[2023] IEHC 464

THE HIGH COURT
JUDICIAL REVIEW

[2022 No. 983 JR]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000 AND IN THE MATTER OF SECTION 78 OF THE HOUSING ACT 1966, AS AMENDED

BETWEEN

JOHN CLANCY AND SHEENA CLANCY

APPLICANTS

AND

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

RESPONDENTS

(No. 2)

JUDGMENT of Humphreys J. delivered on the 28th day of July, 2023

Judgment history

1. In *Clancy v. An Bord Pleanála (No. 1)* [2023] IEHC 233 (Unreported, High Court, 8th May, 2023) I refused an application for costs protection as against the county council in the context of a challenge to a compulsory purchase order (CPO).

2. I am now dealing with the applicants' claim for costs protection as against the other parties.

Facts

3. In or about August, 2016, the council proposed to carry out a development under Part XI of the Planning and Development Act 2000 and Part 8 of the Planning and Development Regulations 2001 for an inner relief road for Ennistymon, including a new vehicular bridge crossing the Inagh/Cullenagh River. The route is located centrally in Ennistymon from approximately 180 metres west of Blake's Corner on the N85 national road to a point approximately 180 metres east of Blake's Corner on the N67 national road.

4. The board decided that a Natura Impact Statement (NIS) was not required and further decided on 5th October, 2016 that an environmental impact assessment (EIA) report was not required.

5. The development was advertised in early 2018 and the applicants made submissions on 23rd February, 2018.

6. The elected members decided to approve the development on 9th April, 2018, or more formally they decided not to veto the development pursuant to s. 179(4) of the 2000 Act. The Chief Executive's decision on foot of that constitutes the development consent.

7. A CPO was made in light of that consent on 12th June, 2020, entitled N67 /N85 Inner Relief Road Ennistymon (Blake's Corner) Compulsory Purchase Order 2020, providing for the acquisition of land on both sides of the Lahinch Road, Bogbere Street, New Road, covering specified properties on Bridge Street including the applicants' dwelling house and business premises. The main operative provisions of the CPO are as follows:

> "WHEREAS in pursuance of the provisions of section 76 of and the Third Schedule to the Housing Act, 1966 as extended by section 10 of the local Government (No. 2) Act, 1960 (as substituted by section 86 of the Housing Act, 1966 as amended) and as amended and extended by section 6 and the Second Schedule to the Roads Acts, 1993 - 2015 and the Planning and Development Acts, 2000-2019 and in particular by section 222 of the Planning and Development Act, 2000 and in exercise of the powers conferred upon it by the above mentioned legislation and in particular section 213 of the Planning and Development Act, 2000 (as amended), Clare County Council (hereinafter referred to as 'the Local Authority') has decided to effect the acquisition of the land to which this order relates:
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> NOW THEREFORE IT IS HEREBY ORDERED THAT: -
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> 1. Subject to the provisions of this order, the Local Authority is hereby authorised-
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> a) to permanently acquire compulsorily, for the purposes of road construction and improvement comprising of development of an Inner Relief Road in Ennistymon including a new vehicular bridge crossing of the Inagh/Cullenagh river approximately 80 metres upstream of the existing bridge crossing. The overall route runs from a point located approximately 170 metres south east of Blake's Corner on the NBS national road to a point located approximately 180 metres west of Blake's Corner on the N67 national road, via Bogbere Street. The development includes the pedestrianisation of the existing bridge, the inclusion of a roundabout at the western end of the proposed new bridge crossing on the L-1084, the relocation of the existing public car park adjacent to New Road (NBS) and all associated site works through the townlands of Deerpark West, Ardnacullia North and Ennistymon in the County of Clare, the land described in the First Schedule hereto which land is shown on the

map marked: Drawing no. EIRR-RODA-LCA-SW_AE-DR-LN-400001 marked Clare County Council N67/N85 Inner Relief Road Ennistymon (Blake's Corner) Deposit Map for Compulsory Purchase Order 2020 and sealed with the seal of the Local Authority and deposited at:

- Clare County Council, West Clare Municipal District Offices, Ennis Road, Deerpark Lower, Ennistymon, Co. Clare V95 YX81
- Clare County Council, Aras Contae an Chlair, New Road, Ennis, Co. Clare V95 DXP2

(hereinafter referred to as 'the deposit map'),

b) to extinguish the public and private rights of way described in the Second Schedule hereto, by order made relating to the public rights of way after the acquisition of the land, where the said rights of way are over the land so acquired or any part thereof, or over land adjacent to or associated with the land so acquired or any part thereof.

