THE HIGH COURT

2017 No. 201 JR

(1) BETWEEN:

HELENA MERRIMAN, MICHAEL REDMOND, ADRIENNE MCDONNELL, PETER COLGAN, ELIZABETH MCDONNELL, TREVOR REDMOND, PATRICIA DEIGHEN, MARGARET THOMAS, NOEL REILLY, HELEN GILLIGAN, JAMES SCULLY, FERGUS RICE, NOEL DEEGAN, VALERIAN SALAGEAN, SIDNEY RYAN, GREG FARRELL, SHEELAGH MORRIS, JIMMY O'CONNELL, SILE HAND, DECLAN MCDONNELL, ELIZABETH ROONEY & DESMOND O'CONNOR

Applicants

– AND –

FINGAL COUNTY COUNCIL

First Respondent

– AND –

IRELAND AND THE ATTORNEY GENERAL

Second and Third Respondents

– AND –

DUBLIN AIRPORT AUTHORITY PLC

First Notice Party

– AND –

RYANAIR DAC

Second Notice Party

2017 No.344 JR

(2) BETWEEN:

FRIENDS OF THE IRISH ENVIRONMENT CLG

Applicant

– AND –

FINGAL COUNTY COUNCIL

Respondent

– AND –

DUBLIN AIRPORT AUTHORITY PLC

First Notice Party

– AND –

IRELAND AND THE ATTORNEY GENERAL

Second and Third Notice Parties

– AND –

RYANAIR DAC

Fourth Notice Party

JUDGMENT of Mr Justice Max Barrett delivered on 21st November, 2017.

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A. INTRODUCTION

I

The Applications and the Parties

1. The above-named applications ostensibly concern a decision made by Fingal County Council earlier this year to grant an extension to a planning permission of 2007 pursuant to which Dublin Airport Authority has permission to construct a new runway and do certain related works at Dublin Airport (the 'new runway permission').

2. The individuals named as applicants in the first application (the 'Case 1 Applicants') are all householders, so-called 'ordinary' people seeking, as their counsel put it at hearing "*to protect their homes from being overwhelmed by a runway or in fact more particularly, being overwhelmed by an administrative process which is trundling down a runway toward them and has been for the last ten years*".

3. The sole applicant in the second application (the 'Case 2 Applicant') is a limited company whose objects include the protection of the Irish environment. It is a member of the Irish Environmental Network and the European Environmental Bureau. In recent years, it has been especially concerned as to the growing impact of human activities on the environment and, in particular, the impact on our climate of the increasing production of greenhouse gases.

4. As will be seen, the applications brought by the householders and Friends of the Irish Environment are not identical. However, they overlap to such an extent that the two applications were heard in tandem, the arguments of the two sets of applicants greatly

overlap, and it is possible to adjudicate on their applications in a single judgment, though some elements of the judgment, as will be seen, are particular to one or other of the applications brought. One point of distinction is that the Case 1 Applicants have not previously been given leave to bring judicial review. What they have received is what is sometimes referred to as a 'telescoped hearing' in which application has been made on notice to seek judicial review, with the court to decide (i) whether to grant leave, and, if so, (ii) whether to grant relief? By contrast, the Case 2 Applicant has been given leave to bring judicial review proceedings and the court is therefore, only concerned with whether or not relief should be granted.

5. The respondents and notice parties are well-known persons and require no introduction.

II

The Nature of the Permission Granted

6. There are different types of planning decisions, for example, planning decisions that will inure to the financial gain of a particular private developer and planning decisions that are underscored by considerations of general public interest. That the new runway permission was a decision underscored by considerations of general public interest is clear from the text of the new runway permission, in which An Bord Pleanála expressly states itself to have had regard to, *inter alia*, the *National Development Plan, 2007-2011*, the *National Spatial Strategy, 2002-2020*, *Transport 21, 2006-2015*, the *Regional Planning Guidelines for the Greater Dublin Area, 2004-2016*, the *Dublin Transportation Office Strategy: Platform for*

Change, 2000-2016, and *Fingal County Development Plan, 2005-2011*, as well as previous County Development Plans in which it had been an objective, since 1972, to provide an east-west runway where the new runway is to be completed.

7. As averred to in the affidavit evidence sworn in the context of the within proceedings by Mr O'Duffy, an Assistant Principal in the Planning Policy Division of the Department of Housing, Planning, Community and Local Government:

> "*Dublin Airport constitutes one of the principal gateways into and out of the State, and is vital for the State's economic and broader links with other countries, including trade and tourism*",
>
> and
>
> "[T]*he challenges now presented by Brexit, and the current international geopolitical uncertainty, further contribute to the need for a Second Runway to ensure maximum connectivity between the State and the rest of the world.*"

8. The vital importance of the new runway to the national economy constitutes, to the court's mind, a relevant factor to which it may properly have regard in deciding whether to grant discretionary relief in the context of judicial review proceedings.

III

Three Preliminary Points

(i) Impermissible Collateral Attack.

9. To a very large extent the respective applications made by the applicants fall at the very first hurdle. That hurdle is this: any argument grounded on the contention that the new runway permission was granted in breach of the EIA Directive, as consolidated and amended, (the 'EIA Directive') and/or the Habitats Directive constitutes an entirely impermissible collateral attack on the validity of the said planning permission, many years after the time-period for questioning the validity of such permission has passed. This is contrary to:

- sections 50 and 50A of the Planning and Development Act 2000, as amended ('PADA');

- Order 84 of the Rules of the Superior Courts (1986), as amended;

and

- a long line of case-law that includes *Goonery* v. *Meath County Council* [1999] IEHC 15, *Nawaz* v. *Minister for Justice and Equality* [2013] 1 I.R. 142, and *Harrington* v. *Environmental Protection Agency* [2014] IEHC 307.

10. The foregoing is so clearly so that the court must express some surprise at the extent to which the arguments made by the applicants in the within proceedings strayed into the impermissible.

11. It is vitally important in a democracy that there be due participation by affected members of the public in the planning process. But it is equally important in a democracy which cherishes the rule of law that there be due respect for the law, and the law is entirely clear: to reiterate, any argument grounded on the contention that the new runway permission of 2007 was granted in breach of the consolidated EIA Directive and/or the Habitats Directive, constitutes an entirely impermissible collateral attack on the validity of the said planning permission, many years after the time-period for questioning the validity of such permission has passed.

12. In passing, the court notes that there was suggestion in the written submissions for the Case 1 Applicants, though this did not receive an airing at hearing, that the effect of the Opinion of AG Kokott in *Commune di Corridonia* (Case C-196/16) is that it is open to them to challenge an alleged failure to carry out an environmental impact statement, irrespective of the length of time since the planning permission was granted and whether the development has commenced. Two points might be made in this regard:

(1) the foregoing, with respect, mischaracterises AG Kokott's Opinion which discusses the consequences of an omission of an environmental impact assessment prior to the grant of a development consent; here, a full environmental impact assessment was carried out prior to the grant of the planning permission;

(2) it ignores the settled case-law of the Court of Justice (applied by the Supreme Court in *T.D. (a minor)* v. *Minister for Justice* [2014] 4 I.R. 277) that reasonable time-limits on the bringing of judicial review proceedings are compatible with the principle of effectiveness under European Union law.

(ii) Standing.

13. The Case 2 Applicant does not have standing (*locus standi*) to challenge the decision of Fingal County Council to extend the duration of the new runway permission pursuant to s.42 of PADA. It follows that the Case 2 Applicant has no entitlement to make submissions or observations in relation to that decision. In this regard the court recalls the following observation of Peart J. in his judgment in *Coll* v. *Donegal County Council* [2005] IEHC 231, considered later below:

"[T]*he applicant enjoys no* locus standi *to seek the* [s.42] *relief she seeks under this heading. Firstly, she did not participate in the planning process at all, but secondly and critically, the power of the planning authority to exercise a discretion to extend the duration of a planning permission is one which may be exercised appropriately without consultation with the public. It is not necessary under the statutory scheme to publish any notice of intention to apply for an extension, and neither is it necessary to erect any notice at the site of the development indicating an intention to apply for an extension. Under that scheme, as provided by s. 42 of the 2000 Act, a planning authority shall on application being made to it, extend the appropriate period for such additional period as it considers requisite to enable the development to be*

completed provided certain requirements are complied with, one of which is that referred to already, namely that the planning authority is satisfied that the development will be completed within a reasonable time. The applicant has no entitlement to be consulted in the making of that decision and therefore in my view cannot be heard to raise objections to the decision made."

14. Reference might also be made in this regard to the decisions of the High Court in *Lackagh Quarries Ltd v. Galway City Council* [2010] IEHC 479 and *Collins* v. *Galway County Council* [2011] IEHC 3.

15. The court notes that the Case 2 Applicant has also sought to rely on Art. 11 of the consolidated EIA Directive to assert its standing to take these proceedings. Notably, however, Art.11(1) of the consolidated EIA Directive provides as follows:

"*Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:*

(a) having a sufficient interest, or alternatively;

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality

of decisions, acts or omissions subject to the public participation provisions of this Directive."

16. Fingal County Council's decision to extend the duration of the new runway permission was not subject to the EIA Directive, much less its public participation provisions. So the Case 2 Applicant has no standing to challenge Fingal County Council's decision under Art. 11 of the EIA Directive.

17. In passing, to the extent, if at all, that the Case 2 Applicant continues to seek to rely on the Aarhus Convention, *i.e.* the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted on 25th June 1998 in the Danish city of Aarhus, it is clear from the judgment of Clarke J., as he then was, in *Conway* v. *Ireland* [2017] 1 I.R. 53, para. 9, that the Case 2 Applicant and/or its members may not mount a claim relying directly on the provisions of the Aarhus Convention. (Even if they could, a decision under s.42 of PADA is not a 'decision on whether to permit proposed activities'; thus the public participation provisions in Art.6(1) of the Convention would not avail them.)

(iii) Utterances in the Oireachtas.

18. Repeated attempts were made by the applicants to make argument by reference to certain utterances of the Minister for Housing, Planning Community and Local Government before Dáil Éireann (958(2) *Díospóireachtaí Parlaiminte* (Dáil Éireann), 13th July, 2017, 92) and Seanad Éireann (253(1) *Díospóireachtaí Parlaiminte* (Seanad Éireann), 18th July, 2017,

57), in each case in the context of parliamentary debates concerning what was then the Planning and Development (Amendment) No. 2 Bill 2017.

19. The court in arriving at the within judgment has respectfully disregarded the fact and substance of the said utterances by the Minister, as well as all submissions made by the parties concerning same. It has done so for the reasons identified by it last year in *Hoey* v. *Chief Appeals Officer, Social Welfare Appeals Office and anor* (Unreported, High Court, Barrett J., 21st December, 2016) the court's decision in that case being reached by reference to, *inter alia*, the decisions of the Supreme Court in *Crilly* v. *T & J Farrington Ltd* [2001] 3 I.R. 251 and *Controller of Patents* v. *Ireland* [2001] 4 I.R. 229. It is worth noting that the reasons why the court will not entertain argument concerning or relying upon such utterances is not because of some narrow legal point, but for reasons which go to very heart of how a tripartite democracy functions. As the court noted in *Hoey*, at paras. 33-37, under the heading "Consideration of Oireachtas debates":

> "*33. In* Controller of Patents, *a case in which,* inter alia, *discovery was sought of...documentation concerning the pre-enactment progress of certain legislation, Keane C.J. affirmed the Supreme Court's decision in the then recent (and unanimously decided) case of* Crilly... *'...that it will not even entertain the citation of passages from debates in the Oireachtas with a view to ascertaining what the intention of the Government or the executive was... '. The issue of whether the courts ought properly to have regard to Oireachtas debates was re-visited subsequently by McKechnie J.* [then a High Court judge] *in* O'Sullivan [*v. Irish Prison Service* [2010] 4 I.R. 562], *a case concerned with the constitutionality of a particular provision of the European Arrest Warrant* [Act] *2003, McKechnie J. stating as follows, at 584:*

'In relation to a consideration of Dáil debates in general, for the purposes of ascertaining the objectives of the legislation or interpreting provisions thereof, it has long been the case that such is impermissible. Such consideration would inevitably blur the lines between the role of the legislature in enacting laws, and the role of the judiciary in interpreting them…'.

34. McKechnie J. then considered, inter alia, Crilly *and* Controller of Patents, *before stating again, at 584:*

'The above situation seems clear; so also is the fact that the courts can have regard to the legislative history of any enactment for these purposes.'

35. When it comes to 'legislative history', the court understands McKechnie J. merely to be making the uncontroversial assertion that if, for example, s.10 of a particular statute is replaced by a new s.10, the court can have a look at both versions of the provision in a bid to understand the intended effect of the new s.10, a point touched upon by Murray C.J. in Crilly, *at 291* et seq. *where he distinguishes between 'parliamentary history' and 'legislative history'. McKechnie J. continues, at 585:*

'In any event, as noted above, nothing of relevance could in fact be found in the Dáil debates regarding the subject amendment....However, even if relevant commentary on the reasons for the amendment could be found in the debates, I would be extremely reluctant to utilise any such comments in considering the constitutionality of a section. Either the section is

constitutional or not. The debates ultimately can have no effect upon this by virtue of their indicating the intention of the Oireachtas in so legislating.'

36. There is perhaps a certain liberality of sentiment in the above-quoted observations of McKechnie J. that does not seem to all but shut out the admission of parliamentary material in the manner that seems contemplated by the Supreme Court in Crilly *and Controller of* Patents *– though even those cases, strong and clear as they are in their thrust, do not unequivocally establish that parliamentary materials are never ever to be consulted by the courts.*

37. Other jurisdictions have, as it happens, taken a more liberal approach as regards the introduction of the substance of parliamentary debates before their courts. However, it seems to the court that there are at least six reasons why the more (though not absolutely) restrictive tradition presently pertaining in the Irish courts is perhaps to be preferred. First, in giving effect to the intention of the Oireachtas which enacts statute as a whole body, statute is the uniquely authoritative statement of what the body intends. Second, the rule of law requires that citizens should be able to determine the law by reference to the laws as enacted by the Oireachtas and as interpreted by the courts (and by the courts only), not by reference to what a member of the executive and/or legislative branches, however esteemed or well-intentioned, construes the meaning of that legislation whether in draft form or later. Third, parliamentary privilege and the natural comity to be shown between the great organs of state requires that parliamentary debates should not be subject to judicial parsing or scrutiny. Fourth, if statute is plain and unambiguous, it is unnecessary and may engender uncertainty to have regard to the parliamentary debates that preceded its

enactment; the conventional canons of construction suffice as an aid to interpretation and themselves ensure a greater certainty as to the likely meaning of statute that is as yet un-interpreted by the courts. Fifth, if statute is unclear and/or ambiguous, it would be in truth an usurpation by unelected judges of the role of elected lawmakers for a court to correct omissions, remedy defects or fill gaps left by the legislature. Sixth, practical concerns also present such as (i) whose contributions to parliamentary debates are to be preferred (e.g., *a Minister who sponsors legislation, other ministers, Government supporters, members known to have a special interest in particular legislation?) and (ii) the increase in confusion for and costs to members of the public if statutory interpretation were to become a matter of legal advisors reading the runes of parliamentary debates instead of having regard merely to statute and relevant case-law in order to determine statutory meaning.*"

20. To the foregoing, the court would add that it can think of nothing more likely to have a chilling effect on that freedom of speech which ought generally to pertain in a national parliament, than that members of that parliament would consider that every word which was uttered in the sometimes heated environment of a democratic assembly could later be subject to parsing and scrutiny by dry-minded lawyers in dusty courtrooms far removed from the cut and thrust of political fray. This potential chilling effect, as well as the other weighty concerns touched upon by the court in the above-quoted text, amply justify it in taking the approach that it has in the within proceedings, *i.e.* declining to consider those points which the applicants have sought to make by reference to the above-mentioned utterances before the Houses of the Oireachtas.

(iv) Judgment Notwithstanding.

21. Notwithstanding the court's conclusions as to the three preliminary points considered above, it is necessary and appropriate to address the various arguments raised by the parties in the course of these proceedings as though those preliminary findings had not been reached, if only so as to provide a comprehensive judgment on those issues in the event that the court's decision is appealed. However, all that follows must be read on the basis that the court is, until it reaches the final section of this judgment, (i) leaving to one side the conclusions it has reached above on the three preliminary points considered, and (ii) ignoring the great difficulties that those preliminary findings present for the applicants in terms of their respective applications.

IV

Standard of Review and *Ultra Vires* Arguments

(i) Standard of Review.

22. When it comes to judicial review of the decision made by Fingal County Council pursuant to s.42, it is, to coin a colloquialism, 'Judicial Review 101' that the question before the court is not whether it agrees with that decision, and the elements of same, but whether there was material before Fingal County Council which sustains its decision. (*O'Keeffe* v. *An Bord Pleanála* [1993] 1 I.R. 39). The court does not understand this to be disputed. The application of the *O'Keeffe* principles to a s.42-like precursor (s.4 of the Local Government

(Planning and Development) Act 1982) is to be found in *Littondale* v. *Wicklow County Council* [1996] 2 I.L.R.M. 519, Laffoy J. observing, *inter alia*, as follows, at 536:

> *"I have quoted extensively from the judgment of the Supreme Court in O'Keeffe v. An Bord Pleanála for the purpose of emphasising the parameters of the court's function on an application such as this application. On this aspect of the applicant's case, it is not the court's function to determine on the merits whether substantial works were carried out pursuant to the 1981 permission between 31 December 1981 and 31 October 1987 in the light of the evidence adduced in this Court. The court's function is to review the manner in which the respondent concluded that substantial works had not been carried out pursuant to the 1981 permission within that period having regard to the material which was before the respondent when the decision was made on the applicant's application....The question for this Court is not whether the determination that the works carried out were not 'substantial works' within the meaning of paragraph (c)(ii) was correct, but whether that determination flew in the face of reason and common sense."*

23. This observation was subsequently applied with approval in *McDowell* v. *Roscommon Co Council* [2004] IEHC 396, 13, Finnegan P. reciting the above-quoted text and then concluding:

> *"Thus I am not concerned as to whether the conclusion arrived at by the Respondent that the dwelling under construction is significantly different from that for which planning permission was granted is correct: that is a matter which can only be determined, it seems to me, in plenary proceedings or in proceedings under Part VIII*

of the Act of 2000. My function is to review the manner in which the decision was arrived at and determine whether or not the same accords with the requirements of section 42."

(ii) Arguments as to Vires.

a. Overview.

24. So far as issues of *vires* are concerned, it seems to the court, having now heard the applications, that the complaints made are twofold. Thus there is a challenge:

(1) to the finding that there were considerations of a commercial or economic nature which militated against the implementation of the planning permission.

(2) in relation to the commencement of works.

25. Argument (2) itself seems to have two parts, *viz.* (i) that the works had not commenced when Fingal County Council came to make its decision (a contention wholly unsupported by the evidence), and (ii) a more sophisticated argument that (a) if the works had commenced, they commenced in breach of condition and (b) that fact in some way precludes the planning authority from relying on the planning permission as having commenced).

26. As will be seen from the court's consideration of the text of s.42 later below, the above challenges draw from the express terms of that provision.

b. Considerations of a Commercial, Economic or Technical Nature.

27. When one looks to the decision of the Council, which is considered in further detail below, it is clear that Fingal County Council had regard to three particular points:

(I) the global economic environment;

(II) the impact of same on airlines (the principal customers of the DAA); and

(III) the views of the Commission for Aviation Regulation.

28. The foregoing are clearly economic or commercial considerations. And the test arising under s.42(1)(a)(ii)(I) of PADA is a relatively light one, *viz.* that the authority is satisfied "*that there were considerations of a commercial, economic or technical nature beyond the control of the applicant which substantially militated against either the commencement of development or the carrying out of substantial works pursuant to the planning permission*". When the court considers the reports that were submitted to the Council on behalf of Dublin Airport Authority and the assessment of those reports in the planning officer's report, that material and the analysis that followed is clearly sufficient to discharge the rationality test.

c. The Commencement/Extent of the Works.

29. The second challenge presenting concerns the commencement/extent of the works. This, as mentioned above, breaks down into a number of sub-issues.

30. The first of these is whether or not sufficient was done to constitute commencement of works. In this regard, as of the date of the decision on 7th March 2017, works had commenced and the planning authority had conducted a site inspection. So clearly there was commencement of works.

31. The second issue presenting is the argument that because there was a belated compliance with condition 12 (h) that the works were not in fact commenced. (Condition 12 of the new runway permission provides, *inter alia*, that "*Prior to commencement of development, the developer shall submit to the planning authority for written agreement a comprehensive environmental protection plan to minimise the impacts of the construction processes. The plan shall provide,* inter alia, *for...(h) a waste management plan to ensure the minimisation of waste, re-use or re-cycling of materials*").

32. What the applicants seem to do in this regard is to read into s.42 of PADA an additional criterion so that, notwithstanding that s.42(1)(a)(ii)(IV) merely distinguishes the situation "*where the development has not commenced*" it in truth means to refer to commencement in accordance with full compliance with the planning conditions. But that is not what s.42(1)(a)(ii)(IV) provides. It might be nice if it did, it might even be better if it did (the court has no opinion in this regard), but, for the purposes of the within application what

counts is that at the time the Council made its decision s.42(1)(a)(ii)(IV) did not so provide (nor does it so provide today).

33. Importantly, it is clear from the judgment of Finnegan P. in *McDowell* that it would be impermissible for a planning authority to use the occasion of an application for an extension of duration under s.42 as a pretext to conduct, in effect, a form of quasi-enforcement. That, it is clear from the judgment of Finnegan P. would be contrary to the literal provision of s.42 and also to usurp the enforcement role of planning authorities under Part 8 of PADA. So even if Fingal County Council had taken the view (and it did not) that there had been a breach, ongoing or otherwise, of a planning condition, the response to that could only have been enforcement action. Fingal County Council was not entitled to use s.42 for a separate (enforcement) purpose.

V

A Minor Point of Style

34. It has been necessary to include in the within judgment extracts from a number of different texts, *e.g.*, judgments, affidavit evidence, planning materials, *etc.* Any emphases and font styles shown in any such quoted texts appear in the original texts unless otherwise stated.

B. THE PREVIOUS PROCESS

VI

The Process that Preceded the New Runway Permission

(i) Overview.

35. There is a lot of material before the court which identifies the extent of the exercise that was carried out before An Bord Pleanála in 2007. There are two reasons why it is useful briefly to focus on same:

(1) it assists in distinguishing the facts of the within applications from those which pertained in *Dellway*, a case on which no little reliance has been placed by the applicants;

(2) it is clear when one has regard to this material that the complaints now made in relation to the environmental impact assessment, *etc.*, were all fully ventilated and addressed before and by An Bord Pleanála and by the Case 1 Applicants.

36. As mentioned, the Case 2 Applicant did not participate in the process that led to the granting of the new runway permission by An Bord Pleanála. However, other persons who are, in effect, experts in relation to environmental impact assessments and the Habitats Directive did participate. Counsel learned in the law appeared for the Case 1 Applicants. And a trio of inspectors conducted the oral hearing, one of whom has a known expertise in the

issue of noise. So there was a very full consideration of all applicable issues, which consideration might usefully be described by the court at this juncture in 'headline terms.'

(ii) Mr Byrne's Evidence.

37. As good a place as any to start in this regard is with certain affidavit evidence of Mr Byrne, a planning official of Fingal County Council, who avers, *inter alia*, as follows:

> "*The* [Case 1] *Applicants did...invoke the permissions provided for the participation in the appeal process before An Bord Pleanála which led to its decision to grant the said* [new runway] *planning permission with 31 conditions on 29th August 2007....*[T]*he Applicants 'comprise the St. Margaret's Concerned Residents Group'....The St. Margaret's Concerned Residents Group was one of the parties that lodged an appeal to An Bord Pleanála in respect of the planning permission. It made submissions on a range of matters including but not limited to the impact of the development on the community, the daa's proposed voluntary residential buy-out scheme, noise, traffic, health, cultural heritage, visual impacts, the construction process and fauna. It made an appeal submission, and a submission following the EIS Public Notice dated 25th May 2006. It also participated in, and made submissions at, the oral hearing which took twelve days and was held on the 26th and 27th September and from 29th September to 12th October 2006....*
>
> *The Inspector's Report of the said oral hearing records that Ms. Helena Merriman, Ms. Sheila Morris, Mr. Noel Reilly, Mr. Jim Scully and Ms. Helen Gilligan all attended the oral hearing. I say and believe that these names refer to five of the*

Applicants herein. The Inspector's Report also records that Mr. N. Reilly, Mr. J. Scully, Ms. H. Gilligan, Ms. Deirdre Colgan, Ms. S. Morris and Ms. H. Merriman made submissions on behalf of St. Margaret's Concerned Residents [Group] *on the impact of the proposal on their lives and properties and that further submissions by P. & M. Deighan, S. Hand and J. Scully were presented on their behalf. I say and believe these names also refer to a number of the Applicants herein....I say and believe that Deirdre Colgan is identified as a member of the St. Margaret's Concerned Residents Group and the submissions subject to these proceedings is not one of the Applicants herein. Subsequent to the oral hearing, the St Margaret's Concerned Residents Group also made a submission on the revised public notices and the Section 132 response. I beg to refer to a copy of An Bord Pleanála's Inspector's Report.*"

(iii) The Report of An Bord Pleanála's Inspector.

38. The report of An Bord Pleanála's inspector has been exhibited before the court. The court does not propose to engage in any detailed analysis of same; however, it is worth briefly touching upon its substance, if only to show the extent of the public participation that was a feature of the new runway planning permission application process.

39. The report is a lengthy document, over 200 pages in length and drawing on extensive underlying materials that were not before the court. Section 2 of the report is headed "*APPEAL SUBMISSIONS*" and identifies each of the third-party appellants, including the St Margaret's Concerned Residents Group, as well as another community group, the Portmarnock Community Association. The inspector then runs through the issues that were

raised, with the concerns of the St Margaret's Concerned Residents Group being summarised as follows:

"*2.1.7 St Margaret's Concerned Residents Group*

- *The proposal will result in the end of St. Margaret's and the erosion of the strong community. The mitigation measures proposed, which were not discussed or finalised with the group, will serve to destroy rather than provide an acceptable solution.*

[This want of participation has been touched upon by the Case 1 Applicants in the within proceedings. However, the court cannot but note in this regard that the Case 1 Applicants did not seek to contest the legality of the new runway permission when it issued. Nor was there any challenge to the voluntary purchase scheme established pursuant to Condition 9 of the planning permission (which provides that "*Prior to commencement of development, a scheme for the voluntary purchase of dwellings, shall be submitted to and agreed in writing by the planning authority. The scheme shall include all dwellings predicted to fall within the contour of 69 dB LAeq 16 hours within twelve months of the planned opening of the runway for use...*"; it appears from the evidence before the court that the Case 1 Applicants do not come within that contour; even so Dublin Airport Authority, for whatever reason, has included them in the now-agreed voluntary purchase scheme)].

- *In terms of the buy-out scheme, the community has no intention or desire to sell their properties and are therefore being forced into an...* [untenable] *position.*

  [This, the court notes, is a point that was made in near-identical terms by counsel for the Case 1 Applicants at the hearing of the within applications.]

  Currently the community enjoys a rural setting with all the amenities of urban life and an active community. The proposed installation scheme is piecemeal and will not provide a satisfactory solution. DAA do not operate a night curfew.

  [The court notes in passing that the new runway permission deals with this concern and ensures that there will not be night-time air traffic].

- *The manner in which development has been dealt with to date has had a serious impact on health with high levels of stress and anxiety.*

- *Lighting will visually affect Millhead, Dunbro, Kilreesk and St Margaret's village.*

- *The road improvements and road closures will have a negative impact effectively dividing St Margaret's and surrounding townlands. The improvements and proposed reservations at the western boundary of the airport lands should be clarified and put on public display to allow for submissions.*

- *The change in road realignments (R108 and Dunbro Lane) will result in increased traffic and give rise to safety concerns as Dunnbro Road is used for walking, cycling and access to the Boot Inn.*

- *The construction process will have a negative impact on the village.*

- *The community should be advised and consulted about the submissions arising from a number of the conditions attached to the planning authority's decision.*

- *Assessment of mitigation measures for noise every two years is not acceptable. They need to be monitored on an on-going basis with community involvement in a language easy to understand.*

- *The area has a long history with many historical buildings and the runway will adversely affect same. The proposal will result in the extinction of a number of townlands thus eroding the heritage of the area. DAA has not specified where the Forrest Tavern Monument is being relocated to while there are a number of archaeological sites in the area which must be protected.*

- *The hedgerows, fauna and wildlife should be protected from the impacts of HGVs and increased traffic during construction.*

- *No details are given as to where the residents of the 2 halting sites are to be relocated to.*

- *The exact location of the engine testing area should be provided.*

- *The location of the proposed viewing areas should be identified and details provided as to how they are to be policed.*

- *Due consideration should be given to boundary treatment and screening.*

- *Construction hours should not be allowed beyond the times stipulated in condition 3.*

- *Clarification is required about the equipment enclosure.*

- *Clarification is required as to what 'services diversions' will entail.*

- *Clarification is required as to whether the water supply and drainage arrangement would affect the surrounding lands and resident*[s].

- *The duration of the permission for 10 years needs to be clarified.*"

40. Later, there is reference, *inter alia*, to the submissions made by An Taisce, an entity perhaps uniquely well placed to raise concerns about the environmental impact issues presenting. Under the heading "*Water*", the inspector treats with what is in truth the issue of flood risk. Later, the inspector lists a number of issues under the heading "*Ecology*" (including hedgerow and bird-related issues). In passing, the court notes that there was some reference made before it by the Case 2 Applicant concerning the allegedly dated nature of the

bird surveys relied upon before An Bord Pleanála; however, despite this contention being raised, the court notes that there is nothing in the evidence before the court to support this allegation).

41. In a section of the inspector's report headed "*SUBMISSIONS RECEIVED FOLLOWING EIS PUBLIC NOTICE 25/05/06*", there is a further summary of submissions received following the publication of the Environmental Impact Statement public notice on 25th May 2006. St. Margaret's Concerned Residents Group again participated at this stage and raised additional issues to those recited above, those additional issues being as follows:

"● *The EIS does not address the material loss likely to be suffered by the residents on Kilreesk Lane, Millhead and Dunbro.*

● *There is no reference as to how a buy-out procedure would be operated.*

● *There is a vague reference to insulation, however to what degree and specification this will be carried out is unknown.*

● *The cumulative effect of development is to increase the peak drainage flow and constitutes a serious issue.*

● *Detailed proposals are required as to how contaminated water is to be stored to prevent contamination of watercourses.*

- *The overall plans for the airport and surrounding infrastructure should have been lodged simultaneously.*

- *The proposed runway will cause substantial traffic chaos. The application should have included a detailed analysis of the required network infrastructure required.*

- *The applicant should provide a detailed breakdown of the operation modes of both runways.*

- *Details are required on the effect of emissions from radio navigation aids and meteorological equipment on nearby residents.*

- *The location of aerodrome lighting needs to be confirmed.*"

42. Under the section-heading "*RESPONSES TO SECTION 132 NOTICE AND REVISED PUBLIC NOTIES 09/01/07*", it is apparent that responses were received from a number of bodies, including the Portmarnock Community Association and St. Margaret's Concerned Residents Group, with the Portmarnock Community Association having raised a very long list of issues under the sub-headings "*Demolition of Runway 11/29*", "*Engine Testing*", "*Noise*" and "*Other issues.*" Noise had also clearly become a focus of attention within and on the part of the St Margaret's Concerned Residents Group, with the group having sent with its submissions a supporting engineer's report.

43. Next, the planning inspector considers certain national and regional policy documents, before turning to a *"SUMMARY OF ORAL HEARING PROCEDURES."* In attendance at the hearing were, *inter alia*, members of St Margaret's Concerned Residents Group, joined by counsel. The inspector recites various issues that were addressed during the course of the oral hearing, including the issue of flood risk, matters of archaeology, cultural heritage and visual impact, bat activity, bird strike, habitats, public health and safety, air quality and (extensively) noise.

44. In short, the wide-ranging extent of the environmental impact assessment that took place, the repeated opportunity that was given for public participation and the active participation by local residents not just once but at every layer of the process that took place before An Bord Pleanála, can all clearly be seen. There was suggestion by counsel for the Case 1 Applicants at hearing that all of the foregoing was done on the basis of a 10-year perspective. However, this contention is not borne out by the evidence before the court. There was certainly a ten-year period contemplated as the period necessary to allow the new runway to be constructed. But when the court looks at the main concerns that were addressed during the course of the process before An Bord Pleanála, they were not generally focused on construction *per se*. There were certainly some concerns expressed in relation to construction and the consequences that it would have in terms of access, *etc.* However, the principal concerns related to the operation of the runway, and the operation of the runway was intended to extend for a significant period into the future. So it is not correct to suggest that the perspective of the environmental impact assessment was limited to a ten-year period. Clearly, what An Bord Pleanála was required to do (and did) was to look into the future and see what would the consequences or impacts be once the new runway was, to use a colloquialism, 'up and running'. That, in truth, is the focus of the concerns raised by both the Case 1 Applicants

and the Case 2 Applicant, *i.e.* the future operation of the runway as opposed to the construction of the runway.

45. Insofar as construction is concerned, it is clear from the inspector's report that delays in the project were always envisaged as a possibility. So, for example, under the heading "*Duration of Permission Sought*", the inspector observes as follows:

> "*A ten year permission is being sought in this instance. As per details provided by Mr. Hamilton and Mr. O'Donnell, on behalf of...*[Dublin Airport Authority] *a 10 year permission is considered justified given the size of the project and the potential for delays from external factors where statutory responsibilities and procedural matters with the Aviation Regulator will have to be satisfied in addition to procurement procedures and compliance with European requirements.*
>
> *While I note that the air traffic forecasts indicate that the runway would be required well before the expiry of a ten year permission. I would consider the 10 year duration as requested to be reasonable in view of the size of the project, the estimated 3 year construction period and the potential for delay from external sources.*"

46. It is clear from the foregoing that at the time the environmental impact assessment was being carried out there was awareness on behalf of all parties in that process that there was, at the least, the possibility of delay in the project.

C. SECTION 42

VII

The Substance of Section 42

47. Central to the applications at hand is s.42 of the Planning and Development Act 2000, as amended ('PADA'). It provides as follows:

> *"(1) On application to it in that behalf a planning authority shall, as regards a particular permission, extend the appropriate period by such additional period not exceeding 5 years as the authority considers requisite to enable the development to which the permission relates to be completed provided that each of the following requirements is complied with:*
>
> *(a) either:*
>
> *(i) the authority is satisfied that –*
>
> *(I) the development to which the permission relates was commenced before the expiration of the appropriate period sought to be extended,*

(II) substantial works were carried out pursuant to the permission during that period, and

(III) and the development will be completed within a reasonable time.

or..."

48. By way of answer to Q.11 on its "*Application for Extension of Duration of Permission*", the form submitted by Dublin Airport Authority as part of the s.42 process, the Authority made clear that its application for extension was not being made under s.42(1)(a)(i) of PADA. Its application was made under the alternative s.42(1)(a)(ii) which provides as follows.

"*(ii) the authority is satisfied –*

(I) that there were considerations of a commercial, economic or technical nature beyond the control of the applicant which substantially militated against either the commencement of development or the carrying out of substantial works pursuant to the planning permission,

(II) that there have been no significant changes in the development objectives in the development plan or in

regional development objectives in the regional spatial and economic strategy for the area of the planning authority since the date of the permission such that the development would no longer be consistent with the proper planning and sustainable development of the area,

(III) that the development would not be inconsistent with the proper planning and sustainable development of the area having regard to any guidelines issued by the Minister under section 28, notwithstanding that they were issued after the date of the grant of permission in relation to which an application is made under this section, and

(IV) where the development has not commenced, that an environmental impact assessment, or an appropriate assessment, or both of those assessments, if required, was or were carried out before the permission was granted."

49. Somewhat underplayed, or so it seemed to the court, at the hearing of the within application, is that the requirements which require to be complied with under s.42 of PADA do not just include sub-section (a) ((i) or (ii)) but also include subsections (b)-(d), *viz*:

"(1) On application to it in that behalf a planning authority shall, as regards a particular permission, extend the appropriate period by such additional period not exceeding 5 years as the authority considers requisite to enable the development to which the permission relates to be completed provided that each of the following requirements is complied with...

(b) the application is in accordance with such regulations under this Act as apply to it,

(c) any requirements of, or made under those regulations are complied with as regards the application, and

(d) the application is duly made prior to the end of the appropriate period."

VIII

Some General Observations Concerning Section 42

50. A few general points concerning s.42 of PADA might be noted:

(1) the administrative or mandatory nature of the function being exercised by a planning authority pursuant to s.42 reflects the fact that s.42 provides merely for the extension of the duration of a planning permission which has been granted in accordance with the provisions of PADA, *i.e.* pursuant to a statutory decision-making procedure, which entails full rights of participation and the

exercise by an expert decision-maker of discretion and planning judgment in determining whether a particular development is in accordance with the proper planning and sustainable development of the area concerned.

(2) section 42 does not allow a planning authority to interfere with the conditions of a planning permission. Nor does it allow a planning authority to extend the scope or extent of what is to be constructed under a planning permission. Even if a decision to extend is made under s.42, the terms of the relevant planning permission remain the same, the work authorised remains the same, and if any enforcement action subsequently has to be taken in relation to the planning permission, it is the original permission that will be referred to for that purpose, not the decision made under s.42, save to show the continuing existence of the permission.

(3) section 42(1) provides that "*On application to it in that behalf a planning authority* ***shall***..." [emphasis added], so a planning authority is being mandated to do something in the event that certain circumstances present.

(4) unlike s.4(1) of the Local Government (Planning and Development) Act 1982, a legislative forerunner of s.42 that was the subject of consideration in *State (McCoy)* v. *Corporation of Dún Laoghaire* (Unreported, High Court, Gannon J., 1st June, 1984) (considered later below), s.42 does not provide for extension "*if, and only if*" defined criteria are satisfied. The requirement in s.42 is simply "*shall*". So, to that extent, the observations of Gannon J. in *McCoy* need to be

treated with some degree of caution, though the underlying principles touched upon in that case remain applicable.

(5) the current text of s.42 was inserted into PADA by s.28 of the Planning and Development (Amendment) Act 2010. So it was enacted at a time when the nation was wrestling with the perfect storm of financial problems that presented for the State and its residents following the collapse of the banking sector and the arrival of the Great Recession, a state of affairs that clearly informs the substance of s.42(1)(a)(ii)(I).

(6) it is notable in this last regard that s.42(1)(a)(ii)(I) of PADA speaks of "*considerations of a commercial...* [etc.] *nature...which substantially militated against...*" The phrase "*substantially militated against*" is a relatively low standard. It does not mean that the applicant for permission has to prove beyond doubt or even prove as a matter of probability that it was not able to proceed with a development because of particular considerations. There need merely be considerations that "*substantially militated against*". The court, informed by its consideration of applicable case-law later below, does not accept that an especial expertise is required before a planning authority, cloaked in the general expertise that it naturally brings to planning matters, can form an informed and proper view as to whether claimed considerations present. It is up to an applicant for extension to put forward its application, and it is up to the planning authority to assess matters. As counsel for the Council observed at hearing, "*The Oireachtas has designated the planning authority as the appropriate* persona designata *to address those issues. And the planning authority, as I say,*

have dealt with that in some detail in its report and...dealt with it correctly and appropriately. In fact the applicants have not even pleaded a ground in relation to [s.42(1)(a)(ii)](I)". That is an observation which is doubtless informed by, and accords with, the following observation of McKechnie J. in *Meath County Council* v. *Murray* [2017] IESC 25, para. 126:

> "*I am satisfied that the Court should not embark on what might in effect be a further review of matters the determination of which is committed by legislative policy and statutory provision to stipulated bodies. Although in a somewhat different context, Denham J., as she then was, in* Meadows *v.* Minister for Justice, Equality and Law Reform *[2010] 2 I.R. 701, emphasised that the courts should be reluctant to interfere with the decisions of expert bodies, such as An Bord Pleanála*".

The Council, in the exercise of its decision-making function, was satisfied in respect of s.42(1)(a)(ii)(I). There is, in truth, no basis on which this aspect of the decision of Fingal County Council can be impugned.

(7) looking to s.42(1)(a)(ii)(II) of PADA, that provision, it seems to the court, establishes an important safeguard which a planning authority is in a fairly unique position to assess, because a planning authority will be familiar with all of the relevant provisions and guidelines. In passing, it does not seem to the court that any real or substantive criticism has been made of what Fingal County Council in fact did in terms of its assessment. Regardless, there was material before the Council upon which it could be satisfied in respect of this aspect of

its decision, it carried out its function in respect of this aspect of the s.42 process, and it follows that there is, in truth, no basis on which this aspect of Fingal County Council can be impugned.

(8) the same points, *mutatis mutandis*, can be made in respect of s.42(1)(a)(ii)(III) as the court has just made in respect of s.42(1)(a)(ii)(II).

