

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 977 J.R.]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 AS AMENDED

BETWEEN:

GERARD O'SULLIVAN, CAROLE ANNE FLOYD, ANTON FLOYD, BRENDAN DALY, COLM DUGGAN, JAMES CRONIN, KAY CRONIN,
JOSEPH PITTAM, MICHAEL O'CONNELL

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CORK COUNTY COUNCIL, KEEL ENERGY LIMITED, NIGEL DE HAAS, KARIN KEMPF

NOTICE PARTIES

JUDGMENT of Ms. Justice Costello delivered on the 30th day of November, 2017

Introduction

1. In these proceedings the applicants seek judicial review of a decision of An Bord Pleanála ("the Board") dated 28th October, 2016 to grant planning permission to Keel Energy Ltd ("the developer") for a proposed wind farm development on a site at Carrigariel Hill (and straddling a number of town lands) nine kilometres north of Dunmanway, County Cork ("the Carrigariel Development"). The proposed development comprises the construction of five wind turbines with a maximum ground to blade tip height of 140 metres, the upgrading of existing internal access roads and the provision of new internal access roads, the provision of a wind anemometry mast, two burrow pits, a 38kV substation and an underground electrical grid connection.

2. On 22nd December, 2015, the developer applied for planning permission for the Carrigariel Development. The application stated that the connection to the national grid was to occur at one of two un-built substations; either a permitted substation at Barnadivane (the permitted substation) or a larger substation on a larger, different site at Barnadivane (the replacement substation). The site at Barnadivane is 14km from the site of the Carrigariel Development approximately as the crow flies, and the grid connection from the Carrigariel Development to either substation would require a 17.74km connection.

3. The grant of planning permission in respect of the permitted substation is dated 14th February, 2007. On 9th February, 2012, the permission was extended to 13th February, 2017. The planning permission has thus lapsed but was extant when the application for the Carrigariel development was submitted. Furthermore, the design of the permitted substation has been overtaken by the updated substation standards adopted by EirGrid. Consequently, EirGrid would not take over the operation of the permitted substation if built as it does not currently meet these updated standards. It was in part to meet the new requirements of EirGrid that planning permission for the replacement substation was sought.

4. At the date of the application for planning permission for the Carrigariel Development, an application to develop a separate wind farm and the replacement substation at Barnadivane was pending. On 11th July, 2016, the Board granted permission for a six turbine wind farm and the replacement substation at Barnadivane. This replacement substation was intended to provide a grid connection for the wind farm at Barnadivane and two other wind farms, including the Carrigariel Development.

5. On 29th July, 2016, leave to apply for judicial review to challenge this decision of the Board was granted *Larkin v. An Bord Pleanála* [2016 No. 614 J.R.]. In September 2016, the Board decided to consent to an order quashing the grant of permission of 11th July, 2016 for, *inter alia*, the replacement substation at Barnadivane.

6. The Carrigariel Development is situated near a number of European sites, three of which are relevant to this case: the Bandon River Special Area of Conservation (SAC), the Gearagh SAC and the Gearagh Special Protection Area (SPA). The developer therefore submitted an Environmental Impact Statement (EIS) and a Natura Impact Study (NIS) with its application for planning permission and the application was submitted to both Environmental Impact Assessment (EIA) and Appropriate Assessment (AA) by both the planning authority and the Board on appeal.

7. The Board's Inspector finalised his report on the Carrigariel Development on 13th September, 2016. On 15th September, 2016 the National Parks and Wildlife Service (NPWS) issued site specific conservation objectives for the Gearagh SAC.

8. On 7th October, 2016, the Board met to consider the Inspector's report and the submissions on the file. The Board decided to grant planning permission for the Carrigariel Development generally in accordance with the Inspector's recommendation and for the reasons and considerations set out in the Board direction. The presenting Board member became aware of the fact that the NPWS issued conservation objectives for the Gearagh SAC on 15th September, 2016, two days after the Planning Inspector had completed his report and recommendation. As such, the conservation objectives had not been considered by the Inspector in the completion of his report and recommendation. The Board met again on 25th October, 2016 and the submissions on file and the Inspector's report were further considered. The Board revisited the appropriate assessment that it had conducted on 7th October, 2016, in light of the content and specific objectives for the Gearagh SAC contained in the conservation objectives issued by the NPWS on 15th September, 2016. Having considered the specific conservation objectives for the Gearagh SAC, the Board decided that these specific conservation objectives did not alter the Board's earlier conclusions in respect of appropriate assessment and the Board decided to confirm its earlier decision of 7th October, 2016. The Board did not consider it necessary to seek an addendum report from the Planning Inspector in relation to the matter.

9. The Board decided to grant planning permission for the Carrigariel Development in accordance with the plans and particulars and based on the reasons and considerations under and subject to the conditions set out in the decision.

10. Four days later on 1st November, 2016 the planning permission for the replacement substation at Barnadivane was quashed and remitted to the Board for reconsideration. On 19th December, 2016, the applicants were granted leave to seek judicial review in these proceedings.

The Applicants' Case

Environmental Impact Assessment

11. The applicants say that the Board failed to carry out an EIA in accordance with the requirements of s.172 of the Planning and Development Act 2000 (as Amended) (the 2000 Act), as interpreted in accordance with the obligations imposed by Article 3 of Directive 2011/92/EU (the EIA Directive). They argue that the Carrigariork Development and Barnadivane substation development formed parts of a single project for EIA purposes and fell to be subjected to an EIA as such in discharge of the obligation to assess the entire project. They contend that the environmental impact of the entire project including the wind farm, grid connection and the replacement substation was never assessed. Alternatively, any EIA of the Carrigariork Development required an analysis of the cumulative effect of the Carrigariork Development and the Barnadivane substation. In performing the EIA for the wind farm and grid connection the Board did not assess the direct and indirect effects and/or the cumulative impact of the proposed development (the wind farm and the grid connection) and the substation. They say the assessment could not have been carried out because the requisite information in relation to either the previously permitted substation or the replacement substation was not before the Board.

12. Secondly, they say that there was legal uncertainty around the substation to which the wind farm was to connect. The planning permission for the previously permitted substation was due to expire on 13th February, 2017 shortly after the Board's decision on 28th October, 2016. As this planning permission had already been extended, it was not possible to extend it further. In addition, EirGrid had indicated that the permitted substation did not meet its revised requirements and it would not assume operational control of the permitted substation, if built. Thus, there was no practical possibility of the Carrigariork Development connecting to the national grid by means of the permitted substation. In reality the wind turbines could only be connected to the national grid by means of the replacement substation. As of the date of the decision of the Board it knew that the grant of planning permission in respect of the replacement substation was to be quashed by the High Court. Therefore, there could be no certainty that there would be a substation at Barnadivane to receive the grid connection from the Carrigariork Development.

13. The applicants argue that the net effect of this quashing of the Board's decision was that there was legal uncertainty surrounding the substation to which the wind turbines were to connect. This in turn meant that the Board could not as a matter of law conduct an EIA because it could not be certain where the terminus of the grid connection would be and thus the route that the grid connection would take. This meant that the Board could not conduct an EIA on the basis of assessing the environmental impacts of the grid connection or, for that matter, the substation.

14. Thirdly, the applicants say that the Board failed properly to record the EIA it performed and that the Board cannot be heard to say that it performed an EIA which has not been recorded. There were two significant changes to the factual situation relevant to the decision of the Board which occurred following the date of the Inspector's report. It followed that the Board could not rely upon the Inspector's report to set out its reasons in relation to these points and it failed to record its reasons for reaching its decisions in respect of these two points.

