THE HIGH COURT

[2022] IEHC 727

[2020/177 MCA]

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACTS AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT, 2000

BETWEEN

NORTH WESTMEATH TURBINE ACTION GROUP CLG

APPLICANT

AND

WESTLAND HORTICULTURE LIMITED, CAVAN PEAT LIMITED AND COOLE WINDFARMS LIMITED

RESPONDENTS

JUDGMENT of Ms. Justice Bolger delivered on the 21st day of December, 2022

1. This is the applicant's application pursuant to s. 160 of the Planning and Development Act 2000 in respect of what they say are unauthorised works that were and are being carried out on the lands located on Clonsura Bog in Co. Westmeath. For the reasons set out below, I am satisfied that some unauthorised development has taken place but I am exercising my discretion to refuse this application and am allowing the applicant liberty to apply.

Factual background

2. Clonsura bog, located outside the village of Coole in County Westmeath, is owned by the second named respondent ("Cavan Peat") and leased to the first named respondent ("Westland"). Westland commenced industrialised peat milling and harvesting on the bog in 1999. Coole Windfarm Ltd. ("Coole Windfarm") is the recipient of planning permission to build thirteen wind turbines, four of which are to be located on the bog. The applicant is a company that was incorporated for the purpose of, inter alia, participating in the planning process and assisting the public in relation to local environmental concerns.

Westland's activities on Clonsura Bog

3. On 15 April 2013 An Bord Pleanála made a declaration pursuant to s.5 of the 2000 Act that the activities of Westland at Clonsura were development but were not exempted development. Westland and Cavan Peat issued judicial review proceedings challenging that declaration. In *Bulrush Horticulture Ltd v. An Bord Pleanála; Westland Horticulture Ltd v. An Bord Pleanála* [2018] IEHC 58. Meenan J. upheld the s.5 declaration and held that

"the drainage of boglands, peat extraction, accesses from public roads, peat handling and associated activities and works at… Clonsura near Coole,… County Westmeath, are development and were exempted development until 20 September 2012 after which it is development and not exempted development".

4. Following that decision, the Planning and Development (Exempted Development) Regulations 2019 were introduced. Peat harvesting on bogs was permitted, pending an application for an Integrated Pollution Prevention and Control licence. Westland resumed peat harvesting operations until July 2019 when those Regulations were successfully challenged by Friends of the Irish Environment CLG ("FIE") [2019] IEHC 555, [2020] 3 IR 162. By judgment delivered 23 July 2019 the High Court granted an interlocutory injunction restraining the implementation of the Regulations. Peat extraction on Clonsura bog was rendered unlawful and Westland says it immediately ceased its milling activities.

5. There is disagreement between the parties about the extent of Westland's works at Clonsura since July 2019. The applicants claim to have identified the following activities but the existence of all but the three in italics are disputed by Westland:

(i) The removal of stockpiled milled peat from the development by heavy goods vehicles to an off-site location and then to the company factory (said to continue up to 7 May 2020);

(ii) The maintenance of all production fields;

(iii) The collection of loose peat from production fields;

(iv) The maintaining of the extensive drainage system on the bog, though a process of excavation and deposition that it describes as "ditching of drains within the bogs";

(v) The maintenance of drainage infrastructure and outfalls;

(vi) The maintenance of silt ponds;

(vii) The removal of spoil;

(viii) The storage of milling machinery;

(ix) lorry movements to and from the lands;

(x) The maintenance of an internal road by the deposition of crushed stone.

6. Westland's activities on Clonsura bog was the subject of a separate s.160 application by Friends of the Irish Environment CLG ("FIE") against Westland and Cavan Peat (High Court Record No. 2018/200 MCA), which was settled on the basis that Westland would cease excavation but would continue to carry out 'winterisation measures' pending its application to An Bord Pleanála for substitute consent. Westland say that an order was made by the High Court in December 2018 reflecting that settlement agreement.

7. In May 2020 An Bord Pleanála granted Westland leave to apply for substitute consent. Westland subsequently applied for, and was granted, an extension of time for making the application due to the existence of court proceedings. Those proceedings were not identified in An Bord Pleanála's extension of time but were identified by Westland during the hearing as FIE's challenge to the regulations and other proceedings in which the legislation on substitute consent is being challenged. The applicant claims that Westland is improperly securing an 'enforcement holiday' by seeking to postpone its obligation to apply for substitute consent.

8. The applicant claims that what Westland's winterisation measures are unlawful activity coming within the s.5 declaration including construction and excavation of drains. The applicant claims that this activity, along with what the applicant says is Westland's failure to properly clear and maintain silt ponds and drains, is causing pollution and damage to the local environment.

Coole Windfarm's activities on Clonsura Bog

9. Westland and Cavan Peat entered into a commercial arrangement with Coole Windfarm to site four wind turbines on Clonsura bog. The applicant unsuccessfully opposed Coole Windfarm's application to An Bord Pleanála for planning permission for the wind farm but was given leave by the High Court to challenge that grant of planning permission. In May 2019 a stay was placed on the implementation of the planning permission and the substantive case was heard in 2020. Final written submissions were filed in September 2020 and judgement was reserved. At the time of this decision, judgment was still awaited.

10. There is a dispute between the applicant and Coole Windfarm as to the nature of the agreement between Westland, Cavan Peat and Coole Windfarm that will enable the construction of the windfarm turbines on Clonsura Bog. The applicant claims that there is an agreement to integrate Coole Windfarm's wind farm development with what the applicant says is Westland's ongoing peat extraction activity, which by necessity requires the bog to be continued to be de-wetted so as to be suitable as a wind farm site and for the milling of peat. The applicant claims that an increased volume of harvested peat was being removed from the bog by Westland throughout 2019 and into 2020, and that at the same time Westland's agent was facilitating work carried out on the turbine locations by contractors on behalf of Coole Windfarm. The applicant claims that Westland was carrying out unauthorised peat development and Coole Windfarm was carrying out unauthorised wind farm development all in the context of their integration agreement. The applicant claims that Coole Windfarm proposes to erect its turbines and associated infrastructure on Clonsura Bog by using the peat extraction infrastructure of roads, drainage channels and excavations, ie that Westland's current activities will render the land suitable for the erection of Coole Windfarm's development. The applicant therefore claims that the wind farm is being engrafted on an unauthorised development and is unlawful. These claims are strenuously denied by Westland and Coole Windfarm who argue that the applicant's claims are speculative, are not grounded on evidence and in any event raise issues that

belong in the applicant's judicial review of the planning permission and should not have been brought into these proceedings.

11. In addition the applicant claims that Coole Windfarm has conducted site investigation works on Clonsura bog without adhering to the conditions of the planning permission and in breach of the stay on the implementation of the planning permission. Coole Windfarm confirm that they have conducted geotechnical investigations on the site but deny that this is part of the implementation of the planning permission for the wind farm as they say it is a standalone activity not connected with the windfarm. They claim the works are exempt from planning permission by virtue of Class 45 of Schedule 2 (Exempted Development), Part 1 of the Planning and Development Regulations 2001 (S.I. No. 600/2001) which exempts:

> "Any drilling or excavation for the purpose of surveying land or examining the depth and nature of the subsoil, other than drilling or excavation for the purposes of minerals prospecting".

