.(a) A notice published under section 21A shall state that a person may question the validity of any such determination by the Minister by way of an application for judicial review, under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986)*

*(b) The notice shall identify where practical information on the review mechanism may be found." (emphasis added)*

5. It was common case that no notice in accordance with sections 21A or 21B had been published in Iris Oifigiúil or in papers circulating in the local area. Interestingly, counsel for the applicant stated that he was making no complaint about the failure to publish what appeared to the court, to be a mandatory, statutory notice.

6. The foregoing exchanges with counsel took place on Friday afternoon July 5th 2019. Over the ensuing weekend the court had the opportunity to consider the full text of section 21A and section 21B, as well as the legislative history and evolution of the relevant sections, which had been amended in 2009 and 2010 specifically for the purpose of transposing EU Directive 2003/35/EC (the public participation directive) into Irish law. Having done so, the court became concerned as to its jurisdiction to entertain any application in respect of the foreshore license granted to the notice party, in circumstances where the Minister had still not complied with his statutory obligation to publish the fact of the license nor to inform the public of their right to challenge the validity of that licence. Furthermore, the application for judicial review had not been brought pursuant to the provisions of section 21B.

7. On Monday 8th July 2019, the court invited the applicant and the respondent to address it on the issue of jurisdiction. The court expressed the preliminary view that sections 21A and 21B of the Foreshore Act (as amended) provide a complete statutory regime for ensuring public access to environmental information, public involvement in decision making on environmental issues and the mechanism by which the public can access justice on environmental issues, being judicial review under section 21B. As sections 21A and 21B had not been complied with the process was not yet concluded. The respondents' position was that the license application was not a '*relevant application'* within the meaning of section 13A, and accordingly was not covered by sections 21A and 21B. Their subsidiary position was that, if the license application were found to be 'a *relevant application'* then they contended that the failure to publish the required notice simply had the effect that a person who became aware of the license outside the three month period, and who wished to challenge its validity, could apply to court for an

extension of time within which to do so. The applicant's position was that the license application was a relevant application within the terms of section 13A, but that the failure of the Minister to comply with sections 21A and 21B did not render his application moot and that his application did not require to be brought specifically under section 21B.

8. At the conclusion of the hearing the court agreed to accept written submissions on the issues raised. Having considered the submissions which were filed on or about the 22nd July 2019, the court gave an *extempore* judgment on the 29th July 2019. The Court determined that the foreshore licensing process had not yet concluded by reason of the failure of the Minister to comply with his statutory obligations under sections 21A and 21B of the Act, to publish notice of his determination in Iris Oifigiúil and in one or more local papers circulating in the area and by reason of his failure to notify the public of the right to challenge the validity of his decision by means of judicial review. The court concluded that the licence granted on the 21st March 2014 while prima facie valid, was not legally effective and would remain ineffective until the Minister complied with his statutory obligations. In those circumstances, the limited review of the decision to approve the baseline study and monitoring programme of the 30th November 2017, sought by the applicant, was misconceived and any determination made by a court in respect of it would be nugatory. Furthermore, the application had not been brought pursuant to the provisions of section 21B.

9. Two days later on the 31st July 2019, before the court's order was perfected, counsel for the notice party together with counsel for the applicant and the respondent appeared before the court. The notice party was seeking an opportunity to be heard on the issue of jurisdiction. As beneficiary of the 2014 license, it is undoubtedly the case, that the notice party is the party most adversely affected by the court's decision. The notice party cited case law on the issue of revisiting a judgment both prior to, and subsequent to the perfection of the Court's Order. The import of the jurisprudence on the issue is as stated by Clarke J. in *Re McInerney Homes Ltd* [2011] IEHC25, *"[I]n order for the court to exercise its jurisdiction to revisit a question after the delivery of either an oral or written judgment, it is necessary that there be "strong reasons" for so doing."*

10. The court was readily persuaded that on the facts of this case, the notice party had a right to be heard on the issue of jurisdiction, which had only arisen in the course of the underlying judicial review. It was regrettable that they had not been apprised of the issue when it had been pending before the court for three weeks in July 2019. The court put the matter in for rehearing on the 8th October 2019 and directed that the parties exchange their respective submissions on the issue of jurisdiction. The matter was heard over two days on the 8th and 9th October 2019.

**Background Facts and Events**

11. For many years state authorities have been interested in the feasibility and sustainability of mechanically harvesting kelp in Irish coastal waters. According to the evidence, in 1999, the Minister for the Marine and Natural resources launched the National Seaweed Forum to examine the seaweed industry in Ireland. It consisted of 19 members drawn from state bodies, third level institutions and industry. According to the affidavit of John

T O'Sullivan, filed on behalf of the notice party, the forum concluded that seaweed resources were under-utilised and it identified mechanical harvesting as an area crucial to the development of the Irish seaweed industry. The exhibits establish the existence of an ad hoc group known as MLVC (Marine Licence Vetting Committee) from at least February 2003. It included representatives from the Marine Institute, the Martin Ryan Institute in NUIG, Bord Iascaigh Mhara, the National Parks and Wildlife Services, and Taighde Mara Teo. In the early days, the majority view was strongly in favour of deferring any commercial licensing of mechanical harvesting until proper scientifically based trials had been carried out. The stated preference was to have these trials conducted under the auspices of Bord Iascaigh Mhara, Martin Ryan Institute or Marine Institute.

12. In 2004, a review of the potential mechanisation of kelp harvesting in Ireland was conducted by Astrid Werner and Stefan Kraan of NUIG under the auspices of the Marine Institute and Taighde Mara Teo. (ISSN No. 1649-0053). The review noted and expounded the high ecological significance of kelp forests. It examined the mechanical harvesting of kelp in France and Norway where respectively, 60,000 tonnes and 160,000 tonnes of seaweed are mechanically harvested each year. According to the review, the total natural kelp resources for the entire coastline of Ireland is in the order of 3,000,000 tonnes. The review concluded in principle, that mechanical harvesting of kelp in Irish coastal waters, was feasible and sustainable. The review strongly recommended that before mechanical seaweed harvesting was introduced, an appropriate management strategy should be developed, based on sound scientific knowledge and adopting a precautionary approach. The review also recommended at Chapter 6.4 that the advent of mechanical harvesting required a review of existing legislation (Foreshore Act) to ensure sustainable and environmentally acceptable growth of the Irish seaweed industry, with particular reference to the experience gained and the regulations applied in France and Norway.

13. In 2005 the National Parks and Wildlife Service, under the auspices of the department of Environment, Heritage and Local Government, published a report on 'The Role of Kelp in the Marine Environment' (ISSN 1393-6670). It was prepared specifically in the context of a proposal to develop a mechanical kelp harvesting industry in Ireland. It is a wide ranging study which assessed the likely threats that might arise from mechanical harvesting on marine birds, fish, invertebrates, flora and productivity. It identified gaps in information in Irish coastal waters, on the relationship between fish and bird species and kelp habitats. It concluded that kelp harvesting should not be permitted in Natura 2000 sites because "*even well managed kelp harvesting puts substantial ecological pressure on natural kelp beds by increasing disturbance levels and removing resources from the ecosystem*." Mechanical harvesting of kelp would not in the report's view be compatible with the conservation objectives of such sites. The report gave a tentative approval to trialling the possibility of mechanical harvesting in other areas, based on the Norwegian experience, but made it clear that any project would have to be carefully monitored throughout its lifetime.

14. In 2008, the notice party which has been involved in the seaweed industry since 2004 and which holds a patent for a product which is derived from kelp, which has the potential

to replace the use of antibiotics in animal feed, applied for a licence to mechanically harvest seaweed in Kenmare Bay. This application was rejected *inter alia*, on the grounds that Kenmare Bay is a marine Natura 2000 site. In its report on that application, the Marine License Vetting Committee recommended that any future application should focus on an area outside of an SAC and include a commitment to conduct a detailed programme of monitoring.

15. On 16 June 2009, the Notice Party, applied to the then Department of Agriculture, Fisheries and Food, the then appropriate Department, for a foreshore licence pursuant to the Foreshore Act 1933 ("Foreshore Act"), as amended, to mechanically harvest wild kelp in Bantry Bay, County Cork.

16. The licence application stated that:

> *"The [Notice Party] proposes to mechanically harvest wild seaweed known as kelp, specifically laminaria hyperborea and laminaria digitata over an area of approximately 1,860 acres within five harvesting areas A, B, C, D and E on the foreshore licence."*

17. As set out in the licence application form, the kelp is to be harvested from low water to a depth of 20 metres. The Notice Party applied to harvest up to 5,000 tonnes of kelp per boat per year at Bantry Bay. The kelp is to be harvested in accordance with the foreshore licence, and as outlined in the application. The licensed areas are stated not to be within the area of any European site. The nearest European sites are land based.

18. The description of the proposed works in the application for a licence is in the following terms. BioAtlantis propose to harvest *laminaria hyperborea* in the area applied for using a purposely-designed vessel equipped with a winch, suction pump and cutter. In an initial study BioAtlantis found *laminaria hyperborea* to be the main species in the area applied for. *Laminaria digitata* was not present in any of these areas. This is the preferred species and was present in Kenmare Bay.

19. The object is to harvest the material without disrupting the foreshore; i.e. without making physical contact with the seabed. This is to be achieved by applying moderate suction which will draw the weed into the cutter where it will be cut and pumped into the boat. There it will be stored in bags for transportation to the factory by road. The weed will be cut at a minimum 25 centimetres from its holdfast. This will be controlled by using sonar and sounder automation to operate the winch so that the cutter is maintained at this point and distance from the seabed of the foreshore.

20. Over the summer, of 2009 the application was sent to various interested parties for observations. Observations and recommendations were received from the Marine Institute. They acknowledged that notwithstanding the method of harvesting proposed, *'there are still likely impacts on marine habitats and species that are as yet undetermined'*. They recommended that those issues be addressed by monitoring. They set out the parameters for the monitoring of what they described as 'Mechanical Kelp

Harvesting Trials'. There were observations from the Department of Environment Heritage and Local Government, who initially took the view that environmental impact assessments on the effects of the proposed activity on protected habitats and species in the marine and coastal environment, as well as assessments of the likelihood of significant impacts on Natura 2000 sites, were required, but who, some weeks later, expressed itself satisfied with the application, on the basis of the Marine Institute's monitoring recommendations. In that letter, the Dept of the Environment requested the opportunity to contribute to future meetings on the monitoring elements that may be in development.

21. The Senior Environmental Officer with the South Western Regional Fisheries Board suggested that the application be deferred pending a serious assessment of the impacts on fish life. The Central Fisheries Board on the other hand thought it a positive proposal and generally agreed with the Marine Institute's recommendations. It recommended specifically that a condition of the licence '*be the requirement for an agreed baseline sampling programme (to be agreed with relevant environmental stake holders, and with MLVC) to be developed and submitted to MLVC prior to commencement of any harvesting. This baseline must include a suite of pre-harvesting data sets and agreement on subsequent monitoring over the five year recovery phase of selected beds of kelp.'*

22. While these discussions were ongoing, the Minister before whom the license application was pending, somewhat belatedly, made regulations for the purpose of giving effect to Directive No. 2003/35/EC (providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC). These regulations, entitled European Communities (Foreshore) Regulations 2009 (S.I.No.404 of 2009) came into effect on 30th September 2009. They made significant amendments to the Foreshore Act, in particular, as we shall see, to the right of the public to be notified of decisions made in relation to 'relevant applications'.

23. On the 28th October 2009 the MLVC considered the application. The Committee recommended *that ongoing monitoring (before, during and after) be a requirement of any licence granted. Further consideration of the project and a proposed monitoring plan are required.*' It was decided that the Marine Institute would liaise with the National Parks and Wildlife Services and the applicant about drawing up a monitoring plan before reverting to the MLVC.

24. On 3rd December 2009, an official from the Coastal Zone Management Division, which was coordinating the application within the Department, wrote to John T.O'Sullivan of the notice party, enclosing a copy of a public notice which the Department required to be published in either the Irish Examiner or the Southern Star newspaper. The notice party was also required to lodge a copy of the application, relevant map, site plan and drawings with the Sergeant in Charge in Bantry Garda Station, where they were to be on display for a period of 21 days. The notice party was instructed to ensure that the documents were stamped with the station's stamp, both on the date of arrival at the Garda Station and again at the end of the 21 day display period. Thereafter the notice party was

instructed to forward the stamped documents to the Department within 14 days. These instructions were printed in bold in the Department's letter.

25. By letter of the same date 3rd December 2009, the Department official wrote in similar terms to the Sergeant in Charge of Bantry Garda Station. Again, the instructions about the stamping of the documents on the date of arrival and on the expiry of the 21 day period were highlighted in bold.

26. On the 12th December 2009 the public notice prepared by the Department was published in the Southern Star Newspaper. It read:

**"PUBLIC NOTICE OF APPLICATION FOR A FORESHORE LICENCE**

*Notice is hereby given pursuant to Section 19 of the Foreshore Act, 1933 that BioAtlantis, Kerry Technology Park, Tralee , Co. Kerry have applied to Brendan Smith T.D., Minister for Agriculture, Fisheries and Food for a Licence under Section 3 of the Act to occupy an area of foreshore for the purpose of harvesting specific seaweed at Bantry Bay, Co. Cork*

*Any person who wishes to make an objection to, or representations in respect of the grant of the licence sought should do so in writing giving reasons to the Coastal Zone Administration Division, (Ref: MS51/8/1363), Department of Agriculture, Fisheries and Food, Johnstown Castle, Co. Wexford within 21 days of publication of this Notice.*

*All objections and representations received will be forwarded to the applicant for comment prior to any decision being made in the matter.*

*An application, map, site plan of the area in question and drawings of the works may be inspected at Bantry Garda Station, Bantry, Co. Cork.*

*Dated the 10th day of December 2009*

*John T. O'Sullivan*

*BioAtlantis Ltd,*

*Kerry Technology Park*

*Tralee,*

*Co. Kerry."*

27. Section 19 has been in the Foreshore Act since it was enacted in 1933. It gives the appropriate Minister an entirely discretionary power to cause notice of an application for a licence to be published, at such times and in such manner as he thinks proper. At his discretion, he may by such a notice, give an opportunity to all persons interested, to make objections and representations in respect of the licence and he may specify the manner in which such objections and representations may be made. Unlike other sections

of the Foreshore Act, it imposes no obligation or duty on the Minister to publish any notice. The Applicant complained that the Notice did not indicate the true nature of the project proposed, (mechanical harvesting), nor the scale of the operation, (more than 1000 hectares at 20 named locations). The applicant also pointed out that no Garda stamped documents, which had been highlighted as a requirement of the Department, had been exhibited. The applicant also complained that it was inappropriate to display the plans in Bantry which he maintained, was between 25 and 45 miles from the area of the foreshore affected. Castletownbere was in his submission, the appropriate location for the display of the licence application. In any event, there were no objections or representations received from any party. That may be due to the factors identified by the applicant. The court notes an additional potential factor, which is that the period of display coincided almost precisely with the Christmas holiday period.

