THE HIGH COURT

[2013 No. 734 J.R.]

BETWEEN

JAMES HARTEN and PATRICK HARTEN

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CAVAN COUNTY COUNCIL, RODNEY WILTON, ERNE VALLEY CONCERNED RESIDENTS AND

ROBERT BOADEN

NOTICE PARTIES

JUDGMENT of Mr. Justice McDermott delivered on the 29th day of January , 2018

1. The applicants apply to this court by way of judicial review for the following reliefs:

> (1) An order of *certiorari* quashing the decision of An Bord Pleanála dated 22nd August, 2013 granting planning permission for a development comprising a change of use of an existing mushroom compost manufacturing facility to a proposed municipal sewage sludge composting facility and all associated site works at Carnagh Upper and Kilcogy, County Cavan;
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> (2) A declaration pursuant to Article 10(a) of the EIA Directive that the applicants are entitled to challenge the within proceedings at a cost that is not prohibitive and/or is entitled to costs protection under the said Directive.
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> (3) A declaration that the within proceedings are proceedings to which s.50(b) of the Planning and Development Act, 2000 applies and that the applicants herein are entitled to the costs protection afforded by that section.

Background

2. On 31st July 2012 the Second Named Notice Party, Mr. Rodney Wilton, applied to the First Named Notice Party, Cavan County Council, for planning permission for a development comprising the change of use of an existing mushroom compost manufacturing facility to a municipal sewage sludge facility and associated site works. The proposed development the subject of the application for planning permission (Planning Reg. No. 12/209) comprised:

> (1) the change of use of an existing mushroom compost manufacturing facility for use as a municipal sewage sludge facility;
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> (2) change of use and upgrading of existing main process buildings to facilitate sludge composting activities;
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> (3) change of use and upgrading of 3 composting tunnels (1 of which is partially constructed) to facilitate sludge composting;
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> (4) proposed new Bio-filter infrastructure to be positioned over the upgraded composting tunnels;
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> (5) proposed new advanced sewerage treatment unit and storage tank to accommodate staff toilet/wash room facilities located in existing office;
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> (6) two new storm water attenuation areas including by-pass separators;
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> (7) construction of a designated refuelling area;
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> (8) removal of the existing bridge and construction of a new bridge in a revised location across a local river, and
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> (9) all ancillary works.

3. The application for planning permission was accompanied by an Environmental Impact Statement (EIS) and a Screening Report for Appropriate Assessment (AA). The site of the proposed development is located in Carnagh Upper, Co. Cavan, which is situated approximately 3.5km northwest of Kilcogy, 8km north of Granard and 17km southwest of Cavan town. Carnagh Upper is a rural area, the majority of land being used for agricultural activities, primarily agricultural grazing for cattle and horses. There is a pattern of "one off" housing in the area. The proposed development is a 2.5 hectare site which is part of an overall land holding of 5.635ha. Access to the site is reached via an existing site entrance from Local Road L-65610. The western and southern boundaries of the site adjoin undeveloped agricultural land and the north/north east of the site adjoins the first applicant's land comprising a detached farmhouse and ancillary outbuildings, situated approximately 65m from the site of the proposed development. The appeal site lies within 150m of the Lough Gowna proposed National Heritage Area (pNHA), with the south western corner of the site being approximately 118m from the heritage area. Lough Oughter and Associated Loughs,a designated Special Protection Area (SPA) and Special Area of Conservation (SAC), are located approximately 15km from the site the subject of the planning application.

Planning Permission granted by Cavan County Council

4. On 7th February 2013 Cavan County Council granted planning permission for the proposed development subject to 19 conditions and in particular, that the developer:

- Obtains the necessary waste and sludge management certificates and permits under the Waste Management

(Registration of Sewage Sludge) Facility Regulations, 2010 prior to the commencement of facility operations;

• Obtains the approval of Cavan County Council on reports concerning the operational efficiency of the odour management systems prior to the commencement of facility operations and activities;

• Complies with noise emission restrictions set down in Schedule 2 of the decision of 7th February 2013;

• Complies with operational hour restrictions set down in Schedule 2 of the decision of 7th February 2013;

• Undergoes consultation with, and submits method statements for any construction works that may impact on the watercourse for approval by, Inland Fisheries Ireland;

• Maintains an adequate programme for the maintenance of a wheel wash facility and any spillage collection facilities. Records of maintenance works are to be kept on the property for inspection by Council officials;

• Undertakes that all fuel oils to be used during the construction and operation of the facility shall be stored and bunded according to best practice;

• Submit, along with the bio-solid recipient farmer, a fully completed and signed Agreement and Land Owner Consent Letter;

• Install a proprietary treatment system and submit further plans for agreement which should indicate the type of system to be installed andits compliance with the published E.P.A's Code of practice on water treatment and disposal and other stipulated conditions in respect of the treatment and disposal of sewage effluent and maintenance of the system. Confirmation was to be provided that the plant installed was installed in accordance with the specifications of the supplier of the proprietary effluent treatment system. A written confirmation was required from a suitably qualified engineer that the percolation system had been constructed in accordance with the E.P.A's "Code of Practice: Wastewater Treatment and Disposal Systems Serving Single Houses 2009" .

• Retains all trees on site except those that require to be removed to facilitate the physical development of the site;

• Conform with the Inland Fisheries Ireland "Requirements for the Protection of Fisheries Habitat during Construction and Development Works at River Sites";

• Complies with restrictions on traffic on the L65610 local road as set out in Schedule 2 of the decision of 7th February 2013;

• Implements in full all mitigation measures as outlined in the EIS submitted with the application for planning permission of the 31st July 2012;

• Employ, prior to commencement of the development, a specialist company to carry out an extensive asbestos survey and risk assessment to determine potential exposure levels;

• Complies with the prohibition on spreading biosolids within designated or proposed site, namely a Special Protection Area (SPA), Special Area of Conservation (SAC), or Natural Heritage Site, in particular Lough Gowna proposed Natural Heritage Area;

• Make alterations to the placement, direction, intensity and timings of lighting on site in the event of complaints regarding lighting associated with the proposed development.

Appeals to An Bord Pleanala

5. On 5th March 2013, the applicant and Fourth Named Notice Party, Mr. Robert Boaden, submitted an appeal to An Bord Pleanála against the County Council's decision of 7th February. A separate appeal was also submitted by the Erne Valley Concerned Residents, the Third Named Notice Party. In their appeal, the appellants raised a number of concerns relating to the traffic, flooding and odour implications of the proposed development. It was submitted that the Local Road L-65610 and other local roads were unsuitable to service the proposed development. They stated that the acceptance of the suitability of these roads was founded on incorrect and misleading data regarding both their historic and intended future use to service the proposed development. The appellants also stated that the claim in the EIS submitted by the second notice party that there are "inter-visible" passing places along the L-65610 was incorrect, that the agreement of residents for use of privately owned set-backs as passing bays was not obtained and that the safety of the road for the purposes of carrying the traffic expected to arise out of the functioning of the proposed development had not been demonstrated.

6. The appellants also appealed against the acceptance by the Council that the proposed odour/emission control regime was capable of protecting the residents nearest the proposed development from significant odour nuisance. They submitted that the proposed emissions model did not include adequate safeguards to prevent the emission of odours and that the Council's grant of permission allowed the development to be constructed prior to the issuing of an appropriate certificate.

7. The appellants also appealed on the ground that the proposed location of the development on the Gowna flood plain, was wholly unsuitable. They stated that incorrect information in respect of site flooding was submitted in the application for planning permission and that there was a conflict on important issues in the materials relied upon in respect of site flooding history and flood risk, and in relation to the height of the site entrance. The appellants point to photographic and documentary evidence of flooding on the site from 2009.

8. Finally, the appellants appealed against the decision of the County Council insofar as they had regard to historic planning decisions related to withdrawn planning applications to reach a decision to grant planning permission, and that the decision of the Council to grant permission along with the 19 conditions thereto indicated a lack of care on the part of the Council.

An Bord Pleanala

9. On foot of the appeals, An Bord Pleanála appointed Ms. Fiona Fair to conduct an inspection of the proposed development site and produce a report on its suitability for the proposed development and activities arising therefrom.

The Inspector's Report
10. The Inspector conducted a site inspection of the appeal site on 9th May 2013 and completed her Inspector's Report on 16th May 2013. She noted that the maximum tonnage of waste to be accepted at the site would be 3,000 tonnes of municipal sludge feedstock and 500 tonnes of amendment material. The typical output of bio-solids production from the composting process would be approximately 1,500 tonnes per annum.

