AN CHÚIRT UACHTARACH

THE SUPREME COURT

Record No. 2022/15

Dunne J.

Charleton J.

O'Malley J.

Woulfe J.

Hogan J.

Between/

BALLYBODEN TIDY TOWNS GROUP

Appellant

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

Respondents

AND

SOUTH DUBLIN COUNTY COUNCIL

Notice Party

Judgment of Mr. Justice Woulfe delivered on the 15th day of November, 2022

Introduction

1. The appellant appeals against a decision of the High Court (Humphreys J.) which dismissed its application for judicial review of a decision of An Bord Pleanála ("the Board") to approve certain development to be carried out by the notice party.

2. The Whitechurch Stream catchment area has been identified under the River Dodder Catchment Flood Risk Assessment and Management Project as a location that is liable to a particular risk of flooding. The Whitechurch Stream is one of the five main tributaries of the River Dodder and flows through Rathfarnham in South County Dublin.

3. On the 17th December, 2020, the notice party was granted approval by the Board for flood defence works along a section of the Whitechurch Stream, pursuant to s.177AE of the Planning and Development 2000 ("the 2000 Act"). As a part of that process, a Natura impact statement was prepared and an appropriate assessment under Directive 92/43/EEC ("the Habitats Directive") was carried out. The Board ultimately concluded that the proposed development would not adversely affect the integrity of any European sites, in view of the site's conservation objectives.

4. The appellant sought to challenge the Board's decision to grant approval for the proposed development on the basis, *inter alia*, that the Board granted a development consent of *indefinite* duration for a project requiring an appropriate assessment under the Habitats Directive. The appellant contended in his Amended Statement of Grounds that while planning permissions granted to natural or legal persons under either s.34 or s.37 of the 2000 Act are time-limited, approvals granted to local authorities under s.177AE can be of indefinite duration. To this end, it argued that the Board should have placed a time limit on this approval, and sought an order of *certiorari* quashing the Board's decision. Insofar as s.177AE permits the

grant of an approval of indefinite duration, the appellant argued that this scheme is inconsistent and incompatible with the requirements of Article 6(3) of the Habitats Directive.

The High Court

5. On the 20th October 2021, Humphreys J. ([2021] IEHC 648) gave judgment dismissing the appellant's challenge to the development consent.

6. The appellant had sought to challenge the Board's decision on a number of grounds. A number of these points were not pursued at the hearing. Two further points were also excluded by the trial judge on the basis that they had been considered and rejected in a recent decision of his (*Save Cork City Community Association CLG v. An Bord Pleanála* [2021] IEHC 50). The trial judge went on to consider and dismiss four points of challenge to the Board's decision.

7. The fourth point pursued by the appellant, and the point relevant to this appeal, is the lawfulness of the indefinite approval granted by the Board under s.177AE of the 2000 Act, in light of the obligations imposed by the Habitats Directive. The appellant claimed that the indefinite nature of the approval was unlawful because such an approval could be activated at any time, even if ecological circumstances had changed. The trial judge felt that the pleadings concerning this point were somewhat confused on the issue as to which of four categories of legal consequences applied – *certiorari*, constitutional invalidity, invalidity by reference to European Union ("EU") law or a non-transposition point. Despite this, Humphreys J. went on to consider the point by reference to each of these four possible legal consequences.

8. In respect of the relief of *certiorari*, Humphreys J. held that this point could only go to the validity of the decision if the Habitats Directive was directly effective in respect of a time limit on the duration of a development consent. He concluded that the appellant had not pleaded that the Habitats Directive was directly effective in this respect, but even if it had done so, any implied rule relating to the duration of a development consent was not sufficiently clear,

precise, and unconditional as to be capable of having direct effect. The claim that the s.177AE procedure was unconstitutional was ultimately not pursued by the appellant. The claim that s.177AE was invalid by reference to EU law was withdrawn in part, and rejected in part by Humphreys J. as being really a transposition argument.

9. Finally, in respect of any potential non-transposition argument, the trial judge found that the appellant had not pleaded that s.177AE fails to transpose Article 6 of the Habitats Directive and, given the indispensability of the requirement to plead one's case with precision, he thought this was sufficient to dispose of the claim under this heading. He stated that one cannot altogether dismiss the merits of the point as unarguable should it be properly pleaded in some future case, and one might possibly see arguments for some (potentially renewable) limitation on the duration of s.177AE approvals needing to be put in place.

10. In a separate judgment, Humphreys J. ([2022] IEHC 1) refused to certify a number of proposed questions to the Court of Appeal pursuant to s.50B of the 2000 Act, concluding again that the case sought to be made by the appellant regarding the obligation to impose a time limit on a development consent granted under s.177AE was not properly pleaded.