15. The first change was the fact that the Board had agreed to consent to the quashing of the planning permission in respect of the replacement substation. The applicants argue that the Board was required to explain why the wind farm could connect to a substation at Barnadivane when the Board knew that there was no reality to the proposed connection to the permitted substation and that the planning permission in respect of the replacement substation was shortly to be quashed. This, the applicants contend, is the case regardless as to whether the substation is regarded as part of the project for the purposes of the EIA or merely to be assessed for cumulative effects as part of the EIA of the Carrigariork Development.

16. The second change was the publication by the NPWS of the specific objectives for the Gearagh SAC on 15th September, 2016. The applicants say that the Inspector did not assess the potential impacts of the proposed development on the Gearagh SAC in light of the specific conservation objectives as they did not exist when he concluded his report. Logically therefore the Board cannot rely upon this report to satisfy its obligation to conduct an adequate assessment of the Carrigariork Development having regard to the specific conservation objectives of the Gearagh SAC as it was required to do. It did not itself conduct such an assessment and therefore it has failed in its obligation to conduct an adequate assessment of the project as required by Article 6(3) of Directive 92/43/EEC (the Habitats Directive) and s.177V of the 2000 Act.

Appropriate Assessment

17. The applicants assert that there was a failure by the Board to conduct an Appropriate Assessment in accordance with the requirements of Article 6(3) of the Habitats Directive and s.177V(1) of the 2000 Act. Absent the "*examination, analysis, evaluation, findings, conclusions and a final determination*" required by Finlay Geoghegan J. in *Kelly v. An Bord Pleanála* [2014] IEHC 400 the Board has no power to grant planning permission. The applicants say that the Board lacked the necessary information to conduct an appropriate assessment; that it took into account material which it ought not to have considered and failed to consider material which it ought to have considered. It is also alleged that the Board erred in considering the baseline against which the impact of tree felling should have been assessed with the result that it did not carry out an appropriate assessment as required by law.

18. The applicants say that the Board failed to carry out an assessment of the potential impact of the Carrigariork Development in combination with either substation at Barnadivane and as a result failed to carry out a lawful adequate assessment of the Carrigariork Development as required by Article 6(3) of the Habitats Directive and s.177V of the 2000 Act. They also separately say that the Board failed to comply with its obligation to record the reasons for its decision on AA.

What was the Project for the Purposes of the Environmental Impact Assessment?

Environmental Impact Assessment

19. The EIA Directive requires that an EIA be carried out before "development consent" may be granted in respect of certain projects. Article 1(1) of the Directive states that "*The Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.*" Article 3 provides as follows: -

"The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 12, the direct and indirect effects of a project on the following factors:

- (a) human beings, fauna and flora;
- (b) soil, water, air, climate and the landscape;
- (c) material assets and the cultural heritage;
- (d) the interaction between the factors referred to in points (a), (b) and (c)."

20. In *Commission v. Ireland* (Case C-50/09 ECLI:EU:C:2011:109, para. 40) the Court of Justice of the European Union (CJEU) stated that: -

"the competent environmental authority must undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the project concerned and the factors set out in the first three indents of Article 3 and the interaction between those factors."

21. The Directive has been implemented by the 2000 Act. Section 171 A (1) defines an Environmental Impact Assessment as: -

"an assessment, which includes an examination, analysis and evaluation, carried out by a planning authority or the Board, as the case may be, in accordance with this Part and regulations made thereunder, that shall identify, describe and assess in an appropriate manner, in light of each individual case and in accordance with Articles 4 to 11 of the Environmental Impact Assessment Directive, the direct and indirect effects of a proposed development on the following:

- (a) human beings, flora and fauna,
- (b) soil, water, air, climate and the landscape,
- (c) material assets and the cultural heritage, and
- (d) the interaction between the factors mentioned in paragraphs (a), (b) and (c)."

Definition of "Project"

22. A "project" is defined in Article 1(2)(a) of the EIA Directive as the execution of construction works or other installations or schemes and other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.

23. Article 5(1) requires Member States to ensure that the developer supplies information describing the project as set out in Annex IV of the Directive. This requires the developer to submit information describing the project including the description of the aspects of the environment likely to be significantly affected by the proposed project. These aspects encompass a wide range of factors including population, fauna, flora, soil, water, air, climatic factors, material assets including the architectural and archaeological heritage, landscape and the interrelationship between these factors. The information is also to include a description of the likely significant effects of the proposed project on the environment. The description should cover the direct effects and any indirect, secondary, cumulative short, medium and long term, permanent and temporary positive and negative effects of the project. It is this latter requirement which is the source of the obligation to assess the cumulative effects of the proposed project with other relevant projects when conducting an EIA in respect of the applicant development.

24. Section 172(1) of the 2000 Act states that an EIA shall be carried out in respect of an application for consent for proposed development. Section 172(1D) requires the planning authority or the Board to consider whether the EIS submitted identifies and describes adequately the direct and indirect effects on the environment of the proposed development. Where it considers that the EIS does not do so, then the planning authority or the Board shall require the applicant for consent to furnish such further information as the planning authority or the Board considers necessary to remedy the defect. Subsection (1G) requires the planning authority or the Board, in carrying out an EIA, to consider the environmental impact statement, any further information furnished to the planning authority or the Board, any submissions or observations validly made in relation to the environmental effects of the proposed development and the views of any other Member States. It may also have regard to and adopt in whole or in part any reports prepared by its officials or by consultants, experts or other advisers.

25. The parties are agreed that the obligation of the Board is to examine, analyse and evaluate the direct, indirect and cumulative effects of the project on the environment.

26. The applicants rely upon the decision of Peart J. in *O'Grianna v. An Bord Pleanála (No. 1)* [2014] IEHC 632 to support their argument that the project for EIA purposes includes the substation, as this is necessary for the connection of the wind turbines to the national grid.

27. In *O'Grianna (No. 1)* the developer applied for planning permission to erect 6 wind turbines (and associated infrastructure) but not the grid connection. At para. 27 of his judgment Peart J. stated that *"the connection to the national grid[,] is an integral part of the overall development of which the construction of the turbines is the first part... The wind turbine development on its own serves no function if it cannot be connected to the national grid. In that way, the connection to the national grid is fundamental to the entire project, and in principle at least the cumulative effect of both must be assessed in order to comply with the Directive."* (Emphasis added). At para. 32 he stated *"...I have already concluded that in reality the wind farm and its connection in due course to the national grid is one project, neither being independent of the other"*.

28. The applicants argue that the reasoning in *O'Grianna* applies equally to the relevant substation in the current case. It is essential that the Carrigariel development connect to the national grid and absent such connection the development is incomplete.

29. In *O'Grianna* it was not necessary to consider the impact of the substation to which the proposed wind farm was to connect to the national grid as it was already built. The applicants accepted that if the Barnadivane substation was in existence when the Board came to reach its decision in respect of the application in this case then the substation would not form part of the project in respect of which planning permission was to be sought. On the other hand, they say that if planning permission for a substation is either permitted or proposed, then the substation must be considered to be part of the project of the wind farm for the purposes of EIA.

30. In this case two applications for planning permission were submitted: one by the developer for the Carrigariel Development and

the other by a related company, Arran Windfarm Ltd, for the replacement substation at Barnadivane. The applicants accepted that that was not a difficulty in itself as long as it did not result in a failure to identify the entire project and to subject the entire project to EIA. To this extent they do not allege that there has been impermissible project splitting designed to evade the obligations to carry out an EIA. They submitted that the Board in this case must look beyond the development for which planning permission had been sought in seeking to identify the "entire project" to ensure that the entire project is subject to EIA.

