THE HIGH COURT

JUDICIAL REVIEW

[2022] IEHC 337

[2021 No. 846 JR]

IN THE MATTER OF SECTION 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

ENNISKERRY ALLIANCE AND ENNISKERRY DEMESNE MANAGEMENT COMPANY CLG

APPLICANTS

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

CAIRN HOMES PROPERTIES LIMITED

NOTICE PARTY

AND

THE HIGH COURT

JUDICIAL REVIEW

[2021 No. 770 JR]

IN THE MATTER OF SECTION 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

PROTECT EAST MEATH LIMITED

APPLICANT

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL AND LOUTH COUNTY COUNCIL

RESPONDENTS

AND

HALLSCOTCH VENTURE LIMITED

NOTICE PARTY

(No. 2)

JUDGMENT of Humphreys J. delivered on Friday the 10th day of June, 2022

1. In *Enniskerry Alliance and Enniskerry Demesne Management Company CLG v. An Bord Pleanála (No. 1)* [2022] IEHC 6, [2022] 1 JIC 1410 (Unreported, High Court, 14th January, 2022), I gave judgment on an application for a protective costs order. In that ruling I noted a consent order in relation to certain costs, decided that s. 50B of the Planning and

Development Act 2000 did not apply to any other grounds, and that the Environment (Miscellaneous Provisions) Act 2011 applied only to one element of the remaining case, namely core ground 6 in Enniskerry insofar as it relates to prevention of future damage to hedgerows by reason of contravention of s. 9(6)(b) of the 2016 Act which prohibits material contravention of the development plan save on certain conditions, and decided in principle to refer certain questions to the CJEU.

2. I now deal with certain procedural matters that are not necessary to include in the order for reference.

Procedural developments since the No. 1 judgment – Enniskerry proceedings

3. On 6th March, 2022, the developer changed tack and proposed agreeing not to seek costs against the applicant, agreed to an order over against it if the board was granted costs against the applicant, and as a fall-back offered the applicant a full indemnity as to costs that might be awarded to the board. The applicant then sought clarification on 10th March, 2022 as follows:

   (i). that the board would undertake not to pursue the applicant if the developer failed to satisfy the indemnity;

   (ii). that the reliefs against the State would not proceed without a similar arrangement;

   (iii). as to the extension of the indemnity to any application for leave to appeal, or on appeal or before the CJEU; and

   (iv). as to payment of the High Court costs of the protective costs motion.

4. There was a further issue raised subsequently as to what the mechanism would be to formalise an agreement.

5. The position in relation to those five issues was as follows:

   (i). The board declined to give any undertakings to the applicant.

   (ii). The issue of the costs of the reliefs against the State wasn't pursued at this time as those reliefs have been adjourned generally.

   (iii). As regards the issue of protection for any appeal, the developer took instructions on this and on 6th April, 2022, clarified that it was positively considering, subject to final instructions, that the undertaking would cover the entire proceedings including appeal but not any costs referable to any hypothetical reference to Luxembourg in the substantive proceedings.

   (iv). The notice party agreed to pay the High Court costs of the costs motion in the event of an agreement.

(v). As regards the mechanism in the event of an agreement, it was suggested that a consent order might be appropriate.

6. However, no meeting of minds between the two sides was in fact reached (I assume because of the exclusion of Luxembourg costs from the offer) and the developer then withdrew from the process of finalising the reference.

7. A draft order was prepared on 1st April, 2022, was circulated to the parties, and without objection was perfected. The applicant was thus at liberty to appeal the refusal of relief in relation to s. 50B of the 2000 Act or under the 2011 Act. The board proposed that it would appeal the finding in relation to the one ground to which I considered that the 2011 Act applied. Both sides were of the opinion that no leave to appeal to the Court of Appeal was necessary. That seems quite dubious to me having regard to the caselaw (in particular *Rowan v. Kerry County Council* [2015] IESC 99, [2015] 12 JIC 1801 (Unreported, Supreme Court, Dunne J. (McKechnie, MacMenamin, Laffoy and Charleton JJ. concurring), 18th December, 2015)). But ultimately that would be a matter for the Court of Appeal – although they presumably won't have to consider it because the Supreme Court has accepted the applicant's appeal.

8. Following the perfection of the order, the applicant appealed (without leave to do so) to the Court of Appeal insofar as it was refused relief [CA Record No. 2022/103].

9. Both the applicant and (insofar as I granted relief) the board sought leave to appeal to the Supreme Court by applications received in the Supreme Court Office on 26th April, 2022, record numbers S:AP:IE:2022:000045 and S:AP:IE:2022:000046. The Supreme Court granted the applicant leave to appeal ([2022] IESCDET 68) but refused the board ([2022] IESCDET 69) on the grounds that the board could pursue its point by cross-appeal, and also apparently on the basis that the board had consented to the relief in relation to ground 6. Some confusion has entered the picture however because the No. 1 judgment indicates that the board didn't consent to relief in respect of ground 6 in Enniskerry, but rather ground 6 in Protect East Meath.

10. To clarify however, those appeals are not appeals against the decision to refer, and in and of themselves do not at this point impact at all upon the proposed reference to the CJEU. If it should happen that the appeals have a result that renders the reference moot I will of course inform the CJEU at that point.

Procedural developments since the No. 1 judgment – Protect East Meath proceedings

11. An issue arose as to whether the agreement as to the costs of the costs issue itself would also apply on appeal. The board said it would, and the notice party sought time to take instructions. On 6th April, 2022, the notice party said that the costs of any appeal about costs would also be subject to no order as to costs if the applicant loses. Thus the question as to whether, if there was a dispute as to the costs of the costs on appeal, this was an issue that could be considered as relevant before the proceedings get going in the High Court, or

alternatively was an issue that could only be raised in an appellate court, did not arise for decision in this case.

12. Again, a draft order was circulated on 1st April, 2022 and following clarification of the foregoing, was perfected.

13. Following the perfection of the order, the applicant appealed to the Court of Appeal (without leave to do so) insofar as I refused relief [CA Record No. 2022/ 104].

14. The applicant also sought leave to appeal from the Supreme Court by application received in the Supreme Court Office on 26th April, 2022, record number S:AP:IE:2022:000044. That was granted: [2022] IESCDET 67.

Consideration of *amici curiae*

15. Following the No. 1 judgment I gave the parties the option of proposing the addition of any *amici curiae* that might assist the formulation of the formal order for reference and that might assist the CJEU.

16. Protect East Meath Limited proposed ClientEarth AISBL as an *amicus curiae*. The State objected to that, albeit the objection seemed to me to become moderately less vigorous as time wore on.