The Determination

11. Following these judgments, the appellant applied for leave to appeal to the Supreme Court. In a determination dated the 4th April 2022 ([2022] IESCDET 42), this Court granted the appellant leave to appeal on the issue of the grant of a development consent under s.177AE of the 2000 Act insofar as it concerns: (i) the interpretation of Article 6(3) of the Habitats Directive, and (ii) the proper transposition of these provisions into domestic law. At para. 8 of the determination it was noted that the Court did not yet have access to the High Court pleadings, and so it was not in a position to assess whether the conclusions of Humphreys J. on the pleadings issue were correct. At para. 10 the Court stated:

"While this does not exclude the Court from arriving at the ultimate conclusion following the hearing of the appeal that neither the issue of interpretation nor the transposition of the Habitats Directive was properly raised in these proceedings, it would nonetheless be premature to exclude this appeal simply on that basis at this stage."

The Court stressed at para. 12, for the avoidance of any possible doubt, that both respondents remained free to raise such arguments regarding the pleading of the case as they might consider appropriate.

Relevant Statutory Framework

12. The legislative framework is contained in Article 6 of the Habitats Directive and in Part XAB of the 2000 Act.

13. Article 6(2) and (3) of the Habitats Directive provide as follows:

"2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant affect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objective. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

14. Section 177AE of the 2000 Act provides as follows:

"(1) Where an appropriate assessment is required in respect of development –

(a) by a local authority that is a planning authority, …

within the functional area of the local authority concerned… (hereinafter in this section referred to as "proposed development"), the local authority shall prepare, or cause to be prepared, a Natura impact statement in respect thereof.

(2) Proposed development in respect of which an appropriate assessment is required shall not be carried out unless the Board has approved it with or without modification.

(3) Where a Natura impact statement has been prepared pursuant to subsection (1), the local authority shall apply to the Board for approval and the provisions of Part XAB shall apply to the carrying out of the appropriate assessment."

15. Section 177R provides that "appropriate assessment" is to be construed in accordance with s. 177V which provides as follows:

"An appropriate assessment carried out under this Part shall include a determination by the competent authority under Article 6.3 of the Habitats Directive as to whether or not a…proposed development would adversely affect the integrity of a European site and an appropriate assessment shall be carried out by the competent authority… before –

…

(b) consent is given for the proposed development."

16. Section 177V(4) provides as follows:

"Subject to the other provisions of this Act, consent for proposed development may be given in relation to a proposed development where a competent authority has made modifications or attached conditions to the consent where the authority is satisfied to do so having determined that the proposed development would not adversely affect the

integrity of the European site if it is carried out in accordance with the consent and the modifications or conditions attaching thereto."

Submissions in this Appeal

Submissions of the Appellant

(i) The Pleadings Issue

17. The appellant disagrees with the criticisms made by the trial judge as to the adequacy of its pleadings regarding the temporal limit issue. It submits that it expressly identified at paras. 18 and 19 of its Amended Statement of Grounds the issue of the incompatibility of the s.177AE procedure with Article 6(3) of the Habitats Directive. The appellant argues that the other parties had experienced no prejudice or difficulty in meeting this point, and notes the absence of any complaint about any failure of pleading in the Statements of Opposition.

18. The appellant argues that in any event an obligation is imposed on domestic Courts, if necessary, of their own motion, to seek to construe national laws implementing a Directive in the light of the wording and purpose of the Directive so as to achieve the result sought by the Directive, once a party has alleged an infringement of EU law. To this end, it relies on the case of *Callaghan v An Bord Pleanála* [2017] IESC 60 ("*Callaghan*") and the analogy drawn by Clarke C.J. therein between the double construction rule in Irish constitutional law and the principle of conforming interpretation in EU law. The appellant also relies on the Opinion of Advocate-General Kokott in Case C-254/19 *Friends of the Irish Environment*, where she noted (at para. 67) that *"…it is not necessary for the parties to expressly plead before the national courts which individual provisions of national law those courts should disapply or interpret in accordance with EU law…"*. It submits that therefore the precise mechanism of the applicability of the identified provision of EU law, *i.e,* whether direct effect or conforming

interpretation or both, need not be identified in the pleadings, although despite this it was clear to all parties the point being raised by the appellant.

(ii) Requirement for a Temporal Limit

19. The appellant argues that a temporal limit on s.177AE development consent is required in order to conform with EU law. As the purpose of an appropriate assessment is to determine whether a proposed development would adversely affect the integrity of a European site, it is argued that with the passage of time the accuracy of environmental information may degrade, resulting in the appropriate assessment becoming out-dated or flawed. The appellant maintains that therefore, at a level of first principles, there is an obvious problem with s.177AE.