31. Section 172(1) requires that an EIA be carried out in respect of an application for proposed development. That being so and where it is accepted that there has been no improper project splitting, it seems to me the project for the purposes of the EIA must be considered to be the application in respect of which planning permission is sought. Where there are two applications for planning permission for two developments and where one of the proposed developments is essential to the functioning of the other, the EIA of the latter development should be conducted by assessing the cumulative effects of the two developments. It is not appropriate to consider them as one single project.

32. The logic for this distinction is clear from the facts in this case. The site of the proposed substation(s) is 14km from the site of the Carrigariork Development. The permitted substation in fact formed part of an application for permission for an eighteen turbine wind farm at Barnadivane which was subject to an EIA. The substation(s) at Barnadivane is intended to connect to a number of wind farms which may be developed in the area. The logic of the applicants' case is that each application for planning permission for each such wind farm must include a substation at Barnadivane as part of the project for the purposes of EIA so long as the substation remains unbuilt. This could result in multiple EIAs of the same substation. Furthermore, once the substation is developed, then the substation ceases to be part of the project for the purposes of EIA but is assessed on the basis of cumulative assessment of the project with other relevant related projects.

33. Both the EIA Directive and the 2000 Act each require that an EIA be carried out in the light of each individual case. I accept the submissions of the Board that the correct application of the Directive to the facts of the present case is that the substation at Barnadivane is a separate development or project from the Carrigariork Development but one that is sufficiently proximate to and associated with it that regards need to be had to any potential likely significant cumulative effects of both developments in the context of the EIA of the Carrigariork Development.

34. The critical difference between this case and *O'Granna (no.1)* is that there were, in that case, a number of possible ways and routes by which the turbines could connect to the existing substation. Thus, it was not possible to assess the impact of the unknown grid connection and no assessment of the grid connection had been undertaken. In this case, the proposed grid connection has been assessed in considerable detail and its impact, if built, has been assessed. If the Carrigariork Development cannot be built due to the absence of a substation at Barnadivane to which it can connect, then the development simply will not proceed. This does not mean that a valid EIA could not be or was not conducted of the Carrigariork Development.

35. This is consistent with the reasoning of Hogan J in *People Over Wind v. An Bord Pleanála* [2015] IECA 272. The court was concerned with whether there was a lacuna in the best scientific evidence before the Board in relation to the protection of the Nore Freshwater Pearl Mussel from the entry of silt into the watercourses in question. The court stressed that the conditions attached to the decision to grant planning permission were designed to ensure that no silt whatever could enter the water run-off. Hogan J held that there was no lacuna in the evidence as the precise issue critical to the protection of the protected species was identified and fully addressed. At paragraph 45 he stated: -

"The question...of whether this objective can be achieved is fundamentally a question of engineering and hydrology....It may be, on the other hand, that condition 17(k) imposes a burden on the developer which, as a matter of practical engineering and hydrology, is simply too onerous and is one which cannot be realised. If that were to transpire to be the case then, of course, the development simply could not proceed."

The fact that a developer might not be able to construct the development in accordance with one of the conditions of the planning permission did not invalidate the grant of planning permission. So, in this case, the developer may only construct the Carrigariork Development as permitted. If there is no substation to which it can connect, then the development cannot proceed. But it does not make the grant of planning permission invalid.

36. This is also consistent with the decision in *North Kerry Wind Turbine Awareness Group v. An Bord Pleanála* [2017] IEHC 126. Mr Justice McGovern held that the grid connection need not be included in the same planning application as the wind farm but that in respect of the application for planning permission of the wind farm "the E.I.A requires information on the grid connection to enable a full E.I.A to be carried out and for the Board to assess the likely significant impact of the windfarm and the grid connection as a whole." It is also consistent with the decision in *O'Granna (No. 1)*. The application was remitted to the Board to enable it to carry out a cumulative assessment of the wind farm and the grid connection, not on the basis that it was one single project.

37. I conclude that on the facts of this case the project which required to be subjected to EIA was the Carrigariork Development and not the development plus the Barnadivane substation. The Board was required to consider the cumulative effects of the Carrigariork Development with the substation at Barnadivane to the extent that any such cumulative effects are likely to arise.

Cumulative effects

38. The applicants argued that the Board did not assess the cumulative effects of the Carrigariork Development and the Barnadivane substation (whether the permitted or proposed substations). They also contend that the Board in fact could not carry out such an assessment because the required information was not before the Board. They argue that the EIS submitted by the developer did not extend to the Barnadivane substation and the planning files in relation to either the permitted substation or the proposed substation were not before the Board. Therefore, it did not have sufficient information to carry out a cumulative assessment of the two developments. The applicants state that the Inspector's report analyses the cumulative effects of the Carrigariork Development with other wind farm developments either built or proposed in the area. They say that there is no assessment of the cumulative effects of the Carrigariork Development with the Barnadivane substation in the Inspector's report. Neither is there any cumulative assessment of the two developments in the decision of the Board. They therefore conclude that there was no cumulative assessment carried out on the Carrigariork Development and the Barnadivane substation.

Decision of the Board

39. The decision of the Board records that it had regard to the pattern of existing and permitted development in the area, including other wind farms. It also had regard to the planning history of the site and its surrounds, the submissions and observations received by it and the report of the Planning Inspector, including the examination, analysis and evaluation taken in respect of the appropriate assessment and Environmental Impact Assessment. The Board expressly records that it was satisfied that the information before it

was adequate to undertake an appropriate assessment and an Environmental Impact Assessment in respect of the proposed development. It did not seek further information pursuant to s.172(1D) or (1E). The Barnadivane substation is listed in para. 2.2.1 of the EIS as part of the study area and at para. 2.5.1 it states that para. 2.2.1 of the EIS provides an overview of other projects located within the wider area *"that have been considered within the cumulative impact assessment"*.

40. The applicants' submission on the appeal to the Board argues that there was impermissible project splitting and that the substation was an essential part of the Carrigariel Development and therefore required to be subject to EIA. This submission highlighted the importance of conducting a cumulative assessment of the two developments and the Board stated that it had regard to submissions and observations it received, which included this submission.

41. The order of the Board stated as follows: -

*"The Board undertook an Environmental Impact Assessment of the proposed development, taking into consideration the nature, scale and location of the proposed development, the Environmental Impact Statement and the documentation submitted in support of the application and appeal, the submissions made on file, including those from the Department of Arts, Heritage and the Gaeltacht, the planning history of development in the vicinity and the report of the Planning Inspector. It is considered that the Environmental Impact Assessment (sic), together with the documentation on file identifies and describes adequately the direct, indirect, secondary and cumulative effects of the proposed development on the environment. The Board completed an Environmental Impact Assessment in relation to the proposed development. The Board concluded that the effects on the environment would be acceptable by **itself and cumulatively with other development in the vicinity**, including other wind farms and proposed grid connection route, subject to the implementation of the mitigation measures proposed and to compliance with the conditions as set out below. In undertaking this assessment, the Board adopted the report and conclusions of the Planning Inspector."*
(Emphasis added)

42. While the decision expressly refers to other wind farms and the proposed grid connection route, the reference to "other development in the vicinity" of the proposed development which was considered by the Board was not confined to other wind farms and the grid connection. It included them. It is not permissible to read the decision of the Board as assessing only other wind farms and the proposed connection route.

Inspector's Report

43. The Inspector's report describes the proposed development in Part 2.1. It includes the following: -

"Underground grid connection to proposed 110kV sub-station to serve proposed wind farm development at Barnadivane townland (some 12km due east of the proposed wind farm site), or else to the proposed sub-station, currently under appeal to the Board ref. PL04.244439, to serve an amended proposal for the wind farm at Barnadivane – the two sub-station sites being different. The total length is 18km (all within public roads and forestry tracks), involving 15 no. water crossings."

