UNAPPROVED

THE COURT OF APPEAL

Neutral Citation: [2024] IECA 202

Record Number: 2022/100

Collins J.

Faherty J.

Power J.

IN THE MATTER OF SECTION 50B OF THE PLANNING AND DEVELOPMENT ACT, 2000

AND IN THE MATTER OF THE ENVIRONMENTAL PROTECTION AGENCY ACT, 1992 (AS AMENDED)

BETWEEN/

HARTE PEAT LIMITED

APPELLANT

- AND -

THE ENVIRONMENTAL PROTECTION AGENCY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

<u>Judgment of Ms. Justice Faherty dated the 31st day of July 2024</u>

1. This appeal arises from a composite judgment of the High Court (Phelan J. hereinafter *"the Judge"*) of 16 March 2022 in respect of two matters then before the High Court, first, the appellant's (*"Harte Peat"*) application for judicial review of the respondent's (*"the EPA"*) decision to refuse to consider Harte Peat's application for an Integrated Pollution Control licence (*"IPC licence"*) pursuant to the provisions of the Environmental Protection Agency Act 1992 (*"the 1992 Act"*) and, secondly, the EPA's application for an injunction pursuant to s.99H of the 1992 Act restraining Harte Peat from extracting peat. The High Court duly granted an order in favour of the EPA pursuant to s.99H. An application by Harte Peat for a stay on the injunction was heard by this Court on 14 September 2022 and refused verbally on 22 November 2022.

2. The Court's reasons for refusing the stay are set out in a judgment delivered on 6 December 2022 ([2022] IECA 276). In essence, the Court determined that whilst Harte Peat had made out an arguable case and had stateable grounds of appeal, the balance of justice nevertheless lay in favour of refusing the stay application. A highly relevant factor was that Hate Peat's activity involved significant peat extraction such that if the Court were to grant the stay and subsequently uphold the High Court decision, *"the injustice that would arise, both as a matter of law and fact, is that irreversible peat extraction from Area G would occur. In such scenario, peat extraction would have been in breach of domestic and EU legislation"* (para. 120). As the Court stated: *"[t]he harm from unlawful peat extraction cannot be reversed or undone", "if peat extraction is now to be resumed in Area G… there is a very significant risk that there will be adverse environmental consequences and a failure to enforce national and EU environmental law"* (para. 122). On the basis of the High Court's findings in the judicial

review proceedings, that risk was *"a near certainty"* (para. 122). As mandated by the approach of O'Donnell J. (as he then was) in *Krikke v. Barranafaddock Sustainability Electricity Ltd.* [2020] IESC 42 (*"Krikke"*) , the Court was of the view that *"the importance of both protection of the public interest in the enforcement of planning and environmental law protecting the environment cannot be underestimated",* thus *"the implementation of a decision made under a statutory scheme for the protection of the environment must attract significant weight, and, as was also emphasised in Krikke, significant weight has to be given to the fact that the High Court has upheld the EPA's decision after a lengthy hearing"* (para.131).

3. I turn now to Harte Peat's appeal of the High Court's decision in respect of the judicial review proceedings and the s.99H injunction. In broad brush, two principal issues arise in the appeal, namely (i) whether the EPA's decision to refuse to consider Harte Peat's licence application on the basis that its peat extraction activity required planning permission was a valid one and (ii) whether the High Court correctly interpreted the definition of Class 1.4 of the First Schedule to the 1992 Act, to wit, "*the extraction of peat in the course of business which involves an area exceeding 50 hectares*" in granting the injunctive relief sought by the EPA. These issues fall to be addressed by reference to the background to the proceedings and the relevant legislative provisions (both at EU and domestic level) which govern the type of activity in which Harte Peat is engaged.

Background

4. By way of judicial review proceedings bearing Record No. 2021/14/JR, Harte Peat sought orders, including *certiorari,* quashing the decision of the EPA made on 24 November 2020 refusing to consider Harte Peat's application for an IPC licence in respect of its wet peat extraction activity at bog lands in Counties Westmeath, Cavan and Monaghan. While, altogether, the lands in issue span a total area of some 150 hectares of bog lands, the application for an IPC licence was in respect of some 73.33 hectares, with a stated peat extraction area of

circa 49 hectares. That decision of the EPA was made pursuant to section 87(1C) of the 1992 Act, of which more anon. For ease of reference, the bog lands in issue here will be referred to as Areas A, B, F and G, as they are so described in the EPA's statutory injunction proceedings. The lands in County Westmeath drain into the Inny River which in turn flows into the nearby Lough Derravaragh, a designated Special Protection Area ("*SPA*") and a National Heritage Area ("*NHA*").

5. The excavation of wet peat (sometimes referred to as black peat) by Harte Peat is for the supply of mushroom casing which is the growing medium for Ireland's commercial mushroom production, and which consists of a mixture of wet peat and other products including a form of straw compost containing mushroom sporium on which mushrooms are grown and from which they are harvested. Harte Peat is a supplier of mushroom casing to a number of mushroom growing enterprises.

6. Harte Peat applied for the IPC licence against the backdrop of an already complicated factual and legal history which I now propose to briefly set out.

The previous proceedings

7. In 2013, the EPA commenced proceedings (Record No. 2013/302 MCA) against Harte Peat and another company pursuant to section 99H of the 1992 Act (hereafter "*the 2013 Proceedings*").

8. In those proceedings, Harte Peat sought the determination of a preliminary issue in relation to the meaning of the phrase "*extraction of peat in the course of a business which involves an area exceeding 50 hectares*" as appears in Class 1.4 of the First Schedule to the 1992 Act. The EPA consented to this preliminary issue being determined.

9. On 30 May 2014, the High Court (Barrett J.) delivered a judgment ([2014] IEHC 308) on the preliminary issue which upheld the EPA's position as to the interpretation of "*extraction of peat in the course of a business which involves an area exceeding 50 hectares*". Harte Peat

appealed that judgment to this Court. On 25 November 2016, the EPA agreed to set aside the Order and judgment of Barrett J. on consent in circumstances where this Court ruled that the preliminary issue should not have proceeded in the absence of agreement as to the underlying facts.

10. In November 2018, a 3-day hearing for an interlocutory injunction took place before Meenan J. in the High Court. The EPA was seeking interlocutory injunctive relief against Harte Peat. The request for interlocutory relief was refused by Meenan J. on 21 November 2018.

11. On 21 May 2019, the EPA's application for final orders in the 2013 Proceedings was compromised on agreed terms. In short, it was agreed that, not later than six months from the date of the Order, Harte Peat would apply pursuant to section 82B of the 1992 Act (as inserted by the European Union (Environmental Impact Assessment) (Peat Extraction) Regulations 2019 (S.I. No. 4 of 2019)) for an IPC licence for peat extraction in respect of Areas A, B and G as shown on the map annexed to the Order, and Harte Peat agreed that it would not extract peat in any other area pending the determination of the licence application.

12. The settlement agreement included what has been referred to as "*a sidebar agreement*" by which the parties agreed that in the event that section 82B of the 1992 Act was found to be unlawful or invalid, or amended or revoked, in whole or in part, such illegality or invalidity affecting performance of the Order of 21 May 2019, the proceedings and the Order of 21 May 2019 should not constitute a barrier to any fresh proceedings that the EPA might wish to institute.

13. In the within proceedings, Harte Peat contends that the terms of the sidebar agreement precluded the EPA from issuing any such injunction proceedings before determining Harte Peat's application for an IPC licence.

The IPC licence application

14. On 7 October 2019, Harte Peat lodged an IPC licence application with the EPA in respect of Areas A, B and G. As already referred to, it concerned a total licence area of 73.33 hectares, with a stated extraction area of circa 49 hectares. Harte Peat accepts that its licence application required an EIA since the licence area exceeds the requisite threshold.

15. On 18 October 2019, the EPA wrote to Harte Peat's agent acknowledging receipt of the application and on the same date, the EPA notified the prescribed bodies of the application.

16. In the period 23 October 2019 to 4 February 2020, the EPA received third party submissions from the HSE, the Department of Culture, Heritage and the Gaeltacht, Friends of the Irish Environment and an anonymous individual in respect of the IPC licence application. On 7 November 2019, the EPA sought the observations of Westmeath County Council on the EIAR that had been submitted by Harte Peat.

17. On 18 December 2019, the EPA wrote to Harte Peat seeking permission to extend the period for its determination to 1 May 2020 to which Harte Peat consented. On 1 May 2020, the EPA sought a further extension for its determination to 30 June 2020.

18. Of some note, at this juncture, is that in the timeframe during which Harte Peat and the EPA were engaging in respect of the IPC licence application, two ministerial regulations, namely the EU (Environmental Impact Assessment) (Peat Extraction) Regulations 2019 (S.I. No. 4 of 2019) (already referred to) and the Planning and Development Act, 2000 (Exempted Development) Regulations 2019 (S.I. No. 12 of 2019) were held to be invalid by the High Court (Simons J.) (see, respectively, *Friends of the Irish Environment Ltd. v. Minister for Communications* [2019] IEHC 555 and *Friends of the Irish Environment Ltd. v. Minister for Communications* [2019] IEHC 646). These two Regulations purported to exempt peat extraction (of whatever scale) from the requirement to obtain planning permission and to constitute the EPA as licensor under the 1992 Act as the single competent authority providing development consent where peat extraction required assessment under the EIA and Habitats

Directives. Essentially, the 2019 Regulations had been designed to take commercial peat extractors out of the planning system altogether and put exclusively into the domain of the EPA. Consequent upon the above decisions, large scale peat extraction was no longer an exempted development under the 2000 Act.

19. As referred to earlier, the parties' compromised previous proceedings contemplated the possibility that the 2019 Regulations would be struck down, as indeed they duly were.

20. In March 2020, the Friends of the Irish Environment commenced judicial review proceedings identifying the EPA as respondent and Harte Peat as notice party (Record No. 2019/910 JR). Amongst the reliefs sought were an order of *certiorari* quashing the decision of the EPA to accept Harte Peat's application for an IPC licence and declaratory relief that the EPA had erred in law and acted contrary to section 87(1C) of the 1992 Act in accepting the application when it knew or ought to have known that the development was not exempt from planning permission and that no such planning permission had been sought, nor confirmation obtained from a planning authority that such permission was not required. As we shall see, Harte Peat maintains that its activities do not require planning permission because they constitute pre-1964 development and, as such, were excluded from the application of the 1963 Act and remain outside the scope of the 2000 Act.

21. On 25 May 2020, the EPA wrote to Harte Peat requesting details of the planning status of the activity pursuant to section 87(1B) of the 1992 Act, noting that failure to comply may result in the licence application not being considered.

22. Harte Peat replied on 29 May 2020 confirming that no grant of planning permission existed and that no such application was under consideration and enclosing a memorandum which stated, *inter alia,* that *"the lands the subject matter of this application have been used for peat extraction well before any planning legislation."* The EPA was also asked to note that

"this application when made and receipted did not require planning permission in any event even under such legislation".

23. The EPA replied on 4 August 2020 to the effect that the licence application *"is one in respect of an activity that prima facie involves development and proposed development for which a grant of planning permission may be required".* It went on to reference the decision of the High Court (Meenan J.) in *Bulrush & Westland* [2018] IEHC 58, of which more anon.

24. On 11 August 2020, Harte Peat wrote to the EPA seeking an extension of time within which to reply to the EPA's letter, an explanation as to why the EPA had concluded that the requirements of s. 87 had not been met and details of the statutory basis on which the EPA was requiring proof of planning status.

25. On 21 October 2020, the EPA reiterated its request for information in respect of the planning status of Harte Peat's peat extraction activity stating that *"there are factors which indicate that the activity is one which will require [EIA], and therefore cannot benefit from any claim to exempted development that would otherwise apply by virtue of S.4(4) [of the 2000 Act]".* The factors identified were the extent of the land holdings in issue and *"the nature and proximity to conservation sites as detailed in the Natura Impact Statement /[EIAR] submitted as part of the licence application".* After reference to the proximity of the peat extraction to various conservation sites as detailed in the EIAR the letter stated that "*it appears that planning permission is required for this activity".* With reference to s.5 of the 2000 Act, it went on to state that it would *"accept a S.5 declaration as conclusive proof that planning permission is not required for this activity".* This correspondence was replied to on 5 November 2020, Harte Peat stating that no adverse finding had been made regarding the planning status of the lands the subject of the licence application.

26. On 12 November 2020, the EPA's licensing inspectorate prepared a memorandum regarding Harte Peat's licence application. The memorandum noted, *inter alia*, that as Harte

Peat had not made an application for substituted consent or for leave to apply for substitute consent to An Bord Pleanála, the request made by the EPA had not been complied with to the extent necessary to bring Harte Peat's licence application in compliance with s.87(1C) of the 1992 Act. The licencing inspectorate therefore recommended that the EPA refuse to consider the application pursuant to section 87(1C) of the 1992 Act.

27. On 17 November 2020 the EPA's Board met to consider the memorandum and Harte Peat's application. It duly accepted the recommendation of the licensing inspectorate and decided to refuse to consider the licence application pursuant to section 87(1C) of the 1992 Act.

28. On 24 November 2020, the EPA wrote to Harte Peat informing it of the decision to refuse to consider its application for a licence pursuant to section 87(1C) of the 1992 Act. It stated:

> *"As stated in our letter of the 21 October last, the Agency considers that the activity for which a licence is sought is one that prima facie involves development in respect of which a grant of planning permission may be required, for the reasons already set out in our correspondence.*
>
> *Further, for the reasons already set out, the Agency considers that there are factors set out in the application which indicate that the activity is one which will require an [EIA], and, therefore, cannot benefit from any claim to exempted development that would otherwise apply by virtue of S.4(4) of [the 2000 Act] …*
>
> *[A]s the Agency considers that the activity for which you seek a licence is one which involves development for which a grant of planning permissions is required, and you have failed to provide either confirmation from the planning authority that an application has been made or a copy of the grant of permission, the Agency refuses to consider your application in accordance with section 87(1C)…".*

In its closing paragraph, the letter asserted that *"it is a breach of section 82(2) … for a person to carry out a specified activity for Class 1.4 in the absence of a licence"*.

29. On the same day, the EPA communicated its decision to the relevant prescribed bodies and the third parties who had made submissions.

30. In essence, in the absence of Harte Peat having provided confirmation from the planning authority that a planning application had been made, or a copy of a grant of permission, the EPA was of the view that it was precluded by section 87(1C) of the 1992 Act from considering Harte Peat's licence application in circumstances where no application for planning permission within the meaning of Part IV of the 1992 Act had been made, and where Harte Peat could no longer rely on a ministerial exemption. Notably, Harte Peat had not sought to rely on a ministerial exemption. Albeit that the EPA did not engage with Harte Peat's claimed pre-1964 user, the decision, however, did address the question of whether an EIA was required, and it explained why same was required – referring to the nature and scale of the peat extraction and the proximity of that activity to a number of identified sensitive environmental sites. That was the factual basis upon which the EPA decided that EIA was required.

31. The EPA's refusal is the basis of the within judicial review proceedings. As already referred to, separately, the EPA moved to seek relief against Harte Peat by way of perpetual injunctive relief pursuant to section 99H of the 1992 Act (Record No. 2021/33MCA).

32. Before turning to the judicial review and statutory injunction proceedings, and the judgment of the High Court, it is necessary at this juncture to refer to the legislative regimes, both at the EU and domestic level, which govern both the licence application in issue here, and the grant of planning permission involving the extraction of peat.

The relevant legislative framework

33. The first thing to be noted is that peat extraction is a prescribed activity for the purposes of Directive 2011/92/EU on the assessment of the effects of certain public and private projects

on the environment (hereafter referred to as *"the EIA Directive"*). The first iteration of the EIA Directive was Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment. Directive 85/337/EEC was amended three times, in 1997, in 2003 and in 2009. Subsequently, the EIA Directive and the amendments thereto were codified by Directive 2011/92/EU, itself amended in 2014 by Directive 2014/52/EU.

34. Peat extraction where the surface area of the site exceeds 150 hectares is designated as an Annex I project, in respect of which an environmental impact assessment (EIA) is mandatory. Peat extraction below that threshold is included in Annex II and an EIA is required if the project is assessed as likely to have a significant effect on the environment. In fact, as we shall see, the threshold fixed in Irish law for triggering a mandatory EIA of new or extended peat extraction projects is significantly lower than the threshold in Annex II of the EIA Directive.

35. Article 2 of the EIA Directive provides that where a project within the scope of the Directive is likely to have a significant effect on the environment, Member States are obliged to make the person carrying out the development apply for development consent and an assessment with regard to the effects of the project on the environment.

36. Article 3 of the 2011 Directive sets out what an EIA entails. It requires the identification, description and assessment of the direct and indirect effects of a project on:

(a) population and human health;

(b) biodiversity with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC;

(c) land, soil, water, air and climate;

(d) material assets, cultural heritage and the landscape; and

(e) the interaction between (a) to (d).

37. Article 4 of the EIA Directive lists the projects that shall be subject to mandatory assessment. Moreover, *"project"* is defined in Article 1(2)(a) as follows:

> *"(a) The execution of construction works or of other installations or schemes other interventions in the natural surroundings and the landscape including those involving the extraction of mineral resources."*

Pursuant to Article 1(2)(c) development consent is defined as:

> *"The decision of the competent authority or authorities which entitles the developer to proceed with the project."*

38. The IPC licence application at issue here was accompanied by an Environmental Impact Assessment Report ("*EIAR*") pursuant to the EIA Directive and a Natura Impact Statement ("*NIS*") pursuant to the requirements of the EU Directive on the conservation of natural habitats and wild flora and fauna (92/43/EEC) ("*the Habitats Directive*"). The Habitats Directive has been transposed into Irish law by the European Communities (Birds and Natural Habitat) Regulations 2011.

39. Section 82 of the 1992 Act provides that a person shall not carry on a licensable "*activity*" unless a licence or a revised licence under Part IV of the 1992 Act is in force in relation to the activity by way of an IPC licence. For present purposes, Class 1.4 of the First Schedule to the 1992 Act identifies the relevant activity which requires a licence, as follows:

> "*The extraction of peat in the course of business which involves an area exceeding 50 hectares*."

40. This 50-hectare threshold represents the gateway to the licencing regime under the 1992 Act and the EPA does not have jurisdiction to entertain a licence application for a project under that threshold.

41. Where an application is made to the EPA for an IPC licence in respect of peat extraction the legislation imposes an express obligation on the EPA to carry out an EIA in certain

circumstances. Section 83(2A)(b) of the 1992 Act (as inserted by the European Union (Environmental Impact Assessment) (Integrated Pollution Prevention and Control) Regulations 2012) provides:

> *"(b) The Agency as part of its consideration of an application for a licence shall ensure before a licence or a revised licence is granted, and where the activity to which such licence or revised licence relates is likely to have significant effects on the environment by virtue, inter alia, of its nature, size or location, that, in accordance with this subsection and section 87(1A) to (1I), the application is made subject to an environmental impact assessment as respects the matters that come within the functions of the Agency including the functions conferred on the Agency by or under this Act. [...]"*

42. As noted by the Judge, here, Harte Peat did not contest that its extraction of peat was subject to the requirements of EIA.

43. It is important, I believe, to bear in mind that the licencing regime provided for in the 1992 Act exists separate and parallel to the domestic planning regime governing the extraction of peat as a development, to which I now turn before elaborating further on the provisions of the 1992 Act.