20. The appellant also submits that the jurisprudence of the Court of Justice of the European Union ("CJEU") suggests that an indefinite grant of development consent cannot be reconciled with the requirements of the Directive. Although it is accepted by the appellant that there is no CJEU decision directly on point, by analogy it cites passages from the opinion of Advocate General Kokott in Case C-127/02 *Waddenzee* and from the judgments of the CJEU in Case C-258/11 *Sweetman*, Case C-43/10 *Nomarchiaki,* Case C-226/08 *Stadt Papenburg* and Case C-254/19 *Friends of the Irish Environment*. In *Nomarchiaki*, the Court observed (at para. 115) that "*it cannot be held that an assessment is appropriate where information and reliable and updated data concerning the birds in that SPA are lacking*". The appellant therefore argues that following the passage of time, Article 6(3) requires that the appropriate assessment reflects the impact on the environment as it *currently* exists and needs to take account of any changes in the relevant environmental and scientific data.

21. It is the appellant's case that, in light of this jurisprudence, s.177AE should be subject to a conforming interpretation by the Court so as to require a temporal limit on development consents granted under the section. The appellant argues that the Board could have adopted

measures to ensure that EU law was fully effective through the attachment of a condition limiting the duration of the consent, which the Board had jurisdiction to attach pursuant to s.177V(4) of the 2000 Act.

22. In the alternative, the appellant submits that Article 6(3) of the Habitats Directive is directly effective against the respondent, in circumstances where that provision has not been fully transposed into the Irish legal order despite the deadline for transposition having expired, and it cites the *Waddenzee* case in support of this argument. Insofar as there is a requirement that the provisions of the Directive are clear, precise and unambiguous, the appellant submits that the implied requirements under Article 6(3), although not expressly stated in the Article itself, have emerged from interpretations of the Article by the CJEU. The appellant submits that the Board was therefore obliged to impose a condition which identified a period within which the proposed development had to be completed.

Submissions of the Board

(i) The Pleadings Issue

23. In the Board's submission, the appellant fails to address at all the obligation on an applicant in a judicial review to plead a Statement of Grounds with precision and accuracy, having regard to O. 84, r. 20(3) of the Rules of the Superior Courts. The Board cites the judgment of this Court in *Casey v. Minister for Housing, Planning and Local Government* [2021] IESC 42, regarding the importance of a Statement of Grounds in defining the issues between the parties. It argues that the appellant failed to identify any provision of domestic law which required to be disapplied, or any directly effective obligation of EU law which the Board failed to comply with, and therefore the legal basis of the claim against the Board was wholly unclear. Insofar as the appellant relies in the alternative on the doctrine of conforming interpretation, while the Board accepts that the general principle of conforming interpretation

need not be expressly pleaded, it contends that the constituent elements to that interpretation do need to be pleaded. In this instance, that required the appellant to identify the basis upon which it contends for a temporal limit and the statutory provision that is to be the subject of the conforming interpretation. The Board also argues that the issue of conforming interpretation only arose in the application for leave to appeal.

24. As regards the appellant's reliance on the cases of *Callaghan* and *Friends of the Irish Environment*, the Board submits that both of these decisions relate to the scope of an appeal which could be pursued before this Court rather than the obligation to plead before the High Court, but they do not establish that it is not necessary to adequately plead a case. It contends that at most those authorities suggest that certain arguments may be pursued in the context of an appeal which has been granted leave by this Court and in particular, suggest that an appellant may call in aid EU law in the context of an argument relating to an interpretative question which arises in an appeal. However, it is submitted that they do not address the pleading obligations on an applicant for judicial review, nor do they suggest that questions of conforming interpretation must be addressed where such an issue has not, in fact, been properly pleaded.

(ii) Requirement for a Temporal Limit

25. The Board makes a number of preliminary comments under this heading, including a comment that the appellant does not identify any terms within Article 6 of the Habitats Directive which are said to support its argument. While the appellant at most can say that there is an implied obligation to impose a temporal limitation, such an implied obligation has never actually been determined to exist by the CJEU. The Board submits that no such implied principle can be discerned from the case law of the CJEU. The Board also notes that the notice party has made it clear that it intends to carry out the works imminently, and suggests it is

therefore clear that the hypothetical concern postulated by the appellant will not arise in this particular case.

26. As regards the nature of the obligations which arise under Article 6, the Board submits that the only temporal limit imposed by Article 6(3) is the requirement for the assessment to be carried out in advance of the grant of development consent. It contends that the case law which is cited by the appellant does not support the proposition contended for, and the Board's submissions go on to examine this case law in some detail. For example, as regards the *Nomarchiaki* decision, the Board argues that the only principle which can be derived from that decision is that an appropriate assessment must be based on updated and reliable data, and it does not contain any suggestion that the grant of development consent is precluded unless a temporal limitation is imposed. During the hearing the Board highlighted the fact that the CJEU has countenanced indefinite consents in these cases, without laying down a time limit rule for all development consents.