2. The land described in the First Schedule hereto, coloured grey, and outlined in red on the said deposited map is land other than land consisting of a house or houses unfit for human habitation and not capable of being rendered fit for human habitation at reasonable expense.

3. Subject to any necessary adaptations, the provisions of-

(a) the Lands Clauses Acts (except sections 127 to 132 of the Lands Clauses Consolidation Act, 1845, and article 20 of the Second Schedule to the Housing of the Working Classes Act, 1890), and

(b) the Acquisition of Land (Assessment of Compensation) Act, 1919, as amended by the Acquisition of land (Reference Committee) Act, 1925, the Property Values (Arbitrations and Appeals) Act, 1960, and the local Government (Planning and Development) Act, 1963 (as amended) (as applied by section 265(3) of the Planning and Development Act, 2000) and the Planning and Development Acts 2000-2019

as modified by the Third Schedule to the Housing Act, 1966 are hereby incorporated in this order and the provisions of those Acts shall apply accordingly.

4. This order may be cited as: -

N67 /N85 Inner Relief Road Ennistymon (Blake's Corner) Compulsory Purchase Order 2020"

8. The CPO was submitted to the board for approval.

9. In June, 2021, an oral hearing took place. The applicants argued that the members' decision wasn't a development consent and that the decision didn't comply with the EIA or habitats directives.

10. On 24th May, 2022, the board's inspector reported, recommending approval of the CPO. Paragraph 3.1 of the inspector's report summarises the position:

> "Schedule I of the CPO Schedule lists 110 x individual plots that will be permanently and temporarily affected during construction works. Schedule II Part I lists the 5 x Public Rights of Way proposed to be extinguished. Schedule II Part II lists the 1 Private Rights of Way proposed to be extinguished. Deposit maps illustrate lands to be permanently and temporarily acquired, the Public and Private Rights of Way to be extinguished and the Private Fishing Rights to be Temporarily Extinguished."

11. On 31st August, 2022, the board adopted a direction approving the CPO and a further direction under s. 219 of the 2000 Act that the applicants should not get their costs of the CPO objections.

12. On 20th September, 2022, the board made an order approving the CPO, and that decision is now challenged together with the refusal of costs.

Procedural history

13. On 14th November, 2022 the matter was first mentioned in the List and adjourned for an amended statement of grounds. Renewed liberty to amend the statement of grounds was given on 21st November, 2022.

14. As papers were not in order, it was adjourned again until 19th December, 2022.

15. There were further issues with the amendments because no MS Word version had been uploaded to ShareFile.

16. In January, 2023, the List Registrar wrote to the applicants' solicitor in this regard but there was no immediate reply. The net result was that there were two unperfected orders on the system (of 14th and 21st November, 2022). This is because the normally applicable procedure is that an order allowing an amendment is not perfected until the MS Word version of the amendment is submitted.

17. It emerged that an amended statement had been filed on 18th January, 2023 but was not on ShareFile. It was eventually emailed to the court on the evening of 30th January, 2023. On foot of that and of answers to the court's checklist indicating that the matter was appropriate for automatic admission to the list, leave was granted.

18. On 20th February, 2023 it emerged that the matter was not in fact one that should qualify for automatic admission and so a motion to admit would have been required.

19. On that basis, on 27th February, 2023 I set aside the leave order by consent, but allowed the orders for amendment of pleadings to stand, without objection from the opposing parties. I adjourned the matter for a motion to admit the case to the List.

20. On 13th March, 2023 on foot of such a motion I admitted the case to the List without objection.

21. The council then applied for an order that leave be on notice. It submitted that the road was important to the community and to the local authority, and that it would be contended that there were no substantial grounds for the proceedings. The action related to a function transferred by Part XIV of the 2000 Act and so comes within s. 50(2)(b) of that Act. The other respondents did not apply for such an order.

22. I decided that the council was entitled to make the application even though the other respondents were not seeking leave on notice. I stated that while one could be sceptical about leave on notice as a generality, on balance it was appropriate here given all of the circumstances including the history of the matter. However I stated that the position regarding costs protection would have to be clarified first. The matter was adjourned for that purpose for a week, and then again by consent on 20th March, 2023.

