Neutral Citation No. [2010] IEHC 61

THE HIGH COURT

JUDICIAL REVIEW

2007 327 JR

BETWEEN/

JOSEPH HOSEY, JOSEPH O'LOUGHLIN AND GERARD HAYES

APPLICANTS

AND

THE MINISTER FOR THE ENVIRONMENT, HERITAGE

& LOCAL GOVERNMENT, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

THE IRISH KENNEL CLUB LIMITED

NOTICE PARTY

JUDGMENT of Mr Justice John Edwards delivered on the 9th day of March 2010.

Introduction

The Notice Party is a company limited by guarantee not having a share capital. According to its Memorandum and Articles of Association (dated 30th day of December, 1985) which have been exhibited with an affidavit of the first named applicant sworn on the 22nd of January, 2009, the objects of this company, which are extensive, include the following (inter alia):

> (i) to encourage and promote and foster the general improvement and breeding of dogs in Ireland in such manner as it may consider advisable or necessary ;
>
> (ii) to promote the interests of dogs and dog owners in Ireland, to protect such interest from unnecessary interference by legislation or public or private bodies;
>
> (iii) to regulation and control all matters concerning Kennel Government in Ireland and for this purpose to make bye-laws and to revoke or alter such bye-laws in accordance with the Articles of Association;
>
> (vii) to organise such activities as may be considered advisable or necessary and to licence approved bodies or individuals for such activities and supervise regulate hold and foster Dog Shows, Dog Field Trials, Obedience Tests and other competitions for dogs in such manner as may be considered advisable or necessary.
>
> (ix) to affiliate Clubs in accordance with the Articles of Association and Bye-laws and to revoke suspend or cancel any such affiliation;
>
> (xv) to obtain all such licences permits orders and authorities as from time to time may be required by law for carrying into effect any of the objects of the Club.
>
> (xvii) to acquire and take over as a going concern the undertaking now carried on in the State of the unincorporated association known as the Irish Kennel Club and all or any of the assets and liabilities used in connection therewith or belonging thereto.

On the 8th of March 2007, the Minister for the Environment, Heritage and Local Government (the first named respondent) granted a licence to hunt (excluding killing) wild birds to the Notice Party in respect of its dog training and field trialing activities. The licence issued pursuant to section 22(9)(c) of the Wildlife Act 1976, as amended by the Wildlife (Amendment) Act 2000. The licence expired on the 31st of March 2007.

The applicants are associate members of an unincorporated body known as the National Association of Regional Games Councils (hereinafter referred to as the N.A.R.G.C.). These proceedings are brought by the applicants on behalf of the N.A.R.G.C. for the purpose, inter alia, of challenging the decision to grant this licence both in principle, and in the particular form in which it was issued. It is not sought to quash the actual licence because it has expired and is no longer extant.

By an Order of the High Court (Peart J) made on the 26th day of March 2007 the applicants were granted leave to apply by way of judicial review for the reliefs set out at part "D" of the applicant's Statement of Grounds upon the grounds pleaded in part "E" of the same document. Various reliefs are sought in part "D" including:

> • An Order of Certiorari quashing the decision of the respondent to issue a licence (Licence No IKC 1/2007) pursuant to sections 9 and 22 of the Wildlife Act, 1976 to the Notice Party on the 8th of March 2007 authorising a class or description of persons to hunt without identifying with particularity the individuals concerned.
>
> • Various Declarations including Declarations that:

o the decision of the first named respondent to issue a licence to a corporate body which purports to permit that body to determine who is authorised to hunt pursuant to the provisions of the said licence is ultra vires and void;

o the decision of the first named respondent to issue a back-dated licence is without legal basis and void;

o the issue of a licence which permits the hunting of bird species during their reproductive cycle is ultra vires the powers of the first named respondent;

o the issue of a licence to the Notice Party authorizing the said Notice Party to permit persons to hunt during the reproductive cycle of protected bird species is contrary to the requirements of Council Directive No 79/409/EEC on the Conservation of Wild Birds (hereinafter called "the Birds Directive");

o the respondents and/or each of them have failed to provide for the proper transposition of the Birds Directive into Irish law.

• Various Injunctions including

o An injunction restraining the first named respondent from issuing any further licences permitting a person or body to hunt certain bird species (identified and listed) during their reproductive cycle contrary to the requirements of the Birds Directive;

o An injunction restraining the Notice Party or any other party with notice of the making of the Order from relying on the provisions of a licence which purports to permit a person or body to hunt certain bird species (identified and listed) contrary to the requirements of the Birds Directive;

• Damages for breach of European Community law and in particular the provisions of the Birds Directive.

Background to the Proceedings
The historical background to the proceedings is primarily to be gleaned from the affidavit of Des Crofton, sworn on behalf of the applicants on the 22nd of March, 2007, and the replying affidavit of Mr Peter Carvill, sworn on behalf of the respondents on the 6th of July 2007. Mr Crofton is the Director of the N.A.R.G.C. and Mr Carvill is an Assistant Principal officer in the National Parks and Wildlife Service (hereinafter the N.P.W.S) which is an integral part of the Department of the Environment, Heritage and Local Government. There are additional affidavits from other deponents on both sides but these consist largely of expert scientific testimony directed to a discrete issue in the case and have little bearing on the historical background to the proceedings.

The first named respondent is responsible (inter alia) for managing the Irish State's nature conservation responsibilities under both National and European law, including the issuing of licences under s.9 and 22(9) of the Wildlife Act 1976, as amended. This latter aspect of the first named respondent's extensive brief is administered through the N.P.W.S. No point was taken on this. In the circumstances the Court will presume that it is done on a Carltona basis (see Carltona Ltd v Commisioners of Public Works [1943] 2 All E.R. 560 as discussed in Devanney v Shields & others [1998] 1 I.R. 230).

For some years prior to 2007 the Irish Kennel Club (the Notice Party) applied annually to the first named respondent, through the N.P.W.S., and pursuant to the provisions of s. 9 & 22(9)(c) of the Wildlife Act 1976, as amended, for a licence to hunt, on a day or during a period of days specified, certain species of protected wild birds for the purpose of training gundogs and holding field trials. The precise statutory provisions on foot of which the licence was applied for and granted are set out and considered later in this judgment.

Up until 2007 it was the practice of the first named respondent to grant what Mr Crofton has characterised as "a global license" to the Notice Party herein. According to Mr Crofton this form of licence purported "to cover each and every individual member, without identifying them, of the Irish Kennel Club who holds a field trial or runs dogs over live birds during the period which is specified on the licence." The reference by Mr Crofton in his affidavit to "each and every individual member …. of the Irish Kennel Club" must be interpreted, having regard to the actual terms of the licence which will be examined in a moment, as referring to any Club affiliated to the Irish Kennel Club Limited.

The 2005 Licence was exhibited by way of illustration and it was in the following form:

"Licence No: 1/2005

WILDLIFE ACT 1976 (AS AMENDED) – SECTION 22(9)(c)

LICENCE TO HUNT (EXCLUDING KILLING)

PROTECTED WILD BIRDS

FOR THE PURPOSE OF TRAINING GUNDOGS

AND HOLDING FIELD TRIALS

The Minister for the Environment, Heritage and Local Government in exercise of the powers vested in him by sections 9 and 22 of the Wildlife Act 1976 (as amended), hereby grants to the Irish Kennel Club Ltd., Fottrell House, Harold's Cross Bridge, Dublin 6W, a licence to hunt (excluding killing) the species of wild birds specified in column 1 of the Schedule hereunder for the purposes of training gundogs and holding field trials during the periods specified in column 2 of the said Schedule, subject to the conditions specified hereunder. The authority given by this licence shall be exercisable by the Licensee named herein and any Club affiliated to the Irish Kennel Club and any person authorised in that behalf by the said Licensee.

Dated this 5th day of May 2005

For the Minister for the Environment, Heritage and Local Government

…….. (Signature)……..

CONDITIONS:-

1. A return giving particulars of all game birds hunted and all field trials held pursuant to this licence including their location and dates may be required on a request made in that behalf by the Minister for the Environment, Heritage and Local Government.

2. This licence shall remain in force for the period beginning on the date hereof and shall be withdrawable by the Minister for the Environment, Heritage and Local Government at any time.

Note: This license does not authorise any person to enter on any land without the permission of the owner or occupier of the land.

SCHEDULE

SPECIES DATE

Grouse

Snipe

Pheasant

Partridge

Woodcock

Duck Species

Wood Pigeon

Other game species covered by section 24

Open Season Order

12 July 2005 to 31 October 2005"

According to Mr Crofton the N.A.R.G.C. has been concerned for some time about licences being issued in this form. The concern has been that a licence issued in this form does not place any restriction upon the class of person who might avail of it, with the result that the licence "on its face appeared as a wholesale delegation of the licensing function vested exclusively in the first named respondent to the Notice Party" – to quote Mr Crofton. Moreover, the N.A.R.G.C. considers that such a licence, because of the very nature of it, can only be issued to a natural person in respect of whose suitability to hold such a licence the Minister is satisfied.