17. As regards whether to join ClientEarth as an *amicus*, the State's first line of attack was to argue that a motion should be brought, preferably by ClientEarth itself, but I rejected that on 4th April, 2022 because it is not in accordance with the general procedure set out in *Eco Advocacy CLG v. An Bord Pleanála (No. 1)* [2021] IEHC 265, [2021] 5 JIC 2704 (Unreported, High Court, 27th May, 2021), which is an attempt to streamline the preparation of any references that may arise. That procedure involves the proposal of *amici* by a party, not by the *amicus* themselves, and moreover doing so by submission rather than affidavit. When this was pointed out to the State, it did not particularly press the objection regarding a motion. That doesn't rule out directing an affidavit if necessary, but it didn't seem necessary here, and it would be pointless formalism to require the putting on affidavit of matters as to its role and expertise set out in a submission by a reputable NGO such as ClientEarth here.

18. The State then complained that there was not sufficient information to allow the joinder of ClientEarth. Without any strenuous objection I directed that the proposed *amicus* would file a submission without prejudice to whether they would be allowed to appear or not in which they could address all such information as to their work and qualifications and why they would be in a position to contribute on this issue.

19. The State also raised various other objections or difficulties to the joinder of an *amicus* but unhelpfully its written submissions didn't particularly engage with my attempt to comprehensively review the caselaw on this issue in *Hellfire Massy Residents Association v. An Bord Pleanála (No. 3)* [2021] IEHC 771, [2021] 12 JIC 1402 (Unreported, High Court, 14th

December, 2021). I think that if the State had properly taken that judgment into account, such an exercise would have answered most of the fairly theoretical concerns articulated here.

20. The legal Alamo under this heading came with the State's last stand of complaining about an alleged lack of additional content in the submission actually made by ClientEarth. Unfortunately that is overblown. If one were to assume *arguendo* that the ClientEarth submission doesn't advance the position beyond what the applicants are saying, which I don't accept, then the State is hardly harmed. Even then, an *amicus* brings not just the immediate content but also a unique perspective on future elaboration of such issues. On balance I think that an application of the *Hellfire* criteria favours the addition of the *amicus* here and I will so order, particularly having regard to their international perspective and their track record of being of assistance to the court (see *Eco Advocacy CLG v. An Bord Pleanála (No. 2)* [2021] IEHC 610, [2021] 10 JIC 0406 (Unreported, High Court, 4th October, 2021) at para. 38). As will be apparent from the separate formal order for reference, and without taking from the valuable assistance I have received from the parties, I have in fact found the ClientEarth submission here particularly helpful, even bearing in mind the obvious point that they broadly agree with the applicants.

The board's application to adjourn the reference

21. In a separate side-battle, the board sought an order putting the reference to the CJEU on hold pending the appeal to the Supreme Court in *Heather Hill Management Company CLG v. An Bord Pleanála* [2021] IECA 259 (Unreported, Court of Appeal, Costello J. (Ní Raifeartaigh and Pilkington JJ. concurring), 14th October, 2021). Leave to appeal has since been granted: [2022] IESCDET 66.

22. But this is based on the false premise that the Irish domestic courts can provide final definitive clarification of the contested EU law questions regarding the effect of Aarhus. I wouldn't in any way question the proposition that the Supreme Court can come to a definitive interpretation of s. 50B of the 2000 Act or of the 2011 Act, since these involve either domestic points or clear EU law points, but the Aarhus interpretative obligation issues seem to me to involve contestable and referrable questions of EU law. Admittedly s. 50B largely reflects EU law also, but no arguable or referrable point of EU law arose under that section that created doubt as to its interpretation, but if the Supreme Court disagrees with that it is by definition going to decide the point itself or refer it as it sees fit.

23. If the applicant in *Heather Hill* wins in the Supreme Court in some kind of grand slam outcome, scooping s. 50B or 2011 Act protection for all points, then the Aarhus issues that arise in this case probably would no longer need to be decided. If that hypothetically happened, and subject to any fairly prompt submission to the contrary from any interested party, I would simply inform the CJEU that the present reference didn't have to be answered.

24. The real problem for the board's application to adjourn this reference is that nothing I do in any way limits the Supreme Court's discretion in dealing with the *Heather Hill* appeal or the

appeals in this case. There are only a limited number of (to some degree overlapping) possible outcomes to such an appeal:

(i). that court finds for the applicants in such a way that the present reference becomes moot (for example by an extensive interpretation of the 2011 Act), in which case it will presumably be withdrawn;

(ii). that court doesn't refer any questions to the CJEU, or refers different questions, or some sub-set of the questions referred here, in which case the present reference will have some added value to the extent that it includes questions not referred by the Supreme Court;

(iii). that court refers either equivalent questions or those and more questions, in which case the present reference while not adding anything will not do any harm either.

25. The board claimed that there was a "stalemate" between my views on the 2011 Act in this case and those of Holland J. in *Jennings v. An Bord Pleanála* [2022] IEHC 249 (Unreported, High Court, 3rd May, 2022), although it didn't explain how that was so. But the following seems to be relevant for present purposes. Holland J. queries the reference to "ecological" harm and suggests "environmental" harm (para. 222), but I think or at least hope that those amount to the same thing. I wasn't attempting to re-write the statute (which covers human and built environment impacts under s. 4(2)(g) and (h) of the 2011 Act), so I meant ecology in a wide sense including tangible and specific impact on the *existing* environment - preventing or rectifying the demolition of a building or the cutting down of a tree for example but not preventing a new building that would be somehow less desirable than some other hypothetical new building by reason of matters such as land use or density. I meant ecological in the sense of impact on *that which exists* rather than attaining a more abstract hypothetically ideal land use outcome. It seems to me that impact on what exists is inherent in the notion of damage, as used in the 2011 Act. "[D]amage to ... cultural sites and built environment" (s. 4(2)(h)) doesn't on the face of it seem directed to activities like building a structure that doesn't create pollution or anything like that but is somehow less environmentally superlative than some other hypothetical structure that might have been built instead. But I now clarify expressly that damage does include to our human world and the built environment as well as the natural world.

26. Insofar as Holland J. expresses lack of clarity as to why I said that the approach to damage should not be open-ended (para. 224), my intention was to navigate through the different emphases of the existing appellate caselaw.