23. Normally, there would simply be a hearing on costs protection but that didn't happen here, because an issue broke out regarding the costs of the costs protection issue. On 27th March, 2023, the board and the State accepted that there would be no order as to the costs of the costs protection application. The council did not so agree.

24. On 17th April 2023, the various options were discussed, specifically that there be a summary hearing on costs protection for the costs protection motion; that the issue about costs of the costs would be rolled into a single hearing, possibly together with the leave hearing, or that the applicants would withdraw the proceedings without incurring further costs. The applicants stated a preference for dealing with costs protection for the costs protection on a summary basis.

25. That issue was then heard, as respects the council, across two short and relatively summary hearings on 24th and 25th April, 2023.

26. In the No. 1 judgment, I rejected the claim for costs protection regarding the council, subject in effect to reviewing that following the decision on costs protection against the other parties.

27. By notice of motion filed on 7th June, 2023, the applicant then sought costs protection as against the board and the State. That application was heard on 17th July, 2023, again in a summary manner. The council did not participate in that hearing. As noted above, the board and the State agreed that there would be no order as to costs in the event that the applicants were not successful in the costs protection application.

Relief sought

28. In the amended statement of grounds, the applicants seek the following reliefs:

> "1. An Order of Certiorari quashing the decision of the First Named Respondent to confirm a Compulsory Purchase Order authorising the compulsory acquisition of the Applicants' lands entitled 'N67/N85 Inner Relief Road Ennistymon (Blake's Corner) Compulsory Purchase Order 2020' which confirmation of the CPO was purported to be made by decision dated 20th September 2022 and signed by Patricia Calleary, Board Member under An Bord Pleanála reference ABP-307413-20 (the impugned decision).
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> 2. Such Declaration(s) of the legal rights and/or legal position of the Applicant and/or Respondents and/or persons similarly situated as the Court considers appropriate.
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> 3. A Declaration, as against the Third and Fourth Named Respondents that insofar as the procedures and test that was applied by the First Named Respondent complies with the statutory provisions required to be complied with in a Compulsory Acquisition of land and the confirmation of the impugned decision the said provisions are, in circumstances where the Applicants' property, family home and its business are the subject matter of a Compulsory Acquisition, the said provisions and procedures are inconsistent with and contrary to Articles 40.3, 41, 43 and 40.5 of the Constitution of Ireland.
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> 4. A Declaration that the provisions of Section 76 of the Third Schedule of the Housing Act 1966 as extended by Section 10 of The Local Government (No.2) Act 1960 as substituted by Section 86 of the Housing Act 1966 and as amended and extended by Section 6 and the Second Schedule of the Roads Act 1993-2005 and Section 213 of the Planning and Development Act 2000-2019 and all other Acts thereby enabling which statutory scheme formed the basis of, making of and confirmation of a Compulsory Purchase Order underlying Compulsory Purchase Order 2020 N67/N85 Inner Relief Road Ennistymon (Blake's Corner) N5, and the tests therein have not been satisfied, and that such decision is contrary to and inconsistent with Articles 43, 40.3, 40.5 and 41 including all unspecified rights and including the [right] to earn a livelihood, right to bodily integrity and endangerment to health, both

physical and psychological and to a clean environment in the particular circumstances of this case.

5. A Declaration that the Applicants are entitled to costs protection in respect of the reliefs set out at Paragraph D on the grounds set out at Paragraph E pursuant to Section 50B of the Planning and Development Act 2000, the Environmental (Miscellaneous Provisions) Act 2011 and the Aarhus Convention.

6. A Declaration that the policy in relation to a claim for costs as relied on by the First Named Respondent in the consideration and determination of the Applicants' claim for costs is inconsistent with and contrary to with Articles 40.3, 43 and 40.5 of the 1937 Constitution and Council Directive 2011/92 EU (as amended).

7. An Order of Certiorari quashing the decision of the First Named Respondent not to award the Applicants' costs pursuant to a policy described as 'An Bord Pleanala Policy in relation to Costs 2016' and requiring that the matter be remitted to the First Named Respondent so as to determine whether the Applicants are entitled to and the quantum of costs in respect of their participation in the Application of the Compulsory Acquisition the subject matter of application ABP307413/20.

8. A stay on the implementation of the said decision subject to application 307413/20, or the taking of any steps in respect of the compulsory purchase of the Applicants' lands pending the determination of the proceedings.

