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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Friends of the Earth Limited's Application [2016] NIQB 91

IN THE MATTER OF AN APPLICATION BY FRIENDS OF THE EARTH LIMITED FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DEPARTMENT OF THE ENVIRONMENT NOT TO ISSUE A STOP NOTICE TO MANDATE THE CESSATION OF SAND AND GRAVEL EXTRACTION AT LOUGH NEAGH PENDING THE OUTCOME OF AN ENFORCEMENT APPEAL

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MAGUIRE J

Introduction

[1] The judicial review proceedings before the court have been taken by Friends of the Earth Limited ("the applicant"). The respondent to the proceedings is the Department of the Environment ("the Department"), now known as the Department for Infrastructure. There are two notice parties to the proceedings, both of which have played a full part. They are the estate of Lough Neagh Limited ("the Shaftsbury Estate or SE") and a number of businesses involved in the activity of sand extraction at the Lough who shall be referred to hereafter as "the sand traders".

[2] The proceedings were begun on 23 September 2015. Leave was granted on 22 January 2016. There has been no amendment formally made to the Order 53 Statement to take account of the Ministerial decision of 20 November 2015 (see paragraph [40] below) but the court is willing to view this decision as the central decision now under challenge. In these proceedings the applicant has been represented by Mr Gregory Jones QC and Mr Sayers BL. The respondent has been represented by Mr Elvin QC and Mr McLaughlin BL. The Shaftesbury Estate has been represented by Mr Orbinson QC and Mr Lyness BL and the sand traders have

been represented by Mr Beattie QC and Ms Cook BL. The court is grateful to counsel for their helpful oral and written submissions.

[3] The relief sought by the applicant is an order of *mandamus* to require the Department to serve a Stop Notice on the owner of the bed of Lough Neagh and the sand traders. This notice would require the cessation of sand extraction pending the outcome of an upcoming enforcement appeal. In the alternative, an order is sought requiring the Department to reconsider whether to serve a Stop Notice or to seek an injunction to similar effect. Various declarations are also sought (*viz* one stating the failure to serve a Stop Notice pending the outcome of the enforcement appeal is unlawful and one stating that the failure to secure notification of changes to the ecology of the Ramsar protected site is unlawful and inconsistent with the obligations imposed upon the United Kingdom government by Article 2.4 of the Ramsar Convention).

[4] The grounds on which the relief is sought are set out in detail in the Order 53 Statement. In simple summary they are:

(i) Breach of the Environmental Impact Assessment Directive and the Habitats Directive in that the Department has wrongly failed to comply with the precautionary approach referred to in Article 191 of the Treaty on the Functioning of the European Union (TFEU).

(ii) Breach in particular of Article 6(3) of the Habitats Directive, as transposed by Regulation 43 of the Conservation (Natural Habitats Etc) Regulations (Northern Ireland) 1995 which imposes a strictly precautionary approach to sites which have a Special Protection Area (SPA) status and which requires appropriate assessment to be undertaken when there is any element of doubt about whether the "integrity of a protected habitat might be affected by a proposed development".

(iii) Breach by the Department of Article 2(1) of the Environmental Impact Assessment Directive transposed by the Planning (Environment Assessment) Regulations (Northern Ireland) 2015. This requires member states to adopt "all measures necessary to ensure that, before consent is given, projects likely to have significant environmental effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to a requirement for an assessment with regard to their effects".

(iv) The Department has acted unlawfully in failing to take steps to secure cessation of activities changing the ecology of the Ramsar protected site and in failing to secure the notification of such changes which are occurring to the Ramsar secretariat pursuant to Article 3.4 of the Ramsar Convention.

The Background

[5] Lough Neagh lies at the centre of the application before the court. It is the largest fresh water body in the United Kingdom with a surface area of 41,188 hectares. The bed of the Lough is owned by the SE.

[6] A very substantial quantity of sand (up to 1.5m tonnes) is extracted from the Lough *per annum*. This involves between 10-20 barges which pull out or suck up the sand from the floor of the Lough. The companies which carry out the extraction are referred to collectively in this case as the sand traders. They pay royalties for the privilege of extracting the sand to SE.

[7] It is not in dispute between the parties that the SE and the sand traders have been involved in extracting sand from the Lough since the 1930s. The quantity of sand extracted has gone up and down over the years. The court has been told that it is now agreed that this activity requires planning permission and that, in fact, no planning permission for this activity has ever – to anyone's certain knowledge – been sought or granted. This may have been because those at the centre of the activity – the SE and the sand traders – may have believed that they did not need planning permission or that they believed that they had in fact obtained it. But, whatever their beliefs in the past, this cannot detract from the true legal position as it is now known. The baseline therefore in this case is that the SE and the sand traders require planning permission if they wish to continue their activities.

[8] The Lough itself has a number of important environmental designations which play a part in this case. It is a Special Protection Area (SPA) due to its important over wintering populations of birds. The Lough is also a Ramsar site and an area of Special Scientific Interest.

[9] Another aspect of the case, which is not in dispute in these proceedings, is that any application for planning permission in respect of the extraction of sand at Lough Neagh would as a matter of EU and domestic law require both an Environmental Impact Assessment ("EIA") and a Habitats Assessment.

[10] For some time the Department has been lobbied to take steps to deal with the fact that extraction of sand at Lough Neagh by the SE and the sand traders is being carried out without planning permission.

Recent Events

[11] The immediate context for this judicial review dates from 2012 and arose from a letter sent to the Department by the Ulster Angling Association querying the status of sand extraction operations by the sand traders in the Lough. This led to the Department concluding in early 2013 that the operation of sand extraction from the

Lough was not being carried out with the benefit of planning permission. In a submission to the Minister in December 2013 officials indicated that it was unclear as to why the Department had not pursued this matter in the past but that it was clear that planning permission was required. It was pointed out that the activity involved the winning and working of minerals and that that constituted a mining operation and hence development for which planning permission was required for the purpose of planning legislation.

[12] As the submission put it: "the winning and working of sand is an ongoing development with every shovelful constituting a new act of development". As a consequence, it was necessary and expedient to investigate the unauthorised extraction and require applications from the operators and land owner.

[13] Interestingly, for present purposes, the submission noted that "[g]iven the designations on the Lough it is likely that if no action was taken the Department could be infringing a number of the European Directives".

[14] A number of options were placed before the Minister: one was a "do nothing" option and one was an option to proceed to formal enforcement action. In between these was the option of speaking with the affected parties with a view to establishing a working relationship with the traders so as to offer the potential for operations to continue whilst the application process was ongoing. This last was the option favoured by the Minister who indicated that the process should be time bound with applications to be urgently submitted. The Minister asked that he should be kept informed of developments.

[15] In the light of the above, various steps were taken by the Department. These included discussion of the issues with consultees such as the Northern Ireland Environmental Agency; investigations as to the nature of the operations themselves; and meetings to discuss potential options. Some of the meetings involved representatives of the sand traders who saw the process, *inter alia*, as involving pre application discussion.

[16] On 16 September 2014 the Minister received a further submission from officials updating him on developments. This noted that any application for planning permission would have to be subjected to a Habitats Regulations Assessment and an Environmental Impact Assessment. As before, a range of options were outlined with the recommendation being for further observation and inspection of operations on the ground, holding enforcement action open should it be deemed necessary.

[17] The above was followed up by a letter from the Department to SE and the sand traders dated 25 September 2014. It is clear from the papers before the court that this letter was sent as a result of a meeting of the Department's Enforcement Group of the same date. The letter indicated that following a review and site visits the Department had decided that the unauthorised dredging of sand from the Lough

constituted a breach of planning control. Accordingly, the recipient was advised that:

> "The dredging of sand from the area indicated on the attached map is unauthorised and that the activity should cease until this situation has been addressed."