44. Historically, s. 4 of the Local Government (Planning and Development) Act 1963 ("*the 1963 Act*") (the precursor to the Planning and Development Act 2000 ("*the 2000 Act*")) exempted "*agriculture*" (the definition of which included the use of land for turbary/ extraction of peat) from the requirement for planning permission under the 1963 Act. However, consequent on the coming into effect of the original version (Directive 85/337/EEC) of the EIA Directive on 3 July 1988, for EIA purposes, and to conform with EU law, the benefit of "*exempted development*" under section 4 of the 1963 Act was disapplied in the case of "*peat*

extraction which would involve a new or extended area of 50 hectares" (see Article 6 and First Schedule, Part II, para. 2(a) of the European Communities (Environmental Impact Assessment) Regulations (S.I. 349 of 1989)) ("*the 1989 Regulations*").

45. The 1989 Regulations, which came into operation on 19 December 1989, and the Local Government (Planning and Development) Regulations 1990 ("*the 1990 Regulations*"), which came into operation on 1 February 1990, transposed Directive 85/337/EEC into Irish law. Article 7 of the 1989 Regulations amended the 1963 Act by, *inter alia,* requiring "*the submission to the planning authority, in the case of specified applications or classes of applications, of an environmental impact statement, in respect of the development to which the application relates*" (s. 25(2)(cc)(i) of the 1963 Act). Pursuant to Article 8 of the 1989 Regulations, the 1963 Act was further amended by the insertion of s. 26(1A) which provided:

> *"Without prejudice to subsection (1) of this section, a planning authority shall, in dealing with an application for permission for the development of land in respect of which an environmental impact statement was submitted to them in accordance with a requirement of or under regulations under section 25 (as amended by the European Communities (Environmental Impact Assessment) Regulations, 1989) of this Act, have regard to that statement…*".

46. Thus, a planning authority, when determining a planning application in respect of which an environmental impact statement was submitted by an applicant, was required to have regard to that statement and to other information relating to the effects of the development on the environment.[1]

47. "*Peat extraction which would involve a new or extended area of 50 hectares*" was one of the classes of development specified in Article 24 of the 1989 Regulations as being development for the purposes of the Regulations (see First Schedule, Part II, para. 2(a)).

[1] See also Articles 4 and 10 of the 1990 Regulations.

48. Consequent on the decision of the CJEU in *Commission v. Ireland* (Case C-392/96 EC) EU:C:1999:431, [1999] E.C.R. I-05901, which criticised the 50-hectare threshold set out in the 1989 Regulations, the applicable thresholds were revised downwards following the enactment of the 2000 Act.

49. The position now under the 2000 Act is as follows: peat extraction is "*development*" for the purposes of the Act. "*Peat extraction in a new and extended area of less than 10 hectares*" is exempted development (Schedule 2, Part 3, Class 17 of the Planning and Development Regulations 2001 (S.I. 600 of 2001) (as amended) ("*the Planning and Development Regulations*"). "*Peat extraction which would involve a new or extended area of 30 hectares or more*" is subject to mandatory EIA (Schedule 5, Part 2, para. 2(a) of the Planning and Development Regulations). In other words, any new development involving more than 10 hectares thenceforth requires planning permission and, where that development involved more than 30 hectares, an EIA is required. Sub-30 hectares development might also require an EIA, on a case-by-case basis (Article 103 of the Planning and Development Regulations). Peat extraction is defined in Article 3(3) of the Planning and Development Regulations as including "*any related drainage of bogland*".

50. Under the 2000 Act, the use of land for agriculture continued to be an exempted development save that the definition of agriculture was amended so as to no longer include "*the use of land for turbary*".

51. The effect of the foregoing provisions on the extraction of peat by developers was in fact mitigated to some degree in the Planning and Development Regulations. Article 11 provided that development commenced prior to the coming into operation (21 January 2002) of the relevant parts of the Regulations and which was exempt development for the purposes of the 1963 Act or the 1994 Regulations, "*shall notwithstanding the repeal of that Act and the revocation of those Regulations continue to be exempted development for the purposes of that*

Act." However, pursuant to amendments made by the Environment (Miscellaneous Provisions) Act 2011, development shall not be exempted development under the Planning and Development Regulations if an EIA or an *"appropriate assessment"* (*"AA"*) is required (s. 4(4) of the 2000 Act)[2]. The genesis of s.4.4 was the 1997 Directive. Section 4(4) does not apply to developments that are excluded.

52. Of relevance for the purposes of these proceedings is that apart from any issue of exempted development, s.24(1)(a) of the 1963 Act effectively excluded "*any development*" commenced before 1 October 1964 from the requirement of the Act. It provided:

> *"(1) Subject to the provisions of this Act, permission shall be required under this Part of the Act –*
>
> > *(a) In respect of any development of land being neither exempted development commenced before the appointed day…"*

The appointed day for the purposes of s. 24 was 1 October 1964. This is the provision upon which Harte Peat relies in these proceedings, saying that it continues to be operative on the basis of certain provisions of the 2000 Act.

53. Hence, a central plank in the case advanced by Harte Peat in the court below (and on appeal) is that its peat extraction activity does not require planning permission on the basis that its user is pre-1 October 1964. It contends that pre-1 October 1964 development continues to be excluded from the requirement to obtain planning permission under the 2000 Act notwithstanding that the 2000 Act does not contain a provision equivalent to s. 24(1)(a) of the 1963 Act.

54. The s. 24 exclusion, Harte Peat says, is carried over by the transitional provisions of the 2000 Act. Its principal argument is that the 2000 Act was structured to keep in being the

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[2] "As enacted, section 4(4) provided that the Minister could "*in connection with the Council Directive, prescribe development or classes of development which, notwithstanding subsection 1(a), shall not be exempted development*."

important date of 1 October 1964, and to distinguish between development (*"use"* or *"works"*) which is authorised or unauthorised, by the reference to the commencement date on 1 October 1964 in certain of the definitions set out in the 2000 Act.

55. To this end, it points, in the first instance, to the definition of *"unauthorised development"* as set out in the 2000 Act. Section 3 defines *"unauthorised development"* in the following terms:

> *"unauthorised development means, in relation to land, the carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use."*

56. *"Unauthorised use"* is defined in the following terms: *"Unauthorised use means, in relation to land, use commenced after 1 October 1964."*

57. The meaning ascribed to *"unauthorised works"* is as follows:

> *"Unauthorised works means any works on, in, over or under land commenced on or after 1 October 1964, being development other than – (a) exempted development (within the meaning of s.4 of the Act) or (b) development which is the subject of a permission granted under Part IV of the Act of 1963, which has not been revoked and which is carried on in compliance with that permission or any condition to which that permission is subject."*

58. Whilst it was expressly provided in the 1963 Act that pre-1964 development did not require planning permission, and while the 2000 Act does not replicate s.24(1), the temporal restrictions contained in the definitions set out above serve to ensure that developments commenced prior to 1 October 1964 continue to be excepted, subject of course to it being established that the activity in question was one actually commenced before the appointed day and that the current user (including works) has sufficient continuity with the asserted pre-1964 user to be identified with it (I will return to this topic in due course). In circumstances

where it is not in dispute that Harte Peat's activity constitutes *"works"* for the purposes of the 2000 Act, as we shall see, the issue that arises here is how Harte Peat's claimed pre-1964 user is to be dealt with so as to ensure compliance with EU law.

59. In the judicial review proceedings, by way of countering Harte Peat's argument, the EPA points to s.32 of the 2000 Act which provides:

> *"Subject to the other provisions of this Act, permission shall be required under this part*
>
> *–(a) in respect of any development of land, not being exempted development."*

60. The EPA maintains that s. 32 of the 2000 Act does not re-enact s.24 of the 1964 Act and that consequently, all pre-1964 development that was still ongoing (largely quarries/peat extractors) when the 2000 Act was enacted had to apply for planning permission irrespective of whether or not an EIA was required.

61. It is noteworthy that in the High Court, the EPA did not contest Harte Peat's assertion of its pre-October 1964 user. Nor did the EPA press its s. 32 argument (see p. 161 of the High Court Transcript, Day 4). The EPA's primary focus in the court below (in aid of its contention that Harte Peat required planning permission) was on the direct effect of Article 2 of the EIA Directive, and its submission that the High Court was required to disapply the definition of *"unauthorised development"* (including *"unauthorised works"*) to give effect to the requirements of EU law. I will return to this in due course.

62. There is a dearth of affidavit evidence to support Harte peat's claim to pre-1964 user. In its submissions to the EPA Harte Peat did not include any engineering evidence or other material to say that the activities it is carrying on are those which it says it was carrying on pre-1 October 1964. The most that is said by Harte Peat's experts is that the user is pre the Planning Acts. On the other hand, the report of Dr. Patrick Crushell, for the EPA, authored in the context of the s.99H injunction proceedings, indicates by reference to historical aerial photography, that Area G was *"fully intact"* in 1995 with a network of surface drainage works to facilitate

peat extraction having only been carried out by 2000. Bulk peat extraction commenced circa 2018 and was ongoing at the time of Doctor Crushell's site visit in March 2021. He reported that Area F was *"fully intact"* in 2000 with drainage works only having been carried out by 2005. On the face of it, therefore, it is difficult to see how Areas F and G benefit from pre-1964 user exclusion. It is also noteworthy that Harte Peat did not provide counsel's opinion explaining why its peat extraction was excluded from the operation of the 2000 Act.

63. Harte Peat says that there was no necessity to furnish details of its pre-1964 user in circumstances where, following the 2013 proceedings, it had an agreement with the EPA that it would apply for an IPC licence and that same would be granted if it was merited. However, as indeed counsel for Harte Peat acknowledged, with the striking down of the 2019 Regulations, the legal landscape had changed significantly by the time the EPA came to consider Harte Peat's IPC licence application.

64. To recap, therefore, there was essentially no evidence adduced in the case to support Harte Peat's claim to pre-1964 user, but at the same time, not much evidence either that it did not have such user. As already referred to, this was not an issue that the High Court was asked to consider. Rather, the matter proceeded in the High Court on the basis that Harte Peat's reliance on its pre-1964 user required to be assessed through the lens of EU law, an argument which ultimately found favour with the Judge, as we shall see.

65. Turning again to the provisions of the 1992 Act, s. 87 thereof provides for the processing of an application for an IPC licence specifically where the application is being made in respect of an activity that involves a development or a proposed development. The section provides separately for the processing of such applications when they concern development for which a grant of permission is required and development for which planning permission is not required. As noted by the Judge here, the proper interpretation of s.87 was central to the issues which arose in the judicial review proceedings.

66. Pursuant to Section 87(1)A:

"'application for permission' means-

(a) An application for permission for development under Part III of the Act of 2000,

(b) An application for approval for development under section 175, 177AE, 181A, 182A, 182C or 226 of the Act of 2000 or,

(c) An application for substitute consent under section 177E of the Act of 2000;"

A *"grant of permission"* is defined as meaning:

"*(a) a grant of permission for development under Part III of the Act of 2000,*

(b) An approval for development under section 175, 177AE, 181b, 182B, 182D or 226 of the Act of 2000 or,

(c) A grant of substitute consent under section 177K of the Act of 2000;"

67. Thus, in summary, the EPA is required to assess whether the activity involves development for which a grant of permission under the 2000 Act is required. A grant of permission includes standard planning permission under Part III, an approval of the development under certain other sections and/or a grant of substitute consent under s.177K. There are elaborate mechanisms set out in the provisions of the 2000 Act for dealing with substitute consent including the submission of a remedial Natura Impact Statement. It is of note that there is no provision in the 1992 Act for the submission of such a document.

68. Section 87(1B) of the 1992 Act, in relevant part, provides that where an application for a licence is made to the EPA in respect of an activity that involves development or proposed development for which a grant of permission is required, the applicant shall furnish to the EPA—

"(a) confirmation in writing from a planning authority or An Bord Pleanála, as the case may be, that an application for permission comprising or for the purposes of the activity to which the application for a licence relates, is currently under consideration

by the planning authority concerned or An Bord Pleanála, and in that case shall also furnish to the Agency either —

(i) a copy of the environmental impact assessment report where one is required by or under the Act of 2000 relating to that application for permission, or

(ii) confirmation in writing from the planning authority or An Bord Pleanála that an environmental impact assessment is not required by or under the Act of 2000,

or

(b) a copy of a grant of permission comprising or for the purposes of the activity to which the application for the licence relates that was issued by the planning authority concerned or An Bord Pleanála and in that case shall also furnish to the Agency either-

(i) where the planning authority or An Bord Pleanála, accepted or required the submission of an environmental impact assessment report in relation to the application for permission, a copy of the environmental impact assessment report, or

(ii) confirmation in writing from the planning authority or An Bord Pleanála that an environmental impact assessment was not required by or under the Act of 2000."

69. Pursuant to section 87(1C), where an application for a licence is made to the EPA in respect of an activity that involves development or proposed development for which a grant of permission is required but the applicant does not comply with subsection (1B), the EPA shall refuse to consider the application and shall inform the applicant accordingly. This was the provision relied on by the EPA here, in refusing to consider Harte Peat's licence application.

70. Sections 87(1D) and 87(1E) provide for the further processing of applications where an EIA is required. In particular, s.87(1D)(d) provides that where an EIA is required for the purposes of s.87(1B)(a)(i), the EPA shall *"ensure that a grant of planning permission has been made or a decision has been made to refuse a grant of permission…"* before *"indicating its proposed determination in relation to the application for a licence".* Section 87(1F) makes provision for liaison by the EPA with the relevant planning authority or An Bord Pleanála as the case may be. Section 87(1G) provides for consultation between the EPA and the relevant planning authority or An Bord Pleanála where one or other or both require an EIA to be carried out. Section 87(1H) provides that where the EPA receives an application for a licence in respect of an activity that involves development or proposed development for which a grant of permission is not required and the EPA, under s. 83(2A) decides that EIA is required in relation to the activity, the EPA shall request the applicant to submit an EIAR.

71. Section 87(9a) of the 1992 Act obliges the EPA, before making a decision on a licence application, to, *inter alia,* take account of the EIAR submitted with the application. Pursuant to s.87(9b)(b), the EPA has power when granting a licence to attach environmental conditions in relation to features of the project or measures envisaged *"to avoid, prevent or reduce and, where possible, offset significant adverse effects on the environment and any appropriate monitoring measures".* As we shall see, this is of some significance in the present case in considering whether the IPC licencing regime is sufficiently robust to meet the requirement for development consent under the EIA Directive in the absence of a separate development consent from a planning authority.

72. Pursuant to s. 87(9A), any decision of the EPA in respect of an application for an IPC licence shall be reasoned as to the conclusions arrived at. One of the arguments advanced by Harte Peat in these proceedings is that the EPA's decision to refuse to process the licence application was inadequately reasoned.

73. Section 99H of the 1992 Act provides in relevant part:

"99H. — *(1) Where, on application by any person to the High Court or the Circuit Court, that Court is satisfied that an activity is being carried on in contravention of the requirements of this Act, it may by order —*

(a) require the person in charge of the activity to do, refrain from or cease doing any specified act (including to refrain from or cease making any specified emission), (b) make such other provision, including provision in relation to the payment of costs, as the Court considers appropriate."

74. As apparent from its terms, s. 99H provides a self-contained statutory procedure whereby the Circuit Court or High Court can make orders for the cessation and prohibition of any specified act where satisfied that an activity is being carried out in contravention of the 1992 Act. This was the provision relied on by the EPA in its application for injunctive relief.

75. It is against the foregoing legislative backdrop that the two sets of proceedings in issue here came on for hearing in the High Court.

The High Court Judgment

76. The judicial review proceedings and the s.99H injunction proceedings were heard together. Although Ireland and the Attorney General ("*the State*") were named as respondents in the judicial review proceedings (along with the EPA), those parties did not participate in the High Court hearing, the High Court having decided to defer consideration of the issues in the proceedings which directly concerned the State. As we shall see, the Attorney General was ultimately a participant in this appeal for reasons which will become clear. For the moment, I turn to the decision made in the judicial review proceedings.

The judicial review

77. As already rehearsed, Harte Peat's argument in the judicial review proceedings was that as its user was pre-1964, there was no requirement for planning permission or separate EIA

through the planning process. It maintained that while it had agreed to make an application for an IPC licence in compromise of the 2013 Proceedings, this did not mean that the activity sought to be licenced was unlawful in the absence of a licence. Moreover, while it accepted the requirement for an EIA as a matter of EU law, it contended that this was a function of the EPA in the licencing process under the 1992 Act.

78. In its injunction proceedings, the EPA sought various orders for the cessation and further prohibition of the extraction of peat and associated activity at specified areas on the part of Harte Peat in circumstances where the EPA contended that the activity in question was being undertaken by Harte Peat without an IPC licence and that planning permission had never been sought in respect of the said activity. In short, the EPA's fundamental position was that Harte Peat was carrying out peat extraction activity in the course of business involving an area exceeding 50 hectares, which the EPA contended required an IPC licence (which Harte Peat did not have) as well as planning permission (which Harte Peat did not have) and which would have required the carrying out of an EIA pursuant to the EIA Directive.

79. While there were thus two strands to the hearing in the court below, it was decided by the parties that the affidavits in both sets of proceedings could be used by either side interchangeably. Thus, the evidence before the High Court in both sets of proceedings was a mix of the evidence in the judicial review and injunction proceedings.

80. As her very comprehensive judgment demonstrates, in the first instance, the Judge was of the view that the resolution of the judicial review proceedings depended (to varying degrees) on whether the EPA, in dealing with the licence application under the 1992 Act, was correct in concluding that before Harte Peat's licence application could be entertained, development consent through the planning process under the 2000 Act was required for the extraction of peat by Harte Peat at sites operated by it within the State (even where those sites concerned

pre-1964 user) because of the scale of the operation and the acknowledged requirement that such extraction was subject to an EIA.

81. In the course of her consideration of the EPA's refusal to process the licence application the Judge noted that the correspondence of 4 August 2020 and 21 October 2020 which emanated from the EPA showed that Harte Peat's application was being considered on the basis that the activity in which Harte Peat was engaged was not exempted activity (incidentally, a case never made by Harte Peat), and that neither of the letters in question had in fact adverted to Harte Peat's contention that it did not require planning permission because of its claimed pre-1 October 1964 user. She also noted the memorandum furnished by the EPA's licencing inspectorate to the Board was an incomplete summary of Harte Peat's position because it failed to clearly set out Harte Peat's reliance on pre-1964 user (para. 176).

82. At para. 181, the Judge observed that Harte Peat had not sought to contest that an EIA was required as a matter of EU law to assess the effects of its peat extraction activity on the environment. There remained, however, two *"central"* questions of law to be resolved, namely (i), whether planning permission was required in respect of the extraction of peat on site where an EIA is required and (ii), whether the extraction of peat by Harte Peat without a licence contravenes the 1992 Act (essentially the EPA's s.99H injunction application).

83. With respect to the first question, Harte Peat's position as a matter of law and fact was that if the activity the subject matter of its IPC licence application was commenced before 1 October 1964, then the provisions of s.87 (1C) did not apply as planning permission was not required. On the other hand, the EPA's position was that the obligation to interpret domestic law in conformity with the requirements of EU law meant that Harte Peat had to obtain planning permission even in respect of pre-1964 user. It contended that what was required by way of *"development consent"* in this case, for the purposes of the EIA Directive, was both planning permission and a licence given the scale of the peat extraction at issue here. Albeit concerned

with the concept of *"exempted development"* under the 2000 Act and not excluded development, the EPA relied on *Bulrush and Westland v. An Bord Pleanála* [2018] IEHC 58 as authority to reject Harte Peat's proposition that peat extraction on lands which was commenced before the coming into effect of the EIA Directive meant that ongoing peat extraction would forever be outside the scope of the Directive.