27. On the meaning of the 2011 Act, Holland J. appears to be saying:

(i). firstly, but for authority he would have adopted an expansive view of the meaning of environmental damage (para. 302), and set this out in some detail;

(ii). secondly, that nonetheless that if he were to decide the matter he would be bound to refuse relief based on Heather Hill; and

(iii). thirdly, that the appropriate order was to adjourn the 2011 Act issue to allow the applicants to benefit from any evolution of the law (para. 338), but to require the case to go on in the meantime.

28. So most of his discussion is, therefore, clearly *obiter*. Indeed given that the judgment rather skilfully gives some support to at least three different possibilities, there is something in it for almost every point of view. The punchline that I choose to take for present purposes is that he would have followed *Heather Hill* to consider himself bound, if deciding the matter, to refuse all of the relief sought in the motion in that case. Similarly, I followed my understanding of *Heather Hill* and *O'Connor* to refuse almost all of the relief sought in the motions in these cases under the 2011 Act. As stalemates go, there have been a lot worse.

29. Due credit to Holland J. for proposing an alternative scheme if the matter was *res integra*. I agree that his scheme is among the more workable options, and am sure that it will be looked at attentively on appeal.

30. But of course the matter isn't *res integra* and both judgments reflect that. The main practical difference really is that while I adjourned the Aarhus issues pending a reference, Holland J. adjourned those issues pending further possible clarification of the law more generally and directed that the case proceed in the meantime. That was in a sense better for the applicants than refusing relief, unless the applicants wanted to appeal the decision to proceed with the case without costs clarification. However, I am not aware that they did in fact try to do that in *Jennings*. In a case where an applicant did actually seek to take that course, such an approach raises a problematic process question because it compels an environmental applicant to undergo a process without any clarity in advance as to what costs rules apply. Unless they consent or acquiesce (and the latter seems to have happened in *Jennings*), that doesn't immediately seem compatible with the CJEU caselaw, subject to any contrary argument of course.

31. The applicants in the present cases vigorously opposed the board's adjournment application. I broadly endorse their criticisms. It may be instructive to take the liberty of quoting at some length from their submissions rather than attempting paraphrase or summary. Firstly, the initial submissions on costs:

> "4. The Applicants are strongly opposed to this most unusual proposal advanced by the Board. It is the view of the Applicants that this proposal is in substance an attempt to circumvent the fact that the Board has no entitlement to appeal the preliminary reference made by this Honourable Court after a full hearing and careful judgment delivered by this Court. This is evident from the purported basis advanced for the proposal which does not stand up to any scrutiny either as a matter of law or practicality.

5. It is notable that the Board has not referred to any legal basis or authority for its application which can be viewed as either an exceptional attempt to have a judgment reopened before the relevant order is perfected, or as a *de facto* appeal, against a decision to make a reference for a preliminary ruling under Article 267 TFEU which is contrary to EU law.

6. The essence of this proposal is that this Court should in reality set aside its decision to make a preliminary reference to allow the Supreme Court to consider the issue of costs as they have yet to do so. This is misconceived and inappropriate for several reasons. Firstly, it fails to respect the autonomous jurisdiction of national courts to make references for preliminary rulings without interference or control by appellate courts.

7. The Supreme Court has itself recently clearly affirmed this fundamental principle in *Data Protection Commissioner v Facebook*, Supreme Court [2019] IESC 46, where Clarke CJ cited Case C-210/06 *Cartesio* [2008] ECR I-9641, where the CJEU stated at §§95-96:

> "Where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the autonomous jurisdiction which [Article 267 TFEU] confers on the referring court to make a reference to the Court would be called into question, if – by varying the order for reference, by setting it aside and by ordering the referring court to resume the proceedings – the appellate court could prevent the referring court from exercising the right, conferred on it by the EC Treaty, to make a reference to the Court.
>
> In accordance with [Article 267 TFEU], the assessment of the relevance and necessity of the question referred for a preliminary ruling is, in principle, the responsibility of the referring court alone, subject to the limited verification made by the Court in accordance with the case-law cited in paragraph 67 above. Thus, it is for the referring court to draw the proper inferences from a judgment delivered on an appeal against its decision to refer and, in particular, to come to a conclusion as to whether it is appropriate to maintain the reference for a preliminary ruling, or to amend it or to withdraw it."

Also at §98:

> "In the light of the foregoing … where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the second paragraph of [Article 267 TFEU] is to be interpreted as

meaning that the jurisdiction conferred by that provision of the Treaty on any national court or tribunal to make a reference to the Court for a preliminary ruling cannot be called into question by the application of those rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings."

8. In substance the proposal is that this Court's considered judgment to refer questions to Europe should be trumped on the basis of hierarchy of the domestic courts to allow the Supreme Court to address matters relating to costs. Again the very notion of hierarchy was again addressed and rejected in Schrems case, where Clarke CJ stated at §3.13:

"At this stage, it is perhaps worth also highlighting the comments of Judge Lenaerts, now President of the CJEU, writing extrajudicially on this issue (see Lenaerts, "National Remedies for Private Parties in the light of the EU Law Principles of Equivalence and Effectiveness" (2011) 46 JUR 13). He observed as follows:-

"...the success of art.267 TFEU is built on the very absence of hierarchy. 'Dialogue' is the raison d'être of the preliminary reference procedure and the interest of promoting dialogue is best served by making the opportunity to engage in dialogue available not only to higher national courts but also to lower ones. Moreover, it will often be apparent from the very outset that a case before a national court of first instance will require a preliminary ruling from the ECJ and it would therefore be both inefficient and counterproductive to apply any form of filter curtailing or inhibiting the lower national court's freedom to make a reference."

3.14 There can be no doubt but that what I will describe as the Cartesio jurisprudence imposes significant limits on the ability of a national appellate court to interfere with the important freedom, which every national court enjoys, to make a reference to the CJEU under Article 267. There may, however, be questions as to the precise extent of that limit."

9. Similarly, in *Krizan* Case 416/10 the Court of Justice emphasised that the exercise of the Article 267 jurisdiction is an autonomous one that the referring Court is obliged to make (per §§68-73) once it considers it appropriate to do so. It is therefore effectively irrelevant that other Courts may be grappling with variations of these issues and this Court, if it requires the assistance of the Court of Justice has the jurisdiction to make such a reference, and the Applicant respectfully submits, has the obligation to now make the reference. Thus the CJEU stated:

["]67 Moreover, the existence of a national procedural rule cannot call into question the discretion of national courts to make a reference to the Court of

Justice for a preliminary ruling where they have doubts, as in the case in the main proceedings, as to the interpretation of European Union law (*Elchinov*, paragraph 25, and Case C 396/09 *Interedil* [2011] ECR I 9915, paragraph 35).

