AN CHÚIRT UACHTARACH
THE SUPREME COURT

Supreme Court Record No. 2021/133

O'Donnell C.J.
Charleton J.
Woulfe J.
Hogan J.
Murray J

Between/

RONALD KRIKKE, PIA UMANS, SEAN HARRIS, CATHERINE HARRIS, PATRICK KENNEALLY, CAROLINE KENNEALLY AND KENNETH GEARY

APPELLANTS

-and-

BARRANAFADDOCK SUSTAINABLE ELECTRICITY LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 3rd day of November 2022

Introduction

1. This appeal provides yet another example of the complexities of our planning laws and of how difficult it is often in practice to apply this *corpus juris*. Once again the Court is required to confront – although, perhaps, in the end not necessarily determine - the vexed question of how the power given to An Bord Pleanála by s. 5 of the Planning and Development Act 2000 (as amended)("the 2000 Act") to determine whether a particular development amounts to development (and, if so, whether such development can be regarded as exempted development) can be aligned with the jurisdiction of the courts to grant an injunction restraining unauthorised development under s. 160 of the 2000 Act.

2. While I gratefully adopt the much fuller statement of facts contained in the judgment which Woulfe J. has just delivered, the essence of this case may nonetheless be summarised as follows.

3. The respondent ("Barranafaddock") was granted a planning permission on 23rd November 2011 by Waterford County Council as planning authority ("the Council") to modify an existing planning permission in respect of a wind farm at Ballyduffy, Co. Waterford, for which permission had originally been granted in 2005 so that the blade diameters of the wind turbines might be increased. The original development was subject to the requirements of what is now the Environmental Impact Assessment Directive (2011/92/EU) ("the EIA Directive") and An Bord Pleanála was required to (and did, in fact) carry out an EIA as part of its decision-making in 2005.

4. The key feature of the November 2011 permission was that the wind turbines were now to have an increased rotor blade diameter of 90 metres. By a decision dated 23rd November 2011, the Council decided to grant planning permission, albeit that this permission was subject to two particular conditions. Condition 1 of the 2011 permission provided that the development

was to be carried out in accordance with the plans and particulars lodged with the application, save where amended by the conditions attached to the permission. The critical provision was, however, condition 3 of the 2011 permission, which provided that prior to the commencement of development, that details of the proposed turbines and associated structures, "including design, height and colour", were required to be submitted to and agreed with the Council. It does not appear that any EIA was carried out as part of the Council's decision-making process in November 2011.

5. Planning consultants retained by Barranfaddock made a compliance submission to the Council in November 2013. The submission included details as to the proposed height of the turbines, but the document also referred to schematic details of the turbine arrangement proposed being included in Appendix B. A drawing in Appendix B of that submission showed a schematic of a wind turbine and this indicated that the rotor blades would in fact have a diameter of 103 metres.

6. In December 2013, the Council addressed the consultants' submission. So far as condition 3 was concerned, the decision-letter merely stated "Noted and agreed". This was administrative brevity to the point of taciturnity. It was striking that there was no analysis of the merits of this application to modify the original planning permission, nor did the Council indicate that it was thereby (apparently) agreeing to an increase in the rotor diameter of the turbine blades from 90 metres to 103 metres. It is, however, only proper to record that the tip height of the turbine blades (that is, at the highest point reached by the tip of a blade) was not altered, as the height of the turbine hubs was lowered so that the tip height remains as permitted by the 2011 permission. The turbines became operational in 2015.

7. The appellants are local residents who were unhappy with the nature of the modified planning permission thus granted in November and December 2013. In response to complaints brought by the appellants and, indeed, others, residing in the general locality, the Council made

a referral to the Board pursuant to s. 5 of the 2000 Act in May 2018. The question referred was whether the deviation from the "permitted blade length of…90 metres diameter…to the constructed blade length of …103 metres diameter" was or was not development, or, if it was development, was or was not exempted development.