Applicant's legal submissions

12. The applicant contends the court should restrain the continuation of what it says is unauthorised peat development on Clonsura Bog ongoing since 2019 which has caused environmental damage. Every fresh excavation of material from a drain constitutes new works and is a fresh act of development and a new structure all coming within the scope of s.160. The applicant relies on the decision in Bulrush upholding the s.5 declaration of An Bord Pleanála that Westland's activities on Clonsura bog constitute an unauthorised development.

13. The applicant contends that what it claims is the engrafting of the windfarm development on the unlawful peat extraction, breaches the principle established in *Cleary Compost and Shredding Ltd. v. An Bord Pleanála* [2017] IEHC 458 that a development cannot be engrafted onto an unauthorised development.

14. The applicant disputes Coole Windfarm's entitlement to rely on the exemption contained in Class 45. Such a claim must be strictly construed and it must be shown that the works clearly and unambiguously come within the terms set down in the Regulations; *Dillon v. Irish Cement Limited* (Unreported, Supreme Court, 26 November 1986). S.4(4) of the 2000 Act removes the protection of exempted development from otherwise qualifying development where an environmental impact assessment ("EIA") is required, which the applicant says is required for these works because they form part of the windfarm development and cannot be split into a standalone portion of work so as to avoid the requirement to carry out an EIA in respect of the entire project; Case C-227/01 Commission v Spain; Case C-205/08 Umweltanwalt von Kärntner Landesregierung at paras. 28-29; *O Grianna v An Bord Pleanála* [2014] IEHC 632; *Daly v Kilronan Windfarm* [2017] IEHC 308.

15. The applicant relies on the public interest that they say is privileged in ensuring compliance with the planning code; *Meath County Council v Murray* [2018] 1 IR 189 and

Morris v Garvey [1983] IR 319 and on the need, and the court's obligation, to give effect to the requirements of EU law. They submit there is no basis for the court to exercise its discretion against granting relief as there is no claim of employment or other arguable public benefit flowing from the works of either Westland or Coole Wind Farm. The public interest in these proceedings lies in enforcing compliance with the planning code and protecting the environment, neither of which can defend itself, and needs to be represented, in this case by the applicant.

Westland and Cavan Peat's submissions

16. Westland and Cavan Peat condemn the applicant's case as a collateral attack on An Bord Pleanála's decision to grant leave to apply for substitute consent, after they failed to challenge the application. An Bord Pleanála, pursuant to section 177L of the Act, could have refused leave to apply and/or directed cessation of any development or activity or directed remediation, which would essentially be the same as the reliefs sought by the applicant in these proceedings. No such directions were made by the board.

17. Westland and Cavan Peat dispute that there has been any peat extraction on the bog since July 2019 and challenge the averments sworn by the applicant's deponent as false and not grounded on evidence. They admit to works that they say are normal winterisation measures and suggest they are maintenance works, exempt pursuant to S.4(1)(h). They submit that the cessation of those works would cause environmental damage and circumvent the Directive. They dispute that the s.5 declaration discharges the applicant's burden to prove an unauthorised development; *Krikke v Barranafaddock Sustainable Electricity Ltd* [2021] IECA 217 (since confirmed by the Supreme Court in *Krikke v Barranafaddock Sustainable Electricity Ltd* [2022] IESC 41) but in any event, deny the existence of any unauthorised development and rely on what they say was their immediate cessation of peat milling upon the quashing of the Regulations in July 2019. They dispute any "engrafting" of the wind farm development onto the existing bog use and submit that the applicant has failed to prove that. They criticise the applicant for having delayed, for having failed to acknowledge the substance of the pending application for substitute consent and for not having pursued matters via the stay order made in the other judicial review proceedings. They say the court should exercise its discretion not to grant any relief pursuant to s.160.

Coole Windfarm's submissions

18. Coole Windfarm says that the applicant's 'engrafting' case is an abuse of process as an attempt to remedy an evidential deficit in the judicial review proceedings. They submit that the applicant has not offered any proof of an integration agreement but has simply speculated on the function of an Interactions Management Group which is identified in the EIA as something that will be set up to coordinate activities between the respondents. They criticise the applicant for not making this case to the court that has seisin of the stay on the implementation of the planning permission. They dispute that the geotechnical investigations carried out in June and July 2020 form part of the wind farm or the commencement of the planning permission for it and rely on the affidavits of the consultants who carried out those investigations. They rely on the exemption provided by Class 45 of Schedule 2 of the Regulations which exempts "drilling or excavation for the

purpose of surveying land or examining the depth and nature of the subsoil, other than drilling or excavation for the purposes of minerals prospecting" and dispute that s.4(4) of the 2000 Act precludes them from relying on this exemption. The investigations were to allow an understanding of the nature and type of the subsoil on the site and form no part of a development subject to EIA. The applicant has not proved that the site investigation works form part of a development that was subject to EIA for the purposes of s. 4(4) the 2000 Act. As the investigations were standalone and not functionally or legally dependent on the wind farm, they do not lose the exemption afforded by Class 45.

19. Whilst Coole Windfarm deny any engrafting of the wind farm onto an unauthorised development, they also assert that the applicant has failed to discharge the burden of proof that rests on them to prove its "engrafting" argument as they have not proved the existence of any unauthorised development. Coole Windfarm rely on the Inspector's Report but in any event, they dispute that the *Cleary Compost* decision supports the applicant's "engrafting" principle as the decision simply affirmed the Board's entitlement to refuse planning permission to intensify an existing unauthorised use. They say the decision is not authority for the proposition that any finding of historic unauthorised development that has concluded has the effect of sterilising the site where any such unauthorised development may have occurred or that no exemption can be relied on in such a situation.

20. Finally Coole Windfarm urges the court to exercise its discretion to refuse this application because of:

(a) The application by way of notice of motion was issued on 31 July 2020, after the site investigation works had concluded.

(b) There are no ongoing works to prohibit.

(c) The concluded site investigation works are minimally invasive.

(d) The wind farm development which appears to be the real target of the applicant's objection is currently the subject of judicial review proceedings in respect of which judgement is awaited.

Orders sought

21. The notice of motion, which issued on 31 July 2020, is drafted in wide terms and seeks a broad range of injunctive and declaratory reliefs. The applicant confirmed at the outset of the hearing that they were primarily seeking orders directing the respondents to cease carrying out or continuing any unauthorised development on Clonsura bog. They later said that they wanted an order restraining Cavan and Westland from carrying out any developments in relation to peat farm development in the absence of planning permission and restraining Coole Windfarm from carrying out any developments associated with the windfarm development on Clonsura bog.

Section 160

22. Section 160 (as amended) provides:

"160.—(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:

(a) that the unauthorised development is not carried out or continued;

(b) in so far as is practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;

(c) that any development is carried out in conformity with—

(i) in the case of a permission granted under this Act, the permission pertaining to that development or any condition to which the permission is subject, or

(ii) in the case of a certificate issued by the Dublin Docklands Development Authority under section 25(7)(a)(ii) of the Dublin Docklands Development Authority Act 1997 or by the Custom House Docks Development Authority under section 12(6)(b) of the Urban Renewal Act 1986, the planning scheme made under those Acts to which the certificate relates and any conditions to which the certificate is subject.