68 A rule of national law, pursuant to which legal rulings of a higher court bind another national court, cannot take away from the latter court the discretion to refer to the Court of Justice questions of interpretation of the points of European Union law concerned by such legal rulings. That court must be free, if it considers that a higher court's legal ruling could lead it to deliver a judgment contrary to European Union law, to refer to the Court of Justice questions which concern it (Case C 378/08 *ERG and Others* [2010] ECR I 1919, paragraph 32; and *Elchinov*, paragraph 27).

69 At this stage, it must be noted that the national court, having exercised the discretion conferred on it by Article 267 TFEU, is bound, for the purposes of the decision to be given in the main proceedings, by the interpretation of the provisions at issue given by the Court of Justice and must, if necessary, disregard the rulings of the higher court if it considers, in the light of that interpretation, that they are not consistent with European Union law (*Elchinov*, paragraph 30).

70 The principles set out in the previous paragraphs apply in the same way to the referring court with regard to the legal position expressed, in the present case in the main proceedings, by the constitutional court of the Member State concerned in so far as it follows from well-established case-law that rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of European Union law (Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 3, and Case C-409/06 *Winner Wetten* [2010] ECR I-8015, paragraph 61). Moreover, the Court of Justice has already established that those principles apply to relations between a constitutional court and all other national courts (Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I 5667, paragraphs 41 to 45).["]

10. Moreover, the Board's proposal could be said to involve requesting this Honourable Court to act contrary to Article 4(3) of the [TEU] which provides that:

> "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties."

The duty of sincere cooperation extends to national Courts of Member States. The questions which the Court has identified are of considerable importance across the Union and require to be addressed in the interests of the Union. This is exemplified by the fact that ClientEarth, an environmental NGO of international significance has agreed to act as *Amicus Curiae*, in this preliminary reference.

11. Secondly, a fundamental flaw in the argument of the Board that the Supreme Court has not been asked to consider costs, is that it fails to the recognise that the definitive arbiter of European law issues is the CJEU and not any national courts including the Supreme Court. All of the six questions referred arising from matters in controversy are clearly matters of European law which require clarification. They are not domestic law questions so it is difficult to understand the logic of the proposal based on the statement that the "…Supreme Court have not yet asked to determine in an inclusive manner the interpretation of section 50B, EMPA and scope of the interpretative obligation where all issues are live". Thus the real matter which requires clarity is not domestic provisions such as section 50B or the EMPA, but obligations arising under European law. The Supreme Court cannot provide definitive clarity on such matter. It is also to be observed that the Heather Hill judgment did not even deal with all domestic issues as it was confined to section 50B of the 2000 Act and did not concern EMPA at all.

...

13. The Board strenuously opposed the application for costs protection in its written and oral submissions at the hearing arguing that the decision in *Heather Hill* was consistent with European law and the judgments of the CJEU. Despite this, the Board failed to convince the Court that the interpretation of EU law it put forward and as they claimed reflected in *Heather Hill* was clear in which case the High Court decided to make a preliminary reference. The proposal has therefore only emerged post judgment of this Honourable Court because the Board is dissatisfied with the outcome. It is noted that the Board is now seeking to facilitate their own proposal by not opposing an application for leave to appeal in *Heather Hill*. It is questionable whether such a position would have been adopted but for this Court deciding to make a preliminary reference.

14. Fourthly, the questions proposed for the preliminary reference are wide ranging and highly significant...

15. The proposed questions are clearly covered by Question 1 and 4 of this Courts questions. Thus, the Board's proposal involves a request for this Court to set aside and delay a preliminary reference to allow parties involved in another case, to get to the point (which may not arise, if leave is not allowed) of requesting a preliminary reference on questions which are already covered by this Court's preliminary reference and further negate other important question which this Court has considered appropriate to refer after a full hearing on the matter. At the national level there is a long line of inconsistent case law on costs (*Heather Hill Management Company v An Bord Pleanála* [2019] IEHC 186, para 72), which was recently criticised by the European Commission, observing:

> "The case law of the national courts has meandered through different interpretations of the costs rules and has left many environmental litigants unable to predict with any certainty the costs exposure." [Remarks on "Environment Policy Post Covid-19", Aurel Ciobanu-Dordea, Director for Implementation,

Governance and Semester, Directorate-General for Environment, European Commission, Environment Ireland Conference, 18-19 January, 2022, Unedited Transcript.]

16. It is clear from all the foregoing that a final definitive consideration by the Court of Justice of Ireland's implementation of the costs rules is urgently required. The Board's proposal will not advance this but will on the contrary delay the same.

...

27. Therefore in the interest of the achieving certainty and clarity in the quickest time possible, it is respectfully submitted that it is very clear that this is through the route of the preliminary reference of this Honourable Court and the matter should proceed accordingly. It is amply clear from the jurisprudence, and as this Honourable Court is all too aware, the issue of costs in environmental litigation in Ireland is fraught with difficulties . It is clear that the answers to the six proposed questions, once delivered by the Court of Justice, would go a very considerable way towards achieving the certainty and predictability in cost issues in environmental matters that it is desired by all parties, including Applicants but equally in ease of the Board and all Developers. The sooner those questions are referred and answered the sooner the desired certainty will be achieved."

32. I now turn to the applicants' supplemental written submissions dated 14th March, 2022:

"2. The Board states that it does not intend to appeal the Court's decision to make a reference. However, with respect it appears to the Applicant that the Board's proposal in substance constitutes an appeal by proxy. It clearly hopes to retain what it perceives to be the benefit of the decision of *Heather Hill* [2021] IECA 259 and, it is respectfully submitted, equally clear that it has calculated that it is more likely to retain that benefit as a result of the Supreme Court's possible determination in that case rather than as a result of the proposed reference.

3. The necessity for the reference does not arise from the fact that the Supreme Court has not as yet addressed all domestic costs issues. This is entirely irrelevant. The Board does not explain how the Supreme Court will resolve (the Board's emphasis §4) "all" costs issues in any possible appeal. The Supreme Court cannot resolve matters of European law which is a matter for the CJEU. Nor does it explain the alleged pragmatic merit in its suggestions. It simply asserts both as facts and then proceeds to make a number of submissions on that basis.

4. The Board acknowledges that the Court has a discretion to make a reference but says that there is a "pragmatic benefit" in the Supreme Court dealing with all costs issues before a reference is made. In fact entirely to contrary there is no such pragmatic benefit, which will serve only to delay matters furthers. In the letter of the 4th February

2022, the Board has suggested that it would be a matter for the Supreme Court to decide whether to make a reference. However, in its submissions it is somewhat inconsistently assuming that a reference would be made by the Supreme Court, which it cannot do. As noted the Supreme Court has to grant leave to appeal (although the Board is seeking to facilitate their own proposal by not opposing the same) a hearing would have to take place and the Supreme Court would have to decide on the matter.