(9) as to s.42(1)(a)(ii)(IV) of PADA, it is both rational and understandable that the Oireachtas, when addressing a situation where (i) a development consent has issued, and (ii) the period or duration of that development consent is about to expire, and (iii) any ability to challenge the consent under the two month period will likewise have expired, would elect to distinguish between circumstances where (a) a development has commenced, *i.e.*, where somebody, acting on an existing consent (and the principle of legal certainty) has commenced development, and (b) where no one has acted on the permission and no works have commenced. There is, the court considers, a distinction to be drawn in this context between the genuine commencement of a development and, *e.g.*, the hurried digging of a few holes on a Friday afternoon in order to beat a legal deadline. However, despite hints of this in the submissions before the court, the court does not accept, on the evidence before it, that this is a case in which anything other than a genuine commencement of development occurred. To the extent that there is suggestion by the Case 1 Applicants (and there is such suggestion) that the planning authority should have had regard to compliance issues when acting under s.42(1)(a)(ii)(IV), this as will be seen, *inter alia*, from the court's consideration later below of *McDowell* v. *Roscommon County*

Council [2004] IEHC 396 is clearly wrong. When it comes to s.42(1)(a)(ii)(IV), Fingal County Council considered that statutory requirement, found that the development had commenced and so (correctly) decided that the provisions in respect of appropriate assessment did not apply. It did not make any legal error in the manner in which it carried out its function. Moreover, as is clear from the decision of Irvine J. in *Lackagh Quarries* (considered later below), once it had established that development had commenced, the Council was not entitled to take into account the provisions of the EIA Directive or the Habitats Directive when making its decision.

(10) the issues that arise for consideration in the context of s.42 are primarily factual matters. That, it seems to the court, is an important consideration, because that goes to the nature of the discretion that is being exercised. There is undoubtedly a limited element of discretion. So s.42 does not involve what was referred to at hearing as a 'box-ticking' exercise. What it does involve is what was referred to by counsel for Fingal County Counsel at hearing as a "*prescribed discretion*", in truth a limited prescribed discretion, in that the relevant factors are identified in s.42 and a planning authority has to engage with those factors in terms of resolving certain questions of fact.

(11) the clear purpose of s.42 is clear. It is, to borrow from the wording of Blayney J. in *Garden Village Construction Company Limited* v. *Wicklow County Council* [1994] 3 I.R. 413, 433, albeit that he was speaking there of s.4 of the Local Government (Planning and Development) Act 1982, a statutory forerunner of s.42, "*'to enable the development to which the permission relates to be*

completed", or to use the wording of s.42 itself "*to enable the development to which the permission relates to be completed.*"

(12) it seems to the court that any fair-minded reading of s.42 should (and in the case of the court does) lead to the recognition that the Oirechtas clearly meant to establish thereby a stream-lined expeditious procedure without a requirement as to public consultation. This is to be contrasted with the detailed provisions made for public consultation, and the imposition of precise time-limits for same in respect of other decisions taken under PADA. Moreover, a consideration of the comprehensive scheme of checks and balances established by the Oireachtas through PADA yields the, in truth all but unavoidable, conclusion that in crafting s.42 as it did, the Oireachtas intentionally and knowingly and for good reason excluded a right to public participation from s.42 and did not simply forget to include it or intend that it exist by implication.

IX

Section 42(2)-(4) and (6) of PADA

51. It is worth mentioning some further sub-sections of s.42 which are of relevance to the case at hand.

(i) Section 42(2).

52. Section 42(2) of PADA provides as follows:

"In extending the appropriate period under subsection (1) a planning authority may attach conditions requiring the giving of adequate security for the satisfactory completion of the proposed development, and/or may add to or vary any conditions to which the permission is already subject under section 34(4)(g)."

53. Section 34(4)(g) of PADA empowers planning authorities, when granting planning permission, to impose *"conditions for requiring the giving of adequate security for satisfactory completion of the proposed development."*

54. What stands out in the above-quoted sub-section is that there is no ability on the part of a planning authority under s.42 to change applicable conditions, save as regards the giving of what is "*adequate security for the satisfactory completion of the proposed development*", such a power being consistent with the desire to see a development for which planning permission has been granted, and which has commenced, being brought to completion, and not being left uncompleted. It would defeat the clear object of s.42 if one could have a situation where developments could be left uncompleted notwithstanding an extension of time having been granted.

(ii) Section 42(3).

55. Section 42(3) of PADA provides as follows:

"*(3) (a) Where an application is duly made under this section to a planning authority and any requirements of, or made under, regulations under section 43 are complied with as regards the application, the planning authority shall make its decision on the application as expeditiously as possible.*

(b) Without prejudice to the generality of paragraph (a), it shall be the objective of the planning authority to ensure that it shall give notice of its decision on an application under this section within the period of 8 weeks beginning on—

(i) in case all of the requirements referred to in paragraph (a) are complied with on or before the day of receipt by the planning authority of the application, that day, and

(ii) in any other case, the day on which all of those requirements stand complied with."

56. It seems to the court that the just-quoted text identifies clearly that the Oireachtas did not have in mind that there would be public participation/submissions in the context of a s.42 application. Thus sub-section (3)(a) imposes strict time limits on a planning authority to make a decision "*as expeditiously as possible*", and subparagraph (b) sets the eight-week timeframe as an ideal. Both provisions appear to the court to be inconsistent with the idea that there would be public participation at this stage. The turnaround timeframe is just too short to accommodate a public participation process.

(iii) Section 42(4).

57. Section 42(4) of PADA provides that "[a] *decision to extend an appropriate period shall be made once and once only under this section and a planning authority shall not further extend the appropriate period.*" This has the effect that there cannot be endless extensions and re-extensions of time. An extension is available "*once and once only*".

(iv) Section 42(6).

58. Section 42(6) of PADA provides that "*Where a decision to extend is made under this section, section 40 shall, in relation to the permission to which the decision relates, be construed and have effect, subject to, and in accordance with, the terms of the decision.*"

59. Section 40 of PADA is concerned with the duration of a permission, and provides as follows:

> "*(1) Subject to subsection (2), a permission granted under this Part, shall on the expiration of the appropriate period (but without prejudice to the validity of anything done pursuant thereto prior to the expiration of that period) cease to have effect as regards—*
>
> *(a) in case the development to which the permission relates is not commenced during that period, the entire development, and*

(b) in case the development is commenced during that period, so much of the development as is not completed within that period.

...

(3) In this section and sections 42 and 42A, 'the appropriate period' means— (a) in case in relation to the permission a period is specified pursuant to section 41, that period, and (b) in any other case, the period of five years beginning on the date of the grant of permission."

60. So section 40 sets out the limit of duration of a permission and sub-section (6) of s.42, when read in conjunction with s.40, has the effect that a planning permission previously granted will not cease to have effect until the end of the extended period, nothing more.

X

Extent of Discretion Arising under Section 42

61. To what extent is there a discretion presenting for a planning authority when making a decision under s.42? This is an aspect of matters that has been briefly touched upon above. A few general points might be made:

(1) there is, under s.42(1)(a)(ii)(I) of PADA an element of discretion in assessing whether "*there were considerations of a commercial, economic or technical nature beyond the control of the applicant which substantially militated against either the commencement of development or the carrying out of substantial works pursuant to the planning permission,*" This is not a very wide discretion: the developer knows all, presents the details for review to the planning authority and the facts, to use a colloquialism, either 'stack up' or not.

(2) there is, under s.42(1)(a)(ii)(II) of PADA an element of discretion in assessing whether *"there have been no significant changes in the development objectives in the development plan or in regional development objectives in the regional spatial and economic strategy for the area of the planning authority since the date of the permission such that the development would no longer be consistent with the proper planning and sustainable development of the area*". This it is not a very wide discretion, because the planning authority just checks to see whether or not there have been changes and must determine whether any (if any) changes are "*significant*". However, the check is limited and wholly within the competence of the planning authority. (In passing, the court notes that the applicants in the within proceedings have adduced no evidence to suggest that the development objectives applicable to the new runway development were in any way changed during the applicable timeframe).

(3) there is, under s.42(1)(a)(ii)(III) of PADA an element of discretion in assessing whether "*the development would not be inconsistent with the proper planning and sustainable development of the area having regard to any guidelines issued*

by the Minister under section 28, notwithstanding that they were issued after the date of the grant of permission in relation to which an application is made under [s.42]". This again is a narrow discretion. The planning authority is not asked to look *in toto* at the proper planning and development and sustainable development of the area. It is merely required to ascertain whether or not the development would be consistent with, essentially subsequent but, on the face of the provision, all, ministerial guidelines. That is, to use a colloquialism, something of a 'double-check'. It is not a re-opening of all matters to do with proper planning and sustainable development. Here the only ministerial guideline that exists and is relevant pertains to flood risk assessment and the substantive issues presenting as regards flood risk were previously considered in the planning permission process.

(4) there is, under s.42(1)(a)(ii)(III) of PADA an element of discretion in assessing whether "*where the development has not commenced... an environmental impact assessment, or an appropriate assessment, or both of those assessments, if required, was or were carried out before the permission was granted.*" In the first instance, this distils down to a question of fact: had the development commenced or not? Here it had.

XI

Some Case-Law on Section 42

(i) Overview.

62. Given the length that this case was at hearing, it is perhaps surprising to learn that the ambit and effect of s.42 has previously been the subject of comprehensive consideration by the Superior Courts. The court turns now to consider the more prominent cases among that body of case-law.

a. *Coll* v. *Donegal County Council and anor*

[2005] IEHC 231

63. In *Coll*, a case that has been touched upon previously above, the notice party, Mr Gillespie, had applied for planning permission for the erection of a shopping centre and filling station with a sewerage treatment plant in Co. Donegal, in December 1998. That permission was subsequently extended under a statutory forerunner of s.42. The applicant, Ms Coll, a local resident, objected to the decision made under s.42. (She also objected to another decision in relation to a public road which is not immediately relevant). In his judgment, Peart J., indicates, *inter alia*, as follows, at 16:

> *"The second decision which the applicant seeks to have quashed is that by which the respondent extended the duration of the notice party's planning permission until the 28th October 2005. The applicant has submitted that the requirements of s. 42 of the*

Planning and Development Act, 2000 have not been complied with in as much as the respondent could not have been able to form the view as required by s. 42(1)(c)(iii) that "the development will be completed within a reasonable time."

In my view, firstly, the applicant enjoys no locus standi to seek the relief she seeks under this heading. Firstly, she did not participate in the planning process at all, ***but secondly and critically, the power of the planning authority to exercise a discretion to extend the duration of a planning permission is one which may be exercised appropriately without consultation with the public. It is not necessary under the statutory scheme to publish any notice of intention to apply for an extension, and neither is it necessary to erect any notice at the site of the development indicating an intention to apply for an extension.*** *Under that scheme, as provided by s. 42 of the 2000 Act, a planning authority shall on application being made to it, extend the appropriate period for such additional period as it considers requisite to enable the development to be completed provided certain requirements are complied with, one of which is that referred to already, namely that the planning authority is satisfied that the development will be completed within a reasonable time.* ***The applicant has no entitlement to be consulted in the making of that decision and therefore in my view cannot be heard to raise objections to the decision made.*** *It is a matter within the discretion of the planning authority, and provided that the discretion is exercised in a judicial manner it is a decision which then planning authority may make in its discretion. However I will in any event address the applicant's submissions in this regard also."* [Emphasis added.]

64. That, with respect, is a clear, cogent and complete answer to the contention made by the Case 1 Applicants that when it came to Dublin Airport Authority's application under s.42, they had a right make submissions. As a matter of law, they did not.

b. *McDowell and anor* v. *Roscommon County Council*

[2004] IEHC 396

65. In *McDowell*, Roscommon County Council refused to make an order under s.42 in relation to the construction of a house in Co. Roscommon, which house was being constructed by the applicants. The applicants then challenged the decision of the County Council by way of judicial review. The central issue in the case was whether the Council was entitled to refuse under s.42 in circumstances where the development (so, at least, the Council argued) was not being constructed in accordance with the relevant planning permission. (This last aspect of *McDowell* has a particular resonance in the context of the within proceedings because there is suggestion, certainly by the Case 1 Applicants, that if the new runway development has been commenced in breach of a condition of the planning permission then the decision made under s.42 cannot be made. But that proposition is entirely contrary to the view arrived at by Finnegan P. in *McDowell*, in a judgment that involves a useful analysis of certain applicable case-law. Per Finnegan P:

"The first relevant case is ***State (McCoy) v Dun Laoghaire Corporation*** *1985 ILRM 533. In relation to section 4(1) of the 1982 Act Gannon J. said—*

'Section 4(1) of the 1982 Act is expressed in mandatory terms bearing both positive and negative aspects. It confers on the Planning Authority not merely

the power but rather the obligation to extend the duration of a planning permission in relation to uncompleted development upon which a developer has embarked.'

This is equally true of section 42. Again in the course of his Judgment Gannon J. refers to the meaning of 'the particular permission': the effect of the phrase is that the Planning Authority must have regard to the permission in question and not other permissions whether relating to the same development or other developments. In dealing with section 4(1)(c) of the 1982 Act he points out that there are set out therein factual matters upon which the Planning Authority is required to make an assessment or evaluation and in relation to (iii) the Planning Authority must be satisfied as to the probability that the development will be completed within a reasonable time. Section 4 of the 1982 Act precludes consideration of any other matters and the power to extend the permission or not may not be exercised in any other manner or upon any other considerations. I am satisfied that these considerations apply equally where the application is made pursuant to section 42 of the Act of 2000.

In ***Littondale Limited v Wicklow County Council*** *1996 2 ILRM 519Laffoy J. took the same view of the provisions in section 4(1) of the 1982 Act. If the conditions set out in section 4(1) are complied with the Planning Authority must extend the duration of the permission and consideration of matters other than the conditions set out there is precluded. While the issue in that case was whether substantial works had been carried out Laffoy J. in setting out the function of the Court correctly states my function on this application. At page 536 she said—*

'I have quoted extensively from the Judgment of the Supreme Court in O'Keeffe v An Bord Pleanala for the purpose of emphasising the parameters of the Court's function on an application such as this application. On this aspect of the Applicant's case, it is not the Court's function to determine on the merits whether substantial works were carried out pursuant to the 1981 permission between 31 December 1981 and 31 October 1987 in the light of the evidence adduced in this Court. The Court's function is to review the manner in which the Respondent concluded that substantial works had not been carried out pursuant to the 1981 permission within that period having regard to the material which was before the Respondent when the decision was made on the Applicant's application.'

Thus I am not concerned as to whether the conclusion arrived at by the Respondent that the dwelling under construction is significantly different from that for which planning permission was granted is correct: that is a matter which can only be determined, it seems to me, in plenary proceedings or in proceedings under Part VIII of the Act of 2000. My function is to review the manner in which the decision was arrived at and determine whether or not the same accords with the requirements of section 42.

The third case is ***Garden Village Construction Company Limited v Wicklow County Council*** *1994 3 I.R. 413. In that case the Supreme Court again dealt with the meaning of 'particular permission'. It was there held that on an application for an extension of duration the Planning Authority may only look at the actual permission which they are being asked to extend. Thus they could not look at substantial works*

carried out pursuant to that permission and could look at works carried out pursuant to other permissions which benefited the lands the subject matter of the particular permission in question."

66. Finnegan P. then moves on to the passage that is of greatest interest in the context of the within judgment, *viz*:

"***The Issue for Determination***

The Planning Authority having concluded (the correctness of that conclusion not being a matter for my consideration) that the development being undertaken was not in compliance with the particular planning permission were they entitled to have regard to that conclusion and on the basis of the same refuse to extend the duration of the planning permission? The Respondents argument is that they have notwithstanding the wording of section 42 of the Act of 2000 and the decisions to which I have referred a residual discretion which they were entitled to exercise and refuse the extension. They argue that it would be illogical for them to extend the duration in the light of their conclusion as a development when completed would not be in compliance with the planning permission. There are a number of factors which militate against my accepting this view:

1. The wording of section 42 is clear. It provides that if the Planning Authority are satisfied on certain matters the Planning Authority must grant an extension. It is clear on the authorities that to take into account any other matter, fact or circumstance is ultra vires."

67. In truth, when one looks to *McDowell*, the error into which the council fell in that case is precisely the (erroneous) course of action which the Case 1 Applicants are urging this Court to deem to be correct as a matter of law. Perhaps especially notable in this regard are Finnegan P.'s observations that "*if the Planning Authority are satisfied on certain matters the Planning Authority must grant an extension*" and "*It is clear on the authorities that to take into account any other matter, fact or circumstance is* ultra vires." Thus the planning authority acts, it decides whether it is satisfied as to certain matters and it must not take into account any other matter, fact or circumstance. That is what Fingal County Council has done in the case at hand, and that it has acted correctly as a matter of law is entirely clear from case-law.

c. *State (McCoy)* v. *The Corporation of Dún Laoghaire*

[1985] I.L.R.M. 533

68. A case referenced in the above-quoted extract from *McDowell* is the judgment of Gannon J. in *McCoy*. This appears to have been the first case in which the High Court delivered a written judgment on the nature of an application to extend the appropriate period of a planning permission, albeit under s.4 of the Act of 1982. In it, Mr McCoy applied for an extension to the period for which a planning permission would be valid. The Corporation refused the extension on the ground that this permission had been superseded by separate permissions, pursuant to which construction had occurred, rendering it impossible to carry out the development under the permission in respect of which extension was sought.

69. Section 4 (1) of the Local Government (Planning and Development) Act, 1982 provided that a local authority "*shall, as regards a particular permission, extend*" the period for which permission is given to enable the development to be completed "*if, and only if*", *inter alia*, substantial works were carried out within that time pursuant to that permission and the development would be completed within a reasonable time. The application for extension was based on the assertion that the completion of the constructed properties was part of the development contemplated by the initial permission. As touched upon previously above, the wording of s.4(1) is different to s.42 and some caution is therefore required when approaching *McCoy*. Nonetheless the principles for which it is authority continue to hold true.

70. In the course of his judgment, Gannon J. observes, *inter alia*, as follows, at 536:

> *"S. 11 of the 1982 Act empowers the Minister to make regulations providing for any matter of procedure in relation to applications under s. 4 of the Act [this is also an aspect of s.42 to which the court will return], and also enumerates particular aspects of such applications for which special requirements may be made by such regulations. It follows that in relation to compliance with conditions indicated at sub-paragraphs (a) and (b) of s. 4 (1) of the 1982 Act the onus is on the applicant to clear the negative aspect and make way for the positve aspect of the decision imposed as mandatory on the planning authority. Compliance with the terms of sub-paragraph (c) of s. 4 (1) requires that the planning authority* ***'be satisfied'*** *on all of the matters under three sub-headings in relation to the particular permission. These are factual matters in relation to the performance of works of development within the control of*

the developer upon which the planning authority is required to make an assessment or evaluation." [Emphasis added].

71. It will be recalled that s.42(1)(a)(ii) likewise requires that "*the authority is satisfied*". That satisfaction has to present as regards certain matters of fact. So, with respect, it does not seem to the court that it is open to the Case 1 Applicants simply to assert, as they have asserted in the within proceedings, that the planning authority is not possessed of sufficient expertise or that they disagree with such expertise as the Council has brought to bear: that is not the test, as will be seen in the court's consideration of *Littonvale* later below. The planning authority simply has to be satisfied that certain matters present.

72. Notable too are Gannon J.'s observations as to the restrictive role afforded a planning authority under s.4(1) and the issue of *vires* that can quickly present in this regard, certainly if a planning authority were to take into account compliance issues separate from the issues prescribed by s.4(1), or now by s.42. Thus, per Gannon J., at 537:

"*The particularity of the provisions of s. 4 (1) of the 1982 Act and the fact that they are included in a section imposing a mandatory function precludes consideration of any other matters. The subsection is explicit on what it requires, and consequently the exercise of the power to extend the appropriate period as regards a particular permission or to not extend that period must comply in all respects with the terms of s. 4 (1) and may not be exercised in any other manner or upon any other considerations. A decision, therefore, of a planning authority as to whether or not to extend the appropriate period as regards a particular permission which is arrived at without considering all the matters set out in sub-paragraphs (a), (b) and (c) (i), (ii)*

and (iii) or upon consideration of other matters not coming within these sub-paragraphs would be ultra vires."

d. *Lackagh Quarries Ltd* v. *Galway City Council*

[2010] IEHC 479

73. In truth, the logic comprised within and the lesson to be taken from this case is not so very different from that in *McDowell*. The facts of the case are as follows. Following an appeal from the decision of the council on 9th October, 2000, An Bord Pleanála granted the applicant planning permission for certain quarrying works. An application for extension of duration under s.42 was received by the planning authority on 24th February, 2010. On 16th April, 2010, that application was refused by way of manager's order. The second reason offered for this refusal was that to grant the sought extension would be in conflict with the planning authority's obligations under the EIA Directive and the Habitats Directive. (The similarity between that reasoning and the substance of the complaint made by the Case 1 Applicants in the within proceedings is striking). Lackagh Quarries contended, *inter alia*, that this last-mentioned reason was concerned with matters that could only be taken into account at the time of an application for planning permission and were not open for consideration under the process provided for in s.42.

74. Of interest is what the Council had to say concerning its second reason, and then what Irvine J. had to say about matters. Irvine J., at para. 17 recounts as follows the Council's arguments concerning the second reason:

"*Regarding the second reason given for refusing the application, the respondent maintains that it was obliged to have regard to a number of the EU Directives. These include...the Habitats Directive...the Birds Directive...the Wildlife Acts 1976 – 2000...and* ...[the] *Environmental Impact Assessment Directive....The respondent further maintains that under s. 28 of the 2000 Act it is required, when performing its functions, to have regard to relevant ministerial guidelines. In this regard, it relied upon a number of circular letters and also upon 'guidance for planning authorities' issued by the relevant department.*"

75. In terms of her own analysis, Irvine J. addresses the existing law in relation to s.42 in the following terms, at paras. 47-49 of her judgment, under the heading "*The Law in Relation to Section 42 of the 2000 Act*":

"*47. There is now a substantial body of case-law which has considered the role of the planning authority in an application to extend the life of a planning permission under s. 42 of the 2000 Act. It commences with the decision in* State (McCoy) *v.* Dun Laoghaire Corporation *[1985] I.L.R.M. 533 ('McCoy'), where Gannon J. dealt with the positive and negative aspects of s. 4 of the 1982 Act. He pointed to the mandatory nature of the obligation placed upon a planning authority, having regard to the use of the word 'shall' in the section.*

48. Gannon J in McCoy *emphasised that the onus was on an applicant seeking an extension to the life of a planning permission to satisfy the planning authority regarding each of the matters specified at s. 4 of the 1982 Act. He also stressed the*

lack of discretion enjoyed by the planning authority to consider any matters beyond those specified in the section. At pp. 536-537 he stated as follows:-

'Compliance with the terms of sub-paragraph (c) of s. 4(1) requires that the planning authority 'be satisfied' on all of the matters under three sub-headings in relation to the particular permission. These are factual matters in relation to the performance of works of development within the control of the developer upon which the planning authority is required to make an assessment or evaluation. These matters, of their nature, are such that the onus must lie on the developer to furnish the planning authority with information or evidence verifying such facts sufficient to support a decision as to the accuracy of the facts at (i) and (ii) and the probability in relation to (iii). The expression that the planning authority 'are satisfied' used in paragraph (c) is an expression commonly used in reference to a verdict, or judgment or decision.

The particularity of the provisions of s. 4(1) of the 1982 Act and the fact that they are included in a section imposing a mandatory function precludes consideration of any other matters. The subsection is explicit on what it requires, and consequently the exercise of the power to extend the appropriate period as regards a particular permission or not to extend that period must comply in all respects with the terms of s. 4(1) and may not be exercised in any other manner or upon any other considerations. A decision, therefore, of a planning authority as to whether or not to extend the appropriate period as regards a particular permission which is arrived at without considering all

the matters set out in sub-paragraphs (a), (b) and (c) (i), (ii) and (iii) or upon consideration of other matters not coming within these sub-paragraphs would be ultra vires.'

49. That statement of law has been followed repeatedly in more recent times. In particular McCoy *has been followed by Smyth J. in* John A. Wood, *referred to above, and* Laffoy J. *in* Littondale....*In* John A. Wood *Smyth J. concluded (inter alia) that the planning authority, in dealing with an application under s. 4(1) of the 1982 Act, was not entitled to have regard to the fact that if the extension sought was granted it would preclude the rights of third parties who lived in close proximity to the development from a right of appeal. For other reasons, however, he did not quash the decision made. Most recently these principles were adopted by Finnegan P. in* McDowell *v.* Roscommon County Council *[2004] I.E.H.C. 396....Whilst I find it difficult to agree with all aspects of that decision, it is nonetheless clear authority and support for the conclusions of Gannon J.* in McCoy."

76. As regards the Habitats Directive, *etc.* point contended for by the Council, Irvine J. observes, *inter alia*, as follows, at paras. 55-56 and 61, 66 and 68-70:

"*55. Having considered the submissions made by the parties in relation to this issue, I accept all of the arguments made by the applicant and I am satisfied, as a matter of law, that the respondent was not entitled to take into account the provisions of either Directive when making its decision.*

56. Notwithstanding the copious case-law submitted by the respondent, I remain to be convinced that either Directive was ever intended to apply to an application such as that which is provided for under s. 42 of the 2000 Act. However, that is not what matters. What matters is the extent to which the obligations set out in those Directives have been transposed into Irish domestic law. Having considered all of the relevant regulations and legislation in this jurisdiction, I am satisfied that the Directives have not been transposed in a manner such as to permit the respondent to take these environmental considerations into account on a s. 42 application.

...

61. It is clear from the aforementioned Regulation that the objectives of the Directive, as transposed into Irish law, are to be achieved through the proper investigation of all of the relevant matters by the planning authority prior to the commencement of a development and in the course of the application for planning permission. There is nothing in the Regulations, from which it can be inferred, that it was intended that the environmental considerations provided for in the Directive would form any part of the s. 42 process. Whilst it must be accepted that the Regulations fall to be construed in the light of the wording of the community measure, there is nothing in those Regulations which supports the respondent's submission. The 'plan or project' requiring approval under art. 6 has, in the aforementioned Regulations, been confined to the plan for the development in respect of which planning permission is sought, rather than any application for an extension of the lifetime of a planning permission so granted.

...

66. The EIA Directive is implemented in this jurisdiction by the Planning and Development Acts, the Planning and Development Regulations 2001-2002 and the European Communities (Environmental Impact Assessment Regulations) 1989-2000. These Regulations set out (inter alia) thresholds above which an EIA is required and the criteria by which a development may be classified as having a significant effect on the environment. However, these matters are only relevant to those processes which have been captured by the Directive as transposed into Irish law. In this regard, the respondent has failed to identify any regulation from which it can be inferred that the environmental concerns which form the objective of the EIA Directive are proper matters for consideration on a s. 42 application.

...

68. In further support of the applicant's submission is the fact that s. 42 of the 2000 Act, which postdates the Regulations implementing the Directives, specifically sets out matters to be considered by the planning authority on a s. 42 application, but makes no reference to these Directives. I must conclude that environmental issues were not open for the respondent's consideration on that application.

69. Of perhaps some further importance is the fact that the Planning and Development Act 2010, which came into effect on the 19th August, 2010, gives further effect to both the Habitats Directive and the EIA Directive, which are listed at s. 3 thereof. [What Irvine J. is referring to here is the Planning and Development (Amendment) Act 2010 (Commencement) Order 2010, para. 2 of which commenced

s. 28 of the Act of 2010 (which inserted into PADA the s.42 of PADA that is the focus of the within proceedings).] *It is interesting to note that the Act does not incorporate the need for an environmental assessment under the EIA Directive or appropriate assessment under the Habitats Directive into the application process. This is of significance in circumstances where the provisions of s. 42 of the 2000 Act have been changed so as to extend the circumstances in which an extension can be obtained, yet no provision has been made to provide for the updating of any EIA that accompanied the original planning application. Accordingly, it is difficult to see how the respondent can maintain that the relevant environmental assessments were matters it was entitled to consider in the context of the application under section 42.*

70. The respondent has failed to convince me that there is any regulation or statutory provision in this jurisdiction from whence it can be maintained that the s. 42 application was a project which required development consent within the meaning of the EIA Directive, or was one requiring appropriate assessment under the Habitat's Directive. Even if the Directives had direct effect, which they do not, there are strong grounds to argue that development consent was given following the assessment of the likely environmental impact of the proposed project at the time of the application for planning permission. An Environmental Impact Statement ('EIS') was submitted and considered subsequent to which the project received approval. A similarly strong argument can be made to the effect that a s. 42 application should not be considered to amount to a change or extension to the project as referred to in Annex II of the EIA Directive, such as to require further development consent. The development as planned and approved of from an environmental prospective remained the same as did the scale of the project. It was only the addition of time to complete the previously

approved project that had changed. However, as already stated, the Directives do not have direct effect."

77. Turning to the issue of fair procedures, *i.e.* to what Irvine J. refers to, at para. 72, as "*the fallback argument....that if the respondent was entitled to have regard to the EIA Directives and the Habitats Directives in making its decision under s. 42, its failure to advise it of this fact so as to afford it an opportunity to make submissions in relation thereto was to fail to comply with the rules natural justice and fair procedures*", Irvine J. observes as follows, at para. 73:

"*To consider whether or not fair procedures were afforded to the applicant, it is probably necessary to consider the nature of the process which is involved in an application for an extension of the appropriate period under s. 42 of the Act. In this regard, the wording of s. 42 does not give any support to the view that the decision to be made by the planning authority is of a quasi-judicial nature. The planning authority has very little discretion in relation to its decision, and its role appears to be confined to satisfying itself as to whether the applicant has complied with the statutory conditions for the grant of an extension of time and the legislation makes no provision for third party participation of any nature.* [There are echoes in the foregoing of the judgment of Peart J. in *McColl.*] *All of these factors tend to suggest that the role of the planning authority on a s. 42 application is an administrative decision, thus limiting the circumstances in which judicial review is available as a remedy.*"

78. At para.112, Irvine J. touches on how there is no mixing of compliance issues with a determination of matters under s.42, observing as follows:

> *"The second matter to which I briefly wish to refer is the complaint made by the applicant, that much of the s. 42 report relates to enforcement issues and as to whether or not the applicant was operating lawfully in accordance with the planning permissions granted. It was submitted that these were not matters to which the planning authority was entitled to have regard and I agree with this submission."*

79. At para. 119, Irvine J. again touches on the fact that an application for planning permission and an application for extension under s.42 involve completely different processes, one wide-ranging, the other greatly constrained. Per Irvine J:

> *"119. The matters to which the planning authority are entitled to have regard to in a s. 42 application are so limited that it cannot reasonably be stated that a right to apply for planning permission provides an adequate remedy to an applicant if that decision is invalid. An applicant seeking planning permission faces a whole range of obstacles and hurdles which do not arise on a s. 42 application. For example, environmental regulations fall to be considered, as do third party objections. No such concerns arise on a s. 42 application. The two processes are inherently different and an applicant could fail to obtain planning permission for a range of reasons which would not even arise for consideration on a s. 42 application."*

80. This is consistent with all the other authorities that the court has touched upon above.

XII

Conclusion

81. The clear effect of the case-law considered above is that s.42 of PADA requires that a planning authority such as Fingal County Council, upon application to it under s.42 as regards a particular permission, must extend the appropriate permission, provided that the prescribed requirements are complied with. It follows that the basis on which the Case 1 Applicants have sought to make their case is misconceived having regard to the case-law of the Superior Courts. For example, they are fundamentally incorrect in their submission that before a development consent could be extended in the circumstances presenting, or any circumstances, that matters beyond those set out in s.42 need to be considered.

82. Likewise it is clear that the Case 1 Applicants, and indeed the public in general, do not have a right to make observations on applications brought pursuant to s.42 of PADA. There is no provision in s.42 which allows for the consideration of submissions from the public. And the High Court, in its previous decisions in, *e.g.*, *Coll* and *Lackagh Quarries*, has been entirely clear that PADA makes no provision for third party participation in this regard. (See also *Collins* v. *Galway County Council* [2011] IEHC 3). In passing, the court notes that in their written submissions, the Case 1 Applicants refer to *Callaghan* v. *An Bord Pleanála* [2015] IEHC 357 to support their claim to a participation rights. However, such support is not to be found in *Callaghan*. There, the applicant was held not to have a right to participate in a decision before the consent procedure had commenced (because his participation rights would be fully vindicated in the subsequent consent procedure). Here the opposite scenario presents: the Case 1 Applicants have no right to participate in a decision after the planning

permission has issued (because they have already had their participatory rights vindicated through that consent procedure).

XIII

Constitutionality of Section 42

83. This was not an aspect of the Case 1 Applicants' application that received attention at hearing. However, to the extent that it continues to be contended that s.42 is in breach of any or all of Articles 40.3, 40.5 or 43 of the Constitution, this contention is rejected by the court for the following reasons:

(1) section 42 benefits from the presumption of constitutionality. As Budd J. observes in *Educational Co. of Ireland Ltd v. Fitzpatrick* (No. 2) [1961] 1 I.R. 345, 368, "[T]*he legislative body must be deemed to legislate with a knowledge of the Constitution and presumably does not intend by its measures to infringe it.*" (Why must it be so deemed one might ask? Three reasons immediately suggest themselves: (1) such a presumption reflects the usual rule of evidence and procedure that s/he who advances a point must prove it; (2) there is an obvious danger in a court unmaking a law when it cannot make a law to fill the void that it has itself created; (3) in a well-functioning parliamentary democracy such as ours where the rule of law reigns strong within and between the great branches of government, the constitutionality of a decision of the majority of the legislative body from time to time, as reflected in statute, should to some extent,

to borrow a colloquialism, 'be given the benefit of the doubt' when its constitutionality is assailed.)

(2) insofar as there is no express statutory mechanism permitting further public participation following the grant of planning permission and that this results in any (if any) restriction of the ability of the Case 1 Applicants to vindicate their constitutional property rights, such restriction, it seems to the court is justified by the interests of the common good (*inter alia* in administering a functioning and efficient system of planning in the State).

(3) the Irish courts have consistently upheld the right of the State to impose restrictions on the use and enjoyment of constitutional private property rights in the interests of the common good (that good here being the need to operate an efficient planning system within the State). (See, for example, the decision in *Central Dublin Development Association* v. *Attorney General* (1975) 109 ILTR 69).

(4) although in assessing whether a restriction constitutes an unjust attack on constitutional property rights, the courts have taken into account whether fair procedures have been followed (the decision in *Dellway Investments v. NAMA* [2011] 4 I.R. 1, considered later below, being a good example of this), those decisions are each concerned with alleged substantive interference with a property right, they do not hold that an extension of a duration of a planning permission constitutes such an interference, nor does this Court consider it so to be. The decision to extend that is at issue in the within proceedings was not a

decision to extend the runway; that decision was taken with the granting of the planning permission back in 2007, and the applicants participated in the process prior to the planning permission and did not challenge the decision of An Bord Pleanála to grant that permission.

(5) this case can be decided on grounds which do not involve declaring s.42 to be unconstitutional (not that the court considers it to be unconstitutional in any event) and hence falls to be determined on those grounds. As Murray C.J. observes in *Carmody* v. *Minister for Justice, Equality and Law Reform* [2010] 1 I.R. 635, 649:

> "[T]*he question involving any validity of a statute or a section thereof should be postponed until consideration has been given to any other question of law, the resolution of which could determine the issues between the parties. If a decision on such questions of law does determine such issues then, in principle, it is not necessary for the court to address the constitutional question.*"

D. THE AMENDED STATEMENT OF GROUNDS

AND CERTAIN AFFIDAVIT EVIDENCE

XIV

The Amended Statement of Grounds

84. In setting out the amended statement of grounds it is important to remember that it paints a picture of matters as perceived by the applicants.

85. The statement of grounds describes the applicants as:

> "*the owners and occupiers of lands which include dwelling houses which adjoin and are affected by the lands the subject matter of* [the second runway planning application]....*which application is for the extension of and/or a new runway at Dublin Airport and in respect of which application the Applicants' dwelling houses are identified as likely to be seriously affected by the development such that An Bord Pleanála imposed a condition that a voluntary purchase scheme be put in place because of the effect of the development on the capacity of these houses to continue as dwelling houses with any degree of residential amenity by virtue of the use and operation of the proposed runway. The application the subject matter of these proceedings in which the Applicants wish to participate and which has now been determined involves the extension of the appropriate period of this planning permission and in those circumstances directly affects their properties and in particular their dwelling houses and where they have sought to make a submission in*

respect of that application and where the planning authority has refused to consider and/or accept that submission, returned the submission and determined the application without any regard to the Applicants herein or the effect on said Applicants or their property and/or dwelling houses and/or the environment."

86. The reliefs sought by the applicants are then identified as follows:

"*1. An order of certiorari by way of application for judicial review quashing the decision of Fingal County Council dated the 31st day of January 2017 refusing to accept and/or consider a submission made in respect of a proposed extension of the appropriate period of* [the runway planning permission]....

2. An Order of certiorari...quashing the [said] *decision.*

3. A Declaration that by virtue of the extent to which [the runway planning permission] *affects the Applicants' property including their dwelling houses which properties are the subject matter of constitutional protection under Article 40.3, Article 43 and/or Article 40.5, the Applicants are entitled to make submissions in respect of an application which affects to a significant extent the right of those Applicants to continue to reside in those dwelling houses and are entitled to be heard in respect of any such application.*

4. A Declaration that the Applicants are entitled to make a submission to the First Named Respondent in respect of the application to extend the appropriate period [of the runway planning permission]...*having regard to Section 42 of the*

[PADA]...and the requirement to construe same in accordance with and/or in a manner consistent with Article 40.3, 43 and 40.5 of the Constitution.

5. *A Declaration that the First Named Respondent erred in law and acted contrary to fair procedures and to natural and constitutional justice in failing and/or refusing to accept and/or consider the Applicants' submissions regarding the application the subject matter of the* [decision aforesaid]....

6. *A Declaration that, having regard to Articles 40.3, 43 and 45 of the Constitution, the First Named Respondent erred in law and acted contrary to fair procedures and to natural and constitutional justice in failing and/or refusing to accept and/or consider the Applicants' submissions regarding the application the subject matter of the decision of the First Named Respondent dated the 7th day of March 2017 granting an extension to the appropriate period of* [the runway] *planning permission.*

7. *A Declaration that in considering the application the subject matter of the decision of the First Named Respondent dated the 7th day of March 2017 granting an extension to the appropriate period of* [the runway] *planning permission...the First Named Respondent acted in breach of and contravenes Council Directive 2011/92/EU of the 13th December 2011 and the assessment of certain public and private projects on the environment (the consolidated environmental impact assessment directive) in refusing to allow the making of submissions in this regard.*

8. *In the alternative a Declaration that the Second Named Respondent has failed to correctly transpose the requirements of Council Directive 2011/92/EEC.*

9. *In the alternative a Declaration that the Second Named Respondent has failed to correctly transpose the requirements of Council Directive 92/43/EEC of 21st May 1992 on the conservation of natural habitats and of wild fauna and flora ('the Habitats Directive').*

10. *An Order staying the making of any further agreement as between the First Named Respondent and the Notice Party in respect of the conditions of* [the runway] *planning permission...pending the determination of the above entitled proceedings*

11. *A Declaration that the decision of the First Named Respondent dated the 7th day of March 2017 was made contrary to and in breach* [the Habitats Directive]....

12. [Not being proceeded with]....

13. *Further and/or in the alternative an Order declaring that Section 42(1)(a) of the* [PADA] *is invalid having regard to the provisions of the Constitution as Section 42 fails to provide any mechanism to allow persons in the position of the Applicants herein to vindicate their constitutional property rights under Article 40.3, Article 40.5 and Article 43 of the Constitution.*

[This relief requires to be viewed in conjunction with some of the relief which is sought against the other respondents. Thus if the court looks to reliefs 3-6, by way of reliefs 3 and 4 the Case 1 Applicants are in effect contending that because they enjoy particular property rights they were entitled to make submissions in relation to the s.42 application made by Dublin Airport Authority. In respect of relief 5 they again contend (as will be seen, by reference to the decision of the Supreme Court in *Dellway* (considered later below)) the Case 1 Applicants maintain that they should have been given an opportunity, not by reference to their property rights, but simply by reference to fair procedures and natural constitutional justice, to make submissions. Then, by way of relief 6 what is contended for is really an amalgam of reliefs 3 and 4. Thus, when it comes to relief 6, the Case 1 Applicants say, both by reference to their constitutional rights and by reference to the requirements of fair procedures that Fingal County Council ought to have considered the submissions which they made or sought to make. But in relation to these reliefs, as will be seen, a common deficiency arises, because it appears to the court that the property rights and right to fair procedures are not in fact engaged, on the facts of this case, under s.42 of PADA. (It is only if they were engaged (and they are not) that the issue arises, under *Dellway,* whether, notwithstanding that there is no express statutory right to make submissions, such a right should be implied, in any event, as a matter of constitutional justice and fair procedures).]

14. *A Declaration that Section 42 of the* [PADA]*...is incompatible with the State's obligations under Articles 6, 8 and 13 of the European Convention on Human*

Rights and under Article 1 of the First Protocol thereof as given effect to by the European Convention on Human Rights Act 2003.

15. *A Declaration that Section 42 of the* [PADA]*...is incompatible with* [the Habitats Directive].

16. *A Declaration that Section 42 of the* [PADA] *is incompatible with* [the EIA Directive].

17. *An Order that the within proceedings fall within the scope of and attract the benefit of the protective costs provisions set out at Section 50B of the* [PADA].

18. *Further and/or in the alternative, an Order pursuant to Section 7 of the Environment Miscellaneous Provisions Act 2011 declaring that Section 3 of the Environment (Miscellaneous Provisions) Act 2011 applies to the within proceedings.*

[19–21. Various other consequential reliefs.]".

