AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2021:000126

O'Donnell C.J.
Dunne J.
Woulfe J.
Hogan J.
Murray J.

Between/

HELLFIRE MASSY RESIDENTS ASSOCIATION

Appellant

-and-

AN BORD PLEANÁLA, THE MINISTER FOR HOUSING, PLANNING &

LOCAL GOVERNMENT, IRELAND AND THE ATTORNEY GENERAL

Respondents

-and-

SOUTH DUBLIN COUNTY COUNCIL

Notice Party

Judgment of Mr. Justice O'Donnell, Chief Justice, delivered on the 24th October, 2022.

1. This appeal raises a novel point which illustrates the complexity of planning law and judicial review procedure particularly when, as is almost now universally the case, issues of European law are sought to be relied upon.

2. The development which is the subject matter of these proceedings is a proposed visitor centre near the Hellfire Club, an 18th Century building at the summit of Montpelier Hill in County Dublin. It is proposed that it would be developed by the South Dublin County Council ("the Council"), which is the notice party. The development of a Dublin Mountain Visitor Centre was first proposed in 2007, and was identified as an objective in the 2016-2022 South Dublin Development Plan. The details of the development and the somewhat tortuous planning history are set out in four judgments delivered by the learned High Court judge in this matter:-

(i) [2021] IEHC 424 (the substantive judgment and the subject matter of this appeal -"Judgment Number 1");

(ii) [2021] IEHC 636 (Refusal of leave to appeal to Court of Appeal – "Judgment Number 2");

(iii) [2021] IEHC 771 (joinder of two *amici curiae* – "Judgment Number 3"); and

(iv) [2022] IECH 2 (ruling re: questions for Article 267 reference to the Court of Justice of the European Union ("CJEU") – "Judgment Number 4")

For present purposes, however, it is possible to focus upon a small subset of issues raised and facts addressed in the proceedings while, however, keeping in mind that the issues starkly highlighted in this appeal were only a small part of a larger and more detailed and complex piece of litigation.

3. After discussions at County Council level and public open days, the planning process was commenced by an application in 2017 to An Bord Pleanála ("the Board") pursuant to the Planning and Development Act, 2000 as amended ("the 2000 Act") for a determination of whether the Council was required to carry out an Environmental Impact Assessment ("EIA"). The Inspector appointed by the Board recommended that the Council should not be so required, but the Board decided to the contrary, having regard to the impact of increased visitor numbers on historical and archaeological heritage. Accordingly, in July, 2017, an application for permission was submitted to the Board pursuant to s. 175 of the 2000 Act accompanied by an Environmental Impact Assessment Report ("EIAR"). The main elements of the proposed development were two buildings comprising the visitor centre, a tree canopy walk/pedestrian bridge over the old Military Road, R115, and the proposed conversion of conifer forest to deciduous woodland. Further information was requested, and a further round of public consultation ensued, culminating in an oral hearing of six days duration. The Inspector's report raised concerns relating to biodiversity in relation to the impact on squirrels and bats. The report also raised concerns as to the appropriate assessment relating to the impact on European sites.

4. Following the receipt of the report, the Board requested further information and a revised EIAR was submitted. The Inspector concluded that, while there had been obvious gaps in the information provided initially, those *lacunae* had been addressed, and the Board then decided to approve the application subject to a number of conditions.

5. The applicant challenged the decision on, what the High Court judge described as, "a modest 98 grounds", resulting in extensive pleadings and the delivery of lengthy legal submissions by the parties. For present purposes, however, it is relevant to note that the respondents to the proceedings were the Board, which had granted the permission sought to be challenged, and the Minister for Housing Planning and Local Government, Ireland

and the Attorney General ("the State Bodies"), and that South Dublin County Council, the proposed developer, was a notice party. The trial judge with commendable lucidity and brevity rejected two domestic law points of challenge relating to the assessment of visitor numbers, and compliance with the public consultation provisions of the 2000 Act, and also dismissed challenges contending that there had been inadequate assessment by reference to identified European law provisions. No issue now arises in relation to any of these grounds.

6. In addition to these challenges relating to the manner in which the permission process was conducted, the applicant also raised an issue in relation to the validity of the public participation provisions contained in s. 175 of the 2000 Act and had also challenged the validity of Regulations 51 and 54 of the European Communities Birds and Natural Habitats Regulations of 2011 (S.I. 477 of 2011) ("the 2011 Regulations") which in turn implemented the Habitats Directive, 2009/147/EC, as amended ("the Habitats Directive"). Again, the High Court judge rejected the challenge to s. 175 and no issue now arises in relation thereto. However, this appeal is concerned with the challenge to the 2011 Regulations and what flows from that.