27. As regards the appellant's suggestion that Article 6(3) is directly effective, the Board notes that neither the text of the Habitats Directive nor the case law contains an explicit statement that a competent authority must impose a temporal limitation on a development consent. It submits that, in those circumstances, any purported implied obligation to impose a temporal limitation (if it exists at all) could not, on any view, be regarded as clear, precise or unconditional or without any margin of discretion.

28. Finally, the Board makes a submission that the obligations which arise from Article 6(2) of the Habitats Directive are also relevant to the issues in this appeal. It notes that the appellant does not address this provision in its written submission, notwithstanding the fact that the obligations arising from that Article bind the notice party as an emanation of the State. Article 6(2) provides that Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as

disturbance of the species. The possible review obligation arising is reflected in Regulation 27 of the EC (Birds and Habitats) Regulations, 2011 (S.I. 477 of 2011) ("the 2011 Regulations"). The Board submits that any concern that some change of circumstances in the future could undermine the conclusion of the appropriate assessment is addressed by the 2011 Regulations far more effectively than the imposition of a general and automatic requirement for an unspecified time limit on all approvals granted under s.177AE.

Submissions of the State Respondents

(i) Interpretation of Article 6(3)

29. The State respondents submit that Article 6(3) does not require a temporal limit to be imposed on grants of development consent, and that this is clear from both the case law of the CJEU, and from the application of well-settled principles on interpretation of EU law. As regards the case law, they submit that the point raised by the appellant has in reality already been determined by the CJEU, against its position. They cite passages from a number of authorities, including the *Stadt Papenburg* case, and say that in that case the CJEU accepted that initial works, coupled with regular maintenance works, can be considered to be the same "project" for the purpose of the Habitats Directive. They submit that it seems indisputable after that case that no temporal limitation is required by Article 6(3), as if this were not the case, each separate intervention at issue would have required a separate appropriate assessment.

30. As regards the relevant interpretative principles, they note that provisions of EU law must be interpreted in light of their "wording, context and objectives". In terms of its wording, they note that it is accepted by all parties that Article 6(3) does not include an express temporal limitation on grants of development consent. In terms of the context and objective of Article 6(3), they suggest that Article 6(2) is of particular relevance as it may be triggered in changed circumstances, and the notice party, as an emanation of the State, would have obligations

arising under that provision to ensure that the flood defence works did not cause deterioration/ disturbance to the protected site. The State respondents submit that this provision fully addresses the concern identified by the appellant, such that there is no need to artificially imply a temporal obligation into Article 6(3).

(ii) Conforming Interpretation

31. The State respondents do not accept that the issue of conforming interpretation can be raised at this stage of the proceedings, and argue that this point has effectively been made for the first time on this appeal. They submit that the point was not pleaded properly in the Amended Statement of Grounds, and in fact was not made until the oral hearing on the application for a certificate for leave to appeal. In the circumstances, the point would only be argued properly for the first time in this appeal, even though it has long been established that new issues should not be determined for the first time on appeal.

32. Notwithstanding the above, the State respondents submit that as Article 6(3) does not provide that a development consent of indefinite permission cannot be granted, there is no basis for the conforming interpretation advanced by the appellant. However, if Article 6(3) is to be interpreted to incorporate a temporal limitation, it is also submitted that such a conforming interpretation is readily available. The State respondents accept that a temporal limitation could be applied to a development consent pursuant to s.177V(4) of the 2000 Act, as suggested by the appellant. However, they submit that, on the facts here, there was no need to impose such a condition given that the application by the notice party clearly envisaged the works being undertaken in the short term.

(iii) Proper Transposition

33. For the above reasons, the State respondents submit that the provisions of domestic law at issue when properly construed are in full conformity with EU law or, in the alternative, are capable of being construed in accordance with EU law. If this is incorrect, they do not accept that the temporal limitation which the appellant proposes, as arising impliedly from Article 6(3), is capable of direct effect. As the provision does not refer to the duration of a development consent, it cannot be regarded as sufficiently clear, precise and unconditional on this issue.

(iv) Overarching Objection

34. It is stated that these submissions are made without prejudice to an overarching objection, namely, that the determination of the issues identified for appeal draw this Court into the realm of delivering an advisory opinion. The State respondents highlight the factual situation arising in this case, whereby the notice party stated that, subject to planning approval, the proposed works were forecast to commence in early to mid-2021 and estimated to take twelve months. They say that this is therefore not a situation in which indefinite duration is an issue or a problem that arises, and is not a situation in which there has been any delay, and that there is no dispute about this. They argue that in the circumstances the appeal is therefore entirely hypothetical, and it is well established that a Court should not determine advisory or hypothetical issues.