[18] The material before the Department's Enforcement Group at its meeting had consisted of a substantial document which had recommended that a precautionary approach was necessary in the absence of evidence to prove that the activities will not cause any impacts. The matter was put thus: "[a]n assessment of the potential significant impacts could at this stage only be made using assumptions and worst case scenarios due to lack of information available". The document also noted that the Minister had agreed that the Department should request in writing that the operations cease and that the operators could apply for planning permission to enable them to continue. In short, "the operators cease activities and the Department monitor compliance with that request".

[19] After a period, in May 2015, the sand traders made a scoping request for the purpose of Regulation 7 of the 2015 Environmental Assessment Regulations. The request included a significant statement of the traders' view of the issue of environmental impact against an acceptance that a proposed planning application constituted EIA development.

[20] Shortly after the above request was made, the Department on 27 May 2015 took enforcement action and issued three important documents. These were (a) an Enforcement Notice to SE and the sand traders; (b) a substantial Enforcement Report running to some 28 pages; and (c) an EIA Development Determination.

[21] The Notice indicated that it appeared that there had been a breach of planning control in the form of the unauthorised working of minerals without the grant of planning permission. Under the heading of what the recipient had to do it was stated that it must "cease the working of minerals on the said lands within 1 day of the date this notice takes effect". The date the notice was to take effect was specified as 30 June 2015 "unless an appeal is made against it beforehand". The Notice was issued under section 131 (1) (a) of the Planning Act (Northern Ireland) 2011.

[22] The Enforcement Report, in summary, set out the background and recorded the process which culminated in the sending of warning letters requiring the cessation of operations while they were being assessed. It noted that on the basis of the information available it could not be determined whether the project (i.e the extraction activity) would not have significant impacts on a European site. Consequently, it indicated that the competent authority would have to now undertake an appropriate assessment of the implications for the site in view of conservation objectives. The policy background is explored in detail in the report, as was the impact of various Policy Planning Statements. The impact of the Habitats

Regulations and the EIA Regulations was considered. As regards the former, Regulation 43 was set out. The terms of paragraph (1) were cited which indicated that a competent authority, before deciding to give any consent, permission or other authorisation for a plan or project which is likely to have a significant effect on a European site shall make an appropriate assessment of the implications for the site in view of the site's conservation objectives. The need for a precautionary approach was invoked and it was stated that "consent cannot be given unless it is ascertained that there will be no adverse effect on the integrity of the site". As regards the EIA Regulations, emphasis equally was placed on the obligation to give development consent in respect of projects which are likely to have significant effects on the environment only after an assessment of the likely significant environment effects of those projects had been carried out.

[23] The Enforcement Report also included an analysis of the impacts of the project on receptors *viz* the element of the receiving environment that are impacted. A series of impacts were set out in the document.

[24] The central conclusion the Report arrived at was that "when considered against the current legislation, policy and applicable case-law, the operations are unauthorised. Given the absence of enforceable restrictions on the operations and when assessed against the current legislation and development plans and planning policy the operations are also considered unacceptable". Moreover "[f]or the operations to continue they must also comply with applicable European Directives specifically the Habitats Directive and the EIA Directive. Due to the presence of doubt over the potential impacts the operations may be having on a European site and on the environment, the operations are not considered compliant with these directives. In order for the operations to be carried out they must be first subject to the relevant Habitats and Environmental Impact assessments and be determined in accordance with the planning system. In the interim however a cessation of the operations will be necessary".

[25] The EIA Development Determination held that the development (the working and removal of minerals from the bed of the Lough) fell both within Schedule 1 and Schedule 2 of the 2015 Regulations. It was decided that the environmental effects were likely to be significant for the purpose of the Regulations as evidenced by a wide range of impacts which were set out in the document.

[26] On 24 June 2015 SE appealed against the Enforcement Notice to the Planning Appeal Commission ("PAC"). The same step was taken by the Sand Traders on 26 June 2015. In each case the grounds of appeal were wide ranging with each Notice of Appeal containing a ground (a) appeal. This is a reference to section 143(3)(a) of the 2011 Act which provides that an appeal can be pursued against an enforcement notice where it is claimed that planning permission ought to be granted in respect of the breach of planning control in question. In such an event the decision maker in respect of the issue becomes the PAC.

[27] Importantly the effect of an appeal on the enforcement notice is specified in section 143 (7) of the 2011 Act. The sub-section states that:

> "Where an appeal is brought…the enforcement notice shall be of no effect pending the final determination or the withdrawal of the appeal."

[28] The Minister was informed of these developments in July 2015. In a submission to him from officials it was noted that "the Department will come under pressure from environmental groups to serve a Stop Notice on the sand traders". There is then a discussion of the advantages of doing so. Firstly, the author noted that the timescale for the final determination of the enforcement appeal by the PAC would be lengthy given the need for an Environmental Statement as part of the appeal process. For this reason the service of a Stop Notice may be appropriate. Secondly, the service of a Stop Notice would re-inforce the Department's precautionary approach given the lack of clear evidence regarding potential environmental impacts of sand dredging activities on the Lough. Thirdly, in terms of potential concerns which might be raised by the EU, a Stop Notice would send a clear message that the Department was taking the protection of the Lough seriously. On the other hand, it was noted by the author that the service of a Stop Notice would place a legal obligation on the Sand Traders to cease all activities until the planning issues surrounding their activities were regularised. This would be seen as an escalation of the Department's enforcement action and would inevitably draw a reaction from the traders and others, including elected representatives, who would point to the negative impacts on their businesses and the wider construction industry. Moreover, if a Stop Notice was served the Department would be expected to act if it appeared that the notice was being ignored and dredging activity continued. Reference was also made to questions which might arise of potential compensation costs that might become payable by the Department in certain circumstances.

[29] The submission asked the Minister to consider the issues in respect of the serving of a Stop Notice.

[30] The applicant on 15 September 2015 sent to the Department a pre-action protocol letter indicating that it proposed to challenge the failure of the Department to serve a Stop Notice.

[31] In or about the same time the appellants before the PAC raised with it the need for further time to be granted to enable them to carry out the necessary work to prepare the assessments, particularly the production of their Environmental Statement. In this regard a substantial programme of work which needed to be done was outlined. The appellants indicated that they had instructed their own experts.

[32] By e-mail of 2 October 2015 the Minister responded to the July 2015 submission referred to above. He stated that:

> "I consider that a key issue to be considered here is the nature and strength of evidence available to us on the nature of any environmental impacts of sand dredging activities on the Lough … NIEA staff are now preparing an environmental report on the position … [t]his report can provide further information relevant to our consideration of the question whether a Stop Notice would be an appropriate and proportionate response to the current situation on the Lough and the current consideration of the issues by the Planning Appeals Commission."

The Minister asked to have information on the position once the NIEA report was available.

[33] The appellants' request for an extension of time for the production of its assessment was provided by the PAC to other interested parties. In a response to it from the present applicant it was indicated that it was reasonable to extend the deadline but only on condition that unauthorised extractions do not continue to take place. The Department opposed such an extension.

[34] A further submission was provided by officials to the Minister on 9 November 2015. Having rehearsed the background in some detail the author expressed concern about the effect of any extension of time by the PAC in respect of the submission by the sand traders of their Environmental Statement. It was noted that "[s]uch an extension of time would potentially allow, in the absence of Stop Notice or injunction, the traders to continue dredging until the PAC process has concluded", which might not be until mid-2017 some 4 years from the date of initial warning letters requesting that they cease dredging operations. At the same time the author acknowledged that "the traders will require time to prepare a robust environmental statement, particularly in light of the lack of environmental information available on the issues".