7. As the trial judge observed, the pleadings in this regard are not entirely clear and it will accordingly be necessary to set them out in detail. However, before doing so, it is important to explain the particular factual issue that arises, and by reference to which the claim was made.

8. The particular focus of the applicant's challenge were the provisions of Regulations 51 and 54 of the 2011 Regulations. The 2011 Regulations themselves implement the Habitats Directive, and, among other things, create an offence of interfering with, destroying, or causing the deterioration of, habitats. Regulations 51 to 54 (and, indeed, 55) however, provide for the possibility of derogation from the 2011 Regulations in certain

circumstances. As one might expect , it is possible that issues may arise in relation to interference with the habitat and the possibility of seeking a derogation in advance of the development as a result of matters which may be disclosed in an EIS or in the Environmental Impact Assessment ("EIA"), or may arise thereafter, in the course of development, or indeed the operation of it. These provisions of the 2011 Regulations seek to make provision for this contingency.

9. The pleadings insofar as they are relevant may be summarised 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. …

47. …

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. …

52. …

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, Article 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."

[Emphasis added]

10. The trial judge observed that it is not entirely clear what is being alleged here other than the invalidity of the 2011 Regulations. It is clear that what is being complained about is the asserted inadequacy of the procedure available after consent or permission being granted. However, it is not entirely clear whether what is being alleged here was a challenge to the decision itself or merely to the validity to the 2011 Regulations, which, as the trial judge observed, was capable of being a self-standing claim giving rise to declaratory relief. While paragraph 54 appeared to limit the claim to a claim against the State respondents, (and therefore directed to the general validity of the 2011 Regulations) this portion of the pleadings was headed "Grounds 1, 4 and 5 – Bat Fauna". Relief 1 is a

claim for *certiorari* of the decision granting permission, and Relief 4 is a declaration of the invalidity of the 2011 Regulations.

11. In ease of the applicants, the judge assumed that it was being alleged that the asserted invalidity of the 2011 Regulations was also relied upon as invalidating the decision to grant permission. In analysing that claim, however, he drew a sharp distinction on the facts. While questions relating to habitat had been raised during the planning process, there was no question of disturbance or destruction of habitat being contemplated by the decision, and accordingly no question of derogation being required or provided for or was even contemplated by the decision granting permission. There was no sense in which the permission relied upon the possibility of post-grant derogation being available. Humphreys J. concluded therefore that the decision to grant permission could not be said to have been made by virtue of the provisions of the 2011 Regulations, and specifically Regulations 51 and 54. It followed accordingly that any possible invalidity of the 2011 Regulations and/or those provisions, could not affect the validity of the decision to grant permission. At paragraph 61 of Judgment No. 1, it is stated that "the board did not rely on the prospect of grant of a derogation licence for anything that was being specifically authorised that was known about as of the time of the development consent … Consequently, the board did not "rely" on a derogation licence in the sense pleaded".

12. At paragraph 79 of the same judgment, the judge concluded that: "[b]ecause the decision wasn't taken *under* the 2011 regulations, it cannot be invalid by reference to a challenge to the 2011 regulations" [emphasis in original]. He concluded that, at least as far as the pre-consent situation was concerned, no question of reliance on the 2011 Regulations or the possibility of derogation arose, and accordingly, even if it were to be determined that the 2011 Regulations did not properly transpose the requirements of the Habitats Directive, that could have no impact upon the grant of permission. Accordingly, he

dismissed the case insofar as it related to the reliefs granted by way of *certiorari*, and the challenge to validity of s. 175 of the 2000 Act, and the challenge to the invalidity of the 2011 Regulations "insofar as it concerned the pre-development consent situation". The Board and the Council were then dismissed from the case with no order as to costs with an entitlement to make submissions in the event that the remaining matter in the case required a reference under Article 267 of the Treaty on the Functioning of the European Union ("TFEU"). Following that decision, he proceeded to hear further submissions on the validity of the 2011 Regulations regarding the post consent situation, a claim in respect of which the State parties were the only respondent.

