[2023] IEHC 715

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2021.00000251]

IN THE MATTER OF SECTIONS 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000 AND
IN THE MATTER OF THE PLANNING AND DEVELOPMENT (HOUSING) AND RESIDENTIAL TENANCIES ACT 2016

BETWEEN
ALICE O'DONNELL, COLIN ACTON, SEÁN GOFF, EVELYN CAWLEY, DECLAN MORRIS, CIARA MAN, GARETH MADDEN, AILEEN LENNON, KEITH SCANLON AND CARINA HARTE-HOLMES

APPLICANTS

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

RESPONDENT

AND
DRUMAKILLA LIMITED

NOTICE PARTY

(No. 3)

JUDGMENT of Humphreys J. delivered on Thursday the 21st day of December, 2023

1. This request for a preliminary ruling concerns the interpretation of Article 16(1) of Directive 92/43 and of Article 11 of Directive 2011/92 insofar as it relates to that provision.

2. The request is being made in proceedings concerning a challenge to the legality of a derogation licence to facilitate the proposed construction of residential units and associated works at the former Carmelite monastery at Delgany, County Wicklow.

Legal context

European Union law

3. Article 16(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora OJ L 206 22.7.1992, p. 7-50 provides:

> "1. Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15 (a) and (b):
> (a) in the interest of protecting wild fauna and flora and conserving natural habitats;
> (b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;
> (c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;
> (d) for the purpose of research and education, of repopulating and re-introducing these species and for the breedings operations necessary for these purposes, including the artificial propagation of plants;
> (e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities."

4. Article 6 of Directive 2011/92 provides:

> "1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities or local and regional competences are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent, taking into account, where appropriate, the cases referred to in Article 8a(3). To that end, Member States shall designate the authorities to be consulted, either in general terms or on a case-by-case basis. The information gathered pursuant to Article 5 shall be forwarded to those authorities. Detailed arrangements for consultation shall be laid down by the Member States.
> 2. In order to ensure the effective participation of the public concerned in the decision-making procedures, the public shall be informed electronically and by public notices or by other appropriate means, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:
> (a) the request for development consent;

(b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies;
(c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;
(d) the nature of possible decisions or, where there is one, the draft decision;
(e) an indication of the availability of the information gathered pursuant to Article 5;
(f) an indication of the times and places at which, and the means by which, the relevant information will be made available;
(g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.
3. Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned:
(a) any information gathered pursuant to Article 5;
(b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;
(c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information (7), information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 of this Directive and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.
4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.
5. The detailed arrangements for informing the public, for example by bill posting within a certain radius or publication in local newspapers, and for consulting the public concerned, for example by written submissions or by way of a public inquiry, shall be determined by the Member States. Member States shall take the necessary measures to ensure that the relevant information is electronically accessible to the public, through at least a central portal or easily accessible points of access, at the appropriate administrative level.
6. Reasonable time-frames for the different phases shall be provided for, allowing sufficient time for:
(a) informing the authorities referred to in paragraph 1 and the public; and
(b)
the authorities referred to in paragraph 1 and the public concerned to prepare and participate effectively in the environmental decision-making, subject to the provisions of this Article.
7. The time-frames for consulting the public concerned on the environmental impact assessment report referred to in Article 5(1) shall not be shorter than 30 days."

5. Article 11 of Directive 2011/92 provides:
"1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:
(a) having a sufficient interest, or alternatively;
(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;
have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.
2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.
3. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To that end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article.
4. The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.
Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

5. In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures."

6. It was common ground between the parties that Article 11 of Directive 2011/92 applies to a challenge to a screening decision, not just to a decision following environmental assessment: the judgment of 15 October 2015, *Commission v Germany*, C-137/14, ECLI:EU:C:2015:683 at §48 and 49, the judgment of 16 April 2015, *Gruber*, C-570/13, ECLI:EU:C:2015:231; the judgment of 7 November 2018, *Flausch and Others,* C-280/18, ECLI:EU:C:2019:928, paras. 46 and 47. Additionally, the applicant's submission was that the "Aarhus Convention Compliance Committee in case ACCC/C/2010/50 concerning compliance by the Czech Republic held that an EIA screening decision is a determination under Article 6(1)(b) of the Convention and therefore the provisions of Article 9(2) apply which require that the public concerned have access to a review procedure to challenge the legality of the outcome of the EIA screening process".

