

THE HIGH COURT
JUDICIAL REVIEW

[2021 No. 251 JR]

IN THE MATTER OF SECTIONS 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT
ACT 2000 AND
IN THE MATTER OF THE PLANNING AND DEVELOPMENT (HOUSING) AND RESIDENTIAL
TENANCIES ACT 2016

BETWEEN

ALICE O'DONNELL, COLIN ACTON, SEÁN GOFF, EVELYN CAWLEY, DECLAN MORRIS,
CIARA MAN, GARETH MADDEN, AILEEN LENNON, KEITH SCANLON AND CARINA HARTE-
HOLMES

APPLICANTS

AND

AN BORD PLEANÁLA, MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE,
IRELAND AND THE ATTORNEY GENERAL

RESPONDENT

AND

DRUMAKILLA LIMITED

NOTICE PARTY

(No. 2)

JUDGMENT of Humphreys J. delivered on Wednesday the 1st day of November, 2023

Judgment history

1. In *O'Donnell v. An Bord Pleanála* (No. 1) [2023] IEHC 381, [2023] 7 JIC 0501 (Unreported, High Court, 5th July, 2023), I dismissed an application for *certiorari* of a planning permission for a housing development and adjourned for further submissions a challenge to a derogation licence in connection with that development.

2. An important point in this regard is that the applicants "failed to mount a derogation-based challenge" to the planning permission, as the State points out. No such case is made on the pleadings. Thus the derogation licence point has no impact on the *certiorari*.

3. The applicants propose to seek leave to appeal in relation to *certiorari*, which will be dealt with at a later stage, but of course in that context a would-be appellant is also confined to the pleadings.

Background

4. The background is set out in the No. 1 judgment. At para. 162 I set out the issues which the applicants would have to establish in order to quash the derogation licence, although in fairness to the applicants they have somewhat refined their arguments since.

5. The licence states:

"This licence is granted solely to allow the activities specified in connection with the proposed strategic housing development located at Delgany, Co. Wicklow, for Drumkilla Ltd."

6. Condition 4 states:

"The mitigation measures outlined in the application report (Environmental Impact Assessment for a proposed strategic housing development on lands, Delgany, Co. Wicklow, 7. remedial or reductive measures, 7.11 Protection Measures for Bat Roosts -- Buildings, 7.12 Protective Measures for Bat Roosts -- Trees, 7.13 Protective Measures for Bat Foraging and Commuting, pp 30-37), together with any changes or clarification agreed in correspondence between NPWS and the agent or applicant, are to be carried out. Strict adherence must be paid to all the proposed measures in the application."

7. The critical dates are as follows:

- (i) date of derogation licence – 4th March, 2020, amended on 21st July, 2020;
- (ii) date applicants knew or could reasonably have been aware of the derogation licence – 21st October, 2020 on the making of the application for permission;
- (iii) Date of permission – 15th February, 2021; and
- (iv) Date on which the proceedings challenging the derogation licence were brought – 25th March, 2021.

8. The No. 1 judgment permitted further submissions on the derogation licence question. A hearing was then held on 24th October, 2023. A further relatively brief follow-up mention was held on 25th October, 2023, at which it was agreed that the questions now arising be specified by the court, anything that can be determined now addressed, and a final round of submissions permitted, with the court to deal with the matter (either itself or by way of a reference) on the papers thereafter.

Conforming interpretation

9. Some complexity has been caused in the present case by the fact that "conforming interpretation" has been invoked liberally, but it has four different relevant senses:

- (i) a conforming interpretation of O. 84 r. 21(1) and/ or (2) whereby time would not commence to run until an applicant knew or ought to have known of a decision even in the absence of an application for an extension of time;
- (ii) a conforming interpretation of O. 84 r. 21(1) and/ or (2) whereby time would not commence to run for a derogation licence until the planning permission decision had been made even in the absence of an application for an extension of time;
- (iii) a conforming interpretation of O. 84 r. 21(3) whereby in the event of an application for an extension of time to reflect the date when the applicant knew or ought to have known of a decision, time would be so extended insofar as that was required to give effect to EU law rights (this was the situation in the Judgment of 28 January 2010, *Uniplex (UK) Ltd v NHS Business Services Authority*, C-406/08, ECLI:EU:C:2010:45); and
- (iv) a conforming interpretation of O. 84 r. 21(3) whereby in the event of an application for an extension of time to reflect the date of the subsequent planning permission, time would be so extended insofar as that was required to give effect to EU law rights.

