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Judgment Title: Sandymount and Merrion Residents Association -v- An Bord Pleanála & Ors

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THE HIGH COURT

[2013 No.29 J.R.]

COMMERCIAL

JUDICIAL REVIEW

BETWEEN

SANDYMOUNT AND MERRION RESIDENTS ASSOCIATION

APPLICANT

AND

AN BORD PLEANÁLA

FIRST NAMED RESPONDENT

THE MINISTER FOR ARTS HERITAGE AND THE GAELTACHT

SECOND NAMED RESPONDENT

IRELAND AND THE ATTORNEY GENERAL

THIRD AND FOURTH NAMED RESPONDENTS

AND

DUBLIN CITY COUNCIL

NOTICE PARTY

Judgment of Mr Justice Charleton delivered on the 19th day of November 2013.

1.0 My previous judgment on this matter was dated the 25th March, 2013, and concerned the entitlement of the Sandymount and Merrion Residents Association to be the applicant in these proceedings. That entitlement is established.

1.1 This judgment concerns the substantive challenge by the Residents' Association to the decision of An Bord Pleanála of the 16th November, 2012 to grant consent to Dublin City Council to develop and expand the existing sewage treatment plant for Dublin city and to construct a tunnel outflow 9 kilometres into Dublin Bay. This is situated near the old Pigeon House power station on the sea shore. A map of this proposal may be referenced at the end of this judgment. When the tide is out, this location is beside, on the South side, Sandymount strand. A person can walk all the way around on that beach to the South Great Wall and then continue out on the wall for some miles into the Irish Sea. Dublin Bay is pierced by two walls coming eastwards out from the city; the South Great Wall and the opposing North Bull Wall. Together these walls frame the estuary of the River Liffey into a bottleneck; thus, by Venturi action, according to the design of Captain William Bligh in 1801, increasing outflow and reducing silting. Since the last judgment, further papers have been filed and it is possible to describe the existing works and the new plan more accurately and in more detail. The project arose in consequence of the disquiet of the European Commission and the negotiations that resulted from its intervention.

1.2 I am now told that, when fully operational, the new sewage plant will cater for over 2.1 million people. The necessity to upgrade the existing plant arises from the increase in the population of Dublin over the last two generations. Additionally, sewage will be pumped from the hinterland of Dublin to be treated there. All of this treated sewage must go somewhere. At the moment, sewage from the city flows directly out to the North of the sewage works and is diffused right into the estuary of the Liffey between the North and South walls. This area contains the facilities for a swimming club. Part of what is now planned for the new works is a 9 kilometre pipeline that will discharge that treated effluent far out into Dublin Bay. On the 3rd December, 2012, the respondent Minister designated a huge sea area that includes the outfall pipe as a candidate special area of conservation. On the 18th January, 2013, the applicant obtained leave to commence these judicial review proceedings. In consequence, Dublin City Council slowed or stopped the work on the new plant. The pipeline and what is to come out of it is what most concerns this application for judicial review.

1.3 Essentially, the Residents' Association argue that the consent of An Bord Pleanála should be quashed because:

1. firstly, the Board failed to have regard to the designation of the special

area of conservation seventeen days after its decision;

2. secondly, the State failed to implement the relevant European legislation on habitats by not designating the special area of conservation at the latest by the 1st April, 2006;

3. thirdly, the State failed to inform the Board about the impending designation;

4. and, fourthly, any further consent required for the project cannot now protect the designated area thus breaching habitats obligations.

1.4 Since the notices of opposition are in essence denials, it is not necessary to recite these. Dublin City Council, however, argues that the Residents' Association have no interest in what happens in Dublin Bay and, in particular, accuse it of making a pretence of interest in the harbour porpoise and in sea reefs which the special area of conservation is designed to protect. To place this decision in context, a short background is required.

Background

2.0 Council Directive 92/43/E.E.C. of 21st May, 1992 on the conservation of natural habitats and of wild fauna and flora, O.J L206/22.7.1992 came into force on the 10th June, 1994. In essence, the plan of the Directive was to identify and to protect species of animals and plants that needed conservation within the territory of the European Union and to similarly protect land, coastal and sea areas which contain special characteristics. One of the plans that came about in consequence of the Directive was the Natura 2000 network of sites that was to be identified for special protection as a millennium project. Whatever the rights and wrongs of what had and had not been designated, as time went on the European Commission turned its attention to the Atlantic seaboard area and the important flora and fauna that flourished there and the unique habitats that estuaries, bays, beaches, sandbanks and underwater reefs comprised. In particular, it was felt that the Atlantic waters were insufficiently protected through designation under the Directive and that more areas needed to be identified and proposed for conservation together with the species that inhabited or used these habitats. In March 2009, Ireland, Belgium, Denmark, France, Germany, the Netherlands, Portugal, Spain, Sweden and Great Britain – the European nations that had an Atlantic coast or were washed by Atlantic waters – met in Galway at an event that was entitled the Marine Atlantic Biographic Seminar. Facilitated by the Commission, the nations concluded that by the end of 2012 they should have identified and proposed the protection of Atlantic habitats and species according to the model set out in the Directive. On the 15th May, 2009, Stefan Leiner, the Commission's acting head of the Directorate-General of Environment, wrote to this group of nations in the following terms:

I wish to thank all the delegations of the Member States participating in the seminar for their contributions and hard work, and I look forward to a rapid and successful completion of site designations for this marine region. On the basis of these conclusions, I am urging you to continue working towards remedying the insufficiencies identified as well as on the scientific reserves noted. In that regard I should be grateful if you could provide us by 1st September 2009 with a clear timetable of your actions in order to fill in the gaps.