In Part 4 of the report the Inspector sets out the planning history relevant to the Carrigariel Development. He refers to the grant of the 14th February, 2007 permitting the development of eighteen turbines and the substation at Barnadivane. He refers to the fact that this permission was extended by permission reference 11/6605. He refers to the grant of permission for the substitute substation at Barnadivane dated the 11th July, 2016 and notes that the decision is subject to judicial review.

44. Part 10 of the report sets out the Inspector's Environmental Impact Assessment. At para. 10.1.3 he stated that "[t]he environmental impact of the proposed development is assessed and, **where relevant**, the cumulative impact with other permitted or proposed developments in the area is considered as part of the EIA process" (Emphasis added). He then carries out cumulative impact assessments in relation to particular environmental impacts. The cumulative effects were assessed by reference to other built, permitted and proposed wind farms and other projects.

45. It is clear that the Inspector's report scrupulously assesses the cumulative effects of the Carrigariel Development with other existing or proposed development in the vicinity under the various headings in respect of which an EIA is required to be carried out. At the beginning of his assessment the Inspector emphasised that he would be assessing the effects "where relevant". It is important to bear in mind that the site of the Barnadivane substation is fourteen kilometres distant from the site of the turbines at Carrigariel. Clearly the nature of the development of a substation is significantly different to that of a wind farm. There is no reason to conclude that the EIA conducted by the Inspector omitted the substation at Barnadivane from such assessment when he expressly recorded both the permitted and proposed substations as part of the planning history relevant to the application under consideration. This is particularly so where the Inspector scrupulously considered all of these potential environmental impacts cumulatively with other permitted or proposed developments in the area. I am satisfied that his EIA was not flawed in the manner alleged by the applicants.

46. The Board expressly had regard to the report of the Planning Inspector including his examination, analysis and evaluation undertaken in respect of the EIA. It follows that when it adopted the report and conclusions of the Inspector its decision likewise was not flawed in the manner contended. Moreover, the Board stated that it had conducted an EIA and concluded that the effects on the environment would be acceptable by itself and cumulatively with other development in the vicinity.

47. The Board expressly stated that it was satisfied that it had adequate information to enable it to undertake that EIA. The onus is on the applicants to prove in their case that the Board did not carry out a cumulative assessment of the substation with the Carrigariel Development. The decision of Noonan J. in *Aherne v. An Bord Pleanála* [2015] IEHC 606 makes this abundantly clear: -

"21. In the present case, the applicants contend that no EIA was carried out by the Board. However, the decision of the Board clearly records that it did carry out an EIA and the onus of proving otherwise rests upon the applicants. No evidence has been adduced to contradict the assertion of the Board contained in its decision."

48. In light of the detailed assessment conducted by the Inspector and adopted by the Board, the fact that there is no express specific reference in either the Inspector's report or the Board's decision to the likely cumulative effects of the Carrigariel Development when considered with the Barnadivane substation does not amount to proof that the Board did not carry out an EIA as required by the 2000 Act and the Directive.

Did the Legal Uncertainty About the Connection to the National Grid Preclude the Conduct of a Valid EIA?

49. The applicants argue that the Board did not have the requisite information to carry out an EIA and therefore was not legally in a

position so to do. This is because at the date of its decision there was no certainty that a substation could be built at Barnadivane. The permitted permission was shortly to expire on the 13th February, 2017. EirGrid would not assume operational control of the permitted substation if it were built and therefore as a matter of practicality connection to the national grid could not be achieved. This meant that the only possible viable connection to the national grid was the replacement substation. As of the date of the decision of the Board, the Board had agreed it would consent to an order of the High Court quashing that decision. In the circumstances the applicants submit that there could be no certainty as to where the grid connection would terminate. This in effect undermined the detailed assessment of the route of the grid connection from the Carrigariork site to the site of the Barnadivane substation by both the EIA and AA.

50. The EIA has been conducted on the basis that the grid connection will follow the outlined route to the Barnadivane substation(s) and planning permission has been granted for that development and no other. If it turns out that no substation is ever built at Barnadivane, this means that as a matter of practicality the Carrigariork Development cannot operate and therefore the development will not proceed. It does not follow that planning permission in respect of the Carrigariork Development cannot be granted. This is analogous to the decision of the Court of Appeal in *People Over Wind* discussed above.

51. The logical implication of the submissions of the applicants is that the developer could not have applied for planning permission for the Carrigariork Development until there was a grant of planning permission for the replacement substation. This is because the developer could not conduct an EIS and neither the planning authority nor the Board could conduct an EIA until it was certain that planning permission for the replacement substation had been issued. This means that it could not have applied for planning permission (and neither the planning authority nor the Board could have conducted a valid EIA) while the application for planning permission in respect of the Barnadivane replacement substation was still pending either before the planning authority or the Board.

52. I was referred to no authority or any provision in the 2000 Act or the Directive which deprives the decision maker of jurisdiction to conduct an EIA when an application for a related development is pending. The question of prematurity in a case such as this is quintessentially a matter of planning expertise and judgement as was held by Hedigan J. in *Sweetman v. An Bord Pleanála* [2016] IEHC 310. The issue was raised in the submissions before the Board but clearly was not accepted by it.

53. I am satisfied that as a matter of law the Board had jurisdiction to decide whether it was in a position to conduct an EIA. It expressly did so in this case. It was entitled to do so whether or not there was a valid grant of planning permission in respect of the replacement substation or merely a pending application for such planning permission.

54. For these reasons I am not satisfied that the applicants have shown that the Board lacked sufficient information in order to conduct a valid EIA in respect of the Carrigariork Development.

Alleged Failure to Record the Environmental Impact Assessment.

55. The applicants allege that the Board failed to discharge its statutory obligation under s.172(1J) of the 2000 Act to record the EIA being conducted when making the decision to grant planning permission for the Carrigariork Development. As pleaded this referred to an alleged failure to record an EIA of the Carrigariork Development and the substation at Barnadivane (whether the permitted or proposed substation). At hearing that argument was not pursued and an alternative was put forward. It was said that the Board could not rely upon the Inspector's report for the purposes of fulfilling its statutory obligation to record the EIA insofar as it purported to rely upon the connection of the Carrigariork Development to the replacement substation. This was because after the Inspector had concluded his report and his assessment, the Board had agreed that the planning permission for the replacement substation should be quashed. It was said that the Board was required to explain why the Carrigariork Development could connect to the Barnadivane substation when the Board knew that the grant of permission was to be quashed and that there was in reality no possibility of connecting the Carrigariork Development to a substation to be built pursuant to the permitted permission.

56. The Board's obligation to record the EIA it has carried out in respect of the development can be sourced from Article 9 of the EIA Directive. Article 9 provides: -

"1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public thereof in accordance with the appropriate procedures and shall make available to the public the following information:

(a) the content of the decision and any conditions attached

thereto;

(b) having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process;

(c) a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects."

57. This has been implemented by s.172(1J) of the 2000 Act. The Board is required to inform the applicant for consent and the public of its decision and to make available the following information to the applicant for consent and the public: -

"(a) the content of the decision and any conditions attached thereto;

(b) an evaluation of the direct and indirect effects of the proposed development on the matters set out in section 171A;

(c) having examined any submission or observation validly made,

(i) the main reasons and considerations on which the decision is based, and

(ii) the main reasons and considerations for the attachment of any conditions, including reasons and considerations arising from or related to submissions or observations made by a member of the public;

(d) where relevant, a description of the main measures to avoid, reduce and, if possible, offset the major adverse

effects;

(e) any report referred to in subsection (1H);

(f) information for the public on the procedures available to review the substantive and procedural legality of the decision, and

(g) the views, if any, furnished by other Member States of the European Union pursuant to section 174.”

