

**THE HIGH COURT  
JUDICIAL REVIEW**

[2021] IEHC 771  
[2020 No. 568 JR]

**BETWEEN**

**HELLFIRE MASSY RESIDENTS ASSOCIATION**

**APPLICANT**

**AND**

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

**RESPONDENTS**

**AND**

**SOUTH DUBLIN COUNTY COUNCIL**

**NOTICE PARTY**

**(NO. 3)**

**JUDGMENT of Humphreys J. delivered on Tuesday the 14th day of December, 2021**

1. In *Hellfire Massy Residents Association v. An Bord Pleanála (No. 1)* [2021] IEHC 424, [2021] 7 JIC 0201 (Unreported, High Court, 2nd July, 2021), I decided in principle to refer certain questions to the CJEU having dismissed the applicant's proceedings on other points.
2. In *Hellfire Massy Residents Association v. An Bord Pleanála (No. 2)* [2021] IEHC 636, [2021] 10 JIC 1302 (Unreported, High Court, 13th October, 2021), I refused leave to appeal to the Court of Appeal in relation to the dismissed matters.
3. The applicant subsequently proposed the addition of two *amici curiae* for the purposes of making submissions in advance of the reference to the CJEU, the proposed *amici* being An Taisce – The National Trust for Ireland and Save Our Bride Otters. The State respondents expressed some reservations about this, although in fairness the objection was not pressed very strongly.
4. On 29th November, 2021, I heard submissions in this regard. I also indicated that I would amend the title of the proceedings to reflect the current official title of the Minister concerned (the Minister for Housing, Local Government and Heritage).
5. On 1st December, 2021, I informed the parties of the order being made, and I now give reasons. I will begin by outlining some contextual issues, the essential requirements for joinder of an *amicus curiae*, and factors to be considered if those essential requirements are met.

**Some contextual points**

6. Joining an *amicus curiae* does not normally create any major problem. While the jurisdiction should be exercised sparingly, and is certainly not automatic, we need to be clear what that means. Of tens of thousands of cases instituted across the totality of all levels of the system every year, the number where an *amicus* might be an issue will be an extremely small percentage. That is what "sparingly" means. Not routine or run-of-the-mill and not for common or garden cases. Even in the context of art. 267 TFEU, where cases from Ireland run only into the single digits a year, the appointment of an *amicus curiae* is not automatic, although it would not be that surprising if the question fell to be

considered in a fair number of that small single-digit number of cases. “Sparingly” means sparingly in the legal system overall, not that appointment of *amici* can’t in practice be more frequently concentrated and considered in particular limited and defined contexts.

7. The inherent jurisdiction to appoint an *amicus curiae* was recognised by the Supreme Court in *H.I. v. Minister for Justice, Equality and Law Reform* [2003] IESC 42, [2003] 3 I.R. 197 at para. 22 *per* Keane C.J. At para. 17 the court referred to the illuminating judgment of Kirby J. (diss.) in the High Court of Australia in *Levy v. Victoria* [1997] 189 C.L.R. 579, where he said that “[t]here is no need for undue concern about adopting a broader approach” in relation to the appointment of *amici curiae*, and that “[t]he court itself retains full control over its procedures. It will always protect and respect the primacy of the parties. Costs and other inhibitions and risks will, almost always, discourage officious busybodies. Those who persist can usually be recognised and easily rebuffed. The submissions of interveners and *amici curiae* will typically be conveyed, for the most part, in writing.” While not specifically quoted by Keane C.J., Kirby J. began the discussion by pointing out that the court “finally declaring the law ... in a *particular* case for application to *all* such cases” is a “far from mechanical task” and makes it appropriate to hear from a “broader range of interveners and *amici curiae*” than might have been previously thought. In my view, the increasing complexity of society and law makes these comments very resonant, doubly so in a case where the CJEU will be finally deciding a point for the continent. Kirby J.’s conclusion was that “[c]onforming to the Constitution, this Court should adapt its procedures, particularly in constitutional cases or where large issues of legal principle and legal policy are at stake, to ensure that its eventual opinions on contested legal questions are informed by relevant submissions and enlivened by appropriate materials.”
8. That judgment is a valuable reality-check to any anxiety that might be created by the sheer unfamiliarity of *amici curiae* in the Irish context, even recognising that they will remain the exception rather than the rule in terms of litigation overall and will not become automatic even in the very limited and specialised contexts where their appointment might arise for consideration more frequently.
9. I turn now to the essential requirements for the appointment of an *amicus curiae*.