[35] The submission went on to describe the conclusions of the forthcoming NIEA report. In this regard it was noted that five of the twelve SPA features of the Lough were currently in unfavourable condition. However, these declines were thought to be attributable to extrinsic factors. Nonetheless, "intrinsic or site related factors such as pollution, food availability leading to increased competition, recreation and commercial activity could be compounding these effects". A problem was that the Department/NIEA currently held no scientific data in relation to potential impacts of sand extraction or the significance of those potential effects. In these circumstances the author recommended that the Department should appoint a reputable scientific body to undertake targeted research so as to inform the Department's views on the compatibility of sand extraction and the ecological requirements of the Lough's designations.

[36] The submission, having referred to the nature of Stop Notices and the legal effect such a notice would have in the present case *viz* placing a legal obligation on the sand traders to cease all activities until the planning issues surrounding their activities had been regularised, went on to make a clear recommendation. This was that the Minister should agree to the issue of a Stop Notice compelling the sand traders to cease their operations until the required environmental assessments had taken place.

[37] While such a step could have significant and long term negative socio-economic impacts in terms of potential closure of businesses, job losses and effects on the quarrying and construction industries, failure to take action could potentially result in action being taken by the European Commission in addition to the applicant's proposed judicial review.

[38] On 13 November 2015 the PAC extended the time for the appellants' environmental statement to 31 October 2016.

[39] A still further submission was provided to the Minister on 19 November 2015. This indicated that steps were in train to engage the specialised advice referred to in the earlier submission but it was stated that it would not be until the end of 2016 that the department would be in a position to understand fully the nature of the environmental impacts of sand dredging on the Lough. In these circumstances the recommendation contained in the previous submission in favour of the serving of a Stop Notice was affirmed.

[40] The Minister's formal response to this last submission - in the form of an e-mail of 20 November 2015 – declined to follow the recommendation in favour of the serving of a Stop Notice. In the Minister's view this would not be a proportionate response in a situation in which there was no evidence that dredging was having any impact on environmental features of the Lough. Moreover, such a step was not viewed by the Minister as being in the wider public interest as it would risk potential economic harm. The Minister supported the procurement of ecology expertise as quickly as possible and indicated that he would review the situation as soon as the relevant information was available.

[41] By the date of the hearing a report had become available compiled by H. R, Wallingford. It is entitled "Implications of sand extraction on the Lough Neagh and Lough Beg SPA and Ramsar site". It is dated June 2016. It was received by the court without objection from any of the parties. It was not, however, a report to which the Minister had access for the purpose of his decision which is challenged in these proceedings. The court, therefore, makes reference to it only for completeness.

[42] The report's central conclusion was that:

> "The results of the present study indicate, based on the currently available evidence, that although impact[s] of sand extraction are inevitably major at the very local scale of operation, an impact of dredging activities on the receptors of important (SPA, Ramsar and ASSI features) is a relatively minor [one] in the context of the whole lough. As no significant negative impacts of moderate significance or greater have been identified during the assessment, mitigation measures were not considered to be required. However given the location of the dredging activity in the vicinity of favourable pollan spawning grounds, the species' priority status and the present lack of good spatial and temporal population density data for this species across the lough, devising an appropriate monitoring scheme for pollan was proposed as beneficial for informing future assessments of dredging activity impact on this species."

[43] The report goes on to identify "important gaps in understanding the effects of sand dredging and pointed to further information being required to allow for a high level of certainty impact assessment". Specific issues on which such data is required were set out.

[44] The report also contains a helpful summary of impacts of dredging on receptors and designated features. This information is provided in a table which refers to the receptors and to the issue of impact and for each there is a column dealing with the sufficiency of the information (see pp. 67-68).

Relevant legal provisions and principles

[45] There are a substantial number of legal provisions and principles at play in respect of this judicial review. The principal ones are set out below.

Stop Notices

[46] Stop Notices may be issued by the Department under Section 151 of the Planning Act (Northern Ireland) 2011. This provision states that:

> "(1) The Department may serve a Stop Notice.
>
> (2) The Department must not serve a Stop Notice without consulting the appropriate Council.
>
> (3) A notice served by the Department under subsection (1) shall have the same effect as if it has been served by a Council.

> (4) The provisions of Section 150 shall apply, with any necessary modifications, to the service of a Stop Notice by the Department as they apply to the service of a Stop Notice by a Council."

[47] It is necessary therefore, because of the terms of Section 151(4) to consider the terms of Section 150, which relate to the service of a Stop Notice by a Council. Section 150(1) lays down the test to be applied:

> "(1) Where the Council considers it expedient that any relevant activity should cease before the expiry of the period for compliance with an Enforcement Notice, it may, when it serves the copy of the Enforcement Notice or afterwards, serve a notice (in this Act referred to as a 'Stop Notice') referring to, and having annexed to it a copy of the Enforcement Notice and prohibiting the carrying out of that activity on the land to which the Enforcement Notice relates, or any part of that land specified in the notice."

[48] Section 150 contains a range of further provisions. Of note for present purposes are:

> "(2) In this section and Section 185 'relevant activity' means any activity specified in the Enforcement Notice as an activity which the Council requires to cease and any activity carried out as part of that activity or associated with that activity ….
>
> (5) A Stop Notice shall not take effect until such date as it may specify (and cannot be contravened after that date). ….
>
> (10) A Stop Notice may be served by the Council on any person who appears to it to have an estate in the land or to be engaged in any activity prohibited by the notice and where a Stop Notice has been served in respect of any land, the Council may display thereon a notice (in this section referred to as a 'Site Notice') stating:
>
> (a) That a Stop Notice has been served;
>
> (b) That any person contravening the Stop Notice may be prosecuted for an offence … ."

[49] From the above, it is clear that the Department may serve a Stop Notice (following consultation with any appropriate Council) where it considers it expedient that any relevant activity (here the sand extraction) should cease before the expiry of the period for compliance with an Enforcement Notice.

[50] It is worthy of note that the test is what the Department considers to be expedient. This test *per se* is a wide one as is demonstrated by such authorities as Health and Safety Executive v Wolverhampton City Council [2012] UKSC 34; R (Ardagh Glass Limited) v Chester City Council [2009] Env LR 34; Perry v Stanborough Limited [1978] JPL 36; and Gazelle Properties v Bath and North East Somerset Council [2010] EWHC 3127 Admin. The essence of the test appears to be the authority's view of the balance of the advantage or disadvantage in issuing a Stop Notice and what appears to be appropriate to the authority in all the circumstances. In the context of a judicial review, absent any relevant provisions of European Law which have a contrary effect, the decision-maker would enjoy a wide area of discretionary judgment and its decision could only be impugned on standard Wednesbury unreasonable grounds. For these reasons, it appears to the court that in the present case a conventional challenge to the non-issue of a Stop Notice, without the input of EC law, would be unlikely to succeed as there is plain evidence that the Minister had wrestled with the question of the advantages and disadvantages of the course of action of putting in place a Stop Notice directed at the notice parties.

[51] It is thus important to consider relevant provisions relating to EU law.

Environmental Impact Assessment (EIA)

[52] The subject of environmental impact assessment of development projects has been a tool of environmental law in the Community for some 30 years now. It has been developed both to create consistency in the standards which should be applied within Member States and as a means of generally protecting the environment throughout the EU. The framework for national regulations is found currently in Directive 2011/92/EU ("the EIA Directive"). The regulations which apply to Northern Ireland are the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2015. As would be expected these are materially similar to the sister set of regulations which apply in England and Wales.

[53] The key provision in the Directive is Article 2 (1). This reads:

> "2(1) Member states shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects upon the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects…"

At Article 4 there are detailed provisions which govern how Member States should identify those projects for which environmental assessment is necessary. The process of assessment is then described in Articles 5-10. This involves the submission of an environmental statement by the developer which must contain prescribed information about the project and its effects. Thereafter a process of consultation with the public and designated consultation authorities is set out. There is then consideration of the outcome of consultation and ultimately consideration by the authority prior to the grant of consent to the project.

[54] The key provision in the Regulations is regulation 4(2). This provides:

> "(2) A council, the Department or the Commission, as the case may require, shall not grant planning permission or subsequent consent pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration, and they shall state in their decision that they have done so."