7. Other relevant EU law includes:

(i) Judgment of 16 June 2005, *Pupino*, C-105/03, ECLI:EU:C:2005:386, (https://curia.europa.eu/juris/document/document.jsf?text=&docid=59363&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3072819);

(ii) Judgment of 19 September 2006, *Germany GmbH and Arcor AG & Co. KG*, C-39/04 and C-422/04, ECLI:EU:C:2006:586, (https://curia.europa.eu/juris/showPdf.jsf?text=&docid=64424&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3068255), para. 57;

(iii) Judgment of 15 April 2008, *Impact v Minister for Agriculture and Food and others,* C-268/06, ECLI:EU:C:2008:223, (https://curia.europa.eu/juris/document/document.jsf?text=&docid=71395&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3070637) ;

(iv) Judgment of 28 January 2010*, Commission v Ireland*, C-456/08, ECLI:EU:C:2010:46, https://curia.europa.eu/juris/document/document.jsf?text=&docid=84093&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3071121);

(v) Judgment of 30 June 2011, *Meilicke and Others*, C-262/09, ECLI:EU:C:2011:438, (https://curia.europa.eu/juris/document/document.jsf?text=&docid=106024&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3066169) para 55;

(vi) Judgment of 18 October 2012, *Pelati v Republika Slovenija,* C-603/10, ECLI:EU:C:2012:639, (https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62010CJ0603), para 36;

(vii) Judgment of 20 December 2017, *Caterpillar Financial Services*, C-500/16, EU:C:2017:996, (https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62010CJ0603),paragraph 42;

(viii) Judgment of 15 March 2018, *North East Pylon Pressure Campaign and Sheehy*, C-470/16, ECLI:EU:C:2018:185 (https://curia.europa.eu/juris/document/document.jsf?text=&docid=200265&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3073072);

(ix) Judgment of 10 October 2019, *Luonnonsuojeluyhdistys Tapiola*, C-947/17,ECLI:EU:C:2-19:851, (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62017CJ0674);

(x) Opinion of the Advocate General of 21 October 2021, C-463/20, *Namur-Est Environnement,* EU:C:2021:868 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62020CC0463);

(xi) Judgment of 24 February 2022, C-463/20, *Namur-Est Environnement*, ECLI:EU:C:2022:121 (https://eur-lex.europa.eu/legal-content/EN/TXT);

(xii) Judgment of 6 July 2023, *Hellfire Massy Residents Association*, C-166/22, ECLI:EU:C:2023:545, (https://curia.europa.eu/juris/document/document.jsf?text=&docid=243867&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2801329) ; and

(xiii) Judgement of 15 June 2023, *Eco Advocacy*, C-721/21, ECLI:EU:C:2023:477, (https://curia.europa.eu/juris/document/document.jsf?text=&docid=274644&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2805135).

Domestic law

8. Section 4 of the Planning and Development (Housing) and Residential Tenancies Act 2016 (as enacted - https://www.irishstatutebook.ie/eli/2016/act/17/enacted/en/html) allowed (prior to its repeal) for strategic housing development applications.

9. Order 84 r. 21(1) to (5) of the Rules of the Superior Courts (RSC) (https://www.courts.ie/rules/judicial-review-and-orders-affecting-personal-liberty) states:

"21. (1) An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose.
(2) Where the relief sought is an order of certiorari in respect of any judgement, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgement, order, conviction or proceeding.
(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:
(a) there is good and sufficient reason for doing so, and
(b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either:
(i) were outside the control of, or
(ii) could not reasonably have been anticipated by
the applicant for such extension.
(4) In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party.
(5) An application for an extension referred to in sub-rule (3) shall be grounded upon an affidavit sworn by or on behalf of the applicant which shall set out the reasons for the applicant's failure to make the application for leave within the period prescribed by sub-rule (1) and shall verify any facts relied on in support of those reasons."

10. In accordance with established European and domestic caselaw, and in particular with the principle of effectiveness, the domestic law power to extend time under O. 84 r. 21(3) RSC is susceptible to a conforming interpretation such that it can and must be exercised in such a way as to provide for the full period (in this case, 3 months) to run from the date on which an applicant is or ought to be aware of the impugned decision. However the applicants made no application here for an extension of time.

11. There is no specific statutory or regulatory provision in Irish law specifying how Article 11(2) of Directive 2011/92 applies to derogation decisions under Article 16(1) of Directive 92/43.

12. Therefore general principles of statutory interpretation apply. The general national law principle is that interim decisions should be challenged following the final decision in a procedure, but while this is the predominant approach, this principle has not been applied consistently. However as a matter of domestic law the derogation licence is not an interim decision. The referring court concludes that in domestic law, and subject to any requirements of conforming interpretation, where a project requires multiple consents, each consent is a separate substantive decision which are to be individually challenged within the statutory period running individually from the date of each decision. Such a situation is not a series of interim decisions leading to a final definitive consent.

13. Thus a derogation decision is a separate decision in law so that the time for judicial review commences when that decision is made, not when the related development consent is granted.

14. The referring court concludes that the time limits for challenge to the derogation licence are reasonably foreseeable by reference to the general law on judicial review.