10. It is going to be crucial to keep in mind distinguish between these possibilities because they have different implications for the way in which this matter has to be resolved.

The options in relation to the time issue

11. At first sight the applicants have little to no wriggle room arising from the No. 1 judgment. The State pegs the applicants down with a series of powerful propositions deriving from the judgment as follows:

- (i) "For the purposes of Irish law, the Derogation Licence is a legally separate decision under a legally separate code made by a legally-separate decision-maker and is not a preliminary decision with any unitary process leading to a development consent." That is correct, as discussed further below, but subject to one caveat which is factoring in any requirement for a conforming interpretation of O. 84 r. 21.
- (ii) "Secondly, the Court noted that there is no challenge in these proceedings to the validity of the European Communities (Birds and Natural Habitats) Regulations 2011 [S.I. 477 of 2011] (the '2011 Regulations') by reference to the procedure for granting Derogation Licences, either in terms of lack of public participation or a failure to provide a 'joined up' system." Any such claim is not pleaded so cannot succeed.
- (iii) "[A]s a matter of domestic law, an extension is required to challenge a derogation licence if the challenge is brought more than three months after the date of the licence, given the time limit in Order 84 of the Rules of the Superior Courts." That is correct as discussed below subject to a conforming interpretation of O. 84 r. 21.
- (iv) "Fourth, on the facts, it was held (§136) that the Applicants did not move within three months from the date upon which when they became aware of the Minister's decision to grant the Derogation Licence." That is the position.
- (v) "Fifth, the Court noted (at §151 of the Judgment), having cited and quoted from the judgment of the CJEU in Case C-348/15 *Stadt Wiener Neustadt*, 'that there isn't anything inherently unlawful about national law providing rules about things like time limits as an aspect of the principle of national procedural autonomy...' Rather, as the Court observed (§153), 'the principle of EU law is that the domestic procedural rule must not make it in practice impossible or excessively difficult to exercise EU law rights.' This conclusion is consistent with the Supreme Court decision in *Krikke v Barranafaddock Sustainability Electricity Ltd.* – which is expressly referenced at §151 of the Judgment – wherein Hogan J. stated (§28) that it is perfectly clear from a multitude of decisions of the Court of Justice that domestic time limitation periods are in principle consistent with EU law provided the time periods in question comply with the principles of equivalence and effectiveness." Again I think that is clear but the argument has become slightly more nuanced now in that the applicants are not taking issue with the 3 month time limit as such but only arguing for the need for a conforming interpretation in the second sense above.
- (vi) "Relatedly, the Judgment of this Court suggests that the time limit in Order 84, r.21 – which applies in the case of a challenge to the Derogation Licence – does not breach the principles of equivalence and effectiveness that subtend the principle of national procedural autonomy, further noting that the time limit allows for flexibility insofar as it permits for extensions for time. In that respect, the Judgment is consistent with the decision of the Court of Appeal in *Arthroparm (Europe) Ltd. v. The Health Products Regulatory Authority* [2022] IECA 109, which expressly considered the provisions of Order 84, r.21 and in which the Court of Appeal

considered and applied the judgments of the CJEU in Case C-456/08 *Commission v. Ireland* and Case C-408/08 *Uniplex (UK) Ltd. v. NHS Business Services Authority*.”
 (vii) “As noted in the Court’s Judgment, the Applicants in this case elected not to seek an extension of time”.

12. The State’s eloquent response is undoubtedly formidable. The critical points are that the applicants didn’t seek an extension of time, that they didn’t challenge O. 84 r. 21 in the statement of grounds, or seek to amend their statement to include such a challenge once time was raised by way of opposition (which would be a permissible procedure – an applicant can’t be held liable for not anticipating points of defence), and they are faced with the problem that in domestic law the derogation licence is a separate decision, separately challengeable, subject only to the issue of conforming interpretation. Does that mean they must lose? The problem for the opposing parties, despite being correct about almost everything, is that the answer is possibly not.

