Judgment

Title: North East Pylon Pressure Campaign Limited & anor -v- An Bord Pleanála

Neutral Citation: [2016] IEHC 300

High Court Record Number: 2016 150JR

Date of Delivery: 12/05/2016

Court: High Court

Judgment by: Humphreys J.

Status: Approved

Neutral Citation: [2016] IEHC 300

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 150 JR]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 AS AMENDED

BETWEEN

NORTH EAST PYLON PRESSURE CAMPAIGN LIMITED AND MAURA SHEEHY

APPLICANTS

AND

AN BORD PLEANÁLA

THE MINISTER FOR COMMUNICATIONS, ENERGY AND

NATURAL RESOURCES, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

EIRGRID PLC

NOTICE PARTY

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 12th day of May, 2016

1. When does time begin to run in a judicial review application? When should an applicant be required to await the final outcome of a process rather than challenge it mid-stream? When is the appropriate time in a process to challenge a statute, statutory instrument or instrument-like measure of general application, by way of judicial review? And what types of acts or decisions are encompassed by the more demanding rules for judicial review of planning matters? These procedural questions are easy to state but are of momentous practical importance across the whole field of judicial review.

Facts

2. At issue in the present leave application is a challenge to the development consent process for a 400kV North/South electricity interconnector from Woodlands Station, Co. Meath, passing through Cavan and Monaghan, to a proposed substation at Turleenan, Moy, Co. Tyrone.

3. The first named applicant was established in November 2007, following the announcement of a proposed North/South Electricity Interconnector Project. It represents a large number of interested parties and local property owners, of which the second named applicant is one.

4. Regulation No. 347/2013 of the European Parliament and of the Council of 17th April, 2013 on guidelines for trans-European energy infrastructure and repealing Decision No. 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No. 714/2009 and (EC) No. 715/2009 (energy infrastructure regulation) was adopted to make provision for the European Energy Infrastructure. The regulation envisaged a category of infrastructural development referred to as projects of common interest, which were to be managed in two phases, a pre-application procedure and a statutory phase. The regulation came into force in June, 2013. Article 8 of the regulation requires Member States to designate a competent authority for the purposes of that regulation by 16th November, 2013.

5. The North/South Interconnector was designated a "*project of common interest"* under the regulation on 14th October, 2013.

6. On 11th December, 2013, the board provided what EirGrid describes as a scoping opinion which set out the board's opinion on what information had to be included in the environmental impact statement, apparently furnished by virtue of s. 182E of the Planning and Development Act 2000 as inserted by s. 4 of the Planning and Development (Strategic Infrastructural Development) Act 2006 (in Appendix 1.4 to vol. 3B of the environmental impact statement submitted on 9th June, 2015).

7. On 4th December, 2013 (after the EU deadline had expired), An Bord Pleanála was designated by the Minister for Communications, Energy and Natural Resources as the competent authority pursuant to art. 8 of the regulation. This designation was effected by means of a letter from Mr. Ken Spratt, Assistant Secretary General in the Department of Communications, Energy and Natural Resources to Dr. Mary Kelly of the board. The letter itself was not formally published and its text only became available to the applicants in the course of the hearing.

8. An issue apparently arose as to whether the transitional provisions in art. 19 of the 2013 regulation applied to the proposed project. The board's inspector prepared a

report dated 2nd May, 2014 recommending that they did not so apply. That report was published in May, 2014.

9. On 15th May, 2014, the board published a manual of permit granting process procedures, setting out its role in projects of common interest.

10. In June, 2014, EirGrid provided the board with a detailed outline of its project.

11. On 2nd July, 2014, the submission of the project outline was acknowledged by the board.

12. On 28th July, 2014, EirGrid informed the first named applicant that the board was the competent authority for projects of common interest in Ireland.

13. On 31st July, 2014, EirGrid submitted a concept for public participation to the board, which referred to the past consultations which had taken place.

14. On 10th September, 2014, the board informed EirGrid that it had modified the concept requiring EirGrid to publish an information leaflet and place an advertisement in national newspapers.

15. On 24th September, 2014 the board appears to have prepared an updated "Projects of Common Interest Manual of Permit Granting Process Procedures" which stated *inter alia* that the board had been designated as a competent authority. The manual was then published on the board's website.

16. A draft application file was submitted to the board on 7th November, 2014.

17. On 18th November, 2014 the first named applicant wrote to the European Commission complaining about the proposed project on a number of grounds, one of which was an alleged conflict, or bias, arising from the dual role of the board as both an approving body for strategic infrastructure under the Planning and Development (Strategic Infrastructural Development) Act 2006, as well as its role as a designated competent authority under the 2013 energy infrastructure regulation.

18. The board specified certain missing information that it required from EirGrid, on 16th December, 2014. This was responded to on 13th March, 2015.

19. A previous application for the development gave rise to an oral hearing at which the applicants say net costs in the region of €530,000 were incurred. The application was then withdrawn and the applicants instituted proceedings for recovery of costs, which were settled on payment of a contribution.

20. The formal process of development consent was put in motion on 9th June, 2015 when EirGrid applied to the board under s. 182A of the Planning and Development Act 2000 for approval of proposed development consisting of the intended North/South Electricity Transmission Interconnector. This formal application marked the transition between the pre-statutory phase and the statutory phase of project consent.

21. The application was acknowledged by the board on the 11th June, 2015. Between 16th June, and 24th August, 2015 over 900 submissions from over 1,500 persons were made in connection with the application.

22. The solicitors for the first named applicant made a submission regarding preliminary issues on 24th August, 2015 and requesting an oral hearing.

23. The board indicated that it would consider the applicants' submissions when determining the application rather than as a preliminary issue, on 22nd September, 2015.

24. On 19th October, 2015, EirGrid submitted its response to the submissions made.

25. On 21st January, 2016, the board informed the parties of its intention to hold an oral hearing.

26. The precise proposed time and date for the commencement of that hearing (11:00am on 7th March, 2016) was communicated to the solicitors for the applicants on 18th February, 2016.

27. A pre-action letter was sent on 26th February, 2016 requesting that the oral hearing not proceed. The board did not agree to this and a further letter warning of injunctive relief being sought was sent on 3rd March, 2016.

28. At around 4:00pm on Friday, 4th March, 2016, the applicants first moved an application for an injunction to restrain the oral hearing. This application initially came before Mac Eochaidh J. who was not in a position to deal with it due to a potential conflict.

29. The application then came before me at 10:00am on Monday, 7th March, 2016, approximately one hour before the oral hearing was due to start. On that date, I refused the proposed injunction and directed that the present application for leave to seek judicial review should be made on notice.

30. On 22nd March, 2016, in the course of the oral hearing before the inspector, additional or amended information and material was introduced by EirGrid, changing the proposed temporary access routes from what they had been in the Environmental Impact Statement. The applicants characterised this as an amendment to the application, and sought an adjournment from the board's inspector, which was refused.

31. On 31st March, 2016 following a direction that notice be given to the Minister for Communications, Energy and Natural Resources, I made that Minister a respondent and permitted the applicants to amend their statement (without objection) seeking as a specific relief a declaration that the designation of the board as a competent authority was invalid. As mentioned above, it was not until the hearing on 31st March, 2016 that a copy of that designation was in fact made available to the applicants.

32. At a resumed hearing on 21st April, 2016, I allowed the applicants to add Ireland and the Attorney General as respondents and to refine and amend their challenge to the designation.

Amendment of pleadings

33. In fairness to the respondents and notice party, the applicants' application to amend their pleadings to refine the challenge to the ministerial designation was not very hotly opposed. But in that regard, I should perhaps record that the State raised a misconceived concern that by engaging with the applicants to clarify the wording of their plea in this regard I was in some way "suggesting" points to the applicants. This is simply a misunderstanding of the role of the court, and indeed of what in fact occurred in this case (possibly explained by the fact that the State was not originally named as a

respondent and "came late to the party"). The issues raised by the applicants as to the form of the ministerial designation and their objections to it were raised by them at their own initiative in the first instance in correspondence but did not seem to me to have been properly captured in the pleadings as drafted. This necessitated some discussion with the applicants to ensure that the pleadings actually captured the issues arising. As I explained previously in *S.O. v Minister for Justice and Equality* [2015] IEHC 821 (Unreported, High Court, 21st December, 2015) at paras. 9 to 10, the teasing out of the logical consequences of a proposition is a core element of any reasoning process or intellectual inquiry. Anything the court says in the course of a hearing must be construed as a question and not as the expression of a view. A court is perfectly entitled to ask a party if the logical consequence of proposition X is proposition Y, or even if a party wishes to advance a further or alternative proposition Z. A court is also entitled to discuss with a party whether the particular argument it is making is not encompassed by, or alternatively not fully particularised in, pleadings. In the course of a leave application, for example, this may frequently take the form of a dialogue between bench and bar as to what the appropriate wording is to encompass the complaint actually being made. As frequently as not, this involves a reduction or deletion of surplus grounds (see the issues raised in my judgment in *O'Mahony Developments Ltd. v. An Bord Pleanála* [2015] IEHC 757 (Unreported, High Court, 27th November, 2015) at para. 51), but just as legitimately it may involve raising a question as to whether the applicant wishes to add to the grounds if they do not already fully capture the point being made, or its logical consequences, or even some further point which is latent in the facts and matters pleaded. Such a question is not an encouragement, and should not be taken as an encouragement, to that party to advance further propositions, still less to seek an amendment to his or her pleadings for that purpose. That is a matter for decision and application by the party concerned. It is well established that if there are points latent in a case that neither party has identified, it is fully within the legitimate scope of the judicial power to draw attention to such points.

34. In *T.D. v. Minister for Justice, Equality and Law Reform* [2014] IESC 29 (Unreported, Supreme Court, 10th April, 2014), the Supreme Court noted without apparent disapproval (see judgment of Fennelly J. at para. 2) that Hogan J. (the trial judge in the High Court) had, of his own motion, taken a point as to the validity of s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000 in terms of EU law.

35. In *J.K. (Uganda) v. Minister for Justice and Equality* [2011] IEHC 473 (Unreported, High Court, 13th December, 2011), Hogan J. took an important point of his own motion after having reserved judgment, and reconvened the hearing to invite further submissions on it.

36. In a very recent judgment, the Supreme Court returned to this theme. In *Tracey v. Burton*[2016] IESC 16 (Unreported, Supreme Court, 25th April, 2016), MacMenamin J. (Denham C.J. and Charleton J. concurring) said at para. 48 that *"[s]ubject to the Constitution, the administration of justice in public does not debar a court from assisting litigants, and their advisors, by considering the papers in a case beforehand; by sifting through the documentation in order to see what is relevant and what is not; by identifying the issues which truly fall to be decided; and by directing whatever written submissions may be necessary in order to ensure justice is done, effectively and efficiently"*. The process of "*identifying the issues*" clearly must involve interrogating the pleadings as drafted and teasing out with the parties whether the points which they wish to make, or the logical consequences of those points, or even points latent in the papers but not yet brought out, should (or should not) be expressly pleaded, and if so, how. This does not involve an unacceptable departure from adversarial procedure. The short answer to the State's (in fairness relatively mild) protest in this case is simply that this is what case management looks like.

37. In my decision in *Hall v. Stepstone Mortgage Funding Ltd. (No. 1)* [2015] IEHC 737 (Unreported, High Court, 16th November, 2015) at para. 15, I commented that putting respondents on notice of a leave application was not intended to turn the leave application into a mini-trial. However, the present proceedings have involved a large number of issues of some complexity and a great deal of importance and occupied a considerable amount of time, certainly by comparison with a garden-variety leave application. I heard submissions from Mr. Esmond Keane, S.C. (with Mr. Conleth Bradley S.C., Mr. Michael O'Donnell, B.L. and Mr. Christopher Hughes, B.L.) for the applicants, Ms. Emily Egan, S.C. and Mr. Brian Foley, B.L. for the Board, Mr. Brian Murray, S.C. and Mr. Jarlath Fitzsimons, S.C. (with Mr. Stephen Dodd, B.L. and Ms. Susan Murray, B.L.) for EirGrid and Mr. Michael McDowell S.C. and Ms. Gráinne Gilmore, B.L., for the State. I have had the benefit of a number of extensive written submissions from all parties, as well as oral submissions on the procedural issues addressed in this judgment. The parties agreed on 5th April, 2016 that in the interests of determining the leave application in as speedy and efficient manner as practicable, I could decide the question of arguability or substantial grounds as the case may be based on the affidavits and written submissions. Following that however the further amendment of the pleadings as referred to arose, as well as additional affidavits and submissions, which necessarily required consideration before a decision could be given.

Reliefs for which leave is sought

38. Mr. Keane in a very able submission applies for leave to seek judicial review for 16 reliefs on 46 grounds, as set out the amended statement of grounds. The reliefs can be broken down as follows:-

> (a) 6 declarations addressed to the invalidity of one or more parts of the development consent process, particularly the application. These declarations are superfluous if a substantive order of prohibition is ultimately made and inappropriate if it is refused.
>
> (b) A declaration that the ministerial designation is invalid. The applicants originally sought an order setting aside the designation but this is not the appropriate wording of the relief. The court does not grant an "*order setting aside*" Acts of the Oireachtas or statutory instruments (or instrument-like measures of general application as here); the appropriate relief is declaratory. I therefore required that this relief be amended to its present form.
>
> (c) 4 reliefs which are variously described as prohibition or injunctions restraining the board from either considering the matter further or conducting an oral hearing.
>
> (d) 5 reliefs that are either formal (extension of time, liberty to apply, further and other relief and costs) or interlocutory (an interim or interlocutory injunction – which I have already refused).

39. The proliferation of reliefs adds little to the case. There are only two key reliefs which would have been sufficient, an order of prohibition or an injunction restraining the further processing of the application and a declaration that the ministerial designation is invalid. Apart from extension of time, it is not necessary to expressly seek interlocutory reliefs in a statement of grounds, although if a stay is sought it may be helpful to include that relief in particular.

40. The 46 grounds – again an apparently excessive number – can be summarised further and I attempt to do as follows:-

> (a) The application for approval does not comply with arts. 22 and 23 of the Planning and Development Regulations 2001 (S.I. 600 of 2001). The notice party is taking a pleading objection to a related complaint that the working area around the towers has been incorrectly shown on the planning drawings and that access routes are situated outside the site boundary as identified in the planning documentation. If the matter were proceeding further, I would have required such matters to be particularised by way of amendment to obviate any further unnecessary argument about what was and was not pleaded.
>
> (b) The environmental impact statement and Natura impact statement are defective.
>
> (c) The ministerial designation is invalid and the role of the board under the European energy infrastructure regulation is in conflict with its role as a giver of development consent.
>
> (d) The application does not comply with s. 182A of the 2000 Act.
>
> (e) Objection was taken to various developments in the course of the oral hearing including a failure to adjourn it. Again while these matters are not specifically pleaded I would have required any such matters to be particularised in an amended statement if those complaints were to proceed further in the present case.

41. I noted previously in my decision in *O'Mahony Developments v. An Bord Pleanála* [2015] IEHC 757 (Unreported, High Court, 27th November, 2015) at para. 51, that the court cannot simply be overwhelmed by a large number of grounds and materials and grant leave on that basis. It is interesting to note that a similar point has been made in U.K. jurisprudence, in particular by Laws J. in *R. v Local Government Commission for England ex p. North Yorkshire County Council*(Unreported, High Court (Queen's Bench Division), 11th March, 1994); and by Keene J. in *R. v. London Docklands Development Corporation ex p. Frost* [1997] 73 P. & C.R. 199, 204: *"The approach of 'never mind the quality, feel the width' has no application in these proceedings".*

The test for leave in G. v. D.P.P.