84. In *Bulrush and Westland,* the High Court (Meenan J.) had held that if an EIA was required then planning exemptions were lost and there was an obligation to apply for planning permission. In other words, peat extraction activities that required an EIA did not enjoy the exemption provided for in the 2000 Act. Indeed, *Bulrush and Westland* was decided on the basis that the State itself had provided in s.4(4) of the 2000 Act that exemption did not apply to projects that required an EIA. As already alluded to, there is of course no similar provision in the 2000 Act in respect of pre-1964 user. As noted by the Judge, the issue between the parties here was whether the fact that an EIA was required meant that planning permission was required (as contended by the EPA) or whether the requisite development consent could otherwise be satisfied through the IPC process (as argued by Harte Peat). That issue, the Judge noted, had not previously been directly determined in respect of a pre-1964 user involving peat extraction.

85. In arguing its position, the EPA placed significant reliance on the decision in *JJ Flood & Sons Manufacturing Ltd and David Flood v. An Bord Pleanála* [2020] IEHC 195 (*"JJ Flood"*). In *JJ Flood*, the High Court rejected the submission that a quarry which commenced operations prior to 1964, even one that stayed within its pre-1964 user, was automatically by virtue of that user immune from the EIA Directive. Ní Raifeartaigh J. accepted the contention of An Bord Pleanála that *"if you fall within the Directives, you need development consent"*. She noted the *"positive obligation"* on Member States under EU law *"to ensure domestic law complies with the Directives"* as *"explicitly stated in Article 2 of the EIA Directive"*. According to Ní

Raifeartaigh J., *"one must start the analysis by looking at Irish law while wearing the spectacles of EU law, as it were, rather than the other way round"* (para. 78). She considered the argument being advanced by the quarry owner as one which sought to *"invert the corrected relationship between the domestic law and EIU law, by seeking to elevate the status of a quarry under domestic planning law prior to the date of transposition of the Directives to a status which trumps EU law requirements concerning quarries"* as one that could not be correct. She went on to state that the only projects which were relieved of the obligation to obtain development consent were ones which already had a development consent or were in the process of obtaining same. She added that *"[t]he rationale for relieving such projects from the Directive does not apply to a project which has never held any form of development consent".*

86. In effect, Ní Raifeartaigh J. applied the logic of Meenan J.'s judgment in *Bulrush and Westland* to pre-1964 development and stated that one had to look at Irish law through a European lens.

87. In the present case, Harte Peat, in disputing that *JJ Flood* was authority for the proposition that pre-1964 user was not a material factor for the requirement for an EIA, relied on the fact that *JJ Flood* concerned quarrying and the relevant planning regulation regarding quarries made no requirement that the area of quarrying be a *"new or extended area"* in the way that the regulations provided for new and extended areas when considering peat extraction.

88. The Judge acknowledged that there were distinctions to be drawn between *JJ Flood* and the present case, not least the fact that there was no equivalent provision in respect of peat extraction to the s.261A *"gateway"* for planning permission provided for in the 2000 Act in respect of quarries. At para. 196, she noted that from Harte Peat's perspective, *"the gateway to obtaining a development consent is not necessarily through the planning process in respect of peat extraction".*

89. In this regard, Harte Peat's contention in the court below was that all that was required was for it to make an application to the EPA for a licence (which it had done) and that that process provided a means for assessing environmental impact, thus satisfying EU law.

90. The EPA's response to that argument was that the EIA process under the IPC licensing regime did not meet EU law assessment requirements because it was limited to the EPA's own functions and powers. The EPA's position was that as far as Harte Peat was concerned, development consent within the meaning of the EIA Directive required assessment in the context of a planning application and that the EPA did not have power to authorise development consent on such basis: it only had power to condition emissions from an activity.

91. In deciding which argument was to prevail, the Judge found the decision in *Friends of the Environment Ltd v. Minister for Communications* [2019] IEHC 555, [2019] 3 I.R. 162 (*"Friends of the Irish Environment Ltd."*) of assistance even though the case did not concern the question of pre-1964 user but rather the validity of the 2019 Regulations. There, Simons J. had relied on the judgment of the CJEU in Case C-196/16 *Comune di Corridonia* as indicating that the requisite assessment under the Directives required to be both retrospective and prospective and could not be confined to the future effects of the projects which, according to Simons J., meant that EU law required that domestic law must provide for remediation measures as part of the development consent process.

92. With this dictum of Simons J. in mind, the Judge considered that since EU law requires an EIA in respect of peat extraction such as that being carried out by Harte Peat:

> "*As a matter of fact and law, this in turn means that the domestic means by which an EIA which is fit for the purposes of the Directives is concluded is through the requirement to seek planning permission. This is because no other effective means exist in domestic law providing for remediation measures as part of the development consent process. Enhanced powers exist under [the 2000 Act] (as amended) in relation to*

> *remedial and mitigation measures to remedy or mitigate any significant effects on the environment relating to the development for which consent is sought which far surpass the powers of the Agency*" (para. 200).

93. Moreover, it was clear from *JJ Flood* that this *"does not mean that existing extraction is unauthorised from a domestic planning perspective but rather that it requires an EIA conducted within the ambit of a sufficiently robust development consent in order to satisfy EU requirements"* (para. 201).

94. Albeit that the Judge appears to premise her conclusion on the need for Harte Peat to obtain retrospective development consent (substitute consent), she did not actually make a specific finding that the activities of Harte Peat required such consent. As we shall see, in the appeal it is argued, *inter alia*, by the EPA that such a finding was implicit in the High Court judgment. The EPA also submits that the Judge did not have to explicitly make such a finding because Harte Peat had accepted that peat extraction had occurred which required an EIA. Counsel for the EPA surmised that that perhaps was the reason why the Judge did not elaborate on whether there was a requirement for substitute consent: as Harte Peat required an EIA, it required retrospective consent and the only retrospective consent in domestic law that meets the requirements of EU law is substitute consent. The EPA also argues that the reason the Judge came to the decision she did is because the powers of the EPA do not amount to development consent that would comply with EU law in this case. These and other related arguments are considered later in this judgment.

95. Returning now to the High Court judgment, as the Judge opined, as far as peat extraction was concerned, the requisite *"robust"* development consent was not to be found in the 1992 Act. She put it as in the following terms:

> "*203. In finding that there is a requirement to obtain planning permission, the Agency is in reality making a decision that the extraction of peat by [Harte Peat] requires*

'development consent' as a matter of EU law because it requires an EIA. Given the limitations on the Agency in terms of their powers and functions, the conduct of an EIA under ss. 83(2A) and 87(1H) of the EPA Act is not adequate to meet the requirements of EU law as clear when one contrasts the respective powers of the planning authority and the Agency as regards remedial and mitigation measures where environmental impact is concerned.

Accordingly, it is my view that as a matter of law, pre-64 user notwithstanding, planning permission is required for the extraction of peat activity to which the licence application relates once it is accepted that an EIA is required as a matter of EU law. The requirement to obtain development consent in the form of planning permission derives from the requirements of EU law because Irish law does not provide another adequate mechanism which allows for the regularisation of development in accordance with the requirements of EU law. The Agency would require enhanced powers and functions similar to those of a planning authority were the IPC licence to be equated with a development consent process under the Directives...".

96. It will be recalled that the EPA in its decision letter of 24 November 2020 did not distinguish between prospective and retrospective consent. What the EPA communicated to Harte Peat was that planning permission was required for the prospective activities sought to be licensed. It did not make any finding about what happened in the past. Yet, it would appear, retrospectivity was critical to the determination made by the Judge. Again, I will return to this issue in due course.

97. The Judge did not accept Harte Peat's argument that the reference in the decision letter to the requirement for an EIA amounted to an error of law on the part of the EPA: as she stated, the ratio in *Bulrush* as to the requirement for an EIA extended to commercial peat extraction *"even where it continues further to pre-64 development for which there was no requirement to*

obtain planning permission when the planning regulation was first introduced" (para. 203). She was satisfied on the authority of *JJ Flood* and *Friends of the Irish Environment Ltd.,* together with the decision in *Bulrush,* that *"development consent sufficient to discharge obligations under the Directives in the Irish context necessitates an application to the planning authorities having regard to the relative scope of the powers of planning authorities and the Agency when it comes to regulating for environmental protection"* (para. 203).

98. At para. 210, the Judge held that the EPA *"was not only entitled to refuse to process the [IPC licence] application but was obliged to do so where satisfied that the application was one in respect of an activity for which development consent in the form of planning permission was required".* Hence, she could not accept Harte Peat's contention that the requirement to submit to an EIA was an irrelevant consideration.

99. Whilst the Judge duly concluded that the EPA's decision letter of 24 November 2020 was not vitiated by error of law by reason of the foregoing, it still fell to her to consider whether the decision was unsustainable because of inadequate reasoning in the communication of that decision, as argued by Harte Peat. The Judge found that the EPA had not explained how it was that the decision letter moved from a consideration that planning permission *"may"* be required to a position that such permission *"is"* required. More pertinently, there was no reference in the record of the decision-making process to the fact that Harte Peat maintained that its activity involved development for which a grant of permission was not required by virtue of the relevant activity having commenced before 1 October 1964. She found that the reference in the decision letter to the EPA's power (and duty in certain circumstances) to refuse to process the licence application was not sufficient to absolve the EPA of its obligation to explain why planning permission was required in respect of pre-1964 user. In short, the EPA had not set out in the decision letter why its power to conduct an EIA was inadequate for EU law purposes. She opined that the obligation on the EPA to explain was all the more so in circumstances where it

had power to grant a licence under s.87(1E) and to require submission to EIA where development consent in the form of planning permission was not required.

100. Thus, whilst the test properly identified and applied by the EPA to refuse to process the application in reliance on s.87(1C) *"was its correct conclusion that development consent in the form of planning permission was required for development because of the need for EIA",* this was separate to the question as to whether the EPA's decision was adequately reasoned or whether the basis of the decision was sufficiently clear from the decision.

101. From her analysis of relevant case law (*Connolly v. An Bord Pleanála* [2018] IESC 31 and *Mallak v. The Minister for Justice* 2012 3 I.R. 297), the Judge's conclusion was that the EPA's decision on the licence application was inadequately reasoned (in respect of which the EPA has not cross-appealed). As said by the Judge, *"[n]othing in the reasoning advanced in the letter or the record of decision making explains why a pre-64 user does not mean that a development consent in the form of a planning permission is not required where the Directives require EIA"* (para. 219).

102. She noted that the EPA's consideration appeared to have been confined to circumstances where reliance was placed on an exemption under the 2000 Act as excusing the necessity for planning permission. She further noted Harte Peat's contention that the type of documentation provided for in s. 87(1B) of the 1992 Act would not ever be available in respect of pre-64 user and that there was no mechanism to provide conclusive proof by way of any statutory document as contemplated by s.87(1B) in relation to that use. In the view of the Judge, this begged the question as to whose function it was to determine that development consent in the form of planning permission was required for pre-1964 peat extraction and what decision-making capacity the EPA had in that regard. She noted that s.87(1C) vested the EPA with the power to make a decision that planning permission was required in refusing to process an IPC licence application and she read that as meaning that the EPA had power to determine that development

consent in the form of planning permission is required by reason of the requirement for an EIA. Insofar as it had this function, the EPA had failed to demonstrate through the record of the decision-making process that it had considered Harte Peat's claim that planning permission was not required by virtue of its claimed pre-1964 user.

103. However, despite the EPA's inadequate reasoning, the Judge declined to quash the refusal decision in view of her finding that planning permission was required for the activity the subject of the IPC licence application "*by virtue of the requirement to conduct an EIA and obtain development consent"* (para. 229). Quite clearly, the Judge's decision in this regard was influenced in no small way by the reasoning of Ní Raifeartaigh J. in *JJ Flood* and the Judge's own analysis of Article 2 of the EIA Directive. It was in those circumstances, that she considered that it would be futile to quash the decision and send it back to the EPA because if sent back, the EPA would have reached the same decision, namely that it was obliged to refuse to consider the licence application if planning permission was required. Thus, in the view of the Judge, the appropriate remedy was declaratory relief rather than *certiorari.*

The s.99H injunction

104. The Judge then went on to consider the EPA's application for an order pursuant to s. 99H of the 1992 Act. The EPA's injunction application was on the basis that it is a breach of s.82 (2) of the Act for a person to carry out a specified or prescribed activity for Class 1.4 in the absence of a licence. The case advanced by the EPA in the court below was that Harte Peat was engaging in commercial peat extraction in an area which exceeded 50 hectares without a licence. The Judge duly determined that Harte Peat was carrying on peat extraction for commercial purposes in an area which exceeded 50 hectares and for the reasons set out in the judgment, she was satisfied to grant the order sought by the EPA. The various bases for the Judge's reasoning that Harte Peat's activity met the requisite threshold and the factors which

led her to conclude that the EPA should prevail in the injunction application are addressed later in this judgment.

105. Consequent on the findings made in her judgment, on 8 April 2022 the Judge made an Order requiring Harte Peat, its servants and/or agents to cease peat extraction, including all associated and/or ancillary works and the associated and/or ancillary processing of peat on lands referred to as Areas F and G, in addition to an Order requiring Harte Peat its servants and/or agents to refrain from extracting peat, including all associated and/or ancillary works and the associated and/or ancillary processing of peat on lands at Areas A, B, F and G, pursuant to section 99H of the 1992 Act.

106. On the same date she made an Order in the judicial review proceedings declaring that the EPA failed to adequately reason its decision to refuse Harte Peat a licence but refusing any further relief in those proceedings.

The appeal

107. Harte Peat's grounds of appeal are set out in a single composite notice of appeal. The EPA's respondent's notice contains the grounds upon which it opposes the appeal.

108. The appeal first came on for hearing before this Court on 14 July 2022. It is apposite firstly to consider the issues arising in the judicial review appeal.

The judicial review appeal

109. As emerged from the parties' oral submissions to this Court on 14 July 2022, some matters were not in dispute. Albeit strenuously disputing that it required planning permission, it was accepted by Harte Peat that the peat extraction at issue here involved acts of extraction and therefore constituted *"works"* within the meaning of the 2000 Act and, thus, was development within the meaning of that Act. Secondly, Harte Peat accepted that its peat extraction development was of such a scale and at a location such that it required an EIA. Once an EIA was required (as it was here) that triggered an obligation on Harte Peat to obtain

development consent. Harte Peat's contention, however, was that the requisite development consent was achievable through the IPC licence application process provided for in the 1992 Act.

110. The EPA accepted that development consent is not necessarily planning permission since there is no uniform concept of what shape development consent takes for the purposes of Article 2(1) of the EIA Directive. Indeed, the Supreme Court in *Martin v. ABP* [2008] IR 336 is authority for the proposition that the EPA can, in certain circumstances, be the body who provides development consent sufficient to satisfy EU law. The EPA contended, however, that given the circumstances here, what was required is a two-stage process by Harte Peat, first, the obtaining of a grant of planning permission and then an application for an IPC licence. Thus, the nub of dispute between the parties is the EPA's contention that Harte Peat cannot be considered for an IPC licence absent a grant of planning permission or evidence that such application was made or pending.

111. The EPA also accepted that it did not, as it should have, engage directly with Harte Peat's pre-1964 argument and it conceded that it should have articulated clearly in the 24 November 2020 decision that it did not accept the pre-1964 argument.

A snapshot of the parties' points of disagreement on 14 July 2022

Harte Peat

112. Harte Peat's primary contention was that the whole structure of the 2000 Act does not apply to its peat extraction activity. That being the case, the EPA's decision not to engage with its licence application was wrong in law. As put by counsel, since Harte Peat's peat extraction activity or "*development*" (and no one disputes that it is development as defined in the 2000 Act) predates 1 October 1964, Harte Peat was not required to apply for planning permission under the terms of the 2000 Act or its predecessor, the 1963 Act. Moreover, notwithstanding the absence in the 2000 Act of any equivalent provision to s. 24(1)(a) of the

1963 Act, the status of its pre-1 October 1964 user had not been affected by the provisions of the 2000 Act. In this regard, Harte Peat relied on the definitions in the 2000 Act of "*unauthorised development*", "*unauthorised use*" and "*unauthorised works*", as set out earlier.

113. It also argued that insofar as certain of its activities which have an environmental impact require to be the subject of EIA thus triggering the requirement under EU law for development consent for such activities, that requirement did not amount to a requirement to obtain planning permission. Given that its licence application was in respect of an area which exceeded the threshold provided for in Class 1.4, it duly supplied an EIAR with its licence application, for the purposes of the conduct by the EPA of an EIA, as required by EU law. The EIAR dealt with both the EIA Directive and the Habitats Directive and the whole question of what would happen to Harte Peat's lands thereafter.

114. Thus, Harte Peat's position was that the grant of an IPC licence, once such EIA was conducted, would amount to "*development consent*" for the purposes of the EIA Directive and therefore satisfy the requirements of EU law.

115. It was submitted that what is required by EU law is purely that which is required to protect the environment under EU law. The only requirement that EU law makes of Ireland as a Member State is that activity which requires development consent, and which entails an EIA, is to be judged solely by its environmental effect: the requirement is not there to bolster planning permission requirements in the State. What EU law demands is that an activity be the subject of development consent, and that the development consent contains within it an EIA. The EPA had all the necessary power to consider an EIA and, if necessary, pursuant to s. 86 of the 1992 Act, impose conditions to protect the environment in the manner required by EU law. Hence, a view could be taken that if the EPA is in a position to grant development consent and if it is entitled to carry out an EIA and an AA, then it must be assumed to have all the necessary powers to comply with EU law.

116. It was submitted that had Harte Peat obtained the relevant licence from the EPA, that would have amounted to development consent for the purposes of EU law. In other words, the EU law requirement that there be development consent based on EIA would have been satisfied by the granting of an IPC licence, without the requirement for an application to the local authority for planning permission.

117. It was said that the only basis upon which Harte Peat would have had to apply for planning permission would be if its activity was no longer excluded development, *i.e.* if it had not started before 1 October 1964. Counsel emphasised the fact that Harte Peat was never pursued by Westmeath County Council under s.160 of the 2000 Act.

118. Insofar as s.87(1B) (b) of the 1992 Act provides that an applicant for an IPC licence *"shall furnish"* its planning permission, Harte Peat accepted that it did not comply with that provision, its whole case being that it did not require planning permission and, moreover, it was applying to the EPA for development consent.

119. Insofar as the High Court had (implicitly) determined that Harte Peat required retrospective consent as provided for in s.177K of the 2000 Act, it was submitted that the substitute consent provisions of the 2000 Act (even if they could be said to apply, which Harte Peat denied) were not engaged in the case having regard to the circumstances whereby Harte Peat came to apply for a licence under the 1992 Act. The licence application arose from prior proceedings (the 2013 Proceedings) instituted by the EPA pursuant to s. 99H of the 1992 Act the result of which was the agreement reached between the EPA and Harte Peat that Harte Peat would apply for an IPC licence. Having duly made the requisite application, the EPA, Harte Peat maintained, was obliged to consider the application. Had it done so, the EPA could have carried out every step it considered necessary to protect the environment.

120. It was also contended that, in any event, Harte Peat's circumstances did not fall within the ambit of ss. 177A, 177B, 177C and 177D of the 2000 Act and/or that those provisions made

it "entirely impossible" for someone in Harte Peat's situation to obtain substitute consent. Moreover, the statutory regime which the State has provided for quarries pursuant to s. 261 and s. 261A of the 2000 Act was not extended to peat developers. Essentially, the State had failed to put in place any such system for peat extraction.

121. In Harte Peat's view, the Judge had reached the conclusion that the EPA were correct to refuse to process its licence application by effectively rewriting the 2000 Act. Even having done so (erroneously Harte Peat says), she failed to consider that there was not available to Harte Peat any of the s. 261/261A type procedures or *"gateways"* for the obtaining of planning permission that are available to quarry developers.

