THE HIGH COURT

JUDICIAL REVIEW

[2014/475JR]

BETWEEN

STEPHEN CARROLL, JOANNE ADDIE & PETER SWEETMAN

APPLICANTS

AND

AN BORD PLEANALA

RESPONDENT

AND

GREEN WIND ENERGY (WEXFORD) LIMITED

NOTICE PARTY

AND

OFFALY COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Mr. Justice Fullam delivered the 11th day of February 2016

Factual Background

1. This is an application for judicial review pursuant to s.50 of the Planning and Development Act, 2000, in which the applicants seek a primary order of *certiorari* quashing the decision of the respondent ("the Board") made on the 3rd June, 2014, to grant planning permission to the first named notice party, Green Wind Energy (Wexford) Limited ("GWE") for 29 wind turbines and ancillary development north of Rhode, County Offaly.

2. The first applicant is a tiling contractor and resides at Bunsallagh, Croghan, Rhode Co. Offaly, the second applicant is a homemaker and resides at Ballyburly, Rhode, Co. Offaly. The third applicant is an environmentalist and resides in Cashel, Connemara Co. Galway.

3. The Board granted permission pursuant to s.37G of the Planning and Development Act, 2000 (PDA), as amended, for the development of 29 electricity-generating wind turbines with a maximum tip height of up to 166 metres, hard standings, a 110kV substation containing two control buildings, an electrical compound and a waste water holding tank, 9 water course crossings, temporary construction compound, a permanent meteorological mast, a new access road off the R400 roundabout and upgraded access roads, associated site roads, drainage and site works, all located on a site in the townlands of Derryarkin, Derryiron, Coolcor, Coolville, Ballyburly, Greenhills, Bunsallagh, Derrygreenagh, Knockdrin Wood, Killowen, Corbetstown, Carrick Garr and Dunville, close to the Westmeath and Offaly border.

4. The applicants further seek declaratory relief that the Board was in breach of Directive 2011/92/EU of the European Parliament and of the Council of 13th December, 2011 on the assessment of the effects of certain public and private projects on the environment, O.J. L26/1 28.01.2012 (Environmental Impact Assessment Directive) and specifically Articles 3 and 8 thereof; and,

5. A declaration that a "screening for appropriate assessment" exercise purportedly carried out by the respondent was in breach of Council Directive 92/43 E.E.C. of 21st May, 1992 on the conservation of natural habitats and wild fauna and flora, O.J. L206/7 22.07.1992 (Habitats Directive) incorporating the Birds Directive by taking mitigation measures into account.

6. GWE supports the respondent in opposing the application. Offaly County Council, the second notice party, has not participated in these proceedings. However, as will appear, it did take an active role in the planning decision process by way of submission of detailed questions, suggestions and recommendations which were accepted by GWE and its consultant engineers.

Background to Grant of Permission

7. Wind energy production is part of the national energy policy aimed at reducing dependency on fossil fuel imports, developing sustainable and competitive energy supplies and underpinning the move towards a low-carbon economy. In 2006, the Department of the Environment published "*Guidelines for Planning Authorities on Wind Farm Development and Wind Energy Development"* to assist the proper planning of wind power projects throughout the country. The preference for wind energy can be seen from The County Offaly Development Plan 2009-2015 where it states that:-

> *"It is council policy to facilitate the continual development of renewable energy sources having regard to the proper planning and sustainable development of the area, having particular regard to amenities, landscape sensitivities and the protection of habitats and heritage, where such proposals comply with policy contained in the County Development Plan."*

8. The County Offaly Wind Strategy 2015 identifies 12 areas examined for potential wind farm development. Area no. 1 is "north of Rhode". The document states:-

> *"Having regard to proximity to an existing substation, access roads, cut over bog, large land holdings, precedent of existing visually intrusive infrastructure, this area is highly suitable. There is some sensitivity to the overlooking of the western portion of this area from protected views."*

9. The planning application in respect of this development was made directly to the Board in accordance with s.37A of the PDA 2000, as amended, by the Planning and Development (Strategic Infrastructure) Act, 2006. Under the legislation, an applicant is obliged at the outset to consult with the Board and if the Board is of the opinion that the development constitutes a category of infrastructure project specified in the Seventh Schedule and complies with one or more of the three criteria set out in s.37A(2) of the PDA, it shall notify the applicant of same. The notification is the trigger for the formal application.

10. In the present case, GWE first carried out environmental studies. It then consulted with Offaly County Council in 2010 and applied to Eirgrid for a connection in April 2012. Subsequent to this, pursuant to s.37B of the PDA it commenced pre-planning consultations with the Board in October 2012. In December 2012, GWE conducted a public consultation meeting at Rhode. In March 2013, the Department of the Environment, Community and Local Government published Draft Guidelines on carrying out Environmental Impact Assessments. In June and September of 2013 further pre-planning consultations were held between GWE and the Board. On 31st October, the Board made an order that Yellow River Wind Farm was strategic infrastructure. On 28th November, 2013, GWE applied to the Board for permission for the development of a wind farm comprising 32 turbines.

11. The application was accompanied by an Environmental Impact Statement (EIS) and an Appropriate Assessment Screening Report (also referred to as Natura Impact Statement) (NIS) prepared by Dr. John Madden dated 19th November, 2013. Dr Madden's report is stated to have been prepared in accordance with, *inter alia*, "*The Guidance for Planning Authorities relating to Appropriate Assessment"* issued by the Department of Environment, Heritage and Local Government (December 2009). The report listed eight European sites comprising six Special Areas of Conservation (SAC) and two Special Protection Areas (SPA), within 15Km of the development which could be potentially affected by the project, namely; Lough Ennell SAC, Lough Ennell SPA, River Boyne and River Blackwater SAC, River Boyne and River Blackwater SPA, Raheenmore Bog SAC, Mount Hevey Bog SAC, Split Hills and Mount Esker SAC, and The Long Derries SAC. The Whooper Swan (*Cygnus cygnus*), which is a listed species under Annex 1 of Council Directive 2009/147/EC of the European Parliament and of the Council of 30th November, 2009 on the conservation of wild birds, O.J. L20/7 26.01.10 (Birds Directive), does not have a qualifying interest in any of these sites.

12. Observations and submissions were invited from the public and specific statutory consultees. Following receipt of observations and submissions, the Board, by letter dated 13th March, invited the developer, GWE, to make its response. The format of GWE's response to submissions of 3rd April, 2014, was an extensive document in two sections. Section 1 contained the response to statutory consultees, common issues raised by third parties and individual third party issues. Section 2 contained the response to suggestions made by the Offaly County Manager. The manager's recommendations included:-

• the omission of a small number of turbines;

• the relocation of other turbines;

• the reduction in height of a number of turbines;

• the consideration of a general noise limit proposed by the 2013 Draft Guidelines, and;

• a limit implementing a similar proposal in the Guidelines in respect of shadow flicker whereby there would be no shadow flicker within ten rotor diameters of any dwelling.

13. The response of GWE included a revised noise impact report, a revised shadow flicker report, a revised landscape and visual impact report and also a whooper swan winter survey 2013/2014. The principal changes from the original Environmental Impact Statement were:

• The number of turbines was reduced form 32 to 29;

• Three turbines were re-located. Turbines T22 and T24 were moved further from houses to comply with the 2006 Guidelines and T31 was moved 56 metres in a west/north westerly direction;

• The height of eleven turbines was reduced from 166 metres to 156 metres;

• The maximum noise limit was reduced from 44 dB(A) to 40 dB(A) at noise sensitive receptors;

• The computerised modelling for the revised layout showed that shadow flicker at residences within 10 rotor diameters of a turbine was eliminated and in the "unlikely event" that any occurred, the tenders for the turbines provided for the installation of a Shadow Flicker Management System in the SCADA software and also photocells (light sensors) on top of the turbine nacelles.