42. In *G. v. D.P.P.* [1994] 1 I.R. 374 at 377 to 378, Finlay C.J. set out the criteria for the grant of an *ex parte* application for leave. In some previous leave decisions (e.g., *M. McK. v. Minister for Justice and Equality*, Unreported, High Court, 25th April, 2016), I have attempted to summarise these requirements. As developed by subsequent changes to the rules of court, and subsequent caselaw, the criteria can be summarised as follows:-

(i) That the applicant "*has a sufficient interest in the matter to which the application relates"* (p. 377);

(ii) That "*an arguable case in law can be made that the applicant is entitled to the relief which he seeks*" (p. 378) on the basis of facts averred to by the applicant, albeit that the court can also have regard at least to uncontradicted or reliable evidence adduced by a respondent who has been put on notice of the application (*Joel v. D.P.P.* [2012]

IEHC 295 (Unreported, High Court, 9th July, 2012) per Charleton J. at para.13; *Gilligan v. Governor of Portlaoise Prison* [2001] 4 JIC 1201 (Unreported, High Court, McKechnie J., 12th April, 2001). Of course in particular circumstances a higher threshold than arguability applies, such as where legislation requires substantial grounds, or where the grant of leave would itself be likely to determine the event (*Agrama v. Minister for Justice and Equality* [2016] IECA 72 (Unreported, Court of Appeal, 22nd February, 2016) *per*Birmingham J. at para. 32);

(iii) That the application has been made within the appropriate time limit or that the Court is satisfied that it should extend the time limit in accordance with the applicable rules of court or legislation;

(iv) That "*the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure"* (p. 378).

(v) That there are no other grounds to warrant refusal of leave. "*These conditions or proofs are not intended to be exclusive and the court has a general discretion, since judicial review in many instances is an entirely discretionary remedy which may well include, amongst other things, consideration of whether the matter concerned is one of importance or of triviality and also as to whether the applicant has shown good faith in the making of an ex parte application." (*p. 378).

43. Obviously in the planning context, the foregoing is subject to the statutory overlay of s. 50 of the 2000 Act, if it applies, a matter which I will address below. Subject to that point, it is now therefore necessary to assess the present application under the *G. v. D.P.P*. headings that are in issue here, in particular (a) arguability, (b) the question of time, and (c) the issue of alternative remedies, which raises the related question of prematurity.

44. It is clear from *G. v. D.P.*P that a leave application must resolve a number of issues above and beyond the standard of mere arguability. A determination on such issues is not a determination that it is arguable that, for example, there is an alternative remedy. It is a determination that there is in law an alternative remedy. One of the matters that has to be determined as matter of law (as opposed to deciding what is arguable) at this stage is the correct procedure to be applied. The matter simply cannot be progressed further one way or the other without resolving, among other issues, whether s. 50 applies or not.

Judicial review as a vehicle for the challenge to the ministerial designation

45. EirGrid initially appeared to suggest that the challenge to the validity of the ministerial designation was not properly constituted, or alternatively could have been constituted in a different manner, in effect suggesting that the appropriate way to challenge that designation would have been by way of declaration sought in plenary proceedings, perhaps by analogy with the decision of Clarke J. (Fennelly, O'Donnell, McKechnie and MacMenamin JJ. concurring) in *Nawaz v. Minister for Justice, Equality and Law Reform* [2012] IESC 58 (Unreported, Supreme Court, 29th November, 2012) where he indicated that where the primary relief being sought in proceedings was a declaration of unconstitutionality of a statute, a plenary summons was normally the appropriate procedure to adopt (see *Riordan v. An Taoiseach* (No. 2) [1999] 4 I.R. 343 *per* Barrington J. (Hamilton C.J., O'Flaherty, Lynch, Barron JJ. concurring) at pp. 350 to 351, citing *The State (Lynch) v. Cooney* [1982] I.R. 337 per Walsh J. at p. 373).

46. However, where a final decision which itself is subject to certiorari has been made, a constitutional, ECHR or *ultra vires* challenge can be "*tack[ed] on"* to a conventional judicial review challenge to the decision (*S.M. v. Ireland* [2007] 3 I.R. 283 *per* Kearns J. (Murray C.J. and Fennelly J. concurring) at p. 293, para. 30).

47. Of course here, there is neither a final decision nor is the validity challenge the sole relief. On further discussion, Mr. Murray was not pressing any objection to the validity challenge having been brought by judicial review rather than plenary summons, but rather sought to rely on the method chosen under the heading of a time argument. I will deal with the question of time below.

Does s. 50 of the Planning and Development Act 2000 apply to this leave application?

48. Like any judicial review application, the present proceedings are subject to O. 84 of the Rules of the Superior Courts. However, those rules are modified for certain categories of judicial review application where s. 50 of the 2000 Act applies. Like s. 5 of the Illegal Immigrants (Trafficking) Act 2000, s. 50 imposes a significantly shorter limitation period (8 weeks as opposed to 3 months), involves a higher thresholds to be met before leave can be granted (substantial grounds as opposed to being merely arguable) and restricts the right of a appeal to the Court of Appeal by imposing a leave requirement.

49. A curious feature of this issue is that the challengers, who might be expected to argue for a low threshold, submitted that s. 50 did apply, whereas the board as the object of the challenge, and who might have been expected to argue for a high threshold, generally submitted that s. 50 did not apply.

50. I am grateful to Ms. Egan and Mr. Foley for not attempting to inflate s. 50 beyond its proper contours. Indeed the board expressly argued that s. 50 was not relevant in a prohibition context because "[*w]here the applicant is seeking to prohibit the taking of a decision, there is by definition no decision to challenge*" (para. 13 of Supplemental Submissions).

51. As to what explains the applicant's stance, I could not help wondering whether it was partly motivated by the desire to secure the protections of s. 50B as to the costs of the application. But whatever the reasoning, the question of the application of s. 50 to the proceedings needs to be addressed before the application can be meaningfully dealt with.

52. The notice party in submissions (7th April, 2016, para. 1.3) suggested in effect that as the applicants had chosen to pin their colours to the mast of s. 50, they had to live or die by that standard, and could not be allowed to fall back on the general terms of O. 84 as a stand-by argument. I do not think that objection is well-founded. Parties in litigation have a general entitlement to put forward alternative arguments. In any event if Mr. Keane is wrong about whether s. 50 applies I still have to deal with the application one way or the other.

53. A discussion of the issue of the scope of s. 50 is primarily informed by the view that questions of public and legal policy underlying the legislative intention should inform statutory interpretation. Statutory interpretation is not the application of a dictionary to words on a page: *"We do not believe in fairy tales any more"* (Lord Reid "The judge as lawmaker" (1972) 12 *Journal of the Society of Public Teachers of Law 22*). Statutory interpretation is primarily an exercise in reading a statute in the context of its policy or policies and in a way that is consistent with those policies and with wider objectives of the legal system as a whole, where possible. The question of when to challenge and

when to await a final decision is governed by a number of such questions, consideration of which pervades the present judgment, not limited to this heading of the case. The judgment is split into different headings to facilitate analysis but any individual element of that discussion should be read in conjunction with the other sections of this judgment in which those questions are also discussed; and indeed answered in a similar and I hope mutually reinforcing manner.

54. Solicitors for the board wrote to the applicants' solicitors on 23rd March, 2016, seeking clarification as to what act or decision was being questioned in these proceedings such as to bring the action within s. 50. The applicants' solicitors replied by letter dated the 29th March, 2016 indicating that the acts complained of were:-

> (a) The action to appoint the board as the appropriate authority in connection with the application for development consent;
>
> (b) The failure to comply with the statutory requirements for an environmental impact statement and an Natura impact statement;
>
> (c) The failure to comply with the provisions of the Planning and Development Act 2000 and regulations thereunder;
>
> (d) The failure to comply with the statutory requirements for the making of the application in accordance with s. 182A of the 2000 Act.

55. It also appears from legal submissions both initially and in reply that emphasis is being placed in particular on the decision to convene an oral hearing. Are these matters which bring the present application within the scope of s. 50?

56. A point which is made by the board that if any of the foregoing matters constitute an act or decision within the meaning of s. 50, then the appropriate way to plead such matters in order to come within s. 50 is to seek *certiorari* of the particular act or decision concerned. Here the applicants have not as such sought *certiorari* of any of the foregoing alleged acts or decisions, or indeed of any act or decision whatever. That is a difficulty although not an insurmountable one. It is in the very nature of an ongoing process that some acts will already have taken place and some acts are yet to take place. Should an applicant seek *certiorari* of the acts that have already occurred, prohibition of those yet to happen, or simply take refuge in a dust-cloud of declarations? Or all three? Seeking vast numbers of declaratory reliefs is unhappily not a rarity in the drafting of judicial review applications, and while such reliefs have their place, generally a multiplicity of declarations adds little to an application. However the doing of justice in an individual case should not hinge on infelicities of pleadings in this regard.

57. The question of whether s. 50 applies to the proceedings must be determined by reference to substance rather than form. The section applies if in substance the application seeks to attack the validity of an act or decision to which s. 50 relates, even if *certiorari* is not specifically sought. If the court finds that s. 50 does apply, it can always consider directing any consequential amendment of the pleadings that may appear convenient, in line with the strong mandate for case management given by the Supreme Court in Tracey.

58. The alleged omissions can be shortly dealt with. Failure to make a decision such as declining to reject an application *in limine* but proceeding to consider it is clearly not an "*decision made or other act done*" in a context such as this. Failure to make a decision is encompassed by s. 50B of the Act, but that only emphasises that such

omission is not included in s. 50. *"Decision made or other act done"* implies something positive and definite. An omission to act, and *a fortiori* a decision not to act, can legitimately be made subject to judicial review in principle, but under O. 84 stricto sensu and not s. 50. That illustrates perhaps the distinction between conduct (including omission) that amounts to a matter amenable to judicial review at all and conduct which amounts to an act or decision within s. 50. The latter is obviously a narrower category.

59. Ms. Egan submitted that the matters challenged did not generally come within the scope of s. 50. Mr. Keane on the other hand adopted the position in submissions that they did, other than as to the challenge to the ministerial designation.

60. It is perhaps instructive to consider that in terms of the historical origin of the state side remedies, certiorari "*would only lie to review something in the nature of a decision*" (Hogan and Morgan, *Administrative Law* in Ireland 3rd ed., p. 696; 4th ed., p. 823).

61. Section 50(2) of the 2000 Act provides that *"[a] person shall not question the validity of any decision made or other act done by (a) a planning authority, a local authority or the Board in the performance or purported performance of a function under this act … otherwise than by way of an application for judicial review under order 84 …".*

62. The first thing to be noted about this restriction is that it only applies to decisions or acts of a planning authority, local authority or the board. It has no application to the decision of the Minister to designate the board as a competent authority under the 2013 regulation. On any view, this element of the case falls outside s. 50.

63. The question therefore is whether steps taken by the board (or indeed a planning authority) in the course of considering an application for development consent themselves amount to and acts or decisions by the board or authority so as to engage the machinery of s. 50.

64. That in turn raises the question as to what is the purpose of s. 50. Ms. Gilmore and Mr. Murray in particular laid considerable emphasis in this case on the importance of legal certainty, specifically that administrative acts should be free from doubt and that if challenges are to be made, they should be brought promptly (*K.S.K. Enterprises Ltd. v. An Bord Pleanála* [1994] 2 I.R. 128 (Finlay C.J. (O'Flaherty, Egan, Blayney and Denham JJ. concurring))). Of course, the promotion of legal certainty is one of the purposes of s. 50 and indeed of O. 84, r. 21. A simplistic view of promoting legal certainty above all other objectives would suggest that s. 50 should be read in the widest possible manner, and that any act, however minor, tentative, provisional, instrumental or secondary, must be challenged immediately within the eight week period, or alternatively is forever immune from review, even if a challenge is brought in a timely manner following the ultimate development consent decision.

65. But as Scalia J. (dissenting) pointed out in *King v. Burwell* 576 U.S. (2015), "*it is no more appropriate to consider one of a statute's purposes in isolation than it is to consider one of its words that way"* (slip op p. 15).

66. There are a number of other important values and considerations behind the architecture of O. 84 more generally and specific refinements of it such as s. 50 of the Planning and Development Act 2000 or of the s. 5 of the Illegal Immigrants Act Illegal Immigrants (Trafficking) Act 2000 in particular.

67. Foremost among these is the right of access to the court. That right is fundamental in a democracy (albeit that it does have some limits: see *Agrama*). Mr. Bradley's

textbook *Judicial Review* (Dublin, 2000) at p. 223 cites the views of Le Seur and Sunkin in "Applications for Judicial Review: The Requirement of Leave" [1992] Public Law 102 at 104, that in terms of "policy goals" reflected in caselaw as justifying the leave requirement, "*that of facilitating access to justice has never been more than a bit player"* (punctuation omitted). Mr. Bradley questions whether this reflects the Irish position and I agree that it does not. Access to justice is absolutely central in how the leave requirement is to be interpreted, whether in s. 50 or O. 84 generally. That connotes requirements of clarity and certainty and of not making such access unduly difficult.

68. There must be a clear route for access to the court for an applicant with a grievance as to a statutory or administrative procedure in general and indeed a development consent objection in particular. Applicants should not be confronted, as these applicants on one view were, by simultaneous objections that their application is both out of time and premature.

69. Order 84, s. 50 and similar provisions must be construed in such a way as to vindicate this crucial right of access to the court and to provide a clearly identifiable and practicable pathway to enable an aggrieved applicant to present his or her complaint to the court. Such an interpretation militates overwhelmingly in favour of the view that the sort of decisions or acts to which s. 50(2) refers are those amounting to ultimate substantive determinations, such as the grant or refusal of development consent, or some other similar definitive and non-reversible decision as to rights and liabilities, and not the subsidiary and intermediate steps, acts or secondary decisions that may take place on the way to that ultimate substantive determination.

70. Any such ultimate decision may involve innumerable "*act[s] done by"* the decision maker along the way. In the present case, every step taken by the board in handling the application is an "act". Everything said or done by the inspector in the conduct of the oral hearing is an "act". To hold that these are the type of acts to which s. 50 (2) applies would impose an absolutely impossible burden on an applicant who wished to challenge the process. Multiple judicial reviews would be required to be brought, at enormous expense and inconvenience to an applicant, and fundamentally contradictory to such applicant's constitutional, ECHR and EU right to an effective remedy (and, for good measure, that under the International Covenant on Civil and Political Rights) of 16th December, 1966 (ICCPR)). The right might exist in theory, but would be made impossibly difficult in practice.

71. In the planning and environmental context, these considerations are reinforced by Directive 2003/35/EC of the European Parliament and of the Council of 26th May, 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, which specifically provides for a right to seek review by the court in a manner that does not involve excessive cost (see art. 7).

72. It is true that art. 10a of the Directive provides that "*Member States shall determine at what stage the decisions, acts or omissions may be challenged*". However this does not mean that member states have carte blanche. It would not be consistent with a purposive interpretation of the directive to require multiple challenges at numerous stages during a process, because to do so would impose an undue and disproportionate obstacle to the exercise of EU law rights. The discretion conferred by art. 10a appears to me to be more directed to permitting the member states to decide what remedies must first be exhausted before a challenge can be brought rather than permitting the

erection of unnecessary obstacles to access to the court by requiring multiple judicial reviews.

73. Another important statutory objective is to prevent disruption to the very administrative process under discussion. If restrictions such as s. 50 are to be read as requiring intermediate steps (not amounting to a definitive decision) to be challenged, this objective will be severely undermined. First of all the process itself will be interrupted by a requirement for an applicant to seek leave to challenge any and all such intermediate steps.

74. From a public policy point of view, it seems to me that the need to avoid disruption to the processes of public administration is not only just as important as legal certainty in the abstract, but indeed significantly more important. This perhaps is clearest in the criminal context, but the point holds good across the spectrum of public administration. If it were to be regarded as appropriate or even necessary to seek prohibition during the criminal process itself in order to vindicate an applicant's rights, the effect on the orderly conduct of trials would be disruptive in the extreme. Rather, the courts have in recent times repeatedly emphasised that prohibition is an "*exceptional*" remedy in this context and therefore in general an applicant must submit to the process and only seek a remedy if it is satisfied with the ultimate conclusion of that process: see the discussion on prohibition in *Irwin v. D.P.P.* [2010] IEHC 232 (Unreported, High Court, Kearns P., 23rd April, 2010); *Byrne v. D.P.P.* [2011] 1 I.R. 346 (O'Donnell J. (Fennelly and Finnegan JJ. concurring); *M.S. v. D.P.P*. [2015] IECA 309 (Unreported, Court of Appeal, Hogan J. (Ryan P. and Peart J.), 22nd December, 2015); *H. v. DPP* [2006] 7 JIC 3107 (Unreported, Supreme Court, Murray C.J., 31st July, 2006); *M.L. v. D.P.P*. [2015] IEHC 704 (Unreported, High Court, Noonan J., 13th November, 2015); *Kearns v. D.P.P*. [2015] IESC 23 (Unreported, Supreme Court, Dunne J., (Denham C.J., Murray, Hardiman and O'Donnell JJ. concurring), 15th January, 2015); *Sirbu v. D.P.P.* [2015] IECA 238 (Unreported, Court of Appeal, Hogan J. (Irvine and Kelly JJ. concurring), 9th November, 2015).

