[2020] IEHC 353

THE HIGH COURT

COMMERCIAL

[2019 No. 2960 P]

BETWEEN

CLONRES CLG

PLAINTIFF

AND

THE MINISTER FOR CULTURE, HERITAGE AND THE GAELTACHT

IRELAND

THE ATTORNEY GENERAL

CREKAV TRADING GP LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 16th day of July, 2020

Summary

1. This case concerns an attempt by a local residents' association in Clontarf to prevent the building of housing on lands located at St. Paul's, Sybil Hill, Raheny, Dublin 5 (the "St. Paul's site"). The plaintiff ("Clonres") is seeking to have the St. Paul's site designated as a special protection area ("SPA") because of the use of that site as feeding grounds by brent geese and black tailed godwit. This would have the result of rendering the building of housing on the St. Paul's site highly unlikely, if not impossible. In addition, the designation of the St. Paul's site as an SPA would require the State to take measures to prevent the deterioration and disturbance of the aforementioned species of birds pursuant to Article 4(4) of Directive 2009/147/EC (the "Birds Directive").

2. These proceedings were issued by Clonres in April 2019 (the "April 2019 Proceedings") against the Minister for Culture, Heritage and the Gaeltacht (the "Minister") regarding her failure to designate the St. Paul's site as an SPA. The Minister had designated several sites in the locality of St. Paul's as SPAs in 2009/2010, including the North Bull Island SPA, which is just 1.2 kilometres from the St. Paul's site. It is relevant to note that in a planning submission to An Bord Pleanála in February 2018, Clonres claimed that the St. Paul's site was '*inextricably linked'* to the North Bull Island SPA.

3. It is also relevant to note that Clonres challenged a grant of planning permission by An Bord Pleanála for the building of housing on the St. Paul's site by the fourth named defendant and owner of the site ("Crekav"). Clonres issued those judicial review proceedings in May 2018 (the "Judicial Review"). The Minister was joined to those Judicial Review proceedings.

4. In that May 2018 Judicial Review, Clonres challenged the decision of An Bord Pleanála to grant planning permission, for the building of 536 residential units, to Crekav. While the primary aim of the Judicial Review against An Bord Pleanála was to quash the decision of the Board to grant planning permission, the Minister was joined to those proceedings as a respondent, as Clonres also claimed in that Judicial Review that the lands should have been designated by the Minister as an SPA – very similar relief as Clonres is seeking in these April 2019 Proceedings.

5. Before this Court, counsel for Clonres accepted that the relief sought against the Minister in the May 2018 Judicial Review was '*ancillary*' to the relief of quashing the grant of planning permission sought in those proceedings. This was because its primary aim was to prevent the building of housing on the St. Paul's site, for which purpose it relied on, *inter alia*, the fact that the environmental status of the lands meant they should not be developed.

6. The outcome of the Judicial Review was that the grant of planning permission was quashed on consent by An Bord Pleanála and remitted back to the Board on the 31st July, 2018. Of significance, is the fact that the ancillary relief against the Minister to have the St. Paul's site designated as an SPA in that May 2018 Judicial Review was never pursued by Clonres. It is also significant that it received a letter, after the proceedings had been struck out, from the Chief State Solicitor's Office (on behalf of the Minister) on the 24th August, 2018 (the "August 2018 Letter"), refusing Clonres' demand of the 7th August, 2018 for the St. Paul's site to be designated as an SPA. Despite the threat by Clonres to issue proceedings if it got such a refusal from the Minister, Clonres did not issue proceedings at that time or within the three month time limit for the bringing of judicial review proceedings.

7. However, Clonres is now seeking very similar relief in these April 2019 Proceedings against the Minister. As noted below:

- Clonres' failure to challenge the initial non-designation by the Minister of the St. Paul's site almost 10 years previously in 2009/2010,
- its failure to proceed with the May 2018 Judicial Review against the Minister (to designate the site as an SPA), and
- its failure to carry through its threat to litigate after the refusal of the Minister in the August 2018 Letter to designate the site,

may well have been because (in 2009/2010) the St. Paul's site was part of a school and (thus unlikely to be developed for housing) and because (in 2018) Clonres had achieved its primary aim of preventing the grant of planning permission on the site and so was not as focused on the protection of the birds through designation of the site as an SPA, since this was *'ancillary'* to its primary aim of preventing the building of housing on the site. However, the primary issue in considering whether time-limits have been complied with is not the reason for the failure to issue proceedings, but rather the fact of that failure to issue proceedings within time.

8. This judgment deals primarily with the application by the first, second and third defendants (the "State Defendants") for, *inter alia*, an Order dismissing the claim as against those named defendants on the grounds that these April 2019 Proceedings are in substance judicial review proceedings and should have been instituted within three months of the decision

by the Minister not to designate the St. Paul's site as an SPA in 2009/2010 or (at the latest) within three months of the Minister's refusal to designate the site in August 2018. The judgment also considers an application brought by Clonres whereby it seeks to amend its Plenary Summons and Statement of Claim and to extend time for the purpose of seeking the reliefs sought in these proceedings.

9. For the reasons set out below, this Court concludes that Clonres is out of time in issuing these proceedings challenging the non-designation of the St. Paul's site by the Minister. This should have occurred within three months of the failure to designate the site as an SPA in 2009/2010. Even if the Court is wrong in this regard, it should have occurred within three months of the Minister's refusal by letter to designate the site in August 2018. This Court also concludes that Clonres has not provided a good and sufficient reason for the delay and it has not shown to the Court that the circumstances that led to the delay were outside of its control or could not reasonably have been anticipated by it. Thus, this Court finds that there is no basis for an extension of the time-limit and the proceedings should be struck out.

General background

10. Clonres is a representative organisation comprised of residents living in the Clontarf area. As a residents' organisation it has been active for over 30 years and was incorporated on 27th November, 2006.

11. In 2009 and 2010, the Minister made the decision to designate six areas proximate to the St. Paul's site as SPAs. The sites designated as SPAs at this time are as follows:

- Malahide Estuary,
- Rogerstown Estuary,
- Skerries Islands,
- South Dublin Bay and River Tolka Estuary,
- Baldoyle Bay, and,
- North Bull Island.

12. Prior to the designation of these six sites as SPAs, between May 2008 and November 2009, notices of intention to designate each site were made publicly available. Despite Clonres being active at that time, it does not appear that it sought to challenge the decision of the Minister not to designate the St. Paul's site as an SPA at that time, notwithstanding the proximity of the six aforementioned sites to the St. Paul's site.

13. It is significant that, while Clonres is now seeking that the St. Paul's site be designated as an SPA because of its importance as feeding grounds for brent geese and black tailed godwit, it chose not to, or failed to, challenge the Minister's decision not to designate the site as an SPA in 2009/2010. There is no suggestion that the environmental concerns for the birds (expressed by Clonres in these proceedings) did not exist in 2009/2010. However, what did change since 2009/2010 is that the St. Paul's site, which was part of St. Paul's College (a school in Raheny), in 2009/2010 (when lands in the locality were designated as an SPA), was bought by a developer, Crekav, in March 2015.

14. Crekav purchased the site for tens of millions of euro with the purpose of building housing on the site. In April 2018 it was granted planning permission for the development of residential units on the St. Paul's site but, as previously noted, this was challenged by Clonres in the Judicial Review in May 2018 which resulted in the quashing of that grant of planning permission.

15. There is a minor difference between the lands which form part of the St. Paul's site for the purposes of the designation as an SPA in these April 2019 Proceedings (which amounts to 7.8 hectares), and the slightly smaller part of those same lands which was the development site for the purposes of the planning application and the May 2018 Judicial Review (which amounts to 6.4 hectares). However, as nothing major turns on this difference, the reference to the St. Paul's site when used in this judgment refers in broad terms to the lands which were subject to a planning application by Crekav and also to the site which Clonres seeks to be designated as an SPA.