2.1 The file of relevant papers has been discovered from the respondent Minister. This shows that as early as 2010, an area was mapped out whereby an initial proposal to suggest special areas of conservation to the North of Dublin Bay and to the South of Dublin Bay were proposed to be combined into one large area stretching from the Rockabill Islands in the North, past Lambay Island, skirting Howth Head and continuing over the Burford sandbank to Dalkey at the most Southerly point. The stated conservation objectives were harbour porpoises, which were widely studied as to their prevalence and

habits and the underwater reefs. Kish sandbank, with its celebrated lighthouse, was separately considered from a similar conservation concern. In addition, the respondent Minister's department was working on areas to the South, for instance Roaring Water Bay, and on places along the West coast, like Galway Bay and North coast, such as Rockall. It seems that most of these made the eventual designation as candidate special areas of conservation, but that the Kish sandbank did not. According to the evidence filed, the approach of the Department is not to engage in public consultation or consultation with specialist groups more widely than is strictly necessary prior to the designation. Prior announcements of intention are not, however, made. The reasoning is, and I accept it, that developers, people engaged in mining, or people planning fish farms, will tend to rush in and obtain planning permission whereby they can establish facts on the ground that might undermine the conservation objectives of designating an area. Consequently, the strategy was to prepare the groundwork so that the respondent Minister could study the entire file of proposed areas and, after having finally consulted with his officials, make the decision. On the 11th January, 2012, a concise but detailed note was sent to the respondent Minister particularising a background of the existing 80 special areas of conservation and highlighting the qualifying interest of designating new marine areas. This note went through the necessity to protect biogenic reefs, which are formed by deep sea coral, which was already under protection, and proposed that geogenic reefs, formed from rock, would be added. Emphasis was placed on the importance of protecting certain cetaceans common in Irish waters, including the harbour porpoise and the bottlenose dolphin. Hence, it was proposed to add the following to existing sites: Hempton's Turbot Bank, Blackwater Bank, Kish/Bray Bank, Porcupine Bank Canyon, South East Rockall Bank, Rockabill to Dalkey Island, Erris Coasts and West Connacht. Existing sites were also mentioned from the point of view of adding qualifying interests related to sea caves, reefs, dolphins and harbour seals. A draft letter which was to enclose the newspaper advertisements which come with the designation of a special area of conservation, was drawn up in February, 2012 for transmission to conservation and other interested groups. On the 19th November, 2012, Rosanna Kearns, of the relevant section dealing with European Union compliance, placed a detailed set of proposals, which by this stage did not include the Kish/Bray Bank - which was dropped, or the Erris Coasts - which had become subsumed into the West Connacht Coast area, before the respondent Minister so that he might study and approve the designation and public advertisement of six new marine special areas of conservation in accordance with the Directive. The Minister approved the proposal.

2.2 Whereas a suspicion might arise, and seems to have been a tacit part of the argument early on in this hearing, that the entire process of preparation was delayed for the purpose of allowing Dublin City Council to obtain the consent of An Bord Pleanála for the upgrading of the sewage plant and Dublin Bay diffusion pipeline, any such question has melted away on a proper consideration of the file. There were genuine reasons for targeting December, 2012 in accordance with the timetable proposed in consequence of the Galway meeting of European Atlantic nations in March, 2009. The special area of conservation proposed for the East coast of Ireland, including Dublin Bay, proceeded at the same pace as other areas. Considerations resulted in the amalgamation of two sites and the dropping of another. Every step of the procedure is demonstrated on the file with detailed assessment, including the expert assistance of the Irish Whale and Dolphin Group survey of 2008, which was considered from December, 2010.

Notification

3.0 The Residents' Association claims, as applicant in these proceedings, that the respondent Minister did not inform Dublin City Council or An Bord Pleanála of his then imminent plan to designate the Rockabill to Dalkey area of Dublin Bay as a special area of conservation. In particular, a complaint is made that when the board referenced the respondent Minister for submissions, that the letter of the 2nd July, 2012, in that regard made no reference to the proposed special area of conservation. The strength of this submission, however, has to be seen within the context in which that letter was sent. This kind of major planning application requires the preparation of an application for permission by the proposed developer prior to its submission to the Board. It is not disputed that this

application was made pursuant to section 226 of the Planning and Development Act 2000, as amended. Since section 175 of the Act of 2000 identifies classes of development for the purposes of section 176, an environmental impact statement in respect thereof is required as the application was being made "by a local authority that is a planning authority". In that regard, section 177AE requires that the local authority "prepare, or cause to be prepared, a Natura impact statement in respect thereof." Thus, the planning of this project, as regards societal transparency, inclusivity and care for the environment went back to July, 2010. This requires the preparation of an environmental impact statement. In addition to that process, there was a non-statutory consultation that was carried out in preparation for the relevant statutory purpose. Paragraph 2.6 of the environmental impact statement details public meetings: in Howth, in August, 2011; in Clontarf, in August, 2011; in Dalkey, in October, 2011; in Dún Laoghaire, in October, 2011; and in Ringsend, from the point of view of the communities in Ringsend, Sandymount and Irishtown, in October, 2011. This was part of the environmental impact statement scoping report, the purpose of which was to focus in on the breadth of that report in the areas that you would have to cover. In addition, leaflets were delivered to 20,300 homes and emails were sent to councillors, deputies and relevant residents associations. Paragraph 2.6 of the resulting environmental impact statement references the process. It was not a secret. Chapter 10 of that document details the existing special areas of conservation and the existing special protection areas, which are referenced to bird species. These include large areas of Dublin and its hinterland. This is an exhaustive study. It does not leave anything out nor does it deceive anybody. At paragraph 10.3.2, the environmental impact statement references designated areas in the context of the existing environment. This could not be more clear in what it says:

Sites subject to Natura 2000 designations (i.e., candidate Special Areas of Conservation (cSAC) designated under the Habitats Directive, and Special Protection Areas (SPA) designated under the Birds Directive) in the Greater Dublin area, are shown in figure 10.2. The National Parks and Wildlife Service (NPWS) published an update of the areas subject to Natura 2000 conservation designations on 17th August 2011. A major extension of the area of Rockabill SPA is proposed, now including some 52 km² of marine habitat around Rockabill Island. It is understood that the NPWS also proposes to designate the greater part of Dublin Bay as a cSAC for the conservation of Harbour Porpoise and that the area around the Kish Bank is likely to be designated as cSAC for the protection of the Annex I habitat 'Sandbanks which are slightly covered by sea water all of the time' (EU Code 1110). Following consultation with the NPWS it was stated on the 6th February 2012 that "There is no further information at this time as to when or if they will be designated."

3.1 All of this was also accurate. Further, it was in accordance with what later transpired to be the amalgamation of two areas and the dropping of another area and the information conformed to the policy of the respondent Minister of ensuring protection to the environment and democratic participation. This process of preparation continued to April, 2012. In that month, Dublin City Council notified all prescribed bodies of the application and in that notification the very detailed environmental impact statement was referenced. In lodging the application for consent on the 13th April, 2012, the Natura impact statement and the environmental impact statement were included; the former to facilitate the carrying out of an appropriate assessment by An Bord Pleanála in accordance with the relevant Directive. Publication of the application occurred, but on the 2nd May, 2012, the Board insisted on the publication of a new notice as the first notice had not expressly referred to the fact that the application included a Natura impact statement. Consequently, a revised notice was sent to the relevant prescribed bodies. The Residents' Association made a written observation on the application on the 25th June, 2012. This referenced the history of wastewater treatment at Ringsend and asserted that "political expediency does not necessarily result in good and proper planning and siting of either development or infrastructure." In fact, the applicant asserted: "The contrary is usually the case." After

some pages, the following reference is made:

The lands, including beaches, and waters surrounding the existing overloaded [waste water treatment] plant are designated as [special protection areas for birds and], [special areas of conservation], as designated sensitive water bodies, as habitats for cetaceans and as salmonid waters. It is a scientific fact that disturbance from sound sources may result in injury and possible mortality of cetaceans yet it does not appear that any prior assessment of the effects of drilling was done.

3.2 Apart from being against this project, as to what alternative proposal might be made for the treatment and dispersal of human waste in the Dublin area, the submission ends:

We demand:-

1) that the volume of sewage throughout the Ringsend [waste water treatment plant] be reduced to permanently below the 1.6mPe for which it was designed in order to allow for any necessary maintenance

2) all further waste of money in furtherance of this proposal which neither reduces nor solves the problem of eutrophication of the waters of Dublin Bay must cease forthwith

3) at least one and possibly two additional treatment plants should be constructed over the next five years to the west and/or north of Dublin City to cater for the treatment of wastewater from a population of 1.5mPE minimum with room for future expansion and full treatment

4) all drilling and other works presently in progress which are or may be associated with or imply an expansion of the Ringsend [waste water treatment plant] must cease immediately.

3.4 On the 2nd July, 2012, the respondent Minister made observations on the planning application. In this, he detailed the protection to cetaceans that is required under European and national legislation and warned against the introduction of "certain sound sources into the marine environment, as may result from construction or survey activities over the foreshore, [which] have the potential to cause injury and possibly mortality in these species." A list of ten conditions was therefore proposed to An Bord Pleanála. This included adherence to the methods and environmental practices already outlined in the environmental impact statement; the presence of a trained marine mammal observer to monitor the operations; the advising of whether scheduled activity is possible in prevailing weather conditions; monitoring before, during and after any construction; no construction while marine mammals are within a 100 metre radial distance of the intended sound source; no harassment of marine mammals; sound generating activity not to commence until at least 30 minutes have elapsed since the last detection of a marine mammal; agreed signalling as to whether the activity may proceed; ceasing the activity if weather conditions deteriorate or if marine mammals enter the monitored zone; and full reporting to the Department. As a general comment, it was recommended by the respondent Minister that "all mitigation measures proposed in the [environmental impact statement] and appropriate assessment for the protection of the National Heritage are made a condition of planning." It may be commented that whereas the applicant Residents' Association are entitled to, and clearly do, put forward their viewpoint as to the desires of their own members, the respondent Minister clearly shows a much higher level of concern for, and expertise in, the protection of sea mammals. The exhaustive nature of this process continued with An Bord Pleanála directing its inspector to hold an oral hearing. This took place on the 18th, 19th and 20th of September, 2012. On the 22nd October, 2012, the report of the inspector was delivered and this included a summary of all the submissions or observations received in respect of the application. The applicant Residents' Association participated in the oral hearing. It is clear that that its participation was

genuine as was the observation made on the proposal. I reject any submission of pretence of care for the environment. On the 5th November, 2012, the Board met and considered the application and decided to grant approval subject to conditions. The formal order was signed on the 16th November, 2012. The decision includes these conditions:

1. The development shall be carried out and completed in accordance with the plans and particulars lodged with the application and the information contained in the environmental impact statement, including all mitigation measures contained therein, as amended by the further plans and particulars submitted at the oral hearing, except as may otherwise be required in order to comply with the following conditions.