75. Precisely the same considerations hold good in the civil context and in interpreting s. 50. If what I am terming intermediate steps constitute acts which must be challenged under s. 50(2), then the stage will have been set for enormous disruption to the development consent process. It will require applicants to seek judicial review at every stage of the process, such as a refusal to reject an application as invalid as a preliminary matter, a decision to hold an oral hearing, a refusal to adjourn an oral hearing, and so on, with all the potential for procedural chaos that would be unleashed by such an approach.

76. I turn finally to the legislative objective of facilitating the court in the orderly processing of public law challenges. No benefit to the public interest can be served by unnecessary multiplication of judicial reviews. Indeed the logical end point of the argument that an applicant is out of time if he or she does not challenge all intermediate steps when they occur is that the resources of the court will be overwhelmed by the number of additional court applications that would become necessary on such a counterproductive doctrine.

77. As O'Donnell J. (Geoghegan and Fennelly JJ. concurring) pointed out in *Galway City Council v. Samuel Kingston Construction Ltd. & Anor*. [2010] IESC 18 (Unreported, Supreme Court, 25th March, 2010) (citing Lord Simon of Glaisdale in the Ampthill Peerage Case [1977] A.C. 547), "*litigation … is not in itself an inherently desirable activity*". And as Charleton J. (Denham C.J. and Hardiman J. concurring) said in *Talbot v. Hermitage Golf Club* [2014] IESC 57 (Unreported, Supreme Court, 9th October, 2014), the court must foster its resources. Judicial resources are limited, and as far as judicial review is concerned, those resources should be prioritised for applicants who do

not in fact have the alternative remedy of a process to which they can submit. An interpretation of s. 50 that requires subsidiary and intermediate acts to be challenged within eight weeks is a prescription for gridlock and overwhelm. The courts can either be part of the problem or part of the solution. My preference is for the latter.

78. To that extent and for the reasons discussed I would answer the question impliedly posed (but not as I read it decided) by Finlay Geoghegan J. in *Linehan v. Cork County Council* [2008] IEHC 76 (Unreported, High Court, 19th February, 2008) that an applicant does not have to challenge earlier procedural decisions (which do not irreversibly and substantively determine rights and liabilities) prior to the final decision. Indeed the fact that the question was posed at all does at one level illustrate the huge potential for uncertainty that could be created by a wide interpretation of s. 50, an interpretation which for the reasons given I would not accept.

79. This approach appears to me to be consistent with the decision of Costello J. in *Callaghan v. An Bord Pleanála* [2015] IEHC 357 (Unreported, High Court, 11th June, 2015), where she said at para. 68 that in making a final decision on a planning application which may differ from earlier pre-planning decisions, the board is not "*questioning the validity of*" an earlier pre-planning decision as to whether the strategic infrastructure procedures apply. Admittedly that case appears to proceed on the basis that it assumes rather than decides that s. 50 applies to a judicial review of such an earlier decision, but the logic of para. 68 appears to me to suggest that this assumption could be open to debate where the earlier decision does not finally and substantively determine any rights or liabilities.

80. A possibly wider view of s. 50 was taken in some comments in *Mac Mahon v An Bord Pleanála*[2010] IEHC 431 (Unreported, High Court, Charleton J., 8th December, 2010) and *An Taisce v. An Bord Pleanála* [2015] IEHC 604 (Unreported, High Court, Haughton J., 7th October, 2015), and it is to those cases that I must now turn.

Are the comments on the scope of s. 50 in Mac Mahon and An Taisce to be followed?

81. In considering the extent to which I should apply an approach suggested by some of the comments in *Mac Mahon* and *An Taisce,* I am of course starting from the default position that previous decisions should be followed. There are some circumstances where this rule does not apply, which I attempted to list in *R.A. v. Refugee Appeals Tribunal* (No. 1) [2015] IEHC 686 (Unreported, High Court, 4th November, 2015) at paras. 60 to 61. Those circumstances include where the previous comment was obiter, or where potentially determinative matters were not brought to the court's attention.

82. *Mac Mahon* is a decision of some interest and contains much useful guidance on planning law. In one relatively brief passage however Charleton J. appeared to consider *Linehan* as having laid down a view, with which he agreed, whereas I read it as posing a question. He referred to the legislative history of s. 50 (which as enacted specified the acts to which it applied and was amended to refer to acts and decisions more generally) and stated that *"[i]n passing s. 50, and then amending it so as to extend its strictures to administrative steps, the Oireachtas clearly intended to impose strict time limits for the challenging of decisions in the planning process by way of judicial review"* (para. 7). This statement appears to be obiter because the case was decided on the wider ground of the scope on which a challenge to the board's decision could be mounted.

83. The one thing that is clear is that s. 50 as it currently stands is wider than its previous form which listed particular decisions (as s. 5 of the Illegal Immigrants (Trafficking) Act 2000 continues to do, for similar purposes). But the fact that a general formula is used, rather than a specific list of decisions, could simply mean that planning

law is so complex that there are too many types of substantive final decision to warrant being specifically listed by the Oireachtas; it does not mean that any and all "*administrative steps*" must be taken to be included. Such a conclusion is, in my view, not the legislative intention, for all of the reasons spelled out in detail above, which are issues not brought to the court's attention in Mac Mahon.

84. By way of contrast, s. 5 of the Illegal Immigrants (Trafficking) Act 2000 does specify the specific final decisions to which it applies. The net result of this is that an remarkable number of final decisions in the complex area of immigration and asylum are omitted from that list: a matter I discuss further in a judgment in *K.R.A. v. Minister for Justice and Equality* being delivered today (12th May, 2016), where a list of the anomalous omissions is set out. It is clear that the option of the specific list creates clear omissions in the final decisions covered. But one can say with reasonable confidence that all of the decisions covered by s. 5 are final in the sense of determining rights and liabilities of parties either irreversibly or subject only to appeal. The section has no application to purely interim, reversible decisions, although it is not absolutely confined to very final decisions in the sense that it applies to for example decisions of the Refugee Applications Commissioner which are appealable to the Refugee Appeals Tribunal. By analogy, s. 50 is not necessarily to be read as applicable to interim decisions either; it applies to decisions of a local authority which are appealable to the board, but apart from such cases, there is no reason to assume that the Oireachtas must have intended that non-final decisions were generally to be covered. Indeed the area of planning is probably even more complex than asylum and immigration and thus even less appropriate for the use of an exhaustive list of the final decisions covered. All one can infer from the use of a general formula in s. 50 is that the Oireachtas might have considered that the inevitable omission of certain final decisions that would be involved in an attempt at a specific list was something that was undesirable. It does not remotely follow that the Oireachtas intended that non-final or non-substantive decisions would also be included.

85. For example, a decision by the board could include certain conditions which require that certain further matters be decided upon by or agreed with the local authority. A further decision by the local authority would not necessarily in itself give rise to an entitlement to a further appeal to the board, and would be definitive and substantive and therefore a proper subject for inclusion in the type of "*decision made or other act done*" caught by s. 50. G*regory v. Dún Laoghaire Rathdown County Council* (Unreported, High Court, Geoghegan J., 16th July, 1996) is instructive in this regard. Such kinds of decision might be too numerous to list and therefore the choice by the legislature to use the general category of "*decision made or other act done"* is perfectly consistent with wishing to capture substantive decisions determining rights or liabilities that were either final or irreversible only and is not necessarily indicative of a wish to include any and all administrative steps.

86. Further, to the extent that the view expressed by Charleton J. in Mac Mahon would promote if not require multiple judicial reviews in the course of a planning application, and would involve the expenditure of court resources prior to final decisions on issues that might become moot once the final decision is made, thereby undercutting the overriding objective of husbandry of the court's resources which Charleton J. advocated in *Talbot*, I would prefer an approach more consistent with*Talbot*.

87. Therefore I would very respectfully differ from the view expressed by Charleton J. in Mac Mahon, because:-

(a) It appears to be *obiter* and therefore not binding in any event;

(b) The conclusion as to the legislative intention does not seem to me to be supported by the text or legislative history and is consistent with a much more practical interpretation, namely that the kinds of substantive decision which could be caught by the section were too numerous to list, but they remain substantive;

(c) Significant policy considerations militate against such an interpretation. It undermines access to the court, threatens overwhelm of the courts by premature and multiple judicial reviews, and requires a "*lamentable waste of precious judicial resources"* (to use a phrase of Tallman J. (dissenting) in *Frost v. Gilbert* (Application number 11-35114, U.S. Court of Appeals for the 9th Circuit, 21st March, 2016, p. 33) in deciding questions in a vacuum that might turn out to have been moot.

(d) Those significant policy considerations were not brought to the attention of the court in *Mac Mahon.*

(e) The necessity for husbandry of the court's resources that features so emphatically in the subsequent Supreme Court decision in *Talbot* should also be taken into account in determining what interpretation to adopt.

(f) The wide conclusion of "*administrative steps*" being covered by the section is by no means the only interpretation of the section and I would respectfully say that it is not the preferable one for the reasons discussed.

88. In *An Taisce v. An Bord Pleanála,* Haughton J., at para. 75, speaking of a delay in challenging an initial direction to prepare an environmental impact statement (made in 2011), he said *"[t]he nub of the problem with An Taisce's claim is that if there was 'project-splitting' from an EIS perspective this arose from the Direction, and An Taisce had all the knowledge and standing that it needed to challenge the validity of the Direction when it received the EIS. It is like calling back 400 metre runners after they have finished their race to rerun it because of a false start; the time to rectify the false start is immediately after it happens. An Taisce's challenge to the Direction should have been made in 2012, not in 2015. … If An Taisce's submission that there was unlawful 'project-splitting' was accepted at this point in time it would render at nought everything that has taken place over the three years of the unhappy history of this 28km road project."*

89. One cannot but sympathise with the practical difficulty facing the court in *An Taisce* where a process had continued over a long period of time and objection was now being made to a step taken at an early stage. However, at the same time, I would very respectfully say that the proposition that "*the time to rectify the false start is immediately after it happens"* is not a valid analogy as applied to the supervision by the High Court on judicial review of judicial processes in the District and Circuit Courts or of quasi-judicial or administrative processes across the whole spectrum of public administration. It does not seem therefore to be necessarily a valid analogy by way of review of the limited area of planning decisions. The fact that a particular planning process might take 3 years may not be desirable but it is hard to see why that should have the effect of determining when time must be held to run for the purposes of s. 50. If the process in An Taisce had taken 4 weeks, would that have produced a different result? The meaning of s. 50 cannot hinge on factors such as this. The underlying

process must normally be allowed to mature to its conclusion. To launch judicial review proceedings before then is, to continue the athletic analogy, to jump the gun.

90. At para. 64, Haughton J. states that "*there does not seem to be any good reason to cut done the ambit of 'any'".* It would therefore appear that the litany of reasons militating against a wide interpretation was not brought to the court's attention (the public participation directive was referred to but not in this context). Ultimately however it is clear that that case was decided on a concession: as is noted in para. 64, *"[u]ltimately counsel for An Taisce accepted that the Direction was a 'decision' of the Board within s. 50(2) of the PDA 2000*". A case decided on a concession is not a binding precedent in the same way as a case where the proposition was fully contested.

91. For what it is worth, *An Taisce* did not deal with s. 182 as such either. An Taisce was a case where leave to appeal was refused, although as I understand matters that was largely on the basis of the "public interest" leg of the leave to appeal requirement, which was held not to be satisfied in that case.

92. I would therefore very respectfully adopt a perhaps more limited interpretation of s. 50 than might be thought to arise from some of the comments in *An Taisce*, having regard to many of the same reasons as apply to the Mac Mahon case and for the reasons set out in this judgment which factors do not appear to have been brought to the attention of the court in either case.

93. It should be noted that *An Taisce* did not decide that any and all "administrative steps" were covered by the section, but rather that it applied to a particular interim decision which had a fundamental effect on the whole course of the application thereafter. Section 50 should be confined to major decisions having a real and substantial and inevitable (in the sense of not being capable of being revisited) impact on the ultimate decision, not on minor intermediate steps such as those at issue in the present case. The decision in An Taisce had a fundamental effect on the entire nature of the scheme at all stages thereafter. The decisions at issue in the present case do not appear to have such an effect, even making allowances for the one substantive decision that could be said to have been made, namely the scoping decision of December, 2013 as to the contents of the environmental impact statement.

94. That said, one can see the groundhog day that would open up for the court if *any* intermediate steps are regarded as being covered by s. 50. It would almost invite repetitious argument in every case as to whether *this particular* decision came within s. 50 or not. Who benefits from such a quagmire of uncertainty? To my mind, only in limited cases (where the decision is substantive in the sense of determining rights or liabilities, and not capable of subsequent reversal) should non-final decisions be regarded as coming within s. 50.

95. Subsection (4) of s. 50 provides that "*[a] planning authority, a local authority or the Board may, at any time after the bringing of an application for leave to apply for judicial review of any decision or other act to which subsection (2) applies and which relates to a matter for the time being before the authority or the Board, as the case may be, apply to the High Court to stay the proceedings pending the making of a decision by the authority or the Board in relation to the matter concerned*". This clearly envisages that at least some acts or decisions made before the complete finalisation of the process are intended to come within s. 50. For example, if a decision of a planning authority is challenged, the board could apply under sub-s. (4) to stay the judicial review until any appeal to the board was determined. But there may be other interim decisions which could properly cause the sub-section to be operated. The fact however that some interim decisions are proper subjects of a s. 50 challenge does not of course mean that all interim decisions must be subject to that section. Indeed the preference for allowing

the process to proceed to a conclusion before a challenge proceeds could even be said to be embodied in the very policy of sub-s. (4) itself.

96. The question posed in *Linehan*, which was possibly sought to be addressed in a particular way in *Mac Mahon* and *An Taisce,* has a number of important consequences. Those consequences are highly pertinent to the issue of statutory interpretation. A statute cannot simply be read literally, that being the end of the matter. Of course, I do not accept that a literal interpretation of s. 50 supports the idea that every administrative act of the board or a planning authority is included. That is to read into the statute words which are not there: *"any decision made or administrative act whatsoever done …*". This is not literal interpretation.

97. One then turns to the consequences of adopting a broader over a narrower interpretation. The economist Thomas Sowell is associated with the concept that "there are no solutions, only trade-offs". It is an aphorism that is pertinent here. One can either "solve" the "problem" of applicants delaying in challenges to interim decisions, by interpreting s. 50 as applying to such interim decisions or even to administrative steps. Or one can address the much more significant problem of applicants prematurely challenging a process before there is a final decision at all. Any particular interpretation of s. 50 cannot do both. How should this trade-off be managed? This requires express consideration and cannot be simply assumed.

98. It is true that there are some costs to requiring parties to await the end of a process. For example, a party may be subjected to procedures it does not want to have to be subjected to, and may incur costs in doing so. In the context of a lengthy planning application, developers and third parties may incur costs which could be avoided if a simple knock-out point was determined at an earlier stage. All one can do in terms of attempting to reconcile the competing legal and legislative policies involved is to endeavour to balance the factors involved in the situation overall rather than from one single perspective. In my view that balance militates strongly in favour of a general preference for allowing the process to proceed to a conclusion before regarding s. 50 as triggered, although there will be exceptions to which I have referred.

99. If the judicial review *ex parte* list is anything to go by, the problem of applicants prematurely challenging an uncompleted process occurs with far more regularity than the problem of applicants trying to revive a truly stale issue in order to support a challenge to a later decision, perhaps at a ratio of frequency in the order of about 10 to 1. I appreciate that that list deals with broader issues than planning, but planning is a sub-set of administrative law generally and should not be allowed to lose its moorings from general principles common across the field of public law (a point I made in the asylum context in *R.A*. (No. 1) at para. 12). If my assessment of where the balance of the problem lies, the courts should be highly reluctant to adopt an interpretation of s. 50 which creates a much bigger difficulty than it purportedly solves. It is hard not to come back to the point that the court can be part of the problem or part of the solution.