### **Essential requirements**

10. The core requirements for the appointment of an *amicus curiae* are as follows:
  - (i). One criterion that is indispensable at least in practice is that the proposed *amicus* agrees to act as such. It is true that in *Grant Thornton v. Scanlon* [2019] IECA 276, [2019] 10 JIC 3105 (Unreported, Court of Appeal, 31st October, 2019), Baker J. (Irvine and Donnelly JJ. concurring), said at para. 67 that it will “weigh heavily” on the court that a proposed *amicus* was not seeking the role. But even if a proposed *amicus* is not actively seeking to be appointed, such an entity would nonetheless have to agree to carry out the role if that order was made. Otherwise the appointment of an *amicus* would be completely pointless as it would simply decline to make any submissions.

- (ii). It is also necessary for the proposed *amicus* to have *bona fide* interest in the issue or issues in relation to which its appointment falls to be considered (see *per* Keane C.J. in *H.I.* at p. 203). This point is sometimes loosely referred to in caselaw as having an interest in “the proceedings” (*per* Eagar J. in *L.C. v. Director of Oberstown* [2016] IEHC 705, [2016] 12 JIC 0905 (Unreported, High Court, 9th December, 2016)), but that is not quite correct. An *amicus* might have no interest whatsoever in the particular proceedings as such, but that doesn’t mean it wouldn’t have a *bona fide* interest in one or more of the issues to which the proceedings relate.
- (iii). An *amicus* cannot contest undisputed facts and cannot get involved in evidence unless exceptionally so ordered by the court. The point that an *amicus* is not normally entitled to adduce any evidence was highlighted by Keane C.J. in *H.I.* at para. 23 referring to *United States Tobacco Company v. Minister for Consumer Affairs* [1988] 20 F.C.R. 520, and noting that an *amicus* “has no right of appeal”. Costello J. in *Data Protection Commissioner v. Facebook Ireland Ltd.* [2017] IEHC 105, [2017] 2 JIC 2003 (Unreported, High Court, 20th February, 2017) said at para. 10 that “[i]t is absolutely clear that an *amicus curiae* cannot contest the undisputed facts in the case”. More generally Clarke J. in *Fitzpatrick v. F.K.* [2006] IEHC 392, [2007] 2 I.R. 406 said at p. 417 that “an *amicus* should not be permitted to involve itself in the specific facts of an individual case. It is only after those facts have been determined that the extent to which issues of general importance may remain for decision will be clear. That is far more likely to be the case at the appellate rather than the trial level”. Kelly J. in *EMI Records Ireland Ltd v. UPC Communications (Ireland) Ltd.* at para. 69 said “[i]f it is the intention of the applicant to contest either of the factual matters ... then it will be seeking to involve itself in the factual aspects of the proceedings and there is no role for an *amicus curiae* in that regard.” Impliedly a court could order otherwise, but that is very much exceptional and unlikely to the point of being hardly worth discussing. The reference to *amici* at appellate level being more likely than at trial level is not because that rule is an end in itself, but a consequence of the principle that *amici* should not get involved in evidential disputes. If there are no such disputes at trial level, or if the trial court has already found the facts, such a hesitation doesn’t apply.
- (iv). An *amicus* is bound by the existing parameters of the case unless otherwise ordered. In a comprehensive, and if I may respectfully say so, extremely helpful, judgment on this issue in *Schrems v. Data Protection Commissioner (No. 2)* [2014] IEHC 351, [2014] 2 I.L.R.M. 506, Hogan J. refused to allow an *amicus* to propose an additional question for the CJEU on the grounds that “an *amicus* is normally bound by the parameters of the existing litigation” (para. 38) and that “[t]hese additional questions would effectively make [Digital Rights Ireland (DRI) (the *amicus*)] a party to the litigation in order to facilitate it to make a case which the parties themselves had never made” (para. 41). An *amicus* can comment on the detail of a proposed question which sometimes could be helpful, and it could also argue that a point that the court is considering referring is in fact *acte clair* (thereby perhaps reducing the scope of the reference), but it cannot seek to extend the parameters of the case, at

least in the absence of some exceptional order to that effect, which again seems so unlikely as to be hardly worth considering further.