...

6. Not only does the reference address a much broader suite of questions than in *Heather Hill* but ultimately only the Court of Justice can give a final and definitive interpretation in relation to these matters. Finally, and not insignificantly, if the reference is made now no more time will be wasted.

7. There are [two] courses of action:

a) If the Boards' proposal is accepted there is a possibility of some costs questions being determined by the Supreme Court, with the inevitability of litigants in that or future cases advocating for the necessity for a reference to the Court of Justice being made and, in the absence of a reference in that case, those issues continuing to arise in future cases, or,

b) If the Boards' proposal is rejected the reference will be made and determined forthwith which will result in a definitive interpretation of the cost requirements in environmental litigation from the only body capable of providing that interpretation. That interpretation will be binding in all cognate litigation and put an end to all reasonably foreseeable issues in relation to costs.

8. Given the complete disparity between the two options, it is simply not credible for the Board to maintain its opposition to the proposed reference being made. If the Board wishes for a (§10) "definitive ruling" then the reference is the quickest, most efficient and indeed, only way of achieving the same. The suggestion that the Supreme Court may arrive at a decision in *Heather Hill* which is inconsistent with a pronouncement of the CJEU is entirely speculative and based on the unwarranted assumption that the Supreme Court would not be alert to the questions referred to the CJEU. See to that end the decision of the Court of Justice in *Van Dijk* Case C-72/14 which dealt with the obligations on a court of final instance when a lower court in a case similar to the one before it concerning exactly the same legal issue has made a reference to the Court of Justice.

9. The Board's submission do not address the patent unfairness and undesirability of the Applicants in the present proceedings passing on custody of these important questions to other Applicants when those very same Applicants failed to draw the Court

of Appeal's attention to important and significant material as found by this Honourable Court

10. The Board's reference to *Data Protection Commissioner v Facebook Ireland & Schrems* [2019] IR 255 does not provide any assistance to its proposal. The Supreme Court held that there could be no such appeal but that an appellate Court could entertain an appeal against facts or against findings of national law that were determined as part of a process leading to a reference.

11. In DPC the Supreme Court made very clear that the default position was one where no appeal would be entertained (§64) and an appeal should ordinarily be progressed only after the Court of Justice had given its decision:

> "However, in the vast majority of cases there will be a very strong basis for suggesting that an appellate court should not entertain an appeal against findings of fact or of national law contained in a judgment or ruling of a lower court which has made a reference to the CJEU, while the reference is pending. The reasons for adopting that course of action are derived from the interests of justice and the proper use of judicial resources. In the vast majority of cases, a party who is aggrieved by what it feels is an erroneous determination of fact or of national law will retain the opportunity, after the CJEU has given its response to the reference and the referring court has made a final determination on the merits of the case, to appeal against the overall decision to any higher court having jurisdiction. It is clear in that context that, while the appellate court will be bound by the interpretation of EU law which is to be found in the judgment of the CJEU, the appellate court will be entitled to overturn, in any manner consistent with Irish procedural law, any erroneous decisions of fact or of national law. The appellate court will thus be able to overturn the decision of the referring court if, as a result of determining that decisions of fact or of national law were incorrect, it transpires that the final resolution of the proceedings by the referring court was incorrect. Indeed, it is entirely possible to envisage such a case where the effect of the decision of the appellate court in Ireland will mean that the reference will turn out to have been unnecessary in the first place"

12. The Court continued (§68):

> "In the context of the sui generis process which was carried out by the High Court in this case, by virtue of the decision of the Court of Justice in Schrems v. Data Protection Commissioner (Case C-362/14) [2016] Q.B. 527, it seems to me that there are exceptional factors at play. It is clear from Schrems v. Data Protection Commissioner (Case C-362/14) that it is for the national referring court to determine the facts and to reach a conclusion as to whether it shares the concerns of the DPC, or her equivalent in other member states. Such a determination of the facts (or of national law, should it be relevant) made by a referring court is a

"decision" which is capable of being appealed. However, the type of reasons why an appellate court might not normally entertain an appeal in such circumstances does not apply in this case. As already noted, in most ordinary proceedings any finding of fact or of national law will be subject to an appeal in the normal way, in accordance with the Irish appellate process. That provides a very strong justification for leaving over an appeal against such findings until after the proceedings have been finally determined at trial. However, where, as here, the only purpose of the findings of fact is to feed into the ultimate analysis by the CJEU as to the validity of the SCC Decisions under challenge, different considerations apply. Unusually therefore, there can, in practice, be no appeal against those findings of fact, for a definitive determination on the validity of the challenged measures will have been taken by the CJEU. Against that backdrop, I can see no reason which would lean the court against entertaining an appeal on the facts at this stage. Indeed, the opposite is the case, for to decline to exercise the jurisdiction of the court to entertain an appeal against the facts at this stage would be for this court to abdicate its constitutional role of reviewing, within the confines of the limitations imposed by Irish procedural law, findings of fact made in a court such as the High Court."

13. Thus the only exception to an appeal in the above is if there were relevant factual or relevant issues which would then inform the reference before the CJEU. However there are no such factual matters of relevance in the present instance, which relates to the PCO motion.

...

15. The Board's statement that it is proposing to appeal this Court's decision in relation to the conclusions drawn in respect of the 2011 Act, its protestations that it is entitled to do so without a certificate pursuant to section 50(A)7 and the contingent possibility of that potential appeal being leapfrogged into the Supreme Court simply demonstrate the absurdity of the Board's proposal – it sought to ground its counter-proposal to the certainty of a definitive interpretation from the Court of Justice on a possibility of a definitive judgement by the Supreme Court in *Heather Hill* and then is forced to accept that even that possibility is predicated upon the further possibility of a further appeal being leapfrogged in these proceedings (§29) and the entirety (possibly) being determined at some point in the indefinite future. All of this will involve delays and so contrary to the Board's statement there is no pragmatic merit to such a circuitous and contingent proposal.

16. The Applicants note that the Board state that (§31) "only the Supreme Court can give a definitive resolution of the matter of how costs rules are to be interpreted across the different statutory frameworks…" This would be correct if those statutory frameworks were grounded entirely on domestic law. However, it is not disputed that

both section 50B of the 2000 Act and/or section 3 and 4 of the 2011 Act are statutory obligations that were implemented in response and pursuant to the State's European law obligations and it is only the Court of Justice that can definitively resolve those issues. This is abundantly clear, it is respectfully submitted[,] from the questions posed by this Honourable Court in the proposed reference.