28. In January 2010, certain functions relating to the foreshore, including licencing were transferred from the Department of Agriculture, Fisheries and Food to the Department of Environment Heritage and Local Government. On the 18th February 2010 the MLVC met primarily to review the role of the committee in the context of the transfer of functions. The meeting was attended by representatives from the Marine Institute, the Coastal Zone Management Division, the National Parks and Wildlife Services, the Engineering units of both the Department of Agriculture and the Department of the Environment, the Underwater Archaeology Unit, the Central Fisheries Board and the Sea Fisheries Protection Authority. In response to a query from NPWS, the chair made it clear that the committee had no terms of reference beyond advising the Minister on Foreshore applications. The desireability and usefulness of having pre-application guidelines was discussed. It was suggested that each discipline represented on the MLVC would devise guidance notes for pre-application consultation. One of the representatives from the Foreshore Section/Coastal Management Division suggested that "*the guidance note on appropriate assessment should also be made widely available and that clarity on what projects require an E.I.A. (some appear sub threshold but actually require E.I.A.) would be useful to the process.*"

29. The meeting also discussed individual cases including the application of the notice party. The representative from the Marine Institute which had been the main supporter of the application "*outlined the history of the inter departmental group on kelp harvesting. He advised that group had developed criteria for monitoring etc if harvesting was to take place. In this case (Marine Institute Representative) and (Central Fisheries Board Representative) have drafted monitoring programme and applicant was in agreement to implement it. The programme still needs some refinement and it was agreed to send the draft programme to all members of the MLVC. Dr. O'B (Marine Institute) would receive and compile any input from the committee members and advise to applicant. ……MLVC agreed to recommend the licence subject to the monitoring plan being in place..*"

30. On the 13th July 2010, while the monitoring plan was being refined and presumably discussed with the members of the MLVC, a further amendment of the Foreshore Act was effected for the express purpose of giving effect to the Public Participation Directive The

European Communities (Public Participation) Regulations 2010 S.I. No. 352 of 2010, inserted section 21B into the Foreshore Act. It requires that where a Minister determines a relevant application, the notice which he is required to publish pursuant to section 21A *"shall state that a person may question the validity of any such determination by the Minister by way of an application for judicial review, under Order 84 of the Rules of the Superior Courts*."

31. The BioAtlantis application was the subject of a report and recommendation by the MLVC dated 1st December 2010. Having set out the background to the application, including the fact that significant mechanical harvesting of kelp takes place in France and Norway; the harvesting method proposed; the fact of a public consultation during which no submissions were received; the documents considered, which included the licence application and accompanying documentation, written submissions from the Department of the Environment through NPWS and the Underwater Archaeology Unit , the Marine Survey Office, the Sea Fisheries Protection Authority; the Eastern Regional Fisheries Board, the Central Fisheries Board and the Marine Institute and the 2004 report referred to earlier entitled *"Review of the Potential Mechanisation of Kelp Harvesting in Ireland" ,* the Committee stated:

> *"The MVLC is of the view that kelp represents a significant natural resource that, if sustainably exploited, could lead to the development of novel products which would, in turn, stimulate economic development. As a key stage in this process the MLVC is of the view that harvesting trials should be carried out and that, as an essential part of the trials, the environmental impact of mechanical harvesting should be monitored. The result of such monitoring would assist in the development of national policy in this area and in the future development of a sustainable seaweed harvesting industry in Ireland.*

Under the heading 'Conclusions' the committee states;

> *"The MLVC concludes that subject to compliance with the specific conditions set out below, the proposed harvesting of the seaweed is not likely to have a significant negative impact on the marine environment, would not adversely impact on marine Natura 2000 sites and therefore recommends that a permit be issued.*

The committee proposed seven conditions for inclusion in the Licence. They were as follows:

*"1. The Licensee shall use that part of the Foreshore the subject matter of this licence for the purposes as outlined in the application and for no other purposes whatsoever.*

*2. The Licensee shall notify the Department of the Environment, Heritage and Local Government at least 14 days in advance of the commencement of the harvesting.*

3. *The Licensee shall liaise as appropriate with the Harbour Masters in Castletownbere and Bantry during the harvesting activities.*

4. *The Licensee shall furnish the names/registered number of all vessels involved in the operation to the Marine Survey Office in Dublin to ensure compliance with respect to Irish Load line and other relevant vessel certification.*

5. *The Licensee shall submit a detailed monitoring plan for approval by the Department of Environment, Heritage and Local Government prior to the commencement of any harvesting activity. The parameters to be monitored and the monitoring methods shall be based on those set out in Appendix 1.*

6. *The Licensee shall submit an annual report of harvesting activities to include the area and quantities harvested and measured regeneration rates of the seaweed.*

7. *In the event that unacceptable impact on the environment is observed, the Minister reserves the right to modify/restrict harvest practices and schedule as necessary."*

Appendix 1, set out the parameters of the baseline survey to be undertaken and the monitoring programme. The recommendation was for a survey period of 4 years consisting of a pre-harvest assessment followed by 3-4 years post-harvest monitoring to assess the short and long term impacts and recovery. It was intended that there be a review and refinement of the monitoring programme after the year 1 post- harvest survey.

32. On the 7th December 2010 a file was prepared for the Minister. It included a case summary, a legislative checklist in respect of compliance with environmental legislation, copies of correspondence with state bodies, copies of the deliberations of the MLVC and the final report and recommendation of the MLVC of the 1st December 2010. In the context of compliance with environmental legislation the Department officials reported that the development was not of a class that required an EIS and further reported that the development was not likely to have significant effects on the environment. In relation to the Habitats Directive the officials reported that the proposed development was not likely to have significant effect on European sites. The legislative checklist also pointed out that Public Notice had been given pursuant to section 19 of the Act, and that no observations were received. The Minister was told that if approval were granted, that BioAtlantis would be informed that permission had been granted and that the Chief State Solicitor's Office would be instructed to prepare a licence for signature. On 6th January 2011 the Minister approved the application.

33. The ministerial approval of the 6th January 2011, has been described by the respondents, as a determination/decision 'in principle' to grant a licence. The legal status of such a decision 'in principle' seems to the court to be uncertain. The only power given to the Minister under the Foreshore Act is to *"grant by deed under his official seal such licence……commencing at or before the date of such licence as that Minister shall think proper."* That power is specifically expressed to be *"subject to the provisions of this Act"*

(section 3). In these circumstances, it seems to the court that the power of the Minister to make a binding decision 'in principle' must be questionable, since it is not provided for in the Act. In any event, it is common case that the decision 'in principle' was not published in accordance with sections 21A and 21B of the Act as it existed at the time of the decision. More than three years passed before the execution of the deed of licence. The court has no evidence of why the execution of the deed took so long, nor of the interactions (if any) between the respondent and the notice party during that period.

34. Between the decision 'in principle' of the 6th January 2011 and the execution of the licence agreement on 21st March 2014 there was significant additional legislation in relation to environmental matters (see paragraph 41 below). On 21st March 2014 the Minister for Environment, Community and Local Government executed a foreshore licence agreement with the Notice Party permitting it to mechanically harvest wild kelp in Bantry Bay (the "2014 Foreshore Licence Agreement"). According to Clause 4 thereof, the 2014 Foreshore Licence Agreement is for a period of 10 years, rather than the 4 years recommended by the MLVC. It commenced on 1 January 2014. The Notice Party has been paying rent on foot of the 2014 Foreshore Licence Agreement in accordance with the terms thereof.

35. As we have seen, as part of the foreshore licence application the Minister consulted with eight State bodies namely the National Parks and Wildlife Service, the Marine Institute, the Marine Survey Office, the Sea Fisheries Protection Authority, the Eastern Regional Fisheries Board, the Central Fisheries Board, the Underwater Archaeology Unit of the Department of the Environment. These were co-ordinated by the Marine Institute and the coastal division of the relevant department.

36. The seven conditions recommended by the MLVC in its report of 1st December 2010, were transferred *verbatim* into the licence and are set out in the second schedule thereof. The five licensed areas are depicted on the foreshore licence map prepared in February 2014 and on the map prepared in the course of these proceedings by departmental engineer Barry McDonald. This latter map shows the relationship of the licensed sites to various SACs and SPAs.

37. Following the grant of the licence the notice party retained experts to prepare the Baseline Survey and Monitoring Programme in accordance with the licence requirements. This involved a number of engagements between the experts and the Department and various statutory agencies. Draft reports submitted required amendment in order to satisfy and conform to the parameters set out in the licence. In the meantime, according to the evidence, information on the licence appeared on the Department's website from at the latest 31st March 2016.

38. In February 2017, the proposed mechanical harvesting by the notice party, featured in an episode of the RTE environmental issues programme, Eco-Eye. It should be noted, that the programme led to a successful complaint by the notice party, to the Broadcasting Authority of Ireland, that the programme lacked *"fairness, objectivity and impartiality and was contrary to broadcasting regulations".* That said, the programme led to a local

campaign to suspend or rescind the licence. Some campaigners threatened to initiate judicial review proceedings but subsequently withdrew that threat. This applicant, in Facebook postings on February 19th 2017, expressed the view that the licence was an 'abomination' which had been granted without an environmental impact assessment or an assessment as required by the Habitats Directive. He bemoaned the failure to give proper notice to the public. He adverted to a possible legal challenge. He perceived that he was long out of time to bring a challenge to the licence by means of judicial review, but mused on the possibility of maintaining plenary proceedings. The respondents relied on these exchanges to show that the applicant was fully aware of all details surrounding the grant of the licence as of February 2017, (contrary to his sworn statement in these proceedings that he first learned of the licence in late summer of 2017) and took no steps to challenge the licence.

39. On 27th November 2017 BioAtlantis submitted its baseline report and monitoring plan for approval in accordance with the terms of the licence. It was a detailed, 55 page document, which was recommended for approval on the grounds that both the I.F.I. and the Marine Institute were satisfied as to its suitability. Ministerial approval was granted on the 30th November 2017. It is that decision which the applicant seeks to quash in these judicial review proceedings, launched on the 5th March 2018.

40. On the 14th June 2018, in the course of the judicial review proceedings, the Notice Party issued a formal notification to the Department of Housing, Planning and Local Government, the Department then responsible for the foreshore, confirming the intention of the Notice Party to commence the mechanical harvesting of wild kelp in Bantry Bay from 4 July 2018. This prompted the applicant, who had not sought injunctive relief in his judicial review proceedings, to issue a Notice of Motion pursuant to section 160 of the Planning and Development Act 2000, restraining BioAtlantis from carrying out unauthorised development, including the mechanical harvesting of seaweed at Bantry Bay, County Cork. That application was rejected by this court in a decision dated the 6th June 2019.

41. Ultimately on the hearing of the judicial review, the court came to the conclusions set out earlier, that the licencing process had not yet concluded by reason of the failure of the Minister to comply with his statutory obligations under sections 21A and 21B of the Foreshore Act 1933 (as amended).

**European Environmental Law and the Foreshore Act 1933.**

42. The EIA Directive (85/337/EEC) ("1985 Directive") marks the beginning of the European Environmental legal regime. The objective of the Directive is to ensure that projects that are likely to have a significant environmental effects are properly assessed before they are approved. Possible impacts it may have on the environment (either from its construction or operation) are to be identified and assessed. The Directive also ensures the participation of environmental authorities and the public in environmental decision-making procedures. In particular, members of the public concerned must be given the opportunity to comment on any proposal while all options are still open, i.e. before a final decision is taken by the competent authority on a request for development consent. When

approving a project, the competent authority is required to take into consideration the results of consultations and to inform the public, notably on the measures envisaged to avoid, reduce or compensate for environmental impacts.

43. The EIA Directive has been in force since 1985 and applies to a wide range of defined public and private projects, which are defined in Annexes I and II. There are two types of projects under this Directive those which require a Mandatory EIA (all projects listed in Annex I are considered as having significant effects on the environment and require an EIA) and those which are at the Discretion of Member States (projects listed in Annex II, the national authorities have to decide whether an EIA is needed). The screening of EIAs under Annex II is done by the "screening procedure", which is a determination of the effects of projects on the basis of certain thresholds/criteria or a case by case examination. National authorities are required to take into account the criteria laid down in Annex III during the screening procedure.

44. The EIA Directive was transposed into Irish law by the European Communities (Environmental Impact Assessment) Regulations 1989 (SI No. 349/1989). These regulations inserted sections 13A, 19A, 19B, 19C and 21A into the Foreshore Act, to comply with the Directive. As changes occurred in European law these sections were repeatedly amended. These sections gave effect to the EIA regime and provided for the dissemination of information relating to an EIS. These regulations inserted the definition of "relevant application" which is set out in section 13A(5). This set of regulations mirrors Annex I and Annex II of the 1985 Directive under Article 24, and copies Annex III in Article 25.

45. There were further minor amendments to the Foreshore Act with the Foreshore (Environmental Impact Assessment) Regulations 1990 (SI No. 220/1990). These regulations set out the meaning of "prescribed period" and "prescribed body" under section 19A of the Foreshore Act.

46. Another, separate EU environmental regime which directly impacts on the Foreshore Act is Council Directive 92/43/EEC or the "Habitats Directive" which was adopted on 21st May 1992. It was designed to promote and ensure the conservation of natural habitats and of wild *fauna* and *flora*. It aims to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements. It forms the cornerstone of Europe's nature conservation policy and is tied into the Birds Directive (Directive 2009/147/EC). The Habitats Directive establishes the EU wide Natura 2000 ecological network of protected areas, safeguarded against potentially damaging developments.

47. The European Communities (Natural Habitats) Regulations, 1997 (SI No. 94/1997) purportedly transposed the 1992 Directive into the Foreshore Act. The 1997 Regulations expressly provide that an "operation or activity" includes use of the foreshore. These regulations require that the Minister, when granting or considering the grant of a section 2 lease or a section 3 licence under the Foreshore Act, must have regard to the Regulations, and where necessary is given the power to *"affirm, modify or revoke such lease or licence."* In Case C-418/04 *Commission v Ireland* (2007) it was held that Ireland

had failed to properly transpose the Habitats Directive by conflating the concept of EIS with the appropriate assessment requirements of the Habitats Directive.

