[2023] IEHC 591

THE HIGH COURT
JUDICIAL REVEW

[2020 No. 568 JR]

BETWEEN

HELLFIRE MASSY RESIDENTS ASSOCIATION

APPLICANT

AND

AN BORD PLEANÁLA, THE MINISTER FOR HOUSING, HERITAGE AND LOCAL GOVERNMENT (BY ORDER), IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

SOUTH DUBLIN COUNTY COUNCIL

NOTICE PARTY

(No. 5)

JUDGMENT of Humphreys J. delivered on Friday the 27th day of October, 2023

Judgment history

1. This is the eighth judgment or decision arising from these proceedings, the applicant having lost on all grounds to date.

2. In *Hellfire Massy Residents Association v. An Bord Pleanála* (No. 1) [2021] IEHC 424, [2021] 7 JIC 0201 (Unreported, High Court, 2nd July, 2021), I decided in principle to refer certain questions to the CJEU having dismissed the applicant's proceedings on other points.

3. In *Hellfire Massy Residents Association v. An Bord Pleanála* (No. 2) [2021] IEHC 636, [2021] 10 JIC 1302 (Unreported, High Court, 13th October, 2021), I refused leave to appeal to the Court of Appeal in relation to the dismissed matters.

4. In *Hellfire Massy Residents Association v. An Bord Pleanála* (No. 3) [2021] IEHC 771 I added two *amici curiae*.

5. In *Hellfire Massy Residents Association v. An Bord Pleanála* (No. 4) [2022] IEHC 2, [2022] 1 JIC 1406 I made the formal order for reference.

6. In *Hellfire Massy Residents Association v. An Bord Pleanála* (No. 5) [2022] IESCDET 21 the Supreme Court granted an application for leapfrog leave to appeal in relation to the dismissed matters.

7. In *Hellfire Massy Residents Association v. An Bord Pleanála* (No. 6) [2022] IESC 38, [2022] 10 JIC 2402 (O'Donnell C.J.) Hellfire 2022 IESC 38 the Supreme Court dismissed the appeal on the merits.

8. In judgment of 6 July 2023, *Hellfire Massy Residents Association v An Bord* Pleanála & Ors, C-166/22, ECLI:EU:C:2023:545 , the CJEU (Seventh Chamber) answered the referred questions as follows:

> "Articles 12 and 16 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora
> must be interpreted as meaning that a piece of national legislation intended to transpose those provisions into national law cannot be regarded as contrary to that directive on the ground that that piece of national legislation does not provide for (i) a development consent procedure which involves a decision by a competent authority determining whether it is necessary to apply for a derogation under Article 16 of the abovementioned directive because of matters identified following the grant of development consent to a project and/or whether surveys are required to that end or (ii) public participation in that derogation procedure."

9. Accordingly I am now resuming the main proceedings in order to determine them in accordance with the judgment of the CJEU.

10. The applicant now seeks declaratory relief. It also seeks costs irrespective of whether a declaration is granted or not.

Facts

11. As noted in previous judgments, the applicant challenges the validity of the Irish legislation regarding strictly protected species set out in regulations adopted to give effect to the habitats directive 92/43/EEC and the birds directive 2009/147/EC. This challenge to the legislation arose in the context of a challenge to a development consent granted, with conditions, on 25th June, 2020 by An Bord Pleanála ("the board") to South Dublin County Council ("the council") for two buildings comprising a visitor centre at Montpelier Hill in County Dublin, a tree canopy walk/pedestrian bridge over the R115, conversion of conifer forest to deciduous woodland and conservation works to existing structures.