13. In that regard, the trial judge considered (at paragraph 95 of Judgment No. 1) that the declaration claim was quite separate from the *certiorari* claim and therefore not affected by the failure of that latter claim in respect of the validity of the permission. He considered that there was an arguable basis for an anticipatory challenge and for that purpose found as a matter of fact that there was a reasonable possibility that a post consent survey could give rise to a need to apply for a derogation under Article 16 of the Directive. While that was far from certain, it was a sufficient possibility given the nature of the habitat the species concerned and the precautionary approach and the necessary and inevitable terms of the EIAR, and accordingly gave rise to questions which he considered required a reference to the CJEU under Article 267 TFEU.

14. In the event that he considered four questions arose for determination by the CJEU for the purposes of that reference. They are as follows:-

(1) Whether the general principles of EU law arising from the supremacy of the EU legal order have the effect that a rule of domestic procedure, whereby an applicant in judicial review must expressly plead the relevant legal provisions cannot preclude an applicant who challenges the compatibility of domestic law with

identified EU law from also relying on a challenge based on legal doctrines or instruments that are to be read as inherently relevant to the interpretation of such EU law, such as the principle that EU environmental law should be read in conjunction with the Aarhus Convention as an integral part of the EU legal order.

(2) Whether Article 12 and/or 16 of Directive 92/43 EEC and/or those provisions as read in conjunction with Article 9(2) of the Convention on Access to Information Public Participation the Decision Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998 and/or in conjunction with the principle that Member States must take all the requisite specific measures for the effective implementation of the directive have the effect that a rule of domestic procedure whereby an Applicant must not raise a "hypothetical question" and "must be affected in reality or as a matter of fact" before she can complain regarding the compatibility of the domestic law with a provision of EU law cannot be relied upon to preclude a challenge made by an Applicant who has invoked the public participation rights in respect of an administrative decision and who then wishes to pursue a challenge to the validity of a provision of domestic law by reference to EU law in anticipation of future damage to the environment as a result of an alleged shortcoming in the domestic law, where there is a reasonable possibility of such future damage, and in particular because the development has been authorised in an area which is a habitat for species subject to strict protection and/or because applying the precautionary approach there is a possibility that post consent surveys may give rise to a need to apply for a derogation under Article 16 of the Directive.

(3) Whether Articles 12 and/or 16 of Directive 92/43 EEC and/or those provisions as read in conjunction with Article 6(1), 2(9), and/or 9(2) of the Convention on Access to Information, Public Participation in Decision Making and

Access to Justice and Environmental Matters done at Aarhus, Denmark, on 25 June 1998 and/or with the principle that Member States must take all the requisite specific measures for the effective implementation of the directive have the effect that a derogation licence system provided in domestic law to give effect to article 16 of the Directive should not be parallel to and independent of the development consent system but should be part of an integrated approval process involving a decision by a competent authority (as opposed to an *ad hoc* judgement formed by the developer itself on the basis of a general provision of criminal law) as to whether a derogation licence should be applied for by reason of matters identified following the grant of development consent and/or involving a decision by a competent authority as to what surveys are required in the context of consideration as to whether such a licence should be applied for.

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

15. This issue was touched in both the second and fourth judgments of the High Court. One of the issues sought to be appealed by the appellant concerned the dismissal of the *certiorari* challenge in circumstances where an issue was being referred to the CJEU on

the validity of the 2011 Regulations. This was dealt with by the High Court judge at paras. 9-11 of Judgment No. 2 as follows:-

> "9. Secondly and independently, the argument that this issue is "integral to th[e] the permission" does not arise on the facts: see para. 61 of the No. 1 judgment. The board did not rely on a derogation licence in the sense pleaded. As noted in para. 79 of the No. 1 judgment, the decision was not taken "under" the European Communities (Birds and Natural Habitats) Regulations 2011 …, which are meant to give effect to the system of strict protection, so it cannot be invalid on the basis of any challenge to those regulations.
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> 10. The applicant also in this context makes the elaborate-sounding point that the principle of effectiveness of European law and the requirement to implement Directives with "unquestionable binding force" … means that permissions that rely on an invalid procedure must be quashed.
>
> 11. The applicant would indeed have a point if the decision did in fact rely on the legislation and a court dismissed the challenge to the decision by continuing to entertain a challenge to the validity of the legislation. But that is not factually the case so this conceptually interesting point does not arise."