58. Counsel for the Board submitted that if there is no legal requirement that there be extant planning permission for the replacement substation at Barnadivane in order for the Board to carry out an EIA in respect of the Carrigarierk Development in this case, then there is no need for the Board to record how it resolved a matter which was not in fact as matter of law a difficulty.

59. I have concluded that the Board had jurisdiction to determine the application for planning permission of the Carrigarierk Development whether there was an extant decision to grant planning permission for the replacement substation or whether the application for planning permission of the replacement substation was pending as an appeal before the Board. The decision of the Board to consent to the quashing of the decision to grant planning permission in respect of the replacement substation resulted in the remitting of the appeal back to the Board for determination. Thus that application for planning permission for the replacement substation remained a live pending appeal at the date of the Board’s decision on the Carrigarierk Development appeal. I accept the submission of the Board that there was no legal requirement that there be extant planning permission for the replacement substation at the date of the Board’s decision in this case. It logically follows that there was no difficulty created by the forthcoming quashing of the decision to grant planning permission for the replacement substation and therefore there was no requirement to give reasons as to how this perceived obstacle was dealt with by the Board in reaching its decision.

60. I conclude that there was no breach by the Board of its obligation to record the EIA conducted in this case.

Appropriate Assessment

61. Article 6(3) of the Habitats Directive provides: -

“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.”

62. The Directive has been transposed into Irish law by Part XAB of the 2000 Act. Section 177V(1) provides: -

“An appropriate assessment carried out under this Part shall include a determination by the competent authority under Article 6.3 of the Habitats Directive as to whether or not a ... proposed development would adversely affect the integrity of a European site and an appropriate assessment shall be carried out by the competent authority, ... before -

...

(b) consent is given for the proposed development.”

Subsection 2 requires the Board to take into account the following matters when carrying out an appropriate assessment in respect of an application for planning permission: -

- (1) the Natura impact report or statement, as appropriate;
- (2) any supplemental information in relation to such a report or statement;
- (3) if appropriate, any additional information sought by the authority and furnished by the applicant for planning permission in relation to a Natura impact statement;
- (4) any information or advice obtained by the competent authority
- (5) if appropriate, any written submissions or observations made to the competent authority in relation to the application for consent for the proposed development and
- (6) any other relevant information.

63. The planning authority or the Board as the case may be is required to identify all European sites which potentially may be impacted by the proposed development. It then must assess whether or not the proposed development would adversely affect the integrity of the site concerned in view of the sites’ conservation objectives. This is a two stage process. Once a site has been screened in for the purposes of the Habitats Directive then the planning authority or the Board must conduct an AA.

64. In *Waddenzee* (Case C-127/02 (2004) ECLI:EU:C:2004:482, para. 61) the ECJ stated that: -

“...under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site’s conservation objectives must be identified in the light of the best scientific knowledge in the field.”

65. In *Kelly v. An Bord Pleanála* [2014] IEHC 400 at para. 39 to 41 Finlay Geoghegan J. stated that: -

“If an appropriate assessment is to comply with the criteria set out by the CJEU in the cases referred to, then it must, in my judgment, include an examination, analysis, evaluation, findings, conclusions and a final determination.”

She summarised the requirements for an AA as set out by Article 6(3) and s.177(V)(1) as follows: -

"(i) Must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the light of its conservation objectives. This clearly requires both examination and analysis.

(ii) Must contain complete, precise and definitive findings and conclusions and may not have lacunae or gaps. The requirement for precise and definitive findings and conclusions appears to require analysis, evaluation and decisions. Further, the reference to findings and conclusions in a scientific context requires both findings following analysis and conclusions following an evaluation each in the light of the best scientific knowledge in the field.

(iii) May only include a determination that the proposed development will not adversely affect the integrity of any relevant European site where upon the basis of complete, precise and definitive findings and conclusions made the Board decides that no reasonable scientific doubt remains as to the absence of the identified potential effects."

66. She concluded that the Board had no power to grant planning permission if it did not conduct the examination, analysis, evaluation, reach findings and conclusions and make a final determination as required by Article 6(3) and s.177(V). The applicants allege that this did not occur in this case. This needs to be determined in light of the assessment actually carried out in this case.

Natura Impact Statement

67. The NIS identified all European sites which are potentially impacted by the proposed Carrigariel Development. No part of the site for the turbines or the grid connection route was within any European site. The NIS described any likely direct, indirect or secondary impacts of the Carrigariel Development on the European sites. It identified the sole pathway of potential impacts on the European sites as being via hydrological linkages. On that basis three sites were screened in for the AA: the Gearagh SAC, the Bandon River SAC and the Gearagh SPA.

68. The screening assessment identified potential pathways for the proposed development to impact on the three European sites through potential emissions to surface water, in particular during the felling and groundworks phase of the construction of the turbines and associated roadways. Any potential pathways for impacts of each of the qualifying interests was then assessed. When no such pathways were identified for any particular qualifying interest no further assessment was required. Where potential pathways were identified a further assessment was made of the potential for significant effects on the conservation objectives of each qualifying interest when considered having regard to the specific measures that were proposed to block any pathways for impact on the European site.

69. The "in-combination" assessment is set out in chapter 7 of the NIS. In paragraph 7.1 the permitted and proposed wind farms within a 10km radius of the proposed Carrigariel site are identified. A further twenty wind energy developments between ten and twenty kilometres from the proposed Carrigariel Development are identified: twelve operating, six permitted and two further projects proposed. The report goes on to note *"in addition, the following permitted and proposed projects associated are located in the vicinity of the grid connection cable route"* and it identifies as the first of these the Barnadivane proposed and permitted substations.

70. Paragraph 7.2 provides:

"Hydrological connection has been identified as the only potential pathway for impacts on the conservation objectives of the following European sites: The Gearagh SAC, Bandon River SAC and the Gearagh SPA. For this reason the potential cumulative impacts that may occur via this pathway with other similar developments within the Lee and Bandon catchments are discussed below...with respect to the preparation/construction and operational phases of the proposed wind farm and its associated grid connection cable route..."

In terms of the potential impact of wind farms on downstream surface water bodies, the biggest risk is during the construction phase of the development as this is the phase when earthworks and excavations will be undertaken. The potential for sediment entrainment in site runoff is greatest during this period. The hydrological assessment conducted of the proposed development concludes that if the Carrigariel wind farm is permitted/constructed over the same period as any other wind farm in the same catchment(s), the proposed mitigation measures ...will ensure there will be no cumulative impacts arising.

The hydrological assessment also states that the risk to downstream surface waters is normally slight to negligible during the operational phase assuming the appropriate attenuation measures are used at the site. No cumulative impacts were anticipated during the operational phase."

71. In relation to the grid connection, the N.I.S. concludes that: -

"the actual cumulative impacts arising from the construction of the Carrigariel wind farm, the delivery route[,], temporary accommodation junctions and the proposed grid connection route are expected to be negligible for the following reasons.

- The proposed Carrigariel surface water management plan will ensure all surface water runoff leaving the site and its access/delivery routes will be of the highest quality and therefore impacts on the downstream River Lee are not anticipated; and,*
- The potential for surface water quality impacts arising during the construction of the grid connection route are expected to be negligible as no crossing instream works are proposed and also the majority of the proposed grid connection cable route is along existing roads."*

72. At para. 8.1.4 the NIS concludes as follows: -

"The proposed wind energy development, comprising wind turbines and associated infrastructure, on-site interconnection cable route, grid connection cable route and junction accommodation works, in view of best scientific knowledge and on the basis of objective information, either individually or in combination with other plans or projects, is not likely to have any significant or any adverse effects on the conservation objectives or overall integrity of any European sites."