There is a definition of "environmental information" which for the purpose of the regulations means the content of the environmental statement, any further environmental information submitted by the developer and any information supplied as part of the consultation with the public and authorities.

[55] The subject of EIA assessment has recently been considered in the Supreme Court in the case of <u>R (Champion) v North Norfolk DC and Another</u> [2015] UKSC 52.

[56] In a lengthy passage, which is worthy of being cited in full, Lord Carnwath stated as follows:

> "4. Directive 2011/92/EU ('the EIA Directive') provides the framework for the national regulations governing environmental assessment. The preamble (para (2)) states that Union policy is based on 'the precautionary principle' and that effects on the environment should be taken into account 'at the earliest possible stage in all the technical planning and decision-making processes'. By article 2 the EIA Directive requires member states to adopt all measures necessary to ensure that projects 'likely to have a significant effect on the environment' are subject to environmental impact assessment before consent is given. The projects to which it applies are those defined in article 4 and annexes I and II. Projects in annex I require assessment in any event; those in annex II (which covers the present project) require a 'determination' by the 'competent authority' whether it is

likely to have a significant effect, so as to require assessment (article 4(2)). The competent authority is the authority designated for that purpose by the member state (article 1(f)). For projects subject to assessment member states are required to adopt the measures necessary to ensure that the developer supplies in an appropriate form the information specified in annex IV, which includes details of the project and its anticipated effects, and the measures proposed to prevent or reduce adverse effects (article 5). That information is to be made available to the public likely to be affected, who must be given 'early and effective opportunities' to participate in the decision-making process (article 6).

5. In the United Kingdom the environmental assessment procedure is integrated into the procedures for granting planning permission under the planning Acts…

The Regulations do not follow precisely the form of the EIA Directive, but there is no suggestion of any failure of implementation. The starting point is the expression 'EIA development', defined by reference to Schedules 1 and 2 (corresponding to annexes I and II of the EIA Directive).

6. Although the Regulations do not in terms 'designate' a 'competent authority', it is clear at least by implication that this role is given in the first instance to the local planning authority…which is given the task of determining whether Schedule 2 development is EIA development…

7. The mechanism by which the authority determines whether assessment is required is referred to in the Regulations as 'screening' (not an expression used in the EIA Directive). A 'screening opinion' may be given in response to a specific request by the developer (Regulation 5), or, in various circumstances where an application is received by the authority for development which appears to require EIA and is not accompanied by an environmental statement (regulations 7-10).

8. Regulation 3 prohibits the grant of consent for EIA development without consideration of the 'environmental information', defined (by regulation 2) to include the 'environmental statement' and any

representations duly made about the environmental effects of the development. The contents of the environmental statement are defined by reference to Schedule 4 (which corresponds to annex IV of the EIA Directive, and like it includes a reference to measures envisaged to prevent, reduce or offset any significant adverse effects on the environment).

9. The environmental statement, in proper form, is central to this process. In *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603, Lord Hoffmann rejected the submission that it was enough if the relevant information was available to the public in the various documents provided for inspection:

> '… I do not accept that this paper chase can be treated as the equivalent of an environmental statement. In the first place, I do not think it complies with the terms of the Directive. The point about the environmental statement contemplated by the Directive is that it constitutes a single and accessible compilation, produced by the applicant at the very start of the application process, of the relevant environmental information and the summary in non-technical language. It is true that article 6(3) gives member states a discretion as to the places where the information can be consulted, the way in which the public may be informed and the manner in which the public is to be consulted. But I do not think it allows member states to treat a disparate collection of documents produced by parties other than the developer and traceable only by a person with a good deal of energy and persistence as satisfying the requirement to make available to the public the annex III information which should have been provided by the developer.'" (p 617D-F)

Habitats Assessment

[57] The subject of habitats assessment derives from the requirements of the Wild Birds and Habitats Directive. Under this, Member States were obliged to classify certain areas of wild bird habitat as Special Protection Areas ("SPAs"). Pursuant to Article 4 of the Directive, Member States were required to classify and submit to the Commission a list of all of the areas within their territories of certain defined

habitats and the habitats of defined species. The idea was that these areas would contribute to the creation of a network of Natura 2000 sites across the Union known as Special Areas of Conservation ("SACs"). Under Article 3 of the Directive it is stated that:

> "1. A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types list in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.
>
> The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC."

[58] Once the list submitted by a Member State was approved by the Commission, Article 6 (2), (3) and (4) would apply to the site (see Article 4(5)). The terms of the above paragraphs of Article 6 are significant for present purposes. Accordingly, the court will set them out:

> "(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 effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.
>
> (4) If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a

> plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted".

[59] Article 6 (3) and (4) have been transposed in Northern Ireland by regulations 43 and 44 of the Habitats Regulations 1995. The relevant parts of Regulation 43 reads as follows:

> "43. (1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which:
>
> (a) is likely to have significant effect on a European site in Northern Ireland (either alone or in combination with other plans or projects); and
>
> (b) is not directly connected with or necessary to the management of the site,
>
> shall make an appropriate assessment of the implications for the site's conservation objectives.
>
> (2) A person applying for any such consent, permission or other authorisation shall provide such information as the competent authority may reasonably require for the purposes of the assessment.
>
> (3) The competent authority shall for the purposes of the assessment consult the Department and have regard to any representations made by it within such reasonable time as the authority may specify."

[60] Habitats Assessments were also considered in the Champion case. Lord Carnwath provided a useful description of these as follows:

> "10. Council Directive 92/43/EEC ('the Habitats Directive') provides for the establishment of a European network of special areas of conservation under the title Natura 2000. Article 6 imposes duties for the protection of such sites. By article 6(3):

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

11. The relevant implementing regulations are the Conservation of Habitats and Species Regulations 2010 [in Northern Ireland the Conservation (Natural Habitats etc) Regulations (Northern Ireland) 1995] ('the Habitats Regulations'). Regulation 61 [in Northern Ireland regulation 43] reproduces the effect of article 6(3). A 'competent authority', before deciding to give consent for a project which is "likely to have a significant effect on a European site … (either alone or in combination with other plans or projects)' must make 'an appropriate assessment of the implications for that site in view of that site's conservation objectives'. It may agree to the project 'only after having ascertained that it will not adversely affect the integrity of the European site', having regard to 'any conditions or restrictions' subject to which they propose that the consent should be given.

12. Authoritative guidance on the interpretation of article 6(3) has been given by the Court of Justice of the European Union ('CJEU') in (Case C-127/02) *Waddenzee* [2006] 2 CMLR 683 (relating to a proposal for mechanical cockle-fishing in the Waddenzee Special Protection Area). There is an elaborate analysis of the concept of appropriate assessment, taking account of the different language versions, in the opinion of Advocate General Kokott (paras 95-111). In its judgment the court made clear that the article set a low threshold for likely significant effects:

> '41. … the triggering of the environmental protection mechanism provided for in article 6(3) of the Habitats Directive does not presume - as is, moreover, clear from the guidelines for interpreting that article drawn up by the Commission, entitled 'Managing Natura 2000 Sites: The provisions of article 6 of the Habitats Directive (92/43/EEC)' - that the plan or project considered definitely has significant effects on the site concerned but follows from the mere probability that such an effect attaches to that plan or project.'

The court noted that article 6(3) adopts a test 'essentially similar' to the corresponding test under the EIA Directive (para 42), and that it 'subordinates' the requirement for an appropriate assessment of a project to the condition that there be 'a probability or a risk that the latter will have significant effects on the site concerned'. The Habitats Directive had to be interpreted in accordance with the precautionary principle which is one of the foundations of Community policy on the environment (para 44). It concluded:

> '45. In the light of the foregoing, the answer to Question 3(a) must be that the first sentence of article 6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects.'