9. Interim and/or interlocutory reliefs.

10. Further and other relief.

11. The costs of the application."

Grounds of challenge

29. The amended statement of grounds sets out the following core grounds:

"1. The First Respondent impugned decision is invalid, failed to apply the appropriate legal test and/or procedure in respect of its consideration and determination of application 307413/20 of the Compulsory Acquisition of the Applicants' lands.

2. The First Respondent impugned decision is invalid, failed to and/ or would not apply properly or at all the test of proportionality as primary consideration as to confirm the Scheme for the Compulsory Acquisition of the Applicants' lands.

3. The First Named Respondent impugned decision is invalid, failed to facilitate, consider, or engage with the Applicants' submissions with regard to the Compulsory Acquisition application in respect of their property in an appropriate manner or the circumstances arising from the said Compulsory Acquisition in application 307413/20.

4. The First Named Respondent erred in law in excluding a consideration of and/or the adequacy of a procedure for providing compensation which was required to be addressed in the particular circumstances of this case, which is contrary to the Applicants Constitutional rights.

5. The First Named Respondent erred in law in the manner in which it considered and determined the Applicants' application for costs, relied on a document that fettered its discretion and adopted a fixed rule as the determination as to how any costs application would be determined, no matter what the particular circumstances, which is unreasonable, inappropriate, and contrary to plain reason and common sense.

6. The Scheme underlining the Compulsory Acquisition is ultra vires to the Second Named Respondent in that the nature and purpose of the Scheme grounding the Compulsory Purchase Order is not provided for and/or is inconsistent in the Clare County Development and as such the impugned decision is ultra vires, invalid and void.

7. The First Named Respondent erred in law in having regard to the Road Safety Strategy 2013-2020 and the South West Regional Planning Guidelines in application 307413/20, which failed to properly apply Council Directive 92/43EEC and 2001/42EC into the decision making process.

8. Insofar as Statutory provisions and procedure grounding the consideration of a compulsory purchase order excludes any consideration of the procedure for and adequacy of compensation in a procedure where the Applicants' family home and its business is to be compulsorily acquired and where the effect of such acquisition will be to render the Applicants homeless and incapable of providing accommodation for themselves and for their children, such provisions are contrary to Article 40.3, Article 43, and Article 40.5 of the Constitution.

European Law:

1. The First Named Respondent erred in law in relying on Section 179 of the Planning and Development Act 2000 and Part 8 of the Planning and Development Regulations 2001 in excluding the Applicants from raising submissions in respect of Directive 92/43EEC,

predetermined the issue and where part of the scheme was located adjoining and/or within a European site.

2. Section 78 of the Housing Act 1966 (as amended) is inconsistent with and/or fails to transpose Council Directive 92/43EEC and/or with Section 50, 50A, 50B of the Planning and Development Act 2000.

3. Section 50(1) of the 1993 Roads Act is inconsistent with the Statutory Scheme underlying the making of a Compulsory Purchase Order insofar as it excludes, and did in fact exclude the making of and the consideration of a scheme which is a specified and/or sub threshold development for matters relevant to Council Directive 2011/92EU.

4. The Third and Fourth Named Respondents failed to transpose their requirements of Council Directives 92/43EC and/or 2011/92EU into the Statutory Scheme underlying the making of a Compulsory Purchase Order and as applied in application number ABP/307413-20 whereby Council Directive 92/43 EEC and/or 2011/92EU were excluded in the determination made of application 307413/20.

5. The Statutory Scheme underlying the making of and determination of a Compulsory Purchase Order and/or in application 307413-20 which excluded any consideration of environmental issues either under Council Directive 92/43EEC, 2001/42EU or 2011/92EU is inconsistent with and contrary to and/or fails to transpose the provisions of the aforesaid Directives."

The application for costs protection in respect of the CPO challenge

30. The first complaint made (which is the applicants' best point) is that the power to compulsorily acquire land is not just about title and there are numerous ancillary aspects such as the right to confirm an order in part only and the extinguishment or allegedly the creation of rights of way. Those points need to be unpacked slightly:

(i) The confirmation of a CPO in part isn't really relevant because that doesn't constitute development in some sense that does not apply to confirmation in whole.

(ii) Extinguishment of rights of way is provided for under s. 10(4)(d) of the Local Government (No. 2) Act 1960 as most recently relevantly amended by the 2000 Act. That needs separate consideration and I return to that below.