16. In the fourth judgment, the High Court judge, applying a practice developed by him, delivered a ruling on the formulation of the questions to be referred to the CJEU and proposed answers to them. The State parties had contended that the third question proposed, relating to the possible necessity that the derogation system be part of an integrated approval process, was not necessary (and therefore did not require an Article 267 reference) since no derogation licence was required at the time of the development consent. The High Court judge dealt with this at paragraphs 69 and 70 of Judgment No. 4:-

"69. As regards the State objection of lack of clarity, this confuses the issue here because the reference relates only to the question of how derogation should be granted after the grant of development consent. Hence it is clearly irrelevant that no derogation licence is currently required as of the time of grant of the development consent. I don't accept that where the No. 1 judgment refers to some level of integration of the derogation system with the development consent system, that this is unacceptably clear. The concept is phrased as a question in general terms because it is the very question on which guidance from the CJEU is sought.

70. The reason for the reference of this question is that the Irish derogation licence system is independent of the planning consent system and thus the process of surveys and scrutiny for the purposes of EIA and AA does not carry over into any post-consent developments. If the question was answered Yes then the Irish system would need to be integrated so that the development consent decision-maker would have a role in scrutinising any subsequent derogation application or at least in determining what level of surveys and measures would have to be undertaken for such an application

17. The appellant's arguments on this appeal were put with attractive simplicity. The third and fourth questions raised issues over the procedure which was followed or might have to be followed in respect of disturbance of habitats. In particular, the third question raised the issue of whether the parallel process of development consent and derogation licences under the 2011 Regulation was one which required to be integrated. Indeed, the High Court judge had expressed the provisional view that this separation of the system was not compatible with the requirements of European law and, in particular, the requirement of strict protection under the Habitats Directive. It was not necessary, or indeed possible, to decide if this is a correct view. That was a matter for the CJEU. However, this appeal

must be approached on the basis that it is at least possible that the CJEU may take the same view. If so, it was argued, it would follow that Irish law would in some respect be deficient, and it was argued, that it must also follow that the permission which, on this argument would have been granted under a flawed and unlawful procedure, was invalid and should be quashed. However, the dismissal of the claim for *certiorari* would preclude that possibility. It follows therefore, it was argued, that the High Court was wrong to dismiss the claim for *certiorari* of the permission, and that the proper course was to have adjourned the question of the validity of the development permission pending the determination of the reference.

18. This argument was strengthened somewhat by the observation that the CJEU is not bound by the form or content of the question posed by the national court, and often amalgamates and reformulates them, and that it was possible in its discussion of the general issue that it might make observations casting light on the question of validity of the permission. If the High Court order was not set aside, the national court would be unable to give effect to what, on this hypothesis, could conceivably be definitive guidance on the requirements of European law.

19. In addressing this issue, it is necessary to clear away some matters. There is no question of the High Court judge having made some finding of fact on contested or oral evidence to which an appellate court should apply the approach required under *Hay v. O'Grady* [1992] 1 I.R. 210, [1992] ILRM 689. It is instead a matter of logic involving a consideration of the case pleaded, the questions raised, and the possible impact of any possible decision of the CJEU. It is ultimately a matter for this Court to decide, however, the observations of the trial judge on this matter would require careful consideration given the familiarity that the judge had with the entire case, the issues raised and argued. The observation that the views of the trial judge should command respect in an appellate court

applies with particular force in this context. The function of a reference under Article 267 TFEU is not to initiate a claim which will be heard and determined by the CJEU. Rather, the function of a reference under Article 267 is to allow a national court to decide issues in proceedings before it. It follows that the national court has a good, indeed the best, understanding of the issues which it has to decide, and in respect of which it is considered a reference is required, the limits of those issues in the proceedings, and the range of possible outcomes.

20. It is also clear that a significant portion of the appellant's submissions focused on an attempted reconfiguration of the case and an assertion (based, moreover, on the original EIAR and not the amended EIAR in respect of which the Board had made its decision) that a derogation licence was either required for the development or that the grant of permission somehow relied on the possibility of a post-grant derogation. It is clear however that this was not the case, and this argument was not pressed at the hearing. The net issue here must be considered on the basis that the outcome of the EIAR was that there was no possible disturbance or destruction of habitat contemplated by a permitted development which would itself require the consideration of a derogation licence under the 2011 Regulations. The furthest that the trial judge's finding went was that in the nature of things there was a sufficient possibility of a matter emerging in the course of the development or the operation of the development which might require a derogation licence, which was sufficient to allow an argument to be made as to the standing of the applicant to make the legal argument that a separate system of consent permission and derogation licence was not compatible with the requirements of European law. This gave rise to the second question posed by the trial judge relating to the question of standing. It is clear, therefore, that the issue remaining to be determined in these proceedings and in

respect of which the reference was made concerned the post-consent situation rather than anything which had been involved or considered in the grant of permission.

