**THE HIGH COURT**
**JUDICIAL REVEW**

[2021] IEHC 424
**[2020 No. 568 JR]**

**BETWEEN**

**HELLFIRE MASSY RESIDENTS ASSOCIATION**

**APPLICANT**

**AND**

**AN BORD PLEANÁLA, THE MINISTER FOR HOUSING, PLANNING AND LOCAL GOVERNMENT, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**AND**

**SOUTH DUBLIN COUNTY COUNCIL**

**NOTICE PARTY**

**JUDGMENT of Humphreys J. delivered on Friday the 2nd day of July, 2021**

1. The Hellfire Club is an 18th century building at the summit of Montpelier Hill in County Dublin. It has been suggested that the architect was Edward Lovett Pearce who is associated with the Stillorgan Obelisk, Castletown House and the Irish Parliament House among other buildings.

2. While it seems to have been erected by William Conolly, Speaker of the Irish House of Commons, as a hunting lodge in 1725, the National Inventory of Architectural Heritage (NIAH) states that it was built by Lord Rosse around 1740 (see para. 2.3.6 of the inspector's report noting the discrepancy). Presumably there is a definite answer to that, albeit that it may not have been clarified to the board.

3. The land is bisected by the Old Military Road/Killakee Road (R115). To the west is Montpelier Hill and Hellfire Forest, and to the east is Massy's Wood. Part of the old Military Road is itself on the National Inventory of Architectural Heritage with a date of approximately 1780.

4. Massy's Wood takes its name from the family of the sixth Baron Massy who inherited the lands in 1880. The lands were part of the demesne of Killakee House which originally included formal gardens and walled gardens, as well as glasshouses designed by the ironmaster Richard Turner, more famous for the Palm Houses in Kew Gardens, Belfast Botanical Gardens and the Royal (later National) Botanical Gardens in Glasnevin. The remains of the walled gardens are a protected structure (RPS 384).

5. The concept of a Dublin Mountains Visitor Centre in the area was first proposed in the 2007 Dublin Mountains Strategic Development Plan for Outdoor Recreation. It was subsequently identified in the South Dublin Tourism Strategy 2014 and as an objective in the 2016 to 2022 South Dublin Development Plan.

6. Detailed presentations were made by the Chief Executive of South Dublin County Council to the elected members and landowners in February and March 2017 and public open days were held in April 2017.

7. Under s. 120(3)(b) of the Planning and Development Act 2000, the council requested the board to determine whether it was required to carry out an environmental impact statement (EIS). The inspector recommended that the council should not be required to prepare an EIS.

8. On 8th May, 2017, the board decided to the contrary and directed the council to do so, referring to the impact of the increase in visitors on the historical and archaeological heritage of the area.

9. On 16th May, 2017, the deadline for transposition of directive 2014/52/EU, the amending EIA directive, fell due. However, the directive was not in fact transposed until 1st September, 2018 although no point is taken on that here.

10. In lieu of an EIS, an environmental impact assessment report (EIAR) was submitted with the application.

11. On 12th June, 2017, a further presentation to elected members was made and the council agreed that an application for permission would be submitted to the board.

12. In July 2017, the Dublin Mountains Visitor Centre Business Plan final report was prepared by CHL Consulting Company Ltd. This document included a summary of demand projections based on an estimated pre-existing cohort of local amenity users of 100,000 per year and a "prudent estimate" of growth to 225,000 per year with a target for 300,000 for the subsequent five-year period.

13. The document modishly divides the public into "consumer segments" such as the "culturally curious (overseas)", "social energisers (mainly UK)", "connected families (domestic)" and "great escapers (overseas)". It states that a number of assumptions have been made to model the performance of the visitor's centre which "for the most part are drawn from CHL's experience of trends and norms in the visitor attraction sector. In most cases the assumptions made tend to err on the side of caution". Caution here means that the report is not tending to overstate visitor numbers or revenue.

14. The formal application for a visitor's centre and associated works was submitted directly to the board under s. 175 of the 2000 Act on 31st July, 2017. The lands concerned are owned by Coillte, which is consenting to the application. No part of the development is within a European site.

15. The main elements of the application are for two buildings comprising the visitor centre, a tree canopy walk/pedestrian bridge over the R115, conversion of conifer forest to deciduous woodland and conservation works to existing structures.

16. On 5th September, 2017, the board requested the council to submit additional information by way of a shapefile showing the red-line boundary.

17. On 9th October, 2017, the board requested further information in relation to potential impacts on fauna and habitats which had been raised in a submission from the Department of Culture, Heritage and the Gaeltacht on 25th September, 2017.

18. The council responded to this request in November 2017 and that response was subjected to a round of public consultation.

19. On 7th February, 2018, the board requested additional information in relation to potential impacts on specified matters, in particular the Wicklow Mountains Special Protection Area (SPA).

20. An oral hearing took place over six days between 20th and 27th November, 2018.

21. On 9th January, 2019, the inspector prepared a first report which was negative in nature. It indicated that the inspector was satisfied with the issues of proper planning, zoning and design, but considered that the impact of the bridge had not been fully assessed. The inspector thought that very little surveying had been carried out in Massy's Woods (para. 10.3.11). Certain aspects of the design were queried.

22. An issue had been raised as to the identity of the applicant, but the inspector concluded that the applicant was South Dublin County Council, not the Dublin Mountains Partnership or Coillte (see para. 10.6.5 to 10.6.8).

23. The ownership of one small piece of land was queried, but the inspector thought that that could be worked around if it became a problem (para. 10.6.10 to para. 10.6.11). No point is taken on that here.

24. She noted that the car park, footpaths and cycle lanes would be a planning gain and would address existing safety issues (para. 10.8.4).

25. Under environmental impact assessment (EIA) and consideration of alternatives, she noted at para. 11.2.12 that the design statement refers to similar buildings such as the Wordsworth Centre in Grasmere in the Lake District of England, the Sliabh Gullion Visitor Centre near Newry in County Armagh and the Rosmuc Visitor Centre in County Galway.

26. Her main concerns were with biodiversity, noting the impact on squirrels from both clear-felling for the car park and replacement of coniferous trees with deciduous trees. The latter would give the invasive grey squirrel the advantage in the area in its war of attrition with the native red squirrel (see para. 11.6.5).