[...]

7. Underwater noise levels shall be monitored in accordance with a monitoring plan drawn up following consultation with the National Parks and Wildlife Service during the construction period. Reason: To ensure the protection of marine mammals and other marine fauna.

8. During the construction of the diffuser shaft, a suitably qualified marine ecologist shall be present on the marine construction rig so as to ensure that no cetaceans are within the 100 metre exclusion zone of the rig during the commencement of drilling operations. Where such marine fauna are present within the exclusion zone, drilling operations will be suspended until such time as the fauna leave the exclusion zone. Reason: To ensure the protection of cetaceans.

3.5 The purpose of the planning code is to ensure that developments take place in accordance with the relevant development plan of the local authority, allowing for the possibility of public observations, or consultation, and to ensure proper planning and development consistent with sustainable development. It is fair to say that although An Bord Pleanála does not have expertise in waste water, proper planning includes the study of the general impact of a project on the impacted area. But while planning conditions are attached in relation to odour and in relation to waste, the primary focus of a planning authority is the built environment and the use thereof. As will later emerge, before any discharge of water that consists of treated sewage can be pumped into a protected site, from the point of view of environment and fauna, the existing waste water licence which is due to expire in 2014 cannot be adequate, and that therefore the plan for operation of the plant in 2016, its expected date of first operation, through discharge from the diffuser 9 kilometres out into Dublin Bay will require a further authorisation under the Wastewater Discharge (Authorisation) Regulations 2007. This is the detailed process by which an assessment can be made of what will be going into the bay, what harm it may do to the protected environment, and what steps need to be taken as regards primary, secondary, or perhaps tertiary, treatment of the waste to ensure the integrity of the site as worthy of protection and the health and security of sea mammals. Furthermore, the change in status of the relevant sea area and the reasons relating to harbour porpoises and reefs appear clearly in the environmental impact statement. It is understandable that the concern of the applicant Residents' Association at the oral hearing was on their main contention that the Ringsend plant should not be further burdened. The applicant Residents' Association has not met the burden of proving any lack of protection for the special area of conservation.

3.6 I turn to grounds 1 and 4 as to, respectively, any failure by any party to have regard to the special area of conservation and the protection now afforded to the environment.

European and national protection

4.0 The origin and form of protection for designated sites and for designated species comes from the Directive. National protection exceeds the mandated transposition. No question can arise as to a failure in effective cooperation. Neither the reefs in question nor

the harbour porpoise are priority species as defined in article 1 of the Directive and as set out in the relevant schedule.

4.1 The aim of the Directive is set out in article 2. This is to "contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory" to which the legislation applies. Thus, the measures to be taken by the Member States are to be "designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of [EU] interest." Under article 3, it is required to set up a "coherent European ecological network of special areas of conservation" for that purpose. Every Member State is to contribute to this project by designating sites of special areas of conservation having regard to these objectives. Consequently, on the basis of criteria set out in annexes to the Directive, the task of Ireland was to identify and propose a list of sites with species as set out in the annexes which were native to that territory. Where species are more wide-ranging, the natural range focuses on areas essential to their life and reproduction. For aquatic species, the site is to be proposed "only where there is a clearly identifiable area representing the physical and biological factors essential to their life and reproduction." Member States had three years under article 4 to propose such a list of sites to the Commission. It was then the task of the Commission to list sites for protection within six years of the commencement of the Directive and to establish priorities. Article 5 deals with exceptional cases where a priority species or a priority natural habitat has not been notified to the commission, a bilateral consultation procedure can be initiated. If a dispute remains unresolved, the Council may nonetheless adopt a site. If, however, and this is not stated in the article, there is no question but that a priority species inhabits a site, or the site is a priority natural habitat, a failure to designate may lead without more to direct action before the Court of Justice of the European Union. Article 6 must be quoted in full:

1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.
2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.
3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.
4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of

Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.

4.2 The legislation is written in plain language but a short narrative may help. All of it must be interpreted in the light of the recitals. In particular, the sixth recital in the preamble to the Directive states this as its aim: "in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network according to a specified timetable." In summary, special areas of conservation require to be conserved and managed; Member States must avoid deterioration of natural habitats and any significant disturbance to species; where a plan or project, and the diffusion of treated sewage into Dublin Bay amounts to this, is neither directly connected with or necessary to the management of the site but is, instead, likely to have a significant effect on it, there must be an appropriate assessment of its implications for the site in the context of the objective of designating the site as a special area of conservation; once that assessment is made, there is a second step which requires "the competent national authorities" to refuse the plan unless such authorities have ascertained that it "will not adversely affect the integrity of the site concerned"; in appropriate cases, "the opinion of the general public" may be obtained pursuant to the principle of societal inclusivity; even if there is a negative assessment of the applications for the site, where there is no alternative solution to the plan, here the diffusion of treated sewage into Dublin Bay, and where there are "imperative reasons of overriding public interest", then a Member State is required to take "all compensatory measures necessary to ensure the overall coherence" of the set of sites which comprise the Natura 2000 plan; the Commission must be informed of any such compensatory measures. A different situation arises by reference to priority species and habitats. Where there is a priority species present within the site, or the site hosts a priority natural habitat, the only considerations which may involve overriding the duty of protection are imperative reasons of overriding public interest "those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."