12. The formal application for a visitor's centre and associated works was submitted directly to the board under s. 175 of the 2000 Act on 31st July, 2017. The lands concerned are owned by Coillte, which is consenting to the application. No part of the development is within a European site.
13. The main elements of the application are for two buildings comprising the visitor centre, a tree canopy walk/pedestrian bridge over the R115, conversion of conifer forest to deciduous woodland and conservation works to existing structures.
14. An oral hearing took place over six days between 20th and 27th November, 2018.
15. On 9th January, 2019, the inspector prepared a first report which was negative in nature. It indicated that the inspector was satisfied with the issues of proper planning, zoning and design, but considered that the impact of the bridge had not been fully assessed. The inspector thought that very little surveying had been carried out in Massy's Woods (para. 10.3.11). Certain aspects of the design were queried.
16. Her main concerns were with biodiversity, noting the impact on squirrels from both clear-felling for the car park and replacement of coniferous trees with deciduous trees. The latter would give the invasive grey squirrel the advantage in its ongoing battle with the native red squirrel (see para. 11.6.5).
17. She notes that a squirrel drey was recorded (para. 11.6.16) and also referred to mitigation measures (para. 11.6.17). Observers provided evidence of other dreys in Massy's Woods (para. 11.6.19) and she noted the intention to conduct a pre-construction survey.
18. The report noted that the EIAR table 6.16 notes that there will be a loss of a drey and a further information response notes that a derogation licence would be sought to destroy one drey (para. 11.6.20). The inspector said that this was contradicted at the oral hearing in that it was stated that the design of the car park was arranged to avoid the drey.
19. Following further information and public participation, the inspector then produced an addendum to the report on 6th May, 2020.
20. The inspector thought that "there were obvious gaps in the information initially provided", but "I am satisfied that those lacunae have been addressed" (para. 5.4.26). She noted that the NPWS was of the same view and generally considered that matters had been adequately addressed.
21. On foot of that addendum and the original report, the board decided to approve the application, with conditions, on 25th June, 2020.
22. The board's decision states that it had regard, among other things, to the habitats directive 92/43/EEC, the birds directive 79/409/EEC, the water framework directive 2000/60/EC and the EIA directive 2014/52/EU amending directive 2011/92/EU. Regard was also had to national, regional and local policy to the objectives and interests of the Wicklow Mountains SPA (004040) and the Wicklow Mountains SAC (002122).
23. The board completed an appropriate assessment exercise and concluded there was no adverse effect on European sites. It also completed an environmental impact assessment and concluded that the main direct and indirect effects would be mitigated as set out in the decision. The conclusion was that "subject to the implementation of the mitigation measures proposed … and subject to compliance with the conditions set out … the effects on the environment of the proposed development … would be acceptable".
24. While the inspector had recommended to omit the tree-top bridge and canopy and bridleway in Massy's Woods, the board decided not to omit that element, essentially on the basis of the further ecological information and surveys.
25. The board concluded that the proposed development would be in accordance with proper planning and sustainable development. Nine conditions were imposed including applying the mitigation measures in the EIAR (condition 2) and the NIS (condition 3), a revised forestry management plan to retain the majority of mature conifers on the Hellfire plantation to support the red squirrel (condition 5), and the engagement of an ecological clerk of works (condition 7).

Procedural history

26. The proceedings were instituted on 14th August, 2020, seeking *certiorari* of the permission granted and various declaratory reliefs.
27. An outline of the procedural history can be gathered from the judgments referred to above.
28. A first module related to the validity of the permission. That was determined against the applicant, a decision that was upheld on appeal. The court then turned to the declaratory relief, and referred questions to the CJEU in that regard.
29. Following the judgment of the CJEU, correspondence took place between the parties from 21st July, 2023 onwards, as to what order if any the court should make in the light of the decision of the CJEU.
30. The hearing of the present, final module in the proceedings which deals with whether to grant declaratory relief in the light of the judgment of the CJEU, took place on 23rd October, 2023.

Relief sought

31. The relief sought in the amended statement of grounds is as follows:

"D. Reliefs:

1. An Order of Certiorari by way of application for judicial review quashing the decision of the First Respondent ("The Board") dated 25th June 2020 to approve the construction of a visitors centre, car park and associated works at Montpelier Hill in south County Dublin.

2. Such declaration(s) of the legal rights and/or legal position of the applicant and/or persons similarly situated and/or the legal duties and/or legal position of the Respondents and as the court considers appropriate.

~~2. A Declaration that the public consultation process adopted by the Notice Party ('the Council') breached the public participation rights and the rights to fair procedures of the Applicant.~~

3. A Declaration that the public consultation procedure provided by the Second Respondents contained in section 175 of the Planning and Development Act 2000 is incompatible with the requirements of the EIA Directive and/or breaches the Applicant's rights to fair procedures, constitutional rights and rights to effective public participation.

~~4. A Declaration that the Board erred in law in granting permission for the proposed development without considering adequately or at all the impacts on bat fauna for the purposes of Article 12 of Council Directive 92/43 on protection of natural habitats ("the Habitats Directive") and/or article 4 of Directive 2011/92/EC (as amended) (the "EIA Directive")~~

~~5.~~4. A Declaration that Articles 51 and 54 of the European Communities (Birds and Natural Habitats) Regulations 2011 (SI No 477 of 2011) are contrary to Articles 12 and 16 of Council Directive 92/43 on protection of natural habitats ("the Habitats Directive").