100. Looking close-up at problems such as those in *Mac Mahon* and *An Taisce* one can easily see how the solution of an inclusive interpretation of s. 50 presents itself. One might formulate a different perspective if the question is formulated differently and more focused on systemic questions.

101. A separate issue is the toxic uncertainty created for applicants (and indeed all concerned) by a broad interpretation of s. 50. If an applicant can never be sure that he or she is safe awaiting a final decision (normally the sensible and practical thing to do, matters not irrelevant to questions of how legal issues including statutory interpretation should be resolved), then intolerable pressure and confusion is created for such applicants and their legal advisers, which continues right up to the final determination

of any ultimate challenge, because they are always at risk of the court being persuaded at a very late stage (as the court was in *An Taisce*) that they are out of time. The ECHR (reflecting the ICCPR) guarantees an effective remedy, which involves a right of access to the court. (Indeed I would not accept that the 1937 Constitution is generally less protective of fundamental rights than international law; such a right to an effective remedy (of which the right of access to the court is a component) also arises under Article 40.3). But ECHR rights must be protected by laws which have a requisite quality of certainty: see cases in numerous contexts under the ECHR such as *Hashman and Harrup v. the United Kingdom* (Application No. 25594/94) European Court of Human Rights, 25th November, 1999, paras. 37 to 41 (see also *Gillan and Quinton v. the United Kingdom* (Application No. 4158/05) European Court of Human Rights, 28th June, 2010). I have little doubt that an interpretation of s. 50 that is as extensive as to cover administrative acts which do not amount to substantive determinations is so amorphous and unpredictable in its outcomes as to fail to comply with this requirement, which permeates not simply the right to an effective remedy under art. 13 but the very concept of "law" as understood by the Convention in contexts such as art. 6 (see *Bellet v. France*, (Application no. 23805/94) European Court of Human Rights, 4th December, 1995, at para. 36: "*The degree of access afforded by the national legislation must also be sufficient to secure the individual's 'right to a court', having regard to the principle of the rule of law in a democratic society. For the right of access to be effective, an individual must have a clear, practical opportunity to challenge an act that is an interference with his rights*"). Even if such a law was clearly expressed beyond peradventure to bring all administrative steps within the scope of s. 50, by imposing a requirement to challenge a process at each and every step of the way, it would impose an intolerable and disproportionate burden on applicants which would render their remedy ineffective for the purposes of art. 13 of the ECHR. Such an approach would also violate art. 47 of the EU Charter. In addition such an interpretation would lack objective justification having regard to the very substantial reasons militating against it as set out in this judgment. It would also for the reasons explained contravene Article 40.3 of the Constitution.

102. Insofar as art. 13 of the ECHR is concerned, s. 2 of the European Convention on Human Rights Act 2003 comes into play, and the court is required to adopt an interpretation of s. 50 that is compatible with the Convention "*in so far as possible".* It is not only possible but necessary to read s. 50 in a manner that does not impose such burdens on applicants, and limits the kind of acts and decisions covered to substantive and determinative acts and decisions. In doing so, as I have endeavoured to set out above, the process of public administration also benefits – in my view to an much greater extent - because its machinery is not burdened by excessive interim challenges; it is permitted to simply get on with its job and the court can then review the final result.

103. These considerations are reinforced in the present context by the public participation directive which, by adding an EU law overlay, engages the right to an effective remedy pursuant to art. 47 of the EU Charter of Fundamental Rights.

104. Again, if there was a further reason for taking a different perspective to that in *Mac Mahon*and *An Taisce*, consideration of the 2004 Act and the public participation directive would furnish a further such consideration. The 2004 Act was not considered in either case, and the public participation directive was considered in An Taisce but not under the heading of whether an effective remedy would be impaired by a wide interpretation of s. 50.

105. It is perhaps ironic that a wide interpretation of s. 50, adopted in the name of legal certainty, creates massive and continuing uncertainty as to the correct procedure to be adopted, as the present application illustrates.

106. Take for example a garden-variety planning application. A planning authority accepts an application, stamps it as received and opens a file. Four weeks later it seeks additional information from the developer. An objector wishes to make the point that the application is invalid. Adopting the interpretation that one has to challenge any act or decision that would have been invalid on the challenger's theory within eight weeks of that act or decision would suggest that the objector has to come into court within eight weeks of not merely the decision to act on the application by seeking further information, but probably within eight weeks of the planning authority taking any action on it, namely accepting it. In the present case there were arguments addressed to me that time for the purposes of any objection which could go to the validity of the application should run from the making of the application, a proposition that would be just as valid (or invalid) in any run-of-the-mill application as it is in this case.

107. The notion that a citizen must take on the worry, inconvenience and expense of applying to the High Court *at the outset of the process*, or else lose forever the right to complain in court about the validity of an application, is repugnant. By requiring such an application in addition to requiring subsequent judicial review applications as to any other legal points that may crop up at any later stage of the process, such a doctrine blows a hole a mile wide in the commitment to a "*fair, equitable, timely and not prohibitively expensive*" procedure for access to the court in art. 10(a) of the public participation directive, 85/337/EEC inserted by directive 2003/35/EC. Such a procedure requiring multiple judicial reviews nullifies the statutory intention to provide an alternative quasi-judicial process to resolve planning issues and fails at every level, including that of basic legal certainty, to comport with the obligation to provide an effective remedy under art. 47 of the EU Charter of Fundamental Rights and art. 13 of the ECHR. Indeed there can be few forms of legal uncertainty more toxic and paralysing than uncertainty as to the time from which a limitation period runs.

108. That uncertainty in the present context is not inevitable. The court does not have to blindly or heroically steer the ship onto the rocks in pursuit of a siren called literal interpretation. A court cannot simply say, in effect, this is what the statute means, someone else can pick up the pieces and all will be well. An assessment of the consequences must be built in to statutory interpretation in terms of an examination of whether the interpretation proposed to be adopted comports with the policies underlying the legislation. The consequences of a wide interpretation of s. 50 militate overwhelmingly against such an interpretation.

109. The only element of the board's activity to date that has any of the characteristics of a substantive decision is the opinion furnished under s. 182E in December, 2013. However s. 182E(5) provides that "*Neither— (a) the holding of consultations under subsection (1), nor (b) the provision of an opinion under subsection (3), shall prejudice the performance by the Board of any other of its functions under this Act or regulations under this Act, or any other enactment and cannot be relied upon in the formal planning process or in legal proceedings*". This seems to me to be a complete answer to the suggestion that the opinion of December, 2013 is definitive or starts any clock for the purposes of the running of time. Even in the absence of a provision such as s. 182(5), however, that decision seems to me to be merely preliminary and secondary, and not the sort of decision to which s. 50 could apply. It is not in any way irreversible during the course of the process and therefore falls outside the section.

110. For all the reasons stated, I reject the notion that s. 50(2) has any application to intermediate or subordinate steps in the development consent process which do not

substantively determine rights and liabilities in an irreversible manner. That section applies to substantive decisions, normally those made at the end of a particular process to grant with or without conditions or to refuse a particular application. In addition there may be limited cases where before the finalisation of the process a substantive decision is made which irreversibly determines rights and liabilities to such an extent as to reach the threshold to which s. 50 applies. These categories are limited and unusual. The section has no relevance to decisions of the type challenged in this case, such as to accept and process an application or to conduct an oral hearing, or the opinion as to the contents of the environmental impact statement under s. 182E, where a final decision on the grant or refusal of development consent has yet to be made.

Are the proceedings improperly constituted insofar as they purport to be issued under s. 50?

111. It was at one stage in the hearing suggested that if s. 50 does not apply, the proceedings are improperly constituted because they purport to be issued under s. 50 (and in particular they are entitled in the matter of s. 50).

112. This is not a fatal obstacle to the action. The fact that the applicants think they need to proceed under s. 50 does not stop the court from granting them leave under O. 84 *simpliciter*. As far as the pleadings are concerned, this problem could be easily rectified by correcting the title to the proceedings. It would be disproportionate to refuse leave for such a reason alone.

Is the complaint arguable?

113. The consequence of the foregoing findings is that I have to be satisfied that the complaint is arguable rather than that there are substantial grounds for it. It is no disrespect to the industry and effort put in by the parties to submissions on this issue for me to say that taking all matters submitted into account, I find the applicants' complaints to be arguable in the not-altogether-exacting sense that applies here. They are certainly not so manifestly wrong as to enable the court to resolve them on that basis at this stage. It is not therefore necessary to discuss that aspect in further detail but even if I were minded to do so, that is not necessary for reasons which will follow. I am not deciding whether there are substantial grounds for the application because that question does not arise at this stage.

Is the application out of time?

114. Given that s. 50 of the 2000 Act does not apply to challenges of this type the crucial provision governing the time issue is therefore O. 84, r. 21(1), as amended by the Rules of the Superior Courts (Judicial Review) 2011 which provides that "[*a]n application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose".*

115. Sub-rule (2) provides some clarification that the intention is focused on the ultimate decision, insofar as it states that "[*w]here the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding".*

116. As with the discussion on the interpretation of s. 50, a similar issue arises as to the interpretation of O. 84, r. 21.

117. Do grounds "*first arise*" when they first enter the narrative in any way, or when the applicant could possibly have raised them, or do they arise in the sense in which that term is used in O. 84, r. 21, in general, only when the applicant is substantively damnified by becoming the recipient of an adverse decision? The general rule would

seem to have been acknowledged that time runs from the date of the final decision (see e.g. Charleton J.'s comments in *Mac Mahon*; *Finnerty v. Western Health Board* [1998] IEHC 143 (Unreported, High Court, Carroll J. 5th October, 1988)). In *McEniry v. Flynn* [1998] IEHC 65 (Unreported, High Court, McCracken J., 6th May, 1998), reference was made to the action having been commenced within the appropriate period from the date of the ultimate certificate of taxation rather than from the date of the hearing complained of. In *Hogan v. Waterford County Manager* (Unreported, High Court, Herbert J., 30th April, 2003) it was held that"*[i]n the case of a matter involving a number of steps, time begins to run when the final decision of the series of decisions is made" .*

118. An analogous point arose in the context of O. 84A in *Veolia Water UK p.l.c. v. Fingal County Council* (No. 1) [2007] 1 I.R. 690 (Clarke J.), where the issue was primarily whether grounds arose when the decision was made or when an applicant came to know of it. Clarke J. preferred the former, although subsequently Barrett J. in *Harrington v. Environmental Protection Agenc*y [2014] 2 I.R. 277 preferred the latter (at pp. 285 to 286), albeit without reference being made to *Veolia*. Fortunately I do not need to consider that particular issue (albeit recognising that as Clarke J. pointed out there may be little difference in the outcome in many cases depending on how one applies the extension of time, so natural justice can be incorporated through that mechanism). The real question for present purposes is how substantial a decision would have to be before time beings to run at all, and in particular whether and to what extent pre-final decisions trigger the running of time.

119. As Clarke J. commented in the course of that discussion, *"[t]here may be decisions which have a greater or lesser degree of formality and which may be binding and irreversible to a greater or lesser extent"* (at p. 705). "*At the other extreme, there will be many informal and internal stages*" in the process (at p. 706). Time therefore runs from the date when "*a formal adverse consequence which has crystallised to the extent of a formal step in the process being taken adverse to the interests of the applicant concerned. The fact that informal steps, capable of reversal, have been taken does not, it seems to me, give rise to grounds for challenge"* (at p. 706).

120. Admittedly this particular passage does not specifically say what the approach should be if the step is a formal one, but also capable of reversal. But the words of a judgment are not to be read as the words of an Act of Parliament: *Woodland v. Essex County Council* [2013] UKSC 66; [2014] 1 AC 537 per Lady Hale at para. 28; *Cox v. Ministry of Justice* [2016] UKSC 10 per Lord Reed at para. 42.

121. It seems to me that having regard to all of the considerations referred to in this judgment, only a formal decision having irreversible effects triggers the start of the running of time for the purposes of O. 84 (as with s. 50). This is normally the final decision for the simple reason that most interim decisions are capable of being rectified in substance in favour of the applicant prior to or by means of the final decision.

122. *Sfar v. Revenue Commissioners* [2016] IESC 15 (Unreported, Supreme Court, McKechnie J., 16th March, 2016) dealt with a different situation, namely where an applicant received an adverse decision and engaged in further correspondence about it, bringing a challenge following the "*final*" correspondence. As this was in effect a re-iteration of the original decision, the application was out of time. A party cannot revive or extend the time period by in effect challenging the decision maker to revisit the decision, except where there has been a clear error or failure of natural justice which it would be reasonable for the decision-maker to be allowed consider. This may be a matter of degree but the fundamental point is that one cannot use the device of correspondence in order to prolong the time period. It was in that context, and, as I

read it, in that context only, that McKechnie J. commented that the operative date was the date when "*an application could first have been made*" (at para. 15).

123. As discussed above, to make a fetish of one particularly narrow view of legal certainty and to elevate it unnaturally above all considerations is to engage in a significant distortion of the legal process. Other significantly more important considerations, which militate in favour of generally deeming grounds to arise, at least as far as *certiorari* is concerned, only when the decision has actually been made, are:

> (a) protecting the right of access to the court by avoiding a situation where due to the need to bring multiple or interim judicial reviews, or due to the uncertainty as to when time begins to run, or both, the exercise of that right is rendered unnecessarily or disproportionately difficult;
>
> (b) the importance of preventing disruption of public administration by multiple and interim challenges; and
>
> (c) the public interest in preventing the proliferation of litigation, particularly given the limited resources of the court and the needs of litigants who do not have an alternative remedy, by generally requiring applicants to submit to a process to its conclusion before drawing on scarce judicial resources.

124. For the purposes of determining when time begins to run to challenge a decision of a public body, the grounds must be taken to first arise, in general, when the final decision is made.

Time limits should be construed in harmony with the preference for certiorari over prohibition

125. Another important reason why this is so arises from the exceptional nature of prohibition, already referred to. The caselaw on the exceptional nature of prohibition arises generally in the criminal context and for the good reason that a criminal trial is presided over by a judge and accompanied by a number of safeguards. Similar considerations apply to prohibition of civil proceedings in the District and Circuit Courts, and perhaps to a slightly lesser extent, to quasi-judicial proceedings such as in tribunals or bodies like the board. Safeguards are far less secure if the process is an administrative one without the established protections of an independent quasi-judicial officer, so the further one gets from a process presided over by a judge the more willing the High Court might be to consider intervening in the process before its conclusion. The present case seems to be more in the independent quasi-judicial realm where there are strong considerations in favour of letting the process continue to a conclusion.

126. Assuming prohibition to be exceptional (apart from processes to which adequate safeguards do not apply), one must then follow that train of thought to its logical conclusion and not interpret O. 84, r. 21 (for good measure a legal provision made within the system established by the Courts Acts themselves) in a manner that would not only be non-goal-congruent but absolutely perverse having regard to the stated objective of favouring *certiorari* over the "exceptional" remedy of prohibition. To hold that the three month time limit for judicial review is capable of being triggered, in general, by individual matters that may arise in the course of an administrative or indeed judicial process, before the ultimate decision, is not merely to invite but to require the bringing of multiple judicial reviews by way of prohibition before the ultimate decision is made. For the court to adopt such an interpretation would cast

considerable doubt on the sincerity of its commitment to characterising prohibition as exceptional.

127. More fundamentally still, it was expressly recognised in *G v. D.P.P.* that a precondition for the grant of leave for judicial review is a determination that such leave is the most appropriate remedy for the matter complained of. It is inherent in that approach that where an applicant has a better remedy, he or she should avail of that instead of, or at least, prior to a judicial review. In a case where the remedy involves submission to the process and awaiting a result, *G. v. D.P.P*. precludes an approach which insists that the applicant should not avail of that remedy and must proceed by prohibition instead in order to avoid being held to be out of time.

128. Exceptionality for the purposes of permitting prohibition occurs where a breach of natural justice or law has arguably occurred in particularly egregious or special circumstances giving rise to the conclusion that the public interest would be better served by permitting a challenge, despite the alterative remedy of submitting to the process, for example where the complaint is of conduct that might not be adequately corrected unless the court were to intervene. I will admit that exceptionality as so conceived is probably easier to recognise than it is to define but the foregoing represents at least an attempt at definition. What one can say however is that the large majority of complaints are not exceptional, and this one is no different.