Submissions of the Notice Party

(i) The Pleadings Issue

35. In their written submissions the notice party submits that the requirement to plead a case properly is a matter within the national procedural autonomy of Member States, and so it is not an answer to same to claim that the purported points raise important points of European

law. It is submitted that a party cannot obtain leave to apply for judicial review on one basis and then attempt to go beyond the grounds pleaded in the Statement of Grounds, either by way of averments in subsequent affidavits, or in their legal submissions to an appellate Court. The notice party argues that impermissibly going beyond the pleadings by way of legal submission is precisely what the appellant is attempting to do in this appeal. However, at the hearing counsel for the notice party said that he was not pressing the pleadings point very far.

(ii) Grant of "Indefinite" Planning Permission

36. The notice party contends that it is open to question whether there is a factual basis for the legal argument in the first place, in other words whether in fact the Board did grant a permission of indefinite duration. The permission was subject to Condition 1 which requires the development "to be carried out and completed in accordance with the plans and particulars lodged with the application". The plans and particulars lodged with the application did not seek a permission of indefinite duration; on the contrary, the notice party stated therein that, subject to planning approval, the proposed works were forecast to commence in early to mid-2021 and estimated to take twelve months. The delay in commencement arises solely by reason of these proceedings.

37. Even if it is accepted that the permission is for unlimited duration, it is not accepted that the Board was obliged to attach a condition stipulating the period by which the proposed development had to be completed, in order to comply with Article 6(3). The notice party seeks to re-emphasise that the Habitats Directive simply does not stipulate that agreement by a competent national authority to a project should have some temporal limitation. It argues that there is no basis for the appellant's assertion that the terms of Article 6(3) and the CJEU and national case law "suggest" that "an indefinite grant of development consent cannot be reconciled with the requirements of the Directive". The appellant's ground of challenge is

based on elements of conjecture and speculation, and the Courts are generally reluctant to engage in resolving hypothetical or speculative questions which may or may not arise.

38. The notice party submits that there were already two mechanisms in existence to achieve the appellant's concern in relation to unanticipated changes in environmental conditions. Firstly, the mitigation and monitoring measures set out in the Natura impact statement were "conditioned into" the planning permission *via* condition 2.

39. Secondly, the notice party submits that the appellant has singularly failed to consider the terms and effect of Article 6(2) of the Habitats Directive, and that this is a significant omission from their submissions. It contends that Article 6(2) provides a complete answer to the appellant's concern, as that provision may require competent authorities to adjust permitting conditions in view of recently changed environmental conditions, and it examines a number of authorities regarding the scope and effect of that provision. Finally, it submits that Article 6(2) and (3) of the Habitats Directive must be construed as a coherent whole, and are designed to ensure the same level of protection of habitat types and habitats of species.

Decision

40. It seems to me that the following questions arise, or may possibly arise, for decision in this appeal:

(i) Whether the Court below was correct to dispose of the appellant's incompatibility point (*i.e.* that the indefinite nature of the approval was incompatible with Article 6(3) of the Habitats Directive) on the basis that it was not properly pleaded;

(ii) Whether Article 6(3) contains an obligation to impose a temporal limitation on a grant of development consent;

(iii) If the answer to the second question is yes, whether the s. 177AE procedure is capable of bearing a conforming interpretation or whether s. 177AE is incompatible with Article 6(3);

(iv) In the alternative, if the answer to the second question is yes, whether the appellant is entitled to rely on the direct effect of any such obligation.

The First Question: *The Pleadings Issue*

41. The appellant in its Amended Statement of Grounds did expressly plead that insofar as "s. 177AE allows for permissions of indefinite duration to be granted it is inconsistent and incompatible with the requirements of Article 6(3) of the Habitats Directive". One of the reliefs claimed made express reference to "conforming construction". There was no express reference to a failure to "transpose" the time limit requirement arising under Article 6(3), nor to any such requirement being "directly effective".

42. As set out above, the trial judge held that there was simply no argument pleaded that s. 177AE "fails to transpose" Article 6 of the Habitats Directive, and he thought that was sufficient to dispose of the claim under that heading. The appellant denies any allegation of any deficiency in its pleadings. It submits that, in any event, as per the approach of Advocate General Kokott in *Waddenzee*, it is not necessary for the pleadings to engage with the precise mechanism of the applicability of the identified provision of EU law, *i.e.* whether direct effect or conforming interpretation or both.