13. As to the content of such appropriate assessment, the court said:

> '52. As regards the concept of 'appropriate assessment' within the meaning of article 6(3) of the Habitats Directive, it must be pointed out that the provision does not define any particular method for carrying out such an assessment.

> 53. None the less, according to the wording of that provision, an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives.
>
> 54. Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field. Those objectives may, as is clear from articles 3 and 4 of the Habitats Directive, in particular article 4(4), be established on the basis, inter alia, of the importance of the sites for the maintenance or restoration at a favourable conservation status of a natural habitat type in annex I to that Directive or a species in annex II thereto and for the coherence of Natura 2000, and of the threats of degradation or destruction to which they are exposed …
>
> 56. It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned.'

14. More recently in *Sweetman v An Bord Pleanála (Galway County Council intervening)* (Case C-258/11) [2014] PTSR 1092 the court spoke of the two stages envisaged by article 6(3):

> '29. That provision thus prescribes two stages. The first, envisaged in the provision's first sentence, requires the member states to carry out an appropriate assessment of the implications for a protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on that site [citing *Waddenzee* (above) paras 41, 43]

> …
>
> 31. The second stage, which is envisaged in the second sentence of article 6(3) of the Habitats Directive and occurs following the aforesaid appropriate assessment, allows such a plan or project to be authorised on condition that it will not adversely affect the integrity of the site concerned, subject to the provisions of article 6(4).
>
> …
>
> 40. Authorisation for a plan or project, as referred to in article 6(3) of the Habitats Directive, may therefore be given only on condition that the competent authorities – once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field – are certain that the plan or project will not have lasting adverse effects on the integrity of that site. That is so where no reasonable scientific doubt remains as to the absence of such effects …'"

The Precautionary Principle

[61] It will have already been observed that the precautionary principle is an element within the policy of the European Union, both in respect of the EIA Directive (see paragraph [49] *supra*) and the Habitats Directive (see the quotation from Waddenzee *supra*). The principle was, it will be recalled, expressly referred to in the discussion between officials in this case and in submissions to the Minister. The theme of the various references was the need to err on the side of caution in the absence of evidence to show that sand extraction would not cause deleterious impacts on the environment.

[62] Article 191 (2) of the TFEU, dealing with Union policy on the environment, states:

> "Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that protective action should be taken, that

> environmental damage should as a priority be rectified at source and that the polluter should pay."

[63] There is no definition of what the precautionary principle precisely requires.

The Applicant's case

[64] The applicant's case is that the Minister is legally obliged to take effective enforcement action. What he cannot do is to stand aside and allow the notice parties to conduct business as usual. The Department has been clear in holding that the ongoing environmental consequences of unauthorised development were potentially likely to be significant. Unless a Stop Notice is put in place, enforcement in this case amounts to no more than a paper tiger. What is required is action which requires a cessation of extractive activity, especially as each shovel full of sand removed from the Lough amounts to still further unlawful development and cannot be put back.

[65] The problem, moreover, it is argued, is acute and the issue of the grant of planning permission is likely to involve significant delay. This is especially so as the PAC can only deal with a decision which grants permission for the historic activity which has given rise to the Enforcement Notice which the Department issued. The planning authority, itself, must deal with the position going into the future and there is no sign of any early decision in this regard – indeed, to date the notice parties have not even applied for such permission.

[66] In the context of likely significant ongoing damage to the Lough this, the applicant says, is a classic case for the application of the precautionary principle which legally is the approach which has to be adopted in this case. While the Minister has been advised to follow it, he has adopted instead a stance which is antithetical to it, notwithstanding that there is an absence of scientific data as to the effects that continuing dredging and extractive activity is having. The Minister's position, it has been submitted on behalf of the applicant, cannot be reconciled with the precautionary principle.

[67] In support of its approach, the applicant has relied on a range of cases, both European and domestic. In respect of operation of the key aspects of habitats assessment, and in particular the interpretation of Article 6, reference has been made to Waddenzee (*supra*) and to the Advocate General Sharpston's remarks in Commission v Ireland (C-215/06). Considering Article 6 of the Habitats Directive, in the light of its constituent parts, she said:

> "Paragraph 2 imposes an overarching obligation to avoid deterioration or disturbance. Paragraphs 3 and 4 then set out the procedures to be followed in respect of a plan or project which is not directly connected with or necessary to the management of the site (and which is not covered

> by paragraph 1) but which is likely to have a significant effect thereon. Collectively, therefore, these three paragraphs seek to pre-empt damage being done to the site or (in exceptional cases where damage has, for imperative reasons, to be tolerated) to minimise that damage. They should therefore be construed as a whole."

[68] As regards domestic law cases as regards habitats reliance was placed on a range of cases where the importance of the precautionary approach was recognised. One such was that of In Re Sandale Development Limited's Application [2010] NIQB 43 where Weatherup J (as he then was), adverting to the position in European Law, stated:

> "I repeat the ECJ approach to the Habitats obligations – the triggering of the environmental protection mechanism follows from the mere probability that such an effect attaches to a plan or project, a probability or a risk that the plan or project will have significant effects on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of the objective information that the plan or project will have significant effects on the site concerned…The above approach requires objective information about the risk, the potential impact. If no information on Habitats issues is provided, requested, researched, sought or obtained then any objective information about the risk to Habitats is unlikely to emerge.": see paragraphs [39]-[40].

[69] In his submissions on behalf of the applicant Mr Jones QC also drew attention to what he described as the principle in community law of effective judicial protection. In this regard he referred to Article 4(3) of the TEU where it stated that:

> "the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the treaties or resulting from the acts of the institutions of the Union."

In the context of EIA and Habitats assessments, this meant, according to counsel, that the authorities were obliged to take, within the sphere of their competence, all appropriate general or particular measures to remedy a failure to carry out an assessment of the effects of a project.

[70] In the context of the EIA Directive the applicant placed reliance on such authorities as R (Wells) v Secretary of State for Transport, Local Government and the Regions [2004] Env L.R. 27, a European Court judgment in response to a reference

by the High Court in England and Wales hearing a judicial review application, and R (Ardagh Glass Ltd) v Chester City Council [2009] EWHC 745 (Admin), a first instance domestic judgment.

The Respondent's case

[71] On the respondent's behalf, it was claimed that the applicant's case of on-going damage to the Lough caused by the activities of the notice parties was exaggerated and blown out of all proportion. The notice parties' activities had been being carried on for some considerable time and while the possibility that sand extraction might be causing some damage could not be excluded at this time, any such damage was likely to be limited.

[72] The Minister, it was submitted, was not in breach of domestic or European law. In particular, the Department was not under any obligation to carry out either an EIA or Habitats assessment at this time. On a proper analysis, there was in fact no application before the Department for development consent. Consequently, there was no requirement on it by virtue of the Directives and national regulations to act in any particular way, subject to one exception[1].

[73] Nor, it was submitted, was it legally accurate to say that any failure by the Department to take further action against the notice parties could be the equivalent of granting development consent. The legal authorities were against this proposition and reliance was placed, in particular, on the case of Prokopp [2003] EWCA Civ 961.

[74] The court was reminded of the importance of the national legal framework in respect of planning enforcement which applied in this case. This framework provided a suitable scheme for dealing with a case like this. In this regard, emphasis was placed on the operation of section 143, the appeal provisions, which came into play once an enforcement notice had been served. Sections 143 (3A) and (7) had the effect of suspending the operation of the enforcement notices and placing responsibility to consider the deemed application for permission which arose on the PAC, which was seized of the matter. The powers of the PAC were extensive. In accordance with section 144 it had to make one of three decisions in terms of outcome: it had to quash the notices or vary or uphold them. Provided the notices were not quashed they could continue to have effect even in the circumstance where the PAC decided to grant planning permission for historical breaches of planning control. In these circumstances the notices could still apply to future activity (see section 145 (1) (c)). Likewise, compliance with the notice did not discharge it (see section 149; and see also section 169 (2) (b)).