Mr Crofton has deposed that in early July 2005 these concerns came into sharp focus when members of the Irish Kennel Club turned up out of season to run their dogs over Grouse on the preserves of the Dublin Regional Game Council, a constituent member of the N.A.R.G.C.. Mr Crofton became personally involved at this stage on behalf of the N.A.R.G.C. and made representations to the N.P.W.S. concerning the legality of the licence. The circumstances in which he did so are described in his affidavit as follows:

> *"It was at that point that I became directly involved in the issue and the question of the legality of the licence which was granted to the Notice Party became an issue because it was on foot of this licence that the members of the Notice Party were purporting to hunt."*

Mr Crofton has averred that in 2006 the N.P.W.S., acting on foot of representations from the N.A.R.G.C. about the legality of the licence, moved to withdraw the licence from the Notice Party. It is clear that the so-called "representations" were in fact a threat by the N.A.R.G.C. to mount a legal challenge in the Courts to the validity of the licence. However the Notice Party counter threatened to sue the first named respondent / N.P.W.S. in the event of the licence being withdrawn, on the basis that it had already committed and incurred significant expense in organising and promoting field trials on the basis of the licence then issued. In all the circumstances of the case, the N.A.R.G.C. agreed with the first named respondent / N.P.W.S. not to proceed with it's threatened challenge at that time on condition that once the licence had expired it would not be renewed by the first named respondent without prior consultation with (Mr Crofton on behalf of) the N.A.R.G.C..

On the 23rd of February 2007, an application having been received by the first named respondent from the Notice Party for a renewal of it's licence, a meeting was held between Mr Crofton on behalf of the N.A.R.G.C., and the aforementioned Mr Carvill, then Assistant Director of the N.P.W.S., on behalf of the first named respondent. In the course of that meeting the possibility of a renewal of the Notice Party's licence was discussed, and it was indicated by Mr Carvill to Mr Crofton that the first named respondent was satisfied on the basis of legal advice that the word "person" where it appears in s.22(9) of the Wildlife Act 1976 (as amended) was to be construed as including "a body corporate", and that therefore it was within his power to grant a licence to a the Irish Kennel Club Limited. (It has been confirmed to the Court by counsel for the respondents in the course of his submissions that the advice referred to was based upon s.11(c) of the Interpretation Act, 1937.) Mr Crofton indicated the N.A.R.G.C.'s strong disagreement with this view. The meeting concluded without the parties reaching any measure of agreement. However, Mr Carvill undertook to inform Mr Crofton if and when the first named respondent arrived at any decision with respect to the Notice Party's application for a renewal of its licence.

On Monday the 5th of March, 2007 Mr Crofton learned from an associate member of the N.A.R.G.C. that the Notice Party had conducted field trials over Grouse on the previous weekend, namely on Saturday the 3rd, and on Sunday the 4th, of March, 2007, respectively, and that a schedule of events for the trialling of dogs over birds during the month of March 2007 had already been issued to individual clubs within the Irish Kennel Club structure. He was further made aware that the Notice Party was representing to its affiliates that it had a licence to conduct such trials.

Later on the same date, and in consequence of what he had learned, Mr Crofton telephoned Mr Carvill to enquire whether the first named respondent had in fact recently renewed, or granted, a licence to the Notice Party. Mr Carvill informed Mr Crofton that no licence had been issued.

On Tuesday the 6th of March 2007 Mr Crofton received a copy of the March edition of the "Irish Shooters' Digest" and on page 15 of that publication, which was exhibited with Mr Crofton's affidavit, he discovered a list of field trial events for the month of March 2007 organised by clubs within the Irish Kennel club structure. Mr Crofton then contacted Mr Carvill and brought this information to his attention. Mr Carvill informed Mr Crofton that the first named respondent was still in discussions with the Notice Party but that he felt that on balance it was likely that the Minister would issue the licence. He undertook to inform Mr Crofton in the event of that happening and to keep him advised.

On Thursday the 8th of March 2007 Mr Carvill telephoned Mr Crofton to advise him that the first named respondent proposed to issue a licence to the Notice Party on that day. A licence duly issued to the Notice Party on that day. However, it was in a slightly different form to the licence that had issued in previous years. A copy of this new licence has been exhibited before the court, and it is in the following form:

"Licence No: IKC 1/2007

WILDLIFE ACT 1976 (AS AMENDED) – SECTION 22(9)(c)

LICENCE TO HUNT (EXCLUDING KILLING)

PROTECTED WILD BIRDS

FOR THE PURPOSE OF TRAINING GUNDOGS

AND HOLDING FIELD TRIALS

The Minister for the Environment, Heritage and Local Government in exercise of the powers vested in him by sections 9 and 22 of the Wildlife Act 1976 (as amended), hereby grants to the Irish Kennel Club Ltd., Fottrell House, Harold's Cross Bridge, Dublin 6W, (the licensee), a licence authorising, in accordance with the provisions of subsection 2 of the aforesaid section 9, the following class or description of persons to hunt (excluding killing) the species of wild birds specified in column 1 of the First Schedule hereunder for the purposes of training gundogs and holding field trials during the periods specified in column 2 of the said First Schedule, subject to the conditions specified hereunder.

Members of the Club or of its affiliated clubs whose names and addresses are listed in the Second Schedule to this licence.

The authority given by this licence shall be exercisable only by such persons and shall not be assignable.

This licence does not authorise any person to enter on any land without the permission of the owner or occupier of the land and of the holder (if another person) of the sporting rights to the land in relation to the species listed in the First Schedule. It does not authorise any activity carried out on any land without such permission.

Dated this day of 2007

For the Minister for the Environment, Heritage and Local Government

…….. (Signature)……..

CONDITIONS:-

1. A return giving particulars of all game birds hunted and all field trials held pursuant to this licence including their location and dates may be required on a request made in that behalf by the Minister for the Environment, Heritage and Local Government.

2. This licence shall remain in force for the period beginning on the date hereof and shall be withdrawable by the Minister for the Environment, Heritage and Local Government at any time.

3. The licensee shall provide each person authorised by this licence with a copy of this licence.

FIRST SCHEDULE

SPECIES DATE

Grouse

Snipe

Pheasant

Red Legged Partridge

Woodcock

Duck Species

Wood Pigeon

Other game species covered by section 24

Open Season Order

1 February 2007 to 31 March 2007"

SECOND SCHEDULE

…….

Mr Carvill, at paragraph 11 of the affidavit sworn by him on behalf of the respondents on the 6th of July 2007, in reply to Mr Crofton's said affidavit, has stated:

" As part of my consideration of the Notice Party's application for a licence, and having regard to representations made by Mr Crofton on behalf of the N.A.R.G.C., I decided to require the Notice Party to submit a list of all of their members proposing to avail of the licence. It is for this reason that I forwarded to Mr Crofton a copy of the licence. The names and addresses of all persons permitted to carry out the activities permitted by the licence were attached to the licence issued to the Notice Party and listed in the 'Second Schedule'. For Data Protection purposes, this Schedule was not given to Mr Crofton, although the existence of the Schedule is clear from the words appearing on the face of the licence.

The licence does not, as claimed by the applicants, purport to empower the notice party to determine which individual members of its clubs or affiliates may hunt pursuant to the licence in question."

The respondents complain that Mr Crofton's prècis of the events up to this point fails to adequately convey the poor relations that developed between the N.A.R.G.C. and the Notice Party, and conceals the real motive on the part of the N.A.R.G.C. for embarking on the present legal challenge which is, the respondents believe, to exact retribution from, or inflict punishment on, the Notice Party for perceived misdeeds. In that regard, Mr Carvill has stated the following in his affidavit (at paragraph 7 thereof):

" I beg to refer to an extract taken from the Irish Shooters Digest dated May 2007 entitled 'N.A.R.G.C. Matters, N.A.R.G.C. clarifies legal challenge against IKC licence, By Des Crofton' upon which marked with the letters and numbers 'PC 1' I have signed my name prior to the swearing hereof. In answer to a letter from a reader (also a member of the Notice Party) requesting information on the nature and origin of the dispute between the N.A.R.G.C. and the Notice Party, in this extract Mister Crofton writes,

' the legal case has it's[sic] origins in a written complaint submitted to the Irish Kennel Club by Dublin Regional Game Council by letter dated the 13th of July 2005 concerning the running of dogs over Dublin Regional Game Council's grouse preserves in the Dublin mountains by two named members of the Irish Kennel Club. The complaint was only submitted after failing to get an undertaking in the previous 12 months from the two individuals concerned to desist. The complaint was copied to N.A.R.G.C., F.A.C.E. Ireland and N.P.W.S. [….]'

Mr Crofton then describes the correspondence between the N.A.R.G.C., on whose behalf he acted, and the IKC and its solicitors concerning the complaint. He also describes his discussions with the N.P.W.S. concerning the legality of the licence issued to the IKC at that time, which licence preceded the issue of the licence the subject matter of these proceedings.

' I advised the N.P.W.S. that if they did not take appropriate action to curb the trespass by IKC members on Dublin RGC preserves, then a legal challenge to the IKC licence would be mounted.

[…] in deference to the N.P.W.S. difficulties, I withdrew from the legal route on condition that the licence would not be renewed in its present form.'