4.3 All of this is clear indeed. What is equally transparent is that now the Rockabill to Dalkey site has now been designated as a candidate special area of conservation and that under national legislation it does not require the consent of the Commission the protections of national and European legislation for this site and for the species inhabiting it are immediately in place. Many other Member States require the Commission to first consent to a designation before any legislative protection under national law is in place. That protection in Ireland is automatic on designation. Furthermore, whereas for planning purposes, "the competent national authorities" within the meaning of article 6.3 of the Directive is either the local planning authority or, for strategic infrastructure projects or local authority planning projects, as here, An Bord Pleanála, the imperative therein contained is not trammelled by legislation into planning alone. Instead, who or what is the competent national authority depends upon the nature of the plan. More than one authority is clearly envisaged in the text; and this is not surprising. Whereas some doubt was expressed during the hearing as to whether any further assessment might be necessary, and as to the appropriate authority in that regard, it is beyond doubt that a licence for the waste water from this rebuilt facility is required to be processed in accordance with the new status of Dublin Bay as a special area of conservation. The relevant authority which must carry out the appropriate assessment and then the second stage test is the Environmental Protection Agency. The Minister for the Environment,

Community and Local Government in considering any foreshore licence for these works under the Foreshore Acts 1933 to 2011, and in particular section 3, must follow the relevant European and national legislation.

4.4 Furthermore, this principle is put beyond doubt by the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011). Under this devolved legislation, the protection arises immediately upon the declaration of the respondent Minister and not upon the Commission accepting the site for inclusion. Primarily this is because under these Regulations, protection is premised upon the definition of every candidate site of European importance, every site of European importance, every candidate area of conservation, every special area of conservation, every candidate special protection area and every special protection area being defined as "European Sites" in the definition section of article 2. Were there to be any doubt, this legislation, in its masterly drafting in aid of fostering protection of the environment, defines a "public authority" in a manner which is inspired by the parallel phrase in article 6.3 of the Directive reference to "competent national authorities" as including a Minister of Government, a local authority, An Bord Pleanála, and the Environmental Protection Agency in the context of a comprehensive list. Article 42 of the Regulations requires a screening for appropriate assessment of the plan or project for which an application for consent is received, and "which is not directly connected with or necessary to the management of the site as a European Site". Relevant and detailed regulation follows as to the manner of processing any such application by a public authority. It is futile to argue against the plain text of a transposition which does everything, and more, that European law requires. Legislation necessitated by the State's duty of effective cooperation with the institutions of the European Union, similar rules arise to those which apply in construing legislation where there is a challenge to its constitutionality. Where a national measure is passed in order to give effect to an obligation of the State which arises from European law, such national legislation must be construed so as conform to that legislative purpose. I am not at liberty, as I have been urged by the Residents' Association, to put a strained interpretation on the definition sections with a view, curiously, to lessening protection for the environment. In *Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1990] 4 E.C.R I-4135 (C-106/89), the European Court of Justice declared the binding nature of Directives on litigation of national origin so as to interpret it in "the light of the wording and the purpose of the Directive in order to achieve the result pursued" by it and by what is now the Treaty of Functioning of the European Union.

4.5 Even were this litigation to be between domestic undertakings as to the correct interpretation of national legislation necessitated by European law, the obligation still applies; joined cases of *Pfeiffer and Others v. Deutsches Rotes Kreuz* [2004] E.C.R. I-08835 (C-397/01 to C-403/01). The principle of conforming interpretation between Irish statute law and the European legislation which necessitates a measure such as the Directive cannot allow that measure to be used beyond the scope of its proper purpose so as to impose a solution which contradicts the plain terms of national law, such as though such a strained interpretation that may be in conformity with an obligation under a Directive. The limit of the duty of the national courts is to interpret national law in the light of any European law obligation as far as this is possible. This cannot lead to results which are a distortion of what the enactment means or, as the European Court of Justice has put it, *contra legem*; C-105/03 *Pupino* [2005] E.C.R. 1-05285. Contrary to the submission made by the applicant Residents' Association, it could not be clearer from the definition sections of the Regulations and from its text that further detailed assessment is required before sewage can, pursuant to the impugned planning permission, be pumped into Dublin Bay. Under article 38 of the Regulations, the respondent Minister is entitled to seek injunctive relief against those who are causing the deterioration of any natural habitat or a disturbance of any species protected. Article 27 (2) makes it plain that the European legislation which protects habitats and birds is the primary focus of any change in the status of a site that is given protection in national legislation, merely through the mechanism of notification to the Commission of a proposal to designate a site as a special

protection area for birds or a special area of conservation for habitats, fauna or flora. This reads:

Any public authority having or exercising functions, including consent functions, which may have implications for or effects on nature conservation shall exercise those functions in compliance with and, as appropriate, so as to secure compliance with, the requirements of the Habitats Directive and the Birds Directive and these Regulations.