129. The general position is that a person aggrieved in the course of an administrative process should complete that process before seeking judicial review; and indeed a person with a right of appeal against a decision complained of should exhaust that remedy before seeking judicial review. These, of course, are general propositions, to which there will be exceptions, because unless judicial review is, in principle, available during an administrative process, the court would be powerless to check even an egregious abuse.

130. Why should a process be exhausted before judicial review is sought? It is true that in some previous case law, statements have been made from time to time to the effect that an applicant can complain about a threatened breach of his or her rights and does not have to wait to be injured in order to litigate (see *East Donegal Co-operative Livestock Mart Ltd. v. Attorney Genera*l [1970] I.R. 317 per Walsh J. at 388; *State (Lynch) v. Cooney* [1982] I.R. 337 per Walsh J. at 371; and *Curtis v. A.G.* [1985] I.R. 458 per Carroll J. at 462.

131. However, there are several significant reasons, already referred to, which strongly favour the need to submit to an administrative or judicial process prior to seeking relief by way of judicial review:-

> (a) Firstly, such a requirement prevents the severe disruption to the administrative or judicial process concerned that would be occasioned by mid-stream applications.
>
> (b) Secondly, it prevents premature and unnecessary consumption of the very limited resources of the court. For this reason, in particular, it does not seem to me to be crucial that the decision maker in question can resolve the specific legal point made by an applicant. For example, supposing an applicant is on trial in the District Court under a statute which he or she contends to be unconstitutional. Obviously, that court does not have jurisdiction to resolve that particular issue. But that is not a reason why prohibition should be allowed so as to enable the statute to be challenged in advance. The applicant may, after all, be acquitted,

thereby obviating the need for any inquiry into wider public law issues. As long as the decision maker has jurisdiction to provide satisfaction to an applicant, even if that is by a route which does not address the specific grievance in legal terms, an applicant should, in general, be required to submit to that process before seeking judicial review.

(c) Thirdly, the underlying process may resolve a number of factual and possibly legal questions which will simplify, assist or possibly obviate the necessity for judicial review proceedings at the end of the process. For example, an issue which appears potentially relevant in advance may in the event turn out not to be decisive. An applicant's standing to raise particular issues might turn out to be either confirmed or lacking depending on certain findings of fact in the course of the process.

(d) Fourthly, by simplifying the process for challenge, such an approach assists applicants overall by providing a clear pathway to an effective remedy and by removing uncertainty as to whether they should intervene in the course of a process or await its outcome, as a matter of generality.

(e) Relatedly, it also assists applicants who do not have an alternative remedy by freeing up court resources for their benefit rather than allowing such resources to be spent on applicants who have, but do not wish to use, the alternative remedy of a process to submit to.

132. In the present case, for example, the board cannot invalidate the Minister's designation of it as a competent authority. But it can, however, refuse consent for the development. If it does the latter, the applicant's grievances will have been dealt with, thereby removing the need for recourse to either this Court or any court. Mr. Keane suggested that some party would challenge the result no matter which way the board decided. That does not seem to me to be a reason why his clients should be allowed to seek judicial review without first exhausting the process of making their objection and awaiting a decision. If the decision is adverse, it can be challenged on *certiorari*within eight weeks.

133. For the foregoing reasons, an applicant must in general submit to a process which constitutes an alternative remedy before seeking judicial review. It necessarily follows from that approach that he or she cannot be out of time for doing so. Time for the purposes of *certiorari* at least therefore must run from the ultimate decision at the conclusion of the process.

134. The court cannot express a preference for certiorari over prohibition while at the same time pandering to arguments that time begins to run from a point before the conclusion of the process. To do so is to place applicants in what the anthropologist Gregory Bateson refers to as the "double bind". "*The essential hypothesis of the double bind theory is that the 'victim'—the person who becomes psychotically unwell—finds him or herself in a communicational matrix, in which messages contradict each other, the contradiction is not able to be communicated on and the unwell person is not able to leave the field of interaction"* (Paul Gibney, "The Double Bind Theory: Still Crazy-Making after All These Years" (2006) 12 *Psychotherapy in Australia* 48).

Categories of complaint made

135. It is now necessary to apply the foregoing principles to each category of complaint made. To summarise those categories even further than was done above:-

(a) Complaint is made about certain developments in the course of the oral hearing, including what is said to be an amendment of the application as well as the conduct of the inspector in refusing to adjourn the hearing.

(b) Complaint is made about non-compliance with the legislation in various respects. This complaint can be subdivided as follows:-

(i) a challenge to the authority of EirGrid to prosecute the application, whether it has a sufficiency of interest, and whether landowner consent is required;

(ii) the inadequacy of the environmental impact statement and Natura impact statement; and

(iii) alleged non-compliance with arts. 22 and 23 of the Planning and Development Regulations 2001.

(c) It is submitted that there is a conflict of interest or bias between the role of the board in deciding on development consent and its role under art. 8 of the 2013 regulations following the ministerial designation on 4th December, 2013. This "bias" ground is in substance a challenge to that ministerial designation.

Are the complaints regarding the conduct of the hearing out of time?

136. Taking the first of these complaints, any issues arising in the course of the oral hearing are clearly not out of time on any view as the application for leave was made (just) before the start of the hearing. Nor would they be out of time in any challenge brought at the conclusion of the process. Having said that, merely because they are not out of time does not mean they are not premature.

Does the board have jurisdiction to interpret the legislation?

137. Turning to the second ground, that of breach of various aspects of planning law, the challenge immediately raises the question as to whether these matters could be considered by the board in the first instance prior to any judicial review. The applicants essentially submitted that the application rested on issues of law, which were not appropriate for the board. Reference was made to *Shannon Regional Fisheries Board v. An Bord Pleanála* [1994] 3 I.R. 449 at 456, where Barr J. stated that no other body can usurp the function of the court regarding statutory interpretation. It is important not to read too much into this approach. While, of course, it is a matter for the court ultimately to definitively interpret the 2000 Act, that does not mean that the Board cannot do so in the first instance. Indeed, any body or person charged with implementing legislation must be entitled and indeed required to form a view as to what the legislation means. In the case of central government, that view is presumptively, and is normally in fact, based on the advice of the Attorney General, but either way, a view on the meaning of legislation is something that a public body is perfectly entitled to attempt to come to. That does not, in any way, take away from the definitiveness of the court's ultimate adjudication. The Irish position is not the same as the American one where caselaw establishes that the court should be deferential an agency's interpretation of legislation relating to that agency's area. One does not have to go that far in order to accept the legitimacy and indeed necessity of statutory bodies adopting an interpretation of legislation which they administer.

138. Likewise, I had previously observed in *O'Mahony Developments v. An Bord Pleanála* [2015] IEHC 757 (Unreported, High Court, 27th November, 2015) at para. 17 that the similar comment of Barr J. in *Tennyson v. Corporation of Dún Laoghaire* [1991] 2 I.R. 527 at 534 that the High Court has "*exclusive jurisdiction*" to interpret the development plan cannot be read literally, because in many planning contexts, a planning authority or the board must, to some degree, interpret the development plan. The reference to the role of the court must be read as an expression of the view that the court has "ultimate" rather than "exclusive" jurisdiction to decide what a development plan means.

139. The board makes the point that since interpretation of development plans is a matter of law (*Re. X.J.S. Investments Ltd.* [1986] I.R. 750 (McCarthy J. (Finlay C.J., Walsh, Henchy, Hederman JJ. concurring); *Cicol v. An Bord Pleanála* [2008] IEHC 146 (Unreported, High Court, Irvine J., 8th May, 2008)) and therefore not a matter on which the court has to defer to the board's view, the applicant's submission would preclude the board from forming a view on the meaning of the development plan in the first place. This would clearly be an incorrect result; the premise of the applicants' argument must therefore be erroneous.

140. MacMenamin J. in *Treacy v. An Bord Pleanála* [2010] IEHC 13 (Unreported, High Court, 22nd January, 2010) at para. 29 noted that planning issues were more appropriate for determination by planning authorities "*even if a question of questions of law may arise*". I would respectfully agree. Of course, the court can following a final decision review if any determination of a legal question is correct, which involves the court forming its own view rather than deferring to the board. The application of legal criteria to particular facts is a mixed question of fact and law, in relation to which some deference to the decision-maker may however be appropriate: *Kildare County Council v. An Bord Pleanála* [2006] IEHC 173 (Unreported, High Court, MacMenamin J., 10th March, 2006),*E.D. v. Refugee Appeals Tribunal* [2011] 3 I.R. 736, per Hogan J. at para. 8 citing *A.M.P. v. Refugee Appeals Tribunal* [2004] 2 I.R. 607 (Finlay Geoghegan J.); Paul Daly, "Judicial Review of Factual Error in Ireland" (2008) 30 D.U.L.J. 187.

141. In any event, the issue is not whether the issues are ones of law or fact, it is "*what is the more appropriate remedy for the applicant's complaints or to put it in the converse fashion will the applicant suffer any injustice if left to his remedy before An Bord Pleanála?"* (per Kelly J., as he then was, in Kinsella v. Dundalk Town Council [2004] IEHC 373 (Unreported, High Court, 3rd December, 2004)).

Are the complaints regarding the validity of the application and related issues out of time?

142. Therefore as regards the second group of issues raised in this challenge, it seems to me that these are all matters which the board has jurisdiction to determine. The board can and indeed must determine whether an application is valid (see *McCallig v. An Bord Pleanála* [2013] IEHC 60 (Unreported, High Court, 24th January, 2013) *per* Herbert J. at paras. 62 to 64; and *Southwest Regional Shopping Centre Protection Association v. An Bord Pleanála* [2016] IEHC 84 (Unreported, High Court, 4th February, 2016) per Costello J. at para. 86). Furthermore the adequacy of an Environmental Impact Statement or similar document such as a Natura impact statement is also a matter that the board can and must determine (see *Kenny v. An Bord Pleanála* (No.1) [2001] 1I.R. 565 per McKechnie J. at p. 578; and *Harrington v. An Bord Pleanála* [2006] 1 I.R. 388 (Macken J.),*Craig v. An Bord Pleanála* [2013] IEHC 402 (Unreported, High Court, 26th August, 2013) per Hedigan J. at para. 7.8. Time therefore runs from the date of the ultimate decision of the board which is predicated upon any such determinations, even if made by way of a preliminary decision.

143. Even if the board did not have jurisdiction to deal with any of these issues, that does not mean that time for the purposes of any challenge must be deemed to have started running prior to the ultimate decision of the statutory authority in question, in this case the board. It seems to me that all of the elements of the applicants' complaints under this heading are well within the jurisdiction of the board to assess, but even if that were not the case, the one thing the board undoubtedly has jurisdiction to do is to refuse development consent. If it were to do so, this would obviate the necessity for any challenge whatever by the applicants.

144. The notice party submits in written submissions that if the application is invalid *"then any such invalidity or fundamental flaw was inherent in the application ab initio*" and "[*t]he application for leave to apply for judicial review is, self-evidently, out of time"*. That argument is based on a false premise, namely that time must be taken as running for the purposes of O. 84, r. 21 from the first date at which the issue could possibly have been raised in any form.

145. While on a narrow view which looks to the first appearance of the issue on the horizon without regard to any other relevant considerations, some or many of these issues may have first made an appearance at the time of the making of the application under s. 182A of the 2000 Act, that is not the time at which the grounds "*first arose"* in the sense in which that expression is used in O. 84, r. 21, for all of the reasons referred to above. To adopt such a construction of the rules of court would compel applicants across the whole field of public administration to launch multiple and premature judicial reviews as soon as issues appear and before they crystallise in a formal decision. This would undermine the much more important policy considerations of preventing disruption to public administration, preventing the court's resources from being wasted, and avoiding an excessive barrier to the right of access to the court. It would also interfere without proper justification, and in a disproportionate manner, with, and therefore contravene, an applicant's rights to an effective remedy under the Constitution and art. 13 of the ECHR (reflecting art. 2 of the ICCPR), and, where it applies, art. 47 of the EU Charter and art. 10a of the public participation directive. Awaiting the substantive decision is the reasonable and practical course. The applicants' complaints under this heading will first arise in that sense when the applicants are in receipt of an adverse decision, which is the point at which they will be substantively damnified for legal purposes. The applicants are not out of time under this heading.

Is the complaint regarding the ministerial designation and bias out of time?
146. The third ground of complaint is the complaint regarding the ministerial designation of the board as a competent authority under the 2013 regulation and the related allegation of bias. The State submits that because that designation was made in December, 2013, the applicants are now out of time, having failed to institute the application for leave within three months of that date. Alternatively, reference is made in their supplementary submissions to various alternative dates including the date it was recommended that the transitional provisions of the 2013 regulation did not apply (2nd May, 2014), the publication of that report (May, 2014), the publication of the project manual in May 2014, and the complaint to the European Commission in November 2014.

147. A similar submission is made by EirGrid, which argues that time runs from the making of the designation, or alternatively from the date when the board acknowledged the notification given by EirGrid of the North South Interconnector development for the purposes of the 2013 regulation (2nd July, 2014), or at least the applicants' knowledge of it. The notice party emphasises that such knowledge of the designation occurred at an early point, and that the designation constituted the taking of a formal step. Mr. Murray also argued specifically that by choosing to pursue the challenge to the validity

of the designation by judicial review rather than plenary summons, the applicants took on the obligation to comply with the three-month time limit.

148. The board in supplementary submissions (27th April, 2016) alleges that since the designation relates to functions of the board as part of the projects of common interest process, it is relevant that that process consists of two separate procedures under art. 12 of the 2013 regulation: a pre-application procedure and the statutory permit-granting procedure. The board submits that the pre-statutory phase is now over as of 9th June, 2015. It submits that any time period to challenge that process expired in September 2015 pursuant to O. 84 and the challenge to the ministerial designation now is out of time. All the normal rhetorical flourishes are then applied to the situation; the applicants are alleged to have "*sat on their hands*" (para. 9 of submissions) and so on. They are even faulted for failing to scour the (hundreds of) annual statutory instruments on irishstatutebook.ie to identify the one that was not there, and thereby for failing to appreciate the absence of a formal statutory instrument in this regard (para. 8).

149. In an alternative submission, it is suggested that time to challenge the ministerial designation ran from the date the formal statutory process commenced (9th June, 2015), or alternatively from the date when the board indicated that it would consider the applicants' submissions when determining the application rather than as a preliminary issue (22nd September, 2015).

150. The foregoing submissions illustrate how tediously easy it is for a respondent or notice party to argue that a person who is the subject of or a participant in an ongoing process (and therefore not in any legitimate sense "sitting on their hands") is nonetheless out of time. Does time run from:-

(a) The date the designation was made (4th December, 2013)?

(b) The date of the report recommending that the transitional provisions did not apply (2nd May, 2014)?

(c) The date the board first prepared a manual referring to the designation (15th May, 2014)?

(d) The date the board acknowledged the notification given by EirGrid of the North South Interconnector development for the purposes of the 2013 regulation (2nd July, 2014)?

(e) The date the first named applicant was informed of the designation (28th July, 2014)?

(f) The date the revised board's manual was published on its website (around 24th September, 2014)?

(g) The date of the formal complaint to the European Commission (18th November, 2014)?

(h) The date when the pre-statutory phase ended (9th June, 2015)?

(i) The date when the board indicated that it would consider the applicants' submissions when determining the application rather than as a preliminary issue (22nd September, 2015)?

151. To set out these matters might suggest that the applicants ignored red flag after red flag, and continued to do nothing despite the expiry of multiple limitation periods. No doubt that is how the respondents and notice party would like to see things. But such a convenient frame of reference ignores just one small detail – this process is still ongoing. It is reasonable for a participant in an ongoing process to await a final decision before drawing on the resources of the High Court through judicial review.

152. The real point here is that it is *always* possible for a respondent in an ongoing process to claim that an applicant should have moved sooner. Taken in isolation from all related matters, such claims can sound plausible. At the same time, attempts by applicants to move sooner will be met with a claim of prematurity. That is the classic double bind in which claimants are placed. The court can either pander to those convenient and plausible-sounding but fundamentally illogical objections, or alternatively set out a clear pathway to access to the court, as required by the Constitution, the ECHR, the ICCPR, the EU Charter and the public participation directive; such pathway normally being at the conclusion of the process.