He continues,

' To this day the IKC has done absolutely nothing about the original complaint, but has allowed it to fester and escalate to the point we are now at. The blame for this, without a shadow of a doubt, lies with the IKC.'

I therefore say and believe that this application is improperly brought against these Respondents and in reality concerns, in the first instance, a dispute between the Applicants and the Notice Party about the activities of its members and further, a dispute between the Applicants and these Respondents concerning the issue of an earlier licence to the Notice Party, which is not the licence that is the subject matter of these proceedings and which issued in a different form."

Mr Carvill also deals with another aspect of the matter, namely, an allegation contained in paragraph 24 of Mr Crofton's said affidavit that the licence which issued on the 8th of March, 2007 to the Notice Party was backdated to 1st February 2007 and was intended to run from that date until the 31st of March 2007. Not putting a tooth in it, Mr Crofton has suggested that this was done "to legitimise acts which were clearly unlawful at the time they happened more particularly the field trials held on 3rd and 4th of March last". Mr Crofton has further suggested that this "amounts to an act of collusion" between the first named respondent and the Notice Party. In reply Mr Carvill has stated (at paragraphs 14 & 15 of his affidavit):

"14. In reply to Mr Crofton's averments contained in paragraph 24 I accept that the date of the beginning of the period within which the permitted activities could be carried out is stated in the First Schedule to the licence to be 1st February 2007. However, this does not render the issue of the licence ultra vires the powers of the respondent or in any way unlawful.

15. I say and believe that the Notice Party applying for the licence some months prior to its issue and may have reasonably expected to be issued to them before March 2007 in order for their members to carry out certain activities. This delay was due partly to short staffing in my Department and partly to my consideration of the wider issues concerning the issue of such licences pursuant to the Wildlife Acts. For this reason, in the First Schedule to the licence, as drafted, the date of the beginning of the period within which the permitted activities could be carried out is stated to be1st February 2007. However, I say and believe and am advised that the licence is stated to be effective from the date of issue and hence activities carried out prior to its issue could not be covered retrospectively."

The Issues

While the grounds pleaded at "E" are extensively set out, it seems to the Court that there are potentially five major issues on which the Court may be required to rule. The first is in the nature of a preliminary issue, and the next two relate to the substantive questions at issue in these proceedings. The final two are subsidiary issues raised by the respondents without prejudice to their desire to oppose the applicants' substantive claims on their merits.

The Preliminary Issue

Issue No 1
Do the Applicants have locus standi?

The respondents have raised a preliminary issue as to whether the applicants have the necessary locus standi to maintain these proceedings. While this issue of locus standi may be characterised as a "preliminary" one in the sense that the applicants' entitlement to ask the Court to determine a substantive issue, or substantive issues, in the proceedings is dependent on them having the necessary standing, it is clear from the case law that the issue as to whether or not the applicants have the necessary standing cannot be determined unless and until the Court is in possession of all of the facts necessary to determine that issue. The reason for this was made clear by Walsh J giving judgment in the Supreme Court in the State (Lynch) v Cooney [1982] I.R. 337 wherein he stated (at p.369):

> *"The question of whether or not a person has sufficient interest must depend upon the circumstances of each particular case. In each case the question of sufficient interest is a mixed question of fact and law which must be decided upon legal principles but, it should be added, there is greater importance to be attached to the facts because it is only by an examination of the facts that the court can come to a decision as to whether there is a sufficient interest in the matter to which the application relates."*

The issue of a party's locus standi on any issue cannot be regarded as a preliminary point unless there is an admission of all the facts necessary to determine the issue. Walsh J continued:

> *"In the absence of any admission in any case where the point is raised, it is necessary for the court to enter into a sufficient examination of the facts and, having heard them, to decide whether or not a sufficient interest has been established."*

In circumstances of this case it has been necessary for the Court to give some consideration to the affidavit evidence to enable it to ascertain the facts necessary to determine the locus standi issue, which is dealt with separately later in this judgment.

The Substantive issues
Subject to the outcome of the preliminary issue, the applicant has then raised two substantive issues for determination in these proceedings.

Issue No 2.
The "Administrative Law Question"

Whether the licence which purportedly issued to the Notice Party on the 8th of March, 2007 is ultra vires the powers of the First Named Respondent under sections 9 and 22(9) of the Wildlife Act, 1976 (as amended)? The Court will refer to this as the "administrative law question". There are a number subsidiary issues contained within this question concerning, inter alia, the entitlement (if any) to issue a licence to an non natural person, i.e., an unassociated body or a body corporate; whether the first named respondent was entitled to issue a so-called "blanket licence" to the Notice Party leaving it to the Notice Party to determine which, and how many, persons should benefit from it; and the entitlement (if any) to back date a licence.

Issue No 3.
The "European Law Question"

The applicants have framed this question in their written submissions in the following way:

> *"whether there has been a failure to transpose the provisions of the Birds by reason of the failure to ensure that the requirement of the Directive that birds are not hunted during the periods of their greatest vulnerability, such as reproduction, the return migration to the nesting areas, and the raising of chicks, is effective in the State. In particular, it is contended that by authorizing the hunting of certain named birds during the period of their reproductive cycle, the State has breached directly effective provisions of EC law and/or has failed to provide for the proper transposition of EC law."*

The Court will refer to this as "the European Law question," because it encompasses more than just the issue of transposition of the Birds Directive. It is also concerned with whether or not those aspects of the Birds Directive in controversy are directly effective; and, if so, whether by virtue of the licence granted by the first named respondent to the Notice Party the State has acted in breach of it; and further, if so, the entitlement, if any, of the applicants to damages.

The Subsidiary Issues

Issue No 4.
Is the Court being asked to decide a moot?

Without prejudice to their desire to oppose upon the merits the applicants' claim at "Issue No 2." above, the respondents contend that in circumstances where the licence at issue expired on the 31st day of March 1997 the applicants challenge to the validity of that licence is manifestly moot and that the primary relief claimed in respect of the decision to grant the said licence, namely an Order of Certiorari, is inappropriately sought and ought not to be granted.

Issue No 5.
Should the Applicants be denied relief for lack of candour?

The respondents further contend that even if the Court considers that the first named respondent has acted ultra vires his powers under the Wildlife Act 1976, as amended, the Court ought in the exercise of its discretion to refuse to grant relief to the applicants due to a lack of candour on the applicants part, and in particular a failure on their part to disclose all material facts in their application for leave to apply by way of judicial review.

The Relevant Legislation
The Wildlife Act, 1976, is the principal national legislation ("the Principal Act") providing for the protection of wildlife and the control of some activities that may adversely affect wildlife. The Wildlife Act, 1976, came into operation on 1 June 1977. It was the only major

legislation concerned with wildlife that was passed in the previous 45 years. It replaced the Game Preservation Act, 1930, and the Wild Birds (Protection) Act, 1930.

The aims of the Wildlife Act, 1976, are to provide for the protection and conservation of wild fauna and flora, to conserve a representative sample of important ecosystems, to provide for the development and protection of game resources and to regulate their exploitation, and to provide the services necessary to accomplish such aims. The Act also enables the possession, trade and movement of wildlife to be regulated and controlled. Hunting and also falconry is controlled under the Act. Specific areas of importance for wildlife may be protected under the Act either as Nature Reserves, Refuges for Fauna, or by way of management agreements.

Under the Act, the Minister may provide assistance and advice on wildlife matters, undertake the necessary research and promote public knowledge and understanding of wildlife. The Wildlife Act is not concerned with animal welfare per se, as its primary purpose is the conservation of wildlife. Animal welfare is the responsibility of the Department of Agriculture and Food.

The Principal Act was amended by the provisions of the Wildlife (Amendment) Act, 2000 ("the 2000 Act"). One of the main objectives of the 2000 Act was the enhancement of a number of existing controls in respect of hunting, which are designed to serve the interests of wildlife conservation.

Section 2 of the Principal Act (as amended by section 6 of 2000 Act) defines "hunting" in the following terms (the words which are drawn through were deleted by the 2000) Act:

> *""hunt" means stalk, pursue, chase, drive, flush, capture, course, attract, follow, search for, lie in wait for, take, trap or shoot by any means whether with or without dogs, and, except in sections 28 and 29, includes killing in the course of hunting, but does not in this Act include stalking, attracting, searching for or lying in wait for any fauna by an unarmed person solely for the purpose of watching or of taking or making photographic or other pictures, and kindred words shall be construed accordingly."*

Section 9 of the Principal Act provides:

> *9 (1) The Minister may –*
>
> *(a) attach conditions to any licence granted or permit issued for any of the purposes of the Wildlife Acts, 1976 and 2000,*
>
> *(b) vary such conditions, and*
>
> *(c) revoke any such licence other than a licence granted by the Minister under section 29 of the Principal Act or withdraw any such permit.*
>
> *(2) Subject to the provisions of section 32(5) of this Act, a licence granted or a permit issued by the Minister under the Wildlife Acts 1976 and 2000, shall, if so expressed, operate to authorise the doing by any person who is of a class or description specified in the licence or permit of –*
>
> *(a) anything allowed to be done by the licence or permit, or*
>
> *(b) anything which is a thing so allowed to be done and is of a class or description so specified.*
>
> *(3) the Minister may, with the consent of the Minister for Finance, prescribe fees payable in respect of licences granted or permits issued by the Minister under the Wildlife Acts, 1976 and 2000, and different fees may be prescribed for different classes of licences or permits.*
>
> *(4) Regulations prescribing matters to which this section relates may provide for such incidental or related matters as are, in the opinion of the Minister, necessary to give effect to such fees."*

Section 22(9) of the 1976 Act (as amended by section 30 of the 2000 Act) provides:

(9) The Minister may grant a licence to a person—

(a) at any time to capture or kill humanely or capture and humanely kill a protected wild bird of a species specified in the licence for such educational, scientific or other purposes as shall be so specified,

(b) to hunt, in accordance with the licence, on such day or during such period of days as is specified in the licence, protected wild birds which are both pen-reared and of a species so specified,

(c) to so hunt, on such day or during such period of days, protected wild birds of a species so specified for the purpose of either training gun dogs for any field sport or holding gun dog trials,

(d) to examine, inspect or take the nests or eggs of protected wild birds of a species so specified for such educational, scientific or other purposes as shall be so specified.