4.6 While conscious of the argument advanced to the contrary, that no further assessment can be made before sewage in massive quantities is pumped into the Dublin Bay special area of conservation, awareness in that context is towards caution against accepting a submission from a body claiming to represent consciousness for the environment that would promote exactly the opposite result. Furthermore, plain commonsense must require that the meaning of ordinary and plain words is not ignored.

4.7 The decision to declare a European site is not necessarily the end of the matter. When the respondent Minister designates a candidate site, he is required under article 12 to inform relevant departments of government and agencies and, where appropriate, to consult with them. Furthermore, every owner and occupier of land included in a candidate site must be notified. General public notice must also be given. This was done, in this instance, through a radio broadcast, the text of which is included in the papers. In addition, plans and maps may be deposited in offices of public service, such as Garda stations, libraries or agricultural centres. Having earlier above that sites obtain protection in Ireland on such publication, for the purpose of notification to the Commission, under article 13 of the Regulations, persons having an interest in the land in question may object and in that regard the object of the notice is to set out the form of any appropriate objection to which it should be directed. Under article 13(5) of the Regulations, the respondent Minister may consider such objections and, having regard to the criteria for inclusion which are so carefully set out at article 10, may modify the list of sites. This process, of its nature, may include the modification of the extent of the site or of the objectives stated. The Commission may thereupon be notified of any modification.

4.8 In conclusion on the protection issue, it is beyond doubt that a planning consent authorises nothing more than construction of the sewage works and pipeline, in this instance, and that this is subject to stringent conditions for the protection of the environment. Where there is to be a modification in relation to the existing licence for waste water, and the plan to discharge treated sewage effluent into the special area of conservation in Dublin Bay is such a modification, then the Environmental Protection Agency must consider the appropriate safeguards in the context of the obligations which arise under the relevant European and national legislation; in particular article 6 of the Directive. In granting or refusing a foreshore licence for the necessary works, the relevant minister of Government has a similarly onerous obligation.

4.9 There is no basis on which I can conclude that the stringent obligations to protect the Rockabill to Dalkey special area of conservation will not be met in the context of sewage discharge. Certainly, there is a high seriousness in the drafting of the observations to An Bord Pleanála by the respondent Minister and the Regulations, constituting the applicable national legislation make the relevant obligations clear.

Shadow protection

5.0 Finally, even before a site is designated, the issue finally arises whether there is some shadow protection that proceeds backwards from the designation so as to ensure that the obligations of the Regulations of 2011 apply, despite the fact that a relevant permission, albeit one applicable to only the built environment and not to any discharge from the site, has already been given? The answer appears to be that this is possible in some

circumstances but that such circumstances do not arise in this case.

5.1 Three cases decided by the Court of Justice of the European Union are authority for two propositions. Firstly, that where a site is notified to the Commission, national authorities are not entitled to undermine the integrity of the site or the protection of flora and fauna for which notification is made, through authorising works which strike against that protection. This principle is applicable whether or not the issue is concerned with priority sites or priority flora and fauna. Secondly, where a site is central to the protection and maintenance of a priority species, and where there is no scientific disagreement between the Commission and the Member State, the procedure in article 5 of the Directive of bilateral consultation and decision by the Council becomes unnecessary due to the absence of a dispute, and protection of the site of priority natural habitat or priority species will arise and be enforceable for that reason alone. The first principle may be regarded as the application of logic; that no one is entitled to destroy the object for which one proposes legal protection. The second principle may be part of the general maxim that in failing to designate an area or a species which are listed in the annexes to the Directive as requiring priority protection, there can be no reliance on failure to comply with the law. The three cases in question are case C-117/03 *Società Italiana Dragaggi SpA and Others v. Ministero delle Infrastrutture e dei Trasporti* [2005] ECR I-167, case C-244/05 *Bund Naturschutz in Bayern eV and Others v. Freistaat Bayern* [2006] ECR I-8445, as to the first principle, and case C-103/10 *Commission v. Hellenic Republic* [2012] ECR I-1 147 as to the second principle. Other cases have been cited but these are essential. A summary is appropriate in this context as to how the judgments united in ensuring that the Directive was not set at naught in its aims of societal transparency, inclusivity and care for the environment.

5.2 In the *Dragaggi* case, Italy proposed the 'Foce del Timavo' site to the Commission as a site of importance as containing priority habitats. By tender, prior to this date, a company by the name of *Dragaggi* had obtained a contract to dredge out the port of Monfalcone, the sediment from which was to be deposited on reclaimed land inside the candidate site. In consequence, Italy annulled the contract on environmental grounds; stating that the depositing of dredged material was to be subjected to an assessment of implications and that the project could not possibly be approved through the procedure. In argument, it was pointed out that it would be contradictory for Member States to first propose sites and then to impair the very features that would predetermine inclusion of the sites in the Natura 2000 network. Such conduct would be contrary to the principle *nemini licet venire contra factum proprium*; none may set up contradictions to their own prior actions. While the Court did not wish to trammel the entitlement of the Commission to accept or reject sites according to the criteria set out in the Directive, and while the protective measures described in the Directive apply only to sites selected as being of importance to the Community and as adopted by the Commission in accordance with the procedure laid down in article 21 of the Directive, contradictory conduct in proposing a site for special protection while destroying it at the same time could not be permitted. This is clear from the Court's judgment:

26. This does not mean that the Member States are not to protect sites as soon as they propose them, under Article 4(1) of the Directive, as sites eligible for identification as sites of Community importance on the national list transmitted to the Commission.