(2) In making an order under subsection (1), where appropriate, the Court may order the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or other feature.

23. The section addresses unauthorised developments past, present or future. Unauthorised development is defined at s. 2 (1) as the carrying out of any unauthorised work including the construction, erection or making of any unauthorised structure or the making of any unauthorised use. "Works" are defined to include "any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal .."

24. Any exemption from a s. 160 application must be strictly construed and the burden of proof rests on a respondent to show that the development clearly and unambiguously comes within the terms of such an exemption; *Dillon v. Irish Cement Ltd* (unreported, Supreme Court, 26 November 1986) per Finlay C.J. at para. 4.

25. Section 160 has a European dimension insofar as an application relates to a development that requires an EIA, as the windfarm development in this case did. Article 10A of the EIA Directive requires a Member State to provide effective, proportionate and dissuasive penalties for infringements of national legislation adopted pursuant to that Directive.

The burden of proof

26. The applicant accepts the burden to prove an unauthorised development, including an evidential basis for it. Insofar as the respondents claim either that their activities have the

benefit of planning permission or that they constitute an exempted development, the burden of proof rests on them.

27. The applicant has made a number of allegations on affidavit which are heavily contested. No independent expert evidence was furnished by any of the parties which left the court having to assess the strength of the claims and counterclaims solely by reference to the affidavits of the parties, their servants or agents. There are claims that can be established by bare assertion by a deponent who claims to have seen something, other claims are not so straightforward. Claims of pollution or environmental damage fall into the latter as what may look like pollution to the unqualified eye may not in fact be so. I am mindful in this regard of the dicta of Charleton J. in Sweetman v Shell [2016] IESC 58, [2016] 1 IR 742 at para. 22 where he commented on the role of 'proof' and cited the decision of Dunne J on the importance of an assertion being supported by evidence:

> "While those who genuinely pursue a concern for the environment may not have perfect knowledge of infringements, licences or permissions and the conditions attached thereto when they assert a challenge to a particular development in good faith, proof remains the cornerstone of our system of justice. One can grant a measure of appreciation, but these criticisms go far beyond that. Further, in adversarial proceedings, orders such as that made by Smyth J to enable inspection, and orders for discovery of documents, elucidate the public nature of the planning process together what can be observed on the ground offer sufficient in the way of court procedures for the gathering of appropriate evidence in environmental proceedings. There was no want of information. There is no warrant for disturbing the order of the High Court as to costs made in consequence of that judgment. There is nothing in the Act of 2011 to indicate any intention by the legislature to look backwards to 2006 and to alter existing rights. Thereafter, the appeal to this Court was warehoused by Peter Sweetman. There was no movement over most of a decade despite Shell facing an action which could have resulted in an order to reverse a huge infrastructural project. This is not a fair way to conduct litigation. In terms of the pursuit of an appeal, the trenchant comment in this Court by Dunne J. ought to be recalled:
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> *'It goes without saying that a person invoking the jurisdiction of the courts in proceedings of this kind has a responsibility in relation to the assertions being made in the proceedings. Assertions have to be supported by evidence. Equally, such a person has a responsibility to ensure that the proceedings are managed appropriately and speedily. Delay in the conduct of the proceedings may cause hardship to the party entitled to develop a particular project and in cases of excessive delay, the delay may disentitle the applicant to the relief sought in the proceedings'".*

28. The obvious need for the court to have evidence on which it can make a determination has been reiterated since that decision. For example in *Irish Water v Woodstown Bay Shellfish Ltd* (2017) IEHC 223 Baker J said:

> "40. In concrete terms, this means in the present case that an order may not be made by the court permitting inspection of the site, it being a European site, unless the court has evidence on which to assess the environmental impact, if any, of the works proposed, and has sufficient evidence on which it might, in a suitable case, make directions to reduce or ameliorate the environmental impact of the carrying out of such activity
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> …
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> 46. As to the nature of the assessment to be carried out, Finlay Geoghegan J. explained the strict requirements that the appropriate assessment be carried out 'in the light of the best scientific knowledge in the field' and on the basis of 'complete, precise and definitive findings and conclusions which may not have lacunae or gaps'".

29. In many previous cases where issues of environmental concern were raised, evidence of actual and potential environmental impact was put before the court. In *McCoy and ors v Shilleagh Quarries and ors* [2015] IEHC 838 Baker J. stated at para 73:

> "The quarry is in an area of particular environmental sensitivity in the Wicklow Mountains, it is close to but not part of European sites, it is operating close to the maximum height at which the 350m contour line in respect of which the local authority in its development plan has determined there is to be no development of this nature. I have heard extensive evidence of the works being carried out of and the potential and actual environmental impact. I accept what is argued by counsel for the respondent namely that the evidence does not point to an immediate or potential damage to the aquifer, and I have also heard evidence that the bird habitat sought to be protected by the neighbouring SAC is not overly adversely affected in that the birds have shown a remarkable ability to modulate their behaviour and to adapt to environmental change. The visual impact is visible in a relatively small window, but I consider that the quarrying work has created a discordant landscape in an area of exception public amenity".

30. More recently in *Harte Peat v EPA* [2022] IEHC 148, Phelan J. had the benefit of evidence from a chartered ecologist:

> "In particular, 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 of the

EPA Act having regard, in particular, to the intensity of its current activity, including the depth to which HP is extracting, the fact that HP has been aware of the decision in Bulrush & Westland but continues to seek to advance arguments to the effect that it is not subject to regulation which are inconsistent with that authority and the evidence that unauthorised peat extraction activity, which is being carried out in the absence of any regulation, is having detrimental and irreversible environmental consequences on the lands in question (as more fully set out in the report of Dr. Patrick Crushell, Chartered Ecologist exhibited in the proceedings). In my view, the public interest in ensuring that peat extraction is carried out in compliance with both domestic and EU environmental law cannot be overstated and is the single most significant factor warranting the grant of the orders sought by the Agency".

The affidavits

31. Ms. Jen Gallagher swore three affidavits on behalf of the applicant. Westland furnished five affidavits sworn by three deponents and Coole Windfarm furnished three affidavits sworn by two deponents.

32. In assessing the applicant's allegations I have had regard to the following:

(i) The absence of independent expert scientific evidence from any of the parties.

(ii) The means of knowledge of each deponent.

(iii) The absence of any notice of intention to cross examine. The decision of the Supreme Court in *RAS Medical v Royal College of Surgeons in Ireland* [2019] IESC 4 confirms the difficulty for this Court in being asked to reject evidence on affidavit in circumstances where the parties chose not to cross examine the deponent.

(iv) Some broad allegations made in Ms. Gallagher's grounding affidavit seem to have become distilled down in the course of the affidavits and were not pressed on the court at the hearing.