(iii) Creation of rights of way was referred to in oral submissions (although despite being the applicants' best point, there seems to be no reference to rights of way at all in the written submissions), but unless I missed it, no specific statutory provision was identified as a basis for the alleged power to create rights of way under a CPO. In the absence of identifying such a provision I think that point is going nowhere, and we can limit our later discussion to extinguishment of such rights.

31. The second point is that this is a self-contained power that was formerly vested in the Minister. But whether it's self-contained or not is not the point.

32. The third point is that the board is obliged to consider whether it is appropriate or not to confirm the order, which the applicants say is a critical step in whether what they call "the scheme" should proceed (here in submissions using "scheme" in a sense to mean the development). This, they say, illustrates that it is not within the power of the developer to proceed with the "scheme", but that the "scheme" depends on the acquisition being approved. Again, that doesn't make the CPO a development consent any more than any other necessary step such as a contract for sale.

33. Fourthly, the applicants rely on the CPO being capable of being heard at the same time as the consent which indicates that environmental considerations are a factor. That doesn't establish that the CPO process is a manifestation of national or European environmental law.

34. Fifthly, the intra-urban nature of the scheme and the proximity to a European site doesn't change the legal nature of the CPO process.

35. The sixth and final point was that European environmental law arises as part of the development and thus as a factor to be considered in the CPO process, for example as part of assessment of suitability. That again is essentially a misconceived argument that an applicant by making environmental submissions at the CPO stage can convert a CPO into a development consent.

36. The principle that one project may require multiple consents (*Harte Peat Limited v. The Environmental Protection Agency, Ireland and The Attorney General* [2022] IEHC 148, [2022] 3 JIC 1606 (Unreported, High Court, Phelan J., 16th March, 2022); *Martin v An Bord Pleanála, Ireland and The Attorney General* [2007] IESC 23, [2008] 1 I.R. 336, [2007] 2 I.L.R.M. 401, [2007] 5 JIC 1001; Case C-50/09 *European Commission v. Ireland* (Court of Justice of the European Union, 3rd March, 2011, ECLI:EU:C:2011:109)) doesn't have the effect that a procedure such as CPO that is not a development consent should be treated as if it was.

37. So the only one of the applicants' points that needs further consideration is in effect that the power at CPO stage to extinguish rights of way involves a need to comply with the habitats directive in particular and thus makes the CPO legislation into legislation giving effect to that directive, thus triggering statutory costs protection under s. 50B of the 2000 Act.

The rights of way issue

38. This particular CPO proposes to extinguish various rights of way, and any CPO in principle could do so. Does that involve a "project" such that the EIA or habitats directives apply?

39. As regards EIA, clearly not. The EIA directive involves an interpretation of "project" that involves it being physical in nature: Case C-275/09 *Brussels Hoofdstedelijk Gewest and Others v. Vlaams Gewest* (Court of Justice of the European Union, 17th March, 2011, ECLI:EU:C:2011:154) para. 24:

> "It follows that the renewal of an existing permit to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a 'project' within the meaning of the second indent of Article 1(2) of Directive 85/337."

40. This was put in general terms in Case C-121/11 *Pro-Braine ASBL and Others v. Commune de Braine-le-Château* (Court of Justice of the European Union, 19th April, 2012, ECLI:EU:C:2012:225) para. 31:

> "As has been established by the Court, the term 'project' refers to works or interventions involving alterations to the physical aspect of the site (Case C-275/09 *Brussels Hoofdstedelijk Gewest and Others* [2011] ECR I-1753, paragraphs 20, 24 and 38)."

41. The point was repeated in Case C-411/17 *Inter-Environnement Wallonnie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v. Conseil des ministres* (Court of Justice of the European Union, 29th July, 2019, ECLI:EU:C:2019:622):

> "61 The term 'project' in Article 1(2)(a) of the EIA Directive refers, in the first indent, to the execution of construction works or of other installations or schemes and in the second indent, to other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.
>
> 62 It follows from the case-law of the Court that the definition of the term 'project', specifically in the context of the wording of the first indent of Article 1(2)(a) of the EIA Directive, refers to work or interventions involving alterations to the physical aspect of the site (see, to that effect, judgment of 19 April 2012, *Pro-Braine and Others*, C-121/11, EU:C:2012:225, paragraph 31 and the case-law cited)."