The Inspector's Report

73. Chapter 11 of the Inspector's report comprises his appropriate assessment of the Carrigarierk Development. He noted that a preliminary screening assessment determined that an NIS was required and that the site was largely occupied by coniferous forestry some of which had recently been clear-felled. The wind farm site naturally drains to the Lee River catchment to the north and the Bandon River catchment to the south, most of the site drained to the south. The grid connection route is located almost entirely within the Lee River catchment.

74. In relation to the three European sites which may be impacted by the proposed development, the Inspector lists the qualifying interests in respect of each site. He summarises the likely potential impacts on the European sites identified in the NIS and the threats identified by objectors to the development. At para. 11.4 he stated: -

"Freshwater pearl mussel is a qualifying interest of the Bandon River SAC only...The major threat to this species is the release of sediment during construction and also possible eutrophication arising from felling of trees. It must be pointed out that felling of the forest at Carrigarierk will be carried out regardless of whether this development proceeds or not, and as such, there is no likelihood of increased eutrophication...Felling is subject to licence from the Forestry Service which currently limits clear-felling to not greater than 25ha. The 13.8 ha to be felled is small in relation to the area of the catchment of the Caha and Bandon Rivers upstream of the closest Freshwater pearl mussel sites - 24.5 km² and 100 km² respectively. Best practice Forestry Service Guidelines and Freshwater pearl mussel guidelines will be observed during felling."

75. In relation to the Gearagh SAC, the Inspector noted that the developer undertook a survey for otters arising from the concerns expressed by the ecologist for Cork County Council and submitted the results by way of the first party appeal. The Inspector noted that there was limited evidence of otter usage and no instream works were proposed for the grid connection. Works along any particular stretch will be of limited duration - a few days at most. He concluded that given the lack of evidence of any otter holts, there is no potential for the grid connection to cause disturbance to this species and that the proposed grid connection will not impact on this qualifying interest of the Gearagh SAC.

76. At para. 11.11 the Inspector dealt with "in-combination" impacts. He stated: -

"In-combination impacts relating to surface water drainage are likely to be the greatest threat to European sites. The hydrological assessment undertaken by the applicant would indicate that if the proposed development were to be constructed at the same time as other permitted or applied for wind farm developments in the area, the proposed mitigation measures would ensure that there would be no cumulative impacts - either from the wind farms themselves or the grid connections supporting them. This is a reasonable conclusion based on the information submitted with the application/appeal."

77. He concluded by rejecting the objectors' contention that reasonable scientific doubt remains as to the impact of the Carrigarierk Development on European sites. He stated: -

"I consider it reasonable to conclude on the basis of the information on the file, which I consider adequate in order to carry out a Stage 2 Appropriate Assessment, that the proposed development, individually or in combination with other plans or projects would not adversely affect the integrity of European sites 004162, 004109, 002171 or 000108 or any other European site, in view of the Conservation Objectives for the sites in question."

In the Inspector's report, European site 004162 refers to the Mullaghanish to Musheramore SPA, European site 004109 refers to the Gearagh SPA, European site 002171 refers to the Bandon River SAC and European site refers to the Gearagh River SAC.

The Board's Appropriate Assessment

78. The Board in its decision set out its appropriate assessment screening and then its appropriate assessment as follows: -

"Appropriate Assessment Screening

In conducting [the] screening exercise for Appropriate Assessment, the Board considered the nature, scale and location of the proposed development, the Appropriate Assessment screening information contained within the submitted Natura Impact Statement, the documentation submitted in support of the application and appeal, the submissions on file, the planning history of wind farm development and energy infrastructure in the vicinity and the assessment of the Planning Inspector in relation to the potential for impacts on European sites. In completing the screening exercise, the Board adopted the Planning Inspector's report and concurred with his analysis and conclusions, and concluded that, by itself and in combination with other development in the area the proposed development would not be likely to have significant effects on European sites (including St. Gobnet's Wood SAC (Site code 000106) and Mullaghanish to Musheramore SPA (Site code 004162)) in view of their conservation objectives other than The Gearagh SPA (Site code 004109), the Gearagh SAC (Site code 000108) and the Bandon River SAC (Site code 002171) in relation to which sites a Stage Two analysis is required.

Appropriate Assessment

Having regard to the nature, scale and location of the proposed development, the Natura Impact Statement and the contents of same and the documentation submitted in support of the application and appeal, the submissions on file, the planning history of development in the vicinity and the report of the Planning Inspector, the Board undertook an Appropriate Assessment in relation to the potential impacts of the proposed development on the Gearagh SPA (Site code 004109), the Bandon River SAC (Site code 002171) and the Gearagh SAC (Site code 000108). The Board accepted the examination analysis and evaluation set out in the Planning Inspector's report and concurred with his conclusions and adopted his report. The Board, therefore, concluded that by itself or in combination with other plans or projects, including the grid connection route, the proposed development would not adversely affect the integrity of these European Sites in view of their conservation objectives."

Was the Appropriate Assessment Lawful?

79. The applicants argue that the AA conducted by the Board was unlawful. The case pleaded differed to the case advanced at hearing. At hearing the applicants raised three grounds to challenge the AA. They also argued that the Board failed to record properly the AA in accordance with s.177V of the 2000 Act and Article 6(3) of the Habitats Directive.

80. The primary ground for challenging the AA was the same as that for challenging the EIS: the uncertainty regarding the substation by means of which the Carrigariork Development was to connect to the national grid. It was submitted that it was not possible to assess the environmental effects of the proposed project unless the competent authority knew what the project was. It could not know this unless it knew the terminus of the grid connection. In addition, it must know that the wind farm can operate. It was submitted that the Board could not grant planning permission for the Carrigariork Development unless it knew that it could actually operate. Counsel submitted that the Board could look at existing and approved projects but not at pending projects. Rhetorically the applicants asked "is it compatible with the Board's obligations to conduct an AA that there be uncertainty as to the connection to the national grid at the date of its decision?"

81. I do not accept that the uncertainty as described by the applicants means that the Board is not capable of conducting an appropriate assessment as required by law. No authority for the proposition that there must be either existing infrastructure or a grant of permission for the infrastructure necessary for the operation of the proposed project was relied upon. Prematurity is essentially a matter of planning judgment as was held by Hedigan J. in *Sweetman*. This is quintessentially a matter for the expertise of the Board. If the Board erred, I am not satisfied that the error was of such magnitude as would entitle this court to intervene and hold that the decision of the Board is unlawful.

82. Furthermore, I do not believe that the premise of the argument is correct. Grants of planning permission may be overtaken by events so that in fact the grant of the planning permission may never be developed. A clear example of this is the grant of permission for the permitted substation. The reason the substation was not built was due to a change in the requirements of EirGrid before it would assume operational control of the substation. This was not related to either the environment or planning matters. It is not clear to me why the timing of the change of EirGrid's requirements should affect the capacity of the Board to conduct an AA.

83. Planning permission is routinely granted to developments which may not operate without separate authorisation from a different body which may or may not be forthcoming. This does not invalidate the grant of planning permission. For example, a factory may not operate without an IPPC licence from the EPA or a development may require a foreshore licence to name but two examples. The source of the legal uncertainty as to whether the project, if built, could operate should not determine whether the Board (or in appropriate cases the planning authority) can conduct an AA for the purposes of the Habitats Directive and Part XAB of the 2000 Act.

