[2023] IEHC 592

THE HIGH COURT
JUDICIAL REVIEW

[2023 No. 407 JR]

IN THE MATTER OF SECTIONS 21B AND 3 OF THE FORESHORE ACT 1933, AS AMENDED AND IN THE MATTER OF SECTION 50B OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN

IVAN TOOLE
AND
GOLDEN VENTURE FISHING LIMITED

APPLICANTS

AND

THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE

RESPONDENT

AND

RWE RENEWABLES IRELAND LIMITED AND THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE

NOTICE PARTIES

(No. 6)

JUDGMENT of Humphreys J. delivered on Tuesday the 31st day of October, 2023

Judgment history

1. In *Toole v. Minister for Housing (No. 1)* [2023] IEHC 263, [2023] 5 JIC 2205 (Unreported, High Court, 22nd May, 2023), I granted an interim stay on the foreshore licence impugned in the proceedings.

2. In *Toole v. Minister for Housing (No. 2)* [2023] IEHC 317, [2023] 6 JIC 1603 (Unreported, High Court, 16th June, 2023), I continued the stay on an interlocutory basis.

3. In *Toole v. Minister for Housing (No. 3)* [2023] IEHC 378, [2023] 7 JIC 0302 (Unreported, High Court, 3rd July, 2023), I dismissed the case save as to two points, refused the application to dismiss those or to reduce them to declaratory issues only, set out a decision algorithm to progress the case going forward, and invited further submissions.

4. In *Toole v. Minister for Housing (No. 4)* [2023] IEHC 403, [2023] 7 JIC 1301 (Unreported, High Court, 13th July, 2023) I dealt with step (iv) in the decision algorithm set out at para. 51 of the No. 3 judgment by making an order of mandamus and deciding in principle to make a reference to the CJEU.

5. In *Toole v. Minister for Housing (No. 5)* [2023] IEHC 590 (Unreported, High Court, 27th October, 2023) I set out the reasons for the request for the expedited procedure before the CJEU.

6. I am now revisiting the stay in the light of the above developments, which is the module set out at step (v) in the decision algorithm.

Procedural history

7. This case was initiated on 26th April, 2023. For those who have an interest in such things, it can be noted that it has gone from a standing start to full pleadings, a full hearing, multiple ancillary hearings and six judgments within barely more than six months, two of which fell during the long vacation. Whatever else the parties may complain about, they can't complain about not getting reasonably prompt attention relative to other cases.

8. Following the No. 4 judgment on 13th July, 2023, the parties filed affidavits and written submissions on the stay, albeit that there was some slippage from the timetable set out in that judgment. The applicants delivered a final replying affidavit, a Fifth Affidavit of Marie Louise Heffernan, at 23.50 on 21st July, 2023 in unsworn form (sworn on 24th July, 2023). That is objected to.

9. Separately from that, the applicants and respondent delivered submissions on the proposed reference, dated 21st and 23rd July, 2023, respectively.

10. The present module was listed for hearing on 24th July, 2023, and adjourned to 25th July, 2023, when it was heard and judgment was reserved. The following procedural directions were given at that time:

(i) the applicants objected to any further amendment of the licence condition beyond that that had been directed and the opposing parties were given time until 26th July, 2023 to provide any further written comments on the possible amendment to the licence with a right to the applicants to reply by 28th July, 2023;

(ii) the State had 7 days from the hearing to endeavour to agree wording regarding a possible application for the expedited procedure in the CJEU;

(iii) it was noted that the developer indicated that it was not getting involved in Luxembourg; and

(iv) I reserved the right to also seek further written answers from the parties – as we shall see that was taken up with a figurative vengeance.

11. The State then prepared a draft request for the expedited procedure, which was circulated on or about 27th July, 2023. The applicants prepared a replying submission dated 28th July, 2023. Those documents were useful to the court in preparing the judgment on that issue.

12. On 10th August, 2023, the applicants lodged notices of appeal arising from the No. 3 and No. 4 judgments, Court of Appeal record nos. 2023/203 and 2023/204. While it's not a matter for me, some of the matters relied on as grounds of appeal are hard to recognise as points made in that form in the High Court, but in fairness to these applicants, that wouldn't be unprecedented as far as appellants generally are concerned, if my experience is anything to go by. Also in fairness to the applicants, a party that loses on some points mid-way through the case would not normally appeal at that stage but would await the conclusion of the case. Here however the State had expressly asked for all orders to be perfected as we went along, thereby making such mid-stream appeals inevitable. At the time, I did pose the question as to whether such a procedure would cause procedural complication but the State informed me that it saw no such complication. Eye of the beholder perhaps.