48. The original 1985 Directive has been amended by subsequent Directives. On each occasion Ireland purported to transpose the new Directive by amending sections 13A, 19A, 19B, 19C and 21A. The first amending Directive was Directive 97/11/EC ("1997 Directive"). This Directive brought the 1985 Directive in line with the UN ECE Espoo Convention on EIA in a Transboundary Context. The Directive of 1997 also widened the scope of the original EIA Directive by expanding the types of projects covered, and the category of projects requiring mandatory environmental impact assessment (Annex I). It also provided for new screening arrangements, including new screening criteria (at Annex III) for Annex II projects, and established minimum information requirements. The 1997 Directive expands Annex II to include, among others, aquaculture projects and specifies a wider range of criteria to be considered when assessing a project, under Annex III.

49. Following the 1997 Directive minor amendments were made to the Foreshore Act by the European Communities (Environmental Impact Assessment) (Amendment) Regulations, 1998 (SI No. 351/1998). These Regulations provide under section 13A that the Minister when exempting a project from an EIS must consider alternative methods of assessment of the environmental impacts of the project and to publish his reasons for the exemption. The Regulations inserted into section 19B a requirement to make publicly available any additional environmental information that has a bearing on the relevant application.

50. The European Communities (Environmental Impact Assessment) (Amendment) Regulations, 1999 (SI No. 93/1999) ("1999 Regulations") made significant changes to the Foreshore Act. Section 13A was amended to include sites protected under the Habitats Directive and the Wildlife Act 1976. Section 13A was also amended to reflect the widened remit of the 1997 Directive. These regulations also substituted section 19C regarding transboundary EIAs and made minor amendments to section 21A. The Regulations expanded the range of projects requiring an EIA.

51. The Aarhus Convention was signed 1998 and came into force in 2001. Ireland eventually ratified the Treaty on the 20th June 2012, though judicial notice of the Convention was provided for in section 8 of the Environmental (Miscellaneous) Provisions Act 2011. The core objectives of the Aarhus Convention are to ensure that the public has access to environmental information held by public authorities; to ensure that the public is involved in the decision making process; and to ensure that the public have access to justice.

52. The Aarhus Convention was adopted into EU law by Directive 2003/35/EC. The enactment of this Directive significantly changed the EIA regime and widened the scope of public participation. The Directive specifies that the public concerned with environmental projects are the public affected or likely to be affected by, or who have an interest in environmental matters, and includes non-governmental organisations who promote environmental protection.

53. Ireland belatedly purported to transpose this Directive by enacting the European Communities (Foreshore) Regulations 2009 (SI No. 404/2009) ("the 2009 Regulations"). Those regulations significantly amended section 21A and inserted section 21A (a) & (b) into the Foreshore Act. Those regulations require that when the appropriate Minister determines a relevant application he must publish the determination and the material upon which the determination was based (the full text of the amended section 21A is set out at paragraph 4 of this judgment). These Regulations also inserted section 13A(4) which imposes certain obligations on the Minister when exempting a "relevant application" from an EIS. The duty imposed is that when an EIS is deemed unnecessary, there is a duty to publish the reasons why it has been exempted from an EIS. While the amended section 21A satisfied the requirements of the 2003 Directive regarding environmental information it did not satisfy the requirement of the 2003 Directive of providing access to justice for the public in environmental matters.

54. This deficiency was remedied by inserting section 21B (a) & (b) into the Act, this was done by enacting the European Communities (Public Participation) Regulations 2010 (S.I. No. 352 of 2010), reg. 7. The subsection was enacted to ensure that the public knows that they have a right to challenge the validity of any determination by the minister of a relevant application and the means by which they can do so.

55. The Foreshore and Dumping at Sea Act 2009 made a wide range of minor amendments to the Foreshore Act. It recognised that in the context of the frequent transfer of Ministerial functions between government departments that references to Minister should be changed to "appropriate minister". This Act also restated section 13A(4) and the amendments to section 21A effected by the 2009 Regulations.

56. The Birds Directive (Directive 2009/147/EC) also affects the Foreshore Act. The Directive is designed to ensure that any protected species of and area belonging to birds are to be protected from potentially damaging developments. The Directive was transposed into the Foreshore Act by European Union (Birds and Natural Habitats) Regulations 2011 (SI No. 477/2011) which amended section 13A so that the potential effects of a development on birds on the foreshore are to be considered by the appropriate Minister when considering the grant of the licence.

57. The amendments to the 1985 Directive were consolidated in Directive 2011/92EU ("the 2011 Directive"). The 2011 Directive was designed to ensure a high level of environmental protection and that environmental considerations are integrated into the preparation and authorisation of projects. The 2011 Directive places central importance on public consultation, it encourages the expeditious provision of information to the public, so that when a decision is made, the information relating to the decision, must be made available as quickly as possible. The 2011 Directive consolidated developments in EU law since the original Directive of 1985. The Annexes were also minorly expanded by the Directive.

58. The next development in the Foreshore Act's alignment with European law was the extension of section 21B (a) and (b). This section was extended by the European Union

(Access to Review of Decisions for Certain Bodies or Organisations promoting Environmental Protection) Regulations 2014 (S.I. No. 352 of 2014) reg. 6(b). It inserted subsections (c), (d), (e), (f) & (g). These regulations specified the members of the public who could question the validity of a ministerial decision. It permitted NGO's with an interest in the environment to be included in the definition of the "public".

59. The repeated amendment of section 13A and sections 19A, 19B and 19C to give effect to evolving EU norms has resulted in a confused legislative landscape, in which it is challenging, even for a lawyer, to discern the applicable law, duties and obligations, at any particular point. This confusion has been increased by the frequent transfer of Ministerial functions between governmental departments. When this application was first made in 2009 it was made to the Department of Agriculture, Food and Fisheries. When the decision 'in principal' was made on the 6th January 2011 it was made by the Minister for the Environment, Heritage and Local Government. When the licence was executed on the 21st March 2014 it was executed by the Minister for Housing, Planning and Local Government. In 2012 the terms 'Environmental Impact Assessment' and 'Environmental Impact Statement' were finally inserted into the definition section of the Foreshore Act in compliance with the 2011 Directive. The definition makes clear what the duties and obligations of a minister are when considering a relevant application:

> *"'environment impact assessment' means an assessment, to include an examination, analysis and evaluation, carried out by the appropriate Minister in accordance with this Act that shall identify, describe and assess in an appropriate manner, in light of each individual case and in accordance with Articles 4 to 11 of the Council Directive, the direct and indirect effects of a proposed development on the following:*
>
> *(a) human beings, flora and fauna,*
>
> *(b) soil, water, air, climate and the landscape,*
>
> *(c) material assets and the cultural heritage, and*
>
> *(d) the interaction between the factors mentioned in paragraphs (a), (b) and (c);*
>
> *'environmental impact statement' means a statement of the direct and indirect effects which the proposed development will have or is likely to have on the environment and shall include the information specified in regulations prescribed under section 177 of the Act of 2000."*

**Submissions of the Applicant on the Jurisdictional Issue**

60. The Applicant's submissions address the effect, if any, on the Courts jurisdiction of the Respondent's failure to publish a notice of the making of the determination; and the relationship between the judicial review procedure under O 84 RSC and section 21B of the Foreshore Act 1933, as amended.

**Publication**

61. The notification obligations for relevant applications are set out in section 21A. Before considering these, it is first necessary to consider the definition of "relevant application" in section 13A (5). Section 13A was first introduced by the European Communities (Environmental Impact Assessment) Regulations 1989 (SI No 394). In that version, sub-section 5 read:

> *"(5) In this section and in sections 19A, 19C & 21A "relevant application " means, as the case may be —*
>
> *(a) an application to the appropriate Minister for a lease under section 2 of this Act,*
>
> *(b) an application to the appropriate Minister for a licence under section 3 of this Act,*
>
> *(c) an application to the appropriate Minister for his approval under section 10 of this Act for maps, plans, and specifications for erection of structures on the foreshore,*
>
> *(d) an application to the Minister for the Environment, Heritage and Local Government for his consent under section 13 of this Act for the deposit of material on the foreshore."*

62. As new sections have been added to the Act, section 13A(5) has in turn been amended to include reference to those new sections, so that the definition of "relevant application" now applies to section 13A itself and also to sections 13B, 19A, 19C, 21A and 21B. The crucial point is that an application for a foreshore licence has since 1989 been a "relevant application" for the purposes of section 21A, the publication provision.

63. For the sake of completeness, it may be noted that section 13A(6) was inserted in 2009 to make it clear that a "relevant application" in section 13A itself does not include an application for an aquaculture licence (within the meaning of the Fisheries (Amendment) Act 1997 that is accompanied by an environmental impact statement.

64. Returning now to section 21A, there have been a number of different versions of this section. It was first introduced in 1989; it was substituted in 1999, by which the publication obligations arose "When a decision is taken on a relevant application in respect of which an environmental impact statement was submitted in accordance with a requirement of or under section 13A of this Act".

65. As discussed at the hearing on the 12th July, a new version of section 21A was substituted by SI 404 of 2009 (with effect from 30 September 2009) by which the publication obligations arose "When the Minister determines a relevant application". It is clear that this expanded the publication obligations beyond those cases in which an environmental impact statement was submitted, to all relevant applications.

66. Yet another new version of section 21A was substituted by section 15 of the Foreshore and Dumping at Sea (Amendment) Act 2009 (with effect from 15 January 2010). The only change was to substitute the "the appropriate Minister" for "the Minister".

67. Section 21A was amended in 2012 by substituting a new paragraph (b); this did not affect the obligation in 21A(a) to publish a notice in Iris Oifigiúil and a local newspaper.

68. Thus it is clear that at the time the 2011 decision was made, the Minister was under a statutory obligation to publish the determination. The Department appear to have operated on the mistaken basis that the obligation to publish only applied where the application was accompanied by an EIS; while that view was justified in the light of the 1999 version of section 21A, it was not justified by the versions introduced in 2009 and applicable subsequently. Any attempt to restrict the publication obligation to applications accompanied by an EIS amounts to a re-writing of the section. The Department's apparent misunderstanding demonstrates the complexity of the legislation.

**Applicants submissions on consequences of failure to publish**

69. The Applicant says that the consequences (leaving aside any issue as to costs) of the failure to publish the notice as required by section 21A are as follows -

    I. It supports his contention that the screening or Appropriate Assessment in 2011 was not conclusive or definitive

    II. It indicates that the criticism levelled at the applicant that he knew or ought to have known of the decision to grant the licence is misdirected

    III. It lends credence to the concerns about the unsatisfactory nature of the public participation provisions as a whole, starting with the newspaper notice which failed to mention the word "mechanical"; continuing with the location of the plans in Bantry Garda Station rather than Castletownbere, and continuing further with the failure to publish notice of the determination.

70. However, the Applicant did not seek to argue that the failure to publish the notice deprives the Court of jurisdiction, notwithstanding the concerns about jurisdiction expressed by the Court itself, eg because the time has not started to run.

71. If the Court were to nevertheless conclude that it lacks jurisdiction by virtue of the Minister's failure to publish the notice, the Applicant will be obliged to preserve his position by taking two steps:

    I. appealing the Court's decision that it does not have jurisdiction

    II. requiring the Minister to publish the relevant notice (by application for Mandamus if necessary) and then seeking leave to apply for Judicial Review of the 2011 decision.

**Submissions on the ambit of Section 21(B)**

72. Section 21(B) was first introduced in 2010 by the European Communities (Public Participation) Regulations 2010. In its original form, Section 21(B) addressed only the contents of what should be in the notice required by section 21A.

*"(a) A notice published under section 21A shall state that a person may question the validity of any such determination by the Minister by way of an application for judicial review, under Order 84 of the Rules of the Superior Courts ( S.I. No. 15 of 1986 ).*

*(b) The notice shall identify where practical information on the review mechanism can be found."*

73. Additional subsections were introduced by SI No 352 of 2014 -

*"(c) A person shall not question the validity of a decision made or act done or purported to be done by the Minister in relation to a relevant application otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts ( S.I. No. 15 of 1986 ).*

*(d) The High Court shall not grant leave for judicial review under this section unless it is satisfied that —*

*i) the applicant has a sufficient interest in the matter which is the subject of the application, or*

*ii) the applicant —*

*i. is a body or organisation other than a State authority, a public authority or governmental body or agency the aims or objectives of which relate to the promotion of environmental protection, and*

*ii. has, during the period of 12 months preceding the date of the application, pursued those aims or objectives.*

*(e) A sufficient interest for the purposes of subparagraph (i) of paragraph (d) is not limited to an interest in land or other financial interest.*

*(f) The Court, in determining either an application for leave for judicial review under this section, or an application for judicial review on foot of such leave under this section, shall act as expeditiously as possible consistent with the administration of justice."*

74. The impugned decision of 30 November 2017, is a decision in relation to a relevant application. It is submitted that section 21B, and more specifically the amendments introduced in 2014, do not create a new free-standing form of judicial review independent of the judicial review procedure regulated by Order 84, but rather regulate the existing judicial review procedure insofar as it relates to "relevant applications". Section 21B (c) makes this clear in its own terms.

75. Further, it is hard to see why the notice to be published under section 21A should state that the validity of the decision could be challenged "by way of an application for judicial review, under Order 84 of the Rules of the Superior Courts" if in fact the application was to be brought under section 21B of the Act.

76. The role of statutory judicial review is discussed by de Blacam in Judicial Review (3rd Ed., 2017) at Chapter 53 et seq. At paras 53-01 and 53 -02 the author states "It is clear that applications for judicial review are in some instances perceived as having an inimical influence on effective public decision-making, and for that reason statutory restrictions on the review remedy have been introduced. (The paradigm cases are the restrictions in the planning and immigration spheres.) These restrictions do not alter the nature of the remedy, but they do affect the procedures relating to it and in some cases the way in which the remedy operates. Their object is to minimise the risk that the implementation of the decisions concerned will be delayed by involving the decision-maker in fending off spurious claims and to introduce finality at the earliest opportunity.

77. Although the statutory restrictions examined in this text are not identical, broadly speaking, they share some or all of the following characteristics. First, they require challenges to the decisions in question to be made within the format of an Ord 84 application, and thus preclude challenges by means of proceedings commenced by plenary summons. Secondly, instead of an *ex parte* application for leave, the applicant may be required to serve notice of his intended challenge. Thirdly, the time limit for the application may be limited and, if an extension is allowed, it may be granted only in restricted circumstances. Fourthly, the threshold requirement for obtaining leave may be raised from one of arguability to proof of 'substantial grounds'. Finally, the decision of the High Court, both on the application for leave and the substantive application, may be rendered final; and, in that event, no appeal will lie save with the leave of the High Court, which may be granted only where the court certifies a point of law of exceptional public importance and that it is in the public interest that an appeal should be taken."

78. As it happens, the section 21B requirements contain very little of the sort of provisions identified in the analysis above. Order 84 of the Rules of the Superior Courts sets out in some detail the requirements for leave applications and applications for judicial review and which also requires the applicant to have sufficient interest (rule 20(5)): 20 (5) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

79. Therefore, apart from the requirement for the Court to "act as expeditiously as possible consistent with the administration of justice", and the more specific provision relating to sufficient interest, the requirements of section 21B do not change the procedure under Order 84. Further or in the alternative, there is no material difference between Order 84 and section 21B for the purposes of this case.