14. In April and May 2014, the public and statutory consultees were afforded a further opportunity to make additional submissions. On 15th May, the inspector appointed by the Board, Mr Dillon, issued his report. He recommended, at page 104, that permission be granted for the reasons and considerations set out subject to 30 conditions. The reasons and considerations to which the inspector had regard were as follows:-

(a) National Policy with regard to the development of sustainable energy sources.

(b) The "Wind Energy Development Guidelines" for planning authorities issued by the Department of the Environment, Heritage and Local Government in June, 2006.

(c) The character of the landscape in the area and the topography surrounding the site.

(d) The policies of the planning authority as set out in the current Offaly County Development Plan and the County Offaly Wind Strategy to 2015.

(e) The policies of adjoining planning authorities – Westmeath, Meath and Kildare.

(f) The distance to dwellings or other sensitive receptors from the proposed development.

(g) The Environmental Impact Statement submitted.

(h) The Appropriate Assessment screening report for Habitats Directive assessment submitted.

(i) The extensive submissions made in connection with the planning application.

The Inspector considered that:-

"Subject to compliance with the conditions, the proposed development would not have a significant adverse impact on the landscape or on the visual or residential amenities of the area or upon its archaeological or cultural heritage, would not give rise to any significant impact on the natural heritage of the area or affect the integrity of any European Site or any protected species, and would be acceptable in terms of traffic safety and convenience of road users. The proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area."

15. On 29th May, the Board issued a direction, wherein it stated that it had decided "*to grant permission generally in accordance with the Inspector's recommendation subject to certain amendments*". On 3rd June, the Board issued its decision to grant permission. The format of its decision replicated the reasons and considerations adopted by the inspector and, save for some minor alterations and omissions, adopted the substance of the inspector's conditions.

Judicial Review Proceedings
16. By Order dated 30th July, 2014, the applicants were granted leave to apply for judicial review for the reliefs set out at paragraph (D) on the sixteen grounds set out at paragraph (E) of the statement of grounds. The proceedings were admitted to the Commercial Court by Order of McGovern J. on 31st October, 2013. Statements of opposition were filed by the notice party (GWE) and the respondent Board on the 7th and 8th of December respectively.

The Grounds of Challenge
17. In the course of the hearing, the applicants informed the Court that they were not pursuing grounds 15 and 16 which relate to Conditions 7 and 8 attaching to the permission. The grounds before the court can be summarised as follows:-

1. The failure of the Board to carry out a proper EIA in accordance with Article 3 the EIA Directive/ Section 171A PDA 2000. This ground can be sub-divided into;

(a) the structural argument which asserts that the Board did not carry out an evaluation in accordance with the inspector's report but merely 'noted' the report, and;

(b) substantive errors on the part of the Board in dealing with the potential impact of the proposed development on the health, particularly the mental health, of the local population; erroneously concluding that no evidence had been submitted that would demonstrate a significant impact on property values of proximate households, and; erroneously evaluated the proposed development by reference to the 2006 Guidelines relating to noise limits when lowered thresholds in the proposed draft guidelines published in 2013 were consistent with international guidelines.

2. Failure to comply with Article 6(3) of the Habitats Directive/Part XAB of the PDA 2000 (section 177 (s)(t)(u)(v)) by erroneously considering mitigation measures at stage one Screening for Appropriate Assessment.

Statutory Framework
18. The decision of the Board involves compliance with three separate statutory requirements:-

(1) Consideration of the general planning requirements under the PDA 2000, as amended, by the Planning and Development (Strategic Infrastructure) Act, 2006 and compliance with their procedural requirements.

(2) The carrying out of an environmental impact assessment as required by Article 3 of the EIA Directive as implemented by Part X of the PDA.

(3) The carrying out of an appropriate assessment if screening so requires in accordance with Article 6(3) of the Habitat's Directive implemented by Part XAB of the PDA..

19. The Board assigned an inspector to report on the application pursuant to s.146(1) of the PDA as amended. The inspector's report must include a recommendation to the Board which it is obliged to consider before making its decision. In accordance with s.34 (10) of the PDA the Board must state the main reasons and considerations on which the decision is based.

Environmental Impact Assessment
20. The obligations on the Board imposed by the EIA Directive are set out in Part X of the PDA. Section 171A(1) defines an Environmental Impact Assessment as:-

"An assessment which includes an examination, analysis and evaluation carried out by…the Board…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 landscape;

(c) material assets and the cultural heritage; and

(d) the interaction between the factors mentioned in paragraphs (a), (b) and (c)."

21. Section 172(IH) permits the Board in carrying out an EIA to "*have regard to and adopt in whole or in part any reports prepared by its officials or by consultants, experts or other advisors"*. This includes the report of its inspector. Section 172(IJ) obliges the Board, when it has decided whether to grant or refuse consent for the proposed development, to inform the applicant and the public of the decision and to make the following information available to them:-

"(a) the contents of the decision and any conditions attaching thereto;

(b) an evaluation of the direct and indirect effects of the proposed development on the matters set out in s.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 members of the public;

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

(e) any report referred to in subsection (IH);

(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 s.174."

Appropriate Assessment

22. The third statutory requirement imposed on the Board relates to its obligations under Article 6 of the Habitat's Directive as implemented by Part XAB of the PDA. . Article 6 of the Habitats Directive, in so far as relevant, provides:-

"2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of the Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site and, if appropriate, having obtained the opinion of the general public."

23. Article 6(3) as implemented by ss.177U and 177V of the PDA envisages a two stage process which requires:-

(i) a screening for appropriate assessment in accordance with S.177U;

(ii) if, on a screening, the Board determines that an appropriate assessment is required then it must carry out an appropriate assessment in accordance with S.177V.

24. The nature and purpose of the screening process is explained by Advocate General Sharpston in *Sweetman v. An Bord Pleanala (Case C-258/11)* at paras. 47-49:-

"47. It follows that the possibility of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of Article 6(3). The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry an appropriate assessment. There is no need to establish such an effect; it is, as Ireland observes, merely to determine that there may be such an effect.

48. The requirement that the effect in question be "significant" exists in order to lay down a de minimis threshold. Plans or projects that have no appreciable effect on the site are thereby excluded. If all plans or projects capable of having any effect whatsoever on the site were to be caught by Article 6(3), activities on or near the site would risk being impossible by reason of legislative overkill.

49 The threshold at the first stage of Article 6(3) is thus a very low one. It operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken on the implications of the plan or project for the conservation objectives of the site…".

25. Article 6 (3) of the Directive incorporates a two stage test;

a. The first stage is to determine whether the project in question is 'likely to have a significant effect on the site'. If there is a possibility that there would be a significant effect, there will then be a need for an appropriate assessment for the purposes of Article 6 (3). In essence, the first stage acts as a trigger for the requirement to carry out an appropriate assessment. It is not necessary to establish such an effect, just determine that there may be one. This stage introduces a de minimis threshold to exclude plans or projects that have no appreciable effect on the site. The question at the first stage is simply- *should we bother to check?*

b. The second stage is that an expert assessment must determine whether the plan or project has 'an adverse effect on the integrity of the site'. This is a substantially higher threshold than the first stage. It is an appropriate assessment of the implications of the project in question for the conservation objectives of the site. The plan or project should be examined on the basis of the best scientific knowledge in the field. The question in the second stage is *what will happen to the site if this plan or project goes ahead?- is that consistent with maintaining or restoring the favourable conservation status of the habitat or species concerned?*

26. Only if the competent national authorities, in this case the Board, are convinced that projects will not adversely affect the integrity of the site may they grant authorisation. As stated by Advocate General Sharpston in *Sweetman* it is the essential unity of the site that is of relevance. Integrity refers to the wholeness and soundness of the characteristics of the site.