13. On 11th August, 2023, the List Registrar on my behalf communicated with the parties to request further submissions on one issue that arose in the hearing.

14. On foot of that, the applicants delivered a submission on 4th September, 2023, RWE did likewise on 11th September, 2023 and the State delivered a submission on 12th September, 2023. On 14th September, 2023, the applicants sought either a resumed oral hearing or a right to make a replying written submission. At that point I suggested that, if there was no objection, the applicants could do so within one week, but in the event of an objection the matter would be listed on 2nd October, 2023. The former option was acquiesced in and the applicants ultimately delivered a replying written legal submission on 25th September, 2023.

15. On 28th September, 2023 having reviewed all submissions I communicated further with the parties about issues that arose from all of the foregoing, particularly matters that were relevant to the wording of the reference, and listed the matter on 2nd October, 2023.

16. A further hearing then took place on 25th October, 2023 at which final submissions on the stay and other issues being dealt with in the present module took place.

17. I will now address a number of essentially procedural or technical issues and then turn to what now falls for decision, drawing on the list of issues set out at the end of the No. 4 judgment at para. 66 (xi). This has been somewhat more procedurally and substantively involved than most applications (and to illustrate that for the benefit of the parties, and without giving too much away, it will be no surprise to those involved in the case that the present judgment went through a record-breaking 42 draft versions, even bearing in mind that version numbers tend to be indicative rather than exact calculations of the amount of change involved).

Whether the applicants' final affidavit should be admitted

18. The notice party did not object to the admissibility of the applicants' final affidavit (the Fifth Affidavit of Ms Heffernan) as a matter of principle, while objecting to its relevance and weight. The State did object to the admission of this affidavit, but the objection was pitched at a very abstract level, on the basis that the opposing parties had already lashed their colours to the mast in submissions by that stage. But the State hasn't shown how that grand-sounding principle has caused any unfairness in practice. Given the timelines, it seems extremely unlikely that the applicants' affidavit was drafted with the specific purpose of neutralising points in the opposing parties' submissions specifically (as opposed to affidavit evidence). Even if that was the case, the opposing parties could make oral submissions by way of counter-punch. On an overall balance of justice and fairness basis it seems to me that I should allow this affidavit to be filed, but very much without prejudice to its legal relevance and weight. However as matters developed that issue has taken on a different character, as we shall see.

Wording of the licence condition

19. The order of mandamus was provided for in the No. 4 judgment to provide for new wording for condition 31.13 "along the lines" of wording set out.

20. The developer initially proposed an amended wording as follows (para. 10 of affidavit of Mr Kelly):

> "In the interests of mitigating possible in-combination environmental effects, the Licensee shall coordinate with other licence holders that overlap with the survey area to ensure that no temporal overlap between two or more ~~projects~~ surveys occurs.
> Where necessary, the Minister will determine the timing of specific survey activities with potential for in-combination effects to ensure that there is no temporal overlap."

21. The developer's concern was for example that relatively inert surveys, specifically buoys and FLiDAR (Floating Light Detecting and Ranging), might (probably would, since they are in place for

an extended period) overlap temporally with surveys by other developers hence giving rise to a technical breach of the condition as amended.

22. On the other hand, their wording is over-broad if it implicitly creates a category of activity that is a project but not a survey. The developer's basic concern however seems reasonable and can be addressed by an order that a particular forma, to which I will come, complies with the existing order of mandamus to put in place a wording "along the lines" set out in the No. 4 judgment.

23. At the hearing there was a discussion of a wording along the following lines:

> "In the interests of mitigating possible in-combination environmental effects, the Licensee shall coordinate with other licence holders that overlap with the survey area to ensure that no temporal overlap between two or more projects capable of having cumulative or in-combination effects occurs. Where necessary, the Minister will determine the timing of activities implementing such projects to ensure that there is no temporal overlap."