80. Of note, section 21B does not in fact specify a time limit for making the application. The applicant has not sought to contend that no time limit applies; but rather accepts that where the statutory procedure is silent on some matter such as a time limit - the

provisions of Order 84, in this case rule 21 apply. Obviously that could not apply if the statutory procedure is a stand-alone concept.

81. In *McCarthy v An Bord Pleanala* [2000] 1 I.R. 42, an issue arose as to the meaning of "parties" to be served. Counsel for the Board and the other Notice Parties contended that by virtue of the statutory procedure, the Applicant (who had objected to the permission) should have served other objectors as well. As noted by Geoghegan J. "Counsel for the respondent and the notice parties fully concede that there is no rational purpose in having the co-objectors as parties. It is simply a technical objection they are taking to the application".

82. Geoghegan J further noted "Counsel for the applicant points out that under the inserted sub-section (3A) of section 82 of the Act of 1963, a person is prohibited from questioning the validity of a decision of the respondent on any appeal 'otherwise than by way of an application for judicial review under O. 84 of the Rules of the Superior Courts, 1986 (S.I. No. 15 of 1986)'. The Oireachtas, therefore, in enacting the Act of 1992, was not intending to introduce some new kind of judicial review application in relation to planning matters different from judicial review applications in relation to all other matters. It was merely altering the procedures and requirements for obtaining leave".

83. While not expressly adopting the formulation of counsel for the Applicant Geoghegan J concluded – "*Having regard in particular to the fact that the relevant statutory provision specifically refers to O. 84 of the Rules of the Superior Courts, 1986, I am satisfied that the word 'parties' should be interpreted as meaning relevant parties."*

84. It is submitted that this approach supports the contention that the statutory scheme regulates the existing procedure rather than introducing a standalone procedure. The court notes that the case of *McCarthy v An Bord Pleanála* was a statutory judicial review under the Planning Act and the issue was whether or not the application was properly constituted having regard to the terms of the Act.

**Submissions by the Respondent on the Jurisdictional Issue**

85. The Court has invited submissions on the possible requirement for the Minister to have published notice of his decision to grant a foreshore licence in *Iris Oifigiúil* and the consequences of any failure so to do. The Court has queried whether it has jurisdiction to determine these proceedings in the absence of such notification.

86. The Respondents submit that the Court has full jurisdiction to hear the Applicant's claim. In outline, and as shall be expanded upon below, this is for the following reasons:

    a. BioAtlantis' application was not a "relevant application" within the meaning of section 21A, as can be seen when the scheme of the 1933 Act is considered, the legislative history of the section is traced and the normal rules of statutory interpretation are applied. Therefore the requirement for publication did not arise.

    b. Without prejudice to the foregoing, even if there was a requirement, the failure to publish does not render the decision to grant the licence ineffective. The decision to

grant the licence took effect from the date of the decision and was susceptible to challenge by way of judicial review from that date. The entitlement to challenge a decision on a relevant application by way of judicial review is not contingent on notice of the decision having been published.

c. Section 21B does not either confer a new statutory jurisdiction on the Court or create a separate statutory scheme for seeking judicial review of relevant applications, rather it limits any entitlement to challenge a decision on a relevant application to challenges by way of judicial review, *i.e*. it excludes, for instance, the possibility of a plenary challenge.

d. The procedural provisions in section 21B are designed to assist those wishing to challenge the determination of a relevant application to gain access to the courts and, in circumstances where no notification had been published, the Minister would be prevented from raising any objection that time had automatically started running for the purposes of Order 84 RSC at the date of the decision and that any applicant had been required to challenge the decision *"within three months from the date when grounds for the application first arose"* (as Order 84 RSC provides).

e. The Applicant in the present case has challenged the 2017 decision to approve a monitoring plan and baseline survey submitted in accordance with the licence which the Minister decided to grant in 2011 and which was executed in 2014. There is no question of the 2017 decision the subject matter of these proceedings being subject to any notification requirement and therefore the proceedings challenging same are properly constituted.

f. Insofar as the applicant challenges the decision to grant the licence itself (by means of a collateral attack or otherwise) the consequence of any non-compliance with the publication requirements in section 21A is that the Minister is precluded from arguing that time started running against this Applicant until such time as he had knowledge of the impugned decision.

g. The Applicant has averred that he has known of the execution of the 2014 Licence Agreement since 2017 and the evidence establishes that he knew of the licence and his complaints in relation to it in February 2017.

h. In the circumstances, notwithstanding any non-publication of the decision to grant the licence, the Applicant was out of time to challenge it by the time these proceedings commenced. He was, however, within time to challenge the 2017 decision to approve the monitoring condition.

**Relevant Sections of the Foreshore Act 1933**

87. Section 13A of the 1933 Act provides as follows at sub-sections (5) and (6):

*"(5) In this section and in sections 13B, 19A, 19C, 21A and 21B "relevant application" means, as the case may be—*

*(a) an application to the appropriate Minister for a lease under section 2 of this Act,*

*(b) an application to the appropriate Minister for a licence under section 3 of this Act,*

*(c) an application to the appropriate Minister for his approval under section 10 of this Act for maps, plans, and specifications for erection of structures on the foreshore,*

*(d) an application to the Minister for the Environment, Heritage and Local Government for his consent under section 13 of this Act for the deposit of material on the foreshore.*

*(6) In this section 'relevant application' does not include an application for an aquaculture licence (within the meaning of the Fisheries (Amendment) Act 1997) that is accompanied by an environmental impact statement."*

88. Section 19, pursuant to which the application the subject of these proceedings was made, provides:

> *"Whenever the appropriate Minister proposes to make an order under this Act or an application is made to the Minister for the making of a lease or an order or the granting of a licence under this Act, that Minister may, if he so thinks fit, cause notice of such proposal or application to be published at such times and in such manner as he thinks proper, and may by such notice give to all persons interested an opportunity of making to that Minister objections and representations in respect of such order, lease, or licence (as the case may be) and may include in such notice directions as to the time, manner, and place in and at which such objections and representations may be made."*

89. Section 19A, by contrast, provides as follows:

> *"Notwithstanding section 19 of this Act, a person who has submitted an environmental impact statement in accordance with a requirement of or under section 13A of this Act shall, as soon as may be, publish in one or more newspapers circulating in the district in which is situated the foreshore to which the relevant application relates a notice […]."*

90. This sets out detailed measures for what must be contained in the notice and what information must be made available.

91. Sections 21A and 21B then provide as follows:

*"21A.— When the appropriate Minister determines a relevant application, that Minister shall—*

*(a) publish a notice, in Iris Oifigiúil and in one or more newspapers circulating in the area where the foreshore subject to the determination is situate, of the determination and specifying the means by which any material received by that Minister upon which that Minister determined the application may be inspected free of charge or purchased at a price to be determined by that Minister (which shall not be more than the reasonable cost of making the copy or copies concerned)*

*(b) ensure that arrangements to comply with paragraph (c) are available for inspection or for purchase by members of the public on the terms specified in the notice published in accordance with paragraph (a),*

*(c) inform a Member State to which section 19C of this Act applies in respect of the relevant application of the determination and matters specified in paragraph (a) of this section, and*

*(d) arrange to make the environmental impact statement relating to the relevant application and other material upon which the determination was based available for inspection for such period as that Minister considers appropriate.*

*21B. – (a) A notice published under section 21A shall state that a person may question the validity of any such determination by the Minister by way of an application for judicial review, under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986)*

*(b) The notice shall identify where practical information on the review mechanism can be found*

*(c) A person shall not question the validity of a decision made or act done or purported to be done by the Minister in relation to a relevant application otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986).*

*(d) The High Court shall not grant leave for judicial review under this section unless it is satisfied that—*

*(i) the applicant has a sufficient interest in the matter which is the subject of the application, or*

*(ii) the applicant—*

*(I) is a body or organisation other than a State authority, a public authority or governmental body or agency the aims or objectives of which relate to the promotion of environmental protection, and*

*(II) has, during the period of 12 months preceding the date of the application, pursued those aims or objectives.*

*(e) A sufficient interest for the purposes of subparagraph (i) of paragraph (d) is not limited to an interest in land or other financial interest.*

*(f) The Court, in determining either an application for leave for judicial review under this section, or an application for judicial review on foot of such leave under this section, shall act as expeditiously as possible consistent with the administration of justice.*

*(g) In paragraph (d), "State authority, a public authority or governmental body or agency" means—*

*(i) a Minister of the Government;*
*(ii) the Commissioners of Public Works in Ireland;*
*(iii) a harbour authority within the meaning of the Harbours Act 1946;*
*(iv) a local authority within the meaning of the Local Government Act 2001;*
*(v) the Health Service Executive;*
*(vi) a person established—*
*(I) by or under any enactment (other than the Companies Acts),*
*(II) by any scheme administered by the Government, or*
*(III) under the Companies Acts, in pursuance of powers conferred by or under another enactment, and financed wholly or partly, whether directly or indirectly, by means of moneys provided, or loans made or guaranteed, by a Minister of the Government or by subscription for shares held by or on behalf of a Minister of the Government;*

*(viii) a company (within the meaning of the Companies Acts), a majority of the shares in which are held by or on behalf of a Minister of the Government."*

**The Bioatlantis Application was not a Relevant Application for the Purpose of Section 21A**

92. It is submitted that the BioAtlantis application was not a "relevant application" within the meaning of section 21A of the 1933 Act, as intended to be understood by the Oireachtas and that this is evident when the scheme of the 1933 Act is considered, the legislative history of the section is traced and the normal rules of statutory interpretation are applied.

93. Firstly, it is important to note that the 1933 Act makes a distinction between "applications" and "relevant applications". This is clear from the provisions of sections 19 and 19A.

94. Section 19 provides that when an "application" is made for a licence, the Minister *may* "if he so thinks fit" cause notice of the making of the application to be published and *may* give notice of an opportunity to make objections and representations in respect of the

licence and the method for making such objections and representations. In other words, public participation on such applications is not mandated by the 1933 Act.

95. By contrast, section 19A which provides for the procedure in relation to "certain relevant applications" is expressed to apply *"notwithstanding section 19 of this Act"* and only applies where an environmental impact statement ("EIS") is submitted and imposes *obligations* in terms of publication in relation to the "relevant application". The obligation to submit an EIS is found in section 13A of the Act which also defines "relevant application" but notably only defines it for the purpose of section 19A and not for the purpose of section 19.

96. Section 21A then imposes an obligation to notify decisions on "relevant applications" in *Iris Oifigiúil*. It is submitted that in this context "relevant applications" does not encompass simple "applications" pursuant to section 19, to which the definition of "relevant application" is not applied by section 13A, but rather is intended only to apply to "relevant applications" made pursuant to section 19A. In truth, it would be peculiar if the Act provided that an application in respect of which there was no mandatory form of public participation during the course of decision-making would nonetheless be subject to a mandatory form of post-decision notification.

97. It is submitted that this interpretation is reinforced when one considers the legislative history. Sections 13A, 19A and 21A were first introduced by the European Communities (Environmental Impact Assessment) Regulations 1989 (S.I. No. 349 of 1989) ("the EIA Regulations"). Those regulations inserted those relevant sections as follows:

*"Environmental impact assessment of certain proposals relating to the foreshore.*

*13A.—(1) A relevant application to the Minister which proposes the undertaking of development of a class for the time being specified under Article 24 of the European Communities (Environmental Impact Assessment) Regulations, 1989, or under any provision amending or replacing the said Article 24, shall be accompanied by a statement of the likely effects on the environment (hereinafter in this Act referred to as an "environmental impact statement") of such proposed development.*

[…]

*(5) In this section and in sections 19A, 19C and 21A "relevant application" means, as the case may be—*

*(a) an application to the Minister for a lease under section 2 of this Act,*

*(b) an application to the Minister for a licence under section 3 of this Act,*

*(c) an application to the Minister for his approval under section 10 of this Act for maps, plans, and specifications for erection of structures on the foreshore,*

*(d) an application to the Minister for his consent under section 13 of this Act for the deposit of material on the foreshore.*

[…]

*Procedure in regard to certain relevant applications.*

*19A.—(1) Notwithstanding section 19 of this Act, a person who has submitted an environmental impact statement in accordance with a requirement of or under section 13A of this Act shall, as soon as may be, publish in one or more newspapers circulating in the district in which is situated the foreshore to which the relevant application relates a notice—*

*(a) stating that he has made the application and indicating the location and nature of the proposal to which the application relates,*

*(b) stating that an environmental impact statement has been prepared in respect of the proposal,*

*(c) naming a place where a copy of the environmental impact statement may be inspected free of charge or purchased by any interested person,*

*(d) specifying the times and the period (being the prescribed period) during which the environmental impact statement can be so inspected or purchased,*

*(e) stating that any person may during the prescribed period make objections and representations to the Minister in relation to the effects on the environment of the proposal.*

*(2) Copies of the environmental impact statement shall be available for purchase by interested persons for a fee not exceeding the reasonable cost of making a copy.*

*(3) A person who has submitted an environmental impact statement in accordance with a requirement of or under section 13A of this Act shall, as soon as may be, furnish copies of the statement to the prescribed bodies, and shall indicate that objections and representations may be made to the Minister during the prescribed period in relation to the effects on the environment of the proposal.*

*(4) In this section and in section 19B "prescribed" means prescribed by the Minister by regulations.*

[…]

*Publication of notice of Minister's decision in relation to certain relevant applications.*

*21A.—Notice of the Minister's decision on a relevant application in respect of which an environmental impact statement was submitted in accordance with a requirement of or under section 13A of this Act shall be published in the Iris Oifigiúil and in one*

*or more newspapers circulating in the district in which is situated the foreshore to which the relevant application relates."*

98. The amendments wrought by the EIA Regulations were necessitated by the obligations of membership of the EU. The requirement to subject certain projects to environmental impact assessment ("EIA") and the detailed public participation requirements provided for in the new sections 13A, 19A and 21A are all consistent with, and required by, the State's obligations pursuant to the EIA Directive. In particular, the EIA Directive requires the giving of notice to the public of an application which is subject to EIA and an opportunity to make submissions (reflected in section 19A) and also notice of the making of a decision on such an application (reflected in section 21A).

99. It is obvious that the EIA Directive imposes no such obligations in respect of applications to which the Directive does not apply. Therefore, insofar as the definition of "relevant application" was introduced by statutory instrument, the extension of the scope of that definition to applications not subject to EIA was not required by the Directive and therefore the Regulations ought not be read as having had that effect.