87. In the factual background, the statement refers firstly to the original planning application for the new runway. Then the grounds go on to state:

"*2. With respect to the foregoing, by decision dated 29th August 2007...An Bord Pleanála granted, subject to 31 conditions, planning permission to Dublin Airport*

Authority plc...for development comprising the construction on airport lands, of a runway just over 3km in length and 75 metres in width....

3. The Applicants herein are residents that live in an area known as St. Margarets which is located very close to Dublin Airport. They are adversely affected by the aforementioned development and the construction of same and together the said Applicants comprise the St. Margaret's Concerned Residents Group and at all stages fully participated in the planning application process and in the Environmental Impact Assessment and the various Reports acknowledge the impact on the Applicants residences and the conditions imposed in the aforesaid planning permission reflect these.

4. The application made on the 11th January 2017 sought a five year extension to allow the Notice Party sufficient time to complete the development and the application has been made in accordance with Section 42(1)(a)(ii) of [PADA]*....The application made on the 11th January 2017 relies on Section 42(1)(a)(ii) which provides for an extension of the appropriate period where substantial works have not been carried out but where owing to considerations of a commercial and economic nature beyond the control of the applicant (DAA) the development was not capable of being implemented sufficiently to allow completion of the development within the appropriate period.*

5. The documentation grounding the said decision of the First Named Defendant takes no account of and does not refer to the Applicants herein having sought to make

a submission nor does it refer to the expressed concerns of the Applicants herein or to their property.

6. The documentation accompanying the application for the extension of the appropriate period of said planning permission wrongly discloses that certain conditions which were required to be agreed prior to the commencement of development (being conditions which had been inserted by An Bord Pleanála) were agreed by the 15th December 2016 and that construction works commenced on Friday the 16th December 2016 and the Notice Party assert and expressly rely on the commencement of development in their extension application.

7. The commencement of the development is relied on such that the requirements of [the Environmental Impact Assessment Directive] *and* [the Habitats Directive]*...require to be disapplied.*

8. The aforesaid application made by the Notice Party contends that the works carried out were not otherwise relied on in circumstances where the application was made pursuant to [Section 42(1)(a)(ii) of PADA]....

9. The works that are disclosed in the documentation relate to the establishment of a contractors compound, certain hedge removal works, site fencing, the demolishing of a training building and other structures and in those circumstances they rely on these works to avoid certain obligations under [Section 42(1)(a)(ii) of PADA]....*The Notice Party particularly relies on these works to avoid any and/or all obligations under the* [Environmental Impact Assessment Directive]....*The Notice Party further*

seeks by the commencement of these works to disapply the provisions of [the Habitats Directive]*...and/or to avoid any and/or all obligations under the Habitats Directive.*

10. Among the matters that was required to be and was in fact agreed in or about this time was a scheme which An Bord Pleanála required to be agreed between the Notice Party and the First Named Respondent in respect of the Applicant's dwelling houses. An Bord Pleanála in formulating its decision to grant permission recognised that the use and operation of the runway would create significant disamenity for the Applicants of the nearby St. Margaret's by virtue of noise and general nuisance associated with aircraft movements on the adjoining lands and that prior to the commencement of any development proposals should be formulated so as to provide for an appropriate basis whereby the Applicants' dwelling houses could be voluntary[il]*y purchased and that proposal was submitted by the Notice Party and was agreed by the First Named Respondent despite the opposition of and the lack of any agreement on behalf of the residents to any such proposal. In effect the proposal that has been agreed as between the developer, the Dublin Airport Authority and the Planning Authority was a valuation methodology on the basis of the existing development but without factoring in the extension as this rendered the Applicants' houses uninhabitable because of noise and general disturbance from aircraft and airport related activity and therefore of no significant value. It is inconceivable that any of the residents who wish to take up the scheme would be in a position to buy a comparable properly because the scheme which is the very vehicle that depreciates the value of the houses has not been discounted and is to be taken into account when valuing the houses.*

11. The application made to extend the appropriate period extends the voluntary purchase agreement made between the Dublin Airport Authority and Fingal County Council in respect of the Applicants' dwellings which provides for a mechanism for the purchase of said dwellings where said dwellings will be rendered uninhabitable if they are not sold but which at the same time provides for a scheme which will not permit the replacement of the Applicants' houses on a like for like basis and in those circumstances the Applicants in this instance have a direct and material interest in the application in circumstances where their properties are directly and adversely affected particularly in circumstances where the permission was granted for an unusually long period namely ten years and the burden that has been imposed on the Applicants in these proceedings, namely to have that degree of uncertainty over their houses, is now to be extended for a further period of five years, and the Applicants in those circumstances are at least entitled to participate in the decision making process as to whether this additional five year period is to be given.

12. The Applicants were anxious to raise a number of issues in respect of the application to extend the appropriate period so as to enable the development to be carried out and in particular would wish to make submissions in respect of each of the requirements set out in Section 42 of [PADA] *and sought in doing so that the life of the permission not be extended so as to protect their dwellings from being rendered uninhabitable and/or the voluntary scheme or purchase would lapse.*

13. The reasons that the Notice Party gave for not implementing the permission is because of the general downturn that occurred soon after the grant of planning permission and the documentation lodged refers to a reduction [in] gross domestic

product of 8.5% and that the employment rate rose by 4.6%. However in the very period in which the recession was at its most severe in 2008, passenger numbers were at their highest namely 23.4 million and while the number of passengers thereafter dropped by 5 million they were still at no time lower than the passenger numbers which were in evidence at the date on which the application was made or at any time thereafter.

14. The very issues of economic depression and the fall in property prices combined with the effect of the runway on the Applicants' houses would severely impact upon the single biggest investment of each of the Applicants, namely the value of their dwelling houses and the very circumstances relied upon by the Notice Party has a clear effect on the Applicants property and is a matter that the planning authority ought to have regard to in the consideration whether or not the Notice Party meet the first test so as to justify an extension of the appropriate period.

15....An entirely new development plan has been made called the Fingal Development Plan 2011-2017 and there is a draft development plan for Fingal from 2017-2023. The new development plan 2017-2023 has yet to be adopted. The Dublin Airport Local Area Plan which was in place at the date of decision has now expired and therefore this is a significant change in the whole planning landscape and is such by itself as to disentitle the planning authority from extending the appropriate period. There are additional provisions relating to noise installation and the prohibition of new residential development within the inner noise zone and this recognises the particular[ly] *vulnerable position of the applicants given that the planning authority have permitted the development of their property within an area that the plan*

recognises as inappropriate for this activity. There is a range of additional objectives in the plan relating to the protection of the environment and the amenity of residential property that the Applicants would wish to address in respect of a submission to the planning authority and which would disentitle reliance on Section 42 of [PADA] *in circumstances where an entirely new plan with materially changed objectives has now been adopted.*

16. There have been significant changes with ministerial guidelines and in particular the documentation lodged acknowledges that flood risk management is now a critical issue which was not in place at the date of the previous grant of permission. The Notice Party has sought to retrospectively comply with the ministerial guidelines by preparing a flood risk screening assessment, but given that this is an entirely new provision arising from a guideline issued by the Minister under Section 28 of the [PADA] *this of itself disentitles an extension of the appropriate period and this is implicitly acknowledged by the detailed flood risk assessment that has been submitted as part of the extension application.*

17. This flood risk assessment would significantly affect the Applicants' property given its proximity to the area of the flood risk assessment. The report where it details the water courses acknowledges that the Applicants' respective properties fall within the area to which the flood risk assessment applies. Insofar as a report has been prepared to ground the application for an extension of the appropriate period of the planning permission, which permission affects the Applicants properties, the Applicants are entitled to make submissions in respect of the implications of this and

the appropriateness of these documents as they are particularly affected as a matter of their geographical location in respect of this particular flood risk assessment.

18. The documentation submitted as part of the application for the extension of the appropriate period of the said planning permission acknowledges that while an Environmental Impact Assessment was carried out the development was not the subject matter of an Appropriate Assessment.

19. [Section 42(1)(a)(ii) of PADA]*...provides that the Planning Authority in advance of extending the appropriate period must be satisfied that an Appropriate Assessment if required was carried out. There is no dispute that an Appropriate Assessment was required by the Notice Party and it asserts that by commencing the development on the 16th December 2016 and by carrying out the most minor of works that they are entitled to avoid their obligations under the Habitats Directive and it is in this context that the contractors compound, the hedge row removal and security fencing is relied upon. The Applicants would wish to assert that the carrying out of an Appropriate Assessment is a mandatory obligation that arises under the Habitats Directive in the circumstances of this development and in circumstances where no such Appropriate Assessment was carried out the development cannot be extended. It would be no defence for example given the test as set out in Section 42(1)(a)(ii)(IV)* [of PADA] *that if no Environmental Impact Assessment had been carried out, the commencement of the works of a type specified by the Notice Party in the application to extend the appropriate period, had commenced and by so commencing these works could avoid the statutory obligations set out therein. The same principles apply to an Appropriate*

Assessment and it is simply not possible to seek to circumvent these important European obligations....

20. The development as it is being carried out and insofar as it has commenced has commenced in breach of the conditions attached to the permission as contrary to what is set out in the documentation. A number of these conditions have not been complied with, in particular the preparation of an Environmental Protection Plan (Condition 12) has not been carried out and this condition is required to be complied with before the commencement of any works and consequently it cannot in those circumstances be asserted and further in breach of Condition No.1 of the Board's decision, that the development has commenced as development in this context and therefore must mean that works have unlawfully commenced.

21. The Applicants became aware of the making of the application for the extension of the appropriate period of said planning permission on or about the 16th January 2017 and by letter addressed to the [planning authority]*...made a submission in respect of that application dated the 27th January 2017. The submission which was in the name of Helena Merriman, Chairperson of the St. Margaret's Concerned Residents Group...raised concerns about the impact that the development would have upon the surrounding community and in particular on behalf of the named individuals on whose behalf the submission was made. The submission further stated that the application to extend the permission granted nearly ten years ago was contrary to European Community Law, particularly in circumstances where there had been no screening for Appropriate Assessment. A fee of €20.00 was also enclosed in respect of the submission.*

22. By letter dated the 31st January 2017, (although not received until 6th February, 2017) the First Named Respondent acknowledged receipt of the letter in respect of the original planning application...but the letter stated that Fingal County Council's position is that there is no provision in the planning legislation for the making of observations and applications for an extension of the appropriate period of a planning permission. Accordingly the submission and the cheque were returned.

23. On 6th March 2017, the Applicants herein made an application to the High Court seeking leave to apply for judicial review in respect to the decision of Fingal County Council dated the 31st January 2017 refusing to accept and/or consider a submission made by the Applicants in respect of what was at that time a proposed extension of the appropriate period of planning....The High Court (Mr. Justice Noonan) directed that the Respondents and Notice Party herein be put on notice of the within application for leave to apply for judicial review. The within leave application was made returnable to 10th March 2017.

24. On 7th March 2017 the Applicants' solicitors notified and subsequently served, by way of registered post, the Respondents and Notice Party with the aforementioned proceedings.

25. By way of letter dated 8th March 2017, solicitors for the Notice Party informed the Applicants' solicitors that on 7th March 2017 the First Named Respondent had issued its decision in respect of the Notice Party's application to extend the appropriate period [of the new runway planning permission]....

26. The said decision relies on the commencement of the development to dis-apply the provisions of the Habitats Directive and the Environmental Impact Assessment Directive which, but for this disapplication, would have resulted in the extension of the appropriate period application being refused.

27. By way of letter dated 9th March, 2017, the First Named Respondent informed the Applicants' solicitors that on 7th March 2017 it had decided to extend the appropriate period of [the new runway] *planning permission...notwithstanding that the development has never been subject to any assessment under the Habitats Directive, the requirements of which have been circumvented.*"

XV

Ms Merriman's Affidavit Evidence

88. Following on the consideration of the statement of grounds in the previous part of the court's judgment, this might be a useful juncture at which to touch upon a couple of points arising from Ms Merriman's affidavit evidence. Ms Merriman is a member of the St Margaret's Concerned Residents Group and one of the Case 1 Applicants. In her affidavit evidence, Ms Merriman avers, *inter alia*, as follows, in relation to Condition 12 of the new runway planning permission (the condition which required that "*Prior to commencement of development, the developer shall submit to the planning authority for written agreement a comprehensive environmental protection plan to minimise the impacts of the construction processes...*"):

"10. I say and believe that the inclusion of Condition 12 in the aforementioned permission is in part explained by the fact that the Environmental impact Statement (EIS) submitted as part of the application for permission had been prepared long before the original planning application was submitted and was based upon surveys which were carried out even further back. There is therefore a considerable and understandable concern on the part of the Applicants in light of this and the proposed extension of the ten year period by a further five years. The consequence of such an extension is that the total appropriate period of the permission is fifteen years. This is very significant of itself in circumstances where during the original ten year period there has already been a wholesale change in circumstances. For example, some residents of St. Margaret's who did not have children now have children, some residents of St. Margaret's who were it their fifties are now in their sixties and some residents who were in employment are now retired. None of these fundamental changes in circumstances of the residents of St. Margaret's were in being at the time of the preparation of the aforementioned EIS all those year ago."

89. The court would but note that that is not the same as saying that such matters were not contemplated at the time of the original planning application.

90. Ms Merriman continues:

"11. I say that the residents of St. Margaret's are also gravely concerned about the objectivity of Fingal County Council and their capacity to be objective in dealing with the residents' concerns regarding the development and the construction of same

as referred to above. It appears to the residents that the Council is in effect acting as an agent of the DAA in relation, for example, to the extinguishment of certain rights of way which has not been formally completed notwithstanding the fact that works that appear to relate, in a preparatory sense, to the construction of the runway have already commenced. Moreover I say and believe that in all of the circumstances it appears to be the case that the Council are otherwise, in a more general sense, facilitating the carrying out by the DAA of the development. The residents' concerns are exacerbated by the refusal of the Council to even consider our submission in respect of the DAA's application for the extension of the appropriate period of the permission, which is all the more troubling given the clear and recognised adverse effects of the development and the construction of same upon our respective homes. In the circumstances the residents' concerns and fears also justifiably extend to the serious issue of whether there is or could ever be an objectively fair voluntary purchase of dwellings scheme, with a scheme for the voluntary purchase of dwellings being a requirement set out at condition 9 of the permission granted in 2007. In this regard such a scheme was agreed between the DAA and Fingal County Council despite the opposition of and lack of agreement on behalf of the residents to any such proposal.

12. I say that by way of application dated 11th January 2017, the DAA applied to Fingal County Council for an extension [to the duration of the new runway planning permission]....

13. I say that the residents became aware of the DAA's extension application some time in or around the middle of January 2017. While such application was not

publicly advertised, when we became aware of it we were concerned as local residents given the extent to which we are particularly affected by the development and given that our property and dwellings are the subject of conditions of the permission granted by An Bord Pleanála and therefore we wanted to participate in the process by making a submission in relation to the DAA's extension application.

14. I say that the residents of St. Margaret's then attempted to participate in the process in this regard by way of a letter dated 27th January 2017. This letter from the residents contained a submission in which we expressed our concerns about the impact that the development would have upon the surrounding community and in particular on behalf of the named individuals on whose behalf the submission was made. The submission also set out that the application to extend the permission granted nearly ten years ago was contrary to European Community Law, particularly in circumstances where there had been no screening for Appropriate Assessment. A fee of €20.00 was enclosed.

[Ms Merriman then refers to that letter and cheque being returned, then continues as follows.]

16. In light of these refusals by Fingal County Council to consider and to not even accept our submissions, we decided to attempt to compel Fingal County Council to accept and consider our submission and I say that on 6th March 2017 the Applicants made an application to the High Court seeking leave to apply for judicial review in relation to the decision refusing to entertain their involvement....

17. I say and believe and am advised that on the morning of 7th March 2017 the Applicants' solicitors, at in or around 10.30 a.m., contacted the Respondents and Notice Party by way of telephone call and, amongst other things, informed them that the aforementioned proceedings were going to be served on each of them later that day.

18. I say that by way of letter dated 8th March 2017, solicitors for the DAA informed the Applicants' solicitors that on 7th March 2017 Fingal County Council had 'issued its decision' in respect of the DAA's application to extend the appropriate period [of the new runway planning permission]....

19. I say that by way of letter dated 9th March 2017, Fingal County Council informed the Applicants' solicitors that on 7th March 2017 the Council had decided to extend the relevant period....

20. I say that of grave concern to the residents of St. Margaret's is the fact that the documentation that supposedly sets out the basis of the decision of Fingal County Council to grant the extension of the appropriate period...does not take any account of our attempts to make a submission to the Council in relation to the extension application and it also does not refer to the fact that we sought to make a submission to the Council in relation to the extension application, nor does it refer to the concerns we have expressed in relation to the adverse effects on our homes. The aforementioned documentation also contends, amongst other things, that Fingal County Council has completed the discharge of all of the pre-commencement of development conditions associated with the new runway and further that the relevant

statutory provisions were complied [with]. *In relation to the foregoing and while more properly a matter for legal submissions I am advised that neither of these contentions made by the Council in the aforementioned documentation is correct.*

21. Of further concern to the residents is the fact that Fingal County Council in making its decision to extend the appropriate period of the aforementioned planning permission, has decided that works which were carried out by the DAA commencing on Friday 16th December 2016 and which consisted of the establishment of a Contractor's Compound; hedge row removal and tree felling works...the erection of site security fencing; the demolition of the Former Airport Fire Training Ground buildings and Training structures; the demolition of existing high mast lighting and associated cabling at the Former Airport Fire Service Training Ground and the removal of existing hard standings; the demolition of the existing farm outbuildings adjoining the Former Airport Fire Service Training Ground and associated works in respect of...all of the foregoing, and which was all carried out before the terms of Condition 12 of [the new runway permission]....*I say it is clear from the relevant statutory provisions that no extension of the appropriate period can properly be granted if no Appropriate Assessment had been carried out and in circumstances where the development the subject of the planning permission...clearly required an Appropriate Assessment and where all parties agree that no such Appropriate Assessment has been carried out, there is no basis or provision in the relevant statutory provisions that allows for the extension application to be granted as has occurred in the present case. The documentation lodged by the DAA as part of the extension application acknowledges that the development was not the subject matter of an Appropriate Assessment.*

22. I say that while an Environmental Impact Assessment was carried out as part of the permission granted in 2007 the whole environment, planning context and development context has altered over the 10 year period and the application for extension should have but does not reflect these changes in a new Environmental Impact Assessment because no such further assessment has been carried out.

23. I say that since the date of the permission granted in 2007, ministerial guidelines have issued which were not in place at the date of the previous decision, in particular ministerial guidelines related to flood risk assessment, which is something that was never carried out in respect of the original application for permission. These new guidelines alter the planning context and render the DAA's extension application incapable of being granted and the extent to which the planning context has been altered is evident by the DAA preparing and submitting a flood risk assessment as part of its extension application, as if they were applying for a new planning permission and not an extension of the appropriate period of the existing permission. We as residents were not afforded an opportunity by Fingal County Council to make a submission on the critical issue of flood risk assessment despite the fact that this flood risk assessment is one which clearly impacts on our property and dwellings and indeed the water courses identified as part of that assessment are ones which are equally applicable to the residents of St. Margaret's.

24. I say that it is deeply troubling that the decision of the Council to grant the extension to the appropriate period of the aforesaid planning permission was made in circumstances where conditions of the permission which require to be agreed before

commencement of the development have not been complied with and therefore any works carried out on foot of the permission amount to unauthorised development.

[This last matter is the subject of s.160 proceedings that are the subject of separate judgment being handed down on the same date as the within judgment.]

25. In making its decision to grant the extension application without giving the residents of St. Margaret's any opportunity to make any submission on same, and without the Council giving any reasons for denying us such an opportunity other than there was no right to make a submission, the residents of St. Margaret's have been denied the opportunity to have a fair, or indeed any say in relation to issues of utmost seriousness which directly and adversely affect our property and quality of lives. This is compounded by other aspects of the Council's decision to grant the extension, which decision, among other things, in its terms appears to involve a clear circumvention of important European environmental law."

E. SOME PRINCIPAL DOCUMENTS

XVI

The Planning Permission

91. The planning permission, granted on appeal, against the recommendation of the planning inspector's decision to refuse planning permission, involved, *inter alia*, a finding by An Bord Pleanála that "*sufficient information had been submitted in the Environmental Impact Statement, in further information submitted both to the planning authority and the Board and at the oral hearing to enable it* [An Bord Pleanála] *to make an assessment of the significant impacts of the proposed development on the environment and its acceptability in terms of proper planning and sustainable development*". As usual, various conditions were attached by An Bord Pleanála to the planning permission. So, for example:

- Condition 2 provides as follows:

  "*This permission is for a period of 10 years from the date of this order* [*i.e.* 28th August, 2007]".

- Condition 6 provides as follows:

  "*Prior to commencement of development, a scheme for the voluntary noise insulation of schools shall be submitted to and agreed in writing by the planning authority (in consultation with the Department of*

Education and Science). The scheme shall include all schools and registered pre-schools predicted to fall within the contour of 60 db LAeq 16 hours *within twelve months of the planned opening of the runway...*"

- Condition 7 provides as follows:

"*Prior to commencement of development, a scheme for the voluntary noise insulation of existing dwellings shall be submitted to and agreed in writing by the planning authority.*"

(As with Condition 6 there is a noise attenuation boundary set, with the scheme "*to include all dwellings predicted to fall within the contour of 63* dB LAeq 16 hours").

- Condition 8 provides as follows:

"*The runway hereby permitted shall not be brought into use until noise insulation approved under conditions numbers 6 and 7 above has been installed in all cases where a voluntary offer has been accepted within the time limit of the scheme.*"

[Apparent from Conditions 6-8 is the care which An Bord Pleanála took as regards concerns about noise].

- Condition 9 provides as follows that:

"Prior to commencement of development, a scheme for the voluntary purchase of dwellings, shall be submitted to and agreed in writing by the planning authority. The scheme shall include all dwellings predicted to fall within the contour of 69 dB LAeq 16 hours within twelve months of the planned opening of the runway for use. Prior to the commencement of operation of the runway, an offer of purchase in accordance with the agreed scheme shall have been made to all dwellings coming within the scope of the scheme and such offer shall remain opening for a period of 12 months from the commencement of use of the runway."

[There seemed to be suggestion by the Case 1 Applicants at hearing that there is a very narrow 12-month advance period applicable to the voluntary purchase scheme. It is worth noting in passing that this is not so: the Case 1 Applicants have the option under Condition 9 to remain in their homes for a period of 12 months, see how they fare and, depending on whether they prefer to participate in the scheme or live adjacent to the airport, they can then choose to proceed as they wish. So the process contemplated, does create a predicament for homeowners, and the court is sympathetic to that predicament; but, even so, that process, viewed fairly, is not, with respect, an un-facilitative arrangement. Worth noting too is that, on the evidence before the court and as mentioned previously above, the Case 1 Applicants do not come within the applicable contour but have been included in the voluntary purchase scheme in any event.]

Conditions 20 and 21 provide as follows:

"20. Surface water from the proposed development shall be drained in accordance with the proposals outlined in the planning application and the Environmental Impact Statement. Full details of the design, construction, operation and monitoring of the surface water attenuation, treatment and disposal system shall be agreed in writing with the planning authority, in consultation with the Eastern Regional Fisheries Board prior to commencement of the development....

21. A monitoring regime for the monitoring of surface water discharged to streams and the public sewer shall be agreed in writing with the planning authority and shall be fully operational prior to the completion of construction of the runway..."

[Clear from Conditions 20 and 21 is that the Board was quite careful to deal with, and properly to condition, the position in relation to surface water drainage in order to prevent flooding.]

– Conditions 23-26 provide, *inter alia*, as follows:

"23. Commitments in relation to archaeology, ecology and landscape in...the Environmental Impact Statement shall be carried out in full. This shall include...

(b) measures to be taken to mitigate impacts on fauna, including fauna protected by law such as badgers and bats,

(c) measures to be taken to mitigate impacts on birds,

(d) the provision of a compensatory 8 hectare woodland, together with the provision of 3 hectares of amenity lands on lands zoned for such use.

[Under the Habitats Directive, compensatory measures cannot be used as mitigation. But this, it seems to the court, is not what the just-quoted text is dealing with. There is no loss of protected habitat in this case. All that the just-quoted text is addressing is that simply because the construction of the new runway will lead to the loss of ordinary (*i.e.* not protected) hedgerows, this measure is being put in place.]

(e) the provision of funding for a hedgerow survey of Fingal, and

(f) the provision of funding for the restoration of the historic formal gardens in the Ward River Valley Regional Park....

24. The developer shall comply in full with the proposals submitted for ecological compensation habitats [This ties back to Condition 23.]...

25. A pre-construction survey of badgers on the site shall be submitted to the planning authority and the National Parks and Wildlife Service prior to commencement of development. The timing of all necessary measures in relation to badgers, such as removal of setts, which arise from the results of the survey shall be agreed in writing with the planning authority and the National Parks and Wildlife Service prior to commencement of development....

26. The planning authority shall be notified in writing of the name of the bat specialist prior to commencement of development. The bat specialist shall be present when any buildings are being fully/partially demolished or when trees are being removed to ensure that all necessary measures are taken in relation to bats. In the event of bats being found located in buildings or trees, the National Parks and Wildlife Service and the Heritage Officer shall be immediately notified."

[This requirement to notify the National Parks and Wildlife Service appears to provide a significant measure of protection to ensure that steps are not taken which will endanger or expose a protected species such as bats to peril.]

XVII

The Application for Extension of Duration of Permission

92. The court has had opened to it an "*Application for Extension of Duration of Permission*" date-stamped as having been received by Fingal County Council on 11th January, 2017. Its content requires to be recounted in some detail.

93. The "*Application for Extension of Duration of Permission*" provides, *inter alia*, as follows:

> "***In accordance with Section 42 of the Planning and Development Act 2000 As Amended by way of substitution of Section 28 of the Planning and Development (Amendment) Act, 2010, and Regulations made thereunder, a Planning Authority shall extend a permission as appropriate provided that the application is made in accordance with regulations made under the Act and the Authority is satisfied in relation to the permission that:-***
>
> *To extend the appropriate period:*
>
> *(i) The development to which such permission relates commenced before the expiration of the appropriate period sought to be extended, and*
>
> *(ii) Substantial works were carried out pursuant to such permission during such period.*

(iii) The development will be completed within a reasonable time.

OR

(i) There were considerations of a commercial, economic or technical nature, beyond the control of the applicant, which substantially mitigated against the commencement of development or the carrying out of substantial works pursuant to the planning permission.

(ii) There have been no significant changes in the development objectives in the Development Plan or in regional development objectives in the regional planning guidelines for the area of the Planning Authority since the date of the permission such that the development would no longer be consistent with the proper planning and sustainable development of the area.

(iii) That the development would not be inconsistent with the proper planning and sustainable development of the area having regard to any guidelines issued by the Minister under Section 28, notwithstanding that they were so issued after the date of the grant of permission in relation to which an application is made under this section.

[Notably, this last provision contemplates the consideration of matters arising subsequent to the permission, in this case guidelines issued by the Minister subsequent to the granting of the permission].

(iv) Where the development has not commenced, that an environmental impact assessment or an appropriate assessment (or both of those assessments), if required, was or were carried out before the permission was granted.

[The court returns later below to item (*iv*) which is directed to compliance with Ireland's obligations under the EIA Directive and the Habitats Directive, as amended.]."

94. Turning to the balance of the application form, it states as follows at Item 11:

"*Where the application is made on the basis of compliance with Section 42(1)(a)(i) particulars of the substantial works carried out pursuant to the permission before the expiration of the appropriate period*".

95. The answer given by Dublin Airport Authority to Item 11 is "*N/A*", making clear that the application for extension is not being made under s.42(1)(a)(i) of PADA (and hence is being made under s.42(1)(a)(ii)).

96. Item 12 of the "*Application for Extension of Duration of Permission*" provides as follows:

"*Where* [as here] *the application is made pursuant to Section 42(1)(a)(ii), information regarding the considerations of a commercial, economic or technical nature beyond the control of the applicant, which substantially militated against the commencement*

of the development OR the carrying out of substantial works, (please list and provide documentary evidence)."

XVIII

The Letter of 11th January, 2017

97. By way of response to Item 12 of the "*Application for Extension of Duration of Permission*", Dublin Airport Authority issued a letter dated 11th January, 2017, which contains the substance of the application, and states, *inter alia*, as follows:

"***1.1 Application for Extension of Duration of Permission***

daa is applying to Fingal County Council, under the provisions of Section 42 of the Planning and Development Act (as amended), specifically Section 42(1)(a)(ii) of the Act, for an extension to the appropriate period of Fingal County Council planning permission...for development of the North Runway at Dublin Airport, County Dublin.

Development on foot of this permission commenced on Friday, 16th December 2016.

daa is seeking an extension of duration of a 10 year permission originally granted on 29th August, for a period of five years to 28th August 2022. A 5 year extension is sought to allow the Applicant sufficient time to complete the development, including any unforeseen circumstances which may delay the completion of the project having

regard to the scale and complexity of the design, construction and commissioning stages of the project....

1.2 All Requirements for Application for Extension of Duration are Satisfied

This letter demonstrates that all the necessary criteria to enable the duration of the life of the permission to be extended by Fingal County Council have been made and that no obstacle exists to grant same. This application is made on the basis that permission is compliant with the requirement of Section 42 of the Planning and Development Act 2000 (as amended) and Articles 41 and 42 of the Planning and Development Regulations 2001 (as amended). In summary:

1. *This application to extend is made prior to the end of the life of the planning application.* ☑

2. *This application is not made earlier than one year before the expiration of the period sought to be extended or extended further.* ☑

3. *There were considerations of a commercial and economic nature beyond the control of the applicant which substantially militated against the completion of development.* ☑

4. *There have been no significant changes in the development objectives....* ☑

5. *The development remains consistent with the proper planning and sustainable development of the area having regard to all Guidelines issued by the Minister for the Environment, Heritage and Local Government.* ☑

Each of these criteria and how this application satisfies same is explored in greater detail below.

2.0 Timing of Application

The final grant of permission issued by An Bord Pleanála in respect of the above development was dated 29th August 2007....

3.0 COMPLIANCE WITH THE REQUIREMENTS AT SECTION 42 OF THE PLANNING AND DEVELOPMENT ACT, 2000 (AS AMENDED).

Section 42 of the Planning and Development Act, 2000 (as amended)... [has] been complied with in full by the Applicant in support of the application to extend the appropriate period for the subject planning permission....

Compliance with the four criteria in Section 42(1)(a)(ii) are set out in sections 3.1–3.4 below.

3.1 Commercial and Economic Conditions Substantially Militated Against the Commencement of Development

Section 42(1)(a)(ii)(I) states that the Planning Authority must be satisfied that:

'there were considerations of a commercial, economic or technical nature beyond the control of the applicant which substantially militated against either the commencement of development *or the carrying out of substantial works pursuant to the planning permission.' [Our emphasis.]*

[Dublin Airport Authority maintains that, in effect, the Great Recession slowed down the development of the new airport runway. Counsel for the Case 1 Applicants, in his submissions, commented, *inter alia*, in this regard that "*It is hard to credit that however bad the economic situation might have been, the work couldn't have been commenced.*" The court respectfully does not share counsel's scepticism in this regard.]

Guidance on Information to be Provided is Given in DEHLG Circular Letter

Guidance on the information required to support an application for extension of duration of permission is provided in the Department of Environment, Heritage and Local Government (DEHLG) Circular Letter PPL 1/2010, dated 20th August 2010....

Annex 2 of the Circular Letter states that:

'In relation to considerations of a commercial or economic nature, whether these are advanced in relation to large developments or smaller developments

(including single houses), **it is not considered necessary for *[the]* planning authority to seek evidence as to the personal financial or commercial situation of the applicant.** The planning authority may base its decision on matters such as **relevant national and local conditions affecting the property and development market or availability of credit,** having regard to e.g.

- **Data published by official agencies or independent research bodies** such as the ESRI relating to economic growth , employment rates, availability of credit, etc. at national level **and/or**

- Local property market data such as the existence of a high level of vacant or unsold property comparable to the type of development for which the permission was granted.'...*[Our emphasis.]*

Reasons for not implementing the Permission

daa is applying for an extension of duration of planning permission for the North Runway...as it was not possible to implement the permission due to the severe economic, commercial and financial recession which hit the Global economy and Ireland in 2008. This recession caused a significant downturn in commercial and financial markets and there were fears of a prolonged recession in many quarters. It was not prudent to proceed with the North Runway project in an environment where:

- *The World economy and that of leading countries were severely impacted by the recession – the Irish economy, which is a key driver of Dublin Airport traffic, collapsed more than almost all others and the UK and USA, two of Dublin Airport's key markets, were greatly affected, undermining demand. As a result Dublin Airport's traffic volume fell precipitously by 5 million passengers after a previous extended period of stable growth.*

- *Airlines were greatly impacted upon, including some of Dublin Airport's key customers. Airlines were anxious to avoid costs in this period and sought a deferral of the North Runway project.*

- *The Regulator would only allow revenue to enable North Runway cost recovery when passenger volumes reached 25 million and that threshold was only reached at the end of 2015. It was not financially practical to proceed with a project of this scale and cost without regulatory approval of revenue recovery."*

98. Counsel for the Applicants paused at this point in his reading of the letter of 11th January, 2017, to highlight what he perceived to be "*the tenderness of the indulgence*" that Dublin Airport Authority was seeking in relation to its plans. "*It was seeking...quite marked indulgence for its powerless financial situation.*" But if it was, what of it?

99. The letter continues:

"3.1.1 Economic, Commercial and Financial Recession

Air travel is tied to economic growth. Research shows that GDP is the fundamental driver of the demand for air travel. The close relationship between GDP and passenger traffic can be clearly seen in the Irish context where, over the last 30 years, for every 1% increase in GDP, passengers at Dublin Airport have increased by 1.1%. The future performance of the Airport will, therefore, be largely driven by the level of growth in the Irish economy.

The recession of 2008 adversely effected markets globally and, therefore, the outlook for air travel and Dublin Airport. Governments had to put in place dramatic recovery plans, some of which are still in operation. The USA and the UK are two of the largest international customer regions of Dublin Airport and their economies were badly hit by the recession. There were significant concerns that the Euro currency which underpins the economies of Continental Europe, a key market for Dublin Airport, might not survive the crisis.

Ireland accounts for the majority, approx.52% of passengers using Dublin Airport. However the Irish economy was impacted even more than the USA or UK economy as the Irish economy entered severe recession in 2008. In the first quarter of 2009, GDP was down 8.5% from the same quarter the previous year and the Government deficit reached 7.1% in 2008 compared to the EU average of 2.3%. The country received an €85bn bailout from the IMF, ECB and EU in 2010. The unemployment rate rose from 4.6% in 2007 to 11.8% in 2009, 13.6% in 2010 and 14.6% in 2011. It was difficult in

this environment to anticipate when recovery would take hold sufficiently to enable a decision to proceed with the runway.

3.1.2 Dublin Airport Passenger Volume Decline

The recession caused a very significant decline in passenger demand at Dublin Airport. Passenger traffic which had experienced 17 years of stable growth from 1992 fell dramatically by 5m passengers from a high of 23.4m in 2008 to 18.4m in 2010....

Passenger traffic returned to growth in 2011 and has been growing for the last 5 years; however it was not until 2015 that passenger numbers exceeded those in 2007, the year in which planning approval was granted. The volume level of 25 million passengers underpinning the project was not therefore recovered until 2015."

100. The Case 1 Applicants contend that rather than focusing on 2007 (when the permission was granted) Dublin Airport Authority ought instead to have focused on 2004 (when the application for the permission was made). The court admits to being mystified by this contention. Dublin Airport Authority was seeking to explain in its letter of 11th January, 2017, why it had not acted on a planning permission granted in 2007 and was effectively offering as its rationale that the Great Recession commenced and had a deleterious effect on various economic markers of significance when it came to determining when to build pursuant to the permission received. How Dublin Airport and the wider world were positioned in 2004 has no relevance to why Dublin Airport Authority acted following the granting of the permission for the second runway.

101. The letter continues:

"3.1.3 Airlines Sought Deferral of the Project

Airlines were impacted severely by the recession and sought to reduce costs wherever possible. This includes airport costs and there was concern that Dublin Airport would be adding to capacity, and therefore costs, at a time when demand was declining or uncertain. Airline customers advocated strongly that the runway construction should not proceed as it was not commercially viable given the fall in passenger numbers and revenue.

3.1.4 Regulator would not allow Revenue Recovery until passenger volume reached 25m

The North Runway is a costly project and it is not reasonable or financially practical to undertake a project of this scale without Regulator approval of a revenue recovery mechanism. The Regulator was clear in its regulatory decisions covering the periods 2009-14 and 2015-19 that the runway was a major capital project and it would approve revenue recovery only when passenger volume hit the 'trigger' of initially 23.5m and subsequently 25m. The trigger threshold was not met before 2015. Relevant Regulator statements are as follows:

'Determination on Maximum Levels of Airport Charges at Dublin Airport, Commission Paper 4/2009, 4 December 2009

Triggers

The Commission has included three triggers in the formulae that increase the maximum level of airport charges per passenger should events that require DAA to undertake additional capital expenditure.

The runway trigger would entail an increase in the price cap should passenger numbers exceed 23.5 million in a 12-month period. The level of the increase is calculated to be sufficient to allow the DAA to spend €288m (in 2009 prices) building a new runway. The calculation assumes that the DAA recovers the costs in equal sums over 50 years and allows a real rate of return on the capital of 7% per annum.

...

Triggers

We have included four triggers in the formulae that increase the maximum level of airport charges per passenger should events occur that require DAA to undertake additional capital expenditure...

...The northern runway trigger would entail an increase in the price cap should passenger numbers exceed 25mppa [presumably 'million passengers per annum'] in a 12-month period prior to the price cap year. The level of the

increase is calculated to be sufficient to allow DAA to spend €246.9 million (in July 2014) prices building the runway.'

'Consultation on Scope of the Interim Review of the 2014 Determination....

In October 2014, we made a regulatory decision to allow Dublin Airport start recovering the capital costs of the planned Northern Parallel Runway once more than 25 million passengers were served by the airport in a 12 month period...

...

The trigger was not hit during the period 2009-2014."

102. Counsel for the Case 1 Applicants drew a comparison between the amounts of money under consideration in the above-quoted text – €288m down to €246.9m – and the wherewithal of his clients whom he described as "*minnows in this decision-making process*". The court accepts that the Case 1 Applicants are not wealthy people, sympathises with them for the predicament in which they find themselves, and, if it might so observe, respects their fighting spirit. But the fact that they do not have to hand the resources that Dublin Airport Authority may borrow or command is not, with respect, of relevance when it comes to adjudicating upon the legal points presenting in their application.

103. The letter continues:

*"**Reason that the Permission can now be implemented***

The recent recovery of the Irish economy has created a commercial environment where the runway permission can now be implemented. The Economic and Social Research Institute (ESRI) publishes an Economic Commentary *each Quarter, addressing economic growth, employment rates and related matters at National level. At the time of compiling this report, the most current* Quarterly Economic Commentary *was that of winter 2016.*

Economic & Social research Institute's Commentary

We have reviewed the Quarterly Economic Commentary Winter 2016 in the preparation of this application. The commentary is quite upbeat with regard to the Irish economy and employment and expects continued growth in the economy over the next several years.

The summary indicates that:

> 'The continued improvement in economic performance over the past number of years has seen a significant stabilisation of the public finances; we believe that the fiscal accounts will be almost in balance in 2016, with a small surplus likely in 2017.'

Overall the ESRI quarterly economic commentary paints a picture of Ireland climbing out of economic crisis. The ESRI forecast growth in domestic demand but it still remains modest. The ESRI expects that GDP will increase by 3.5 per cent in 2017. The main downside risk to this forecast for Ireland is the possibility that global economy [economic growth?] *may be revised downward in light of increasing uncertainty down and the impact of Brexit may further impact on the national economy. The ESRI report notes that:*

> 'Unemployment continued on its downwards trajectory in the third quarter of 2016...with the seasonally adjusted rate falling from 8.3 to 7.9 per cent between Q2 and Q3 2016.'"

...

Conclusion

There has clearly been a national economic crisis which has militated against most development opportunities in the Country. However, as recent economic publications have evidenced, the economy is beginning to demonstrate steps towards a recovery, which has facilitated the commencement of the North Runway project.

It has been demonstrated above that the economic and commercial climate immediately following the granting of permission for the North Runway and for several years thereafter was not conducive to the implementation of the permission. It was not possible to proceed to the construction of the North Runway given the

extremely poor economic outlook in the country, an outlook that has changed in a positive manner only very well recently.

The analysis of the significant fall in passenger numbers and subsequent return to growth with over 27.9 million passengers through Dublin Airport in 2016 illustrates the improved economic circumstances at the airport and the need to facilitate the development of the North Runway. The ESRI reports have also demonstrated the marked improvement in the economy and employment in the country, since the economic crisis, and the future prospect for continued growth.

This Application for extension of duration of planning permission, if granted, will enable the development to be constructed within the extended period of time as economic circumstances continue to improve and the commercial viability of the North Runway becomes more certain."

104. Among the complaints made by the Case 1 Applicants is that the extensive economic arguments advanced by Dublin Airport Authority to Fingal County Council when making application for extension of the planning permission were not subjected to separate economic analysis by Fingal County Council. But there is no requirement, under PADA or otherwise, that there be some third-party professional analysis of submissions received by a planning authority before such an authority can arrive at the position of satisfaction contemplated by s.42(1)(a)(ii)(I) of the PADA. And it is important too not to lose sight of the historical context in which the application for extension of the planning permission was made: the contention that during and immediately after the Great Recession there was no rush to build a second runway at Dublin Airport is as unsurprising as it is credible.