43. In his judgment for this Court in *Cooney v. Browne* [1984] I.R. 185, Henchy J. referred (at 191) to the situation where "the pleading in question is so general or so imprecise that the other side cannot know what case he will have to meet at the trial". In the present case while the appellant could (and perhaps should) have pleaded the different strands of its case more precisely (and one has some sympathy for the trial judge in that regard), notwithstanding same

it appears that the other parties did know the case they had to meet at the trial, and subsequently on appeal. I note also that in *Friends of the Irish Environment Limited v. An Bord Pleanála* [2019] IESC 53, at para. 29, Irvine J. stated that this Court, as the final appellate court, "could not allow itself be placed in a position where it might incorrectly construe a statute by reason only of the fact that in the court below the applicant had failed to argue the effect of European Union law on that construction". At the appeal hearing the other parties did not press any pleading point, and therefore I feel it is appropriate to consider the other questions arising on their merits (if necessary), rather than dispose of any of them on pleading grounds.

The Second Question: Obligation to Impose a Temporal Limit?

44. This question really forms the heart of this appeal, as the third and fourth questions only arise if there is an obligation to impose a temporal limit pursuant to Article 6(3) of the Habitats Directive. In my opinion Article 6(3) cannot reasonably be interpreted as imposing any such obligation, for the following reasons.

45. Firstly, approaching the issue from first principles, I accept the submission on behalf of the State respondents that it is well established, as per Advocate General Kokott in Case C-278/05 *Robins v. Secretary of State for Work and Pensions* (at para. 34), that provisions of EU law must be interpreted in light of their "wording, context and objectives".

46. As regards wording, it was accepted by all parties that Article 6(3) does not include an express temporal limitation on development consent. The only express temporal requirement in Article 6(3) is that the competent national authorities shall approve a plan or project only "after" appropriate assessment has been carried out.

47. The context and objectives of Article 6(3) can be considered together, and such consideration bolsters the argument that no temporal limit arises under Article 6(3). The appellant's concern is that, at some unspecified time in the future, there may be unanticipated

changes in environmental conditions such that the project, when actually carried out, may adversely affect the site. However, this concern can be addressed by interpreting Article 6(3) in context, and in particular in the context of construing Article 6 as a coherent whole. In that regard Article 6(2) is of particular relevance, and it is that provision which appears on the face of it to give rise to a general or ongoing obligation on Member States to take appropriate steps to deal with changed environmental conditions.

48. Secondly, the outcome of that approach from first principles finds strong support in the case law of the CJEU, in my opinion. In his oral submission to this Court counsel for the appellant relied primarily on the opinion of Advocate General Kokott in *Waddenzee,* and it is therefore necessary to consider that case in some detail.

49. The *Waddenzee* care related to the annual grant of authorisations for the mechanical fishing of cockles in the Netherlands Wadden Sea, which is an important habitat for many bird species. The Netherlands had therefore designated the majority of the Wadden Sea a special protection area within the meaning of Council Directive 79/409/EEC ("the Birds Directive"). The Dutch court which made a preliminary reference sought to ascertain, *inter alia*, whether the annual authorisation of cockle fishing was to be regarded as agreement to a plan or project, so that the procedure for authorising plans or projects laid down in Article 6(3) of the Habitats Directive would be applicable.

50. The appellant relied upon passages from the opinion of Advocate General Kokott including the following:

> "32. Doubts as to the existence of a plan or a project could arise from that fact that cockle fishing has already been carried on in its present form for many years. However, neither the term "plan" nor the term "project" would preclude a measure renewed at regular intervals from being regarded on each occasion as a separate plan or project.

33. Netherlands law also appears to proceed from this basis. Cockle fishing cannot be carried on without the annual grant of an authorisation. Therefore, it requires authorisation by the competent authorities. However, the procedure for authorising plans and projects arises from Article 6(3) of the Habitats Directive. Nevertheless, the applicability of Article 6(3) of the Habitats Directive cannot be based solely on the fact that the Netherlands has granted no permanent authorisation but rather renews the authorisation annually. If the need for an appropriate assessment turned solely on whether national law provided for permanent authorisation or annually renewable authorisation for the relevant measure, there would be an incentive to grant authorisations relating to special protection areas for an unlimited period in order to circumvent the application of Article 6(3) of the Habitats Directive.

34. However, such circumvention of Article 6(3) of the Habitats Directive would be incompatible with Community law. In the same way as other Directives on the environment, the Habitats Directive provides that certain measures require authorisation by the authorities. The legislature clarified this matter subsequently in the Directive on environmental assessment.

35. Since the Habitats Directive does not stipulate which activities are to be authorised in which form, it is primarily for the Member States to lay down the relevant rules. However, in laying down the requirements relating to authorisation they must take account of the likelihood of Natura 2000 sites being affected. Temporary authorisations which have to be reviewed on a regular basis are particularly appropriate where the possible effects cannot be assessed with sufficient accuracy at the time of the initial authorisation but instead depend on variable circumstances."