16. In these stand-alone plenary proceedings (i.e. unconnected with any judicial review of planning decisions by An Bord Pleanála regarding the St. Paul's site) issued in April 2019, the local residents' group is seeking an Order requiring the Minister to designate the site as an SPA.

17. Since these proceedings are plenary proceedings rather than judicial review proceedings, this raises the question of whether the three-month time limit for issuing judicial review proceedings applies and if so, whether these proceedings are out of time by virtue of Clonres' failure to challenge the decision of the Minister to designate the St. Paul's site as an SPA some ten years ago, when that decision to designate sites as SPAs in the area was made.

The key issue is whether the proceedings were taken within the time-limit

18. The key issue therefore in this case relates to whether Clonres' challenge, to the failure of the Minister to designate the St. Paul's site as an SPA under the Birds Directive and take appropriate steps to protect the site, was made outside the relevant time limit. Accordingly, the focus of this judgment is on this key issue relating to whether the proceedings were brought within the time-limit.

Background to the time-limit issue

19. The St. Paul's site was not designated as an SPA under the Birds Directive in 2009/2010, when various sites in its locality were so designated, including the North Bull Island SPA, which is only 1.2 kilometres from the St. Paul's site. As previously noted, the local residents' association, Clonres, did not challenge the failure by the Minister to designate the St. Paul's site at that time.

20. The site was subsequently bought by a developer, Crekav, in 2015 for tens of millions of euro with the intention of building hundreds of housing units thereon.

21. In 2018, many years after the original non-designation of the St. Paul's site as an SPA, the developer, Crekav, obtained planning permission for the building of housing units on the site and Clonres took the Judicial Review challenging that grant of planning permission on various planning grounds. In addition however, Clonres joined the Minister to those

proceedings and challenged the grant of planning permission on what counsel for Clonres submits were *'ancillary'* grounds, namely the non-designation of the site as an SPA. For this reason, the Judicial Review against An Bord Pleanála also sought a declaration in the following terms from the Minister and An Bord Pleanála:

> "A Declaration that the [Minister] is under an obligation to designate the lands the subject matter of the proposed development for the purposes of Article 4(2) of the Birds Directive.
>
> A Declaration that [An Bord Pleanála] is under an obligation to take all appropriate steps to prevent deterioration of the foraging habitat for Brent Geese and the Black Tailed Godwit on the lands the subject matter of the proposed development or any disturbance to the said birds, in accordance with Article 4(4) of the Birds Directive, pending the designation of the said site."

22. On the 31st July, 2018 due to a technical oversight by An Bord Pleanála, which oversight was unconnected with the non-designation of the site as an SPA, the Judicial Review was struck out and the planning application was quashed. The application for planning was remitted back to An Bord Pleanála pursuant to the terms of a judgment of Barniville J. of that date.

23. Even before the judgment of Barniville J. on the 31st July, 2018, solicitors for Clonres wrote to the Minister's solicitors, the Chief State Solicitor's Office ("CSSO"), by letter dated 18th July, 2018, stating, *inter alia*, that:

> "It is our client's position that the errors in the Board's decision are so great that the entire application is flawed and should be quashed outright.
>
> The relief sought against your client is to the effect that the North Bull SPA should be extended to include the land at Saint Paul's […]
>
> In default of action by the Minister or the Council, our clients will take such action as they may be advised, in particular in exercise of their rights and obligations under the Aarhus Convention and under European law, and will rely on this letter in an application for costs of any proceedings that they may incur, and an application that the State is liable under European law to make good such costs."

24. After that judgment, on the 7th August, 2018, Clonres' solicitors wrote to the Minister requiring her to issue orders to protect the St. Paul's lands. This letter states, *inter alia*:

> "We act on behalf of Clonres Ltd which has recently obtained an order quashing permission for the construction of housing on playing pitches at Saint Paul's, Sybil Hill Road, Raheny, Dublin 5.
>
> In the course of those proceedings it emerged that those pitches form a key feeding ground […] under Directive 2009/147 on wild birds. Our clients maintained that the State was obliged to designate the Saint Paul's lands under that Directive.
>
> As the proceedings were conceded by [An Bord Pleanála], no order was made in relation to the designation of the site. However, the issue of protection of this key feeding area remains live. […]

As Crekav has not responded to our client's call that it cut the grass, we now call on you to issue an urgent order pursuant to Regulations 28 and or 29 of the 2011 Habitats Regulations requiring it to do so.

Please note that, if you do not issue such an order, our clients will issue proceedings against you relating to a breach of the State's duty to give effect to Council Directive 92/43 on natural habitats and 2007/149 on wild birds."

25. By letter of the same date, Clonres' solicitors also wrote to the CSSO, calling on the Minister to designate the St. Paul's site as an SPA and stating, *inter alia*:

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

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

26. The Minister replied to Clonres' solicitors on the 24th August, 2018 (the aforementioned "August 2018 Letter"), through the CSSO, stating that she would not designate the site or issue protection orders, in the following terms:

"[…] there is no basis for issuing the Ministerial Directions requested by your clients. The lands the subject of your clients' concern do not form part of a designated European Site, and there is no activity been carried out on the lands which meets any of the criteria for the issuing of directions under either Regulation 28 of Regulation 29. […]

We have already refuted your clients' allegation that there is a requirement to extend the area of the North Bull Island SPA in our letter of 31st July 2018. Our clients maintain the position as set out in that letter. The existing boundary of North Bull Island SPA encompasses all of the core areas used by the bird species by the inclusion of relevant wetland habitats. […]

There is no requirement under the Birds Directive to include as part of a SPA all and any lands which might be used on occasion as feeding grounds. [...]

As indicated in previous correspondence, the State will fully defend any fresh proceedings which seek reliefs similar to those in the now concluded proceedings."

27. It is crucial to note that, despite the August 2018 Letter containing the Minister's clear statement regarding her view of the legal position and her clear refusal to designate the site and her willingness to defend the proceedings which had been threatened by Clonres, this letter was met with silence from Clonres.

28. No doubt Clonres considered with its legal advisers the contents of the August 2018 Letter in light of Clonres' threat of proceedings within 14 days of the 7th August, 2018 and, for whatever reason, it did not issue proceedings against the Minister to compel the designation of the St. Paul's site as an SPA, despite its extensive correspondence with the Minister seeking same.

29. Yet in April 2019, some eight months after this refusal by the Minister to designate and protect the St. Paul's site (and thus well over three-months from the August 2018 Letter), Clonres issued these proceedings against the Minister seeking in substance the same relief sought in the Judicial Review, namely the designation and protection of the St. Paul's site.

30. Although these proceedings are plenary proceedings, rather than judicial review proceedings, the State Defendants have argued that, as the proceedings clearly involve public law issues, the time limit for judicial review proceedings of three months, set out in Order 84, rule 21(1) of the Rules of the Superior Courts, applies to this case and that Clonres failed to comply with that time limit. This is because the Minister claims that any challenge to the non-designation of the St. Paul's site should have been issued within three months of the decision made in 2009/2010 to designate sites as SPAs in the area of St. Paul's and so these proceedings are years out of time. The Minister also claims that even if the refusal contained in the August 2018 Letter was regarded as the appropriate date from which time should run, the current proceedings are out of time, since they were issued eight months after that letter.

31. This claim that the current proceedings are out of time is the key issue in this case and is the basis for the Minister's motion to strike out Clonres' proceedings.