**Factors to be considered**

11. If and only if those mandatory requirements are satisfied, one then turns to a weighing of various factors to be considered in the exercise of the discretion as to whether an *amicus* should be joined. The key factors are as follows:

- (i). The public law nature or public interest value of the case, which might enhance the case for an *amicus*: see *Schrems*.
- (ii). The status of the proposed *amicus* under international or national law or practice. As Hogan J. noted in *Schrems* at para. 23, in a number of cases where an *amicus* had been appointed by Irish courts, such an entity had a role under either national or international law. Examples are the UNHCR in *H.I.*, the Law Society in *O'Brien v. Personal Injuries Assessment Board* [2008] IESC 71, [2009] 3 I.R. 243, and the Equality Authority in *Doherty v. South Dublin County Council* [2006] IESC 57, [2007] 1 I.R. 246. However, as Clarke J. pointed out in *Fitzpatrick v. FK*: "I am not persuaded that the joining of *amicus curiae* is confined to such bodies. However it seems to me that the fact that the body seeking to be joined is charged in either domestic or international law with a public role in the area which is the subject of the litigation concerned is a factor of some significance to be taken into account."
- (iii). In particular, any international or regional perspective that could be brought to bear by the body. Especially in an art. 267 context, a body with a European or wider perspective can bring something very distinct to bear that is not otherwise provided by domestic entities. Hence, it was particularly valuable in *Eco Advocacy (No. 2) v. An Bord Pleanála* [2021] IEHC 610 to have the views of ClientEarth in particular, as an international NGO, as well as those of An Taisce from within the jurisdiction. In an art. 267 context, a court might naturally be particularly attentive to any proposals to hear from any body that had a pan-European or international perspective on the matters at issue, as this would normally genuinely add something totally distinct from how matters might be perceived by purely domestic actors. In *B.D. (Bhutan and Nepal) v. Minister for Justice and Equality* [2018] IEHC 461, [2018] 7 JIC 1709 (Unreported, High Court, 17th July, 2018), I was greatly assisted by the views of the UNHCR in considering whether to make a reference in that case (see para. 27 where I noted that its contribution was particularly helpful).
- (iv). The expertise of the proposed *amicus* - a factor referred to by Hogan J. in *Schrems*.
- (v). Even if the proposed *amicus* is a domestic entity, the degree to which it would bring a perspective additional to those available to the court. This was acknowledged in *Fitzpatrick v. F.K.* at para. 4. and in *Schrems*, where Hogan J. countered the argument that Member States would be entitled to make submissions in an art. 267 reference by saying at para. 34: "I agree with [counsel] that it is very likely that many Member States are likely to seek to intervene in the Article 267 TFEU reference,

so that it is unlikely that any relevant point will be overlooked. Yet given the track record of DRI - not least its recent successful challenge to the validity of the Data Retention Directive - it is likely that it will be in a position to articulate its own distinctive views on these questions of data protection and surveillance. The articulation of these views may assist the Court of Justice as that Court grapples with these difficult questions." Like the similar views of Kirby J. in *Levy*, there is a refreshing gust of reality to these comments. At the ever-present risk of stating the obvious, some legal questions, especially where EU or international law is at stake, are genuinely complex. Judging such questions is not a mechanical or even necessarily an easy process, and hearing from a wider suite of views may as a matter of actual practicality help concentrate the court's mind and assist it in bringing out the points that require particular focus and attention, or help the court see things in new ways that add shade and contrast to the submissions of the parties themselves. In the limited types of contexts where it arises, hearing from additional voices normally isn't anything to be massively afraid of, and the proceedings may even, to use Kirby J.'s term, be "enlivened" in the most constructive sense by such a dialogue.