8. Following the preparation of an inspector's report in August 2018, the Board ultimately ruled on the s. 5 request in December 2018. Given its importance to this appeal, it is necessary to set out the terms of this particular ruling:

"**AND WHEREAS** An Bord Pleanála has concluded that –

(a) the erection of the turbines comes within the scope of the definition of development contained in s. 3 of the Planning and Development Act 2000,

(b) the alterations to turbines, including the length of the rotor arm/blades, do not come within the scope of the permission granted,

(c) there is no provision for exemption to the said alterations to turbines in either s. 4, as amended, of the said Act or Article 6 of the Planning and Development Regulations 2001, and

(d) therefore, the construction of the wind turbines as currently erected on site including the alterations to the rotor arms/blades is development and is not exempted development.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by s. 5(4) of the 2000 Act, hereby decides that the deviation from the permitted blade length of 45 metres (90 metres in diameter) to the constructed blade length of 51.5 metres (103 metres in diameter) in relation to permission granted under planning register reference number PD11/400 for modifications to a windfarm at Barranafaddock Wind Farm, County Waterford is development and is not exempted development."

9. Following the commencement of s. 160 injunction proceedings brought by the appellants in the wake of the s. 5 ruling, in the High Court Simons J. ultimately concluded that the s. 5 decision bound the Court, so that (in effect) it could not be argued that the development was unauthorised. He duly granted the s. 160 order sought by the appellants: see *Krikke v. Barranafaddock Sustainable Electricity Ltd.* [2019] IEHC 825.

10. As Woulfe J. has noted in his judgment, this decision was reversed by the Court of Appeal in a comprehensive and impressively detailed judgment delivered by Donnelly J.: see *Krikke v. Barranafaddock Sustainable Electricity Ltd.* [2021] IECA 217. As I propose to refer to this judgment from time to time in the course of my own judgment it is perhaps simply sufficient to say at this point that she disagreed with the earlier conclusion of Simons J. that the Board was not entitled to make a determination in the course of the s. 5 reference that there had been unauthorised development. The only role of the Board was to determine whether there was development or exempted development. In those circumstances, the High Court was not bound to follow the conclusion reached by the Board as to unauthorised development.

11. Against this general background I can now proceed to address the principal issues in the appeal which Woulfe J. has identified.

Can the decision of the Council of November 2011 now be challenged?

12. The first question is whether the decision of the Council of 23rd November 2011 and the subsequent decision of the Council in November 2013 to agree the details of the development with the developer can now be questioned in these s. 160 proceedings even though the applicants have never sought to have either of these two decisions quashed by way of judicial review. Section 50(2) of the 2000 Act (as amended) provides that:

> "A person shall not question the validity of any decision made or other act done by –
>
> (a) a planning authority, a local authority or the Board in the performance or purported performance of a function under this Act….

otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts."

13. There are certainly features of the decision-making process which led to the modification of the original planning permission in respect of which I cannot avoid feeling are distinctly unhappy. It is true that the practice of granting planning permissions subject to the agreement of certain conditions with the planning authorities is one which has received the general *imprimatur* of this Court in *Boland v. An Bord Pleanála* [1996] 3 I.R. 435. Perhaps such a conclusion was inevitable given that the work of planning authorities and the Board would otherwise have been rendered impossible. Yet, as Woulfe J. notes in his judgment, right from the earliest period of our planning laws, concerns have been expressed about the manner in which this grant of planning permission subject to later to be agreed conditions system actually operated in practice.

14. This was the very point which was made by McMahon J. in *Keleghan v. Corby and Dublin Corporation* (1976) 111 ILTR 144 at 145. Here, a planning authority granted permission subject to a condition that a new access road would have to be resubmitted for agreement. As it happens the permission subsequently granted was held to be invalid by reason of non-compliance with the publication requirements of the planning regulations which were then in force. McMahon J. nonetheless drew attention to the problem presented by the grant of a permission of this kind:

> "….in this case what was granted was permission for access subject to details to be submitted for agreement. The public would have no knowledge what details were in fact being agreed and [had] no way of appealing against the details agreed on between the applicants and the planning authority."