42. That decision also highlighted that the definition of "project" under the habitats directive was wider than that under the EIA directive. Under a section headed "[t]he definition of a 'project', for the purposes of the Habitats Directive", the court said:

> "122 As the Habitats Directive does not define the term 'project', for the purposes of Article 6(3), account should be taken of the definition of 'project' in Article 1(2)(a) of the EIA Directive (see, to that effect, judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging*, C-127/02, EU:C:2004:482, paragraphs 23, 24 and 26; of 14 January 2010, *Stadt Papenburg*, C-226/08, EU:C:2010:10, paragraph 38; of 17 July 2014, *Commission v Greece* C-600/12, not published, EU:C:2014:2086, paragraph 75; and of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others*, C-293/17 and C-294/17, EU:C:2018:882, paragraph 60).
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> 123 The Court has previously held that if an activity is covered by the EIA Directive, it must, a fortiori, be covered by the Habitats Directive (judgment of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others*, C-293/17 and C-294/17, EU:C:2018:882, paragraph 65).
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> 124 It follows that if an activity is regarded as a 'project' within the meaning of the EIA Directive, it may constitute a 'project' within the meaning of the Habitats Directive (judgment of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others*, C-293/17 and C-294/17, EU:C:2018:882, paragraph 66).
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> 125 Given the answer to Question 6(a) to (c), it must be held that measures such as those at issue in the main proceedings, together with the work inextricably linked thereto, constitute a project, for the purposes of the Habitats Directive.
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> 126 Further, it is not disputed that the project at issue in the main proceedings is neither linked to nor necessary for the management of a protected site.
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> 127 Last, the fact that a recurrent activity has been authorised under national law before the entry into force of the Habitats Directive does not constitute, in itself, an obstacle to such an activity being regarded, at the time of each subsequent intervention, as a distinct project for the purposes of that directive, at the risk of permanently excluding that activity from any prior assessment of its implications for that site (see, to that effect, judgments of 14 January 2010, *Stadt Papenburg*, C-226/08, EU:C:2010:10, paragraph 41, and of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others*, C-293/17 and C-294/17, EU:C:2018:882, paragraph 77).
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> 128 To that end, it must be determined whether, having regard in particular to the regularity or nature of some activities or the conditions under which they are carried out,

they must be regarded as constituting a single operation, and can be considered to be one and the same project for the purposes of Article 6(3) of the Habitats Directive (see, to that effect, judgments of 14 January 2010, *Stadt Papenburg*, C-226/08, EU:C:2010:10, paragraph 47, and of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others*, C-293/17 and C-294/17, EU:C:2018:882, paragraph 78).

129 That would not be the case where there is no continuity in the activity, inter alia when the location and conditions in which it is carried out are not the same (judgment of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others*, C-293/17 and C-294/17, EU:C:2018:882, paragraph 83).

130 In the present case, while industrial electricity production by the Doel 1 and Doel 2 power stations was authorised before the entry into force of the Habitats Directive for an unlimited period, the Law of 31 January 2003 limited that period of activity to 40 years, up until 15 February 2015 for the Doel 1 power station and 1 December 2015 for the Doel 2 power station. As noted by the referring court, that legislative choice was modified by the measures at issue in the main proceedings, with the result, in particular, that one of those two power stations had to be restarted.

131 It is also undisputed that upon implementation of those measures, industrial production at those two power stations will not be carried out under operational conditions identical to those initially authorised, if only due to scientific developments and new safety standards, the latter of which justify, as stated in paragraphs 64 to 66 of the present judgment, proceeding with major upgrading work. Furthermore, the order for reference indicates that a production consent was granted to the operator of those power stations after the Habitats Directive had entered into force, following an increase in their capacity.

132 It follows that the measures at issue in the main proceedings, together with the work inextricably linked thereto, constitute a distinct project, subject to the rules of assessment provided for in Article 6(3) of the Habitats Directive.

133 The fact that the national authority that is competent to approve the plan or project in question is the legislature has no bearing in this matter. In contrast to the provisions of the EIA Directive, no derogation is possible from the assessment under Article 6(3) of the Habitats Directive on the grounds that the competent authority to grant consent to the project in question is the legislature (see, to that effect, judgment of 16 February 2012, *Solvay and Others*, C-182/10, EU:C:2012:82, paragraph 69)."