The EPA

122. The EPA's overarching argument was that Harte Peat requires planning permission for its activities. The requirement to look for planning permission arose, at some point in the past, by virtue of Harte Peat's peat extraction activities having reached the point of triggering a requirement for an EIA, albeit the EPA could not identify exactly when Harte Peat's development became unauthorised. That was the EPA's position notwithstanding that it never confronted Harte Peat's claim to pre-1964 user. Whilst it could not identify the precise point in time at which Harte Peat's operations reached the point of being likely to have had significant effects on the environment, the EPA maintained that the reversal and removal of boglands itself was of such a scale as to have met the trigger of being likely to have significant effects on the environment and, so, the direct effect of Article 2 of the EIA Directive kicked in at that moment.

123. Hence, at some point in time after 1998, *i.e.* after the 1997 amendment to Article 2 of the EIA Directive became effective, Harte Peat's ongoing peat extraction activities reached a point where a requirement for environmental assessment was triggered. Consequently, as a result of not having obtained planning permission in the past as it ought to have done, Harte Peat was now required to look for retrospective development consent, in other words, substitute consent.

124. Anything lawfully done up to the enactment of the 2000 Act did not necessarily preserve that position post the enactment of the 2000 Act. Insofar as Harte Peat relies on the definition of unauthorised development/unauthorised works/use (which do refer to the appointed day as 1 October 1964), the EPA pointed to the dicta of Ní Raifeartaigh J. *JJ Flood* that unauthorised development is a domestic construct which required to be viewed through a European lens. Moreover, one cannot look at the application for an IPC licence through a domestic lens because the 1992 Act itself is laden with the requirements for an EIA, and here, Harte Peat does not challenge that an EIA is required.

125. The EPA's position was that the only legislative scheme which gives the competent authority power to grant retrospective consent is that established under the 2000 Act.

126. It argued that it is not necessarily *contra legem* for the Court to construe the 2000 Act so as to give effect to Article 2 and to say that planning permission is required. However, if the Court was not with the EPA on that, then, insofar as Harte Peat relies on the provisions of the 2000 Act which, Harte Peat says, excludes from the provisions of the 2000 Act ongoing works that commenced pre-1 October 1964, this Court could disapply the word "*commenced on or after 1 October 1964*" from the definitions of "*unauthorised use*" and "*unauthorised works*", in order to conform to the requirements of EU law, particularly the requirements of Article 2(1) of the EIA Directive which have direct effect.

127. While noting Harte Peat's argument that it had provided the EPA with the requisite material for an EIA and an AA to be carried out and that if the EPA had proceeded to consider the licence application on its merits and decided that the merits were such that the licence should issue there then would have been compliance with EU law, the EPA's position was that if development had been carried out which requires an EIA, without there first having been an EIA as required under Article 2, then it behoved the developer to regularise its position in this regard. That, it was said, required assessment of the historic effects of what has been done

unlawfully as well as the prospective effects of what would happen if the development were to continue. The only retrospective consent available which gives the competent authority the power to do it is under the planning legislation (substitute consent).

128. Whilst it was accepted that unlike the position as regards quarries there was no requirement in law imposed on Harte Peat to apply for substitute consent, the EPA maintained that the effect of Article 2 of the EIA Directive is such that Harte Peat is under an obligation to do so. The only way pathway to substitute consent was the 2000 Act, as found by the Judge.

129. It was submitted that here the Court has two choices, the first of which, having regard to the different wording of s.24 of the 1964 Act and s.32 of the 2000 Act, is to construe the 2000 Act in a manner as to give effect to the requirements of Article 2 of the EIA Directive. Secondly, the Court could disapply the definition of *"unauthorised development"* in the 2000 Act insofar as it concerns ongoing works that commenced pre-1964.

130. Insofar as Harte Peat maintained that anything required by the EIA Directive could be done by the EPA, that was not the case. For Harte Peat to impute such powers to the EPA would involve a wholesale rewriting of the 1992 Act, which, it was submitted, is not permissible.

131. Asked by the Court whether there was any situation where a pre-1964 development did not need planning permission/substitute consent, the EPA did not accept that to be the case: the requirement for an EIA, post the amendment of the EIA Directive in 1997, trumps the pre-1964 user relied on by Harte Peat.

132. It was acknowledged by the EPA that there is no s.261/261A equivalent in the 2000 Act as far as peat extraction is concerned. Whilst the State had tried to address the position of peat extractors in the 2019 Regulations, those Regulations have been struck down.

133. Notwithstanding the State's failure to provide the equivalent of s.261/261A for peat extractors, the EPA contended that there remains the requirement for substitute consent here

and that Harte Peat could avail of the mechanism provided for under s.177C of the 2000 Act to seek such consent. The absence of an express additional gateway for peat extractors did not change the fundamental position, which was that Harte Peat's development requires retrospective development consent.

134. Albeit not specifically stated by the Judge, the substance of the High Court judgment here was to effectively disapply national law. The Judge was alerted to s.32 of the 2000 Act and also advised that she could construe the 2000 Act in a manner that was open to the EU law, and which was not *contra legem.* Further, it was argued in the court below that in any event, as far as it was necessary, the Judge had an obligation in accordance with the direct effect of Article 2 to disapply the definition of *"unauthorised development"*. It was submitted that if this Court accepts the EPA's arguments, it can disapply national/domestic law, or, in the alternative, decide that at some unspecified date, the scale of Harte Peat's project became such that, because of the direct effect of Article 2, it required planning permission.

Harte Peat's replying submissions

135. Harte Peat's response to the EPA's arguments was to ask if, in 1965, Harte Peat had applied for and obtained planning permission (when no EIA was required), whether such planning permission would be invalid because of subsequent developments in EU law. Counsel submitted it would not be invalid because there never was a requirement to go through an EIA process. Furthermore, on the case the EPA was now making, Harte Peat, because of its pre-1964 user, was now in a worse position applying for an IPC licence than it would have been had it applied for planning permission immediately post 1 October 1964. In any event, Harte Peat's primary point was that its pre-1964 user was legally equivalent to activity authorised by a planning permission of 1965. Counsel queried at what point, on the EPA's logic, would someone who had a 1965 planning permission be told that they would have to

apply for new planning permission because their activity at the present was required by EU law to be the subject of development consent.

136. It argued that the Judge's position (namely that pre-1964 user notwithstanding Harte Peat required planning permission) was tantamount to the High Court legislating, and the manner in which the Judge had approached the matter put Harte Peat at a huge disadvantage compared to quarry owners in an analogous situation to Harte Peat.

137. Insofar as the EPA contended that the Court could strike out from the definition of unauthorised development/unauthorised works the reference to *"on or after 1 October 1964"*, Harte Peat's position was that it either has the benefit of s.24 of the 1963 Act or it has not.

138. It was submitted that if Harte Peat is correct about pre-1964 user and its entitlement thereto, then the Judge's effective decision was to disapply portions of the 2000 Act with the effect that Harte Peat was deprived of its immunity and exposed to total liability, including criminal liability. All that, it was said, could have been avoided had the EPA proceeded to process Harte Peat's application for development consent based on EIA, pursuant to the 1992 Act.

The Court's ruling of 14 July 2022

139. Arising from certain interactions that the Court had with counsel for Harte Peat and counsel for the EPA on 14 July 2022 regarding the EPA's contention that for the purposes of determining whether the High Court was correct in finding that Harte Peat required development consent through the planning process the Court may have to disapply certain parts of the 2000 Act to give effect to the requirements of EU law, the Court indicated to the parties that it might wish to hear from the Attorney General (already a party to the judicial review proceedings) in respect of the issues and arguments. The Court also indicated that it intended to formulate questions to be addressed in the first instance by the EPA, with an opportunity thereafter for Harte Peat to comment on the EPA's response. Thereafter, the Court would

further consider the involvement of the Attorney General. On that basis, the appeal was adjourned to 14 September 2022 for mention by which time the EPA and Harte Peat would have responded to the Court's questions.

140. Eight questions were duly formulated by the Court and furnished to the parties. Following the responses received from the EPA and Harte Peat, the Court decided to ask the Attorney General to participate in the appeal and communicated that decision to the parties when the appeal came back for mention on 14 September 2022.

141. Following receipt of the Attorney General's response to the questions posed, and the EPA's and Harte Peat's observations on the Attorney General response, the appeal duly resumed on 7 December 2022.

The questions

142. It is, I believe, instructive for the matters that are considered later in this judgment to set out the questions posed by the Court, which were as follows:

> *"1. Please specify precisely the nature of 'the development or proposed development' that, on the EPA's case required a 'grant of permission'?*
>
> *2. Having regard to the terms in which 'grant of permission' is defined in s.87(1A) of the 1992 Act, please specify which particular form of grant that, on the EPA's case, Harte Peat required as of November 2020 ('the relevant grant of permission').*
>
> *3. Please specify, as precisely as possible, when, on the EPA's case, the requirement for Harte Peat to obtain the relevant grant of permission first arose and identified the circumstances and events triggering that requirement.*
>
> *4. If the EPA's case is that the relevant grant of permission is a grant of substitute consent under Part X A of the Planning and Development Act 2000 (as amended) ('the PDA') because of an alleged failure on the part of Harte Peat to apply at some earlier point in time for a permission under Part III PDA, please specify, as precisely*

as possible, when, on the EPA's case, the requirement for Harte Peat to obtain a Part III permission first arose and identify the circumstances and events triggering that requirement.

5. Please identify, as precisely and comprehensively as possible, the legal basis for the EPA's contention that Harte Peat was required to obtain the relevant grant of permission specifying each and every provision of domestic Irish law (including but not limited to any applicable provisions of the Planning and Development Act 2000 (as amended) ('the PDA') and/or the Planning and Development Regulations and/or of EU Law (including but not limited to Council Directive 2011/92/EU (as amended) ('the EIA Directive') and the predecessors to that Directive) on which the EPA relies in making that contention and please explain how those provisions operate so as to give rise to the claimed requirement for the relevant grant of permission.

6. The Court understands the EPA's case to be that the relevant grant of permission was/is required by Harte Peat irrespective of whether its current turf extraction operations constitute 'development commenced before the appointed day' (1 October 1964) ('pre-64 development').

> *(1) Does the EPA accept Harte Peat's contention that, notwithstanding the absence from the PDA of any provision equivalent to s.24(1)(b) of the Local Government (Planning and Development) Act 1963 excluding pre-64 development from the requirement to obtain planning permission, as a matter of general principal, pre-64 development continued to be excluded from the requirement to obtain planning permission under the PDA?*
>
> *(2) In what circumstances, on the EPA's case, did/does pre-64 development require permission under the PDA? What is the precise legal basis on which such a requirement is said to arise?*

(3) In what circumstances, in particular, did/does pre-64 development comprising and /or including the extraction of peat require permission under the PDA? What is the precise legal basis on which such a requirement is said to arise?

7. In the course of the hearing on 14 July 2022, counsel for the EPA invited the Court to 'disapply' the words 'commenced on or after 1 October 1964' from the definitions of 'unauthorised development', 'unauthorised use' and 'unauthorised works' in s.2 PDA. Please set out as fully and precisely as possible (i) the legal basis on which, it is said, this Court can and should take such a step and (ii) the effect of doing so for the determination of the judicial review proceedings.

8. In circumstances where it is accepted by the EPA that 'development consent' for the purposes of Article 2 of the EIA Directive may mean a consent otherwise by means of planning permission, and where it is accepted by Harte Peat that their licence application to the EPA required an EIA (and where a full EIAR and Habitat's Directive report accompanied the licence application) and where the 1992 Act provides for the carrying out of an EIA by the EPA, on what basis is it being asserted that the licensing process is not sufficient to satisfy the requirements of the EIA Directive?"

143. The respective positions of the EPA, Harte Peat and the Attorney General on the questions posed by the Court are summarised, or otherwise referred to, below.

Discussion

144. There is really no dispute that Harte Peat's IPC licence application is subject to the requirements of EU law and to an EIA. The nub of the appeal is the parties' differing interpretations of how the requirements of EU law are to be accommodated in the context of the license application, with Harte Peat arguing that this could be done within the framework

of the EPA licencing application and the EPA contending that prior engagement with the planning process was a perquisite to the licencing application process.

145. The starting point for any interrogation of the parties' respective positions is of course the EIA Directive itself.

146. As earlier referred to, Article 2(1) of the Directive (following its amendment by Directive 97/11/EC on 3 March 1997) requires that projects within the scope of the Directive which were likely to have significant effects on the environment be made subject to a requirement to obtain development consent, as well as a requirement for an EIA.

147. Thus, there are two requirements that are pertinent regarding the scope of the EIA Directive. The first is that there is a project or activity that is subject to development consent and secondly, that development consent can be granted only after an EIA has been conducted. This arises from a plain reading of Article 2(1) of the EIA Directive (see *JJ Flood* at paras. 77 – 78). This was accepted by Harte Peat in this Court (transcript p.31 lines 17-23).

148. Article 2(1) has direct effect, and, thus, domestic legislation must be construed in conformity with EU law (see case C-244/12 *Salzburger Flughafen* (para. 48); Case C-72/95 *Kraaijeveld* (paras. 55 – 58)).

149. It has also been established in Ireland that, regardless of the question of thresholds, peat extraction requires an EIA where it is likely to have a significant effect on the environment (see *Bulrush* at paras. 38-40). This is consistent with the established principles of EU law. It follows, therefore, that pursuant to Article 2(1), peat extraction activity that is likely to have a significant effect on the environment must be subject to a requirement for development consent and to EIA.

150. The direct effect of Article 2(1) also means that there must be in place provision for the regularisation of development that has occurred in breach of the EIA Directive. As a matter of principle, if the development is such that it was carried out in the past (*i.e.* after the

environmental impact assessment/development consent requirement was put in place), EU law requires that certain measures be put in place and the development in question cannot be utilised without remedial assessment. As a matter of Irish law, the only statutory procedure for putting such measures in place is to be found in the 2000 Act (the requirement to obtain substitute consent).

151. In the context of the EIA Directive, the question here is how Harte Peat's development is to be accommodated to ensure compliance with EU law.

152. It is, I believe, noteworthy that there are very few categories of development that have the *"long tail"* that is in issue here, namely development that could conceivably have been continuing from pre-1964 until now. It was accepted by the parties, however, that quarries, and peat extraction, could be considered as examples of such *"long tail"* developments. However, whether there is here, as Harte Peat submits, almost sixty years of a "*long tail"* of peat extraction commenced pre-1 October 1964 seems implausible, to say the least. This is something to which I shall return in due course.

153. Here, the EPA's case is that the *"development or proposed development"* that required a *"grant of permission"* (as found in s.87(1A) of the 1992 Act) comprises (i) Harte Peat's peat extraction, including any drainage of bogland (as per Regulation 3(3) of the Planning Regulations 2001) that had occurred and was ongoing as of 7 October 2019 (the date of Harte Peat's licence application); (ii) extraction that occurred between that date and 24 November 2020 (the date the EPA communicated its refusal to consider the licence application); and (iii) the *prospective* peat extraction referred to in the IPC licence application. Having regard to the terms in which *"grant of permission"* is defined in s.87(1A) of the 1992 Act, the EPA say that the relevant *"grant of permission"* comprises (i) substitute consent under s.177K of the 2000 Act for all development carried out in breach of the requirements of the EIA Directive up to 24

November 2020 and (ii) a grant of planning permission of Part III s.34 of the 2000 Act for all prospective peat extraction.

154. The EPA says that the requirement for the relevant grant of permission first arose when Harte Peat's development reached a scale at which it was likely to have significant effects on the environment such that an EIA was required. It contends that from this point onwards planning permission was required and any development carried out from that point that had not been subject to an EIA requires substitute consent.

155. Whilst the EPA cannot pinpoint the precise point in time at which it considered the threshold of likely significant effects on the environment to have been reached and/or passed, it says that it is clear from the case made by the EPA in the 2013 proceedings that as of 10 June 2013 (the date of the swearing of the grounding affidavit of John Gibbons in the 2013 proceedings), it was of the view that the development the subject matter of those proceedings (including activity in areas A, B, F and G) was likely to have significant environmental effects and required an EIA (as well as AA under the Habitats Directive). Albeit it accepts as a general principle, as a matter of domestic law, that pre-1964 development continues to be excluded from requirement for planning permission, the EPA's position is that Harte Peat's development nevertheless requires a relevant grant of planning permission. This is because the development involves ongoing *"works"* after the coming into effect of the EIA Directive which did not have a development consent or a pending application for same as of the date of the transposition of the EIA Directive. Consequently, the development in question falls within the scope of and is subject to the requirements of the EIA Directive. The EPA points out that Harte Peat itself does not seek to argue that its peat extraction is not subject to the Directive. Moreover, it is not disputed that the works in question here have reached the threshold as to have significant effects on the environment.

156. The EPA also relies on the fact that from 14 March 1999 (the date for transposition of the 1997 amendment to Article 2(1)), Harte Peat's *"works"* were made subject to a requirement for development consent. Within the 2000 Act, development consent comprises substitute consent and planning permission. Furthermore, where peat extraction comprises an *"activity"* for the purposes of Class 1.4, an IPC licence is also required as of 10 June 1999.

157. As is clear from his written responses to the Court's questions (and further written clarification obtained post the resumed hearing on 7 December 2022), at the level of principle (and albeit in the absence of any direct knowledge on his part), the Attorney General agrees with the EPA that as well as requiring an IPC licence, the activity in this case requires both prospective planning permission under Part III of the 2000 Act and substitute consent under Part XA, on the basis of the Attorney General's understanding that the activity in question had reached the threshold of being likely to have significant effects on the environment as of July 2013 and that the activity has continued since then. The Attorney General further relies on the fact that Harte Peat does not dispute that its peat extraction activity had reached the level of being likely to have significant effects on the environment by July 2013.

158. On the other hand, Harte Peat describes the contention that two separate grants of permission (substitute consent and Part III planning permission) are required as *"radically misconceived"* in both respects. As regards substitute consent, it reiterates its view that neither s.177B nor s.177C of the 2000 Act has application in this case. It points out that s.177B clearly provides that an application to An Bord Pleanála for substitute consent depends on there being a development for which planning permission was previously granted and final judgment to the effect the grant was invalid or defective. As far as s.177C is concerned, that provides that a developer or relevant land owner may, but is not obliged to, apply to An Bord Pleanála for leave to apply for substitute consent if the applicant considers that any relevant planning permission may be defective or invalid for want of compliance with EIA requirements or if the

applicant is of the "opinion" that exceptional circumstances (within the meaning of s.177A) exist such that it may be appropriate to permit the *"regularisation"* of a development. Harte Peat says, however, that *it* is not of the opinion that any relevant development or works carried out or being carried out by it require regularisation under the 2000 Act. It considers that because of its pre-1964 user status, its activities are not irregular for the purposes of the 2000 Act and is of the opinion that no planning permission or substitute consent is required and, therefore, it does not intend to apply for same.

159. As far as Part III planning permission is concerned, Harte Peat notes the EPA's acceptance that as a general principle as a matter of domestic law, pre-1964 development continues to be excluded from the requirements to obtain planning permission under the 2000 Act.

160. Harte Peat contends that the central issue in this case for Harte Peat is whether (as the EPA and the Attorney General maintain) the EIA Directive means, in Irish law, that the requirement for *"development consent"* means planning permission under the 2000 Act as well as an IPC licence (an argument with which Harte Peat does not agree). It says that unless development consent as used in the EIA Directive can *only* mean planning permission or substitute consent pursuant to the 2000 Act (which Harte Peat says is not the case), there was no lawful basis for the EPA to invoke the prohibition in s.87(1C) to refuse to consider its application for an IPC licence. Hart Peat's argument is that, as shown in *Martin,* the EPA itself is a *"competent authority"* for the purposes of granting development consent, and that the requisite compliance with EU law can be achieved *via* the IPC licence application that Harte Peat has submitted.