100. It is accepted that section 21A was further amended by the Foreshore and Dumping at Sea (Amendment) Act 2009 ("the 2009 Act"), which was an Act, principally, as is clear from its long title, to *"provide for the transfer of certain functions relating to the foreshore from the Minister for Agriculture, Fisheries and Food to the Minister for the Environment, Heritage and Local Government"*, and which substituted *"appropriate Minister"* and *"Minister for the Environment, Heritage and Local Government"* in the necessary places to effect the transfer of functions. In respect of section 21A, the following was substituted:

*"21A.— When the appropriate Minister determines a relevant application, that Minister shall—*

*(a) publish a notice, in Iris Oifigiúil and in one or more newspapers circulating in the area where the foreshore subject to the determination is situate, of the determination and specifying the means by which any material received by that Minister upon which that Minister determined the application may be inspected free of charge or purchased at a price to be determined by that Minister (which shall not be more than the reasonable cost of making the copy or copies concerned),*

*(b) ensure that the following information is available for inspection or for purchase by members of the public on the terms specified in the notice published in accordance with paragraph (a):*

*(i) the determination;*
*(ii) any conditions attached to such determination;*
*(iii) the main reasons and considerations upon which the determination is based;*
*(iv) details of the public participation process;*

*(v) the main measures, if that Minister considers it necessary, to avoid, reduce or offset adverse effects on the environment arising from the relevant application;*

*(vi) arrangements to comply with paragraph (c) of this section,*

*(c) inform a Member State to which section 19C of this Act applies in respect of the relevant application of the determination and matters specified in paragraph (a) of this section, and*

*(d) arrange to make the environmental impact statement relating to the relevant application and other material upon which the determination was based available for inspection for such period as that Minister considers appropriate."*

101. That section still clearly links the publication of information about "relevant applications" to applications which are subject to the requirement in section 13A to submit an EIS (and therefore subject to section 19A rather than section 19). In this regard, see, in particular, section 21A(d) above. More importantly, however, no amendment was made to the definition of "relevant application" and it is submitted, therefore, that the scope of that definition has therefore not changed since amendments to the Act were introduced in the 1989 Regulations for the purpose of giving effect to the State's obligations pursuant to EU law.

102. For completeness, the European Communities (Public Participation) Regulations 2010 (S.I. No. 352 of 2010) inserted section 21B as follows:

*"21B. (a) A notice published under section 21A shall state that a person may question the validity of any such determination by the Minister by way of an application for judicial review, under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986).*

*(b) The notice shall identify where practical information on the review mechanism can be found."*

103. The European Union (Access to Review of Decisions for Certain Bodies or Organisations promoting Environmental Protection) Regulations 2014 (S.I. No. 352 of 2014) subsequently inserted section 21B(c) and (d) into the 1933 Act.

104. Insofar, therefore, as the 1933 Act now provides that the only remedy available is by way of judicial review, that amendment only came into effect long after the decision to grant the licence in this case and after the execution of the licence itself.

105. Accordingly, it is submitted that, having regard to the contrasting provisions in sections 19 and 19A, the reference in section 21A(d) to the requirement to make available for inspection "the environmental impact statement relating to the relevant application" and the source (the 1989 EIA Regulations) of the definition of "relevant application", there is, at least, an ambiguity regarding the application of section 21A (and therefore section

21B) to applications made pursuant to section 19 rather than section 19A. It is submitted that, having regard to the discretion clearly afforded to the Minister in respect of *applications* which are not the subject of the public participation requirements imposed by the EIA Directive, in the case of ambiguity, the Act should not be read to impose an obligatory requirement on the Minister in respect of notification of a *decision* on such an application.

106. It was on the basis of this understanding of the requirements of the 1933 Act that notice of the decision to grant the licence to BioAtlantis was not published in *Iris Oifigiúil.*

107. Notwithstanding all of the above, it is submitted that it is not, in fact, necessary for the Court to determine whether the above understanding and interpretation is correct or whether sections 21A and 21B apply to the decision to grant the licence the subject matter of these proceedings. This is because: (i) even where there is clearly a requirement to publish a notice in *Iris Oifigiúil,* e.g. in respect of a decision on an application made pursuant to section 19A, the failure to meet that requirement would not render any decision made either unlawful or immune from challenge; and (ii) in the circumstances of this case, the applicant does not contend that he has been prejudiced by any lack of publication since it is not disputed that he knew of the decision not later than February 2017, and it is not claimed that he did not know of any available remedy.

**Decisions Made on "Relevant Applications" have Legal Effect Even if Failure to Publish a Notice**

108. There is nothing in the scheme of the Act which suggests that the effectiveness of a decision on a relevant application is contingent on publication in *Iris Oifigiúil.* Rather, section 3(1) makes clear that a licence will take effect from the date of the licence:

> *"If, in the opinion of the appropriate Minister, it is in the public interest that a licence should be granted to any person in respect of any foreshore belonging to the State […] that Minister may, subject to the provisions of this Act, grant by deed under his official seal such licence to such person for such term not exceeding ninety-nine years commencing at or before the date of such licence, as that Minister shall think proper"* (emphasis added).

109. Section 21B sets out the mechanism by which a decision on a relevant application can be challenged, *i.e*. by way of judicial review. The 1933 Act does not create an *entitlement* to challenge such a decision by way of judicial review where none otherwise exists – the entitlement of the High Court to challenge administrative decisions by way of judicial review is derived from the Constitution – rather the Act prescribes the procedure which must be availed of in making any challenge to the lawfulness of a decision made under the Act, i.e. judicial review. It excludes, for instance, a plenary challenge.

110. Insofar as the requirement for the notification and the availability of judicial review are "tied together" in section 21B(a) – which provides that the notification of a decision must include a reference to the availability of a remedy by way of judicial review pursuant to Order 84 – this must (as with the analysis above) be understood in the context of EU law. The requirement was inserted by the European Communities (Public Participation)

Regulations 2010 (S.I. No. 352 of 2010). These Regulations gave effect to Council Directive 2003/35/EC ("the Public Participation Directive"). That Directive requires that when making decisions subject to the EIA Directive that "practical information is made available to the public on administrative and judicial review procedures". The 2010 Regulations insert a requirement to give such information in to a number of legislative schemes, including the Foreshore Act 1933 at section 21B.

111. It is not the case, therefore, that the requirement to provide such information in the notice means or was intended to mean that the notice itself created the entitlement to challenge a decision by way of judicial review, still less that the failure to give such notice rendered the decision ineffective. The Act does not create a complete statutory scheme, compliance with which is necessary in order for a remedy to be available.

112. In *J & J Haire & Company Ltd v Minister for Health* [2010] 2 IR 615, the High Court (McCracken J) dealt with an argument that a failure to promulgate a statutory instrument in accordance with the requirements of the Financial Emergency Measures in the Public Interest Act 2009 rendered the statutory instrument ineffective. The Court noted that the plaintiff accepted the argument was "ultra-technical". Although McCracken J concluded that there had, in fact, been compliance with the Act, it is clear that in the absence of any prejudice to the plaintiff in that case, he considered that the plaintiff could not, in any event, have complained regarding non-compliance:

> *"The defendants also point out, firstly, that the plaintiffs have no standing to make the present argument as no prejudice to the plaintiffs has been identified to the court. A hypothetical argument is being advanced that a pharmacist wishing to terminate on learning of the Regulations might have been prejudiced and also, that the thirty days notice a pharmacist must give to terminate might have been given earlier if the Regulations were known at an earlier date. As indicated before this court, however, it is clear that the plaintiffs have not exercised and had no intention of exercising their right to terminate. It is well established that a challenge of this nature cannot be entertained by the courts on a hypothetical basis, or on an ius tertii argument (see Madigan v. Attorney General [1986] I.L.R.M. 136)."*

113. It is clear that in *J & J Haire*, the Court had regard to the purpose of the notice requirement in considering whether any failure to comply with it operated to invalidate a decision made. To similar effect is *Keogh v Galway Corporation* [1995] 3 IR 457, in which case the failure to publish a notice in *Iris Oifigiúil* and in a local newspaper *during the course of the public consultation process* on a development plan had undermined that public consultation. No such issue arises here where the only notice requirement at issue is notice *after the fact.*

114. The Respondents submit that the effect of non-compliance with a requirement to notify a decision is that a third party, in this case the Applicant, could not be deemed to have been "on notice" of the fact that a decision had been made. In such circumstances, any person not actually aware that a decision had been made would likely have a good argument to make that he/she could not have challenged a decision within the time

mandated by Order 84, but only when he/she became aware or ought to have become aware of it and that time should be extended for the bringing of an application in light of the lack of actual notice.

115. In this regard, see *Sweetman v An Bord Pleanála* [2017] IEHC 46, in which the High Court (Haughton J) had to consider whether an application to challenge a decision on a section 5 referral (finding that development was exempted development) had been made in time. The applicant had contended that he did not actually know of the decision until long after it had been made and contended that the 8-week time limit to challenge the decision should only run from his date of actual knowledge. The Court rejected that argument:

> *"In circumstances where the applicant in the present proceedings only became aware of the s. 5 declarations in September 2015, counsel for the applicant appeared to urge on the court that the 8 week period did not begin to run until the applicant became aware of the declarations. That submission is not sustainable in light of the established jurisprudence, which flows from the express wording of s. 50(6) that the 8 week period commences on 'the date of the decision or, as the case may be, the date of the doing of the act by the planning authority'."*

116. However, the Court also concluded that due to his lack of actual knowledge, the applicant satisfied some of the criteria for an extension of time:

> *"11.1 Section 5 does not require that there be any public notification of a referral, and there are no statutory consultees, and no right of the public to participate. The evidence that the applicant was unaware of the s. 5 referrals, or the declarations of exemption made on 1st April, 2015 and 6th May, 2015, until some date in September 2015, was not contested. The absence of notification or publication in the circumstances meant that the applicant could not have, and could not reasonably be expected to have, known about these declarations.*
>
> *11.2 On these facts it is clear that the applicant satisfied the test at s. 50(8)(b) namely that the circumstances that resulted in his failure to make an application for leave to seek judicial review of the s. 5 declarations within the period of eight weeks from the date of those declarations 'were outside the control of the applicant for the extension."*

117. However, because the applicant did not move promptly once he did become aware of the decision, the Court refused to extend the time to challenge the decisions.

118. Order 84 of the Rules of the Superior Court sets out the procedure for judicial review generally and is incorporated by section 21B(a) of the 1933 Act as the applicable procedure for challenging the validity of any determination by the Minister on a relevant application with some minor modifications. The time limit for bringing an application under Order 84, rule 21(1) is three months from *"the date when grounds for the application first arose*". Insofar as the applicant in this case challenges the decision to grant the licence (by way of collateral challenge, permissible or otherwise) the time for

bringing that challenge therefore ran from the date of the decision impugned (i.e. 6 January 2011).

119. However, Order 84, rule 21(3) provides as follows:

> *"(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:—*
>
> *(a) there is good and sufficient reason for doing so, and*
>
> *(b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either—*
>
> *(i) were outside the control of, or*
> *(ii) could not reasonably have been anticipated by the applicant for such extension."*

120. The provisions are similar to those considered by Haughton J in *Sweetman*. It is not, therefore, that time doesn't "run" when a person isn't aware that "grounds for challenging the decision" have arisen, but rather time can be extended for challenging such a decision where the person seeking to challenge it can show that he/she was unaware of the decision (or the grounds for challenge) for reasons outside their control and has moved promptly once actually aware.

121. The High Court (McGrath J) recently advocated a similar approach when dealing with provisions under the Gas Acts requiring publication of a decision to grant a consent to operate a gas pipeline. Under the Gas Acts, the relevant Minister is under the same publication obligation as contained within section 21A and 21B of the 1933 Act. In *Harrington v Minister for Communications* [2018] IEHC 821, it was contended that the Minister had not published in accordance with the requirements of the Act. Whilst finding that the claim was not made out on the facts, the Court was clearly of the view that any such failure would not have vitiated the decision to grant the consent:

> *"138. The applicant contends that the Minister failed to notify the general public of the decision to grant the consent to operate simultaneously with the notification to the notice party. I am not satisfied that the facts, as deposed on affidavit, bear this out. Even if they did, unless it was a statutory requirement that notification to the notice party and to the general public be simultaneous, it is difficult to understand any legal basis upon which notification of the making of the decision could have the effect of vitiating such consent. Indeed, the applicant in oral submissions before the Court did not suggest that the consent might be vitiated in such manner. Further, the applicant in submissions conceded that she was not prejudiced by any delay, even if there was an obligation to notify her personally. It may be that the delay in notification might provide grounds for the extension of time in which to bring a challenge by way of judicial review, but in and of itself, no authority has been open to this Court to substantiate such allegations of illegality or that any delay in*

*notification might vitiate the consent. The Court must therefore reject this ground of challenge also."*

122. A similar approach applies under EU law provisions for judicial review of the legality of acts of the institutions and may be useful by analogy. Article 263(5) TFEU provides as follows:

> *"The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be."*

123. It is the intention of the Oireachtas that access to the courts should not be impeded but aided and both the obligation to publish a notice in respect of relevant applications in section 21A and the possibility of extending time to bring an application for judicial review where there is good and sufficient reason are means to this same end.

124. It is submitted that the consequence of any failure to publish notice of a decision is that the Minister could not object to an extension of time for challenging a decision unless an applicant has delayed from the date of his or her actual knowledge of the decision. In a situation where the Minister had published his determination in *Iris Oifigiúil*, the Minister could argue that the time to challenge the decision had start running from the time of publication subject to an applicant being able to otherwise demonstrate a good and sufficient reason for which the application couldn't have been brought earlier, but that argument is not available to the Minister if he fails to satisfy a requirement to publish.

**The Applicant in this Case had Knowledge of the Decisions but did not Challenge Promptly**

125. In this case, it is not disputed that the Applicant was aware of the decision to grant the licence from not later than February 2017. Indeed, it is apparent from the exhibits that he was aware in February 2017 not only of the decision but also of the grounds upon which he now claims that those licences were not granted in accordance with law. In other words, from February 2017 he was actually aware that the grounds he now has for impugning the decision to grant the licence had "arisen" within the meaning of Order 84, rule 21(1).

126. The Applicant did not, however, challenge the decision promptly thereafter or indeed at all. Rather, he challenged the decision to approve the monitoring plan and baseline survey made on 30 November 2017 in proceedings commenced in March 2018. It is the Respondents' contention that in so doing he is impugning the earlier decision to grant the licence and that he is out of time for so doing even if there had been a failure to notify that decision in accordance with the requirements of the Act. In truth, it doesn't appear to be disputed by the Applicant that he is out of time to challenge the decision to grant permission, rather he contends that his proceedings are not, in fact, a challenge to that decision.