43. Case C-254/19 *Friends of the Irish Environment Ltd v. An Bord Pleanála* (Court of Justice of the European Union, 9th September, 2020, ECLI:EU:C:2020:680) repeats this point:

"28 In the first place, in order to assess whether a decision extending the period set in the original consent for the construction of a natural liquefied gas regasification terminal, in respect of which works have not commenced, relates to a 'project' within the meaning of Article 6(3) of the Habitats Directive, it is important to observe that it follows from the case-law that the concept of 'project' within the meaning of Article 1(2)(a) of the EIA Directive can be taken into account in that regard (see, to that effect, judgment of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, paragraph 122 and the case-law cited).

29 Furthermore, since the definition of the concept of 'project' under the EIA Directive is more restrictive than that under the Habitats Directive, the Court has held that, if an activity is covered by the EIA Directive, it must, a fortiori, be covered by the Habitats Directive (judgments of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others*, C-293/17 and C-294/17, EU:C:2018:882, paragraph 65, and of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, paragraph 123).

30 It follows that if an activity is regarded as a 'project', within the meaning of the EIA Directive, it may constitute a 'project' within the meaning of the Habitats Directive (judgment of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, paragraph 124 and the case-law cited).

31 The term 'project' in Article 1(2)(a) of the EIA Directive refers, in the first indent thereof, to the execution of construction works or of other installations or schemes and, in the second indent thereof, to other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.

32 In addition, it follows from the Court's case-law that the definition of the term 'project', specifically in the context of the wording of the first indent of Article 1(2)(a) of the EIA Directive, refers to work or interventions involving alterations to the physical aspect of the site (judgment of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, paragraph 62 and the case-law cited).

> 33 In the present case, the decision to extend a period originally set for the construction of a liquefied natural gas regasification terminal, for which works have not commenced, meets such criteria and must therefore be regarded as relating to a 'project' within the meaning of the EIA Directive.
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> 34 Such a decision must therefore also be regarded as relating to a 'project' within the meaning of Article 6(3) of the Habitats Directive.
>
> 35 However, as Advocate General Kokott observed in point 32 of her Opinion, if, having regard in particular to the regularity or nature of those activities or the conditions under which they are carried out, certain activities must be regarded as constituting a single operation, they can be considered to be one and the same project for the purposes of Article 6(3) of the Habitats Directive, exempted from a new assessment procedure under that provision (see, to that effect, judgments of 14 January 2010, *Stadt Papenburg*, C-226/08, EU:C:2010:10, paragraphs 47 and 48, and of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others*, C-293/17 and C-294/17, EU:C:2018:882, paragraphs 78 and 80)."

44. So we then come to the question of whether the extinguishment of rights of way at the CPO stage as envisaged by the CPO legislation could constitute a project for habitats purposes. I think that is arguable, based on what the applicants have put forward, which creates a procedural complication here which has the effect that I shouldn't go on from there to determine the actual merits of that point in the absence of the council.

45. The procedural complication arises because in the No. 1 judgment I didn't think that the applicants had an arguable point against the council, save insofar as they managed to establish such a point against the board or State. They have done that now to the level of arguability, which means that there should be a costs-protected hearing on whether they are correct substantively on that (as opposed to having merely established that the point is arguable so as to warrant costs protection for the argument as to whether the point is actually correct), involving all opposing parties. Logically, costs protection including against the council must apply to that hearing because the applicants have managed to surmount the threshold of having an arguable ground for this point, as discussed more fully in the No. 1 judgment.

46. If in due course the applicants did manage to establish that such extinguishment could be a "project", then it wouldn't seem to matter that they haven't made any point in the pleadings on the issue of the extinguishment of rights of way, because they could rely on *Heather Hill Management Company CLG v. An Bord Pleanála* [2022] IESC 43, [2022] 2 I.L.R.M. 313, [2022] 11 JIC 1004 in reply to that. In other words, if that is a project, then the CPO legislation *is* legislation to implement the habitats directive (contrary to the view I took in the No. 1 judgment, but in fairness that was subject to further argument involving the other opposing parties), and therefore a challenge under that legislation is covered by s. 50B of the 2000 Act on the *Heather Hill* doctrine irrespective of the grounds pleaded.

The application for costs protection in relation to the challenge to the refusal of costs

47. As noted above, the board also decided under s. 219 of the 2000 Act that the applicants should not get their costs of the CPO objections.

48. But if the CPO process is not domestic law related to the environment, or law giving effect to EU environmental law, such that costs protection applies to that process, then an ancillary application regarding costs of that process is not going to attract costs protection either. So this point falls, subject to the rights of way issue.