51. In my opinion, however, this authority does not in fact support the proposition being advanced by the appellant. The Advocate General was simply indicating that, as a matter of

EU law, an activity renewed at regular intervals can still be regarded on each occasion as a separate "plan or project", for the purposes of Article 6(3) of the Habitats Directive. She was pointing out that a national law system providing for permanent authorisations or annual renewable authorisations for the relevant activity cannot be decisive. There are circumstances in which one or other type of authorisation may be appropriate, and in particular variable circumstances may mean that temporary authorisations are appropriate.

52. In my opinion the analysis of the Advocate General is premised on an acceptance that there are circumstances in which the grant of a permanent authorisation may be appropriate. She does not suggest, either expressly or by implication, that every grant of a development consent must be subject to a temporal limitation.

53. There is another aspect of *Waddenzee* that runs counter to the proposition advanced by the appellant, rather than helps to support same. By its second question the national court in essence asked what the relationship is between Article 6(2) and (3) of the Habitats Directive. In its judgment the CJEU stated as follows:

> "36. Authorisation of a plan or project granted in accordance with Article 6(3) of the Habitats Directive necessarily assumes that it is considered not likely adversely to affect the integrity of the site concerned and, consequently, not likely to give rise to deterioration or significant disturbances within the meaning of Article 6(2).
>
> 37. Nevertheless, it cannot be precluded that a plan or project subsequently proves likely to give rise to such deterioration or disturbance, even where the competent national authorities cannot be held responsible for any error. Under those conditions, application of Article 6(2) of the Habitats Directive makes it possible to satisfy the essential objective of the preservation and protection of the quality of the environment, including the conservation of national habitats and of wild fauna and flora, as stated in the first recital in the preamble to that Directive.

> 38. The answer to the second question must therefore be that Article 6(3) of the Habitats Directive establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site, while Article 6(2) of the Habitats Directive establishes an obligation of general protection consisting in avoiding deterioration and disturbances which could have significant effects in the light of the Directive's objectives, and cannot be applicable concomitantly with Article 6(3)."

54. The CJEU thus confirmed the suggested approach from first principles as set out above, *i.e.* that the possibility of changed environmental conditions subsequent to approval of a development is a matter to be dealt with under the "obligation of general protection" established under Article 6(2) of the Directive.

55. Counsel for the appellant also relied upon what he described as the "*Stadt Papenburg* line of authority", and again it is necessary to consider that case in some detail. Papenburg is a port town in Lower Saxony on the River Elms, where there is a shipyard. In order to enable ships with certain big dimensions to navigate between the shipyard and the North Sea, the River Elms was required to be deepened by means of certain required dredging operations. In 1994, Stadt Papenburg (the Municipality of Papenburg) and others were granted a permission of indefinite duration to dredge that river, where required, before the expiry of the time limit for transposing the Habitats Directive.

56. The issue of the applicability of the now transposed Habitats Directive to the previously permitted and ongoing dredging works came before a German Court, which decided to stay the proceedings and refer certain questions to the CJEU for a preliminary ruling. By its fifth question, the referring court asked, in essence, whether ongoing maintenance works in respect

of the navigable channel of the estuary at issue in the main proceedings, which were not directly connected with or necessary to the management of the site and which were already authorised under national law before the expiry of the time limit for transposing the Habitats Directive, must, to the extent that they are likely to have a significant effect on the site concerned, undergo an assessment of their implications for the site pursuant to Article 6(3) and (4) of the Habitats Directive where they are continued after inclusion of the site in the list of sites of Community importance pursuant to the third subparagraph of Article 4(2) of that Directive.

57. In its judgment the CJEU stated as follows:

> "39. An activity consisting of dredging works in respect of a navigable channel may be covered by the concept of "project" within the meaning of the second indent of Article 1(2) of Directive 85/337, which refers to "other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources".
>
> 40. Therefore, such an activity may be considered to be covered by the concept of "project" in Article 6(3) of the Habitats Directive.
>
> …
>
> 47. Finally, if, having regard in particular to the regularity or nature of the maintenance works at issue in the main proceedings or the conditions under which they are carried out, they can be regarded as constituting a single operation, in particular where they are designed to maintain the navigable channel at a certain depth by means of regular dredging necessary for that purpose, those maintenance works can be considered to be one and the same project for the purposes of Article 6(3) of the Habitats Directive.
>
> 48. In that case, as such a project has been authorised before the expiry of the time limit for transposing the Habitats Directive, it would not be subject to the requirements

relating to the procedure for prior assessment of the implications of the project for the site concerned, set out in that Directive (see, to that effect, Case C-209/04 *Commission v. Austria* [2006] ECR 1-2755, paras. 53 – 62).