27. She notes that a squirrel drey was recorded (para. 11.6.16) and also referred to mitigation measures (para. 11.6.17). Observers provided evidence of other dreys in Massy's Woods (para. 11.6.19) and she noted the intention to conduct a pre-construction survey.

28. The report noted that the EIAR table 6.16 notes that there will be a loss of a drey and that the further information response also notes that a derogation licence would be

sought to destroy one drey (para. 11.6.20). The inspector said that this was contradicted at the oral hearing in that it was stated that the design of the car park was arranged to avoid the drey.

29. Regarding bats, she had concerns regarding the lack of baseline survey data (para. 11.6.25) and had similar issues regarding otters (para. 11.6.32). The lack of information regarding birds was of "significant concern" (para. 11.6.34).

30. She considered there was insufficient assessment of the impact on merlin and generally was not satisfied that there had been assessment of the full impact on habitats.

31. Mention is made of bryophytes and of the impact of introducing horses into an equestrian trail through the habitats concerned. She was also concerned regarding the impact on adjacent Natura 2000 sites due to the potential increase in footfall, but overall the environmental impacts were acceptable apart from in relation to biodiversity (para. 11.16.2).

32. On appropriate assessment (AA) she concluded that a stage 2 assessment was needed having noted the screening report. She said that in the absence of a Natura Impact Statement (NIS) she could not conclude that there would be no significant impact on European sites, making specific mention of the Glenasmole Valley Special Area of Conservation (SAC) (001209), the Wicklow Mountains SAC and the Wicklow Mountains SPA.

33. Following this report, the board requested additional information on 6th February, 2019 in particular an additional bird survey, the preparation of an NIS and an additional survey of habitats and an updated EIAR. That further information was submitted in December 2019.

34. The revised EIAR referred at para. 6.9.3.1 to the impact on and mitigation measures for red squirrels as a key environmental receptor among other species.

35. The council also submitted an NIS dated November, 2019 and an updated operational management and monitoring commitments document. It also included a walkers survey from summer 2019 and surveys of fauna and habitats taken over the period April to September 2019.

36. A red squirrel conservation management plan was submitted dated November 2019 as well as a paper by Amy Haigh, Fidelma Butler, Ruth M. O'Riordan and Rupert Palme, "Managed parks as a refuge for the threatened red squirrel (Sciurus vulgaris) in light of human disturbance", *Biological Conservation* 211, (2017), pp. 29 to 36. The additional information was subjected to a further round of public information.

37. The National Parks and Wildlife Service (NPWS) said that their concerns regarding merlin and the impact on European sites had been addressed in the further information.

38. The applicant made a submission dated 7th February, 2020.

39. The inspector then produced an addendum to the report on 6th May, 2020. This noted that the further bryophytes survey indicated a number of notable findings including two species not previously recorded in Dublin and five not recorded in Dublin since 1959. No larval webs of Marsh Fritillary were found (para. 5.4.17) although it was noted that this was disputed by an observer.

40. The inspector thought that "there were obvious gaps in the information initially provided", but "I am satisfied that those lacunae have been addressed" (para. 5.4.26). She noted that the NPWS was of the same view and generally considered that matters had been adequately addressed.

41. Under the heading of appropriate assessment, various objections to the new information were noted, but the inspector considered them not to have been borne out.

42. On foot of that addendum and the original report, the board decided to approve the application, with conditions, on 25th June, 2020.

43. The board's decision states that it had regard, among other things, to the habitats directive 92/43/EEC, the birds directive 79/409/EEC, the water framework directive 2000/60/EC and the EIA directive 2014/52/EU amending directive 2011/92/EU. That is a mis-reference in that it should be to the 2011 directive as amended *inter alia* in 2014 although no point is taken on that. Regard was also had to national, regional and local policy to the objectives and interests of the Wicklow Mountains SPA (004040) and the Wicklow Mountains SAC (002122).

44. The board completed an appropriate assessment exercise and concluded there was no adverse effect on European sites. It also completed an environmental impact assessment and concluded that the main direct and indirect effects would be mitigated as set out in the decision. The conclusion was that "subject to the implementation of the mitigation measures proposed … and subject to compliance with the conditions set out … the effects on the environment of the proposed development … would be acceptable".

45. While the inspector had recommended to omit the tree-top bridge and canopy and bridleway in Massy's Woods, the board decided not to omit that element, essentially on the basis of its view of the further ecological information and surveys.

46. The board concluded that the proposed development would be in accordance with proper planning and sustainable development. Nine conditions were imposed including applying the mitigation measures in the EIAR (condition 2) and the NIS (condition 3), a revised forestry management plan to retain the majority of mature conifers on the Hellfire plantation to support the red squirrel (condition 5), and the engagement of an ecological clerk of works (condition 7).

47. The applicant now challenges the board's decision by way of a statement of grounds that weighs in, in amended form, at a modest 92 grounds.

48. The amended statement was filed on 12th November, 2020. The substantive reliefs essentially are relief 1, an order of *certiorari*, relief 3, a declaration that s. 175 of the 2000 Act is invalid, and relief 4, that regs. 51 and 54 of the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) are invalid. The pleadings were supplemented by a grand total of 119 pages of legal submissions combined from the various parties.

49. On 9th June, 2021, having heard the applicant's submissions in full I dismissed the case insofar as it related to reliefs 1 (*certiorari*) and 3 (validity of s. 175), and also relief 4 (invalidity of the 2011 regulations) insofar as it concerned the pre-development consent situation. I give further reasons for that below.

50. On foot of that order I let the board and the council out of the case with no order as to costs, with liberty to reapply if they wished to make a submission (which I envisage would be on an everyone-bearing-their-own-costs basis if it arises) should the remaining matter in the case transpire to require a reference under art. 267 TFEU, of which more below.

51. Following that decision I proceeded to hear further submissions on the validity of the 2011 regulations regarding the post-consent situation. I will start by outlining the reasons for the decisions announced on 9th June, 2021 and will then turn to the question of the remaining issue regarding the validity of the 2011 regulations. I will endeavour to deal with these under the standard three headings:

    (i). domestic law points;

    (ii). EU law points; and

    (iii). points regarding validity of legislation.

**Domestic law points**

52. There were essentially two domestic law points made:

    (i). an alleged error of fact by relying on unreliable visitor numbers (grounds 10 to 20); and

    (ii). an alleged non-compliance with s. 175 of the 2000 Act (grounds 21 to 23).