105. The letter continues:

*"3.2 **Compliance with Development Plan and Regional Planning Guidelines***

Section 42(1)(a)(ii)(II) states that the Planning Authority must be satisfied: *'that there have been **no significant changes in the development objectives in the development plan or in regional development objectives in the regional planning guidelines** for the area of the planning authority since the date of the permission **such that the development would no longer be consistent with the proper planning and sustainable development of the area.** '*

daa has reviewed the development objectives in the Regional Planning Guidelines for the Greater Dublin Area 2010-2022, Fingal Development Plan 2005-2011, Fingal Development Plan 2011-2017 *and the* Draft Fingal Development Plan 2017 -2023 *and conclude that the development remains consistent with the proper planning and sustainable development of the area.*

3.2.1 Regional Planning Guidelines for the Greater Dublin Area 2010-2022

The Regional Planning Guidelines for the Greater Dublin Area 2004-2016 contained a statement at section 8.3 that:

'In order to achieve air passenger numbers of 22.3 million by 2010 and 31.0 million by 2020, Dublin Airport will require a new runway by 2009, extended apron facilities and additional terminal passenger processing facilities. Increased air-freight will require the relocation and provision of additional freight facilities on new sites within the Airport area. Any proposed expansion should safeguard the current and future operational, safety, technical and development requirements of Dublin Airport within a sustainable development framework, being mindful of its environmental impact on local communities.'

The 2004 RPGs [Regional Planning Guidelines] *made no further specific references to development of a new parallel runway at the airport.*

The Regional Planning Guidelines for the Greater Dublin Area 2010-2022...contain the following statement at 1.5 – Progress in Implementing 2004 RPGs:

'The 2004 RPGs places strong emphasis on the need to build and support key infrastructure to support the role of Dublin Airport and Port in meeting the needs of the GDA. [Greater Dublin Area] and the State as a whole. The completion of the Dublin Port Tunnel formed a significant part of overall investment in this area during the life of the RPGs. Also for Dublin Airport, permission is now granted for the new terminal, runway and new apron facilities and construction is underway. This investment has been necessary to meet the rapid and continuing growth in the Irish economy experienced over the last decade. However, there are also some elements needed that have yet

to make progress on the ground and these have been examined as part of the review.'

Section 6.3.3 states that:

'Aviation and air transport are essential to economic trade, international competitiveness and movement of people. The GDA contains the unique asset of Dublin Airport, which is a primary international air access point for the State. Dublin Airport has grown from 10 million passengers per year in 1997 to 23.5 million in 2008 and the Airport Authority forecast [that] by 2020...30 million passenger numbers may be using the airport. Construction of Terminal Two and related facilities is nearing completion and planning permission for a new runway has been granted. It is anticipated these developments will assist in meeting existing and future airport demands.'

The 2010 RPGs support the development of infrastructure, such as the permitted North Runway, to meet the future growth of Dublin Airport. The permitted development is therefore consistent with the RPGs."

106. The Case 1 Applicants suggest that it is of note that even in the 2010 Regional Planning Guidelines there was an appreciation, fuelled perhaps by information from Dublin Airport Authority, that passenger figures were going to rise by 2020 to a figure in excess of the number needed to satisfy the Regulator. The court does not see how it would aid Fingal County Council in arriving at the position of satisfaction contemplated by s.42(1)(a)(ii)(II) of PADA – which is what the letter of 11th January in the just-quoted segment is seeking to

facilitate and ensure – that at some point previous to the application for extension of planning permission being made it had been predicted that, some years after the point in time when that application was made, passenger figures would rise to a figure in excess of the number needed to satisfy the Regulator. That, it seems to the court, is a prediction that is of no relevance to the issue of focus in s.42(1)(a)(ii)(II).

107. The letter continues:

"***3.2.2 Fingal Development Plans***

The extant permission was granted under the Fingal Development Plan 2005-2011, *which was the functional development plan for Fingal at that time. The current* Fingal Development Plan 2011-2017 *is now the statutory plan for Fingal and it is noted that the* Draft Fingal Development Plan 2007-2023 *is currently being prepared. It should be noted that the* Draft Fingal Development Plan 2017-2023 *does not differ in any material sense from the current County Development Plan.*

We outline the context of the site having regard to the existing 2011 plan and the 2005 plan and Draft 2017 Plan to illustrate the policies and objectives that relate to the development of these lands.

Land Use Zoning Objective

The application site is subject to Land Use Zoning Objective DA in the 2011 Plan, which seeks to 'Ensure the efficient and effective operation and development of the

airport in accordance with the adopted Dublin Local Area Plan'. This zoning objective is as per the 2005 Plan and as outlined in the Draft 2017 Plan.

The Draft 2017 plan refers to the development of the airport in accordance with an 'approved Local Area Plan'. It is noted that Dublin Airport Local Area Plan 2006 was extended further to 2015 but has now expired.

Development Plan Objectives relating to Dublin Airport

The Fingal Development Plans, from the 2005 Plan to the Draft 2017 Plan, all contain consistent objectives relating to the development of Dublin Airport and in particular to facilitating the development of a 'second major east-west runway at Dublin Airport' and to 'restrict the cross-wind runway to essential occasional use on completion of the second east-west runway.' The objective also further seek to facilitate the augmentation and improvement of terminal facilities at the airport.

The Development Plans also contain policies/objectives to strictly control inappropriate development...in the vicinity of Dublin Airport and to require noise insulation where appropriate with the Outer Noise Zone. It is also stated that the provision of new residential development and other noise sensitive uses should be resisted within the Inner Noise Zone.

Having reviewed the Development Plans with regard to policies and objectives which pertain to Dublin Airport no significant changes in the policies and objectives have been identified.

Having regard to other policies and objectives in the Development Plans relating to transportation, St. Margaret's, environment etc., there are no significant changes in the policies and objectives identified that would render the development inconsistent with the proper planning and sustainable development of the area.

3.3 Compliance with Ministerial Guidelines

Section 42(1)(a)(ii)(III) states that the Planning Authority must be satisfied:

'that the ***development would not be inconsistent with the proper planning and sustainable development*** *of the area having regard to any* ***guidelines issued by the Minister*** *under section 28, notwithstanding that they were so issued after the date of the grant of permission in relation to which an application is made under this section.'* ***[Our emphasis.]***

Section 2 of the Planning and Development Act 2000 (as amended) defines the 'Minister' as the Minister for the Environment and Local Government. Section 28 of the Act provides for the issuing of guidelines to planning authorities regarding any of their functions under the Act by the Minister.

The Minister has issued twelve sets of such guidelines in accordance with the provisions of section 28 of the Act since planning permission was granted for development of the north runway. It is considered that the only relevant guidelines

relating to this permission are the planning system and the Flood Risk Management Guidelines for Planning Authorities, *issued in November 2009.*

We refer to the Flood Risk Screening Assessment prepared by RPS...and having reviewed these Guidelines, the proposed development would not be inconsistent with those guidelines having particular regard to the fact that: the proposed development would not be situated within any designated flood zones; the proposed development would not involve any works to or the creation of any new access to any national roads; and the proposal was the subject of an Environmental Impact Assessment which comprehensively assessed the potential environmental effects of the proposal prior to development consent being given.

The proposed development, therefore, would not be inconsistent with the proper planning and sustainable development of the area having regard to any guidelines issued by the Minister under section 28.

3.4 Requirements under Section 42(1)(a)(ii)(IV)

Section 42(1)(a)(ii)(IV) states that the Planning Authority must be satisfied that:

*'**where the development has not commenced**, that an environmental impact assessment, or an appropriate assessment, or both of those assessments, if required, was or were carried out before the permission was granted.' [Our emphasis.]*

Following the final discharge on Thursday, 15th December 2016, of the entire prior to commencement of development conditions, construction works commenced on Friday, 16th December on the first Construction Package 1 (NRCP1). The main elements of NRCP No. 1 are outlined in Appendix E and daa can confirm to Fingal County Council that the follow[ing] *works have commenced:*

- *Establishment of the Contractors Compound,*
- *Hedge Row removal and Tree Felling Works, including along Barberstown Lane,*
- *Site security fencing to the site perimeter,*
- *Demolition of the Former Airport Fire Service Training Ground Buildings and Training Structures, including the house, aircraft simulator, smoke training buildings and fuel management system,*
- *Demolition of the existing high mast lighting and associated cabling at the former Airport Fire Service Training Ground, and the removal of the existing hard standings,*
- *Demolition of the existing Farm Outbuildings adjoining the Former Airport Service Training Ground,*

- *All associated permitted works.*

108. Counsel for the Case 1 Applicants expressed some scepticism as to the scale of works undertaken in this regard, noting that "*they were commenced on Friday, 16th December, which was a few days before Christmas, and were completed prior to this letter, which is dated 11th January 2017. And at the time my clients had no impression that this was what was going to be relied on as the commencement of works.*" (The commencement of works is of significance because the commencement of works is relied upon to avoid any obligation to subject Dublin Airport Authority, as applicant for an extension of time, to fresh environmental scrutiny). The court respectfully does not share counsel's scepticism in this regard: even the demolition of the buildings and outbuildings referred to are clearly works.

The letter continues:

> "*A map illustrating where works have commenced is included in Appendix F.*
>
> *As works on foot of the planning permission have commenced, it is submitted that the requirements of Section 42(1)(a)(ii)(IV) of the Planning and Development Act 2000 (as amended) do not apply and that therefore, an Appropriate Assessment of the project is not required in this instance.*
>
> *It should also be noted that the original planning application was subject to EIA in the Board's assessment...*"

109. The point made in the just-quoted text is that there was an environmental impact assessment carried out in the context of the planning application in respect of which extension was made. There was, it seems, no appropriate assessment; however, works having commenced Dublin Airport Authority contends (correctly) that s.42(1)(a)(ii)(IV) of PADA does not apply and so no appropriate assessment is required. Among the complaints made by the Case 1 Applicants is that because they were not involved in the s.42 process, no alternative submissions could be placed before Fingal County Council and this, they maintain, is legally objectionable, because, *inter alia*, it involves a misapplication of applicable European Union law (a proposition that, as will be seen, the court does not accept).

110. The letter continues:

> *"4.0 VALIDITY OF APPLICATION*
>
> *In order for Fingal County Council to determine this application, the submission must be in accordance with the provisions of Article 42 of the Planning and Development Regulations 2001 (as amended). The requirements of this Article are listed below and a response to each requirement is indicated.*
>
> *(1). An application under section 42 or section 42(A) of the Act to extend the appropriate period as regards a particular permission shall be made in writing, shall be accompanied by the appropriate fee as described by Article 170 of these Regulations and shall contain the following information.*

Sub-article	Response

...

(h) the date on which the permission will cease to have effect,	26th November 2017 (having regard to Section 251 of the Planning and Development Act, 2000 (as amended)).
(i) where the application is made on the basis of compliance with subparagraph (i) of section 42(1)(a) or subparagraph (i) of section 42(A)(1)(a), particulars of the substantial works carried out or which will be carried out pursuant to the permission before the expiration of the appropriate period.	Not applicable.

...

(k) the date or projected date of commencement of the development to which the permission relates,	15th December 2016
(l) the additional period by which the permission is sought to be extended, and	Five years.
(m) the date on which the development is expected to be completed.	March 2020.

5.0 CONCLUSION

daa submits that this application for extension of the appropriate period be granted as it fully complies with the requirements of Section 42 of the Planning and Development Act 2000 (as amended) as follows:

- *This application has been made within the lifetime of the permission but less than one year before the expiry of the planning permission.*

- *Work on foot of the permission commenced on Friday, 16th December 2016.*

- *There were considerations of a commercial and economic nature, at both local and national level, which substantially militated against the commencement of development.*

- *There have been no significant changes in the Development Objectives in either the Fingal 2005-2011, Fingal Development Plan 2011-2017, Draft Fingal Development Plan 2017-2023 or the Regional Planning Guidelines for the Greater Dublin Area such that the development would no longer be consistent with the proper planning and sustainable development of the area.*

- *The development is not inconsistent with the proper planning and sustainable development of the area having regard to the Ministerial Guidelines issued since Planning Permission was granted.*"

XIX

Fingal County Council's Consideration of the Extension Application

111. Exhibited in the evidence before the court is a document headed "*RECORD OF EXECUTIVE BUSINESS AND CHIEF EXECUTIVE'S ORDER*" which details, in effect the internal consideration within Fingal County Council of the extension application received from Dublin Airport Authority. After reciting certain administrative details (including the substance of the permission under consideration), the document continues as follows, under the heading "*Planning Officer's Report*":

"*Report of the Planning Officer typed 2nd March 2017.*

Introduction

This is an application for ***EXTENSION of DURATION of PERMISSION*** *under the provisions of Section 42 of the... Planning and Development Acts, 2000-2015....*

This application to extend the duration of the above Permission has been lodged specifically under Section 42(1)(a)(ii) of the Planning and Development Acts 2000-2015 *and seeks to extend the duration of the permission for a further period of five years to* ***28th August 2022****. A 5 year extension is sought by the DAA to allow the*

applicants sufficient time to complete the development. The current 10 year permission expires on the 28th August 2017.

Development on foot of this permission commenced on Friday, 16th December 2016.

The relevant 'appropriate period' for the purposes of Section 251 of the Planning and Development Acts, 2000-2015 is addressed by the applicant in the submission.

In a covering letter submitted as part of the application the following is stated:

'...Section 251 of the Planning and Development Act, 2000 (as amended) provides for an additional 9 days per year and thus, the deadline for the Applicant to submit an application for extension of duration in respect of the subject permission is extended by 90 days (9 days for each of the 10 years of the permission), or up to 26th November 2017. This application for an extension of duration of permission is therefore made prior to the end of the life of the planning permission and not made earlier than one year before the expiration of the period sought to be extended.'

The applicant is relying on the provision of Section 251 of the Planning and Development Acts to determine that the relevant period or 'appropriate period', within which the current permission has effect, is up to and including the 26th November 2017.

...

Planning History

A 10 year permission was granted by An Bord Pleanála for the proposed new Northern Runway, on 29th August 2007. This permission was subject to 31 no. Conditions.

...

Compliance submissions

...15 of these conditions required matters to be submitted to and agreed in writing with the Planning Authority prior to the commencement of development.

Fingal County Council has completed the discharge of commencement of development compliance conditions associated with the new runway.

Fingal Development Plan 2011-2017

The site of the proposed development is located in an area designated with the ***Zoning Objective "DA" DUBLIN AIRPORT*** *where it is the Objective to:*

'Ensure the efficient and effective operation and development of the airport in accordance with the adopted Dublin Airport Local Area Plan.'

...

Relevant Objectives include the following:

Objective EE46: *Safeguard the current and future operational, safety, technical and developmental requirements at Dublin Airport, having regard to the environmental impact on local authorities.*

Objective EE48: *Facilitate the development of a second major east-west runway at Dublin Airport and the extension of the existing east-west runway 10/28.*

Objective TO39: *Facilitate the operation and future development of Dublin Airport recognising its role in the provision of air transport, both passenger and freight.*

Objective SW06: *Implement the Planning System and Flood Risk Management Guidelines for Planning Authorities.*

Local Objective 361: *Facilitate the provision of a second major east-west runway...*

...

Planning and Development Legislation Provisions

Under Section 42 of the...Planning and Development Acts 2000-2015, the Planning Authority is required to extend the appropriate period (as defined at section 40(3)(a) & (b) of the Act) by such additional period not exceeding 5 years as the authority

considers requisite to enable the development to which the permission relates to be completed provided that each of the following conditions is complied with:

[Reference is then made to s.42, with s.42(1)(a)(ii) being the focus of the within proceedings]

...

Reports:

Transportation Planning Section: *The Senior Executive Engineer notes that under Section 42(1)(a)(ii)(II) of the Planning and Development Act as amended the Planning Authority must be satisfied:* 'that the development would not be inconsistent with proper planning and sustainable development of the area having regard to any guidelines issued by the Minister under section 28, notwithstanding that they were so issued after the date of the grant of permission in relation to which an application is made under this section.'

He confirms that the development would not be inconsistent with the proper planning and sustainable development of the area having regard to the Spatial Planning and National Roads Guidelines 2012, issued by the Minister under Section 28.

The Transportation Planning Section has no objection to the proposed extension of duration of permission.

***Water Services Section**: Water Services has no objection subject to the conditions attached to the permission granted...being adhered to.*

***Irish Water**: Irish Water has no objection.*

***Parks and Green Infrastructure**: The Parks and Green Infrastructure Division has no objection*

***Biodiversity Officer**: The Biodiversity Officer has confirmed that he has no objection to the application.*

***Conservation Officer:** The Conservation Officer has no objection to the application.*

***Heritage Officer:** The Heritage Officer has reported as follows:*

'I have reviewed the information submitted by the applicants in relation to this application for an extension of time in respect of planning permission [number of permission cited]...which was the subject of a final grant of permission by An Bord Pleanála in August 2007....

I note from the application that the development has commenced. I am, therefore, of the view that the provisions of Section 42(1)(a)(ii)(IV) in respect of environmental impact assessment and appropriate assessment do not apply in this case.'"

Transport Infrastructure Ireland [TII]

The submission by TII states that the NTA is both the Sanctioning Authority and the Sponsoring Agency during the initial stages of the new Metro North project. It refers to Condition 17 of the permission for the runway and advises that the NTA be consulted.

No reports have been received from the IAA; the NTA; the DHPCLG; the DTTS; the Eastern and Midland Regional Assembly; DCC or Meath County Council."

112. Counsel for the Case 1 Applicants contends that it is apparent from the just-quoted text that there was "*to some degree*" a consultation process from which his clients, "*the people who were in the way of the aircraft trundling down the runways*" were denied involvement. But the question arising is whether his clients had any legal entitlement to participate in the decision-making process effected pursuant to s.42 of PADA. The court considers, for the reasons identified in this judgment, that the Case 1 Applicants do not (and did not) enjoy any such entitlement at law.

113. The document continues:

"***Assessment***

The DAA is applying to Fingal County Council under the provisions of section 42 of the Planning and Development Acts for an extension to the appropriate period of the permission granted.....

Section 42 of the Planning and Development Acts, 2000-2015, states that a planning authority shall, as regards a particular permission, extend the appropriate period by such additional period not exceeding 5 years as the authority considers requisite to enable the development to which permission relates to be completed provided the requirements of Section 42 are met.

Permission is being sought specifically under Section 42(1)(a)(ii) of the Planning and Development Act, 2000 [as amended].

While I note that the site outlined in red on figure A.1 entitled "Aerial View of Airport and Subject Site" [included in...the covering letter] *does not correctly show the full extent of the subject application site outlined in red...I also note that there is no legal requirement to submit a site location map.*

The assessment of this application under the 4 criteria stated in Section 42 is as follows:

Section 42(1)(a)(ii)(I)

Section 42(1)(a)(ii)(I) states that the Planning Authority must be satisfied that:

'there were considerations of a commercial, economic or technical nature beyond the control of the applicant which substantially militated against either the commencement of development or the carrying out of substantial works pursuant to the planning permission.'

The DAA state that it was not possible to implement the permission due to the severe economic, commercial and financial recession which hit the Global economy and Ireland in 2008. The recession of 2008 it is stated, adversely affected markets globally and therefore the outlook for air travel and Dublin Airport. It also caused a very significant decline in passenger demand at Dublin Airport. Passenger traffic which had experienced 17 years of stable growth from 1992 fell dramatically by 5 million passengers from a high of 23.4 million in 2008 to 18.4 million in 2010.

The DAA state that this recession caused a significant downturn in commercial and financial markets and there were fears of a prolonged recession in many quarters. It was therefore not prudent to proceed with the North Runway project in an environment where the following conditions pertained:

- *The World economy and that of leading countries were severely impacted by the recession - the Irish economy, which is a key driver of Dublin Airport traffic, collapsed more than almost all others and the UK and USA, two of Dublin Airport's key markets, were greatly affected, undermining demand. [Dublin Airport's traffic volume fell precipitously by 5 million passengers after a previous extended period of stable growth].*

- *Airlines were greatly impacted upon, including some of Dublin Airport's key customers.*

- *The Regulator would only allow revenue to enable North Runway cost recovery when passenger volumes reached 25 million and that threshold was only reached at the end of 2015.*

The DAA state that the subsequent return to growth, with over 27.9 million passengers through Dublin Airport in 2016 illustrates the improved economic circumstances at the airport and the need to facilitate the development of the North Runway.

The DAA has demonstrated to the satisfaction of the Planning Authority that there were considerations of a commercial and economic nature beyond the control of the applicant which substantially militated against the commencement of development until recently. [the DAA states that development on foot of this permission, commenced on Friday, 16th December, 2016] and therefore the carrying out of substantial works pursuant to the planning permission.

[The court understands that it was the commencement of 'works' simpliciter that was contended for but this is not a point on which anything turns in this regard.]

114. A complaint made by the applicants is that what occurs in the "*RECORD OF EXECUTIVE BUSINESS AND CHIEF EXECUTIVE'S ORDER*" is, especially when it comes to economic matters, a regurgitation of what Dublin Airport Authority says and an acceptance of what is being told without further ado. Clearly when it comes to the other aspects of matters, *e.g.*, parks, biodiversity, there is consultation within the Council as to whether there is any objection to the extension. Specifically as regards the economic dimension of matters,

counsel for the applicants complains that what was presented in this context "*involved the consideration of complex economic arguments and no expert appears to have been retained to form any view as to whether any of this was really credible or not.*" Three points might be made in this regard:

(1) there is no requirement that a council engage expert external advice before it reach a conclusion under s.42(1)(a)(ii)(I).

(2) the court does not see anything complex, in economic terms or otherwise, about the thrust of what Dublin Airport Authority had to say in this regard which is essentially that 'The world economy took a massive hit during the lifetime of the permission. That being so, we held off on the second runway until a certain level of economic turnaround came.' Fingal County Council, it seems to the court, was perfectly capable of reaching a sensible conclusion as to the *bona fides* and general sense of what Dublin Airport Authority had to say in this regard, both by reference solely to what the Authority said and the more general experience of the Council as to the effects of the Great Recession on planning and development generally within its boundaries.

(3) there is a sense with the applicants of the Council's being, to borrow a colloquialism 'damned if you don't and damned if you do', depending on what it suits them to argue: they criticise the Council for not engaging expert external economic advice, yet they also criticise the Council that it raised query with Transport Infrastructure Ireland and Irish Water whether they respectively had any objection to the proposed development.

115. The document continues:

"*Section 42(1)(a)(ii)(II)*

Section 42(1)(a)(ii)(II) states that the Planning Authority must be satisfied:

> 'that there have been no significant changes in the development objectives in the development plan or in regional development objectives in the regional planning guidelines for the area of the planning authority since the date of the permission such that the development would no longer be consistent with the proper planning and sustainable development of the area.'

...

Regional Planning Guidelines

The Regional Planning Guidelines for the Greater Dublin Area 2004-2016 and the Regional Planning Guidelines for the Greater Dublin Area 2010-2022 both highlight the need for a new runway.

In this regard the following is noted...."

116. There follows what counsel for the applicants describes as "*a rehash of what was relied on by the applicant without, as far as I can see, any real interrogation whatsoever.*"

Again, the court respectfully does not see merit to this criticism. What the author of the report, a senior executive planner does is to recite certain provisions of the *Regional Planning Guidelines 2004-2016* and the *Regional Planning Guidelines for the Greater Dublin Area 2010-2022* and arrive at certain conclusions (described below). What more is sought? A planner considers the planning guidelines, something she is especially well qualified to do and arrives at certain conclusions that are well within her particular expertise. Just because she relies upon the text of the submissions made when drafting her own conclusions does not in and of itself tarnish what she has done. If anything, the fact that she has had careful regard to the submissions may well be suggestive of just how thorough a job she has done. The court recalls in this regard its own decision earlier this year, in *O'Brien* v. *Minister for Justice and Equality and anor* [2017] IEHC 199, a case in which objection was made, *inter alia*, to the somewhat standardised form of response that issued from the Department for Justice and Equality when application for enhanced remission of sentence was made, the court indicating that what was before it was (para. 9) "*an entirely rationalised consideration by the Minister of the applicant's application in precisely the manner contemplated by* McEnery [v. *Commisisoner of An Garda Síochána* [2013] IESC 47], the court then continuing:

> "*9...Neither* McEnery *nor the preceding case-law referred to above requires that the Minister should engage with every aspect of an applicant's application for enhanced remission in exhaustive detail, providing a comprehensive compendium of answers to each aspect of every point raised. The Minister is required to provide a suitably rationalised response by reference to the facts of the application before her, and this she has done.*

10. If it is claimed, and there is a hint of this in the pleadings, that the Minister's response came in a somewhat standardised form (notwithstanding that it involved a rationalised engagement with the individual application) that, with respect, is to be expected. There are only so many reasons why one-third remission would be granted or refused. It is likely that similar reasons may ultimately be offered in many, perhaps even most cases, notwithstanding that each is individually considered. It demands the impossible of decision-makers tasked with the everyday operation of government that they should be required constantly to conceive innovative and different ways to convey what seems likely ultimately to be a broadly similar message (save as to conclusion) regardless of which way the Minister's discretion is exercised. Consistency in messaging can be compatible with individualised decision-making."

117. Likewise it seems to the court that it would be absurd if a planner or a local authority tasked with reaching a decision on such submissions as are before them were to be considered to have descended to lawfully objectionable behaviour by incorporating into the text of their conclusions elements of such text as has been placed before them. What is important is that submissions are duly considered and the overall issue at hand likewise receives due consideration. There is nothing in the evidence before the court to suggest that the manner in which Fingal County Council approached the text, or arrived at the conclusions, under consideration, did so in anything other than a competent, professional and lawful manner.

118. The document continues:

"The Planning Authority considers that there have been no significant changes in either [a] the development objectives in the 2011-2017 Fingal Development Plan or [b] the regional development objectives in the Regional Planning Guidelines for the Greater Dublin Area 2010-2022 for the area of the Planning Authority since the date of the permission such that the development would no longer be consistent with proper planning and sustainable development of the area.

Section 42(1)(a)(ii)(III)

Section 42(1)(a)(ii)(III) states that the Planning Authority must be satisfied:

> 'that the development would not be inconsistent with the proper planning and sustainable development of the area having regard to any guidelines issued by the Minister under section 28, notwithstanding that they were so issued after the date of the grant of permission in relation to which an application is made under this section.'

...

"The Planning Authority considers that the development would not be inconsistent with proper planning and sustainable development of the area having regard to any guidelines issued by the Minister under section 28, notwithstanding that they were so issued after the date of the grant of permission in relation to which an application is made under this section.

Section 42(1)(a)(ii)(IV)

Section 42(1)(a)(ii)(IV) states that the Planning Authority must be satisfied that:

> *'where the development has not commenced, that an environmental impact assessment or an appropriate assessment, or both of these assessments, if required, was or were carried out before the permission was granted.'*

The Dublin Airport Authority state that construction works commenced on Friday, 16th December, 2016 on the North Runway Construction Package No 1 (NRCP1).

The works comprised in the North Runway Construction Package No. 1 (NRCP1) are listed in Appendix E. A map illustrating the locations where works have commenced is also included in Appendix E.

The DAA confirms that the following works have commenced:

- *Establishment of the Contractors Compound,*
- *Hedge Row removal and Tree Felling Works, including along Barberstown Lane,*
- *Site security fencing to the site perimeter,*

- *Demolition of the Former Airport Fire Service Training Ground Buildings and Training Structures, including the house, aircraft simulator, smoke training buildings and fuel management system,*

- *Demolition of the existing high mast lighting and associated cabling at the former Airport Fire Service Training Ground, and the removal of the existing hard standings,*

- *Demolition of the existing Farm Outbuildings adjoining the Former Airport Service Training Ground,*

- *All associated permitted works.*

The site was inspected on the 2nd February 2017 by the Senior Planner and the Senior Executive Planner, and the site inspection confirmed that development has commenced as stated.

Given that the development has commenced, the Planning Authority considers that the provisions of Section 42(1)(a)(ii)(IV) of the Planning and Development Act 2000 (as amended) in respect of environmental impact assessment and appropriate assessment do not apply in this case.

119. The applicants again make complaint in this regard that there was no interrogation by Fingal County Council of the proposition that what was done amounted to commencement of development. The court does not see how this can properly be contended in the face of the

statement that "*The site was inspected on the 2nd February 2017 by the Senior Planner and the Senior Executive Planner, and the site inspection confirmed that development has commenced as stated.*"

120. The document then refers to the Climate Action and Low Carbon Development Act 2015 and the requirement for public authorities generally to have regard to the matters referenced in s.15 of that Act in the performance of their functions. The author then moves on to her conclusions and the recommendation to extend the planning permission up to and including 28th August, 2022.

XX

Ms Merriman's Letter of 27th January, 2017 and the Reply Received

121. On 27th January, 2017, Ms Merriman wrote a letter to Fingal County Council headed "*Re: St Margaret's Concerned Residents Group*", stating, *inter alia*, as follows:

"*Dear Sirs,*

This submission is on behalf of the above named residents.

It has come to our attention that Dublin Airport Authority has sought an extension of duration to permission F04A1755/E1. We understand some works have taken place to date, although they cannot be considered as substantial works.

It is our submission that no Environmental Impact Assessment, no screening for Appropriate Assessment, and no Appropriate Assessment accompanied this extension application. This is contrary to [European Union law]....

This development in question will have direct impacts upon the surrounding community and there has been no assessment of any potential issues which arise since the original permission was granted nearly 10 years ago which is contrary the European law. Therefore, the application should be refused.

We enclose the fee in the sum of €20.00...."

122. In a letter dated 31st January, 2017, the Council returned the €20 cheque uncashed stating, *inter alia*, as follows:

"*Dear Ms. Merriman,*

I wish to acknowledge receipt of your letter regarding the above planning permission.

Please note that there is no provision in the Planning Legislation for making observations on applications for extensions of a planning permission.

Please find your submission and cheque herewith...."

123. The foregoing is essentially the case upon which the Council continues to rely when it comes to considering the position of the Case 1 Applicants. What those applicants maintain is

that that there is no obligation on the part of the Council to construe the planning legislation as excluding or precluding (a) an application by the residents, or (b) consideration of the position of the residents, simply because there is no express provision in that legislation requiring such consideration. For the reasons identified elsewhere in this judgment, the court does not accept that it is a proper construction of s.42 that its failure expressly to exclude consideration of the position of those such as the applicants in the context of an application for extension of planning permission has the consequence that their interests must or may arise for consideration by the Council.

F. CERTAIN CASE-LAW

XXI

The Decision in *Dellway*

(i) Introduction.

124. The principal decision that the Case 1 Applicants rely upon when it comes to the issue of unfairness is the decision of the Supreme Court in *Dellway Investments Limited* v *NAMA* [2011] 4 I.R. 1. In that case, Dellway and a number of associated companies were developers, all controlled by a Mr McKillen. The developers had relationships with a number of banks. Under the National Asset Management Agency Act 2009, the National Asset Management Agency (NAMA) was conferred with the right to acquire 'bank assets', including bank loans and all of the contractual rights and security associated with such loans. Banks could object

only if they were of the opinion that the bank asset was not an eligible bank asset. A borrowing party to such loans, the person who was in an existing relationship with a bank from which acquisition was made, had no entitlement to make any representation concerning such proposed acquisition. (There were other issues in the case but they need not be considered here).

125. By way of aside, if one 'parks' the issue of whether or not the plaintiffs in *Dellway* enjoyed a legal right in the bank's interests in their loans, *Dellway* presented, in reality, as strong an attack on the property rights and right to earn a livelihood of Mr McKillen and his associated companies, as one could possibly imagine, short of direct expropriation of the property itself. The attack occurred in a context in which Mr McKillen did not enjoy a right to make submissions and it is in that context that the Court's considerations in *Dellway* must be viewed. Moreover, and in passing, the court cannot but note that the position of the Case 1 Applicants in the within proceedings is quite different to Mr McKillen's position in *Dellway*. This is because:

(1) NAMA had a substantive choice to make about the selection of assets. By contrast, the discretion left to a planning authority under s.42 is minimal.

(2) unlike the situation in *Dellway*, there has been extensive opportunity for public participation in the planning permission and subsequent appeal. (The fact that statute does not provide in s.42 for a right of participation is because the participatory dimension to the planning process is otherwise fully and properly provided for).

(3) the interests of Mr. McKillen and his companies were adversely or materially adversely affected by the decision. Here, there is no aspect of the discretionary element of the decision under s.42 which the Case 1 Applicants have a direct material interest in commenting upon.

(4) the Case 1 Applicants did not seek to make submissions, nor do they seek now to challenge, the planning authority's application of the statutory criteria presenting under s.42 such as the flood risk assessment or the economic rationale for the airport.

126. Mr McKillen sought leave to challenge the acquisition of his loans by NAMA by way of judicial review on the grounds, *inter alia*, that he enjoyed certain rights connected to his bank loans and that he had the right to be heard prior to the making of the decision to acquire his loans due to interference, or potential interference with these rights. It was further submitted by Mr. McKillen that if the Act of 2009 could not be interpreted as affording the applicants an entitlement to be heard as regards the acquisition of the relevant loans and/or the Act was interpreted as permitting the acquisition of unimpaired loans, then the Act was inconsistent with the Constitution. In reply it was submitted by the respondents that there was no interference or potential interference with any constitutional right which triggered an entitlement to fair procedures and that an exclusion of such an entitlement in the legislation was proportionate and justifiable.

127. Before proceeding further with a consideration of *Dellway*, it is worth noting – and in truth all of the contentions made by the Case 1 Applicants (as also adopted by the Case 2 Applicant) by reference to *Dellway*, flounder on this elementary divergence between the facts

of *Dellway* and the facts of the case now presenting – *Dellway* is a case where Mr McKillen and his companies never had an opportunity to make any submissions. By contrast, in the present case the Case 1 Applicants had an opportunity to make submissions in relation to the matters of concern to them, such as the voluntary purchase scheme, such as the impact of noise generated by the second runway, and, also, the flood risk, prior to the new runway permission being granted. (The court understands that the Case 2 Applicant did not participate in the planning permission process).

128. Mr. McKillen and his companies were unsuccessful before a Divisional High Court and appealed to the Supreme Court. There they submitted that the High Court, *inter alia*, erred in its judgment and misunderstood the constitutional position concerning what constituted an interference with constitutional rights sufficient to trigger an entitlement to fair procedures and, moreover, had incorrectly applied the test for interference with constitutional rights. It was further submitted by the applicants that in its assessment of the facts of the case and its interpretation of the Act, the High Court failed to address the facts peculiar to Mr. McKillen's case by reference to the evidence, this last aspect of matters being something upon which special emphasis is being made in the within proceedings as well.

(ii) Overview of Decision and Conclusions.

a. Decision.

129. The overall result of *Dellway* insofar as the issue of fair procedures is concerned, has, if the court might respectfully observe, been encapsulated succinctly by Hogan J. in his observation in *Callaghan* v. *An Bord Pleanála* [2016] IECA 398, para. 37, that "*The*

Supreme Court...[in *Dellway*] *held that fair procedures meant that the applicant was entitled to be heard prior to any decision by NAMA to receive*...[a particular] *tranche of loans*...*because such a transfer of those loans quite obviously had material reputational and practical implication for the borrowers.*"

130. While that is the overall conclusion reached in *Dellway* as regards fair procedures, it is necessary to undertake a consideration of certain of the reasoning that led to that conclusion. Unfortunately, because each member of the Supreme Court in *Dellway* delivered her or his own judgment, it is difficult to discern an entirely clear reason for the decision of the court because each judge differed, and even to the extent that they agreed the nuances of language come into play. In essence, however, the core judgments, particularly those of Murray C.J. and Fennelly and Macken JJ., can perhaps be synthesised as follows:

(1) the criteria for assessing whether fair procedures require a person to be heard before a decision is made include (a) the nature of the decision, (b) the nature of the statutory scheme, (c) the importance of the decision to the person invoking the right and (d) the choice of the procedure adopted by the decision-maker. There can be other relevant criteria such as any legitimate expectation presenting.

(2) a person whose interests are capable of being directly affected in a material way by a decision, should be allowed to put forward reasons as to why the decision should not be made or not take a particular form, even if that decision is justifiable in the interests of the common good. However, the mere diminution of property values would not normally suffice to establish the right to be heard.

(3) the right to be heard before a contemplated decision is made is not dependent on establishing interference with a specific and identifiable right. The courts have never laid down rigid rules for determining when the need to observe fair procedures applies: it depends on the circumstances and the subject matter. The fundamental underlying principle is fairness.

b. Conclusions.

131. A somewhat lengthy analysis of *Dellway* follows. It may assist if, before engaging in that analysis, the court sets out certain of its key conclusions. These are as follows.

(1) even if the Case 1 Applicants enjoy a class of interest by reason that they fall within a particular condition of the planning permission the opportunity for prior participation in the planning permission process and the limited discretion enjoyed by Fingal County Council under s.42 is insufficient to yield a right of participation.

(2) even if third parties in the position of the Case 1 Applicants do enjoy a right of participation (which is not accepted by the court to be the case), the Oireachtas has proportionately limited that right.

(3) as to the claim by the Case 2 Applicant that there is a freestanding constitutional right to public participation (and hence to make a submission), neither in its written nor its oral submissions has the Case 2 Applicant advanced any

argument or authority for the proposition that such a freestanding constitutional right exists. Nor does the court consider, in any event, that it does exist. With every respect, it runs against all authority, not to mention common-sense, to view the constitutional right to fair procedures (and hence to make a submission) as vesting in third parties with no material interest whatsoever.

(4) the applicants have, with respect, tended to present the section 42 process as though it exists bereft of the rest of the elements of PADA. But the planning process and the decision made by Fingal County Council must be considered in their entirety when considering whether or not the applicants' right to fair procedures has been engaged or infringed.

(5) following on (4), the court notes that a s.42 decision takes place in the context of the prior planning process, including a right to public participation. This is a substantive legal right that (properly) tends generally to be, and in this case has been, treated with all seriousness by, *inter alia*, An Bord Pleanála. It is also a right of which the Case 1 Applicants fully availed. Moreover, there were many opportunities to judicially review the new runway permission and its conditions.

(6) when it comes to s.42, the decision-maker (Fingal County Council) enjoys and enjoyed a limited discretion. It was confined to considering the matters specified in s.42, as, for example, Finnegan P. found in *McDowell*. Thus it could not go beyond s.42 and trespass upon the original planning permission.

(iii) Judgment of Fennelly J.

a. Overview.

132. It seems to the court that the judgment of Fennelly J. in *Dellway* is the most pertinent to the issues raised in the within proceedings. It is to that judgment to which the court now turns.

b. Effect on Rights and Diminution in Property Values.

133. In his judgment, Fennelly J., at 321, observes as follows:

> *"**[433]** As I have explained, I have decided to consider as a separate matter whether the applicants have shown that their rights or interests are in fact capable of being affected by a NAMA acquisition decision. I am posing, as a first question, whether NAMA and the State are correct in their submission that consideration of the borrower's interest is excluded. I do so, therefore, on the hypothesis that Mr. McKillen's interests are affected.*

[Rights of Person Whose Interests are Capable of Being Affected.]

> ***[434]** When the question is expressed thus, there can be only one answer. A person whose interests are capable of being affected by a decision of a public body exercising statutory powers, is ordinarily entitled to have notice of the intention to*

consider the making of the decision and to have his representations heard by the decision maker with regard to those effects.

...

[Nature of Effect on Rights.]

[442] *I have set out earlier in this judgment the respects in which the applicants claim that their constitutional rights are liable to be affected by a NAMA decision to acquire their loans. The applicants have analysed these effects under four principal headings, which I now repeat:-*

1. *effects on their underlying properties, i.e., their constitutionally protected property rights;*
2. *effects on their right to the income stream from their properties. i.e., their constitutionally protected right to earn a livelihood;*
3. *effects on their bundle of contractual rights;*
4. *effects on their reputation.*

...

[451] *The judgments of the High Court and the Supreme Court in* MacPharthalain *v.* Commissioners of Public Works *[1992] 1 I.R. 111; [1994] 3 I.R. 353 held that the decision 'affected the rights' of the applicants. Does that mean that the rights themselves have to be infringed in their legal quality or does it include cases where*

the exercise of the rights is rendered more difficult, less valuable or merely less attractive?

[452] *A distinction has to made between decisions addressed to or closely connected with named or identifiable individual persons or bodies and decisions made in the general public interest. The High Court cited the following passage from the judgment of Costello J. in* Hempenstall *v.* Minister of the Environment *[1994] 2 I.R. 20 at pp. 28 and 29:-*

> *'... a change in law which has the effect of reducing property values cannot in itself amount to an infringement of constitutionally protected property rights. There are many instances in which legal changes may adversely affect property values (for example, new zoning regulations in the planning code and new legislation relating to the issue of intoxicating liquor licences) and such changes cannot be impugned as being constitutionally invalid unless some invalidity can be shown to exist apart from the resulting property value diminution.'*

[453] *We are not here, of course, concerned with a legislative measure. Nonetheless, government and other public bodies may adopt decisions having general application, which, while they have effects on individuals, do not impose an obligation on the decision maker to accord a hearing to affected persons. Planning authorities adopt development plans and designate or 'zone' large areas of land for specified types of use. Such decisions are more relevant to this case than zoning regulations, mentioned by Costello J. The legislation provides its own mechanism for publication and*

objection. Decisions may be challenged on judicial review for want of vires or on other grounds. They do not, however, require observance of the rule of audi alteram partem.

[Diminution of Property Values.]