32. However, in order to deal with the claim that it failed to bring these proceedings within three months *'from the date when grounds for the application first arose'* (*per* the wording of Order 84, rule 21(1)), Clonres claims that it is not in fact challenging a decision allegedly taken in 2009/2010 or one allegedly taken in August 2018 and hence there is no question of a time limit applying to this challenge. Instead, in its submissions, Clonres claims that *'[t]here is no public law 'measure' challenged in the present proceedings'*. Instead it says the Minister is under a continuing obligation to designate SPAs under the Birds Directive and so Clonres is not in breach of any time limit in issuing these proceedings in April 2019.

Applicable time limit for proceedings which are in substance judicial review proceedings?

33. The first issue to be considered is whether the time limit applicable to judicial review proceedings is applicable to these plenary proceedings. Clonres did not seriously dispute that its proceedings, *albeit* issued as plenary proceedings, in which it seeks a declaration that the Minister should designate the St. Paul's site as an SPA, are quintessentially public law proceedings and therefore the proceedings are judicial review in nature. In this regard, Clonres acknowledged in its submissions that the proceedings *'undoubtedly involve public law issues'*. Indeed, it would be hard to argue that a challenge to an act/omission of a Minister (to designate a site as an SPA) is not a public law issue. On this basis and on the authority of *O'Donnell v. Corporation of Dun Laoghaire* [1991] I.L.R.M. 301 and *Shell E & P Ireland Ltd v. McGrath* [2013] 1 I.R. 247, it seems clear that the time limits set out in Order 84, rule 21 apply to these proceedings, notwithstanding that they are plenary proceedings.

34. Therefore, this Court has little hesitation in concluding that, pursuant to Order 84, rule 21(1), the proceedings in this case should have been issued '*within three months from the date when grounds for the application first arose'*.

When did the grounds for this application first arise?

35. One of the most telling aspects of this case is that it is clear that these proceedings issued on the 10th April, 2019 and that accordingly the latest date, by which the grounds for the proceedings must have arisen (based on a three-month time limit), was 10th January, 2019. Yet, nowhere does Clonres state in its pleadings or in its submissions, the date of the decision, or the date of the omission to make a decision by a public body, that it is challenging in what are in essence judicial review proceedings.

36. It is unusual to have judicial review proceedings (in substance or in form) where there is no actual act or omission of a public body, in this case a Minister, which has been specified by the applicant as having occurred on a certain date and therefore as being subject to challenge/judicial review.

37. As discussed further below, it seems to this Court that the only logical reason for this approach is that if Clonres, in seeking to force the Minister to designate the St. Paul's site as an SPA, was to hang its hat on challenging a particular act or omission of the Minister on a particular date, it would be forced to concede that it is out of time to bring the proceedings. This is because the only possible act/omission to designate the St. Paul's site occurred in 2009/2010 or possibly in August 2018, both of which occurred well over three months before the 10th April, 2019

What decision is Clonres challenging in this 'judicial review'?

38. Even if Clonres does not accept that the *specific* decision of the Minister that it is challenging is the decision not to designate the St. Paul's site taken in 2009/2010 or the decision not to designate the site which was contained in the August 2018 Letter, it is nonetheless clear that Clonres is challenging *a decision* (whether an act or omission) of the Minister not to designate the St. Paul's site as an SPA. This is because the relief which it seeks pre-supposes that a decision should have been taken by the Minister, i.e. the first and primary relief Clonres is seeking is a declaration that the Minister is:

> "required to designate the lands at Saint Paul's as a Special Protection Area for the purposes of Council Directive 2009/147/EC (the Birds Directive), and/or an injunction to compel her to do so."

By seeking a declaration/injunction requiring the Minister to designate the site, it must be the case that Clonres is claiming that the Minister has unlawfully failed to take a decision to designate the site. Because of the nature of this relief being sought by Clonres, which requires the Minister to designate the St. Paul's site, this also raises the preliminary question of whether Clonres is in substance seeking an order of mandamus.

Is the declaration/injunction being sought in effect an order of mandamus?

39. An order of mandamus is described in Collins & O'Reilly, *Civil Proceedings and the State* (3rd Ed., Round Hall, 2019) at para. 5-57 in the following terms:

> "An order of mandamus is a command to a public body to perform a legal duty of a public nature. For mandamus to issue, there must be a demand made of a public body to perform such a duty and a refusal or failure on its part to act on foot thereof."

Since Clonres is seeking in effect to command a public body, the Minister, to perform her legal duty under the Birds Directive, there can be little doubt that Clonres is seeking in effect an order of mandamus.

40. However, as is clear from the foregoing extract, for mandamus to issue there must be a demand made of the Minister which she fails to perform. As noted in Hogan, Morgan & Daly, *Administrative Law in Ireland* (5th Ed., Round Hall, 2019) at para. 18-25, there are very good policy reasons for this approach:

> "The requirement that there must be 'a demand and refusal' has much to commend it: it makes sense that the administrative body concerned be given the chance to mend its hand before the aggrieved citizen resorts to litigation."

41. These policy reasons avoid the taxpayer being put to the considerable cost of defending High Court litigation against a public body, where that litigation is totally unnecessary. This is achieved by ensuring that the citizen first requests that the public body, for example a Minister, make the decision that the citizen complains of, before the citizen issues and pursues expensive High Court litigation. Otherwise a citizen could simply troop into the High Court (and thereby inflict considerable legal expense on the taxpayer in having to defend that litigation) and demand that a Minister (or any other public body) take a particular decision (which the citizen alleges he/she is legally obliged to take), without having demanded that the Minister take that decision in the first place. This is a particularly important policy objective during times of considerable financial uncertainty which this country is now facing, since the taxpayer spends many millions of euro each year defending High Court litigation, such as this, which is instituted against state defendants.

42. For this reason, it is a further curiosity of this case (in addition to the fact that Clonres does not claim that it is challenging a specific decision of the Minister taken or omitted to be taken on a particular date), that Clonres also does not claim that it made a demand of the Minister to perform her duty (by designating the St. Paul's site) which she failed to perform, so as to justify an order of (in effect) mandamus. In particular, Clonres does not claim that, in seeking (effectively) an order of mandamus against the Minister to designate the St. Paul's site, that it demanded (and was refused) such a designation in August 2018 during its correspondence with the Minister.

43. Instead Clonres simply instituted proceedings, that are in essence mandamus proceedings, without Clonres claiming anywhere in those pleadings or in its submissions, that it had demanded of the Minister that she so designate the lands and further that she failed to so do. Instead, Clonres denies that the August 2018 Letter was even a decision that is subject to judicial review, let alone a refusal following a demand.

44. The truth of the matter, in this Court's view at least, is that Clonres did in fact make a 'demand' and get a 'refusal' from the Minister regarding the designation of the St. Paul's site, since no other interpretation could be put on the exchange of correspondence between the

parties beginning on the 18th July, 2018 and culminating with the August 2018 Letter. However, as this demand/refusal was more than three months prior to the issue of these April 2019 Proceedings, it is clear that if Clonres had framed the April 2019 Proceedings as relying on this 'demand and refusal', those proceedings would on their face be outside the time limit.

Claim by Clonres that the August 2018 Letter does not constitute a 'decision'

45. This approach that the August 2018 Letter was not a decision (and that no demand or refusal has occurred), faces the obstacle that Clonres is seeking, in effect, an order for mandamus, yet on its own case, it never got a decision from the Minister and similarly never made a demand of the Minister, which was refused, even though this is a pre-condition for a court to grant an order of mandamus.