27. If those sites are not appropriately protected from that moment, achievement of the objectives seeking the conservation of natural habitats and wild fauna and flora, as set out in particular in the sixth recital in the preamble to the Directive and Article 3(1) thereof, could well be jeopardised. Such a situation would be particularly serious as priority natural habitat types or priority species would be affected, for which, because of the threats

to them, early implementation of conservation measures would be appropriate, as recommended in the fifth recital in the preamble to the Directive.

28. In the present instance, it should be remembered that the national lists of sites eligible for identification as sites of Community importance must contain sites which, at national level, have an ecological interest that is relevant from the point of view of the Directive's objective of conservation of natural habitats and wild fauna and flora (see Case C-371/98 *First Corporate Shipping* [[2000](#)] [ECR I 9235](#), paragraph 22).

29. It is apparent, therefore, that in the case of sites eligible for identification as sites of Community importance that are mentioned on the national lists transmitted to the Commission and may include in particular sites hosting priority natural habitat types or priority species, the Member States are, by virtue of the Directive, required to take protective measures appropriate for the purpose of safeguarding that ecological interest.

5.3 In the *Bund Naturschutz* case, Germany proposed to build a motorway, described as an "absolute priority", through sites that had been notified to the Commission, but not yet accepted, which were of the priority habitat type containing "alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior*". The environmental group in question sought a ruling that the protection of the Directive applied to these sites notwithstanding that the Commission had yet to accept them. The Court pointed out that the purpose of the Directive was to establish a coherent European ecological network of special sites of conservation and that to fulfil this task, an exhaustive list of sites which have an ecological interest relevant from the point of view of the Directive's objective of conservation must be notified. Hence, logically, as in the *Dragaggi* case, what the Directive was designed to achieve could not be met through the mere proposal of a site that would be stripped of all effectiveness through that site being undermined, or possibly disappearing as to its special characteristics or the species inhabiting or resting in it, through development that did not carry the safeguarding characteristics of the article 6.3 procedure. Therefore, the protection of the site from the time that it was notified to the Commission was required to reflect the obligation to draw up an exhaustive list of sites eligible as special areas of conservation. As the Court said:

41. Consequently, the Commission must be sure of having available an exhaustive list of sites eligible as special areas of conservation, the drawing up of which is aimed at a coherent European ecological network. It also follows from this that, at the time of the decision which the Commission is called upon to take, the sites identified by the Member States must reflect the situation on the basis of which the scientific evaluations of potential sites of Community importance have been carried out.

42. If that were not the case, the Community decision-making process which is not only based on the integrity of the sites as notified by the Member States, but is also characterised by the ecological comparisons between the different sites proposed by the Member States, would run the risk of being distorted and the Commission would no longer be in a position to fulfil its duties in the area concerned.

43. It must be added that, in accordance with Annexe III, Stage 2, paragraph 1 of the Directive, 'all the sites identified by the Member States in Stage 1 which contain priority natural habitat types and/or species will be considered as sites of Community importance'. It is therefore correct that those sites appear on the list which the Commission must draw up.

44. Having regard to the foregoing considerations, the Member States must, as regards the sites identified with a view to their inclusion on the Community list, take appropriate protective measures in order to maintain the ecological characteristics of those sites.

45. In that regard, it must be remembered that, in accordance with the first part of Annexe III to the Directive, the ecological characteristics of a site identified by the competent national authorities must reflect the assessment criteria which are listed there, namely, the degree of representativity of the habitat type, its area, its structure and functions, the size and density of the population of the species present on the site, the features of the habitat which are important for the species concerned, the degree of isolation of the population present on the site and the value of the site for conservation of the habitat type and species concerned.

46. Member States cannot therefore authorise interventions which may pose the risk of seriously compromising the ecological characteristics of a site, as defined by those criteria. This is particularly the case when an intervention poses the risk either of significantly reducing the area of a site, or of leading to the disappearance of priority species present on the site, or, finally, of having as an outcome the destruction of the site or the destruction of its representative characteristics.

5.4 *Commission v. Cyprus* could be regarded as a ruling on the extreme edge of the obligation not to undermine one's own prior legal declaration. That, however, is not the underlying rationale of the case. Instead, the duty of effective cooperation which devolves on all Member States pursuant to the Treaty of the European Union infers an obligation to positively search out and identify areas that are suitable for conservation, and therefore for notification to the Commission. Where this requirement is not met, and sites which host priority species are actively destroyed, then the protections required under the Directive will be applied notwithstanding that there has been no notification to the Commission. In that case, in fact, it was the Commission itself, acting on the notification of a community environmental group, which identified that the Paralimni Lake hosted an important population of Cypriot grass snakes. Failure to act, in this instance, would have resulted in the destruction of part of the habitat through the development of housing and other works on the Northern end of the lake and of the extraction of water. Furthermore, the situation was not classified as an exceptional case pursuant to article 5 of the Directive, thus requiring a consultation procedure, since there was no doubt that the species in question was classified as a priority species and its habitat area was scientifically proven. The reasoning of the Court was that inaction on an obligation under the Treaty could not be exploited against the specific aim of care for the environment:

43. It should be noted that, in the case of sites eligible for identification as sites of Community importance which are included in the national lists transmitted to the Commission and, in particular, sites hosting priority natural habitat types or priority species, the Member States are, by virtue of the Habitats Directive, required to take protective measures that are appropriate, from the point of view of the Directive's conservation objective, for the purpose of safeguarding the relevant ecological interest which those sites have at national level (see *Draggagi and Others*, paragraph 30).