[454] *I would add that I do not consider that the mere fact of diminution of property values would normally suffice to establish an individual right to be heard. The decision of a public body to embark on the construction of a bridge, an airport, sewerage works, a new motorway or the like may affect many people, in particular by adversely impacting on property values, but public consultation rather than individual judicial review is the preferred and appropriate means of balancing public and private interests. At any rate, I do not think that mere adverse effects on property values flowing from a public law decision can, on its own, trigger the right. I am prompted to recall the analogy with the rules for compensation for compulsory acquisition of property. The rules make a distinction between injurious affection caused by what is done on land taken from the claimant and on land not so taken. In other words, the claimant has to put up with the effects of the compulsory purchase order, insofar as they emerge from land not taken from him (see* Chadwick *v.* Fingal County Council *[2007] IESC 49, [2008] 3 I.R. 66.)*"

134. The court respectfully notes Fennelly J.'s observation, at para. 454 that "*I do not consider that the mere fact of diminution of property values would normally suffice to establish an individual right to be heard*". It might, perhaps not unreasonably, be contended, though it clearly has not been accepted by the Supreme Court, whose decisions bind this

Court, that the aspect of residential property most cherished by residential property-owners is its centuries-long rise in value. Recent national economic events notwithstanding, that general rise remains widely perceived as the best means of giving the next generation a 'leg up' in a society which, disappointingly, has yet to find a means of ensuring that residential property is available to each succeeding generation at a reasonable price, instead of being an increasingly unattainable luxury in the acquisition of which parents now so often seek to assist by borrowing against the value of their own private residence or 'trading down' so as to free up money for their children. In the context of such borrowing and trade-downs and, of course, intended property bequests, the notion that "*diminution of property values would* [not] *normally suffice to establish an individual right to be heard*" is notable. It is difficult to conceive of a property-related matter which has greater potential to agitate emotion, and in respect of which people would more want (and expect) to be heard, than a decision which has the potential, or is practically certain, to result in a diminution in the value of property, especially residential property (which for most people is the single-greatest asset they possess and which they have often gone through straitened circumstances to acquire). There is no such thing as a right to a property value, but that does not mean that people do not have the keenest 'interest' (in the ordinary, non-legal sense of that word) in speaking to a perceived threat to a perceived property value. However, the Supreme Court has set its mind against the "*mere*" fact of diminution of property values normally sufficing to establish an individual right to be heard, and by that conclusion this Court, as mentioned, is bound.

[Different Types of Decision]

135. Notable too is Fennelly J.'s observation that "*government and other public bodies may adopt decisions having general application, which, while they have effects on*

individuals, do not impose an obligation on the decision maker to accord a hearing to affected persons." The s.42 decision that is the focus of the within proceedings is an individual decision affecting primarily Dublin Airport Authority, so it is qualitatively different from, say, a zoning which would affect a much wider number of people. However, the central point being made by Fennelly J. holds good, *viz.* that in not all cases is a right to hearing to be afforded; it is a matter of degree and it is a matter of context.

[When right to be heard presents]

136. Moving on, Fennelly J. observes as follows:

> "***[456]*** *The applicants cited the decision of Murphy J. in* Chestvale Properties Ltd. *v.* Glackin *[1993] 3 I.R. 35 at p. 45 to the effect that provisions of the Companies Act 1990 conferring powers on inspectors to demand documents from solicitors and bankers '[did] impinge to some extent on their property rights insofar as the same consist of mutual contractual obligations between themselves and their bankers and solicitors respectively'. Murphy J. held, however, that there was a limited intrusion on constitutional rights which was justified as a means of reconciling the exercise of properties with the common good.*
>
> ***[457]*** *Neither party cited the decision of this court in* Haughey *v.* Moriarty *[1999] 3 I.R. 1, which seems to me to be a more helpful authority. The applicants had brought a wide ranging challenge to the Tribunal of Inquiry (Payments to Politicians). One of many complaints was that the Tribunal had infringed their constitutional right to privacy in relation to their banking transactions by addressing orders for wide-*

ranging discovery to a number of financial institutions without notice to them. Geoghegan J., in the High Court, observed that the rights of the plaintiffs in relation to banking records could be viewed merely as contractual rights to confidentiality or might be protected by the constitutional right to privacy. Both Geoghegan J. and the Supreme Court considered that, in any event, the making of the orders by the tribunal was justified in the interests of the common good.

[458] *Nonetheless, it was held both in the High Court and the Supreme Court that the plaintiffs should have been notified and heard before any such order was made. Hamilton C.J., speaking for a unanimous Supreme Court, dealt with the matter as follows at pp. 75 and 76:-*

> *'While the Tribunal is entitled to conduct the preliminary stage of its investigations in private, and to make such orders as it considers necessary for the purposes of its functions, that does not mean that in the making of such orders, it was not obliged to follow fair procedures.*
>
> *In the making of such orders the Tribunal had in relation to their making all such powers, rights and privileges as are vested in the High Court or a judge of that court in respect of the making of orders.*
>
> *Fair procedures require that before making such orders, particularly orders of the nature of the orders made in this case,* the person or persons likely to be affected thereby should be given notice *by the Tribunal of its intention to make such order, and should have been afforded the opportunity prior to the*

making of such order, of making representations with regard thereto. Such representations could conceivably involve the submission to the Tribunal that the said orders were not necessary for the purpose of the functions of the Tribunal, that they were too wide and extensive having regard to the terms of reference of the Tribunal and any other relevant matters' (emphasis added).

...

[460] *It does not appear to me that it has been established that the right to be heard before a contemplated decision is made depends on establishing interference with a specific and identifiable legal right. It is difficult to discern a principled basis for restricting the right in that way. The courts have never laid down rigid rules for determining when the need to observe fair procedures applies. Everything depends on the circumstances and the subject matter. The fundamental underlying principle is fairness. If a decision made concerning me or my property is liable to affect my interests in a material way, it is fair and reasonable that I should be allowed to put forward reasons why it should not be made or that it should take a particular form. It would be unjust to exclude me from being heard. For the purposes of the right to be heard, I would not draw a sharp line, what is sometimes called a 'bright line' of distinction between an effect which modifies the legal content of rights and a substantial effect on the exercise or enjoyment of rights. I would fully endorse the first part of the statement of the High Court, quoted above as follows:-*

'[116] The court is not satisfied that any mere possibility that there might be an indirect consequence for a party's rights affords the party concerned a

right to fair procedures. There must be a real risk that a party's rights will be interfered with in the event that there is an adverse decision.'

The problem is with the interpretation of the following statement that '[t]he adverse decision must be such as would directly interfere with those rights, or at least any interference must be so closely connected with any adverse decision so as to warrant that the party concerned be entitled to invoke a right to fair procedures'. If the requirement is that there be direct interference with the legal substance of the rights, the statement is too narrow. It should be capable of including material practical effects on the exercise and enjoyment of the rights. Subject to this qualification, which was crucial to the outcome of the case in the High Court, I would approve the passage at para. [116] (quoted at para. [445] above) as a correct statement of principle."

[Para. [445] of the judgment of Fennelly J., not quoted previously above, reads as follows:

"***[445]*** *The High Court approached the matter as follows:-*

'[116] The court is not satisfied that any mere possibility that there might be an indirect consequence for a party's rights affords the party concerned a right to fair procedures. There must be a real risk that a party's rights will be interfered with in the event that there is an adverse decision. The adverse decision must be such as would directly interfere with those rights, or at least any interference must be so closely connected with any adverse decision so as

to warrant that the party concerned be entitled to invoke a right to fair procedures. Obviously, the precise application of that general principle requires an analysis of the right which it is said might be interfered with and the manner in which it is said that an adverse decision would interfere with that right. "].

137. What Fennelly J. posits is that there must be a real risk of an adverse interference with a party's rights, including adverse practical effects on the party's exercise and enjoyment of those rights, other than the right to fair procedures itself. This entails an analysis of the right which is said to have been interfered with. The Case 1 Applicants rest their right on (1) condition 9 of the new runway permission, a provision that is not amenable to change, and/or (2) the potential diminution of their property values and enjoyment of their property. But, as touched upon above, the court is bound by the decision of the Supreme Court that "*the mere fact of diminution of property values would* [not] *normally suffice to establish an individual right to be heard*". Moreover, the nature of the decision under s.42 is such that it changes nothing as to the property rights or enjoyment of the applicants' property: the nature of the statutory scheme is one involving minimal discretion and one in which the applicants have had the opportunity to be heard (and have been heard) and to litigate.

138. Continuing with his analysis, Fennelly J. turned from his principled analysis (considered above) to look at the alleged effects on the rights of the applicants in that case, observing, *inter alia*, as follows, at paras. 461, 463 and 466-7.

"*[461] Before turning to consider the actual effects on their rights alleged by the applicants, it is necessary to consider how the affidavit evidence produced by the applicants should be treated. Should the court itself assess its strength or weigh its value? Should the court arrive at a conclusion as to the likely effects on the applicants' business of the NAMA business plan? I do not think it is necessary for the court to go so far. It suffices, in my view, that there is an apparently credible body of evidence that the applicants' business is likely to be significantly affected. It is not for the court to decide on the weight to be attached to that evidence or whether it should be accepted at all. That would be to beg the question which arises, which is what NAMA should be required to take it into account when considering in its discretion to make an acquisition decision. I take the same view about the question of whether or not the applicants' loans are impaired. As already noted, the High Court decided that it was not part of its function to decide whether the loans were 'impaired', an approach conceded to be correct by the applicants during the hearing of the appeal. There is some controversy as to whether the applicants' loans are, in fact, impaired and as to the extent of any impairment. These are not matters that could be resolved without very close scrutiny of the lending documentation and the financial evidence. I have referred earlier to some general and tentative conclusions of the High Court regarding compliance with loan-to-value covenants. These are matters in respect of which the applicants would, no doubt, wish to make representations to NAMA.*

[Here one sees tied together questions of the evidence required and the discretion to be exercised].

...

[463] *As shown by the NAMA business plan, NAMA sees itself as a 'work-out' vehicle, or, in accordance with its title, an asset management agency. Borrowers are required to produce business plans including detailed and credible targets for reducing their debt including any asset disposals which would contribute to that end. There was a reasonable expectation that existing expired facilities would be routinely renewed as an administrative matter, whereas NAMA will be able to and is likely to rely on the legal fact of expiry. In a normal profitable and performing banking relationship, a lending bank would not, in practice, rely on breach of loan-to-value covenants to call in loans. NAMA has a core commercial objective of recovering for the taxpayer whatever it has paid for the loans in addition to whatever it has invested to enhance property assets underlying those loans. It is expected to have a lifespan of seven to ten years. This objective is incompatible with Mr. McKillen's business model, which is to invest long term and to enhance his portfolio.* [So one can see the direct adverse affect on Mr McKillen.] *It is significant that the European Commission saw a distinction between a bank and NAMA so far as its relation with a borrower is concerned. It said at paragraph 44 of its Decision, which I dealt with more fully in my earlier judgment on the issue of state aid:-*

> *'Some of the powers granted to NAMA are not available or go beyond those available to traditional market players operating on the real estate financing market in Ireland. According to Irish authorities, such powers are essential for the discharge by NAMA of the obligations imposed on it by statute. They are essential for NAMA's fundamental purpose of acquiring assets in order to*

address a serious threat to the economy and to the systemic stability of credit institutions in the State.'

...

[466] *Finnegan J. has analysed in his judgment today the foregoing and a number of other provisions of the Act conferring specific powers on NAMA. He has demonstrated that, at the very least, NAMA has powers which were not available to the financial institutions. Their precise effects cannot be judged in the abstract or apart from the context of a particular dispute. It is not possible to pass judgment definitively on these provisions. I believe, however, that, when considered in their entirety they show that the transfer of loans to NAMA has the potential to affect borrowers, at least to a sufficient extent to require NAMA to accord a hearing to the applicants prior to making an acquisition decision.*

[467] *I have endeavoured above to give a brief summary of the applicants' case for effects on their interests. There is dispute about the correctness of some of Mr. McKillen's claims, in particular, about the extent to which his loans are impaired. The central point is, in my view, that the transfer to NAMA puts the applicants and Mr. McKillen in a fundamentally different situation. NAMA, a statutory body, with statutory powers and objectives replaces his banks with which he has had, up to now, a commercial relationship. His long term business model is not compatible with NAMA's statutory remit, which is essentially short term. Where NAMA is in a position to rely on default by any of the applicants under their loan agreements, it is not only likely to but obliged to take action in pursuance of its statutory objectives, where a*

bank either would, or at least might, not do so. The consequence of an acquisition decision is to make a substantial change in the way in which the applicants are in a position to exercise their property rights. Their ability to manage their properties independently is reduced."

139. In the last sentence, which is italicised in the original, Fennelly J. gets to the crux of the *Dellway* decision, which, as mentioned, is a case concerned with a situation that was about as close as one could come to the direct expropriation of property. There was a very substantial interference presenting and it is for that reason that Mr McKillen and his proper businesses were afforded an opportunity by the Supreme Court to make submissions. That is, with respect, a very different position to the position in which the Case 1 Applicants find themselves, where what presents is a decision to extend the duration of a planning permission in the context of a limited statutory discretion.

140. Continuing, Fennelly J. observes as follows, at paras. 471-2:

"***[471]*** *I have come to the conclusion that the applicants have the right to be heard by NAMA before it makes any acquisition decision in respect of their loans. That right relates, as I have already emphasised, only to representations with regard to the effects any acquisition decision is likely to have on their particular interests. It does not extend to making representations concerning the considerations, other than effects on the applicants, to which NAMA will have regard when considering whether to make a decision. I would emphasise that the right is to make representations. This is not a case where the decision maker will be proposing to deprive the subject of a proposed decision of an office or employment, a licence or other legal right or*

privilege. In such cases, where it is proposed to make a decision adverse to the holder, the law requires that notice be given of any intention to rely on any misconduct or breach of the terms of the relevant license or other legal instrument (see for example The State (Gleeson) *v.* Minister for Defence *[1976] I.R. 280). In the present circumstances, it is the applicants and, in particular, Mr. McKillen, who, as explained in the application for judicial review, wish to advance reasons why the decision should not be made by reason of matters peculiar to them.*

[472] *I would not dictate the form or extent of any facility which NAMA should extend to the applicants. I do not suggest that they are entitled to an oral hearing before the Board of NAMA or any officer of NAMA. All these are matters to be decided by NAMA, in consultation with its advisers. NAMA is clearly entitled to have regard to any element of urgency attending the decision making process. I would endorse the following passage from Woolf, Jowell and Le Sueur* De Smith's Judicial Review *(6th ed., Sweet & Maxwell, London, 2007) at p. 377, para. 7.039:-*

> *'The content of procedural fairness is infinitely flexible. It is not possible to lay down rigid rules and everything depends on the subject-matter. The requirements necessary to achieve fairness range from mere consultation at the lower end, upwards through an entitlement to make written representations, to make oral representations, to a fully-fledged hearing with most of the characteristics of a judicial trial at the other extreme. What is required in any particular case is incapable of definition in abstract terms.'"*

141. Notable in the just-quoted text is Fennelly J.'s assertion that "*the right to be heard by NAMA*", which arises in the context presenting "*relates...only to representations with regard to the effects any acquisition decision is likely to have on their particular interests.*" When it comes to the (limited) discretionary elements of s.42, the court notes that there are either no impacts on the particular interests of the applicants or, at the least, interests that are not of such substantial gravity that the applicants have a material interest in any, if any, potential adverse effect arising from a decision under s.42.

(iv) *Wexele* v. *An Bord Pleanála*

[2010] IEHC 21

142. When coming to court looking for a right to participate in a particular decision-making process, the relevant applicants must establish that they have something to say. The court has been referred in this regard to the decision in *Wexele*. That was a case in which the applicant had been refused planning permission to build a retail and residential complex on the ground, which refusal was grounded, *inter alia*, on that the loss of parking spaces arising from the proposed development would result in an under-provision of car parking spaces for the area, thus leading to traffic congestion. The applicant sought to have the decision quashed on the grounds that issues as to parking and traffic congestion were outside the scope of what An Bord Pleanála could have regard to, and thus irrelevant and immaterial to the application. In his judgment, Charleton J. observes, *inter alia*, as follows, at para. 20:

> "*Fundamentally, if a complaint is made that an applicant was shut out of making a submission, that party must show that they have something to say. What they have to say must not be something that has already been said. Nor can it be a reiteration in*

different language of an earlier submission. If a party is to meet the onus of alleging unfairness by the Board in cutting them out for making a submission they must reveal what has been denied then, what they have to say and then discharge the burden of showing that it had been unjust for the Board to cut them out of saying it."

143. Applying that authority in the context of the within proceedings, even if it were the case that the rights of the Case 1 Applicants were engaged (and the court does not accept, for the reasons elsewhere stated in this judgment that they were so engaged) the Case 1 Applicants would still have to discharge the onus of showing that it has been unjust that they were not permitted to participate: this they have not done. At no point have the Case 1 Applicants said that An Bord Pleanála has acted incorrectly in some way (not that it is possible to assail the decision of An Bord Pleanála in the within proceedings). All that the Case 1 Applicants have said is that they wanted an opportunity to input into the s.42 process by way of submission but their desired submissions concern the environmental impact assessment and the appropriate assessment, matters on which they have submitted previously. So the Case 1 Applicants have not, with respect, discharged the burden of showing that it was unjust to "*cut them out*" (to borrow from the above-quoted wording of Charleton J.) of the s.42 process.

(v) *Klohn* v. *An Bord Pleanála*

[2009] 1 I.R. 59

144. This was an appeal, under s.127 of PADA, focused on whether or not there was permissible exclusion of the right to make further representations or further submissions.

Under the heading "*Breach of fair procedures*", McMahon J. observed, *inter alia*, as follows, at paras. 55-56:

> "***[55]*** *The applicant makes the case that the respondent acted unlawfully in failing to allow the appropriate persons to make comments in respect of the submissions of the second notice party of the 16th February and the 25th March, 2004. He makes the point that the respondent, in this decision, admits that the original application has been "amended" by the submissions dated the 16th February and the 25th March, 2004 and, as such, could not have been covered by the original environmental impact statement.*
>
> ***[56]*** *The submission of the 16th February, 2004, was the response by the Achonry Development Group to the second notice party's appeal. The submission of the 25th March, 2004, was the second notice party's response to the observations of the applicant. The applicant states that these ought to have been circulated to the applicant for his further comment. Specifically, the applicant alleges that the respondent's action in this matter was invalid for two reasons. [For the purpsoes of the within proceedings, it is the second of the said reasons that is relevant.]...Secondly, he argues that as a matter of fair procedures both he and the Achonry Development Group ought to have been furnished with these submissions and given the opportunity to make further representations. Both of these arguments will be discussed in turn.*"

145. Before turning to McMahon J.'s analysis, the court notes that *Klohn* is a case that is not truly 'on point'. This is because it is concerned with an appeal process within which

further submissions were not submitted, as opposed to a s.42-type process within which no submissions were permitted. However, the factors which McMahon J. considered in his judgment appear to the court to be of relevance in considering the limited discretion that the Oireachtas has granted to decision-makers under s.42.

146. Turning to the text of *Klohn*, McMahon J. observes, *inter alia*, as follows:

> "***[62]*** *The second argument advanced by the applicant in this context, is that his right to fair procedures was denied and, in particular, that he was denied further opportunity to comment on the submissions made on the 16th February and the 25th March, 2004, in breach of fair procedures and, in particular, in breach of the* audi alteram partem *rule.*
>
> ***[63]*** *In assessing this argument it should be remembered that, in the present case, the applicant and the Achonry Development Group, of which he was a member, participated fully and actively in the whole process from the very beginning. Both had made submissions in response to the appeal lodged by the second notice party. The group, itself an appellant, had been supplied with all relevant submissions and observations and the applicant, as an observer and a member of the group, was fully aware of the submissions. A brief look at the chronology of the events in the initial application and the appeal discloses how thorough the process was and, in these circumstances, it is difficult to conclude that the applicant or the group lost any significant opportunity to be fully heard. The consultation process is not interminable: if the applicant was afforded the opportunity to further respond, would the respondent then have to provide the second notice party with an additional right*

of reply? There must be an end to the consultative process at some stage and, in view of the fact that the respondent considered that there was nothing new in the submissions of the 16th February or the 25th March, it was entitled to put a halt to the submission and observation phase of the process. It was entitled to move to the deliberation and the decision phase. In contentious planning applications it is, on occasion, understandable that local feelings will run high and, while it is important that objectors and others be given their say, it is inevitable that a point will come when the decision maker must bring an end to the consultation process and proceed to make his decision. In reviewing this decision in the light of fair procedures requirements one must be mindful of striking a fair balance between the competing interests. One is dealing here with principles which should be applied in a sensible and robust fashion. In entertaining an argument from an objector who says that he was short changed in the participation, one is entitled to stand back and look at the overall picture bearing in mind, at all times, the discretion given to the decision maker. Before one would conclude that the applicant has not been given a fair hearing, one would need to conclude that justice has been seriously offended. Given the level of participation and the level of information available to the applicant in this case, I do not believe that there has been any breach of fair procedures."

147. The factors which are being considered by McMahon J. in the above-quoted text, are factors which the Oireachtas appears to have considered in how it has framed s.42 and in the context of the very limited discretion available to a decision-maker under s.42 (here Fingal County Council). The exhaustive prior participation in complete planning processes, it appears to the court, has the result that no right to fair procedures is engaged. But even if the court were to take the view that a right to fair procedures is engaged (and it does not take that

view), such a right, as is clear from the above-quoted text can be, and here has been, circumscribed lawfully. In this last regard it is perhaps worth noting too that the Oireachtas must be presumed, in its enactment of s.42, to have acted in a constitutional manner.

(vi) Blinkered Focus on Facts at Hand?

148. There can be a temptation, on the part of both counsel and courts, when looking at statutory provisions, to read them only by reference to the particular facts of the case at hand. In this regard, it could perhaps be argued that the facts of the within case are somewhat stark, involving a ten year planning permission. But if the logic of the position advanced by the Case 1 Applicants were correct, there would always be a right to be heard under s.42 which potentially could lead to absurd results. As counsel for Dublin Airport Authority contended at hearing:

> "[I]*f we posit the following scenario: suppose a developer has planning permission to build 100 houses and within the initial appropriate period of the planning permission he has built 95 of those houses. So 95% of the development is complete* [and] he [the developer] *applies for an extension of duration to complete the five houses....Could it really be said, in those circumstances, that any impact on neighbouring properties was caused by the extension of duration? Remember, 95 of the 100 houses have already been built and the additional five don't make a difference one way or the other. And I accept that's an extreme example, it is a* reductio ad absurdum, *but it indicates the fallacy of my friends' argument. They are either right on s.42 or they are wrong. If they are right, then there is always a right to participate. And that applies in circumstances where, clearly, the extension of duration could have no*

impact one way or another on somebody living within the vicinity. And we say, with respect, they are wrong: section 42 doesn't require it."

149. That is a contention and a conclusion with which the court respectfully concurs.

G. THE ENVIRONMENTAL IMPACT DIRECTIVE

XXII

Is a Decision under Section 42 a 'Development Consent'?

150. Under Art. 1 of the consolidated EIA Directive, the term "*development consent*" means "*the decision of the competent authority or authorities which entitles the developer to proceed with the project*", with the term "*project*" defined in the same Article as meaning both "*the execution of construction works or of other installations or schemes*" and "*other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.*" There is no doubt but that the new runway development is a 'project'.

151. The Case 1 Applicants' case, so far as the EIA Directive is concerned, stands or falls on them persuading the court that the decision to grant an extension of duration under s.42 is a development consent within the meaning of the EIA Directive. So, for example, when it comes to *Križan* (considered later below), it was accepted by counsel for the Case 1

Applicants in the course of submission that it is only if an extension of duration under s.42 is a development consent that *Križan* in fact applies. When it comes to contending that a decision under s.42 *is* a development consent, the applicants advance what might be described as a 'but for' test. Thus they contend that but for the fact that an extension of duration was granted on the 7th March 2017 the development of the new runway could not continue (or, in truth, could not have continued following on the expiration of the planning permission in August 2017). That is an argument which is superficially attractive but unfortunately wrong. Indeed, in *Dunne* v. *Minister for the Environment (No. 2)* [2007] 1 I.R. 194, para. 44, Murray C.J. expressly deprecates a 'but for' test in the following terms:

> "[44] *What emerges clearly from these judgments is that the question as to whether or not a particular decision constitutes a 'development consent' cannot be determined simply by the application of a 'but for' test; in other words, the fact that the development might not be permitted to proceed 'but for' the particular decision in issue cannot* per se *be conclusive. As Buxton L.J. stated in* R. (Prokopp) *v.* London Underground Ltd. [2004] 1 P & C.R. 31 479 (at para. 60):-
>
> > '*In our case, both in law and in common sense the 'project' is the whole of the ELLX. For that reason, as Mr. Gordon pointed out, the fact that by a rule of the domestic law of a particular member state further permission is required in the course of the project, though for reasons unconnected with its environmental impact, does not mean that the granting of such permission must be treated as a 'development consent'. Indeed, quite the reverse. The relevant and only such consent in terms of the Directive was the original decision that permitted the project to go forward in the first place.*'"

152. In the case at hand, the new runway development could "*go forward*", it could commence, it did commence and, per the submissions made by Dublin Airport Authority to Fingal County Council, it could even have been concluded, but for the economic and commercial considerations presenting. That is in marked contrast with the scenario presenting, for example, in *Wells* (also considered below), a case concerned with old mineral planning permissions which had not been worked for two years and where development could not proceed (the mining could not be resumed) but for the decision of the Secretary of State which imposed the new conditions. Likewise, in *Križan,* the development consent had not yet been granted and the environmental impact assessment was an independent separate decision which, it seems, could pre-date a development consent by a number of years. So the development could not proceed but for the grant of the IPC licence (and that is why it was a development consent).

153. Here, the decision under s.42 to extend duration was not a decision that allows a development to proceed, was not a decision that could or did change the substance of the project, and was not a decision that could or did change the substance of the conditions. That is clear from the terms of s. 42 of PADA. The only condition that can be added is to make sure that the financial security for the completion of the development is continued in being over the extended period. Other than that no change can be made to the conditions. This is a theme that is picked up in the judgment of Murray C.J. in *Dunne (No. 2)*, para 49:

> "*[49] The court is satisfied for the following reasons that the ministerial directions under s. 8 of the Act of 2004 do not fulfil any of the requirements necessary to constitute a 'development consent':-*

(a) *firstly, the first defendant does not have power under s. 8 of the Act of 2004 to embark upon a reconsideration of the environmental issues arising for the road development, and, more importantly, does not have power to modify the road development. All that is left for the first defendant is a power to regulate the manner in which the works which are necessary to allow the road to proceed are carried out...*"

154. The common thread that arises from any consideration of the applicable case-law is that in each instance courts have been applying the same criteria: 'Does this decision change the project?' 'Does the decision change the applicable conditions?' And the answer, when it comes to s.42 is 'No, it does not.' And on the related issue, 'Does the decision-maker have a discretion or power to re-appraise the environmental effects of the already permitted development?' the answer to that question in the context of s.42 is the same.

155. In the context of *Dellway*, the argument has likewise been put forward by the Case 1 Applicants that 'but for' the extension of duration there would be no difficulties for them because the new runway development to which they are so clearly opposed would not take place. But, to use a colloquialism, 'that horse has bolted', and it bolted back in 2007. The truth of matters is that the Case 1 Applicants and the Case 2 Applicant, for all the eloquence of their various arguments, are in truth seeking to upset the 2007 planning permission in circumstances where they did not make timely challenge to same in 2007.

156. In the case at hand a planning permission was granted in 2007, which planning permission was always subject to the possibility of extension. The issue and rationale for the

initial duration of the permission was considered in the planning inspector's report and, it is accepted by the court, was a matter on which the applicants could have made submission back in 2007, had they wished to do so. It was very much a live issue in the appeal, particularly in circumstances where there appears to have been a lack of clarity as to whether Fingal County Council's decision at first instance was in fact for ten years. All that being so, it is important to note that what *Dellway* requires is, in there-identified circumstances, a right to be heard. It does not establish or recognise a right to be heard on a serial basis. A party that is entitled to be heard in connection with a planning application is not entitled to a rejoinder every time some other action is taken in relation to a project. So, in the case at hand, just as Fingal County Council does not have to engage in public consultation each time it receives a compliance submission in connection with an ongoing development, equally it does not have to engage in public consultation when it receives an application under s.42 for an extension of duration.

XXIII

Some General Points

(i) A Ten-Year Permission.

157. In the runway planning permission, An Bord Pleanála observed, *inter alia*, as follows:

> "*In deciding not to accept the Inspector's recommendation to refuse permission, the Board considered that sufficient information had been submitted in the Environmental Impact Statement, in further information submitted both to the*

planning authority and the Board and at the oral hearing to enable it to make an assessment of the significant impacts of the proposed development on the environment and its acceptability in terms of proper planning and sustainable development. The Board considered that in overall terms the inconsistencies or deficiencies in information referred to by the Inspector were not so significant as to warrant a refusal of permission and could be addressed by way of condition."

158. Counsel for the Case 1 Applicants submitted at hearing that:

"[As] *the permission was to be for a period of ten years from the date of the order... it must be assumed... that An Bord Pleanála was satisfied that the Environmental Impact Assessment... embraced a 10 year perspective.*"

159. The court respectfully does not consider the foregoing to be correct. The new runway permission pertains to a permanent runway at Dublin Airport. The runway is not going to disappear at the end of ten years. So the development that is the runway consists, obviously, of its construction, but, also, of its operation in perpetuity. It is, therefore, misleading to characterise the environmental impact assessment process as only having a window or perspective of ten years. What An Bord Pleanála did was to assess what the long-term impact would be if Dublin Airport Authority constructed and operated a new runway at Dublin Airport, balancing the public interest, proper planning and sustainable development and the rights of individuals.

(ii) Transposition.

160. The applicants have questioned the due transposition by Ireland of the EIA Directive.

161. The arguments concerning transposition relied in part on certain utterances of the Minister for Housing, Planning Community and Local Government before Dáil Éireann (958(2) *Díospóireachtaí Parlaiminte* (Dáil Éireann), 13th July, 2017, 92) and Seanad Éireann (253(1) *Díospóireachtaí Parlaiminte* (Seanad Éireann), 18th July, 2017, 57) in each case in the context of parliamentary debates concerning what was then the Planning and Development (Amendment) No. 2 Bill 2017. For the reasons set out in Part A of this judgment, the court in arriving at the within judgment, has respectfully disregarded the fact and substance of the said utterances by the Minister and all submissions made by the parties concerning those utterances.

162. The court has also been invited to identify an alleged failure to transpose the EIA Directive correctly into Irish law by reference to such changes as will fall to be made to s.42 of PADA upon the commencement at some future time of s.28(1) of the Planning and Development (Housing) and Residential Tenancies Act 2016, as amended by s.1 of the Planning and Development (Amendment) Act 2017. The fact that s.28(1) of the Act of 2016 has not been commenced, in truth, is neither here nor there: what is being asked of the court in this regard, regardless of whether and when s.28(1) is commenced, is an entirely impermissible form of statutory interpretation. So, for example, if one looks to *Cronin (Inspector of Taxes)* v. *Cork and County Property Co. Ltd* [1986] I.R. 559, a case concerned with the interpretation of revenue legislation, Griffin J., in the Supreme Court, observes, *inter alia*, as follows, at 572:

"*With regard to the submission of counsel for the company that the amendment of s. 18 by s. 29 of the Finance Act, 1981, was an implied acceptance by the Oireachtas of the construction of s. 18 for which they contended, the Court cannot in my view construe a statute in the light of amendments that may thereafter have been made to it. An amendment to a statute can, at best, only be neutral — it may have been made for any one of a variety of reasons. It is however for the courts to say what the true construction of a statute is, and that construction cannot be influenced by what the Oireachtas may subsequently have believed it to be.*"

163. In a similar vein, there is the observation of Denham J. in *Clinton* v. *An Bord Pleanála* [2007] 1. I.R. 272, 283, in which she declines to construe s.50 of the Planning and Development Act 2000 by reference to s.13 of the Planning and Development (Strategic Infrastructure) Act 2010 (which substituted a new s.50 into the Act of 2000), observing that "[T]*he* [new] *section does not apply to this case. Nor would I construe s.50 of the Planning and Development Act 2000 by reference to this new section.*"

XXIV

Some Case-Law of Interest

(i) Križan v. Slovakia.

(Case C-416/10)

164. This was a Slovenian case concerning a landfill where there was a significant gap of several years between the environmental impact assessment and the impugned development. It has been proffered by the applicants as being a case about development consent. However, the court, with respect, does not see it to be so. It is not a case about development consent. It is a case concerned with the existence of a time-gap between a pre-existing environmental impact assessment and a subsequent development consent. Notably, what happened in *Križan* cannot happen under Irish law. This is because under our legal system the relevant planning authority's decision falls to be made only after an environmental impact assessment has been completed, and there will not be a significant gap between the carrying out of that environmental impact assessment by the relevant planning authority and the issue of the planning permission (development consent).

165. Before turning to the Opinion of AG Kokott, it is useful to note a point of fact touched upon by the Court of Justice in its judgment. Thus the Court in its judgment, at para. 20, summarises certain applicable Slovak law as follows:

"*Paragraph 37 of that law provides:*

'...

6. *The period of validity of the final opinion concerning an activity is three years from its issue. The final opinion shall maintain its validity if, during that period, a location procedure or a procedure for a permit for the activity is initiated under the specific legislation.*

7. *The validity of the final opinion concerning an activity may be extended by a renewable period of two years at the request of the applicant if he adduces written evidence that the planned activity and the conditions of the land have not undergone substantial changes, that no new circumstance connected to the material content of the assessment report of the activity has arisen and that new technologies used to proceed with the planned activity have not been developed. The decision to extend the validity of the final opinion concerning the activity reverts to the competent body.*'"

166. Unlike the case at hand, where An Bord Pleanála was looking into the future in relation to the operation of the new runway, the Slovakian system only looked three years ahead. Moreover, there appears to have been something of a disconnect between the period of validity of the environmental impact statement and the location procedure. Thus it appears that an environmental impact assessment could be carried out before the location was chosen. And there was the provision in para. 37(7) of the Slovakian law whereby the final opinion could be extended by a renewable period of two years in defined circumstances.

167. Turning from the judgment to the Opinion of AG Kokott, she commences that Opinion with a recital of the applicable factual background that is useful to quote. Thus per the Advocate General, at 3:

"*1. The Supreme Court of the Slovak Republic...refers several questions to the Court which arise from a highly complex dispute concerning the permit for a landfill site.*

2. In particular, it must be clarified whether for the purposes of public participation in a permit procedure under the Directive concerning integrated pollution prevention and control (2) ('the IPPC Directive') it is necessary to submit a decision determining the location of a landfill site which was made in a separate procedure from the permit procedure.

3. In addition, questions arise as to the application of the Directive on the assessment of the effects of certain public and private projects on the environment (3) ('the EIA Directive'), in particular in relation to temporal applicability, the sufficiently up-to-date nature of the assessment and on public participation for the purposes of the decision as to whether the assessment is still sufficiently up-to-date.

4. These questions of environmental law are embedded in problems of putting the principle of effectiveness into practice in the organisation of administrative proceedings and appeal proceedings under national law.

5. *Thus, in connection with access to the location decision, the question arises whether an initial unlawful refusal to give access to the decision may be remedied later in the administrative proceedings.*

6. *With regard to possible defects in the environmental impact assessment, it is necessary to clarify whether European Union law permits the laying down of separate appeal proceedings, distinct from the remedies provided for against the integrated permit for the landfill and whether, in legal proceedings concerning the integrated permit, the competent national court may, or must, raise defects in the environmental impact assessment ex officio where appropriate.*

7. *In addition, the Supreme Court asks whether it has the right to grant interim relief and whether the enforcement of both of the directives referred to above and of the Aarhus Convention (4) is compatible with the fundamental right to property.*"

168. Moving on, under the heading "*The EIA Directive*", AG Kokott observes, *inter alia*, as follows, at 10:

"*39. On the application of the company Pezinské tehelne a.s. of 16 December 1998, the Ministry of the Environment conducted an environmental impact assessment of the landfill project and issued a final opinion on the environmental impact on 26 July 1999.*

40. In parallel with the procedure to determine the location, upon the request of Pezinské tehelne a.s., by its decision of 27 March 2006, the Ministry of the Environment prolonged the validity of the above-mentioned opinion on the environmental impact until 1 February 2008.

...

43. On 22 January 2008, the Environment Inspectorate issued the integrated permit for the construction and operation of the landfill site."

169. Viewing the just-quoted paragraphs in the light of the above-quoted text from the judgment of the Court of Justice, it appears that the procedure to determine location was something that took place subsequent to the environmental impact assessment, a process that, at least from the perspective of an alien legal system, is difficult to fathom. Be that as it may, the environmental impact assessment was carried out in July 1999, it was extended in 2006 and in January 2008, the relevant development consent was issued. The case presenting before this Court involves a set of facts that, in truth, are the complete opposite of those that presented in *Križan*. Here the environmental impact assessment took place immediately before the decision of An Bord Pleanála, and it seems to the court that everything AG Kokott has to say must be viewed in the context of the radically different factual matrix that presented in *Križan*.

170. At paras. 124-6 of her Opinion, AG Kokott observes as follows, under the heading "*b) The criteria for prolonging the validity of the decision on environmental impact*":

"*124. If it were to become apparent that the EIA Directive is applicable to the permit for the landfill project or that national law requires a corresponding application of the requirements of that directive, the question arises whether it was compatible with the directive to prolong the validity of a decision on environmental impact issued in 1999 in 2006.*

125. In this respect, the national court would have to review, first of all, whether the assessment issued in 1999 already satisfied all of the requirements of the EIA Directive: even in the event of its validity being prolonged [an observation that is understandable in light of the situation presenting in *Križan* and considered above], *an inadequate assessment cannot be a substitute for an assessment within the meaning of the directive.*

126. The EIA Directive does not expressly govern the question whether the validity of an assessment which is adequate in terms of its content can be prolonged. [Critically, AG Kokott is dealing here with the prolongation of an environmental impact assessment, not with the set of circumstances that confronts this Court (which is confronted with the prolongation of a permission)]. *Nevertheless, the objective of the environmental impact assessment which is laid down in Article 2(1) of the EIA Directive must be determinative. Pursuant to that provision, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an environmental assessment. Such an assessment cannot be restricted to the effects which would have been caused if the project had been proceeded with at some time in the past. On the contrary, it must include all the effects which may actually be likely at the time of the consent*".

171. In one sense, all of the foregoing is irrelevant because of this Court's conclusion that a s.42 decision is not a development consent. Leaving that aside for one moment, if one looks to the sentence "*Nevertheless...at the time of the consent*", the words "*at the time of the consent*" seem to the court to be significance. What they show is that AG Kokott is looking at matters in accordance with the structure of the consolidated EIA Directive which envisions that at the time of a development consent, an environmental impact assessment should be carried out. Hence her use of the words "*at the time of the consent*" and the complete absence of any suggestion that once consent has been given there is any obligation thereafter to carry out any new or fresh environmental impact assessment. No suggestion of that kind is made anywhere in the Advocate General's opinion.

172. At paras. 127-8 of her Opinion, AG Kokott observes as follows:

> "*127. This is also apparent from Annex II, point 13, of the EIA Directive, which covers changes to projects...for the purposes of which the concept of changes must be understood in a broad sense...*
>
> [The court has considered this aspect of matters in its analysis of *Pro-Baine*.]
>
> *128. If, in the meantime, environmental conditions or the project have changed so that other significant effects on the environment are possible, the procedure for the environmental impact assessment must be supplemented or even be carried out completely again in a repeat EIA procedure. Consequently, it may become necessary to examine whether the environmental impact assessment still correctly represents the*

possible significant effects of the project on the environment at the time of consent...therefore...an updating assessment must be carried out with the objective of determining whether a supplementary environmental impact assessment is necessary."

173. Again this last-quoted paragraph appears to the court to be dealing with circumstances where there is a gap between a pre-existing environmental impact assessment and a subsequent decision as to whether or not to grant development consent. That is completely different to the circumstances that present in the within proceedings. And the court cannot but note the use again, in para. 128 (as in para. 126) of the words "*at the time of the consent*" and would reiterate its observations, in its assessment of para. 126, concerning that phrase.

174. Continuing, AG Kokott identifies a number of significant factors that arose in *Križan* which she says could be of significance in the context of an updating assessment. Thus she indicates in para.130 that:

130....In principle, the environmental impact assessment must already take into consideration the specific form of the project as apparent from the integrated permit. It would not be surprising if the effects of the project on the environment had changed as compared with the environmental impact assessment. The Landfill Directive was adopted only in the year of the decision on the environmental impact, but the requirements of that directive had to be complied with for the purposes of the integrated permit. Even if Slovakia already applied European Union law in 1999 in anticipation of accession, it is not clear that the environmental impact assessment

would already have taken into consideration the consequences of the Landfill Directive in relation to the environmental effects of the landfill.

131. Furthermore, since the environmental impact assessment the town of Pezinok has changed its development plans. Consequently, the possibility cannot, in particular, be ruled out that the environmental effects of the landfill project will need to be re-evaluated with regard to changes to the use of neighbouring areas which have not yet been taken into account. Such uses could be more sensitive as regards the effects of a landfill or could intensify the cumulative effects compared to the original assessment.

[Again, this last observation is understandable in circumstances where the development consent had yet to be issued.]