Recommendations
11. The Inspector's report was based upon the information submitted to the County Council and An Bord Pleanála, and the site inspection. It recommended (at p. 55) that the decision of the Council of the 7th February 2013 be overturned and planning permission for the development be refused. The Inspector states under the heading "Reasons and Considerations" at p.56 of the report:-

> " 1. The site is located just 118m south east of Lough Gowna designated 'Major Lake' and pNHA. Carnagh Lough, a seasonal lake, is located approx. 500m northwest (upstream) of the site. The OPW Flood Mapping Tool demonstrates that the site lies on the boundary of an area of 'benefitting lands'… the OPW mapping also indicates that flooding has been reported in the stream to the south of the site at the point where it passes under the N55 road. There is also documented and photographic evidence of flooding on the site and at the site access. The development would be contrary to stated policy of the Cavan County Development Plan 2008-2014… The proposed development would also be contrary to the Planning System and Flood Risk Management Guidelines for Planning Authorities, Nov. 2009, which clearly sets out that development should be located in areas with little or no flood hazard.
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> 2. The site is located on a minor road, L-6561-0 which is seriously substandard in terms of width and alignment. Having regard to the scale of the proposed development, including the movement of 3000 tonnes of municipal sludge feedstock and 500 tonnes of amendment material it is considered that the proposed development would endanger public safety by reason of traffic hazard and obstruction of road users.
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> 3. Having regard to the location of the proposed municipal sludge composting treatment facility in close proximity to existing dwellings, in particular the Harten residence located only 65 meters distant, it is considered that the proposed development, notwithstanding the mitigation measures proposed in the Environmental Impact Assessment submitted with the application, would seriously injure the amenities of properties in the vicinity by reason of visual impact, noise and general disturbance and by reason of odour impact. The proposed development would, therefore be contrary to the proper planning sustainable development of the area.
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> 4. The Board is not satisfied that the proposed development would not be likely to have significant adverse impacts on a sensitive environment; based upon (i) lack of information provided in relation to source of wastewater sludge (ii) lack of information provided with respect to a landbank for land spreading of the end product and (iii) lack of information provided in relation to consideration of alternative sites. The development would thus be contrary to the proper planning and sustainable development of the area."

An Bord Pleanála's Decision
12. In a Direction dated 22nd August 2013, An Bord Pleanála granted planning permission for the change of use sought. The Board considered the statements on file, including the EIS submitted with the application, further information submitted to the planning authority on foot of the appeals, and the Inspector's report. It concluded that the files submitted were "adequate in identifying and describing the direct and indirect effects of the proposed development." The Board "completed an environmental impact assessment, and agreed with the Inspector in her assessment of the likely significant effects of the proposed development". The Direction states that the Board "generally adopted the report of the Inspector" except in relation to the:-

> "• susceptibility of the lands to flooding;
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> • traffic impacts of the proposed development
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> • impact of the proposed development on residential amenities in the area and
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> • likelihood of serious adverse impacts on the environment."

13. In its reasons for declining to adopt the report of the Inspector in respect of the above matters, the Board had regard to the fact that the proposed development involved the reuse of an existing permitted facility, and did not involve any works that will result in an increased risk of flooding. The Board also accepted the contents of the Flood Risk Assessment submitted with the planning application which stated that the development site is in excess of 1 metre above the 100 year flood event level.

14. In respect of the effects on traffic of the proposed development, the Board states that it had regard to the traffic movements associated with the previous use of the site and considered that the traffic movements associated with the proposed development are considerably less than those associated with the previous use and are stated as being of the order of one heavy goods vehicle per day. The Board concluded that this level of activity on the L-65610 and other local roads was acceptable in terms of traffic safety and convenience.

15. The Board also considered the odour assessment and management proposals submitted with the application. It considered that "subject to compliance with conditions… the proposed development would be acceptable and would not be such as to seriously injure the residential amenities of property in the area". The Direction states that the Board did not share the concerns of the Inspector in relation to the source of the sludges to be treated as the stated source of the wastewater sludge to be processed at the site is municipal wastewater treatment plants. The Board also concluded that the location of the proposed site was acceptable having regard to the consideration of alternative sites in the Environmental Impact Statement and the planning history of the development site.

16. The Board's decision to grant planning permission in respect of the development was subject to 13 conditions which generally conform with the 19 conditions to the planning permission set out by Cavan County Council in the decision of 7th February 2013.

Statement of Grounds
17. The applicants in very broadly drafted grounds set out at paragraphs E(5)-(26) of the statement grounding the application for judicial review, claim that the reasons and considerations set out in the Board's Direction of the 22nd August 2013 are insufficient in law, do not properly engage with the issues before it and fail to comply with the requirements of s.34 of the Planning and Development Act 2000, the EIA Directive and the Aarhus Convention.

18. In their appeal the applicants raised concerns in respect of road traffic safety, flooding, odour emissions and the environmental sensitivity of the area surrounding the appeal site. These concerns were considered and some were shared or accepted by the Inspector who ultimately recommended that the Board refuse planning permission for the development for the reasons set out above.

19. It is claimed in paras. E(5), (6) and (12) of the statement of grounds that the reasons set out in the Board's decision and direction of 22nd August 2013 are inadequate as they do not properly disclose the reasoning of the Board or the matters considered during its deliberations and therefore fail to address or engage properly, or at all, with the concerns expressed by the Inspector in the Report. In particular, it is claimed that the Board failed to give adequate reasons for not following the recommendations of the inspector and failed to comply with the provisions of s.34 of the PDA . It is said that the decision of An Bord Pleanála is therefore ultra vires, void and of no legal effect.

20. The applicants claim in paras. E(15) and E(28) that the decision of the Board, in light of its failure to engage with the concerns and recommendations of the Inspector, particularly in respect of the issue of site flooding, has "failed to discharge its obligation to give a reasoned decision in respect of its deliberations and insofar as any reasons are given, those reasons are flying in the face of reason and common sense and accordingly, said decision is irrational".

21. The applicants also claim, at para. E(26) of the statement of grounds that the Board failed in its statutory duty to carry out and/or record an Environmental Impact Assessment in respect of the proposed development.

22. At paragraph E(29)-(34) of the statement of grounds, the applicants claim that the Board has also failed to properly conduct an Appropriate Assessment in accordance with article 6 of Directive 92/43/EEC of 21st May 1992 on the conservation of natural habitats and of wild fauna and flora. It is submitted that where a proposed development is likely to have an impact on a Natura 2000 site, namely Lough Oughter and associated loughs designated SAC and SPA, An Bord Pleanála is obliged in accordance with national and European Law, to conduct a Stage 2 full AA in respect of the proposed development. The applicants also claim that the Board failed, in accordance with its obligations pursuant to s.177(u) of the Planning and Development Act 2000, as amended, to record its determination on whether a Stage 2 full AA was required following the conclusion of a screening for AA.

Obligation To Give Reasons and Unreasonableness/Irrationality – Grounds E (5),(6),(12),(15) and (28)
23. It is submitted that the reasons and considerations given in the Board's direction and decision of 22nd August 2013 are insufficient, do not properly engage with the issues before it and are inadequate. The reasons are said to be inadequate as they fail to disclose the reasoning of the Board or the matters considered during its deliberations. In particular, it is submitted that the failure of the Board to provide reasons for departing from the decision of the Inspector renders the decision ultra vires, void and of no legal effect. It is also submitted that the decision is unreasonable and/or irrational in light of its failure to engage with the concerns and recommendations of the inspector in relation to the issue of traffic infrastructure and flooding. The court will address these related issues together.

Adequacy of reasons, unreasonableness and irrationality
24. Section 34(10) Planning and Developments Act 2000 (hereinafter PDA) provides that:-

> "(a) A decision given under this section or section 37 and the notification of the decision shall state the main reasons and considerations on which the decision is based, and where conditions are imposed in relation to the grant of any permission the decision shall state the main reasons for the imposition of any such conditions provided that where a condition imposed is a condition described in subsection (4), a reference to the paragraph of subsection (4) in which the condition is described shall be sufficient to meet the requirements of this subsection.
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> (b) where a decision by the planning Board under section 37 to grant or to refuse permission is different in relation to the granting or refusal of permission from the recommendation in -
>
> > (i)…
> >
> > (ii) a report of a person assigned to report on an appeal on behalf of the Board, a statement under paragraph (a) shall indicate the main reasons for not accepting the recommendation in the report or reports to grant or refuse permission".