24. Following the hearing, by way of letter dated 26th July, 2023, the developer took up the liberty to suggest a further amended wording along the following lines:

> "In the interests of mitigating possible in-combination environmental effects, the Licensee shall coordinate with other licence holders that overlap with the survey area to ensure that no temporal overlap between two or more projects occurs in respect of activities capable of having in-combination environmental effects. Where necessary, the Minister will determine the timing of such activities to ensure that there is no temporal overlap."

25. The applicants objected to both refinements as not coming within the concept of a wording "along the lines" of the wording in the order of mandamus, as set out in that order.

26. On balance I think that the developer's final proposed wording does capture the essence of the point being made by the MLVC, or in other words, that if the licence is amended in this manner, there would not be any remaining legal infirmity by reason of a failure to reflect the essence of the reasoning within the terms of the licence. I provided for flexibility by allowing something "along the lines" of what was set out, so there isn't anything wrong in the developer taking that up, as long as what is proposed is along those lines, which I think it is. Admittedly, as the applicants point out objectingly, that would leave matters open to the Minister to determine what are in-combination effects, something which the applicants dispute. But the wording of the condition is to address a discrete legal point which was the mis-match between the licence and its supporting reasoning.

27. The conclusion under this heading therefore is that I will make an order to the effect that the developer's final proposed wording of 26th July, 2023, complies with the order of mandamus already made.

28. The factual background of all of this is that the applicants' evidence as to the potential in-combination or cumulative effects of inert surveys is very light.

29. I now turn to some of the specific issues in the issue paper outlined in the No. 4 judgment, but not in the order set out.

Issue (a) - Amendment of Statement of Grounds

30. Issue (a) is possible amendment of relief 2 by the substitution of "Minister" for "Board". The correction of that typo was not particularly contested so I will give the applicants liberty to file an amended statement of grounds accordingly.

Issue (j) - Whether the issue of the possible ultimate relief should be revisited

31. Issue (j) on which submissions were invited in the No. 4 judgment was whether the issue of not limiting core ground 10 sub-issue E to declaratory relief should be revisited in the light of developments since the question was previously considered.

32. That issue has proven to be more complicated than one might initially imagine.

33. While the notice party was clear that *certiorari* should be taken off the table, the State expressly accepted that this was a possible outcome of a subsequent hearing that might take place after the reference in the event that an error was shown to have occurred. The State subsequently did somewhat attempt to back-pedal and recharacterize that as just a description of what I had already held, but that isn't really a great answer because I specifically left that open in the No. 4 judgment and invited further submissions for the present module. Furthermore such a buck-passing characterisation contradicts the logic of their acceptance of the need for a further hearing.

34. The obvious problem with taking *certiorari* off the table at this stage is the possibility that in the event of an error being established, there would be a remedial obligation to redress any effects, which presupposes that the court should not generally permit any effects to actually occur while the decision is under plausible challenge.

35. If there is a reasonable possibility of adverse effects on a European site, then there is an argument that preserving the option of *certiorari* would be a requirement of EU law (although I don't need to decide this because I am referring this question as set out below). In its Judgment of 7 January 2004, *R. (Wells) v Secretary of State for Transport, Local Government and the Regions*, C-201/02, ECLI:EU:C:2004:12, the CJEU said as follows:

"64. As to that submission, it is clear from settled case-law that under the principle of cooperation in good faith laid down in Article 10 EC the Member States are required to nullify the unlawful consequences of a breach of Community law (see, in particular, Case 6/60 *Humblet* [1960] ECR 559, at 569, and Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 36). Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned (see, to this effect, Case C-8/88 *Germany v. Commission* [1990] ECR I-2321, paragraph 13).

65. Thus, it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment (see, to this effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 61, and WWF and Others, cited above, paragraph 70). Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337.

66. The Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment."

36. A similar principle is outlined in the Judgment of 12 November 2019, *Commission v Ireland,* C-261/18, ECLI:EU:C:2019:955, (Grand Chamber):

"75. Under the principle of sincere cooperation provided for in Article 4(3) TEU, Member States are nevertheless required to eliminate the unlawful consequences of that breach of EU law. That obligation applies to every organ of the Member State concerned and, in particular, to the national authorities which have the obligation to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out an environmental impact assessment, for example by revoking or suspending consent already granted, in order to carry out such an assessment (see, to that effect, judgments of 7 January 2004, *Wells*, C-201/02, EU:C:2004:12, paragraph 64, and of 26 July 2017*, Comune di Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraph 35).