132. However, intensified cumulative effects might also result from the fact that the existing Pezinok landfill site was not closed in 2001, as had been assumed in the environmental impact assessment, but had continued in use until at least 31 October 2007, possibly even for longer. As a consequence of this, the previous impact upon the area could have increased.

[The foregoing arose in the context of the facts before AG Kokott where what was in issue was a significant gap in time between the carrying out of an environmental impact assessment and the issue of a development consent. There is no like time-gap in the within proceedings. Even so, it seems to the court to be of some significance

that the Advocate General took the view that there is no mandatory requirement for public participation.]"

175. Proceeding under the heading "*Public participation in the decision of whether an old environmental impact assessment is still sufficient*", AG Kokott identifies a number of significant concerns that have to be borne in mind in considering whether public participation should be required. Thus per the Advocate General, at paras. 134-6:

"*134. In that regard, it must be noted that the updating assessment should determine whether repeat public participation is necessary. The interests in effective and timely administrative proceedings must be balanced against the rights of the public. Public participation would make the procedure more cumbersome, especially since in the course of a permit procedure it would possibly be necessary to examine, on more than one occasion, whether the environmental impact assessment is sufficiently up to date following changes in circumstances which have occurred in the meantime.*

135. Even if there is no public participation with regard to the updating decision, the public is not left without rights. The updating decision demonstrates parallels to the preliminary investigation as to whether smaller-scale projects, which are listed in Annex II to the EIA Directive, must be subject to an assessment at all. For the purposes of the preliminary investigation, the competent authorities must ensure that no project likely to have significant effects on the environment, within the meaning of the directive, should be exempt from assessment, unless the specific project excluded could, on the basis of a comprehensive screening, be regarded as not being likely to have such effects. The public, as well as the other national authorities concerned,

must be able to ensure, if necessary through legal action, compliance with the competent authority's screening obligation. In order to guarantee effective remedies, the competent national authority is under a duty to inform the public and the authorities of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request.

136. These principles must also apply to an updating assessment, since it is also aimed at identifying significant effects on the environment which have not yet been sufficiently assessed. Subject to that proviso, it should be left to the Member States to determine whether and, where appropriate, to what extent they involve the public in the updating decision."

176. Not surprisingly, the applicants have sought to place some emphasis on the foregoing. However, the Advocate General's comments in this regard must be viewed, as with all her comments in *Križan*, in the context of a case that in terms of its facts is the complete opposite of what presents in the case at hand and which does not deal at all with the issue that was dealt with in *Pro-Baine* (considered hereafter) concerning the duration of the development consent. (The decisions in *Pro-Baine* and *Wells* (considered hereafter) are, in truth, the relevant decisions that fall to be borne in mind in the context of the development consent issue).

(ii). R. (Wells) *v.* Secretary of State for Transport, Local Government and the Regions (Case C-201/02).

a.Facts.

177. The next decision at European level that falls to be considered is *Wells*. That was a reference to the Court of Justice from the High Court of England and Wales. The facts underpinning the case were as follows. In 1947, permission to work a quarry by the name of Conygar Quarry was granted under an Interim Development Order (IDO). In 1991, quarrying works, which had stopped many years earlier, resumed for a short period. The resumption resulted in blasting operations, movements of heavy goods vehicles on the lane running past Mrs Wells' house and crushing operations. Those workings caused cracking to Mrs Wells' house and forced her to keep her windows shut. In accordance with applicable legislation (the Planning and Compensation act 1991) the operators of Conygar Quarry had their old mining permission registered on 24th August 1992. The permission was classified as dormant, because no operations had taken place in the two years preceding 1 May 1991. The operators also applied to the Mineral Planning Authority (MPA) for it to determine the conditions of the permission.

178. By determination made on 22 December 1994, the MPA imposed on the operators conditions that were more stringent than those proposed in their application. The operators exercised their right of appeal to the Secretary of State. "*On 25 June 1997*", AG Léger writes, "*he* [the Secretary of State] *issued a decision letter in which he imposed 54 conditions on the planning permission.*" The Secretary of State, as well as imposing a multitude of conditions,

also left some issues to be decided by the MPA, such as the monitoring of noise and of blasting on the site. Those matters were approved by the MPA on 8 July 1999.

179. Before proceeding further, the court notes that the just-quoted extract from the Opinion of AG Léger touches upon what seems to the court to be a most significant feature of *Wells*. For it seems to the court to be an obvious proposition that if (as is not the case under s.42), a planning authority could substitute a rake of new conditions when making a decision under that provision, then what would result would be a new development consent (for one would look to that later decision in terms of enforcement, rather than the original permission). But, again, that is not the position that pertains under s.42. When it comes to the enforcement of the new runway permission the document to be relied upon will undoubtedly be the decision of An Bord Pleanála, for it is that decision which sets out all of the conditions which must be observed as a matter of law by the Dublin Airport Authority, albeit that its continuing existence is attributable to a decision made under s.42.

180. Continuing with the facts of *Wells*, no environmental impact assessment within the meaning of the EIA Directive was carried out prior to adoption of the decision of the Secretary of State of 25th June, 1997, and that of the MPA of 8th July, 1999. At that time the United Kingdom authorities took the view that the EIA Directive did not apply to the determination of new planning conditions under the Act of 1991. However, on 11th February, 1999 the House of Lords held, in *R* v *North Yorkshire County Council ex parte Brown* [2000] 1 A.C. 397, that the determination of such conditions was a grant of development consent for the purposes of Article 1(2) of the EIA Directive. As a result of that decision, United Kingdom legislation was amended in order to make the determination of new planning

conditions under the Act of 1991 subject to environmental impact assessment in accordance with the EIA Directive. That amendment entered into force on 15th December, 2000.

181. By letter of 10th June, 1999, Ms Wells requested the Secretary of State to take action to remedy the lack of an environmental impact assessment in respect of the resumption of operations at Conygar. She received no reply to this request. Ms Wells then commenced proceedings in the High Court. The High Court decided to stay proceedings and to refer various questions to the Court of Justice for a preliminary ruling.

b. The Decision of the Court of Justice.

182. It does not seem to the court that it is necessary to go into the detail of the questions referred to the Court of Justice in *Wells*. It suffices for the purposes of the within proceedings to note the observations made by the Court of Justice at paras. 44-47 of its judgment, *viz*:

> *44. In the main proceedings, the owners of Conygar Quarry were obliged under the Planning and Compensation Act 1991, if they wished to resume working of the quarry, to have the old mining permission registered and to seek decisions determining new planning conditions and approving matters reserved by those conditions. Had they not done so, the permission would have ceased to have effect.*
>
> *45. Without new decisions such as those referred to in the previous paragraph, there would no longer have been 'consent', within the meaning of Article 2(1) of Directive 85/337, to work the quarry."*

46. It would undermine the effectiveness of that directive to regard as mere modification of an existing 'consent' the adoption of decisions which, in circumstances such as those of the main proceedings, replace not only the terms but the very substance of a prior consent, such as the old mining permission.

47. Accordingly, decisions such as the decision determining new conditions and the decision approving matters reserved by the new conditions for the working of Conygar Quarry must be considered to constitute, as a whole, a new 'consent' within the meaning of Article 2(1) of Directive 85/337, read in conjunction with Article 1(2) thereof."

183. Paragraph 46 is perhaps the most significant of the paragraphs just quoted. Two observations might be drawn from what the Court of Justice asserts. First, it appears clear that the Court would not have had difficulty with what it describes as a "*mere modification of an existing consent*". Second, it is clear that the Court of Justice does, to use a colloquialism, 'have a problem' where there is in substance a new consent. But that pointedly is not the case when it comes to the facts at issue in the within proceedings. What presents here, and this is clear from the law on s.42 in this jurisdiction is but an extension of the duration of an existing planning permission.

*(iii) Some post-*Wells *Irish case law.*

a. *Dunne* v. *Minister for the Environment*

[2007] 1 I.R. 194.

184. This is the well-known case concerning Carrickmines Castle, a Hiberno-Norse ruin in south County Dublin through which, regrettably, Dublin's M50 motorway was re-routed after having originally been routed to go around the ruins. *Dunne* is not a s.42 case; however, there is a parallel to be drawn between the arguments made by the applicants in the within proceedings and those made by the applicants in Dunne. There, Dun Laoghaire Rathdown County Council had commenced road-building works at the Castle site pursuant to consents and approvals issued by the Minister for the Environment under the Roads Act 1993. There was no distinct consent for the purposes of the EIA Directive; rather, the requirements of the Directive had been implemented through the Roads Act 1993. During the course of the development it became apparent that the nature and extent of the archaeological features at the site were greater than had been anticipated at the time of the initial environmental impact statement. Works were halted for a time, following various applications for injunctive and other relief by concerned. The approval of the Minister under the National Monuments Acts for interference with a national monument (for the purpose of continuing the road building works) was subsequently struck down as *ultra vires*. Modifications to the road-building plan were then made by the various State parties so as to preserve some of the site's archaeological features. In the meantime, the National Monuments (Amendment) Act 2004 amended the National Monuments Act 1930 and introduced, by way of s.8, a special provision which provided, *inter alia*, that the consent of the Minister was not required in relation to the carrying out of any works by Dun Laoghaire Rathdown County Council

affecting any national monument in connection with the completion of the roadway, but that any such works should be carried out on the directions of the Minister. Works then re-commenced pursuant to the directions issued by the Minister. Thereafter, Mr Dunne sought, *inter alia*, declarations that s.8 of the Act of 2004 was invalid as being in contravention of the Constitution, and that the directions of the Minister pursuant to s.8 were invalid by reason of failure to comply with the EIA Directive, it being submitted (and here something of a neat parallel arises between the *Dunne* case and this case) that the works constituted a 'project' within the meaning ascribed that term by the EIA Directive, and that the directions issued by the Minister constituted a development consent. Commencing at 216, Murray C.J. observed, *inter alia*, as follows:

> "*43 The concept of 'development consent' has been considered in a number of cases, including* R. (Wells) v. Secretary of State for Transport (Case C-201/02)...*and some of these cases are more fully explored in the judgment of the trial judge.*
>
> ...
>
> *46 In* R. (Wells) v. Secretary of State for Transport...*the European Court of Justice emphasised at para. 46 that:-*
>
> > *'It would undermine the effectiveness of that directive [*i.e. *,85/337] to regard as mere modification of an existing consent the adoption of decisions which, in circumstances such as those of the main proceedings, replace not only the terms but the* very substance *of a prior consent, such as the old mining permission' (emphasis added).*

In considering when the environmental assessment must be carried out, the court also noted at para. 52:-

> *'Accordingly, where national law provides that the consent procedure is to be carried out in several stages, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision.'*

...

48 In the present case, it seems clear to the court that the principal development consent is that of October, 1998. The court is of the view that the plaintiff is mistaken in suggesting that the decisions of 1998 and the directions given in August, 2004, are, in some manner, different stages in the same decision making process. In our view, the decisions of 1998 are stand-alone decisions which allow the road development to proceed whereas the directions involve merely the regulation of activities for which the principal consent, raising the substantial environmental issues, has already been given.

49 The court is satisfied for the following reasons that the ministerial directions under s. 8 of the Act of 2004 do not fulfil any of the requirements necessary to constitute a 'development consent':-

(a) *firstly, the first defendant does not have power under s. 8 of the Act of 2004 to embark upon a reconsideration of the environmental issues arising for the road development, and, more importantly, does not have power to modify the road development. All that is left for the first defendant is a power to regulate the manner in which the works which are necessary to allow the road to proceed are carried out;*

(b) *secondly, the project is prescribed for the purposes of Council Directive 85/337/E.E.C., as amended, as the road development, the subject matter of the consent of 1998. Excavation works of the type the subject matter of the ministerial directions under s. 8 of the Act of 2004 are not a prescribed project.*"

185. Notably, under s.42, there is, to borrow from the wording of the Chief Justice no "*power to modify the...development*" that is the subject of the permission in respect of which application for extension is made.

b. *Lackagh Quarries Ltd* v. *Galway City Council*

[2010] IEHC 479

186. This was a case where Galway City Council, acting under s.42 of PADA, had refused, on environmental grounds, an application to extend the permission at issue in that case. Irvine J. came to the conclusion that the EIA Directive did not have direct effect as between the parties before her. (That is an issue that does not arise in this case because the State is a party

and, therefore, any question of direct effect can obviously be invoked as against the State). But what is of interest are the observations of Irvine J., at para.70 of her judgment, made well before the decision of the Court of Justice in *Pro-Baine* decision, but consistent with the approach adopted by the Court of Justice in that later case. Per Irvine J:

> "*70. The respondent has failed to convince me that there is any regulation or statutory provision in this jurisdiction from whence it can be maintained that the s. 42 application was a project which required development consent within the meaning of the EIA Directive, or was one requiring appropriate assessment under the Habitat's Directive. Even if the Directives had direct effect, which they do not, there are strong grounds to argue that development consent was given following the assessment of the likely environmental impact of the proposed project at the time of the application for planning permission. An Environmental Impact Statement ('EIS') was submitted and considered subsequent to which the project received approval. A similarly strong argument can be made to the effect that a s. 42 application should not be considered to amount to a change or extension to the project as referred to in Annex II of the EIA Directive, such as to require further development consent. The development as planned and approved of from an environmental prospective remained the same as did the scale of the project. It was only the addition of time to complete the previously approved project that had changed. However, as already stated, the Directives do not have direct effect.*"

187. These observations are clearly *obiter*. However, the court accepts the contention made by counsel for the State parties that Irvine J.'s observations are entirely consistent with *Pro-Baine* and lend still further support to the proposition, accepted by the court, that because

there are no additional works being undertaken pursuant to a s.42 decision and because there are no new conditions which change the substance of the pre-existing permission there is no fresh development consent presenting.

XXV

No Requirement as to Further Public Participation

188. Nothing in the consolidated EIA Directive requires that, in deciding whether to extend the duration of a development consent, the public must be afforded a further opportunity to participate in the decision-making process.

189. Article 6(4) of the consolidated EIA Directive provides as follows:

> *"The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken."*

190. No such obligation exists in the case of a decision to extend the duration of a planning permission because such a decision to extend does not, for the reasons stated elsewhere herein, constitute a development consent within the meaning of Art. 1(2)(c) of the consolidated EIA Directive and thus does not come within the scope of Art. 2(2) of that Directive ("*The environmental impact assessment may be integrated into the existing*

procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive."). The right to participate, as previously stated, applies prior to the decision on the planning permission and that is a right which the Case 1 Applicants availed of in this case.

H. ASPECTS OF THE CASE 2 APPLICANT'S CASE

XXVI

Background Facts

191. Counsel for the Case 2 Applicant constructed his case on the following understanding of the background facts which are accepted by the court to pertain, save that it understands and considers the works to have commenced on 16th December, 2016:

(1) Dublin Airport Authority sought and received planning permission for the new runway at Dublin Airport from An Bord Pleanála in 2007;

(2) Dublin Airport Authority's application for that permission was not accompanied by a Natura Impact Statement and no Appropriate Assessment was carried out by an Bord Pleanála;

(3) that no works of any description were carried out between the granting of the permission and 15th December, 2016 in relation to the construction of the runway;

(4) works were commenced on 15th December, 2016, approximately three weeks (nine working days) prior to the application being made under s.42 of PADA;

(5) had those works not commenced prior to the said s.42 application, Fingal County Council would have been obliged to consider whether, *inter alia*, an Appropriate Assessment was or should have been carried out prior to permission being granted;

(6) Dublin Airport Authority applied to Fingal County Council for an extension of permission in a process which was not accompanied by any updated environmental information for the purposes of the consolidated EIA Directive or the Habitats Directive, despite the lapse of approximately 9½ years from the grant of the original permission and the lapse of just over 12 years from the date of submission of the original environmental impact statement;

(7) the net result of Fingal County Council's decision is that Dublin Airport Authority has received an extension of permission under s.42 of PADA without any revisiting of vintage environmental information;

(8) a member of the Case 2 Applicant attempted to participate in the s.42 process but was told that there was no opportunity to make a submission. (The

submission was returned in the same way that Ms Merriman's submission was returned).

(9) it appears to be (certainly, the court would observe, it may be) that without the grant of the s.42 extension, the new runway development likely would not be completed at all.

XXVII

The Statement of Grounds

(i) Some Aspects of the Statement of Grounds.

192. There are a few initial points to note about the application brought by the Case 2 Applicant and the reliefs sought. (In passing, the court notes that the sole respondent to the application is Fingal County Council; the State is merely a notice-party). The reliefs sought by way of the application are nine-fold, *viz*:

"*1. An Order of Certiorari by way of application for judicial review quashing the decision of the Respondent to grant, to the First Notice Party, planning permission for an additional five years for the construction of a new...runway...at Dublin Airport...*

2. A Declaration by way of application for judicial review that the Respondent was not entitled to grant the permission in the absence of an assessment of the

proposed development in the receiving environment being carried out for the purposes of the Environmental Impact Assessment Directive... and/or the Habitats Directive... as implemented by [PADA]...

3. *A Declaration that the Respondent acted in breach of its obligations under the Climate Action and Low Carbon Development Act 2015 ('the 2015 Act') in granting the impugned permission.*

4. *A Declaration that the Respondent acted in breach of the rights of the applicant and its Members under the Charter of Fundamental Rights of the European Union.*

5. *A Declaration that the Respondent acted in breach of the Applicant's rights under the Aarhus Convention.*

6. *A Declaration that the Respondent acted in breach of the constitutional and natural rights of the Applicant and its Members in granting the permission sought.*

7. *A Declaration that the decision of the Respondent was unreasonable, irrational, erred in law and fact, was ultra vires the statutory power of the Respondent, failed to provide any or any adequate reasoning and was not made in accordance with law.*

8. *An Order providing for the costs of the application and, where appropriate, an Order pursuant to section 50 B of [PADA]...and Article 11 of the Directive and/or section 4 of the Environment (Miscellaneous Provisions) Act 2011 in respect of the costs of this application.*

9. *Such further or other Order as this Honourable Court deems appropriate.*"

193. Notable from the above is that there is no relief sought of the kind that presents in the application brought by the Case 1 Applicants which carefully and properly seeks declarations in relation to the failure to transpose, and in relation to alleged invalidity of s.42 of PADA, having regard to the provisions of applicable European Union law and the Constitution. There is, it is true, at para. 12 of the statement of grounds, under the heading "*Grounds upon which the reliefs are sought*" the following assertion:

> "*Insofar as Respondent and/or the Notice Parties argue that the terms of section 42 and in particular the mandatory requirement to grant permission ('shall') where four requirements are satisfied same constitutes a transposition error as between the Directive and the Planning and Development Act 2000.*"

194. Notwithstanding this assertion, no relief is sought that there has been a failure on the part of the State to transpose. Likewise, at para. 26 of the statement of grounds, the following text appears:

> "*Insofar as Respondent and/or the Notice Parties argue that the terms of section 42 and in particular the mandatory requirement to grant permission ('shall') where four*

requirements are satisfied precludes or offers a defence to either or both of the arguments above same would constitute a transposition error as between the Habitats Directive and the Planning and Development Act 2000."

195. Yet again, no relief has been sought seeking a declaration that there has been a failure to transpose.

196. Finally in this regard, if the court looks to para. 27 of the statement of grounds, it states as follows:

"This raises the final ground of the Applicant's case. Independently of the constitutional argument raised above in respect of climate change section 42 of the Planning and Development 2000 is repugnant to the Constitution. In excluding interested third parties entirely, in failing to provide for any opportunities for participation by objectors or interested individuals, in failing to provide for fair procedures, in elevating the interests of developers to the absolute exclusion of those opposed to a particular development, in failing to give a local authority any discretion in deciding whether to grant extension permission or not to a developer once minimal conditions are satisfied section 42 is repugnant to the constitutional guarantees of fair procedures, equality, non-discrimination and the protections bestowed by Article 40.3.2 of the Constitution including the unenumerated right to environmental protection."

197. No relief, of course, is sought against the State.

(ii) Some Case-Law of Relevance.

198. Having touched upon the above-mentioned aspects of the statement of grounds, it is necessary to consider a couple of cases of relevance. The first of these is *A.P.* v. *The Director of Public Prosecutions* [2011] 1 I.R. 729. In that case the applicant sought an order of prohibition restraining a criminal trial from proceeding. He said that it was an abuse of process that he was being subjected to a fourth trial in relation to the same charges where the trial had not previously proceeded on three separate occasions (because a witness had not turned up for the trial). In the course of the Supreme Court appeal, the applicant also sought to rely on the issue of delay. But the Supreme Court refused to allow the applicant to do so because it was not part of the case in respect of which he had obtained leave to seek judicial review. What the decision shows is the importance of an order giving leave to bring judicial review proceedings and provide an example of how an applicant is limited to the case that he has made in the statement of grounds required to ground an application for judicial review. In the course of his judgment, Murray C.J. observed, *inter alia*, as follows, at 731-2:

> "***[3]*** *Because there has been a not insignificant number of appeals in which there was a lack of clarity and even confusion as to the precise issues that were before the High Court, I propose to make a number of observations in that regard.*
>
> ***[4]*** *Judicial review constitutes a significant proportion of the cases that come before the High Court and before this court on appeal. A party seeking relief by way of judicial review is required to apply to the High Court for leave to bring those proceedings and can only be granted such leave on specified grounds when certain criteria, required by law, are met. In most cases the applicant must demonstrate that*

he or she has an arguable case in respect of any particular ground for relief and there are also statutory provisions setting a somewhat higher threshold for certain specified classes of cases.

[5] *In the interests of the good administration of justice it is essential that a party applying for relief by way of judicial review sets out clearly and precisely each and every ground upon which such relief is sought.* ***The same applies to the various reliefs sought.***" [Emphasis added].

199. It is true that, at para. 9 of his judgment, Murray C.J. continues as follows:

"***[9]*** *The court of trial of course may, in the particular circumstances of the case, permit these matters to be argued, especially if the respondents consent, but in those circumstances the applicant should seek an order permitting any extended or new ground to be argued. This would avoid ambiguity if not confusion in an appeal as to the grounds that were before the High Court. The respondents, if they object to any matter being argued at such a hearing because it goes beyond the scope of the grounds on which leave was granted, should raise the matter and make their objection clear. Although it did not arise in this particular case, it is also unsatisfactory for objections of this nature to be raised by the respondents at the appeal stage when no objection had been expressly raised at the trial or there is controversy as to whether this was the case.*"

200. Notwithstanding para. 9 of Murray C.J.'s judgment, the underlying principle touched upon previously in the judgment of Murray C.J. is repeated in each of the judgments of the other judges of the Supreme Court. Thus:

per Denham J., at 734,

> "*[*[1]*7] When an applicant seeks leave to apply for judicial review he does so on specific grounds stated in the statement required. On the* ex parte *application for leave the High Court Judge may grant leave on all, or some, of the grounds sought or may refuse to grant leave. The order of the High Court determines the parameters of the grounds upon which the application proceeds. The process requires the applicant to set out precisely the grounds upon which the application is to be advanced. On any such application the High Court has jurisdiction to allow an amendment of the statement of grounds, if it thinks fit. Once an application for leave to appeal has been granted the basis for the review by the court is established.*
>
> ***[18]*** *In this case the ground upon which the relief was sought is as set out previously. This then is the scope of the review to be made by the court*",

per Hardiman J., at 739,

> "***[43]*** *In too many judicial review cases, it will be found that little attention has been paid to the* **absolute necessity** *for a precise defining of the grounds on which relief is sought until the case is actually before the court. In my*

view, this case furnishes an extreme example of this unfortunate tendency. The delay in the case and the consequent anxiety to the defendant are an obvious feature but they are not relied upon at all in the grounds and are only developed in the solicitor's replying affidavit. There is no attempt to define the precise level of anxiety and the effect, if any, on other family members, as was done in D.S. *v.* Judges of the Cork Circuit Court [2008] IESC 37" [Emphasis added],

and, per Fennelly J., at 744-5,

"***[64]*** *The first matter to be determined is the scope of the appeal. The statement of grounds, as quoted above, is based only on the allegation of abuse of the process and infringement of the applicant's right to a fair trial arising from the fact that the applicant is to be put on trial for a fourth time. The grounding affidavit recounts the history of the applicant's charging and the three previous trials. It proceeds to state that the applicant "has secured three jury discharges on the basis of the infirmities in the prosecution evidence adduced by the prosecution" and adds that the applicant 'was in no way culpable for the said discharges'. The solicitor says that the applicant 'has suffered severe distress and anxiety in having to undergo three criminal trials' and that it would be unfair if there were to be a fourth trial. The solicitor then claims that there is some risk of 'adjustment of evidence' if the matter is be tried for a fourth time.*

[65] The application for judicial review is thus very narrowly based. It claims in essence that it is inherently unfair to put the applicant on trial on a fourth occasion. It is notable that neither the original grounding affidavit nor the statement of grounds makes any mention of delay or of the letter demanding money of November, 2002. I am satisfied that the applicant should not be allowed to argue either of these matters on the present appeal. No leave was granted to rely upon them. Delay is, in many cases, a legitimate element of background. For example, where there is prosecutorial delay, it is well established that the fact of pre-existing long delay in making a complaint may be a relevant factor. However, there is no complaint of prosecutorial delay in the present case. Insofar as long delay may, in itself, be a ground for restraining a prosecution, it will be necessary to establish that the delay itself has led to the existence of a real and serious risk to the fairness of the trial (see S.H. v. Director of Public Prosecutions *[2006] IESC 55...). No leave was obtained from the High Court to argue delay as a ground.*"

201. So even though the issue of delay was an obvious one to raise and argue in *A.P.*, the Supreme Court would not allow it to be argued because no leave had been granted in relation to it. While that may seem harsh, that it seems to the court is the critical principle to be drawn from the judgments of the Supreme Court judges in *A.P.*, subject to the potential for mitigation identified by Murray C.J.

202. A relatively recent example of that critical principle being applied by the High Court (though the decision in *A.P.* does not make an appearance in the judgment of the court) is offered by *Alen-Buckley* v. *An Bord Pleanála* [2017] IEHC 311. That was an application to

have the State respondents in that case discharged from the proceedings. (No such application has been brought in the context of the application brought by the Case 2 Applicant). At pp. 3-4 of her judgment, Costello J. sets out the reliefs that were claimed in these proceedings, which reliefs were all claimed against the respondent (An Bord Pleanála) and not the State parties. At pp. 6-7, Costello J. then identifies the grounds that concerned the State parties (albeit that no relief against the State parties was sought). Costello J. then moves on to observe as follows, at para. 41:

> "*It is noteworthy that* [as with the Case 2 Applicant] *the applicants advanced no explanation as to why they did not seek any relief expressly against the state defendants. It was open to them, had they so wished, to have sought declaratory relief to the effect that the Directive had not been properly transposed into Irish law, if that was the case which they wished to advance. Of course, such a case would have to be properly pleaded in accordance with the requirements of O. 84, r. 20 (3). In addition, it would have to be pleaded when the leave application was moved and to have been within the time limited for bringing judicial review proceedings. No explanation was provided to the court as to why the applicants did not seek to identify any provisions of either the Directive or Irish statute law or regulations upon which they wish to advance their case that Irish law had failed properly to transpose the Directive*",

later concluding, at para. 44:

> "*In my opinion, the proceedings in fact seek no relief whatsoever against the State defendants, notwithstanding the attempt of the applicants to argue to the contrary. Therefore, the continued maintenance of these proceedings against these respondents*

is vexatious and amounts to an abuse of process. On the pleadings as they stand, even if the applicants were to succeed entirely in the case they have advanced to date, no relief could be granted against the State defendants. It follows inescapably in my opinion that the proceedings fail to disclose a cause of action on their face within the meaning of O. 19, r. 28."

203. Costello J. then struck out the proceedings against the State parties.

204. As mentioned, the State parties have not brought a strike-out application against the Case 2 Applicant. Even so, the State parties are entitled to draw (and have drawn) the court's attention to the fact that in the case of the application brought by the Case 2 Applicant there is no relief sought against the State parties, and *A.P.* and *Alen-Buckley* provide (in truth, ample) authority for the proposition that in those circumstances the grounds set out in the statement of grounds cannot be relied upon to seek such reliefs as have been sought in the proceedings brought by the Case 1 Applicants.

XXVIII

Some General Submissions by the Case 2 Applicant

205. Counsel for the Case 2 Applicant makes a number of general submissions:

(i) that while it is true that the physical parameters of what is the subject of the new runway planning permission, as extended, has not changed, what is absent is

any recognition that the receiving environment is dynamic and has changed between 2007 and 2017;

(ii) Dublin Airport Authority is in the "*unenviable position*" of adopting one of two approaches to the case brought by the Case 2 Applicant, each such approach being, per counsel for the Case 2 Applicant, "*unsustainable*", either (a) that once a planning permission has been granted on the basis of full public participation rights and a right of appeal to An Bord Pleanála, there is nothing in principle objectionable about extending that permission thereafter, or (b) that although environmental information becomes obsolete over time, a statutory scheme which allows for an extension of a planning permission without any opportunity to assess whether in fact that environmental information has become obsolete is defensible.

[In truth, the key issue arising is relatively straightforward, *viz.* whether or not Fingal County Council has acted in accordance with s.42 of PADA.]

(iii) certain complaints are made by the Case 2 Applicant against the State parties (who are but notice parties) by reference to particular utterances made by the Minister for Housing, Planning Community and Local Government before Dáil Éireann (958(2) *Díospóireachtaí Parlaiminte* (Dáil Éireann), 13th July, 2017, 92) and Seanad Éireann (253(1) *Díospóireachtaí Parlaiminte* (Seanad Éireann), 18th July, 2017, 57) in each case in the context of parliamentary debates concerning what was then the Planning and Development (Amendment) No. 2 Bill 2017. Again, for the reasons set out in Part A of this judgment, the court in

arriving at the within judgment, has respectfully disregarded the fact and substance of the said utterances by the Minister and, with respect, all submissions made by the parties concerning those utterances.

XXIX

Climate Change

(i) Overview.

206. The Case 2 Applicant contends that: (i) if the new runway is built it will lead to an increase in greenhouse gas emissions; and (ii) if there is an increase in greenhouse gas emissions that will accelerate the process of climate change. These seem fairly unremarkable propositions, but proposition (i) was the subject of some contention at hearing, though it does not seem to the court that it is necessary for it to adjudicate upon the competing views offered in this regard in order to determine the application made by the Case 2 Applicant.

(ii) The IPCC Report and Professor Bows-Larkin's Observations.

a. The IPCC Report.

207. Opened to the court at hearing by counsel for the Case 2 Applicant was, *inter alia*, a document entitled "*Climate Change 2014, Synthesis Report, Summary for Policymakers*", published by the Intergovernmental Panel on Climate Change or 'IPCC', an international body set up in 1988 by the World Meteorological Organization and the United Nations

Environment Programme to provide policymakers with regular assessments of the scientific basis of climate change, its impacts and future risks, and options for adaptation and mitigation. That document states, at 8, *inter alia*, that:

> "*Continued emission of greenhouse gases will cause further warming and long-lasting changes in all components of the climate system, increasing the likelihood of severe, pervasive and irreversible impacts for people and ecosystems. Limiting climate change would require substantial and sustained reductions in greenhouse gas emissions which, together with adaptation, can limit climate change risks*",

and, at 13:

> "*Climate change will amplify existing risks and create new risks for natural and human systems. Risks are unevenly distributed and are generally greater for disadvantaged people and communities in countries at all levels of development.*
>
> *Risk of climate-related impacts results from the interaction of climate-related hazards (including hazardous events and trends) with the vulnerability and exposure of human and natural systems, including their ability to adapt. Rising rates and magnitudes of warning and other changes in the climate system, accompanied by ocean acidification, increase the risk of severe, pervasive and in some cases irreversible detrimental impacts. Some risks are particularly relevant for individual regions...while others are global. The overall risks of future climate change impacts can be reduced by limiting the rate and magnitude of climate change, including ocean acidification. The precise levels of climate change sufficient to trigger abrupt and*

irreversible change remain uncertain, but the risk associated with crossing such thresholds increase with rising temperature (medium confidence). For risk assessment, it is important to evaluate the widest possible range of impacts, including low-probability outcomes with large consequences....

A large fraction of species faces increased extinction risk due to climate change during and beyond the 21st century, especially as climate change interacts with other stressors (high confidence). Most plant species cannot naturally shift their geographical ranges sufficiently fast to keep up with current and high projected rates of climate change in most landscapes; most small mammals and freshwater molluscs will not be able to keep up at the rates projected...in flat landscapes in this century (high confidence). Future risk is indicated to be high by the observation that natural global climate change at rates lower than anthropogenic climate change caused significant ecosystem shifts and species extinctions during the past millions of years. Marine organisms will face progressively lower oxygen levels and high rates and magnitudes of ocean acidification (high confidence), with associated risks exacerbated by rising ocean temperature extremes (medium confidence). Coral reefs and polar ecosystems are highly vulnerable. Coastal systems and low-lying areas are at risk from sea level rise, which will continue for centuries even if the global mean temperature is stabilized (high confidence)....

Climate change is projected to undermine food security....Due to projected climate change by the mid-21st century and beyond, global marine species redistribution and marine biodiversity reduction in sensitive regions will challenge the sustained provision of fisheries productivity and other ecosystem services (high confidence)...".

208. In terms of the connection between climate change and aviation emissions, what is in effect an appended report to the above-mentioned IPCC report, entitled "*Summary for Policymakers, Aviation and the Global Atmosphere*", approved in 1999 and so now somewhat dated, states as follows, at paras.1–3:

"***1. Introduction***

This report assesses the effects of aircraft on climate and atmospheric ozone and is the first IPCC report for a specific industrial subsector. It was prepared by IPCC in collaboration with the Scientific Assessment Panel to the Montreal Protocl on Substances that Deplete the Ozone Layer, in response to a request by the International Civil Aviation Organization (ICAO)**[1]** because of the potential impact of aviation emissions. These are the predominant anthropogenic emissions deposited directly into the upper troposphere and lower stratosphere.

Aviation has experienced rapid expansion as the world economy has grown. Passenger traffic (expressed as revenue passenger-kilometres**[2]**) has grown since 1960 at nearly 9% per year, 2.4 times the average Gross Domestic Product (GDP) growth rate. Freight traffic, approximately 80% of which is carried by passenger airplanes, has also grown over the same time period. The rate of growth of passenger traffic has slowed to about 5% in 1997 as the industry is maturing. *Total aviation emissions have increased, because increased demand for air transport has outpaced the reductions in specific emissions**[3]** from the continuing improvements in technology and operational procedures. Passenger traffic, assuming unconstrained*

demand, is projected to grow at rates in excess of GDP for the period assessed in this report.

The effects of current aviation and of a range of unconstrained growth projections for aviation (which include passenger, freight and military) are examined in this report, including the possible effects of a fleet of second generation, commercial supersonic aircraft. The report also describes current aircraft technology, operating procedures, and options for mitigating aviation's future impact on the global atmosphere. The report does not consider the local environmental effects of aircraft engine emissions or any of the indirect environmental effects of aviation operations such as energy usage by ground transportation at airports.

2. How Do Aircraft affect Climate and Ozone?

Aircraft emit gases and particles directly into the upper troposphere and lower stratosphere where they have an impact on atmospheric composition. These gases and particles alter the concentration of atmospheric greenhouse gases, including carbon dioxide (CO_2) ozone (O_3), and methane (CH_4); trigger formation of condensation trails (contrails); and may increase circus cloudiness – all of which contribute to climate change....

The principal emissions of aircraft include the greenhouse gases carbon dioxide and water vapour (H_2O). Other major emissions are nitric oxide (NO) and nitrogen dioxide (NO_2) (which together are termed NO_x), and water vapour by aircraft, are well known relative to other parameters important to this assessment.

The climate impacts of the gases and particles emitted and formed as a result of aviation are more difficult to quantify than the emissions; however, they can be compared to each othger and to climate effects from other sectors by using the concept of radiative forcing. ***[4]*** *Because carbon dioxide has a long atmospheric residence time (= 100 years) and so becomes well mixed throughout the atmosphere, the effects of its emissions from aircraft are indistinguishable from the same quantity of carbon dioxide emitted by any other source. The other gases (e.g. NO_x, SO_x, water vapour) and particles have shorter atmospheric residence rimes and remain concentrated near flight routes, mainly in the northern mid-latitudes. These emissions can lead to radiative forcing that is regionally located near the flight routes for some components (e.g. ozone and contrails) in contrast to emissions that are globally mixed (e.g., carbon dioxide and methane).*

The global mean climate change is reasonably well represented by the global average radiative forcing, for example, when evaluating the contributions of aviation to the rise in globally averaged temperature or sea level. However, because some of aviation's key contributions to radiative forcing are located mainly in the northern mid-latitudes, the regional climate response may differ from that derived from a global mean radiative forcing. The impact of aircraft on regional climate could be important, but has not been assessed in this report.

Ozone is a greenhouse gas. It also shields the surface of the Earth from harmful ultraviolet (UV) radiation, and is a common air pollutant. Aircraft-emitted NO_x participates in ozone chemistry. Subsonic aircraft fly in the upper troposphere and

*lower stratosphere (at altitudes of about 9 to 13km), whereas supersonic aircraft cruise several kilometres (at about 17 to 20km) in the stratosphere is expected to increase in response to NO_x increases and methane is expected to decrease. At higher altitudes, increases in NO_x lead to decreases in the stratospheric ozone layer. Ozone precursor (NO_x) residence times in these regions increase with altitude, and hence peturbations to ozone by aircraft depend on the altitude of NO_x injection and vary from regional in scale in the troposphere to global in scale in the stratosphere. Water vapour, SO_x (which forms sulfate particles), and soot**[5]** play both direct and indirect roles in climate change and ozone chemistry.*

3. How are Aviation Emissions Projected to Grow in the Future?

Global passenger air travel, as measured in revenue passenger-km, is projected to grow by about 5% per year between 1990 and 2015, whereas total aviation fuel use – including passenger, freight, and military**[6]** – is projected to increase by 3% per year, over the same period, the difference being due largely to improved aircraft efficiency. *Projections beyond this time are more uncertain so a range of future unconstrained emission scenarios is examined in this report....All of these scenarios assume that technological improvements leading to reduced emissions per revenue passenger-km will continue in the future and that optimal use of airspace availability (i.e.,ideal air traffic management) is achieved by 2050. If these improvements do not materialize then fuel use and emissions will be higher. It is further assumed that the number of aircraft as well as the number of airports and associated infrastructure will continue to grow and not limit the growth in demand for air travel. If the infrastructure was not available, the growth of traffic reflected in these scenarios would not materialize.*

[1] ICAO is the United Nations specialized agency that has global responsibility for the establishment of standards, recommended practices, and guidance on various aspects of international civil aviation, including environmental protection.

[2] The revenue passenger-km is a measure of the traffic carried by commercial aviation: one revenue –paying passenger carried 1km.

[3] Specific emissions are emissions per unit of traffic carried, for instance, per revenue passenger-km.

[4] Radiative forcing is a measure of the importance of a potential climate change mechanism. It expresses the perturbation or change to the energy balance of the Earth-atmosphere system in watts per square metre (Wm^{-2}). Positive values of radiative forcing imply a net warming, while negative values imply cooling.

[5] Airborne sulfate particles and soot particles are both examples of aerosols. Aerosols are microscopic particles suspended in air.

[6] The historical breakdown of aviation fuel burn for civil (passenger plus cargo) and military aviation was 64 and 36%, respectively, in 1976, and 82 and 18%, respectively, in 1992. These are projected to change to 93 and 7%, respectively, and to 97 and 3%, respectively, in 2050."

b. Professor Bows-Larkin's Observations.

209. The court has also had exhibited before it a witness statement sworn on 5th January, 2016, by Prof. Alice Bows-Larkin, a professor in climate science and energy policy at the University of Manchester. That witness statement was sworn in the context of a proposed

expansion to London's Heathrow Airport. It appears from that witness statement that Prof. Bows-Larkin is an expert in climate science and energy policy, with a particular emphasis on the emissions from international transportation, including aviation. The learned professor's general observations at paras. 1.1-1.3, 5.4, 6.1 and 8.1 of the said witness statement, are of interest when it comes to the general question of aviation and climate change:

"**1 Impact of aviation on the climate and other aircraft emissions**

1.1 Like other modes of transport, aircraft combust fossil fuels, contributing to increasing global carbon dioxide concentrations and releasing a variety of other emissions, including nitrous oxides, soot, water vapour and sulphur oxides. However, unlike other transport sectors, the altitude at which aircraft fly, and the sensitivity of this part of the atmosphere to chemical input, means emissions released there contribute additional climate warming. This means that measuring aviation's climate impact based only on the amount of carbon dioxide released by the aircraft, will miss out a large fraction of emissions that contribute to rising global temperatures....In summary additional impacts are caused by:

- *1. The altitude where emissions are released puts water vapour, another greenhouse gas, directly into the stratosphere where it causes warming.*

- *2. The nitrogen oxides released at altitude from ozone in the upper troposphere, which leads to warming. However, they also lead to a depletion of methane...another greenhouse gas, thereby having a cooling impact.*

- *3. Water vapour and soot released into the troposphere lead to the formation of contrails, which cause warming.*

- *4. Sulphur oxides, sulphuric acid and soot lead to an increase in the cirrus cloud cover, again further increasing the climate warming impact of the aircraft.*

1.2 The combined effect of these contributions to the amount of warming is uncertain and challenging to ascertain precisely. One of the reasons for this is that some of the emissions become well-mixed globally as they are very long-lived (e.g., the release of CO_2 with a lifetime of >100 years), while others are local and persist for a matter of minutes (e.g. contrails)....As a result, a metric that can combine these different types of emission, and their impacts, is sometimes employed. Radiative forcing is one such metric. Estimates of the historical warming caused by the aviation industry to date (using radiative forcing) suggest that the total warming impact of aviation has been around twice...than would be caused by the CO_2 alone. While there are uncertainties in this value (a two-fold increase), there is consensus that additional warming to that from the CO_2 alone has been produced by these other emissions.