27. The 2009 *Guidance for Planning Authorities relating to Appropriate Assessment* states at paragraph 3.2.3:-

"Plans or projects that are outside the boundaries of a site may still have effects on that site. The approach to screening is likely to differ somewhat for plans and projects, depending on scale and on the likely effects, but the following should be included:

1. Any Natura 2000 sites within or adjacent to the plan or project area.

2. Any Natura 2000 sites within the likely zone of impact of the plan or project. A distance of 15km is currently recommended in the case of plans, and derives from UK guidance (Scott Wilson et al., 2006) for projects, the distance could be much less than 15km, and in some cases less than 100m, but this must be evaluated on a case by case basis with reference to the nature, size and location of the project, and the sensitivities of the ecological receptors, and the potential for in combination effects."

Different Effects of Environmental Impact Assessment and Appropriate Assessment

28. In her judgment in *Kelly v. An Bord Pleanala* [2014] IEHC 400, Finlay Geoghegan J. explained the different requirements for Environmental Impact Assessment and Appropriate Assessment:-

"33. As appears, the respective effects on the decision making process of the Board of the environmental impact assessment and the appropriate assessment (where both have to be carried out by the Board prior to taking its planning decision) are quite different. In carrying out an environmental impact assessment the Board is required to conduct an examination, analysis and evaluation of and identify the direct and indirect effects of the proposed developments on the matters specified in section 171A(1). However, the outcome of that examination analysis, evaluation and identification informs rather than determines the planning decision which should or may be made. The Board has jurisdiction in its discretion to grant consent regardless of the outcome of the EIA though of course it impacts on how it should exercise its discretion.

34. In contrast, the Board in carrying out an appropriate assessment under Article 6(3) and s.177V, is obliged, as part of same, to make a determination as to whether or not the proposed development would adversely affect the integrity of the relevant European site or sites in view of its conservation objectives. The determination which the Board makes on that issue in the appropriate assessment determines its jurisdiction to take the planning decision. Unless the appropriate assessment determination is that the proposed development will not adversely affect the integrity of any relevant European site, the Board may not take a decision giving consent for the proposed development unless it does so pursuant to Article 6(4) of the Habitat's Directive."

29. At paragraph 49, Finlay Geoghegan J. highlighted the distinction between the approach of the courts in considering a challenge to a decision of the Board made under the normal planning legislation and a decision made where Appropriate Assessment under the Habitats Directive is involved:-

"Secondly, it appears to me that whilst the requirement for an appropriate assessment has been implemented in Ireland by amendment of the Planning Acts and requires to be carried out inter alia as part of the planning process, the determination which must be made by the Board as competent authority is not a "planning decision" in the sense used in the judgments relating to reasons relied upon by the Board. In such a planning decision, the Board is exercising a jurisdiction with a very wide discretion. By contrast, the determination it must make as part of an appropriate assessment is significantly narrower and legally constrained as explained in the CJEU cases cited. It also determines the Board's continuing jurisdiction to grant planning consent, and therefore a decision which goes to its jurisdiction. The application of the principle set out by Clarke J. in Christian, Rawson and EMI to the different types of decision results as envisaged therein in a requirement for reasons of a different order in relation to the different types of decision."

General Principles Relating to Judicial Review of Planning Decisions

Presumption of Validity

30. The decisions of An Bord Pleanala enjoy the presumption of validity until the contrary is shown. In *Lancefort Ltd v. An Bord Pleanala* [1999] 2 I.R. 270 McGuinness J. stated:-

"The onus of proof in establishing that An Bord Pleanala did not consider the question of environmental impact assessment… and thereby rebutting the presumption of validity of the Board's decision lies squarely on the applicant".

Standard of Review

31. In *O'Keeffe v. An Bord Pleanala* [1993] 1 I.R. 39 Finlay C.J. stated at page 71:-

"It is clear from these quotations that the circumstances under which the court can interfere on the basis of irrationality with the decision-maker involved in an administrative function are limited and rare. It is of importance and, I would think, of assistance to consider not only as was done by Henchy J. in The State (Keegan) v. Stardust Compensation Tribunal [1986] I.R. 642 the circumstances under which the court can and should intervene, but also in brief terms and not necessarily comprehensively, to consider the circumstances under which the court cannot intervene.

The court cannot intervene with the decision of an administrative decision-making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it.

These considerations, described by counsel on behalf of the appellants as the height of the fence against judicial intervention by way of review on grounds of irrationality of decision, are of particular importance in relation to questions of the decisions of planning authorities.

Under the provision of the Planning Acts the legislature has unequivocally and firmly placed questions of planning, questions on the balance between development and the environment and the proper convenience and amenities of an

area within the jurisdiction of the planning authorities and the Board which are expected to have special skill, competence and experience in planning questions. The court is not vested with that jurisdiction, nor is it expected to, nor can it, exercise discretion with regard to planning matters.

I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision- making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision making authority had before it no relevant material which would support it decision."

32. The circumstances where a court could and should intervene as referred to in the judgment of Finlay C.J. supra were described by Henchy J. in the *State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 at 658 in the following terms:-

"I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted ultra vires, for the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires,inter alia, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."

33. In *Weston v. An Bord Pleanala* [2010] IEHC 255 Charleton J. said at para 11:-

"The burden of proof of any error of law, or fundamental question of fact, leading to an excess of jurisdiction, or of demonstrating such unreasonableness as flies in the face of fundamental reason and common sense, rests on Weston, the applicant in these proceedings. Once there is any reasonable basis upon which the planning authority or An Bord Pleanala can make a decision in favour of, or against, a planning application or appeal, or can attach a condition thereto, the court has no jurisdiction to interfere. Furthermore, where, as a colourable device, a reason is chosen for refusing permission which does not give rise to an entitlement to compensation under the legislation, the burden of proving that a decision choosing such an incorrect reason for that improper purpose rests with the applicant. The presence in the planning file, including the report to the manager, or in the case of An Bord Pleanala, the report of the inspector, of any material which could rationally justify a refusal on a non-compensatory ground is sufficient to support the lawfulness of a decision."

34. In *Klohn v. An Bord Pleanala* [2009] I.R. 59 McMahon J said at page 73:-

"It is recognised in cases such as this that the court in reviewing the Board's decision will not interfere with a bona fide exercise of its discretion in these matters. It is not the court's function to second guess the respondent and substitute its own decision for that of the Board. The legislature, in its wisdom, vested the power to make such a decision in a body which has expertise and experience in these matters. Such a body is much better qualified and in a much better position to make such technical decisions in this specialised area than the court, which has to rely on expert evidence to inform it in these cases. The courts will only interfere in such decisions where they appear so irrational that no reasonable authority or decision maker in this position would have made such a determination. Although the attitude has been criticised as being over deferential, this judicial restraint is now well established in our jurisprudence. Whether it will have to be reassessed in future because of more recent European Union directives in this area remains to be seen. Such a reassessment does not arise in this case, however."

35. The question for the court in *Klohn* was whether the environmental impact statement was so deficient as to prevent a subsequent proper assessment by the decision maker or was it such as to deprive the parties to the process of a real opportunity to participate. In the present case, Mr. Healy on behalf of the applicants argued that the court should not be constrained by the *O'Keeffe* test. He submitted that that approach which should be taken by the court was, in the words of Clarke J. in *Sweetman v An Bord Pleanala* [2007] 1 I.R. 277 at 279 , *"…to consider whether there were substantial grounds for suggesting that, in relation to that decision, a higher level of scrutiny was required on the facts of the case…"* (Emphasis added). He suggested that the court should adopt the "manifest error" test applied by Fennelly J. in *SIAC v. Mayo County Council* [2002] IESC 39, or the "anxious scrutiny" test applied in the U.K. in respect of cases involving fundamental human rights.