127. Of course, the Applicant here has challenged the monitoring (and, the Respondents contend, has collaterally challenged the decision to grant the licence) without ever raising any issue in relation to non-publication in Iris Oifigiúil. It is submitted that non-publication could not, therefore, be a basis for this Applicant contending that the decision was invalid or, by extension, the Court to determine these judicial review proceedings by reference to the fact that the decision hadn't been published. The situation is analogous to the entry of an appearance in response to a summons where service has been defective. In that context, an unconditional appearance "cures" the defective service. In this regard, see *Baulk v Irish National Insurance Co. Ltd* [1969] IR 66.

**Conclusion**

128. The proceedings involve a challenge to the decision to approve a monitoring plan and baseline survey in respect of which there was no notification requirement. That decision has been challenged in accordance with the provisions of the 1933 Act and Order 84 and the proceedings are, therefore, properly constituted.

129. The Court is not precluded from considering the proceedings by reason of any purported failure to notify an earlier decision to grant a foreshore licence. Whether or not there was such a requirement, the decision to grant the licence was effective from the date of the decision and was subject to challenge by way of judicial review. It did not require notification to give it lawful effect.

130. Nor was the entitlement of this Applicant to challenge the decision contingent on publication of the notice. His *ability* so to do may have been undermined since he may not have been deemed to have notice of the decision, but once he became actually aware of the decision and of the grounds upon which he seeks to impugn it, he was in a position to issue proceedings and was obliged to act promptly in so doing.

131. In circumstances where the Applicant's actual knowledge of the decision is not disputed, it is not strictly necessary for the Court to determine whether, in the circumstances of this case, the Department's understanding – that the notification provisions only applied to relevant applications made pursuant to section 19A – was correct.

**Notice Party Submissions**

**The application and effect of section 21A of the Foreshore Act**

132. On a proper interpretation of the Foreshore Act it is submitted that section 21A thereof does not apply to the 2011 Decision. Section 21A of the Foreshore Act has no application to the foreshore licence granted in this case by reason of the fact that it did not require an environmental impact statement. As already indicated, Bioatlantis adopts the submissions made on behalf of the Respondents in this regard. In any event, the issue of the application of section 21A does not even arise in relation to the 2017 Decision in respect of the monitoring plan and baseline survey, which is the subject of challenge in these judicial review proceedings. Regardless of the issue of the application of section 21A to the 2011 Decision, there is a justiciable controversy before this Court pertaining to the purported decision of 2017. The Applicant cannot use these judicial review proceedings or the related proceedings under section 160 of the Planning and

Development Act 2000 to challenge the decision of the Respondent to grant the foreshore licence in 2011 or execution of same in 2014.

133. The issues raised in the Court's judgment relating to the Aarhus Convention will be addressed further below.

**2011 Decision and Foreshore Licence Agreement have legal effect**

134. As already indicated, Bioatlantis submits that section 21A of the Foreshore Act did not apply to the determination of the foreshore licence in this case and Bioatlantis adopts the submissions made on behalf of the Respondents in this regard. In the alternative, even if section 21A did impose an obligation on the Minister to publish notice of the 2011 decision in Iris Oifigiúil, his failure to do so did not deprive the Minister's decision of legal effect, nor did it deprive the Applicant of the opportunity of challenging the validity of that decision, provided that the proceedings were brought in a timely manner and/or the Applicant could have shown that he met the criteria for an order extending the time for challenge.

135. At the outset, it should be noted that Section 21A of the Foreshore Act does not expressly provide for the consequences of failure to comply with the obligation to publish the notice in *Iris Oifigiúil*: it does not provide that the determination will be invalid as a consequence nor does it provide that the determination will be deprived of legal effect. Section 21A provides as follows:

*"21A.— When the appropriate Minister determines a relevant application, that Minister shall—*

*(a) publish a notice, in Iris Oifigiúil and in one or more newspapers circulating in the area where the foreshore subject to the determination is situate, of the determination and specifying the means by which any material received by that Minister upon which that Minister determined the application may be inspected free of charge or purchased at a price to be determined by that Minister (which shall not be more than the reasonable cost of making the copy or copies concerned)*

*(b) ensure that arrangements to comply with paragraph (c) are available for inspection or for purchase by members of the public on the terms specified in the notice published in accordance with paragraph (a),*

*(c) inform a Member State to which section 19C of this Act applies in respect of the relevant application of the determination and matters specified in paragraph (a) of this section, and*

*(d) arrange to make the environmental impact statement relating to the relevant application and other material upon which the determination was based available for inspection for such period as that Minister considers appropriate.*

136. The underlying legislative purpose of Section 21A, read as a whole, is to provide notice of the decision so as to enable the public concerned to have access to judicial review and to provide for the expeditious disposal of any such challenges so that the person granted the license can have certainty in relation to its validity. Any such challenge must be brought within the 3 month time limit provided for under Order 84. Section 21B of the Foreshore Act provides as follows:

*21B. – (a) A notice published under section 21A shall state that a person may question the validity of any such determination by the Minister by way of an application for judicial review, under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986)*

*(b) The notice shall identify where practical information on the review mechanism can be found*

*(c) A person shall not question the validity of a decision made or act done or purported to be done by the Minister in relation to a relevant application otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986).*

*(d) The High Court shall not grant leave for judicial review under this section unless it is satisfied that—*

*(i) the applicant has a sufficient interest in the matter which is the subject of the application, or*

*(ii) the applicant—*

*I. is a body or organisation other than a State authority, a public authority or governmental body or agency the aims or objectives of which relate to the promotion of environmental protection, and*

*II. has, during the period of 12 months preceding the date of the application, pursued those aims or objectives.*

*(e) A sufficient interest for the purposes of subparagraph (i) of paragraph (d) is not limited to an interest in land or other financial interest.*

*(f) The Court, in determining either an application for leave for judicial review under this section, or an application for judicial review on foot of such leave under this section, shall act as expeditiously as possible consistent with the administration of justice.*

*(g) In paragraph (d), "State authority, a public authority or governmental body or agency" means—*

*(i) a Minister of the Government;*

*(ii) the Commissioners of Public Works in Ireland;*

*(iii) a harbour authority within the meaning of the Harbours Act 1946;*

(iv) *a local authority within the meaning of the Local Government Act 2001;*

(v) *the Health Service Executive;*

(vi) *a person established—*

I. *by or under any enactment (other than the Companies Acts),*

II. *by any scheme administered by the Government, or*

III. *under the Companies Acts, in pursuance of powers conferred by or under another enactment, and financed wholly or partly, whether directly or indirectly, by means of moneys provided, or loans made or guaranteed, by a Minister of the Government or by subscription for shares held by or on behalf of a Minister of the Government;*

(vii) *a company (within the meaning of the Companies Acts), a majority of the shares in which are held by or on behalf of a Minister of the Government."*

137. It is clear from this provision that the intention of the legislature was to confine the opportunity of persons to impugn by way of judicial review decisions made by the Minister. One of the principal restrictions under the Order 84 procedure is that proceedings in which the relief of *certiorari* is sought must be brought within three months of the date of the relevant decision. Provision is made for the extension of this time provision but where an applicant has not brought such proceedings within three months of the date when he or she became aware of the decision, such an extension will normally be refused on the basis that there is no "*good reason*" for extending the time limit. BioAtlantis will rely upon the decisions which have been referred to in the Respondents' submissions concerning applications for an extension of time.

138. The failure to publish notice of the Minister's decision in Iris Oifigiúil would not necessarily invalidate the 2011 decision, having regard ot the passage of time and the effect of the reliance of BioAtlantis on the 2011 decision and subsequent decision of the Minister to execute a foreshore lease in reliance thereon. In *Lynch .v. Dublin City Council* Unreported, High Court, O'Caoimh, J., July 25, 2003. O'Caoimh, J. had to consider the effect of the failure of the planning authority to notify the applicant of a decision to grant permission. The Court had to consider whether the requirement to provide notification of the decision to a person who had made submissions on the planning application was mandatory or directory and decided that it was mandatory. The applicant argued that the effect was to deprive her of the opportunity of appealing the decision in circumstances where she was not aware that the decision had been made and that the decision to grant permission should be quashed. O'Caoimh, J. stated as follows (at page 6584 of the unreported transcript of the judgment):

> *"I am conscious of the fact that I have indicated that the requirement in question was mandatory, but at the same time I am not inclined to hold that the failure to comply with that requirement necessarily results in an invalidity in the decision process itself.*

*In the instant case, as I have already indicated, the passage of time has resulted in the construction of the extension to the property owned by the Notice Party. While some suggestion has been made that the Notice Party may have proceeded with work somewhat prematurely, in light of the decision that had been made, it is quite clear that any works that have been effected were effected in circumstances where a decision had been made to grant planning permission. No application was made to this court at any time to restrain the development in question pending the outcome of these proceedings. … The Court is conscious of the invaluable role that is effected by Residents' Associations throughout the State in ensuring the compliance with the planning code, and undoubtedly the assistance that they give to planning authorities throughout the State in policing breaches of the planning regulations.*

*In the instant case, I feel constrained, however, to hold that by reason of the passage of time, notwithstanding the findings that I have made, even if I were to hold that the failures in question were in any way to give rise to a situation that might invalidate the decision, and I have indicated that I do not so hold, in my discretion I would refuse the relief which is now sought and that arises by reason of the fact that the construction in question proceeded without any serious suggestion that the Notice Party was acting in any way unlawfully.*

*The passage of time has resulted in this development. It was submitted by counsel on behalf of the applicant that I should in some way seek to set aside the decision of the planning authority to enable it to be formally retaken, to enable an appeal to be thereafter advanced to the Board. I feel that there is little reality to this situation, especially in light of the fact that the construction of the extension has in fact been effected.*

*In all of these circumstances, I believe that I must refuse the relief which is sought in these proceedings*." (emphasis added)

139. Another planning decision of some relevance is the decision of Costello, J. in *Colgan v Dublin Corporation*, Unreported, High Court, 19th March, 1991. This decision supports the proposition that a decision can have legal effect despite the fact that notification requirements in relation to the decision have not been fulfilled. In that case, the applicant was seeking what was generally referred to as a "*default permission*" pursuant to *Section 26(4*) of the Local Government (Planning and Development) Act, 1963, which provided that where an application is made to a planning authority and the authority does not *"give notice to the applicant of the decision within the appropriate period".* The appropriate period in that case was two months beginning on the date of the receipt of the application. The applicant submitted that as he received no notification until after the period had expired, the deeming provisions of the section operated and he was entitled to a decision by default. The Corporation raised a preliminary point that the proceedings were statute-barred by *Section 82(3A)* of the 1963 Act, as amended, which provided that:

> *"A person shall not by prohibition, certiorari or in any other legal proceedings whatsoever question the validity of a decision of a planning authority on an application for a permission or approval under Part IV of the Principal Act …unless the proceedings are instituted within the period of two months commencing on the date on which the decision is given."*

140. On the facts of the case, the two month period had elapsed since the decision of the Corporation to refuse planning permission. The decision is interesting because it distinguishes clearly between legal validity and legal effect. Even a decision which is patently invalid will have legal effect if it is not challenged in accordance with the time constraints on any such challenge. In the Colgan case, the applicant was making the point that he was not caught by the time limit because he was noly claiming that he was entitled to a deemed decision by default. However, the Court took the view that he was also questioning the validity of the decision made outside the period for determining planning applications, in respect of which an obligation to notify also applied. Costello, J. stated:

> *"Counsel for Mr. Colgan has argued that he is not seeking to quash the decision of the 30th July 1990 and does not need to do so, that the relief he seeks is a declaratory order that in the events that have happened he has obtained by operation of law a decision to grant permission, and that accordingly the section does not apply to these proceedings. I cannot agree. The section applies to all proceedings which "question the validity" of a decision by a planning authority made on an application for planning permission, and it seems to me that these proceedings quite clearly question the validity of the decision of the 30th July 1990. The legal validity of that decision depended on the fulfilment of a condition subsequent, namely its notification to the applicant within the two month statutory period. The applicant can only be entitled to the declaration sought if the decision of the 30th July is invalid because of non-compliance with the notice provisions. Manifestly, therefore, a challenge to its validity is mounted in these proceedings as the Court cannot grant the relief claimed unless it first concludes that the decision is invalid for the reasons advanced."* (emphasis added)

141. Under the provisions of the 1963 Act (see *Section 26(1)* thereof), compliance with the requirements of the regulations, which included requirements in relation to the notification of decisions, was, in effect, a pre-condition to the exercise of the discretion to grant or refuse planning permission. Failure to provide notification of a decision to grant permission was therefore fatal to the validity of any decision, provided the proceedings were brought within time and complied with Order 84. However, the Court held that it could not grant the relief sought in circumstances where the proceedings were not brought within time. However, what is clear from *Colgan* also is that the failure of the planning authority to provide notice or notification of the decision did not deprive the decision of legal effect, notwithstanding the fact that notification of the decision was not provided before the expiration of the period for the deeming provision to come into effect.

142. The time limit for challenge under *Section 21B* runs from the date of the determination of the application for a Foreshore Licence which is the "*decision*" referred to for the purposes of *Section 21B(c*) It is that decision which has legal effect for the purposes of an application for judicial review, irrespective of any applicable requirement to provide notice of the decision is Iris Oifigiúil.

**Aarhus Convention**

143. The provisions of the Aarhus Convention concerning legal costs and access to justice are contained in Article 9(2) - (4) thereof.

144. Article 9(2), obliges each State Party "*within the framework of its national legislation"* to ensure that the public concerned, subject to certain standing requirements, have:

> *"access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention."*

145. The scope of application of Article 9(2) is defined by reference to Article 6 of the Convention which provides that it applies to:

I. Decisions on whether to permit proposed activities listed in Annex I of the Convention; and

II. In accordance with national law, decisions on proposed activities not listed in Annex I which may have a significant effect on the environment. The activities listed Annex I comprise inter alia large industrial installations in the energy, metal production/processing, mineral, chemical, waste, waste-water, transport, and petroleum sectors.

146. Article 9(3) provides:

> *"In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."*

147. Article 9(4) provides, in relevant part,

> *"In addition, and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive…"*

148. It is accepted that the relevant provisions of the Foreshore Act must be interpreted by reference to Article 9 of the Aarhus Convention. However, the imposition of a three month time limit pursuant to Order 84 of the Rules of the Superior Courts does not cut across the wide access to justice provisions of Article 9. Those provisions do not prevent Convention States from imposing reasonable restrictions on the entitlement to bring judicial review proceedings.

149. For the reasons set out herein it is submitted that this Court ought to set aside its judgment of 29 July 2019 and should not make any order that affects the validity or legal effect of the 2011 decision or the Minister to grant a foreshore licence, having regard, in particular, to the fact that its validity or legal effect was not challenged in these proceedings.