(e) to take the eggs of a protected wild bird of a species specified in the licence for the purposes of having them hatched out for repopulation, or re-introduction to the wild or, for such purposes, to move such eggs from the nest of a bird so specified to that of another bird of the same species or for such other purposes as the Minister considers appropriate in the circumstances in respect of the species so specified,

(f) to take or make photographic, video or other pictures of a protected wild bird of a species specified in the licence on or near a nest containing eggs or unflown young,

(g) to have in possession, for a reasonable period of time—

(i) an injured or disabled wild bird, or

(ii) one or more than one dependant young of a wild bird which is orphaned,with the intention of tending and later releasing such bird or young back into the wild when and only when such bird or young, as the case may be, is no longer injured, disabled or dependant,

(h) to retain possession of a wild bird, that for reasons of disability or for other reasons deemed reasonable by the Minister, would, if released, be unlikely to survive unaided in the wild.

Locus Standi on the administrative law issue

As there is an issue in this case as to the locus standi of the applicants it is necessary at the outset to establish who the applicants are, and whom it is that they represent.

Relevant additional facts as disclosed in the affidavits

The applicants are three private citizens who are also associate members of an unincorporated body known as the National Association of Regional Games Councils (the N.A.R.G.C.). They are also described in the Statement of Grounds as "trustees" of the N.A.R.G.C. Although the position was initially unclear, it has now been established that the applicants, although technically litigants in their own behalf, bring the action primarily as representatives of the N.A.R.G.C, a body which is not a legal person capable of suing or of being sued in its own right.

It was remarked upon by the Court on the first day of the hearing that it was certainly unusual, and perhaps somewhat irregular, that none of the applicants had personally sworn an affidavit dealing with any of the central issues in the case. Moreover, it was not fully apparent from affidavits sworn by other deponents on behalf of the applicants as to what precisely was the relationship, if any, between those deponents and the applicants. In consequence of the Court's remarks a short affidavit was prepared overnight, was duly sworn by Mr Hosey, and was filed with the leave of the Court at the commencement of the second day. In that affidavit sworn on the 22 of January 2009, Mr Hosey states:

> *"… I act as a Trustee for and on behalf of the NARGC and in this capacity represent the NARGC in the above entitled proceedings. I and the other two Trustees have been directed by the Executive Committee of the NARGC to act as applicants in the within proceedings for and on behalf of the NARGC. The second and third named applicants are the other trustees of the NARGC. I am authorised by the NARGC and my fellow trustees to make this affidavit for and on their behalf …".*

Mr Hosey further states:

> *"I make this affidavit for the purpose of verifying the facts relied upon in the Statement of Grounds and to clarify the position of the applicants in these proceedings."*

He also states:

> *" I confirm that I, along with the other applicants and also the Executive Committee of the N.A.R.G.C. have authorised Des Crofton, Director of the N.A.R.G.C. to swear such affidavits verifying the facts relied upon in the within proceedings."*

There is no evidence that the applicants have any personal interest in this matter separate and distinct from their interest as associate members of the N.A.R.G.C. Accordingly, it seems clear that the applicants are interested only to the extent that they are associate members of that organisation. Moreover, to the extent that they are interested as associate members of the N.A.R.G.C. their interest is no greater than that of any other associate member or members of the N.A.R.G.C..

Further, the N.A.R.G.C does not claim that the applicants are the holders of relevant property interests, such as sporting rights, on trust for the associate members of the N.A.R.G.C., or bodies affiliated thereto (assuming they are legally capable of owning such property in their own right). Sporting rights, such as the rights of fishing, shooting, hunting (venery), hawking (falconry) and fowling (auceptary), are property rights in the nature of profits à prendre and as such are incapable of being owned by an unincorporated body or association in its own right. Such rights may of course be held by persons legally capable of owning them upon trust for the members of an unincorporated body or association. However, the challenge in the present case is not based upon a suggestion of prejudice to specific property interests held by the applicants upon trust for the members or affiliates of the N.A.R.G.C.. Indeed, the Court has not been told the nature of the property in respect of which the applicants are trustees. They might, for example, be trustees of the building in which the N.A.R.G.C. has its headquarters. They might also be trustees of a fund or funds operated by the body in question, and they might also be the owners in trust of property rights in the nature of profits à prendre. The problem is that the Court simply does not know of what it is they are said to be trustees. In the absence of any evidence that they are specifically interested as the owners of a relevant property right or rights held by them upon trust for some or all of the membership or affiliates of the N.A.R.G.C., the fact that they are such trustees has no relevance in terms of their standing.

In the circumstances it is necessary to examine more closely the nature and purpose of the N.A.R.G.C as an unincorporated association.

According to the Constitution and Rules of the N.A.R.G.C., which have been exhibited by Mr Crofton in his affidavit of the 22nd of March, 2007, the aims and objectives of the N.A.R.G.C. are:

> *"to promote the sport of game hunting and sport shooting by:*
>
> *(a) representing and protecting the interests, objectives and traditional right of resident shooting sportsmen/sportswomen; and*
>
> *(b) promoting the conservation of wildlife and its habitat."*

In partial furtherance of these aims N.A.R.G.C. maintains a Game Hunting Compensation Fund.

The N.A.R.G.C. is a body comprised of "Affiliated Bodies" and, according to it's Constitution and Rules an "Affiliated Body" is in turn "the county body which has the support of the majority of gun clubs within the county and where this support has been achieved by democratic/constitutional means, and such other body as has been affiliated by democratic vote of the Governing body of the N.A.R.G.C.".

All members of gun clubs which are affiliated to Affiliated Bodies must be members of the Game Hunting Compensation Fund and every person whose compensation fund contract is validated by the N.A.R.G.C. becomes a non-voting associate member of the N.A.R.G.C. during the currency of that contract. This fund is administered by three trustees elected at the AGM of the N.A.R.G.C. from among the associate members.

The N.A.R.G.C. itself is governed by a Governing Body consisting of two duly accredited delegates from each of the Affiliated Bodies together with the members of the Executive Committee. The Executive Committee consists of eight Officers of the Association and seven other associate members, elected in accordance with Rule 5 of the Constitution and Rules of the N.A.R.G.C.. The Court's understanding is that the Governing Body has overall responsibility, subject to the wishes of the membership as expressed at AGMs/EGMs, for the formulation and implementation of policy directed towards the achievement of the organisation's aims as set out in its Constitution and Rules, whereas the Executive Committee is responsible for the day to day management of the organisation and reports to the Governing Body. The Constitution and Rules does not make clear what is the status of "the Director" and in particular what is his relationship to the Governing Body, the Executive Committee, the associate members and the Affiliated Bodies, but nothing really turns on it.

Mr Crofton asserts in his affidavit of the 22nd of March 2007 that the N.A.R.G.C. represents the interests of game bird shooters throughout the island of Ireland. He says that the Association has a deep concern to ensure that the conservation of any huntable species should not be threatened by injudicious behaviour. The N.A.R.G.C. has some 25,700 associate members throughout Ireland and is the largest game conservation organization in the country.

Mr Crofton further says that the N.A.R.G.C. is engaged in many game and bird conservation projects. It is represented on the Steering Committee of the National Grouse Survey which is being undertaken by BirdWatch Ireland under contract to the first named respondent and is providing volunteers to assist with that project.

According to Mr Crofton the N.A.R.G.C is recognized nationally as the authoritative body representing the interests of game shooters.

The Law
Counsel on both sides have referred the Court to a number of cases, including Cahill v Sutton [1980] I.R. 269; State (Lynch) v Cooney [1982] I.R. 337 (previously referred to); Lancefort Limited v An Bord Pleanàla and Ors [1999] 2. I.R. 270; Mulcreevy v The Minister for the Environment, Heritage and Local Government & Dun Laoghaire-Rathdown County Council [2004] 1 I.R. 72; Friends of the Curragh Environment Ltd v An Bord Pleanàla and Ors [2006] IEHC 390; R v Secretary of State for the Environment, ex p. Rose Theatre Trust Co [1990] Q.B. 504; R v Inland Revenue Commissioners, ex p. National Federation of Self-Employed and Small Business Ltd [1982] A.C. 617 (known as the IRC case) and R. v. Secretary of State for Foreign & Commonwealth Affairs, ex p. World Movement Ltd. [1995] 1 W.L.R.386.