25. The principles regarding the adequacy of reasons and statement of considerations for a planning authority's decision are well established. Although the reasons given by a planning authority for a decision need not be discursive, they must be sufficiently detailed in order to enable the courts to review the decision and to satisfy people having recourse to the tribunal that the authority has directed its mind adequately to the issue before it (*O'Donoghue v. An Bord Pleanála* [1991] I.L.R.M. 750, *per* Murphy J. at pg. 757). The reasons furnished by the Board must also enable an applicant to consider whether there is a reasonable chance of success in appealing against the decision of the planning authority and to arm himself or herself for the hearing of such an appeal (*The State (Sweeney) v. Minister for the Environment* [1979] I.L.R.M. 35, *per* Finlay P.). Section 34(10) of the PDA, changed the law to include an obligation on a planning authority to provide a statement of the main reasons for its decision and the main considerations on which its decision was based. Section 34(10)(b), which imposed an obligation on a planning authority to indicate its main reasons for not accepting the recommendations of an inspector was considered in *Mulholland v. An Bord Pleanála (No.2)* [2006] 1 I.R. 453. The conclusions of Kelly J. in respect of the principles applicable to assessing the adequacy of the statement of reasons and considerations of the board are worth setting out in full:-

> "30. I accept, and indeed it is not seriously argued otherwise, that s.34(10)(a) and (b) of the Act of 2000 brought about changes to the pre-existing statutory position already identified. These changes were by way of expansion to that position. That expansion involved, insofar as relevant:-
>
> > (a) an obligation on both the planning authority and the respondent to give reasons irrespective of whether the decision is to grant or refuse permission;

(b) an obligation to state the main reasons and considerations on which a decision is based; and

(c) an obligation to state the main reasons for not accepting the recommendation of the respondent's inspector.

31. It is noteworthy that the legislature made no attempt in the Act of 2000 to alter the existing jurisprudence on what is required for reasons to be adequate at law. Thus, the pre-existing caselaw on adequacy of reasons (*O'Donoghue v.An Bord Pleanála* [1991] I.L.R.M. 750 and *State (Sweeney) v. Minister for the Environment* [1979] I.L.R.M. 35) continues to apply. That is so whether the reasons are those mentioned in (a), (b), or (c) *supra*.

32. Thus there is no obligation to provide a discursive judgment but the reasons given must, if they are to be considered adequate, comply with the requirements set forth in the two Irish cases cited…

33. Insofar as the reasons at (c) *supra* are concerned the test remains the same. I do not accept that the English authorities which I have quoted from create a more onerous obligation than what is required in this jurisdiction. Both *R. v. Westminster City Council* [1996] 2 All E.R. 302 and *The London Residuary Body v. Secretary of State for the Environment 58* (1998) J.P.L 637 do no more than apply pre-existing, well established principles to their particular facts. These pre-existing principles are no different to those that were identified in the Irish Cases of *O'Donoghue v. An Bord Pleanála* [1991] I.L.R.M. 750 and *State (Sweeney) v. Min. for the Environment* [1979] I.L.R.M. 35. It is no more than common sense that if reasons of the type specified in (c) above are to pass the test in the above cases, they must be clear and cogent. I do not read the English cases as saying more than that. This is no different to what is required in Irish law.

34. The obligation at (b) above to state the considerations on which a decision is based is, of course, new. I am of the opinion that, in order for the statement of considerations to pass muster at law, it must satisfy a similar test to that applicable to the giving of reasons. The statement of considerations must therefore be sufficient to: -

(1) give to an applicant such information as may be necessary and appropriate for him to consider whether he has a reasonable chance of succeeding in appealing or judicially reviewing the decision;

(2) arm him for such hearing or review;

(3) know if the decision maker has directed its mind adequately to the issues which it has considered or is obliged to consider; and

(4) enable the courts to review the decision. Thus, the criteria which must be met for the statement of considerations are precisely the same as those which apply in respect of the statement of main reasons.

35. I am also satisfied that the approach of the Supreme Court in *O'Keefe v. An Bord Pleanála* [1993] 1 I.R. 39 is equally applicable to the approach which the court should take in conducting an examination of the reasons given and considerations expressed under the Act of 2000. There, Finlay C.J. said at p.

76 -

'Firstly, I am satisfied that there is no substance in the contention made on behalf of the plaintiff that the Board should be prohibited from relying on a combination of the reasons given for the decision and the reasons given for the conditions, together with the terms and conditions. There is nothing in statute which would justify such a rigid approach and it would be contrary to common sense and fairness. What must be looked at is what an intelligent person who had taken part in the appeal or had been appraised of the broad issues which had arisen in it would understand from this document, these conditions and these reasons.'

36. This approach applies with equal force to the stating of considerations as it does to the giving or reasons. Whether that has been done is capable of being examined by reference to the documents which have been placed before the court which consist of all the material which is before the respondent…"

26. The adequacy of a planning authority's reasons for its decision was subsequently considered in *O'Neill v. An Bord Pleanála* [2009] IEHC 202. In that case An Bord Pleanála declined to follow the recommendations of an inspector who recommended that permission for a proposed craft and retail store be refused due to concerns surrounding its visual amenity resulting from its "excessive scale". On foot of the report, a full set of revised plans was subsequently submitted to the planning authority who granted planning permission for the development based thereon. Hedigan J. noted (at para. 25) that in *Mulholland*, Kelly J. had drawn a distinction between the obligations of the board to state its main reasons and considerations for its decision in respect of a planning application under s.34(10)(a) of the PDA 2000, and its obligations in respect of its decision to depart from the recommendations of its inspector under s.34(10)(b), pursuant to which a Board must only outline its main reasons for departing from same. Having reviewed the relevant authorities, Hedigan J. set down three general principles regarding the obligation to give reasons under s.34(10) of the PDA 2000:-

"28. The respondent… is not obliged to engage in a lengthy review or analysis of its own reasoning when communicating its decision. Furthermore, and of particular relevance for the present purposes, section 34(10)(b) only requires that the respondent should explain its decision to differ from the overall recommendation of the inspector, as opposed to specific conditions suggested by him or her…

29. The second principle of general application is that the adequacy of reasons should be assessed from the perspective of an intelligent person who has participated in the relevant proceedings and is appraised of the broad issues involved. This requires that the respondent's decision should not be read in isolation but rather in conjunction with any conditions attached thereto.

…

30. As such, in the present case the Court is required to construe the respondent's main decision in conjunction with the

> 21 conditions which were simultaneously imposed. For example, there are 6 conditions which address the issue of visual amenity, the primary concern of the inspector…
>
> 31. The third and final general principle is that the reasons should provide a certain minimum standard of practical enlightenment…"

Hedigan J. adopted and applied the principles set down by Kelly J. in *Mulholland* quoted above. The learned judge added that:-

> "32. The decision of *Fairyhouse Club Limited v. An Bord Pleanála* [2001] IEHC 106 also bears relevance to this principle. In that case, Finnegan P. held that even where the reasons provided in support of a decision were terse, the decision maker would not have acted unlawfully unless the applicant had been prejudiced in some way. The Court must therefore consider whether its role, or indeed the position of the applicant, has been appreciably hampered by the respondent's formal decision."

27. Applying the above principles, Hedigan J. held that although the reasons provided by the respondent were terse and in some respects limited, they were not so insufficient as to render the decision unlawful. Having regard to the main body of the decision as well as the conditions appended thereto, it was clear that the respondent had adequately addressed its mind to the concerns which were raised by the inspector. The court considered that although the obligation imposed by s.34(10) on a respondent was not an onerous one, the circumstances of that case could be readily distinguishable from the circumstances which arose in *Grealish v An Bord Pleanála* [2007] 2 I.R. 536, in which O'Neill J. found that the parties would have to "rely on bald assumption to distil the supposed reasoning of the decision-maker from its extremely limited explanation."

28. The obligation to give reasons for departing from the recommendation of the inspector was more recently considered by O'Malley J. in *Stack Shanahan & Or. v. An Bord Pleanála* [2012] IEHC 571 and *Nee v. An Bord Pleanála* [2012] IEHC 532. In the latter case, O'Malley J. considered that the adequacy of reasons and the alleged unreasonableness and/or irrationality of the decision were inextricably linked. The learned judge stated at para. 45 of the judgment:-

> "45. Section 34, as mentioned earlier requires the Board to state its reasons when it disagrees with the recommendation of the Inspector. The argument under this heading is that in coming to conclusions which differed from those of its Inspector the Board did not give adequate reasons.
>
> 46. It is well established by the authorities that the obligation imposed on the Board to give reasons is not to give a discursive judgment, or to provide detailed reasoning equivalent to the highly professional and detailed report of the inspector… It is also clear that where conditions are imposed they are to be read in conjunction with the reasons.
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> 47. In making the case that the Board acted unreasonably, the Applicant has to meet the standard set out by the Supreme Court in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. That requires him to demonstrate that the Board had before it, in relation to any particular issue, *'no relevant material which would support its decision'…"*

29. The grounds relating to the adequacy of reasons and the Board's compliance with its obligations under s.34(10) of the PDA and the alleged unreasonableness and/or irrationality of the decisions mainly concern the Board's approach to the issues of traffic and road infrastructure servicing the site and potential flooding risks which were canvassed with and extensively addressed in the inspector's report.