15. Other relevant domestic law includes:

(i) Sections 50 and 50A of the Planning and Development Act 2000 (as amended): https://revisedacts.lawreform.ie/eli/2000/act/30/revised/en/html#SEC50 ;

(ii) Planning and Development Regulations 2001 to 2023 (SI 600 of 2001), as amended (unofficial consolidation): https://assets.gov.ie/135619/1ef55833-465c-48da-afc0-592a164fdd1d.pdf;

(iii) Regulations 51, 54 and 54A of the European Communities (Birds and Natural Habitats) Regulations 2011 to 2021 (unofficial consolidation): https://www.npws.ie/sites/default/files/files/European%20Communities%20(Birds%20and%20Natural%20Habitats)%20Regulations%202011%20to%202021%20-%20Unofficial%20Consolidation%20(Updated%20to%2028%20July%202022)(1).pdf; and

(iv) *Quinn and anor. v. An Bord Pleanála* [2022] IEHC 699, [2022] 12 JIC 1608 (and the case law cited): https://courts.ie/view/judgments/9778a840-567e-4b45-a9dd-fb409957df81/415dff81-b1e2-4dc6-a80a-75cc04f15e04/2022_IEHC_699.pdf/pdf.

Facts

16. In anticipation of the development consent application, an application for a bat derogation licence was made to the National Parks and Wildlife Service (NPWS) on 17th January, 2020. The licence was issued on 4th March, 2020.

17. On 16th July, 2020, a request was made to amend the licence to include the brown long-eared bat. That was granted and an amended licence issued on 21st July, 2020.

18. The licence states:

"This licence is granted solely to allow the activities specified in connection with the proposed strategic housing development located at Delgany, Co. Wicklow, for Drumkilla Ltd."

19. Condition 4 states:

"The mitigation measures outlined in the application report (Environmental Impact Assessment for a proposed strategic housing development on lands, Delgany, Co. Wicklow, 7. remedial or reductive measures, 7.11 Protection Measures for Bat Roosts -- Buildings, 7.12 Protective Measures for Bat Roosts -- Trees, 7.13 Protective Measures for Bat Foraging and Commuting, pp 30-37), together with any changes or clarification agreed in correspondence between NPWS and the agent or applicant, are to be carried out. Strict adherence must be paid to all the proposed measures in the application."

20. Two factual conclusions can be drawn by the referring court in relation to the derogation licence:

(i) while the licence denies the existence of satisfactory alternatives to the grant of the derogation, the materials disclose no consideration of alternatives with less impact on strictly protected species, or of the alternative option of not granting the licence, which gives rise to the inference that it is likely that there was no such consideration; and

(ii) the licence states that it is issued in the interests of protection of the species concerned. If and insofar as that requirement means that the derogation itself, as opposed to mitigating conditions, is in the interests of such species, then that conclusion is manifestly unreasonable and indeed absurd.

21. The critical dates are as follows:

(i) date of derogation licence – 4th March, 2020, amended on 21st July, 2020;

(ii) date applicants knew or could reasonably have been aware of the derogation licence – 21st October, 2020 on the making of the application for permission;

(iii) date of permission – 15th February, 2021; and

(iv) date on which the proceedings challenging the derogation licence were brought – 25th March, 2021.

22. Pre-application consultation took place on 23rd July, 2020, which resulted in a board order identifying issues to be addressed dated 12th August, 2020.

23. The application for planning permission under section 4 of the Planning and Development (Housing) and Residential Tenancies Act 2016 was submitted on 21st October, 2020. The application was accompanied by an EIA screening report. The revised derogation licence was appended to the application documentation, so the application date was the first date on which the applicants could have known about it.

24. The applicants made submissions on the application. The board's inspector then prepared a report recommending grant of permission with conditions dated 3rd February, 2021. The board broadly accepted this recommendation.

25. The board completed a screening for environmental impact assessment and considered that the Environmental Impact Screening Report submitted by the developer identified and described adequately the direct, indirect, secondary and cumulative effects of the Proposed Development on the environment. The board concluded that having regard to the matters listed in the board's decision that the proposed development, by reason of the nature, and location of the site the proposed development would not be likely to have significant effects on the environment. The board therefore decided that an environmental impact assessment report for the proposed development was not necessary.

26. The board granted permission on 15th February, 2021.

27. Insofar as the applicant made an issue under Article 11(2) and (5) of Directive 2011/92 it was common ground that:

(i) there is no specific statute specifying the time limit for a challenge to a derogation decision specifically, above and beyond the rules on judicial review generally; and

(ii) likewise the State has not specifically publicised any particular procedure for the information of the public as to how to challenge a derogation decision as opposed to giving public information on judicial review generally.

Procedural history

28. Proceedings challenging the board's decision and the derogation licence were issued on 25th March, 2021. The applicants did not seek to extend time for the challenge.