Cahill v Sutton was concerned with the standing necessary to challenge the constitutionality of a statute. Although we are not specifically concerned with that here it was acknowledged by Keane J in his judgment in Lancefort Limited v An Bord Pleanàla and Ors that some of the decisions of the superior courts which have dealt with the question of locus standi in constitutional challenges are of assistance in considering the question of an applicant's standing in other types of challenges. According to Keane J in Lancefort:

> *"The authorities reflect a tension between two principles which the courts have sought to uphold: ensuring, on the one hand, that the enactment of invalid legislation or the adoption of unlawful practices by public bodies do not escape scrutiny by the courts because of the absence of indisputably qualified objectors and, on the other hand, that the critically important remedies provided by the law in these areas are not abused.*

In the latter area, the courts have dwelt on occasions on the dangers of giving free rein to cranks and busy bodies. But it is to be borne in mind that the citizen who is subsequently seen to have performed a valuable service in, for example, bringing proceedings to challenge the constitutionality of legislation, while exposing himself or herself to an order for costs, may at the outset be regarded by many of his or her fellow citizens as a meddlesome busybody. The need for a reasonably generous approach to the question of standing is particularly obvious in cases where the challenge relates to an enactment of the Oireachtas or an act of the executive which is of such a nature as to affect all the citizens equally: see, for example, Crotty v. An Taoiseach [1987] I.R. 713. But it is also the case that a severely restrictive approach to locus standi where the decision of a public body is challenged would defeat the public interest in ensuring that such bodies obey the law.

Nevertheless the requirement that, as a general rule, locus standi must be established where a person seeks to challenge the decision of a public body remains, although the criteria have changed over the years, a "sufficient interest" in the matter having replaced the somewhat more restrictive concept of a "person aggrieved". In the particular case of challenges by way of certiorari,, with which these proceedings are concerned, the insistence on the party having such an interest reflects the policy of the courts which is intended to ensure that this most potent and valuable of legal remedies is not resorted to by the merely officious or men or women of straw who have nothing to lose by clogging up the courts with ill-founded and vexatious challenges.

In cases where certiorari is sought in respect of a decision by a planning authority on an application for a permission or a decision of the first respondent on any appeal, these considerations must be given even greater weight, having regard to the policy of the Oireachtas as reflected in s. 82(3A) and (3B) of the Local Government (Planning and Development) Act, 1963, as amended by s. 19(3) of the Local Government (Planning and Development) Act, 1992. In requiring, as they do, an applicant to institute such proceedings within a strict time limit of two months, and to establish "substantial grounds" for contending that the decision in question is invalid before leave is granted and in severely restricting the right of appeal from the decision of the High Court to this Court, the Oireachtas has made plain its concern that, given the existence of an elaborate appeals procedure which can be invoked by any member of the public and the determination of the issues by an independent board of qualified persons, the judicial review procedure should not be availed of as a form of further appeal by persons who may well be dissatisfied with the ultimate decision, but whose rights to be heard have been fully protected by the legislation. The courts are bound in their decisions to have serious regard to that concern.

At the same, it must be borne in mind that, as pointed out by Finlay C.J. in Electricity Supply Board v. Gormley [1985] I.R. 129, where a challenge by a person afforded locus standi in a case such as this succeeds, the planning permission is set aside, not because any direct injury to the applicant has necessarily been established, but because of a jurisdictional frailty in the decision which it is the paramount objective of certiorari to remedy.

While it is thus clear that a person initiating such a challenge by way of judicial review must at the least have what the law regards as a "sufficient interest" in the subject matter of the impugned decision, whether he has such an interest can only be determined by reference to the circumstances of the particular case: see, in particular, the judgment of Walsh J. in The State (Lynch) v. Cooney [1982] I.R. 337. Since that decision, the requirement that the applicant for judicial review should be so qualified was reflected in O.

84, r. 20(4) of the Rules of the Superior Courts, 1986 as follows:-

> *"The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates."*
>
> Under s. 82(3A) of the Local Government (Planning and Development) Act, 1963, as amended by s. 19(3) of the Local Government (Planning & Development) Act, 1992:-
>
> *"A person shall not question the validity of -*
>
> *. . .*
>
> *(b) a decision of the Board on any appeal or on any reference.*
>
> *otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts …"*

The same provision also requires that the application should be made by motion on notice and that leave is not to be granted unless the High Court is satisfied that there are "substantial grounds" for contending that the decision is invalid or ought to be quashed.

I think that it is clear that the terms of O. 84, r. 20(4) of the Rules of the Superior Courts, 1986, correctly embody the Irish law as to locus standi as set out in such decisions as The State (Lynch) v. Cooney [1982] I.R. 337 and Cahill v. Sutton [1980] I.R. 269. Two questions arise, however, in determining whether a person has a "sufficient interest in the matter to which the application relates" which were the subject of discussion in this case. The first is as to whether the issue of locus standi should be determined as a threshold issue on the application for leave to issue the judicial review proceedings or whether, assuming leave to be granted, it should be determined on the hearing of the substantive application for relief. The second is as to the extent to which the court, in determining the issue of standing, should consider the merits of the case the applicant seeks to make.

In Reg. v. I.R.C.; Ex p. Fed. of Self Employed [1982] A.C. 617, the House of Lords took the view that, save in simple cases, the question of locus standi should not be determined until the substantive application is heard, since the question should not be considered in the abstract, but rather in a particular legal and factual context. Walsh J. in The State (Lynch) v. Cooney [1982] I.R. 337, also laid emphasis on the importance of determining the issue of standing by reference to the facts of the particular case and, although he was speaking before the new judicial review procedure came into being in Ireland, his approach would also be consistent with determining standing as a threshold issue, on the application for leave, only in simple cases where it is obvious that the person has not a sufficient interest. Those considerations do not apply, however, to applications seeking judicial review of decisions by planning authorities or the first respondent since in such cases the application must be made on notice to the authority concerned and the applicant must at that stage show that there are substantial grounds for contending that the decision in question was invalid. As a general rule, there should be sufficient evidence before the court at that stage to enable the judge to determine the question of standing: to require the court in every case to reserve the question until the hearing of the substantive application would be inconsistent with the general statutory scheme.

In the present case, Morris J, decided the issue of standing in favour of the applicant at the first stage. The issue was reopened at the hearing of the substantive application before McGuinness J. and she arrived at the same conclusion. As already noted, however, she also, gave leave to the first respondent and the notice party to appeal to this Court from that finding.

The question as to locus standi is thus properly before this Court and the procedural route by which that result was reached is not of great significance. It was, however, urged at one stage on behalf of the applicant that it was a necessary corollary of the determination by the High Court and this Court that they had "sufficient grounds" for contending that the decision was invalid that they also had locus standi.

That submission should be considered in the general context of the second question to which I have referred, namely, the extent to which the court, in determining the issue of standing, should embark on a consideration of the merits of the challenge. In Reg. v. I.R.C.; Ex p. Fed. of Self Employed [1982] A.C. 617, Lord Diplock said that there would be a grave lacuna in public law if what he described as "outdated technical rules of locus standi " prevented a person from bringing unlawful conduct on the part of a public body to the attention of the courts and getting the conduct stopped. This prompted one learned commentator, Professor H. R. Wade, to say:-

> *"Although Lord Diplock's speech was the most far-reaching in its terms, it is fully consistent with the majority view that the real question is whether the applicant can show some substantial default or abuse, and not whether his personal rights or interests are involved."*

[Administrative Law , 7th ed., 1994, p. 712]

That statement was cited with approval by Rose L.J. in Reg. v. Foreign Sec.; Ex p. World Movement Ltd. [1995] 1 W.L.R. 386.

The tendency in England has thus been to treat the requirement of "a sufficient interest" as being met where the applicant has established unlawful conduct on the part of a public body, even though the conduct in question may not have affected any private interest of the applicant.

The facts of the two cases should, however, be borne in mind. In the first, the allegation (not established on the facts) was that the Inland Revenue had acted unlawfully in not pursuing claims for tax not paid. In the second, it was that the United Kingdom Foreign Secretary had exceeded his powers under relevant legislation by providing overseas aid to a hydroelectric project in Malaysia against the advice of his civil servants. It was accepted in both cases that it was unlikely that any other responsible challenger would emerge if standing was denied to the applicants and that the allegations, if made out, would establish a clear breach of an important duty or a default in a significant area by public bodies.

It is also the case that the requirements of national law as to standing may in some instances have to yield to the paramount obligation on national courts to uphold the law of the European Union."

The respondents place particular reliance upon the following passage from the judgment of Schiemann J in the IRC case. He stated (at p.522 of the report):

"(1) Once leave has been given to move for judicial review, the court which hears the application ought still to examine whether the applicant has sufficient interest.

(2) Whether an applicant has a sufficient interest is not purely a matter of discretion in the court.

(3) Not every member of the public can complain of every breach of statutory duty by a person empowered to come to a decision by that statute. To rule otherwise would be to deprive the phrase "a sufficient interest" of all meaning.