**Alleged unreliable visitor numbers (grounds 10 to 20)**

53. The applicant says that the figures for future visitors are without foundation and that, therefore, the board acted unlawfully in taking them into account. That is misconceived for essentially three reasons:

    (i). The exercise of predicting future visitor numbers is inherently uncertain, so while an element of estimation and assumption is inevitable, the point can only be judged in the light of informed opinion. The fact that visitor numbers are crucial to the impact of the development does not detract from the fact that this is still a process of estimation. This is a classic example of the "argument that proves too much"

because no future estimation would pass the standard set by the applicant. There will always be some element of estimation.

(ii). There is in any event an element of empirical measurement to the council's numbers which is clearly documented in objective facts from a variety of sources going well beyond the business plan.

(iii). The applicant did not put forward any contrary statistical information. Hence the board was entitled to rely on the evidence before it unless that evidence was flawed on its face as seen by a reasonable expert (see *Reid v. An Bord Pleanála (No. 2)* [2021] IEHC 362 (Unreported, High Court, 27th May, 2021)). There was nothing stopping the applicant from getting its own expert and putting alternative numbers to the board. The applicant has not demonstrated that the figures were so flawed on their face that a reasonable expert would have rejected them.

**Alleged non-compliance with s. 175 of the 2000 Act (grounds 21 to 23)**

54. A point is made that because Ballyroan Library (where plans were meant to be on display) was closed for nine days due to the Covid-19 emergency, there was a breach of s. 175 (5)(d)(i) regarding public notice. There are three reasons why this cannot succeed:

(i). The applicant was not inhibited from making a submission, and as noted above in fact did so. It cannot now make a fair procedures point on behalf of someone else and does not have standing to do so.

(ii). There is a clear explanation for the discrepancy between the planning notice and the subsequent closure in that the public planning notice was issued prior to the Covid-19 related planning circular changing arrangements for access to information.

(iii). Even assuming *arguendo* that there was some technical breach (which I do not accept), I would refuse relief in the discretion of the court. It would bring the law into disrepute to uphold such an opportunistic attempt to invalidate a planning permission merely because a particular library had to be closed due to the Covid-19 emergency. Such a submission trivialises the impact of the pandemic (which at time of writing has killed 3,923,238 people worldwide, according to who.int), and the extent of the extraordinary arrangements that had to be made to deal with a situation unprecedented in living memory.

**EU law points**

55. As the domestic law points fail I turn now to the European law issues.

**Alleged reliance on unreliable visitor numbers for EU law purposes (grounds 10 to 20)**

56. This argument fails for similar reasons to the point as made for the purposes of domestic law. The applicant sought to argue that *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 was not the final answer in terms of environmental impact assessment (a similar argument regarding appropriate assessment was accepted in *Reid v. An Bord Pleanála* (*No. 2*)). Unfortunately, that argument does not really arise here because this is not a

case where, as put on behalf of the applicant, "as long as there is a scrap of paper in front of the board" the developer's information can be accepted. This was a case where no countervailing information was put up as to visitor numbers.

57. The argument was made that the decision-maker should have interrogated the materials or inferentially, that they were so flawed on their face that they should not have been accepted without such interrogation even in the absence of contrary information. That point was not properly pleaded. But even if it had been, it still needs an evidential basis demonstrating that a reasonable decision-maker with the knowledge of a reasonable expert would have seen the materials on their face as inadequate. That evidence is lacking here as it was in *Reid v. An Bord Pleanála (No. 2).*

**Alleged inadequate assessment of bat fauna (grounds 30 to 43)**

58. The applicant informed me that this point was being withdrawn.

**Alleged use of unverified mitigation measures for bats (ground 44)**

59. The applicant complains that the board relied on mitigation measures the utility of which was unverified, and that this is unlawful by analogy with case C-142/16 *Commission v. Federal Republic of Germany* (Court of Justice of the European Union, 26th April 2017, ECLI:EU:C:2017:301). However, the factual basis for this complaint is lacking because the evidence is that the mitigation measures *are* verified, and in particular are those in the relevant guidelines: see affidavit of Patrick O'Shea at para. 41 referring to the *Guidelines for the Treatment of Bats During the Construction of National Road Schemes* (NRA, 2006), *Best Practice Guidelines for the Conservation of Bats in the Planning of National Road Schemes* (NRA, 2005) *and Bats and Artificial Lighting in the UK* (The Bat Conservation Trust (BCT), London, 2018).

**Alleged unlawful reliance on derogation licence in relation to bats (grounds 45 to 54)**

60. We will be coming back to grounds 45 to 54 under the heading of the challenge to legislation. As drafted, they are not totally clear in that they can be read both as a complaint about the individual decision and about the legislation. But in fairness to the applicant I will assume that the intention was to make both challenges and I will deal with the issue here insofar as it relates to this particular decision.

61. The problem for the applicant in making this point as a challenge to this decision is that the board did not rely on the prospect of grant of a derogation licence for anything that was being specifically authorised that was known about as of the time of the development consent. I will deal later with the question of how threats to protected species that emerge post-consent are dealt with under the legislation, but for present purposes it is sufficient to note that the decision is not premised on there being any current definite or likely intention to seek a derogation licence. Consequently, the board did not "rely" on a derogation licence in the sense pleaded. In submissions, the point was made to the effect that the board should have anticipated possible post-consent problems in the decision and introduced a particular condition to deal with any need for post consent derogation licences. However, that particular complaint falls well outside the pleadings. Nowhere is there a specific complaint that the board, in this specific case, failed to impose a particular condition of the type argued for in submissions or at all.

**Alleged impermissible authorisation of drey destruction (grounds 55 to 64)**

62. The applicant informed me that this point was not being pursued. But in any event, the Red Squirrel Management Plan submitted with the amended EIAR does not envisage a licence being sought for the destruction of a red squirrel drey. Consequently, one can leave the strict protection and derogation licence point there insofar as it was made as a pre-consent issue because it simply does not arise on the facts.