46. Clonres either made the demand of the Minister to designate the St. Paul's site by letter on 7th August, 2018 and got the refusal on 24th August, 2018 (which Clonres denies), in which case the proceedings are out of time, or as Clonres implies, no decision was ever taken by the Minister and so it is not out of time (but then there was no demand and refusal). However, since a demand and refusal is a pre-condition for the grant of an order of mandamus (which in substance Clonres is seeking), it is *prima facie* not entitled to such an order.

47. At a macro-level, this is the fundamental contradiction which appears to this Court to be at the heart of the approach of Clonres to these proceedings. However, this Court will next consider at a micro-level the application of the time-limit to this case.

Application of time-limit to this case

48. It is clear from the foregoing that, although Clonres is challenging a ministerial act/omission regarding the designation of the St. Paul's site as an SPA, it fails to specify a particular date when this act/omission occurred. As previously noted, the form of relief sought means that Clonres is claiming that the Minister failed on some date (although it fails to specify that date) to designate the St. Paul's site. It seems clear to this Court, that the decision Clonres is actually challenging, and which should have been specified, is the failure of the Minister in 2009/2010 to designate the St. Paul's site as an SPA or perhaps the refusal of the Minister to comply with Clonres' demand for the site to be designated in August 2018. Yet Clonres does not accept that this is the case. It is possible that a factor in Clonres' refusal to accept that this is the case may be the fact that both these dates are well outside the three-month time limit.

A continuing obligation to designate, which is not subject to time-limit for challenge?

49. Instead Clonres claims that the Minister failed to comply with her continuing obligation to designate the St. Paul's site, but avoids stating when this failure, in the form of an act or omission, occurred. In making this 'continuing obligation' argument, Clonres appears to be relying on the fact that a continuous obligation means that there was a continuing failure to designate the St. Paul's site (which must have commenced at some date, but this is not specified). On this basis, when the proceedings issued, on the 10th April, 2019, Clonres argues that there was on that date a failure which was judicially reviewable. In essence, in making this argument Clonres is claiming that due to what it alleges is the 'continuing failure' of the Minister to designate the site, it (or presumably any other concerned party) is at liberty to judicially review this failure on any date, for as long as the Minister fails to designate the site.

50. For the reasons set out herein, this Court cannot accept that where a Minister has *not* been called upon to make a decision that she can nonetheless be judicially reviewed for that failure. The whole purpose of judicial review is to challenge a decision (whether an act or omission) that was taken by a Minister. In this case, there is no specific date, within three months prior to the issue of the proceedings on 10th April, 2019, when a decision was taken by the Minister not to designate the St. Paul's site.

51. The approach of Clonres, in arguing that the Minister is under a 'continuing obligation' to designate sites under the Birds Directive, would, if it were correct, mean that in effect no time limit applies to a challenge by Clonres to the failure of the Minister to designate the St. Paul's site as an SPA. This would also mean that third parties who buy land which had not been designated as an SPA when sites were designated (and where nothing has changed since that original decision) could never safely assume that the land would not be so designated at any time in the future (and thereby rendered valueless). There can be no doubt that if this approach were to be accepted as correct, it would result in prejudice to third parties.

Clonres did not challenge the failure to designate in 2009/2010 within three months

52. In considering this issue, it is first relevant to note that Clonres was in existence and had as its objective the protection of the environment in the Clontarf area at the time of the original designation of SPA sites in 2009/2010. For whatever reason, Clonres chose not to challenge the decision of the Minister not to designate the site as an SPA in 2009 or 2010, even though in its observations to An Bord Pleanála in a letter dated 5th February, 2018 (submitted as part of the planning process for the proposed development of housing by Crekav on the St. Paul's site), it stated, *inter alia*, that the St. Paul's site is:

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

Thus, it is relevant to note that in February 2018, Clonres claimed for the first time that the St. Paul's site is inextricably linked with North Bull Island, which was designated as an SPA in 2009/2010.

53. There was no evidence produced to this Court to suggest that this claim in February 2018 that the St. Paul's site was inextricably linked with North Bull Island, was a brand new link, and that this '*inextricable link'* had not existed in 2009/2010 when the North Bull Island site was designated as an SPA. On this basis, it seems that the St. Paul's site, should have been, on Clonres' case at least, designated as an SPA in 2009/2010 because of this *'inextricable link'*. No evidence was produced to this Court to suggest that there was some change since 2009/2010 which meant that the St. Paul's site did not merit designation in 2009/2010.

54. It seems therefore to this Court that the administrative decision which is subject to judicial review in this case, regarding the non-designation of the St. Paul site, was the decision taken by the Minister not to designate that site in 2009/2010. On this basis, the three-month time limit for issuing proceedings to challenge the non-designation of the St. Paul's site had expired almost a decade by the time the April 2019 Proceedings were issued and so these proceedings are out of time.

Why did Clonres not challenge the non-designation of the St. Paul's site sooner?

55. Nothing turns on the reason why Clonres did not challenge the failure to designate the St. Paul's site as an SPA within three months of the decision in 2009/2010. Nonetheless, it is relevant background to note that it seems the importance of designating the St. Paul's site as an SPA only first came into focus for Clonres when the site was sold in 2015 to a developer and only came into sharp focus when the developer sought planning permission for hundreds of housing units in 2017 and was granted that permission in April 2018, as evidenced by the letter dated 5th February, 2018 from Clonres to An Bord Pleanála.

56. Prior to the acquisition of the St. Paul's site by Crekav in 2015 when the lands were used as part of the playing fields by St. Paul's College, Clonres may have felt that designating the site as an SPA in order to protect the birds was unnecessary, as it did not serve the 'primary' aim of preventing housing development, since no development was in prospect.

57. However, all that seems to have changed when Crekav sought planning permission in December 2017 for housing on the St. Paul's site. Only thereafter, did Clonres challenge for the first time the non-designation of the St. Paul's site as an SPA, and even at that stage it was not a matter of primary concern for Clonres. This is because counsel for Clonres submitted that it only raised the designation of the St. Paul's site as an *'ancillary'* argument in the Judicial Review challenging the grant of planning permission to Crekav for hundreds of homes on the St. Paul's site. By joining the Minister to that Judicial Review and seeking a declaration that she was obliged to designate the site for the protection of birds (an ancillary aim), it seems Clonres hoped to render the St. Paul's site incapable of being developed for housing (the primary aim). Counsel for Clonres submitted that:

> "[T]he reliefs sought against the State were clearly ancillary to the challenge to the Board's decision."

58. Thus, it seems the primary focus of Clonres in seeking the designation of the St. Paul's site as an SPA at that time in the May 2018 Judicial Review was the prevention of housing on the St. Paul's site rather than the protection of birds. This may also explain why Clonres did not challenge the non-designation of the site in 2009/2010.

59. Indeed, it may also explain why Clonres did not follow through with its threat to issue proceedings, when the Minister in her August 2018 letter refused to designate the site, and explains Clonres' failure to do so within three months of that refusal. This is because at that stage Clonres had successfully achieved its primary aim of getting an order from the High Court revoking Crekav's planning application for housing on the site. It is quite possible that Clonres may have concluded that having achieved its primary aim, the designation issue, which it submits was only an 'ancillary' issue, slipped down its priority list. However, this Court would emphasise that nothing turns on the reason why Clonres might have taken *'its eye off the ball'* in this regard, since the only issue of importance is that it failed to issue proceedings within three months of the 2009/2010 decision or the August 2018 Letter, not the reason for this failure.