**Decision**

150. Arising from the facts, the relevant legislation and the submissions of the parties, it appears to the court that there are four issues for determination. They are as follows: 1. Is the licence application in this case a 'relevant application' under section 13A, and section 21A of the Foreshore Act? 2. If it is a 'relevant application,' which Ministerial determination is required to be published, the decision 'in principle' of the 6th January 2011, or the licence granted on the 21st March 2014? 3. What is the effect of non-publication of the Ministerial determination? 4. Can the court continue to determine John Casey's application? Does section 21B require that any challenge to the validity of a Ministerial decision/determination be brought under that sections?

**Issue 1. Is this a "Relevant Application" under sections 13A, 19A and 21A?**

151. The court is satisfied that the licence application of the notice party, BioAtlantis Ltd, to mechanically harvest kelp in Bantry Bay, is a 'relevant application' within the meaning of sections 13A, 19A and 21A of the Foreshore Act 1933(as amended). The argument advanced by the respondents and adopted and endorsed by the notice party, that there are two types of licence applications under the Act, one being simple 'applications' to which section 19 relates and the other being, 'relevant applications' to which section 19A relates is contrived and spurious. There is no such concept in the Foreshore Act as a section 19 licence application nor indeed a section 19A licence application. All licence applications are governed by section 3 of the Foreshore Act, which contains a complete description of the licencing power conferred on the Minister. The core power is contained in section 3(1) which provides:

> *"3.—(1) If, in the opinion of the appropriate Minister, it is in the public interest that a licence should be granted to any person in respect of any foreshore belonging to the State authorising such person to place any material or to place or erect any articles, things, structures, or works in or on such foreshore, to remove any beach material from, or disturb any beach material in, such foreshore, to get and take any minerals in such foreshore and not more than thirty feet below the surface thereof, or to use or occupy such foreshore for any purpose, that Minister may, subject to the provisions of this Act, grant by deed under his official seal such licence to such*

*person for such term not exceeding ninety-nine years commencing at or before the date of such licence, as that Minister shall think proper.*

152. Section 19 which dates from the original Act of 1933, confers on the Minister a discretionary power. It provides that when an "application" is made for a licence, the Minister *may* "if he so thinks fit" cause notice of the making of the application to be published and *may* give notice of an opportunity to make objections and representations in respect of the licence and the method for making such objections and representations. The section imposes no duty nor any obligation on the Minister. As we have seen, in the course of this licencing application, the Minister chose to avail of this discretionary power. That is his right. However, the existence or use of this discretionary power, does not obviate the need for the Minister to discharge the duties imposed on him by sections 13A, 19A, 19B and 21A, 21B of the Act. More importantly, section 19 certainly does not create a parallel licencing system which is outside the ambit of European law. Frankly, the court is extremely surprised that the state respondents would even argue for such a construction.

153. Even a cursory reading of the departmental documents adduced in evidence by the respondents in the underlying judicial review, demonstrates, that at all times, the department officials and its consultees treated this application as a 'relevant application' within the meaning of section 13A. From the outset, everyone was clear that the proposed activity of mechanically harvesting kelp was likely to have environmental impacts on marine habitats and species that were, as yet, undetermined. The initial reaction of the Department of the Environment Heritage and Local Government was that the proposed activity required both an environmental impact assessment and a screening for appropriate assessment pursuant to the Habitats and Birds Directives. That Department later appears to have relented and to have endorsed the Marine Institute's proposal that environmental impacts be assessed by the alternative means of a baseline study and monitoring programme.

154. When the file was sent to the Minister in January 2011, it contained a Legislative Compliance Checklist in which subsections 13A(1), 13A(2) and 13A(2A) were all addressed. The department concluded that the development is not likely to have significant effects on the environment. The Department also addressed Regulation 31(1) of the European Communities (Natural Habitats) Regulations 1997 S.I. 94 of 1997. Under the heading 'Appropriate Assessment', the Department asked itself; Is the proposed development likely to have a significant effect on European sites? It answered itself in the negative. Those statements in the Legislative Compliance Checklist comprise the environmental impact statement in this case. At no point in the lengthy deliberations and consultations surrounding this licencing application was it ever suggested, by anyone, at any time, that this was not a 'relevant application' but rather a 'simple application', such that the provisions of the EU Environmental Directives did not apply to it.

155. Sections 13A, 19A and 21A were first introduced by the European Communities (Environmental Impact Assessment) Regulations 1989 (S.I. No. 349 of 1989). These

regulations transposed Council Directive (no. 85/337/EEC) on the assessment of the effects of certain public and private projects on the environment.

156. Section 13A(1) was inserted by the 1989 Regulations and read as follows: -

*"13A.—(1) A relevant application to the Minister which proposes the undertaking of development of a class for the time being specified under Article 24 of the European Communities (Environmental Impact Assessment) Regulations, 1989, or under any provision amending or replacing the said Article 24, shall be accompanied by a statement of the likely effects on the environment (hereinafter in this Act referred to as an "environmental impact statement") of such proposed development."*

157. This provides that relevant applications to the Minister proposing developments listed in Article 24 of the 1989 Regulations would require an EIS. The Minister was given power to exempt a relevant application from the EIS requirement (section 13A(4)), but in the event that he exercised that power, that fact had to be published in Iris Oifigiúil and in one or more newspapers circulating in the local area. The definition of "relevant application" is set out in section 13A(5). It has remained essentially the same since its insertion into the Act in 1989. Section 13A(5) reads as follows: -

*"(5) In this section and in sections 19A, 19C and 21A "relevant application" means, as the case may be—*

*(a) an application to the appropriate Minister for a lease under section 2 of this Act,*

*(b) an application to the appropriate Minister for a licence under section 3 of this Act,*

*(c) an application to the appropriate Minister for his approval under section 10 of this Act for maps, plans, and specifications for erection of structures on the foreshore,*

*(d) an application to the Minister for the Environment, Heritage and Local Government for his consent under section 13 of this Act for the deposit of material on the foreshore."*

The Regulations also inserted section 19A and section 21A, creating an obligation for the publication of the fact and content of the EIS and also publication of the Ministerial decision regarding the relevant application. Sections 19A and 21A as inserted by the 1989 regulations read as follows: -

*"19A.—(1) Notwithstanding section 19 of this Act, a person who has submitted an environmental impact statement in accordance with a requirement of or under section 13A of this Act shall, as soon as may be, publish in one or more newspapers circulating in the district in which is situated the foreshore to which the relevant application relates a notice—*

*(a) stating that he has made the application and indicating the location and nature of the proposal to which the application relates,*

*(b) stating that an environmental impact statement has been prepared in respect of the proposal,*

*(c) naming a place where a copy of the environmental impact statement may be inspected free of charge or purchased by any interested person,*

*(d) specifying the times and the period (being the prescribed period) during which the environmental impact statement can be so inspected or purchased,*

*(e) stating that any person may during the prescribed period make objections and representations to the Minister in relation to the effects on the environment of the proposal.*

*(2) Copies of the environmental impact statement shall be available for purchase by interested persons for a fee not exceeding the reasonable cost of making a copy.*

*(3) A person who has submitted an environmental impact statement in accordance with a requirement of or under section 13A of this Act shall, as soon as may be, furnish copies of the statement to the prescribed bodies, and shall indicate that objections and representations may be made to the Minister during the prescribed period in relation to the effects on the environment of the proposal.*

*(4) In this section and in section 19B "prescribed" means prescribed by the Minister by regulations."*

*…*

*21A.—Notice of the Minister's decision on a relevant application in respect of which an environmental impact statement was submitted in accordance with a requirement of or under section 13A of this Act shall be published in the Iris Oifigiúil and in one or more newspapers circulating in the district in which is situated the foreshore to which the relevant application relates."*

158. While the definition of 'relevant application' in section 13A(5) has remained constant since its first insertion in 1989, the nature of the projects plans and activities which require EIA and EIS has expanded with each EU Environmental Directive. So too has the definition of EIA and EIS changed over the years. Sections 13A, 19A, 19B, 21A and 21B have been the subject of multiple amendments to give effect to those changes. For example, section 13A has been amended to include the Habitats and Birds Directives, as part of the required Ministerial deliberations when considering the grant of a licence. What is required by those Directives is not an EIS, but rather a screening for appropriate assessment, which is an entirely different process. section 19A was amended by section 13 of the Foreshore Dumping at Sea amendment Act 2009 to provide that a reference to EIS in sections 19A and 19B or section 21A includes a reference to an alternative form of

assessment referred to in section 13A(4)(b) of the Act. Section 10 of the same Act amends section 13A by giving the Minister power to exempt a relevant application from the requirement of an EIS, but if he does so, he must consider whether the effects if any, of the proposed development should be assessed in some other manner and make available to the public the fruits of that consideration and the reasons for the exemption.

159. Eventually, the definition of' Environmental Impact Assessment' and 'Environmental Impact Statement' was inserted into section 1, the definition section, of the Foreshore Act. The definition makes clear what the duties and obligations of a minister are when considering a relevant application:

> "'*environment impact assessment' means an assessment, to include an examination, analysis and evaluation, carried out by the appropriate Minister in accordance with this Act that shall identify, describe and assess in an appropriate manner, in light of each individual case and in accordance with Articles 4 to 11 of the Council Directive, the direct and indirect effects of a proposed development on the following:*
>
> *(a) human beings, flora and fauna,*
>
> *(b) soil, water, air, climate and the landscape,*
>
> *(c) material assets and the cultural heritage, and*
>
> *(d) the interaction between the factors mentioned in paragraphs (a), (b) and (c);*

160. '*environmental impact statement' means a statement of the direct and indirect effects which the proposed development will have or is likely to have on the environment and shall include the information specified in regulations prescribed under section 177 of the Act of 2000."* (European Union (Environmental Impact Assessment) (Foreshore ) Regulations 2012 (S.I. no 433 of 2012) reg.3. The effect of this amendment is that every relevant application requires the Minister to conduct an environmental impact assessment and to make an environmental statement. On the evidence the Minister certainly purported to carry out an environmental impact assessment and in his consideration of the application he made an environmental impact statement.

161. Section 21A, which was amended in 2009 and again in 2010 to give effect to the public participation directive, requires that when a Minister determines a relevant application *"any material received by that Minister upon which that Minister determined the application may be inspected*.." That material might include an EIS in its original form under the 1989 regulations, or it might not. It could include, an alternative form of assessment such as a baseline study and monitoring programme. It could include a screening for appropriate assessment as provided for by the Habitats and Bird Directives. It could include an environmental impact statement that the proposed development will have no significant effects direct or indirect on the environment, as is the case on this

application. What triggers the obligation to publish is the Ministerial determination of a relevant application. The notice party's licence application is a relevant application.

**Issue 2 . When does the Minister 'determine' a relevant application?**

162. On the evidence, it is clear that on the 6th January 2011, the Minister approved the notice party's application for a licence to mechanically harvest kelp in Bantry Bay. This is referred to by the respondents as a 'decision in principle'. It was expressly made subject to the inclusion in the licence, of the conditions recommended by the MLVC. The approval records that the applicant was willing to accept the conditions recommended by the MLVC. For some reason, which did not emerge in the evidence before the court, it took more than three years for the licence to be executed. This occurred on the 21st March 2014. The licence was expressed to have commenced on January 1st 2014.

163. It appears to the court that under the Foreshore Act, the Minister determines a relevant application when he grants a licence pursuant to section 3 of the Act. The Minister's power to determine the relevant application derives exclusively from section 3. The core of the Ministerial power is as already stated, contained in section 3(1).

> *"3.—(1) If, in the opinion of the appropriate Minister, it is in the public interest that a licence should be granted to any person in respect of any foreshore belonging to the State authorising such person to place any material or to place or erect any articles, things, structures, or works in or on such foreshore, to remove any beach material from, or disturb any beach material in, such foreshore, to get and take any minerals in such foreshore and not more than thirty feet below the surface thereof, or to use or occupy such foreshore for any purpose, that Minister may, subject to the provisions of this Act, grant by deed under his official seal such licence to such person for such term not exceeding ninety-nine years commencing at or before the date of such licence, as that Minister shall think proper."*

164. There is a number of things to be observed about this power. 1. It is a discretionary power. The Minister cannot be compelled to grant a licence. 2. It is a power to be exercised in the public interest. 3. It is a power which is expressly made subject to the provisions of the Foreshore Act. 4. A licence must be granted by deed under the Minister's official seal. 5. A licence may be backdated to commence before the date of the licence.

165. The remaining subsections of section 3 impose other conditions in relation to the grant of a licence which need not detain us here. Of passing interest is subsection 9 which gives the Minister a discretionary power to hold a public inquiry in regard to the granting of a licence. What is clear from section 3(1) is that there is no licence until one is granted by deed under seal. It appears to the court to follow that the relevant application in this case, was determined within the meaning of section 21A, on the date of the licence i.e. the 21st March 2014.

166. What then is the status of the Ministerial approval of the 6th January 2011, described as a decision in principle to grant a licence? The Foreshore Act makes no provision for decisions in principle in respect of licences. A licence is either granted pursuant to section

3 or it is not. This is not to say that the Minister cannot make such decisions, merely that such decisions have no legal standing under the Act. It seems to the court that the Minister, had he chosen to do so, could have deployed section 19 to cause notice of his decision in principle to grant a licence, to be published and to invite public objections and representations thereon. He could also have used his power to hold a public enquiry into the granting of a licence pursuant to section 3(9) of the Act. Indeed, he probably also had a discretion to utilise the provisions of sections 21A and 21B to notify the public of his thinking. The powers conferred on the Minister pursuant to both section 19 and section 3 are discretionary and the Minister was not under a duty nor any obligation to exercise those powers.

167. On the other hand, when the Minister determined this relevant application on the 21st March 2014, there was a mandatory statutory obligation on him to comply with sections 21A and 21B of the Act, as it then was. He was required to publish in Iris Oifigiúil and one or more newspapers circulating in the local area, the fact of the determination and the means by which any material received by him, upon which he determined the application, could be inspected. The information to be made available for public inspection included, the determination and any conditions attached to it; the main reasons and considerations underlying the determination; details of the public participation process; the main measures to avoid reduce or offset adverse effects on the environment arising from the relevant application. He was also obliged to arrange to make the environmental impact statement relating to the relevant application and other material upon which his determination was based available for inspection for such period as he considered appropriate. Most importantly, in the context of this case, he was statutorily obliged to inform the public of a person's right to question the validity of his determination and to identify where practical information on the review mechanism could be found.

168. Every licence granted under section 3 of the Foreshore Act, is expressly made subject to the provisions of the Act. The mandatory obligations set out in sections 21A and 21B, have not yet been satisfied. Accordingly, the court finds that the licencing process on this application is not yet complete and there is at present no valid subsisting licence. Finally, on this issue, the court observes that even if the court is wrong in its assessment of the status of the 'decision in principle' made on 6th January 2011, and that that decision is capable in law of being a ' determination' within the meaning of section 21A, the court's finding would not change because sections 21A and 21B have not been fulfilled in respect of that decision either.