76. As regards the possibility of regularising such an omission a posteriori, Directive 85/337 does not preclude national rules which, in certain cases, permit the regularisation of operations or measures which are unlawful in the light of EU law, provided that such a possibility does not offer the persons concerned the chance to circumvent the rules of EU law or to dispense with their application, and that it should remain the exception (judgment of 26 July 2017, *Comune di Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraphs 37 and 38)."

37. The present case has presented an incredible range of conundrums, not all of which have made it into the light of day in judgments because of the shifting range of thought, arguments and positions adopted or considered during the course of this matter, not least by the court. However the particular conundrum here can only be answered by asking how a court should normally deal with a defective AA and then by applying that to the situation here.

How should a court normally deal with a defective AA?

38. The premise of this discussion is of course that the relevant AA is in fact defective. That is an assumption for this purpose which will obviously be contested and argued in due course.

39. The normal sequence would be along these lines:

(i) in the context of an interlocutory hearing, if asked to do so the court would consider a stay on the decision pending the challenge to the AA – normally environmental considerations and the precautionary principle as well as the strict context of removing all scientific doubt would favour the grant of such a stay;

(ii) in the context of a substantive hearing, the court would decide on whether the AA is flawed;

(iii) if the AA was flawed, the order to be made would then be either as follows:

  (a). the remedial obligation would normally involve quashing the decision in the context of a direct challenge to a decision supported by a defective AA (see *Carrownagowan Concern Group v. An Bord Pleanála* [2023] IEHC 579 para. 88); or

  (b). taxonomically perhaps under the domestic heading of discretion, if it were established that the error would not have made any difference by analogy with Case C-72/12 *Altrip*, the court might not quash the decision but make some other order, which I discuss further below.

(iv) the court would then consider remittal if requested to do so; and

(v) if the matter is remitted, the court could give any necessary directions under O. 84 r. 27(4) RSC to the decision-maker as to the methodology of the fresh decision.

40. Suppose for example the court were satisfied that there was not going to be any significant risk to any European site (just a hypothesis obviously). How would that affect matters?

41. On that premise one could see an argument for both discharging the stay while the process plays out, and then ultimately considering some order other than quashing the permission overall once we got to step (iii). That could for example involve quashing the AA alone, directing a fresh AA and only quashing the decision if something new emerging from that process indicated scientific doubt about effects on a European site.

42. The logic of working through that hypothesis is that *certiorari* probably should remain on the table no matter what happens with the stay, so that the court will have whatever instruments are needed at its disposal depending on how earlier steps play out.

43. There is another practical and procedural advantage of that which is that it keeps the question of directions on remittal following *certiorari* on the table also, which enables the court to refer questions of a slightly more systemic nature as sought by the State. Otherwise the court might be confined to matters strictly arising on the facts and pleadings to date, as opposed to questions needed to guide remittal at a future point. Obviously that involves an acceptance by the parties that the matters which the State wants the court to refer can be properly the subject of an order of remittal or indeed declaratory relief by the applicant pursuant to the general claim in that regard, in due course. If anyone disagrees they need to let the court know immediately but otherwise silence will be taken as acquiescence.

44. The punchline is that I should not dismiss *certiorari* at this point and that it should remain an available relief until at least after the judgment of the CJEU.

Implications for the stay of retaining *certiorari* as an option

45. But keeping *certiorari* as an option doesn't automatically mean there has to be a stay. What it does mean however, given the precautionary principle, is that the stay should normally remain in place unless it can be demonstrated to be unnecessary to the same level of certainty as would be required following a hypothetical future finding that the AA was flawed.