15. This appeal presents what amounts to a paradigm example of the difficulties to which McMahon J. alluded. The appellants were clearly and immediately affected by any material

increase in the diameter of the motor blade such was proposed here. While the overall height of the actual tip of the rotor blade might not have increased (given that the height of the turbine tubs was correspondingly reduced), the sweep of the turbine blades was nonetheless exponentially increased ($\pi r2$) by an increase in the blade size from 90m. to 103m. Given the views I am about to express regarding the scope of s. 50(2) of the 2000 Act, it is unnecessary to express any view as to the legality of the actions of Council in agreeing conditions of this kind and in this manner. It is sufficient to say that the appellants have an understandable grievance in that regard, even if the actions of the Council were intra vires (a question on which I express no view).

16. Yet even if one were to take the view that the actions of the Council in this regard were to be judged as unlawful so that the decision was in principle liable to be quashed, the effect of s. 50(2) of the 2000 Act is nonetheless now to shield that decision from judicial challenge. Section 50(2) of the 2000 Act operates as a sort of statutory suture which serves to bind up the wounds of invalidity and to banish all infirmities (subject only to some possible exceptions in the case of non-compliance with EU law) which might heretofore have attached themselves to the decision once – as here – the appellants did not commence the appropriate judicial review proceedings in a timely fashion as required by the sub-section or where time was not extended for this purpose. This is a simply another example of the more general principle of legal certainty which Henchy J. articulated in *Murphy v. Attorney General* [1982] I.R 241 at 315:

> "For a variety of reasons, the law recognises that in certain circumstances, no matter how unfounded in law certain conduct may have been, no matter how unwarranted its operation in a particular case, what has happened and cannot, or should not, be undone."

17. It is perhaps unnecessary here to consider whether there are any possible exceptions to this statutory rule in the manner suggested, for example, by the judgment of McKechnie J. in *Mone v. An Bord Pleanála* [2010] IEHC 395 where a planning permission was apparently

granted in the face of a statutory prohibition and where no proceedings had been brought in a timely fashion. It may be that this is a special case but even here such is the breadth of s. 50(2) that all types of legal errors – ranging from the trifling to the egregious – seem to be captured thereby. To that extent, therefore, I agree with Woulfe J. that *Mone* would appear to have been wrongly decided.

18. Here it is also necessary to say something about my own judgment in *Wicklow County Council v. Fortune (No.3)* [2013] IEHC 397 on which Simons J also relied. This was a case in which the Council had also applied for a s.160 order in respect of what was contended to be the unauthorised use of a large shed. The defendant had maintained that the shed itself was being used for the upkeep of horses whereas the Council contended that site inspections had revealed no evidence of this, save for the presence of manure and some three bales of straw.

19. The defendant had applied under s. 5 for a declaration that the structure was exempt in that it was being used for agricultural purposes. This application was refused in 2008, albeit that no very clear reasons had been given for that decision. No application for judicial review had ever been taken in respect of this decision.

20. In my judgment I held that the effect of this Court's decision in *Grianán an Aileach Interpretative Centre Co. Ltd. v. Donegal County Council* [2004] IESC 41, [2004] 2 I.R 265 was impliedly to preclude the High Court from pronouncing on "whether particular development is exempted development where the relevant local authority has already refused to grant a s. 5 declaration." While this meant that the Council were in principle entitled to a s. 160 order given that the local authority had refused to declare it exempt and the defendant did not have planning permission in respect of the use of the shed, I nonetheless noted (at paragraph 15 of the judgment) that the Council's decision had not in fact addressed the central argument which had been advanced on behalf of the defendant, namely, that as (he contended) the shed was being used for agricultural purposes, it was thereby exempt.