However, it is important to be cautious if wishing to express the impact of current or future air travel taking into account all of the emissions and their impacts. There are some attempts to do [so] *using an 'uplift factor', where the warming due to CO_2 is multiplied by a particular factor to account for the additional emissions. However, a more reasonable way of assessing future warming would be to consider projected aviation growth, combined with any new technological interventions that may alter the production of each of the gases and any other operational changes that might be*

feasible. For instance, if aircraft were to fly at a lower altitude to avoid contrail formation, they would not the[n] produce warming-inducing contrails, but they may increase the amount of fuel burnt and hence CO_2 emitted due to flying in a more turbulent part of the atmosphere. Whilst recognising that these other emissions are important, it is also worth noting that the long-lived nature of CO_2 means that if aviation growth were curtailed to zero (i.e. no additional flights each year), then the warming impact induced by the CO_2 from the aircraft increases in importance compared with the sum of all the emissions over time. This is because most of the additional emissions will not accumulate as their lifetimes are so short, whereas CO_2 lasts for >100 years....

1.3 The aviation industry is aware of these additional climate change impacts, and also recognises that addressing or mitigating one kind of emission can exacerbate another. For example, and as mentioned in 1.2, altering the altitude at which aircraft fly can reduce the formation of contrails and cirrus clouds, but likely increases fuel burn, and hence CO_2 emissions....Similarly, noise restrictions and targets may require additional engine parts, increasing the weight of the aircraft, and again the fuel burn. Although there are always steps being taken to improve the fuel efficiency of aircraft, given an imperative to reduce fuel costs, it is clear that to avoid an increase in CO_2 production from aviation, the growth in the industry needs to be off-set by fuel efficiency gains or alternative non-carbon emitting fuels. Moreover, the recent Paris Climate Agreement has a legally binding goal of avoiding a temperature rise of 'well below' 2℃. There are discussions on-going around how to achieve this – but mathematically 'well below' 2℃ can only be achieved by preventing CO_2 production, to the extent that any sinks that can absorb CO_2 are larger than the CO_2

produced, leading to net zero emissions by 2050....There is an on-going debate highlighting the limited capacity of the Earth to absorb CO_2 to the extent necessary by 2050. If it is assumed that these 'negative emission sources' do not materialise in time, 'well below' 2℃ will only be achieved by a wholesale shift away from fossil fuel combustion. This would mean that CO_2 produced by the aviation sector would also need to be reduced to near zero....

More conventionally, when considering global temperature targets, the timeframe being discussed (decades) tends to lead national governments to consider sources of CO_2 before assuming there will be additional CO_2 sinks (such as burning biomass with carbon capture and storage (CCS)) to off-set these emissions. In the case of the UK, the 2℃ target (referenced in the Copenhagen Accord – which will be superseded by the Paris Agreement) was interpreted by the UK Government in its Climate Change Act as an 80% cut in CO_2 by 2050 across all sectors, but excluding international transport. However, at the time that this target was set, we argued that because the UK's CO_2 target was based on a global temperature goal, all sources of CO_2 needed to be included [*the 'we' here is a reference to Bows, A. and K. Anderson,* "Policy clash: Can projected aviation growth be reconciled with the UK Government's 60% carbon reduction target?" *(2007) 14* Transport Policy *103*]....*This was our informed and considered view at the time. My views on this have not changed. However, others have argued that these 'international' emissions should be mitigated by international bodies – the International Civil Aviation* [Organization]...*(ICAO) in the case of aviation. Moreover, others argue that emission cuts could be achieved by trading aviation CO_2 emissions with other sectors – i.e. other sectors make greater cuts and sell 'allowances' to the aviation sector so that it*

can emit. Either way, mathematically the contribution from aviation CO_2 needs to be recognised in any estimate of the total reduction amount of CO_2 across all sectors commensurate with a set temperature goal. The Committee on Climate Change (CCC) recognise this, by suggesting that all other sectors would need to reduce emissions by 90% to account for aviation's CO_2 emissions in future....However, this estimate assumes that others sectors are able to cut emissions by greater than 80% by 2050. To date there is limited evidence that this will be achieved, and in my view there are no policies currently in place [presumably in the United Kingdom] *that incentivise even 80% reductions by 2050, let alone those required to avoid a 'well below' 2℃ goal which limits the carbon budget even further.*

It is my view that a 'proportionate' response from the aviation sector should be considered. In other words, that aviation deserves no more 'special' status than any other sector (e.g. shipping, road transport, household heating etc.) because other sectors will also struggle to deliver cuts >80% in the timeframe necessary. If the aviation sector had the same CO_2 constraints as other UK sectors at present, it would need to plan for absolute cuts to its own CO_2 emissions in the coming decades....Moreover, if the UK's climate change target were to be strengthened in line with 'well below' 2℃ as stated in the Paris Agreement (the existing 80% target is based on a 63% chance of exceeding 2℃...), then these constraints would need to reflect complete global decarbonisation by 2050 (assuming negative emission technologies are not widespread)...

...

5.4 To conclude, options for expanding the aviation sector are at odds with the Paris Agreement, given that the language of 'well below' 2℃ will require net zero CO2 emissions from around 2050 (this is taken from the Agreement). This is because, without the widespread global adoption of negative emission technologies that are currently unproven at scale, 'well below' 2℃ implies a phasing out of fossil fuels as sources of energy by around 2050. This is largely uncontested. What would be contested would be the assumptions around negative emission technologies – but scientific understanding on their development and deployment is only recently starting to emerge.

...

6.1 Given that the evidence suggests that an expansion of airport capacity in general will support an increase in CO_2 emissions, or at least not facilitate their reduction out to 2050, and yet the UK is supportive of the Paris Agreement, a decision to expand Heathrow suggests that CO2 is a low priority consideration in planning decisions. It is not being considered as a make or break factor. In my view, this also implies a misunderstanding by UK Government of the scale of CO2 mitigation that a 2℃ goal relies upon – let alone a 'well below' 2℃ target.

...

8. On the impact on human health due to climate change

8.1 The Intergovernmental Panel on Climate Change's 5th Assessment Report (2014) includes 30 chapters on 'Impacts, Adaptation and Vulnerability' through the contribution of Working Group II....The report provides an up to date view of the current state of scientific knowledge on Climate Change, explicitly considering the range of scientific evidence and academic opinion and assigning confidence levels and probabilities where appropriate. The Fifth Assessment Report states that the 'health of human populations is sensitive to shifts in weather patterns and other aspects of climate change'. They categorise this statement as having 'very high confidence'...(the highest level of confidence).

They go on to say that 'These effects occur directly, due to changes in temperature and precipitation and occurrence of heat waves, floods, droughts, and fires. Indirectly, health may be damaged by ecological disruptions brought on by climate change (crop failures, shifting patterns of disease vectors), or social responses to climate change (such as displacement of populations following prolonged drought). Variability in temperatures is a risk factor in its own right, over and above the influence of average temperatures on heat-related deaths....

*The IPCC state that if climate change continues as projected in line with the Representative Concentration Pathways (RCP), the major negative changes to health compared to a no climate change future will include (*inter alia*):*

- *'Greater risk of injury, disease, and death due to more intense heat waves and fires (very high confidence)'*

- *'Increased risk of undernutrition resulting from diminished food production in poor regions (high confidence)'*

- *'Increased risks of food – and water-borne diseases (very high confidence) and vector-borne diseases (medium confidence)'...*

The World Health Organization (2014), through scenario analysis of future climate impacts, estimate the additional deaths due to climate change across a range of health issues known to be sensitive to climate change (heat-related mortality in elderly people, mortality associated with coastal flooding, mortality associated with diarrhoeal disease in children aged under 15 years, malaria population at risk and mortality, dengue population at risk and mortality, undernutrition (stunting) and associated mortality). Using a medium-high emissions scenario (this would be one that is relatively close to the current emissions track, and not a 'well below' 2℃ scenario) they project an additional 250,000 deaths per annum due to climate change across this subset of potential health issues.

It should be noted that there may also be positive impacts on health as a result of climate change. Again, in line with the RCPs, the IPCC state that these positive impacts will be:

- *'Modest reductions in cold-related mortality and morbidity in some areas due to fewer cold extremes (low confidence), geographical shifts in food production, and reduced capacity of disease carrying vectors due to exceedance of thermal thresholds (medium confidence).'*

...However, the IPCC also note that 'These positive effects will be increasingly outweighed, worldwide, by the magnitude and severity of the negative effects of climate change (high confidence)'."

210. The foregoing makes for bleak reading. However, in the context of the within application, it does not really advance matters for the Case 2 Applicant. It is the kind of material that fell to be put forward and considered when the new runway permission application process was underway. It is not material that fell to be put forward by the Case 2 Applicant and considered by Fingal County Council as part of the s.42 process.

(iii) Climate Action and Low Carbon Development Act 2015.

211. The attention of the court has been drawn to s.15(1) of the Climate Action and Low Carbon Development Act 2015 which provides as follows:

"***15.*** *(1) A relevant body shall, in the performance of its functions, have regard to–*

...

(c) the furtherance of the national transition objective, and

(d) the objective of mitigating greenhouse gas emissions and adapting to the effects of climate change in the State".

212. The court understands it to be common case between the parties that Fingal County Council is a "*relevant body*". As for the "*national transition objective*", this is referred to in s.3(1) of the Act of 2015 which provides as follows:

> "*3. (1) For the purpose of enabling the State to pursue, and achieve, the transition to a low carbon, climate resilient and environmentally sustainable economy by the end of the year 2050 (in this Act referred to as the 'national transition objective') the Minister shall make and submit to the Government for approval*
>
> *(a) a national mitigation plan, and*
>
> *(b) a national adaptation framework.*"

213. So the "*national transition objective*" is, to borrow from s.3(1), "*the transition to a low carbon, climate resilient and environmentally sustainable economy by the end of the year 2050*".

214. Notably, s.15 of the Act of 2015 does not in any way change the substance of section 42 of PADA. The decision to be adopted by a planning authority under s.42 does not require to be changed in light of s.15. Invocation of s.15 of the Act of 2015 does not afford a ground on which to refuse an extension under s.42. Section 15 exists, in effect, to remind relevant bodies, in the context of all of their work (not just in the context of decisions under s.42 of PADA) to have regard to the objectives referenced in s.15. Counsel for the State parties did not demur, and rightly so, from the contention made by counsel for the Case 2 Applicant that a party required to have regard to particular objectives would have to give reasons if it

elected completely to depart from such objectives; however there is not a whiff of a suggestion in the evidence that Fingal County Council so elected.

215. Turning to Fingal County Council's "*RECORD OF EXECUTIVE BUSINESS AND CHIEF EXECUTIVE'S ORDER*", considered previously above, it states as follows under the heading "*Climate Action and Low Carbon Development Act 2015*":

> "*The Planning Authority notes Section 15 of the Climate Action and Low Carbon Development Act 2015 and the requirement in that section for public authorities generally to have regard to the matters referenced in Section 15 in the performance of their functions.*
>
> *The Planning Authority notes the progress made to date in relation to the making of:*
>
> - *The first statutory approved National Mitigation Plan* [on climate change]
> - *The first statutory approved National Adaptation Framework* [on climate change]
> - *The statutory approved Sectoral Adaptation Plans.*
>
> *It is also noted that these Plans have not been finalised to date.*
>
> *In relation to the objective mentioned in section 15 of 'mitigating greenhouse gas emissions' and in relation to the 'national transition objective' the Planning Authority is conscious that a reduction in aviation emissions will help to make a*

contribution towards the overall greenhouse gas mitigation and towards the national transition objective, especially in the context of the timeframe within which the national transition objective is intended to be achieved (the 'national transition objective' is defined in the Act as '...transition to a low carbon, climate resilient and environmentally sustainable economy by the end of the year 2050...').

In circumstances where it is recognised that the control of international aviation emissions requires a collaborative industry-based and multilateral approach (the UN climate change regime, for example, as historically recognised the International Civil Aviation Organisation (ICAO) as the appropriate forum through which, in the first instance, to seek reductions in international aviation emissions) the Planning Authority notes the dialogue and efforts that have been taking place in different international fora, (e.g. in the airline industry, the EU and through the ICAO) to try to achieve aviation emissions reductions in different ways (including various market-based and technology approaches to reduction). The Planning Authority notes the recent agreement reached within the ICAO (in October 2016) for the establishment of a market-based mechanism (MBM) for the proposed capping of emissions from international aviation at 2020 levels (with the offsetting for any increases beyond that level). The Planning Authority notes the likelihood that in 2017 and 2018 the EU will consider its future approach to the control of aviation emissions (both intra-EU emissions, as well as emissions from flights in and out of the EEA), including whether to accept and adopt the ICAO's MBM approach or whether (as one alternative) to resume the application of the EU ETS (EU emissions Trading Scheme) to emissions from all flights into and out of the EEA. The Planning Authority notes that, as an EU Member State, Ireland will be involved in the EU's continuing policy responses to

aviation emissions control, and as regards the ICAO initiative, it notes Ireland's long-standing membership of the ICAO and it notes that, prior to its adoption in October 2016, the ICAO initiative was the subject of a consultation process in Ireland conducted (in early 2016) by the aviation services division of the Department of Transport, Tourism and Sport."

216. Counsel for the Case 2 Applicant, having read the just-quoted text to the court, observed as follows:

"*So there is an agreement reached at ICAO level, the EU may or may not participate in that at some point in the future and Ireland, as a member of both the EU and ICAO, will, presumably, or possibly, or potentially be involved in whatever those future discussions are....That is the height of how the Respondent engaged with the 2015 Act. And I say it is hopelessly inadequate....*[T]*he Respondent simply moves on to 'Summary' and continues from there and doesn't mention climate change or any of the associated considerations again. There is simply no reason provided, no rationale, no consideration, no.... 'We have accepted...that's contrary to the national transition objective, which we are obliged to have regard to'....*[T]*hey simply say: 'Well look, there* [are]*...possible discussions, that Ireland may or may not be involved in, at some point in the future.' In my respectful submission, that cannot...be what the Oireachtas intended when it required Local Authorities to have regard to the national transition objectives. If it were then a Local Authority could simply put in whatever it felt like as long as it mentioned the words 'national transition objective' and the relevant Act....And it is said against me 'Well, if I'm correct in that...it will eviscerate the planning process because local authorities would be under an obligation to*

essentially refuse any piece of infrastructure which would be contrary to the national transition objective. So they paint a waste land, where no roads can be built, no ferries, no ports, no airports...nothing. That's not at all the case I am making. The case I am making is that if the Oireachtas requires you to have regard to something you are under an obligation, if you are adopting a course contrary to those objectives you are required to have regard to, to, at the very least, explain or justify that decision. And there is no explanation or justification at all anywhere in the Respondent's decision....that engages the objections identified in my submissions that, firstly, if the Oireachtas requires a local authority to have regard to particular objectives they...have to be taken seriously. In my respectful submission, none of those requirements are satisfied by the Respondent's treatment. Secondly, if you are proposing to adopt a position contrary to those objectives you're required to have regard to, I say there is a heightened obligation on the Respondent to explain exactly why it is adopting that course of action."

217. When it comes to the foregoing, counsel for the Case 2 Applicant relies on certain observations of Clarke J., as he then was, in *Tristor Ltd* v. *The Minister for the Environment, Heritage and Local Government* [2010] IEHC 397, a case which involved, *inter alia*, a consideration of position pertaining under s.28 of PADA (as it then stood), which section provided that "[T]*he Minister may, at any time, issue guidelines to planning authorities regarding any of their functions under this Act and planning authorities shall have regard to those guidelines in the performance of their functions*". Notably perhaps, in the Minister's statement of opposition in that case it was suggested, *inter alia*, "*that an obligation to 'have regard to' those guidelines required Dún Laoghaire Rathdown Council to 'seek to accommodate the objectives and policies contained in the guidelines and, in choosing to*

depart from them, the second named respondent must give bona fide reasons for doing so which are consistent with the proper planning and development of the area'". At para. 7.14 of his judgment, Clarke J. observes as follows:

> "*Precisely how to apply the Retail Planning Guidelines in a particular case can be a matter of judgment. There may, of course, be examples of proposals which plainly fly in the face of the Guidelines. In such a case there may well be a requirement that a local authority, in order to be able to demonstrate that it 'had regard to' the Guidelines would need to establish that it had cogent reasons for such a departure. However, taking a view of the Guidelines as a whole and also of all of the reasons set out in the resolution passed by the elected members, I find it difficult to see how it could be said that the elected members had not at least had regard to those Guidelines. That the Minister might have felt that the application of those Guidelines to the facts of the case in question ought to have given rise to a different conclusion is one thing. The Minister may well have come to that view. However, there is nothing in the papers to suggest that the Minister either considered, or had any basis for considering, that the elected members had not at least had regard to the Guidelines.*"

218. As to the phrase "*have regard to*", the court recalls in this regard the observation of Keane C.J. in *Glencar Explorations plc* v. *Mayo County Council (No. 2)* [2002] 1 I.R. 84, 142, 162, that the fact that the respondent in that case was "*obliged to have regard to policies and objectives of the Government or a particular minister does not mean that, in every case, it is obliged to implement the policies and objectives in question. If the Oireachtas had intended such an obligation to rest on the planning authority in a case such as the present, it would have said so.*" In a similar vein, Kearns J. pithily observed in *Evans v. An Bord*

Pleanála (Unreported, High Court, 7th November, 2003), 23, "*The statutory obligation to 'have regard to' means precisely that, no more and no less*". In terms of what the formula substantively involves, the court notes, by reference to the judgment of Quirke J. in *McEvoy v. Meath County Council* [2003] I.R. 208, 224, that such a formula obliges informing oneself fully of, and giving reasonable consideration to, those matters to which one is obliged to have regard. When it comes to s.15(1) of the Act of 2015, it will be recalled that a "*relevant body*" must have regard, not to the national transition objective but to the "*furtherance of the national transition objective*" and to the "*objective of mitigating greenhouse gas emissions and adapting to the effects of climate change in the State*". Moreover, it must be that the Oireachtas intended a "*relevant body*" to have regard to such matters in the specific circumstances in which a "*relevant body*" is acting. And it is not the case that the requirement to 'have regard to' will never yield a practical consequence, as counsel for the State parties helpfully indicated in response to a query along these lines from the court:

> "*COURT:* *You assume lawmakers want you to do something for a purpose though; so what is the purpose of the Council 'having regard to'..?*
>
> *COUNSEL:* *...Having regard to in the performance of its functions, will, for example, mean that when Fingal County Council's County Manager chooses to develop the expenses policy for his staff that he may have regard to the emissions targets in his corporate plan...and say: '...*[H]*aving regard to it I will make sure they use unleaded.' ...*[I]*t's an obligation of consideration and it...will be more relevant in certain spheres than it is in others and it is certainly...not directly relevant to the making of decisions on s.42. It is something they*

> [Fingal County Council] *are obliged by statute to have regard to so that it is present in their minds. And it is part of our national policy...so that...measures* [taken] *are not merely ones that are taken by direct government action, but are part of a culture of change and that that is the purpose of s.15. But it is not the purpose of s.15 to alter existing statutory tests such that there could be other methods of judicial review in respect of those decisions.*"

219. Though the court's initial sense, on reading the above-quoted extract from Fingal County Council's "*RECORD OF EXECUTIVE BUSINESS AND CHIEF EXECUTIVE'S ORDER*", was that it said nothing despite saying a lot, it seems to the court, on reflection, that Fingal County Council does manage in that text to discharge its statutory obligations under s.15(1) of the Act of 2015. As the court reads that text, the Council, in the specific context of aircraft emissions, has regard to the "*furtherance of the national transition objective*" and the "*objective of mitigating greenhouse gas emissions and adapting to the effects of climate change in the State*". It itself takes no concrete steps consequent upon its consideration but that seeming inaction flows from:

(a) its observation that "*the control of international aviation emissions requires a collaborative industry-based and multilateral approach*", and

(b) the very limited obligation to which it is in any event subject by a statutory provision (s.15(1) of the Act of 2015) which merely requires it to "*have regard to*", and no more.

220. To borrow from the phraseology of Clarke J. in *Tristor*, that the Case 2 Applicant felt that the observation by the Council of its obligations under s.15(1) ought to have given rise to a different result is one thing: the Case 2 Applicant is entitled to that view; however, that does not yield as a further or corollary conclusion that the Council did not discharge its obligations under s.15(2) of the Act of 2015. It was open to the Oireachtas to apply a more stringent obligation to relevant bodies under s.15(2) but this the Oireachtas elected not to do. Moreover, there is, to return to the complaints made by counsel for the Case 2 Applicant and quoted above, no indication that the Council did not (or does not) take seriously the matters referred to in s.15(1). And it is not apparent to the court that Fingal County Council has elected, to borrow from the submissions of counsel for the Case 2 Applicant, "*to adopt a position contrary to those* [s.15(1)] *objectives*". Merely to depart from what the Case 2 Applicant would prefer is not necessarily to depart from the objectives referred to in s.15(2).

XXX

The Environmental Impact Assessment Directive

(i) Article 267 TFEU.

221. Counsel for the Case 2 Applicant adopted the submissions of the Case 1 Applicants concerning the Environmental Impact Assessment Directive. He also appeared to suggest that when it comes to the issue of what is the lifespan of an environmental impact assessment, that, pursuant to the judgment of the Court of Justice in *CILFIT* v. *Ministry of Health* (Case 283/81) only if "*this Court*...[is] *convinced that the* [answer]...*is equally obvious to the courts of the other Member States and to the Courts of Justice*....*may* [it] *refrain from*

submitting the question to the Court of Justice and take upon itself the responsibility for resolving it." With respect, that is not correct as a matter of law. As regards the court electing to make a reference to the Court of Justice, the position is as was identified by the court earlier this year in *People over Wind & anor* v. *Coillte Teoranta* [2017] IEHC 171, paras. 19–21, under the heading "*References to the CJEU*":

> "*19. It was contended by counsel for Coillte at the hearing of the within application that '[T]*he practice has been that it is really only appellate courts who make references [to the CJEU]. It is very rare…that the High Court actually makes a reference. It is nearly always an appellate court.' *The court respectfully does not accept the contention that the High Court has previously applied, let alone that it would be appropriate for it to apply, some form of self-censorship when it comes to the preliminary reference procedure under Art. 267 TFEU. The High Court, as a court of a European Union member state, is entirely competent to make a reference under Art. 267 TFEU; there is no practice whereby its competence in this regard has been yielded by it to the appellate courts.*
>
> *20. The preliminary ruling procedure is an essential mechanism whereby uniform interpretation and application of European Union law across the Union is sustained. As a cooperative mechanism between judges, it provides national courts competent to apply European Union law with a means of obtaining an interpretation of that law by the body tasked with ensuring uniform interpretation of European Union law across the Union. The aim of Art. 267 TFEU is to foster cooperation between national and European judges so as to facilitate the uniform application of European Union law; any national court*

dealing with a dispute where such law poses, inter alia, interpretative issues, is enabled and entitled to make reference to the CJEU for a preliminary ruling where, as here, it considers that a decision on the question raised is necessary to enable it to give judgment; for courts of last resort, references under Art. 267 TFEU can be mandatory.

21. Through Art. 267 TFEU, the High Court is afforded an avenue of approach to the CJEU that is not afforded to individuals. It would damage the uniform interpretation and application of European Union law, diminish the preliminary ruling procedure, and be a disservice to persons coming before the courts with arguments arising out of or pursuant to European Union law if the High Court were to seek single-handedly to resolve disputes, in instances where the need for a preliminary reference is necessary, in the hope that such a reference might in the future be made by an appellate court (assuming that a party aggrieved by the High Court's judgment had the financial resources required to sustain the bringing of such an appeal)."

222. As regards the court being obliged to make a reference, that situation does not present. So long as the Supreme Court can grant leave to appeal in proceedings over the head of a High Court judge (and it can; for a notable example of the perhaps surprising reach of the Supreme Court's entitlement so to do in the planning law context, following on the approval of the 33rd Amendment to the Constitution, see *Grace and anor* v. *An Bord Pleanála* [2017] IESC 10), the Court of Justice has made clear in *Lyckeskog* (Case C-99/00) that where an appellate court has the right to entertain a petition for leave to appeal, the appellate court is

the final court in that legal order. Per the Court of Justice, at paras. 14-16 and 19 of its judgment in *Lyckeskog*:

"*14 The obligation on national courts against whose decisions there is no judicial remedy to refer a question to the Court for a preliminary ruling has its basis in the cooperation established, in order to ensure the proper application and uniform interpretation of Community law in all the Member States, between national courts, as courts responsible for applying Community law, and the Court. That obligation is in particular designed to prevent a body of national case-law that is not in accordance with the rules of Community law from coming into existence in any Member State (see, inter alia, Hoffmann-La Roche, cited above, paragraph 5, and Case C-337/95 Parfums Christian Dior [1997] ECR I-6013, paragraph 25).*

15 That objective is secured when, subject to the limits accepted by the Court of Justice (CILFIT), supreme courts are bound by this obligation to refer (Parfums Christian Dior, cited above) as is any other national court or tribunal against whose decisions there is no judicial remedy under national law (Joined Cases 28/62, 29/62 and 30/62 Da Costa en Schaake [1963] ECR 31).

16 Decisions of a national appellate court which can be challenged by the parties before a supreme court are not decisions of a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law within the meaning of Article 234 EC [see now Art 267 TFEU]. *The fact that examination of the merits of such appeals is subject to a prior declaration of*

admissibility by the supreme court does not have the effect of depriving the parties of a judicial remedy.

...

19 The answer to the first question must therefore be that, where the decisions of a national court or tribunal can be appealed to the supreme court under conditions such as those that apply to decisions of the referring court in the present case, that court or tribunal is not under the obligation referred to in the third paragraph of Article 234 EC."

223. So the court is not obliged to make a reference to the Court of Justice. Moreover, given what the court considers to be the clear position presenting under European law as regards the European law issues raised in the within application, the court also has not elected to make a reference to the Court of Justice.

(ii) Development Consent and Continuing Process.

224. Counsel for the Case 2 Applicants contends that (1) a point touched upon previously above in the context of the contentions made by the Case 1 Applicants, the decision to grant the extension is a 'development consent' that stands independent of the planning permission of 2007. Alternatively, counsel for the Case 2 Applicants contends that (2) the s.42 process is a stage on a continuum that commenced in 2007 and which has continued into 2017.

225. Counsel for the Case 2 Applicants contends that:

- as Condition 2 of the runway planning permission provides that "*This permission is for a period of 10 years*", it follows that an extended permission in which Condition 2 no longer applies is not the development consent that was granted in 2007. The court respectfully does not accept this logic. If one looks to s.42(1), it is clear that statute perceives there to be a continuing permission, albeit it with an extension of the appropriate period "*not exceeding 5 years as the authority considers requisite to enable the development to which the permission relates to be completed*".

- a "*development consent*", per Art. 1 of the consolidated Environmental Impact Assessment Directive, means "*the decision of the competent authority or authorities which entitles the developer to proceed with the project*" and the decision which entitles Dublin Airport Authority now to proceed with the new runway project is the decision made pursuant to s.42 of PADA. In this regard, counsel for the Case 2 Applicant invokes the decision of the Court of Justice in *Abraham* v. *Région Wallonne* (Case C-2/07). That was a case where the Court of Justice was considering whether an agreement to restructure a military airport for cargo use constituted a development consent for the purposes of the Directive. For reasons that do not arise in the within application, the Court of Justice found that what presented in that case was not a project that engaged the consolidated Environmental Impact Assessment Directive. However, counsel for the Case 2 Applicant has referred the court to the observations of the Court of Justice, at para. 25:

"*In the present case, it should be pointed out to the national court that it is for it to determine, on the basis of the applicable national legislation, whether an agreement such as the one at issue in the main proceedings constitutes a development consent within the meaning of Article 1(2) of Directive 85/337, that is to say a decision of the competent authority which entitles the developer to proceed with the project (see, to that effect, Case C-81/96 Gedeputeerde Staten van Noord-Holland [1998] ECR I-3923, paragraph 20). Such would be the case if that decision could, under national law, be regarded as a decision of the competent authority or authorities granting the developer the right to proceed with construction works or other installations or schemes or to intervene in the natural surroundings and landscape.*"

Applying the foregoing to the within application, counsel for the Case 2 Applicant asks 'can the decision arrived at under s.42, as a matter of national law, be regarded as a decision of the competent authority or authorities granting the developer the right to proceed with construction works or other installations or schemes or to intervene in the natural surroundings and landscape?' His answer to this question is 'yes'. His reasoning is that "[i]*f the* [Council's]...*decision had not been taken, there would be no runway built; there would be no interventions in the natural surroundings and landscape and there certainly would be no construction work.*" The court respectfully does not agree with this reasoning. It sees the s.42 decision as but an ancillary stage in an overarching process.

(iii) Commission *v.* Ireland.

226. Counsel for the Case 2 Applicant points to the fact that in *Commission* v. *Ireland* (Case C-215/06), a case in which the European Commission successfully sought, *inter alia*, a declaration of the Court of Justice that Ireland had failed to fulfil certain of its obligations under the original Environmental Impact Assessment Directive. In the course of its judgment, the Court of Justice observed, *inter alia*, at para. 45:

> "*According to*...[Ireland], *the requirements of Directive 85/337 as amended are wholly procedural and are silent as to whether there may or may not be an exception by virtue of which an environmental impact assessment might, in certain cases, be carried out after commencement of works. Ireland adds that nowhere in the directive is it expressly stated that an assessment can solely be carried out before the execution of a project, and refers to the definition of the term 'development consent' given by Directive 85/337 as amended to argue that the use of 'proceed' is significant, that term not being confined to the commencement of works but also applying to the continuation of a development project.*"

227. So, counsel for the Case 2 Applicant observes, the State, in arguments before the Court of Justice, has previously advanced an argument that the Environmental Impact Assessment Directive would continue to apply after the beginning of the execution of a project, and could apply, as in this case, to the continuation of the development project. He is right. That is what the State did. But what is critical in the foregoing is that the argument made by the State was implicitly not accepted by the Court of Justice. (This follows from the

fact that the Court of Justice found against the State). So what the State argued in that earlier case does not matter. It made its arguments, it lost, and that is the end of matters.

(iv) Change or Extension to Project Already Authorised.

a. General.

228. Article 4 of the EIA Directive makes provision for environmental impact assessments in respect of certain projects listed in Annexes I and II of that Directive. Annex I categorises as a separate project "*Any change to or extension of projects listed in this Annex where such a change or extension in itself meets the thresholds, if any, set out in this Annex*". Annex II categorises as a separate project "*Any change or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment (change or extension not included in Annex I).*"

229. Article 4 of the EIA Directive makes provision for environmental impact assessments in respect of certain projects listed in Annexes I and II of that Directive. Annex II categorises as a separate project at point 13(a), *inter alia*, "*Any change or extension of* ***projects*** *listed in Annex I or this Annex,* [1] *already authorised,* [2] *executed or* [3] *in the process of being executed, which may have significant adverse effects on the environment (change or extension not included in Annex I).*" [Emphasis added.]

230. Counsel for the Case 2 Applicant suggested in the course of his submissions that the term "*extension*" when used in this regard includes an extension of the temporal scope of a

project. With respect, the court, whether it looks to the language of the consolidated EIA Directive and/or to the decision of the Court of Justice in *Pro-Baine* (considered hereafter) does not accept that contention. Looking first to the language of the Directive:

- the term "*project*" is defined in Art.1(2)(a) of the EIA Directive as meaning: "[a] *the execution of construction works or of other installations or schemes,* [b] *other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources*". If one refers to point 13(a) of Annex II, quoted above, and, to use a colloquialism 'plugs in' the just-quoted language of Art. 1(2)(a), it seems quite clear that point 13(a) only captures 'any change or extension of [a] the execution of construction works or of other installations or schemes, or [b] other interventions in the natural surroundings and landscape (including those involving the extraction of mineral resources)'. That is not language that appears to the court to embrace a purely temporal extension

- the EIA Directive speaks of an "*extension of projects*", *i.e.* of projects simpliciter, not the permissions that embrace such projects. Even in terms of ordinary English parlance, an extension of the temporal scope of the planning permission applicable to a project does not equate to an extension of the project to which that permission relates.

- counsel for the Case 2 Applicant has drawn the court's attention in this regard to the passing observation of AG Kokott in her Opinion in *Križan*, *op. cit.*, para. 127, that "*Annex II, point 13, of the EIA Directive, which covers changes to*

projects...for the purposes of which the concept of changes must be understood in a broad sense." The court sees in the Advocate General's observation that but a proper encouragement to see a change for what it is, not to see what is not a change for something that it is not. The court is buttressed in its reading of the EIA directive by the decision of the Court of Justice in *Pro-Baine*, to which the court now turns.

b. *Pro-Baine ASBL and Others*

(Case C-121/11).

231. This was a case concerning an existing landfill site that was already in operation in Belgium. New legislation was introduced which required all existing operators of landfill projects to submit a conditioning plan to an authority in Belgium. That authority then had to decide whether to allow the operation to continue. The key question presenting was whether the decision by that authority to allow a development to continue constituted development consent. In its judgment, the Court of Justice observed, *inter alia*, as follows, at paras. 26-32:

"*26. It is, therefore, necessary to examine whether that decision constitutes a 'consent' within the meaning of Article 1(2) of Directive 85/337.*

27. In that regard, it should be borne in mind that the concept of 'consent' is defined in Article 1(2) of Directive 85/337 as being 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'. Accordingly, there can only be 'consent', within the meaning of that Directive, where a 'project' is to be carried out.

28. *The definition of the concept of a 'project' set out in Article 1(2) of Directive 85/337 does not specify whether changes to or extensions of existing projects may themselves be considered 'projects'.*

29. *However, inter alia, the installations and sites listed in Annex II to Directive 85/337, to which reference is made in Article 4(2) thereof, are 'projects' within the meaning of that Directive.....Point 13 of that Annex includes in the list of projects referred to '[a]ny change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment ... '.*

30. *It follows from those provisions that any change to or extension of a landfill site, such as the one at issue in the main proceedings, may constitute a 'project' within the meaning of Directive 85/337 where it may have significant adverse effects on the environment.*

31. *As has been established by the Court, the term 'project' refers to works or interventions involving alterations to the physical aspect of the site (Case C-275/09 Brussels Hoofdstedelijk Gewest and Others [2011] ECR I-0000, paragraphs 20, 24 and 38).*

32. *Thus, the mere renewal of an existing permit to operate a landfill site cannot, in the absence of any works or interventions involving alterations to the physical*

aspect of the site, be classified as a 'project' within the meaning of Article 1(2) of Directive 85/337."

232. Paragraph 32 of the Court of Justice's judgment is clearly a critical paragraph. In it the Court of Justice makes a clear distinction between the extension of the duration of a development consent and the extension of the scope of a project: the extension of duration is not a development consent, the extension of the scope of a project is. And that, in truth, is a complete answer to the submissions made in the within proceedings by the applicants that a decision under s.42 of PADA is a development consent. All that section 42 does is to permit the duration of the existing permit to continue. It does not allow the authorisation of the carrying out of any additional works beyond what was previously authorised. It would only be in circumstances where it did authorise the execution of new works that it would be a new project within the meaning of the Directive and within the meaning of point 13 of Annex II.

XXXI

The Habitats Directive

(i) Submission Made.

233. There is no dispute between the parties but that the intended runway has never been assessed for the purposes of the Habitats Directive. In this regard, counsel for the Case 2 Applicant made a somewhat strained contention at hearing, *viz*:

"*I am not making the case and I can't make the case that it* [the new runway development] *must have been subjected to an assessment for the purposes of the Habitats Directive in 2007. As the respondents rightly say, I'm now out of time to do that. And there is no such argument in my submissions....What I am saying is that if there was a failure to conduct an assessment in 2007, when there should have been such an assessment, there was an obligation on the Respondents, in the first instance, and on this honourable Court, in the second instance, to remedy that defect.*"

234. In short, while counsel disavows that he can argue for an assessment at this time, he nonetheless seeks of the court that it undertake an assessment at this time, *i.e.* even though the court sits within and as the judicial branch of government, it is being invited to conduct an executive task. That is an invitation that the court must respectfully decline.

(ii) No Issue Presents.

235. In any event, no issue presents under the Habitats Directive *vis-à-vis* s.42 of PADA. This is because a decision under s.42 does not, in any way, alter the project in issue. What Art. 6(3) of the Habitats Directive requires is that before development consent is given for a project, the project must be subject to an appropriate assessment in those cases where an adverse impact on a protected site or a protected species cannot be ruled out. Thus, per Art. 6(3):

'*Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment*

of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.'

236. There is no separate requirement in the Habitats Directive or otherwise to carry out an appropriate assessment where all that is done is to extend the duration of the planning permission.

(iii) Bald Assertions.

237. Even were all the foregoing not so (and it is so), the court in any event only has bald assertions before it that the new runway development will have an impact on protected sites/species some kilometres from the runway. Such bald assertions are not sufficient: a party must put evidence before the court when suggesting that Article 6 is in fact engaged. In this regard, the court recalls the decision in *An Taisce* v. *An Bord Pleanála* [2015] IEHC 633. That was a case in which, like here, two sets of proceedings were heard together. They were proceedings brought by An Taisce on the one hand and the Case 2 Applicant on the other, and they both related to a decision by An Bord Pleanála to allow development in the form of a peat and biomass power plant in County Offaly. It is not necessary to go into the case in detail; however, it seems to the court that the following observations of White J. (and, vicariously, of O'Neill J.) are of equal relevance to the case at hand where it is baldly asserted that certain protected sites may be impacted by the new runway development:

"*75. The court has serious concerns about the application of the second applicant. Order 84, rule 20(3) of the Rules of the Superior Courts requires an applicant for judicial review to state his or her grounds of challenge precisely giving particulars where appropriate, it states:-*

> *'It will not be sufficient for an applicant to give as any of his grounds for the purpose of paragraphs (ii) or (iii) or sub rule 2(a), an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate and identify in respect of each ground the facts or matters relied upon in supporting the ground.'*

76. In Harrington v. An Bord Pleanála *[2014] IEHC 232 , O'Neill J. stated, at paras 45 and 46,*

> *'45. ...There is no doubt that the procedure in this judicial review is undoubtedly adversarial, and the onus of proof resting upon the applicant in these proceedings is well-settled. The foregoing dicta from the cases of* O'Keeffe v. An Bord Pleanála, Westin v. An Bord Pleanála and Lancefort Ltd. v. An Bord Pleanála *clearly establishes that the applicant carries the burden of proof of establishing the grounds in respect of which leave for judicial review was granted.*
>
> *46. ...The applicant failed to adduce any evidence whatsoever to support her contention that the site in question was a priority habitat, warranting, on*

the basis of the 'precautionary principle', the elimination of 'scientific doubt' by the carrying out of an independent ecological assessment. Thus, on these judicial review proceedings, I am quite satisfied that the applicant has failed to discharge the onus of proof resting on her to establish that the respondent failed in its legal duty, as she contends, in that regard.'

77. I have already differentiated between the nature of the application of the first applicant and the second applicant and referred to the documents relied on by the second applicant in advancing the reliefs for judicial review.

78. I am not satisfied with the assertion in the affidavit of David Healey at para. 9 of his affidavit sworn on 22nd January, 2014. This assertion is relied on in the written legal submissions of the second applicant at paragraphs 4, 13 and 22.

79. I have already emphasised that the submissions made by the second applicant relate to further downstream consequences of the extraction of peat on the designated peat bogs. The only documents generated by the second applicant, other than the inspector's report and the National Parks and Wildlife Service Conservation objectives for the River Barrow and River Nore SAC 002162, are the submission to An Bord Pleanála of 12th August, 2013, and the two site synopsis documents which I presume have been prepared by Mr. Healey but that is not clear.

80. The first respondent has objected to the application based on the dicta of O'Neill J., the second respondent has relied on the provisions of the Rules of the Superior Courts and that no case, has been made out against the second and third respondent.

81. The second applicant falls substantially short of the standard I would expect to sustain its argument. I accept that it may not be well resourced financially but that does not excuse its failure to put before the court, cogent material by way of expert analysis on affidavit of the case it is making about the Habitats Directive."

238. The court does not know if it continues to be the case that the Case 2 Applicant is, to borrow from the judgment of White J., "*not...well resourced financially*". It is unfortunate if this should continue to be so. But, whatever the cause, the fact remains that the court only has bald assertions before it that the new runway development will have an impact on protected sites/species some kilometres from the runway. These assertions by themselves are insufficient by way of evidence to the claimed facts.

(iv) European Communities (Birds and Natural Habitats) Regulations 2011.

239. For the sake of completeness, the court notes in passing that certain argument was made by the Case 2 Applicant with reference to the above-mentioned regulations. However, the Case 2 Applicant itself admitted that the said regulations are not applicable in this case. So the point that it was sought to raise is not relevant and is not considered further.

(v) Conclusion.