**Alleged misunderstanding of scientific evidence regarding squirrels (ground 64)**

63. The applicant complains that the board misunderstood the Haigh *et al*. paper referred to above which concerned Fota Island. However, that situation is explained by Mr. Patrick O'Shea, Ecologist, in his affidavit at para. 53. This seems to be just another example of an applicant thinking up points regarding the developer's science after the event, as in *Reid v. An Bord Pleanála (No. 2).* Again, the point remains that the applicant did not put up scientific evidence to counter the council's position. And the council's science hasn't been shown to be so flawed on its face as to warrant interrogation in the mind of a hypothetical reasonable expert even without such countervailing information.

**Alleged lack of reasons regarding number of dreys (grounds 66 to 67)**

64. Counsel confirmed that grounds 66 and 67 were to be construed as essentially a lack of reasons argument. However, the obligation for reasons does not require micro-specific detail, but rather the main reasons for the main issue: see *Balscadden Road SAA Residents Association Ltd. v. An Bord Pleanála* [2020] IEHC 586, [2020] 11 JIC 2501 (Unreported, High Court, 25th November, 2020), at paras. 37 and 38, *Connelly v. An Bord Pleanála* [2018] IESC 31, [2018] 2 I.L.R.M. 453. The issues raised by observers were considered, and the inspector preferred the developer's material. The applicant reflexively relies on the comment about reasons in *Balz v. An Bord Pleanála* [2019] IESC 90, [2020] 1 I.L.R.M. 637 at para. 57, but doesn't attempt to acknowledge or address the contextualising caselaw regarding that comment. The standard of reasons is as set out in *Connelly* and is satisfied here.

**Alleged inadequate survey of otters grounds 68 to 73**

65. The applicant complains that the otter surveys were inadequate having regard to published guidelines, specifically the *Ecological Surveying Techniques for Protected Flora and Fauna during the Planning of National Road Schemes* (NRA 2008) (pp. 134 and 153). The complaint that the council did not survey otters for the appropriate periods and in the appropriate seasons has been countered by Mr. O'Shea's affidavit (see paras. 59 to 64). In particular he states that the guidelines allow surveys to be done all year, that increased vegetation in June to August may make holts more difficult to spot, but that such vegetation was not present at the survey site. In the absence of this evidence being adequately countered, the applicant has not overcome the burden of proof under this heading.

**Alleged lack of reasons regarding impact on Marsh Fritillary (grounds 74 to 79)**

66. The applicant informs me that this point is not being pursued.

**Alleged inadequacy of reasoning in appropriate assessment (grounds 80 to 92)**

67. Again the applicant informs me that this point is not being pursued.

**Legislative validity points**

68. As the complaints regarding this specific decision, both domestic and European, all fail, we now turn to the challenge to the validity of the legislation, specifically s. 175 of the 2000 Act and the 2011 regulations.

**The pleading of the challenge to s. 175 of the 2000 Act**

69. The State's written submissions make the point at para. 4 that "[t]he reliefs sought by the Applicant as against the State Respondents … should have been sought in the alternative, arising only in the event that the relief sought against the Board is not granted."

70. Without taking from the valid point being made, that formulation possibly slightly overstates the principle. It depends whether the challenge to legislation is independent of the challenge to the decision.

71. It is generally not appropriate simply to challenge legislation (or measures of general application like policy documents) just for the sake of it. An applicant must identify which challenges go to the validity of an impugned decision, and which are stand-alone challenges that can arise irrespective of whether a decision is quashed or upheld. Insofar as a validity challenge is a fall-back to a *certiorari* claim, the State is correct here that it should be pleaded as being sought by the applicant if the applicant is not otherwise entitled to *certiorari* of the decision. That certainly applies to the challenge to s. 175 which should have been pleaded on the basis that relief is sought if the *certiorari* challenge otherwise failed. I do, however, think that the 2011 regulations challenge is stand-alone, so could have arisen even if the *certiorari* claim succeeded, but in fact that does not particularly matter because the *certiorari* claim fails anyway.

72. Relief 3 also involves a further pleading problem. It is in the following terms: "[a] Declaration that the public consultation procedure provided by the Second Respondents contained in section 175 of the Planning and Development Act 2000 is incompatible with the requirements of the EIA Directive and/or breaches the Applicant's rights to fair procedures, constitutional rights and rights to effective public participation."

73. The phrase "the Second Respondents" is a drafting idiosyncrasy on the part of the applicant who seems to mean the State respondents. Those respondents were originally named as the Minister for Housing, Planning and Local Government, Ireland and the Attorney General. Needless to say the reference should have been to the second to fourth named respondents.

74. Apart from that, there is another problem, which is that a procedure provided for in legislation is not "provided by" the relevant Minister as pleaded. Any given Minister is not an appropriate party to a challenge to the validity of primary legislation which she introduced. Such legislation becomes property of the State on enactment, not property of the sponsoring Minister. The terms of the 2000 Act are not "provided by the second responden[t]" in any sense. The position is slightly different insofar as one is challenging a statutory instrument or policy document. In such a case, the maker of the instrument is an appropriate respondent if that maker is an entity that is not part of central

government. If the instrument is (as here) made within central government, there is no obligation to name individual Ministers because they have privity with Ireland and the Attorney General who *are* required respondents. While not obligatory, nor is it incorrect to also add the Minister in such a challenge, but failure to do so doesn't make any difference to whether the challenge succeeds or not.

75. There is a third pleading problem in that the title of the Minister for Housing, Planning and Local Government was changed on 30th September, 2020 after the proceedings were filed, but before leave was granted. The two Ministers in whose areas the legislation arises are the Minister for Housing, Local Government and Heritage who is responsible for the 2000 Act, and the Minister for Tourism, Culture, Arts, Gaeltacht, Sports and Media who is responsible for the 2011 regulations. The State thought that the latter Minister should be substituted as the second respondent if the matter was to go further and the applicant accepted that so I am making that order here.

**Alleged invalidity of s. 175 (grounds 24 to 29)**

76. Assuming for the sake of argument that s. 175 of the 2000 Act has some infirmity that interferes with public participation, it did not interfere with any rights of this applicant, who was able to make a submission as noted above and as referred to in the inspector's addendum report. Therefore, the applicant does not have standing to challenge the legislation. One cannot assert the fair procedures rights of some other person who is not an applicant save in exceptional circumstances that do not apply here. I would reject the challenge on that basis both in terms of EU law and the Constitution. There is no automatic read-across to the challenge to the 2011 regulations regarding post-consent derogation (with which I deal below) because under that challenge the applicant is *not* asserting the rights of a third party. It is endeavouring to deal with environmental concerns which it has raised in its own capacity as an objector.