33. Whilst the applicant alleges a history of Westland engaging in unauthorised development on Clonsura bog, Ms. Gallagher focusses in particular on their activities during the summer of 2020 and what she says was Westland's unlawful peat farming activity and Coole Windfarm's site investigation works that took place between 30 June and 24 July 2020, although it was confirmed by the applicant in the course of the hearing that they do not seek the removal of the boreholes that were dug in the course of those works.

34. Ms. Gallagher avers to her means of knowledge in her affidavit as the fact that she is a director of the applicant company which was incorporated to represent the interests of local residents. She said that she, along with other members of the group preceding the formation of the company, carried out research on health, planning and environmental issues and coordinated and advised on planning observations and submissions and that she has lived close to the windfarm site at Clonsura bog since 2013 and regularly walks on the bog.

The applicant's claims against Westland

35. In her grounding affidavit Ms. Gallagher sets out the history of peat extraction on Clonsura bog. She said there was an unauthorised quarry on what she describes as the windfarm site when peat excavation commenced there in or around 1999. Mr. James Spillane for Westland disputes Ms. Gallagher's description of the windfarm site as he says, when constructed, the windfarm turbines to be located on Clonsura bog will take up no more than four very limited plots of land. In relation to the quarry, Mr. Spillane says that Westland has no knowledge of and no involvement in any unauthorised quarry whether on the windfarm site or otherwise. He refers to a disused quarry to the south of the Clonsura land which are not part of the Clonsura bog, which he understands was used by Coillte some decades ago but has not been used since Westland entered the lands, and had not been recently used at that time.

36. Ms. Gallagher claims that Westland built an extensive network of internal roads to and from 2004, and transported milled peat from the bog by heavy goods vehicles. She refers in her second affidavit at para. 54 to an agreement between the peat developer and the windfarm developer to facilitate access for the construction of the turbines which she says translates to the use and improvement of the unauthorised roads constructed on the bog by peat developers. Mr. Spillane says this statement is entirely false, that Westland has not built an extensive network of internal roads and there has only ever been one road on Clonsura bog. He relies on the aerial imagery and mapping he has exhibited. A similar denial is made by Mr. Shane Curry, a contractor who has provided contract services to Westland over Clonsura bog for the past twenty years. Mr. Curry says there is only one road in and out of the bog and it has been there for decades, long before Westland arrived in 2001. He describes it as no more than a gravel road or trackway leading directly onto the end of the first section of the bog. Ms. Gallagher did not raise these disputed issues again in either her second and third affidavit and did not seek to move on them at the hearing.

37. Ms. Gallagher makes allegations about the milling of peat which she described in her grounding affidavit of 31 July 2020 in the present tense. Her averments suggest that peat was being milled at that time from early morning to late at night generating a lot of dust, noise and fast traffic. At para. 19 she averred to what she describes as "significant activity on the site particularly from January 2020 and intensifying during the covid 19 lockdown from mid-March 2020", again all phrased in the present tense and suggesting that intensive peat milling activity was going on at the time Ms. Gallagher swore her affidavit. She continues at para. 23 to state the following:

> "In addition there has been major excavation of multiple drainage channels to depths of some two metres or more and other excavations on the site. The purpose of these major drainage works is to improve the structural stability of the land and make it suitable for the implementation of the planning permission relative to the construction of the wind farm, which again is part of what was proposed as part of the plans and particulars lodged in respect of the wind farm planning application".

At para. 21 of her third affidavit Ms. Gallagher goes further in referring to "the destruction of the bog by de-wetting".

38. Ms. Gallagher's central allegation is that Westland has and is damaging the bog by engaging in major drainage works in order to make the bog suitable for the implementation of the windfarm planning permission, pursuant to an agreement between Westland and Coole Windfarm. She sets out the basis for those allegations at para. 7 of her grounding affidavit where she said "the third named respondent proposes to carry out its wind farm development in coordination and integrated with the first named respondent's commercial industrialised peat extraction and milling works on the second named respondent's lands".

39. Westland and Coole Windfarm both dispute the existence of an 'engrafting' agreement and the claim that the wind farm development is dependent on ongoing peat excavation works. They say that an integration management group was proposed to An Bord Pleanála and accepted for the purpose of minimising the environmental impact of activities on the site but they dispute the applicant's claim that this constitutes an integration of their activities.

40. Mr. Spillane for Westland disputes the existence of either peat milling or extensive drainage works when he swore his replying Affidavit on 17 November 2020, although he does confirm that peat milling took place on the site at various times since 2013 which was believed to have been lawful at the time due to a stay granted within the proceedings challenging the s. 5 declaration in *Bulrush Horticulture Ltd v. An Bord Pleanála; Westland Horticulture Ltd v. An Bord Pleanála* [2018] IEHC 58, and the subsequent implementation of new Regulations in June 2019 which permitted peat harvesting pending application for certain licences. Those regulations were struck down by Simons J. in *Friends of the Irish Environment v. Minister for Communications* [2019] IEHC 646; [2020] 3 I.R. 162 in which judgment was delivered on 23 July 2019. On that day, Westland says it immediately ceased peat extraction and applied to An Bord Pleanála for leave to apply for substitute consent. Westland said they have not engaged in any peat milling or extraction on Clonsura bog since then. They dispute the drainage and excavation works attributed to them by the applicant and say their only activities are what they identify as "winterisation measures" designed to ensure silt pipes and ponds are cleaned out so as to avoid environmental damage.

41. Ms. Gallagher's second affidavit focuses on those winterisation measures which she asserts is unauthorised and therefore unlawful activity. She questions whether there has been appropriate drainage management and refers to a 2010 report which criticises such measures as resulting in weeds, ineffective sediment traps, drainage of sediment into a European site, and neglect. She claims the same neglect is present on the bog as of the date she swore that affidavit on 4 January, 2021. She offered no expert evidence to corroborate her claims of neglect and does not explain how a 2010 report grounds her claims of neglect in the management of traps, pipes and ponds in 2022.

42. Ms. Gallagher alleges significant environmental damage. She said that there had been major excavation of multiple drainage channels, to depths of some two metres or more, that had been constructed to drain the site directly into the River Inny downstream from where it joins with the River Glore. She describes the River Inny as a significant and important watercourse that drains local lakes before draining into the Shannon via a number of SAC/SPA designated sites. She says that "[t]hese drainage works are therefore extremely damaging not just to the land itself but also to the entire water system in this area". She goes on to say "the site is discharging pollutants into water and there is clear evidence of this pollution. There is significant offsite sediment transport into Lough Derravaragh. Where they had been provided, the unauthorised sediment traps have become sediment traps". She exhibits a photograph which she says illustrates a channel discharging sediment into the River Glore. Later in her third affidavit Ms. Gallagher repeats her allegation that "harmful sediment" is being leached into the River Glore which she claims is as a result of Westland's activity on Clonsura bog.

43. Ms Gallagher does not identify any evidential basis for her allegations of extensive works and pollution, other than photographs the authenticity of which have been challenged by Westland's deponents. The court is as equally unqualified as Ms. Gallagher to determine the existence of pollution by looking at a photograph, even if Ms Gallagher is correct that the photograph was taken on Westland's site and shows Westland's pipes.