161. In aid of its argument that development consent is achievable outside of the 2000 Act, Harte Peat points out that in the case of afforestation, the requirement for a full EIA (in cases arising under Annex II of the Directive) is provided under the Forestry Act 2014 by licensing

in which it is the relevant Minister (acting as a *"competent authority"*), rather than any planning authority under the 2000 Act, who licenses forestry development.

162. Harte Peat, however, acknowledges that in determining applications for an IPC licence, the EPA is obliged by s.83(2A)(b) to consider the need for an EIA and, where needed, to conduct an EIA which fully complies with the terms of the EIA Directive having regard to all the criteria in Annex II and III, the Habitats Directive, and other legal requirements mentioned in the subsection. Those criteria include all the broad environmental issues, such as the characteristics, location and impact of the project, as specified at paras. 1-3 of Annex III. The EPA is also required to consider whether the activities for which a licence is sought are such as to require planning permission.

163. Harte Peat points to s.83(2A)(a) of the 1992 Act which, it says, defines the term *"environmental impact assessment"* as a cumulative process involving the preparation of an EIAR by the applicant, the carrying out of any consultation required by the 1992 Act, the examination of any information received under the Act (which includes input from the planning authority), the reaching of a reasoned conclusions on the significant effects of the proposed activity on the environment, the integration of the reasoned conclusions into a decision, the conducting by the EPA of an examination, analysis and evaluation of the direct and indirect significant effects of the proposed activity on *"population and health", "biodiversity"* with particular attention to protected habitats under the Habitats Directive, and on *"land, soil, water, air and climate"*, and on *"material assets, cultural heritage and the landscape",* and the *"interaction"* between all of the foregoing. It points to the fact that the EPA is expressly required by s.83(2A)(dg) to ensure that it has or has access to sufficient expertise to examine an EIAR by reference to all these obligations under s.83. It is thus contended that any suggestion that the EPA's EIA duties under the 1992 Act are narrowly focused or confined to technical matters is simply wrong.

164. It is not, Harte Peat argues, an objective or a requirement of the EIA Directive that wider planning issues relating to planning permission applications, such as county development plans, zoning, development levies, national planning strategies, or planning guidelines form part of the EIA process. Contrary to the Attorney General's responses, those broader planning regime requirements are not relevant to the issue of whether an EPA licence complying with s. 83 satisfies the requirements of EU law.

165. Harte Peat also relies on the fact that s.87(IH)(a) to (c) of the 1992 Act expressly provide that where a grant of planning permission is not required but an EIA is required, the EPA must nevertheless notify the planning authority in writing and seek observations in relation to the application and the EIA report and consult with the planning authority as it considers appropriate *"in relation to the environmental impacts of the proposed activity to which the application relates"*. Moreover, as happened in the case of Harte Peat's licence application, where the application is accompanied by an EIAR, the EPA is obliged under s.87(I1)(g) to notify the relevant planning authority, consider the observations of that authority before making a decision to grant a licence under s.83 and to enter into consultations with the planning authority (or with any person or body that it considers appropriate) in relation to *"any environmental impacts of the proposed activity to which the application for a licence relates"*. That planning authority is then entitled to object to the granting of a licence where it is duly notified of the EPA's proposal to grant same, and the EPA is obliged to give a reasoned decision in relation to any such objection made on the evidence and submissions made in relation to the objection.

166. Accordingly, Harte Peat says, it is not the case that the planning authority is excluded from the licensing process or that *"any environmental impacts of the proposed activity"* raised by the planning authority are excluded from the necessary deliberations of the EPA where an EIAR is supplied by an applicant. It is submitted that the foregoing provisions do and should

apply to Harte Peat's licence application. Section 87(IH), Harte Peat says, expressly acknowledges that the requirement for an EIA does not equate with requirement for planning permission.

167. Harte Peat also points to s.87(9) which provides, *inter alia,* that the EPA must, before determining an application for a licence, take into account submissions including those of the planning authority and must come to a *"reasoned conclusion"* (s.87(9b)(a)) on the likely significant effects on the environment and is obliged to incorporate into its decisions any *"environmental conditions"* it considers necessary *"to avoid, prevent or reduce and, where possible, offset significant adverse effects on the environment and any appropriate monitoring measures"* (s.87(9b)(b)).

168. Furthermore, any licence granted by the EPA must, where appropriate, by conditions include *"necessary measures"* to return the site of activity post-works to *"a satisfactory state"* (s.83(5)(a)(x)). Attention is also drawn to the obligation on the EPA to ensure *"that it has, or has access as necessary to, sufficient expertise to examine the environmental impact assessment report"* (s.83(2A). Harte Peat also says that s.87 (1C) and (1D) of the 1992 Act only apply where subsection (1B) applies, *i.e.* where a grant of permission is required which, it is said by Harte Peat, is not the case here.

169. By way of further comment on the Attorney General's responses, Harte Peat submits that at no point do those responses make the case that an EPA licence cannot by itself constitute a *"development consent"* for the purposes of the EIA Directives. Nor does the Attorney General say that development consent for the purposes of Irish or EU law can only mean planning permission granted under the 2000 Act.

170. On the other hand, the EPA refutes the case being made by Harte Peat as to the scope of the EPA's powers and says that it does not have the requisite powers (as far as this case is concerned) to give consent for *"development"* or to assess and condition certain aspects of

development by reference to the full range of criteria appliable under the planning code, relating to the proper planning and sustainable development of the area in which the development is occurring. These criteria include consideration of the development plan for the county concerned, visual impact, cultural heritage, material assets and landscape. It points out that the EPA is only empowered to licence *"activity"* and control emissions to the environment and its role is limited in that regard. Consequently, the EIA conducted by the EPA in the context of a licensing process is more limited than that conducted under the planning code given that the EPA is only empowered to carry out an EIA in respect of the matters within its function under s.83(2A)(b) of the 1992 Act. It further points out that the 1992 Act does not make necessary provision for the EPA to carry out a remedial EIA where development has already occurred in breach of the EIA Directive and that there is no provision in the Act in relation to the preparation and submission of a remedial Environmental Impact Statement. This contrasts with the provisions of s.177F of the 2000 Act.

171. Moreover, the EPA only has jurisdiction as regards peat extraction in the case of Class 1.4, *i.e.* extraction involving an area exceeding 50 hectares. Thus, the relevant development consent for peat extraction development under 50 hectares and which is also likely to have significant effects on the environment can only conceivably be obtained *via* the planning permission process. Fundamental to the EPA's position is its submission that the Court must accord an interpretation of the domestic legislation, and in particular the 2000 Act, that can be consistently applied to all situations where an EIA is required.

172. There is, therefore, the EPA says, a clear basis upon which the Court should affirm the High Court judgment and thereby disapply national law excluding development relying on pre-1964 user from the requirement to obtain planning permission, in order to give effect to the requirements of Article 2(1) of the EIA Directive.

173. The Attorney General's position on the effectiveness of the 1992 Act to provide the requisite development consent in this case largely mirrors that of the EPA. He also agrees that the EPA is not a body which is authorised to or would not be capable of undertaking the EIA required here to the degree required by EU law. That, the Attorney General says, is not a problem in this case because there is a mechanism, *via* the 2000 Act, in respect of which the requisite planning permission can be sought and the requisite substitute consent applied for, to ensure that sufficient and adequate EIA, in its broad sense, is undertaken.

Overview and Decision on the planning permission issue

174. What falls for consideration is the EPA and the Attorney General's contention that albeit an application for an IPC licence can be considered an application for development consent in some cases, the present case is not one where there would be sufficient compliance with the requirements of EU law merely by the grant of an IPC licence. Essentially, both contend that the EPA is not empowered to conduct the requisite EIA here and that it falls to be conducted in the planning regime. In light of Harte Peat's argument that its claimed pre-1964 user obviates any requirement for planning permission, the EPA and the Attorney General, in advocating that planning permission is required so as to comply with EU law, ask the Court to take the necessary steps so as to ensure that something (here, peat extraction) that requires an EIA and development consent under EU law undergoes a process sufficient to satisfy the requirements of EU law. They say that the obligation on the Court is to avoid allowing a project which requires EIA to proceed without the necessary assessment.

175. It seems to me that the first observation to be made is that what EU law requires in respect of peat extraction is an appropriate EIA and development consent from an appropriate authority (Article 1(2)(a) of the EIA Directive as reinforced by Recital 5 of Directive 97/11).

176. As we have seen, as far as the EIA Directive is concerned, the relevant cut-off date for EU law compliance purposes is the date when the requirement for development consent arose.

In order to give effect to the original version of the EIA Directive (Directive 85/337/EC) the deadline for implementing the EIA Directive was 27 June 1998. After this, the benefit of *"exempted benefit"* under s.4 of the 1963 Act was disapplied in the case of peat extraction which involved a new or extended area of 50 hectares or more (see Local Government (Planning and Development) Regulations 1990). Any activity on this scale required EIA which was mandatory pursuant to the European Communities (Environmental Impact Assessment) Regulations 1989. As referred to earlier, the 50 hectares threshold was criticised by the CJEU in *Commission v. Ireland* (case C-96/392) and after that case, the threshold for peat extraction under national law was revised downwards, as explained earlier in this judgment.

177. Here, there is proposed development, as per Harte Peat's IPC licence application. The issue of Harte Peat's claimed pre-1964 user (and I will return to this) apart, what the law provides for is that for peat extraction in excess of 30 hectares, a mandatory EIA is required (Schedule 5, Part 2, para. 2(a) of the Planning and Development Regulations). Harte Peat's proposed development exceeds 30 hectares, thereby requiring an EIA. In addition, the law provides for planning permission for any new development involving more than ten hectares (Schedule 2, Part 3, Class 17 of the Planning and Development Regulations).

178. There is compelling evidence here that an activity which required EIA for planning purposes was being undertaken after the cut-off date of 27 June 1998 in respect of Area F (a new area) (total extent 90 hectares) and Area G (a new area) (total extent 37.65 hectares). At a minimum, the report of Dr. Crushell establishes this, and it has not been gainsaid by Harte Peat's experts. Those areas were well in excess of the 30 hectares threshold that is fixed for mandatory EIA under the planning code.

179. It also bears repeating that there is a considerably higher threshold set by the 1992 Act for the requirement on peat extractors to obtain a license from the EPA than there is for obtaining a grant for planning permission under the 2000 Act. In essence, the remit of the EPA

commences in respect of peat extraction involving 50 hectares or more. On the other hand, pursuant to the Planning and Development Regulations, in respect of an operator proposing to extract peat in a new or extended area, the legislature has ordained the threshold for mandatory EIA to be 30 hectares. Thus, the only mechanism for regularising thresholds lower than 50 hectares is *via* the planning regime. The EPA has no control or regulating authority in respect of a peat extraction area under 50 hectares.

180. Notably, in his submissions to the Court, counsel for Harte Peat accepted the proposition that if a peat extractor benefiting from the pre-1964 user proposes to go into a new or extended area of 30 hectares that, in itself, triggers a requirement under Irish law for an EIA, at least by reference to the 2000 Act, if it is likely to have a significant effect on the environment. Harte Peat was also reminded by the Court that in Irish and EU law (see *Bulrush and Westland*, paras. 38-39), development consent is also required below the 30 hectares threshold if the possibility of developing that sub-threshold area triggers a requirement for EIA because the development is likely to have a significant effect on the environment. As referred to earlier, as of the time of its licence application, Harte Peat's current peat extraction was in Area G (26.53 hectares). Albeit Area G is sub-threshold for requisite EIA under the 2000 Act, as *Bulrush and Westland* establishes, sub-threshold development requires EIA from the planning authority if it is likely to have a significant effect on the environment. Having regard to Dr. Crushell's report, Area G undoubtedly falls into this category. When asked by the Court how the requirement for development consent is to be satisfied in the scenario outlined above in circumstances where that requirement cannot be satisfied by an application to the EPA under the 1992 Act because such an application requires a threshold of 50 hectares, counsel for Harte Peat did not clearly answer this question.

181. I agree with the EPA that it would be incoherent to find that below 50 hectares, a peat extraction applicant must go to the planning authority for development consent but that above

50 hectares the appropriate authority is the EPA. These choices are not alternatives. Rather, as the EPA submits, in the case of peat extraction requiring an EIA, the EPA's role is *in addition* to that of the planning authority. The licence requirement for activity that exceeds 50 hectares obviously reflects the concern on the part of the Oireachtas about the increased likelihood of environmental emissions from peat extraction within the scope of Class 1.4. Consequently, in addition to requiring planning permission, peat extraction involving 50 hectares or more requires an IPC licence.

182. The foregoing factors, of themselves, are, in my view, sufficient to uphold the decision of the EPA to refuse to process Harte Peat's licence application.

183. In light of Harte Peat's contention that the development consent that EU law requires is for this case found in the 1992 Act, I turn now to Harte Peat's argument that its EU law obligations can be met and (albeit not conceding such) that any infractions on its part can be washed away by the fact that development consent is within the remit of the EPA to grant, and that the EPA is authorised to undertake the requisite EIA.

184. As regards the capacity of EPA to conduct the requisite EIA here, I cannot agree with Harte Peat's submission. First and foremost, it cannot be gainsaid but that the functions and responsibilities of the EPA are narrower than those of a local authority/An Bord Pleanála when authorising development in this jurisdiction. Whilst, at the level of abstraction, it is true that the matters that require to be assessed pursuant to the 1992 Act mirror those in the EIA Directive, in reality, however, the scope of the EPA's *functions* does not correlate to what is required here and, in my view, was never intended to correlate with the requirements of EIA where *"works"* are involved. This is because, as I have just explained above, there are aspects of peat extraction, as an activity, which are required under domestic law (itself implementing the EIA Directive) to be assessed under the EIA code *via* the planning regime, and for which no provision is made under the 1992 Act.

185. Moreover, the EPA's function is focused narrowly on environmental pollution and on controlling emissions from the relevant activity (see s.52(2) and 83(3) of the 1992 Act). Section 52(1)(a) sets out the specific statutory function attributed to the EPA, namely *"the licensing, regulation and control of activities for the purposes of environmental protection"*. I have earlier referred to the fact that as per Class 1.4 of the First Schedule to the Act, the EPA is only entitled to consider a licence application to grant a licence in relation to peat extraction on sites that are 50 hectares or more. Furthermore, the EPA has no remit to consider matters such as proper planning and sustainable development, compliance with the relevant development plan, visual impact or traffic impact (albeit as regards visual impact, I note Harte Peat's contention that this aspect is met by the 1992 Act in that s.83 specifically requires the EPA to have regard to *"landscape"*). It is also the case that the licensing regime under the 1992 Act makes no provision for retrospective consent, or the carrying out of retrospective or remedial environmental assessments. (For reasons which will become clear later, in this case the Court does not have to determine whether remedial considerations are a determinative factor for the purposes of deciding whether planning permission is required).

186. Thus, based on the foregoing, it is immediately apparent the EPA's statutory remit is narrower than that of a planning authority or An Bord Pleanála when those bodies are deciding on an application for planning permission.

187. Section 83(2A)(a) describes the EIA to be conducted by the EPA. It defines *"environmental impact assessment"* as a process consisting of the preparation of an EIA report by the applicant and thereafter the EPA's *"reasoned conclusion"* (after the requisite examination) in accordance with s.87(9a) *"on the significant effects of the proposed activity on the environment…"*. The EPA's examination, analysis and evaluation requires to have regard to "*the direct and indirect significant effects of the proposed activity"* on:

> *"(I) population and human health,*

(II) biodiversity…

(III) land, soil, water, air and climate,

(IV) material assets, cultural heritage and the landscape, and

(V) the interaction between the factors mentioned in subparagraphs (I) to (IV)"

Admittedly, as I have earlier observed, that description is taken pretty much directly from Article 3 of the EIA Directive. Significantly, however, s.83(2A)(b) of the 1992 Act makes clear that any EIA conducted by the EPA is in respect of *"the matters that come <u>within the functions of the Agency</u> including the functions conferred on the Agency by or under this Act"* (emphasis added). That is the qualification which is in the 1992 Act and, as is clear from s.83(2A)(b), the qualification applies, *inter alia*, to the provisions of s.88(1H) and s.87(1I)(g) upon which Harte Peat placed reliance in the course of its submissions. Confined as it is to matters within its statutory function, it is thus immediately apparent that even as far as prospective development is concerned, the EPA does not have the breadth of function that is required under the EIA Directive. Given the limitations that attach to the EPA's functions, I reject Harte Peat's contention that the EPA's insistence that it was not equipped to conduct the requisite EIA here constituted an *"artificial"* argument.

188. Indisputably, the language used in s.83(2A)(b) circumscribes the remit of the EPA. In essence, the EPA has a restricted statutory function in relation to the conduct of environmental assessment: its assessment must relate to something which is carried out by the EPA within the remit of its powers. It bears repeating that that remit is as is described in s.52 of the 1992 Act, namely *"<u>the licencing, regulation and control of activities</u> for the purposes of environmental protection"*. *"[A]ctivity"* is defined in the Act as "*any process, development or operation specified in the First Schedule and carried out in an installation"*. The relevant provision of the First Schedule is Class 1.4 which makes clear that the EPA has no function in the regulation of peat extraction in relation to activity under 50 hectares.

189. Furthermore, in my view, the manner and sequencing of the EPA's role when considering an application for a licence, as mandated by s.87(1B)-(1H) of the 1992 Act, evidence the emphasis which the legislature has put, before a licence application is considered, on ascertainment of the planning status of the development in question. This factor, together with the limitations on the EPA's role to which I have referred above, are central to the question as to whether Harte Peat's licence application can be deemed the *"best fit"* to ensure compliance with EU law, in circumstances where its peat extraction also comprises *"works"* for the purposes of the 2000 Act, and where the position under EU law is that it is a requirement of the EIA Directive not just that an EIAR and/or an NIS is prepared and examined by the authority that gives development consent but also that the authority has (arising from its assessment) the requisite power (and obligation) to impose any appropriate conditions on an applicant seeking development consent. In all the circumstances that arise here, the EPA cannot be said to possess the requisite competence that EU law requires.

190. If an obligation arises (as it does (and which Harte Peat accepts)) under EU law to subject development such as the development in issue here to an EIA and development consent, then the State (and the organs of the State) must ensure that that obligation is satisfied faithfully and fully. Accordingly, the High Court was entitled and indeed obliged to ask, *"What is the best fit?"* as a matter of Irish law, so as to ensure the necessary compliance with EU law. I will return to this theme in due course.

191. In the course of its submissions, Harte Peat argued that even if s.83(2A)(b) operates to restrict the scope of what the EPA can do, then the subsection should be interpreted by the Court in such a way as to disapply this restriction.

192. I cannot agree with Harte Peat's contention in this regard, not only for the reasons already set out but also on the basis that Harte Peat's solution would involve adding a swathe of provisions into the 1992 Act in respect of matters which are beyond the statutory functions of

the EPA, and which are readily provided for in the 2000 Act, by virtue of the planning regime established thereunder. The legislature has ordained, *inter alia,* the planning authorities, as defined in the 2000, as the requisite authority to conduct EIA in respect of peat extraction exceeding 30 hectares. In my view, the parallel consent regime that is provided for in the 1992 Act was never meant to act as an alternative to the regime provided for in the planning code. Rather, it is there to supplement the 2000 Act regime in cases where the peat extraction in issue, because of its scale, is likely be a cause of greater environmental emissions that might otherwise be the case. In this regard, the 1992 Act regime in relation to peat extraction exceeding 50 hectares aligns easily and logically with the planning regime.