The Traffic Issue

30. In respect of the suitability of the road network surrounding the proposed development, in particular the L-65610, the Board in its Direction stated:-

> "The Board had regard to the traffic movements associated with the previous use of the site and considered that the traffic movements associated with the proposed development are considerably less than those associated with the previous use and are stated as being of the order of one heavy goods vehicle per day. The Board considers this level of activity was acceptable in terms of traffic safety and convenience in the context of the local road network".

The applicants submit that this reason does not engage with the concerns expressed by the Inspector in her report or those raised by the applicants in their appeals from the County Council's decision of 7th February 2013. They also submit that the reason was founded on misinformation and factual inaccuracies, in particular in respect of the previous use of the site, which the applicants submit had ceased operation for some six years, and had been operating in a manner that did not comply with its planning permission. It is also contended that the reason given by the Board in respect of the traffic issue fails to demonstrate any engagement with the traffic and road infrastructure concerns raised by the Inspector in her report. At pages 46-48 of the Report, the Inspector considered the suitability of L-65610 for the traffic expected to arise from the activities of the proposed development. The Inspector noted that the EIS accompanying the planning permission application indicated that the traffic generating potential of the proposed facility for Heavy Goods Vehicle (HGV) traffic, was based upon the assumption that the facility would operate five days per week for 50 weeks per annum. There would be 9 heavy vehicles per week between the months of November and January and 11 per week between the months of February and October. The Light Goods Vehicle (LGV) traffic generation is indicated as being 75 per week. The overall traffic forecast for the months of November to January would therefore be 84 vehicles per week and 86 vehicles per week during the months of February to October. It was stated in the EIS submitted with the application for planning permission that the expected traffic generation volume from the proposed development was low, particularly when compared with the higher volume of HGV traffic generated during the operation of the mushroom composting facility which previously occupied the site. Therefore there would be no adverse effects on the L-65610 or its users taking account of the previous decisions by the local authority.

31. The Inspector disagreed with the contention that the proposed development was essentially a change of use application because the previous permitted use on the site had not taken place for over six years. The inspector also noted the fundamental differences between the processes, product and materials to be used in the operation of the proposed facility and the previous mushroom composting facility.

32. A further issue addressed by the inspector concerned the area of the set backs from the road situate at the front of individual houses along the L-65610, which were stated in the EIS to be available for use as passing bays to facilitate the traffic generated by the proposed development. It appears from the report that no agreement with the residents of the houses appurtenant to the set-backs, who asserted property rights in respect thereof had been secured in respect of their future use. Indeed the entitlement of the developers to use these set-backs and the entitlement of residents to place barriers or otherwise block or fence off these set-backs to prevent their use as passing bays was a point of contention between the applicant and second named notice party who both

sought legal opinion on the matter. The inspector noted that it was not a matter for the Board to resolve the question of any property rights in respect of the set-backs the resolution of which was a matter for the courts.

33. The Inspector had serious concern that the local road network was not suitable to carry the volume of HGV traffic proposed and would give rise to a traffic hazard and stated at pg. 48 of the report:

> "Views west along the L65610 clearly show that the road alignment and structure is poor, it is constructed on an embankment which falls away steeply, in sections, from the carriageway. Given the type of development proposed, [a] sewage sludge composting facility, and therefore the material being transported in particular to the appeal site I would share the concern of the third party appellants in relation to carrying capacity of what is a rural road network. In my opinion the proposed development as submitted would constitute a traffic safety hazard to road users".

34. The applicants submit that none of these issues in the Inspector's report is addressed in the decision of the Board and that no reason is given for the Board's departure from the Inspector's views in respect of the suitability of the road network surrounding the proposed development. It is contended that the statement in the Direction of the Board, quoted above, contains no analysis of the current use of the road or its condition, and does not engage with any of the concerns raised by the Inspector or indeed in the appeals submitted by the applicants and the Third Notice Party and that it is impossible to discern from the reasons given in the Board's Direction that any of these issues were considered by the Board.

Flooding

35. The applicants contend that the reasons given by the Board for its decision to grant planning permission do not disclose what, if any, considerations the Board gave to the issue of flooding and hydrological issues highlighted in the Inspector's report, and raised in the applicants' appeals against the Council's decision. The Inspector expressed considerable concern regarding the risk of flooding on the site given the proximity of the site to the Lake Gowna, proposed National Heritage Area (pNHA), located less than 40m from the site boundary and 118m from the proposed development building. The Inspector also had regard to the fact that the site is drained by a stream which is a tributary of the River Erne, which in turn flows into Lough Oughter, a Special Area of Conservation. The Inspector noted that were the site a brown field site, the presence of the proposed development at the proposed location would, on hydrological grounds, be wholly unacceptable. The inspector also considered that if the development is deemed to be processing "treated" municipal sewage for land application, the product is not waste and no EPA permit or local authority permit is required, raising significant issues as regards the ongoing monitoring of the site. The Inspector stated, in respect of the hydrological issues, at pg. 52 of the report:

> "Regard being had to the foregoing, it is my opinion that the proposed development is wholly reliant upon mitigation measures in order that it would not be likely to have significant adverse impacts on the environment. I would have specific concern with regard to Condition Nos. 3 and 5 of Register Reference 12/209.
>
> Given the environmentally sensitive nature of the Appeal site and the nature of the proposed development, I consider the proposed development would thus be contrary to proper planning and sustainable development of the area."

36. In respect of the issue of the flooding the Inspector noted that during her site visits in November and May, she witnessed visible flooding in the field to the east of the site. She noted photographic evidence that indicated flooding at the site entrance during a flood event in 2009. The Inspector went on to state, at pp. 53-54 of the report, that:

> "The planning System and Flood Risk Management – Guidelines for Planning Authorities, Nov. 2009 clearly sets out that development should be located in areas with little or no flood hazard thereby avoiding or minimising the risk. Development should only be permitted in areas at risk of flooding when there are no alternatives, reasonable sites available in areas of lower risk, where development is necessary in areas at risk of flooding an appropriate land use should be selected and precautionary approach should be applied.
>
> …
>
> The flood risk assessment submitted considers that having regard to the sequential test set out in the Guidelines (2009) that both zone i and zone ii are located in flood risk zone B. That the eastern area is at a higher elevation than the western area and the majority of site activities will take place within the eastern area. The justification test was used to assess the appropriateness of the development in an area susceptible to risk of flooding. One significant factor is the existing brownfield status of the site and the reduction to current flood risk that a controlled management system of stormwater which will result from the development…
>
> I consider that the site/portions of the site and access could be described as being located within Flood Zone A as set out in the Guidelines, where the probability of flooding from rivers is highest (greater than 1%or 1 in 100 for river flooding). The guidelines recommend justification testing for development proposed within Flood Zone A and if justification test fails the development should either be directed towards Zone C or the application refused.
>
> While the flood risk assessment concludes that the proposed development, taking cognisance of all the mitigation measures would not have a negative impact in terms of flood risk on the local drainage network, lands adjoining the applicant's property, on local private property, to people or to the surrounding environment, I have serious concern, given the drainage sensitivity of the site and surrounding environment, and consider that the precautionary principle should be applied and permission refused."

37. In respect of the issue of the susceptibility of the land to flooding and the hydrological issues of the site, the Board stated in its decision:-

> "The Board noted that the proposed development involves the reuse of an existing permitted facility. The proposed development does not involve any works that will result in an increased risk of flooding. The Board further noted and accepted the contents of the Flood Risk Assessment submitted with the application which concluded that the subject lands were in excess of 1 metre above the 100 year flood event level."

38. It is common case that a Board's reasons must also be read in conjunction with the conditions attached to the grant of permission. The conditions relevant to this aspect of the application include condition 2 which states that "all the environmental mitigation measures set out in the Environmental Impact Statement and in the further information response received by the planning authority on 22nd November 2012 shall be implemented in conjunction with the timelines set out…"

39. It is specifically stated in the Board's decision that the above quotations from the decision represent its reasons, *inter alia*, as to why the Board did not accept the Inspector's recommendation to refuse permission.