29. The applicants did not challenge the derogation licence within 3 months of when they became or ought to have become aware of it (and hence within a period that the court would have permitted by way of a conforming interpretation of the power to extend time, had such an application been made).

30. On 19th April, 2021, the referring court granted leave to seek judicial review and a stay on the works. The referring court gave case management directions on 14th May, 2021. The matter was heard on 9th to 11th May, 2023.

31. Following the CJEU judgment of 15 June 2023, *Eco Advocacy*, C-721/21, ECLI:EU:C:2023:477, the matter was listed for any further submissions arising from that case.

32. On 5th July, 2023, the referring court dismissed the application to quash the planning permission and adjourned for further submissions the challenge to the derogation licence. The stay was continued for the time being.

33. An important point in this regard is that the applicants failed to mount a derogation-based challenge to the planning permission. On the pleaded case, the challenge to the derogation licence was not a ground to challenge the permission. Hence the challenge to the planning permission was dismissed even though the derogation licence challenge remains outstanding.

34. On 1st November, 2023, the referring court identified relevant questions of EU law and invited further submissions.

35. A hearing was then held on 24th October, 2023 which was followed by written submissions by the parties.

36. A further hearing was held on 11th December, 2023 at which time judgment was reserved.

37. The referring court's conclusion is that the application is out of time and should be dismissed, subject to any rule of EU law that required a contrary result. The referring court was inclined to the view that there was no such rule, but that the position was not completely beyond doubt and therefore that it was appropriate to refer the issue to the CJEU.

38. In the circumstances the referring court has decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling.

39. The board (the first named respondent) did not get involved in the issues regarding the reference.

The first question – Scope of *Namur-Est*

40. The first question is:

> **Does Article 11 of Directive 2011/92 read in the light of the principle of wide access to justice under Article 9(2) of the Aarhus Convention have the effect that, in a case where a project within the meaning of Article 1(2)(a) of Directive 2011/92 the subject of an application for development consent (the "primary consent") cannot be carried out without the developer having first obtained another permission (the "secondary consent"), and where the authority competent for granting the primary consent for such a project retains the ability to assess the project's environmental impact more strictly than was done in the secondary consent, such a secondary consent (if granted prior to the primary consent) is to be treated as forming part of the development consent procedure for purposes other than in relation to the scope of matters to be considered or assessed under Directive 2011/92, either generally or where the secondary consent is a decision adopted under Article 16(1) of Directive 92/43 and which authorises a developer to derogate from the applicable species protection measures in order to carry out the project?**

41. The applicant's proposed answer is that the *Namur-Es*t judgment is not limited to the scope of consideration and therefore is relevant for procedural matters such as limitation periods. It is clear from the *Namur-Est* judgment, that in the particular circumstances which arose in Belgium and which also apply in Ireland, the derogation decision must be considered as forming part of the development consent procedure with the grant of development consent being the end point of the decision making process. In particular the authority competent for granting development consent, i.e. the board, retains the ability to assess the project's environmental impact assessment more strictly than was done in the derogation decision. The Court also ruled that it was not necessary to provide public participation in respect of the derogation decision provided that such participation is effectively ensured before the adoption of the decision on possible development consent. This is also the case in Ireland. As already submitted by the applicants, the EIA screening decision is effectively a threshold determination as to whether EIA is required for the project and therefore also as to whether the findings of the *Namur-Est* case apply at all to the project. This supports the applicants' view that under EU law the time limit to challenge the derogation licence must run from the date of the EIA screening decision which screened the project out, since it is only at that point is it determined whether the derogation decision must be considered as part of the development consent procedure per *Namur-Est* or whether it comes within another regime. It would also be contrary to *Namur-Est* for it to be interpreted as applying only to the scope of consideration and irrelevant to other issues such as limitation periods. It would be perverse for Directive 2011/92 to be interpreted in such a way that a member of the public concerned would have to challenge a derogation licence

before the public participation phase of the procedure had concluded, which would be the case if national limitation periods were not affected by the *Namur-Est* ruling.

42. The State's proposed answer is that in *Namur-Est*, the CJEU held (at §66) that the Directive 2011/92 must be interpreted as meaning that a decision adopted under Article 16(1) of Directive 92/43/EEC, which authorises a developer to derogate from the applicable species protection measures in order to carry out a project within the meaning of Article 1(2)(a) of Directive 2011/92, forms part of the development consent procedure within the meaning of Article 1(2)(c) of Directive 2011/92, where, first, the project cannot be carried out without the developer having first obtained that derogation decision and, secondly, the authority competent for granting development consent for such a project retains the ability to assess the project's environmental impact more strictly than was done in that derogation decision. Thus, a decision to grant a Derogation Licence under Article 16 of Directive 92/43 forms part of the development consent procedure within the meaning of Article 1(2)(c) of Directive 2011/92. In that context, the Derogation Licence is a discrete decision taken in a development consent process and is "challengeable" as a discrete decision taken in that process. However, the Derogation Licence is not to be treated as forming part of the development consent procedure for purposes other than in relation to the scope of matters to be considered or assessed under Directive 2011/92. It is further submitted that the decision in *Namur-Est* is limited to the scope of consideration and is irrelevant to the issue of the applicable limitation period.