153. The fact that the applicants wish to include the challenge to the designation in their judicial review as a point going to the validity of the process and ultimate decision (rather than proceeding by plenary summons) means that such relief should be sought within 8 weeks of that ultimate decision. It does not mean that they must apply within 3 months from the date of the designation (or any of the other intermediate dates referred to above).

154. It necessarily follows from the discussion of the matters which trigger the running of time, set out above, that the occurrence of a matter, an applicant's knowledge of it, or the taking of a formal step, does not trigger the running of time for the purposes of O. 84 or s. 50 (or analogous provisions), unless the decision is crystallised by being embodied in a substantive decision having irreversible effect, normally the final decision. To hold otherwise would undermine important policy objectives, would risk the overwhelm associated with multiple and premature challenges, would be absurdly to render meaningless the preference for *certiorari* over prohibition as discussed throughout this judgment, and would fundamentally interfere with the right of access to the court and the right to an effective remedy.

155. More fundamentally, the submissions of the State, the board and EirGrid do not properly conceptualise the distinction between an individual decision addressed to a particular person and a regulatory measure of wider application to a class of persons, or indeed persons generally. The ultimate decision to be made by the board in this case, namely the grant refusal of consent for the North/South Interconnector, is an individual decision in the former sense. While it is obviously a matter that affects the wider community, it is nonetheless a specific decision addressed to a finite group of people, namely the applicant for consent (EirGrid) and other parties to the process (such as the applicants).

156. By contrast, the ministerial designation dated 4th December, 2013, is a measure of general application. While it is effected in the form of seemingly routine correspondence between two public servants, it is intended to be legally binding and as much a part of the regulatory and legal system as if that designation had been specifically set out in a statutory instrument or even in primary legislation. (I note that the applicant submits that such a designation indeed requires legislation, either as a matter of principle or because the designation is inconsistent with the functions of the board as specifically provided for in primary legislation (thus warranting a specific amendment before the board could be so designated); whereas the Minister will

contend that EU or Irish law does not require that a designation of this type must be made in a statutory instrument under the European Communities Act 1972.)

157. It would be fundamentally unconstitutional on a host of grounds, including the primacy of the rule of law and the requirement to prevent breach of substantive rights and breach of the right of access to the courts, to impose a time limit on challenging any measure of the general application, whether that be a statute, a formal statutory instrument, or a regulatory document that goes above and beyond a decision addressed to named individuals, as this ministerial designation does. A legislative or regulatory measure of general application must be capable of being challenged from time to time as occasion requires, and cannot be made subject to a time limit that would require such a challenge to be mounted before the issues involved had come to a head in the sense of having been embodied in an adverse decision for any particular challenger. (A law originating in a Bill "cleared" under Article 26 is the only, anomalous, exception, although it might not be possible to preclude on an *a priori* basis an argument arising at some point that Article 26 should be read purposively and as not precluding a challenge based on arguments not raised in the original reference or arising from a fundamental change of circumstances since then.)

158. Thus, a challenge to the constitutionality or ECHR compatibility of legislation does not in general crystallise until the challenger has been subject to the law in question; or in the criminal context until the defendant has actually been convicted and has exhausted the criminal process (see my decision in *Casey v. D.P.P.* [2015] IEHC 824 (Unreported, High Court, 21st December, 2015)). To *require* a challenge earlier would imperil the right to an effective remedy under Article 40.3 of the Constitution, art. 47 of the EU Charter, art. 13 of the ECHR and art. 2(3)(a) of the ICCPR, which (while not of course part of Irish law) is of persuasive authority in interpreting the foregoing.

159. Similarly a challenge to legislation, statutory instruments or administrative documents of a regulatory character does not crystallise in terms of time beginning to run until the person affected is the subject of an adverse substantive decision. In this case, that decision would be the grant of development consent.

160. To require an applicant to prosecute a claim of constitutionality or validity, or ECHR compatibility, in respect of such a measure before being the subject of an adverse decision, has a host of unacceptable consequences, which I have discussed in Casey and which I will endeavour to summarise as follows.

161. First, such an approach fails to comply with the principle of reaching constitutional issues last, which was affirmed by Denham J. (Murray C.J., Geoghegan, Fennelly, and Macken J. concurring) as she then was in *Gilligan v. Special Criminal Court* [2006] 2 I.R. 389. That doctrine is itself a subset of a wider doctrine of "reaching public law issues last". It is clearly in the interest of coherence and effective public administration that challenges to the validity (or ECHR compatibility) not just of legislation but of statutory instruments or regulatory administrative decisions on legal grounds should not take place if the issues can be disposed of on more conventional and limited grounds. It would be an improvident and unacceptable use of the court's resources to undertake an investigation into the validity of the assignment of the competent authority function to the board if it were to turn out that the board were minded to refuse development consent, thus rendering that entire enquiry moot.

162. Given that public law challenges of this kind, whether constitutional, ECHR or legal, have the potential to cause elements of public administration to grind to a halt, an approach by the State arguing that such a challenge is out of time is counterproductive. The argument which was in fact advanced, namely that this challenge is out of time, may perhaps suit the State in this particular case but would if accepted give rise to a

situation where in future and in many wider contexts across the whole spectrum of public administration and prohibition of criminal and civil trials, such challenges would have to be entertained before any substantive decision had been made.

163. One can take the view that a given application should be resolved on the basis of arguments that suit the immediate needs of the situation without regard to broader consequences, or one can approach the matter in a way that promotes the coherence of the legal system as a whole. My preference is for the latter.

164. A rule of restraint also supports the separation of powers. A measure of general application should not be struck down at the suit of someone who does not need such a sweeping order. If a given applicant can have his or her complaint resolved in some other way (such as by acquittal, or refusal of a planning permission to which he or she objects, just to take two examples), then it is not appropriate to require the People of Ireland to submit to having a duly enacted or adopted legislative or quasi-legislative measure struck down unnecessarily. There are sufficient demands on the legislative power without the courts adding to them by creating legislative emergencies when this is simply unnecessary in order to resolve a dispute in a particular case.

165. A further reason why challenges to legislative or regulatory measures should be postponed until a substantive determination has been made is that by requiring an applicant to go through the judicial or administrative process concerned, the decision maker will very frequently be required to resolve a number of issues, both legal and in particular factual, which will then form a practical matrix for any remaining constitutional or legal challenge to be resolved. It will frequently be the case that particular findings of fact will either confer standing on an applicant or deprive him or her of such standing. It would therefore be premature and inappropriate to endeavour to wade into such an issue without the facts having first being clarified in the course of the process, and indeed perhaps without certain legal matters also having being ruled on in the course of that process. For example it is not entirely clear to me at least at this stage as to how the dual role of the board is likely to impact in practice upon the decision-making process. That is something that it seems to me would significantly benefit from being teased out in the course of the development consent process itself. It may be that by the end of that process, no particular problem will have arisen. On the other hand, if such a problem does arise, it will arise in the context of specific facts which will form the necessary matrix and basis for the court's future examination of the validity of the ministerial designation. To decide the issue now would be to decide it in a vacuum. That is an unattractive and indeed unacceptable option, giving the availability of a process of review after the ultimate decision on development consent.

166. *Osmanovic v. D.P.P*. [2006] 3 I.R. 504 provides some support on the face of it for these applicants. That case concerned applicants who were charged with offences contrary to s. 186 of the Customs Consolidation Act 1876, as amended by s. 89(b) of the Finance Act 1977. The section provides for a fixed penalty for conviction on indictment on charges of illegal importation of goods. The applicants pleaded not guilty and were sent forward for trial to Dublin Circuit Criminal Court. They then sought by way of judicial review a declaration that s. 89(b) of the 1997 Act was unconstitutional. Ó Caoimh J. refused the relief sought on the basis that the application was premature as the applicants had not been tried, convicted or sentenced. This decision was successfully appealed to the Supreme Court.

167. In his judgment which is quoted by Geoghegan J. at p. 507, Ó Caoimh J. had said that *"the facts of Curtis v. Ireland [1985] I.R. 458 can be contrasted with the instant case as in that case issues of fact relative to the offence charged were not capable of being determined before the court of trial".*

168. The reasoning of the Supreme Court in allowing the appeal as set out in just two paragraphs of the judgment of Geoghegan J., paras. 19 and 20, at pp. 510 and 511 of the report.

169. Firstly, Geoghegan J. notes that Ó Caoimh J. "*took the view that these applicants might well be acquitted on the merits and that they should wait until they were convicted before mounting any challenge to the constitutionality of the provision"* (at pp. 510 to 511). Geoghegan J. stated that *"I do not accept that locus standi is such a narrow concept or that the views of the learned trial judge conformed with the principles of this court set out in Cahill v. Sutton [1980] I.R. 269. I appreciate that prematurity and locus standi are not quite the same thing…. I am of the opinion that if the appellants' complaints based on the Constitution could be arguably justified, they are perfectly entitled to air them at this stage".*

170. At para. 20, Geoghegan J. made reference to a number of previous decisions to the effect that "*a person facing criminal charges has sufficient standing to challenge the constitutionality of the substantive provisions at issue".* He noted that while cases such as *Norris v. Attorney General*[1984] I.R. 36, *Desmond v. Glackin* (No. 2) [1993] 3 I.R. 67 and C.C. v. Ireland and P.G. v. Ireland [2005] IESC 48; [2006] 4 I.R. 1, were distinguishable or had special or particular features, the "general principle" was supported by the decision of Carroll J. in *Curtis v. A.G.* to the effect that a plaintiff who had been charged but not convicted had *locus standi* to challenge the constitutionality of the provisions in question "*as he was in imminent danger of a determination affecting his rights, and this need not necessarily be a decision which would adversely affect his rights"* (Curtis, at p. 459, cited by Geoghegan J. in Osmanovic, at 511.)

171. While there is no doubt at all that there can be exceptions where in particular cases (of which*Osmanovic* was one), challenges were permitted despite the underlying process not having concluded, there are some countervailing considerations which point in a different direction to the*obiter* statement in *Osmanovic* that to allow such challenges is the general rule as long as the applicant is in imminent danger of being affected.

172. Firstly, I hope it will be regarded as permissible to observe that the relatively brief discussion set out in the judgement of Geoghegan J. is very largely a statement of conclusions, rather than of the reasons and considerations supporting those conclusions.

173. Secondly, Geoghegan J. acknowledges the distinction between locus standi and prematurity, but nonetheless went on to hold that having regard to the decision of Carroll J. *"that the plaintiff had locus standi*" that "[*a] applying the same principles to this case, I consider that none of the proceedings, the subject matter of this appeal, are premature*". That particular chain of reasoning would seem to be potentially open to the view that the acknowledged distinction between locus standi and prematurity has not been altogether developed. There is no question that an applicant has locus standi if he or she is either adversely effected or is in imminent danger of being so effected, as decided in *Norris, Curtis* and *Osmanovic*. It does not however follow that simply because an applicant has *locus standi* for that reason, that any and every challenge is automatically therefore ripe for immediate decision, and can not be characterised as premature. In general such an implication would not automatically or necessary follow.

174. The downside of permitting constitutional challenges prior to the underlying process coming to fruition does not appear to have been drawn to the court's attention in *Osmanovic*. I have referred to many elements of the downside of that approach above, and further discussed those elements in Casey. v. D.P.P. A point not argued is of course a point not decided see *The State (Quinn) v. Ryan* [1965] I.R. 70 per Ó Dálaigh

C.J. at 120, cited in numerous decisions, including *Ó Maicín v. Ireland* [2014] IESC 12 (Unreported, Supreme Court, Hardiman J., 27th February, 2014).

175. *Casey* was based on the doctrine requiring the court to "*reach constitutional issues last*", *per*Denham J., as she then was, in *Gilligan v. Special Criminal Court* at p. 407 (see also O'B. v. S. [1984] I.R. 316 per Walsh J. at 328). As well as having been applied on numerous occasions by the Irish courts, this approach has a venerable history in U.S. constitutional law, as discussed in*Ashwander v. Tennessee Valley Authority* 297 U.S. 288 (1936). In that case, Brandeis J. said (at pp. 346-347) that "[*t]he Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it*" Liverpool, N.Y. & P. S.S. Co. v. Emigration Commissioners, 113 U. S. 33, 113 U. S. 39; … *Abrams v. Van Schaick,* 293 U. S. 188; *Wilshire Oil Co. v. United States*, 295 U. S. 100. '*It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' Burton v. United States* 196 U.S. 283, 196 U.S. 295". As Easterbrook J. put it in Alliance for *Water Efficiency v. Fryer* (U.S. Court of Appeals for the Seventh Circuit, Appeal Number 15-1206, 22nd December, 2015), "*courts should not decide constitutional issues unnecessarily*" (p. 7).

176. For the reasons set out above, such an approach of restraint also respects the separation of powers in a way that embarking, at the suit of a person who has an alternative remedy, on a process of potentially striking down a statute or similar act simply does not.

177. As discussed in *Casey*, an approach requiring the court not to express a view on the constitutionality of legislation until such time as it has been finally applied to a participant in a process would be a more economical use of judicial resources because of the significant possibility that the issue may be capable of being resolved in any event in the course of that process. An applicant (who is a criminal defendant) may for example be acquitted, or alternatively, if convicted, may have that conviction overturned on appeal. Either outcome would render it unnecessary and inappropriate to make a determination on the constitutionality of the legislation concerned. In the present context, an objector to a development consent application may succeed on the merits, rendering a public law challenge unnecessary.

178. Alternatively, facts as found in the course of the process may deprive an applicant of standing to make particular arguments, or render those arguments clearly unsustainable, thereby reducing if not eliminating the necessity for the court to embark on what may be a quite theoretical investigation of the constitutionality of the legislation. For the court to determine the validity of that legislation in a prohibition application prior to the full ascertainment of the factual matrix in the course of the process could, in many instances, amount to the determination of a moot question.

179. As in Casey, if it is the case that an applicant can secure a postponement of a process simply by challenging the constitutionality of the relevant legislation (or its ECHR compatibility, or the validity of a sub-statutory measure), an avenue for the delay or frustration of the process will have opened up.

180. I might observe that such considerations are particularly acute in the criminal context but not of course confined to that context. The criminal trial is a mechanism to vindicate the legal, constitutional, EU and ECHR rights of a victim of crime. The strengthening of these rights has been a growing theme in recent legal developments, such as directive 2012/29/EU of the European Parliament and of the Council of 25th October, 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (victims' directive). These rights include the positive rights arising from the State's "*obligation to*

conduct an effective prosecution" (*Söderman v Sweden* (Application No. 5786/08) European Court of Human Rights, 12th November 2013, para. 88). To allow a criminal trial to be de-railed unnecessarily by judicial review, when the matter complained of either lacks merit or could be dealt with more proportionately within the trial, creates the potential for such delay or interference with the criminal process as to bring the performance of this obligation to victims into question. I would add to the above that the performance of the State's obligation "*to conduct an effective prosecution*" could also be brought into question by the delaying of the criminal process for the purpose of constitutional or ECHR litigation which should more properly be pursued after the conclusion of that process.

181. More generally, if any one applicant is given leave in relation to a public law challenge to a statute or instrument, prior to the conclusion of the process, this could amount in practice to a suspension of the legislation in question, because any other person similarly situated (for example, a defendant charged with the same offence) will know that they must also be entitled to a similar order for the asking. It is the function of the judiciary to "*uphold*" the Constitution and the laws of the State (Article 34.5.1°), not to contribute to a situation where those laws can be put into suspension, or at least not without very substantial reasons for doing so. What goes for a criminal trial must go for other civil processes where similar considerations apply. To prohibit the present process on the grounds that the ministerial designation is arguably invalid would be to give the green light to leave for prohibition for the asking for any other applicant involved in a process to which the project of common interest process applies. That could be in effect to put the designation into suspension.

182. *Osmanovic* does not discuss the fundamental principle of reaching constitutional issues last, which as I have said is a particular instance of the wider principle that the court should reach public law issues last, and thus not strike down a statute instrument or even an administrative decision of general regulatory applications (such as that in issue in the present case), if the case is capable of being decided on other, narrower, grounds.

183. It seems to me that the principle of reaching constitutional issues last is just simply not possible to reconcile with a view that as a matter of generality, a person only has to show "*imminent danger of a determination affecting his rights"* in order to be permitted to advance a challenge to the constitutionality of a statute.