- (vi). The extent to which the *amicus* can provide impartial assistance. Impartiality is a desirable factor, but complete impartiality is not required. Keane C.J. acknowledged in *H.I.* that an *amicus* would not be expected to be wholly disinterested in the outcome of litigation (see *per* Baker J. in *Scanlon* at para. 58). Clarke J. said in *Fitzpatrick v. F.K.* that the courts "have, to an extent, moved away from the principle that such parties should be entirely neutral and have permitted, in certain circumstances, parties to be appointed who could be expected to adopt a partisan role in the proceedings. However that is not to say that the role likely to be played is not, nonetheless, an important factor to be taken into account." McGovern J. noted in *Data Protection Commissioner v. Facebook* [2016] IEHC 414, [2016] 7 JIC 1906 (Unreported, High Court, 19th July, 2016), at para. 13 that "[t]he reluctance of the court to admit a party as an *amicus curiae* if they have a strong view or vested interest seems to have diminished somewhat in recent times", citing Hogan J. in *Schrems*.
- (vii). The extent to which a proposed *amicus* might otherwise be deprived of an opportunity to contribute to the determination of a point that affects its position. Circumstances could arise where a proposed *amicus* has an interest in other litigation or in a particular fact-situation where it might find its legal position being affected or determined or its points in such other proceedings being precluded without its involvement if it were not appointed as an *amicus curiae*. For example, where an issue is referenced to the CJEU that might also arise in another case, one would have to give consideration, if asked to do so, to the prejudice to a party in that other case if the point were to be decided without their involvement. That might lend support to any proposal for them to be allowed act as an *amicus* in the lead case.
- (viii). The extent to which the involvement of an *amicus* can be managed to minimise costs. This is a factor that weighed with Hogan J. in *Schrems*, where he made the point at

para. 19 that an *amicus* in that case would have to bear its own costs, and at para. 33 to the same effect that it would not be allowed to seek costs from any party. Kirby J. in *Levy v. Victoria* also made the point that the involvement of an *amicus* could mainly be by way of written submission. Both of these factors are already accounted for in the directions set out in *Eco Advocacy CLG v. An Bord Pleanála (No. 1)* [2021] IEHC 265, [2021] 5 JIC 2704 (Unreported, High Court, 27th May, 2021), which have already been applied to the present case, and which provide that any *amicus*, if added, would bear their own costs, would not be liable for the costs of others and would be involved in a written-submission-only basis at least as far as the Irish courts are concerned.

- (ix). The benefit that may arise from particular circumstances in allowing an *amicus* in proceedings to be referred under art. 267 where otherwise the *amicus* would not be heard in the CJEU. This was a point that weighed with McGovern J. in *Data Protection Commissioner v. Facebook* at para. 16: “[b]ecause there is no factual dispute or *lis inter partes* in these proceedings, the applicants argue that the usual rule, excluding the involvement of an *amicus curiae* at the first instance hearing, does not apply. Furthermore, when the issues raised in the proceedings are almost certain to involve a reference to the CJEU, it is essential that any party who has a right to be heard as an *amicus curiae* should be heard in the proceedings before the High Court. It seems to me that this is a reasonable view. Therefore, having regard to the particular circumstances of this case, I am prepared to entertain the applications from the various parties to be admitted as an *amicus curiae* at this stage.” The fact that a party (other than a member state or EU institution) can’t be heard in Luxembourg unless part of the domestic case was referred to in *Eco Advocacy* as a basis for at least considering the question of *amici* in the art. 267 context.
- (x). The views of the parties. Even when we are considering the question of an *amicus*, the system remains adversarial and consequently the views of the parties are always of interest and relevance from the court’s viewpoint. Kirby J. in the *Levy v. Victoria* case referred to the “primacy” of the parties, and that remains the position. The views of the parties were also referred to specifically by Hogan J. in *Schrems*. Obviously that doesn’t mean that one or even all of the parties together have a veto in the matter, because the court can act of its own motion if it thinks necessary, but their views are certainly an important factor.
- (xi). Finally, and, as the State in fairness acknowledged here, of some centrality, is the court’s own evaluation of its desire to be assisted. Ultimately an *amicus curiae* is there to help the court, and notwithstanding all other factors that may be argued pro and con, on any analysis a major factor is the court’s own individual assessment of to what extent it would welcome assistance from entities that are not directly concerned in the specific proceedings. Admittedly, there is a possibly subjective element to that, and the court’s own willingness to entertain a wider suite of views in any situation may possibly vary to some extent as situations vary from court to court or from time to time or from case to case. But nonetheless, there is something