**Issue 3. What is the effect of the failure to publish the Ministerial determination?**

169. Both the respondents and the notice party argue that the failure to publish the determination is simply an administrative failure, which does not affect the validity of the determination but merely gives rise to the possibility that that an applicant for judicial review who learned of the determination outside the three month period for judicial review, could seek an extension of time within which to challenge the determination. They point to the fact that on the evidence, the applicant was aware of the determination

in February 2017, at the latest, and on becoming so aware took no steps to challenge the determination.

170. In the court's opinion, the respondents and the notice party have misconstrued the nature and the effect of the obligations imposed on the 'appropriate Minister' by sections 21A and 21B of the Foreshore Act. In 2009 and again in 2010, sections 21A and 21B were amended for the specific purpose of giving effect to the objectives of the Aarhus Convention, which were enshrined in EU law by Directive (2003/35/EC), the Public Participation Directive. The three core objectives of the Convention and the Directive were to ensure that the public has access to environmental information held by public authorities; to ensure that the public is involved in the decision making process; and to ensure that the public has access to justice by having a means of questioning any decision of a public authority that affects the environment. Member states were given until the 25th June 2005 to implement the Directive. Ireland failed to do so.

171. In belated purported compliance with the Directive, Ireland enacted the European Communities (Foreshore) Regulations 2009 (SI 404/2009). These regulations amended section 21A by inserting section 21A (a) & (b) into the Foreshore Act which then provided:

*"21A.— When the Minister determines a relevant application, that Minister shall—*

*(a) publish a notice, in Iris Oifigiúil and in one or more newspapers circulating in the area where the foreshore subject to the determination is situate, of the determination and specifying the means by which any material received by the Minister upon which the Minister determined the application may be inspected free of charge or purchased at a price to be determined by the Minister (which shall not be more than the reasonable cost of making the copy or copies concerned),*

*(b) ensure that the following information is available for inspection or for purchase by members of the public on the terms specified in the notice published in accordance with paragraph (a):*

*(i) the determination;*
*(ii) any conditions attached to such determination;*
*(iii) the main reasons and considerations upon which the determination is based;*
*(iv) details of the public participation process;*
*(v) the main measures, if the Minister considers it necessary, to avoid, reduce or offset adverse effects on the environment arising from the relevant application;*
*(vi) arrangements to comply with paragraph (c) of this section,*

*(c) inform a Member State to which section 19C of this Act applies in respect of the relevant application of the determination and matters specified in paragraph (a) of this section, and*

*(d) arrange to make the environmental impact statement relating to the relevant application and other material upon which the determination was based available for inspection for such period as the Minister considers appropriate."*

172. While the 2009 regulations satisfied the objective of providing public access to environmental information, they did not adequately address the right of the public to question the validity of a Ministerial determination of a relevant application. That deficiency was remedied by the enactment of the European Communities (Public Participation) Regulations 2010 (S.I. No. 352 of 2010). Regulation 7 inserted section 21B after section 21A . Section 21B provides that:

*"21B. (a) A notice published under section 21A shall state that a person may question the validity of any such determination by the Minister by way of an application for judicial review, under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986).*

*(b) The notice shall identify where practical information on the review mechanism can be found."*

173. Sections 21A and 21B confer substantive legal rights on the public. Those legal rights are an integral part of the licencing regime under the Foreshore Act. The determination of every relevant application must be published as provided for in section 21A and the public must be informed of the right to question the validity of the determination as provided for in section 21B. (emphasis added). Until those provisions are complied with the licencing process is not complete. The process will only conclude when the requisite notice under sections 21A and 21B is published. It follows from this finding that the time for judicial review only begins to run from the date of publication of the requisite notice.

**Respondents/notice party submission**

174. The court rejects the submissions of the respondents and notice party. Were the time for judicial review to start running from the date of the Ministerial determination, be that January 2011, or March 2014, as submitted by the respondents and the notice party, then the public could effectively be deprived of its legal right to question the validity of the determination. If that were the law, a Minister could avoid the operation of sections 21A and 21B entirely, by withholding publication of the fact of his determination for a period of three months after the determination was made. That is not the law.

175. Nor is the situation cured as submitted by the same parties, by allowing a person who learned of the Ministerial determination outside the three month period allowed for judicial review pursuant to Order 84, to seek an extension of time within which to apply for leave to apply for judicial review. A decision whether to grant an extension of time to apply for leave is a matter of discretion, to be exercised by a court on the facts of the particular case before it. A court's discretion can be exercised in favour or against an applicant. Sections 21A and 21B confers a legal right to question the validity of a determination. A legal right cannot be satisfied by the exercise of a discretion unless

that is specifically provided for in the legislation. The act confers no such discretion on the court.

176. As set out herein the respondents and the notice party opened various authorities to the court, in the course of their respective submissions. Most of the authorities derived from Planning law and many pre-date the Public Participation Directive of 2003. While Planning Law has been hugely affected by EU Environmental Directives and contains many requirements for the publication of notices informing the public of the right to question the validity of decisions of either a planning authority or the board, its statutory regime is different from that of the Foreshore Act. Planning Law doesn't contain a restricted licencing power such as that set out in section 3 of the Foreshore Act, which makes the granting of a licence expressly subject to the provisions of the Act. It doesn't have a concept of 'relevant application' as set out in section 13A in respect of which publication is required by sections 21A and 21B of the Foreshore Act.

177. Planning Law does, unlike the Foreshore Act, have specific statutory time limits for the bringing of an application for judicial review, which are set out in section 50 and section 50A. The Act provides at section 50(6) a time limit of eight weeks to apply for judicial review from the date of the decision or the doing of the act which is sought to be impugned. However, where notice of a decision is required by law to be published then the eight week period only begins to run from the date of publication (section 50(7)). In that regard, the Foreshore Act and the Planning and Development Act seem to be aligned. Both make distinctions between decisions which must be challenged within a stated period from the date of the decision and decisions which must be challenged within a stated period after publication of the decision. Worryingly, from the court's viewpoint, subsection 50(7) which provides that in certain matters, time runs from publication, was not opened to the court by any party during the hearing of this application, despite the court's request to be addressed on comparable statutory regimes.

178. Because the time limit for questioning the validity of planning decisions has been significantly abridged from the conventional three month period, the Planning Act confers a specific discretionary power on the High Court to extend the eight week period but only in circumstances where the court is satisfied that there is good and sufficient reason for doing so and that the circumstances that led to the failure to bring the application within the eight week period were outside the control of the applicant. No such discretion is conferred on the Court by the Foreshore Act.

179. The Foreshore Act, requires publication of the Ministerial determination of the relevant application. The notice must advise the public of the right to question the validity of the determination. The time period for judicial review runs from the date of publication

**The effect of the Applicant's knowledge of the determination**

180. There is no doubt that the Applicant was aware of the Ministerial determination as of February 2017. The evidence reveals that he considered the grant of the licence to be an 'abomination'. He discussed the issue with others on facebook and wrongly concluded that the licencing process was complete and that he was out of time to challenge the

licence. Deprived, as he perceived it, of the opportunity to question the validity of the licence, he sought to challenge the subsequent approval of the baseline study and monitoring programme, approved in November 2017, by means of this judicial review application and by mounting an application for an injunction pursuant to section 160 of the Planning Act 2000 as amended. That latter application was rejected by this court after ten hearing days, on the 6th June 2019. The fact that this applicant misperceived the law, does not in any respect alter that law. The publication requirements contained in sections 21A and 21B still subsist and this licencing application will not be complete until the Minister's obligations under the Foreshore Act have been met.

**Issue 4. Can the court continue to determine John Casey's application? Does section 21B require that any challenge to the validity of a Ministerial decision/determination be brought under that sections?**

181. The Applicant has expressed a wish to proceed with his application notwithstanding the court's findings in respect of the incompleteness of the licencing process. He has further indicated his intention in default to seek an order of *Mandamus* compelling the Minister to publish the notice required by sections 21A and 21B. On that latter point, the court is satisfied that no action in *mandamus* lies at the suit of the applicant. The granting of foreshore licences is discretionary and is subject to the provisions of the Foreshore Act. There is at present, no valid licence in existence because the provisions of the sections 21A and 21B of Foreshore Act have not been satisfied. If and when the Minister chooses to publish the required notice, then the applicant will have three months in which to apply for leave to seek judicial review under the Act. It would indeed be a strange situation were an individual, who opposes the grant of a licence, permitted to bring an action to compel the Minister to issue the very licence to which he objects.

182. On the question of proceeding with the current application, the court is of the view that both procedurally and substantively, it is not appropriate for the court to do so.

**Procedural issue**

183. After the Ministerial determination of this application in March 2014, section 21B was further amended to give effect to the European Union (Access to Review of Decisions for Certain Bodies or Organisations promoting Environmental Protection) Regulations 2014 (S.I. No. 352 of 2014). Reg. 6(b). inserted the following after sections 21B(b)

*"(c) A person shall not question the validity of a decision made or act done or purported to be done by the Minister in relation to a relevant application otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986).*

*(d) The High Court shall not grant leave for judicial review under this section unless it is satisfied that—*

*(i) the applicant has a sufficient interest in the matter which is the subject of the application, or*

*(ii) the applicant—*

*(I) is a body or organisation other than a State authority, a public authority or governmental body or agency the aims or objectives of which relate to the promotion of environmental protection, and*

*(II) has, during the period of 12 months preceding the date of the application, pursued those aims or objectives.*

*(e) A sufficient interest for the purposes of subparagraph (i)*

*of paragraph (d) is not limited to an interest in land or other financial interest.*

*(f) The Court, in determining either an application for leave for judicial review under this section, or an application for judicial review on foot of such leave under this section, shall act as expeditiously as possible consistent with the administration of justice.*

*(g) In paragraph (d), "State authority, a public authority or governmental body or agency" means—*

*(i) a Minister of the Government;*

*(ii) the Commissioners of Public Works in Ireland;*

*(iii) a harbour authority within the meaning of the Harbours Act 1946;*

*(iv) a local authority within the meaning of the Local Government Act 2001;*

*(v) the Health Service Executive;*

*(vi) a person established—*

*(III) by or under any enactment (other than the Companies Acts),*

*(IV) by any scheme administered by the Government, or*

*(V) under the Companies Acts, in pursuance of powers conferred by or under another enactment, and financed wholly or partly, whether directly or indirectly, by means of moneys provided, or loans made or guaranteed, by a Minister of the Government or by subscription for shares held by or on behalf of a Minister of the Government;*

*(vii) a company (within the meaning of the Companies Acts), a majority of the shares in which are held by or on behalf of a Minister of the Government."*

184. The addition of these provisions had the effect of creating a statutory scheme for judicial review of determinations of relevant applications within the meaning of section 21A and 21B, as well as other decisions or acts done by a Minister in relation to a relevant application. The approval given by the Minister to the baseline study and monitoring programme in November 2017, *prima facie* appears to be an' act done' within the meaning of section 21B(c). As such, it appears to the court to be amenable to judicial review '*under this section'*. The words 'under this section 'is contained in both section 21B (d) and (f). The applicant has not brought this application pursuant to section 21B.

He has instead, brought a conventional judicial review under Order 84. In the court's view his application is therefore not properly constituted. A court when determining an application for leave for judicial review under sections 21B, must direct its mind to the matters set out in section 21B(d) and must be satisfied that an applicant has sufficient interest in the matter which is the subject of the application or alternatively, be among the exempted bodies. The fact that 'standing 'is a factor in every conventional judicial review pursuant to Order 84, does not relieve the applicant of the obligation to satisfy the Court of his sufficient interest pursuant to section 21B(d) of the Foreshore Act.

**Substantive reasons**

185. This entire application proceeded on the basis that the notice party is the holder of a foreshore licence which commenced on the 1st January 2014. All of the submissions made to the court by both sides, assumed the existence of a valid licence. The Applicant's contention is that the Baseline study and Monitoring programme approved in November 2017 is itself a plan or project which requires screening for appropriate assessment under the Habitats and Birds Directives. The Respondents have countered with pleas and arguments that the application amounts to an impermissible collateral attack on the 2011 Decision and/or the 2014 Licence Agreement. Further they argue that the 2017 approval is not a decision which is susceptible to judicial review because it is merely a decision that BioAtlantis had satisfied a condition of the Licence Agreement and was not therefore a decision which triggered any obligation pursuant to the Habitats Directive or the Regulations made thereunder. Having determined as a matter of fact and law that the licencing process in relation to the Notice Party's licence application has not yet concluded by reason of the failure to comply with section 21A and section 21B of the Foreshore Act, the court has no jurisdiction to determine the particular dispute which has arisen between the parties.

186. Even if the court could determine whether the 2017 Approval is a plan or project which requires screening for appropriate assessment, any such determination would be nugatory in the wider context of the court's finding that there is as yet, no valid licence, because of the failure of the respondents to comply with the obligations imposed on them by sections 21A and 21B of the Foreshore Act. Should the respondents now comply with those provisions, the public will be told of its right to question the validity of the Minister's determination and its right of access to justice will be vindicated. If, on the other hand, the required notice is not published, then the position will continue to be as it is now; that the licencing process is still incomplete.

**Conclusion**

187. For the reasons set out in this judgment the court will set aside its judgment delivered extempore on the 29th July 2019 on the grounds that BioAtlantis, had a right to be heard on that application. This written judgment is the Court's determination on the issue of jurisdiction. The Court refuses the applicant's request to proceed to judgment on his application.

188. As we have seen, all the experts agree that the mechanical harvesting of kelp, of which there is an abundance around our shores, if done in a sustainable manner, could yield

significant benefits to some of our coastal communities. The only way to know for certain what the environmental effects of mechanical harvesting will be, is to conduct trials. As long ago as 2004 the expert report of Astrid Werner and Stefan Kraan of NUIG under the auspices of the Marine Institute and Taighde Mara Teo. (ISSN No. 1649-0053) advised that the trialling of mechanical kelp harvesting might require a specific legislative framework outside the normal licencing provisions of the Foreshore Act. France and Norway have regulatory systems in place for mechanical harvesting in their jurisdictions. Rather than act on that advice the state opted to use the existing licencing provisions to grant what in effect, is a trial licence, to the Notice Party. That is the state's right. However, when opting to use existing legislation the state must comply with the provisions of that legislation. Unfortunately, they have not done so, to date. They have failed to comply with those provisions which provide for public scrutiny of their decisions. As a consequence of the state's failure, the Licence Agreement which was executed in 2014, is not yet operative or effective. This is hugely regrettable not least for the notice party BioAtlantis, who have complied with every request of the state during the licencing process and who have expended very significant time and resources in doing so. In this case the state has been the source of the problem. Perhaps now, it can be the source of the solution.