21. It was on the basis and "in these special circumstances" that I thought it best to adjourn the s. 160 application to enable the defendant to make a fresh s. 5 application should he think it appropriate to do so: see paragraph 19 of the judgment. As is clear from the judgment, it was in essence purely a pragmatic exercise of a discretionary jurisdiction as to whether to adjourn the making of the s. 160 order. It was not, I think, in any real sense questioning the validity of the original s. 5 decision, because, as the judgment makes clear, I considered that in the absence of a judicial review challenge, the s. 5 decision remained valid and effective. It was, after all, the very validity of that s. 5 refusal and its binding status which led to my conclusion that the High Court had no jurisdiction to address the exemption question and that on the facts of that case the Council was in principle entitled to a s. 160 order.

22. In these circumstances I agree with Woulfe J. that, with respect, Simons J. was incorrect in placing the reliance which he did on this decision. In any event, it would seem based on a recent decision of the Court of Appeal in *Norcanon Trust v. An Bord Pleanála* [2021] IECA 307 that the Council probably would not have had a jurisdiction to entertain any fresh s. 5 application absent new circumstances. To that extent I may well have been wrong in *Fortune (No.3)* in adjourning the s. 160 application in the manner in which I did.

23. Section 50(2) states clearly that the validity of the relevant planning decision shall not be questioned save in the course of the requisite judicial review proceedings. As Barron J. said of its immediate statutory predecessor, "since the validity of the decision cannot [now] be questioned, it must be treated as valid": see *Inver Resources Ltd. v. Limerick Corporation* [1987] I.R 159, at 162. In that case the argument was that since the permission was granted to a non-existent company, the permission was itself so worthless that it had no application at all. While Barron J. accepted that the validity of the decision could not now be questioned because the relevant judicial review proceedings had not been commenced within the statutory period, he nonetheless added (at 162):

"Nevertheless it cannot be given a greater validity than it purports to have. It is submitted on behalf of the applicants that since the company on whose behalf the application was made to which the permission has been granted never existed, in effect the permission is worthless because there is no one who can take its benefit."

24. Barron J. went on first to conclude ([1987] IR 159 at 164) that:

"…it is not necessary to decide whether or not the advertisement was properly advertised. Even if it was not, the decision cannot now be questioned. Equally the failure to give proper details of the applicant cannot now be questioned. The planning authority may not have had the jurisdiction to make the decision, but the absence of jurisdiction cannot now be questioned."

25. Barron J. then went to say:

"The only remaining issue is whether what they did has any substance or reality. It seems to me that it did. They had a real application before them and they adjudicated it upon it. This application was made by agents on behalf of a disclosed principal. In contract law, there might be ground for maintaining that, since the disclosed principal did not exist, the agent should be treated as the principal. However, the reality of the situation is that the second respondent [the de facto owner of the yet to be incorporated company] was the principal."

26. In the present case there is no doubt but that was a real application to modify the permission. Even if it be said that the Council's actions in November 2011 and November 2013 were ultra vires as permitting amendments to the original permission by open-ended conditions of this kind which extended the diameters of the rotor blades, it cannot be said that this did not relate to a real application made by an identifiable legal entity. In these circumstances, the decision to grant permission in this way and in this manner must be regarded as now standing beyond the reach of legal challenge.

27. I now turn to the second question of whether s. 50(2) the appellants can now challenge the validity of any such decision made or act done by the planning authority on EU law grounds,

Issue 2: EU Law and domestic time limits

28. I entirely agree with the conclusions of Woulfe J. on this issue. It is perfectly clear from a multitude of decisions of the Court of Justice that domestic time limitation periods are in principle consistent with EU law provided the time periods in question comply with the principles of equivalence and effectiveness: see, e.g., *Stadt Wiener Neustadt* (C-348/15, C:2016: 882), paragraphs 40 and 41.

29. In that case a Viennese municipality had originally granted a planning permission for a plastic waste processing facility. In December 2002, the local regional government for the Land of Lower Austria sanctioned an extension of that plant, relying for this purpose on general environmental legislation. No environmental impact assessment was, however, carried out in respect of this latter permission. The three-year time limit in respect of applications for annulment of the decision had, however, expired.