~~6. A Declaration that the Board erred in law in granting permission for the proposed development without considering adequately or at all the impacts on red squirrel fauna contrary to the EIA Directive and/or the Wildlife Act 1976 and/or contrary to the Applicant's rights to a justified conclusion/reasons.~~

~~7. A Declaration that the Board erred in law in granting permission for the proposed development without considering adequately or at all the impacts on otter fauna for the purposes of Article 12 of the Habitats Directive.~~

~~8. A Declaration that the Board erred in law in granting permission for the proposed development without considering adequately or at all the impacts on Marsh Fritillary fauna contrary to the requirements of the EIA Directive and/or contrary to the Applicant's rights to a justified conclusion/reasons.~~

~~9. A Declaration that the Board erred in law in conducting a Stage 2 Appropriate Assessment that concluded that there would be no significant effects from the proposed development on qualifying interests of the Wicklow Mountains SAC and the Wicklow Mountains SPA.~~

~~10.~~5. A stay, if necessary, on the undertaking of any works pursuant to the grant of the planning permission for the proposed development pending the hearing of the action.

~~11.~~6. An Order providing for the costs of the application and, where appropriate, an Order pursuant to sections 3, 4 and 7 of the Environment (Miscellaneous Provisions) Act 2011 and/or Section 50B of the 2000 Act and / or Order 99 of the Rules of the Superior Courts in respect of the costs of this application.

~~12. Such further or other Order as this Honourable Court deems appropriate."~~

32. Reliefs 1, 3 and (insofar as concerns the pre-consent process) 4 were dismissed in the No. 1 judgment.

33. A stay (relief 5) doesn't arise because *certiorari* has been dismissed.

34. The applicant clarified that it wasn't pursuing the declaration at relief 4. That was sensible because as regards relief 4, it follows from the judgment of the CJEU that that court rejected the basis for impugning the 2011 regulations which was the alleged need for an interlinkage between the planning system and the derogation system.

35. So the only substantive relief remaining is the general declaration (relief 2).

Relevant grounds of challenge

36. The relevant grounds are as follows:

"45. Thirdly, it is the Applicant's case that reliance on *ex-post* grant derogation licences is incompatible with the requirements of strict protection for the purposes of the Habitats Directive. This approach is completely incompatible with the decisions of the Court of Justice in *Finnish Wolves Case* C-647/17 and *Commission v Ireland* Case C-183/05.

46. In its "Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC" the Commission explains at p45 "Breeding sites and resting places are to be strictly protected, because they are crucial to the life cycle of animals and are vital parts of a species' entire habitat. Article 12(1)(d) should therefore be understood as aiming to safeguard the continued ecological functionality of such sites

and places, ensuring that they continue to provide all the elements needed by a specific animal to rest or to breed successfully. The protection applies all year round if these sites are used on a regular basis."

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

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

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

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

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

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

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

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

The claimed declaration

37. By letter of 6th October, 2023, the applicant suggested a declaration reflecting para. 36 of the judgment of the CJEU. That paragraph of the judgment provides as follows:

"36 It follows from that case-law that, in the specific case where, first, the execution of a project that is subject to the dual requirement for assessment and development consent laid down in Article 2(1) of Directive 2011/92 involves the developer applying for and obtaining a derogation from the plant and animal species protection measures prescribed in the provisions of national law transposing Articles 12 and 13 of Directive 92/43 and where, second, a Member State confers power to grant such a derogation on an authority other than the one on which it confers power to give development consent for the project, that potential derogation must necessarily be adopted before development consent is given. If it were otherwise, that development consent would be given on an incomplete basis and would not, therefore, meet the applicable requirements (see, to that effect, judgment of 24 February 2022, *Namur-Est Environnement*, C-463/20, EU:C:2022:121, paragraphs 52 and 59 and the case-law cited)."

38. It needs to be noted however that the next paragraph of the judgment of the CJEU provides rather crucial context as follows:

"37 However, as is apparent from the file before the Court and, in particular, from the referring court's judgment of 2 July 2021, the referring court, which alone has jurisdiction to find and assess the facts of the dispute in the main proceedings, has already held that,

> at the time when the decision of 25 June 2020 was adopted, the need to obtain a derogation under Regulation 54 of the 2011 Regulations had not been identified. It follows that the situation referred to in the previous paragraph, namely that in which the obtaining of such a derogation is required before development consent is given, has not arisen in this instance."

39. The proposition is that if a derogation licence is necessary, it should be obtained in advance. But while that may be important in another case, it doesn't arise here because a derogation licence isn't necessary as matters stand. The derogation licence was envisaged to allow destruction of a drey. But as noted above, it was clarified at the oral hearing in 2018 that the drey will not be destroyed and the car park has been redesigned to avoid that. So the applicant is essentially trying to hang on to an old point that has been scotched five years ago.