46. Contrary to the applicants' argument, that is not AA by another name, or the court impermissibly stepping into the shoes of the Minister or any other dramatic and impermissible procedure. It is the court deciding on an interlocutory injunction, but calibrating the dials to the most applicant-friendly position, in view of the precautionary principle. Essentially discharging the stay on such a premise amounts to saying that as of now one can conclude that the decision would have been the same had the Minister used an approach that the applicant proposes: see *Canterbury City Council v. Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1211 (Admin). That doesn't mean that the ultimate outcome might not result in a new AA or that a new AA could conceivably throw up something new, but it does mean that any such a possibility is only speculative if there is no sufficient evidence of a risk of adverse effects on a European site that can be brought home as of now. The applicants complained of the costs burden, which I appreciate, but I am not sure that that outweighs the rights of other parties to have issues determined in a context like this. In fairness to developers in this kind of situation, stays or indeed proceedings being brought at all tend to impose significant costs, and the Aarhus context means that an undertaking as to damages is not going to be an option. So in that sort of context the financial burden on an applicant in defending an application to discharge a stay, while a factor, is unlikely in itself to be a decisive factor.

47. The immediate implication is that I am going to refuse the application to discharge the stay as of now. But I will give liberty to apply if the opposing parties want to have a hearing on that issue to be conducted on the assumption that all Luxembourg dominoes fall in favour of the applicants. This includes the following assumptions:

(i) the hearing will be *ex tunc*, that is can accommodate new scientific evidence not before the Minister, including but not limited to the evidence already filed;

(ii) the burden of proof will be on the Minister to meet the appropriate standard for AA of excluding all reasonable scientific doubt as to adverse effects on the integrity of a European site; and

(iii) the assessment will have to be conducted by reference to the maximal suite of types of projects that could potentially be considered as set out in the first of the additional questions proposed by the State for reference, notwithstanding any limitations in the applicants' pleadings and notwithstanding that certain elements of the case relevant to such impacts have already been dismissed.

48. I should finally add that, if hypothetically the opposing parties want another go at the stay issue, then on that premise, from the court's point of view, it would be preferable if the Minister were just to voluntarily conduct a fresh AA based, again voluntarily, on those assumptions, entirely without prejudice to the State's contention that those assumptions are not legally required, prior to seeking the discharge of the stay. For the reasons discussed (i.e., because this is just an interlocutory injunction, not the court doing an AA) I don't think that is a legal requirement, but it

is certainly better from my point of view and assuages the applicants' concerns of any apparent departure from the orthodox position. As stated there is no such departure, but it would be better on any possible view to let the Minister work everything through formally first by way of a detailed exercise, before coming back to the court for a fourth bite of the cherry in terms of opposing the stay. Also it is not completely inconceivable that such a fresh exercise might result in possible additional conditions to the licence which the Minister would be best placed to address by amendment prior to coming back to court. That isn't to suggest that amendment is likely, only that it is within the range of the possible.

49. On that basis and subject to the issue of metocean surveys, most of the other questions in the issue paper, which relate to the stay, no longer arise at this point.

Metocean surveys

50. Mr Kelly in his Third Affidavit reiterates at para. 17 that:

"Broadly, the Licensed activities are classified under the following headings (i) Geotechnical surveys, (ii) Geophysical surveys, (iii) wind, wave and current (metocean) measurement, and (iv) ecological monitoring."

51. At para. 22 of that affidavit he reiterates:

"As I outlined at §13 of my First Affidavit, certain geophysical surveying techniques use acoustic (noise-producing) systems, while others are passive (not noise-producing). Among the 'acoustic' systems, there are differences in the frequency and energy of the underwater noise produced, depending on the type of information required and the conditions in which the equipment will be utilised. This variability between equipment types introduces variability in the outputs and predicted effects of these systems on the marine environment and specifically on marine species."

52. While the specific geophysical survey techniques are not expressly listed on the axis of acoustic vs passive, Mr Kelly says:

"73. Table 2.1 of the IEC AA Screening report, page 100, tabulates the proposed equipment to be used for geophysical surveys, as revised following the receipt of RWE's Response Document, and the frequency ranges and sound pressure levels SPLpeak for the range of geophysical survey equipment proposed. As noted, SSS, MBES can be excluded from further consideration of underwater noise effects as they operate at frequencies that are too high for the marine mammals to hear, and magnetometers can be excluded because they emit no noise frequency at all.

74. The proposed refraction survey will take place in shallow waters close to the shoreline, is non-intrusive and therefore there will be no impact on any protected features. Again, there is no potential for adverse effects alone or in combination with other plans and projects."

53. Ms Heffernan replies to this at para. 48 of her Fifth Affidavit:

"In response to paragraph 73, I do not suggest that there is an impact from every piece of equipment, but all surveys cause disturbance through the presence of boats. This leads to the possibility of in-combination effects."