(4) However, a direct financial or legal interest does not give one an interest.

(5) Where one is examining an alleged failure to perform a duty imposed by statute it is useful to look at the statute and see whether it gives an applicant a right enabling him to have that duty performed.

(6) Merely to assert that one has an interest does not give one an interest.

(7) The fact that some thousands of people join together and assert that they have an interest does not create an interest if the individuals did not have an interest.

(8) The fact that those without an interest incorporate themselves and give the company its memorandum power to pursue a particular object does not give the company an interest. "

The respondents contend that the applicants in the present case have failed to demonstrate that they have a sufficient interest in the decision that they seek to challenge so as to be entitled to do so. The Court, having examined the matter to which the challenge relates, as well as the relevant legislation, finds itself in agreement with this submission. The legislation does not confer on the applicants any greater right or expectation than is conferred on anyone else to challenge a decision by the Minister to grant a licence pursuant to sections 9 and 22(9) of the 1976 Act as amended. In order to have standing to mount such a challenge they must be in a position to demonstrate a sufficient interest. As was made plain by Schiemann J in the IRC case, the fact that a large number of people join together by way of an unincorporated association and assert that they have an interest does not have the effect of creating that interest. Mere assertion of an interest does not create that interest. Moreover, if a large number of individuals asserting an interest join together the fact of them having done so cannot of itself create an interest if the individuals forming that association do not themselves have an interest.

I have given consideration to whether special circumstances exist in this case that might justify the Court in entertaining the applicants claim notwithstanding their lack of individual or personal interest, as were found to exist in the IRC case and in R. v. Secretary of State for Foreign & Commonwealth Affairs, ex p. World Movement Ltd. It will be recalled that Keane J remarked in Lancefort that:

"It was accepted in both cases that it was unlikely that any other responsible challenger would emerge if standing was denied to the applicants and that the allegations, if made out, would establish a clear breach of an important duty or a default in a significant area by public bodies."

None of that is true here. In the Court's view the applicants do not need to act as guardians of the public interest or even of the interests of those concerned generally with wildlife conservancy. There is every likelihood that some interested individual, or corporation, owning property rights, and in particular sporting or hunting rights in the nature of a profit à prendre, will seek to challenge the Minister's actions if indeed it is apprehended that he is acting, or has acted, ultra vires his powers under the 1976 Act, as amended, to the prejudice of those interests.

Moreover, the Court has significant doubts as to the bona fides of the applicants, or more specifically the N.A.R.G.C. whom they represent, in the context of the present attempted challenge. The Court is not satisfied that this challenge is being brought for wholly altruistic motives and/or in the public interest or even in the interests of those concerned generally with wildlife conservancy. I consider that there is strong circumstantial evidence that the real agenda has been to punish the Irish Kennel Club with whom the N.A.R.G.C. was, and may still be, in dispute.

I have also been influenced in arriving at my decision on the locus standi issue by a belief that the applicant's case on the administrative law issue, though arguable, is weak and I have taken that into account. Although it is not necessary in the circumstances for the Court to express a definitive view on it, the applicants would, I anticipate, have had some difficulty in persuading the Court that the decision they were seeking to impugn was infirm in any respect in terms of its vires, having regard in particular to the matters averred to in the affidavit of Mr Carvill sworn on the 6th of July, 2007 and the provisions of the relevant legislation properly interpreted.

The European law issue

Locus Standi

I have previously referred to Keane J's remarks in the Lancefort case to the effect that the requirements of national law as to standing may in some instances have to yield to the paramount obligation on national courts to uphold the law of the European Union. This obligation was unequivocally spelled out in the judgment of the European Court of Justice on an application for a preliminary ruling in a case of R v Secretary of State for Transport, ex p. Factortame and Others (Case C-213/89) [1990] E.C.R. I-2433. The Court of Justice stated (inter ala):

"It is for the national courts, in application of the principle of cooperation laid down in Article 5 of the EEC Treaty, to ensure the legal protection which persons derive from the direct effect of provisions of Community law.

Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with the requirements inherent in the very nature of Community law .

The full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in

those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule."

Insofar as the applicants' claim concerns issues of European Law, the respondents deny that any breach of or failure to transpose the Birds Directive has occurred. However, they say that notwithstanding this, and in the context of the claimed locus standi, it is unclear how the applicants propose to place reliance on the terms of the Birds Directive. To be given a positive right of action by a provision of EU law individuals such as the applicants must first establish three things:

(i) that the provision is capable of having direct effect;

(ii) that the provision is such as to provide a right of action; and

(iii) that the individuals satisfy the requirements of locus standi before the National Courts.

They make the further point that, with regard to the claim for damages, even if the applicants were to establish that the Directive had direct effect a consideration of the relevant case law discloses that the ECJ has circumscribed the right to damages by imposing three conditions: i) the rule of law infringed must be intended to confer rights on individuals; ii) the breach must be sufficiently serious; this would be so where the Member State had manifestly and gravely disregarded the limits on its discretion imposed by Community Law; iii) there must be a direct causal link between the breach of the obligation and the damage sustained by the injured party. See Francovich v Italian Republic [1991] ECR I-5357; and Brasserie du Pecheur/ Factortame III (C-46/93 and C-48/93) [1996] ECR I-1029

Before addressing these arguments the Court must consider the relevant provisions of the Birds Directive, and the applicants' case in regard to them.

The Birds Directive
Council Directive 79/409/EEC on the conservation of wild birds, commonly referred to as the Birds Directive, is the EU's oldest piece of nature legislation and one of the most important, creating a comprehensive scheme of protection for all wild bird species naturally occurring in the Union. It was adopted unanimously by the Member States in 1979 as a response to increasing concern about the declines in Europe's wild bird populations resulting from pollution, loss of habitats as well as unsustainable use. It was also in recognition that wild birds, many of which are migratory, are a shared heritage of the Member States and that their effective conservation required international co-operation.

The Birds Directive recognises that habitat loss and degradation are the most serious threats to the conservation of wild birds. It therefore places great emphasis on the protection of habitats for endangered as well as migratory species (listed in Annex I), especially through the establishment of a coherent network of Special Protection Areas (SPAs) comprising all the most suitable territories for these species. Since 1994 all SPAs form an integral part of the NATURA 2000 ecological network.

The Birds Directive bans activities that directly threaten bird populations, such as the deliberate killing or capture of birds, the destruction of their nests and taking of their eggs, and associated activities such as trading in live or dead birds, with a few exceptions (listed in Annex III - III/1 allows taking in all Member States; III/2 allows taking in Member States in agreement with European Commission).

The Directive recognises hunting as a legitimate activity and provides a comprehensive system for the management of hunting (limited to species listed in Annex II - II/1 allows hunting in all Member States; II/2 allows hunting in listed Member States) to ensure that this practice is sustainable. This includes a requirement to ensure that birds are not hunted during the periods of their greatest vulnerability, such as reproduction and the return migration to the nesting areas, and the raising of chicks. It requires Member States to outlaw all forms of non-selective and large scale killing of birds, (especially the methods listed in Annex IV). It promotes research to underpin the protection, management and use of all species of birds covered by the Directive (Annex V).

The following recitals, which seem to the Court to be potentially of particular relevance, are included among a long list of recitals at the start of the instrument.

" Whereas the measures to be taken must apply to the various factors which may affect the numbers of birds, namely the repercussions of man's activities and in particular the destruction and pollution of their habitats, capture and killing by man and the trade resulting from such practices; whereas the stringency of such measures should be adapted to the particular situation of the various species within the framework of a conservation policy;"

"Whereas because of their high population level, geographical distribution and reproductive rate in the Community as a whole, certain species may be hunted, which constitutes acceptable exploitation; where certain limits are established and respected, such hunting must be compatible with maintenance of the population of these species at a satisfactory level;"

"Whereas the various means, devices or methods of large-scale or non-selective capture or killing and hunting with certain forms of transport must be banned because of the excessive pressure which they exert only exert on the numbers of the species concerned;"

Then, Article 1 of the Directive (so far as is relevant to this case) provides:

" 1. This Directive relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies. It covers the protection, management and control of these species and lays down rules for their exploitation.

2. It shall apply to birds, their eggs, nests and habitats."

Article 2 of the Directive provides:

" Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of the these species to that level."

Article 5 then provides:

"Without prejudice to Articles 7 and 9, Member States shall take the requisite measures to establish a general system of protection for all species of birds referred to in Article 1, prohibiting in particular:

(a) deliberate killing or capture by any method;

(b) deliberate destruction of, or damage to, their nests and eggs or removal of their nests;

(c) taking their eggs in the wild and keeping these eggs even if empty;

(d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive;

(e) keeping birds of species the hunting and capture of which is prohibited."

Article 7 of the Directive provides:

1. Owing to their population level, geographical distribution and reproductive rate throughout the Community, the species listed in Annex II may be hunted under national legislation. Member States shall ensure that the hunting of these species does not jeopardize conservation efforts in their distribution area.

2. The species referred to in Annex II/1 may be hunted in the geographical sea and land area where this Directive applies.