<u>Even if August 2018 Letter is fresh decision, the proceedings are out of time</u>

60. Even if this Court is wrong in identifying the decision in 2009/2010 as the specific decision being challenged in this case, it seems clear that there was a decision taken by the Minister in the August 2018 Letter to the same effect. This was, in this Court's view, simply a

confirmation of the decision taken in 2009/2010 (as happened in *F.G. v. The Child and Family Agency* [2018] IESC 28). This was because, as in the *F.G.* case, there was no additional information or change in circumstances which would require a re-consideration of that earlier decision not to designate the St. Paul's site as an SPA. As is clear from the *F.G.* case, an applicant cannot get time to run afresh for the purposes of taking judicial review proceedings by simply seeking confirmation of a prior decision:

> "[A]n applicant who has delayed in bringing judicial review cannot circumvent the time limits by seeking a fresh confirmation of a prior decision." (at para. 102 *per* McKechnie J.)

61. However even if the Court is wrong in this regard, and the August 2018 refusal to designate the St. Paul's site amounts to a fresh decision, then this would be the latest date when the grounds for these proceedings arose. Yet, even on this basis, the April 2019 Proceedings were issued out of time, since they were issued eight months after the August 2018 Letter. So on this basis, the proceedings are also out of time.

Continuing obligation of Minister to designate the site?

62. To overcome the foregoing considerable obstacles regarding the April 2019 Proceedings being either 10 years or five months out of time, Clonres claims that the Minister is under a continuing obligation to designate sites and therefore the time limits do not apply. Clonres relies upon the Supreme Court decision in *Mungovan v. Clare County Council* [2020] IESC 17 to support the proposition that the decision, on whether to designate lands as an SPA, does not relate to an individual application process, which would be subject to time running from the date of the decision on the application, but is of a general nature more *akin* to policy-making which is not subject to that type of time-limit.

63. The *Mungovan* case was concerned with a particular fixed policy regarding the type of qualifications an engineer had to have if he was to get an appointment from Clare County Council. In that case the engineer applied a number of times for appointment and was refused each time because he did not meet the requirements of the policy. The Supreme Court held that because this was a fixed policy, each of these decisions was not like an individual assessment of a given situation taking account of particular factors. Accordingly in that case the Supreme Court held that where there is a fixed policy that means you are always going to reach the same result, i.e. the engineer was going to fail in his application each time he applied, then the time limits did not run from the first decision. In that instance the time limit ran from the date of the last refusal and not the first refusal.

64. However, in this case there is no fixed policy comparable to that in the *Mungovan* case. Indeed, if anything, this case is the reverse of a fixed policy scenario since the Birds Directive make it very clear that in relation to the designation of particular sites as SPAs, they are done on a case-by-case basis to determine whether they meet the criteria, e.g. whether the site regularly supports 1% or more of the all-Ireland population of a species listed in Annex I of the Birds Directive.

65. Accordingly, this Court does not see any basis for concluding that, as suggested by Clonres, it is somehow exempt from time limits in its decision to challenge the non-designation

of the St. Paul's site because of the alleged continuing obligation of the Minister to designate the St. Paul site. An extract from *Mungovan* relied upon by Clonres states:

> "By not making a challenge to a particular decision, time runs. That is beyond dispute. But, a decision generally leads to result, for instance a licence is refused, someone cannot use a facility or obtain a grant. Those decisions must be challenged in time. But where the matter is analogous to secondary legislation, it is difficult to reason that fixed and unalterable policies become immune to judicial scrutiny simply because there has been a particular refusal that remained without challenge." (at para. 16 *per* Charleton J.)

66. It is worth noting that in contradistinction to a case where you could have repeated challenges and still be within the time-limits, Charleton J. instanced the typical judicial review situation, i.e. where you have a decision which generally leads to a result and those decisions must be challenged in time. This is exactly what happened here, where there was a decision in 2009/2010 and a result, namely the non-designation of the site which was not challenged in time (or even a confirmation of that decision in the August 2018 Letter which was also not challenged in time).

67. Obviously, if there was new information which required the Minister to change her mind, it might be different. This is clear from the *F.G.* case, to which reference has already been made. However, Clonres has not pleaded that the Minister took the decision in 2009/2010 based on certain information and that there was since then new information which justified a different decision (which information was ignored by the Minister), thereby justifying that subsequent refusal, by the Minister to designate, then being subject to fresh judicial review time limits.

68. Indeed, in its submissions, Clonres confirmed that it was not claiming that there had been a failure by the Minister to take into account new information or indeed relevant considerations or that the failure to designate the St. Paul's site was irrational. Counsel for Clonres submitted that:

> "[Counsel for the State Defendants] referred to the fact, well it doesn't say anything of what you would expect in judicial review, irrationality or failure to take into account relevant considerations. But of course we are not saying these are judicial review, but even if it was characterised in terms of judicial review, **they are not the type of grounds which would be relevant.** It's the failure of the State to take obligations or actions in compliance with their legal obligations, so **it wouldn't be an irrationality type ground or failure to take into account relevant considerations because that is not the type of challenge which is involved here**." (Emphasis added)

This is also curious because even if Clonres was not out of time, it is difficult to see how Clonres could successfully challenge the failure of the Minister to designate the St. Paul's site (based on her continuing obligation to designate sites), without claiming that some evidence was not taken into account by the Minister or that she reached an irrational decision. This is particularly so since it has accepted that this litigation does *'undoubtedly involve public law*

issues' and so is in substance a judicial review. Yet Clonres' own submissions deny that there is any such failure by the Minister.

69. For all these reasons therefore, this Court does not accept the claim by Clonres that the Minister is under a continuing obligation to designate sites, such that Clonres would be exempt from the time limits that apply to a judicial review of the Minister's decision not to designate the St. Paul's site in 2009/2010 (or even its confirmation of this decision in August 2018).

Extending the time limit?

70. If, as this Court has concluded, Clonres did not issue the proceedings within the time limit, the next issue that arises is whether this Court should grant Clonres an extension of time, since Clonres seeks such an extension, *albeit* it says out of an abundance of caution.

71. The basis for extending time is set out in Order 84, rule 21, sub-rules (3), (4) and (5), which provide 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.
>
> (4) In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party.
>
> (5) An application for an extension referred to in sub-rule (3) shall be grounded upon an affidavit sworn by or on behalf of the applicant which shall set out the reasons for the applicant's failure to make the application for leave within the period prescribed by sub-rule (1) and shall verify any facts relied on in support of those reasons."

72. It is important to note the mandatory nature of this order, namely that the Court shall only extend time *if* there is a good and sufficient reason for so doing. However, this is not enough. This is because the Court must also be satisfied that the circumstances which led to the failure to comply with the time limit were outside the control of Clonres *or* could not reasonably have been anticipated by Clonres. Furthermore, in considering whether there is good and sufficient reason to extend the time, the Court may have regard to the effect of any such delay on any third party, in this case, Crekav.

73. The only basis put forward by Clonres as a good and sufficient reason for the extension of the time was the following averment of Ms. Deirdre Nichol ("Ms. Nichol") on its behalf:

> "In relation to the application for an Order extending time to seek the reliefs set out in the pleadings I say and am advised that while it may not be necessary to do so, it is appropriate, out of an abundance of caution, to bring an application seeking to extend time to seek the reliefs sought in these proceedings. The Plaintiff relies upon all the circumstances of the case in this regard and the fact that these proceedings allege breaches of ongoing European environmental law obligations."

74. This is a most perfunctory attempt at coming up with a good and sufficient reason for this Court to extend the time limit. This averment does not engage to any degree with the underlying facts or circumstances of this case. It amounts to a claim that a good and sufficient reason for bringing judicial review proceedings almost a decade late is that the judicial review concerns European environmental law.

75. If this were the state of the law of judicial review, the legislature should simply have provided for no time limits when it comes to any challenge to any decision by a public body that relates to European environmental law, which it obviously has not done.