40. The shortness or suggested "terse" nature of the reasons does not of itself establish a legal shortcoming in the decision. The court is satisfied that the reasons given by the Board in this case were concise and focussed on the relevant issues and direct and indirect effects of the proposed development. They are readily understood by those involved in the process and/or a consideration of the available materials (see *Mulhaire v An Bord Pleanala* [2007] IEHC 478 and *Leefield Ltd v An Bord Pleanala* [2012] IEHC 539 *per* Birmingham J. and *Cork Institute of Technology v An Bord Pleanala* [2013] IEHC 3 *per* Hogan J.).

41. The applicants also submit that by reason of the inadequacy of reasons given in the Board's direction, the decision failed to engage with the concerns of the inspector and is therefore unreasonable. The court does not accept that submission.

Conclusions on the adequacy of reasons and unreasonableness or irrationality
42. The court is satisfied that the Board considered all relevant matters before reaching its determination in respect of the planning decision. Traffic and flooding risks were the subject of detailed assessment in the EIS and detailed submissions made by the applicants and those who made observations in the course of the planning process. They were examined in detail by the Inspector who again considered the submissions made and reports submitted. The court is satisfied that it is clear from the decision and the direction issued by the Board and from the conditions attached to the planning permission granted that all of the evidence and materials to which reference has been made in the course of the hearing in these proceedings were available to and considered by the Board. The relevant extracts from the Board's direction quoted above satisfy the court that it addressed the issues of traffic and flooding in the decision. It stated its main reasons and considerations concerning the overall decision and those discrete issues in what the court regards as a clear and cogent manner. It has, in doing so, included a short statement of the basis for not accepting and differing from the recommendation of the inspector. It was not obliged to provide what the case-law describes as a discursive judgment. The court having considered the papers and submissions in the case, is satisfied that any reasonable person engaged in this process, though disagreeing with the decision, would nevertheless fully comprehend the reasons as stated. The Board was entitled to differ with the inspector and reach a contrary conclusion on the materials presented.

43. The court is also satisfied that the direction and decision convey all necessary and appropriate information to enable the applicants to assess whether the Board had directed itself adequately to those issues which it was obliged to consider and whether they were sufficient to enable the court to review the planning decision. The court is satisfied that its function in reviewing this decision was not hampered by the suggested inadequacy of the reasons or considerations relied upon by the applicants in respect of these issues, nor is it satisfied that the applicants were hampered or prejudiced in any way in assessing them or in initiating or conducting this application or otherwise. The applicants disagree with the correctness of the decision made but this court is concerned with the lawfulness of the decision not its merits.

44. The court is satisfied having considered all the materials before the Board that the applicant's submission that there was no relevant material before the Board which would support its decision is unsustainable. The Board made reference to those relevant materials in its consideration, decision and direction. The threshold required to establish that the Board acted unreasonably or irrationally has not been reached.

Environmental Impact Assessment-Ground E(26)
45. The applicants submit that the respondents were under an obligation to carry out and record an Environmental Impact Assessment (EIA) but that the material set out by the Board in its direction does not in law comprise an EIA nor do the paragraphs relating to the EIA give any meaningful information of the assessment made, if any. The applicants also submit that the Board's reasons for departing from the report of the inspector on the issues of flooding, traffic issues, the effect on residential amenities in the area and serious adverse effects on the environment, stated over four terse paragraphs do not comprise an EIA nor do they give any meaningful information of the assessment made.

46. The respondents submit in response that in light of the statement of the Board quoted below that it carried out an EIA there can be no doubt that the Board did so and that the Inspector's report formed part of its assessment in that regard but it reached different conclusions to those in the report in respect of four issues. It is also clear that it considered the other materials presented e.g. in respect of the issue of flooding the Board considered the Flood Risk Assessment submitted by the developer as part of the EIS which informed its conclusion on that issue.

47. It is accepted by the parties that s.172 of the PDA required the Board to carry out an EIA in respect of the proposed development. An EIA must "identify, describe and assess in an appropriate manner in the light of each individual case and in accordance with Articles 4 to 11 of the Environmental Impact Directive, the direct and indirect effects of a proposed development on…" *inter alia* human beings, flora, fauna, soil water, landscape and the interaction between these factors. Section 172(1H) provides that the Board may have regard to and adopt in whole or in part any reports prepared by its officials or by consultants, experts or other advisers.

48. In *Aherne v. An Bord Pleanála* [2015] IEHC 271 Noonan J. considered the obligation to carry out and record an EIA:

> "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. The applicant's secondary position is that if the Board did carry out an EIA, it was obliged to record same in writing and this it failed to do.
>
> 22. However there is no requirement in the PDA that the Board must state in writing within its own decision what the EIA comprises and it seems to me that once it is clear from the terms of the decision and the documents therein referred to how the EIA was arrived at that this satisfies the Board's obligation under s.172. Subsection (1D) and (1E) mandate the Board to consider whether the EIS identifies and describes adequately the direct and indirect effects on the environment of the proposed development and if it does not, to obtain from the applicant such further information as it requires to enable it to carry out an EIA.
>
> 23. Subsection (1H) expressly permits the Board to adopt in whole or in part any reports prepared by its own officials, such as the Inspector here, or by consultants, experts or other advisors… in carrying out its EIA. The Board is not required to separately identify, describe and assess the direct and indirect effects of the proposed development within its decision where these matters are contained within an EIS which the Board considers is sufficient to enable it to carry out an EIA…

> 24. It seems to me that the fact that the Board reached a different conclusion than that recommended by the Inspector does not somehow alter its obligations with regard to carrying out an EIA. I cannot accept the submission of the applicants that because the Board disagreed with its Inspector's recommendation, this obliged it to provide a more detailed decision than might otherwise be the case. I can find no warrant for such a proposition within the terms of the Act itself nor has any authority been referred to the applicants to support it. Its obligation in this regard is confined to indicating the main reasons for not accepting the recommendation under s.34(10)(b).

49. In *Rathiniska v An Bord Pleanála* [2015] IEHC 18, a similar argument was made by the applicant that the Board failed to conduct and record an EIA. Haughton J. stated:

> "83. The applicants assert that the Board failed to 'record' the EIA. The applicants also aver that the Board failed to 'engage' with the inspector's assessment and disregarded his concerns which were based on broader factors. They asserted that the Board failed to give any or any proper reasons for its decision to depart from the Inspector's recommendation (that the Board seek further information). They assert that this aspect of the decision was entirely unreasonable having regard to the potential health consequences and risks.
>
> 84. The respondent and EirGrid argued that there was no evidence that the Board had failed to carry out or record a proper EIA; that there was ample evidence on which the Board could come to the conclusions and assessment that it did come to. They contended that in light of the evidence and particularly international research which was considered by the Board, its conclusion could not be impugned for irrationality.
>
> 85. The court is satisfied firstly that the Board did undertake a comprehensive EIA in relation to this aspect of the Development and that this is recorded in the body of the decision where the Board stated that it was satisfied that the information available on file was adequate to allow an EIA to be completed. It is also apparent from a reading of the decision as a whole that the Board considered and assessed the EIS, the Inspector's Report (where an assessment of the EIS and this issue was carried out by the Board's nominated officer) and other relevant documentation. The Board also expressly confirms that in forming its view it had regard to listed and publicly available documents of a scientific or guidance nature relevant to this issue. Secondly, the Board clearly had before it relevant evidence from which it could take a decision in relation to this aspect of the Development."

50. In *People Over Wind v. An Bord Pleanála* [2015] IEHC 271. Haughton J. again addresses this issue:-

> "113. Turning to the Board's decision, the Board decided that it was satisfied that the information before it was satisfactory for the purposes of undertaking an AA and EIA on the proposed development. Having taken into account the range of information and documentation on file for the appeal, the court finds that the Board did complete an EIA and concluded that the proposed development, either by itself or cumulatively with other projects, would not be likely to have significant effects on the environment.
>
> 114. What is notable in the decision is the very specific adoption of the inspector's assessment of environmental impacts with the exception of certain matters which the Board sets out later in its decision. It also points to specific information arising from the documents to which it also had regard when coming to its conclusion.
>
> 115… the inspector gave 3 reasons for her recommendation to refuse permission which the Board decided not to follow. On pp. 6 to 8 of the decision, the Board provides analysis of the points raised by the inspector, explaining its reasons for not adhering to those elements of her assessment. These narratives clearly set out the Board's own assessment and evaluation of these aspects…"

51. The direction of the Board in this case, insofar as it relates to the EIA, states

> "The Board considered that the Environmental Impact Statement submitted with the application, supported by the further information submitted to the planning authority and the report, assessment and conclusions of the inspector, was adequate in identifying and describing the direct and indirect effects of the proposed development. The Board completed an environmental impact assessment, and agreed with the Inspector in her assessment of the likely significant effects of the proposed development, and generally agreed with her conclusions on the acceptability of the mitigation measures proposed and residual effects."