193. As we have seen, the High Court (and this Court) were faced with Harte Peat's argument regarding its claimed pre-1964 user status. Harte Peat relies on its statutory exclusion from the remit of the 2000 Act by reason of the temporal limitation contained in the definition of *"unauthorised works"* in that Act. In my view, Harte Peat's argument that it does not need planning permission because its activities come within the boundaries of its pre-1964 user requires a degree of interrogation which, admittedly, was not carried out by the EPA. I have already commented on the implausibility of the *"long tail"* of Harte Peat's claimed pre-1964 user having subsisted over a period of almost sixty years in circumstances where, in my view, Harte Peat singularly failed to put before the High Court any actual evidence that this is indeed the case. Moreover, for the purposes of availing of the temporal restriction in the definition of *"unauthorised works"*, which is said by Harte Peat to carry forward the benefits provided for in s. 24 of the 1963 Act, Harte Peat is required to establish, at a minimum, that its current and indeed proposed development remains within the parameters of its asserted pre-1964 user. As I have said, the exact nature of that user has not been established in these proceedings. Furthermore, even taking Harte Peat's claim of pre-1964 user at its height, it seems to me entirely implausible that Harte Peat's activities remain within the parameters of whatever user

it was exercising on the appointed day. I am fortified in this conclusion by the observations of Murphy J. in *Waterford County Council v. John A. Woods Limited* [1999] I.R. 556. At p. 561, with reference to s. 24 of the 1963 Act, he stated:

> *"Section 24 of the Act of 1963 having expressly excluded works from the need to obtain permission-which term expressly includes 'any act or operation of ...excavation...'- necessarily permits the continuation of such works even where they involve a material change in the user of adjoining ground. If s.24 had not contained a provision so as to exclude existing uses and works from the new planning code serious and perhaps unconstitutional injustice might have been imposed on those who had invested time, money and resources into such developments. It seemed to me clear that the purpose of s.24 was to permit (among other things) a developer to continue works which he had commenced before the appointed day without the necessity of planning permission which might not be forthcoming and the application for which would at the very least involve significant delay."*

194. Importantly, however, Murphy J. went on to state:

> *"On the other hand it is, in my view, equally clear that the right to continue works commenced before the appointed day does not give to the developer an unrestricted right to engage in activities of the nature commenced before the relevant date. The exclusion from the operation of s. 24 could not be invoked to confer on the particular developer a licence to carry on generally the trade or occupation in which he was engaged. The section merely permits the continuation to completion of the particular works commenced before the appointed day at an identified location. In my view the answer to the question posed by the learned judge of the High Court requires the examination of all of the established facts to ascertain what was or might reasonably*

have been anticipated at the relevant date as having been involved in the works then taking place." (Emphasis added)

195. As Murphy J. put it, if, by way of example, the pre-1964 user related to building works, then *"presumably plans prepared or contracts entered into by the developer would give very considerable guidance as to the nature and extent of the building works which might be anticipated."* In relation to mining, he opined that *"if work had commenced on the extraction of ore from a small ore body the fullest extent of the rights preserved by s.24 would be the extraction of that ore body. It could not be argued successfully that work on a different ore body had been commenced before the operative date."* This latter observation is particularly apposite here, in my view. As I have said, whatever peat extraction Harte Peat were carrying on pre the appointed day, it seems to me entirely implausible that it could argue successfully that the actual activities in respect of which it now seeks a licence from the EPA relate to the peat extraction being carried on pre-1 October 1964. This is, of course, ultimately a matter between Harte Peat and the relevant planning authority whereby it will be for Harte Peat to establish that a requirement for planning permission did not arise here, as a matter of domestic planning law, long before the impact of the EIA Directive.

196. The significance of this issue will be obvious: to the extent that Harte Peat's peat extraction activities in the period post 1964 went beyond established pre-1964 user and works, the ordinary planning rules applied and unless (and only to the extent that) such user and works may have been for the time being exempted development, they required planning permission as a matter of domestic planning law. That is so quite apart from any consideration of the impact of EU law and in particular the EIA Directive.

197. In any event, as we know, in this case, the Judge, for the reasons she set out, determined that Harte Peat's asserted pre-1964 user had to yield to the requirements of EU law. In this appeal, the EPA and the Attorney General, in asking this Court to uphold the High Court,

contend that the Judge was correct to find that the starting point for the requisite development consent in this case is *via* the 2000 Act, so as to ensure that the proper environmental assessment is undertaken before development consent is granted. As explained already, this is because it is the planning regime that is equipped to carry out the requisite assessment in issue here, being broader in scope than the narrower *"environmental pollution"* focus of the 1992 Act. The EPA says that a planning application pursuant to the 2000 Act considers not just the question of emissions (to which the EPA is confined), but a much broader range of matters relevant to proper planning and sustainable development (see s.34(2) and (4) of the 2000 Act).

198. If, per chance, Harte Peat were somehow to establish that it has remained within the confines of its pre-1964 user (however implausible that may seem), then the Court agrees that the 2000 Act requires to be read in the manner advocated here by the EPA and the Attorney General. In other words, even if Harte Peat's user is pre-1964 user, that does not exclude the application of the EIA regime and the consequences that flow from it as per *JJ Flood*, such that the temporal restriction upon which Harte Peat relies would have to be disapplied. Disapplying the temporal restriction in the definition of *"unauthorised works"* would not only satisfy the requirement to carry out an EIA which the EU has mandated for peat extraction, it also has the benefit of consistency, i.e., one is reading the 2000 Act consistently in respect of, say, a peat extraction of 49 hectares or less which is likely to have a significant effect on the environment or a European site, *and* a peat extraction of 50 plus hectares also likely to have a significant effect on the environment or affect a European site.

199. I note that in aid of his submissions to the Court, reliance was placed by the Attorney General on Case C-321/18 *Terre Wallonne* and the opinion of Advocate General Kokott, at para. 103, to the effect that a failure to properly carry out an environmental assessment cannot have the result of restricting the protection of Natura 2000 sites, and a practical approach to resolving such a scenario is thus appropriate.

200. Of note in this regard is the report of Doctor Crushell in the present case. It identifies the areas of sensitivity in the vicinity of Harte Peat's activities, with the nearest site having been designated as a natural heritage area. Doctor Crushell identifies Lough Bane which forms part of the Area F as being of natural conservation importance due to the presence of a mesotrophic lake and surrounding transition mire habitat which, as per Annex 1 of the Habitats Directive, is the highest level of protection the EU can give. With specific reference to Lough Bane, and transition mire, Dr. Crushell states that transition mire is a listed habitat on Annex 1 of the Habitats Directive. He states that *"Lough Bane and the surrounding habitats are considered to be of natural conservation importance".* He also identified Lough Derravaragh located circa one kilometre south of Area B as an SPA of ornithological importance and part of which is also designated as a Natural Heritage Area for raised bog.

201. Dr. Crushell goes on to describe a small remnant of high bog occurring to the south of the recently created artificial lake in Area F and says that this remaining bog shows signs of degradation due to the effects of marginal drainage. He states that the habitat *"corresponds with the EU Habitat's Directive Annex 1 listed habitat 'degraded raised bogs still capable of natural regeneration [7120]'"*

202. In the context of looking at the *"requirement for appropriate assessment",* Doctor Crushell states:

> *"In determining the potential for adverse impacts on European sites, the source pathway and receptor model was considered. The four peat extraction sites lie within the same river catchment (Inny, Shannon SC020). Drainage from all four sites discharges to the Inny via the on-site network of artificial drains. The Inny in turn flows into Lough Derravaragh to the South. Run-off of suspended solids or other potential pollutants in surface water discharges arising from the works has the potential to cause a deterioration of water quality in the river Inny and in turn within Lough Derravaragh*

SPA. Any alteration of water quality within the SPA has the potential to adversely impact on the conservation interest features including water birds and wetland habitats present… the permanent loss of raised bog habitat from the extraction sites has contributed to a contraction in the geographic range of this EU Habitat's Directive Annex 1 habitat in Ireland. The complex of bogs along the River Inny represented an unusual example of the habitat type in Ireland with features of local distinctiveness including the natural transition of the raised bog to the River Inny on the natural transitions from bog through other wetlands habitats such as finn and lakes as present at Lough Bane. These features add significantly to the conservation interest of the bog complex. These type of raised bog landscapes are now rare, if not extinct in Ireland. The loss of these natural features (due in part to peat extraction and associated drainage) has reduced the variability or diversity of raised bogs in Ireland."

203. In light of Dr. Crushell's observations (and apart altogether from the fact that EIA is mandatory under the planning code where development exceeds 30 hectares), I accept the submission of the Attorney General that the observations of Advocate General Kokott in *Terre Wallonne* apply in the present case, in circumstances where there is evidence of potential damage to a Natura 2000 site, indeed as found by the Judge at paras. 130 and 249.

204. The aforesaid factors effectively serve to undermine Harte Peat's reliance on its claimed pre-1964 user. Thus, even if Harte Peat were to establish successfully its entitlement (as a matter of purely domestic planning law) to the benefit of the temporal limitation found in the definition of *"unauthorised works"* in the 2000 Act, the factual matrix at play here, as found in Dr. Crushell's report, compel the solution advanced by the Attorney General and the EPA here, namely the "reading out" of the exclusion of development commenced before 1 October 1964 from the definition of *"unauthorised works"* in the 2000 Act, in the circumstances of this case.

205. Undoubtedly, it is wholly unsatisfactory that the Court is left in a position whereby it is finding that such an exercise might have to be engaged in, in order to ensure compliance with EU law. The Oireachtas, had it chosen to do so, could have made it clear, as it did in s.4(4) of the 2000 Act in respect of exempted development, that where a requirement for an EIA arose then any exclusion or exception from the 2000 Act arising from a pre-1964 user was lost. It did not do so. As we have seen, the legislature did attempt to address the grant of development consent in the case of peat extraction by means of the 2019 Regulations, but these were subsequently found to be unlawful, and the position has not been revisited in the interim. The Court now finds itself in the position of being asked to address the *lacuna* in the legislation that arises.

206. As explained above, planning permission is required because what is in issue here is a development in circumstances where the land use aspects (the proposed *"works"*) of development fall under the auspices of the planning code, with any activity exceeding 50 hectares also requiring a second consent, which is within the statutory remit of the EPA. Once the Court is satisfied (as it is) that what was proposed by Harte Peat to the EPA required an EIA, that, of itself, indicated a requirement for planning permission, which can only be granted *via* the 2000 Act. This is the core of the EPA's (and the Attorney General's) argument that the decision of the Judge should be upheld. The EPA also contends that the Court does not actually need to disapply the pre-1964 exclusion from any other definition in the 2000 Act other than the definition of *"unauthorised works"*. This is because we are not dealing with a structure, but rather works that are continuously ongoing, in other words, there are continuous acts or operations of excavation and continuing works developments that, whether commenced in pre-1964 or otherwise, are ongoing. Even taking Harte Peat's claim of pre-1964 user at its height, the fact of the matter is that the project in issue here within the meaning of the EIA Directive continued after October 1964.

207. That being the case, I agree with the EPA and the Attorney General that the 2000 Act has to be interpreted in a way that is consistent for all pre-1964 peat extraction that requires EIA. All peat extraction that is likely to have a significant effect on the environment, irrespective of whether its pre-1964 or not, requires EIA and the mere fact that the peat extraction exceeds 50 hectares just means, as already explained, that an additional stage consent from the EPA is necessary.

208. Admittedly, this does not appear to have been the premise upon which the Judge decided the matter. Undoubtedly, the Judge rejected Harte Peat's contention that it was enough for EU law purposes for Harte Peat to look for a licence because that application of itself involved a requirement to conduct an EIA. The predominant reason for the Judge's rejection of Harte Peat's argument was that she believed that a retrospective EIA was required and hence, only the planning process could carry out such an exercise. Thus, albeit her analysis led her to conclude that planning permission was required, her conclusion that the planning regime had to be activated or invoked was significantly influenced by her assessment that remedial assessment/substitute consent was required. She focused on the lack of a framework for remedial obligation within the EPA and the lack of powers in the EPA to require remediation. She was, of course, also alert to the fact that s.83(2)A(b) of the 1992 Act made it clear that the EPA was only to do an EIA within the matters within its statutory competence.

209. In focusing on the necessity for remediation, the approach adopted by the Judge was different to the reasoning set out by the EPA (the EPA opining in its decision of 24 November 2020 only that planning permission was required, with no reference to the necessity for Harte Peat to remediate and which would involve applying for substitute consent, albeit, as noted earlier, the licencing inspectorate's memorandum had alluded to substitute consent).

210. As the EPA and the Attorney General contend (and with which I agree), even if you strip away any question of past non-compliance such that the need for substitute consent might arise

under Irish law, for the reasons I have already outlined, once a requirement for EIA is triggered by a proposal or an intention or a likelihood of development that is likely to cause significant environmental impacts, that of itself triggers an obligation to apply for planning permission, by analogy with the judgment of Meenan J. in *Bulrush and Westland*. In other words, once the requirement for an EIA arises, even if it is only exclusively prospective, it triggers, essentially, the requirement for planning permission.

211. The proposition that the starting point for appropriate development consent here is firstly an assessment under the 2000 Act and, thereafter, an IPC licence under the 1992 Act is, in my view, entirely consistent with the *dicta* of the CJEU in Case C-50/09 (*Commission v. Ireland*). There, the CJEU was examining the dual consent procedure Ireland has chosen *i.e.* where the planning system deals with land use aspects and the EPA deals with pollution aspects. The argument the Commission advanced was that:

> *"…it is of the essence that the environmental impact assessment be carried out as part of a holistic process. In Ireland following the Agency's creation, certain projects requiring such an assessment are subject to two separate decision-making processes: one process involves decision-making on land-use aspects by planning authorities, while the other involves decision-making by the Agency on pollution aspects. The Commission accepts that planning permission and an Agency licence may be regarded, as has been held in Irish case law (Martin v. An Bord Pleanala), as together constituting 'development consent' within the meaning of Article 1(2) of Directive 85/337 and it does not object to such consent being given two successive stages"* (para. 51).

212. At para. 72, The CJEU opined:

> *"For the purposes of the freedom thus left to them to determine the competent authorities for giving development consent, for the purposes of that directive, the*

Member States may decide to entrust the task to several entities, as the commission has moreover expressly accepted."

213. As a matter of Irish law, the primary mechanism for authorising development in Ireland is the local authority/ An Bord Pleanála. The EPA is a secondary authority. Case C- 50/09 makes clear that there was nothing to preclude Ireland's choice to entrust the attainment of the EIA Directive's aims to two different authorities, namely planning authorities on the one hand and the EPA on the other. Thus, the requisite development consent for "*works*" development here is both planning permission (regardless whether it is peat extraction of 49 hectares or less which is likely to have a significant effect on the environment or a European site or a peat extraction of 50 hectares plus which is likely to have a significant effect on the environment or affect a European site) and, where those works exceed 50 hectares in terms of commercial peat extraction, an application to the EPA for an IPC licence. That is so even if the works are within "the envelope" of a pre-1964 exclusion.

214. I agree with the Judge's conclusion that on the logic of *JJ Flood,* the pre-1964 exclusion becomes irrelevant. As Ní Raifeartaigh J. said, the matter has to be viewed through the prism of EU law. The question to be asked is are there works after the date of transposition of the EIA Directive that are likely to have a significant effect on the environment for the purpose of EIA. If the answer is in the affirmative, the works require development consent. Here, the EPA had to ask itself what the requisite development consent for a peat extraction project was. Save for the brief exception of a period in 2019 when the 2019 Regulations were in force, the requisite development consent comprises a planning permission under the 2000 Act and, where the works exceed 50 hectares, the Class 1.4 licence in conjunction with that planning permission.

215. The obligation is to view the matter through the lens of EU law, and, where necessary (focusing on the definitions and scope of criteria that are provided for in EU law) to set aside

national law concepts where they do not purport to support an interpretation of EU law that allows the discharge of the necessary obligations under the EIA Directive. This is, I believe consist with the dicta of the CJEU in *Kraaijeveld* where the Court stated, at para. 55:

> *"First of all, it should be recalled that the obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of Article 189 of the EC treaty and by the directive itself…That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts…"*

216. This obligation was restated in Case C-378/17, *Minister for Justice & Equality, Commissioner of An Garda Síochána v. Workplace Relations Commission* where it was emphasised that the duty to disapply national legislation that is contrary to EU law *"is owed not only by national courts, but also by all organs of the Sate including administrative authorities-called upon, within the exercise of their respective powers, to apply EU law"* (para.38). It was more recently reiterated in Case C-873/119, *Deutsche Umwelthilfe eV v. Bundesrepublik Deutschland*:

> *"…any national court, hearing a case within its jurisdiction, has, as a body of a Member State, the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect pending before it…".* (at para. 77)

217. There is nothing about a pre-1964 user which automatically would render immune an extraction activity (a development) from the requirements of EU law, in particular obtaining proper environmental assessment. This was duly recognised by the Judge, and I agree with her.

218. I note that Harte Peat in its written and oral submissions appear to argue that its pre-1964 user could be equated with the so-called *"pipeline"* cases, including Case C-226/08, *Stadt Papenburg v. Bundesrepublik Deutschland* and Case C-431/92, *Commission v. Germany.*

219. As the Judge noted, an argument of similar ilk was canvassed in *Bulrush and Westland* which concerned s.4(4) of the 2000 Act (the removal of *"exempted development"* for EIA purposes). Meenan J. found the *"pipeline"* cases of no assistance to Bulrush and Westland, saying:

> *"These cases cover situations [where] permission or consent for a project had been sought before the expiry of the time limit for transposing the Directive in question. This is not the case here. Neither Bulrush nor Westland had any planning permission pending during the time allowed for the transposition of either the Environmental Impact Directive or the Habitats Directive. In my view, the submissions made by both Westland and Bulrush that they are, in effect, "pipeline Projects" is an aspect of the more general submission that the relevant legislation offends the principle against legislation being retrospective."* (para. 43)

Meenan J. went on to reject the argument that the removal of the exemption was retrospective. He stated:

> *"Section 4(4) does not make unlawful that which was lawful at the time it was done. The effect of s.4(4) is prospective. Bulrush now require planning permission for their activities. The wording of section 4(4) which gives rise to this is clear and unambiguous."* (para. 48)

220. Harte Peat's contention is that its pre-1964 exclusion from the requirement to have planning permission is quite different in nature and effect to the concept of *"exempted development"* for the purposes of the 2000 Act. It says furthermore that there is no equivalent wording to that of s.4(4) in the Act in respect of pre-1964 user (as indeed the Judge also noted).

221. In my view, Harte Peat's attempt to align its circumstances to those that arose in the *"pipeline"* cases can be easily disposed of. A similar argument to that of Harte Peat was canvassed in *JJ Flood* on behalf of the quarry developers in that case who like Harte Peat claimed pre-1964 user and who maintained that a quarry which stayed within its pre-1964 user was not subject to the Directives because it did not require development consent. That argument did not find favour with Ní Raifeartaigh J. who relied in part on Meenan J.'s reasoning in *Bulrush and Westland.* She stated:

> *"The crucial distinction drawn by Meenan J. is between the situation where (i) an activity has an exemption or exclusion from the domestic planning code, on the one hand, and (ii) an activity which actually had planning permission or had a pending planning application in existence as of the trigger dates, on the other. The two categories are not to be equated with each other when considering or not the Directives apply."* (para. 85)

In the view of Ní Raifeartaigh J., the conclusion drawn by Meenan J. applied with equal force to the case before her. She stated:

> *"The purpose of s.261A was to comply with Ireland's EU obligations which require Member States to ensure conformity with EU law in this area. If the applicants' argument were correct then an entire industry with significant effects on the environment such as quarrying would be outside the scope of the Directives simply because the Member State had, historically, decided to exclude the activity from domestic planning law."* (para. 86)

222. Insofar as Harte Peat appears to contend that the absence in the 2000 Act of any provision regarding pre-1964 user equivalent to that of s.4(4) somehow puts its position on a par with the *"pipeline"* cases, I reject that submission, adopting the reasoning of Ní Raifeartaigh J. in *JJ Flood.* Moreover, the decisions in the *"pipeline"* cases were arrived at in circumstances where

there was authorisation or pending authorisation for the relevant activity in place. In other words, the project in question had been subject to an individualised assessment by a competent authority under national law as to whether the project should go ahead. In essence, Harte Peat's argument that it is outside of the remit of the 2000 Act by virtue of its pre-1964 user is, as Ní Raifeartaigh J. observed in *JJ Flood, "one which seeks to invert the corrected relationship between domestic law and EU law"* (para. 86), which is not permissible.