17. Finally, the Board's reliance on the Supreme Court's decision to admit the applicant's petition in *Hellfire Massy Residents Association v An Bord Pleanala* [2022] IESCDET 21 is misconceived. In that case, the issue before the Supreme Court is whether this Court was correct to refuse *certiorari* of a planning permission in circumstances where it made a reference in respect of an element of the legislative scheme that the applicant alleges the Board relied upon. The appeal before the Supreme Court in no way relates to the substance of the reference and instead is focused on whether the possibility of *certiorari* should be foreclosed prior to the judgement of the Court of Appeal."

33. It seems to me that the applicants' arguments are compelling. Having regard to the caselaw and reasons they cite, and the other matters referred to above, I do not think it is either appropriate or desirable, still less necessary, to exercise any discretion to adjourn the reference to the CJEU. I have indicated at greater length in *Save Roscam Peninsula CLG v. An Bord Pleanála* [2022] IEHC 202, [2022] 4 JIC 0809 (Unreported, High Court, 8th April, 2022), why in my view the reference does not cut across the s. 50B and 2011 Act issues now before the Supreme Court. To the extent that I might have had any residual uncertainty, the board's surprising and unexpected submission to another judge that the present reference is in breach of *stare decisis* pretty much ensured that I could not adjourn the reference, because to do so would be to appear to agree with that sentiment. I need to explain that in a little detail.

The entitlement to refer

34. While the reference was under consideration, the board (and the developer) in the *Jennings* case complained to Holland J. that I should not have referred questions to the CJEU as this allegedly cut across the Court of Appeal's views.

35. The submission made was that the referring court, in referring the questions, was "in breach of the requirements of *stare decisis*" (*Jennings v. An Bord Pleanála* [2022] IEHC 249 para. 329).

36. Strangely the board never made this complaint to me in those terms. These misunderstandings can happen, and I don't criticise their legal representatives, but from my point of view, that is an undesirable approach. Far better from the point of view of consistency to take the approach that if you disagree with something the court is about to do, is in the course of doing, or has just done, on the basis of some point or material which you think the court may have overlooked, you should let the court concerned know that so it can consider whether or not you have a point – not run off to complain without warning in some other forum. That preferable approach was taken by the State and the board in *Kerins v. An Bord*

Pleanála (No. 2) [2021] IEHC 612, [2021] 10 JIC 0408 (Unreported, High Court, 4th October, 2021), where those parties helpfully made their complaints about the decision to invoke art. 267 TFEU to the referring court itself rather than launching the objections for the first time in Luxembourg (see para. 37).

37. Holland J. recorded the submission as follows (*Jennings v. An Bord Pleanála* [2022] IEHC 249 (Unreported, High Court, 3rd May, 2022) at para 329, footnotes omitted):

> "Colbeam and the Board submit that Humphreys J, by referring questions to the CJEU in Enniskerry/PEM, failed to follow the Court of Appeal in Heather Hill #1 and instead referred questions to the CJEU in effect questioning the Court of Appeal's decision and so acted in breach of the requirements of stare decisis, and specifically the principle identified in Minister for Justice v O'Connor [[2015] IECA 227, [2018] 3 I.R. 1]. Mr O'Connor had submitted that if the Court of Appeal considered itself bound by a Supreme Court decision it should refer a question to the CJEU. Ryan P held that would be inappropriate:
>
> > "….. even if this court were minded to take a different view of the issue than that of the Supreme Court. While it is always prudent in these matters to eschew absolute rules, it would not be proper for this court to seek to overturn a Supreme Court decision that was binding otherwise by referring the matter to the Court of Justice in hope of securing a different result. That would be inconsistent with the constitutional structural relationship and the comity of the courts and is not something that this court would be prepared to consider otherwise than in wholly exceptional circumstances."
>
> Hogan J was of the same view. He considered the Court of Appeal bound by the Supreme Court's decision and said:
>
> > "It is also true that, strictly speaking, this court also enjoys the freedom as a matter of EU law to make an Article 267 TFEU reference, irrespective of any views which the Supreme Court may have expressed on the point …… however, having regard to the hierarchical system of our legal system and the importance of precedent in that legal system, it would be inappropriate for this court to take a step which might be thought indirectly to impeach the authority of Minister for Justice v Olsson [2011] IESC 1 by making an Article 267 TFEU reference to the Court of Justice.""

38. Regardless of the fact that the board didn't initially articulate this complaint before me, it has done so in another court and obviously may consider itself entitled to do so in some further or other forum. Also its submissions in response to my raising the issue were somewhat equivocal. That plus the *O'Connor* decision itself seems to call into question the very right of this court to make the present reference. The applicants' position is in effect that this is undermining the entitlement of the individual domestic court to engage in dialogue with the

CJEU, thereby impugning one of the fundamental principles of the EU legal order. The fact that there is some domestic caselaw called in aid of this exercise means that the point doesn't seem to be *acte clair* as seen by the Irish appellate courts, and thus a separate and distinct procedural question arises which warrants being included in the reference to the CJEU.

39. When I raised this matter with the parties on 23rd May, 2022 I gave them the opportunity to offer brief proposed replies to the question raised in this situation. The gist of those replies has informed the order for reference. The matter was then listed again on 30th May, 2022 to enable the order for reference to be finalised.

40. All that said, I agree that any first instance judge would hesitate (as I did, and as I said already at para. 5 of the No. 1 judgment) before either referring something that an appellate court had decided without a reference, or if she does so, in suggesting an answer different to that which seems to follow from an appellate judgment. So of course I understand the sentiment that motivated some of the views in *O'Connor*. No first instance judge wants to appear to differ from an appellate court. And no appellate court wants some lower court questioning its conclusions. And I might not have referred any of these questions if the applicants hadn't come up with anything new in terms of material or arguments. But leaving aside all that natural hesitation, my view of EU law is that if a domestic judge thinks that a point so decided really isn't *acte clair*, she does have a freedom to refer it, and to suggest whatever answers she sincerely considers appropriate, and that doing so can neither be prohibited nor restrained by quasi-legal condemnations of that being "inappropriate". The analogy that comes to mind, not exact perhaps, but illuminative, is the decision of the Court of Criminal Appeal in *The People (D.P.P.) v. Barnes* [2006] IECCA 165, [2007] 3 I.R. 130, where Hardiman J. said at para. 129, speaking of a trial judge making "arch" comments about the fact that counsel were not wearing wigs, that "it is inconsistent with respect for the proposition that counsel may not be required to wear wigs to make arch (or any) remarks about whether they are so equipped or not." The general point is that if arch commentary by relevant actors may dissuade the doing of something that is both lawful and legitimate, then that may not be permissible. The principle doesn't quite apply if the thing being done is lawful but unreasonable, but I don't see referring a question to the CJEU as even arguably within that category.