[1] The exception was where the authority (here the Minister) declined to take enforcement action knowing that the effect of this would be to render the activities lawful by reason of the passage of time for enforcement being about to expire. Such a situation arose in Ardagh (see, paragraphs [64]-[66] of the first instance decision) where the court required enforcement action to be taken. The exception, counsel argued, had no impact in this case where enforcement action has already been taken.

[75] The decision making of the Minister in the above circumstances was perfectly lawful and understandable.

The position of the Notice Parties

[76] It was suggested on behalf of the notice parties, on the basis of expert evidence which had recently been assembled by them for the purpose of this judicial review application (and which was not therefore involved at all in the impugned decision making of the Minister), that there simply was no evidence to support the conclusion that their activities on the Lough involved any adverse impact on it.

[77] The position of both the SE and the sand traders was, however, that both wished to deal with the need for planning permission and each was working towards this end. With this in mind, considerable resources had been devoted to the appeal against the enforcement notices which was to be heard by the PAC and in preparing assessments which were required in that context. Their desire was for the future to have the requisite planning permissions in place.

[78] In the context of the Minister's decision on the issue of putting in place a Stop Notice, there was, it was argued, a need for a responsible response which was proportionate to the circumstances. The Minister, it was submitted, had acted proportionately and was not under any legal obligation to decide otherwise. He enjoyed discretion and had used it sensibly. Moreover, the Minister had indicated that he would keep the matter under review.

[79] It was made clear that on the facts of the case the notice parties had accepted the Department's environmental determination and took no issue with the requirement both for an EIA and a Habitats assessment. But it did not inexorably follow that the need for assessments meant that there would be on-going damage to the integrity of the Lough caused by their activities.

[80] In their submissions, the absence of a Stop Notice was not the equivalent of a grant of consent. On this point, they agreed with the submissions of the respondent.

[81] The court could invest reliance on the PAC rigorously to carry out its task when dealing with the notice parties' appeals, especially as it was a body familiar and experienced in dealing with sensitive sites and appeals of this kind.

Case Law

[82] The parties in this case have extensively cited case law to the court. All of the cases cited have been considered although it is only the principal cases which will be referred to below.

Ardagh Glass Limited

[83] This is a case involving EIA development on a substantial scale. The developer was Quinn Glass. It constructed a glass works and began operating it without planning permission. By the time the matter came to court in 2009 there was no issue that the development was being operated unlawfully. The applicant company was a trade rival. It wanted the planning authorities to take enforcement action against the developer before the time for doing so ran out, a step which was being resisted by the planning authorities, and it contended that no retrospective planning permission could lawfully issue as an EIA had not been carried out. For this reason also, effective enforcement action was required and a stop notice should, the applicant argued, be issued.

[84] At first instance, Judge Mole QC (sitting as a Deputy High Court Judge) required the planning authorities to issue an enforcement notice in view of the imminent expiry of the time limit for such action. In the Judge's opinion, to have allowed the developer to achieve immunity from planning enforcement on the basis of the passage of time would have been a disgrace. However, on the wider issue before him, he did not conclude that retrospective permission could not lawfully be granted and refused relief to the applicant on this aspect of the matter. In reaching his conclusion on this issue the Judge was clearly influenced by the decision of the ECJ in the case of Commission v Ireland where the court had held that, exceptionally, there may be circumstances in which a retrospective development consent could be granted. The Judge held that there could be a retrospective permission so long as the authorities paid careful regard to the need to protect the objectives of the EIA Directive. The procedures adopted, he said, were a matter for the State. Once an enforcement notice was issued, existing procedures were able to secure compliance with the Directive.

[85] The decision in Ardagh Glass Ltd was the subject of an appeal to the Court of Appeal but only in respect of the wider issue referred to above. Sullivan LJ had no doubt that the Judge had been right to reject the bald proposition that community law did not permit the grant of retrospective planning permission for EIA development. The Judge's view, Sullivan LJ indicated, accorded with common sense, with the need to ensure that measures to ensure compliance with the Directive were proportionate and with the decision in the Commission v Ireland case which had recognised, subject to certain conditions, that national law may permit the regularisation of unauthorised EIA development. In respect of common sense, he said:

> "Given the variety of circumstances in which EIA development might be carried out in breach of the requirements of the directive and the wide range of consequences of such a breach, it would be very surprising if there was only one lawful response to a breach, however caused and whatever its environmental

> consequences…[i]t would be…an affront to common sense if retrospective planning permission (correcting the legal error unrelated to EIA) could not be granted in such a case, and the local planning authority was compelled to require the removal of the development prior to considering any further application for planning permission, not least because the process of removal might itself cause serious environmental harm."

[86] In relation to the topic of proportionality, Sullivan LJ stated:

> "While member states must take all appropriate measures to ensure compliance with the directive and to nullify the effects of any breach, it is a fundamental principle of community law that such measures must themselves be proportionate…a prohibition upon the grant of retrospective planning permission for EIA development, regardless of the circumstances surrounding and the environmental consequences of, the breach of the directive, would be wholly disproportionate."

[87] Commenting on the Commission v Ireland case Sullivan LJ referred to paragraph 61 in the ECJ's judgment. This had held that Ireland had failed to comply with the requirements of the directive "by giving to retention permission, which can be issued even where no exceptional circumstances are proved, the same effects as those attached to a planning permission preceding the carrying out of the works and development". In the Judge's view those passages seemed to be "an express recognition by the ECJ that, subject to certain conditions, there may be exceptional circumstances in which a retention permission may be granted for EIA development".

[88] In a short passage dealing with the issue of Stop Notices, Sullivan LJ noted that:

> "[O]nce it is accepted that retrospective planning permission for unauthorised development is permissible in principle (subject to certain conditions), there is no substance in the appellant's further submission before the judge that the respondent was bound to issue a stop notice and not merely an enforcement notice. The latter was sufficient to ensure the removal of the unauthorised EIA development if retrospective planning permission was not granted either by the respondent under section 73A, or by the Secretary of State under section 177 in

response to any appeal against the enforcement notice by the interested party."

Prokopp

[89] This case concerned the building of a railway line extension in East London. Planning permission had been granted for this after there had been a proper EIA but later, for reasons unconnected with the EIA, that permission lapsed. The developer was unwilling to submit a new planning application because this would trigger the need to prepare another environment assessment. In these circumstances it reached an agreement with the planning authorities which would enable the project to go ahead without the developer being at risk of enforcement action. The applicant for judicial review argued that the developer had failed to comply with the EIA Directive as a further EIA was required before planning consent could be given and that the action of the planning authorities in indicating that they would not take enforcement action amounted to the giving of consent. The applicant for judicial review succeeded in part at first instance but the Court of Appeal allowed an appeal by the developer and planning authorities. The court held that there was in the circumstances no requirement for a further EIA and that a failure to take enforcement action did not amount to a consent within the meaning of the Directive. In particular, a resolution of the planning authorities not to enforce against a developer does not give the developer any entitlement to proceed with the development. Rather it merely left him to proceed at his peril.

[90] The applicant and the respondent both relied on this case to some extent. In particular, the applicant referred to the reasoning of Collins J at first instance where he had said that the EIA Directive had to be given a purposive construction "to ensure that decisions entitling developers to proceed with projects which might affect the environment are made on the basis of full information". Hence "a failure to act which has the effect of allowing a project to proceed is within the Directive" (paragraph [24]). As the judge went on to say: "If a decision not to take enforcement action were not within the Directive, there would be a real possibility of avoiding the requirement to provide an EIA in a particular case" (ibid). It followed that a decision not to take enforcement action was a development consent within the meaning of the Directive.