223. To recap, therefore, given the imperatives mandated by the EIA Directive and notwithstanding Harte Peat's reliance on a claimed pre-1964 user and the absence of any proviso (relating to pre-1964 user) in the 2000 Act equivalent to that of s.4(4), and irrespective of any question of whether retrospective or substitute consent is required in this case, I am satisfied that the pre-1964 peat extraction activity in issue here (if indeed it be the case that the activity is pre-1964) requires planning permission as soon as it reaches the point of creating a likelihood, in the sense in which that word is used in the EIA Directive, of having a significant impact on the environment. As the evidence demonstrates, that threshold has been reached in this case. Indeed, this obligation applies to all pre-1964 user, not just peat extraction and quarries. Furthermore, it does not just depend, as it appears the Judge thought it depended, on there having been a historical failure to look for appropriate development consent therefore triggering, under EU law, the requirement for a retrospective EIA and substitute consent in Irish legal terms. It bears repeating that once planning permission is required, one is then taken into the domain of the 2000 Act.

224. For the reasons set out above, I propose therefore to adopt the position that has been advocated by the Attorney General and the EPA, which is, firstly, to allow the 1992 Act to be read such that s.87(1)(b) permits the EPA to make an assessment as to whether or not an activity involves a development or proposed development for which a grant of permission (as defined in s. 87(1)(a)) is required. Here, the EPA determined, correctly in my view, that planning

permission was required and, so, again correctly in my view, declined to consider Harte Peat's licence application.

225. Secondly, Harte Peat's claimed pre-1964 user notwithstanding, for the reasons already set out in this judgment, even if Harte Peat were to successfully establish that its activities (current and proposed) align with its claimed pre-1964 user, in the sense explained by Murphy J. in *Waterford County Council v. John A. Woods*, it remains the position that effective compliance with the obligations of EU law requires, in this case, a reading out of the temporal limitation put upon the definition of *"unauthorised works"* in the 2000 Act (and upon which Harte Peat relied).

226. One of the arguments advanced by Harte Peat in the appeal was, albeit conceding that the 2000 Act was not a penal statute, that the disapplication of the temporal limitation in *"unauthorised works"* would expose Harte Peat to criminal sanction. I am satisfied that Harte Peat's concern in this regard is misplaced. The *dicta* of O'Malley J in *Cronin (Readymix) Ltd v. An Bord Pleanála* [2017] IESC 36, [2017] 2 I.R. 658 is apt. At para. 40, she stated:

> *"I am satisfied that the Act is not a penal statute in the sense of having as its objective the creation of a criminal offence. The purpose and scheme of the Act is to create a regulatory regime within an administrative framework which, in the interests of the common good, places limits on the right of landowners to develop their land as they might wish. The principal objectives of the regime are proper planning and sustainable development…"*

227. In summary therefore, for all the reasons set out above, I am satisfied that:

- Harte Peat requires planning permission for its activities.
- It lost its exclusion from planning permission once the threshold for EIA was reached.
- Its pre-1964 claim, in any event, is without foundation. Essentially, that claim was overtaken by the law and, in particular, EU law.

Substitute consent

228. Where activity has been carried out in the past there may arise an obligation for remedial assessment. That obligation arises from the EIA regime provided for in the EIA Directive, as interpretated by the CJEU. In Case C-196/16 *Comune Di Corridonia,* the CJEU put it in the following terms:

> *"In light of all the foregoing considerations, the answer to the question posed is that, in the event of failure to carry out an environmental impact assessment required under Directive 85/337, EU law, on the one hand, requires Member States to nullify the unlawful consequences of that failure and, on the other hand, does not preclude regularisation to the conducting of an impact assessment, after the plant concerned has been constructed and has entered into operation on condition that: national rules allowing for that regularisation do not provide the parties concerned with an opportunity to circumvent the rules of EU law or to dispense with applying them, and an assessment carried out for regularisation purposes is not conducted solely in respect of the plant's future environmental impact but must also take into account its environmental impact from the time of its completion."* (para. 43)

229. As noted by Simons J. in *Friends of the Irish Environment,* in this jurisdiction the planning permission regime under the 2000 Act makes provision for retrospective consent and a remedial EIA. As the Judge observed (at para. 200), the enhanced powers in relation to remedial and mitigation measures to remedy and mitigate any significant effects on the environment contained in the 2000 Act are not provided to the EPA under the 1992 Act.

230. As regards quarry development, ss. 261 and 261A of the 2000 Act comprise the State's actions to transpose the EU law requirement that quarry development likely to have significant effects on the environment be made subject to a requirement for planning permission notwithstanding any pre-1964 user. There is, however, no equivalent domestic legislative

provision to s.261 or s.261A in the 2000 Act for peat extraction development. In other words, there is no bespoke provision in the 2000 Act that enables/requires local authorities or An Bord Pleanála to tell existing peat extracting operators that they have to register and apply for planning permission and apply for substitute consent in the way there is provided for in the 2000 Act in respect of quarries.

231. There is however a further *"gateway"* to substitute consent provided for in the 2000 Act, in the guise of ss.177A-177K. As we have seen, Harte Peat contends that that gateway is not something it can avail of even if the issue of substitute consent arises in respect of its development. For reasons that will become clear, it is not necessary for the Court to express a view on the argument Harte Peat makes in this regard.

232. Here, the Judge implicitly stated that Harte Peat required substitute consent. Indeed, she appears to have premised her finding that planning permission was required on that basis.

233. It will be recalled that the EPA's submission to the Court is that Harte Peat's activities in the areas in question, coupled with Dr. Crushell's finding that AA is required for Lough Derravaragh SPA and the general uniqueness of the bogland habitat and the proximity to Area F of a lake of natural conservation importance which has deteriorated as a result of related drainage, all meet the threshold for EIA and AA including EIA in respect of what has been done in the past (which is assessed through the substitute consent procedure provided for in s.177K of the 2000 Act).

234. In addition to their contention that Harte Peat needs to apply for prospective planning permission, both the EPA and the Attorney General contend that substitute consent is also required. This is because, they say, development was previously carried out by Harte Peat in breach of the requirement for an EIA and the requirement for development consent, such that it triggers a requirement in EU law for retrospective consent which, as a matter of Irish law, is only available through the planning process.

235. We have seen from her judgment that the Judge's focus was on the requirement for remedial action on the part of Harte Peat. It is of note, however, that the EPA itself did not in its decision of 24 November 2020 address the need for substitute consent. The question that thus arises is whether in those circumstances this Court should embark upon such consideration.

236. Given that I have already concluded, for the reasons set out above, that because an EIA was required Harte Peat must apply for prospective planning permission, and in circumstances where the EPA in its decision did not address the question of substitute consent and, indeed, did not need to make a decision on substitute consent (having found, in any event, that an EIA and planning permission were needed), my view is that it is not necessary for this Court to form any concluded view on the issue of substitute consent. It is sufficient, to my mind, for the purposes of the within judicial review proceedings that the EPA determined that planning permission for prospective development was required (as indeed this Court has also found).

237. So, in circumstances where the Court is satisfied that the requirement for development consent in this case means at the very least a requirement for prospective planning permission, it is not necessary for the Court to embark on a consideration as to whether substitute consent is required. It will be a matter for the planning authority, in due course, to consider whether Harte Peat needs to apply to An Bord Pleanála for substitute consent.

238. All that having been said, there is evidence in the case which suggests significant levels of extraction which have had a significant impact on the environment. Dr. Crushell,'s report deals, *inter alia,* with the ecological impacts associated with peat extraction. He states:

> *"Peat extraction works at each of the four sites [Area A, B, F, and G] has caused the permanent loss of raised bog habitat (EU Annex 1 listed habitat) at each of the four locations. This loss of habitat has resulted in the local displacement of typical peatland flora and fauna.*

The habitat alteration is likely to have caused major changes in the hydrological regime of the study area. This is likely to contribute to adverse impacts on water quality and quantity in downstream waterbodies. Such changes in water quality and quantity are in turn likely to result in adverse effects on the ecological status of downstream waterbodies".

239. As I have said, the question of any remediation measures as may arise here is for another day.

Summary

240. For the reasons set out in this judgment, I would uphold the judgment and order of the High Court in the judicial review proceedings and dismiss Harte Peat's appeal.

The s. 99H injunction

241. The second issue in the appeal is whether the operation of Harte Peat's business without a licence was in breach of the 1992 Act such that the High Court had jurisdiction to make the orders sought by the EPA under s.99H of the Act.

242. Notably, the argument advanced by Harte Peat in the court below, notwithstanding its application for an IPC licence and its acceptance that its activity was subject to EIA requirements (peat extraction over an area of 30 hectares), was that the EPA's contention that Harte Peat required a licence for the peat extraction it was then carrying on was wrong as a matter of fact and law. This was, Harte Peat said, because the area of its current peat extraction (limited to Area G (26.53 hectares)) did not exceed 50 hectares. Indeed, it claimed that none of the areas included in the licence application in fact exceeded the 50-hectare threshold and thus did not require to be subject to licencing.

243. At the end of the day, for the purposes of the statutory injunction sought by the EPA pursuant to s.99H, the Judge was satisfied that the 50-hectare threshold was met in this case. In reaching her determination that the 50-hectares threshold had been met, the Judge had regard

both to the principles emerging from the case law of the CJEU in respect of the interpretation of projects and activities under the EIA Directive, and the evidence adduced in the injunction application. For the purposes of determining whether the EPA had established the requisite threshold, she made a number of findings, which I have summarised as follows:

- There was an obligation on the High Court to apply the law in such a way that projects likely to have significant environmental effects are made subject to EIA, and for this purpose subject to a consent procedure (para. 139);
- The definitions of "*installation*" and "*plant*" [in the 1992 Act] capture not merely the footprint of the land from which peat is removed, but also any land used for purposes incidental to peat extraction, including lands drained (deliberately or incidentally), access roads, storage areas, buffer zones and sedimentation ponds, all of which should be included in reckoning the threshold (para. 140;
- Nothing in the wording of Class 1.4 requires that lands must be contiguous and to interpret the threshold in this manner would be inconsistent with EU and domestic authorities on project splitting (paras. 141-143);
- It was *"legitimate"* to aggregate lands separated by a road or stream where the land involves peat extraction (para. 146);
- The lands at both Areas A and B (74.56 hectares) are contiguous and form a single peat land with common drainage; the lands at Areas F and G (comprising 128.04 hectares of which Harte Peat were the registered owner of 67.24 hectares within these areas) are also contiguous and also technically and hydrologically connected (para. 148);
- Areas A and B, and F and G, separately satisfy the 50 hectares threshold (para. 150);

- All four Areas, A, B, F and G are part of an overall single bog complex west of Castlepollard and drain into the river Inny which in turn flows into Lough Derravaragh, SPA and share a hydrological connection to the area where peat extraction is occurring (para.150);
- It is appropriate to reckon all areas under the control of an operator that have a technical or hydrological connection to an area where extraction is occurring and on this basis Areas A, B, F and G meet the threshold;
- Harte Peat's activity is licensable on the basis that the threshold is met in Areas A and B and/or Areas F and G;
- To confine reckonable lands solely to areas where peat extraction is actively occurring, is impermissible under EU law and would defeat the legislative intent for regulation;
- Where EU law requires EIA for Harte Peat's peat extraction activity, there is a parallel requirement to seek planning permission, pre-1964 user notwithstanding;
- An IPC licence is required for Harte Peat's activity in Areas A, B, F and G;
- The EPA was required to refuse to process Harte Peat's licence application, however the decision to do so was inadequately reasoned;
- Harte Peat's peat extraction activity is in contravention of the 1992 Act and constitutes a serious and ongoing breach of environmental law;
- There is an onus on the court to ensure conformity with EU environmental law in exercising its discretion under section 99H of the 1992 Act; and,
- While the Orders under section 99H would have significant economic effects, this factor did not outweigh the very serious, detrimental and irreversible

environmental consequences of allowing Harte Peat to carry on unregulated activity.

244. In circumstances where it was clear from the affidavit evidence adduced by the EPA that Harte Peat was carrying out extraction of peat in the course of business without a licence, the Judge found that this was in contravention of the 1992 Act where the 50-hectare threshold was met. She stated:

> *"232. I have concluded on the evidence that HP engages in peat extraction in the course of business which involves an area significantly in excess of 50 hectares. Based on its current activity alone, it is intensively extracting peat from its boglands at Derrycrave near Finnea, Areas F & G. HP is the registered owner of 67.24 hectares of land within these two Areas which are contiguous, technically and hydrologically connected and environmentally and ecologically comprise a single bog of 128.04 hectares. This alone means that the threshold is met. In addition, HP has previously carried out peat extraction, including associated activities which must be reckoned in accordance with the case law above, such as drainage of bogs, the creation of a siltation pond and storage of extracted peat, in Areas A and B (which again are contiguous within one another, comprising a single raised bog, and which also form part of an overall raised bog complex which also includes Areas F and G, as confirmed by the evidence of Dr. Crushell). I have concluded above that as the total area of A, B, F & G clearly exceed 50 ha. and these areas of bog are all part of the single bog complex west of Castlepollard which drain to the River Inny and into Lough Derravaragh, the existing activity at G requires that HP obtain a licence. The obligation to obtain a licence is established by reference to the proximity and connection of these areas of bogland.*

> 233. *At present HP's current activity is concentrated at Area G which adjoins Area F which has already been extracted down to the marl, however orders are also sought under s. 99H of the 1992 Act regarding Areas A, B, D & E in circumstances where HP has previously extracted peat in Areas A & B and with extraction also having occurred in Area E1, a sub-area of Area E, and in the expectation that if ordered to cease peat extraction in one area, HP will simply move to extract from other areas. Peat extraction involving an area exceeding 50 hectares is a specified activity for the purpose of Class 1.4 of the First Schedule to the EPA Act and the requirement for a licence is triggered at this threshold pursuant to s. 82 of the EPA Act. There is no dispute, but that HP continue to operate in the absence of any such licence at present. Having already determined that a licence is required, I am satisfied that an activity is being carried on in contravention of the requirements of this Act."*

245. The Judge noted that s.99H jurisdiction was *"broadly analogous"* to that of the courts under s. 160 of the 2000 Act albeit there was one important distinction which in the Judge's view touched on the scope of the court's power rather than the exercise of the discretion, *"namely the use of the current tense in s.99H…which contrasts with the more widely drawn power under the [2000 Act] which is referable to past, present and future actions"* (para. 234). This distinction notwithstanding, the Judge considered that the case law governing injunctions under s.160 of the 2000 Act which had been cited to her (including *Ampitheatre Ireland Ltd v. HSS Developments* [2009] IEHC 464; *Cork County Council v. Slattery Precast Concrete Ltd* [2008] IEHC 29; *McCoy v. Shillelagh Quarries Ltd* [2015] IEHC 838; *Dunne v. Guessford Ltd* [2021] IEHC 583 and *An Taisce v. McTigue Quarries* [2018] IESC 54) *"to be of persuasive force in guiding the principled exercise of my powers under section 99H of the EPA Act"*.

246. Applying this case law and taking cognisance that it was *"now well established that there is an onus on the Court to ensure conformity with EU environmental law in exercising a*

discretion under section 160 of the PDA 2000 and, by analogy, s.99H of the EPA Act" (para. 237), the Judge was satisfied on the evidence that Harte Peat was carrying out an activity in contravention of the 1992 Act and thus her *"discretion to do anything other than grant orders restraining the unauthorised development"* was limited.

247. Albeit that there were undoubtedly factors which militated against the making of the orders sought (Harte Peat's engagement with the licencing process, its EIAR, the lack of effective regulation in relation to peat extraction, adverse economic consequences for Harte Peat and others), the Judge was satisfied that the nature of the breach could not be considered other than material and significant, even attaching a lower level of culpability to Harte Peat arising from a historic lack of proper regulation. Whilst the historic breaches could not fairly or proportionately be considered gross in light of what the Judge described as the State's piecemeal and ineffective approach to regulation, she considered that on foot of an emerging clarity in the law, *"continuing and ongoing breaches to comply with regulatory controls lawfully imposed properly attract increasing levels of censure and opprobrium"* (para. 244). Hence, the public interest in the mushroom industry, including industry employment and choice of product, *"cannot outweigh the very serious environmental consequences of allowing [Harte Peat] to continue to carry on an unauthorised and wholly unregulated activity"* (para. 245).

248. The Judge considered that *"the public interest safeguarding the environment and the duty on the Court to ensure compliance with the requirements of EU environmental law and guard against a situation which would permit those requirements to be circumvented, requires this Court to intervene to make orders under s.99H…having regard, in particular, to the intensity of its current activity…"* (para. 247).

249. As can be seen, therefore, the Judge held, as a matter of fact, that Areas A and B were contiguous lands comprising 74.56 hectares and that they were also technically and

hydrologically connected. She held that Areas F and G were contiguous as well as being technically and hydrologically connected beneath the road that separated them. She found that environmentally and ecologically, Areas F and G comprised a single bog of 128.04 hectares: *"This alone means that the threshold is met"*. She also concluded that *"as the total area of A, B, F & G clearly exceed 50 ha. and these areas of bog are all part of the single bog complex west of Castlepollard which drain to the River Inny and into Lough Derrravaragh, the existing activity at G requires that HP obtain a licence. The obligation to obtain a licence is established by reference to the proximity and connection of these areas of bogland"*. (para. 232).

250. In effect, the High Court decided that Harte Peat was carrying out *"extraction activity in the county of Westmeath involving areas A, B, F and G"* and thus determined, as regards Areas A and B (74.56 hectares) and F and G (128.04 hectares), that this meant that Harte Peat was involved in peat extraction in the course of business in an area exceeding 50 hectares. Separately, the threshold was also met by the combined Areas F and G. Either combination gave the High Court jurisdiction to grant an injunction pursuant to s.99H and the Judge was satisfied to make orders in respect of both Areas A, B, F and G and Areas F and G, as the Order of 8 April 2022 shows.

An overview of the parties' respective arguments on appeal

251. Harte Peat characterises the Judge's decision as one that completely ignored the state of the evidence in the High Court which, it contends, did not indicate that Harte Peat was carrying out peat extraction in Areas, A, B or F at the time the application for a statutory injunction was made. It says that since the making of the consent Order in May 2019 in respect of the 2013 Proceedings it has completely confined its peat extraction activities to Area G. It argues that the jurisdiction under s.99H of the 1992 Act is clearly limited to an activity which *"is being carried on in contravention of the requirements of the Act"* and so contends that in the absence of any evidence that Harte Peat was carrying on peat extraction in Areas A, B or F, the Judge's

finding at paras. 208-209 of her judgment (where she concluded that Areas A, B, F and G should be regarded as a *"single unit for the purposes of the 50 hectares threshold"*) is insupportable.