13. Conceptually there are only a limited number of options for the applicants in relation to the issue of time:

- (i) Order 84 r. 21(1) and (2) RSC allows the challenge here, leaving aside a conforming interpretation;
- (ii) if not, a conforming interpretation of the rules would allow such a challenge even in the absence of an application for an extension of time;
- (iii) alternatively a conforming interpretation means that the applicants should get an extension of time – that doesn’t arise because it wasn’t applied for, and r. 21(3) requires an application; and
- (iv) alternatively O. 84 r. 21 is invalid as contrary to EU law or should be set aside under the Judgment of 2 December 2018, *Minister for Justice v Workplace Relations Commission*, C-378/17, ECLI:EU:C:2018:979, (Grand Chamber), which is the same thing - that doesn’t arise either because if such is necessary, a conforming interpretation is more than possible, whether we are talking about r. 21(1) or r. 21(3), and anyway the applicants didn’t plead this, and a challenge of this kind would have to be expressly pleaded.

14. So the essential issues are whether r. 21 favours the applicants leaving aside a conforming interpretation, and if not whether a conforming interpretation saves them, or might plausibly do so such as to make a reference worth considering.

Is the challenge out of time, leaving aside conforming interpretation?

15. The State’s submissions rely on the powerful observation made by Murray J. (for the Court of Appeal) in *Arthroparm (Europe) Ltd v. Health Products Regulatory Agency* [2022] IECA 109, [2022] 5 JIC 1003, at §142:

“It would make a nonsense of the time limit imposed by Order 84 Rule 21 if an applicant could under the guise of a challenge to a decision made within time, obtain the invalidation of an earlier decision for which time had run and expired. The rule against collateral attack prevents this.”

16. The key question then is – is the derogation licence a decision for which time separately runs?

17. Order 84 r. 21(1) RSC states:

“An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose.”

18. Sub-rule (2) states:

“Where the relief sought is an order of *certiorari* in respect of any judgement, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgement, order, conviction or proceeding.”

19. The setting of time limits for challenges is in principle a matter of national procedural autonomy, subject to effectiveness and equivalence: see *Krikke v. Barranafaddock Sustainability Electricity Limited* [2022] IESC 41, [2023] 1 I.L.R.M. 81, [2022] 11 JIC 0303 (*per* Woulfe and Hogan JJ.); Judgment of 17 November 2016, *Stadt Wiener Neustadt v. Niederösterreichische Landesregierung*, C-348/15, ECLI:EU:C:2016:882 at paras. 40 and 41.

20. As a matter of domestic law, and leaving aside conforming interpretation, the derogation licence is a discrete decision, not part of the planning process as such. Therefore the 3-month time limit applies, subject to the possibility of extension.

21. The concept that the applicants couldn’t have challenged the decision at the time because they didn’t have standing is implausible. The fact that there wasn’t any public participation procedure in the grant of that licence doesn’t preclude a challenge (see *Mulcreavy v. Minister for Environment* [2004] IESC 5, [2004] 1 I.R. 72, [2004] 1 I.L.R.M. 491, [2004] 1 JIC 2701 (Keane C.J.)), especially by a person affected, such as a local resident or any person affected by the consequent permission.

22. The concept that the applicants couldn't have challenged the derogation licence until such time as the permission was granted, because such a challenge would have been premature and moot, would be valid if the decision was an intermediate step in a process - *Spencer Place Development Company v. Dublin City Council* [2020] IECA 268, [2020] 10 JIC 0202 (Costello J.) Challenges to intermediate steps can be saved for the final decision. It is inherent in that that the concept of the date of the proceeding in sub-rule (2) as applied to administrative proceedings means the final proceeding. However as a matter of domestic law the derogation licence is not treated as an intermediate step in a process – it is a separate decision under a separate code by a separate competent authority.

23. The applicants make the argument that if a decision is ineffective without a subsequent decision, the applicants couldn't challenge the first decision until there was a later decision. They rely on the Supreme Court decision in *Mulcreevy v Minister for Environment*, but that dealt with a different situation where there was in fact only one decision which didn't become operative for a period of time.

24. The judgment notes that on 3rd July, 2003 "the Environment Minister made the National Monuments (Approval of Joint Consent) Order, 2003". The judgment goes on:

"It is agreed in this case that, before the works restrained by the interlocutory injunction could proceed, it was necessary that this order should be laid before both Houses of the Oireachtas and that it would not become effective until 21 sitting days of both Houses had elapsed during which no resolution to annul the order had been passed by either House. It is accepted that, accordingly, the order did not come into effect until the 2nd December, 2003. The interlocutory injunction granted by this court was discharged by the High Court on 8th December, 2003 and, on that day, the local authority stated that it would be taking the appropriate steps to implement the approval given by the Environment Minister."