30. The Court of Justice held that while national law was entitled to prescribe a time limit in respect of such annulment proceedings, such a limitation period could not go to the extent of deeming the permission to be valid for all possible purposes. As the Court noted (at paragraphs 45 and 46 of the judgment):

> "45. ….it is the Court's settled case-law that the Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment (judgment of 7 January 2004, *Wells*, C-201/02, EU:C:2004:12, paragraph 66).
>
> 46. To that end, the competent authorities are obliged to take all general or particular measures for remedying the failure to carry out such an assessment (judgment of 7 January 2004, *Wells*, C-201/02, EU:C:2004:12, paragraph 68)."

31. For present purposes it is unnecessary to decide whether the extension of the rotor blades from 90m to 103m was in itself sufficient to trigger the application of an environmental impact assessment. Even if it did, the effect of s. 50(2) is to immunise that decision from legal challenge at the hands of these applicants, although, of course, in the light of the decisions of the Court of Justice in both *Wells* and *Stadt Wiener Neustadt* the State may still possibly have independent obligations under EU law vis-à-vis the site. I express no view whatever in relation to this because it could make no difference to the outcome of this particular appeal.

32. The real question is whether the eight-week time period (with a power to extend time) prescribed by s. 50(2) of the 2000 Act is compatible with EU law. There is, I think, no issue with the issue of equivalence. After all the sub-section applies indistinctly to all types of planning decisions and does not differentiate in any way as between domestic and EU law grounds of challenge.

33. Nor can there be any real question as to whether an eight-week period (with a power to extend time) makes it excessively difficult to bring judicial review proceedings of this kind. Here it would be difficult to improve on the analysis contained in the Court of Justice's judgment in *Danqua* (C-429/15, EU:C: 2016: 789) where the issue of a 15-day limitation period in respect of an application by an asylum seeker for subsidiary protection was at issue. The Court expressed itself as follows (at paragraphs 42-46):

> "42. In this connection, it must be noted that the Court has held that every case in which the question arises as to whether a national procedural provision renders the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. In that context, it is necessary, inter alia, to take into consideration, where relevant, the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the procedure (see, to that effect,

judgment of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, EU:C:2015:742, paragraph 41 and the case-law cited).

43. In this case, it is appropriate to consider, in particular, whether a time limit such as that at issue in the main proceedings may be justified for the purposes of ensuring the proper conduct of the procedure for examining an application for subsidiary protection, in the light of its implications for the application of EU law (see, by analogy, judgment of 3 September 2009, *Fallimento Olimpiclub*, C-2/08, EU:C:2009:506, paragraph 28).

44. As regards time limits, the Court has held that, in respect of national rules which come within the scope of EU law, it is for the Member States to establish those time limits in the light of, inter alia, the significance for the parties concerned of the decisions to be taken, the complexities of the procedures and of the legislation to be applied, the number of persons who may be affected and any other public or private interests which must be taken into consideration (see, to that effect, judgment of 29 October 2009, *Pontin*, C-63/08, EU:C:2009:666, paragraph 48)…….

46. In that context, taking account of the difficulties such applicants may face because of, inter alia, the difficult human and material situation in which they may find themselves, it must be held that a time limit, such as that at issue in the main proceedings, is particularly short and does not ensure, in practice, that all those applicants are afforded a genuine opportunity to submit an application for subsidiary protection and, where appropriate, to be granted subsidiary protection status. Therefore, such a time limit cannot reasonably be justified for the purposes of ensuring the proper conduct of the procedure for examining an application for that status."

34. It is true that the context of *Danqua* was very different from that which obtains in the present case. The general principle nevertheless holds true, in that the time period here is considerably more generous (eight weeks as compared to just fifteen days). There is furthermore a power to extend time. And, as Woulfe J. notes in his judgment, the applicants cannot realistically complain of any supposed difficulties attending the eight-week period because they never actually sought to apply for judicial review. And nor, for that matter, did they seek to extend time if (as might well have been the case) they were hampered in discovering what had actually happened by reason of a certain lack of transparency on the part of the Council's own decision making. For good measure I would add that I agree completely with all that Donnelly J. has said on this point at paragraphs 128-143 of her judgment for the Court of Appeal.