240. No issue presents under the Habitats Directive *vis-à-vis* s.42 of PADA. This is because a decision under s.42 does not, in any way, alter the project in issue. Even if matters were differently positioned (and they are not) the court in any event only has bald assertions before it that the new runway development will have an impact on protected sites/species some kilometres from the runway. Such bald assertions are not sufficient: a party must put evidence before the court when suggesting that Article 6 is in fact engaged, and such evidence is simply not before the court. All that being so, and so clearly so, the court does not consider it necessary to consider the decisions in *Kelly* v. *An Bord Pleanála* [2014] IEHC 400 or *Brussels Hoofdstedelijk Gewest* (Case C-275/09), to which it was referred by the Case 2 Applicant in this regard (beyond noting that *Brussels Hoofdstedelijk Gewest* is authority for the proposition that, as a matter of European Union law, it is incumbent on European Union member states to provide that an environmental impact assessment must be carried out prior to the grant of a development consent – here the new runway permission – a requirement that has been transposed into Irish law by Part X of PADA, the provisions of which part of PADA are not at issue in the within proceedings).

I. THE CONSTITUTION AND THE CONVENTION

XXXII

Constitutional Right Contended For

241. Among the contentions of the Case 2 Applicant are that there exists, and should be recognised by the court, an unenumerated personal constitutional right to an environment that is consistent with the human dignity and well-being of citizens at large (a category of persons which includes members of the Case 2 Applicant's organization). This personal right, it is contended, enjoys its place in the constitutional hierarchy and exists in balance with all other rights identified under, *inter alia*, Article 40.3.1° of the Constitution.

XXXIII

Consensus?

242. Counsel for the Case 2 Applicant contended that unlike the position that pertained in *Ryan* v. *Attorney General* [1965] I.R.294 (right to bodily integrity) and *McGee* v. *Attorney General* [1974] I.R. 284 (right to privacy), the Case 2 Applicant can and does rely on a scientific consensus concerning the centrality of (maintaining) the environment to continuing human existence. He also argued that there is an emerging jurisprudential consensus as to the existence of the contended-for unenumerated personal constitutional right, though he did not examine this in great depth. And he pointed to what he contends is an emerging

theological/philosophical consensus concerning the contended-for right. In this last respect, counsel for the Case 2 Applicant referred in court to documentation that has emanated from one of the major world religious leaders. But in truth, what is perhaps more striking in this regard are not the views of that one religious leader, however esteemed, but the commonality of views that appears to be shared by all of the major religions on matters environmental, as evidenced by the well-known Assisi Declarations of September 1986 in which distinguished leaders and personages from the Buddhist, Christian, Hindu, Islamic and Judaic faiths individually issued a series of declarations which point to humanity's common destiny as the stewards and trustees of our shared natural environment. Notable too is secular environmental philosophy, whether as fashioned by the Deep Ecology Movement or in its more recent post-naturalistic form, which offers a rational and non-religious basis by which one can arrive at a place not so very far removed from that occupied by the major religious faiths. But, all that said, the court would respectfully emphasise that this is a court of law where legal questions are raised and decided. Though the court has every respect for people of all faiths and none, this judgment falls to be, and has been, decided by reference solely to accepted legal reasoning.

XXXIV

Recognising Expressly a Right Not Previously Recognised Expressly

243. How can or should the court proceed when it comes to recognising expressly an existing unenumerated personal constitutional right that has not previously been recognised expressly? In this regard, the court has been referred to the decision of the Supreme Court in *McGee* v. *Attorney General*, *op. cit.*, a case which was concerned with the constitutionality of

the prohibition in s.17 of the Criminal Law Amendment Act, 1935, on the selling or importation into Ireland for sale of any contraceptive. Less than half a century later, it seems, to put matters at their very mildest, surprising that such a complete statutory prohibition existed or, at the least, for so long persisted. Indeed the facts of *McGee* afford an interesting example of how the certainties of yesterday can very quickly be overtaken by a fresh and very different comprehension of existence. Be all that as it may, however, the prohibition in s.17 of the Act of 1935 was in any event held by the Supreme Court to involve an unjustified invasion of the right to privacy (though the essence of that right was perceived differently by different judges). The court has been referred by counsel for the Case 2 Applicant to the following observations of Walsh J., perhaps the greatest of our post-Independence judges, at 315-6:

> *"So far I have considered the plaintiff's case only in relation to Article 41 of the Constitution; and I have done so on the basis that she is a married woman but without referring to her state of health. I now turn to the claim made under Article 40 of the Constitution. So far as this particular Article is concerned, and the submissions made thereunder, the state of health of the plaintiff is relevant. If, for the reasons I have already given, a prohibition on the availability of contraceptives for use in marriage generally could be justified on the grounds of the exigencies of the common good, the provisions of s. 1 of Article 40 (in particular, the proviso thereto) would justify and would permit the State to discriminate between some married persons and others in the sense that, where conception could more than ordinarily endanger the life of a particular person or persons or particular classes of persons within the married state, the law could have regard to this difference of physical capacity and make special exemptions in favour of such persons. I think that such an exemption*

could also be justified under the provisions of s. 3 of Article 40 on the grounds that one of the personal rights of a woman in the plaintiff's state of health would be a right to be assisted in her efforts to avoid putting her life in jeopardy. I am of opinion also that not only has the State the right to do so but, by virtue of the terms of the proviso to s. 1 and the terms of s. 3 of Article 40, the State has the positive obligation to ensure by its laws as far as is possible (and in the use of the word 'possible' I am relying on the Irish text of the Constitution) that there would be made available to a married woman in the condition of health of the plaintiff the means whereby a conception which was likely to put her life in jeopardy might be avoided when it is a risk over and above the ordinary risks inherent in pregnancy. It would, in the nature of things, be much more difficult to justify a refusal to do this on the grounds of the common good than in the case of married couples generally."

244. Counsel for the Case 2 Applicant relies on this passage for the following proposition, accepted by the court: although the Case 2 Applicant is not in a position like that of Ms McGee, members of the Case 2 Applicant, and by extension the wider population, are equally at risk, in terms of their bodily integrity, from the global and local and accelerating degradation of our environment. Counsel for the Case 2 Applicant contends, and the court accepts, that such materials as the above-referenced IPCC documentation, and the expert views of a distinguished academic commentator (Professor Bows-Larkin) can in truth leave no doubt but that climate change poses a real and immediate risk to, at least, the bodily integrity of members of the Case 2 Applicant, as well as to citizens more generally.

245. The court has also been referred by counsel for the Case 2 Applicant to the following observations in *McGee*, at 318-9, where Walsh J. considers under what circumstances the

courts may recognise expressly an existing constitutional right that has not previously been recognised:

"*In a pluralist society such as ours, the Courts cannot as a matter of constitutional law be asked to choose between the differing views, where they exist, of experts on the interpretation by the different religious denominations of either the nature or extent of these natural rights as they are to be found in the natural law. The same considerations apply also to the question of ascertaining the nature and extent of the duties which flow from natural law; the Constitution speaks of one of them when it refers to the inalienable duty of parents to provide according to their means for the religious, moral, intellectual, physical and social education of their children: see s. 1 of Article 42. In this country it falls finally upon the judges to interpret the Constitution and in doing so to determine, where necessary, the rights which are superior or antecedent to positive law or which are imprescriptible or inalienable. In the performance of this difficult duty there are certain guidelines laid down in the Constitution for the judge. The very structure and content of the Articles dealing with fundamental rights clearly indicate that justice is not subordinate to the law. In particular, the terms of s. 3 of Article 40 expressly subordinate the law to justice. Both Aristotle and the Christian philosophers have regarded justice as the highest human virtue. The virtue of prudence was also esteemed by Aristotle as by the philosophers of the Christian world. But the great additional virtue introduced by Christianity was that of charity—not the charity which consists of giving to the deserving, for that is justice, but the charity which is also called mercy. According to the preamble, the people gave themselves the Constitution to promote the common good with due observance of prudence, justice and charity so that the dignity and*

freedom of the individual might be assured. The judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity. It is but natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts."

246. Counsel for the Case 2 Applicant points to the last observation of Walsh J. as one of particular relevance to the submission that he is making as regards there being a personal, constitutional right to an environment that is consistent with the human dignity and well-being of the members of the Case 2 Applicant and citizens at large. "*If I had been,*" he submitted, "*making this submission, perhaps, 20 years ago I don't think I would have been able to point to a scientific consensus, I don't think I would have been able to point to a jurisprudential consensus, and I don't think I would have been able to point to a philosophical consensus as to the importance of the preservation of the environment and what I say is the appropriateness that be recognised within, at least, Article 40.3 of the Constitution. But, in my respectful submission, in 2017, in the midst of the environmental maelstrom identified by the IPCC, it is high time that this court consider recognising* [the constitutional right contended for]." It seems to the court, with respect, that in fact the above-quoted text from the judgment of Walsh J. may be even more supportive of the case advanced by the Case 2 Applicant than counsel for the Case 2 Applicant suggested at hearing; certainly, as with so many observations of Walsh J., it repays careful reading. In particular, the court's attention is drawn to Walsh J.'s observation that "*According to the preamble, the people gave themselves the Constitution to promote the common good with due observance of prudence, justice and charity so that the dignity and freedom of the individual might be assured.*" It is

difficult to see how the dignity and freedom of individuals is being assured if the natural environment on which their respective well-being is concerned is being progressively diminished. Finally, the court notes Walsh J.'s recognition and acceptance of the judicial role under our Constitution in expressly recognising unenumerated personal constitutional rights that have not previously been recognised. "*The judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity.*"

XXXV

Caution Required

(i) I O'T. *v.* B.

[1998] 2 I.R. 321

247. The court is mindful of the caution that a court must bring to recognising expressly an unenumerated personal right that exists under the Constitution but which has not previously been so recognised. The court recalls in this regard the decision of the Supreme Court in I. *O'T* v. *B.* Hamilton C.J., in his judgment in that case, observes, *inter alia*, as follows, at 345:

> "*In view of the caution to be exercised with regard to the duty of ascertaining and declaring what are the personal rights of the citizen, other than those actually specified in the Constitution, it is incumbent on a court declaring such right to do so in clear and explicit terms and it is only a right which has been so declared, that can be regarded as a right guaranteed by the Constitution. It is not permissible for any*

court to imply from the existence of a right guaranteed by the Constitution, whether from the specific terms thereof or as a result of a declaration by the Superior Courts, the existence of any other right in the absence of a declaration by the superior courts of the existence of that other right."

248. Also of note are the following observations of Keane J., at 368-70:

"*It should also be pointed out that difficulties arise at the outset, in this as in any other case where parties seek to rely on an unenumerated personal right alleged to have been recognised by the Constitution, as to the principles by which the court should determine whether such a right exists. That the courts have power to recognise the existence of such unenumerated rights has been regarded as clear since the decision in* Ryan *v.* The Attorney General *[1965] I.R. 294. In his judgment at first instance in that case, Kenny J. said at p. 31 3:-*

'A number of factors indicate that the guarantee is not confined to the rights specified in Article 40 but extends to other personal rights of the citizen. Firstly, there is sub-s. 2 of s. 3 of Article 40 . . . The words 'in particular' show that sub-s. 2 is a detailed statement of something which is already contained in sub-s. 1 which is the general guarantee. But sub-s. 2 refers to rights in connection with life and good name and there are no rights in connection with these two matters specified in Article 40. It follows, I think, that the general guarantee in sub-s. 1 must extend to rights not specified in Article 40. Secondly, there are many personal rights of the citizen which flow from the Christian and democratic nature of the State which are not mentioned in

Article 40 - the right to free movement within the State and the right to marry are examples of this. This also leads to the conclusion that the general guarantee extends to rights not specified in Article 40.'

Two comments should be made on this frequently cited passage. First, Kenny J. advances two reasons for his finding that the unenumerated rights exist: (a) the actual wording of Article 40 and, (b) his view that in any event there are certain rights which flow 'from the Christian and democratic nature of the State' which are not mentioned in the Article.

Secondly, while his view as to the existence of the unenumerated rights was confirmed on appeal by this Court, it should be noted that Ó Dálaigh C.J. contented himself with saying at p. 344 that:-

'The court agrees with Mr. Justice Kenny that the personal rights mentioned in [Article 40.3.1] are not exhausted by the enumeration of 'life, person, good name and property rights' in [Article 40.3.2] as is shown by the use of the words 'in particular'; nor by the more detached treatment of specific rights in the subsequent sections of the Article. To attempt to make a list of all the rights which may properly fall within the category of 'personal rights' would be difficult and, fortunately, is unnecessary in this present case.'

There was no discussion in that judgment of the question as to whether, given that the unenumerated rights clearly existed in the contemplation of the framers of the Constitution, it was intended by them that the duty of declaring what those rights

were should be the function of the judiciary rather than the Oireachtas, although that fundamental issue is referred to in the judgment of Kenny J. Nor was there any explicit endorsement of Kenny J.'s proposed criterion that they might flow from the Christian and democratic nature of the State. This may have been because the right under discussion was conceded, on behalf of the Attorney General, to be such an unenumerated right, although not in the precise form of a right to bodily integrity.

It would unduly prolong this judgment to consider in detail the problems that have subsequently been encountered in developing a coherent, principled jurisprudence in this area. It is sufficient to say that, save where such an unenumerated right has been unequivocally established by precedent, as, for example, in the case of the right to travel and the right of privacy, some degree of judicial restraint is called for in identifying new rights of this nature."

249. The court respectfully acknowledges and accepts the need for judicial restraint to which Keane J. refers. The court addresses later below the question raised by Keane J. "*as to whether, given that the unenumerated rights clearly existed in the contemplation of the framers of the Constitution, it was intended by them that the duty of declaring what those rights were should be the function of the judiciary rather than the Oireachtas*". The court hesitates, and the court senses from the above-quoted text (and from his later judgment in *T.D.* v. *Minister for Education* (considered later below)) that Keane J., as he then was, likewise hesitated, at the reference by Kenny J. in *Ryan* to the "*Christian...nature of the State*". A State cannot be a Christian, so presumably Kenny J. meant to refer to a State informed by Christian ideals. But our island's troubled past and the wider sweep of European history point to the dangers of mixing religious ideals into the cauldron of constructs that

inform public life. This Court respectfully declines to engage in such commingling in its reasoning.

(ii). T.D. *v.* Minister for Education.

[2001] 4 I.R. 259

250. The court has also been referred by counsel for the State parties to *T.D.* v. *Minister for Education*. There, what was at issue was whether or not there is a right to education or a general right for a citizen to receive (or an obligation on the state to provide) medical or social services as a constitutional obligation. In his judgment in the Supreme Court, Murphy J. observed, *inter alia*, as follows, at 316:

> "*With the exception of Article 42 of the Constitution, under the heading* 'Education', *there are no express provisions therein cognisable by the courts which impose an express obligation on the State to provide accommodation, medical treatment, welfare or any other form of socio-economic benefit for any of its citizens, however needy or deserving. It is true that the exploration of unenumerated constitutional rights* in *Ryan v. The Attorney General* [1965] I.R. 294 has established the existence of a constitutional right of 'bodily integrity'. *The examination of that right in* The State (C.) *v.* Frawley *[1976] I.R. 365 and* The State (Richardson) *v.* Governor of Mountjoy Prison *[1980] I.L.R.M. 82 certainly establishes that the State has an obligation in respect of the health of persons detained in prisons. However, these authorities do not suggest the existence of any general right in the citizen to receive, or an obligation on the State to provide medical and social services as a constitutional obligation.*

In G. *v.* An Bord Uchtála *[1980] I.R. 32, Henchy J. identified the right to bodily integrity at pp. 90 to 91 in the essentially negative terms following:-*

> *'As to a constitutional right to bodily integrity, such a right arises for judicial recognition or enforcement only in circumstances which require that, in order to assure the dignity and freedom of the individual within the constitutional framework, he or she should be held immune from a particular actual or threatened bodily injury or intrusion.'*

With the exception of the provisions dealing with education, the personal rights identified in the Constitution all lie in the civil and political rather than the economic sphere. These are indeed important rights which were won for citizens in different societies over a period of centuries often in the face of bitter opposition. Whilst limited poor law relief or workhouse accommodation has existed in this and neighbouring jurisdictions for many years, the demand for a coherent system of socio-economic rights, and more particularly the acceptance of that demand, does not appear to have emerged until the widespread acceptance of socialist doctrines following the Second World War, resulting in the now generally accepted concept of the welfare state.

The absence of any express reference to accommodation, medical treatment or social welfare of any description as a constitutional right in the Constitution as enacted, is a matter of significance. The failure to correct that omission in any of the 24 referenda which have taken place since then would suggest a conscious decision to withhold

from rights, which are now widely conferred by appropriate legislation, the status of constitutionality in the sense of being rights conferred or recognised by the Constitution.

The reluctance to elevate social welfare legislation to a higher plane may reflect a moral or political opposition to such change or it may be a recognition of the difficulty of regulating rights of such complexity by fundamental legislation which cannot be altered readily to meet changing social needs. Alternatively, it may have been anticipated that the existence of a constitutional right enforceable by the courts would involve - as the present case so clearly demonstrates - a radical departure from the principle requiring the separation of the powers of the courts from those of the legislature and the executive. The inclusion in the Constitution of Article 45 setting out directive principles of social policy for the general guidance of the Oireachtas - and then subject to the express provision that they should not be cognisable by any court - might be regarded as an ingenious method of ensuring that social justice should be achieved while excluding the judiciary from any role in the attainment of that objective."

251. The court is not persuaded that the above-quoted text is especially relevant in the context of the within proceedings. This is because the constitutional right for which the Case 2 Applicant contends is an unenumerated personal right. The court notes, however, Keane C.J.'s return in *T.D.* to ground previously trodden by him as Keane J. in *O'T.*, in the following observations, at 281:

"Two questions, in particular, merit further consideration. The first is as to the criteria by which the unenumerated rights are to be identified. In the High Court in that case, Kenny J. said that there were many personal rights of the citizen which flow from 'the Christian and democratic nature of the State' which are not mentioned in Article 40. There was no explicit endorsement of that view in this court, perhaps because the right under discussion in that case was conceded on behalf of the Attorney General to be such an unenumerated right. Whether the formulation adopted by Kenny J. is an altogether satisfactory guide to the identification of such rights is at least debatable. Secondly, there was no discussion in the judgment of this court as to whether the duty of declaring the unenumerated rights, assuming them to exist, should be the function of the courts rather than the Oireachtas.

In my judgment in I. O'T. *v.* B *[1998] 2 I.R. 321, I said at p. 370 that:-*

> *'... save where such an unenumerated right has been unequivocally established by precedent, as, for example, in the case of the right to travel and the right of privacy, some degree of judicial restraint is called for in identifying new rights of this nature... '".*

252. Beyond noting these further observations, it is not necessary to analyse them further, given the court's analysis of Keane C.J.'s earlier observations in *O'T.*

XXXVI

The Parameters of the Right Contended For

253. As mentioned, the contention of the Case 2 Applicant is that there exists within and under the Constitution, and should be recognised by the court, an uneumerated personal constitutional right to an environment that is consistent with the human dignity and well-being of citizens at large. This right, it is contended, enjoys its place in the constitutional hierarchy and exists in balance with all other rights identified under, *inter alia*, Article 40.3 of the Constitution.

254. One concern posited at hearing is that the contours and parameters of the contended-for right might be contended to be ill-defined. For example: (i) does the contended-for right impose a positive duty to act on government and/or others? (ii) does it afford protection from general environmental risks or actual harms? (iii) is it a right against government only and to what kinds of government action does it apply? (iv) is it the right knowingly to consent to serious health risks in the environment, to government abstention from direct or indirect participation in the creation of a health risk, to government compensation for harm suffered? (v) does it extend to the indoor environment, the home, and the workplace? (vi) what level of health is protected and whose health is protected? (vii) is it a civil right of humans or does it extend to animals and ecosystems?

255. The issues raised by the recognition at this time of an existing but unenumerated personal constitutional right to an environment consistent with the human dignity and well-being of citizens at large may be manifold. But the court does not accept that all such issues

require necessarily to be pre-identified (if they can all be identified) and also resolved before the contended-for existing constitutional right can be recognised as existing. Other constitutional rights, such as freedom of speech, and even recognised but unenumerated constitutional rights, such as the right to bodily integrity, present similar complications, with their limits only capable of being defined, demarcated and better understood over time, and yet they are recognised to exist.

XXXVII

Who Decides?

256. That the court has a jurisdiction to recognise expressly a constitutional right not previously recognised expressly, *i.e.* to engage in what is sometimes referred to as identifying an implicit constitutional right, has been a legally accepted course of judicial action since at least the time of *Ryan* v. *Attorney General* [1965] I.R. 294. A period of legal enlightenment followed upon *Ryan*, in which counsel (and their clients) contended for, and courts found to exist, a variety of disparate, unenumerated rights which could logically be deduced to exist in and under the Constitution, but which, to use a colloquialism, had not previously been 'called out by name'. These included the most elementary of rights which, the court suspects, the woman on the LUAS or the man on the DART, so-called 'ordinary' citizens, if approached today, would be astonished to learn had ever been the subject of legal controversy or dispute (much the court suspects, as the right contended for by the Case 2 Applicant is now, or will in the future, be seen). So, for example, previous courts, through a process of sometimes unfairly disparaged but still logical deduction identified rights such as the right to bodily integrity, the right to earn a living, the right of access to the courts, the right to travel, the

right to marry and the right to beget children. Yet one possible weakness of the reasoning in *Ryan*, as flagged by Keane C.J. in *T.D.* v. *Minister for Education* [2001] 4 I.R. 259, 281, as considered above, is that "*There was no discussion in the judgment of this court* [*i.e.* the judgment of the Supreme Court in *Ryan*] *of the question as to whether the duty of declaring...unenumerated rights...should be the function of the judiciary rather than the Oireachtas*".

257. What Keane C.J. appears to be touching upon in the just-quoted text is the possibility that the identification of unenumerated constitutional rights by (unelected) courts could perhaps be contended to involve an unconstitutional usurpation of the proper role of the (elected) Oireachtas. But would such a contention, if made, be correct? This Court's answer to that question is a respectful 'no'. Of course, if one views the essence of democracy as being the power of a current representative majority to shape all public policy to its liking then, in truth, both enumerated and unenumerated constitutional rights would likely present an at least occasional level of concern to that current representative majority (albeit not so great a concern, perhaps, to its opponents). However, our system of democracy does not confer unfettered power on whoever comprises the current representative majority from time to time. Instead, the Irish people, in their collective wisdom, have freely chosen to establish a higher (constitutional) law which both empowers and constrains all of the great organs of our tripartite government. When matters are viewed so, when one has regard to the fact that one is treating with a system that the Irish people have elected in their sovereign freedom to devise, then the proper recognition and realisation of all true constitutional rights, albeit that some among them may be unenumerated, falls to be seen as greatly democratic, perhaps even superlatively so, notwithstanding that the agent tasked with identifying unenumerated rights is one or more unelected members of one of the three great branches of government

established by the people in their prudent desire for an effective and efficient system of checks and balances within and across the system of public governance established by their Constitution. The rule of law is meant, amongst other matters, to protect the people from their government, not to protect the government from the people; it is the people who have established a Constitution that contemplates the existence of both enumerated and unenumerated constitutional rights; it is the people who have long tolerated, and litigants drawn from among the people who have long participated in, judicial processes that see unenumerated constitutional rights freshly recognised from time to time; and in truth, and in this perhaps lies the best answer to the above-mentioned issue touched upon by Keane C.J. in *T.D.*, if the rule of law, in the form contemplated and tolerated by the people, is not to descend to the arbitrary rule of whoever comprises the current representative majority from time to time, then the only agency available to put rights, including unenumerated constitutional rights, between the claims of the executive or legislative and those of so-called 'ordinary' people, is the judicial branch of the tripartite government that the people have established directly. That can place courts in an uncomfortable position, it may occasionally lead to (hopefully creative) tension between the different branches of government, but regardless of what practical consequences such an arrangement yields, that is the arrangement devised by the Irish people through the Constitution, and in our republic the people are master. It follows from the foregoing, and more fundamentally from the decisions of the courts in *Ryan* v. *The Attorney General*, *et seq.*, that the court may lawfully, properly, and with due regard for constitutional propriety, proceed to recognise an existing but unenumerated constitutional right such as that which the Case 2 Applicant contends to exist.

XXXVIII

Companies and Personal Rights.

258. Can the Case 2 Applicant, a company, contend for the existence of personal rights? The court has been referred in this regard to the decision of the High Court (McKechnie J.) in *Digital Rights Ireland Ltd* v. *Minister for Communications* [2010] 3 I.R. 251.That was a case concerned, *inter alia*, with the *locus standi* of Digital Rights Ireland to bring a so-called '*actio popularis*', in effect an action brought by a member of the public in the interest of public order. In recognising that the plaintiff had the necessary *locus standi*, McKechnie J. observed, *inter alia*, as follows, at paras. 32-35:

> "***[32]*** *The above cases of* Cahill *v.* Sutton *[1980] I.R. 269 and* Crotty v. An Taoiseach *[1987] I.R. 713 both relate to the* locus standi *of natural persons. Where the plaintiff is a corporate body do different considerations arise?*
>
> ***[33]*** *This question was considered in* S.P.U.C. *v.* Coogan *[1989] I.R. 734. Referring to his decision in* A.G. (S.P.U.C.) *v.* Open Door Counselling Ltd *[1988] I.R. 593, Finlay C.J. quoted at p. 741 from p. 623 of that judgment as follows:-*
>
> > *'If, therefore, the jurisdiction of the courts is invoked by a party who has a* bona fide *concern and interest in the protection of the constitutionally guaranteed right to life of the unborn, the courts, as the judicial organ of government of the State, would be failing in their duty as far as practicable to vindicate and defend that right if they were to refuse relief upon the grounds*

that no particular pregnant woman who might be affected by the making of an order was represented before the courts.'

He rejected as misconceived the defendant's proposition that this paragraph was qualified by reference to the special position of the Attorney General, and reaffirmed at p. 742 that the 'broad statement of principle contained in [this] paragraph remains unqualified'. The general test with regards to locus standi *at p. 742 should thus be:-*

'[T]hat of a bona fide *concern and interest, interest being used in the sense of proximity or an objective interest. To ascertain whether such* bona fide *concern and interest exists in a particular case it is of special importance to consider the nature of the constitutional right sought to be protected.'*

[34] *Whilst Walsh J. in the same case emphasised the nature and importance of the right in question (the right to life of the unborn), his comments in my view have a broader application, especially when considered in light of the rights claimed, in the case at hand. He stated at p. 743:-*

'The question in issue in the present case is not one of a public right in the classical sense ... but is a very unique private right and a human right which there is a public interest in preserving ... What is in issue in this case is the defence of the public interest in the preservation of that private right which has been guaranteed by the Constitution. It is a right guaranteed protection by public law as it is part of the fundamental law of the State by reason of being incorporated in the Constitution.'

The judge further noted the exceptional importance of access to the courts, which was essential to the vindication of all other rights. Thus at p. 744 with regards to standing, 'the essential question is has the plaintiff a bona fide *interest to invoke the protection of the courts to vindicate the constitutional right in question'. In relation to* Cahill *v.* Sutton *[1980] I.R. 269, he was of the opinion at pp. 746 to 747 that:-*

> *'The decision ... is not of such sweeping application as it is sometimes thought. It can be understood only in the light of the narrow ground upon which the case was presented and argued and on the possible injustice of the defendant...*
>
> *It is quite clear ... that even in cases where it is sought to invalidate a legislative provision the Court will, where the circumstances warrant it, permit a person whose personal interest is not directly or indirectly presently or in the future threatened to maintain proceedings if the circumstances are such that the public interest warrants it. In this context the public interest must be taken in the widest sense.'*

Finally, as the plaintiff was a company limited by guarantee, established for the sole object of protecting human life, a question arose as to its right to bring the application. Finlay C.J. notes at p. 742 that:-

> *'I would accept the contention that [the plaintiff] could not acquire a* locus standi *to seek this injunction merely by reason of the terms of its articles and*

memorandum of association ... [However] the particular right which it seeks to protect with its importance to the whole nature of our society, constitute sufficient grounds for holding that it is a person with a bona fide *concern and interest and accordingly has the necessary legal standing to bring the action.'*

[35] *Whilst* S.P.U.C. *v.* Coogan *[1989] I.R. 734 did not involve a constitutional challenge to any particular piece of legislation, there is no reason, in my view, as to why it would not equally apply to such a case. Therefore it would thus seem to me that, in principle, a company should not be prevented from bringing proceedings to protect the rights of others where, without otherwise being disentitled, it has a* bona fide *concern and interest, taking into account the nature of the right which it seeks to protect or invoke."*

259. So, in the *S.P.U.C.* case, the court allowed for an expansive approach to *locus standi* where the public interest warrants it. The Case 2 Applicant contends, and the court accepts, that it (the Case 2 Applicant) falls squarely within the concept of standing accorded by the Supreme Court to S.P.U.C. McKechnie J. then goes on to consider a number of particular rights. In relation to some of those rights he held that they did not vest in Digital Rights Ireland and that it had no entitlement to enforce them. Proceeding, however, under the heading "*Actio popularis*", McKechnie J. observes, *inter alia*, as follows, at paras. 79-82:

"**[79]** *Despite the foregoing, it may nevertheless be possible for the plaintiff to litigate matters which do not, or cannot, affect it personally and specially in limited circumstances. The seminal case in this regard is* Crotty *v.* An Taoiseach *[1987] I.R. 713, which is referred to in detail at para. 31* supra. *It is sufficient to recap that the*

plaintiff's inability to point to any prejudice specific to him personally, as distinct from him as a member of the public, did not deprive him of the necessary standing.

[80] *However, as noted above, different considerations may apply to limited companies. One of the primary concerns of rules relating to* locus standi *is to prevent those litigants who are meddlesome, frivolous or vexatious from unduly burdening the court, and those parties whom are sued. Therefore, cases should be brought primarily by persons who have a particular interest in the subject matter. In striving to achieve this outcome, the courts have available the deterrent to impose cost orders against the former group, which may include companies with limited liability. However, there can be concern if such litigants are in fact merely straw men, or straw companies, behind which the true litigants hide so as to evade any order for costs which might ultimately be made against them. In those circumstances the court must examine the nature of the company and its purpose, lifting the veil if required, together with the surrounding circumstances of the case, and the rights which it seeks to vindicate.*

[81] *The Supreme Court in* S.P.U.C. *v.* Coogan *[1989] I.R. 734 recognised the right of the plaintiff company to litigate to prevent a breach of the Constitution where it had a* bona fide *concern and interest, with Finlay C.J. noting at p. 742 that:-*

> *'To ascertain whether such* bona fide *concern and interest exists in a particular case it is of special importance to consider the nature of the constitutional right sought to be protected.'*

Therein he noted that with regards to the right to life of the unborn there could never be a victim or potential victim who could sue. Thus given that 'there can be no question of the plaintiff being an officious or meddlesome intervenient in this matter', considering that the plaintiff in that case had taken proceedings, which had been successfully brought to conclusion by the Attorney General, and 'the particular right which it seeks to protect with its importance to the whole nature of our society', these facts 'constitute sufficient grounds for holding that it is a person with a bona fide *concern and interest and accordingly has the necessary legal standing to bring the action'. In this context the then Chief Justice made it clear that a company could not, by virtue only of its memorandum and articles of association, meet such criteria.*

[82] *Similarly, Walsh J. noted at p. 744 that:-*

> '*One of the fundamental political rights of the citizen under the Constitution, indeed one of the most valued of his rights, is that of access to the courts ...*'

He put it further at pp. 746 and 747:-

> '*It is quite clear from [*East Donegal Co-Operative Livestock Mart Ltd *v.* Attorney General *[1970] I.R. 317,* O'Brien *v.* Keogh *[1972] I.R. 144,* Cahill *v.* Sutton *[1980] I.R. 269] and other decisions that even in cases where it is sought to invalidate a legislative provision the Court will, where the circumstances warrant it, permit a person whose personal interest is not directly or indirectly or in the future threatened to maintain proceedings if the*

circumstances are such that the public interest warrants it. In this context the public interest must be taken in the widest sense.'"

260. There is no suggestion that the Case 2 Applicant is not a sincere and serious litigant. It has been in existence for 20 years, advocating for environmental protection. There is no suggestion that it is vexatious, a 'crank', or a 'busybody'. Moreover, its case raises profound constitutional issues that affect the entire population. And it seems to the court unlikely that many, if any individuals would take upon themselves the grave risk of engaging in High Court proceedings so as to assert the existence of an unenumerated but as yet not expressly recognised personal right, with (such is the lamentable cost of bringing High Court proceedings nowadays) the gravest of risk to their financial welfare if they were unsuccessful in such application. There is too a clear public good at stake when it comes to the contended-for constitutional right to an environment that is consistent with the human dignity and well-being of citizens at large.

XXXIX

Conclusion as to Constitutional Right Contended For.

261. For centuries, humanity has exploited the abundant resources of the natural environment. Until relatively recent decades, this process of exploitation was greatly untrammelled by legal restrictions, prompted perhaps by (a) a notion that nature's bounty is endless and (b) an unawareness of the toll that humanity's industrial and technological progress has taken, and is taking, on the quality of the environment that humanity requires for survival. The historically exploitative approach adopted by our ancestors towards the

environment has, in Ireland, been tempered in recent years, not least by a generally beneficial and largely European Union-inspired environmental law regime which is informed in part by the experience of member states that have had to cope with industrialisation and its ill-effects to a greater extent and for a longer time than Ireland. (That environmental law regime is sometimes criticised for its complexity, but complex issues such as environmental protection are rarely, if ever, susceptible to simple solutions). Along with legislative change, and well within the lifetime of this Court, there has also surfaced (i) a rising public concern about increasing environmental degradation and (ii) a greater public awareness that the quality of our life as a nation, and as members of the wider human community, is threatened by the processes which have yielded the very quality of life which we presently enjoy. It is in this, not un-pressing, context that the Case 2 Applicant contends that there resides within the Constitution an unenumerated and previously not expressly recognised personal right to an environment that is consistent with the human dignity and well-being of citizens at large.

262. As touched upon above, a constitutional right to an environment that is consistent with the human dignity and well-being of citizens at large may be perceived to raise so many issues as to make it a right that is more aspirational than practicable. The court has given examples of some of the questions that can present in this regard. But, again, the court does not accept that all these questions require to be addressed and to be answered before the right contended for can be recognised to exist. Other rights, such as freedom of speech, and even previously recognised, unenumerated constitutional rights such as the right to bodily integrity, face similar complications, being subject to limits can that only be defined, demarcated and understood over time, and yet they are recognised to exist.

263. What existing constitutional rights come into play when it comes to measures hostile to the environment? It seems to the court that, at the least, the following rights are of relevance: the right to life, as recognised in Article 40.3.2° of the Constitution, those injurious impacts to persons' health that come within Art. 40.3, the right to work, whether that is construed as deriving from Art. 40 or 45 of the Constitution (though it is difficult to see that this right could be affected other than indirectly by measures that would be hostile to the environment, *e.g.*, where a gardener became entirely unable to work in an area of heavy pollution) and the right to private property contemplated by Art. 43 of the Constitution (as well as Arts. 40.3.2° and 44.2.6°). These rights are capable of supporting individual claims in particular environmental situations. However, this is a rudimentary form of environmental protection. Is there an underpinning, unenumerated personal constitutional right to an environment that is consistent with the human dignity and well-being of citizens at large? Or, to put matters otherwise, are the individual protections touched upon above, and recognised at law, but particular manifestations of a right to an environment that is consistent with the human dignity and well-being of citizens at large, with this last right continuously informing or underpinning those individual protections, albeit that it has hitherto been to some extent obscured by them?

264. A right to an environment that is consistent with the human dignity and well-being of citizens at large is an essential condition for the fulfilment of all human rights. It is an indispensable existential right that is enjoyed universally, yet which is vested personally as a right that presents and can be seen always to have presented, and to enjoy protection, under Art. 40.3.1° of the Constitution. It is not so utopian a right that it can never be enforced. Once concretised into specific duties and obligations, its enforcement is entirely practicable. Even so, every dimension of the right to an environment that is consistent with the human dignity

and well-being of citizens at large does not, for the reasons identified previously above, require to be apprehended and to be described in detail before that right can be recognised to exist. Concrete duties and responsibilities will fall in time to be defined and demarcated. But to start down that path of definition and demarcation, one first has to recognise that there is a personal constitutional right to an environment that is consistent with the human dignity and well-being of citizens at large and upon which those duties and responsibilities will be constructed. This the court does. However, even though the court accepts that members of the Case 2 Applicant enjoy the contended-for constitutional right, and that the Case 2 Applicant itself has standing as a body corporate, and has a sufficient basis to contend for recognition of that existing but unenumerated constitutional right, the Case 2 Applicant nevertheless did not have a right to participate in the extension decision under s.42 of PADA (there is no such right of participation) and it has failed to establish that there is, by reference to that section and on the facts presenting, any disproportionate interference with the personal constitutional right to an environment that is consistent with the human dignity and well-being of citizens at large. In truth, the court sees in s.42 nothing more than a proper and proportionate legislative interference with the said, ever-present and now expressly recognised personal constitutional right.

XL

The European Convention on Human Rights

265. The Convention received a surprising lack of attention in the submissions before the court. Indeed, the number of judicial review applications in which the Convention features in the statement of grounds, gets lightly touched upon in the written submissions, and seems to

peter out completely at oral hearing is striking. The Convention is a serious and important document, not lightly to be prayed in aid and, if referred to in pleadings, ought in truth to receive fulsome attention thereafter in order that a court may confidently proceed in the full knowledge of any human rights concerns contended to present. Human rights are too important and consequential for an alleged breach of those rights simply to be included in pleadings as a 'catch all' or supplementary ground by reference to which relief is sought and then scarcely touched upon thereafter.

266. As the court understands the written pleadings and submissions, the case made by the applicants is that s.42 of PADA is incompatible with Ireland's obligations under Arts. 6 ("*Right to a fair trial*"), 8 ("*Right to respect for private and family life*") and 12 ("*Right to marry*") of the Convention and/or Art.1 of Protocol No. 1 ("*Protection of property*") to the Convention.

267. It seems to the court that the public participatory process which preceded the grant of the new runway permission satisfies the State's obligations under the above-mentioned Convention provisions. Insofar as there is no express statutory mechanism permitting further public participation following the grant of planning permission, any such restriction on subsequent public participation is justified by, and proportionate to, the public interest in, *inter alia*, administering a functioning and efficient system of planning in Ireland.

268. The court acknowledges that while the European Court of Human Rights has, in a number of cases, considered the compatibility of procedural restrictions with the European Convention on Human Rights, including restrictions on public participation, many of these

cases concern situations of inadequate (or no) public participation in circumstances where there is a clear risk to the health of residents from toxic emissions.

269. Unmentioned in court was, *inter alia*, the decision of the Court of Human Rights in *Taskin and Ors* v. *Turkey* (App. No. 46117/99). In that case the Court of Human Rights recognised a *per se* right to a healthy environment. Indeed, it seems significant that the Court of Human Rights refers in that case to the right to an environment without any qualification (such as 'emergent'), especially as consideration of supranational law was unnecessary. (Turkey's Constitution recognises a right to live in a healthy and balanced environment). Indeed, the Court of Human Rights appeared in *Taskin* to go out of its way to draw attention to the existence of a right to a healthy environment in international legal texts (which perhaps points to that jurisprudential consensus to which counsel for the Case 2 applicant alluded when contending successfully for the recognition of the previously unrecognised, unenumerated peronal constitutional right to an environment that is consistent with the human dignity and well-being of citizens at large). Also interesting is the fact that the Court of Human Rights, in *Taskin*, appears to include procedural environmental rights, the right to environment, and the preservation of existing rights through environmental protection within the rubric of the 'right to a healthy environment'.

270. One pertinent case that did receive mention before the court was *Flamenbaum and Others* v. *France* (App. Nos. 3675/04 and 23264/04, 13th December, 2012), a case which seems of particular relevance in the context of the case now presenting, the Court dismissed a claim brought by residents of an area near Deauville Airport claiming that the extension of the runway breached their Art 8 ECHR rights and property rights, that their views had not sufficiently been taken into account due to the 'splitting' of the decision-making process, that

the market value of their property would decline, and that they would have to bear additional insulation costs. Dismissing their claim, the European Court of Human Rights noted that the French courts had recognised the project's public interest, and that the French Government had established a legitimate aim, namely the relevant French region's economic well-being. Having regard to the measures taken by the authorities to limit the impact of the noise disturbance on local residents, it found that they had struck a fair balance between the competing interests. Further, the European Court held that there was no flaw in the decision-making process as, following *Hatton* v. *United Kingdom* (App. No. 36022/97, 8th July, 2003), adequate studies had been carried out; the results of those studies had been made available to the public; and the applicants had access to judicial review. The European Court emphasised that, while the judicial review was split into phases due to the splitting of the decision-making process, this was due to the structure of French law, and the applicants had the occasion to participate in each phase of the decision-making process and to make observations.

271. Nothing in the case-law of the European Court of Human Rights suggests that there is a mandatory requirement of public participation where, as occurs under s.42 of PADA, the mere duration of an existing permission is extended.

J. LEAVE AND CONCLUSION

XLI

Case 1 Applicants

272. The court respects the fighting-spirit of Ms Merriman and her fellow applicants and sympathises with her and them as regards the predicament in which they find themselves. The court is satisfied to grant Ms Merriman and her fellow applicants leave to bring their judicial review application. However, it follows from the reasoning of the court in the preceding pages that it must respectfully decline to grant any of the reliefs sought of it at this time by Ms Merriman and her fellow applicants.

XLII

Case 2 Applicant

273. It follows from the reasoning of the court in the preceding pages that it must likewise decline to grant any of the reliefs sought of it at this time by Friends of the Irish Environment.

Approved:
21/xi/17