36. In the recent case of *Ratheniska v. An Bord Pleanala* [2015] IEHC 18, Haughton J. considered the manifest error test and held that that it was applicable to a separate category of judicial review involving public procurement. However, the O'Keeffe test continues to bind the High Court when reviewing decisions of the Board. At paragraph 75 he said:-

"Reliance on this case law is misconceived as a different regulatory framework applies to public procurement and the review of public procurement decisions. Directive 89/665/EC ("the Remedies Directive") applies to a review of such decisions and was transposed into domestic law by the EC (Review Procedures for the Award of Public Supply and Public Works Contracts) Regulations 1992. Again in the SIAC case Fennelly J at p 174 stated:-

"Thus, it seems to be well established by a significant line of case law of the Court of First Instance, that a community institution, when in a comparable situation to the awarding authority of a member state, enjoys "a wide discretion" as to the criteria by which it will judge tenders and, moreover, its decisions will be annulled only if a "manifest error" can be demonstrated."

Thus, the test of "clearly established error" or "manifest error" applies to reviews of public procurement decisions.

76. It is the view of this court that the more limited test of substantive review on grounds of irrationality set by the O'Keeffe case, and reiterated in the case law derived from that case, is both well established and remains appropriate, and continues to bind the High Court at least in its review of decisions of the Board, including EIAs forming part of such decisions."

37. While acknowledging the decision of Haughton J. in *Ratheniska*, Mr. Healy urged that the *dicta* of Hogan J. in *Keane v. An Bord Pleanala and PWWP Development Ltd* [2012] IEHC 324 and Clarke J. in *Sweetman v. An Bord Pleanala* [2008] 1 I.R 277 at 298-299 indicate that the manifest error test may be more applicable in cases involving judicial review of decisions involving EIA.

38. In *Sweetman*, Clarke J. said at page 298:-

"Firstly it is important to remember that a court, in judicial review proceedings, is not confined to the irrationality test

identified in O'Keeffe v. An Bord Pleanala [1993] 1 I.R. 39. That is but one ground which can be advanced. A court is also entitled (and indeed is duty bound) to consider matters such as whether the decision maker had regard to factors which ought not properly have been included in the consideration or failed to have regard to factors which should properly have been considered. O'Keeffe v. An Bord Pleanala irrationality only arises in circumstances where the decision maker properly considered all of the matters required to be taken into account and did not take into account any matters which should not. The limitations inherent in the O'Keeffe v. An Bord Pleanala irrationality test, therefore, only arise in circumstances where all, but only, those matters properly considered were taken into account and where the decision maker comes to a judgment based on all of those matters. It is in those circumstances that the court by reason of the doctrine of deference, does not attempt to second guess the judgment of the person or body concerned provided that there was material for coming to that decision. In particular the court does not attempt to reassess the weight to be attached to relevant factors.

The overall jurisdiction is not, therefore, as narrow as a consideration of O'Keeffe v. An Bord Pleanala [1993] 1 I.R 39 alone might suggest."

39. Clarke J. was highlighting the flexibility of the Irish judicial review regime in the context of a challenge that the system of judicial review available in Irish courts was insufficient to meet the State's obligations under Article 10(a) of the Directive to allow persons challenge the substantive and procedural legality of decisions. He observed that Irish judicial review law had been adapted by the courts to provide for a higher level of scrutiny in immigration cases where fundamental rights, life and liberty may be involved. He left open the possibility of extending the application of the anxious scrutiny test to planning cases "if it could be argued successfully that there were substantial grounds that a greater level of scrutiny was mandated by the Directive". Clarke J. further noted the view of Fennelly J. in *SIAC v Mayo County Council* [2002] 3 I.R. 148 that the application of the manifest error test under the Public Procurement Directive "*in practice…would not be very different from the application of the traditional Irish judicial review law.*" In *SIAC* the Supreme Court had reached the same conclusion as the High Court but declined to apply the Wednesbury "unreasonableness" or "irrationality" test. Apart from "noting" the Advocate General's opinion in the reference that the test was "*rather less extreme than the test applied by the trial judge"* and was not to be equated with "*obvious error*", the Supreme Court did not define the term "manifest error" or suggest the circumstances when it might be invoked in cases other than those involving public procurement.

40. The *O'Keeffe* irrationality test remains central in the Irish law of judicial review so far as planning decisions involving environmental assessments are concerned. The test is the final assessment in a reasoning process which requires the court to consider whether the decision maker has had regard to factors which ought not properly have been included in the consideration or failed to have regard to factors which should properly have been considered. In *Meadows v Minister for Justice* [2010] 2 I.R 701 Denham J., as she then was, confirmed that the *O'Keeffe* test applied to decisions of the Board at p 738:-

"The decision in O'Keeffe v An Bord Pleanala related to a specialised area of decision making where the decision maker has special technical or professional skill. A court should be slow to intervene in a decision made with special competence in an area of knowledge .The O'Keeffe v An Bord Pleanala decision is relevant to areas of special skill and knowledge, such as planning and development".

41. Planning and fundamental rights are at different ends of a spectrum in terms of gravity of outcomes for persons affected by decisions, and, consequently, the deference accorded to the decision-maker is greater in planning cases. Planning involves "*questions of the balance between development and the environment and the proper convenience and amenities of an area…"* as per Finlay C.J in *O'Keeffe* at pp 71 and 72. The questions relate more to policy than law and in general require specialised technical expertise. On the other hand, courts, by training and experience, are aware of the importance of fundamental rights and are therefore capable of assessing asylum/immigration decisions involving life and liberty.

42. The preponderance of authority is against imposing a greater level of scrutiny than is currently required under Irish judicial review law in respect of decisions relating issues of environmental assessment. An applicant faces an uphill task in establishing substantial grounds warranting a departure from the *O'Keeffe* test.

Ground 1(a) - The applicant's case in respect of the failure of the Board to carry out a proper EIA in accordance with the EIA Directive

43. Section 171A of the PDA as inserted by s.53 of the Planning and Development (Amendment) Act 2010, as set out in paragraph 17 above, defines an environmental impact assessment as "*an assessment which includes an examination, analysis and evaluation carried out by a planning authority or the Board*."

44. The applicants submit that the definition as amended by the words *examination, analysis and evaluation*, imposes a specific obligation on the competent authority to carry out an independent evaluation of the material submitted to it by an applicant for planning permission in appropriate cases. The applicants submit that the case, *European Commission v. Ireland* [2011] C-50/09 highlighted the fundamental obligation to evaluate, contained in Article 3 of the Directive, which, at the date that case was heard, Ireland had not sufficiently transposed into its domestic legislation. The transposition of Articles 4 to 11 of the Directive was held to be insufficient to attain the result prescribed by Article 3. The PDA 2000 was amended by the Planning and Development (Amendment) Act 2010 to remedy this defect.

45. The applicants point to the purported assessment carried out pursuant to s.172(IG), by the respondent as described in its Board direction and Board order as follows:-

"The Board considered the environmental impact statement submitted with the application, the submissions on file and the Inspector's assessment of the environmental impacts, ***which is noted*** *(emphasis added) The Board completed an environmental impact assessment and concluded that the proposed development would not have significant effects on the environment."*

46. The applicants take issue with the words underlined and say that *'noting'* is a neutral term and does not indicate that an evaluation or assessment was actually carried out by the respondent. As such, the applicants submit that the respondent's exercise clearly does not comply with its obligation as stated by Haughton J. in *Ratheniska*:-

"The Board has an obligation in law to examine, analyse and evaluate the direct and indirect effects of the proposed development".