44. The appropriate protection scheme applicable to the sites which appear on a national list transmitted to the Commission under Article 4(1) of the Habitats Directive requires Member States not to authorise interventions which incur the risk of seriously compromising the ecological characteristics of those sites. This is particularly the case when an intervention poses the risk either of significantly reducing the area of a site, or of leading to the

disappearance of priority species present on the site, or, finally, of having as an outcome the destruction of the site or the destruction of its representative characteristics (see *Bund Naturschutz in Bayern and Others*, paragraphs 46 and 47).

45. If that were not the case, the European Union decision-making process, which is not only based on the integrity of the sites as notified by the Member States, but is also characterised by the ecological comparisons between the different sites proposed by the Member States, would run the risk of being distorted and the Commission would no longer be in a position to fulfil its duties in the area concerned, namely, in particular, to draw up the list of selected sites as sites of Community importance in order to form a coherent European ecological network (see *Bund Naturschutz in Bayern and Others*, paragraphs 41 and 42).

46. The above considerations also apply, in any event, *mutatis mutandis*, to the sites which the Member State at issue does not dispute satisfy the ecological criteria in article 4(1) of the Habitats Directive and which, therefore, should have been included in the national list of S.C.I.s sent to the Commission.

47. It cannot be permitted, under the Habitats Directive and the objectives which it pursues, that a site such as that at issue in the present case, which the Member State concerned does not dispute must be included in that list, does not enjoy any protection.

48. As regards the conduct of the Republic of Cyprus of which the Commission complains and which it claims is the cause of destruction of the habitat of the Cypriot grass snake in the site of Paralimni Lake and of the endangerment, on the same site, of the maintenance of the population of that species, it is not disputed that the organisation of moto-cross racing on the site at issue, which the defendant Member State claims to have terminated after expiry of the period set in the reasoned opinion, constitutes conduct likely to seriously compromise the ecological characteristics of the site.

49. In that respect, the complaint is therefore well founded.

50. As regards the excessive extraction of water on the site at issue, it is apparent from the documents before the Court that it had not terminated upon the expiry of the two month period set in the reasoned opinion. It is clear that, in the present case, that type of operation is capable of having a considerable negative impact on the habitat of the Cypriot grass snake and on the conservation of that species, particularly during years of drought.

5.4 The complaint of the Commission was therefore upheld against Cyprus by the environmental group concerned with the snake species.

Summary

6.0 It is clear that the underlying objectives of the Directive must be upheld and that the duty of effective cooperation on Member States is not to be diminished or dissolved through either self serving conduct such as inappropriate development or through ignoring the fundamental objective of seeking out and notifying sites that require conservation to the Commission. That is not conduct which occurred in this case. The respondent Minister followed both a timescale and a procedure that was consistent with effective cooperation

and did so with the guidance of the Commission.

6.1 No one was misinformed about anything. Appropriate conditions for the protection of cetaceans were set by An Bord Pleanála from the point of view of the built environment; these were suggested by the respondent Minister. The plans by Dublin City Council for the expansion of the sewage network and of the treatment plant at Ringsend were subject to appropriate environmental analysis that will protect both the reef sites in Dublin Bay and the harbour porpoises that are such an uplifting part of this environment.

6.2 Beyond doubt, this is not the end of the process. The designation by the respondent Minister of the Rockabill to Dalkey special area of conservation has markedly increased the protection of this environment. Instead of, as was argued by the applicant Residents' Association, undermining the protection of Dublin Bay and its environs, the respondent Minister has ensured that more stringent protections are now legally required. With the built environment in place pursuant to the planning consent granted by An Bord Pleanála, before any treated sewage can be pumped 9km out into Dublin Bay in 2016, waste water discharge licences will be required from the Environmental Protection Agency, which is mandated as an appropriate State authority to carefully examine any plans that may impact on a special area of conservation to ensure compliance with article 6.3 of the Directive. Even before that stage may be reached, a further safeguard exists under the foreshore procedure whereby the environmental impact of the pipeline and of its consequences must also be subject to an appropriate assessment and to an ascertainment by the competent national authorities that this plan will not adversely affect the integrity of this site.

6.3 It follows, that in making the declaration of the Rockabill to Dalkey sea site, including much of Dublin Bay, a special area of conservation, the respondent Minister has sharply delineated, and in no way diminished, the protections and safeguards that must now be applied. In terms of national legislation, that safeguard exists because upon the designation by the respondent Minister of the special area of conservation as a European Site, and from the moment of that declaration, the mandatory nature of the protections demanded by article 6 of the Directive are not dependant on any other process or approval.

Result

7.0 There is, in consequence, no unlawful conduct under either European or national law by Dublin City Council as respondent or by the respondent Minister; and there is no excess of jurisdiction, or failure to exercise jurisdiction, by An Bord Pleanála. The application is therefore dismissed.

7.1 The default provision as to costs, as this application was one concerned with Article 10a of Council Directive 85/337/EEC of 27 June 1985, under section 50B of the Planning and Development Act 2000, as inserted by section 33 of the Planning and Development (Amendment) Act 2010 as amended in 2011, is that "each party to the proceedings (including any notice party) shall bear its own costs." There is nothing which would allow the Court to award costs to the losing party under subsection (4) and the respondents and the notice party have not sought costs against the Residents' Association.