184. In any event, since *Osmanovic* was decided, the law on prohibition has moved on very significantly, and it has now been definitively established that prohibition, at least in the criminal context, should not be granted save in "*exceptional*" circumstances (see the cases referred to above). This is not simply because matters of fairness can be dealt with by the trial judge, but is also important because the criminal process impacts on the rights of third parties, particularly injured parties: see the observations of Kearns P. in *Coton v. D.P.P*. [2015] IEHC 302 (Unreported, High Court, 21st May, 2015).

185. Given that the criminal context involved state the highest level of protection for the rights of citizens in our system, prohibition must also be regarded as a generally less appropriate remedy where it is sought to be employed to restrain a civil process. This is a matter of degree. If protections are available in the form of a civil determination by a judicial officeholder or quasi-judicial decision maker, then the court may be as reluctant as it is on the criminal side to permit prohibition, absent special or egregious circumstances of course. If on the other hand, the administrative process lacks appropriate safeguards, the court might be more willing to intervene before the completion of the process.

186. It would be illogical in the extreme if the law was such that prohibition generally can only be granted in limited or exceptional circumstances, but that this approach of exceptionality did not apply if an applicant was seeking to challenge the validity of legislation, and that in the latter case prohibition could be sought as a general rule as soon as imminent danger had been demonstrated. Such an approach would fundamentally undermine the systems recent jurisprudence which has sought to emphasis the necessity to bring a challenge at the conclusion of the process rather than to disrupt it midstream. It would furthermore put a huge premium on seeking to challenge the constitutionality of legislation or the validity of instruments. This would be, in the language of Kennedy J. (dissenting) in *Luis v. United States* 578 US (2016) (slip op. p. 17) "*an approach that creates perverse incentives".*

187. Of course that is not to say that there will not be cases where a particular applicant or plaintiff should be permitted to challenge legislation to which he or she has not actually being subject. *Norris* provides an example of once such case, because if a particular piece of legislation is not in fact being enforced, a rigid rule requiring a person to be convicted first would prevent the unconstitutionality from ever being reviewed by the courts. Likewise, legislation dealing with constitutional questions relating to structures of government, separation of powers, foreign affairs, electoral processes and other such matters do not require a person to have being adversely affected before a challenge may be made, because those challenges relate to broader issues that go far beyond the individual case and are not significantly enhanced by being the subject of a specific individual determination, or, in many cases, do not involve an adjudicative process at all. This means that there is no specific judicial or administrative decision making process to which an applicant can first subject themselves before seeking to challenge the legislation. However, where, as here, there is very specific process with a definitive conclusion in view, the position is different examples of that kind of situation include, the planning process, the criminal process, applications for a particular statutory decision for the benefit or detriment of an individual applicant, and so on. In cases where a process exists which will result in very specific individual decision at the conclusion of that process, the general rule must be that an applicant must submit himself or herself to that process and receive a decision before being permitted to advance a challenge to legislation (or a similar public law challenge as here, such as to a statutory instrument or a regulatory administrative decision).

188. One caveat (not relevant to the present case) that must be added for clarity is, as I indicated in Casey, that in the case of a process the conclusion of which involves a decision by a court that is not subject to judicial review, a defendant must be permitted to initiate such a challenge by plenary summons prior to the conclusion of a criminal appeal, but that challenge should not be heard unless the criminal process in fact has concluded (see Casey, paras. 19 to 21, referring to*Cunningham v. Ireland* (Unreported, ex tempore, not circulated, Kearns P., 24th January, 2014)).

189. I appreciate that *Osmanovic* has been referred to in subsequent cases. However, that has largely been in the context of simply applying the decision rather than considering the matter as I have referred to in this judgment. A more detailed look at those cases is instructive.

190. *S.M. v. Ireland* (No. 2) [2007] 4 I.R. 369 (Laffoy J.), was a simple application of Osmanovic, although it is noteworthy in that case that the State argued (see pp. 378 to 379) that the plaintiff was "*not a person aggrieved until such time as he is convicted of an offence for which he is liable to punishment under the section…his challenge was premature and inconsistent with his innocence".*

191. In *Kennedy v. D.P.P*. [2007] IEHC 3 (Unreported, High Court, MacMenamin J., 11th January, 2007), an attempt to challenge the constitutionality of legislation relevant

to a criminal trial, in advance of his trial, was firmly rejected. MacMenamin J. noted at para. 32 that in relation to the question of interpretation of legislation which could arise during a trial and could be determined by the trial judge, the Supreme Court had indicated in *C.C. v. Ireland* [2005] IESC 48 that it was only prepared to entertain such an issue for "exceptional reasons only" (Kennedy, para. 32).

192. In relation to a constitutional challenge, the court said that the application of the impugned statute to the applicant was "*a hypothesis which has not occurred and may never occur… This court is unaware, and can only speculate as to how the evidence will evolve at trial".* (Kennedy, para. 34)

193. *Maloney v. Ireland* [2009] IEHC 291 (Unreported, High Court, Laffoy J., 25th June, 2009) was a case where an attempt to challenge s. 30(1) of the Offences against the State Act 1939, was rejected on the grounds of a lack of *locus standi.* In that case, Laffoy J. commented: *"[t]here are undoubtedly cases… in which the Superior Courts have made determinations in proceedings challenging the constitutionality of relevant statutory provisions where a criminal trial is pending*". Osmanovic was characterised as a "*recent example*", but, on the other hand, Laffoy J. referred to the decision of Clarke J. in D. v. Ireland [2009] IEHC 206 (Unreported, High Court, 29th April, 2009), regarding restraining a criminal prosecution where a relevant statute is challenged and noting the need to afford a "*very significant weight indeed to the need to ensure that laws enjoying the presumption of constitutionality are enforced*" while acknowledging the possibility of "*any special or unusual countervailing factors*" (para. 4.5); Laffoy J. went on to say that "*an essential consideration in a case where it is sought to restrain the prosecution of criminal charges pending a constitutional challenge is whether it is appropriate for the Court to entertain such proceedings at all".* Such an approach is simply not possible to reconcile with the concept that *Osmanovic* lays down a general rule.

194. In *Murphy v. Ireland* [2010] IEHC 536 (Unreported, High Court, 21st July, 2010), Herbert J. did not accept that reliance on *Osmanovic* was sufficient to establish entitlement on the part of the plaintiff to pursue a constitutional challenge to s. 46(2) of the Offences Against the State Act 1939 prior to his trial, in the absence of supporting the claim with the facts specific to the plaintiff. This decision was overturned in an ex tempore ruling of the Supreme Court on 5th June, 2013, but the report of the substantive decision of the Supreme Court on appeal at [2014] 1 I.R. 198, does not clarify the precise relevance if any of the *Osmanovic* decision in that context.

195. *Damache v. D.P.P.* [2012] 2 I.R. 266 *per* Denham C.J. at 273 was a case where the court considered it appropriate to decide a prospective issue prior to trial, but that decision clearly does not lay down any general rule.

196. An indication of shifting winds in the direction of the jurisprudence was a decision of Hardiman J. for the Court of Criminal Appeal in *D.P.P. v. Cunningham* [2013] 2 I.R. 631, where he commented at p. 660 that if a defendant had "*sought to challenge the validity of the statutory in plenary proceedings [prior to the trial], he almost certainly would have been met with the objection that the proceedings were misconceived and, in any event, premature. If this succeeded, the moving party would be at risk of an award of costs against him".*

197. Hardiman J. in Cunningham said of the Kennedy decision that it "*would certainly suggest that the courts would not readily entertain applications of this kind*". But that "*not all pre-trial challenges will be rejected as premature*", *Osmanovic* being referred to in the latter context; *"Thus, for example, the courts have been willing to entertain challenges to the constitutionality of a statute prescribing a sentence in advance of any conviction".* This cannot be regarded as other than as a significant narrowing of the

scope of the *Osmanovic* decision if the latter were to be viewed as a statement of a "*general principle".*

198. The decision of Hogan J. in *Douglas v. DPP* [2014] 1 I.R. 510 also represents a straightforward application of *Osmanovic* and proceeded on the apparent basis that "*the fact that [the plaintiff] has been charged with these offences…is in itself enough to confer upon him the standing to challenge the constitutionality of these statutory offences"* (at p. 521). Again, I agree with that statement insofar as it is a statement regarding *locus standi.* It does not expressly address the question of prematurity, and to that extent, for the reasons stated, I would not accept that merely being charged with an offence gives rise to an automatic entitlement to pursue to conclusion in advance of a trial, a constitutional challenge to legislation relevant to the offence in the absence of special circumstances. The view could be taken that the peculiarly outdated form of the offence at issue in *Douglas* might have constituted such a special circumstance warranting intervention by way of prohibition.

199. *Osmanovic* was cited in *O'Connell v. Turf Club* [2014] IEHC 175 (Unreported, High Court, 3rd April, 2014), *per* McGovern J. at para. 21, although that was a case where the applicants had, in fact, been the subject of a determination by the turf club referrals committee at the time the hearing in the High Court took place. This was partly because Charleton J. had refused a stay on the proceedings of the committee, despite the grant of leave (see para. 5), a matter which is consistent with the contention that an administrative process should be allowed to proceed notwithstanding a challenge to legislation.

200. *J.F. v. Ireland* [2015] IEHC 468 (Unreported, High Court, Binchy J., 14th July, 2015), was a constitutional and ECHR challenge to ss. 8 and 11 of the Sex Offenders Act 2001. The plaintiff had been convicted of a sex offence and had subsequently been charged under s. 12 of the 2001 Act for failure to comply with the requirements of that Act. The latter charge had not come to fruition prior to instituting the challenge. Binchy J. held that the impugned provisions were both currently operating against the plaintiff as well as threatening to so operate, thereby conferring standing to bring the challenge. This appears to be a case where a prematurity argument would have been much weaker than it is in a case such as the present one.

201. In the light of the foregoing I conclude that the challenge to the ministerial designation is not out of time because it is a challenge to a measure of a general and legislative or regulatory nature, to which time limits do not generally apply until the application of the legislative or regulatory measure is crystallised in respect of a particular applicant by being embodied in a particular final decision affecting that applicant. If at that point challenged by judicial review, such an application should be brought within eight weeks from the date of the ultimate adverse decision if planning consent is granted, because the invalidity of particular legislation, instrument or instrument-like document is being relied on as a ground to ultimately invalidate the planning consent decision. Section 50 therefore applies to proceedings having that outcome as the ultimate objective.

202. If the designation of the board as a competent authority had been an individual decision, rather than a regulatory one, such as if it had been made for the purposes of this application by EirGrid and this application alone, the question presented would have been a finer one, but on balance even then I would have been inclined to the view that such a designation should be regarded as the sort of secondary, subsidiary or incidental decision, the grounds were challenging which would not be properly regarded as arising for the purposes of O. 84, r. 21 until the making of the ultimate decision.

Does a bias complaint have to be launched before a final decision?
203. One feature of this element of the complaint is that the applicants themselves largely characterise it as a bias challenge, rather than more neutrally to say that the process is flawed because the ministerial designation is *ultra vires.* Does the description of the complaint as one of bias impose a greater onus to move for judicial review as soon as this issue appeared on the horizon rather than awaiting a final decision?

204. Mr. Murray submits a bias complaint is one that should be made at the outset and which if not pursued can be deemed to be waived. While that broad principle is not in issue, and indeed a party is normally required to actually make an objection of bias as soon as he or she becomes aware of it, this is not the type of "bias" to which that rule applies. The complaint here essentially is one of incompatibility or conflict arising from the legislative and regulatory architecture, rather than one of actual bias by the board.

205. In any event, in so far as a complaint of bias is in fact made, if it is, all the party is required to do is to protest or object, in order to preserve their position. A party is not required to seek prohibition in order to preserve that position if a decision-maker does not uphold the objection of bias.

206. If one takes the analogy of court proceedings, if a party becomes aware of matters which give rise to an apprehension of bias in respect of a particular judge, that party can either do nothing, in which case the objection must be taken to be waived, or alternatively can make the objection to the judge. If that objection is not upheld, the party's position will still have been preserved for all future purposes. The party is not also required to go on to seek to challenge the judge at that point by way of judicial review (if it lies) or interlocutory appeal. A rule requiring a party to do so would be entirely counter-productive in terms of the requirements of the legal system, because it would be to a significant increase in appeals (and judicial reviews), and possibly incentivise an increase in the number of bias objections, perhaps even for tactical reasons.

207. In short therefore, I can consider that the complaint of the applicant under the "bias" heading is not a complaint of the type that in fact required any objection, given that it primarily arises from the legislative and regulatory scheme rather than a specific act of the board on its own initiative. If I am wrong about that however the applicants have in fact made an objection and thus preserved the point for the purposes of challenge.

Is the application premature?
208. It is well established that where an applicant seeks, by way of judicial review (in particular prohibition) to pre-empt a decision to be made by the decision-maker being challenged, such an application may be dismissed as premature. By way of examples, in *Huntstown Air Park Ltd. v. An Bord Pleanála* [1999] 1 I.L.R.M. 281 (Geoghegan J.), a challenge to a decision of the board not to require certain parties to furnish reports relating to a proposed development was held to be premature, as the board might decide to review that decision at any time. (The decision was also held to fall outside the (admittedly differently-worded) statutory precursor of s. 50). In *Phillips v. Medical Council* [1992] I.L.R.M. 469, Carroll J. (at pp. 474 to 475) said "*Judicial review does not exist to direct procedure in advance … Since the High Court cannot anticipate or direct what the findings … will be, the application for an order of prohibition against holding the inquiry on the grounds that it must of necessity be a nullity, must also fail".* This decision was followed in in Carroll v. Law Society of Ireland (Unreported, Supreme Court, McGuinness J., 19th January, 1999).

209. While there is no absolute rule that certiorari must be preferred to prohibition in all circumstances, there is a general preference for allowing the process to proceed,

particularly if it is a judicial or quasi-judicial process, and then permitting review of the results. That is for the reasons I have referred to – to prevent unnecessary expenditure of the court's limited resources, to prevent unnecessary disruption to the processes of public administration, and to prevent the creation of barriers to the right of access to the court which would exist if an applicant had to launch multiple judicial reviews each time a particular step arose as opposed to awaiting the final decision.

210. For those reasons the submission of the applicants (written submissions, para. 12) that "*no legitimate interests are served by having to wait until the final determination by the respondent*" is misconceived. As the board legitimately puts it in their written submission (para. 69), the applicants "*are seeking, in effect, to enjoin the very process which is supposed to deal with their complaints".*

211. It follows from the host of reasons to which I referred to earlier in this judgment, that all of the points made by the applicants are ones which can and may be pursued by them by way of judicial review if they are in receipt of a decision which is adverse to them on the development consent issue, when the board makes that determination, subject of course to the court being satisfied that there are substantial grounds for any such challenge.

212. While that approach would be necessary for the reasons I have already referred to whether the application was in the planning area or not, the fact that it is raises yet another reason as to why the application at this stage is premature. As set out above, an application for prohibition on grounds such as those advanced here is subject only to arguability at this stage, rather than substantial grounds, whereas a challenge following a decision to grant development consent would be subject to the higher substantial grounds test. It would be inappropriate to permit an applicant to circumvent the legislative intention that there would be a higher hurdle for challenges of this type (or similar challenges such as those to immigration matters) by reframing the challenge as a matter of prohibition before the ultimate decision.

213. If the court is with one breath to disapprove of a circumvention of the legislative intent in this matter, it should not with the next breath encourage such challenges by regarding them (through a broad reading of s. 50 or O. 84, r. 21) as appropriate or even necessary prior to the making of an ultimate decision. The challenge of this type must therefore be held to be premature. It may be that development consent will be refused, in which case the applicants will have no further complaint. If the application is granted, and the applicants at that stage wish to pursue judicial review, they will in accordance with the statutory intention have to demonstrate substantial grounds. An interpretation that an approach that the present application is premature serves that statutory purpose and best husbands the resources of the court.

214. An application of this type must therefore be viewed as premature not just in relation to matters that can be specifically resolved by the decision-maker (in this case, everything other than the challenge to the ministerial designation), but also as to any matters that will be resolved as a matter of practicality by a favourable decision (thus, if the board finds against EirGrid, the challenge to the designation is resolved by being rendered moot).