25. The judgment records that "On 23rd December, 2003 an application was made on behalf of the plaintiffs to the High Court for leave to issue proceedings by way of judicial review". The reliefs were:

"(i) An order of *certiorari* of the National Monuments (Approval of Joint Consent) Order, 2003 made on 3rd July, 2003 (hereafter "the approval order");
 (ii) An order of prohibition prohibiting the local authority from in any way demolishing, removing (in whole or in part), disfiguring, defacing, altering, injuring or interfering in any way with the monument;
 (iii) An injunction against the local authority to the same effect pending the hearing of these proceedings."

26. At the time, the time period for *certiorari* was 6 months, now 3 months (the applicants' written submissions here misunderstand this). So the proceedings were not out of time. Rather they fell foul of the separate requirement, since revoked as contrary to EU law as set out in the Judgment of 28 January 2010, *Uniplex (UK) Ltd v NHS Business Services Authority*, C-406/08, ECLI:EU:C:2010:45, that an applicant must move promptly within that period:

"The application for leave to issue the proceedings by way of judicial review was made on notice to the Environment Minister and the local authority and was heard by Gilligan J. While satisfied that the applicant had standing to institute the proceedings, he was of the view that, although in so far as they sought relief by way of *certiorari*, they were brought within the period of six months prescribed by Order 84, Rule 21(1) of the Rules of the Superior Courts, they had nonetheless not been brought sufficiently promptly and he accordingly refused to grant any of the reliefs sought. From that judgment, the applicant has now appealed to this court."

27. So in fact *Mulcreevy* deals with a completely different point.

28. On balance and leaving aside conforming interpretation, one has to conclude that the derogation licence, being a decision under a different code by a different decision-maker, is a separate decision for domestic law purposes from the planning decision. Indeed, if one wants an illustration of the legal separateness of the derogation licence and the planning permission for domestic law purposes, one need go no further than the applicants' own legal submissions on leave to appeal, which state at para. 3 that "The Applicants do not require a certificate in relation to Core Ground 4 as this is a matter of statutory validity".

Is there a requirement for a conforming interpretation so as to change this outcome?

29. In the No. 1 judgment I was possibly underwhelmed by the way that the case was pleaded or how the issues were addressed in the original written submissions of March, 2023, although I do take the applicants' point that their side have had to labour under a lot of pressure of work on short timescales, and that there may have been some hindsight on my part in the sense that some relevant European developments post-dated the filing of the statement of grounds. I agree that one can't expect parties to be clairvoyant, and indeed one could make the same point about the No. 1 judgment in that one would have to amend my comment about Irish law allowing derogation after

the permission, even though that was technically correct, in the light of the subsequent decision in the Judgment of 6 July 2023, *Hellfire Massy Residents Association*, C-166/92, ECLI:EU:C:2023:545 – delivered the day after the No. 1 judgment - that EU law requires this to be done before or at the same time. But if the judgment was unenthusiastic about some of the applicants' approaches, that was at the intellectual or analytical level in terms of deficits in logic and procedure, and wasn't phrased as being attributed to anyone or meant to be taken as criticism of anyone in particular and certainly not personal criticism. The basic message to parties on either side is "help the court to help you". However maybe the applicants should look on the upside which is that they may have been spurred on to raise their game considerably in preparing the submissions for the present module. One need only compare the applicants' original submission before the No. 1 judgment with the subsequent one to see that the latter is in a completely different league. The original submission didn't even make a single passing reference to the doctrine of conforming interpretation. And the overarching context was that, even though I thought that the applicants had introduced some dud points, I was anxious to be as fair as possible to them and to ensure that any good point buried somewhere wasn't overlooked. It would have been relatively easy and arguably legitimate to simply dismiss the proceedings in their entirety at the stage of the No. 1 judgment, but I didn't do that. Instead I gave the applicants every chance to develop the point in a more structured way.

30. Article 11(2) of the EIA Directive 2011/92 provides that: "Member States shall determine at what stage the decisions, acts or omissions may be challenged". There is no legislation specifically doing so, similar to the issue that arose in the Judgment of 15 March 2018, *North East Pylon v An Bord Pleanála*, C-470/16, ECLI:EU:C:2018:185, see e.g., para. 34. It can hardly be said that Irish caselaw determines this point with certainty in the relatively *sui generis* context of the derogation licence. While I am concluding that this is a separate decision, one has to do so with something less than complete certainty given the various fluctuations in the caselaw in recent times.