inescapably relevant about the court's own preferences and evaluations in such a situation.

**Application of the law to the facts here**

12. Both proposed *amici* meet all of the mandatory requirements and come out favourably in the assessment of most of the discretionary factors to be considered. Without going through them in detail, I could summarise the position as follows:

- (i). The case is of a public law nature and has a significant public law dimension.
- (ii). An Taisce has an important status under domestic law as a statutory consultee entitled to involvement in any planning application.
- (iii). Both proposed *amici* are domestic bodies so the possible added value of hearing from cross-jurisdictional entities doesn't arise. The fact that Irish bodies like An Taisce may also participate in international networks doesn't quite meet the point of the distinct benefit of an extra-territorial perspective under this heading.
- (iv). An Taisce has acknowledged and unquestionable expertise as well as considerable forensic expertise both in terms of domestic and European law. Based on what I have heard from counsel, it seems probable that Save Our Bride Otters has a sufficient practical involvement or interest in at least some of the issues the subject matter of the reference to be in a position to be said to have some relevant expertise to offer.
- (v). While it is true that a diverse set of viewpoints are already represented in the case, there is a distinct benefit in having the additional perspectives of interest groups that are not directly involved in the particular development, what Hogan J. in *Schrems* referred to as the "distinctive views" of particular NGOs.
- (vi). While I would not expect either proposed *amici* to be completely disinterested, they are sufficiently removed from the particular forensic dispute here as to be capable of bringing to bear a perspective that is likely to be of benefit to the court.
- (vii). It is noteworthy that Save Our Bride Otters through its members are involved in proceedings raising an identical point to that the subject matter of the reference here. Under those circumstances, if that body was not joined as an *amicus* it would end up in a position where its members' own proceedings could be determined to significant extent by a CJEU judgment in the present case without its involvement.
- (viii). In accordance with the *Eco Advocacy* directions that apply here, the proposed *amici* will bear their own costs will not be liable for the costs of others, and will participate on a written-submissions-only basis, so any costs implications will be contained to the maximum possible extent.
- (ix). Given the particular nature of the proceedings and the stage in which we are at, if the *amici* are not joined now they could not be heard in the CJEU, which is something

to which regard can be had in reliance on the judgment of McGovern J. in *Data Protection Commissioner v. Facebook*.

- (x). As regards the views of the parties, South Dublin County Council did not get involved, the board was neutral and the applicant was seeking joinder of the *amici*, as noted above. And the State, while opposed, did not press such opposition in any vigorous way.
  - (xi). Finally my own assessment in this case, all other things being equal, would lean towards being positively disposed to hearing from a wider set of voices and views, such as those of the proposed *amici* here.
13. Having regard to all of those factors, it seems to me that the balance is very much in favour of the order sought by the applicant joining the *amici*.

**Order**

14. Accordingly, the order made on 1st December, 2021 was:

- (i). that, as indicated on 29th November, 2021, the title of the proceedings be amended to reflect the Minister's current official title;
- (ii). that An Taisce – The National Trust for Ireland and Save Our Bride Otters be joined as *amici curiae* in accordance with the rules of engagement set out in the *Eco Advocacy* directions already given;
- (iii). that those bodies would have two weeks from 1st December, 2021 to furnish written submissions to the court, copied to the parties, on their proposed answers to the questions identified in the *Hellfire (No. 1)* judgment; and
- (iv). that on the expiry of the two-week period and having regard to any submissions filed by the *amici* within that period (submissions from the parties having already been received insofar as they are participating in the reference), I would then proceed to finalise the order for reference.