215. The board (or any decision maker) must be afforded a presumption that they are going to act lawfully: *Clune v. Director of Public Prosecutions* [1981] I.L.R.M. 17 (High Court, Gannon J.);*Comhaltas Ceolteorí Éireann v. Dun Laoghaire Corporation* (Unreported, High Court, Finlay P., 14th December, 1977); *Lancefort Ltd. v. An Bord Pleanala* [1997] 2 I.L.R.M. 508 (McGuinness J.);*Weston v. An Bord Pleanála* [2010] IEHC 255 (Unreported, High Court, Charleton J., 1st July, 2010) *Craig v. An Bord Pleanála* [2013] IEHC 402 (Unreported, High Court, Hedigan J., 26th August,

2013); *Klohn v. An Bord Pleanála* [2009] 1 I.R. 59 (MacMahon J.); *Harrington v. An Bord Pleanála* [2014] IEHC 232 (Unreported, High Court, O'Neill J., 9th May, 2014); *Ratheniska Timahoe and Spink* (R.T.S.) *Substation Action Group v. An Bord Pleanála* [2015] IEHC 18 (Unreported, High Court, Haughton J., 14th January, 2015). That presumption can be displaced if they clearly indicate that they are not going to act lawfully. However there is no such clear indication in this case. The bulk of the applicant's points are capable of being resolved in their favour by the board itself in due course. That combined with a presumption that the board will act correctly is also relevant to favouring certiorari over prohibition.

216. As White J. stated in *An Taisce v. An Bord Pleanála* [2015] IEHC 633 (Unreported, High Court, 9th October, 2015), *"[i]t is not appropriate for the court to interfere in the determination of the planning application"* (para 71). He went on to indicate that the court would intervene if the relevant article of the directive had been misinterpreted by the board, which illustrates that there is no absolutely inflexible rule, although I would view that finding as a relatively unusual clear case of an error by the board which warranted intervention before a final decision.

217. The fact that the applicant characterises the defects in the application as depriving the board of jurisdiction is not an answer to the point that the board remains a more appropriate remedy within the G. v. D.P.P. approach. The issue is not whether academically one could argue at this point that the process should not be happening. It is whether policy considerations favour the exhaustion of remedies, which they do.

218. Other cases warranting intervention would be a clear and egregious or special case of breach of natural justice such that the public interest in intervention by prohibition outweighs the public interest in awaiting the outcome. While the applicants make a natural justice case, and while breach of natural justice could in principle be a basis for relief (see *Glover v. B.L.N. Ltd*. [1973] I.R. 388 (Walsh J. (Ó Dálaigh C.J. concurring)) any breach alleged is not so clear and egregious as to override the general rule.

219. If the wrong feared is not an inevitable injustice then prohibition is not generally appropriate.

Is there prejudice to the applicants at this stage such as to depart from the normal rule regarding prematurity?

220. Mr. Keane submits that even if applications of this type are thought premature, the present application in the particular circumstances of the applicants is not premature for a number of reasons.

221. Firstly, he submits that the applicants are currently being damnified because of the enormous expense in their representation before the oral hearing. He submits that the legal costs involved could be in the region of €600,000, and consequently argues that the applicants should not be required to submit to the process given that they will lose out financially as a result.

222. However, it seems to me that the cost of legal representation in the course of submitting to a judicial or administrative process could not, in principle, be a reason, at least in general, for permitting an applicant to proceed by way of prohibition rather than by certiorari. If legal costs were to be accepted as such a reason, that would fundamentally undermine the clear preference of the law for certiorari rather than prohibition. If prohibition in criminal cases is "exceptional", such a view is hard to reconcile with the fact that the claim of having to incur legal costs is just as available as a criminal defendant who does not benefit from legal aid as it is to these applicants.

223. Furthermore, the level of legal representation incurred by the applicants is, it seems to me, to be a matter for them. It has not been demonstrated that it is not open to them to make their point by more limited interventions and submissions. In saying that, I am not in any way detracting from the energy and ability with which the applicants' legal advisers have pursued the applicants' interests. I am really making the point that in the context of an oral hearing, it is really a matter for the applicants as to whether to arrange for legal representation at all, and if so, at what level.

224. The second matter relied on by Mr. Keane is his submission that any legal expenses incurred by the applicants in the oral hearing become irrecoverable if the application is withdrawn, as happened previously and indeed that such legal expenses are only rarely granted even if the application proceeds to a full hearing.

225. It seems to me that this complaint is one that would require a wider public law challenge to the legislation or the decisions of the board rather than being a reason for allowing me to interfere with the process by granting leave for prohibition. If this application is withdrawn and the applicants' costs are irrecoverable at that point, they may decide, as they did before, to pursue some form of legal action against EirGrid or the State. If the matter comes to a substantive conclusion and the board declines to award the applicants their costs, the remedy of judicial review in respect of that decision would be open. These matters do not seem to be a basis for the court to intervene by way of prohibition at this stage.

226. Thirdly, Mr. Keane says that his clients' lands are being devalued by the application process and that the damage becomes "*more tangible"* the further the process proceeds. This would seem to be an argument for allowing the process to conclude promptly, rather than for requiring it to become more protracted by putting it on hold pending the determination of the judicial review. It is not a ground for permitting prohibition at this stage.

227. Fourthly, Mr. Keane says that the board enjoys powers of survey pursuant to s. 6 of the 2000 Act (and possibly the power to acquire information under s. 8 of the Act, although that appears to apply only to local authorities). Ms. Egan points out that under s. 252, an owner may withhold consent for entry on to land, which dispute is then determined by the District Court and that under s. 202 of the 2000 Act, provision is made for compensation. The argument that the applicants are currently being damnified because their land is potentially open to entry for the purposes of survey is, as Ms. Egan submits, "*highly theoretical*". Any such entry for the purposes of survey is *a de minimis* interference with property rights which is not of such a nature as would amount to substantial damnification for the purposes of permitting judicial review at this stage.

228. Finally there was a submission to the effect that due to the flaws in the process so far, it was no longer possible for the applicants to participate in the oral hearing. I do not consider that this is the sort of argument to which the court should be sympathetic. Unless some clearly egregious breach of natural justice occurs, which is not the case here, an applicant must be expected to soldier on even before a difficult decision-maker and seek to make the best of it. If the applicants want to withdraw that is up to them but I would not accept that that can be laid at the door of the board at this stage.

Should the application be refused for discretionary reasons due to delay or prejudicial delay?

229. Ms. Egan submits that the applicants lack equity by virtue of having brought an eleventh-hour application in the course of an oral hearing (or at its outset), and should be denied leave in the exercise of discretion. She relies on *Mulcreavy v. Minister for the Environment* [2004] 1 I.R. 72 (Keane C.J., (Hardiman and McCracken JJ. concurring) and *O'Flynn v. Mid-Western Health Board*[1991] 2 I.R. 223 at p. 236, (Hederman J.

(Finlay C.J., Griffin, McCarthy, O'Flaherty JJ. concurring)). This is essentially a delay argument. Of course in respect of the same matter, the applicants cannot be condemned for delay as well as for prematurity.

230. The notice party submits more specifically that the application should be refused on the grounds of prejudicial delay pursuant to O. 84, r. 21(6).

231. It appears to me that because the present claim is significantly based on EU rights, any provision in Irish law (including O. 84, r. 21(6)) for the refusal of leave (or relief) for an application made within specified time limits simply does not apply. Such a provision can only apply to domestic law claims because its application to claims based on EU rights would be incompatible with EU law: see the recent decision in *Shindler v. Chancellor of the Duchy of Lancaster* [2016] EWHC 957 (Admin) (28th April, 2016) per Lloyd Jones L.J. at para. 59, citing Case C-406/08*Uniplex (UK) Ltd v. NHS Business Services Authority* [2010] ECR I-817 at 41 to 43; *R. (Berky) v. Newport City Council* [2012] EWCA Civ 378; [2012] 2 C.M.L.R. 44.

232. Even if I am wrong about that, if prohibition is not the proper remedy then the application should be refused on that ground in this case, not on grounds of delay. If an applicant who has been so refused goes on at a later stage to apply in a timely manner for certiorari following the final decision, he or she cannot then be criticised for delay or visited with adverse consequences for having made a delayed prohibition application. Any such "delay" in the context of an application which itself was premature could not logically or fairly count against an applicant at the *certiorari*stage.

Refusal of leave is without prejudice to the applicants' right to pursue these issues at the appropriate time

233. While it follows from the above that the present application for leave must be refused, I will do so expressly without prejudice to the entitlement of the applicants to pursue any or of the points in question, subject to demonstrating substantial grounds, in the event of a further judicial review arising from any approval of the application made by EirGrid.

234. My decision that the matters are not out of time is intended to reflect the general approach to public or challenges which in my view best promotes the coherence of the legal system and vindicates the rights of all concerned. However more specifically it constitutes a *res judicata*relating to the issues concerned for the purposes of any future judicial review between the present parties. The interests of justice and of avoiding re-litigation of the same questions between the same parties militates in favour of regarding this decision as controlling in the context of any hypothetical further litigation between the parties. It is my intention in resolving that issue now to preclude any party from raising, in any future such judicial review, any objection which I am now rejecting, such as that the applicants would, at that point, be out of time in making any of the points that they have sought to make in the present proceedings, or indeed that they should be prejudiced in any way at that point for having failed to secure leave prior to the ultimate grant of consent for the development. Given the amount of time and energy that this matter has consumed, if nothing else, it would be contrary to any rational system of husbandry of judicial resources to facilitate these parties in re-opening any of these issues in a future judicial review proceeding, by regarding it as acceptable for them to argue for example that the applicants were out of time in such a future challenge commenced within 8 weeks of a final decision.

235. It sometimes occurs that a court may find for a party but on the basis of reasoning which that party finds unpalatable. In such circumstances, the court should be open to crafting an order in terms which would allow the party to appeal if they so wish (an approach I supported in *Li v. Minister for Justice and Equality* (No. 2) [2015] IEHC 747

(Unreported, High Court, 25th November, 2015), at para. 7, and *W.T. v. Minister for Justice and Equality* [2015] IEHC 108 (Unreported, High Court, 15th February, 2016), at para. 28). By providing in the order that it is without prejudice to the future entitlement of the applicants to pursue these points (subject to a showing of substantial grounds) I am seeking to obviate that difficulty. This gives all sides something to appeal against if they so wish. That of course is by way of facilitation should it arise, and not in any sense by way of encouragement.

236. I emphasise that the applicants must in such a hypothetical future judicial review establish substantial grounds if they wish to challenge the final decision. That test would then apply to every element of the case which supports that challenge, including the challenge to the ministerial designation if that challenge is relied on as vitiating the final decision (see by analogy the judgment of Kelly J. in *Kinsella v. Dundalk Town Council*).

237. To avoid any Gordian knot of procedural confusion which might arise if my decision that s. 50 of the 2000 Act does not apply to any element of these proceedings were to become the subject of a different view being adopted by an appellate court, I would wish to be taken as retaining seisin of the matter for the purposes of any application for leave to appeal that might be made in that event. Of course, none of this would arise if the procedure I am holding to be the more appropriate one is followed, namely for the applicants to simply await the final decision and then if necessary challenge it in future proceedings to which s. 50 would indubitably apply.

238. Before concluding I might observe that it is perhaps unfortunate from the applicants' point of view that given the magnitude of the questions raised in the application, a balance was required between the objective of giving a decision rapidly (in view of the ongoing oral hearing) and that of giving a detailed decision. The wide ramifications of the questions posed in this case necessitated much more emphasis on the latter objective. Had the application been commenced earlier it might have been possible to achieve more of the former goal as well, but as noted above the application was of a somewhat eleventh-hour nature, first coming before me on the morning the hearing was due to commence. As against that, the time required to be taken also reflects the necessity to give due consideration to the very able and learned submission made by Mr. Keane on behalf of the applicants. The necessity to give priority in this case to detailed consideration over speed illustrates again the central point made in this judgment: that there are no solutions, only trade-offs.

Summary of principles involved

239. The principles I have endeavoured to set out in this judgment can be summarised as follows:-

> (a) At the level of broad generality, *certiorari* is a more appropriate remedy than prohibition and, ordinarily, parties should undergo a judicial or administrative process first to its conclusion and only seek judicial review if dissatisfied with the final result.
>
> (b) In the case of judicial or quasi-judicial processes, there are exceptional cases where an alleged breach of rights is so egregious or where the balance of the public interest is such as to warrant intervention during the process.
>
> (c) In the case of an administrative process which is not quasi-judicial and where adequate safeguards for rights do not exist, the court might

be more willing to take a broader view of the extent to which, by way of exception, it might intervene before the conclusion of that process.

(d) O. 84 must also be interpreted in a manner consistent with an applicant's right to an effective remedy under Article 40.3 of the Constitution, art. 13 of the ECHR, art. 47 of the EU Charter relating to EU law issues generally, and, insofar as environmental decisions in particular are concerned, with art. 10a of the public participation directive, which principles militate against any interpretation which requires multiple applications to court in respect of the same process.

(e) The point at which time runs for the purposes of judicial review (O. 84, r. 21) must also be interpreted in a manner consistent with giving effect to the right to an effective remedy and the foregoing principles in particular.

(f) In general therefore, the date on which grounds first arise under O. 84, r. 21 must be taken to be the date of the final decision complained of. In addition there may be exceptional cases where an interim decision is so substantive and determines rights and liabilities irreversibly and to such an extent as to warrant it being regarded as giving rise to grounds for the purposes of time running under O. 84, r. 21. Thus only a formal decision having irreversible effects triggers the start of the running of time for the purposes of O. 84.

(g) The point at which time runs for the purposes of special statutory interventions regarding judicial review (such as s. 50 of the Planning and Development Act 2000) must also be interpreted in a manner consistent with giving effect to the foregoing principles and with an applicant's right to an effective remedy under Article 40.3 of the Constitution, art. 13 of the ECHR, art. 47 of the EU Charter and art, 10a of the public participation directive.

(h) Section 50 must therefore be interpreted as meaning that substantive and determinative acts and decisions of a local or planning authority or the board which are not capable of being substantively re-visited in the final decision are the type of acts and decisions to which the section applies. Administrative, subordinate, minor, tentative, provisional, instrumental or secondary steps taken are not acts or decisions to which s. 50 applies. In general therefore, the date on which time begins to run must be taken to be the date of the final decision complained of, although there may be exceptional cases where an interim decision is so substantive and determines rights and liabilities irreversibly and to such an extent as to warrant it being regarded as a decision to which s. 50 applies. Thus only a formal decision having irreversible effects triggers the start of the running of time for the purposes of s. 50.

(i) By way of example, s. 50 has no relevance to decisions such as steps in the pre-statutory process, decisions to accept and process an application, decisions to convene or conduct an oral hearing, or a decision to issue an opinion as to the contents of the environmental impact statement under s. 182E.

(j) It follows from the foregoing that the occurrence of a matter, an applicant's knowledge of it, or the taking of a formal step, does not

trigger the running of time for the purposes of O. 84 or s. 50 (or analogous provisions), unless the decision is crystallised by being embodied in a substantive decision having irreversible effect, normally the final decision.

(k) A public law challenge to a measure of general application, such as a constitutional or ECHR challenge to legislation or a *vires* challenge to a statutory instrument or an instrument-like document of a regulatory character (not being a decision addressed only to an individual case), should in general await the conclusion of the underlying process rather than being raised by way of prohibition.

(l) Time for the purposes of a challenge to such a public law measure of general application does not therefore commence to run until the impact of the measure on an applicant has been crystallised in the form of an ultimate decision. Time does not run from the adoption of the measure, or the applicant's knowledge of it, or any interim step in the process.

(m) There may be exceptional cases where the court may permit such a challenge where the public interest in addressing the issue in advance outweighs the normally more significant disadvantages of determining such a matter before a final decision.

(n) Such a public law challenge to a measure of general application may legitimately be brought by way of *certiorari* as part of a challenge to the validity of a final decision which itself is subject to *certiorari* and which rests on the legislation or instrument being impugned.

Order

240. For the reasons set out above I will order that the application for leave be refused, but without prejudice to the entitlement of the applicants to include the matters contained in the further amended statement of grounds, *mutatis mutandis,* in any application for *certiorari* of the ultimate decision of the board granting development consent (if such be the case), subject to making such application within 8 weeks of that decision and to demonstrating that there are substantial grounds for such application.