35. In these circumstances it cannot be said that the statutory time limit in s. 50(2) contravenes the general EU law principles of equivalence and effectiveness.

The scope and effect of s. 5 of the 2000 Act

36. The final question relates to the vexed issue of the scope and effect of the s. 5 decision of the Council. At the heart of the decision of Simons J. was that the High Court was bound by the outcome of the s. 5 reference to conclude that the development was unauthorised, and this formed the basis for his conclusions in relation to the grant of the s. 160 planning injunction.

37. Section 5 of the 2000 Act provides in relevant part as follows:

> "(4) … a planning authority may … refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board.
>
> (5) The details … of a decision made by the Board on a referral under this section shall be entered in the register.

(6)(a) The Board shall keep a record of any decision made by it on a referral under this section and the main reasons and considerations on which its decision is based and shall make it available for purchase and inspection."

38. Perhaps the first thing to note is that no application to quash this s. 5 decision in judicial review proceedings has ever been brought by the developer. Just as with the November 2013 decision, the legality of the s. 5 decision is thereby rendered invulnerable to challenge even if it is also clear that features of that decision are at least questionable from a legal perspective. Here it is sufficient to observe that recital (b) of that decision (to the effect that the alterations to the turbines, including the length of the rotor blades, did not come within the scope of the permission granted in November 2011) amounts in substance to saying that the Council's own November 2013 decision was ultra vires, even though, of course, this is a legal matter for the High Court and not for the Board. As Woulfe J. notes in his judgment, it is clear from a long line of authority that the Board's s. 5 jurisdiction does not extend to determining that a particular development is unauthorised: see, e.g., *Roadstone Provinces Ltd. v. An Bord Pleanála* [2008] IEHC 210, per Finlay Geoghegan J. and my own judgments in *Heatons Ltd. v. Offaly County Council* [2013] IEHC 261 and *Killross Properties Ltd. v. Electricity Supply Board* [2016] IECA 207, [2016] 1 I.R 541.

39. It is true, of course, that the Board's s. 5 jurisdiction also extends to determining whether a change of use itself amounts to a "development" (in the extended sense of that definition contained in s. 3(1) of the 2000 Act) for the purposes of s. 5(4). It is in that particular sense – and I think in that sense only – that the Board is entitled to say that the change of use was in breach of the terms of the original permission and, hence, so constituted development which was not exempted development. It was in that particular sense that I stated in *Killross Properties* ([2016] 1 I.R 541 at 548) that in practice there was "often only a slender line between ruling that a development is not exempted development since this will generally…

imply that the development is unauthorised on the one hand and a finding that a particular development is unauthorised on the other." The point here is that sometimes a s. 5 determination to the effect that there was development which was not exempt may *implicitly* suggest unauthorised development because in those circumstances it will be for the developer to point to the existence of a planning permission which, if not forthcoming, will necessarily suggest that the development is unauthorised.

40. This emerges from the judgment of McGuinness J. in *Palmerlane Ltd. v. An Bord Pleanála* [1999] 2 I.L.R.M. 514. Here the applicant had been granted planning permission for a retail convenience store, but upon the opening of the store, it also commenced selling some hot food. When the planning authority threatened enforcement action on the ground that the sale of the hot food was unauthorised, the company which owned the store referred this question to the Board under the precursor provisions to s. 5(4) of the 2000 Act.

41. The Board, however, declined to accept the reference on the ground that the company had commenced selling the food on the same day as the store opened, so that there had been no change of use in the ordinary and non-planning sense of this term and, hence, no "development" for this purpose. McGuinness J. quashed the Board's refusal to accept the reference as erroneous in law. As I observed in *Heatons Ltd. v. Offaly County Council* [2013] IEHC 261, "it is implicit in this judgment that a change of use in breach of a planning condition could amount to 'development' for the purposes of s. 5(4).": see *Heatons* at paragraph 37.