76. Indeed, if this Court was to accept the implicit proposition suggested by Clonres it would mean that there would never be any legal certainty regarding administrative decisions taken by public bodies which were related to European environmental law issues. This would mean that third parties, such as Crekav, would always be susceptible to having their plans to create housing, and considerable employment in the building of those homes, set at nought at any time. This cannot be correct in this Court's view.

77. Accordingly, it seems to this Court that this bald averment falls well short of providing good and sufficient reason for the extension of the time limit in this case. On this basis, the application under Order 84, rule 21(3) must be refused since the Court *'shall'* only extend the time limit '*if'* there is good and sufficient reason.

<u>Were the circumstances which caused the delay outside the control of Clonres?</u>

78. If this Court is wrong in this regard and the simple fact of claiming that the judicial review in question concerns European environmental law was regarded as providing good and sufficient reason to extend time, this is still not enough for the Court to extend the time limit. This is because Order 84, rule 21(3) requires Clonres to also establish that the circumstances that gave rise to the failure to meet the time limit were outside of Clonres' control or could not have reasonably been anticipated by Clonres. In its submissions, Clonres concentrated on the first leg of Order 84, rule 21(3)(b), *i.e*. that the circumstances were outside Clonres' control, rather than that the circumstances could not reasonably have been anticipated by Clonres.

79. In this respect Clonres relies on the averment of Ms. Nichol that:

> "I say that on the 11th October, 2018 we met with Mr Richard Bruton and Senator Catherine Noone to discuss the matter and the minutes from that meeting are at Tab 3 of the Booklet. Subsequent to that we had a follow-up meeting Minister Madigan in or around 13th December 2018. No minutes were taken at that meeting but it was to the same effect i.e. we asked her to designate the site and the Minister indicated that she would come back to [Clonres]. I say that we never heard back from the Minister. Having

waited a number of months for that response we ultimately were forced to issue the within proceedings."

80. The minutes of the meeting with Minister Bruton and Senator Noone, to which Ms. Nichol refers, state, *inter alia*, that:

"Meeting re Campaign to Save St Anne's

11th October 2018

[…]

Items Discussed:

Following on from the recent decision of An Bord Pleanála to refuse permission for the proposed development on the St Paul's Playing Pitches in St Annes, it is essential that:

1. these grass lands are restored and maintained,
2. these lands are designated under EU legislation, and

3. the area covered by the North Bull Island SPA is extended to include St Anne's Park and these lands […]

Action requested: Save St. Anne's representatives sought the support of Minister Bruton and Senator Noone in progressing these matters with their colleague Minister Madigan."

81. In considering in this context Clonres' claim that it was outside its control to issue the April 2019 Proceedings sooner or on time, it is important to bear in mind that Clonres' position is that no decision was taken by the Minister in 2010 or in August 2018 regarding the designation of the St. Paul's site that could be challenged. As previously noted, its position is that '*there is no public law 'measure' challenged in the present proceedings'*. However, this claim, that there was no ministerial decision (whether an act or an omission) that is judicially reviewable and so that there is no public law measure being challenged, would mean that Clonres is not subject to any time-limit in these proceedings.

82. It is important to remember that although Clonres claims that no public law measure is being challenged, the very purpose of the current proceedings is to seek a declaration that the Minister is required to designate the St. Paul's site and an injunction to compel her to do so. This is against the background where:

(i) the Minister failed to designate that site in 2009/2010, even though in February 2018 (as part of the planning process for the proposed development of housing by Crekav on the St. Paul's site), Clonres claimed that the St. Paul's site was inextricably linked with the North Bull Island SPA, and,

(ii) Clonres threatened the Minister in August 2018, after the Judicial Review (in which it was claimed that the Minister was under an obligation to designate the St. Paul's site as an SPA) had been struck out, that if she did not designate the St. Paul's site at that time, it would within 14 days issue proceedings against her.

83. Yet against this background, Clonres claims that it is not challenging any public law measure. Clonres seeks to justify this curious approach, by seeking the extension of time, even though it says no decision was taken to which a time-limit might apply, by saying it does so out of an abundance of caution.

84. On this basis it seeks to show that the circumstances, which resulted in the proceedings not being issued sooner, were outside its control. In seeking to show that the circumstances were outside its control, Clonres refers to a meeting with local representatives in their area, a minister and a senator, in which Clonres sought their support in progressing, with the relevant minister at that time (Minister Josepha Madigan), the designation of the St. Paul's site as an SPA and it also refers to a subsequent meeting with Minister Madigan.

85. Clonres is suggesting therefore that this political lobbying and the time it took amounted to circumstances that led to its failure to issue the April 2019 Proceedings earlier and these circumstances were outside its control. While this Court has already concluded that the appropriate time period began in 2010 with the decision at that time not to designate the St. Paul's site, if this Court is wrong in this regard and time began to run from the August 2018 Letter, then one must consider if the failure of Clonres to issue proceedings within three months of the date of that letter (24th August, 2018) can be said to arise from circumstances which were outside Clonres' control.

The nature of the circumstances which were allegedly outside the control of Clonres

86. The background to the August 2018 Letter is that Clonres wrote, through its solicitors, to the Minister and the CSSO on the 7th August, 2018 threatening to issue legal proceedings if the Minister failed to designate the St. Paul's site.

87. Clonres would have been very familiar with the strict three-month time limits for judicial review proceedings as it was legally represented at this time and had already issued the Judicial Review only a few months earlier in May 2018 against An Bord Pleanála and the Minister regarding the St. Paul's site.

88. Yet, despite this knowledge and despite threatening legal proceedings in its letter of the 7th August, 2018, it chose not to institute those threatened proceedings within three months of the August 2018 Letter, even though it did not get its desired response.

89. The key question is whether the subsequent political lobbying was a circumstance that led to Clonres' failure to issue proceedings within time and more importantly whether those circumstances were outside their control.

90. This Court does not accept that the undertaking of political lobbying by a prospective applicant in judicial review proceedings, comes in any way close to making it impossible or even difficult for that applicant to institute proceedings. It does not accept that the undertaking of political lobbying is a circumstance outside of Clonres' control such as to cause the delay in issuing proceedings in this case. Clonres had no difficulty issuing proceedings within the time-limits against An Bord Pleanála and the Minister in the Judicial Review proceedings in May 2018, in relation to the non-designation of the St. Paul's site. In this Court's view there was nothing stopping it from instituting proceedings in the three months after August 2018 in the

sense of there being no circumstances outside of its control (or indeed circumstances which could not reasonably have been anticipated) which prevented it from issuing those proceedings.

91. It may well be that Clonres took its 'eye off the ball' in relation to the proceedings against the Minister regarding the non-designation of the site, in light of its success in the Judicial Review. In any case, despite being aware of the tight time limits for judicial review challenges, it chose for whatever reason not to institute proceedings in time, which would have been by 24th November, 2018.

92. It seems that instead Clonres decided in October 2018 to pursue another way to achieve its 'primary aim' of preventing the building of homes on the St. Paul's site, namely by pursuing the ancillary aim of having the site designated as an SPA, this time through political lobbying (in addition to its previous threat of litigation).

93. The decision of *O'Donnell v. Corporation of Dun Laoghaire* [1991] I.L.R.M. 301 was relied upon by Clonres to claim that this political lobbying amounted to circumstances outside its control which led to the delay in issuing proceedings. This was a case where the delay, on the part of the applicant in taking judicial review proceedings, was caused by his interaction with public representatives. The High Court found that this amounted to *'good reason'*, within the meaning of the previous version of Order 84, rule 21, to extend the time limit.