47. The applicants further submit that the process described by the respondent above is in breach of the 2013 "*Guidelines for*

Planning Authorities and An Bord Pleanala on carrying out Environmental Impact Assessment". In particular, the applicants submit that the process adopted by the Board does not comply with the essential requirement that the assessment of the environmental effects is "*clearly documented with a 'paper trail' being available for public scrutiny and to facilitate and defend any legal challenge*" (para. 4.2 of the Guidelines); nor does it comply with the requirement (at para. 4.4). that "*the decision maker must indicate in a written statement that he or she has read the EIA Report and/or any other report, which the decision maker relies on in carrying out the assessment and either has accepted the conclusions of the planner/Board's Inspector, in whole or in part, or has not accepted such conclusions. Where the decision maker does not accept some or all of the conclusions drawn by the planner/Inspector in the EIA report, he or she must in a written statement give reasons as to why he or she does not accept the conclusions in question*." The applicants submit that there is no indication in the Board's EIA that it adopted the inspector's report and they are left in the invidious position of not knowing whether the Board adopted the inspectors report or completed its own EIA.

48. In summary, the applicants submit that the obligation on the decision maker (in this case the Board), is not met by a determination that it considered the information provided by the developer and/or noted the inspector's assessment (unless this is expressly adopted). Secondly, they submit that it is not sufficient for the respondent as a decision maker to contend that it carried out an EIA without producing evidence of the contents of such an assessment in compliance with Article 3 which is "*capable of being scrutinised*."

49. The Board submits that the applicants have mischaracterised the EIA which it expressly said it carried out at page 3 of its decision. The Board argues that the applicants have not discharged the onus of disproving the presumption that the decisions of the Board are valid. Specifically, the Board says that it is clear from the terms of s.172(1H) as set out in paragraph 18 of this judgment and the decision of Finlay Geoghegan J. in *Kelly and An Bord Pleanala*, that the decision of the Board and its appointed inspector can be read together.

Decision
50. In this case the Board accepted the recommendation of its inspector to grant permission. Section 172(1H) permits the Board *'to have regard to and adopt in whole or in part any reports prepared by its officials or by consultant, experts or other advisers'*. That includes a report by an inspector appointed by it. It is clear from the Board direction, that on 28th May, 2014, prior to making its decision to grant planning permission on 3rd June, the Board considered its inspector's assessment of environmental impacts together with the EIS accompanying the planning application and the submissions on file. On foot of that consideration, the Board decided to grant permission generally in accordance with the inspector's recommendation subject to some amendments. That is a summary of the concluding stage of a protracted strategic infrastructure planning process which requires the Board to manage, direct and monitor a planning application from pre-planning stage to decision or completion.

51. The fact that that the Board made amendments to some of the conditions recommended by the inspector indicates that the members of the Board addressed their minds to the matters contained in the materials before them. Examination of the amendments shows that the exercise carried out by Board reduced the 30 conditions recommended by the inspector to 24 by means of de-duplication, combination, expansion (e.g. additional details included in condition 20 relating to the construction management plan *in the interest of amenities, public health and safety*) and omission (the inspectors cash lodgement conditions satisfied by GWE's undertakings).

52. The process in this case has involved the Board: consulting with the developer at pre-planning stage; considering whether the proposed application met the requirements of s.37; considering the applicant's EIS and screening report; considering the submissions and observations of prescribed consultees and third parties (including the applicants); thereon directing GWE to respond to those submissions and to furnish additional information including specific revision of sections of its EIS; considering GWE's response(as is clear from notes 1 and 2 to the Board's decision); deciding the statutory consultees and third parties have a further opportunity to make submissions and observations on the response; and, ultimately considering the report of it's appointed inspector, Mr Dillon. On any fair view, the exercise carried out by the Board would be regarded as an *examination*, *analysis* and *evaluation* in accordance with the requirements of Article 3.

53. On the date of its decision the Board published its direction and decision on its website. On their face those documents indicate that the Board made its planning decision based on an *examination, analysis and an evaluation* of the matters it was statutorily obliged to consider. No interested person or body involved in the process could have been in any doubt as to the basis for the decision to grant planning permission in the light of those documents and by reference to the reasons given and the conditions imposed.

Ground 1(b) The applicants' case in relation to Public Health, Noise and Property values
54. The applicants also raise a challenge to the inspector's assessment concerning public health, noise and property values. This challenge is raised without prejudice to its primary argument that there was a fundamental failure to comply with Article 3 of the Directive. In this regard the applicants submit that they are not constrained by the irrationality/unreasonableness test of *O'Keeffe*, but, seek a more flexible approach such as the "manifest error test" as adopted in public procurement cases.

Public Health
55. The applicants challenge the determination by the inspector at section 13.16.15 of his report which states:-

> *"A substantial amount of the submissions to the board referred to public health. I have elsewhere in this report dealt with the issue under the headings of noise and shadow flicker. However, some observers refer to the impact of turbines on mental health, persons living with autism and on general health and well being. There is no conclusive evidence in relation to the impacts of turbines on mental health, or on persons living with autism or on general health and well being. There are wind farms erected elsewhere throughout the country".*

56. The applicants describe this finding as "terse" notwithstanding the large number of submissions by members of the public identified at section 12.3.10 of the inspector's report and the affidavit of Mr. Sweetman. Specifically, the applicants submit that the inspector failed to fundamentally evaluate and assess the health impacts of the proposed development with reference to sleep patterns, mental health and epilepsy.

57. The respondent submits that the issue of noise was considered in detail at section 13.7 of the inspector's report (pages 73-76) and shadow flicker at section 13.8 (pages 76-79).

Noise
58. In relation to noise, the applicants submit that the approach taken by the respondent in applying a higher daytime and night time limit contained in the 2006 Guidelines was "manifestly unreasonable" having regard to the projected lower limits in the Proposed

Revisions to the 2006 Guidelines published in December, 2013. The respondent submits that the inspector identified the applicants' noise objection at section 8.2.4 of his report and concluded at section 13.7 that the development would not cause noise nuisance.

Shadow flicker
59. In relation to health, the applicants submit that "*the Inspector fundamentally failed to evaluate and assess the health impacts of the proposed development, and particularly the impact on individuals with epilepsy and autism.*" The respondent submits that the issue of epilepsy was raised only in connection with shadow flicker. At section 8.2.9 the inspector notes the objection:-"*Shadow flicker can cause problems for people who suffer from epilepsy".*

60. In relation to shadow flicker, the inspector concluded at 13.7 that he "*would be satisfied that the proposed development will not result in significant dis-amenity for residents arising from shadow flicker*". The Board submits that it came to a clear conclusion on the issues raised by the applicants determining that the development would not have significant environmental effects and imposed relevant conditions, 10 and 11 on the notice on GWE.

Discussion
61. It should be noted at the outset that noise and shadow flicker were the main health issues which concerned third parties, the Department of Health and Offaly County Council. The latter made specific suggestions to GWE in respect of noise and shadow flicker in the light of the EIS. GWE accepted these suggestions and incorporated them in their response to submissions. Specifically, GWE revised the turbine layout, reducing the number of turbines by three so as to comply with the standards for noise and shadow flicker in the proposed Guidelines. This was to ensure that no house would experience noise levels in excess of 40dBA within 500 metres of a turbine or would be exposed to more than 30 hours of shadow flicker in a year.