31. In the opinion of 21 October 2021, *Namur-Est Environnement ASBL v Région wallonne*, C 463/20, Advocate General Kokott stated (§37):

"Moreover, the Kingdom of Belgium's submission is also not convincing in terms of content, since the permit under species protection law was expressly applied for in relation to the implementation of the quarry project. According to the observations submitted in the hearing, detriment caused to protected species is accordingly permissible only within the framework of the project, and therefore requires, at least in practice, the approval of the project as a whole. A further reason why such a link with the project appears to be necessary under EU law is that only the objectives of the measure concerned, in this case the project, can justify a derogation from the obligations of species protection in accordance with Article 16 of the Habitats Directive and Article 9 of the Birds Directive."

32. The court held at para. 66:

"In the light of all the foregoing considerations, the answer to the first question is that Directive 2011/92 must be interpreted as meaning that a decision adopted under Article 16(1) of Directive 92/43 and which authorises a developer to derogate from the applicable species protection measures in order to carry out a project within the meaning of Article 1(2)(a) of Directive 2011/92 forms part of the development consent procedure, within the meaning of Article 1(2)(c) of that directive, where, first, the project cannot be carried out without the developer having first obtained that decision and, secondly, the authority competent for granting development consent for such a project retains the ability to assess the project's environmental impact more strictly than was done in that decision."

33. The applicants submit that "Both conditions are met in this case".

34. Paragraph 104 of the applicants' submissions makes the critical point:

"[I]t is respectfully submitted that the Court is required to interpret the phrase 'the date when grounds for the application first arose' in a manner which is to the fullest extent possible consistent with the objectives of Article 9(3) and (4) of the Aarhus Convention."

35. This is a point which was simply never made in those terms in the applicants' first set of submissions prior to the No. 1 judgment.

36. Perhaps technically the conforming interpretation would have to be to sub-rule (2) insofar as it applies to administrative proceedings, whereby the date of the proceeding would have to be interpreted as the date of the final decision under the planning code. Given that interim decisions are covered generally, such an interpretation is well within the scope of any confirming interpretation if such is required.

37. It seems to me that the centrality of this point has only come into focus with the applicants' further submissions. Up until now the main focus has been on a conforming interpretation of the power to extend time, which doesn't in fact arise for the reasons explained.

38. All of this gives rise to a number of possible questions, although I should note that the Notice of appeal must be correct that:

“any suggested questions relating to extending time are hypothetical. In this regard, the CJEU has set out that it may refuse to rule on a question referred to it for preliminary ruling where the ‘problem is hypothetical’ (Case C-390/99 *Canal Satélite Digital SL* (Court of Justice, 22 January 2022) at §19).”

39. What emerged from the final listing of this matter was that the court would identify the questions and then invite submissions from the parties on whether these questions arose or whether there were additional questions, whether I should decide these myself, or refer them to Luxembourg and if the latter to provide *Eco Advocacy v. An Bord Pleanála* [2021] IEHC 265 submissions. So I am doing that now. This does not amount to a decision to refer, even in principle.

First question

40. The applicants proposed that the court should refer the following question to the CJEU: “Does EU law require that a challenge to a derogation licence may be brought at the end of a development consent procedure to which it relates within the time limits relating to a challenge to such a development consent notwithstanding any rule of national law to the contrary?”

41. I think this question (whether I refer it or not) needs to be re-worded along the following lines:

Does Directive 2011/92 read in the light of the principle of wide access to justice under Article 9(2) of the Aarhus Convention have the effect that, where a decision adopted under Article 16(1) of Directive 92/43 and which authorises a developer to derogate from the applicable species protection measures in order to carry out a project within the meaning of Article 1(2)(a) of Directive 2011/92 forms part of the development consent procedure, within the meaning of Article 1(2)(c) of that directive, because, first, the project cannot be carried out without the developer having first obtained that decision and, secondly, the authority competent for granting development consent for such a project retains the ability to assess the project’s environmental impact more strictly than was done in that decision, national domestic rules as to the date on which time commences to run to challenge the validity of the decision adopted under Article 16(1) of Directive 92/43 must be interpreted so as to preclude that time from commencing to run prior to the date of adoption of the development consent concerned, even if the proceedings challenging the validity of the decision adopted under Article 16(1) of Directive 92/43 does not contain any ground challenging the relevant development consent by reference to the asserted invalidity of the derogation decision, and even if an applicant fails to apply for an extension of time to bring the challenge to the derogation decision which would be required by domestic law in the absence of a requirement for conforming interpretation?