3. The species referred to in Annex II/2 may be hunted only in the Member States in respect of which they are indicated.

4. Member States shall ensure that the practice of hunting, including falconry if practised, as carried on in accordance with the national measures in force, complies with the principles of wise use and ecologically balanced control of the species of birds concerned and that this practice is compatible as regards the population of these species, in particular migratory species, with the measures resulting from Article 2. They shall see in particular that the species to which hunting laws apply are not hunted during the rearing season nor during the various stages of reproduction. In the case of migratory species, they shall see in particular that the species to which hunting regulations apply are not hunted during their period of reproduction or during their return to their rearing grounds. Member States shall send the Commission all relevant information on the practical application of their hunting regulations."

Article 8 of the Directive provides:

"1. In respect of the hunting, capture or killing of birds under this Directive, Member States shall prohibit the use of all means, arrangements or methods used for the large-scale or non-selective capture or killing of birds or capable of causing the local disappearance of a species, in particular the use of those listed in Annex IV (a).

2. Moreover, Member States shall prohibit any hunting from the modes of transport and under the conditions mentioned in Annex IV (b)."

Article 9 of the Directive provides:

"1. Member States may derogate from the provisions of Articles 5, 6, 7 and 8, where there is no other satisfactory solution, for the following reasons:

(a) — in the interests of public health and safety,

— in the interests of air safety,

— to prevent serious damage to crops, livestock, forests, fisheries

and water,

— for the protection of flora and fauna;

(b) for the purposes of research and teaching, of re-population, of reintroduction and for the breeding necessary for these purposes;

(c) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.

2. The derogations must specify:

— the species which are subject to the derogations,

— the means, arrangements or methods authorized for capture or

killing,

— the conditions of risk and the circumstances of time and place under

which such derogations may be granted,

— the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom,

— the controls which will be carried out.

3. Each year the Member States shall send a report to the Commission on the implementation of this Article.

4. On the basis of the information available to it, and in particular the information communicated to it pursuant to paragraph 3, the Commission shall at all times ensure that the consequences of these derogations are not incompatible with this Directive. It shall take appropriate steps to this end."

The Applicants Case re the Birds Directive

The applicants' primary argument is that there has been a failure to transpose the relevant provisions of the Birds Directive into Irish Law. However, as is correctly pointed out by the respondents they have failed to elaborate on the alleged shortcomings of Irish legislation in transposing the said Directive. The respondents contend that it is not clear that it is even alleged that the legislative framework in respect of (non-killing) hunting licences fails to take account of the requirements of EU law in respect of wild bird species. Notwithstanding that it seems to the Court that this is fair comment, I will proceed on the basis that the applicants case is in essence that the legislative framework in respect of (non-killing) hunting licences fails to take account of the requirements of EU law in respect of wild bird species.

The applicants' secondary or alternative argument is that even if the Irish legislation does adequately transpose the relevant provisions of the Birds Directive, the way in which the legislation has been operated in the circumstances of this particular case, and in particular the manner in which the Minister has exercised his discretion with respect to the Notice Party's licence application, is contrary to the spirit of the Directive and he has therefore acted in breach of E.U. law. Moreover, the applicants, maintaining that the relevant provisions of the Directive are directly effective, contend that in those circumstances they are entitled to rely directly on the Directive before this Court in support of the various reliefs, including damages, claimed by them.

The applicants said claims are articulated in the following way in their written submissions. They have submitted:

"31. The licence issued in March, 2007 which is under challenge in these proceedings includes a First Schedule which lists the species which may be hunted (field trialled) from 1st February until 31st March 2007. It is clear, on the evidence, that during this period, all of the species listed will have commenced their breeding cycle.

32. Accordingly, these species are clearly in their reproductive period during the currency of the licence which has issued to the Notice Party.

33. In light of the fact that the specified species covered by the licence are in their reproductive period (within the meaning of the protection afforded by the Directive) during the currency of the licence, the said licence contravenes the requirements of European law and was issued in breach of European law which is binding on the State and is directly effective.

34. Under the clear terms of the Directive protected species of birds must not be hunted during the period of their reproductive cycle. As we have seen, the evidence in this case establishes that the birds listed in the schedule to the licence which issued dated the 8th of March, 2007, authorizing hunting of the said animal and during the term of the licence were each in their reproductive cycle (subject to whether you construe the reproductive cycle as the breeding period or the incubation/hatching period as posited by the Respondent) during the period of the licence. The net issue for the Court is whether this constitutes a breach of the requirements of EC law and thereby breaches the directly effective provisions of EC law or constitutes a failure to properly implement EC law.

35. The transposition of a directive into domestic law must guarantee the full application of the directive in a sufficiently clear and precise manner (see, to that effect, Case C 361/88 Commission v Germany [1991] ECR I 2567, paragraph 15). The European Court of Justice has repeatedly held that faithful transposition becomes particularly important in the case of the Birds Directive, where management of the common heritage is entrusted to the Member States in their respective territories (see Case 262/85 Commission v Italy [1987] ECR 3073, paragraph 9, and Case C 38/99 Commission v France [2000] ECR I 10941, paragraph 53).

36. Ireland has already been found wanting in respect of its failure to properly transpose the Birds Directive (Commission v. Ireland (C418/04, 2007-12-13) failed to fulfil its obligations under Articles 4(1), (2) and (4), and 10 of the Birds Directive.

37. In these proceedings it is contended that the decision to issue a licence was taken in contravention of the requirements of the Birds Directive because it authorizes hunting during their reproductive cycle. It is the Applicant's case that, with the exception of Wood Pigeon, all species listed in Schedule 1 of the licence issued on the 8th of March, 2007, will have commenced their breeding cycle during the period covered by the licence and that accordingly, the Respondents and each of them have failed in their duty to properly transpose the said Directive into Irish law and/or to comply with the requirements of the said Directive in permitting licences to issue to hunt protected bird species during their breeding period.

38. The Applicants argue that protected species of birds may not be hunted except in accordance with a derogation granted in accordance with the criteria laid down in Article 9 of the Directive during the reproductive period which commences at the start of migration (for migratory species) and ends only when fledgings have left the care of the parents. It bears emphasis that no derogation applies or is properly available in respect of the birds (other than Wood Pigeon) listed in the First Schedule to the licence which issued to the Notice Party on the 8th of March, 2007 and therefore it is not necessary for this Court to consider the application of Article 9 in this case. In the absence of a derogation, however, the hunting of the birds listed at Schedule 1 of the Licence (with the exception of Wood Pigeon) is unlawful and contrary to EC law.

39. The Applicants seek to lay particular emphasis on the position of red grouse because it is the only huntable species which is designated a "red data" species in Ireland i.e. a species of seriously unfavourable conservation status in respect of which special measures are required under the Birds Directive (Articles 4, 5 and/or 7). It is complained that the decision of the First Named Respondent to permit the hunting of red grouse during its reproductive period, is accordingly unlawful and contrary to EC law as this decision jeopardizes conservation efforts. It is noteworthy that the evidence offered on behalf of the Respondent in relation to the pre-breeding behaviour of the red grouse is to the effect that it commences in September of the year and it would therefore appear to be admitted that if pre-breeding behaviour is

protected, then the hunting of red grouse is prohibited during the period authorized by the licence (see paragraph 5 of the Affidavit of Peter Hudson on behalf of the Respondent to the effect that pre-breeding behaviour starts in September and paragraph 7 of the Affidavit of Mr. David Baines who offers evidence on behalf of the Respondent that reproductive behaviour such as pair forming commences in Autumn).

40. The evidence offered on behalf of the Applicant is that the breeding cycle commences for each of the protected birds covered by the licence during the period covered by the licence. This evidence may be summarized as follows:

a. Grouse whose breeding cycle commenced from 25th of January;

b. Snipe whose breeding cycle commenced from the 25th of March;

c. Pheasant whose breeding cycle commenced from the 14th of February;

d. Red legged partridge whose breeding cycle commenced from the 25th of March;

e. Woodcock whose breeding cycle commenced from the 14th of February;

f. Teal whose breeding cycle commenced from the 10th of March;

g. Widgeon whose breeding cycle commenced from the 15th of March;

h. Mallard whose breeding cycle commenced from the 15th of January;

i. Woodpigeon whose breeding cycle commenced from the 25th of March.

41. This evidence is not seriously contested on behalf of the Respondents who artificially and without legal basis seek to limit the period of protection to incubation as the commencement of the reproductive cycle in the face of clear authority to the effect that pre-mating activity (let alone incubation) is included within the temporal scope of the protection. It is noteworthy that the case is made by Mr. Hudson that many of these birds are occasional breeders on open moorland and therefore it is unlikely that there would be any significant disturbance during their breeding cycle (paragraph 14 of the Affidavit of Mr. Hudson). Again, this is to clearly misunderstand the nature of the legal protections provided for under the Directive in that the European Court of Justice has repeatedly made clear that incomplete protection is inadequate. A system which results in just some birds being disturbed is not an effective system of protection and it falls short of the requirements of EC law. Mr. Hudson also seeks to suggest that hunting is permissible during the breeding cycle because when the grouse is nesting her scent emission drops making it harder for trained dogs to locate her (paragraph 15 of Mr. Hudson's Affidavit)."