The court is satisfied that it is clear from the Board's decision that an EIA was carried out and that there was sufficient information furnished to the Board and referred to in its decision, that enabled it to carry out an adequate EIA.

52. It is well established that the standard of obligation imposed on the Board to state its reasons for coming to a conclusion pursuant to an EIA is not over and above the duty to state the main reasons and considerations set down by national law (*Aherne v. An Bord Pleanála* [2015] IEHC 271; *McEntee v. An Bord Pleanála* (Unreported, High Court, Moriarty J., 10th July 2015)).

53. In this case the inspector gave the reasons upon which she based her recommendation to refuse permission. The Board stated that it generally adopted the report of the inspector except in relation to those four reasons. Thus the Board did not adopt the report in respect of the issues of flooding, the effect of traffic, the effect on residential amenities and the likelihood of serious effects on the environment. It then went on to state its reasons for departing from the decision of the inspector. The legal adequacy of this statement as a statement of reasons has already been addressed. The Board, just prior to setting out that aspect of its decision stated that it had completed the EIA and agreed with the inspector's " assessment of the likely significant effects of the proposed development and generally agreed with her conclusions on the acceptability of the mitigation matters proposed and residual effects." The Board is the competent planning authority and was entitled to diverge from the Inspector's conclusions on any or all matters. It did so and adequate reasons were then given for this divergence in respect of each relevant issue. The court does not accept the submission that the Board failed to provide an adequate or sufficient explanation or evaluation of the proposal that identifies describes and assesses the direct and indirect effects of the proposed development. The extensive requirement for which the applicants contend has been held to be overbroad where, as in this case an extensive EIS has been compiled, submitted and considered which the Board was satisfied clearly addressed the relevant direct and indirect effects of the development (see *Aherne* above). It is clear how the EIA was carried out and how and why the Board arrived at its decision. The court is satisfied that the Board in the circumstances of this case complied with its legal obligation as set out in the case-law discussed.

54. In *Balz v. An Bord Pleanála* [2016] IEHC 134 the Board decided not to follow the recommendation of its Inspector that it should refuse planning permission for four wind turbines for reasons relating to residential amenity and ecology. Barton J. found that the

Board had given no explanation in its decision for its conclusion that it was not considered necessary to omit any turbine for ecological reasons. The Board had failed to discharge its obligation to state its main reason for disagreeing with the inspector's recommendation. In doing so the learned judge considered and applied the principles set out in the authorities cited above at paragraphs 165 to 180 of the judgment. In particular, Barton J. accepted the principles set out by Haughton J. in *People Over Wind*. The applicants submit that the instant case is similar to *Balz* insofar as the Board has failed to properly explain its decision and/or properly provide an evaluation of the proposal that identifies, describes and assesses the direct and indirect effects of the proposed development. The court does not agree. In this case the court is satisfied that the Board relied upon specific material drawn from the evidence submitted when stating its reasons. It set out in short form an explanation as to why it did not follow the inspector's recommendation. The case is therefore distinguishable from *Balz*.

55. The applicants also rely on *Connolly v An Bord Pleanala* [2016] IEHC 322 in which the court considered the adequacy of the Board's reasons concerning its EIA in circumstances where the Inspector's report, adopted by the Board related to a six-turbine development whereas during the further information stage the development was re-designed so that it would become a four-turbine development. The court held that despite this change in development:

> "… there is no description, analysis, or evaluation of this information in the decision of An Bord Pleanala. Instead one meets with some generically worded text… Does such an approach conform with the obligations incumbent on An Bord Pleanala pursuant to s.172(1J) of the Act of 2000?
>
> …
>
> 27. The difficulty that the court considers to present for An Bord Pleanala in this regard is that in relying upon quite generic reasoning and a rather contrary report that relates to a different development, it is difficult to see that An Bord Pleanala has complied… with the requirement in s.172(1J) to give a proper 'evaluation of the direct and indirect effects of the proposed development'."

56. The applicants submit that the same state of affairs arose in the present case in which the Board appointed an Inspector who formed a negative view of the proposed development and conducted a negative assessment resulting in a recommendation for a refusal of permission of a most general kind. I do not agree. In *Connolly* the court was addressing a decision in which the inspector's report effectively dealt with a different proposed development to that ultimately considered by the Board. A six turbine proposal morphed into a four turbine proposal, their locations on the site changed significantly, the access route was changed and a substantial body of new information was submitted to the Board. It was in those circumstances of a complete failure to engage with a completely changed application and accompanying documentation that the reasons advanced by the Board for its decision were found to be entirely inadequate.

57. The court is not satisfied that the decision in this case, the EIA carried out by the Board or the manner in which the proposal was considered and determined by the Board, or the reasons given for its decision gave rise to the legal errors identified in *Balz* and *Connolly* .

Appropriate Assessment-Grounds E(29) to (35)
58. The applicants also submit that the decision of the Board should be quashed on the basis of the Board's failure to carry out and/or record an Appropriate Assessment (AA) . The Board in its decision stated:

> "The Board completed an Appropriate Assessment in relation to potential impacts on Natura 2000 sites and having regard to the screening report submitted, the submissions of file including the further information submitted and the report of the Inspector concluded on the basis of the information available that the proposed development either individually or in combination with other plans or projects would not be likely to have a significant effect on the integrity of any European site in view of the conservation objectives of those sites.
>
> It is therefore considered that, subject to compliance with the conditions set out below, the proposed development would not give rise to an undue risk of environmental pollution or damage to water quality, would not be prejudicial to public health, would not seriously injure the rural character of the area or the amenities of property in the vicinity, would not exacerbate the risk of flooding in the area and would be acceptable in terms of traffic safety and convenience... "

59. The Board incorrectly stated that it had conducted an Appropriate Assessment. It had not. The grounds advanced on this issue are based on the proposition that no AA had been carried out but should have been (grounds (34) to (36)). It was stated at ground (34) that there was a legal obligation on the Board to carry out an AA if a proposed development is likely to have an impact on a Natura 2000 site in accordance with the decisions of the CJEU in Case *C-127/02 Waddenze* and Case *C-258/11 Sweetman.*

60. The statement in the Board's decision that an AA was carried out is immediately followed by its conclusion that the criteria appropriate to initiate an AA had not been fulfilled.

61. It is clear that the Inspector considered a screening report for an AA which she had received from the developer carried out in July 2012. She stated:

> "Having regard to the AA screening submitted, I recognise that the Appeal site and Lough Oughter and associated loughs designated SAC and SPA (natura site) while physically separated by a distance of some 15km and linked by way of the River Erne… 'high landscape areas and major lakes'. Accordingly while I note the proposed segregated and contained nature of the development site in association with mitigation measures, inclusive of those set out above, I consider the risk to the Natura site is low. However, having regard to the precautionary principle, should mitigation or management systems fail, then the proposed development would have an adverse effect on the integrity of Lough Oughter and associated loughs designated SAC and SPA."

62. It is accepted by the Board that no AA was carried out. Mr. Harten in his affidavit states that it is unclear whether an AA was carried out. He accepts that a screening report was carried out. There was no Natura Impact Statement and no evidence that an AA was carried out by the Board. The respondent in the statement of opposition relies upon the affidavit of Gabriel Dennison. Mr Dennison states at paragraph 4 of the affidavit that the Board carried a screening for appropriate assessment sometimes called a Stage 1 Appropriate Assessment. It concluded that the stage 2 Appropriate Assessment was not required. This would have required a Natura Impact Assessment. It is accepted that the Board's Decision Order should have read "the Board completed screening for Appropriate Assessment (Stage 1 Appropriate Assessment)" . It is submitted that this is supported by the actual conclusion in the body of the decision that the proposed development "would not be likely to have a significant effect on the integrity of any European site". An AA

would only be required if the development was likely to have a significant effect on the European site's integrity which is the appropriate test to be applied. That is the finding required to trigger a Stage 2 Appropriate Assessment. It is also clear that the Board had considered "the screening report submitted".

63. The grounds of challenge on this issue rest on a number of propositions. Firstly, it is said that the above statement fails to satisfy the Board's obligation to give reasons for its decision not to conduct a Stage 2 AA pursuant to s.177U(7)(a) PDA 2000. Secondly, it is submitted that having regard to the inspector's report in conjunction with the relevant authorities, the Board ought to have conducted a Stage 2 AA, and therefore lacked the jurisdiction to grant planning permission for the proposed development prior to carrying it out.