The application for costs protection in relation to the challenge to measures of general application

49. While not particularly addressed in submissions, I also need to consider whether costs protection applies to the constitutional challenge and the challenge to the board's policy document.

50. That challenge is pleaded in a rather roundabout way. Normally if one wants to challenge a decision under a statute, step 1 is to plead that the decision is *ultra vires* and invalid. Step 2 is to plead that if (which is denied) the decision does comply with the statute, then the statute is invalid or incompatible with ECHR provisions.

51. Here, reliefs 1, 4 and 7 challenge the board's decisions on a conventional administrative law basis. Reliefs 3 and 6 (which precede, rather than follow, the corresponding administrative law grounds 5 and 7 respectively) challenge measures of general application, being the legislation and the board's policy respectively. As the reliefs are phrased, the board policy is impugned by reference to the Constitution and the EIA directive whereas the challenge to the legislation refers only to the former (as does domestic core ground 8). However, European core grounds 2, 3 and 5 allege breaches of EU law by the legislation. This is not reflected in the relief sought. European core ground 4 alleges non-transposition but there is no corresponding relief claimed as required by Practice Direction HC119. There is no core ground supporting the relief regarding the invalidity of the board policy, either by reference to EU law or at all, although possibly domestic core ground 5

could be construed generously as suggesting that the policy document is invalid because it fetters the board's discretion. The core grounds also seek to collaterally challenge the Road Safety Strategy (domestic core ground 7) and what they call the "scheme" underlying the CPO (domestic core ground 6). However, no corresponding reliefs in that regard are claimed. The "scheme" claim needs further investigation. The pleadings also use the word "scheme" confoundingly in a separate sense to refer to the legislation ("statutory scheme"), and in written and oral submissions the applicants used "scheme" to mean the development overall. Surely synonyms could have been found.

52. The applicants don't trouble themselves to define what they mean by "scheme", by reference to a date or a document or anything else, but on closer examination what they mean by that word seems to vary by context to mean either the underlying development, or the CPO considered overall, as opposed to insofar as it affects the applicants. Sub-ground 3 provides that:

> "3. The First Named Respondent applied inappropriate and incorrect tests in respect of the manner in which they considered whether it was inappropriate or not to confirm the scheme ..."

53. This is to use the term "scheme" as equivalent to the CPO. Elsewhere, reference is made to the scheme not being able to proceed unless the CPO is confirmed, which uses it as a term meaning the development. If the challenge to the "scheme" means a challenge to the CPO, it adds nothing to the *certiorari* already explicitly sought. If it means a challenge to the underlying development consent, then it doesn't get out of the starting blocks. That was done and dusted years ago.

54. But despite the depletion of one's *Wille zum Leben* caused by the effort of deciphering the confounding pleadings here, almost none of it actually matters.

55. That's because, subject to the rights of way point:

(i) the impugned CPO legislation is not legislation giving effect to the directives referred to in s. 50B(1)(a) of the 2000 Act and nor does it constitute domestic environmental law;

(ii) the board's CPO costs policy is not made under legislation giving effect to the directives referred to in s. 50B(1)(a) of the 2000 Act and nor does it constitute domestic environmental law;

(iii) the Road Safety Strategy is not (or at least hasn't been shown to have been) made under legislation giving effect to the directives referred to in s. 50B(1)(a) of the 2000 Act and nor does it constitute domestic environmental law; and

(iv) the CPO "scheme" referred to in domestic core grounds 2 and 6 and EU core grounds 1 and 3 either doesn't exist independently of the CPO in the sense in which that word appears in the pleadings, or means the development consent which obviously can't be challenged at this stage.

56. The fact that the foregoing are challenged by reference to EU environmental law doesn't change the legal basis of their adoption.

57. Thus there is no basis for costs protection for these challenges either, subject to the rights of way issue.

Order

58. For the foregoing reasons, it will be ordered that:

(i) the relief sought in the notice of motion as against the board and the State be refused other than in relation to the issue arising from rights of way extinguishment;

(ii) the matter be listed for mention on 9th October, 2023, with a view to fixing a date for a costs protection hearing against all opposing parties on that issue, which will be costs-protected as against all opposing parties including the council; and

(iii) absent any submission to the contrary within 7 days, the foregoing order be perfected forthwith on the basis of the applicants' costs being reserved.