54. At para. 80 Mr Kelly states:

"The Licence permits up to two buoy mounted Floating Lidar (FLiDaR) Units and up to two buoys incorporating wave and current measurement devices. The physical disturbance to benthic habitats and communities would be short term, temporary and over a negligible footprint in the context of a large site and, therefore, with the specified mitigation there is no potential for adverse effects on any European sites. It is considered that, given the very small scale of the metocean surveys and their lack of interaction with any habitats or species, there is no likelihood of in-combination effects with this Licensed activity and any other plans or projects."

55. At para. 81 he continues:

"Finally, the Licence permits up to ten static acoustic monitoring devices (SAM) and up to three annual subtidal benthic ecology surveys comprising drop down video, grab sampling and epibenthic trawls. With mitigation, there is no potential for adverse effects alone or in combination with other plans and projects. Any physical disturbance to habitats and communities would be short term, temporary and over a negligible footprint (§6.4.7, RIAAS)."

56. Insofar as I can identify what elements of the licenced activities are not the subject of meaningful and effective challenge by Ms Heffernan, the only activities that one could be confident about are the metocean surveys (FLiDAR units and buoys). Ms Heffernan hasn't (at any rate clearly) identified detailed reasons why those activities would themselves cause material environmental harm other than the vague comment that they involve boats – but she doesn't quantify that or assess its significance in itself, and putting passive equipment in place or maintaining it by definition only involves limited boat activity. So I would be inclined to vary the stay to permit those. Cross-examination isn't inevitably necessary to address a conflict between a clear and detailed reasoned

averment and a somewhat vague one that lacks detail or sufficiently clear reasons: see *Doorly v. Corrigan* [2022] IECA 6 at para. 137 to the effect that while conflict between equally inherently credible averments, with no cross-examination, is normally resolved against the party carrying the onus of proof, a court is not always obliged to regard all averments as being equally credible, or to disregard internal or evident problems with them (see by analogy the manner in which the Supreme Court considered it was entitled to prefer an affidavit over even oral evidence in *Koulibaly v. Minister for Justice, Equality and Law Reform* [2004] IESC 50, [2004] 7 JIC 2906 (Unreported, Supreme Court, Denham J. (Geoghegan and McCracken JJ, concurring), 29th July, 2004)).

57. I appreciate that putting the FLiDAR and buoys in place will involve some minimal boat activity but I don't have anything to suggest that it would be other than fairly once-off or at least limited and can reasonably be regarded as a *de minimis* intervention. And insofar as the licence is to be operated at all in advance of the final order in the proceedings, the Minister will have to implement the order of mandamus first.

58. That doesn't imply that there is some principled difference between different elements of the licence but rather reflects the state of the evidence on whether the passive surveys are significantly problematic.

Issue (i) - Whether further referrable issues arise

59. Issue (i) is whether the foregoing issues themselves raise any referrable questions of EU law. The applicants propose one possible question:

> "Where a national court or tribunal intends to make a reference to the CJEU pursuant to Article 267 TFEU concerning the lawfulness of a second stage assessment carried out prior to consent being granted in respect of a particular project, pursuant to Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ('the Habitats Directive'), is the Applicant obliged to demonstrate a risk of irreparable harm and/or that the risk of an adverse effect to the integrity of a Natura 2000 site cannot be excluded beyond a reasonable doubt in order to obtain continued interim relief by way of a stay on the implementation of the impugned development consent for that project."

60. However I don't think it is "necessary" in term of Article 267 TFEU to refer any questions regarding the stay. I intend to deal with that myself pending the judgment of the Luxembourg court.

61. The State proposes the following question:

> "If the answer to Question 1 is in the affirmative, must Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (as amended) be interpreted to mean that appropriate assessment of the implications for the site of a project requires that the project be considered in combination with other plans or projects:
>
> (a) for which an application for permission has been made and which are drawn to the attention of the decision-maker for the purpose of such an assessment; and/or
>
> (b) for which an application for permission has been made to the same decision-maker, and which are not drawn to its attention for the purpose of such an assessment; and/or
>
> (c) for which an application for permission has been made to a different decision-maker, and which are drawn to its attention for the purpose of such an assessment; and/or
>
> (d) for which an application for permission has been made to a different decision-maker, and which are not drawn to its attention for the purpose of such an assessment; and/or
>
> (e) for which no application for permission has yet been made, but which are drawn to the attention of the decision-maker for the purpose of such an assessment; and/or
>
> (f) for which no application for permission has yet been made, and which are not drawn to the attention of the decision-maker for the purpose of such an assessment?"