44. Mr. Spillane, in his affidavit on behalf of Westland, sets out his means of knowledge that he is the general manager of Westland with responsibility for its peatlands. Mr. Spillane is clearly not an independent expert witness but he does identify experience he has in peatland management on behalf of Westland and previously in his career.

45. Mr. Spillane describes Ms. Gallagher's averments as "fundamentally misconceived and demonstrates a total lack of understanding of the basic management of peat land". He says the work being done is to preserve the environmental protections which currently exist by inspecting and cleaning silt ponds and traps in line with ordinary winterisation measurements that are commonplace between harvesting seasons, and that it would be "perverse" for Westland to cease winter maintenance works as it could lead to a silt discharge into the Glore stream and possibly onwards into the River Inny. Mr. Spillane highlights the terms of the FIE proceedings (High Court Record No. 2018/200 MCA) which were taken against Westland and struck out on consent where the steps agreed to by Westland met the Friends of the Irish Environment's concerns in relation to what he says are the same issues that have been alleged before this court. Whilst Mr Spillane clearly believes in the utility of these winter maintenance works, he does identify any legal basis for them. A settlement of unrelated proceedings with a different NGO does not present any such legal basis.

46. Mr. Ciaran Murray of Westland also swore an affidavit in which he claims Ms. Gallagher does not understand peatland management. Mr. Murray is a chemical engineer and he says he has a broad knowledge of peat harvesting operations. Mr. Murray refuted Ms. Gallagher's allegations that new drains had been dug and refers to aerial images of

Clonsura bog recorded by Ordinance Survey Ireland (OSI) between 1995 and 2018 which he says confirms the last new drain was dug in 2006. He challenges Ms. Gallagher's photographs of the silt traps and says most of them are not on Clonsura bog and that the one photograph that is, shows the silt pond functioning normally. He said that it would be unnatural for water near a bog to be clear and that what the photograph shows and what Ms Gallagher has (he says wrongly) described as discharge is a common occurrence in the context of water nearby a bog, whether drained or not.

47. I set out these matters as highlighting some of the many and similar averments made by the respondents disputing Ms. Gallagher's claims of peat milling excavation on Clonsura bog, pollution and environmental damage. Whilst there is a clear dispute on the extent of the work being done, it is accepted by Westland that they are engaged in winterisation measures. They have sought to justify that by refence to matters such as good peatland management and the prevention of environmental damage. Whether their claim that the works constitute good peatland management is correct or not, that is not in itself a legal basis for Westland's entitlement to engage in those works in circumstances where the works involve some drainage (whether or not at the level claimed by the applicant) and seem, in principle, to come within the scope of the s.5 declaration.

The applicant's claims against Coole Windfarm

48. Ms. Gallagher claims that Westland and Cavan Peat have commenced the preparation of the site for the implementation of Coole Windfarm's planning permission, notwithstanding the stay on the implementation of the planning permission for the wind farm development. Ms. Gallagher moves firstly on the works she claims are for the purpose of draining the bog to render it suitable for the wind farm development. Westland and Cavan say this work is simply the maintenance of the drains by way of normal winterisation measures, as set out above. Secondly, Ms. Gallagher said Coole Windfarm has carried out excavations, installed subterranean structures encased in concrete at the location of the wind turbines on the site and erected poles and other structures all related to the wind farm development. Mr. Kevin O'Donovan, the managing director of the parent company of Coole Windfarm, says a limited geotechnical investigation was carried out by Coole Windfarm over a few weeks from June to July 2020 involving five bore holes which are minimally invasive and which resulted in the removal of approximately 200kg (or two domestic wheelbarrows) of material. The claimed amount of displaced material is disputed by Ms. Gallagher who says that the structures must have required the displacement of a considerably greater volume of material. No independent expert evidence is offered by her to support this claim. There is no reference to documentation that could have been sought by way of discovery or any explanation for the absence of any such discovery application. Discovery can be sought in s. 160 proceedings as confirmed by O'Malley J. in *Byrne v Dublin Port* [2013] IEHC 208 and as more recently occurred in *Byrne v Abo Wind Ireland Ltd.* [2020] IEHC 591 where Sanfey J. granted discovery of documents and source data relating to the operation of wind turbines and the defendant's engagement with the plaintiffs and the planning authority.

49. Mr. Spillane said that temporary, narrow plastic pipes approximately 60 mm in diameter have been installed in the boreholes to allow for monitoring of underlying soil sites. He said the works do not constitute the implementation of the windfarm planning permission but that any claimed breach of the stay on the implementation of the planning permission should have been raised with the judicial review court. Mr. O'Donovan claims that the works are exempt pursuant to Class 45, Schedule 2, Part 1 of the Planning and Development Regulations, 2001 as "excavation for the purpose of surveying land or examining the depth and nature of the subsoil".

50. Mr. Fergal McNamara, managing director of Ground Investigations Ireland Ltd, the geotechnical and environmental consultant involved in those investigations swore an affidavit in which he said the purpose of the site investigative work conducted between 30 June and 24 July 2020 on behalf of Coole Windfarm, was to investigate subsurface conditions of the proposed windfarm site. He says the purpose of the borehole drilling was to determine the nature and depth of the subsoil present on site and the purpose of the ground water monitoring installation was to enable monitoring of the equilibrium of ground water level across the site. He describes the installation as temporary in nature but said that they are normally left in place for approximately one year or more.

Does the evidence on affidavit discharge the burden of proof?

A. Westland's activity on Clonsura bog

51. The account presented by Ms. Gallagher on behalf of the applicant suggests the existence of many elements of an unauthorised development. Ms. Gallagher paints a picture of extensive cutting of existing drains and making new drains and heavy vehicle traffic carrying milled peat travel over a network of roads from early morning to late evening. In effect the applicant asserted that the type of work determined by the s. 5 declaration to be development (and upheld by Meenan J. in Bulrush) is ongoing. The applicant never sought discovery of documents pertaining to those works, which may have assisted in establishing an evidential basis for its suspicions and assertions.

52. Ms. Gallagher's allegations are denied by Westland. They set out the steps they took following on the *Bulrush* decision, the passing of new Regulations thereafter to permit peat extraction, the subsequent suspension of those Regulations by Simons J. in July 2019 and their quashing in September 2019. Westland's deponent says that on the date on which the interlocutory decision was handed down in July, they immediately ceased all peat extraction activity on Clonsura bog that was clearly unlawful but which Westland believed, up to that decision, was lawful.

53. I accept that Westland believed, for *bona fide* reasons, that their peat extraction activity on Clonsura bog up to 23 July 2019 was lawful. I accept that they ceased most of that activity once Simons J. delivered judgment suspending the Regulations and that they had fully ceased all peat removal activity on the bog by May 2020.

54. I did not understand the applicant to particularly challenge Westland's historic activity during the hearing, but rather chose to focus on the winterisation measures to which Westland admits both historically and to date.