42. As it happens the decision *Palmerlane* was approved by this Court in *Grianán an Aileach***.** It is important to recall that this was another s. 5 change of use case. While the applicant in *Grianán an Aileach* had been given permission to operate as a cultural centre, the local planning authority contended that there had been a material change of use (and, hence, "development" for the purposes of s. 5(4)) inasmuch as the centre seemed in practice to being operating as a venue for regular weekend entertainment and hospitality. In the course of

examining whether the High Court had a jurisdiction to grant a declaration that there had not been a change of use, Keane C.J. observed ([2004] 2 I.R 625 at 636-637) that:

> "...a question as to whether the proposed uses constitute a 'development' which is not authorised by the planning permission is one which may be determined under the 2000 Act either by the planning authority or An Bord Pleanála."

43. I suggest that these words require to be carefully parsed. They should not be understood – as a casual reader might perhaps think – that a planning authority could make a *general* finding that a development was unauthorised, since this is a function reserved to the courts by s. 160 of the 2000 Act. Rather, these words of Keane C.J. are really addressed to the situation where the planning authority (or the Board) simply determines in the course of a s. 5 determination that change of use X is not authorised by planning permission Y. While, as I have already noted, this tends to imply that the development is generally unauthorised, I stress once again that the ultimate decision as to whether it is unauthorised is reserved to the courts.

44. In the present case, of course, there was no change of use (and, hence, no "development") in that special sense, since there is no suggestion that any of the turbines were used for any purpose other than wind generation. Yet in some ways none of this really matters in this case because such is the effect of s. 50(2) of the 2000 Act that the actual s. 5 decision of the Board must nonetheless be treated as being beyond legal challenge and must therefore be treated as valid.

45. What, then, was that decision? It seems to me that for this purpose the decision is the Board's conclusion that the deviation from the permitted blade length of 90 metres in diameter to the constructed blade length of 103 metres in diameter was "development and is not exempted development."

46. Proceeding, therefore, (as one must) from the basis that this decision is valid, it was necessary for Barranafaddock to point to the existence of a planning permission in respect of

this development in order to defend the applicants' s. 160 planning injunction application. But this it readily could do: it could rely on the 2013 decision granting permission for the 103m. blades in conjunction with the earlier 2011 decision.

47. It is unnecessary for this purpose to explore the complex inter-relationship between the Board's s. 5 jurisdiction on the one hand and the courts' s. 160 planning injunction jurisdiction on the other and, specifically, the question of whether the High Court (or, as the case may be, the Circuit Court) is bound by any such s. 5 determination. This was an issue addressed in cases such as *Fortune (No. 3), Wicklow County Council v. O'Reilly* [2015] IEHC 667 and *Kilross Properties.* It is perhaps sufficient to say that such is the curative effect of s. 50(2) on the various planning decisions in the present case, then even if the Board's s.5 determination did indeed bind the High Court and imply that planning permission was necessary, Barranafaddock could in turn reach back to the 2011 and 2013 decisions of the Council to demonstrate that it had in fact a valid planning permission for this purpose.

Conclusions

48. It follows, therefore that I consider for all of these reasons that, with respect, Simons J. was wrong to conclude that the development was unauthorised and that the operation of the relevant turbine with their extended diameter blades should be restrained by a s. 160 injunction. I would instead affirm the decision of Donnelly J. in the Court of Appeal, albeit possibly for slightly different and more confined reasons. While there are certainly features of the Council's decision-making in relation to the grant of permission which are unhappy and not entirely satisfactory, such is the effect of s. 50(2) of the 2000 Act that the validity of such decisions cannot now be questioned in the present s. 160 planning injunction proceedings.

49. It is for these reasons that I would dismiss the present appeal.