40. Thus it is somewhat surprising that the proposed declaration sought by the applicant is along the following lines:

> "The Planning and Development Act 2000 (and other legislation covering development consent) and the European Communities (Birds and Habitats) Regulations 2011(SI 477 of 2011) must be interested as requiring that where a proposed development requiring development consent and environmental impact assessment involves the developer applying for and obtaining a derogation under Regulations 54, 54A, 55 or 55A of Articles 12 and 13 of SI 477 of 2011, that potential derogation must be sought and granted before development consent is given."

41. The applicant therefore wants a declaration replicating (or applying to Irish law) general comments in para. 36 of the judgment of the CJEU. There are multiple reasons why that can't be appropriate:

(i) this complaint wasn't pleaded, and the applicant did not specifically identify any ground in the statement of grounds supporting the proposed declaration - the best the applicant could do is to say that the CJEU often reformulates questions, which is absolutely right but that doesn't bring it within the leave order;

(ii) the pleadings in fact make a different point - what is apparent is that the applicant did not contend (even as an alternative proposition) that the developer should have obtained a derogation licence from the Minister first; rather the whole system is attacked and centrally it is asserted (ground 52) that the board itself should make the crucial determination;

(iii) the issue did not arise in this case because this wasn't a case where the proposed development involved the developer applying for a derogation – that is only a possibility not something that we know to be required;

(iv) the CJEU itself expressly says at para. 37 that the situation referred to did not arise;

(v) the proposed declaration therefore is an impermissible advisory opinion; and

(vi) in any event the judgment of the CJEU speaks for itself and a declaration by me repeating that or purporting to apply it (especially to hypothetical facts) doesn't add anything here – one could conceive of situations where that might be appropriate but this certainly isn't one of them.

42. The authorities relied on by the applicant get it nowhere near an entitlement to a declaration and indeed militate against such a relief insofar as they emphasise the requirement that such a relief add something to the mix. The declaration is an equitable remedy and so must serve some tangible purpose.

43. As the board put it in correspondence, the alleged need for the declaration is based on "mere assertion and conjecture". Everybody now has the CJEU judgment and (in the absence of demonstrable legal reason to the contrary) will need to apply it going forward albeit that strictly it is *obiter* on this point. There's no reason to think they won't. If for some reason the competent authorities don't do that, then the court is on standby to attend to any proceedings that may be instituted at that point, but it is an improvident use of the court's limited resources to try to anticipate such future proceedings. There is no evidence that the CJEU judgment is causing, or is going to cause, any practical difficulties of interpretation, even if it was appropriate to clarify that in this case, which it isn't: see by analogy *Phoenix Rock Enterprise v. An Bord Pleanala* [2023] IESCDET 97 at 22 and 30. The applicant faintly sought to suggest in correspondence that there was some form of contradiction between the judgment of the CJEU and the earlier judgments of the court, but that is "contrived" as the board puts it in correspondence. Even if it wasn't, the CJEU position would prevail and, as I say, that speaks for itself.

Costs

44. There is also no basis for costs to the applicant given that the proceedings have wholly failed especially in a context where the applicant has enjoyed complete costs protection against an adverse order for such proceedings that have failed at every stage (see *An Taisce v. ABP* (No. 4) [2022] IESC 18, [2022] 4 JIC 0402). This case does not come within an exceptional category allowing such

an order. Section 50B(4) of the 2000 Act isn't engaged by raising hypothetical points, or points that may have practical implications but in other cases. The fact that matters were referred to Luxembourg is insufficient to order costs to a losing applicant (*M.S. (Afghanistan) v. Minister for Justice and Equality* [2021] IEHC 164, [2021] 3 JIC 1608). The State has the right of it by stating in correspondence that "[t]here is simply no credible basis for the application of s. 50B(4)".

45. Planning law is already one-sided enough, and the court needs to strive not to make it even more so: *Marshall v. Kildare County Council* [2023] IEHC 73, [2023] 2 JIC 1705 (Unreported, High Court, 17th February, 2023). In the absence of exceptional circumstances, bankrolling an applicant's beaten docket would imbalance things even further.

46. This whole application is devastatingly summarised by the board in correspondence of 12th October, 2023 as follows:

> "The applicant is attempting to opportunistically capitalise on the obiter dictum at §36 of the CJEU's judgment about a hypothetical scenario which does not arise in this case, in order to seek to obtain from this Court a declaration and an order as to costs."

Order

47. For the foregoing reasons, it will be ordered that the proceedings be dismissed with no order as to costs (including no order as to reserved costs or as to costs before the CJEU).