55. I note that a number of the applicant's allegations were made and, following on Westland and Cavan's denials, were not pursued, for example Ms. Gallagher's claims that an unauthorised quarry was on the land and that Westland had developed a network of roads. The applicant, via Ms. Gallagher, seems to have been willing to make those serious allegations without identifying any evidential basis for same and then chose not to pursue them. This raises questions as to why those allegations were made at all.

56. Some of the applicant's other allegations are based on Ms. Gallagher's view of what she has seen on the bog, which could be valuable where Ms. Gallagher is as qualified as anyone else to confirm and comment upon what she saw. However, she has gone significantly further in claiming that what she saw, such as the state of silt ponds and pipes, constitutes neglect by Westland in the discharge of their obligation to protect the environment. Ms. Gallagher claims that there is damaging and unlawful pollution taking place based on the colour of the water she saw emerging from a pipe, but she does so without any expertise or professional experience on environmental, ecological or peat management issues. No expert evidence to support or corroborate Ms. Gallagher's allegations of neglect and pollution was put before the court. The court was therefore expected to determine the veracity of serious allegations of pollution of Clonsura bog and surrounding waterways by reference to nothing more than photographs (which were disputed) of what Ms. Gallagher claims were blocked silt pipes and ponds and discoloured water close to a bog which she claims evidenced pollution, along with a reference to a 2010 report that found the "extent to which '*winterisation*' measures… manifest in neglect, weeds, ineffective sediment traps, and drainage of sediment…" All those claims of pollution and neglectful management of the bog were contested by Westland. Whilst they did not furnish evidence from an independent expert either, they did dispute Ms. Gallagher's allegation by reference to the evidence of their own servants or agents each of whom has either professional qualifications or experience in land peat management. No notice of intention to cross examine was ever served by either side and therefore none of the witnesses had the opportunity to answer any challenge to the accuracy of their sworn evidence.

57. I do not accept what Ms. Gallagher saw as evidence of neglect or pollution. Some of the photographs that she put before the court were challenged by Westland, others were relied on by them as showing silt ponds operating normally and emitting brown water as they said would be expected near a bog. Westland also asserted that cessation of these winterisation measures of clearing the silt pipes and ponds would cause environmental damage.

58. However, I do accept that Westland have been and continue to be engaged in winterisation measures and whilst they may believe that work to be both minor and justified, that does not equate to it being legally authorised. The winterisation measures include drainage and therefore comes within what the s.5 declaration condemned as development that was not exempt, upheld by Meenan J in Bulrush. Westland suggested in the course of the hearing that those works come within the exemption at s.4(1)(h) of the Planning and Development Act for:

"development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures".

An exemption for unauthorised development must be strictly construed; *Dillon*. I am not satisfied that the winterisation measures as described by Westland come within the s.4(1)(h) exemption. I have not had the benefit of independent expert evidence explaining how those winterisation measures only affect the interior of a structure.

59. In the absence of any legal basis for the winterisation measures, I am satisfied that they constitute unlawful unauthorised development.

B. Engrafting

60. The applicant claimed that existing and new drains were being excavated by Westland for the purpose of rendering the lands stable and suitable for the implementation of the wind farm planning permission, which it claimed was part of an agreement between Westland and Coole Windfarm to engraft the wind farm development onto the unauthorised peat activity.

61. Westland and Coole Windfarm deny the applicant's claim that drainage works (to which Mr. Spillane says he was a stranger) are being constructed by or on behalf of Coole Windfarm for the development of the wind farm. They also deny the existence of an engrafting agreement. The applicant did not seek discovery of documentation that might evidence either the implementation of the proposal of coordinated and integrated activity between the respondents, or the existence of an actual agreement, or any steps taken in pursuit of it.

62. The applicant had to prove (i) an engrafting agreement between Westland and Coole Windfarm; (ii) an unauthorised development by Westland on Clonsura bog that was; (iii) pursuant to the engrafting agreement and for the purpose of the windfarm development. The applicant sought to rely on what they said was an agreement between Westland and Coole Windfarm to govern the integration of the wind farm development with the ongoing peat extraction activity. What has been proposed (and is yet to be actioned) in the EIA report and accepted by An Bord Pleanála is the creation of an integration management group to minimise the environmental impacts of activities on the site. That is considerably less than what the applicant has asserted in its claim of an unlawful engrafting arrangement. The fact of this proposal does not corroborate the applicant's suspicions that Clonsura bog is being drained for the purpose of preparing the site for the construction of wind farm turbines. Westland maintain that the sole purpose of the drainage works, which is says is normal winterisation measures, is for good peatland management.

63. The s. 5 declaration is in relation to the activities and works on the bog, not the bog itself. A s. 5 declaration does not in itself determine works to be an unauthorised development

(as per Donnelly J. at para. 46 *Krikke v. Barronafaddock Sustainable Electricity Ltd* [2021] IECA 217) though in many cases there may be an inevitable finding that a development that is not exempted is not authorised (para. 49).

64. Whilst I am satisfied that the applicant has established that unauthorised development is taking place on Clonsura Bog in the form of Westland's winterisation measures, I am not satisfied that the applicant has established that this is taking place pursuant to an agreement between Cavan Peat, Westland and Coole Windfarm to enable the development of the wind farm. The provision of access by Cavan Peat and Westland to Coole Windfarm over Clonsura bog to enable Coole Windfarm to construct boreholes is not, in itself, unauthorised development. I do not therefore need to assess the applicability of Cleary Compost, although I do note that the decision related to facts which do not seem to me to fit neatly into what the applicant claims has occurred here. The case was a judicial review of a decision of An Bord Pleanála to refuse to consider an application to extend an existing unauthorised use unless or until its planning status was regularised. The decision condemned the applicant who failed to regularise the planning status of a development and instead sought to go behind a s. 5 declaration and/or sought an intensification of unauthorised activity. I do not read the decision as preventing <u>any</u> development on a site where unauthorised development has taken place. It seems to me that any such development would require consideration on its own facts.

C. The work by Coole Windfarm

65. Between June and July 2020 Coole Windfarm arranged for five boreholes to be dug into which temporary narrow plastic pipes were inserted. The applicant says this work is part of the wind farm development and has been commenced without any of the mitigation measures or pre development steps required by the planning permission. Coole Windfarm says the works are standalone site investigation works which do not form part of the wind farm development and therefore do not engage the planning permission. If they do come within the wind farm development, then Coole Windfarm rely on their consultant's averments on affidavit to discharge the burden on them to prove that they are exempt pursuant to Class 45 of Schedule 2. Part 1 of the Planning and Development Regulations, 2001 as

> "drilling or excavation for the purpose of surveying land or examining the depth and nature of the subsoil, other than drilling or excavation for the purposes of minerals prospecting."

The applicant says any such work is part of a development (i.e. the wind farm) requiring an EIA for the purposes of s. 4 (4) of the Planning and Development Act, 2000, and relies on the jurisprudence prohibiting 'project splitting' to say that this work cannot be separated into a standalone portion of the windfarm development so as to avoid the requirement to carry out an EIA. They argue that any Class 45 exemption is displaced by s. 4 (4).