**The challenge to the 2011 regulations insofar as it concerns pre-consent matters**

77. There is a significant distinction between matters requiring a derogation licence that arise before consent and after consent. If something likely to require a derogation licence emerges before consent is granted, then in the event that there is some argument for a procedure that should have been applied at that point, it raises the issue of whether the decision is valid and could go to *certiorari*. If, however, as here, the issue is inadequacy in the procedure if a derogation licence is only a possibility and in the event turns out to be needed as a result of a post-consent survey, that does not go to *certiorari* (or at least no compelling reason for it to go to *certiorari* has been pleaded or demonstrated here), but it could go to declaratory relief regarding the validity of the regulations.

78. This takes us to one aspect of what Dr. Christopher Forsythe called "The Metaphysic of Nullity" in his paper of that title, subtitled "Invalidity, Conceptual Reasoning and the Rule of Law" in Forsythe and Hare eds., *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC* (Oxford, Oxford University Press, 1998) p. 141. The logic of the metaphysic of nullity as applied in the context we are dealing with here is that a decision which is made under an invalid enactment is itself invalid, all other things being equal. That is fine insofar as it goes, but even assuming that the 2011 regulations are

defective in the way they deal with pre-consent derogation licence requirements, this particular decision was not made "under" the 2011 regulations because the factual context is such that there isn't a current established or likely requirement for a derogation licence.

79. Because the decision wasn't taken *under* the 2011 regulations, it cannot be invalid by reference to a challenge to the 2011 regulations. Indeed, that is reinforced by the pleadings because para. 54 of the statement of grounds says that the point about a lack of system of strict protection is taken against the State. There is no reference in that paragraph to it being taken against the respondent or notice party.

80. Admittedly the pleadings are slightly contradictory in that the relevant section of the statement of grounds, paras. 30 to 54 which includes the foregoing statement that the point is taken against the State, is headed "Grounds 1, 4 & 5 – Bat Fauna". The word "Grounds" here seems to a confabulation of the word "Reliefs", but reliefs in the pre-amended sense including those deleted in the amended statement of grounds. Even assuming that there was some intention that some of the points in paras. 30 to 54 were relevant to *certiorari*, that doesn't mean that all of them are, and the pleadings expressly say that the 2011 regulations point is taken against the State, stopping there.

81. In the light of the foregoing, the fact that the challenge to the 2011 regulations in relation to post-consent matters remains to be considered isn't a basis for not dismissing the *certiorari* challenge given that all potential grounds for *certiorari* otherwise fail.

82. I turn now to the challenge to the 2011 regulations insofar as that challenge is relevant to the post-consent situation. That in turn brings in a number of sub-points which in turn raise significant issues of European law.

**Whether the challenge to the 2011 regulations is adequately pleaded**

83. Grounds 45 to 54 inclusive state as follows:

> 45. "Thirdly, it is the Applicant's case that reliance on ex-post grant derogation licences is incompatible with the requirements of strict protection for the purposes of the Habitats Directive. This approach is completely incompatible with the decisions of the Court of Justice in *Finnish Wolves Case* C-647/17 and *Commission v Ireland Case* C-183/05.
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> 46. In its "*Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC" the Commission explains at p45 "Breeding sites and resting places are to be strictly protected, because they are crucial to the life cycle of animals and are vital parts of a species' entire habitat. Article 12(1)(d) should therefore be understood as aiming to safeguard the continued ecological functionality of such sites and places, ensuring that they continue to provide all the elements needed by a specific animal to rest or to breed successfully. The protection applies all year round if these sites are used on a regular basis."*

47. "Destruction" is self-explanatory. The Guidance document explains the concept of "deterioration" as follows – "(67) *In general, deterioration can be defined as physical degradation affecting a habitat, or a breeding site or resting place. In contrast to destruction, such degradation may occur slowly and gradually reduce the functionality of the site or place. Deterioration may therefore not immediately lead to a loss of functionality of a site/place, but would adversely affect functionality in terms of quality or quantity and might over a certain period of time lead to its complete loss. Because of the wide variety of species listed in Annex IV(a), the assessment of deterioration of a particular breeding site or resting place must be carried out on a case-by-case basis." (Case C-103/00 Caretta Caretta and Case C-98/03 Commission v Germany).*

48. It is the Applicant's case that these proceedings demonstrate that there is no system of strict protection for the protection of, *inter alia*, bat fauna. Specifically it is the Applicant's case that the State Respondents have erred in law in adopting Articles 51 and 54 of the European Communities (Birds and Natural Habitats) Regulations 2011 (SI No 477 of 2011) ('the Habitats Regulations').

49. The Articles do not create a system that prevents the Council from going ahead with the proposed project that will disturb protected species or cause damage or deterioration to breeding sites, foraging or resting places. Instead, they leave it entirely up to the Council to decide, once they have obtained permission, whether they should also apply for a derogation licence before they can proceed.

50. Therefore, once (as here) the Council receives its grant of planning permission it is entirely at large as to what type of survey effort it will carry out and/or whether or not to seek a Derogation Licence in respect of any identified disturbance/deterioration. The fact that the two parallel and entirely independent systems are therefore, linked (if at all) on a voluntary basis by the Council and on terms selected by the Council, is the antithesis of a system of *"strict protection"*.

51. This is particularly the case where the Council has a clear and obvious vested commercial interest in not linking the two systems or in linking the two systems in a manner favourable to its interests.

52. The Regulations do not provide either that the Board must, or must not, make a determination as to whether there will be deliberate disturbance or damage or deterioration to breeding sites or resting places, so that it is unclear whether the Board can refuse permission on the basis of a breach of Article 51, or must carry out a determination as to whether disturbance or deterioration will occur.

53. The Regulations do not respect Article 6 of the Aarhus Convention or Article 4(3) of the Treaty on European Union because they do not provide for a system of public consultation in relation to the grant of a derogation licence under Article 54.

54. Therefore it is the Applicant's case that for the above reasons, Articles 51 and 54 of the Habitats Regulations fail adequately to implement Articles 12 and 16 of the Habitats Directive. This third point is a point taken against the State Respondents."