252. Harte Peat further describes the Judge's conclusion, at para. 232, that *"[b]ased on its current activity alone, [Harte Peat] is intensively extracting peat from its bogland at Derrycrave near Finnea, Areas F and G* as *"manifestly erroneous"* in circumstances where all the evidence before the High Court established that as of 1 March 2021, Harte Peat was not extracting peat from Area F, an area which had long since been fully extracted. The evidence was that bulk peat extraction in this area had commenced in 2009 and was completed by 2015, by which time the peat in the area was fully exploited. Moreover, Harte Peat points out that Area F is an area in respect of which it gave an undertaking in 2019 not to carry out no further activities: it cannot thus be said that it is carrying on the business of peat extraction in an area from which it has undertaken not to extract peat. It submits that the drainage on Area F did not change that.

253. Harte Peat also says that it was erroneous for the High Court to take into account milled peat harvesting at Areas A and B which likewise had been discontinued prior to the commencement of the injunction proceedings. It points to its IPC licence application as showing that any licence that was being sought in respect of Areas A and B was only prospective in nature and did not imply or have the legal consequences that Areas A and B were, at the time the injunction was sought and granted, being used for the purposes of peat extraction. In the circumstances, Harte Peat argues that there was no basis and no need for any injunction relating to Areas A, B and F in none of which peat extraction was being carried on since the making of the consent order in May 2019: all the relevant site reports indicated that the 26 or so hectares in Area G constituted the *only* area where peat extraction activity was taking place. Moreover, Areas A and B are located some 10 kilometres away from Area G.

254. Harte Peat's principal contention, therefore, is that the aggregation of bog lands in which the High Court engaged for the purposes of its determination that Harte Peat's activity in Area G met the required 50 hectares threshold and thus required a licence, constitutes a pure error of law on the part of the court in circumstances where the EPA's jurisdiction to seek a s.99H order is restricted entirely to what is actually happening at the time application is made for such order.

255. In those circumstances, Harte Peat contends that for the purposes of its injunction application pursuant to section 99H, it was *ultra vires* the powers of the EPA to attempt to aggregate Area G with Harte Peat's bog land holdings in other areas in aid of its argument that Harte Peat's activity in some 26.53 hectares of bog land in Area G required a licence. It is said that the erroneous aggregation of the bog lands comprising Area F (where all peat extraction activity had ceased) with Area G has resulted in the High Court granting *quia timet*-type injunctive relief which is not provided for in section 99H of the 1992 Act.

256. It is submitted that in the event that the Court upholds the position of the EPA and the Attorney General in the judicial review proceedings, it is for Westmeath County Council to take action to prevent Harte Peat's activities: the EPA does not have *locus standi,* statute wise, to do it unless the EPA's arguments regarding the aggregation of Areas F and G (or indeed the other aggregation engaged in by the Judge) is considered by the Court to stand up.

257. The EPA acknowledges that at the time of the making of the s.99H order there was no activity going on in relation to Areas A and B, and, so, accepts that when looked at in isolation the injunction granted by the High Court insofar as it related Areas A and B was in the form of *quia timet* injunction. It submits, however, that there was an intention on the part of Harte Peat to extract peat from those areas in the future. Asked by the Court where the power was under s.99H to make a *quia timet* order, counsel for the EPA pointed to the purpose of Class 1.4 which was directed at commercial peat operators. To my mind, counsel's response did not

address the *quia timet* nature of the relief granted in respect of Areas A and B, which is not provided for in s.99H.

258. As regards Areas F and G, the EPA points to the scientific evidence before the High Court which was to the effect that Areas F and G, albeit separated by a road, comprise a single bog (which exceeds 50 hectares), as duly found by the High Court. The EPA posits that what was occurring in Areas F and G was a continuous and progressive extraction of all of the peat, bit by bit, in this single bog which, in fact, in total comprises 128 hectares.

259. Albeit the EPA accepts that Area F is exhausted (and has been since 2015), it maintains that the peat extraction presently being carried out by Harte Peat affects the entirety of Areas F and G which comprise a single bog. Thus, the EPA says, it cannot be that s. 99H of the 1992 Act, insofar as it refers to activity that "*is being carried on*", can be read in the manner suggested by Harte Peat. Were that the case, counsel for the EPA posits, it would render s. 99H redundant and unusable.

260. The EPA also points to the fact that the Judge duly noted the general methodology of commercial peat extraction whereby at any given time a commercial peat extraction operator was likely to be working in one discrete area of the peat lands under its ownership and control. That notwithstanding, the Judge decisively rejected the argument that Harte Peat's commercial peat extraction only *"involves"* an area of 26.53 hectares. The EPA submits that Harte Peat's activity in Area G must be construed as the Judge determined, namely that past activity in Area F is clearly relevant when reckoning the requisite threshold for the purposes of s.99H. It argues that the Court cannot be asked to ignore the large artificial lake that now exists in Area F, which is part of the same bog as Area G where Harte Peat's commercial activity is presently focused, or the fact that this lake is in the immediate vicinity of the natural mesotrophic lake, Lough Bane, which, given Area F's common drainage and hydrological connection to Area G, will be

affected by, and ought properly therefore be regarded as involved in Harte Peat's commercial extraction activities.

261. Counsel for the EPA also submits that the scope of Class 1.4 should not be allowed to be frustrated by a narrow construction of the words *"is being carried on"* in s.99, which could, he says, result in a frustration of the objectives of the EIA Directive. Counsel posits the scenario of a developer moving successively from one area to another to keep themselves sub-threshold. He points outs out that the Judge was alert to this danger, as is evident from paras. 110 and 144 of her judgment.

262. With reference to the earlier compromise agreement of May 2019 between the EPA and Harte Peat that acknowledged that peat extraction in Area F had been completed and that Harte Peat would confine its activities to Area G, the EPA submits that the previous 2013 Proceedings and their outcome can have no bearing on the correct interpretation or reckoning of the threshold. The EPA also reminds the Court that the sidebar agreement to the compromise of the 2013 Proceedings provided that should the 2019 Regulations be struck down (as they were), the terms of the consent agreement would not be a bar to the EPA taking fresh proceedings. It submits that all the sidebar agreement said was that Harte Peat could extract peat until the EPA determined the licence application.

263. The EPA further contends that Harte Peat's interpretation of the words *"is being carried on"* in s.99H cannot stand in light of how *"activity"* is defined in the 1992 Act which definition refers to any process, development or operation specified in in the First Schedule to the Act and which is carried out in an *"installation"*. The latter is defined as meaning *"a stationary technical unit or plant where the activity concerned or referred to in the First Schedule is or will be carried on, and shall be deemed to include any directly associated activity, whether licensable under this Part or not, which has a technical connection with the first-mentioned activity and is carried out on the site of that activity"*. It is submitted that the Judge correctly

determined that the various definitions of *"installation"* and *"plant"* captured not only the footprint of the land from which the peat was harvested but also any part of any land used for purposes incidental to peat extraction.

264. Furthermore, as regards Areas F and G, the EPA says that, here, the *"technical connection"* is the hydrological and drainage connections between the two sites, and that this drainage not only falls into the realm of *"associated activity"* but is also, *of itself* peat extraction as defined in the 2000 Act. Hence, the EPA's primary submission is that the drainage between Areas F and G comprise part of the peat extraction for which s.99H provides. Counsel also submits that the word *"involves"* as it appears in Class 1.4 requires to be given a broad meaning for environmental purposes and that it captures any lands used by a peat extractor for the purposes of or incidental to peat extraction. The EPA also relies on Case C-216/06, *Commission v. Ireland* as authority for the proposition that for the purpose of EIA all activities associated with the main project require to be looked at. This approach, counsel says, suggests a reading of Class 1.4 that does not confine itself to a narrow construction of what is being harvested or extracted at any point in time but rather suggests that what is to be looked at is all ancillary activities.

265. By reason of the foregoing, the EPA contends that Harte Peat's argument that what is provided for in s.99H is something that is site specific should be rejected.

<u>Discussion and Decision</u>

266. In light of the parties' respective arguments, it seems to me that the issue to be determined in the s.99H injunction appeal is a discrete one, namely whether the Judge correctly established that the requisite 50 hectares threshold was met for the purposes of making an order under s.99H.

267. Part 4 of the 1992 Act, as amended, provides that activities of any class specified in the Act or by ministerial order shall not be carried on, on or after such date as may be specified in

the order, unless a licence or revised licence under Part 4 is in force in relation to the activity. The First Schedule to the Act specifies the activities to which Part 4 applies and they include, as we have seen, at Class 1.4, *"the extraction of peat in the course of business which involves an area exceeding 50 hectares"*.

268. At para. 231 of her judgment, the Judge acknowledged that the *"self-contained statutory procedure under Section 99H only applies where the court is satisfied that an activity is being carried in in contravention of the EPA Act"*. In other words, a s.99H application may only be made where an IPC licence is required for peat extraction which is being carried on in the course of business and only where the extraction of peat involves an area exceeding 50 hectares. Here, the salient question is whether the area in respect of which the activity *"is being carried on"* by Harte Peat exceeded 50 hectares such that triggered the EPA's entitlement to seek injunctive relief. Fundamentally, the EPA had to establish that commercial peat extraction within the meaning of Class 1.4 was being carried on at the time (March 2021) the injunction was applied for.

269. It is noteworthy that s. 99H is phrased in totally different terms to s. 160 of the 2000 Act. Pursuant to s.160, injunctive relief may be sought in relation to activity that *"has been, is being or is likely to be"* carried out. Whether intentionally or otherwise, unlike s. 160, the jurisdiction established by s.99H does not admit of *quia timet* relief. I have already observed that if one were to look only at Areas A and B, the relief granted could only be described as *quia timet* relief. Indeed, the same could be said of Area F. Of course, as far as Areas F and G are concerned, the EPA's primary argument is that they comprise a single bog by virtue of being contiguous (save being separated by a road) and that they are hydrologically connected.

270. As regards Areas F and G, the first thing to be noted is that it is not disputed by the EPA that since the consent Order was made in May 2019 in respect of the 2013 Proceedings, Harte Peat has only physically carried out peat extraction in Area G, at Derrygrave, an area that

comprises 26.5 hectares. Indeed, the grounding affidavit of John Gibbons and the exhibits thereto (upon which the present injunction proceedings were based) appear to confirm this. Moreover, it is not disputed that Area F was not the subject of peat extraction after the making of the May 2019 Order, a fact that also seems to be acknowledged by Mr. Gibbons in his affidavit.

271. In my view, a plain reading of s. 99H, to wit, the words *"is being carried on"* (emphasis added), shows that the EPA has a limited power to stop an activity, namely that which is *actually* happening, and which does not have a licence. The phraseology in the section invites an interpretation or construction that what is being sought to be restrained or stopped is some thing or process that is actively occurring at the time the injunction is being sought at a particular location or site. In *Mahon v. Butler* [1997] 3 I.R. 369, the Supreme Court had to construe s.27 of the Local Government (planning and Development Act 1997 (*"the 1997 Act"*) (the predecessor to the 2000 Act) in a case where the applicants were seeking to restrain what was said to be unauthorised use of the respondent's lands at Landsdowne Road for a concert which was scheduled to take place the following month. Section 27 provided that where development for which planning permission was required *"has been carried out, or is being carried out, without such permission…"* the High Court *"may, on the application of the planning authority or any other person…by order require any person to do or not to do…anything that the court considers necessary…"*. The High Court granted the injunction sought pursuant to s.27. The respondent's appeal was allowed by the Supreme Court. In reversing the High Court, Denham J. held that the section *"plainly refers to events occurring in the present or which have occurred in the past. There is no reference to future events."* She opined that the planning code *"should be construed strictly"*. She further stated:

> *"Section 27 is written in clear and plain language. It is not for the courts to legislate. If there is a lacuna in legislation then it is appropriate to indicate that gap-but not to fill it…"*

The words of Denham J. resonate here, particularly in circumstances where the power given to the EPA in s.99H is even more limited than the powers at play in s. 27 of the 1997 Act.

272. Furthermore, I consider that the phrase *"is being carried on"* cannot logically, on the facts established here, be understood to mean that one can take into account, for Class 1.4 purposes *in the context of a s.99H order*, the fact that Area G (28.53 hectares) has common drainage with Area F, or Area F's status as an area that has been almost entirely excavated. In my view, the phraseology in s.99H (*"is being carried on"*) does not readily admit within its temporal parameters the actual state of affairs that obtained as regards Area F and Areas A and B at the time the injunction was sought (where the evidence established that no peat extraction was taking place in March 2021).

273. For the purposes of the s.99H injunction, it is not the various locations of Harte Peat's business, or whether activity has taken place in the past or is intended for the future, that is the triggering event for invoking the requisite jurisdiction to seek an order under the section, rather a plain reading of s.99H makes it clear that it is the actual activity that is taking place at the time the order is sought that is the relevant consideration for s.99H purposes, including determining whether the 50 hectare threshold is being exceeded, thus triggering the EPA's jurisdiction to seek injunctive relief. All that being said, however, in my view, if the only issue here were the *quia timet* nature of the injunction being sought by the EPA, and if it was established that past activity had, or proposed future activity was lively to have, adverse effects on the environment, in order to comply with EU law there may be compelling reasons for reading s.99H more broadly than the words *"is being carried on"* on their face suggest, notwithstanding the *dicta* in *Mahon v. Butler* (where no EU law issue arose). All that, of

course, would still depend on whether the factual predicate (in terms of area) for an order under s.99H had been established. It is also relevant in this context that s.99H is not the sole means by which Harte Peat's activities may be enjoined given the availability of s.160 of the 2000 Act.

274. The only jurisdiction conferred on the EPA is in respect of peat-extraction which exceeds 50 hectares. The question here is whether the actual activity being carried on in March 2021 was in an area that exceeded 50 hectares. In other words, the only thing that can be injuncted is an activity which itself requires a licence. In order to apply for an injunction, the EPA had to show that Harte Peat was as of March 2021 actively carrying on commercial peat extraction in an area in excess of 50 hectares.

275. The activity which Harte Peat was carrying on at the relevant time was as a matter of fact confined to 26.53 hectares in Area G- a sub-threshold area. Indeed, this is specifically acknowledged by the Judge at para. 233. All the site reports indicated that Area G was the only place where extraction of peat was taking place at the time the injunction was applied for. By the terms of the May 2019 consent Order, Harte Peat was prohibited from extracting peat in any location other than Areas A, B and G. As a matter of fact, post May 2019, it confined its peat extraction to Area G, albeit it is common case that, as its subsequent licence application in October 2019 shows, it was seeking an IPC licence in respect of Areas A and B as well as Area G (presumably on the basis of a intention to recommence peat extraction in Areas A and B in the future). Notably, the Judge did not decide as a matter of fact that Areas A and B were being used for peat extraction at any time after the making of the May 2019 Order. Thus, there was no factual basis established that could have led to a conclusion that Harte Peat were actively extracting peat in Areas A and B (or indeed Area F) at the time of the injunction application.

276. Insofar as the Judge determined that Areas A and B were contiguous and technically and hydrologically connected and determined likewise in respect of Areas F and G (and indeed that all four areas comprised a single bog), I accept entirely that those factors are relevant factors in determining whether there is an activity for the purposes of Class 1.4 (*i.e.* whether a licence is required). And while such factors may equally be relevant to the question of whether the Court should make an order under s.99H, I do not see, however, how the particular factual findings the Judge made as regards the technical and hydrological connections between Areas A, B, F and G can *of themselves* be said to be determinative here given the factual matrix that obtained at the time the injunction was being sought. In my view, it would have to be established *as a matter of fact* that at the time the injunction was applied for, commercial peat extraction was being carried on in Areas A, B and F (or in one or more of those areas in conjunction with Area G) that exceeded the 50 hectare threshold, or, alternatively, that Harte Peat's activity in Area G as of March 2021 was a continuation of a process whereby Harte Peat had successively engaged in the fractioning of its lands to sub-threshold levels (in other word, project splitting in the sense warned against in Case C-392/96, *Commission v. Ireland* (paras. 75-76 and 82)), from which it could reasonably be inferred that this was being done in an attempt to keep peat extraction below 50 hectares, and thus avoid statutory overview by the EPA. However, none of the scenarios to which I have just referred was established in this case, in my view.

277. To my mind, the frailty in the order granted pursuant to s.99H attaches to the *vires* of the EPA to seek such order in circumstances where the actual activity which was sought to be restricted in March 2021 (when the injunction application was lodged) was only being carried on in an area that fell below the requisite 50 hectares threshold for an IPC licence.

278. I note from para. 234 of her judgment, that the Judge herself, while of the view that the s.99H jurisdiction was broadly analogous to an application pursuant to s. 160 of the 2000 Act,

was alert to the restriction on the scope of the court's power under s.99H. As she stated, *"the use of the current tense of the EPA Act with reference to an activity which is being carried on…contrasts with the more widely drawn power under the [2000 Act] which is referable to past, present and future actions".* Notwithstanding this difference, however, she considered that the s. 160 case law which had been opened to her (including well established case law as regards the onus on a court to ensure conformity with EU environmental law in exercising a discretion under the 2000 Act and, by analogy, s.99H of the 1992 Act) essentially compelled a conclusion that Harte Peat were carrying out an activity in contravention of the 1992 Act. In part, therefore, the Judge considered that the imperative to uphold EU environmental law (which mandates regularisation of peat extraction) trumped the temporal limitation which s.99H puts on the relief available to the EPA under the section.

279. Whilst the Judge's reasoning is indeed laudable, guided as it was by reliance on case law imbued with EU environmental law principles (and whilst I agree entirely that the approach adopted by the Judge may be a suitable one in any number of scenarios involving peat extraction including an application for an injunction pursuant to s.99H), the discretion which the Judge was exercising in the present case was, from the outset, dependent on it having been established by the EPA that active peat extraction was being carried on in an area exceeding 50 hectares. That was not established in this case, in my view. In short, therefore, having regard to the factual matrix that pertained at the time the application for relief under s. 99H was made (as outlined above), it was not open to the Judge to engage in the exercise of her discretion. As Denham J. said in *Mahon v. Butler*, "*Section 27 provides a precise statutory remedy. In making an order under that section, the court cannot exceed the jurisdiction conferred by that section. It is a clear and comprehensive code which should be construed strictly. The court has a discretion to exercise in a s.27 application but that is within the ambit of the section and is not to extend the jurisdiction."*

280. Albeit that the view of the Court is that the factual matrix in this case did not permit the exercise of the jurisdiction provided for by s. 99H of the 1992 Act, insofar as it may be considered that injunctive relief is warranted in this case by reason of Harte Peat's activities in Area G, there remains the option (including for the EPA, Ireland and the Attorney General) of applying for injunctive relief under s.160 of the 2000 Act. Whether an order pursuant to s.160 is warranted is not a matter for this Court. I might add, however, that I consider that the likelihood of Harte Peat resuming its activities on Area G a remote one given counsel for Harte Peat's concession, at the hearing of the appeal, that were this Court to find that Harte Peat required planning permission for the activities for which an IPC licence was sought (which it has), Harte Peat would be in a very weak position in any s.160 injunction proceedings in saying that planning permission is not required. As can be seen, this Court has determined that the EPA was correct to find that the activity for which Harte Peat sought a licence requires planning permission and thus, there can be no question of Harte Peat being entitled to resume its activity in Area G (or indeed any other area) absent an appropriate planning permission under the 2000 Act.

Summary

281. In all of the circumstances of this case, I am satisfied that Harte Peat is correct in submitting that it was not the case when the injunction proceedings commenced in March 2021 that Harte Peat was extracting peat in an area exceeding 50 hectares. That being the case, there was no legal basis for the order made by the Judge on 8 April 2022 pursuant to s. 99H. However, that order remains in place pending final orders (including as to costs) being made by the Court following a short hearing which the Court will schedule for a date in Michaelmas term, and in respect of which the parties will be advised. In the interim, it is for the parties to consider their positions arising from this judgment and the Court will expect an update on same when the matter next comes before the Court.

282. As this judgment is being delivered electronically, Collins J. and Power J. have indicated their agreement therewith and with the orders I have proposed.