43. The notice party's proposed answer is to agree with the State's proposed answer.

44. The referring court's proposed answer is No. While the referring court appreciates that in both the opinion of Advocate General Kokott in *Namur-Est* at para. 37, and the judgment of the CJEU, para. 66, the derogation licence was to be treated as part of the development consent, this was only in the context of the scope of matters to be considered or assessed as part of environment impact assessment. *Namur-Est* does not establish that a derogation licence or other multi-consent decision must be treated as a single decision for any other purpose, such as time limits for example. To treat such secondary consents as part of the primary consent for such other purpose would create procedural chaos and would be contrary to the principle of legal certainty. There is nothing perverse about requiring an applicant to challenge a derogation licence while public participation may be ongoing in the related development consent. Nor does this undermine public participation or access to justice in any other way. It simply requires members of the public concerned to bring any challenge to the derogation decision separately by way of an action within the time fixed by domestic law. Otherwise, challenges to a multi-stage consent process would become unmanageable and chaotic if all were to be potentially postponable until the final consent.

45. The relevance of the question is that if an earlier derogation decision is treated as part of the development consent only for the purposes of matters to be considered, and not for the purposes of any extension of limitation periods for challenge, then the present action is out of time under domestic law, and a conclusion to that effect does not contravene EU law, subject to the next question.

The second question – limitation periods generally

46. The second question is:

> **If the answer to the first question is Yes, does Article 11 of Directive 2011/92 read in the light of the principle of wide access to justice under Article 9(2) of the Aarhus Convention have the effect that national domestic rules as to the date on which time commences to run to challenge the validity of a decision adopted under Article 16(1) of Directive 92/43 (the "secondary consent") must be interpreted so as to preclude that time from commencing to run prior to the date of adoption of the development consent concerned (the "primary consent"), either generally or in a case where: (i) the project was subject to the case-by-case examination envisaged by Article 4(2)(a) of Directive 2011/92, and/or (ii) the determination under Article 4(5) for the purposes of the primary consent was made after the secondary consent had been granted and simultaneously with the decision on the primary consent, and/or (iii) the proceedings challenging the validity of the secondary consent do not contain any ground challenging the relevant primary consent by reference to the asserted invalidity of the secondary consent, and/or (iv) the applicant fails to apply for an extension of time to bring the challenge to the secondary consent, which application is required by domestic law for a late challenge in the absence of any EU law rule to the contrary?**

47. The applicant's proposed answer is that insofar as relates to a derogation licence, this does not arise in light of the *Namur-Est* judgment and the national law principle that interim decisions should be challenged following the final decision in a procedure. The applicants argue, by analogy, that the derogation licence decision is a preliminary decision for the purpose of the EIA screening determination in the same way as it was held to be a preliminary decision within the EIA procedure, and therefore only becomes final once the procedures under Directive 2011/92 come to an end,

either with a negative EIA screening determination or the EIA determination if the project is screened in by the competent authority. In addition, since the rationale of *Namur-Est* is derived from the procedural rights given to the public concerned under Directive 2011/92 for projects requiring EIA, it would be contrary to that directive for national law to require the applicants to challenge the derogation licence even before those rights were established which only occurs with the EIA screening determination under Article 4(5) of Directive 2011/92. The EIA screening determination essentially determines whether the procedural rules under EU law apply, as set out in *Namur-Est,* or whether national procedural rules apply, which would be case if a negative screening determination was made under Article 4(5)(b) of Directive 2011/92. If the project is screened in then *Namur-Est* applies which means that the applicants are entitled to wait at least until the screening determination is made before their rights in relation to the derogation licence crystalise. If the project were to be screened in they would then be entitled to wait until the conclusion of the environmental assessment by the competent authority and to consider a possible challenge in light of that assessment as explained by the AG in *Namur-Est* . It would therefore be contrary to Directive 2011/92 for the time limit to challenge the Derogation Licence to start to run before the EIA screening determination was published.