84. The reason that this pleading is not an absolute model of clarity is that it does not entirely distinguish between a number of related situations:

(i). aspects that relate to pre-consent derogation licences and those that relate to post-consent derogation licences;

(ii). aspects that relate to the validity of the decision and aspects that relate to the validity of the legislation independently of the decision; and

(iii). the extent to which the legislation is invalid and a nullity as opposed to being valid insofar as it goes, and in force, but involving a *lacuna* caused by inadequate transposition.

85. Applicants have in previous cases run into problems pleading such claims, but it is important to pay attention to the reasons why that is so. In *Alen-Buckley v. An Bord Pleanála* [2017] IEHC 311, [2017] 5 JIC 1211 (Unreported, High Court, Costello J., 12th May, 2017), there was a failure to claim the appropriate reliefs and in *Sweetman v. An Bord Pleanála* [2020] IEHC 39, [2020] 1 JIC 3104 (Unreported, High Court, McDonald J., 31st January, 2020), there was failure to set out a basis for the relief regarding transposition that had been claimed.

86. It is entirely correct in principle to challenge a decision based on domestic law first, then on the basis of EU law as transposed or as directly applicable, and if that fails then to challenge the effectiveness of the transposition or the validity of the relevant enactments by reference to EU law or the Constitution. Needless to say, just because such a procedure is correct in principle does not mean that any individual applicant will turn out to have pleaded the appropriate reliefs and grounds in the appropriate manner and with acceptable clarity.

87. The State respondents make a pleading objection at para. 26 of the statement of opposition which is as follows:

> "The Applicant has not sought any relief to the effect that the 2011 Regulations are contrary to Article 6 of the Aarhus Convention or Article 4(3) of the Treaty on European Union, at part D of the amended Statement of Grounds. The Applicant is not entitled to pursue the grounds pleaded at E 53 of the amended Statement of Grounds, which do not reflect or support a specific relief sought against the State Respondents. Further or in the alternative these grounds are not pleaded with sufficient particularity as required by Order 84, Rule 20(3) of the rules of the Rules of the Superior Courts (as amended)."

88. This is primarily directed at para. 53 of the statement of grounds, but I think that that paragraph is really a side issue. The correct way to bring the Aarhus Convention into the

case is not to rely on it directly, but to rely on the relevant EU law as read in conjunction with the Aarhus Convention. Ground 53 does not do that and the relief sought only refers to arts. 12 and 16 of the habitats directive. Thus, it seems to me that the objection made by the State is not really decisive because ground 53 as pleaded doesn't in any event get the applicant very far – what would get the applicant somewhere is the reference to EU law provided that it can be read as including Aarhus. The real question is whether the reference to EU law in relief 4 should be read as including by implication a reference to the Aarhus Convention, and I deal with that point below.

89. On the second aspect of the pleading objection at para. 26 of the statement of opposition, I do think that the point made by the applicant is "acceptably clear", to employ a phrase I have used in *Waltham Abbey Residents Association v. An Bord Pleanála* [2021] IEHC 312, [2021] 5 JIC 1002 (Unreported, High Court, 10th May, 2021) *and Eco Advocacy CLG v. An Bord Pleanála* [2021] IEHC 265 (Unreported, High Court, 27th May, 2021).

90. The relevant regulations are the 2011 regulations which were adopted to give effect to the birds directive 2009/147/EC and the habitats directive 92/43/EEC. They were amended by the European Union (Birds and Natural Habitats) (Sea-fisheries) Regulations 2013 (S.I. No. 290 of 2013), the European Communities (Birds and Natural Habitats) (Amendment) Regulations 2013 (S.I. No. 499 of 2013) and the European Communities (Birds and Natural Habitats) (Amendment) Regulations 2015 (S.I. No. 355 of 2015), but those amendments do not appear immediately relevant to the issue here.

91. Regulations 51 to 53 of the 2011 regulations establish a system of strict protection, and regs. 54 to 55 allow derogations. Relief 4 claims "[a] Declaration that Articles 51 and 54 of the European Communities (Birds and Natural Habitats) Regulations 2011 (SI No 477 of 2011) are contrary to Articles 12 and 16 of Council Directive 92/43 on protection of natural habitats …". To weary the reader with yet another pleading problem, the pleading of the validity challenge incorrectly refers to "Articles" 51 and 54 whereas the internal language of the 2011 instrument refers to "regulations".

92. Returning then to the real question raised by the way in which relief 4 is pleaded, it seems to me this raises a referable issue of EU law as follows:

> **The first question is whether the general principles of EU law arising from the supremacy of the EU legal order have the effect that a rule of domestic procedure whereby an applicant in judicial review must expressly plead the relevant legal provisions cannot preclude an applicant who challenges the compatibility of domestic law with identified EU law from also relying on a challenge based on legal doctrines or instruments that are to be read as inherently relevant to the interpretation of such EU law, such as the principle that EU environmental law should be read in conjunction with the Aarhus Convention as an integral part of the EU legal order.**

**Whether the complaint is a theoretical question**

93. The State rely on the test for declaratory relief in *Omega Leisure Ltd. v. Barry* [2012] IEHC 23, [2012] 1 JIC 1205 (Unreported, High Court, Clarke J., 12th January, 2012) at para. 4.4 to the effect that among other things "there must be a real and substantial, and not merely a theoretical, question to be tried." The argument is that because there is no current intention to seek a derogation licence, the challenge to the procedure that would arise in the event that such a licence is required is abstract, hypothetical and theoretical. As against that, there is a clearly arguable basis for an anticipatory challenge here having regard to three factors in particular:

(i). The lands on which the development is to take place and to an extent adjacent lands are a habitat of a number of species subject to the regime of strict protection, particularly bats, red squirrels and otters. Consequently, I find as a fact on the evidence here that there is a reasonable possibility that in this case, the further surveys to be carried out between the grant of consent and the conclusion of construction might uncover further impacts on such strictly protected species.

(ii). There is specific reference to this in the amended EIAR or to the effect that "should any bat roost be detected during the pre-construction survey which will be disturbed or lost during construction, a derogation licence will be required from the NPWS", para. 6.9.3.3 of the amended EIAR. Admittedly, that would be the position anyway, but it is right and appropriate that the EIAR acknowledge this expressly.

(iii). The applicant cannot be expected to await any derogation licence application because there is no public participation process for such licence applications. That is part of the applicant's complaint. So there is no legally-based guarantee that it will become aware that such an application has been made. Nor is there a procedure, either at all or one based in law, for it to make submissions and to have those considered.