62. The inspector had regard to an Adjusted Noise Impact Report submitted on 3rd April, 2014. He noted that the revised proposals, on a worst case scenario, came close to meeting the requirements of the Proposed Revisions to Wind Energy Development Guidelines (2013). He noted that GWE was voluntarily agreeing to abide by the stricter noise standards of the 2013 Draft Guidelines even though such adherence was not a requirement of the existing 2006 Guidelines. In the circumstances he concluded that it was not reasonable to require the developer to abide by standards which were not in the current Wind Energy Guidelines.

63. The inspector proposed noise mitigation measures post construction to monitor noise at various wind speeds and direction, noting that it would be possible to reduce the power output of turbines in order to reduce noise if it exceeded thresholds. Condition 10 of the Board's decision provides:-

> *"Noise mitigation measures outlined in the environmental impact statement and the adjusted noise impact report, received by the board on the 3rd day of April, 2014 should be carried out in full. The following conditions shall be complied with;*
>
> *(a) Noise levels emanating from the proposed development following commissioning, when measured externally at third party noise-sensitive locations, shall not exceed the greater of 43dB(A)L90, 10min or 5dB(A) above background levels.*
>
> *(b) All noise measurements shall be made in accordance with I.S.O. recommendations R1996/1 and 2 "acoustics – description and measurement of environmental noise".*
>
> *(c) Prior to commencement of development, the developer shall agree a noise compliance monitor programme for the operational wind farm with the planning authority.*
>
> *Reason:*
>
> *In the interest of residential amenity."*

64. In relation to shadow flicker the inspector had regard to GWE's response which was based on a computerised modelling of the potential exposure of 195 houses within 1.13 km of a turbine. The study started from a worst case scenario of sunshine all day every day of the year. Adjustments were then made to take account of statistical data relating to local sunshine, non operational periods, i.e. when turbines could not operate because wind speeds were less than 3 m/s or in excess of 25 m/s, for technical reasons or because wind direction was not at right angles to the face of the turbine and did not cause shadow flicker. No adjustment was made for vegetation. As appears above, the conclusion of the modelling was that none of the 195 houses would experience shadow flicker. In the event that shadow flicker did occur, the tender specification for the turbines required the installation of a shadow flicker management system in the software and light sensors on top of the turbines which would result in the turbines being shut down. It is to be noted that in Section 1 of GWE's response to submissions on its EIS, common issues raised by third parties relating to shadow flicker concerned explanations of the adjustments.

65. It is to be noted that among the authorities cited by GWE in the shadow flicker section of its response at pages 2 and 3 of appendix B is the following:-

> *"The Department of Energy and Climate Change for England stated in its report 'Update of UK Shadow Flicker Evidence Base' (2011) that* ***it is*** *considered that the frequency of the flickering caused by the wind turbine rotation is such that it should not cause a significant risk to health. Frequencies higher than 3 Hz but below 10 Hz are widely used in discotheques and the Epilepsy Foundation has made a statement that frequencies below 10 Hz are not likely to trigger epilepsy seizures."*
>
> *The Yellow River Wind Farm is likely to operate at 6-18.5 RPM (revolutions per minute) which translates into a blade pass frequency of less than 1Hz" (Emphasis added).*

66. While there is no agreed standard for shadow flicker impact in Ireland, Condition 11 incorporates the standard proposed in the draft Guidelines together with a monitoring requirement to be agreed with Offaly County Council. It is clear that the inspector considered the applicants' observations and had regard to the likely effects on human health. The court is therefore of the opinion that there was ample evidence on which the Board and its inspector could come to their decision. The *O'Keeffe* irrationality test is appropriate in the present circumstances as the Board properly considered all of the matters required to be taken into account and did not take into account any matters which it should not as outlined by Clarke J. in *Sweetman*. The court considers that on the facts, a higher level of scrutiny is not required. Furthermore, it is clear that even if the standard of review applied in European administrative law, that of manifest error, was to be applied to the present case, it would not avail the applicant. There is no evidence that a manifest error has occurred in the respondent's assessment of either of these issues.

Property Prices
67. The inspector concluded at section 13.16.3 of his report:-

> *"Housing Stock: There is no evidence that wind turbines in the area have any significant impact on house prices. Objectors have submitted studies in relation to wind farms and property prices from other countries. No studies have been carried out to date in Ireland, and the results from other countries do not necessarily translate to Ireland or to this part of the country in particular. The proposed development has been sited to maximise the separation distances between turbines and houses. No house is located within 500 metres of any turbine (apart from the houses of two beneficial owners, and with their written consent)."*

68. The applicants submit that the respondent, by deferring to its inspector's report, failed to take account of evidence submitted in relation to the causal relationship between wind farms and property prices simply on the basis that these studies were carried out in other jurisdictions. The applicants further submit that the inspector failed to assess the parameters and variables in the studies in relation to whether they could be applied in the Irish context. The applicants submit that it is clear from the judgment of *Jutta Leth v. Austria* case C-420/11 unreported judgment dated 14th March, 2013 that an EIA must assess the pecuniary effects of a proposed development which is subject to EIA and which are a direct consequence of the environmental effects of that project.

69. The respondent submits that on the evidence the inspector was entitled to conclude that there was no evidence that wind turbines had any significant impact on house prices. The respondent submits that the *Jutta Leth* case is not authority for the proposition that failing to carry out a proper EIA of the effect on house prices warrants a refusal of planning permission. The respondents submit that the case held that compensation was only payable if there was an environmental effect as opposed to a secondary pecuniary effect.

70. Ms. Leth's home was within the security zone of Vienna-Schwechat Airport since 1997. The authorities extended the airport without undertaking an environmental impact assessment. Ms. Leth brought proceedings in the Austrian Regional Court for compensation of €120,000.00 for pecuniary damage allegedly sustained as a result of the decrease in value of her home following the extension of the airport as a result of noise nuisance and secondly a declaration that the defendants would be liable for any future damage. The first element of her claim was held to be time barred. On appeal, the higher Regional Court held that the claim for the €120,000.00 related only to pecuniary damage which did not come within the objective of protection pursued by the provisions of European Union law, in particular those of the relevant directives and national law. Subsequently, the appeal against the dismissal of the claim for future damage came before the Supreme Court which stayed proceedings and referred two questions for a preliminary ruling:

Is Article 3 of Directive 85/337 as amended to be interpreted as meaning that:

> 1. The term "material assets" covers only their substance or also their value;
>
> 2. That the fact that an environmental impact assessment has not been carried out, in breach of Directive D85-337, confers on an individual a right of compensation for pecuniary damage caused by decrease in the value of his property resulting from the environmental effects of the project under examination.

71. At para. 35 of its judgment the Court said:

> In circumstances where exposure to noise resulting from a project covered by Article 4 of Directive 85/337 has significant effects on individuals, in the sense that a home effected by that noise is rendered less capable of fulfilling its function and the individual's environment, quality of life and, potentially, health are affected, a decrease in the pecuniary value of that house may indeed be a direct economic consequence of such effects on the environment, this being a matter which must be examined on a case by case basis.

72. The court ruled that Article 3- "must be interpreted as meaning that the environmental impact assessment, does not include the assessment of the effects which the project under examination has on the value of material assets. However, pecuniary damage insofar as it is the direct consequence of the effects of the environment of a public or private project, is covered by the objective of protection pursued by Directive 85/337.

73. It is clear that allegations that a project will have or has had a detrimental effect on property values must be considered on a case by case basis, be site specific and based on specific environmental nuisance, such as noise.

74. There is no evidence that the applicant's homes have been affected by any identified nuisance likely to have the effect of rendering their homes less capable of fulfilling the function of a dwelling or that the environment, quality of life or health would be affected. A mere general assertion is insufficient.