Second question

42. There is a further potential issue given the lack of legislation defining what time limits apply: **If the answer to the first question in general is no, does Directive 2011/92 read in the light of the principle of wide access to justice under Article 9(2) of the Aarhus Convention have the effect specified in that question where the law of the member state concerned has not definitively determined, in accordance with Article 11(2) of Directive 2011/92, at what stage the decisions, acts or omissions may be challenged, and where the position is not determined with certainty by domestic caselaw?**

Third question

43. Assuming that the applicants get over the time problem there are two questions on the merits. The next question is:

If the answer to the first or second questions is yes, does Article 16(1) of Directive 92/43 have the effect that a competent authority cannot conclude that there is “no satisfactory alternative” to a decision which authorises a developer to derogate from the applicable species protection measures in order to carry out a project within the meaning of Article 1(2)(a) of Directive 2011/92 unless the competent authority actually considers alternatives such as alternative location or design, or refusal of the derogation?

44. The applicants’ submission on this point is as follows:

“114. The NPWS was not entitled to grant a Derogation Licence pursuant to regulation 54 of the Habitats Regulations unless there were no suitable alternatives. Suitable alternatives included not granting permission, proposing development elsewhere, or requiring an application that did not entail roost destruction or disturbance.

115. This is made clear in the documentation accompanying the Derogation Licence, where it is stated: ‘The mitigation measures outlined in the report were deemed sufficient

and were approved by local NPWS staff. No alternatives were proposed or considered by any NPWS staff as the mitigation measures were considered appropriate.’ This observation misunderstands the architecture of regulation 54 of the Regulations. Mitigation is nothing to do with alternatives and arises (if at all) only after it has been established that there are no reasonable alternatives. In this context mitigation merely reduces the harm rather than remove it. If it were the latter then a derogation would, self-evidently, not be needed.

116. The State responds to this by pointing out that the Derogation Licence ‘states in terms that there is no satisfactory alternative’. However, this is simply a recitation of the statutory test and does not address whether there were alternative locations for development or, if not, a form of development on the site that would leave the strictly protected species undisturbed. It in no way addresses, let alone meets, the pre-requisite requirement in regulation 54 of the Habitats Regulations that there actually be no suitable alternatives. It is not a conclusion, still less a justification, and still less an explanation (either in the Derogation Licence itself or in the Statement of Opposition) that this pre-requisite has been satisfied.”

45. It seems to me that that point is adequately captured in the proposed question.

Fourth question

46. The next question is:

If the answer to the first or second questions is yes, does Article 16(1) of Directive 92/43 have the effect that a competent authority cannot conclude that it is “in the interest of protecting wild fauna and flora and conserving natural habitats” to grant a decision which authorises a developer to derogate from the applicable species protection measures in order to carry out a project within the meaning of Article 1(2)(a) of Directive 2011/92 unless some identified protection is created by the derogation itself rather than by mitigation measures adopted to reduce or compensate for the detriment created by the steps authorised by the derogation decision?

47. The relevance of this is the applicants’ submission as follows:

“The Minister erred in law and fact in purporting to grant a Derogation Licence for the purposes of the preservation of the wild fauna when the activities sought to be authorized by the grant will result in the destruction of identified and unidentified breeding roosts. It is illogical to justify the destruction of breeding places for protected species to facilitate development and at the same time state that it is being done for the preservation of that species. There is no suggestion that the destruction of the roost is being done for the purposes of scientific or other purposes identified by Article 16, and no suggestion to that effect is made in the Derogation Licence itself or the Statement of Opposition. Accordingly, the statutory requirements in regulation 54 have not been complied with.”

Order

48. For the foregoing reasons it is ordered that:

- (i) the parties be directed to prepare simultaneous *Eco Advocacy*-type submissions within 2 weeks which would deal in this instance with whether these questions arise, whether there are additional questions, and whether the court should answer them itself or refer them; and also with their proposed answers, authorities on which they rely, and *amici* if they wish to suggest that in the event of a reference; and
- (ii) in the light of those submissions the court will make any appropriate further order based on the papers, either by determining all suggested questions or by a reference, although reserving the right to have a further hearing if the court so decides or if a party so requests.