66. Whilst the burden of proof is on Coole Windfarm to prove the works are exempted development, a burden remains on the applicant to prove that the works form part of the wind farm development and that s. 4(4) is, therefore, brought into play.

67. If the works are not exempt then the burden of proof is on the applicant to prove the works are unauthorised as not having planning permission. There is planning permission in place albeit currently under challenge and the implementation of the permission is currently subject to a stay. The applicant relies on a letter Coole Windfarm sent to the local planning authority advising them that these site developments were being conducted "for the Coole Windfarm and proposed grid connection route". The local authority did not take issue with the commencement of the works. This suggests they did not view the work as engaging the planning permission which would, in turn, suggest that they did not view the works as part of the wind farm development.

68. The conditions of the planning permission that the applicant claims have been breached refer to steps to be taken prior to the commencement of the development, including at condition 4, hydrological geotechnical investigations relating to the development. Pre-development investigations relating to the development is not the same as commencing the development.

69. The applicant was unable to point to (1) where the planning permission referred to site investigation works of the type that have occurred, that the applicant seems to claim comes within the planning permission; (2) any documentation relating to the investigation work and its purpose which the applicant could have sought by way of discovery; or (3) expert evidence to support the applicant's beliefs that the investigation work comes within the planning permission. The applicant's beliefs may be genuinely held but without corroboration, are little more than assertions and suspicions.

70. The applicant also sought to rely on the fact that any work involving peat extraction requires an assessment under the EIA Directive. However for the reasons set out above in my discussion of the affidavits, the applicant has established that the purpose of the drainage works is to prepare the land for the windfarm development. Therefore this aspect of their argument as to why the EIA Directive or the Habitats Directive are engaged in their engrafting point, must fail.

71. The applicant has not established that these investigation works were part of the wind farm development such as to engage the planning permission or to engage with the provisions of s. 4 (4). If I am wrong on that and the works are part of the wind farm development, they should not have been commenced without adherence to the planning permission, in spite of the local authority's contrary view. This Court has jurisdiction to enforce a stay granted by another court if it were satisfied that the stay is being breached.

72. However I accept the evidence of Coole Windfarm and of their consultants that the purpose of these works was to examine the nature of the subsoil. The applicant contends that an investigation into ground water monitoring is different to an investigation into the

nature of subsoil, but adduces no expert evidence to support this claim. I accept the evidence of Coole Windfarm that the purpose of their monitoring the ground water is to determine the nature and depth of the subsoil by obtaining a picture of ground water monitoring levels at different times of the year.

73. I do not consider these site investigation works, that Coole Windfarm says are not part of the wind farm, to be project splitting as condemned by the court in *O'Grinna v An Bord Pleanála and ors* [2014] IEHC 632, where a connection to the national grid was found to be part of the development of a wind farm as the wind farm could not function without the grid connection. I do not find that to be comparable to the site investigation works here, such as to bring the prohibition on project splitting into play.

74. The applicant sought to rely on the case of *Dillon v Irish Cement* (unreported, Supreme Court, 26 November 1986) as authority for the non-application of Class 45. Finlay C.J. found that the Regulations must be strictly construed in that a developer must be "clearly and unambiguously within them". However I find the decision distinguishable on the facts as involving an excavated area of 600 metres x 12 metres to a depth of 4.5 to 5 metres taking out a total of 10,500 tons of shale to put through the respondent's cement making factory in order to ascertain the quality of the cement to see if it would be satisfactory and up to standard for building purposes and to see whether there were any ingredients in it that would harm that plant. That work was found by Finlay C.J. not to come within the exemption allowed by Class 34 as it could not be "properly or ordinarily described as an attempt to examine the nature of the subsoil". Rather he found it was an examination of the quality of the subsoil for a very specific and confined purpose and therefore did not come within the exemption. The extent and nature of the works in that case were entirely different to the investigation works at issue here.

75. I am satisfied that Coole Windfarm's investigation works were for the purpose of examining the nature of the subsoil, which requires an understanding of the water contained therein. There is no evidence of the works having been for any other purpose. The works clearly and unambiguously come within Class 45 and are therefore exempt.

Substitute consent

76. In Ms. Gallagher's grounding affidavit the applicant raised substitute consent in saying that if peat harvesting activity was to be continued, it would be necessary for Westland to apply for substitute consent. Ms. Gallagher said that she had become aware of Westland's May 2020 application for substitute consent on the day before the proceedings were instituted i.e. 30 July 2020. By then the applicant was out of time to object. Pursuant to Section 177L of the Act in dealing with Westwood's application for leave to apply for substitute consent, An Bord Pleanála could have refused the application and could have directed Westland to cease any development or activity and/or to take remediation steps that are similar to many of the reliefs sought by the applicant in these proceedings.

77. Westland subsequently applied to extend the time to make the application for substitute consent most recently (as of the date of the hearing before this court in March 2022) on 20 January 2022 extending the time to the 14 June 2022 for the reason of ongoing court

proceedings. Westland's counsel advised this court that those ongoing court proceedings were the proceedings quashing the Regulations over which Simons J. retains seisin and which stand adjourned generally as well as other separate proceedings in which the legislation allowing for substitute consent is being challenged. An Bord Pleanála acceded to Coole Windfarm's application to extend time but could have refused it and could, in any future similar application, decide to extend the time or refuse to do so.

78. The applicant argued that Westland has postponed their application for substitute consent because of their settlement of the challenge by the Friends of the Irish Environment and because of the within proceedings and that Westland has, in effect, engineered an enforcement holiday for itself. I have some concern about Westland's reliance on 'ongoing' proceedings (whatever those proceedings are) in extending the time for applying for substitute consent and the risk that the regularisation of its activity over Clonsura Bog may be delayed further for what seem to this Court to be rather vague reasons over which Westland itself may exercise some control.

79. In relation to the applicant's failure to object to the original application by Westland for leave to apply for substitute consent, I have had regard to the decision of the Supreme Court in *Sweetman v. An Bord Pleanála, Ireland and the Attorney General* [2018] 2 I.R. 250 where the applicant challenged a grant of substitute consent because of, inter alia, what it claimed was An Bord Pleanála's failure to assess whether exceptional circumstances existed. The State respondents looked to have the proceedings struck out against them as the applicant had failed to challenge the planning authority's earlier decision to issue the notice directing an application for substitute consent within time. The application was unsuccessful as the court found that the scheme had to be assessed in its entirety and that a failure to challenge the earlier decision did not preclude a challenge to the subsequent decision that claimed the initial decision was not lawfully made. The Supreme Court only considered the collateral attack jurisdiction to be relevant where it was clear that the earlier decision was intended to be final and definitive, and where that was not clear it was not appropriate for the court to prevent the substantive issue going ahead.

80. Applying that principle here, the applicant's failure to challenge Westland's application for leave to apply for substitute consent within the statutory time frame is not fatal to their case. However any application to extend the time to apply for substitute consent must be properly considered by An Bord Pleanála. Westland's application for substitute consent remains live and, if granted, will allow An Bord Pleanála to consider directing mediation measures similar to those sought by the applicant in these s. 160 proceedings. S.177 of the Act which sets out the various substitute consent safeguards available to the board including:

(i) The board can require an applicant for substitute consent to take steps to remedy any significant adverse effects on the environment (s. 177S)

(ii) The board can require the person applying for substitute consent to cease all or part of their activities or operations on or at the site of the development where the

board forms the opinion that its continuation is likely to cause significant adverse effects on the environment. (s. 177J).