21. It is apparent that while this appeal raises an important point of practice, it does not raise any novel issue of law. The law is perfectly clear: if the reference raised an issue which could affect the outcome of the challenge to the permission, then the High Court would have been wrong to determine the issue of the validity of the planning permission without awaiting the outcome of the reference. The issue here is, therefore, not one of law but one of logic: was it possible that the outcome of the reference could affect the decision on the validity of the permission? Or perhaps the issue is best put negatively: was it the case that there was no possible outcome of the Article 267 reference made by the High Court which could result in the invalidity of permission?

22. The source of this issue lies in the proliferation of grounds now commonly pleaded in planning cases. Reliefs and grounds tend to be pleaded collectively and against a number of different respondents, and without distinguishing clearly in respect of the reliefs sought, the grounds upon which such relief is sought, and the respondent or respondents against whom such relief is, or may, as a matter of law, fact, or logic, be sought. It is, perhaps, a matter of perspective whether this type of pleading is seen as helpfully comprehensive and protection against the possibility of a good ground being ruled out on pleading grounds, or a witch's brew designed to spread maximum confusion and to permit any argument to be made at the hearing that ingenuity can suggest. In any event, it is necessary in this case to analyse both the pleadings and the judgment with some care.

23. There is no requirement that all claims made in a single set of proceedings be directed against all respondents. It is permissible to join claims which are separate and distinct both as a matter of fact and law, so long as they can conveniently be tried together, which often means that they arise out of the same, or at least closely related factual

circumstances. In judicial review proceedings, it is not unusual to see an administrative decision challenged on grounds of domestic and sometimes European law, and have that claim linked with a challenge to the validity of the underlying legislative provision, whether primary legislation or statutory instrument. It is also true that the provisions of European law, although familiar and part of the legal system, nevertheless constitute a separate system of law, and that the CJEU adopts a more flexible method of interpretation than Irish Courts may do in the context of domestic law. Furthermore, the provisions of European law must be interpreted against the background of 27 different national legal systems.

24. It is often, therefore, a counsel of prudence to avoid disposing of all issues in a case pending the determination of a reference under Article 267 even where the national court is reasonably confident that some issues are not likely to be affected by any reference. However, as against this, the timescale involved in a reference can be quite considerable. Delay can have unforeseen effects on the viability of a development, which in this case, is being pursued by a public authority in the interest of providing public amenity. It is normally in the public interest that challenges to the validity of permissions for such developments should be resolved promptly, if at all possible. Accordingly, if it was possible to isolate the challenge to the permission and determine it so that only the declaratory relief against State parties would the subject of a reference and the consequent delay, then there were obvious and valid reasons to take that course. The question remains however, whether it is possible to so neatly and decisively separate those claims.

25. As already discussed, the appellant's argument depends upon the language used in the third question posed by the High Court, and in particular the reference to a requirement that the procedures for permission and derogation should not be parallel and independent of each other, but rather should be part of an integrated approval process, and the further

argument that, if so, it must follow that a possible outcome of the reference might be that the process under which the development permission was undoubtedly granted, was legally flawed, and the permission therefore invalid. While I can accept that such an argument can be advanced, at least in the abstract, I cannot agree that it is correct on the facts in the circumstances of this case. As Mr. Foley SC for the Board put it, the flaw in the argument is that it addresses the issue at too high a level of generality which obscures the important point that the determination of the challenge to the validity of the 2011 Regulations does not in any way even arguably affect or impact upon the decision of the Board to grant planning permission in this case. It is not simply a matter that was overlooked, but it rather represents an approach specifically and carefully adopted by the High Court in response to the specific factual circumstances of this case. There are a number of reasons why I consider that this submission is well founded, which can be briefly stated.