64. The obligation on a planning authority to carry out a screening for appropriate assessment is provided for by s.177U of the PDA 2000. Section 177U insofar as is relevant states:

> "(1) A screening for appropriate assessment of a draft Land use plan or application for consent for proposed development shall be carried out by the competent authority to assess, in view of best scientific knowledge, if that Land use plan or proposed development, individually or in combination with another plan or project *is likely to have a significant effect on the European site*." (emphasis added)

Subsections 4 and 5 of that section also states

> "(4) The competent authority shall determine that an appropriate assessment of a draft land use plan or a proposed development, as the case may be, is required if it cannot be excluded, on the basis of objective information, that the draft Land use plan or proposed development, individually or in combination with other plans or projects, will have a significant effect on a European site.
>
> (5) The competent authority shall determine that an appropriate assessment of a draft Land use or plan or a proposed development, as the case may be, is not required if it can be excluded, on the basis of objective information, that the draft Land use plan or proposed development, individually or in combination with other plans or projects, will have a significant effect on a European site.
>
> …
>
> (7) A competent authority shall, as soon as may be after making the Land use plan or making a decision in relation to the application for consent for proposed development, make available for inspection by members of the public during office hours at the offices of the authority, and may also publish on the internet -
>
> > (a) any determination that it makes in relation to a draft Land use plan under subsection (4) or (5) as the case may be, and reasons for that determination…"

65. Under s.177U(7)(a) of the PDA 2000, any determination made by the competent authority under s. 177U(4) or (5) and the reasons therefore must be made available to the public. It is submitted that no reasons for the determination that a Stage 2 AA was not required are apparent from the determination by the Board in accordance with s.177U(7)(a).

66. The applicants again rely upon *Connolly v. An Bord Pleanála* [2016] IEHC 322, in which as already seen Barrett J. granted an order of *certiorari* quashing the decision of the Board to grant permission for the construction of a wind farm. One of the issues raised was whether the Board had satisfied the requirements of s.177U(6)(a) which oblige it to state its reasons for determining that a Stage 2 AA was required on foot of an application for planning permission. A s.132 notice furnished to the applicant merely stated that a Natura Impact Statement was required so that an AA could be carried out. The court held that this did not constitute notification of a decision that an AA was required or the reasons for same.:

67. Barrett J. stated;

> "20. In the course of the hearings of this application, counsel for An Bord Pleanála brought the court in great detail through the seminal aspects of what An Bord Pleanála had done before it arrived at the determination referred to above. However, it seemed to the court, with respect, that in taking the court with such abundant detail through what An Bord Pleanála had done, counsel rather overlooked the requirement that when it comes to, *inter alia*, s.177V(1) what is required is not just that An Bord Pleanála has done right but that a party who comes to the decision of An Bord Pleanála, and who wants to know whether or not to challenge same is able readily to gauge in an informed manner whether An Bord Pleanála has done right… or has gone wrong. Thus it seemed to the court that inadequate regard was had by counsel for An Bord Pleanála to the fact that, as per:
>
> - the Court of Justice in Mellor, para. 59: '[I]nterested parties must… have the possibility of deciding, with full knowledge of the relevant facts, whether there is any point in applying to the courts',
>
> - Clarke J. in Christian, para. 78, 'In order to assess whether a relevant decision is lawful, a party considering a challenge… must have access to a sufficient amount of information to enable an assessment as to lawfulness to be made', and
>
> - Finlay Geoghegan J. in Kelly, para. 48, '[T]he essential principle is that the reasons must be such as to enable an interested party assess the lawfulness of the decision…'."

68. In *Kelly v. An Bord Pleanála* [2014] IEHC 400, Finlay Geoghegan J. had regard to the dicta of the CJEU in Case C-75/08 *Mellor* insofar as it relates to the duty to give reasons in the context of a screening for an EIA. The applicants submit that the dicta of the CJEU in *Mellor*, must similarly apply in the context of a screening assessment for AA. The CJEU stated that:-

> 59. …effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general, that the court to which the matter is referred may require the competent authority to notify its reasons. However, where it is more particularly a question of securing the effective protection of a right conferred by Community law,interested parties must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts.

> Consequently, in such circumstances, the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request...
>
> 60. That subsequent communication may take the form, not only of an express statement of the reasons, but also of information and relevant documents being made available in response to the request made."

69. Finlay Geoghegan J. noted that it was not in dispute between the parties that

the above quoted principles were applicable to reasons given in the context of an appropriate assessment. The judge also noted that the underlying rationale and extent of the obligation to give reasons as explained by Clarke J. in *Christian v. Dublin City Council* [2012] 2 IR 506 appeared to be "similar if not identical to that explained by the CJEU in *Mellor*". In that case Clarke J. stated, at p.540 :

> "The underlying rationale of cases such as *Meadows v. Minister for Justice* [2010] IESC 3 (in that respect) and *Mulholland v. An Bord Pleanála (No. 2)* [2005] IEHC 306 is that decisions which affect a person's rights and obligations must be lawfully made. In order to assess whether a relevant decision is lawful, a party considering a challenge, and the court in the event of a challenge being brought, must have access to a sufficient amount of information to enable an assessment as to lawfulness to be made. What that information may be, may vary enormously depending on the facts under consideration or the nature of the decision under challenge. However, the broad and underlying principle is that the court must have access to sufficient information to enable the lawfulness of the relevant measure to be assessed."

(see also paras 53 – 61 in *Mellor*).

70. It is common case that article 6 of the Habitats Directive envisages a two stage procedure. The directive provides, insofar as is relevant:- '

> 2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.
>
> 3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.
>
> 4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.'

71. The requirements set down by Article 6(3) of the directive were transposed by ss. 177U and 177V of the PDA. Section 177U concerns the screening for appropriate assessment and 177V the Stage 2 full AA. The Court in *Kelly* considered that the failure to complete a lawful AA operated as a jurisdictional bar to granting planning permission, once it was decided on foot of a screening for AA that a full stage 2 AA was necessary.

72. Finlay Geoghegan J. considered the nature and effect of the screening process and stated that the provisions of s.177U(1) and (2) imposed a mandatory obligation on a competent authority to carry out a screening for appropriate assessment. Section 177(U)(4) provides that the competent authority shall determine that a full Stage 2 AA is required if it cannot be excluded, on the basis of objective information, that the proposed development, individually or in combination with other plans or projects will have a significant effect on a European site.

73. As regards the threshold which must be met for the Board to determine that a full Stage 2 AA is required, the court adopted the reasoning of Advocate General Sharpston in Case C-258/11 *Sweetman* at paras. 47-49, 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 out an appropriate assessment. There is no need to establish such an effect; it is… merely necessary to determine that there may be such an effect. 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…
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> 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…"

74. The court in *Kelly* therefore affirmed at para.30 that:-

> "an appropriate assessment is the second stage of a two stage process and only arises where the first stage or screening process has either been determined (or at least implicitly accepted) that the proposed development, alone or in combination with other plans or projects, is likely to have a significant effect on a European site within the meaning of the low threshold set out by Advocate General Sharpston in *Sweetman*".

75. The applicants essentially argue that having regard to the above jurisprudence the Board ought to have decided in the course of its screening for AA that a full stage 2 AA was required having regard to the concerns of the inspector in particular. Because no stage 2 AA was carried out the decision to grant planning permission for the development was unlawful being contrary to s.177V PDA.

76. The inspector stated, at pp. 36-37 of the report that she considered that the risk to the Natura site, namely Lough Oughter and associated lough designated SAC and SPA , is low, she also noted that "[h]aving regard to the precautionary principle, should mitigation or management systems fail, then the proposed development would have an adverse effect on the integrity of Lough Oughter and associated loughs designated SAC and SPA". The applicants submit that, having regard to the decisions of *Sweetman*

and *Kelly* that a decision not to conduct a stage 2 full AA can only be taken where the board could exclude, on the basis of objective information that the proposed development would, individually or in combination with other plans or projects, likely have a significant effect on a European site. The applicants submit that there clearly was a possibility, having regard to the inspector's report and the detailed flood risk reports, of the development having an adverse impact on Lough Oughter and Associated Loughs. Additionally the applicants, at Ground (31) contend that the Board ought not to have had regard to mitigation measures when considering during a screening assessment whether to conduct a stage 2 AA. The applicants therefore submit that, having regard to the decisions of *Sweetman* and *Kelly*, the statutory threshold was met by which the Board ought to have conducted a stage 2 full AA and therefore lacked the jurisdiction to grant planning permission for the proposed development.

77. The court is satisfied that the Board in considering and determining whether an AA was required acted at all times in accordance with law and the procedures prescribed. It reached a substantive decision based on the materials and submissions available that a Stage 2 AA was not required. In the absence of any procedural defects in the board's assessment and decision pursuant to the screening for AA, the decision of the Board not to conduct a stage 2 full AA can only be quashed if it is established that the Board's decision is unreasonable to the standard set down in *O'Keeffe v. An Bord Pleanala* [1993] 1 IR 39, namely that there was no relevant material before the Board capable of supporting their decision.