49. Nevertheless, if the site concerned were, pursuant to the third subparagraph of Article 4(2) of the Habitats Directive, included in the list adopted by the Commission of sites chosen as SCI's the implementation of such a project would be covered by Article 6(2) of that Directive, a provision which makes it possible to satisfy the fundamental objective of preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, and establishes a general obligation of protection consisting in avoiding deterioration and disturbance which could have significant effects in the light of the Directive's objectives…".

58. I accept the submission by counsel for the Board that the conclusion reached by the CJEU in *Stadt Papenburg* is inconsistent with the argument made by the appellant. The Court was prepared to countenance that a permitted activity, even where it includes ongoing maintenance works, can be construed to be a single project for this purpose and can be the subject of an indefinite permission. The implementation of such a single project would be covered by the "general obligation of protection" found in Article 6(2) of the Directive.

59. Thirdly, a court will normally only construe a legislative provision as including an implied obligation of the type argued for by the appellant where it is necessary to do so. In the present case there are a number of factors which lead me to the conclusion that an implied automatic time limit on all approvals granted under s. 177AE is not necessary:

(a) The appellant's concern as to some unanticipated change in environmental conditions at some unknown future point in time is addressed by Article 6(2) of the Habitats Directive, as given effect to in Irish law by the 2011 Regulations.

(b) This concern would appear to be addressed far more effectively by the 2011 Regulations than by the implication of an automatic requirement for an unspecified time limit on all such approvals. If the concern relates to unanticipated changes in environmental conditions, then how can a specified time limit address that concern? As the State respondents put it in their written submissions, should the temporal limitation be five weeks, five months, five years? Or is it ten years, or fifteen years? There is no way of knowing from the text of Article 6(3) itself, nor from the Habitats Directive.

(c) The appellant's concerns can also be addressed by attaching conditions to the approval which incorporate mitigation measures which aim, at least in part, to minimise any negative impacts on a site arising from future changes in ecological data. In the present case condition 2 of the approval "conditioned in" such measures as follows:

"The mitigation and monitoring measures outlined in the plans and particulars relating to the proposed development, including those set out at Chapter 7 of the Natura Impact Statement, or as may be required in order to comply with the following conditions shall be implemented. Prior to the commencement of development, details of a time schedule for implementation of mitigation measures and associated monitoring shall be prepared by the local authority and shall be placed on file and retained as part of the public record.

Reason: In the interest of protecting the environment and European sites."

(d) Finally, if it were felt necessary by the Board to impose a time limit when granting approval, because of the particular facts and circumstances surrounding a proposed development, the Board has the power to attach such a condition pursuant to s. 177(V)(4) of the 2000 Act. The existence of this discretionary

> power again suggests that it is unnecessary to interpret Article 6(3) as containing an implied requirement to impose an automatic time limit on the duration of development consents.

Reference to CJEU?

60. The appellants submitted that if this Court has any doubts on this question, then it should refer a question to the CJEU for a preliminary ruling. The leading authority on this Court's potential obligation to make a preliminary reference is now *Merck Sharp & Dohme Limited v. Clonmel Healthcare Limited* [2022] IESC 11. In his judgment for this Court Charleton J. described how in Case 283/81 *CILFIT* the Court of Justice considered the obligation on Courts of final appeal to refer any matter concerning the interpretation of acts of the Community institutions to the Court of Justice for a preliminary ruling. The Court ruled (at para. 21) that this obligation was not absolute and arose unless, *inter alia*, "the correct application of Community law is so obvious as to leave no scope for any reasonable doubt".

61. The *CILFIT* principles were recently confirmed by the CJEU in Case C-561/19 *Consorzio Italian Management*. At para. 51 the Court stated as follows:

> "In that regard, it follows from the system established by Article 267 TFEU, read in the light of the second paragraph of Article 47 of the Charter, that, if a national court or tribunal against whose decisions there is no judicial remedy under national law takes the view, because the case before it involves one of the three situations mentioned in para. 33 above, that it is relieved of its obligation to make a reference to the Court under the third paragraph of Article 267 TFEU, the statement of reasons for its decision must show either that the question of EU law raised is irrelevant to the resolution of the dispute, or that the interpretation of the EU law provision concerned is based on the Court's case-law or, in absence of such case-law, that the interpretation of EU law was

so obvious to the national court or tribunal of last instance as to leave no scope for any reasonable doubt."

62. In my opinion, for all of the reasons set out above, the correct application of Article 6(3) of the Habitats Directive is so obvious in this case as to leave no scope for any reasonable doubt. Therefore, I do not believe it is necessary to make a reference to the CJEU for a preliminary ruling, and I would decline to do so.

The Third and Fourth Questions

63. In circumstances where the second question has been answered in the negative, the third and fourth questions no longer arise.

Conclusion

64. In conclusion, in my opinion Article 6(3) of the Habitats Directive does not require a competent authority to impose a temporal limitation on a grant of developmental consent. I would therefore dismiss the appeal.