48. The State's proposed answer is that, in the light of the judgment of 6 July 2023, *Hellfire Massy Residents Association*, C-166/22, ECLI:EU:C:2023:545, the question of when time runs where a point of EU law is at issue is *acte clai*r or *acte éclairé* against the applicants. First, the time period within which to challenge the derogation licence was three months from the grant of the derogation licence or, alternatively, applying a conforming interpretation, from the date when the applicants actually, or should have, found out about the derogation licence. Secondly, Directive 2011/92, when read in light of the access to justice principles in Articles 9(2) of the Aarhus Convention, does not require that domestic time limits should be construed differently in this case. Third, the CJEU very recently concluded in *Hellfire Massy Residents Association*, C-166/22 that Directive 2011/92 did not lay down any obligation for the derogation procedure under Article 16 to be integrated into the procedures for granting development consent to projects. Fourth, in the particular circumstances of this case, where the Court has already held that the applicants did not contend on the pleadings that the permission was invalid because the derogation licence was invalid, there is no basis for an interpretation of sub-rules 21(1) and/or (2) that a challenge to the derogation licence may be brought at the end of the development consent/planning application procedure. Fifth, the applicants could have challenged the decision of the relevant competent authority – An Bord Pleanála – to grant development consent, on the basis that it did not assess the project's impact on protected species more strictly than was done at the derogation licence stage. However, the applicants simply did not advance that proposition. It is a matter of the utmost significance that, in considering the inter-relationship between a derogation licence and a grant of planning permission, the CJEU has very recently held that neither Directive 92/43 nor Directive 2011/92 lay down any obligation for the derogation procedure under Article 16 to be integrated into the procedures for granting development consent to projects. The State Respondents submit that if there is no obligation for the derogation licence procedure to be integrated into the procedures for granting planning permission, there can be no concomitant obligation for a conforming interpretation to be applied to sub-rule 21(2) insofar as it applies to administrative proceedings, so as to conclude that the date of the proceedings would have to be interpreted as the date of the final decision under the planning code. It would be entirely contrary to the principle of legal certainty if the time limit that applies to the grant of the derogation licence was, somehow, to be "suspended" until the grant of the development consent. If the court was to hold with this principle, it would potentially also apply to other statutory consents such as foreshore licences granted under the Foreshore Act 1933 (which is domestic law) or industrial emission licences (granted under Regulations and the Environmental Protection Agency Act 1992 giving effect to the Industrial Emissions Directive).

49. The notice party's proposed answer is No.

50. The referring court's proposed answer is that this does not arise because the answer to the first question is No, but if it does arise the answer is No. The *Namur-Est* decision should not be extended to have the effect of cutting across domestic limitation periods which are a matter within the scope of national procedural autonomy, subject to the principles of equivalence and effectiveness: Judgment of 17 November 2016, *Stadt Wiener Neustadt v Niederösterreichische Landesregierung*, C-348/15, ECLI:EU:C:2016:882 at paras. 40 and 41, judgment of 20 December 2017, *Caterpillar Financial Services*, C-500/16, EU:C:2017:996, paragraph 42) (*Flausch and Others*, C-280/18, EU:C:2019:928, paragraphs 46-49, 51, and 54-60. To so extend *Namur-Est* would be contrary to the principle of legal certainty. No such extension is necessary because where a project requires multiple consents, each consent can be challenged as it is made, within the relevant limitation period in domestic law which may vary from decision to decision subject to the principles of equivalence and effectiveness. As regards the specific sub-elements referred to in the question:

(i) the fact that the project was subject to the case-by-case examination envisaged by Article 4(2)(a) of Directive 2011/92 is immaterial;
(ii) the fact that the determination under Article 4(5) for the purposes of the primary consent was made after the secondary consent had been granted and simultaneously with the decision on the primary consent is also immaterial;
(iii) if EU law does not generally require the postponement of a time limit to challenge a secondary consent until the primary consent is given, this must apply *a fortiori* if the proceedings challenging the validity of the secondary consent do not contain any ground challenging the relevant primary consent by reference to the asserted invalidity of the secondary consent; thus while the answer should be No in any event, this is doubly so where the challenge brought to an earlier consent in a multi-stage consent process is not linked in the pleadings to the validity of any consent issued at a later stage; and
(iv) where the applicant fails to apply for an extension of time to bring the challenge to the secondary consent, which application is required by domestic law for a late challenge, this has the effect that a necessary precondition for a conforming interpretation does not apply on the facts. An applicant's failure to even apply for an extension of time as mandated by national rules is a disregard of domestic law which goes beyond any EU law entitlement. If an extension of time that is necessitated by domestic law is actually applied for, any EU law entitlements can be read in by way of a conforming interpretation. But if an applicant fails to even seek the necessary extension of time, contrary to domestic law, the need for a conforming interpretation does not arise.

51. The relevance of the question is that if the answer to either the first question or this question is No then the action must be dismissed as out of time.