41. Maybe I should add that, to be entirely conventional about it, *Heather Hill* is currently the subject of a grant of leave to appeal to the Supreme Court, so is formally under appeal and therefore not so unconditionally precedential as might otherwise be the case. Indeed, ultra-orthodox interpretations would prelude its even being cited until it emerges from out of the further appellate process. So either way even if I might seem to transgressively venture some proposed answers that might strike a different note, this is in a spirit of the utmost respect to the Court of Appeal and in no way is intended to cut across the principle of *stare decisis.* In any event, contrary to the board's submission in *Jennings*, that principle is not breached here, on my interpretation at least, for a number of reasons, mainly because the referring court is not the decision-maker. The CJEU will be providing the relevant decisions on the questions referred. That's the whole point. And secondly, the applicant was making points that were

not argued in *Heather Hill*, and the doctrine of *stare decisis*, even if it applies, is subject to the wider principle that a point not argued is a point not decided, as the Supreme Court itself has emphasised in *The State (Quinn) v. Ryan* [1965] I.R. 70 (as noted in the No. 1 judgment).

42. Broadly therefore I agree with the applicants' submissions on the proposed question as to whether any domestic law rules as to *stare decisis* or domestic practices whereby such references could be viewed as inappropriate, should be disapplied. Those submissions were as follows:

> "1. The Applicants' answer is "Yes", a national court is required to disapply such a rule. This is based on a long line of consistent CJEU case law confirming that the discretion to refer questions to the CJEU under Article 267 TFEU is autonomous and cannot be constrained or qualified by national rules such as *stare decisis*. For example in [Judgment of 16 January 1974, Case 166/73, *Rheinmühlen-Düsseldorf,* ECLI:EU:C:1974:3, para 4 and 5] the Court of Justice held:
>
> > 4. National Courts have the widest discretion in referring matters to the Court of Justice if [they] consider that a case pending before them raises questions involving interpretation, or consideration of the validity of provisions, of provisions of Community Law necessitating a decision on their part.
> >
> > It follows from these factors that a rule of national law whereby a court is bound on points of law by rulings of a superior court cannot deprive the inferior courts of their power to refer to the Court questions of interpretation of Community law involving such rulings.
> >
> > It would be otherwise if the questions put by the inferior court were substantially the same as questions already put by the superior court.
> >
> > On the other hand the inferior court must be free, if it considers that the ruling on law made by the superior court could lead it to give a judgment contrary to Community law, to refer to the Court questions which concern it.
> >
> > If inferior courts were bound without being able to refer matters to the Court, the jurisdiction of the latter to give preliminary rulings and the application of Community law at all levels of the judicial systems of Member States would be compromised.
> >
> > 5. The reply must therefore be that the existence of a rule of domestic law whereby a court is bound on points of law by the ruling of the court superior to it cannot of itself take away the power provided by Article [267] of referring cases to the Court.
>
> 2. A further example is Case [Judgment of 15 January 2013, Case C-416/10, *Križan*, ECLI:EU:C:2013:8, para 68]:

> A rule of national law, pursuant to which legal rulings of a higher court bind another national court, cannot take away from the latter court the discretion to refer to the Court of Justice questions of interpretation of the points of European Union law concerned by such legal rulings. That court must be free, if it considers that a higher court's legal ruling could lead it to deliver a judgment contrary to European Union law, to refer to the Court of Justice questions which concern it.
>
> 3. See also [Judgment of 6 November 2014, C-42/13, *Cartiera Dell'Adda,* ECLI:EU:C:2014:2345, paras 26 to 28] where it was held that the discretion to refer is not even ousted by *res judicata* – "even though it has the force of res judicata under national law, the judgment of the Consiglio di Stato of 31 March 2012 cannot preclude the referring court from making a reference to the Court of Justice for a preliminary ruling if it considers that that judgment may be contrary to European Union law."
>
> 4. None of the above judgments appear to have been cited by or to the Court of Appeal in *Minister for Justice v O'Connor* [[2018] 3 IR 1 §26]"

43. The applicants went on to outline certain distinct differences between that case and the present, and went on to submit:

> "5. If a national court was precluded or in any way felt inhibited from referring a question this could lead to a situation where it could itself potentially be delivering a judgment contrary to European law. The proposed questions on protective costs are of European wide significance; further the duty of sincere co-operation under Article 4(3) TEU which applies to the Courts means it is appropriate that the proposed questions are referred. Otherwise the application of European law could be compromised."

44. Likewise I also broadly agree with the notice party's submissions which were as follows on this issue:

> "The answer is that it does. This question is 'acte clair', having been determined in the following cases, inter alia:
>
> 166/73 Rheinmuhlen: "A rule of national law whereby a court is bound on points of law by the rulings of a superior court cannot deprive the inferior courts of their power to refer to the Court questions of interpretation of Community law involving such rulings."
>
> C-378/08 ERG, §32: "a lower court must be free, if it considers that a higher court's legal ruling could lead it to give a judgment contrary to EU law, to refer to the Court questions which concern it."
>
> C-188/10 Melki and Abdeli, §42, Affirmed the same rule.
>
> C-416/10 Krizan, §68: "a national rule pursuant to which legal rulings of a higher court bind another national court, cannot take away from the latter court the discretion to

refer to the Court of Justice questions of interpretation of the points of European Union law concerned by such legal rulings."

C-136/12 Consiglio Nazionale di Geologi, §36 : "It is for the referring court alone to determine and formulate the questions referred for a preliminary ruling…. National rules which have the effect of undermining that jurisdiction must be disapplied."

45. The only reservation I have with these submissions is to the extent that they assert that the issue is *acte clair*. I would have been inclined to agree, but I think that the judgment of the Court of Appeal in *O'Connor* represents a different view as seen by the Irish appellate courts, so it would seem that the matter is therefore appropriate for a reference.

Relevant legal materials

46. A full list of the relevant EU, international and domestic legal material is set out in the appendix to the judgment together with web links.

Order for reference

47. With those matters addressed, the formal order for reference will be dealt with in a separate judgment.

Order

48. Accordingly, the order will be as follows:

(i). ClientEarth will be joined as an *amicus curiae* in the Protect East Meath case.