75. In support of their contention the applicants point to paragraph 4-08 of Simons, *Planning and Development Law*, 2nd Edition, (Dublin, 2007) where the author discusses the decision in *Maher v. An Bord Pleanala* [1993] 1 I.R. 439, which the High Court held that it was clear that depreciation in value of property in the vicinity of a visually obstructive back garden development and the deterrence of copy cat applications was a valid reason for refusing planning permission. The decision in Maher was based on site specific environmental impacts which are not relevant to wind farms.

76. The applicants also cite a study by Stephen Gibbons published in April 2014 entitled *'Gone with the Wind: Valuing the Visual Impacts of Wind Turbines through House Prices'*. The conclusion of the study suggested that "*wind farm visibility reduces local house prices, and the implied visual environmental costs are substantial*

77. The response of WGE of 3rd April, 2014, demonstrates that the Gibbons' study was considered but deemed not to be authoritative. At page 92 of its response

WGE states:-

> *"There is no evidence of the standard academic requirement of reviewed research in this blog/paper, neither has there been any response or comment from the UK Government or Renewables UK".*

The response continues:-

> *"Anti- wind campaigners were banned from distributing leaflets stating "that home values will fall" by the British Advertising Watchdog (ASA). The ASA ruled that it was misleading to state that house prices would fall when a local wind farm was built. It also noted that the current guidance of the Royal Institute of Chartered Surveyors gives no definitive answer on the question of whether or not wind farms affect property prices."*

Decision
78. The inspector had before him the invalidated Gibbons' report and reports from other countries taking the opposite view. He had no evidence of Irish or local house prices being affected by wind farms. In the circumstances, applying the O'Keeffe test, the court considers that the inspector was entitled to conclude as he did. (Even if the court applied the manifest error test, the court could not come to a different decision on this issue as there is no evidence that a manifest error has occurred in the Respondent's assessment.)

Ground 2 – The applicants' case in relation to The Habitats Directive
79. The Directive provides for the implementation of measures to conserve certain types of natural habitat and certain species which are defined as having priority, to prevent further deterioration and threats to their existence. The object of the measures is the avoidance of deterioration to natural habitats and the habitats of species and significant disturbance of species for which the areas have been designated.

80. Article 6 (3) of the Directive incorporates a two stage test;

> a. The first stage is to determine whether the project in question is 'likely to have a significant effect on the site'. If there is a possibility that there would be a significant effect, there will then be a need for an appropriate assessment for the purposes of Article 6 (3). In essence, the first stage acts as a trigger for the requirement to carry out an appropriate assessment. It is not necessary to establish such an effect, just determine that there may be one. This stage introduces a *de minimis* threshold to exclude plans or projects that have no appreciable effect on the site. The question at the first stage is simply- *should we bother to check*?
>
> b. The second stage is that an expert assessment must determine whether the plan or project has 'an adverse effect on the integrity of the site'. This is a substantially higher threshold than the first stage. It is an appropriate assessment of the implications of the project in question for the conservation objectives of the site. The plan or project should be examined on the basis of the best scientific knowledge in the field. The question in the second stage is *what will happen to the site if this plan or project goes ahead?- is that consistent with maintaining or restoring the favourable conservation status of the habitat or species concerned*?

81. Mr. Browne on behalf of the applicants submits that it is impermissible to consider mitigation measures at the screening stage. He further submits that the jurisprudence indicates that if there is a doubt as to the efficacy of a condition, an appropriate assessment must take place. In this regard, the applicants say that the notice party accepted that there was a potential impact in relation to the whooper swan and as a result proposed mitigation measures to compensate for that impact, which the inspector agreed and adopted.

82. The applicants rely on the observation of Advocate General Kokott at paragraph 71 of his opinion in *Waddenzee Case* C-127/02, as follows:-

> *"In principle, the possibility of avoiding or minimising adverse effects should be irrelevant as regards determining the need for an appropriate assessment. It appears doubtful that such measure could be carried out with sufficient precision in the absence of the actual basis of a specific assessment."*

The applicants submit that that statement incorporates the precautionary principle which is the basis of the National Parks and Wildlife Service Guidelines.

83. In response the respondent and the notice party submit the following arguments:-

i. The applicants misunderstand the significance of the whooper swan and its presence on the development site because the site is not a designated European site under the Habitats Directive, and;

ii. Even if they are incorrect in that submission, the protection of the whooper swan can be assessed by consideration of mitigation measures at the screening stage in accordance with Article 6 authority.

Ground I – Status of the Whooper Swan

Preliminary

84. At paragraph 75 of her judgment in *Kelly*, Finlay Geoghegan J. quoted the inspector's report in that case at para 11.1 :-

> *"International and national policies actively support and encourage the growth of renewable energy sources and wind energy in particular. However, the government's guidelines on wind energy development state that the implementation of renewable energy policies must have regard for the environment, specifically the legally binding requirements of the EU Directives on Birds and Habitats" (Emphasis added).*

85. The first sentence of Article 4.4 of the codified Birds Directive 2009/147/EC (which replicates the identical provision in Directive 79/409/EEC) states :-

> *'In respect of the protection areas referred to in paragraphs 1 and 2,Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting birds, in so far as these would be significant having regard to the objectives of this Article.'*

86. Article 4.1 directs that Annex 1 species are to be subject to special conservation measures concerning their habitat and obliges Member States to classify the most suitable territories in number and size as Special Protection Areas (SPAs) for the conservation of these species. Article 4.2 obliges Member States to take similar measures for regularly occurring migratory species not listed in Annex 1.

87. Article 7 of the Habitats Directive directs that obligations of Member States pursuant to the first sentence of Article 4.4 of the Birds Directive be replaced by the obligations of appropriate assessment in paragraphs 2, 3 and 4 of Article 6 of the Habitats Directive. The whooper swan is an Annex 1 species. Section 177U(1) of the PDA, as amended, makes screening mandatory if, in view of best scientific knowledge, the proposed development is likely to have a significant effect on a European site. The Yellow River development site has not been classified as an SPA. However, there are two Natura 2000 sites within the *'likely zone of impact'* of 15 Km recommended in section 3.2.3 of the Guidance for Planning Authorities, namely Lough Ennel SPA approximately 10 Km to the north west and the River Boyne and River Blackwater SPA approximately 14 Km to the north east. The whooper swan is not a species which is part of the qualifying interests in either SPA.

Conclusion
88. The whooper swan has not been classified as part of the qualifying interest for special protection in either the development site or the two SPAs within 15Km of it. Consequently the obligation to proceed with screening in accordance with Article 6 of the Habitats Directive as implemented by s.177U of the PDA, as amended in respect of the whooper swan did not arise.

89. The Board's preliminary argument that the applicants misunderstood the significance of the whooper swan and its presence on the development site because the site is not a designated European site under the Habitat's Directive is correct.

90. In the event that the view I have taken is wrong and the Board was obliged to proceed with screening in respect of the whooper swan, I will consider the Applicants' substantive argument on mitigation measures in respect of the whooper swan.

Ground II - Mitigation Measures in Screening for Appropriate Assessment
91. As there are eight Natura 2000 sites within a 15 Km radius of the development site, the Board was obliged to carry out the screening for appropriate assessment in accordance with Article 6. The Board stated in its direction that it carried out a screening exercise in relation to the potential for impacts on nearby Natura 2000 sites in which it had regard to the nature and scale of the proposed development, the nature of the receiving environment, the screening report of GWE, the submissions received on ecological matters and the inspector's report. The Board concluded that the wind farm would not be likely to have a significant effect individually or in combination with other plans or projects on any European site.

92. In his report at section 13.15.6, the inspector considered the developer's screening report and concluded that the wind farm would have no detrimental impact on habitats within the eight European sites. As regards impacts on avian species indicated as conservation interests within the SPA's, the inspector concluded that the separation distances between the closest turbine and any site was more than sufficient to ensure that there would be no detrimental impact (10km in the case of Lough Ennell SPA and 14km in the case of the River Boyne and River Blackwater SPA).