The third question – limitation periods in the absence of express provision

52. The third question is:

If the answer to the first question is Yes and if the answer to the second question in general is No, does Directive 2011/92 read in the light of article 47 of the Charter of Fundamental Rights and/or the principle of wide access to justice under Article 9(2) of the Aarhus Convention have the effect that a time limit provided by the domestic law of a member state for the bringing of proceedings to assert a right under that Directive, must be reasonably foreseeable, but does not have to be expressly specified in legislation in accordance with Article 11(2) of Directive 2011/92 and/or in practical information made available to the public on access to administrative and judicial review procedures pursuant to Article 11(5) of Directive 2011/92 and/or definitively determined with certainty by domestic caselaw, so that the answer to the second question is unaffected by provision being made in the domestic law of a member state for a foreseeable time limit of a general nature which applies to public law actions generally including for the bringing of proceedings challenging a decision adopted under Article 16(1) of Directive 92/43 and which authorises a developer to derogate from the applicable species protection measures in order to carry out the project, albeit that this is implicit rather than explicit in the domestic law concerned?

53. The applicant's proposed answer is as per the second question. In the judgment of 28 January 2010*, Commission v Ireland*, C-456/08, ECLI:EU:C:2010:46, the Court of Justice held that the sixth subparagraph of Article 10a of the previous Directive 85/337 (which is identical to Article 11(5) of the current directive) is an obligation to obtain a precise result which the Member State must ensure is achieved. The Court of Justice held that: "In the absence of any specific statutory or regulatory provision concerning information on the rights thus offered to the public, the mere availability, through publications or on the internet, of rules concerning access to administrative and judicial review procedures and the possibility of access to court decisions cannot be regarded as ensuring, in a sufficiently clear and precise manner, that the public concerned is in a position to be aware of its rights on access to justice in environmental matters." Thus, it is not sufficient for the State to state baldly that the general rules, including common law rules, provide that time runs from the date when the public becomes aware of a preliminary decision. The State is required to determine specifically at what stage a challenge may be brought and to provide practical information on access to procedures to bring those challenges, including precisely specifying when the time period within which a challenge must be brought.

54. The State's proposed answer is that Directive 2011/92 read in the light of the principle of wide access to justice under Article 9(2) of the Aarhus Convention does not have the effect specified in the second question where the law of the member state concerned has not definitively determined,

in accordance with Article 11(2) of Directive 2011/92, at what stage the decisions, acts or omissions may be challenged, and where the position is not determined with certainty by domestic caselaw.

55. The notice party's proposed answer is that this does not arise on the facts of this case. Order 84 RSC provides for when time begins to run in respect of a challenge by way of judicial review. The three-month time limit runs from the date of the decision as set out above.

56. The referring court's proposed answer is that this does not arise because the answer to the first question is No. But if it does arise, the answer is Yes. The objectives of access to justice are met by the existence of a foreseeable time limit. There is no basis to go beyond that and to require that the time limit for any particular type of proceedings should be determined beyond doubt by express provision in legislation or express findings in definitive caselaw. Such an obligation would be impracticable given the vast number of possible legal actions that could be brought across the field of EU law, each of which would in principle be subject to the requirement for the existence of an effective remedy. Creating an express list of such actions and keeping it up to date would be impracticable and indeed virtually impossible. Hence a general, foreseeable, time limit must suffice. Here, the general time limit in O. 84 RSC applies and that creates sufficient foreseeability for applicants generally.

57. The relevance of the question is that if the answer to the first question is yes but the answer to the second question remains negative despite the existence of a general time limit then the action must be dismissed as out of time.

The fourth question – merits – alternatives to derogation

58. The fourth question is:

> **If the answer to the first question is Yes and either the answer to the second question is Yes or the answer to the third question is No, does Article 16(1) of Directive 92/43 have the effect that a competent authority cannot conclude that there is "no satisfactory alternative" to a decision which authorises a developer to derogate from the applicable species protection measures in order to carry out a project within the meaning of Article 1(2)(a) of Directive 2011/92 unless the competent authority actually considers alternatives such as alternative location or design, or refusal of the derogation?**

59. The applicant's proposed answer is that the competent authority must (a) consider alternatives; and (b) explain how it has considered them. This is also clear from the judgment of 10 October 2019, *Luonnonsuojeluyhdistys Tapiola*, C-947/17, ECLI:EU:C:2019:851, which held that the obligation to provide a statement of reasons is not met when the derogation contains no reference to the absence of any other satisfactory alternatives or any reference to technical, legal and scientific reports to that effect. Thus it follows that given the requirement to state reasons in relation to satisfactory alternatives, there must be a requirement for the competent authority to actually consider satisfactory alternatives such as alternative location or design, or refusal of the derogation, and to document its reasoned conclusion in its decision. As identified by Richard Moules, Significant EU Environmental Cases: 2019, Journal of Environmental Law, Volume 32, Issue 1, March 2020, Pages 161–172, https://doi.org/10.1093/jel/eqaa002, at page 168: "This decision illustrates that the Court is willing to put national authorities to proof to demonstrate the strict necessity of derogations from the Habitats Directive. The requirement for objective scientific data and clear and precise reasons ensures that derogations are only made as a matter of last resort, thereby strengthening the aim of the Habitats Directive of ensuring biodiversity through the conservation of natural habitats and wild fauna and flora." In the present case none of these concerns was present. There was no countervailing objective of protecting other wild flora or fauna or natural habitats, and the need for a derogation could have been avoided entirely by either not carrying out the project or alternatively through a modified project.