94. The State did inform me that it is not the practice to accommodate individuals or entities with notice of a derogation licence application, but informally offered to notify the applicant in this case if requested to do so. I do not think that an *ad hoc* solution of that kind deprives an applicant of standing to make a complaint that rights have not been afforded by law. And in any event, the offer is limited to a right to be notified, not to make submissions.

95. The declaration claim is quite separate from the *certiorari* claim and the fact that the *certiorari* claim fails does not in any way preclude the applicant's entitlement to seek a declaration, provided that it has standing and that there is a real question to be tried. For that reason, this is not a case of requiring a "transcendent reason" to go beyond *Cahill v. Sutton* [1980] I.R. 269, as the State predictably contended. In fact, *Cahill v. Sutton* is not particularly relevant here. The issue is whether on the facts there is a sufficient possibility of the harm which the applicant anticipates for it to be reasonable for the applicant to sue. That is a totally different situation to that in *Cahill v. Sutton*, a point I made in an analogous context in *M.R. (Albania) v. Minister for Justice and Equality* [2020] IEHC 402, [2020] 8 JIC 1702 (Unreported, High Court, 17th August, 2020) at para. 43,

where I also noted that anticipated as opposed to actual harm can give standing: see *Mohan v. Ireland* [2019] IESC 18, [2019] 2 I.L.R.M. 1.

96. A related point was made by the State that the applicant was not "affected in reality or as a matter of fact", relying on *Friends of the Irish Environment v. Ireland* [2020] IESC 49, [2020] 2 I.L.R.M. 233 at para. 7.21. However, again this is a misconception. The rights in that case were ones that the applicant did not enjoy. Here, the right is one that *the applicant* is asserting, that is, entitlement to exercise rights in relation to public participation to the extent that that concept applies to the derogation licence process. Again we are not in the space of transcendent exceptions to *Cahill v. Sutton*. We are in the space of the applicant's *own* asserted rights. The question thus is whether there is a sufficient basis to anticipate potential use of the derogation licence mechanism to make it appropriate for the court to examine whether the regime is legally valid. The alternative would be to allow any alleged breach to occur before the court could effectively intervene. That would not sit comfortably with the precautionary principle or indeed with the judgment of the CJEU in Case C-183/05 *Commission v. Ireland* (Court of Justice of the European Union, 11th January, 2007, ECLI:EU:C:2007:14).

97. It is also true that the State have not expressly pleaded lack of standing or the issue being theoretical in their statement of opposition. The State submitted that this did not have to be pleaded because it arises from the facts. But, surprisingly, that argument didn't extend the same pleading latitude to the applicant for matters that arise from the facts.

98. Before coming to a final conclusion under this heading, it appears to me that the foregoing raises a referable question of European law as to whether the State is precluded from advancing the hypothetical question argument.

99. As noted above, for the purposes of this question I am finding as a matter of fact that there is a reasonable possibility that a post-consent survey may give rise to a need to apply for a derogation under art. 16 of the directive. Like many predictions of the future, that is far from certain, but as a possibility it is more than reasonable given the nature of the habitat, the species concerned, the precautionary approach and the necessary and inevitable terms of the EIAR.

100. That question is as follows:

> **The second question is whether arts. 12 and/or 16 of directive 92/43/EEC and/or those provisions as read in conjunction with art. 9(2) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998 and/or in conjunction with the principle that member states must take all the requisite specific measures for the effective implementation of the directive have the effect that a rule of domestic procedure whereby an applicant must not raise a "hypothetical question" and "must be affected in reality or as a matter of fact" before**

**she can complain regarding the compatibility of the domestic law with a provision of EU law cannot be relied on to preclude a challenge made by an applicant who has invoked the public participation rights in respect of an administrative decision and who then wishes to pursue a challenge to the validity of a provision of domestic law by reference to EU law in anticipation of future damage to the environment as result of an alleged shortcoming in the domestic law, where there is a reasonable possibility of such future damage, in particular because the development has been authorised in an area which is a habitat for species subject to strict protection and/or because applying the precautionary approach there is a possibility that post-consent surveys may give rise to a need to apply for a derogation under art. 16 of the directive.**

**Whether the 2011 regulations are invalid due to a lack of integration of the derogation system with the planning system (grounds 45 to 54)**

101. The pleading of this complaint as set out above is significantly over-hyped in the sense that it is incorrect to say that it is "voluntary" for the council to seek derogation. The real point is rather that the council must rely on its own judgement as to whether it would be violating the criminal law. The second point is that the system of derogation licences is "parallel and entirely independent" of the planning consent system.

102. In *Redmond v. An Bord Pleanála* [2020] IEHC 151, [2020] 3 JIC 1003 (Unreported, High Court, 10th March, 2020) Simons J. made the point (particularly at paras. 153 to 156) that a planning permission does not remove the need for compliance with other legal obligations. While that is clearly so, the question of the interlinkage between the two systems based on an argument that some such interlinkage is required by European law doesn't seem to have been contended for in that case. The particular condition argued for in that case (see para. 152) was just that the developer would apply for a derogation licence if required, which as Simons J. pointed out quite compellingly, merely replicates an existing legal obligation: see also *Highlands Residents Association v. An Bord Pleanála* [2020] IEHC 622, [2020] 12 JIC 0201 (Unreported, High Court, McDonald J., 2nd December, 2020) at para. 108. A condition that adds nothing is pointless, and the law should not impose pointless obligations.

103. We are dealing here with a different point: not the failure of the board to impose a condition (which was not pleaded here in any form, pointless or otherwise), but rather the argument for the need for interlinkage between the two legislative schemes of planning and derogation. Even if the point had been addressed and rejected by national courts (which it hasn't been), the fact that an EU law point is rejected in the domestic caselaw of one member state does not make it *acte clair*: see *Balscadden Road SAA Residents Association Ltd. (No. 2) v. An Bord Pleanála* [2020] IEHC 143 (Unreported, High Court, 12th March, 2021) para. 20.