93. Separately at section 13.15.7, the inspector considered the position of the whooper swan and noted that it was not a species which was part of the qualifying interests of Lough Ennell SPA. The swans winter within the development site area on improved grassland in the townland of Derryarkin. They roost at night at nearby quarry ponds (Roadstone and Kilmurray).The inspector noted that the feeding areas and the quarry ponds were man-made and their continuation could not be predicted as arable farming would obviously remove grassland and drainage could affect the quarry ponds. The mitigation measures proposed by the developer included: restriction of site-works for T1-T7 to months April-October; limitation of habitat loss to turbine bases and access tracks only; hazard warning lights on hubs T1-T7 to render them more visible during dusk and dawn to be used November to March only; undergrounding of all cables associated with turbines; and winter monitoring prior to construction and for a period of 5 years thereafter.

94. Having considered the mitigation measures proposed and the potential effects on the whooper swan population as a result of dislocation and barrier collisions, the inspector concluded that the swans would avoid the turbines when constructed. The swans would see the turbines in daylight and their flight at night from feeding grounds to roosts are at a level of 30km, well below the lowest point of turbines. The lighting of the turbines at dusk and dawn rendered the turbines more visible during those periods.

95. In its direction dated 29th May, 2014, the Board noted the additional assessment (2013-14 winter survey) undertaken by GWE in relation to whooper swans and agreed with its findings. In its decision the Board adopted the inspector's condition no. 21 as condition no. 17. The applicants have not challenged the conclusion of the Board and its inspector. They merely assert that it was legally impermissible to consider mitigation measures at the screening stage of appropriate assessment.

96. In *Hart v. Secretary of State for Communities and Local Government and Others* [2008] EWHC 1204, Sullivan J held at paragraph 61:-

> *"While it is true that 'effective mitigation of adverse effects on Natura 2000 sites can only take place once those effects have been fully recognised, assessed and reported', if the competent authority is satisfied at the screening stage that the proponents of a project have fully recognised, assessed and reported the effects and have incorporated appropriate mitigation measure in the project, there is no reason why they should ignore such measures when deciding whether an appropriate assessment is necessary.'*
>
> *Under regulation 48(2) the competent authority may ask the proponent of a plan or project for more information about the plan or project, including any proposed mitigation, not merely for the purposes of carrying out an appropriate assessment but also in order to determine whether appropriate assessment is required in the first place. If for any reason the competent authority is not satisfied, then it will require an appropriate assessment. As a matter of common sense, anything which encourages the proponents of plans and projects to incorporate mitigation measures at the earliest possible stage in the evolution of their plan or project is surely to be encouraged. What would be the point, from the proponents point of view, of going to the time, trouble and expense of devising specific mitigation measures designed to avoid or mitigate any effect on an SPA and incorporating those proposals into the project, if the competent authority was then required to ignore them when considering whether an appropriate assessment was necessary?"*

97. Earlier at paragraphs 57-59 Sullivan J. dealt with the opinion of Advocate General Kokott in *Wadensee* where at para 71 he had stated:-

> *"In principle, the possibility of avoiding or minimising adverse effects should be irrelevant as regards determining the need for an appropriate assessment. It appears doubtful that such measure could be carried out with sufficient precision in the absence of the factual basis of a specific assessment."*

98. Sullivan J. emphasised that what the Advocate General was talking about was the possibility of measures to minimise damage being taken into account. Sullivan J concluded at paragraph 59:-

> *"No specific mitigation measures were being put forward, much less were such measure incorporated into, so that they formed part of, the cockle fishing licence. There can be no dispute that the mere possibility that mitigation measures might be devised which might reduce the effect of a project on an SPA would not be sufficient to enable a competent authority to conclude, without an appropriate assessment, that the project would not be likely to have a significant effect on the SPA". (Emphasis added)*

99. In this case the developer has proposed specific and concrete mitigation measures. At paragraph 76, Sullivan J concluded:-

> *"76. For all these reasons, I am satisfied that there is no legal requirement that a screening assessment under reg 48(1) must be carried out in the absence of any mitigation measures that form part of a plan or project. On the contrary, the competent authority is required to consider whether the project, as a whole, including such measures, if they are part of the project, is likely to have a significant effect on the SPA. If the competent authority does not agree with the proponents view as to the likely efficacy of the proposed mitigation measures, or is left in some doubt as to their efficacy, then it will require an appropriate assessment because it will not have been able to exclude the risk of a significant effect on the basis of objective information (see Wadensee above)".*

100. In *Rossmore Properties and Ors v An Bord Pleanala* [2014] IEHC 557, Hedigan J. adopted the reasoning of Sullivan J. at paragraph 61 in relation to mitigation measures at screening stage.

101. In the present circumstances, the development site is not a European site. A small population of whooper swans use part of the site during the winter. The whooper swan is an Annex 1 species specified in the Birds Directive. Article 7 of the Habitats Directive (92/43/EEC), as amended, applies the requirements for Appropriate Assessment under Article 6 to obligations under Article 4(4) of the Birds Directive (79/409/EEC) as codified in Directive 2009/147/EC). However, whooper swans do not have a qualifying interest in any of the designated sites within 15 km of the development. Consequently, in the circumstances, Article 6 obligations did not arise in the case of the whooper swan beyond establishing at screening stage, that the whooper swan did not have a qualifying interest in any relevant designated European site.

102. Nevertheless, GWE carried out a screening assessment (19/11/13) which included proposals for mitigation measures. I agree with the submission of Ms. Butler that the developer went further than was necessary in its response to submissions. In doing so GWE provided an additional survey of the whooper swan carried out over the 2013/2014 winter period. The screening assessment showed that "the main influence on the presence of the whooper swan population in the Derryarkin area was current farming practices. Changes in agriculture, such as lowering of farming intensity, could cause the swans to abandon fields that they presently use. Similarly, improvements to existing fields not currently used by swans could attract them in the future. The assessment concluded that "*the proposed Yellow River wind farm will not add significantly to any current adverse impacts on the Whooper Swan population*." In its conclusion at paragraph 3.6 the assessment stated:-

> *"Whilst the proposed development could have an adverse effect on a local Whooper Swan population,(Annex1 species),it can be objectively shown that the sensitive design of the project along with the mitigation measures proposed will ensure that the project ,either alone or in combination with other projects or land uses, will have no significant adverse impacts on the conservation status of this important European species."*

103. The winter 2013/2014 survey concluded:-

> *"While the number of swans at Derryarkin is substantial, the threshold for national importance, 130, was not exceeded in the two winters. As there is no history of swan usage in this area of County Offaly, it has to be assumed that the population is of relatively recent origin and seems to be availing of suitable grassland feeding in proximity to the recent development of cutaway bog and quarries which provide for roost sites. It is noted that the evaluation of impacts on the Whooper Swan population by the development as presented in the EIS and the Appropriate Assessment Screening Report is not altered by the findings of the 2013-14 winter survey. Also, no additional mitigation measures are considered necessary as a result of the findings of the 2013-14 winter survey".*

The Board expressly agreed with these findings.

104. The Board and its appointed inspector were entitled to take into consideration the mitigation measures proposed by the developer for the purpose of assessing if the proposed development was likely to have a significant effect on the European sites under Section 177U of the PDA, 2000, as amended. Specifically, the Board was entitled to take into account the mitigation measures proposed in respect of the protection of the whooper swan at the screening stage.

Conclusion

105. The applicants have failed to discharge the onus of proof in respect of any of the grounds pursued in this hearing. Accordingly the Court orders that these proceedings be dismissed.