60. The State's proposed answer is that the fourth and fifth questions are moot because the proceedings are outside time. The Court has itself identified that the issues falling for consideration relate to the interpretation and application of Order 84, rule 21 of the Rules of the Superior Courts 1986, as amended. If contrary to this the question arises, the fourth question should be answered in the affirmative.

61. The notice party's proposed answer is that the fourth and fifth questions are not required as the challenge to the Derogation Licence is time-barred and no application for an extension of time has been made.

62. The referring court's proposed answer is that this does not arise because the answer to the threshold first question is No. If it does arise the answer is Yes. The requirements of Directive 92/43 would be significantly undermined and the consideration of alternatives would be artificial and unreal unless the actual alternatives, specifically alternative locations if that is an option, alternative designs if that is an option, or refusal of the derogation, are actually given meaningful consideration.

63. The relevance of the question is that if the application is not out of time, and the question is answered No, the derogation licence would be held invalid.

The fifth question – merits – protection by means of derogation

64. The fifth question is:

> **If the answer to the first question is Yes and either the answer to the second question is Yes or the answer to the third question is No, does Article 16(1) of Directive 92/43 have the effect that a competent authority cannot conclude that it is "in the interest of protecting wild fauna and flora and conserving natural habitats" to grant a decision which authorises a developer to derogate from the applicable species protection measures in order to carry out a project within the meaning of Article 1(2)(a) of Directive 2011/92 unless some identified protection is created by the derogation itself rather than by mitigation measures adopted to reduce or compensate for the detriment created by the steps authorised by the derogation decision?**

65. The applicant's proposed answer is that Article 16(1)(a) of Directive 92/43 does not provide an appropriate legal basis for the grant of the Derogation Licence since the activities sought to be authorised, i.e. the construction of a private housing development, are not aimed at the protection of wild fauna and flora or the conservation of natural habitats. In fact, the overall net result of the derogation would be to harm wild fauna and their habitats, since there are no identified positive benefits from the proposed development which would otherwise give rise to the protection of wild flora and fauna or natural habitats. In the applicants' view, the derogation under Article 16(1)(a) involves a proportionate trade-off between strict protection of species on the one hand and the protection of other wild flora and fauna and the conservation of habitats on the other. In other words, in certain circumstances a derogation may be granted if the harm caused by activities prohibited under Article 12 is the price worth paying for the protection of other species or the conservation of other habitats. This provision is not concerned with facilitating development, particularly where (as here) there is no evidence that the developer considered development alternatives that would have allowed a modified development to proceed that also avoided entirely prohibited activities affecting strictly protected species.

66. The State's proposed answer is that this does not arise as per the fourth question, but if it does arise, the fifth question should be answered in the affirmative.

67. The notice party's proposed answer is as per the fourth question.

68. The referring court's proposed answer is that this does not arise because the answer to the threshold first question is No. If it does arise the answer is Yes. The language and intention of Article 16(1) of Directive 92/43 supports the intention that the reference to the interest of protecting wild fauna and flora and conserving natural habitats must be promoted by the decision itself. Granting the decision for other reasons and then mitigating that decision with protection measures would not comply with that provision.

69. The relevance of the question is that if the application is not out of time, and the question is answered No, the derogation licence would be invalid.

Order

70. For the foregoing reasons, it is ordered that:

(i) the questions set out in this judgment be referred to the CJEU pursuant to article 267 TFEU;

(ii) the substantive determination of the proceedings be adjourned pending the judgment of the CJEU, without prejudice to the determination of any appropriate procedural or interlocutory issues in the meantime including the stay on the primary consent, leave to appeal in relation to the primary consent, and costs of the challenge to that consent;

(iii) the parties be required to comply with the directions regarding preparation of papers for transmission to the CJEU as set out in Guidance Notes attached to Practice Direction HC124, so that all papers are received by the List Registrar in PDF format by 13:00 on Friday 19th January, 2024;

(iv) the parties be required to comply with the directions to keep the referring court informed of progress of the reference as set out in para. 100(vii) of *Eco Advocacy CLG v. An Bord Pleanála* [2021] IEHC 265;

(v) the matter be listed for mention on Monday 22nd January, 2024 to enable directions to be given regarding any appropriate procedural or interlocutory issues;

(vi) the costs of the proceedings related to the challenge to the derogation licence and in connection with the reference be reserved pending the outcome of the reference; and

(vii) all other costs to date not already disposed of be adjourned to a date to be fixed following the mention date already referred to.