84. The alleged lack of certainty about the connection of the Carrigariork Development to the national grid does not amount to the gap in the evidence before the Board within the meaning of the decision of Finlay Geoghegan J. in *Kelly v. An Bord Pleanála*. Counsel did not argue that there was any gap in the information or evidence before the Board such that it could not conduct an AA other than the uncertainty in relation to the terminus of the grid connection. She submitted that it was not for the applicants to identify lacuna in the material before the Board as that goes to the merits of the decision rather than the process with which the Court is concerned in judicial review proceedings. While this is correct as a general proposition, it is not open to the applicants to challenge the lawfulness of the AA conducted by the Board on the basis that there was a lacuna in the information or evidence before the Board while failing to identify the lacuna. If the case advanced is that the Board lacked complete evidence in order to conduct an AA, then the applicants must be able to show the Court the alleged gap in the evidence.

85. The second basis for arguing that the AA conducted by the Board was unlawful related to the change in circumstances which occurred between the date of the Inspector's report and the decision of the Board when the NPWS published its conservation objectives for the Gearagh SAC. As these were published after the Inspector's report the applicants argued that the Board cannot rely upon the report to provide the required examination, analysis, evaluation, findings, conclusions and final determination as to whether the proposed development would adversely affect the integrity of the Gearagh SAC in view of its conservation objectives. They argued that there is no such examination, analysis, evaluation, findings, conclusions or determination in either the Direction of the Board of the 25th October, 2016 or its Decision of 28th October, 2016 as is required by the provisions of the Habitats Directive as outlined by Finlay Geoghegan J. in *Kelly*. The applicants submitted that by analogy to the situation where the Board disagrees with its Inspector and therefore must give its reasons for reaching conclusions contrary to its Inspector, so in this case, where a material matter was not assessed by its Inspector (because he could not) then the Board cannot look to the report of the Inspector to satisfy this mandatory requirement. They said the terms of the Direction indicate that no such examination, analysis or evaluation occurred in light of the conservation objectives published by the NPWS.

86. In many cases this would be a sound submission. However, in this case the NIS *actually* conducted in respect of the Gearagh SAC was by reference to conservation objectives for other similar European sites. The NIS was conducted as if these conservation objectives applied to the Gearagh SAC. At para. 6.1.2 the report states: -

"Whilst no detailed conservation objectives are available for the Gearagh SAC, targets and attributes for the conservation of this habitat are available in detailed conservation objectives for other SACs. These have been reviewed and considered in relation to the current development and are described below."

The adequacy of this exercise has not been challenged by the applicants.

87. The conservation objectives published by the NPWS for the Gearagh SAC were identical to those in respect of which the NIS was prepared. In other words, the NIS would have been the same had the conservation objectives for the Gearagh SAC been published prior to the application for planning permission.

88. The Board's Direction of the 25th October, 2016 records that the Board noted that the Inspector's report stated that the SACs within 15km of the development site had the generic conservation objectives to maintain or restore the conservation condition of the Annex I Habitats and/or the Annex II Species for which the SAC had been selected. The Board noted that this was correct at the time of writing. The Board then expressly recorded: -

"The Board revisited the Appropriate Assessment that had been conducted by the Board at the Board meeting held on 7th, October 2016 at today's meeting, in light of the content and specific objectives for The Gearagh SAC (site Code 000108) contained in the Conservation Objective Series issued by the National Parks and Wildlife Service on 15th, September 2016."

Having considered the specific conservation objectives for The Gearagh SAC, (site code 000108) the Board decided that these specific conservation objectives did not alter the Board's earlier conclusions in respect of Appropriate Assessment"

and the Board decided to confirm its earlier decision of 7th, October 2016 in this case.

The Board did not consider it necessary to seek an Addendum Report from the Planning Inspector in relation to the matter."

89. Given that the specific conservation objectives were precisely those which had previously been considered by the Board and in respect of which the Board had concluded its AA, it was sufficient in this case for the Board to recite that it decided to confirm its earlier decision in that regard. It was entitled to rely upon the Inspector's report for complete, precise and definitive findings and conclusions as the conservation objectives assessed had not been altered by the publication of the European site's conservation objectives by the NPWS. The legal requirement is that there be complete, precise, definitive findings and conclusions and these are apparent from the Inspector's report which the Board adopted. As there was no change brought about by the issuing of the conservation objectives by the NPWS there was no need to repeat this exercise in order to comply with the requirements of the 2000 Act and the Habitats Directive.

90. The third submission related to the baseline environment. The applicants said that the baseline environment adopted by the Inspector for the purposes of the AA and against which the effects of the proposed development on the Bandon River SAC were considered was incorrect in law. The Inspector's report states of the protected freshwater pearl mussel: -

"The major threat to this species is the release of sediment during construction and also possible eutrophication arising from felling of trees. It must be pointed out that felling of the forest at Carrigariork will be carried out regardless of whether this development proceeds or not, and as such, there is no likelihood of increased eutrophication."

91. The applicants say that the Inspector's baseline assumed that trees would be felled regardless of whether the wind farm was developed and that a consequent risk to the freshwater pearl mussel existed through the potential eutrophication of the Bandon River SAC due to such tree felling. He assumed a future risk to the SAC, accepted it and asked merely if the wind farm would increase it. The Inspector did not establish or consider the existing baseline environment of the development site and the Bandon River SAC and did not assess whether the proposed development would adversely affect the SAC. On this entirely erroneous basis, the Inspector concluded that there was no likelihood of increased sediment release or eutrophication of the Bandon River SAC. They submitted that an assessment that used as its baseline the conditions that would pertain after the future felling of trees by an unrelated project (thereby ignoring the risk of sediment release and/or eutrophication of the Bandon River SAC), failed to take into account "all aspects of the development project" and could not lead to a determination based upon "complete, precise, definitive findings and conclusions".

92. The Board emphasised the fact that there was evidence before it that the existing trees will be felled even if there is no development at Carrigariork. They referred to the expert report of Hydro Environmental Services dated 16th March, 2016 which was part of the papers lodged with the Board. At s.8 of that report the authors noted: -

"All of the managed forestry on this site will ultimately be felled should the windfarm project proceed or not. As such, there is no additional risk of nutrient release to the catchments associated with the windfarm project. It is possible that the wind farm project, which requires 13.8 Ha of permanent felling in the Bandon/Caha catchment, would potentially have a very minor positive impact in terms of limiting nutrient release as this area will not be replanted and therefore will not be subject to further felling into the future."

Thus there was evidence before the Board and its Inspector that the trees would be felled regardless of whether the wind farm development proceeded and no assumptions were made by the Board in this regard.

93. In addition, counsel argued that the applicants did not consider the primary basis for the Inspector's conclusion. This was that the absence of adverse effects on the integrity of the River Bandon SAC was to be secured against by the implementation of the "best practice" mitigation measures outlined by the developer (including in the Hydro Environmental Services report). These mitigation measures were assessed by the Inspector. and on the basis of these measures the Inspector was able to conclude that the "development will not result in pollution of water courses which could affect the qualifying interests of European sites, during either the construction or operational phases." The Board concurred with the Inspector's conclusion and adopted his report.

94. The Board submitted therefore that the basis of its determination for the purposes of Article 6(3) was not, as the applicants suggest, that the effect on the relevant European sites arising from the proposed development will be the same as those which would arise regardless from the felling of trees. The determination was, rather, that adverse effects will not occur because the implementation of best practice mitigation measures will prevent the pollution of water courses altogether. In these circumstances, the Board submitted that there was no error as to the baseline environment and no irrelevant considerations were taken into account.

95. I accept the submissions of the Board. Neither the Inspector nor the Board proceeded on the basis of assumptions as to future tree-felling. The uncontested reports before the Board established that the trees would be felled in due course, whether as part of the construction of the Carrigariork Development or as part of the harvesting of the commercial forestry. The Inspector was entitled to take into account and it was reasonable to consider this evidence.. The issue is whether these future impacts ought not to have been considered part of the baseline in this case.