62. This perhaps covers too much ground in one question and I think this can be re-worded into the following questions:

> **If the answer to the first question is yes, does Article 6(3) of Directive 92/43 have the effect that appropriate assessment by a particular competent authority of the implications for a European site of a proposed project the subject matter of a development consent requires that the project be assessed cumulatively or in combination with other plans or projects for which an application for permission has been made to the same competent authority but not determined, in relation to projects which are drawn to the attention of the competent authority for the development consent in question for the purpose of such an assessment, or alternatively in relation to projects of which that competent authority is or ought to be aware irrespective of whether they are drawn to its attention for the purpose of such an assessment?**

If the answer to the first question is yes, does Article 6(3) of Directive 92/43 have the effect that appropriate assessment by a particular competent authority of the implications for a European site of a proposed project the subject matter of a development consent requires that the project be assessed cumulatively or in combination with other plans or projects for which an application for permission has been made to a different competent authority but not determined, in relation to projects which are drawn to the attention of the first-mentioned competent authority for the development consent in question for the purpose of such an assessment, or alternatively in relation to projects of which that competent authority is or ought to be aware irrespective of whether they are drawn to its attention for the purpose of such an assessment?

If the answer to the first question is yes, does Article 6(3) of Directive 92/43 have the effect that appropriate assessment by a particular competent authority of the implications for a European site of a proposed project the subject matter of a development consent requires that the project be assessed cumulatively or in combination with other plans or projects for which an application for permission is proposed but has not yet been made to any competent authority?

If the answer to the fourth question is yes, should such an assessment be carried out in relation to proposed projects which are drawn to the attention of the competent authority for the development consent in question for the purpose of such an assessment, or alternatively in relation to proposed projects of which that competent authority is or ought to be aware irrespective of whether they are drawn to its attention for the purpose of such an assessment?

63. On the basis set out above, that is the relevance of this to directions in the event of remittal, I think this is a viable and appropriate set of questions to refer.

64. In addition the State propose the following question:

"If the answer to Question 1 is in the affirmative, may the relevant national court in a subsequent hearing refuse to quash the decision in question where it is established that there is no reasonable scientific doubt as to the absence of adverse effects on the integrity of the European site in question arising from potential in-combination effects of pending projects?"

65. I think this needs a little re-wording along the following lines:

If the answer to the first question is yes, does Article 6(3) of Directive 92/43 read in the light of the obligation to remedy the effects of a breach of Union law deriving from Article 4(3) TEU have the effect that where an appropriate assessment for a particular development consent was incomplete by reason of failing to correctly consider the question of cumulative or in-combination effects by reference to pending projects, a relevant national court before which a challenge to the development consent is sought may refuse to quash the development consent in question where the court considers that it has been established that there is no reasonable scientific doubt as to the absence of adverse effects on the integrity of any European site arising from cumulative or in-combination effects by reference to pending projects?

66. The State then proposed a further question as follows:

"If the answer to the preceding question is in the affirmative, should the assessment by the relevant national court of whether there is no reasonable scientific doubt as to the absence of adverse effects on the integrity of the European site in question arising from potential in-combination effects of pending projects proceed on the basis of the evidence provided by the developer or the competent authorities and, more generally, on the basis of the case-file documents submitted to the decision-maker at the time that the appropriate assessment was carried out, or on the basis of the facts and matters as at the time of the decision authorising implementation of the project."

67. Again I would re-word this because I think it covers too much ground and really asks both how the court should do its job and how the Minister should deal with a remitted decision. These need to be addressed separately. A further question thus would be:

If the answer to the sixth question is yes, does Article 6(3) of Directive 92/43 have the effect that the assessment by the relevant national court of whether it has been established that there is no reasonable scientific doubt as to the absence of adverse effects on the integrity of the European site in question arising from potential cumulative or in-combination effects by reference to pending projects proceed on the basis solely of matters pleaded by the applicant, including matters

which the applicant pleaded but failed to establish at an earlier stage of the proceedings, or of the material before the decision-maker, or matters that satisfy both criteria, or should such a consideration proceed on the basis of a consideration of all adverse effects including on the basis of such further evidence as may be put before the court when considering whether to annul the development consent, irrespective of whether reliance on such matters has been pleaded by the applicant and of whether or not the applicant has established a claim relating to alleged cumulative or in-combination effects at an earlier stage of the proceedings?