26. First, the case in this regard as set out at paragraph 54 of the Statement of Grounds appears to be directed towards supporting the declaratory relief in respect of the validity of the Regulations and which is directed exclusively towards the State respondents. It was argued with some ingenuity that the sentence "this third point is a point taken against the State respondents" should be understood as meaning that while *all* points were pleaded against the Board and the validity of the permission, it was solely this third point which was *also* pleaded against the State parties. It is also the case that it was pleaded that this point related to the reliefs 1 and 4, that is both *certiorari* of the permission, and a declaration as to invalidity. On this basis, like the trial judge, I will assume in ease of the appellant that this point was being maintained as one which could go to the validity of the permission, but it must be acknowledged that the thrust of the pleaded claim is in respect of the validity of the Regulations appeared to be directed to the State Respondents. There

is an unhelpful lack of clarity as to the pleading. It is certainly the case that, if the appellant considered that a possible invalidity of the derogation provisions of the 2011 Regulations necessarily led to the invalidity of the permission, even if there had been no issue in relation to possible disturbance of habitats and the possible necessity for a derogation, neither that conclusion, nor the reasoning leading to it, was set out in the pleadings.

27. Second, the reference to "an integrated approval process" upon which much of the argument depends, is not one which is derived from the pleadings, but it was rather a point formulated by the trial judge for the purpose of a reference, and which, as already observed, he considered did not go to the validity of the permission. The case as pleaded by the appellant was instead clearly directed towards the possibility of a situation arising post consent being granted. Thus paragraph 49 of the Statement of Grounds refers to the Council "once they have obtained permission", and at paragraph 50 it is stated that "once (as here) the council receives its grant of planning permission". It is said that the post grant situation is inadequate, because of a lack of a linkage of the systems, and moreover because that there is no system of public consultation in respect of a grant of a derogation licence under Article 54 (paragraph 53). These arguments are, therefore, predicated upon a valid permission having been granted. If there is a frailty in the procedure to be followed in the event that after the grant of permission an issue in relation to habitats is discovered, that cannot logically render the permission already granted, invalid.

28. Third, the trial judge announced his conclusion in this regard, on 9 June, 2021, and proceeded to hear further argument in respect of the validity of the 2011 Regulations which proceedings were confined to the appellant and the State parties. No objection was taken to this course, and it was not contended that the further argument in relation to the validity of the Regulations necessarily implicated the validity of the permission. If it was considered that this was a possible outcome of the argument in respect of the Regulations,

then that argument could not have proceeded lawfully in the absence of the body which had granted the permission, or indeed the developer who had sought and obtained it.

29. Fourth, and finally, the trial judge not only proceeded on a basis which was only consistent with the view that no possible outcome of the argument in relation to the validity of the 2011 Regulations insofar as they affected the post consent position could affect the validity of the permission granted but explained why this was so on three separate occasions. While the applicant's pleadings in respect of the validity of the Regulations were less than crystal clear, the trial judge considered it was at least possible that there were three possible interpretations: first, that the applicant was merely making a separate and independent claim of invalidity of the Regulations as against the State respondents alone, and leading, if successful, to a declaration of invalidity of the Regulations and having no direct or consequential implication for the validity of the permission; second, that the first named respondent relied on the derogation procedure in the grant of permission and therefore any possible invalidity of the Regulations would lead to the consequential invalidity of the permission and *certiorari* of the permission (against the first named respondent) as well as a declaration of invalidity of the Regulations; and third, that the applicants were contending that that the post consent procedure for a derogation licence was flawed and the Regulations invalid and that any such invalidity would result in the invalidity of the permission. The trial judge was prepared to assume in the applicants favour that all three cases were being made in the same pleading, but that the second was not established as a matter of fact: the permission did not rely on the derogation procedure, and the third was not possible as a matter of law or logic: a flaw in the procedure under the Regulations which could only arise after a permission was granted could not invalidate the permission. All that was left was the first case and it was in respect of that case that the reference was made. It followed that the

reference, and any possible outcome of it, could not affect the permission granted or mean that the judge had been wrong to dismiss the claim for *certiorari*.

Conclusions

30. For the reasons set out, I am satisfied that Humphrey J.'s analysis of what was, after all, his own judgment and reference, was correct. It is clear that, whatever the precise parameters of the pleading, the validity of the planning permission at issue in this case could not be affected by the outcome of the applicant's challenge to the validity of the 2011 Regulations insofar as it provides for a post-consent derogation.

31. The outcome of that particular challenge will, of course, have to await the outcome of the CJEU's determination. Yet, as that outcome could not affect the validity of the planning permission at issue here, Humphreys J. was perfectly correct in the circumstances to hold that the mere existence of that challenge to the validity of the 2011 Regulations could not - and should not - preclude the High Court from dismissing *certiorari* proceedings directed towards the invalidity of the permission.

32. Accordingly, the appeal must be dismissed.

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