However, this decision is of very limited assistance to Clonres, since it predates the very significant changes to the law introduced by Order 84, rule 21(3) which were clearly designed to introduce greater certainty to administrative decisions by tightening up the grounds upon which an applicant could get an extension to the time-limit. This amended rule introduced the exacting requirements that there be *'good and sufficient reason'* for extending the deadline *and* that the circumstances were outside the control of the applicant (or could not reasonably have been anticipated). Furthermore, sub-rule (5) introduced the requirement that the reasons for the delay had to be verified on affidavit. In addition, *per* sub-rule (4), the effect of the extension of the time limit on any third parties could be taken into account. When the *O'Donnell* case was decided, it was, simply a requirement that there be '*good reasons'* for extending the time-limit. Significantly, there was no requirement that the circumstances which caused the delay were outside of the applicant's control. Hence the *O'Donnell* case is of limited relevance to the present circumstances.

94. What is of more relevance is the decision of Finlay Geoghegan J. in the recent Supreme Court case of *M.O'S. v. The Residential Institutions Redress Board* [2019] 1 I.L.R.M. 149, which considered the current Order 84, rule 21(3) and the caselaw on the extension of time limits. She concluded at para. 51 that:

> "Each of the judgments set out clearly the obligation on a person who does not apply within the time limit **to give good reasons which both explain the delay and offer a justifiable excuse**." (Emphasis added)

She also noted at para. 60 that Order 84:

> "[C]learly requires an applicant to satisfy the court of the reasons for which the application was not brought both within the time specified in the rule and also during

any subsequent period up to the date upon which the application for leave was brought. It also requires the court to consider **whether the reasons proffered by an applicant objectively explain and justify the failure to apply within the time specified** and any subsequent period prior to the application and are sufficient to justify the court exercising its discretion to extend time. The inclusion of sub-rule (4) indicates expressly that the court may have regard to the impact of an extension of time on any respondent or notice party. The case law makes clear the court must also have regard to all the relevant facts and circumstances, which include the decision sought to be challenged, the nature of the claim made that it is invalid or unlawful and any relevant facts and circumstances pertaining to the parties, and must ultimately determine in accordance with the interests of justice whether or not the extension should be granted." (Emphasis added)

95. As noted by Finlay Geoghegan J., an applicant such as Clonres must give good reasons which both objectively explain the delay and offer a justifiable excuse. However, the fact that Clonres decided to adopt another approach to achieve its aim of preventing the housing development (by lobbying politicians to designate the site as an SPA), does not mean that Clonres could not have instituted the proceedings within time against the Minister or that doing so was in any way outside its control. Hence, in this Court's view these are not good reasons which objectively explain the delay or offer a justifiable excuse.

96. Indeed, it is relevant to note that the first time that Clonres brought proceedings to force the Minister to designate the site was three months prior to the August 2018 Letter, since it was in May of 2018 that Clonres instituted the Judicial Review against An Bord Pleanála and the Minister, in which it sought an Order forcing the Minister to designate the site as an SPA. Since Clonres was able to institute proceedings within time limits seeking very similar relief in the Judicial Review (i.e. a declaration that the Minister is obliged to designate the site as an SPA), it is surprising that Clonres would claim that somehow it was '*outside the control'* of Clonres to issue proceedings within time limits against the same Minister for very similar relief, simply because it was also engaged in political lobbying to achieve this end.

Effect of extension of time on third parties

97. In the *M.O'S.* case, Finlay Geoghegan J. also observed that the Court is entitled to take account of any possible prejudice to third parties in deciding whether to extend the time limit. Accordingly, this Court proposes to next consider under Order 84, rule 21(4) the effect that the proposed extension of time might have on a third party, which in this case is Crekav.

98. In this regard, Crekav paid tens of millions for the St. Paul's site with the aim of providing housing to the Dublin market. Mr. Patrick Crean, a director of Crekav, averred that:

> "At no time prior to the completion by Crekav of the purchase of the Subject Lands on 7 April 2016, was there any suggestion by anyone that the Subject Lands, or any part of them, were to be designated as a special protection area or that there was any possibility of this occurring. If there had been, Crekav would simply not have bid on them. At the time Crekav purchased the Subject Lands in 2015, it was actively considering 52 investment opportunities. Crekav opted to purchase the Subject Lands instead of pursuing a number of these opportunities. The purchase of the Subject Lands was funded by Crekav's finance partner and any suggestion of a negative change in the

designation of the Subject Lands as a special protection area would have meant that funding would not have been forthcoming. This is because no financial backer would assume such a risk."

99. As regards the prejudice to Crekav of extending the time period (and thereby preventing the strike-out of these proceedings), it is clear that Crekav would not have invested in the St. Paul's site if there was any possibility of it being designated as an SPA. Yet Clonres, although it was in existence at the time the sites in the locality were being designated as SPAs in 2009/2010, made no attempt to challenge the decision of the Minister not to also designate the St. Paul's site in 2009/2010. It seems clear to this Court that the extension of the time limit to allow Clonres now challenge the non-designation, despite its failure to do so in time and before Crekav purchased the site, would therefore prejudice Crekav.

100. Clonres effectively sat on its hands for 10 years while a developer spent tens of millions on the lands (even though, if Clonres is to be believed, the lands were worthless as development lands, because of their '*inextricable*' link with the North Bull Island SPA). Clonres only brought these proceedings in April 2019, which is almost a decade after the other sites in the vicinity (including, but not limited to, North Bull Island) were being designated as an SPA.

101. The first move by Clonres regarding the non-designation of the St. Paul's site as an SPA was some three years after Crekav had paid tens of millions for the site, with Clonres' issue of the Judicial Review proceedings in May 2018. Similar relief is sought in these the April 2019 Proceedings as was sought in that Judicial Review, and if successful, these proceedings will effectively render the site economically worthless.

102. It is also is clear that the primary aim of Clonres in seeking to have the St. Paul's site designated as an SPA is to prevent any housing being built on the site, which it is seeking to achieve through its *'ancillary aim'* of having the site designated as an SPA. One of the effects of extending the time period (and thereby denying the strike-out application) would be to enable Clonres pursue that aim, which is ancillary to its primary aim of preventing housing on the St. Paul's site, which in any case, it has pursued successfully to date, with two decisions of An Bord Pleanála granting permission for housing having been revoked.

103. Indeed, even if the August 2018 Letter, rather than the designation of SPAs in 2009/2010, was regarded as the administrative decision which should have been judicially reviewed, there would still be some prejudice to Crekav in extending the time limit. This is because Crekav would be dealing with a challenge to their housing plans, some five months after it should have been dealt with and so allowing such a challenge to proceed has the potential to delay any building works commencing by that period of time.

104. Furthermore, although not a determinative factor, it is clear that if the extension of time were granted to enable Clonres bring these April 2019 Proceedings in time, Clonres will then seek to amend its Statement of Claim in order to facilitate the possibility of a reference to the Court of Justice of the European Union ("CJEU"). This is because one of the proposed amendments to the Statement of Claim relates to a claim that the existence of a three-month time limit for the bringing of judicial review proceedings is contrary to EU law. In its submissions to this Court, Clonres refers to its intention to seek a reference to the CJEU on this

point. Such a reference to the CJEU could take up to two years. There is therefore also the future prejudice to Crekav of a possible further two-year delay to its housing development caused by a reference to the CJEU, if the proceedings were allowed to continue (with the benefit of the proposed amendment to the Statement of Claim).

105. In addition, it is clear that very significant costs have been expended by Crekav in seeking to obtain planning permission for hundreds of housing units on the St. Paul's site and to defend the May 2018 Judicial Review as well as a second judicial review of a subsequent planning application for the St. Paul's site. This second judicial review arose because a second decision was made by An Bord Pleanála granting planning permission to Crekav for the development of housing on the St. Paul's site. This grant of planning permission was successfully judicially reviewed by Clonres in July 2020.