The applicants have further argued that dog trialling is an activity captured by the term "hunting" as it appears in the Directive, even though hunting is not defined for the purposes of the Directive. The respondents have argued that the definition of hunting contained in the Irish legislation embraces more than is captured by the Directive and say that dog trialling is not hunting as ordinarily understood or as understood under the rubric of EU conservation legislation and in particular the Birds Directive. They rely upon explanations of the Birds Directive contained in a "Guidance Document on Hunting under Council Directive 79/409/EEC on the Conservation of Wild Birds" issued by the European Commission and exhibited in Mr Crofton's first affidavit. I have given consideration to the possibility of referring a question to the Court of Justice for a preliminary ruling pursuant to Article 234 of the E.U Treaty concerning which interpretation of the expression "hunting" as it appears in the Directive is correct. However, I have decided against doing so for two reasons. First, having read the provisions of the Directive and having considered case law to which I have been referred, including Case C-157/89 Commission v Italy [1991] ECR I-57; Case C-435/92 APAS v Préfets de Maine-et-Loire and Loire-Atlantique [1994] ECR I-67 and Case C-38/99, Commission v. France[2000] ECR I-10941, I have come to the conclusion that the applicants are correct in their interpretation of the Directive on this discrete issue, and that the position is acte clair. Secondly, I do not consider that a definitive resolution of this issue is essential to enable me to render a decision. I will come back to this.

Finally the applicants contend that the duty contained in Article 7(4) of the Birds Directive is clear and concise. They have submitted:

"46. ….The State shall see in particular that the species to which hunting laws apply are not hunted during the rearing season nor during the various stages of reproduction. In the case of migratory species, they shall see in particular that the species to which hunting regulations apply are not hunted during their period of reproduction or during their return to their rearing grounds. It is this duty which it is contended the State has failed to perform in these proceedings. It is contended that the contested licence which issued to the Notice Party in March, 2007, permits hunting during certain vulnerable periods for birds contrary to the requirements of the Directive.

47. It has repeatedly been made clear by the European Court of Justice that Article 7(4) of the Wild Birds Directive seeks in particular to impose a prohibition of hunting of all species of wild birds during the rearing periods and the various stages of reproduction and dependency and, in the case of migratory species, during their return to their rearing grounds. The Court has held that that article is designed to secure a complete system of protection in the periods during which the survival of wild birds is particularly under threat (see Case C-157/89 Commission v Italy [1991] ECR I-57, paragraph 14, and Case C-435/92 APAS v Préfets de Maine-et-Loire and Loire-Atlantique [1994] ECR I-67, paragraph 9).

48. The Court has further ruled that protection against hunting activities cannot be confined to the majority of the birds of a given species, as determined by average reproductive cycles and migratory movements (see the cases cited above, Commission v Italy, paragraph 14, and APAS v Préfets de Maine-et-Loire and Loire-Atlantique, paragraph 10) as such protection is not capable of fulfilling the requirement laid down in Article 7(4) of the Wild Birds Directive, as interpreted by the Court, that there be a complete system of protection for wild birds over the period in which their survival is particularly threatened Case C-38/99, Commission of the European Communities v. French Republic (7 December, 2000).

49. What is covered by the temporal scope of the protection has been ruled upon by the European Court in a landmark ruling in APAS v Préfets de Maine-et-Loire and Loire-Atlantique [1994] ECR 1-67 where the Court has made it clear that the temporal scope of the protection extends to guaranteeing complete protection during the period of pre-mating migration (return to rearing grounds). To oppose the proceedings on the basis that what is required is protection during

periods of incubation is therefore unsustainable having regard to the clear wording of the Directive, its purpose and the manner in which it has been interpreted by the European Court of Justice."

The Court's view of the merits of the claim
Having carefully considered the provisions of the Wildlife Acts 1976 and 2000 I am satisfied that they do adequately transpose the provisions of the Birds Directive into Irish law. I have already indicated my view that I do not require a definitive interpretation of the expression "hunting" as used in the Directive in order to decide this case. It is not necessary because it is common case that the definition of hunting in the Wildlife Acts 1976 and 2000 embraces dog trialling. The Irish legislation is therefore consistent with what I believe to be the correct interpretation of the expression "hunting" contained in the Birds Directive, namely that it captures dog trialling. However, if I am wrong about this it simply means that the definition contained in Irish legislation captures more than the word hunting as used in the Directive, and the applicants can hardly complain about that.

It seems to the Court that the real issue is not whether the particular activity properly comes within the definition of hunting as it appears in the Directive because, of course, hunting as such is not absolutely outlawed. Some hunting activities may be permitted under the Directive. Thus, how dog trialling as an activity is labelled is not particularly important. In the Court's view the really important questions are whether that activity is permissible at all within the spirit of the Directive and, if so, in what circumstances might it be permitted. The exact nature of the Notice Party's dog trialling activities have been described for the Court in an affidavit sworn by Brian O'Hara of the Notice Party on the 2nd of July 2007. It is clear from this evidence that it does not involve the capture or killing of wild birds. In the circumstances the crucial question is then whether it involves "deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of the Directive." This is a matter for scientific evidence.

Scientific evidence has been adduced before me by both sides in affidavits sworn by Professor John O'Halloran and by Dr James Dunne, respectively, on behalf of the applicants, by Professor Peter Hudson on behalf of the respondents and by Mr David Baines on behalf of the Notice Party (which supports the respondents' position). It is fair to say that there is a significant conflict on the scientific evidence both as to the likely degree of disturbance and whether or not it would be significant having regard to the objectives of the Directive, and also as to the definition and duration of "the period of breeding and rearing" in respect of each species. As neither side sought to cross-examine their opponent's experts as to their affidavits it is impossible for the Court to resolve these conflicts. That being so, the Court must have regard to the fact that the applicants bear the burden of proving the essential facts in support of their claim. Prima facie, they have failed to discharge that burden on this aspect of the matter.

In any case the respondents make the valid point that all of the evidence is to the effect that the application by the Notice Party to the respondent was carefully considered before a decision was taken to issue the licence. The opinion of an independent ornithological expert, Professor Peter Hudson, was obtained in relation to the risk of disturbance to the Red Grouse, in particular. Although the applicants have sought to adduce evidence that is in conflict with the first named respondent's views (and the views of Professor Hudson) in relation to the matter of breeding periods, in the context of risk of disturbance to the species concerned (and an alleged consequent breach of EU law), the applicants' and their deponents' disagreement with the first named respondent on this matter does not amount to a basis in law on which a Court could grant an order of Certiorari or any other relief sought by the applicants in these proceedings. Even if the applicants were to adduce evidence of a conflicting scientific view of equal weight, which the respondents contend they have not, that would be immaterial for the purposes of the Court's consideration of the relief sought in the proceedings. I believe that the respondents are correct in this submission.

Accordingly, in all the circumstances and having regard to the evidence before the Court, I am of the view that even if the applicants standing on the European law question was not an issue, the applicants case is unlikely to be sustained on its merits. Returning now to the issue of the applicants locus standi, even if the Court were wrong in its view that the Wildlife Acts 1976 and 2000 adequately transpose the relevant provisions of the Birds Directive, or even if the applicants could establish a failure on the first named respondent's part to operate the legislation in accordance with the spirit of the Birds Directive, I believe it is highly questionable whether the applicants could demonstrate that the provisions in question are capable of having direct effect; that they are such as to provide a right of action to the applicants and that the applicants are sufficiently interested. I have already alluded to the Francovich decision which circumscribed the right to damages by imposing the three conditions previously mentioned viz: i) the rule of law infringed must be intended to confer rights on individuals; ii) the breach must be sufficiently serious; and iii) there must be a direct causal link between the breach of the obligation and damage sustained by the injured party. I do not believe that the applicants could satisfy any of these requirements. In particular, there is not a scintilla of evidence before the Court suggesting that the applicants have suffered any damage by the rendering of the decision in question. In all the circumstances, and notwithstanding the obligation on this Court emphasised in Factortame to ensure the legal protection which persons derive from the direct effect of provisions of Community law, I do not believe that the applicants have demonstrated that the provisions in question are capable of having direct effect and that they are such as to provide a right of action to the applicants. Accordingly, the Court is not satisfied that they have sufficient standing on the European law dimension to these proceedings.

Other issues
It is not necessary in the circumstances for the Court to proceed to consider the other issues in the case, and in particular (i) whether the Court was being asked to decide a moot, and (ii) whether the applicants should be denied relief for lack of candour. As regards the latter issue, although this Court has already indicated earlier in this judgment that it has doubts about the applicants' bona fides as regards their true motives in bringing these proceedings, there is a second aspect to the matter which it is not now necessary to consider. That is an alleged failure by one of the applicants' supposedly independent scientific experts, Dr James Dunne to disclose, at the time that he swore his principal affidavit on the 22nd of March 2007, that he was in fact Vice Chairman of the Dublin Regional Game Council. This fact did not emerge until long after leave in this matter had been granted by Peart J. Suffice it to say that the Court does not have regard the issues raised, and in particular the latter issue, as being either minor or insignificant.

Conclusion
For the reasons stated the court must dismiss all aspects of the applicants' claim for lack of locus standi.