78. The respondents submitted that all lawful procedures were followed and that there was material to support the Board's conclusion that the proposed development was not likely to have a significant effect on the Lough Oughter and Associated Loughs site. The respondents argue that although the inspector stated that having regard to the precautionary principle that should mitigation measures fail the proposed development would have an adverse effect on the European Sites, she was of the overall opinion that:-

"having regard to the Appropriate Assessment Screening Report, and the Report of the DAU of the Department of the Environment, Community and Local Government, which assesses the nature of the proposed development, nature of the receiving environment and proximity to Natura 2000 sites, it is reasonable to conclude on the basis of the information available that the proposed development […] would not adversely affect the integrity of any European sites, in particular Lough Oughter & Associated Loughs, in view of the sites' conservation objectives, provided mitigation measures, as set out in the EIS are implemented in full".

The respondents also state that the Board's decision in this regard must be read in conjunction with the conditions attached to the decision, in particular condition 2 which requires the implementation of "all the environmental mitigation measures set out in the Environmental Impact Statement and in the further information response received by the planning authority."; condition no. 7 which requires that prior to commencement with the development and following consultation with Inland Fisheries Ireland, a construction method statement for works that may impact on the watercourses shall be submitted to and agreed in writing with the planning authority; condition no. 8 which sets down measures to prevent hydrocarbons from entering watercourses; and condition no.10 requiring the installation of a proprietary effluent treatment and disposal system, details of the design, construction and maintenance of which shall be submitted to and agreed in writing with the planning authority prior to the commencement of development.

79. The court is satisfied that the Board was entitled to have regard to mitigation measures when deciding whether to proceed to a Stage 2 AA. The question of whether mitigation measures can be taken into account in a screening decision was considered by the High Court of England and Wales in R (*on the application of Hart District Council) v. Secretary of State for Communities and Local Government (SSCLG)* [2008] EWHC 1204 (Admin). The Court stated at para. 55:-

> "55. The first question to be answered under Article 6(3) or Regulation 48(1) is: what is the plan or project which is proposed to be undertaken or for which consent, permission or other authorisation is sought? The competent authority is not considering the likely effect of some hypothetical project in the abstract.The exercise is a practical one which requires the competent authority to consider the likely effect of the particular project for which permission is being sought. If certain features (to use a neutral term) have been incorporated into that project, there is no sensible reason why those features should be ignored at the initial, screening stage merely because they have been incorporated into the project in order to avoid, or mitigate, any likely effect on an SPA.

The court went on at para.72 to state:

> "72. The underlying principle to be derived from both the Waddenzee judgment and the domestic authorities referred to above is that, as with the EIA Directive, the provisions in the Habitats Directive are intended to be an aid to effective environmental decision making, not a legal obstacle course. if, having considered the objective information contained in the EPR Report and the agreed by the NE in the Statement of Common Ground, the first defendant, as the competent authority, was satisfied that the package put forward by the second and third defendants, including the SANGs, would avoid any net increase in recreational visits to the SPA (thereby avoiding any increased disturbance to the Annex 1 bird species), it would have been 'ludicrous' for her to disaggregate the different elements of the package and require an appropriate assessment on the basis that the residential component of the package, considered with the SANGS, would be likely, in combination with other residential proposals to have a significant effect on the SPA, only for her to have to reassemble the package when carrying out the appropriate assessment.
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> […]
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> 76. For all these reasons, I am satisfied that there is no legal requirement that a screening assessment under Regulation 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 proponent's 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…"

80. The judgment of Sullivan J. in *Hart District Council* was applied in *Rossmore Properties Ltd. v. An Bord Pleanála* [2014] IEHC 557. In that case Hedigan J. considered that the Board was entitled to take into account the implementation of best work practices in its determination of whether a project involving the upgrade of existing electricity lines would be likely to have a significant effect on any European sites. In their subsequent application for leave to appeal the refusal of their application for judicial review pursuant to s.50A(7) of the PDA the applicants sought to certify as a point of law of exceptional public importance the question as to what extent a competent authority is entitled to take account of mitigation measures in a Stage one screening decision in determining that there would be no likely significant effect on an SAC. Hedigan J. stated in his ruling:-

> "The first thing to be noted in regard to this question is that this court has found as a matter of fact that the mitigation

> measures proposed were an intrinsic part of the work to be carried out. This being so, the issue was decided by this court in relying upon the judgment in *Hart v. Secretary of State for Communities and Local Government & Ors*… that, where mitigation measures are an intrinsic part of the project in question, they may be taken into account in the stage one screening process. This decision was considered and followed in the High Court of Northern Ireland in *Alternative A5 Alliances Application for Judicial Review* [2013] NIQB 30, and, of course, in this case. Thus, there are decisions of three jurisdictions supporting this principle."

81. I adopt and apply the principles set out in the judgment of Hedigan J. in *Rossmore Properties* based upon the principles set out in *Hart*. While Hedigan J. considered that mitigation measures amounting to an "intrinsic" part of the proposed development could be considered when screening for appropriate assessment, I do not consider that the principles set down in *Hart*, in the extracts of that judgment quoted above, are limited to mitigation measures intrinsic to the development. It suffices that the mitigation measures form a part of the proposed development the subject of the application for planning permission. It must be emphasised that the permission is subject to the implementation of the conditions. It appears to me that the practical interdependence and connection between the two is an obvious and important aspect of the screening process and that in any event they are an intrinsic element of the development and operation of the site. The issues relating to mitigation and conditions that arose had already been the subject of considerable investigation, reports, submissions and review. The Board in its determination not to proceed to a Stage 2 AA clearly took a view on the efficacy of the mitigation measures along with all the other factors considered in determining that the development would not be likely to have a significant effect on the integrity of any European site. The decision was made that the low threshold required to trigger the Stage 2 AA had not been reached.

82. I am not satisfied that the applicants are entitled to succeed on these grounds.

Conclusion on the Appropriate Assessment issue

83. The court is satisfied that an error was made in the drafting of the Board's decision which did not reflect the actual decision made by the Board not to carry out the Stage 2 AA. It is clear that the error is one of form and not one of substance in that the record of the actual decision was incorrectly drawn up. The court is also satisfied on the evidence that the Board made its decision on the basis of all relevant information and submissions. It was a lawful decision made in accordance and within a prescribed statutory process. It was not unreasonable or irrational. The reason for the decision is clearly stated in the quoted extract and is in compliance with the requirements set down by s.177U(7)(a) PDA 2000 and the above cited authorities. There was evidence available upon which it was open to conclude that the development would not be likely have a significant effect on a European site under s.177U PDA and Article 6 of the Directive. The court is not satisfied that the error in misstating the Board's decision in this case should result in a quashing of the decision. The tenor and terms of the remainder of the relevant paragraph within the decision indicate the conclusion that was clearly concerned with a Stage 1 determination. This is in accordance with the evidence adduced as to the actual decision made. I do not consider that any prejudice was caused to the applicants as a result and indeed the ambiguity thereby created was easily addressed and was resolved on the evidence. Even if the technical form of the order were considered to give rise to a ground for relief it does not appear to me that it is in the interests of justice in the circumstances of this case that the court should exercise its discretion in favour of the applicants and quash the decision which the court is satisfied was in substance made in accordance with law.

Matters to be dealt with by way of condition-Ground 36

84. The applicants submit that the Board acted unlawfully by leaving over various matters to be addressed or agreed between the planning authority and the developer. It is submitted that the Board is not permitted to have regard to matters to be agreed in the future. Relevant issues raised in an EIA or indeed an AA should be addressed in the decision and not left over to a process which is uncontrolled and unregulated. In *Boland v An Bord* Pleanala [1996] 3 I.R. 435 the Supreme Court held that provided matters left over for future agreement are matters of detail and the objectives to be achieved are clearly set down in the conditions imposed, the conditions will be regarded as lawful. No specific condition is impugned in this ground. Conditions 3,4,5,7,8, and 10 deal with what are clearly technical details which are required to be agreed for the reasons given in each case. For example condition 7 relates to the construction of watercourses and condition 10 to a proprietary effluent system. The court is satisfied that conditions which leave over such details for agreement are not contrary to domestic or EU law (*Arklow Holidays v An Bord Pleanala* [2007] 4 I.R. 112; *Dunnes Stores v An Bord Pleanala* [2016] IEHC 226 and *People Over Wind v An Bord Pleanala* [2015] IECA 272). The court rejects this ground also.

Decision

85. For all of the above reasons this application is refused.