106. For all of these reasons, this Court has found that any extension to the time-limit if granted would prejudice Crekav. This Court will next consider the other defences/claims made by Clonres regarding the time-limit issue.

Does an environmental decision have to be publicised to be judicially reviewable?

107. Clonres claims that the August 2018 Letter, which contained the refusal by the Minister to designate the site, was not an act which set time running for the purposes of time limits for judicial review. Clonres relies in this regard on the terms of the *Aarhus Convention*. It claims that since the alleged decision regarding the refusal to designate the St. Paul's site was made in a letter from the Minister's solicitor to Clonres' solicitor, it was not sufficiently public and transparent to amount to a decision for the purposes of time beginning to run.

108. This is because Clonres claims that a decision by the Minister in the field of environmental law must be public and transparent because of the terms of Article 3(1) of the *Aarhus Convention*, which states:

> "Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain **a clear, transparent and consistent framework** to implement the provisions of this Convention." (Emphasis added)

109. However, the *Aarhus Convention* refers to a 'framework' of implementing measures that have to be transparent. That does not mean, in this Court's view, that when, as in this case, a public body has a dispute with a citizen about measures to be taken, that the public body is in breach of the *Aarhus Convention* because that decision, in this case refusing to designate a site as an SPA in the August 2018 Letter, is not publicised on a website or by some other means.

110. Furthermore, Clonres provided no authority to the effect that a letter, from the Minister's solicitor to the citizens' solicitor (which group, it must be remembered, sought the SPA designation under threat of legal proceedings), which contains a decision in the field of EU environmental law, contravened the *Aarhus Convention* or did not constitute a decision for the purpose of judicial review time-limits, simply because it was not publicised, whether on websites, official journals, papers of record or otherwise.

111. Accordingly, this Court rejects the suggestion that the August 2018 Letter was in some way legally deficient or otherwise did not constitute a valid decision of a public body, so as to be judicially reviewable and accordingly this Court also rejects the suggestion that time could not run from the date of that letter (if this was the date of the administrative decision, rather than 2009/2010).

Time limit should not apply if dealing with EU rights?

112. Clonres has also argued that the time limit should not apply where one is dealing with EU rights. However, this issue has been considered by the CJEU in *Barth v. Bundesministerium* (Case C-542/08) and in *Commission v. Ireland* (Case C-456/08), and it is clear from these cases that it is not incompatible with EU law to have a time limit on the bringing of proceedings asserting a right or entitlement that derives from EU law.

113. In fact, an issue which this Court has emphasised in this case, namely the importance of having time-limits to ensure legal certainty in order to protect the interests of third parties, is emphasised in the *Commission v. Ireland* decision as a factor in the CJEU's conclusion that, not only are time-limits valid, but they are necessary in the interests of legal certainty.

114. Hence this Court rejects any suggestion that the time-limit for judicial review does not apply to the challenge by Clonres in this case, simply because it involves EU rights.

115. In making this argument and the argument under the *Aarhus Convention*, Clonres is essentially suggesting that different rules should apply to decisions relating to the protection of the environmental rights, particularly those derived from European law, such that there should be no time limits applicable to protecting environmental rights. The law does recognise some differences between environmental litigation and other litigation (see, for example, the 'not prohibitively expensive rule' to be found in Article 9(4) of the *Aarhus Convention* and see also ss. 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011 which provides for a departure from the normal rule that 'costs follow the event' by allowing for costs to be awarded in favour of a party involved in, *inter alia*, environmental litigation). These differences exist for good policy reasons (i.e. to reduce, but not eliminate, those financial disincentives which exist to discourage unnecessary litigation, where that litigation seeks to protect the environment). However, this does not mean that other rules such as time-limits within which to challenge administrative decisions, which exist for equally good policy reasons (i.e. ensuring legal certainty for third parties) should not apply to environmental litigation.

Time limit should not apply if dealing with a transposition issue?

116. Clonres also claims that the present case raises a transposition issue and therefore the three-month time limit should not apply. Clonres relied on the case of *Commission v. Cyprus* (Case C-340/10) to support this proposition. That case concerned the Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora (the "Habitats Directive") which requires Members States to take measures to establish a system of strict protections for certain animals. The case itself establishes that it is not enough for a Member State to introduce legislation, as concrete and specific protection measures have to be implemented to protect those animals.

117. First, all that is said in Clonres' Statement of Claim regarding transposition is paragraph 45 which states:

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

118. However, there is a lack of particularisation in the Statement of Claim regarding what has been not been properly transposed. For example, there is no particularisation of concrete measures that should have been taken to properly transpose the Habitats and the Birds Directives into Irish law. An assertion by Clonres that the Minister should have designated the lands at St. Pauls as an SPA is not a transposition issue.

119. Secondly, that decision is not authority for the proposition that where, as in this instance, one has a legislative framework (e.g. the European Communities (Birds and Natural Habitats) Regulations 2011) that comply with the relevant directive and a decision is taken by a Minister pursuant to those Regulations not to issue a direction (e.g. to cut the grass), that this failure to issue such a direction amounts to a transposition issue.

120. This Court cannot see how any transposition arises in such a case. If a transposition issue were to arise in this scenario, almost any alleged failure by a public body pursuant to the terms of a regulation (which transposes EU law into Irish law) could be challenged (without any time limit) on the basis that it amounts to a transposition issue.

121. If this were the case then one could imagine every challenge to a decision of a public body, which is made in the field of EU rights, claiming that the act/omission of the public body also amounted to a transposition issue, so as to ensure that no time-limits applied to the challenge. This would run contrary to the principles derived from the *Barth* decision and *Commission v. Ireland* that not only permit time limits to apply to legal challenges, but which require time limits in the interests of legal certainty.

Cannot seek declaratory order in interlocutory proceedings?

122. In the Notice of Motion, the State Defendants seek a declaratory order to the effect that the plenary proceedings are subject, by analogy, to the requirements of Order 84. Clonres has argued that it is not appropriate for the State Defendants to seek declaratory relief as part of interlocutory proceedings. However, these interlocutory proceedings have the potential to be a final application, since if the State Defendants are successful in the relief they seek, the proceedings may end up being struck out. For this reason, this Court does not see any merit in this point, particularly as there are many reliefs which are sought during interlocutory proceedings which end up being final, such as discovery orders and security for costs orders.

Conclusion

123. The conclusions reached by this Court can be summarised as follows:

- The within plenary proceedings are subject to the time limit contained in Order 84, rule 21(1),

- Despite Clonres' claim that it is not challenging any public law measure, this Court has concluded that Clonres is seeking to challenge the decision made by the Minister in 2009/2010 not to designate the St. Paul's site as an SPA,
- The proceedings should have been brought within three months of that decision,
- Even if the August 2018 Letter was the Ministerial decision being challenged, the issue of the April 2019 Proceedings was five months outside the time-limit,
- The reliefs sought by Clonres against the State Defendants are therefore out of time,
- Clonres has not proven that there is '*good and sufficient reason*' for this Court to grant an extension of time. Nor has it shown that the circumstances leading to its failure to institute its proceedings within time were outside its control. In addition, the grant of an extension of time would cause prejudice to Crekav. Hence there is no basis for extending the time.

124. It follows from the foregoing conclusions that this Court will grant the reliefs sought by the State Defendants in their Notice of Motion dated the 27th January, 2020. The proceedings as against the State Defendants will therefore be struck-out. Consequently, this Court refuses to grant the reliefs sought by Clonres in its Notice of Motion dated 16th March, 2020 in which it sought to amend both the Plenary Summons and Statement of Claim and in which it sought an extension of time. This Court will hear from the parties in relation to the precise form of the Orders to be made and any other matters arising from this judgment.