[91] The above reasoning was not, however, accepted in the Court of Appeal where all of the judges rejected the view that on the facts a failure to enforce amounted to a development consent. Buxton LJ said that a failure to take enforcement action was not an application for planning permission (paragraph [59]) and such failure did not entitle the developer to proceed (paragraph [61]). Schiemann LJ reached the same conclusion. At paragraph [46] he referred to the decisive question as being "whether the decisions…in relation to enforcement proceedings are properly characterised as development consents…namely, as being the decisions of the competent authority which entitle the developer to proceed with the project". His answer to this question, given at paragraph [47], was that they

were not. This led to him stating (at paragraph [48]) that: "As a matter of principle, where a developer is acting in breach of planning control it is in the first instance for LPAs not the court to consider whether to take enforcement proceedings. LPAs are only entitled to do so where they consider it expedient… In those circumstances the court will in general only act if there is reason to believe that the LPAs have acted unlawfully". The third judge, Kennedy LJ agreed with the general proposition that the decisions not to take enforcement proceedings could not be regarded as amounting to a development consent (paragraph 91).

[92] There are *dicta* in Prokopp which the applicant drew attention to which, it was argued, had to be factored in to the court's approach to the case. In particular, reference was made to paragraph [38] where Schiemann LJ said:

> "I would accept for the purposes of the present appeal that, if a project which falls within the Directive goes ahead without there having been an Environmental Impact Assessment and the national authorities simply stand by and do nothing then this might well amount to a breach of our obligations under the Directive."

Baker

[93] This case is of interest in that shows how the High Court in England and Wales have applied the Ardagh case in a situation which is not unlike the present case: see R (Baker) v Bath and North Eastern Somerset Council [2013] EWHC 946 Admin. The challenge was to a failure by a local planning authority (Bath and North Somerset Council) not to take enforcement action in respect of a waste composting site which was operating at the relevant point in time without the benefit of planning permission. Planning permission was sought but in the meantime the site continued to be operated. There were, moreover, significant delays in the production of an environmental statement which was required as the operations fell within the scope of EIA development. The applicant, a local resident, argued that the failure of the Council to take enforcement action was in breach of EU law as the Directive applied and the operations were on-going despite the fact that there had not been prior consideration of environmental information as required by the EIA Regulations before a development consent could be granted.

[94] Parker J rejected the challenge, describing the applicant's position as "an extreme one" (parargraph [22]). Having set out a number of principles drawn from the case-law, at paragraph [25] he concluded that these principles did not impose a duty on the Council under EU law immediately to issue an enforcement notice. The grant of a retrospective planning permission in respect of EIA development was, he noted, permissible under the Directive if there were exceptional circumstances. For this proposition he cited Ardagh. Likewise he noted that it was for the planning authority to consider whether the grant of planning permission would give the developer an advantage he ought to be denied and whether the public can be given

an equal opportunity to form and advance their views. These, he commented, were important safeguards to secure effective application of EU law. The Council's decision would enable it later to decide with the benefit of an environmental statement whether to grant the permission sought. To issue an enforcement notice would lead to the matter going to the Secretary of State on appeal. In due course the appeal would be decided with the benefit of an environmental statement.

Evans

[95] In this case a local planning authority granted a planning permission which was challenged unsuccessfully both at first instance and in the Court of Appeal: see [2014] 1 WLR 2034. The permission related to a watercress farm. Originally the farm was an agricultural use but later the produce was sorted, washed and packed on the site and this aspect of the business expanded over time, with other produce being imported from other sites. The use therefore changed to a mixed agriculture/industrial use with the industrial element predominant. The change of use had occurred more than 10 years before the planning application and was viewed as immune from enforcement due to the passage of time. Nonetheless, it was conceded in the litigation that the change of use was "Schedule 2 development" which should have, but had not, been screened in accordance with the EIA Directive and Regulations. Thus EIA development had resulted without the impact assessment requirements having been complied with.

[96] The applicant argued that to ensure compatibility with the EIA Directive the court was required to dis-apply the time limits and issue an enforcement notice. There could, it was argued, be no time limit for taking enforcement notice proceedings in respect of EIA development.

[97] The above argument was rejected at both levels. In the Court of Appeal it was held that the time limit on the taking of enforcement action against EIA development was not incompatible with the state's obligation to ensure compliance with the Directive. The time limit fell with the principle of the procedural autonomy of the state, provided it complied with the principles of equivalence and effectiveness, which the court held it did.

[98] In the course of his judgment Sullivan LJ considered both Ardagh and Prokopp though he distinguished both of these cases on the facts. He said at paragraph [26]:

> "If, as I have concluded time limits on taking enforcement action are not in principle incompatible with a member state's obligations to ensure compliance with the EIA Directive, then the precise nature of the time limits is a matter which falls with the principle of procedural autonomy of the member states, provided

> that the time limits imposed by the member state comply with the principles of equivalence and effectiveness".

Later, at paragraph [30], when discussing the issue of effectiveness of provision in respect of time limits in domestic law, the judge went on to say:

> "The UK has chosen to implement the Directive by tying the EIA process to the process of applying for planning permission. Failure to obtain planning permission for development, including EIA development, is a breach of planning control. It is the local planning authority that has the power to remedy breaches of planning control by way of taking enforcement action."

The Court's Assessment

[99] The court approaches this case on the basis that the onus rests with the applicant to satisfy it that the requirements of EU law are such as to make it obligatory for the Minister to serve a stop notice.

[100] For the reasons advanced earlier in this judgment, the court can discern no basis for a conclusion that, EU law apart, there has been any abuse of discretion by the Minister in this case. The touchstone of expediency provides to the Minister a wide discretion and having examined the documentation leading to the impugned decision there is nothing in it, in the court's view, that would show otherwise than that the Minister considered the issue with care and reached a conclusion which was within the remit of his authority to reach.

Consent for the Project/Development

[101] As with all judicial review applications, it is important for the reviewing court to keep in mind the precise way in which the applicant has cast his, her or its challenge. In this case what is claimed by the applicant is that the Minister/Department is breaching the key provisions of the EIA and Habitats Directives on the basis that it has granted to the notice parties development consent for the continuation of its activities by the omission to take effective enforcement action against them. This, it is claimed, fails to comply with the requirement of each Directive that the requisite assessment is carried out before consent is given.

[102] It seems to the court that this case is difficult to sustain.

[103] The question which arises is whether it can be said that the Minister/Department has granted consent. On this issue no overt permission has been granted but the court is being asked to conclude that action speaks louder than words and that the Department by serving an enforcement notice, in the absence of this being backed up by a stop notice, has given consent by turning a blind eye.

[104] The court is unpersuaded that the applicant's argument on this point is correct. The court considers that the picture presented by the applicant is not consistent with the factual background in this case. While it seems clear that for a long period the notice parties had been able to carry out their activities without planning permission, this position did not remain static and has been the subject of examination by the Department since the matter was raised with it in 2012. The matter then was investigated and the conclusion was arrived at that sand extraction from the Lough was unauthorised and that planning permission for it would have to be obtained. The Department at the outset engaged with the SE and the sand traders to seek to induce planning applications. On 25 September 2014 the Department wrote to both indicating that their activities constituted a breach of planning control and they were told that their activity should cease until the situation was addressed. It was then in May 2015 – when still no planning applications had been received – that matters came to a head after the Department has compiled a substantial enforcement report and an EIA Determination. At this time an Enforcement Notice was issued by the Department. This required the notice parties' operations to cease within one day of the notice taking effect. It is at this point that the domestic statutory regime came into play but the Department cannot have been sure about exactly what would happen. The notice parties had the option of ceasing activity as the notice required or of appealing the notice and taking steps to regularise the situation, primarily by means of obtaining what broadly might be called retrospective permission. They also had the option of ignoring the notice. In the event they chose to appeal and make a deemed application for permission, notwithstanding that a consequence of doing so was to trigger EIA and Habitats assessments. Notably, the notice parties did not appeal the EIA Determination. It seems to the court that the road the notice parties chose to take was one which involved compliance with the Directives whose processes attached to the appeal proceedings before the PAC. While the Minister/Department did not, in the event, put in place a Stop Notice, this option clearly was considered and assessed. Indeed, the Department recommended that the Minister put a Stop Notice in place but the Minister ultimately did not accept this recommendation.