(iii) The board can attach conditions to a grant of substitute consent to avoid, prevent or reduce and, if possible, offset the significant adverse effects on the environment of the development (s. 177K (2E)(a).

(iv) The board can direct such remedial measures as the board considers necessary to restore a site into a safe and environmentally sustainable condition and to avoid deterioration of natural habitats. (s. 177L).

(v) The board can give a draft direction in writing to an unsuccessful applicant requiring them to cease all or part of the activities or operations on or at the site of the development where the board formed the opinion that continuation of all or part of the activity or operation is likely to cause significant or adverse effects on the environment or on the integrity of a European site.

(vi) This applicant will be entitled to make submissions and/or observations on the application for substitute consent (s.177H).

The exercise of the court's discretion

81. The applicant has proved unauthorised development in the form of Westland's winterisation measures and so the court must consider whether it should exercise its discretion to grant relief pursuant to s. 160.

82. The environment cannot speak for itself and it can and may need to be represented by NGOs such as the applicant. Criteria for the exercise of this discretion were identified by the Supreme Court in *Meath County Council v. Murray* [2018] 1 IR 189 and more recently in *Clare County Council v. McDonagh* [2022] IEHC 2. The public interest in ensuring compliance with the planning code and the need for an effective, proportionate and dissuasive remedy for any infringement of European law is of principal importance in the court's determination on how the exercise of its discretion.

83. I consider the following factual conclusions that I have drawn from my analysis of the evidence to be relevant to the exercise of my discretion:-

(i) Peat harvesting, other than winterisation measures, has not taken place on Clonsura Bog since July 2019.

(ii) Peat handling has not taken place on Clonsura Bog since May 2020.

(iii) There has been negligible truck movement on Clonsura Bog since May 2020. Ms. Gallagher says that there was significant activity up to May 2020 but provides no detail of similar activity thereafter.

(iv) No evidence has been identified of any specific activity since July 2020 other than the ongoing winterisation measures.

(v) I am satisfied that whatever truck movement took place up to July 2020 has not continued to any significant extent since then as there has not been any activity that would require it.

(vi) Clonsura Bog is currently idle other than ongoing winterisation measures.

(vii) The applicant did not adduce expert evidence to corroborate its claims that (i) the drains and silt traps and ponds are being poorly maintained; (iii) damage is being caused to fish and the local waterways as a result of Westland's winterisation measures.

(viii) Westland's deponents, who have experience in peatland management, averred that stopping the winterisation measures and, in particular, ceasing to clear the silt ponds and traps would create an additional risk of environmental damage. Support for this view can also be found in Ms Gallagher's own averment that damage is being caused by what she says is the discharge of silt into the waterways because of poor maintenance of the silt traps. Westland's claims that cessation of the winterisation measures would create a risk of environmental damage were not adequately addressed by the applicant, other than a suggestion by its counsel in court that it would be a matter for the substitute consent process. The court is left with an unanswered claim that cessation of the winterisation measures would, itself, cause environmental damage.

(ix) The applicant, through Ms. Gallagher, made a number of allegations that were challenged as untrue including the presence of an unauthorised quarry on Clonsura Bog and of a network of roads (plural). Those allegations were not pursued by the applicant throughout subsequent affidavits and in the course of the hearing. The applicant did not provide any explanation or basis for making those allegations.

(x) These proceedings were instituted at a time when separate judicial review proceedings challenging the windfarm development planning permission were (and still are) in being. The applicant chose to challenge what it claimed was an implementation of the stayed planning permission in the within proceedings rather than raising it as a breach of the stay in the live judicial review proceedings. The applicant suggested that, had they challenged the works as a breach of the stay, Coole Windfarm may have argued that they should have proceeded by way of a s. 160 application. There was no initiating correspondence sent by the applicant to any of the three respondents and no attempt was made to engage with any of the issues raised in the proceedings, prior to the institution of the proceedings.

(xi) Westland has applied for and been granted leave to apply to An Bord Pleanála for substitute consent. An Bord Pleanála has extended the time for Westland to apply for substitute consent. The application for substitute consent remains live before An Bord Pleanála. If Westland wish to extend time further, they will have to reapply to An Bord Pleanála, which has a discretion whether to extend the time again or not.

(xii) An Bord Pleanála did not exercise its statutory jurisdiction to direct any remediation of the lands either when Westland applied for leave to apply for substitute consent or when they later applied for an extension of time. That jurisdiction remains with An Bord Pleanála in any future application to extend the time again.

(xiii) The local planning authority was made aware of Coole Windfarm's intention to conduct site investigation works for Coole Windfarm. The planning authority raised no concern about these works either (i) coming within the planning permission on which there was a stay at that time; or (ii) that the requirements of that planning permission for identified mitigating and pre-development steps to be taken before development could commence were now activated; or (iii) that such site development work, independent of the windfarm development requirements required separate planning permission.

84. The applicant confirmed during the hearing that it seeks to restrain unauthorised development but does not seek the removal of the boreholes. No or no sufficient evidence of a prospect of further future works, other than the ongoing winterisation measures that Westland says it is currently implementing, has been established such as to justify restraining any potential future unauthorised development.

85. I have concluded that:

(i) The unauthorised development on Clonsura Bog is at a minor scale consisting of normal winterisation measures of clearing silt pipes and ponds and is not extensive drainage over an extensive network of roads as was claimed by the applicant.

(ii) I am told that cessation of the works may create a risk of environmental damage if the silt pipes and ponds are not cleared. That claim has not been disputed or adequately addressed by the applicant, other than to say the issue can be addressed in the application for substitute consent.

(iii) An application for substitute consent remains live before An Bord Pleanála.

(iv) The purpose of the unauthorised development is peatland management. It is not for the purpose of preserving the bog for the resumption of peat farming or preparing it for the construction of windfarm turbines.

86. Taking account of those matters, I consider it appropriate at this time to exercise my discretion not to grant the injunctive relief sought restraining Westland's winterisation measures. However such unauthorised development should not be permitted to continue indefinitely, particularly where the Court does not have independent expert evidence of what Westland says is the benefit afforded to the environment by the continuation of those measures, or indeed of the detriment the applicant claims they cause. I am therefore granting the applicant liberty to apply to me to vary the exercise of my discretion in the event that Westland's winterisation measures continue for an

unacceptable period of time into the future without any progress on the application for substitute consent.

Conclusions

87. For the reasons set out above, I am refusing the applicant's application for relief pursuant to s. 160 and I am granting the applicant liberty to apply in the terms set out at paragraph 86 above.

88. I will put the matter in for mention before me on 25th January at 10:30 to deal with the format of final orders, costs and any other orders that may be required. If any of the parties wish to lodge written submissions, they should be lodged with the court by 16:00, two days before the matter is back before me.