104. Case C-183/05 *Commission v. Ireland* dealt with a question of lack of implementation of the derogation procedure. The opinion of Advocate General Léger (Court of Justice of the European Union, 21st September, 2006, ECLI:EU:C:2006:597), notes at para. 61 that at

the time of a development consent there was an "appreciable risk of disturbing the breeding sites and resting places", but "[t]here is nothing to indicate that, at the time when consent was given, the Irish authorities considered it necessary to require a valid derogation" (para. 59). Hence in that case there was a lack of implementation of arts. 12(1)(d) and 16 of directive 92/43/EEC.

105. The commission's essential complaint in that case was noted in the judgment of the court of 11th January, 2007 at para. 34 as being that "the Irish authorities require property developers to provide information on protected species only after development consent has been granted for the project concerned. Therefore, that procedure does not prevent certain developments which may be harmful to the environment." We are not in that precise space here because information on protected species *was* sought in advance by the board and no definite or likely requirement for derogation emerged.

106. However, because the matters that I have referred to give rise to a reasonable possibility that there may be post-consent identification of a need for derogation, the question is how to address any such later discovery. The key part of the judgment of the court for present purposes is paras. 29 and 30 which provide as follows:

> "29. As noted by the Advocate General in point 24 of his Opinion, the transposition of Article 12(1) of the Directive requires the Member States not only to adopt a comprehensive legislative framework but also to implement concrete and specific protection measures (see, to that effect, Case C 103/00 *Commission v Greece* [2002] ECR I 1147, paragraphs 34 to 39).
>
> 30. Similarly, the system of strict protection presupposes the adoption of coherent and coordinated measures of a preventive nature (Case C 518/04 *Commission v Greece*, not published in the ECR, paragraph 16)."

107. That requirement for the adoption of coherent and coordinated measures of a preventative nature was also emphasised by the court in Case C-473/19 *Föreningen Skydda Skogen v. Länsstyrelsen i Västra Götalands län* (Court of Justice of the European Union, 4th March, 2021, ECLI:EU:C:2021:166), at para. 75. The question then is whether a requirement for the adoption of coherent and coordinated measures involves some level of integration of the derogation system with the development consent system. In my view, a referable question arises under this heading which is as follows:

> **The third question is whether arts. 12 and/or 16 of directive 92/43/EEC and/or those provisions as read in conjunction with arts. 6(1) to (9) and/or 9(2) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998 and/or with the principle that member states must take all the requisite specific measures for the effective implementation of the directive have the effect that a derogation licence system provided in domestic law to give effect to art. 16 of the directive should not be parallel to and independent of the**

**development consent system but should be part of an integrated approval process involving a decision by a competent authority (as opposed to an ad hoc judgement formed by the developer itself on the basis of a general provision of criminal law) as to whether a derogation licence should be applied for by reason of matters identified following the grant of development consent and/or involving a decision by a competent authority as to what surveys are required in the context of consideration as to whether such a licence should be applied for.**

**Whether the 2011 regulations are invalid due to the lack of public participation (grounds 45 to 54)**

108. Article 6(1) of the Aarhus Convention states as follows:

> "Each Party:
>
> (a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;
>
> (b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions; and
>
> (c) May decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes."

109. Article 6(3) of the habitats directive envisages public participation in the process created by that provision for appropriate assessment, but the directive does not state that public participation applies to the derogation process. However, it is established that the Aarhus Convention forms "an integral part of the legal order of the European Union", Case C-240/09 *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky* (Court of Justice of the European Union, 8th March, 2011, ECLI:EU:C:2011:125), para. 30 (see also the discussion in *Conway v. Ireland* [2017] IESC 13, [2017] 1 I.R. 53).

110. One can clearly see argument that the purposes of arts. 12 and 16 of the habitats directive is to ensure a high level of environmental protection, and that the potential invocation of art. 16 in a post-consent situation, where the development was originally subjected to appropriate assessment under art. 6(3) of the habitats directive, situates the derogation process in the context of a development which has significant effects on the environment or at least where it is necessary to assess the significance of the effects on the environment within the meaning of art. 6(1)(b) of the Aarhus Convention: see Case C-243/15 *Lesoochranárske zoskupenie VLK v. Obvodný úrad Trenčín* (Court of Justice of the European Union, 8th November, 2016, ECLI:EU:C:2016:838), at para. 47.

111. In such a context it does not seem to me to be decisive that public participation is not expressly spelled out in art. 16 of the directive. Nor quite obviously is it fatal that there is no express authority for this point. Indeed that only reinforces the case for a reference. There is a clear logic to the applicant's argument and it seems to me to create a sufficient doubt as to give rise to a referable point as follows:

> **The fourth question is whether arts. 12 and/or 16 of directive 92/43/EEC and/or those provisions as read in conjunction with arts. 6(1) to (9) and/or 9(2) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998 have the consequence that, in respect of a development where the grant of development consent was subjected to appropriate assessment under art. 6(3) of directive 92/43/EEC, and in a context where a post-consent derogation may be sought under art. 16 of directive 92/43/EEC, there is a requirement for a public participation procedure in conformity with art. 6 of the Aarhus Convention.**

**Order**

112. The major criteria for a reference and the position in this case is as follows:

(i). The questions must raise a point of interpretation, rather than application of EU law and I am satisfied that is the case here.

(ii). The point is not *acte clair* or *acte éclair*é and again that is evident. Indeed the State tried to make a virtue of that by claiming that there was no authority for the applicant's point, but that only makes the case for a reference.

(iii). The answer to the question must be necessary for the decision and I am satisfied that is so here. The answers to the questions are necessary because the claim for a declaration that the 2011 regulations are invalid by reference to EU law is independent of the administrative law challenge and in any event the administrative law challenge to the particular decision is being dismissed.

(iv). The matter then becomes one of discretion (although it would be obligatory if the question came before a final appellate court). I consider in all the circumstances that it is appropriate to exercise the discretion in favour of a reference here in relation to the four questions identified in the judgment.

113. Consequently, the order will be as follows:

(i). as noted above, the proceedings are dismissed as to reliefs 1, 3 and insofar as it relates to the pre-consent process, relief 4;

(ii). I will substitute the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media as the second-named respondent in lieu of the Minister so currently named; and

(iii). I will in principle refer to the CJEU the questions identified in the judgment and now make *Eco Advocacy* directions (see *Eco Advocacy CLG v. An Bord Pleanála* [2021] IEHC 265). For that purpose the matter is to be re-listed in six sitting weeks' time following the carrying out of those directions by the parties.