68. The further separate question as to ministerial obligations is:

Does Article 6(3) of Directive 92/43 have the effect that the assessment by the relevant national competent authority of whether there is no reasonable scientific doubt as to the absence of adverse effects on the integrity of the European site in question, in particular as arising from potential cumulative or in-combination effects by reference to pending projects, should proceed on the basis of the material before the competent authority at the time that the appropriate assessment was carried out, or on the basis of the facts and matters as at the time of the decision as to whether to grant the development consent.

69. In principle I would propose to refer these additional questions and will request the parties to provide proposed answers and identify relevant authorities in the normal *Eco Advocacy v. An Bord Pleanála* [2021] IEHC 265 format and as reflected in PD HC119.

Updated decision algorithm

70. To update the decision algorithm in the No. 3 judgment, having regard to the flood of developments since then, I would propose the following series of steps (keeping the original numbering system). Steps (i)-(iv) have already been completed.

(v) (a) the following step would be to reconsider the question of continuing, varying by reference to specified activities (and if so, temporarily staying the variation of) or discharging (and if so, temporarily staying the discharge of) the stay in the light of the foregoing and in the light of any possible appeals by any party – I am dealing with this now and varying the stay in one respect but otherwise maintaining it.

(b) if the opposing parties so apply, the court can deal with the question of a further hearing on the stay on the assumptions set out in the judgment.

(c) if such a hearing is directed, the court would reconsider the question of continuing, varying by reference to specified activities (and if so, temporarily staying the variation of) or discharging (and if so, temporarily staying the discharge of) the stay in the light of the foregoing and in the light of any possible appeals by any party;

(vi) subject to clarity on whether the foregoing steps are going to happen or not, and if so to those steps being taken, and to liberty to apply, the court would then deal with all adjourned costs including costs of the interlocutory stay applications if still in dispute at that point, including whether to award those costs, make no order, or reserve costs as respects all or any element of such costs; and

(vii) finally the court would deal with any stays on execution of costs awarded, if any, if that were to be an issue.

Order

71. For the foregoing reasons, it is ordered that:

(i) the Fifth Affidavit of Marie Louise Heffernan may be filed without prejudice to its legal relevance and weight;

(ii) pursuant to O. 84 r. 23(2) RSC the applicants have liberty to file an amended statement of grounds, to be filed within 7 days from the date of this judgment, so as to amend relief 2 to substitute "Minister" for "Board";

(iii) there be an order declaring that the developer's final proposed wording of the amended licence condition, dated 26th July, 2023, complies with the order of mandamus already made as being a wording "along the lines" of the wording in that order;

(iv) for the avoidance of doubt, the order of mandamus be without prejudice to a possible order of *certiorari* in due course, so that it need only be complied with in the event that either the licence is to be operated in any way pending the final order of the court, or that such final order does not include an order of *certiorari;*

(v) the stay be varied to permit the carrying out of the metocean surveys (FLiDAR units and buoys) authorised by the licence;

(vi) for the avoidance of doubt, the stay be varied to make clear that it does not operate to preclude or postpone the amendment of the licence in accordance with the order of the court, such that the amendment process can be completed by the respondent

and first named notice party in accordance with the procedure under clause 26 of the licence;

(vii) subject to the following, the stay be continued until the final determination of the proceedings or further order in the meantime;

(viii) there be liberty to apply, including in relation to a further hearing on the stay issue as set out in the judgment;

(ix) the *certiorari* claim remain a live relief at least until after the judgment of the CJEU;

(x) the parties be directed to provide simultaneous *Eco Advocacy* [2021] IEHC 265 type submissions within 2 weeks on their proposed answers to the additional questions for reference;

(xi) the matter be listed for mention on a date to be notified by the List Registrar; and

(xii) costs of the present module including costs of written submissions be adjourned to a date to be fixed.