(ii). I will direct that the applicants jointly lodge the following documents with the List Registrar in an electronic form having agreed the contents with the other parties, within 28 days of the delivery of the judgment on the order for reference, for transmission to the CJEU by the Principal Registrar:

(a). a contents page in electronic form of the documents submitted;

(b). a PDF containing all pleadings; and

(c). an electronic version of all judgments (the version of the present judgments should preserve the clickable links) including an electronic version of the order for reference;

(iii). I will adjourn the hearing of the balance of the matter pending the decision of the CJEU; and

(iv). the matter will be listed for mention on Monday 25th July, 2022.

APPENDIX – RELEVANT LEGAL MATERIALS

European Law

(i). Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment.

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31985L0337

(ii). Directive 92/43/EEC of 21st May, 1992 on the conservation of natural habitats and of wild fauna and flora.

https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31992L0043&from=EN

(iii). Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control.

https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31996L0061&from=EN

(iv). Directive 2001/42/EC of the European Parliament and of the Council of 27th June, 2001 on the assessment of the effects of certain plans and programmes on the environment.

https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001L0042&from=EN

(v). Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJ L 124, 17.5.2005.

https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32005D0370&from=EN

(vi). Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. OJ L 264, 25.9.2006.

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006R1367

(vii). Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control.

https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008L0001&from=en

(viii). Directive 2011/92/EU of the European Parliament and of the Council of 13th December, 2011 on the assessment of the effects of certain public and private projects on the environment (as amended by council directive 2014/52/EU).

https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0092&from=EN

(ix). Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390.

https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=EN

(x). Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0052

(xi). Article 19, Consolidated version of the Treaty on European Union, OJ C 202, 7.6.2016, p. 27–27.

https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016M019&from=EN

European Caselaw

(i). Case C-11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (European Court of Justice, 17th December, 1970, ECLI:EU:C:1970:114).

https://curia.europa.eu/juris/showPdf.jsf?text=&docid=88063&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7296521

(ii). Case C-166/73 *Rheinmühlen Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (European Court of Justice, 16th January, 1974, ECLI:EU:C:1974:3).

https://curia.europa.eu/juris/showPdf.jsf?text=&docid=88645&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2376490

(iii). Case C-181/73 *Haegeman v. Belgium* (European Court of Justice, 30th April, 1974, ECLI:EU:C:1974:41, [1973] I-E.C.R. 449).

https://curia.europa.eu/juris/showPdf.jsf?text=&docid=88512&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=799338

(iv). Case C-12/86 *Demirel v. Stadt Schwäbisch Gmünd* (European Court of Justice, 30th September, 1987, ECLI:EU:C:1987:400).

https://curia.europa.eu/juris/showPdf.jsf?text=&docid=94569&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=799338

(v). Case C-348/*89 Mecanarte - Metalúrgica da Lagoa Ldª v. Chefe do Serviço da Conferência Final da Alfândega do Porto* (European Court of Justice, 27th June, 1991, ECLI:EU:C:1991:278).

https://curia.europa.eu/juris/showPdf.jsf?text=&docid=97054&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2376490

(vi). Case C-53/96 *Hermès International v. FHT Marketing Choice BV* (European Court of Justice, 16th June, 1998, ECLI:EU:C:1998:292).

https://curia.europa.eu/juris/showPdf.jsf?text=&docid=43933&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=799338

(vii). Joined Cases C-300/98 and C-392/98 *Dior SA v. TUK Consultancy BV and Assco Gerüste GmbH v. Wilhelm Layher GmbH & Co. KG* (Court of Justice of the European Union, 14th December, 2000, ECLI:EU:C:2000:688).

https://curia.europa.eu/juris/showPdf.jsf?text=&docid=45447&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=799338

(viii). Case C-239/03 *Commission of the European Communities v. French Republic* (Court of Justice of the European Union, 7th October, 2004, ECLI:EU:C:2004:598).

https://curia.europa.eu/juris/document/document.jsf?text=&docid=49170&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3550347

(ix). Case C-212/04 *Konstantinos Adeneler v. Ellinikos Organismos Galaktos* (Court of Justice of the European Union, 4th July, 2006, ECLI:EU:C:2006:443).

https://curia.europa.eu/juris/document/document.jsf?text=&docid=56282&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3550347

(x). Case C-431/05 *Merck Genéricos - Produtos Farmacêuticos Ldª v Merck & Co. Inc.* (Court of Justice of the European Union, 11th September, 2007, ECLI:EU:C:2007:496).

https://curia.europa.eu/juris/document/document.jsf?text=&docid=62603&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3506122

(xi). Case C-210/06 *Cartesio Oktató és Szolgáltató bt.* (Court of Justice of the European Union, 16th December, 2008, ECLI:EU:C:2008:723).

https://curia.europa.eu/juris/document/document.jsf?text=&docid=76078&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2376490

(xii). Case C-427/07 *Commission of the European Communities v. Ireland* (Court of Justice of the European Union, 16th July, 2009, ECLI:EU:C:2009:457).

https://curia.europa.eu/juris/document/document.jsf?text=&docid=72488&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=376792

(xiii). Case C-378/08 *Raffinerie Mediterranee (ERG) SpA v. Ministero dello Sviluppo economico* (Court of Justice of the European Union, 9th March, 2010, ECLI:EU:C:2010:126).

https://curia.europa.eu/juris/document/document.jsf?text=&docid=79751&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7296521

(xiv). Joined Cases C-188/10 *Melki* and C-189/10 *Abdeli* (Court of Justice of the European Union, 22nd June, 2010, ECLI:EU:C:2010:363).

https://curia.europa.eu/juris/document/document.jsf?text=&docid=80748&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7296521

(xv). Case C-409/06 *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim* (Court of Justice of the European Union, 8th September, 2010, ECLI:EU:C:2010:503).

https://curia.europa.eu/juris/document/document.jsf?text=&docid=80771&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7296521

(xvi). Case C-1 73/09 *Elchinov v. Natsionalna zdravnoosiguritelna kasa* (Court of Justice of the European Union, 5th October, 2010, ECLI:EU:C:2010:581).

https://curia.europa.eu/juris/document/document.jsf;jsessionid=6CF9C62E836371F9D15C6A70022C5A50?text=&docid=81396&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=279921

(xvii). 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).

https://curia.europa.eu/juris/document/document.jsf?text=&docid=80235&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=376792

(xviii). Case C-295/10 *Valčiukienė v. Pakruojo Rajono Savivaldybė* (Court of Justice of the European Union, 22nd September, 2011, ECLI:EU:C:2011:608).

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