96. A baseline provides a benchmark against which the impacts of the proposed development can be compared. This comprises the environment as it exists before the changes are brought about by the proposed development **and** changes in environmental conditions that are likely to occur in the absence of the proposed development. If it did not include the latter, the baseline would be an artificial construct divorced from the actual receiving environment. It follows that the Inspector and the Board were correct to include the probability that the trees would be felled in the future as part of the business of the commercial forestry when establishing the environmental baseline for the Carrigariork Development.

97. The Inspector was also entitled to take into account the effectiveness of the extensive proposed mitigation measures, and the Board was entitled to adopt his examination, analysis, evaluation, findings and conclusions in that regard.

98. In these circumstances neither the Inspector nor the Board erred in law either in establishing or considering the baseline environment. Neither did they take into account irrelevant considerations or fail to take into account relevant considerations, as alleged by the applicants.

Failure to Record Appropriate Assessment

99. Section 177V(5) and (6) of the 2000 Act requires the Board to publish notice of its AA determination and the reasons for the

determination. In *Balz v. An Bord Pleanála* [2016] IEHC 134 Barton J. held that to enable the Court to determine whether the AA was carried out and completed in accordance with law it is necessary that the record should disclose the reason for the Board's determination in an AA. It must include the complete, precise and definitive findings and conclusions reached by the Board and upon which it made its decision. He stated: -

"214. The sufficiency of the reasons given must contain the main rationale for which the Board considered those findings and conclusions capable of removing all scientific doubt as to the absence of adverse effects by the proposed development on the European sites concerned in light of their conservation objectives..."

Absent such evidence from the record, at the time when the determination was made, it would not be possible for the Court to decide whether the AA was lawfully completed or whether the determination made meets the legal test required in accordance with the judgements of the CJEU."

100. He held that such a conclusion could not be reached upon generality and hence it was necessary for the findings to be complete, precise and definitive, as was held by Finlay Geoghegan J. in *Kelly* at para. 48: -

"...the essential principle is that the reasons must be such as to enable an interested party [to] assess the lawfulness of the decision and in the event of a challenge being brought, the court must have access to sufficient information to enable an assessment as to lawfulness to be made."

She went on to hold that:

"...the reasons given for the Board's determination in an appropriate assessment must include the complete, precise and definitive findings and conclusions relied upon by the Board as the basis for its determination. They must also include the main rationale or reason for which the Board considered those findings and conclusions capable of removing all scientific doubt as to the effects of the proposed development on the European site concerned in the light of (...) its conservation objectives. In the absence of such reasons, it would not be possible for a court to decide whether the appropriate assessment was lawfully concluded or whether the determination meets the legal test required by the judgments of the CJEU."

101. At para. 50 of her judgment she stated: -

"Where the Board appoints an inspector to prepare a report, and the inspector carries out an appropriate assessment as part of his or her report, it may be that if the Board, on consideration, accepts the relevant findings made and conclusions reached by its Inspector in his or her report, that the production of the report may satisfy some or all of the obligation of the Board to give reasons for its determination. This would depend upon the relevant facts."

102. In *Connolly v. An Bord Pleanála* [2016] IEHC 322 Barrett J. followed the decision in *Kelly* and accepted that if all of a particular report or text is being relied upon by the Board this was acceptable provided it was identified properly so that the findings and conclusions reached in its determination are sufficiently complete, precise and definitive as to enable: -

"(i) An interested party meaningfully to assess the lawfulness of that determination and

(ii) A court to undertake a ready and comprehensive judicial review of same."

103. In this case the Board has expressly adopted the entirety of the Inspector's report. I have found that there are no gaps in the report and that it records complete, precise and definitive findings and conclusions. The findings and conclusions remove all scientific doubt as to the absence of adverse effects by the proposed development on the European sites concerned in light of their conservation objectives.

104. In *Ratheniska v. An Bord Pleanála* [2015] IEHC 18 Haughton J. similarly was concerned with whether there had been compliance with the obligation to record the AA conducted in that case. He noted that it was clear on the face of the impugned decision that the Board had regard to all of the documentation, the application, the submissions and observations and the Inspector's report, the screening reports as well as the NIS and all the other information and matters to which it was obliged to have regard in carrying out an AA. Secondly it was clear on the face of the decision that the Board itself was satisfied that the information available on file was adequate and allowed it to complete an AA. Thirdly it was clear on the face of the impugned decision that the Board did in fact carry out an AA in respect of the relevant European sites. The Board concluded that *"subject to the implementation of the identified mitigation measures, the proposed development, in itself or in combination with other plans or projects, would not adversely affect the integrity of the River Barrow and the River Nore Special Area of Conservation, in view of the conservation objectives for this site."* Haughton J held that this conclusion was the Board's AA decision.

105. Similarly, in this case it is clear from the face of the decision of the Board which I have quoted above that the Board had regard to all of the relevant necessary documentation, it was expressly satisfied that the information available on file was adequate and allowed it to complete an AA and it in fact completed an AA. Its conclusions are then set out and these constitute the Board's AA decision.

106. Mr. Justice Haughton in *Ratheniska* went on to state at paras. 126 and 127 of the judgment: -

"In s. 177V(5) the Board was obliged in law to give reasons for its [sic] determination. Under s. 182B(5A)(a) the Board was also obliged to state 'the main reasons and considerations on which the decision is based'. In the opinion of the court the Board did this in so far as the AA is concerned in the wording used on p. 6 of its decision. Different considerations may arise where the Board is disagreeing with its Inspector (as in the Kelly case) or perhaps disagreeing with the content of a NIS or even where there is a dispute in relation to scientific evidence presented to the Board or given at an oral hearing. In such instances there may well be a need for the Board to give more detailed reasons for its decision in choosing to accept one side of the scientific argument over the other. Not only was there no scientific dispute in relation to the likely adverse effects on the River Barrow and River Nore cSAC or the necessary mitigation measures but the applicants did not present any scientific evidence, or indeed any particular evidence, that would require comment from the Board in its AA."

The court takes the view that in a case such as this, where the Board on due consideration accepts the relevant findings made and conclusions reached by its Inspector, the production and recitation of that report satisfies the

obligations of the Board to give reasons for its determination. In other words, where the Board, having considered all appropriate documents and matters, accepts the scientific knowledge and findings in relation to the European site, accepts the Inspector's examination and analysis and that the proposed development will not adversely affect the integrity of the European site, it is not necessary for the Board to set out yet again at length in its decision the same examination and analysis. Such an exercise would be both pointless and unnecessary. The mere fact that the resulting decision might be perceived to be 'uninformative and perfunctory' clearly does not of itself amount to any ground for review."

107. I accept this statement. In my opinion the decision of the Board correctly records the fact that it had regard to all of the documentation to which it was required to have regard, it was satisfied that the information available on file was adequate and allowed it to complete an AA, it did in fact carry out an AA and it records the outcome of that determination and the reasons for that determination. The required examination, analysis, evaluation, findings and conclusions are to be found in the Inspector's report with which the Board concurred and his report was expressly adopted. Contrary to what was alleged by the applicants, there was no requirement for them to "wade through the voluminous documents to ascertain the findings and conclusions of the Board and the basis for those conclusions". I find that the Board complied with its obligation to record the AA which it conducted.

Conclusion

108. The Board conducted an EIA and an AA as it was required to do in respect of the Carrigarierk Development and did so in accordance with law. It recorded its decision in relation to both the EIA and the AA in a lawful manner. I therefore refuse the applicants the reliefs sought in these proceedings.