[105] In the court's judgment the sequence of events just described do not foreshadow the conclusion that in fact what was occurring was that the Minister/Department by his decision not to serve a stop notice was in fact granting permission or development consent or project approval to the notice parties. At least part of the Minister's objective, instead, was to secure a situation in which steps were taken to ensure that the matter would have to be confronted by the notice parties and that the pre-consent assessments would indeed be carried out, consistently with the Directives.

[106] The court is of the view that, viewing the sequence of events as a whole, there is no reason why it should do other than follow the unanimous Court of Appeal judgment in Prokopp and, in particular, that part of it which held that a failure by a local planning authority to take enforcement action did not amount to a granting of

consent for the purpose of the EIA Directive. It also seems to the court that the same reasoning can be applied in the context of Habitats Assessment. Buxton LJ's view that the decision not to take enforcement action does not legally enable the parties to proceed seems apposite and the reality, as he said, is that a party, such as the notice parties in the present case, which continues activities without permission, proceeds at its peril. The current position, in the court's analysis, is that the notice parties do not enjoy any consent or permission and will not do so prior to a decision being made (in respect of their appeal by the PAC) following the assessments required by the Directives being carried out. This position is not necessarily in conflict with the Directives in the way claimed by the applicant in these proceedings, as the decisions in Ardagh and Baker demonstrate. In each of these decisions it was held that there had been no breach of European law by reason of circumstances in which activities which attracted the requirements of the EIA Directive were on-going without the grant of consent or permission. Retrospective permissions could be granted so long as the authorities paid careful regard to the need to protect the objective of the Directive. The view that there was only one legal response to this situation *viz* the taking of enforcement action was not accepted, in particular, by the Court of Appeal in Ardagh.

[107] In the present case, the court is inclined to the opinion that the response of the Department/Minister is within the range of lawful responses available. This is not a case where the Minister/Department has been standing by and doing nothing. The service of an enforcement notice demonstrates as much but it does not follow from this that there is an inflexible requirement that the next step must be in the form of the issuance of a Stop Notice. Provided the Minister/Department give their mind to the issue and assess it carefully, paying due regard to the objectives of the Directives, as the court believes has been the case in this instance, there is no basis for the court intervening.

[108] Like other courts before it, this court is un-attracted by the sweeping character of the applicant's submissions. The applicant has elevated general principle to an inflexible code but general principles should not be treated as a straight-jacket from which there can be no relief. The better view, in the court's assessment, is that of Sullivan LJ in Ardagh, exemplified in the quotations at paragraphs [85] and [86] *supra.* There can, in other words, be more than a single response available on the facts of a case like this. The quotation from Sullivan LJ cited at paragraph [88] above is also worthy of recall because it deals with the very issue of whether a stop notice need be served in the context of unauthorised EIA development, such as had been occurring in Ardagh. Sullivan LJ's view was that once it was accepted that retrospective planning permission for unauthorised development was permissible in principle, there was no substance in the further submission that the local planning authority was bound to issue a stop notice and not merely to issue an enforcement notice. The latter was sufficient to ensure the removal of unauthorised EIA development either by the respondent under section 73A or the Secretary of State under section 177, in response to any appeal against the enforcement notice by the interested party (see paragraph [22] of Ardagh in the

Court of Appeal). The above appears to the court to be in point in the present case as there is an enforcement notice already in existence and the issue is whether a stop notice has to be served. There also has been an appeal against the enforcement notice which is the section 177 situation referred to by Sullivan LJ. Plainly Sullivan LJ viewed his conclusion on this point as not inconsistent with EU law and this court is inclined to follow this view.

[109] In the applicant's submissions before the court, considerable effort was devoted to attempting to distinguish the Court of Appeal's decision in Ardagh from the present case. A point raised was that in Ardagh it was possible to rectify the damage done by, for example, requiring the building to be removed if ultimately permission was not granted. It was suggested that this was not the same as in the present case where the sand extracted cannot be put back. It was suggested therefore that Ardagh should not be followed. The court has considered this point but it is of the view that what is important are the principles which arise from Ardagh, which have already been discussed. The factual difference to which attention has been drawn would be insufficient, in the court's judgment, to cause the court not to follow those principles.

[110] The court has also considered carefully the applicant's submissions in respect of the precautionary principle. However, viewed in the context of the challenge made by the applicant, the court has no reason to believe that the Minister/Department has not been alive or given due effect to this principle which is referred to regularly in the submissions which had been prepared for the Minister. In respect of the challenge to the Minister's impugned decision the court observes no mis-direction on this ground. But, in any event, it is important to bear in mind a point advanced by Mr Elvin for the respondent. This was that at the present time the Department/Minister themselves are not seized of any application for planning permission by the notice parties, which was the primary context in which reliance on the precautionary principle has been placed by the applicant. The deemed application for planning permission is before the PAC not the Minister and there is as yet no application for prospective planning permission before the Department. The function of the precautionary principle in the setting of the assessments required by the Directives where project approval or development consent is at issue is, it seems to the court, well established and not, in itself, in issue in these proceedings. Consequently, the court has no reason to believe that the PAC will not be alert to it and indeed there is every sign that it is aware of it. In the view of the court, the PAC can be relied on to be vigilant about securing that the objectives of the Directives in this context are vindicated in a strict but proportionate manner.

The Ramsar Convention

[111] As noted at paragraph [4] of this judgment a ground of judicial review was that the Department had acted unlawfully in failing to take steps to secure cessation of activities changing the ecology of the Ramsar protected site and failing to secure notification of such changes which are occurring to the Ramsar Secretariat pursuant

to Article 3.4 of the Ramsar Convention. The basis for this ground of judicial review appears to be what Mr Orr had to say about it in his first affidavit filed on behalf of the applicant. He dealt with the matter at paragraphs 56-63 and, in essence, drew attention to the need for contracting parties to arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory was changing or likely to change as a result (*inter alia*) of human interference.

[112] This ground of judicial review was barely mentioned in the course of the three day hearing of this application and, so far as the court can see, the issue is referred to in just one paragraph in the applicant's skeleton argument, which simply sets out the terms of Article 3.2 of the Convention without commentary.

[113] The court notes that in the skeleton argument on behalf of the SE there is a reference to this ground where it is stated that as the Ramsar Convention is not a Convention incorporated into United Kingdom domestic law it is not justiciable, citing remarks made by Weatherup J (as he then was) at paragraphs [30]-[37] of National Trust's Application [2013] NIQB 30. In the course of oral submissions none of the authorities referred to by Weatherup J were the subject of discussion and nor was the National Trust case alluded to. There was, in short, no argument as what Weatherup J had said or as to the limits of the doctrine discussed by the court in that case.

[114] The court is of the view that it has insufficient material, both legal and factual, before it on this issue to enable it to come to any determination on this ground.

Conclusion

[115] It is clear from the papers that this judgment will not in itself finally settle the issue of whether a stop notice should, at some stage, issue against the notice parties in these proceedings. The Minister by his actions to date has not favoured this course but nor has he said that the matter is closed. Indeed, he has said that he intends to keep this issue under review. This will, no doubt, involve him in a process wherein he is advised of developments in relation to the information which is available and the progress of the appeals before the PAC. In other words, he has not ruled out the option of serving a stop notice if he becomes convinced as to the expediency of doing so. This is a case where it is more likely than not that events will occur which will require continual appraisal.

[116] For the reasons the court has given, it does not consider that any of the grounds of judicial review has been established. In these circumstances the court dismisses this application.